No. 01-50301

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ISMAEL LEGARRETA; ROBERTO M. LERMA; FRED SANCHEZ, JR.; MAGDALENA C. LERMA; MANUEL G. LERMA; MARIA J. MONTOYA; JESSIE WILLIAMSON; MARGARITA GIRON SANCHEZ; ROSA D. CABALLERO; SOCORRO ESPARZA; PEDRO ESPARZA; TERESA LABORDE; MARGARITA M. GUERRERO; VIRGINIA VALENCIA; HILARIO SOLIS; ANTONIO R. CAMPOS; GRISELDA Y. LERMA; BEATRICE CAMPOS; MANUEL J. BARRAZA,

Plaintiffs-Appellants

v.

JAMES NELSON, in his individual capacity and his official capacity as Commissioner of Education of the State of Texas; LINDA MORA, in her official capacity as the Master designated by the Texas Commissioner of Education for the Ysleta Independent School District,

Defendants-Appellees.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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STATEMENT REGARDING ORAL ARGUMENT

The United States takes no position on whether oral argument is needed.

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INTEREST OF THE UNITED STATES

The complaint here was filed to require state officers to comply with Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Under Section 5, the United States Attorney General shares responsibility with the courts for reviewing changes in voting practices and procedures submitted for preclearance, and may bring actions preventing unprecleared changes from taking effect. The issue here is

whether the decision of the Texas Commissioner of Education to appoint a master to direct the actions of an elected school board is a change in voting requiring preclearance pursuant to Section 5 of the Voting Rights Act. The United States has a strong interest in ensuring that covered voting changes are reviewed pursuant to Section 5, and that enforcement actions to prevent implementation of unprecleared changes are heard by courts with proper jurisdiction and that those courts properly apply the appropriate standards for determining Section 5 coverage.

ISSUES PRESENTED

1. Whether the district court erred in ruling that plaintiffs seeking a declaratory judgment that a change in voting is subject to preclearance under Section 5 of the Voting Rights Act of 1965 must allege that the change was motivated by racial discrimination.

2. Whether the district court erred in ruling that plaintiffs' claim challenging the appointment of a master to oversee the actions of an elected school board was so insubstantial as to justify refusal to convene a three-judge district court under Section 5 of the Voting Rights Act of 1965.

STATEMENT OF THE CASE

A. *Section 5 Of The Voting Rights Act Of 1965*

Congress enacted "the Voting Rights Act under its authority to enforce the Fifteenth Amendment's proscription against voting discrimination." *Lopez* v. *Monterey County*, 525 U.S. 266, 269 (1999). In addition to containing "generally applicable voting rights protections," the Act "places special restrictions on voting

activity within designated, or 'covered,' jurisdictions." *Ibid.* These "covered" jurisdictions – States and political subdivisions – were selected based on a formula in Section 4 of the Act, 42 U.S.C. 1973b, that sets out "specified criteria suggesting the presence of voting discrimination in the jurisdiction." *Id*. at 269-270; see also *South Carolina* v. *Katzenbach*, 383 U.S. 319, 317-318 (1966).

Under Section 5 of the Voting Rights Act, whenever a covered jurisdiction "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 [in] effect" on the date of coverage, the jurisdiction must obtain "preclearance" of the new practice by obtaining a determination from a three-judge court of the United States District Court for the District of Columbia that the new practice does not discriminate in purpose or effect on the basis of race, or by submitting the new practice to the Attorney General and receiving no objection. See *Clark* v. *Roemer*, 500 U.S. 646, 648-649 (1991). Congress intended Section 5 to cover "any state enactment which altered the election law of a covered State in even a minor way." *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 566-567 (1969). Section 5 covers changes "affecting the creation or abolition of an elective office." *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 503 (1992); see also *Allen*, 393 U.S. at 550-551 (change from election of officials to appointment). Texas is a covered jurisdiction under Section 5. See 28 C.F.R. Pt. 51 App. (2000). Thus any change within the State affecting voting practices or procedures, including changes

affecting the creation or abolition of an elective office, must be reviewed pursuant to Section 5.

B. *Facts*

1. This action was brought by residents of the Ysleta Independent School District (the "YISD") against James Nelson, Texas Commissioner of Education (the "Commissioner") (R. 1: Complaint).[1] Plaintiffs Legarreta, *et al.*, appeal from an order of a single-judge district court dismissing their complaint.

YISD is an independent school district in the State of Texas governed by a seven member Board of Trustees (R. 1: Complaint at 3). The YISD held school board elections in May 2000 (R. 1: Complaint at 4), resulting in a majority of members on the Board of Trustees being of Mexican-American or Hispanic origin (R. 1: Complaint at 4).

Shortly thereafter, on August 29, 2000, the Commissioner notified the board of his decision to appoint a master to govern the YISD pursuant to his authority under Tex. Educ. Code 39.131 (R. 1: Complaint at 5 & Exh. A (Letter dated Aug. 29, 2000)). The Commissioner stated that he had been notified "of [the Board's] request that [he] appoint a master to the [YISD]" (R. 1: Complaint at Exh. A (Letter dated Aug. 29, 2000)). The Commissioner stated that, pursuant to Tex.

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[1] "R.__: ___" refers to record items listed in the district court's docket sheet, and the name and page number of the filed record. "Order at __" refers to the district court's Order Of Dismissal entered on March 13, 2001, and which appears as record item 6 on the district court's docket sheet. "U.S. Add. __" refers to pages of the United States' Addendum attached to this brief.

Educ. Code 39.191, the master "may direct an action to be taken by * * * the board of trustees of the district" and "[m]ay approve or disapprove any action * * * of the * * * board" (R. 1: Complaint at Exh. A (Letter dated Aug. 29, 2000)). The master would also have other duties as well to improve the district, and her role would be reviewed every 90 days.

Ninety days after her appointment, the master released her report on YISD (R. 1: Complaint at Exh. A (Letter dated Jan. 9, 2001)). Based on that report, on January 9, 2001, the Commissioner "indefinitely" continued her appointment (R. 1: Complaint at Exh. A (Letter dated Jan. 9, 2001)). The Commissioner expanded the master's authority to include authority to employ, at the school district's expense, advisory staff to assist her in specific areas, including matters of finance, construction, and legal advice, employment functions previously exercised by the board. On March 2, 2001, the master directed the board to reinstate the school superintendent that the board had previously suspended (R. 1: Complaint at 8 & Exh. B (Letter dated Mar. 2, 2001); see also R. 1: Complaint at Exh. C (affidavit of Ismael Legarreta at 2)).

2. School districts in Texas generally are governed by elected boards of trustees. See Tex. Educ. Code 11.051-11.063 (West 1996). In 1995, the Texas legislature enacted provisions in Chapter 39 of the Texas Education Code to promote accountability in the Texas public schools by allowing the State Commissioner of Education to intervene in failing local school districts. Under those provisions, the Commissioner may impose a variety of sanctions on local

school districts, including the appointment of "a master to oversee the operations of the [school] district," Tex. Educ. Code 39.131(a)(7), where the district "does not satisfy the [State] accreditation criteria," Tex. Educ. Code 39.131(a). Pursuant to Tex. Educ. Code 39.131(e)(1) and (2), a master appointed by the Commissioner has authority to "direct an action to be taken by * * * the board of trustees of the [school] district," and "may approve or disapprove any action of the * * * board."

The State submitted the new education legislation to the Attorney General for Section 5 preclearance in 1995. The Assistant Attorney General for Civil Rights[2] concluded that "insofar as [Chapter 39] authorizes the Texas Education Agency to do the following: appoint a master, management team, or board of managers that will exercise a school board's powers * * * it clearly contains voting changes" (U.S. Add. at 6), and precleared Chapter 39 as enabling legislation (U.S. Add. at 7). The Attorney General stated, however, that any actual "voting change made pursuant to Chapter 39 – including but not limited to the replacement, *de facto* or otherwise, of an elected school board by an appointed master, management team, or board of managers" must be precleared when implemented by the Commissioner (U.S. Add. at 7). Neither the State nor the local school district submitted the appointment of the master in YISD for Section 5 preclearance (R. 1: Complaint at Exh. C (affidavit of Ismael Legarreta at 2)).

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[2] The Attorney General has delegated the authority to make determinations under Section 5 to the Assistant Attorney General for the Civil Rights Division. 28 C.F.R. 51.3.

C. *Proceedings Below*

On March 6, 2001, residents of YISD (which included members of the Board of Trustees) filed a complaint in district court against the Commissioner under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c (R. 1: Complaint). Plaintiffs alleged that the Commissioner's exercise of his authority under Tex. Educ. Code 39.131 to appoint a master over an elected school board must be precleared pursuant to Section 5 (R. 1: Complaint at 7-8, 12-13). Plaintiffs also alleged that the Commissioner's appointment of the master violated state law because the Commissioner failed to investigate YISD or make findings that YISD did not satisfy the state's accreditation criteria, and that the sanction imposed by the Commissioner was too severe under the Act (R. 1: Complaint at 9, 13). Plaintiffs sought a declaratory judgment that Section 5 prohibited the Commissioner from appointing a master to the YISD without first obtaining preclearance, and a preliminary injunction to prevent the master from exercising her authority (R. 1: Complaint). On March 6, 2001, plaintiffs also moved for a temporary restraining order to prohibit the Commissioner from taking any action with respect to the governance of YISD (R. 1: Complaint; R. 1: Plt. Mot. for Temporary Restraining Order). The district court denied the motion the same day (R. 2: Order).

On March 7, 2001, plaintiffs moved for the designation of a three-judge local district court pursuant to 28 U.S.C. 2284, as the complaint alleged a violation of Section 5 (R. 5: Plt. Notice of Filing). Section 5 states "[a]ny 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." 42 U.S.C. 1973c.

On March 13, 2001, the district court denied the motion for designation of a three-judge court, and *sua sponte* dismissed the complaint for failure to state a claim (R. 6: Order; R. 7: Judgment). The district court stated that the Voting Rights Act was enacted to "provide voting rights to all eligible citizens 'without distinction of race, color, or previous condition of servitude,'" 42 U.S.C. 1971(a)(1), and that Section 5 "was meant 'to insure that no voting procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise'" (R. 6: Order at 3-4). The district court then held that "a good faith allegation of racial prejudice is a prerequisite to the maintenance of a [S]ection 5 action and to the impaneling of a three-judge court," and that plaintiffs "failed to make a good faith allegation of racial prejudice" (R. 6: Order at 4). The court observed that plaintiffs are "[a]pparently * * * contending that Defendant Nelson harbors racial prejudice, and that such prejudice motivated him to appoint a master to oversee the board only after a Mexican-American majority was elected to the Board" (R. 6: Order at 4). The district court stated that the Commissioner appointed the master "only after the Board of Trustees voted 6 to 1 in favor of asking [the Commissioner] to appoint a [m]aster" (R. 6: Order at 4), and so "the plaintiffs cannot even assert a colorable claim that race discrimination played any part in the appointment of [the master]" (R. 6: Order at 4). The court determined that the complaint is "frivolous" (R. 6: Order at 4).

The court also held that plaintiffs' theory that the Commissioner's appointment of the master violated the state statutory requirements of Section 39.131 "is not subject to preclearance" (R. 6: Order at 5). The court stated that "violations of a state statute are not susceptible to preclearance under Section 5 of the Voting Rights Act or anything else," and that "Congress did not intend the Attorney General and the district court to waste their time considering voting procedures that a state does not wish to enact or administer" (R. 6: Order at 5). The district court stated that any claims that the Commissioner "did not follow state law" may be asserted in state court, and the court dismissed the state pendent claims without prejudice (R. 6: Order at 5-6).

SUMMARY OF ARGUMENT

The district court's dismissal of plaintiffs' complaint was based upon an incorrect interpretation of the standard for determining whether a change in voting practice or procedure is subject to preclearance under Section 5 of the Voting Rights Act. Private individuals seeking to enforce the preclearance requirements of Section 5 are not required to allege that a change in voting had a racially discriminatory purpose prior to the impaneling of a three-judge local district court to determine the Section 5 coverage issue. They are required only to prove to a three-judge court that the new practice is a change affecting voting.

The inquiries in the case plaintiffs filed here before the single judge, therefore, were limited to whether plaintiffs had made non-frivolous claims that the challenged action is a voting change subject to Section 5 preclearance

requirements, has not been precleared, and therefore requires remedial relief. The district court clearly erred in refusing to impanel a three-judge local district court to make those determinations. Contrary to the district court's ruling, the plaintiffs' coverage claims are hardly "frivolous." Under the standards established in *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), which held that replacement of an elected board by an appointed one is a change covered by Section 5, and other cases, plaintiffs' complaint clearly raises a significant allegation that the Commissioner's appointment of the master is a change in voting covered under Section 5. The Commissioner's appointment of a master with authority to "direct," "approve, or disapprove" the decisionmaking of the elected YISD school board raises a substantial question that the appointment creates a *de facto* replacement of the elected school board's decisionmaking powers with that of an appointed official on matters affecting the governance of the school district, and therefore affects voting. The coverage claim presented by plaintiffs is thus legally and factually substantial and the district court's failure to convene a three-judge court, and then to dismiss the complaint, is clearly in error.

In addition, the district court's requirement that plaintiffs must allege that the Commissioner acted with discriminatory motivation was erroneous. Once the three-judge court finds that a covered jurisdiction has enacted a change affecting voting, and has not precleared it, the court should enjoin further implementation of the change until the new practice is precleared. Under the approval process Congress set out in Section 5, the determination whether a voting change was

enacted with prohibited discriminatory purpose, or has a prohibited effect, rests only with the Attorney General or a three-judge panel of the United States District Court for the District of Columbia.[3] Neither the single-judge district court here, nor a local three-judge court, has jurisdiction to determine whether a change in voting was motivated by racial discrimination (or that the change has a prohibited effect) and the court's requirement that plaintiff allege that the new practice was discriminatorily motivated is error.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal of a complaint. *Texas* v. *United States*, 106 F.3d 661, 664 (5th Cir. 1997). In conducting that review, this Court accepts a complaint's well-pleaded factual allegations as true. *Ibid.*

ARGUMENT

I

THE DISTRICT COURT ERRED IN RULING THAT PLAINTIFFS MUST ALLEGE THAT A CHANGE IN VOTING WAS MOTIVATED BY RACIAL DISCRIMINATION IN ORDER TO BE SUBJECT TO SECTION 5 REVIEW

1. The district court dismissed plaintiffs' complaint brought under Section 5 after finding that plaintiffs had failed to allege that the Commissioner's decision to appoint a master to oversee YISD's elected school board was motivated by racial

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[3] Accordingly, this case does not raise the issue whether appointment of the master by the Commissioner in this case is discriminatory in purpose or effect in violation of the substantive provisions of Section 5 of the Voting Rights Act, and this Court should not address the issue.

discrimination. In doing so, the district court clearly misinterpreted the procedural requirements of Section 5 of the Voting Rights Act. In seeking to enforce Section 5 with regard to a covered jurisdiction's possible change in voting practices or procedures, plaintiffs are not required to allege or prove that the change was motivated by racial discrimination. Significantly, under Section 5, a local district court has no jurisdiction even to make the determination that a change in voting has a discriminatory purpose, but is limited to determining whether the action is a change in voting covered by Section 5. That determination of discriminatory purpose rests solely with the Attorney General or a three-judge panel of the United States District Court for the District of Columbia. The district court thus erred in dismissing the complaint on that basis.

a. "The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting which has infected the electoral process in parts of [the] country for nearly a century." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). The Supreme Court has observed that, from the voluminous legislative history of the Act, "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country" and that "the unsuccessful remedies which [Congress] had prescribed in the past would have to be replaced by sterner and more elaborate measures." *Id.* at 309.

"The heart of the [Voting Rights] Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant." *Katzenbach*, 383 U.S. 315. Section 4 of the Act "lays down a formula defining the

States and political subdivisions to which [some of] the[] [Act's] remedies apply." *Ibid.* Section 5 of the Act governs changes in voting practices and procedures in those covered states and jurisdictions by suspending any new voting regulations "pending review by federal authorities to determine whether their use would perpetuate voting discrimination." *Ibid.*

b. Under Section 5, covered jurisdictions may not implement changes in a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," 42 U.S.C. 1973c, without first obtaining "either judicial or administrative preclearance," *Clark* v. *Roemer*, 500 U.S. 646, 652 (1991). See also *Lopez* v. *Monterey County*, 525 U.S. 266, 270 (1999); *United States* v. *Board of Supervisors of Warren County*, 429 U.S. 642, 645 (1977). A covered jurisdiction may obtain judicial preclearance of a change in voting practice or procedure by receiving a determination from a three-judge district court of the United States District Court for the District of Columbia that a new voting 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." 42 U.S.C. 1973c. The more rapid administrative preclearance of a new voting practice or procedure may be obtained by submitting the new practice or procedure to the Attorney General of the United States where, within 60 days of the submission, the Attorney General does not object to the change. 42 U.S.C. 1973c; see also *Clark* , 500 U.S. at 648-649; *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 549 (1969). "A voting change in a covered jurisdiction will not be effective as law until and unless cleared pursuant to one of

these two methods." *Clark*, 500 U.S. at 652 (internal quotations and citations omitted). "Failure to obtain either judicial or administrative preclearance renders the change unenforceable." *Ibid*. (internal quotations and citations omitted). Because Texas is a covered jurisdiction, it must "obtain *either* judicial *or* administrative preclearance before implementing a voting change." *Ibid.* (emphasis added).

c. If a covered voting change has not been precleared, Section 5 authorizes actions in local district courts to enjoin operation of the unprecleared voting change. A private individual or the Attorney General may bring an injunctive action in a local district court to prohibit implementation of a change in voting practice or procedure because of a covered jurisdiction's failure to obtain approval under Section 5. *Allen*, 393 U.S. at 561. "[T]hese suits may be viewed as being brought 'under' § 5." *Ibid*. Section 5 requires that these actions be "heard and determined by a court of three judges in accordance with [28 U.S.C. 2284]." 42 U.S.C. 1973c.

Local federal district courts convened in covered jurisdictions to hear Section 5 enforcement actions may consider only "coverage" questions – "whether a state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enactment." *Allen*, 393 U.S. at 559. In such lawsuits, there is a three-part inquiry: "whether § 5 covers a contested change, whether § 5's approval requirements were satisfied, and if the requirements were not satisfied, what temporary remedy, if any, is appropriate."

Lopez v. *Monterey County*, 519 U.S. 9, 23 (1996).

In *Allen*, the Supreme Court recognized the importance of the unique approval process Congress created under Section 5. "Federal supervision over the enforcement of state legislation always poses difficult problems for our federal system." 393 U.S. at 562. The Court observed that "Congress was well aware of the extraordinary effect the Act might have on federal-state relationships," and held that "Congress intended that disputes involving the *coverage* of § 5 be determined by a district court of three judges." *Id.* at 563 (emphasis added). The Court held, however, that local three-judge district courts reviewing the question whether a voting change should have been precleared do *not* have the authority to approve or disapprove a covered change – that is, to determine whether or not a voting change has a discriminatory purpose or effect and should be precleared or not. *Perkins* v. *Matthews*, 400 U.S. 379, 383-387 (1971). "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." *Id.* at 385 (internal quotations omitted); see also *Lopez*, 519 U.S. at 23.

In enacting Section 5 of the Act and suspending new voting regulations by covered jurisdictions pending federal review, "Congress knew that some of the States covered by * * * the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Id*. at 335. The Court

in *Katzenbach* held that Congress can "appropriately limit litigation under [Section 5] to a single court in the District of Columbia, pursuant to its constitutional power under Art. III, § 1, to 'ordain and establish' inferior federal tribunals," *id.* at 331, and that administrative preclearance authority of the Attorney General "serves as a partial substitute for direct judicial review," *id.* at 333.

d. The district court erred in ruling that for a change in voting to be subject to preclearance procedures under Section 5, plaintiffs must make a good faith allegation that the change was motivated by racial discrimination (see R: 6, Order at 4). The district court in this case had no jurisdiction to determine whether the change in voting by the Texas Education Commissioner had a discriminatory purpose. Only the United States District Court for the District of Columbia or the Attorney General may make that determination. *Clark*, 500 U.S. at 648-649; *Perkins*, 400 U.S. at 385; see also *Barnett* v. *Bailey*, 956 F.2d 1036, 1043 n.9 (11th Cir. 1992) ("dismissal of plaintiffs' Section 5 suit on the basis of a failure to * * * allege [racial animus or discrimination] would * * * be improper"). The district court's holding that plaintiffs must allege in good faith that a change in voting has a discriminatory purpose as a prerequisite to the court appointing a three-judge panel under 28 U.S.C. 2284, ignores Section 5's statutory delegation of "exclusive authority," *Lopez*, 519 U.S. at 23, to the Attorney General and United States District Court for the District of Columbia to make the substantive preclearance determination of "whether a proposed change actually discriminates on account of

race." *Warren County*, 429 U.S. at 645.[4]

In addition, the district court's misinterpretation of Section 5 impermissibly raises the showing required for plaintiffs to assert successfully that a change in voting is subject to administrative or judicial preclearance. Section 5 does not require an allegation or showing of discriminatory *motivation* for a voting change to be subject to preclearance.[5]

By contrast, when a jurisdiction seeks preclearance of a voting change from the United States District Court for the District of Columbia, the burden is on the jurisdiction to prove that the voting change both "does not have the *purpose and* will not have the *effect* of denying or abridging the right to vote on account of

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[4] The district court cites to *Beatty* v. *Esposito*, 439 F. Supp. 830 (E.D.N.Y. 1977), in support of its holding that a good faith allegation of racial discrimination must be made in order for a voting change to be subject to Section 5 preclearance procedures (R. 6: Order at 4). The district court erred, however, in relying on *Beatty*. In *Barnett* v. *Bailey*, 956 F.2d 1036, 1043, n.9 (11th Cir. 1992), the court of appeals reversed a lower court decision, *Barnett* v. *Bailey*, 753 F. Supp. 949, 951 (M.D. Ga. 1990), which relied on that precise holding in *Beatty*. Moreover, the *Beatty* court's legal recitation is inconsistent with the line of cases addressing Section 5, since only the Attorney General or a three-judge panel of the United States District Court of the District of Columbia has jurisdiction to determine whether a voting practice or procedure has a discriminatory purpose or effect (see pp. 14, 16-18, *supra*).

[5] All that is required in a Section 5 enforcement action is that the type of challenged action relates to voting or the election process and thus has a "potential" for discrimination. *Morse* v. *Republican Party of Va.*, 517 U.S. 186, 216-217 (1996); see also *NAACP* v. *Hampton County Elections Comm'n*, 470 U.S. 166, 181 (1995); *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32, 42 (1978). The Supreme Court has already determined that the type of change at issue here – the replacement of an elected official with that of an appointed official – is covered by Section 5 because it has an effect on voting and thus has a potential for discrimination. See *Allen*, 393 U.S. at 569-570; see also pp. 22-26, *infra.*

race." 42 U.S.C. 1973c (emphasis added). Submissions of changes in voting to the Attorney General for Section 5 administrative preclearance are reviewed under that same basic standard. 28 C.F.R. 51.52(a); see also 28 C.F.R. 51.55 ("the Attorney General will consider whether the change is free of discriminatory purpose *and* retrogressive effect") (emphasis added). See also *McCain* v. *Lybrand*, 465 U.S. 236, 247 (1984).

e. The district court also erred in ruling that Section 5 coverage was precluded by plaintiffs' state law claim that the Commissioner had not properly followed the procedures set out in Tex. Educ. Code 39.131 for appointing a master to oversee the YISD. The mere fact that a change affecting voting may be illegal under state law does not exempt the change from Section 5 review where the covered jurisdiction actually "enact[s] or seek[s] to administer" those changes, 42 U.S.C. 1973c, or where the State continues to administer the changes – as the State is here. See *McDaniel* v. *Sanchez*, 452 U.S. 130, 152, 153 n. 34 (1981) ("the application of the statute also is not dependent upon any showing that the Commissioners Court had authority under state law to enact the apportionment plan at issue in this case." "Since we conclude that the Commissioners Court's authority under Texas law to enact this plan is irrelevant for purposes of § 5 coverage, we need not resolve this question of state law"). *Cf. Young* v. *Fordice*, 520 U.S. 273, 283 (1997) ("the simple fact that a voting practice is unlawful under state law does not show, entirely by itself, that the practice was never 'in force or effect.' * * * A State, after all, might maintain in effect for many years a plan that

technically, or in one respect or another, violated some provision of state law"); see also *Foreman* v. *Dallas County*, 521 U.S. 979, 980-981 (1997); *League of United Latin Am. Citizens* v. *Texas*, 113 F.3d 53, 55 (5th Cir. 1997).

II

THE DISTRICT COURT ERRED IN REFUSING TO IMPANEL A THREE-JUDGE COURT TO HEAR PLAINTIFFS' SECTION 5 COVERAGE CLAIM

1. The district court erred in refusing to impanel a three-judge local district court to hear the Section 5 coverage claim. Section 5 requires that actions seeking to enforce preclearance requirements over a change in voting by covered jurisdictions must be "heard and determined by a court of three judges" pursuant to 28 U.S.C. 2284. 42 U.S.C. 1973c. Section 2284(b)(1) of Title 28 states that the district court judge to whom a request for a three-judge court is made "shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit" to convene a three-judge court. The coverage of Section 5 may only be determined by a three-judge court (see pp. 15-16, *supra*); a single judge court may properly dismiss a claim only where that judge determines that the coverage claim is "wholly insubstantial and completely without merit." *United States* v. *Saint Landry Parish Sch. Bd.*, 601 F.2d 859, 863 (5th Cir. 1979); see also *League of United Latin Am. Citizens* v. *Texas*, 113 F.3d 53, 55 (5th Cir. 1997). A very minimal showing, however, is required to show substantiality. In *Goosby* v. *Osser*, 409 U.S. 512 (1973), the Supreme Court made clear just how minimal that showing is:

> Constitutional insubstantiality * * * has been equated with such concepts as essentially fictitious, wholly insubstantial, obviously frivolous, and obviously without merit. * * * In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial * * *. A claim is insubstantial only if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.

Id. at 518 (internal quotations and citations omitted).

In this case the Section 5 coverage issue raised by plaintiffs is not insubstantial; indeed, it has significant merit. The Commissioner's appointment of a master to "direct," "approve[,] or disapprove" the decisionmaking of the elected school board in this case raises the significant question whether the Commissioner's action has caused a change in voting that requires preclearance under Section 5. The Supreme Court has made clear that the Voting Rights Act "was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 565 (1969). The Commissioner's appointment of a master with authority to direct or overrule decisions by the YISD elected school board has a strong "bearing on the substance of voting power." *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 503 (1992). As a result of the appointment of the master over YISD, the Commissioner has effectively reduced the power of the elected board to govern the school district – the power which each of the board's members was elected to exercise by voters within the district. The appointment

also effectively reduces the voting power of the electorate within the school district. See, *e.g.*, *Presley*, 502 U.S. at 507-508 ("the question whether power is shifted among officials answerable to the same or different constituencies is quite distinct from the question whether the power voters exercise over elected officials is affected").

Even though the board may have requested or acquiesced to the appointment of the master (pp. 4-5, *supra*), this does not change the fact that there is a substantial argument that the Commissioner's grant of authority to the master to direct, approve, or disapprove the board's decisionmaking is a change affecting voting subject to preclearance under Section 5, because it may amount to a *de facto* replacement of the board. The powers of the elected school board are indisputably undermined by the appointment of a master with authority to override the board's decisionmaking.[6]

2. It is well settled that the replacement of elected officials with appointed officials constitutes a change in voting requiring Section 5 preclearance. In *Allen*, the Court determined, *inter alia*, that the Voting Rights Act required preclearance of a state statute which provided that officials who in previous years had been elected would now be appointed. 393 U.S. at 550-551. The Court stated that the "power of a citizen's vote is affected by this amendment [because] after the

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[6] See, *e.g.*, *Robinson* v. *Alabama State Dep't of Educ.*, 652 F. Supp. 484, 486 (M.D. Ala. 1987) (three-judge district court) (city council resolution transferring supervision and control of public schools within city from elected school board to appointed board was a change requiring Section 5 preclearance).

change, he is prohibited from electing an officer formerly subject to the approval of the voters." *Id.* at 569-570. The Court stated that "[s]uch a change could be made either with or without a discriminatory purpose or effect; however, the purpose of [Section] 5 was to submit such changes to scrutiny." *Id.* at 570. See also *Presley*, 502 U.S. at 503 (reaffirming that "§ 5 applies to changes * * * affecting the creation or abolition of an elective office"); *McCain* v. *Lybrand*, 465 U.S. 236 (1984) (state statute converting appointed positions on a county commission to elected positions subject to Section 5 preclearance requirements).[7]

Moreover, the Department of Justice has expressed its position to the State of Texas that the Commissioner's appointment of a master to oversee a school district can be a voting change that requires preclearance under Section 5 where the master is actually given authority to direct, approve, or disapprove actions of an elected

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[7] The Supreme Court in *Presley* left open the *de facto* replacement question. 502 U.S. at 508 ("[w]e need not consider here whether an otherwise uncovered enactment of a jurisdiction subject to the Voting Rights Act might under some circumstances rise to the level of a de facto replacement of an elective office with an appointive one, within the rule of *Bunton* v. *Patterson*."). Regardless of whether the YISD board in this case is still intact, the appointment of a master with authority to direct, approve, and disapprove the decisionmaking of the elected YISD school board has a direct effect on the elected board's authority, and thus the substance of the vote of the board's electorate. "Section 5 is not concerned with a simple inventory of procedures, but rather with the reality of changed practices as they effect [minority] voters." *Georgia* v. *United States*, 411 U.S. 526, 531 (1973). The complaint filed by plaintiffs presents a substantial question that the Commissioner's replacement of the board's final decisionmaking authority with that of an appointed master is subject to review under Section 5. See, *e.g.*, *Texas* v. *United States*, 866 F. Supp. 20, 25-26 (D.D.C. 1994) (three-judge district court) ("the replacement of an elected body to an appointed one is a covered change under Section 5"); *Robinson*, 652 F. Supp. at 486.

school board (see U.S. Add. 6). In 1995, when Chapter 39 of the Texas Education Code was enacted, the State submitted the legislation to the Attorney General for preclearance. The Justice Department, in evaluating this legislation, stated that the provisions within Section 39.131 that authorized the Commissioner to appoint a master, management team, or board of managers to exercise an elected school board's powers "clearly contains voting changes" (see U.S. Add. 6). The Justice Department advised that "any voting change made pursuant to Chapter 39" be brought before the District Court of the District of Columbia or submitted to the Attorney General for a determination that the voting change does not have a discriminatory purpose or effect (U.S. Add. 7).[8]

In *Casias* v. *Moses*, No. 5:95cv221(W.D. Tex.), and *United States* v. *Moses*, 5:95cv275 (W.D. Tex.), the district court entered a preliminary injunction under Section 5, concluding that plaintiffs and the United States had demonstrated a substantial likelihood of success on the merits that the appointment of a management team to oversee and direct the operation of the Board of Trustees of Somerset Independent School District pursuant to the Texas Education Code was a change affecting voting which required preclearance (R. 8: Plt. Brief at Attachments). The district court stated that "[b]ecause of the broad authority given

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[8] After preclearance of Chapter 39 as enabling legislation, the State of Texas brought suit against the United States seeking a declaratory judgment that the appointment of a master was not a covered voting change. The Supreme Court upheld the dismissal of Texas' claim as unripe, and thus left open the question whether the appointment of a master under Tex. Educ. Code 39.131 was a covered change. *Texas* v. *United States*, 523 U.S. 296 (1998).

to the management team, it appears that the changes contemplated by [the state statute] * * * could result in the replacement of the elected Board with the appointed management team" (R. 8: Plt. Brief at Attachments, Order on Prelim. Inj. at 8 (filed May 11, 1995)).

The Commissioner's exercise of his authority under Tex. Educ. Code 39.131(a)(7), and appointment of a master to oversee and direct the actions of the YISD board clearly presents a substantial question that the appointment creates a change in voting practice or procedure that requires preclearance under Section 5. Indeed, the Commissioner has authorized the master to "direct," "approve[,] or disapprove" the actions of the elected board of YISD, and the master has already exercised her authority and disapproved the board's personnel actions by rehiring the school superintendent who had been previously suspended by the board (see pp. 5-6, *supra*). Thus the allegations raised by plaintiffs in their complaint present a very substantial claim that the appointment of a master over the YISD elected Board of Trustees is a voting change that requires preclearance under Section 5. Even though the board has not been abolished, its authority has been significantly limited and turned over to an appointed official to an extent that it may amount to a *de facto* replacement of the board. The effect on the elected body and the electorate is similar to the abolition of an elected body.

Indeed, the coverage issue raised by plaintiffs in this case is no less substantial than that addressed by this Court in *League of United Latin Am. Citizens* v. *State of Texas*, 113 F.3d 53 (5th Cir. 1997) (*LULAC*). *LULAC* involved the

State's implementation of a state supreme court decision, *Texas* v. *Hardberger*, 932 S.W.2d 489 (Tex. 1996), that granted the Governor authority to appoint a successor to a retiring judge. Prior to the *Hardberger* decision, the State had a voting practice such that when elected state officials, including judges, submitted a written resignation during an election year, the submission triggered an election to fill that vacancy even though the official intended to occupy the position until after the election. *LULAC*, 113 F.2d at 54.

The district court dismissed a complaint brought under Section 5 of the Voting Rights Act which alleged that the State's implementation of *Hardberger* authorizing the Governor to appoint individuals to replace resigning judges required preclearance before the change is implemented. The district court granted the State's motion to dismiss, finding that the claim was "wholly insubstantial." *Id.* at 54. This Court reversed the district court's dismissal order, and held that neither the legal nor factual aspects of the complaint were insubstantial. *Id*. at 55-56. This Court held that the plaintiff's legal basis for its claim that Section 5 covered the new state laws announced in *Hardberger* concerning the replacement of elected judges with appointed judges was not "wholly insubstantial." *Id.* at 55. This Court remanded for the convening of a three-judge court. *Id.* at 56.

CONCLUSION

The district court's order dismissing the case should be reversed, and this Court should order the convening of a three-judge local district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2001, two copies of the Brief For The United States As *Amicus Curiae*, and one 3 ½ inch computer disk containing Brief's text were served by first class mail, postage prepaid, on each of the following persons:

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