IN THE

Supreme Court of the United States

October Term, 1968

Number 26

CHARLES E. BUNTON, ET AL.,
Appellants,
-vs-
JOE T. PATTERSON, ET AL.,
Appellees.

VERNON TOM GRIFFIN, ET AL.,
Appellants,
-vs-
JOE T. PATTERSON, ET AL.,
Appellees.

SETH BALLARD, ET AL.,
Appellants,
-vs-
JOE T. PATTERSON, ET AL.,
Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES
UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF MISSISSIPPI

BRIEF FOR APPELLANTS Elliott C. Lichtn

LAWRENCE ASCHENBRENNER
MARTHA M. WOOD
233 N. Farish Street
Jackson, Mississippi 39201
Attorneys for Appellants

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MISCELLANEOUS

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The order in *Bunton* is reported at 281 F. Supp. 918. The orders in each of the other above-captioned cases are reported and are reprinted in appellants' separate appendix

(A. 33-34, 67-68 and 98-99).*

JURISDICTION

The District Court entered a judgment in each of the three consolidated cases on October 5, 1967. The Notice of Appeal in each case was filed on November 28, 1967.

The jurisdiction of the court below was based on 28 U.S.C. §§ 1343 (3) and (4), 2201 and 2202 and on 42 U.S.C. § §1971 (d), 1973c (j) and (f). A three-judge district court was required by 42 U.S.C. §1973c and 28 U.S.C. § 2281.

The Supreme Court has jurisdiction of this direct appeal pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 1253.

STATUTES INVOLVED

The statutes involved are Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c and 6271-08 of the Mississippi Code of 1942, prior to its amendment in 1966, as amended in 1966 and as amended in 1968. These statutes are printed in appendix A *infra* of appellant's brief.

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* "A." refers to the portion of the record printed as a separate appendix by appellant. Appendices A and B are printed in the back of this brief.

QUESTIONS PRESENTED

1. Whether the three-judge court below was properly convened pursuant to 42 U.S.C. § 1973c and whether appellants, as private parties, had a right to sue therein.

2. Whether §6271-08 of the Mississippi Code, as amended in 1966, which deprives the qualified electors of a small number of Mississippi counties of the opportunity to elect, and the potential candidates of an opportunity to run for, county superintendent of education is a statute dealing with "a voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" within the meaning of Section 5 of the Voting Rights Act of 1965.

3. Whether the State of Mississippi violated Section 5 of the Voting Rights Act of 1965 by failing to submit the amendment to § 6271-08 to the Attorney General of the United States or to seek a declaratory judgment from the United States District Court for the District of Columbia that the statute is free of racial discrimination prior to enforcing said 1966 amendment.

4. Whether, since no elections for the position of county superintendent of education were held on November 7, 1967, in each of three counties herein, in accordance with the amendment to §6271-08, this Court should set aside any appointments made pursuant to

§6271-08 as amended and order said elections for the position of county superintendent of education pursuant to §6271-08 prior to its 1966 amendment.

STATEMENT OF THE CASE

Prior to June 17, 1966, every county in Mississippi except one* elected its superintendent of education unless 20% of the qualified electors of the county petitioned for an election pursuant to §6271-08 of the Mississippi Code to make the position appointive. (See appendix A attached to this brief for the statute and its later amendments). Effective June 17, 1966, the Mississippi Legislature amended the statute to provide that in 11 of Mississippi's 82 counties, including the three counties represented by appellants here, the superintendent of education *must* be appointed rather than elected.* (See appendix B infra.)

The Voting Rights Act of 1965 applies to Mississippi and provides in Section 5,42 U.S.C. §1973c that whenever a State or political subdivision thereof:

> "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964,"

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* Infra. p. 15 .

** The statute was unchanged with respect to the remaining 71 counties. In 1968, the statute was amended again by adding two counties to and dropping one county from the list of counties requiring appointments to the position. (Appendix A infra).

such State or political subdivision cannot enforce or apply such change until it has either (1) instituted an action in the United States District Court for the District of Columbia for a declaratory judgment that

> "such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" (42 U.S.C. §1973c)

and such judgment has been entered, or (2) submitted the change to the Attorney General of the United States and had no objection interposed by the Attorney General within 60 days after such submission.

Neither the State of Mississippi, nor any of its officials, nor Jefferson, Claiborne or Holmes Counties (in which the named plaintiffs reside), nor any of their officials has instituted any action in the United States District Court for the District of Columbia with respect to §6271-08 of the Mississippi Code, as amended, nor submitted such amendment to the Attorney General of the United States.

Appellants are Negro qualified electors and potential candidates for the position of county superintendent of education in Jefferson, Claiborne and Holmes Counties, Mississippi. They represent a class of persons similarly situated (A. 2, 37, 71). In each of the three suits, appellants seek to have the 1966 amendment to §6271-08

of the Mississippi Code declared such a change in "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting," within the purview of Section 5 of the Voting Rights Act of 1965, as to require appellees to comply with Section 5. Appellants also seek injunctive relief, restraining appellees, their agents, employees, successors and persons in concert with them from enforcing, implementing or otherwise giving effect to §6271-08 of the Mississippi Code, as amended until appellees have complied. At the time of the filing of these suits, prior to the holding of the November 1967 elections, appellants prayed for an order enjoining the appointment of the superintendent of education in their respective counties, unless the voters of the counties authorized same pursuant to §6271-08, and for an order requiring appellees to hold elections to fill said position in November 1967 (A. 13-14, 48, 82). Since the elections should have been held in November 1967, appellants now pray for an order setting aside said appointments of superintendents of education and directing the holding of elections for these positions in accordance with §6271-08 prior to its amendment.

Appellants prayed further that a three-judge district court be convened pursuant to 28 U.S.C. §§2281 and 2283 and 42 U.S.C. §1973c (A. 13. 47-48, 82). A three-judge district court was convened and the cases consolidated for hearing. The Court held that the 1966 amendment did not come within the purview of and is not covered by the Voting Rights Act of 1965 and dismissed

the complaints (A. 33-34, 67-68, 98-99.)* This appeal followed.

SUMMARY OF ARGUMENT

This Court has jurisdiction of this appeal because a three-judge district court was properly convened below in accordance with Section 5 of the Voting Rights Act of 1965. The language of the last sentence of Section 5 and the place of this language in the section support appellants' conclusion of the propriety of a three-judge district court action here. In addition, the purposes of the Voting Rights Act, in particular, and of three-judge district courts in general, support appellants' position.

There is a clear controversy in this case between the State of Mississippi which has failed to comply with its duty to submit the 1966 amendment of §6271-08 of the Mississippi Code to either the Attorney General of the United States or the United States District Court for the District of Columbia in accordance with Section 5 of the Voting Rights Act of 1965. Appellants, who have been injured by appellees' failure to comply with its statutory duty, have a right to compel such compliance.

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* The complaints in each of these cases originally contained a second claim for relief based on the Fifteenth Amendment. Plaintiffs withdrew this claim for the purpose of expediting the hearing in order to secure relief in time for the November 1967 elections.

The county superintendent of education, the official whose position is no longer elective under the amendment to §6271-08, is the full-time professional official with principal responsibility for the education of appellants' children. Effective June 17, 1966, the State of Mississippi required that this office be made appointive in 11 of Mississippi's 88 counties, nine of which have a Negro population majority. Under the amended law, the white-controlled county board of education appoints the superintendent.

The issue before this Court is whether the 1966 amendment is a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" within the meaning of Section 5 of the Voting Rights Act. Appellants contend that the language of Section 5, its legislative history and its broad purpose to finally achieve the guarantees of the Fifteenth Amendment compel the conclusion that the amendment to §6271-08 renders less effective appellants' right to vote within the meaning of the Voting Rights Act. Accordingly, appellants respectfully request this Court to set aside any appointments of county superintendents of education pursuant to said 1966 amendment and to direct the elections for this office which should have been held in November 1967. In addition, this Court should enjoin enforcement of the law as amended until Mississippi complies with Section 5 by submitting the new law to the Attorney General or the United States District Court for the District of Columbia.

ARGUMENT

I. A THREE-JUDGE COURT WAS PROPERLY CONVENED AND APPELLANTS, AS PRIVATE PARTIES, HAVE A RIGHT TO SUE IN THIS CAUSE.

A. A Three-Judge court was properly convened.

This Court has jurisdiction of this appeal if a three-judge court was properly convened below. 28 U.S.C. §1253, 42 U.S.C. §1973c. Appellants contend that the phrase "Any action under this section shall be heard and determined by a court of three judges ..." in Section 5 of the Voting Rights Act (42 U.S.C. § 1973c), and its location at the bottom of said section clearly require the convening of a three-judge court for the reasons stated in the Memorandum for the United States as Amicus Curiae, pp. 8-9. Appellants would add to that discussion several points. The words "any action" and "a court of three judges" (our emphasis) are very general phrases, and suggest more than the declaratory judgment action brought by a covered State in the United States District Court for the District of Columbia. If Congress just had this one suit in mind, it would have been natural to place the three-judge requirement in the first sentence of the paragraph. Moreover, the last sentence of the paragraph is superfluous with respect to the suit described as a "subsequent action to enjoin enforcement of such qualification ..." (following the approval of the Attorney General or the District of Columbia court of the new State

law), because such an action would be under the Fifteenth Amendment and would, therefore, require a three-judge court under 28 U.S.C. §2281 in any event. Unless the last sentence refers to a suit such as the instant cause, it has no utility whatsoever.

The purposes of the Voting Rights Act of 1965 and of three-judge courts in general support appellants' contention that all actions related to Section 5 must be heard by a three-judge court. As is shown more fully in Argument II below, the whole thrust of the Voting Rights Act is to ensure that Negroes in the South, who have been deprived of the franchise too long, are enfranchised as quickly as possible. A major purpose of Section 5 is to permit both States and private parties fast, objective and effective review of legislation affecting voting rights, so as to minimize the interference with the right to vote and state legislation. Three-judge district courts are designed to (1) expedite review by direct appeal to this Court; (2) provide greater restraint and dignity in actions seeking to enjoin the operation of state statutes; (3) reduce the possibility of intimidation in the deliberations of a single judge; and (4) ensure a more critical and objective examination of the important case. Section 5 manifests the conclusion of Congress that a three-judge court should be required -- for all of the reasons there are three judge courts-- when the State is a plaintiff in an action for a declaratory judgment. The rationale applies equally to a case such as this one in which the appellants are indirectly, by seeking compliance with the Voting Rights Act, alleging a deprivation of a most basic right, the right to vote, and the State is a defendant.

B. Appellants, as private parties, have a right to sue in this cause.

Section 12(f) (42 U.S.C. § 1973j(f)) of the Voting Rights Act of 1965 provides:

> "(f) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this subchapter shall have exhausted any administrative or other remedies that may be provided by law."

In addition to conferring jurisdiction, this provision implies the standing of private persons to initiate proceedings to "assert rights under the provisions of [the Voting Rights Act]." Cf. *Morris v. Fortson,* 261 F. Supp. 538, 541 n. 3 (N.D. Ga. 1966). After several references in Section 12 to the Attorney General, Congress refers in section (f) to the assertion of rights by "a person". One must conclude that Congress, by using the general term "person" rather than "the Attorney General" contemplated suits by private parties under the Voting Rights Act. Similarly, in 28 U.S.C. § 1343, which also confers jurisdiction in this action on the federal court, the Legislature again used the very general term "any person" rather than a specific one and the implication is the same.

In the instant case, there is a clear controversy between Mississippi, which has a duty to submit certain

legislation for review, and appellants, Negro citizens, whose voting rights have been impaired by the State's failure to comply with Section 5 of the Voting Rights Act. Even if a right of action by private persons were not implied by the terms of the Voting Rights Act, the courts have consistently held that a breach of statutory duty gives rise to a right of action by an injured party for whose benefit the statute was enacteed, *Goodman v. H. Hentz Co.,* 265 F. Supp. 440 (N.D. Ill. 1967); *Mack v. Mishkin,* 172 F. Supp. 885 (S.D.N.Y. 1959); *Kardon v. National Gypsum Co.,* 69 F. Supp. 512 (E.D. Pa. 1941). Such a right emanates from the statute even though it does not expressly give a private party the right to bring an action. *Dann v. Studebaker-Packard Corp.,* 288 F.2d 201 (6th Cir. 1961). Judge Wisdom dealt, in *Bossier Parish School Board v. Lemon,* 370 F. 2d 847, 852 (5th Cir. 1967), with such a situation and concluded that:

> "Section 601 states a reasonable condition that the United States may attach to any grant of financial assistance and may enforce by refusal or withdrawal of federal assistance. . . . [T]he section is a prohibition, not an admonition. In the absence of a procedure through which individuals protected by section 601's prohibition may assert their rights under it, violations of the law are cognizable by the courts .... The Negro school children, as beneficiaries of the Act, have standing to assert their section 601 rights."

Even though enforcement powers have been granted to public officials, such as the Attorney General in this

instance, the courts have allowed private parties to enforce their rights in order to lighten the Attorney General's burden of investigation (in this case to give him knowledge of the amendment in question), and more importantly to ensure parties whose rights are most immediately affected by noncompliance with legislation that they need not rely upon a governmental agency to protect their rights in the courts. *Dann v. Studebaker-Packard Corp., supra; Subin v. Goldsmith,* 224 F.2d 753 (2d Cir. 1955).

Under appellee's interpretation of the Act, there is no recourse for injured persons such as appellants should the Attorney General, for whatever reason,including merely a particularly heavy workload, refuse to enforce compliance with the Act.* At that point the only remedy left to the persons affected by what might be a discriminatory amendment is to bring a private suit based on the Fifteenth Amendment. This consequence is most serious as a suit to enforce the Fifteenth Amendment can be a monumental, difficult and expensive effort. The result is precisely what Congress meant to avoid by enacting the Voting Rights Act in response to a finding that previously

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* Section 12(d) of the Act (42 U.S.C. § 1973j(d)) states in substance that when any person has violated the Voting Rights Act "the Attorney General may institute for the United States ... an action..." (Emphasis added.) It is thus clear that the Attorney General has the discretion not to sue. It is interesting to note that the Attorney General, as of January 1968, had only once acted to force a state to comply with Section 5, United States v. Crook, 253 F. Supp. 915 (M. D. Ala. 1966). United States Commission on Civil Rights, Political Participation, 1968, pp. 164-65.

existing remedies to enforce the guarantees of the Fifteenth Amendment were inadequate. *South Carolina v. Katzenbach, supra* at 309-316. Appellants conclude therefore, that as private parties they had standing to compel Mississippi's compliance with the Voting Rights Act.

II. SECTION 6271-08 OF THE MISSISSIPPI CODE, AS AMENDED IN 1966, DEPRIVES APPELLANTS OF THE RIGHT TO VOTE FOR, AND RUN FOR, THE POSITION OF COUNTY SUPERINTENDENT OF EDUCATION AND THEREBY CONSTITUTES A STANDARD, PRACTICE, OR PROCEDURE WITH RESPECT TO VOTING WITHIN THE MEANING OF SECTION 5 OF THE VOTING RIGHTS ACT OF 1965.

A. Consequences of §6271-08.

The county superintendent of education is the full-time professional official with principal responsibility for the education of the children of a county. He has the power and duty, for example, to enter into contracts with principals and teachers and to administer the educational policies set forth by the county board of education. §6252-07 of the Mississippi Code (1966 Cum. Supp.). This Court has charged county school boards in Mississippi "with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," *Green v. School Board of New Kent County,*

_____ U.S. _____, 20 L.ed. 2d 716, 723 (1968). The county superintendent of education is similarly charged with the day-to-day responsibility for achievement of this "unitary system." This official performance of his job, therefore, substantially affects the constitutional right of Negro children to a good education in an integrated school.

Prior to June 17, 1966, §6271-08 of the Mississippi Code provided that the position of county superintendent of education shall be elective in all counties except one* unless 20% of the qualified electors of such county file a petition and thereby force an election to determine whether the position shall be made appointive. Effective June 17, 1966, the statute was amended to require the appointment of county superintendents of education in 11 Mississippi counties regardless of the wishes of the qualified electors of those counties. Nine of these 11 counties have a Negro population majority, and now have or may soon have a Negro voting majority (see Appendix B *infra*). Plaintiffs and their class of Negro qualified electors and potential candidates for the position of county superintendent of education have therefore been deprived of the right to vote for, to run for and probably to elect, members of their race to this vital position in nine Mississippi counties.*

With respect to the 11 counties in question, §6271-08

* The statute directed that the post shall be appointive in Washington County.

* Effective May 16, 1968, Mississippi again amended 6271-08, adding one county (Yazoo) with a Negro population majority and deleting one of the two counties with a white voting majority (Lincoln) from the list of counties in which

(b) provides that the superintendent of education shall be appointed by the county board of education. The five members of the county board of education (one from each of the five districts in the county) are elected for staggered six year terms, that is, the term of the member from district five expired January 1, 1967,** the terms of the members from districts one and two expire January 1, 1969 and the terms of the members from district three and four expired January 1, 1971. §6271-08 of the Mississippi Code. Since very few Negroes were registered to vote in Mississippi prior to the passage of the Voting Rights Act in August 1965, it is plain that whites will control these boards of education until at least January 1, 1971, and, accordingly, that whites will be appointed superintendent of education (four year terms) for many years. The consequences of the 1966 amendment are thus clear. The Negro plaintiffs and their class, who constitute a majority of the population in nine of the 11 counties affected by the amendment will have no opportunity to vote for the one full-time professional county official with primary responsibility for the education of their children.

The issue before this Court is whether this statute which deprives plaintiffs and their class of the right to vote for this official is a "standard, practice, or procedure with respect to voting" within the meaning of Section 5 of the Voting Rights Act of 1965. If, as is shown in Section B

(Continued)
superintendents of education are required to be appointed. Lafayette County, the home of the University of Mississippi with a white voting majority, was also required to appoint its superintendent of education as of January 1, 1972. (See Appendix B infra.)

** No Negroes were elected to this office in the November 1966 elections in any of the eleven counties.

and C below the answer is in the affirmative, this Court should order the State of Mississippi to suspend enforcement of the statute and to submit the amendment to the Attorney General of the United States; and if an objection is filed by the Attorney General, Mississippi should prove to the United States District Court for the District of Columbia that the 1966 statute is free of racial discrimination in its purpose and effect.

B. The Operation of Section 5 of the Voting Rights Act of 1965.

In *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), this Court broadly stated the purpose of the Voting Rights Act of 1965:

> "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 our country for nearly a century."....
> "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *Id.* at 308,309.

Congress passed voting legislation in 1957, 1960 and 1964 which had been singularly unsuccessful. In Holmes County, Mississippi, for example, the home of appellant Griffin herein, 20 Negroes were registered to vote prior to

1965 in a county whose 21 and over Negro population was 8757.*

One part of the problem was the great ingenuity of Southern States to contrive "new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *South Carolina v. Katzenbach, supra,* 383 U.S. at 335. In the time it would take for the Government to learn about such newly adopted procedures and to litigate their validity, the new rules would have done their damage.** As Attorney General Nicholas deB. Katzenbach testified at the hearing on the bill:

> "Our experience in the area that would be covered by this bill has been such as to indicate frequently on the part of the State legislatures a desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States." *House Hearing,* p. 60.

Congress thus officially recognized the discriminatory nature and application of previous Southern voting

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* Report of the United States Commission on Civil Rights, supra, p. 244 United States Census of population: 1960, Mississippi, p. 26-27.

** Hearing on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess. (hereinafter House Hearings), p. 72; Hearing on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., p. 237.

statutes and decreed that no future laws could become operative prior to the scrutiny of the Attorney General or the District of Columbia Court.

To those familiar with the overwhelming past history of discriminatory voting legislation and practices in Mississippi, the need for the protection of Section 5 was readily apparent. As this Court observed in *United States v. Mississippi,* 380 U.S. 128, 135-136 (1965):

> "It is apparent that the complaint ... charged a long standing, carefully prepared, and faithfully observed plan to bar Negroes from voting in the State of Mississippi, a plan which the registration statistics ... would seem to show had been remarkably successful."

See *United States v. Lynd,* 349 F.2d 785 (5th Cir. 1965); *United States v. Mississippi,* 359 F.2d 103 (5th Cir. 1966); *United States v. Ramsey,* 353 F.2d 650 (5th Cir. 1965); *United States v. Ward,* 345 F.2d 857 (5th Cir. 1965).

Having demonstrated the extraordinary history of racial discrimination in voting in Mississippi it is hornbook law that a presumption arises that facts or conditions once proven are deemed to continue to exist unless proven otherwise. *Cassell v. Texas,* 339 U.S. 282, 293 (1950); *Allstate Finance Corp. v. Zimmerman,* 330 F.2d 740 (5th Cir. 1964); *NLRB v. Piqua Munising Wood Prods. Co.,* 109 F.2d 552 (6th Cir. 1940); 2 Wigmore, *Evidence,* Section 437 (3d ed. 1940).

New Mississippi voting statutes and practice were thus presumed to be discriminatory. Mississippi was in effect placed on "probation" with the burden on her to prove to the Attorney General or to a District of Columbia Court the nondiscriminatory nature of the proposed statute or rule.

Congress' remedy for this pervasive and seemingly unremitting evil of voting discrimination was very strong medicine indeed. In the covered states, which includes Mississippi, Congress suspended the use of virtually all State "test or devices" with respect to voter registration. If the States failed to register Negroes without regard to race, the federal government would provide examiners to do the job.

But registration of Negroes was only part of the problem. It was necessary to protect this gain by preventing a repetition of the practice of Southern Legislatures of constantly enacting more sophisticated rules to deny or dilute the hard-won right to vote. Accordingly, Section 5 of the Act provided that no "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" could be enacted or administered before the state submitted the new statute or rule to the Attorney General of the United States for his approval. Alternatively, the State was authorized to seek a declaratory judgment from the United States District Court for the District of Columbia that the new statute or rule did "not have the purpose and ... the

effect of denying or abridging the right to vote on account of race or color." Justice Black, dissenting in *South Carolina v. Katzenbach, supra,* described Section 5 as follows:

> "Section 5 goes on to provide that a State covered by §4 (b) can in no way amend its constitution or laws relating to voting without first trying to persuade the Attorney General of the United States or the Federal District Court for the District of Columbia that the new proposed laws do not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color." 383 U.S. at 356.

C. The Scope of Section 5

In the instant case, § 6271-08 withdraws from appellants and their classes the right to vote for, and run for, the position of county superintendent of education. Appellants contend that this law fits easily within the "all-inclusive" scope of the words "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," as used in Section 5 of the Voting Rights Act. The quoted phrase could hardly be broader in scope. This breadth of meaning is reinforced by the definition of "voting" provided by Section 14 (c) (1) of the Act (42 U.S.C. 1973 1 (c) (1))as including "all action necessary to make a vote effective in any primary, special or general election ..." (emphasis added) A broad, rather than narrow, interpretation is given further support by the fact that Section 5 prevents not only the *denial* by a state

of the right to vote, but also any *abridgment* of that right. § 6271-08, of course, flatly *denies* appellants the right to vote for county superintendent of education. That this office remains elective is an obvious "prerequisite to voting" within the meaning of Section 5.

The legislative history of the Act also supports the view that the language of Section 5 should be given the broadest possible reading. Attorney General Katzenbach testified "before a subcommittee of the House Judiciary Committee that "two or three" types of state law could be written out of the section, but "there are precious few, because there are an awful lot of things that could be started for the purposes of evading the Fifteenth Amendment if there is a desire to do so." *House Hearings,* p. 95. Indeed, the Voting Rights Act as a whole was intended to make effective, once and for all, the Fifteenth Amendment of the Constitution. As the Attorney General put it:

> "Thus, it is clear that the Constitution will not allow racially discriminatory voting practices to stand. But it is even clearer, as we have seen, that the Constitution invites Congress to do more than stand by and watch the courts invalidate State practices. It invites Congress to take a positive role by outlawing the use of any practices utilized to deny rights under the 15th amendment. "
>
> This bill accepts that invitation. Senate Hearings, p. 22.

Congress having "outlawed" the use of any practices which effect voting in Mississippi until the State of Mississippi proves to the Attorney General or the United States District Court for the District of Columbia the nondiscriminatory nature of the proposed practice, it is incumbent upon this Court to compel Mississippi to abide by this procedure.

The one judicial construction of the language of Section 5 (other than the Court's conclusionary order below) supports appellants' contention regarding its broad scope. In *Sellers v. Trussell,* 253 F. Supp. 915 (M. D. Ala. 1966), the Alabama legislature extended for two years the terms of office of officials who had been elected at a time when Negroes had been deprived of the right to vote. According to Judge Rives, this statute both violated the Fifteenth Amendment and came within Section 5 since "to freeze elective officials into office is, in effect, to freeze Negroes out of electorate." 253 F. Supp. at 917.* Similarly, in this case, Mississippi has "frozen" whites into the position of county superintendent of education in nine counties with Negro majorities by the device of restricting the selection of superintendents to white-controlled county boards of education elected at a time when Negroes were deprived of the right to vote. Accordingly, Mississippi has effectively destroyed the value of

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* Judge Johnson concluded that the statute was racially motivated in violation of the Fifteenth Amendment and found it unnecessary to reach the Voting Rights Act question. Judge Grooms dissented.

appellants' franchise with respect to this office.

It is, of course, unnecessary for this Court to conclude that § 6271-08 of the Mississippi Code, as amended in 1966, actually discriminates against Negroes, although appellants believe its discriminatory purpose is transparent. This Court must decide only that the amended law affects "voting". That it does so within the meaning of Section 5 is, as we have stated, supported by the broad language of Section 5, the legislative history of the Act and the one judicial construction of its meaning. Unless the Act is read to cover a statute which completely denies appellants' right to vote for county superintendents of education, Congress will have failed again to make the Fifteenth Amendment effective. This Court should resist Mississippi's attempt to frustrate the Act, and, accordingly should hold § 6271-08 as amended in 1966, within the purview of Section 5 of the Voting Rights Act.**

** This Court's decision in Sailors v. Kent Board of Education, 387 U.S. 105 (1967), provides no support for Mississippi's argument in this case, for this Court stated there, "Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs." 387 U.S. at 109. The function of the United States Attorney General and the United States District Court for the District of Columbia under Section 5 is to determine whether the amendment to § 6271-08 "runs afoul of [appellants.] federally protected right" under the Voting Rights Act and the Fifteenth Amendment. Sailors thus means only that Mississippi can make appointive the position of county superintendent of education when it complies with the Voting Rights Act and the Fifteenth Amendment.

III. THIS COURT SHOULD SET ASIDE THE APPOINTMENTS MADE PURSUANT TO § 6271-08, AS AMENDED, AND ORDER ELECTIONS IN ORDER TO CURE THE INJURY CAUSED BY MISSISSIPPI'S FAILURE TO COMPLY WITH THE VOTING RIGHTS ACT.

Since the District Court should have enjoined the enforcement of § 6271-08, as amended in 1966, and the appointment of any county superintendent of education pursuant to said amendment until Mississippi complied with Section 5, this Court should set aside any appointments made pursuant to that law, enjoin its enforcement until Mississippi complies with 42 U.S.C. §1973c, order elections to be held for vacant offices, and order the enforcement of § 6271-08 prior to its 1966 amendment. *Hamer v. Campbell,* 358 F.2d 215 (5th Cir. 1966). As this Court has stated, "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 our country for nearly a century." *South Carolina v. Katzenbach, supra.* By enforcing §6271-08 as amended without complying with 42 U.S.C. §1973c, the State of Mississippi has again evidenced its intention to continue racial discrimination in voting. Only new elections promptly and fairly held can cure that blight.

CONCLUSION

For the reasons stated, this Court should reverse the order of the District Court and grant the relief requested by appellants.

Respectfully submitted,

LAWRENCE A. ASCHENBRENNER
ELLIOTT C. LICHTMAN
MARTHA M. WOOD

Of counsel:

John H. Gross

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APPENDIX A

SECTION 5 OF THE VOTING RIGHTS ACT

§ 1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate offical of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. Pub.L. 89–110, § 5, Aug. 6, 1965, 79 Stat. 439.

SECTION 6271-08 OF THE MISSISSIPPI CODE *

Section 6271-08 of the Mississippi Code as herein relevant, before amendment read:

"(b) Notwithstanding the provisions of subsection (a) hereof, the office of county superintendent of education may be made appointive in any county in the manner herein provided. Upon the filing of a petition signed by not less than twenty per cent (20%) of the qualified electors of such county, it shall be the duty of the board of supervisors of such county, within sixty (60) days after the filing of such petition, to call a special election at which there shall be submitted to the qualified electors of such county the question of whether the office of county superintendent of education of said county shall

* Prior to amendment in 1966 the Statute may be found in Volume 5 of the 1964 Cumulative Supplement to the Mississippi Code pp 392-93; the 1966 amendment may be found in Volume 5 of the 1966 Cumulative Supplement to the Mississippi Code, pp. 436-38; the 1968 Amendment may be obtained from the Secretary of State.

continue to be elective or shall be filled by appointment by the county board of education of said county. The order calling such special election shall designate the date upon which same shall be held and a notice of such election, signed by the clerk of the board of supervisors, shall be published once a week for at least three (3) consecutive weeks in at least one newspaper published in such county. The first publication of such notice shall be made not less than twenty-one (21) days prior to the date fixed for such election and the last publication shall be made not more than seven (7) days prior to such date. If no newspaper is published in such county then such notice shall be given by publication of same for the required time in some newspaper having a general circulation in such county and, in addition, by posting a copy of such notice for at least twenty-one (21) days next preceding such election at three (3) public places in such county, one of which shall be at the door of the county courthouse in each judicial district. Said election shall be held, as far as is practicable, in the same manner as other elections are held in such county and all qualified electors of the county may vote therein. If a majority of such qualified electors who vote in such election shall vote in favor of the appointment of the county superintendent of education by the county board of education then, at the expiration of the term of the county superintendent of education then in office, the county superintendent of education of said county shall not be elected but shall thereafter be appointed by the county board of education for a term of not more than four (4) years; otherwise, said office shall remain elective. No special election shall be held in any county under the provi-

sions of this subsection more often than once in every four (4) years, and no change from the elective to the appointive method of the selection of the county superintendent of education shall become effective except at the expiration of the term of the county superintendent of education in office at the time such election is held.

"In any county of the first class lying wholly within a levee district and within which there is situated a city of more than forty thousand (40,000) population according to the last decennial federal census the county superintendent of education shall hereafter be appointed by the county board of education as above provided."

Following its amendment in 1966, Section 6271-08, as herein relevant, read:

"(b) Notwithstanding the provisions of subsection (a) hereof, the office of county superintendent of education may be made appointive in any county in the manner herein provided. Upon the filing of a petition signed by not less than twenty per cent (20%) of the qualified electors of such county, it shall be the duty of the board of supervisors of such county, within sixty (60) days after the filing of such petition, to call a special election at which there shall be submitted to the qualified electors of such county the question of whether the office of county superintendent of education of said county shall continue to be elective or shall be filled by appointment by the county board of education of said county. Provided, however, that where a Class Three county having an area in excess of eight hundred twenty-five (825) square miles has a county unit school system comprising less than an entire county,

the petition shall only be signed by electors residing within the county unit school district and only electors of said district shall vote on the proposition of appointing the county superintendent of education. The order calling such special election shall designate the date upon which same shall be held and a notice of such election, signed by the clerk of the board of supervisors, shall be published once a week for at least three (3) consecutive weeks in at least one (1) newspaper published in such county. The first publication of such notice shall be made not less than twenty-one (21) days prior to the date fixed for such election and the last publication shall be made not more than seven (7) days prior to such date. If no newspaper is published in such county then such notice shall be given by publication of same for the required time in some newspaper having a general circulation in such county and, in addition, by posting a copy of such notice for at least twenty-one (21) days next preceding such election at three (3) public places in such county, one (1) of which shall be at the door of the county courthouse in each judicial district. Said election shall be held, as far as is practicable, in the same manner as other elections are held in such county and all qualified electors of the county may vote therein. If a majority of such qualified electors who vote in such election shall vote in favor of the appointment of the county superintendent of education then, at the expiration of the term of the county superintendent of education then in office, the county superintendent of education of said county shall not be elected but shall thereafter be appointed by the county board of education for a term of not more than four (4) years; otherwise, said office shall remain elective. No special

election shall be held in any county under the provisions of this subsection more often than once in every four (4) years, and no change from the elective to the appointive method of the selection of the county superintendent of education shall become effective except at the expiration of the term of the county superintendent of education in office at the time such election is held.

"In any county of the first class lying wholly within a levee district and within which there is situated a city of more than forty thousand (40,000) population according to the last decennial Federal census the county superintendent of education shall hereafter be appointed by the county board of education as above provided.

"In any county of the second class wherein Interstate Highway 55 and State Highway 22 intersect and which is also traversed in whole or in part by U. S. Highways 49 and 51, and State Highways 16, 17 and 43 and the Natchez Trace; in any Class Four county having a population in excess of twenty-five thousand (25,000) according to the 1960 Federal census, traversed by U. S. Interstate Highway 55 and wherein Mississippi Highways 12 and 17 intersect;[1] in any county created after 1916 through which the Yazoo River flows; in any Class Four county having a land area of six hundred ninety-five (695) square miles, bordering on the State of Alabama, wherein the Treaty of Dancing Rabbit was signed and wherein U. S. Highway 45 and Mississippi Highway 14 intersect; in any county bordering on the Mississippi River wherein lies the campus of a land-grant institution or lands contiguous thereto owned by the institution;[2] in any county lying within

the Yazoo-Mississippi Delta Levee District, bordering upon the Mississippi River, and having a county seat with a population in excess of twenty-one thousand (21,000) according to the Federal census of 1960; in any county having a population of twenty-six thousand seven hundred fifty-nine (26,759) according to the 1960 Federal census, and wherein U.S. Highway 51 and U.S. Highway 84 and the Illinois Central Railroad and the Mississippi Central Railroad intersect; in any Class Three county wherein is partially located a national forest and wherein U.S. Highway 51 and Mississippi Highway 28 intersect, with a 1960 Federal census of twenty-seven thousand fifty-one (27,051) and a 1963 assessed valuation of $16,692,304.00; the county superintendent of education hereafter shall be appointed by the county board of education.

"In any county bordering on the Gulf of Mexico or Mississippi Sound, having therein a test facility operated by the National Aeronautics and Space Administration, the county superintendent of education shall be appointed by the county board of education beginning January 1, 1972."

1. Underlined portion is description fitting Holmes County.

2. Underlined portion is description fitting Jefferson and Claiborne Counties.

Following its amendment in 1968, Section 6271-08, as herein relevant, reads:

"(b) Notwithstanding the provisions of subsection (a) hereof, the office of county superintendent of education may be made appointive in any county in the manner herein provided. Upon the filing of a petition signed by not less than twenty percent (20%) of the qualified electors of such county, it shall be the duty of the board of supervisors of such county, within sixty (60) days after the filing of such petition, to call a special election at which there shall be submitted to the qualified electors of such county the question of whether the office of county superintendent of education of said county shall continue to be elective or shall be filled by appointment by the county board of education of said county. Provided, however, that where a Class 3 county having an area in excess of eight hundred twenty-five (825) square miles has a county unit school system comprising less than an entire county, the petition shall only be signed by electors residing within the county unit school district and only electors of said district shall vote on the proposition of appointing the county superintendent of education. The order calling such special election shall designate the date upon which same shall be held and a notice of such election, signed by the clerk of the board of supervisors, shall be published once a week for at least three (3) consecutive weeks in at least one (1) newspaper published in such county. The first publication of such notice shall be made not less than twenty-one (21) days prior to the date fixed for such election and the last publication shall be made not more than seven (7) days prior to such date. If no newspaper is published in such county then such notice shall be given by publication of same for the required time in some newspaper having a general circulation in such county and, in addition, by posting a copy of such notice for at least twenty-one (21) days next preceding such election at three (3) public places in such county, one (1) of which shall be at the door of the county courthouse in each judicial district. Said election shall be held, as far as is practicable, in the same manner as other elections are held in such county and all qualified electors of the county may vote therein. If a majority of such qualified electors who vote in such election shall vote in favor of the appointment of the county superintendent of education by the county board of education then, at the expiration of the term of the county superintendent of education then in office, the county superintendent of education of said county shall not be elected but shall thereafter be appointed by the county board of education for a term of not more than four (4) years; otherwise, said office shall remain elective. No special election shall be held in any county under

the provisions of this subsection more often than once in every four (4) years, and no change from the elective to the appointive method of the selection of the county superintendent of education shall become effective except at the expiration of the term of the county superintendent of education in office at the time such election is held.

In any county of the first class lying wholly within a levee district and within which there is situated a city of more than forty thousand (40,000) population according to the last decennial Federal Census the county superintendent of education shall hereafter be appointed by the county board of education as above provided.

In any county of the second class wherein Interstate Highway 55 and State Highway 22 intersect and which is also traversed in whole or in part by U. S. Highways 49 and 51, and State Highways 16, 17 and 43 and the Natchez Trace; in any Class 4 county having a population in excess of twenty-five thousand (25,000) according to the 1960 Federal Census, traversed by U. S. Interstate Highway 55 and wherein Mississippi Highways 12 and 17 intersect; in any county created after 1916 through which the Yazoo River flows; in any Class 4 county having a land area of six hundred ninety-five (695) square miles, bordering on the State of Alabama, wherein the Treaty of Dancing Rabbit was signed and wherein U. S. Highway 45 and Mississippi Highway 14 intersect; in any county bordering on the Mississippi River wherein lies the campus of a land-grant institution or lands contiguous thereto owned by the institutions; in any county lying within the Yazoo-Mississippi Delta Levee District, bordering upon the Mississippi River, and having a county seat with a population in excess of twenty-one thousand (21,000) according to the Federal Census of 1960; in any Class 3 county wherein is partially located a national forest and wherein U. S. Highway 51 and Mississippi Highway 28 intersect, with a 1960 Federal Census of twenty-seven thousand fifty-one (27,051) and a 1963 assessed valuation of Sixteen Million Six Hundred Ninety-two Thousand Three Hundred and Four Dollars ($16,692,304.00); in any Class 1 county wherein U. S. Highway 49 and Mississippi Highway 16 intersect, having a land area in excess of nine hundred thirty (930) square miles; the county superintendent of education hereafter shall be appointed by the county board of education.

In any county bordering on the Gulf of Mexico or Mississippi Sound, having therein a test facility operated by the National Aeronautics and Space Administration, the county superintendent of education shall be appointed by the county board of education beginning January 1, 1972.

In any county which has a population of more than twenty-one thousand (21,000) inhabitants but not more than twenty-two thousand (22,000) inhabitants according to the 1960 Federal Census and wherein the state's oldest state-supported university is located and in which Mississippi Highway 7 and Mississippi Highway 6 intersect, the county superintendent of education shall be appointed by the county board of education beginning January 1, 1972.

APPENDIX B

Statutory Language	County	Population
"Any county of the first class lying wholly within a levee district and within which there is situated a city of more than forty thousand (40,000) population according to the last decennial federal census;"	Washington	35,239 White 43,097 Negro 302 Other
"In any county of the second class wherein Interstate Highway 55 and State Highway 22 intersect and which is also traversed in whole and in part by U.S. Highways 49 and 51 and State Highways 16, 17 and 43 and the Natchez Trace;"	Madison	9,267 White 23,630 Negro 7 Other
"in any Class Four county having a population in excess of twenty-five thousand (25,000) according to the 1960 Federal census, traversed by U.S.Interstate Highway 55 and wherein Mississippi Highways 12 and 17 intersect;"	Holmes	7,595 White 19,488 Negro 13 Other
"in any county created after 1916 through which the Yazoo River flows;"	Humphreys	5,758 White 13,300 Negro 35 Other

Statutory Language	County	Population
"in any Class Four county having a land area of six hundred ninety-five (695) square miles, bordering on the State of Alabama, wherein the Treaty of Dancing Rabbit was signed and wherein U.S. Highway 45 and Mississippi Highway 14 intersect;"	Noxubee	4,724 White 12,064 Negro 38 Other
"in any county bordering on the Mississippi River wherein lies the campus of a land grant institution or lands contiguous thereto owned by the institution;"	Claiborne and Jefferson	14,630 White 31,440 Negro 142 Other
"in any county lying within the Yazoo Mississippi Delta Levee district, bordering upon the Mississippi River, and having a county seat with a population in excess of twenty-one thousand (21,100) according to the Federal census of 1960;"	Coahoma	14,630 White 31,440 Negro 142 Other

Statutory Language	County	Population
"in any county having a population of twenty-six thousand, seven hundred fifty-nine (26,759) according to the 1960 Federal census and wherein U.S. Highway 51 and U.S. Highway 84 and the Illinois Central Railroad and the Mississippi Central Railroad intersect;"	Lincoln	12,992 White 14,057 Negro 1 Other
"in any Class Three county wherein is partially located a national forest and wherein U.S.Highway 51 and Mississippi Highway 28 intersect, with a 1960 Federal census of twenty-seven thousand fifty-one (27,051) and a 1963 assessed valuation of $16,692,304.00;"	Copiah	12,992 White 14,057 Negro 1 Other
"in any county bordering on the Gulf of Mexico or Mississippi Sound having therein a test facility operated by the "National Aeronautics and Space Administration," the superintendent shall be appointed beginning January 1, 1972."	Hancock	11,784 White 2,246 Negro 9 Other

Statutory Language	County	Population
"in any Class 1 county wherein U.S.Highway 49 and Mississippi Highway 16 intersect, having a land area in excess of nine hundred thirty (930) square miles;"	Yazoo	12,862 White 18,759 Negro 32 Other
"In any county which has a population of more than twenty-one thousand (21,000) inhabitants but not more than twenty-two thousand (22,000) inhabitants according to the 1960 Federal Census and wherein the state's oldest state-supported university is located and in which Mississippi Highway 7 and Mississippi Highway 6 intersect, the county superintendent of education shall be appointed by the county board of education beginning January 1,1972."	Lafayette	14,110 White 7,208 Negro 37 Other

CERTIFICATE OF SERVICE

I certify that I have this day mailed, via United States mail, postage prepaid, copies of the foregoing Brief of Appellants, to the following:

Attorney General Joe T. Patterson
New Capitol Building
Jackson, Mississippi

J. T. Drake, Esq.,
P. O. Box 366
Port Gibson, Mississippi

Corban & Corban
Robert L. Corban, Esq.
Fayette, Mississippi

Calvin R. King, Esq.
P. O. Drawer 392
Durant, Mississippi

August, 1968

LAWRENCE A. ASCHENBRENNER