Nos. 96-987 and 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

APPELLANTS' SUPPLEMENTAL BRIEF

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APPELLANTS' SUPPLEMENTAL BRIEF

Appellants file this Supplemental Brief in response to the Memorandum Of Appellee Suggesting That The Case May Be Moot [hereinafter "Mem."]. Appellee Dallas County has asked the Court to defer consideration of this case until October Term

1997 on the ground that a bill recently passed by the Texas Legislature "may" moot this case. Mem. at 1-2, 4-5. Texas House Bill No. 331, however, has not been signed by the Governor of Texas, has not become law, and has not been precleared under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. And even if the bill were promptly signed and precleared, it would *not* moot this case. Therefore, this Court should deny Dallas County's request for a delay.

I. TEXAS HOUSE BILL NO. 331 CANNOT MOOT THIS CASE.

Even if Texas House Bill No. 331 is signed by the Governor and promptly precleared by the Attorney General or the District Court for the District of Columbia, it will not moot this case. By its own terms, the bill would not take effect until September 1997. *See* Mem. at 4a (Section 79 of the bill) ("This Act takes effect September 1, 1997."). Dallas County election judges, whose selection and appointment are at issue in this case, are appointed by the Dallas County Commissioners Court in July, and their one-year terms commence on the following August 1. *See* Tex. Elec. Code Ann. § 32.002; *see also* Mem. at 1a. Therefore, absent relief from this Court or from the District Court on remand, Dallas County will be under no legal obligation to change its current, unprecleared method for selecting and appointing election judges until July 1998. In the meantime, an entirely new set of election judges, unaffected by the new bill, will be appointed and will preside over the fall 1997 and spring 1998 elections. Thus, even if the bill is promptly signed and precleared, it will not govern the selection and appointment of the next set of Dallas County election judges and will have no impact on elections held in Dallas County before August 1, 1998. Indeed, the County's brief concedes that the appointment of "a new set of judges . . .

under the old system" is "possible." Mem. at 3 n.2. But that scenario is not just "possible." It is certain.

Thus, if this Court summarily reverses the District Court's judgment[1] (or summarily vacates it and remands the case for further consideration in light of the position presently asserted by the Acting Solicitor General in his brief for the United States), the District Court on remand may grant appellants their requested declaratory and injunctive relief, and appellants may regain their posts as Dallas County election judges for the fall 1997 and spring 1998 elections. Because Texas House Bill No. 331, even if promptly signed into law and precleared, would not "make[] it impossible . . . to grant [appellants] 'any effectual relief,'" *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)), this case will not be moot.

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[1] Dallas County's latest brief actually bolsters appellants' arguments for summarily reversing the judgment below. *First*, the County now admits that its 1996 methods for selecting and appointing election judges simply "allocat[e] . . . all positions to members of a single political party." Mem. at 2; *see also* Br. for the United States as *Amicus Curiae* at 4 (referring to the September 1996 method as "the Republican precinct method"). *Second*, on top of its earlier concession that "the statute creating the position of election judge is an election procedure requiring section 5 preclearance," Mot. to Affirm at 7, Dallas County now concedes that a statute prescribing a set formula for allocating election judges among the political parties "must be precleared under section 5." Mem. at 4. *Third*, in a blatant attempt to run away from the obvious, Dallas County has now rephrased its second question presented to refer to the 1983 and 1995 changes as changes in "methodologies," even though the County's Motion to Affirm had referred to them as changes in "standard[s]" – the very term Congress adopted in drafting Section 5. *Compare* Appellants' Br. in Opp'n to Appellees' Mot. to Affirm at 3 (arguing that these were changes in a "standard, practice, or procedure" within the meaning of Section 5) *with* Mot. to Affirm at i (implicitly conceding that point by calling them "standard[s]").

II. UNLESS DALLAS COUNTY REVERSES COURSE AND SUBMITS TO THE PRECLEARANCE PROCESS, TEXAS HOUSE BILL NO. 331 MAY NOT BE PRECLEARED AND HENCE WILL NOT BECOME LEGALLY ENFORCEABLE AND CANNOT POSSIBLY MOOT THIS CASE.

The assumption on which Dallas County's brief is premised -- that Texas House Bill No. 331 will actually be precleared -- is very much in doubt. And even Dallas County does not contend that the bill will moot this case if it is *not* precleared.

First, Texas House Bill No. 331 contains literally dozens of revisions to the Texas Election Code in addition to those reprinted in the appendix to the County's Memorandum. Preclearance could be denied if *any* of those revisions prove to be retrogressive. *See Upham v. Seamon*, 456 U.S. 37, 38 n.1 (1982) (*per curiam*).

Second, even the provisions of Texas House Bill No. 331 that are reprinted in the appendix to the County's Memorandum could be denied preclearance. Throughout this litigation, and dating back a quarter of a century, one fact has held firm: Dallas County has refused to submit to the Department of Justice *any* information regarding changes in its methods of selecting and appointing election judges. *See* Br. for the United States as *Amicus Curiae* at 5; J.S. at 6. Even now, as the County seeks to delay consideration of this case on mootness grounds, it continues to argue that it is free to ignore the Justice Department's requests. *See* Mem. at 1 n.1. If Dallas County continues to defy Section 5's command by refusing to provide federal authorities with information about the methods currently (and previously) in force or effect, it may be impossible for the Attorney General (or the District Court for the District of

Columbia) to establish a benchmark for measuring the effect of Texas House Bill No. 331 on Dallas County's minority voters. Because Dallas County encompasses one-ninth of the population of the State of Texas (and nearly one-fifth of its African-American population), it also may be impossible to gauge whether the bill is retrogressive to the State's minority citizens, taken as a whole. Thus, ironically, Dallas County's obstinacy may prevent the preclearance of the very bill that the County now argues may moot this appeal.

CONCLUSION

Accordingly, this Court should deny Dallas County's request to defer consideration of the case, and should summarily reverse the judgment of the District Court or, alternatively, note probable jurisdiction.[2]

Respectfully submitted,

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[2] For the reasons set forth in this Supplemental Brief, appellants agree with Dallas County's conclusion that it would be pointless to remand the case to the District Court for consideration of mootness. *See* Mem. at 4 (citing *Vitek v. Jones*, 436 U.S. 407 (1978)).