No. 96-1389

In The

Supreme Court of the United States

October Term, 1996

B.C. FOREMAN, IDA CLARK, OTIS TARVER, DOMINIC DE LA CRUZ, LOUIS DAVIS, and MANDY PESINA,

Appellants,

v.

DALLAS COUNTY, TEXAS; COMMISSIONERS COURT OF DALLAS COUNTY, TEXAS; LEE F. JACKSON, Dallas County Judge; JIM JACKSON, JOHN WILEY PRICE, MIKE CANTRELL, and KENNETH MAYFIELD, Dallas County Commissioners; and BRUCE SHERBET, Elections Administrator of Dallas County, Texas,

Appellees.

On Appeal From The United States District Court For The Northern District Of Texas

SUPPLEMENTAL BRIEF

C. ROBERT HEATH*
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MEMORANDUM OF APPELLEE SUGGESTING THAT THE CASE MAY BE MOOT

Dallas County files this memorandum pursuant to Supreme Court Rule 18.10 to bring the Court's attention to recent legislation passed by the Texas Legislature that may render this case moot. *Board of License Commissioners of the Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) ("continuing duty [of counsel] to inform the Court of any development which may conceivably affect the outcome"), *quoting and citing Fusari v. Steinberg*, 419 U.S. 379, 390-91 (1975) (Burger, C.J., concurring).

Two fundamental issues are presented in this appeal:[1]

> (1) Whether the various actions of the Dallas County commissioners court in considering political party affiliation when deciding whom

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[1] Although the parties and the amicus have expressed the issues presented in different language, there seems to be no question that a fundamental issue is whether the actions of the commissioners court in using different methods to determine whom it would appoint were practices, standards, or procedures within the meaning of the Voting Rights Act. The United States' recently submitted argument simply assumes that the answer is "yes". *See* Amicus Brief for the United States at 3-4, 8 (stating, without discussion, that appointment methods were "procedures"). Dallas County believes the issue is more subtle and that there is a continuum ranging from the statutory provision indicating how election judges are to be appointed, to the methodology by which the commissioners determine which names will be on the list of possible appointees, to the ultimate appointment of specific individuals. The issue is where along that continuum the line can be drawn that defines what is a section 5 practice, standard, or procedure and what is not. *See* Motion to Affirm (96-1389) at 7-11.

> to appoint as presiding election judges were standards, practices, or procedures within the meaning of section 5 of the Voting Rights Act, 42 U.S.C. § 1973c; and
>
> (2) If so, whether the commissioners court's abandonment of the challenged, but unprecleared methodologies, and its ultimate appointment of all presiding election judges from a single political party represented a change in a standard, practice, or procedure.

It seems clear that there is an insufficient factual basis to decide the second question as the record does not reflect the practice in effect in Dallas County on November 1, 1972, which is a potentially critical date for determining the baseline against which any subsequent practice must be measured to determine if there is a difference between the two. *E.g.*, Amicus Brief of the United States at 16-17; Motion to Affirm at 23-25. The record is presumably sufficient to address the first issue; however, recent action of the Texas Legislature may make both questions moot.

The first issue arises from the Dallas County commissioners court's appointment of presiding election judges pursuant to various methods ranging from an allocation of appointees on the basis of presidential election returns, to an allocation based on senatorial election returns, to an allocation of all positions to members of a single political party. As section 32.002, TEX. ELEC. CODE, vested the commissioners court with the discretion to determine whom to appoint, the commissioners court had clear authority under state law to adopt any one of these methods.

House Bill No. 331, recently passed by the Texas Legislature, removes that discretion and requires the commissioners court to allocate appointments pursuant to a strict formula. Under that statute, relevant portions of which are attached as an appendix to this memorandum, the county chairs of the major political parties will submit lists of potential appointees for all county election precincts. The presiding judge for a precinct is required to come from the party that carried the precinct in the last gubernatorial election. The alternate judge is required to come from the party that received the second highest number of votes in the precinct in that election. For each precinct, the commissioners court must appoint the first person who meets the qualifications for appointment on the list submitted by the relevant county chair. Thus, election judges will be allocated among the parties by a set formula prescribed by statute. The conduct that is challenged in this case and that is sought to be enjoined will no longer be possible.[2] The entire case will accordingly be moot. *See, e.g., United States Department of Justice v. Provenzano*, 469 U.S. 14, 15 (1984) (intervening passage of legislation mooted issue); *County of Los Angeles v. Davis*, 440 U.S. 625, 631-33 (1979) (case moot where complained-of actions were abandoned and where there was no reasonable expectation that the challenged actions would recur).

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[2] As both the new and existing statute contemplate appointment of election judges in July and the new statute has an effective date of September 1, 1997, it is possible that a new set of judges will be appointed under the old system. Any appointments after September 1, however, should be governed by the new statute.

It is important to note that the legislation is not yet effective. While House Bill No. 331 has been passed by both houses of the Texas Legislature, it has not yet been signed by the Governor. Under the Texas Constitution, the Governor has until June 22, 1997 to sign the bill, to veto it, or to permit it to become law without his signature. Assuming the bill is approved by the Governor, it will represent a change in chapter 32, TEX. ELEC. CODE, that must be precleared under section 5 of the Voting Rights Act. The standard time for preclearance is 60 days from submission, although it is possible for the Attorney General to have a second 60-day period for her review. 28 C.F.R. §§ 51.37 and 51.42. In any event, it will be known in a relatively short period of time whether the legislation has become effective and will thus cause this case to be moot.

Dallas County is aware that, where there is any uncertainty whether a post-judgment development has rendered an appeal moot, the Court may remand the case to the district court for consideration of mootness. *E.g.*, *Vitek v. Jones*, 436 U.S. 407 (1978). In this instance, if House Bill No. 331 becomes law and is precleared by the Attorney General, there is little doubt that this case will be moot. Conversely, if House Bill No. 331 does not become law, or is not precleared, the controversy will remain precisely in the form now before this Court. Accordingly, there is nothing to be added by the district court on a remand to consider mootness, the only result of which would be delay in again presenting this appeal to this Court.

For these reasons, Dallas County, appellee, suggests that the issues raised in this appeal may shortly become

moot and requests that the Court defer consideration of the issue pending determination of whether House Bill No. 331 will be approved by the Governor and precleared by the Attorney General. The answers to both questions should be apparent by or shortly after the beginning of the Court's 1997 term.

Respectfully submitted,

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APPENDIX

HB 331

AN ACT

relating to certain election processes and procedures.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

* * *

SECTION 8. Sections 32.002(a) and (b), Election Code, are amended to read as follows:

(a) The commissioners court [~~,~~] at its July term [~~each year~~,] shall appoint the election judges for each regular county election precinct.

(b) Judges appointed under Subsection (a) serve for a term of one year beginning on August 1 following the appointment, *except that the commissioners court by order recorded in its minutes may provide for a term of two years.*

SECTION 9. Sections 32.002(c) and (d), Election Code, are amended to read as follows:

(c) *The presiding judge and alternate presiding judge must be affiliated or aligned with different political parties, subject to this subsection. Before July of each year, the county chair of a political party whose candidate for governor received the highest or second highest number of votes in the county in the most recent gubernatorial general election shall submit in writing to the commissioners court a list of names of persons in order of preference for each precinct who are eligible for appointment as an election judge. The commissioners court shall appoint the first person meeting the applicable eligibility requirements from the list submitted in compliance with this subsection by the party with the highest number of votes in the*

precinct as the presiding judge and the first person meeting the applicable eligibility requirements from the list submitted in compliance with this subsection by the party with the second highest number of votes in the precinct as the alternate presiding judge. The commissioners court may reject the list if the persons whose names are submitted on the list are determined not to meet the applicable eligibility requirements. If the list is rejected, the appointment shall be made for the full term in accordance with the same procedures provided for the filling of vacancies under Subsection (d) based on the time of the rejection instead of the time that a vacancy occurs. If a list of names is not submitted in compliance with this subsection, the commissioners court shall appoint an eligible person who is affiliated or aligned with the appropriate party, if available.

(d) The commissioners court shall fill a vacancy in the position of election judge for the remainder of the unexpired term. An appointment to fill a vacancy may be made at any regular or special term of court. *Not later than 48 hours after the county clerk becomes aware of a vacancy, the county clerk shall notify the county chair of the same political party with which the original judge was affiliated or aligned of the vacancy. Not later than the fifth day after the date of notification of the vacancy, the county chair of the same political party with which the original judge was affiliated or aligned shall submit to the commissioners court in writing the name of a person who is eligible for the appointment. If a name is submitted in compliance with this subsection, the commissioners court shall appoint that person to the unexpired term. If a name is not submitted in compliance with this subsection, the commissioners court shall appoint an eligible person who is affiliated or aligned with the same party, if available.*

~~[(d) The county clerk shall recommend a presiding judge and an alternate judge for each precinct and shall submit a list of the recommendations to the commissioners court. The clerk shall also recommend an appointee for each unexpired term. The court shall consider the clerk's recommendation before making an appointment.~~]

SECTION 10. Section 32.007, Election Code, is amended by amending Subsections (a) and (b) and adding Subsection (f) to read as follows:

(a) If neither the presiding judge nor the alternate presiding judge can serve in an election and their inability to serve is discovered so late that it is impracticable to fill the vacancy in the normal manner, the presiding officer of the appointing authority or the authority if a single officer shall appoint a replacement judge to preside at the election, *subject to Subsection (f)*. If the appointing authority is unavailable, the authority responsible for distributing the supplies for the election shall appoint the replacement judge.

(b) If a person authorized to act as presiding judge is not present at the polling place at the time for opening the polls, on receiving information of the absence, the authority authorized to appoint a replacement under Subsection (a) shall investigate the absence and appoint a replacement judge, *subject to Subsection (f)*, unless the authority learns that a previously appointed judge will immediately report for duty.

(f) A person who is appointed as a replacement for a judge originally appointed under Section 32.002 must be affiliated or aligned with the same political party as was the original judge, if possible.

SECTION 11. Section 32.051, Election Code, is amended by amending Subsection (a) and adding Subsection (e) to read as follows:

(a) Except as provided by Subsection (b) *or (e)*, to be eligible to serve as a judge of an election precinct, a person must:

(1) be a qualified voter of the precinct; *and*

(2) for a regular county election precinct for which an appointment is made by the commissioners court, satisfy any additional eligibility requirements prescribed by written order of the commissioners court.

(e) In a regular county election precinct for which an appointment is made by the commissioners court and in which a political party's candidate for governor received more than 85 percent of the vote in the most recent gubernatorial general election, the alternate presiding judge may be a qualified voter of another precinct in the county.

SECTION 12. Subchapter C, Chapter 32, Election Code, is amended by adding Section 32.0552 to read as follows:

Sec. 32.0552. INELIGIBILITY OF PERSON CONVICTED OF ELECTION OFFENSE. A person is ineligible to serve as an election judge or clerk in an election if the person has been finally convicted of an offense in connection with conduct directly attributable to an election.

* * *

SECTION 79. This Act takes effect September 1, 1997.