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.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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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 the Attorney General precleared either the August 1982 qualifying period for candidates for the March 15, 1983 election or the March 15, 1983 election date itself when he withdrew his objection to Act No. 549.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and regulations:

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

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 jurisdiction of this Court is invoked under 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.

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[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.

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, 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

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[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).

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 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 ground, 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 first 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]

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[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

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 appellants were not changes within the meaning of Section 5, but merely "the ministerial acts necessary to accomplish [Act No. 549's] purpose." 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.

DISCUSSION

The United States urges summary reversal of this case because, although the district court erred, the case does not involve novel or complex questions

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referendum to the South Carolina Code Commissioner, as required by Act No. 549. J.S. 6 n.2.

of law requiring plenary consideration by this Court. Rather, the district court simply failed to follow this Court's consistent admonition that all changes in voting practices or procedures must be unambiguously submitted and precleared before they can be implemented by jurisdictions covered by Section 5 of the Voting Rights Act. See, *e.g.*, *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110 (1978); *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969). Specifically, the district court erred in two respects. First, its holding that the scheduling of a qualifying period for candidates and the setting of a date for an election are not changes subject to Section 5 preclearance is contrary to precedent and to the intent of Congress. Second, the court erred in concluding that even if the scheduling of the qualifying period and the setting of the election date involved here were changes within the meaning of Section 5, the Attorney General precleared them when he withdrew his objection to Act No. 549.

1. 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 approved 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 acknowledged (*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 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

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[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.

> 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 (1971)): "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." 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. See also 28 C.F.R. 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 scheduling of the filing period for candidates for the office of trustee for August 16-31, 1982, was a change subject to the preclearance requirement of Section 5.[5]

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 mi-

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[5] 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. 110, 122-123 (1978), and *Dougherty County Board of Education* v. *White*, 439 U.S. 32, 37-40 (1978). See also S. Rep. 97-417, 97th Cong., 2d Sess. 8 (1982); H.R. Rep. 97-227, 97th Cong., 1st Sess. 6 (1981).

nority voters. Such a result clearly is contrary to the very purpose of Section 5.

2. A distinct question is whether the changes at issue were precleared when the Attorney General withdrew his objection to Act No. 549.[6] For the reasons discussed below, we agree with appellants that they were not.[7]

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[6] The authority for such retroactive approval arises from this Court's decisions in *Perkins* v. *Matthews*, 400 U.S. at 396-397, and *Berry* v. *Doles*, 438 U.S. 190, 192-193 (1978). In those cases, the Court held that, in certain circumstances, the appropriate remedy for failure to preclear an election change was not to invalidate the election automatically, but rather to afford the offending jurisdiction a reasonable time within which to seek preclearance. Likewise, where the circumstances warrant, the Attorney General is entitled to extend retroactive approval to a change that has already been put into effect.

[7] We agree with the district court (J.S. App. 10a-11a) that the abolition of the office of Hampton County Superintendent 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 January 1, 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").

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 (*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 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. 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.[8]

Advance preclearance of future, unspecified changes thus is contrary to the basic concept of Section 5. It is also inconsistent with the practicalities of ad-

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[8] The same authorities undermine appellees' reliance (Mot. to Dismiss or Affirm of Hampton County School Districts 18) on the fact that the Attorney General did not 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 pratical matter, submission of election dates for preclearance would be impossible, since the Attorney General might not respond before the scheduled date (Mot. to Dismiss or Affirm of Hampton County Election Commission and Treasurer 17-21; Mot. to Dismiss or Affirm 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. Even 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.

ministering 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. Indeed, the Attorney General's regulations (28 C.F.R. 51.27) expressly provide for the submission of comments by interested individuals and groups. Such comments obviously are most usefully addressed to specific 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.[9] That filing period, however, was for "candi-

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[9] 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

dates offering for election in November, 1982" (note 9, *supra*). As discussed above (pages 4-5, *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 August 1982 filing period for the March election (or any ensuing elections).[10]

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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.

[10] 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). 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

CONCLUSION

The Court should note probable jurisdiction, 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.[11]

Respectfully submitted.

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MAY 1984

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relation between the August filing period and the March election date.

[11] As noted above (note 6, *supra*), 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 approval of the change. *Berry* v. *Doles*, 438 U.S. at 192-193; *Perkins* v. *Matthews*, 400 U.S. at 396-397. The suggested relief provides a practical solution to avoid temporary uncertainty concerning the governance of the County's school system. If the County should submit the March election date for retroactive clearance, and if it were granted, the election would stand. If, on the other hand, the County fails to make a prompt submission or, if preclearance is requested but denied, the election could be invalidated. The proposed relief thus avoids uncertainty at least until the County's submission can be considered.

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