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No. 94-203

In the Supreme Court of the United States

OCTOBER TERM, 1994

FORTIS MORSE, ET AL., APPELLANTS

v.

OLIVER NORTH FOR UNITED STATES SENATE COMMITTEE, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the decision of a political party to require voters to pay a fee to participate in the party's convention for nominating a candidate for the United States Senate is a change "with respect to voting" under Section 5 of the Voting Rights Act of 1965 (the Act), 42 U.S.C. 1973c.

2. Whether a voter may bring a private action under the anti-poll-tax provision of the Act, 42 U.S.C. 1973h.

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

STATEMENT

This case involves the decision of the Republican Party of Virginia to select its 1994 nominee for the United States Senate at a convention open only to voters who paid a $35 or $45 fee. Appellants are three individuals registered to vote in Virginia. They contend that the Party's decision to require the fee violated the Voting Rights Act of 1965 (the Act), 42 U.S.C. 1973 *et seq.*, in two ways: (1) the Party did not obtain preclearance for the fee, as required by Section 5 of the Act, 42 U.S.C. 1973c; and (2) the fee violates the anti-poll-tax

provision in Section 10 of the Act, 42 U.S.C. 1973h. A three-judge court dismissed appellants' claims under Section 5 and Section 10 for failure to state a claim for which relief could be granted.[1]

1. Virginia law authorizes a political party to place its nominee for the United States Senate on the general election ballot if the party received at least 10% of the vote in any contest in either of the two preceding statewide elections. Virginia law also authorizes a party to select its senatorial nominee by a primary election or other means. Va. Code Ann. §§ 24.2-101, 24.2-509(A) (Michie 1993).

The Republican Party of Virginia (the Party) has used a variety of means to select its senatorial nominees. See David S. Johnson Aff. (Johnson Aff.) ¶ 3, attached as an addendum to the Republican Party of Virginia's Mem. of Law Opposing Pls.' Mot. for a Prelim. Injunction. In 1964, for example, the Party's senatorial nominee was selected by its State Central Committee. In most later election years, however, the Party chose its senatorial nominee at a convention. See Mot. to Affirm or Dismiss 3 n.1; Johnson Aff. ¶¶ 13, 15. In 1990, which was the senatorial election year immediately preceding the one at issue in this case, the Party decided to select its nominee at a primary election, but the election was cancelled because no one challenged the Party's

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[1] In this posture, the allegations in appellants' complaint must be taken as true, *Miree* v. *DeKalb County*, 433 U.S. 25, 27 n.2 (1977), and the dismissal of their claims under Section 5 and Section 10 of the Act cannot be upheld "unless it appears beyond doubt that the [appellants] can prove no set of facts in support of [those] claim[s] which would entitle [them] to relief," *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). See also, *e.g.*, *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993) (reviewing dismissal of equal protection claim on appeal).

incumbent. See Johnson Aff. ¶ 14. The Party has never sought judicial or administrative preclearance of changes in its nominating process under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. Compl. ¶ 47.

For the 1994 senatorial election, the Party decided to select its nominee at a convention to be held on June 3, 1994. Compl. ¶ 12; see Johnson Aff. ¶ 16. According to the Party's Plan of Organization, delegates to such a convention are to be selected at local "mass meetings," which are open to anyone registered to vote in Virginia who supports the Party's principles and is willing to declare his or her support for the Party's nominee. Johnson Aff. ¶¶ 4-5. Although the Plan provides for the convention delegates to be "elect[ed]" at these mass meetings, *id.* at ¶ 5, in practice any qualified voter who wants to be a delegate and shows up at a mass meeting is chosen as a delegate. Compl. ¶ 14; see Mot. to Affirm or Dismiss 2.

A person cannot, however, attend the Party's convention merely because he or she has been selected as a delegate. Instead, the delegate must also pay a nonrefundable fee to the Party. The amount of the fee has increased over the years. For the 1994 convention, the fee was $35 or $45, depending on the locality from which the delegate was selected. Compl. ¶ 16; see Johnson Aff. ¶ 11. Appellants allege that the Party's practice of charging the fee was not in effect on November 1, 1964 (the date with reference to which changes in voting practices are determined under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c). Compl. ¶ 11. Nonetheless, the Party has never sought preclearance of the fee under Section 5 of the Act. Compl. ¶¶ 46-47.

2. Appellants are registered voters in Virginia who wanted to attend the Party's 1994 convention. Appellants Kenneth Bartholomew and Kimberly Enderson

were deterred from attending by the fee requirement. Appellant Fortis Morse learned of the fee requirement when he went to the headquarters of the Albemarle County Republican Party in February, 1994, to register as a delegate. Because Morse did not have enough money in his bank account to pay the $45 fee, he asked a party official whether it could be waived. The official said no. Morse borrowed the money from a friend and was permitted to register as a delegate only after paying the fee. Compl. ¶¶ 4-6, 17-25, 35-39.

While at the Party's county headquarters, Morse met an official of the Oliver North for United States Senate Committee (North Committee). The North Committee official gave Morse $45 to repay his friend when Morse indicated that he would support North at the convention. Morse repaid both his friend and the North Committee. The Party has retained Morse's $45. Compl. ¶¶ 26-33.

3. On May 2, 1994, appellants filed their five-count complaint in this action in the United States District Court for the Western District of Virginia. Counts 1 and 2 charged that the fee violated the Twenty-Fourth and Fourteenth Amendments to the Constitution. Compl. ¶¶ 41-44. Counts 3 and 4 alleged that the fee violated Section 5 of the Act, 42 U.S.C. 1973c, because it was not precleared, and Section 10 of the Act, 42 U.S.C. 1973h, because it was a poll tax. Compl. ¶¶ 45-49. Count 5 charged that the North Committee violated the anti-vote-buying provision of the Act, Section 11(c) (42 U.S.C. 1973i(c)). Compl. ¶¶ 50-51. The complaint sought, among other relief, preliminary and permanent injunctions preventing the Party from imposing the fee and ordering it to return Morse's $45. Compl. 6-7.

A three-judge court was convened to consider appellants' claims under Section 5 and Section 10 of the Act. See 42 U.S.C. 1973c, 1973h(c); 28 U.S.C. 2284(a).

After expedited briefing and a hearing, the court granted appellees' motion to dismiss those claims. J.S. App. A2-A14.[2]

With regard to appellants' Section 5 claim, the court recognized that political parties are subject to Section 5 "to the extent they are empowered by the State to conduct primary elections for purposes of selecting national convention delegates." J.S. App. A8. But the court held that Section 5 never applies to "a change in political party rules dealing not with primary elections, but instead with a party convention, canvass, or mass meeting." *Ibid.* The court believed that this holding was supported by the regulation of the Attorney General that cites a change in party rules for primary elections as one example of a change that is covered by Section 5. J.S. App. A9-A10 (discussing 28 C.F.R. 51.7). The court also relied on this Court's summary affirmance of *Williams* v. *Democratic Party*, No. 16286 (N.D. Ga. Apr. 6, 1972), summarily aff'd, 409 U.S. 809 (1972). In *Williams*, the district court held that Section 5 did not cover a party's decision to change its method of selecting delegates to a national convention from a system under which they were appointed to a system under which they were chosen in open convention. See J.S. App. A10. The court in this case concluded that, because the fee at issue here was imposed in connection with a convention, rather

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[2] The three-judge court remanded appellants' Section 11 claim and their constitutional claims to a single-judge district court. Appellants voluntarily dismissed the Section 11 claim and asked the single-judge court to postpone consideration of the constitutional claims. J.S. 6 n.6. The only claims before this Court are the claims in Counts 3 and 4, arising under Section 5 and Section 10 of the Act.

than a primary, the Section 5 challenge to the fee had to be dismissed. J.S. App. A10-A11.

In dismissing appellants' Section 10 claim, the court held that actions under Section 10, the anti-poll-tax provision of the Act, may be brought only by the Attorney General, and not by a voter subject to a poll tax. J.S. App. A11-A12. The court based that holding on the fact that Section 10 of the Voting Rights Act does not expressly authorize private actions. *Id.* at A12. The court recognized that in *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969), this Court held that Section 5 of the Act is enforceable by private actions, even though it, like Section 10, does not expressly authorize them. J.S. App. 12. The court observed, however, that Section 10 differs from Section 5, because Section 10 expressly authorizes enforcement actions by the Attorney General. J.S. App. A12.

DISCUSSION

This case presents two important questions concerning the Voting Rights Act of 1965 (the Act), 42 U.S.C. 1973 *et seq.* The first question concerns the extent to which Section 5 of the Act applies to political parties. Although this Court has never addressed that issue, the Court has made it clear that Section 5 applies not only to state and local governments but to "all entities having power over any aspect of the electoral process within designated jurisdictions." *United States* v. *Board of Comm'rs*, 435 U.S. 110, 118 (1978). Consistent with that understanding, the Attorney General has interpreted Section 5 to cover the activities of political parties if those activities involve a "public electoral function," affect "voting" within the meaning of the Act, and are carried out under state authority. 28 C.F.R. 51.7. In our view, the Party's decision to im-

pose the fee at issue here fits within the Attorney General's criteria and therefore is subject to the preclearance requirement of Section 5. The three-judge court in the present case, however, relied on this Court's summary affirmance in *Williams* v. *Democratic Party*, No. 16286 (N.D. Ga. Apr. 6, 1972), summarily aff'd, 409 U.S. 809 (1972), to hold that Section 5 applies to a political party only when it selects a nominee in a primary election, but not when it selects a nominee at a convention. Because that holding is incorrect and fosters circumvention of the remedial scheme that Congress sought to provide under the Act, plenary review is warranted.

The second question is whether an action under Section 10, the anti-poll-tax provision of the Act, may be brought by a voter who is subject to such a tax, or instead may be brought only by the Attorney General. That important question, like the first question presented, has never been addressed by this Court. In *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969), however, this Court held that private actions may be brought under Section 5 of the Act, even though Section 5 does not expressly authorize such actions. The three-judge court's holding that private actions may *not* be brought under Section 10 cannot be reconciled with *Allen*. That holding, like the court's holding on Section 5, warrants plenary review.[3]

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[3] Contrary to appellees' contention (Mot. to Affirm or Dismiss 19-21), this case is not moot, because appellant Morse has a continuing, concrete interest in recovering his $45, see *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 8-9 (1978), and because the questions presented here are capable of repetition, yet evading review. See Opp. to Mot. to Affirm or Dismiss 8-10.

1. a. Section 5 of the Voting Rights Act prohibits certain jurisdictions, including Virginia, from changing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" until the change has been precleared by either the United States District Court for the District of Columbia or the Attorney General. 42 U.S.C. 1973c.[4] The preclearance requirement applies only to changes that have a "direct relation to, or impact on, voting." *Presley* v. *Etowah County Comm'n*, 112 S. Ct. 820, 830 (1992). The term "voting" is defined broadly under the Act, 42 U.S.C. 1973*l*(c)(1):

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

Moreover, Section 5 is "expansive within its sphere of operation." *Presley*, 112 S. Ct. at 828. "[A]ll changes in voting must be precleared" (*ibid.*), even if they are "minor," and without regard to whether they have a racially discriminatory purpose or effect. *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 566, 570 (1969).

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[4] To obtain preclearance, a covered jurisdiction must demonstrate "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 [membership in a language minority group]." 42 U.S.C. 1973c.

This Court has made clear that a voting change can be covered by Section 5 even if the change is not made by a governmental unit. Section 5 "applies to all entities having power over any aspect of the electoral process within designated jurisdictions, not only to counties or to whatever units of state government perform the function of registering voters." *United States* v. *Board of Comm'rs*, 435 U.S. 110, 118 (1978). In that respect, the Court has explained, Section 5 is "like the constitutional provisions it is designed to implement"—the Fourteenth and Fifteenth Amendments. *Ibid.* The Court has held that those Amendments govern political party activities that are "part of the machinery for choosing [government] officials." *Smith* v. *Allwright*, 321 U.S. 649, 664 (1944); see also *Terry* v. *Adams*, 345 U.S. 461 (1953).

In accordance with this Court's decisions, the Attorney General has interpreted Section 5 to apply to "[c]ertain activities of political parties." 28 C.F.R. 51.7. A regulation of the Attorney General adopted in 1981 states in relevant part (*ibid.*):

> A change affecting voting effected by a political party is subject to the preclearance requirement [of Section 5]: (a) If the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction * * *.

The regulation further states that, "[f]or example," Section 5 applies to "[c]hanges with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen." *Ibid.*[5] Under the regulation, the Attorney

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[5] The regulation also provides examples of party activities that "are not subject to the preclearance requirement" of Section 5,

General has precleared numerous proposed changes in party rules and on some occasions objected to such changes. See, *e.g.*, *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 97th Cong., 1st Sess. Pt. 3, at 2246, 2265 (1981) (appendix to letter from James P. Turner, Acting Assistant Attorney General, to Rep. Edwards, listing objections filed under Section 5, including ones filed against political parties).

The lower federal courts have held that changes in party rules affecting who chooses a party's nominee are subject to preclearance under Section 5. For example, in *Fortune* v. *Kings County Democratic Comm.*, 598 F. Supp. 761 (E.D.N.Y. 1984), a three-judge district court held that Section 5 applied to a change by the Kings County Democratic Party affecting the voting membership of its executive committee. The court reasoned that the executive committee performed "public electoral function[s]" by "filling vacancies in nominations * * * and * * * authorizing nonparty members to run as Democrats." *Id.* at 765. Because the change in the committee's membership affected the constitution of the body that exercised those functions, the court held it subject to preclearance.[6]

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including "changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms." 28 C.F.R. 51.7.

[6] See also *Hawthorne* v. *Baker*, 750 F. Supp. 1090, 1094-1097 (M.D. Ala. 1990) (Section 5 applied to changes in the way political party selected members of its state, and certain county, executive committees), vacated as moot, 499 U.S. 933 (1991); *MacGuire* v. *Amos*, 343 F. Supp. 119 (M.D. Ala. 1972) (three-judge court) (per curiam) (Section 5 applied to changes in rules governing selection of delegates to Democratic and Republican parties' national conventions); cf. *Wilson* v. *North Carolina State Bd. of Elections*,

b. The decision of the Republican Party of Virginia to charge a fee to delegates wishing to attend the Party's 1994 senatorial convention falls within Section 5, as interpreted by this Court, the Attorney General (whose interpretation is entitled to "considerable deference," *Presley*, 112 S. Ct. at 831), and lower courts in other cases. Because the court below, in reaching a contrary conclusion, relied on the Attorney General's regulation, see J.S. App. A9-A10, we focus here on the manner in which that regulation applies to the Party's decision to impose the fee.

First, the Party's imposition of the fee clearly relates to its performance of a "public electoral function": selecting a nominee for public office whose name will be placed on the general election ballot. 28 C.F.R. 51.7. That selection process is a "part of the machinery for choosing [government] officials," *Smith* v. *Allwright*, 321 U.S. at 664, whether it occurs at a convention or at a primary election. Cf. *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985) ("[T]he form of a change in voting procedures cannot determine whether it is within the scope of § 5.").

In addition, imposition of the fee "affect[s] voting." 28 C.F.R. 51.7. It does so by affecting the selection of the candidates to be placed on the ballot at the general election. This Court has long recognized that changes in the procedures by which candidates gain positions on the general election ballot affect voting by controlling the choices that voters make at the general election. See *Presley*, 112 S. Ct. at 828. In *Allen*, for example, the Court held that Section 5 applied to changes that made it

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317 F. Supp. 1299, 1302-1303 (M.D.N.C. 1970) (three-judge court) (Section 5 applied to "Rotation Agreement" that limited county from which party's state senatorial candidate could be selected).

more difficult for independent candidates to petition for a place on the general election ballot. See 393 U.S. at 551, 570. The Court reasoned that such changes affected voting because they "might * * * undermine the effectiveness of voters who wish to elect independent candidates." *Id.* at 570.[7] See also *Hampton County Election Comm'n*, 470 U.S. at 174-181 (Section 5 applied to change in length of time between candidate filing period and election); *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32, 37-43 & n.10 (1978) (school board rule requiring candidates for office to take unpaid leave affected voting because it "tends to deny some voters the opportunity to vote for a candidate of their choosing").

Finally, in imposing the fee and thereafter increasing it, the Party is "acting under authority explicitly * * * granted by" Virginia to select a senatorial nominee for inclusion on the general election ballot. 28 C.F.R. 51.7(b); see Va. Code Ann. §§ 24.2-101, 24.2-509(A) (Michie 1993).

c. The three-judge court in this case relied on this Court's summary affirmance of *Williams* v. *Democratic Party*, No. 16286 (N.D. Ga. Apr. 6, 1972), summarily aff'd, 409 U.S. 809 (1972). J.S. App. A10. *Williams*, however, provides little support for the district court's holding.

In *Williams*, the district court held that Section 5 did not apply to a party's decision to change its method of

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[7] Justice Harlan agreed that these changes affected voting, and were therefore covered by Section 5, even though he took a different view of the scope of Section 5 than the majority. He reasoned that "[s]ince the Voting Rights Act explicitly covers 'primary' elections, see § 14(c)(1) [42 U.S.C. 1973*l*(c)(1)]," and since the petition procedure for independent candidates was "the functional equivalent of the political primary," there was "no good reason why it should not be included within the ambit of the Act." *Allen*, 393 U.S. at 592 (Harlan, J., concurring in part and dissenting in part).

selecting delegates to the party's national convention from an appointment system to a system under which delegates were chosen in open convention. The district court was "convinced that voting rights connected with the delegate election process are the type of rights Congress intended to safeguard." *Williams*, slip op. 4 (copy lodged with the Court). The court nonetheless held that the party's change in the delegate election process was not subject to Section 5 because the court believed that the Act provided "no way for the State Party to gain the required federal approval." *Id.* at 5.

That belief is no longer accurate, if it ever was. After *Williams*, the Attorney General amended the regulations implementing Section 5 expressly to allow a political party to obtain preclearance for a covered change in voting. 28 C.F.R. 51.23. That amendment calls into question the correctness of the district court's reliance on *Williams*. At the very least, it warrants plenary review by this Court to clarify the significance of the Court's summary affirmance in *Williams*.

d. The district court's holding invites circumvention of Section 5's preclearance requirement. Under the court's holding, a political party in a covered jurisdiction may avoid the preclearance requirement merely by selecting its nominees in a convention rather than a primary election. Although the initial change from a primary to a convention process would have to be precleared, see *Presley*, 112 S. Ct. at 828, once the process is in place, the district court's decision would allow the party to adopt any kind of exclusion, no matter how invidious, without having to preclear it. A party could, for example, even adopt a rule excluding black voters from serving as voting delegates to its convention. "The only recourse for the minority group members affected by such changes would be the one

Congress implicitly found to be unsatisfactory: repeated litigation." *Board of Comm'rs*, 435 U.S. at 125.

e. In defense of the district court's holding on Section 5, appellees advance three grounds upon which the court itself did not rely. None of appellees' contentions is persuasive.

i. Appellees contend that the application of Section 5 to the Party's decision to impose the fee violates the First Amendment, as incorporated in the Fourteenth Amendment. Mot. to Affirm or Dismiss 10, citing *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). This Court rejected a strikingly similar argument in *Smith* v. *Allwright*, *supra*.

In *Allwright*, black voters argued that a rule of the Texas Democratic Party barring them from voting in the party's primary election violated the Fourteenth and Fifteenth Amendments. The party "defended [the rule] on the ground that the Democratic party of Texas is a voluntary organization with members banded together for the purpose of selecting individuals of the group representing the common political beliefs as candidates in the general election. As such a voluntary organization, it was claimed, the Democratic party is free to select its own membership and limit to whites participation in the party primary." *Allwright*, 321 U.S. at 657.

This Court rejected that defense. It held that, because the party's primary election was "a part of the machinery for choosing officials," *Allwright*, 321 U.S. at 664, the party's rule excluding blacks from voting in the election was subject to the Fifteenth Amendment. See *id.* at 664-665. In *Terry* v. *Adams*, 345 U.S. 461 (1953), the Court relied on *Allwright* to declare unconstitutional an unofficial "pre-primary" election held by the

Jaybird Democratic Association of Texas from which black voters were excluded.

Allwright and *Terry* make it clear that when, as here, a political party performs a public electoral function, its freedom of association interests do not prevail over the requirements of the Fifteenth Amendment. Nor do they negate the Voting Rights Act, which was enacted under Congress's "remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326 (1966).

ii. Appellees contend that, even if a party's rules are subject to Section 5 when they involve a "public electoral function," it is impossible to fashion a "workable" standard for distinguishing those rules from party rules that relate solely to the internal deliberations of the party. Mot. to Affirm or Dismiss 7. That contention is flawed in two ways. First, although it may be difficult in some cases to determine whether a party rule relates to a public electoral function, that is no reason to hold that all such rules fall outside the scope of Section 5, any more than it is a reason to hold that all such rules are free from scrutiny under the Fifteenth Amendment. Cf. *Smith* v. *Allwright*, *supra*; *Terry* v. *Adams*, *supra*. Second, it has not in fact proven impossible to fashion a workable standard in this area. The Attorney General's regulation (28 C.F.R. 51.7) provides such a standard. See pp. 9-12, *supra*. The Attorney General has applied the regulation for more than a decade. Appellees do not claim that application of the regulation has interfered with the operation of political parties. See Mot. to Affirm or Dismiss 5-8.

iii. Finally, appellees err in asserting that this case is analogous to *Presley*. Mot. to Affirm or Dismiss 6-7. In *Presley*, this Court held that Section 5 did not apply to

the resolution of a county commission that changed the allocation of authority among individual commissioners. 112 S. Ct. at 829-830. Appellees argue that "[i]f Section 5 cannot reach the internal operations of an elected body, there is no reasonable construction of its terms that will support its reaching the internal deliberations of a private body, particularly the decisions of a political party as to who may attend its convention." Mot. to Affirm or Dismiss 7. Such decisions, however, do not relate solely to a party's "internal deliberations," any more than do a party's decisions regarding who may vote in its primary election. Instead, such decisions are directly connected to a party's performance of a public electoral function. Thus, *Presley* is not controlling.[8]

2. The three-judge court in this case held that private parties cannot avail themselves of the remedies against poll taxes in Section 10 of the Act. J.S. App. A11-A12. The court based that holding on the fact that (1) Section 10 does not expressly authorize private actions; and (2) Section 10 *does* expressly authorize actions by the Attorney General. The court's holding is at odds with this Court's decision in *Allen*. For that reason, and because private actions can play a significant role in the enforcement of Section 10, plenary review is warranted.

In *Allen*, the Court held that private parties may obtain declaratory and injunctive relief against changes in voting that have not been precleared as required by

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[8] See *Henderson* v. *Graddick*, 641 F. Supp. 1192, 1195, 1201 (M.D. Ala. 1986) (three-judge court) (Section 5 applies to party's decision to change from open to closed primary); see also, *e.g.*, the Attorney General's preclearance decisions regarding similar changes in: Green Party of Alaska (June 25, 1992); Democratic Party of Alaska (Feb. 28, 1992); Republican Party of Alaska (May 21, 1991); and Republican Party of Alaska (Sept. 18, 1990).

Section 5. 393 U.S. at 555. The Court recognized that "[t]he Voting Rights Act does not explicitly grant * * * private parties" authority to enforce Section 5. *Id.* at 554. The Court found implicit authority for private enforcement, however, in the language of Section 5, analyzed "in light of the major purpose of the Act." *Id.* at 555. The Court reasoned that "[t]he guarantee of § 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." *Id.* at 557. Accordingly, the Court determined that "the specific references" in Section 12 of the Act, 42 U.S.C. 1973j, to actions by the Attorney General to enforce Section 5 "were included to give the Attorney General power to bring suit to enforce what might otherwise be viewed as 'private' rights," and not to bar private enforcement actions. *Id.* at 555 n.18.[9]

Allen strongly supports the conclusion that private parties may seek judicial enforcement of Section 10. Section 10 explicitly recognizes the right of each citizen to be free from unconstitutional poll taxes. 42 U.S.C. 1973h(a). That right likewise "might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." *Allen*, 393 U.S. at 557. Accordingly, the provision in Section 10 authorizing enforcement of Section 10 by the Attorney

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[9] Section 2 of the Act, 42 U.S.C. 1973, like Section 5, does not expressly authorize private enforcement actions, and it is expressly enforceable by the Attorney General under Section 12. Although this Court has not explicitly addressed whether Section 2 authorizes private enforcement actions, it has repeatedly entertained such actions. See, *e.g.*, *Johnson* v. *De Grandy*, 114 S. Ct. 2647 (1994).

General should be construed as giving her power to enforce "what might otherwise be viewed as 'private' rights," *Allen*, 393 U.S. at 555 n.18, and should not be construed to bar private enforcement of Section 10.

In defending the district court's contrary holding, appellees observe that Section 10 does not create a substantive right to be free from poll taxes but instead merely provides a remedy for enforcing the proscription against poll taxes in the Twenty-Fourth Amendment. Mot. to Affirm or Dismiss 16-17. That observation, while true, is beside the point. The Court in *Allen* rejected as irrelevant the argument that Section 5 did not create a substantive right but merely provided a remedy for violations of the Fifteenth Amendment (393 U.S. at 556 n.20):

> Appellees argue that § 5 * * * gave citizens no new "rights," rather it merely gave the Attorney General a more effective means of enforcing the guarantees of the Fifteenth Amendment. It is unnecessary to reach the question of whether the Act creates new "rights" or merely gives plaintiffs seeking to enforce existing rights new "remedies." However the Act is viewed, the inquiry remains whether the right or remedy has been conferred upon the private litigant.

Similarly, the fact that Section 10 does not confer any new right on individual voters—but only creates a remedy for violations of the Twenty-Fourth Amendment—does not answer the question whether individual voters may avail themselves of that remedy.

This Court should note probable jurisdiction to resolve the availability of private remedies under Section 10, a question that is important to the effective enforcement of the Section. The Court should, consistently with

Allen, hold that Section 10 is enforceable by private actions.[10]

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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[10] Appellees defend the dismissal of the Section 10 claim on the alternative ground, not addressed by the three-judge court, that the Party's fee requirement is not a "poll tax." Appellees appear to argue that the remedy set forth in Section 10 is narrowly limited to the historic definition of a poll tax: "a head tax imposed by the state." Mot. to Affirm or Dismiss 18; see *United States* v. *Texas*, 252 F. Supp. 234, 238 (W.D. Tex.) (three-judge court), summarily aff'd, 384 U.S. 155 (1966). That argument is refuted by the broad language of Section 10, which authorizes relief "against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, *or substitute therefor*." 42 U.S.C. 1973h(b) (emphasis added). We believe that appellants' allegations describe a "poll tax * * * or substitute therefor" within the meaning of Section 10.