IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 701

GASTON COUNTY, a Political Subdivision of the State of North Carolina,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

This case of first impression as to the application of Section 4(a) of the Voting Rights Act of 1965, 42 U.S.C. Section 1973b (Supp. II, 1965-1966) presents the questions whether Gaston County, a political subdivision of the State of North Carolina, during five years prior to August 18, 1966 had used a "test or device" within the meaning of Section 4(a) of the Voting Rights Act of 1965 (*supra*) for the purpose or with the effect of denying or abridging the right to register to vote or to vote on account of race or

color; whether a segregated educational system alone is sufficient to preclude a state or political subdivision thereof from using a literacy test to determine voter qualification; and whether a county political unit, which has no jurisdiction or control over municipal elections held within the county unit by virtue of state law, is required by Section 4(a) of the Voting Rights Act of 1965 to refute the presumption that literacy tests were used in a discriminatory manner in municipal elections.

Declaratory Judgment relief was sought by the Appellant pursuant to Section 4(a) of the Voting Rights Act of 1965. By opinions entered August 16, 1968 (A. 441) (Opinion of Circuit Judges Wright and Robinson), this relief was denied on the theory that Negroes of voting age in Gaston County, North Carolina, as children, were denied education equal to that provided White children. Consequently any literacy test imposed upon Negroes as a prerequisite to voting would have the effect of abridging the right of Negroes to vote on account of race or color. District Judge Gasch, in concurring opinion, but on a different theory, disagreed with the majority and declared there was no evidence to sustain the conclusion reached by the majority.

The concurring opinion (A. 461) (Opinion of District Judge Gasch) was based on the theory that Appellant failed to show an absence of discrimination in municipal elections within Gaston County.

This appeal affords this Court an appropriate opportunity to declare whether Appellant used a "test or device" with the effect of denying or abridging the rights of its citizens to register to vote on account of race or color; whether the fact that a state or political subdivision thereof had unequal educational systems, and whether that fact alone is sufficient to deny relief under the Voting Rights Act of 1965; and whether a county unit must show absence of discrimination in municipal elections even though the county unit has no control or jurisdiction over such municipal elections by virtue of state law.

CITATIONS TO OPINIONS BELOW

The majority opinion of the statutory Three Judge Court, convened pursuant to 28 U.S.C. 2284 (Opinion of Circuit Judges J. Skelly Wright and Spottswood W. Robinson, III) (A. 441) and the concurring opinion of District Judge Oliver Gasch (A. 461) are reported in 288 F. Supp. 678, 690 (1968). The majority opinion of Circuit Judges Wright and Robinson is set forth at (A. 441) and the concurring opinion of District Judge Gasch at (A. 461).

JURISDICTION

This action was instituted on August 18, 1966, in the United States District Court for the District of Columbia for a declaratory judgment pursuant to the Voting Rights Act of 1965, 42 U.S.C. Section 1973 *et seq.* (Supp. II, 1965-1966). Trial of the action was held on June 21 and 22, 1967, before the statutory Three Judge Court consisting of Circuit Judges J. Skelly Wright, Spottswood W. Robinson, III and District Court Judge Oliver Gasch.

On August 16, 1968, an opinion was filed by Circuit Judges Wright and Robinson denying Appellant's motion for declaratory judgment (A. 441). On August 18, 1968, an opinion concurring in the results was filed by District Judge Gasch but on different grounds (A. 461).

Notice of appeal to the Supreme Court of the United States was filed with the Clerk of the United States District Court for the District of Columbia on September 13, 1968. Jurisdiction of this Court to review the decision of the Three Judge Court for the District of Columbia is conferred by Section 4(a) of the Voting Rights Act of 1965, 42 U.S.C. Section 1973 *et seq.* (Supp. II, 1965-1966).

Probable jurisdiction was noted on January 13, 1969.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 4(a), 4(b), 4(c) and 4(d) of the Voting Rights Act of 1965, 42 U.S.C. Section 1973b *et seq.* (Supp. II, 1965-66).

SEC. 4(a) - To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under sub-section (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: Provided, That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose

or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November, 1964.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any manner, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State

or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

2. Article VI, Section 4, of the Constitution of North Carolina.

Sec. 4. Qualification for registration - Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language. But no male person who was, on January 1, 1867, or at any time prior thereto, entitled to vote under the laws of any state in the United States wherein he then resided, and no lineal descendant of any such person, shall be denied the right to register and vote at any election in this State by reason of his failure to possess the educational qualifications herein prescribed: Provided, he shall have registered in accordance with the terms of this section prior to December 1, 1908. The General Assembly shall provide for the registration of all persons entitled to vote without the educational qualifications herein prescribed, and shall, on or before November 1, 1908, provide for the making of a permanent record of such registration, and all persons so registered shall forever thereafter have the right to vote in all elections by the people in this State, unless disqualified under section two of this article (Const. 1868; 1899, c. 218; 1900, c. 2, § 4; Ex. Sess. 1920, c. 93.)

3. Section 163-28. General Statutes of North Carolina, Vol. 3D.

SEC. 163-28. Voter must be able to read and write; registrar to administer section.—Every person presenting himself for registration shall be able to read and write any section of the Constitution of North Carolina in the English language. It shall be the duty of each registrar to administer the provisions of this section. (1901, c. 89, § 12; Rev., § 4318; C.S., § 5939; 1927, c. 260, § 3; 1957, c. 287, § 1.) (Recodified in 1967 as Sec. 163-58)

QUESTIONS PRESENTED

1. Whether Gaston County, a political subdivision of the State of North Carolina, during five years prior to institution of this action on August 18, 1966, had used a literacy test for the purpose or with the effect of denying or abridging the right of its citizens to register to vote or vote on account of race or color?

2. Whether a denial of equal educational opportunity alone is sufficient to preclude a state or political subdivision thereof from using a literacy test to determine voter qualifications?

3. Is a county political unit, which has no jurisdiction or control over municipal elections held within the county unit by virtue of state law, required by section 4(a) of the Voting Rights Act of 1965 to refute the presumption that literacy tests were used in a discriminatory manner in municipal elections?

STATEMENT OF THE CASE

On March 29, 1966, the Attorney General of the United States determined that a "test or device" within the meaning of the Act was maintained within the territory of Gaston County on November 1, 1964. This determination was made after the Director of the Census had determined that fewer than fifty per cent of the persons of voting age residing in Gaston County voted in the presidential election of November, 1964. As a result, the use of the written literacy test in Gaston County was suspended. Thereafter, this suit was brought to terminate the suspension of its test or device for the simple reason that Gaston County has not, within five years prior to August 18, 1966, used a test or device discriminatory in purpose or effect.

Gaston County, a political subdivision of the State of North Carolina, instituted this action on August 18, 1966, in the United States District Court for the District of Colum-

bia pursuant to Section 4(a) of the Voting Rights Act of 1965 seeking a declaratory judgment that, during the past five years, no "test or device" had been used for the purpose or with the effect of denying or abridging the right to register to vote or to vote on account of race or color.

On August 16, 1968, Circuit Judges Wright and Robinson filed an opinion (A. 441) denying the relief requested on the theory that Negroes, as children, were denied equal education with that of White and consequently any literacy test imposed upon Negroes as a prerequisite to register to vote would have a discriminatory effect.

On August 18, 1968, District Judge Gasch filed an opinion in which he disagreed with the theory on which the majority based its decision (A. 461). He stated:

> "On this record, it would be impossible to find that Gaston County used its literacy test for the purpose of discrimination against Negroes." (A. 462).

Judge Gasch concurred in the denial of the relief sought, however, on the theory Appellant made no showing that a literacy test had not been used by municipal registrars in a discriminatory fashion.

From denial of the relief sought, Gaston County appealed to the Supreme Court of the United States.

ARGUMENT

I.

DID GASTON COUNTY, WITHIN FIVE YEARS PRIOR TO AUGUST 18, 1966, USE A "TEST OR DEVICE" FOR THE PURPOSE OR WITH THE EFFECT OF DENYING OR ABRIDGING THE RIGHT TO REGISTER TO VOTE OR TO VOTE ON ACCOUNT OF RACE OR COLOR?

Article VI, Section 4 of the Constitution of North Carolina and Section 163-28 of the General Statutes of North Carolina provide in pertinent part as follows:

> "Every person presenting himself for registration shall be able to read and write any section of the Constitution of North Carolina in the English language." (A. 12) See *Lassiter v. Northampton County Board of Education*, 360 U.S. 45 (1959).

Pursuant to this section of the Constitution and the General Statutes of North Carolina and in order to comply with the Civil Rights Act of 1964, election officials in Gaston County adopted a written test as a prerequisite to register to vote. The test adopted was of the simplest form. The three shortest and simplest sentences in the North Carolina Constitution were selected. (A. 52). A potential voter was not required to write or print all three sentences, but only to write or print any one of them. The registrant was not asked to read or interpret the meaning of any word or sentence. In fact, the registrant was not required to write every word in the sentence selected, but only to produce a reasonable facsimile thereof. (A. 53).

The test used by Gaston County contained the following sentences from the North Carolina State Constitution (Pl. Ex. A; A. 52, 170):

(1) Art. IV, Sec. 17
Clerks of the Superior Courts shall hold their offices for four years.

(2) Art. VII, Sec. 8
No money shall be drawn from any county or township treasury, except by authority of law.

(3) Article VIII, Sec. 6
The seat of government in this State shall remain at the City of Raleigh.

Judge Gasch in his concurring opinion, recognizing the practicality of this test, had this to say:

> "Given the very low level of competency required by the test, it is not at all clear that even the Negro schools in Gaston County did not provide adequate and sufficient training for Negroes to pass the test.

> It may well be that even though the Negro student received an inferior education, he was at least equipped to pass this simple test." (A. 466)

He also had this to say:

> "There is nothing to indicate that the pre-1964 oral test was administered with any more rigidity." (A. 466).

Justice Douglas, in *Lassiter v. Northampton County, supra,* referring to Art. VI, Sec. 4 of the North Carolina Constitution and G.S. 163-28, stated:

> "That seems to us to be one fair way of determining whether a person is literate, not a calculated scheme to lay springes for the citizen."

It was agreed that in April, 1962, the Gaston County Board of Elections, pursuant to North Carolina Law, adopted a new system of voter registration known as a permanent loose-leaf system, which required a general registration of all voters in Gaston County. For this reason, every person now eligible to vote in Gaston County in Federal, State or County elections, has become registered to vote during or since April, 1962. (A. 13). Consequently, the relevant period for purposes of this suit would involve registration activities since April, 1962, even though the period would ordinarily be for five years preceding the filing of the action, or from August 18, 1961. It was also agreed that from April, 1962, to the effective date of the Civil Rights Act of 1964 oral literacy tests were used, that such tests were replaced by written tests after that date.

Appellant's evidence in this case shows clearly that upon adoption of the new system of registration every possible effort was made by election officials to publicize the fact that a new registration system was being put into effect in Gaston County and in order to be eligible to vote the potential voter would be required to re-register. Appellant was one of approximately 15 counties out of 100 counties to adopt the modern loose-leaf system. (A. 63). The publicity

given to the new system was directed to all citizens without any thought of race or color.

Beginning on April 21, 1962, the number of voting precincts in Gaston County were increased from thirty-five (35) to forty-four (44) for the convenience of voters and to provide additional places for citizens to register. (A. 17). The registration books were kept open after May, 1962, at the principal office of the County Board of Elections from 8:30 A.M. to 5:00 P.M. Monday through Friday of each week throughout the year, except twenty-one (21) days prior to an election as provided by State law (A. 20, A. 51). Attention is directed, however, to the fact that from April 21, 1962, to the primary in May, 1962, and prior to May, 1962, a person could only register on any one of three Saturdays and any time during the fifteen days between the three Saturdays (A. 44, A. 51). In addition to being permitted to register from 8:30 A.M. to 5:00 P.M. Monday through Friday of each week at the principal office of the County Board of Elections, any person could register with the registrar of the precinct in which he or she resided at any reasonable hour of each day of each week except for a period of twenty-one days prior to an election (A. 51).

When the new system of registration was adopted, schools were conducted for registrars to instruct them as to proper procedures for permitting applicants to register and to achieve a uniform system of registration in all forty-four voting precincts (A. 19). After use of the oral test was abolished by the Civil Rights Act of 1964, registrars of the forty-four voting precincts were again instructed by the Chairman of the Board of Elections as to proper and lawful procedures to follow in permitting applicants to register (A. 53). Each registrar was instructed that "they should not require an applicant to spell each word exactly or even to be able to write every word in the sentence." (A. 53). L. B. Hollowell, Jr., chairman of the County Board of Elections, testified: "The purpose was not to prevent anyone from registering unless we had no choice under the State

Law." (A. 53). The literacy test used in Gaston County, as its evidence clearly establishes, was designed to comply with the state constitution and laws, and not as a method of disenfranchising Negroes.

News media gave extensive coverage by editorials and news reports to citizens of Gaston County explaining the new registration system and informing the public in general where and when they could register. Spot announcements were purchased through local radio stations urging citizens to register (A. 20). Paid advertisements were obtained in newspapers in 1962, 1964 and 1966 showing precinct maps, names of registrars in all precincts, precinct numbers, home addresses of registrars and telephone numbers of registrars in order to inform the citizens of the County where and when they could register to vote. (Pl. Exs. G through Z and AA through GG, A. 170; A. 20, 21, 56, 57, 58)

Prior to the primary election in May, 1962, five (5) registration commissioners or deputy registrars, three of whom were Negroes, were appointed to assist citizens to register. (A. 22). The deputy registrars could register voters anywhere in the County (A. 55), while the regular registrars could only register voters within their respective precincts. Prior to the general election in November, 1964, there were no regular Negro registrars in Gaston County. One Negro was appointed in 1965 in Precinct Number Seven, a predominantly Negro precinct in the City of Gastonia (A. 55).

In 1962 and again in 1964, the County Board of Elections distributed a letter to the students of all schools in the County for delivery to the parents, urging them to register to vote. In 1962, thirty-one thousand five hundred (31,500) such letters were distributed (A. 22). Thirty-four thousand (34,000) such letters were distributed in 1964 (Pl. Ex. D, A. 56, 57). Moreover, conferences were held with Negro leaders of the County seeking their assistance in informing the Negro citizens of where and when to register (A. 57). Negro leaders, prior to the general election in 1964, urged Negroes to register by announcements in the churches

(A. 99). As a special incentive to registrars, to encourage registration, each registrar was paid, in addition to the amount authorized by State Law, a fee for each person registered (A. 66).

The majority opinion of the Court below stated:

> "And that registrars have been authorized—indeed encouraged—to be available to register any qualified person at any reasonable hour each day of each week and, in addition, to be at the precinct voting place on designated Saturdays throughout the registration period." (A. 447) . . .
>
> "Plaintiff's evidence also established that these publicity efforts were fairly directed to all persons residing in the County, regardless of race or color, and that special conferences were held with Negro leaders for the specific purpose of obtaining their assistance in informing Negro citizens of where and when to register." (A. 447)

It seems rather inconsistent for the Appellant to do all these things referred to in the majority opinion on the one hand and then use the simple "test or device" for discriminatory purposes on the other. The Appellee stipulated as follows:

> "The Government finds no evidence that during the five years preceding the institution of this suit that any registrar of voters in Gaston County advised any Negro citizen that he or she would be refused registration because of his or her race." (A. 14)

Judge Gasch went so far as to say:

> "On this record, it would be impossible to find that Gaston County used its literacy test for the purpose of discriminating against Negroes." (A. 462)

II.

WHETHER A DENIAL OF EQUAL EDUCATIONAL OPPORTUNITY ALONE IS SUFFICIENT TO PRECLUDE A STATE OR POLITICAL SUBDIVISION THEREOF FROM USING A LITERACY TEST TO DETERMINE VOTER QUALIFICATIONS

The majority denied declaratory relief on the ground that as a result of segregated educational systems Negroes in Gaston County were placed at a material disadvantage to Whites in passing the literacy test causing the test to have a discriminatory effect against Negroes in registering and voting. To support the decision, the majority cited certain census statistics and pointed out that Gaston County public schools were legally segregated until 1965 (A. 467). In spite of the statistics cited in the majority opinion, Judge Gasch stated that, in his opinion, the evidence was insufficient to support the majority's case (A. 467).

Appellant's evidence, however, dispels the conclusions reached by the majority. Statistics offered by the Appellant show that 69,252 White persons and 8,407 Negroes of voting age lived in Gaston County. Of these, 63.3 per cent of the White persons and 52.2 per cent of the Negroes eligible to vote in the general election in November, 1964, in the County were registered. In the general election in November, 1964, 37,326 people of those registered actually voted. Of the registered Negroes, 68.95 per cent of them actually voted in the general election in November, 1964, and 80.97 per cent of the registered Whites voted (A. 62). Even though these figures comprise fewer than 50 per cent of the voting age adults, more than 50 per cent of those registered actually voted. These percentages are far in excess of those cited in *South Carolina v. Katzenbach,* 383 U.S. 301, at page 313 (1966).

This evidence, along with that set out above, satisfies the burden of proof placed upon Appellant, and declaratory relief should be granted. "The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant." *South Carolina v.*

Katzenbach, supra. There is no evidence in the record of voting discrimination, flagrant or otherwise.

> "An area need do no more than submit affidavits from voting officials, asserting that they have not been guilty of racial discrimination through the use of tests and devices during the past five years, and then refute whatever evidence to the contrary may be adduced by the Federal Government." *Apache County, et al. v. United States,* 256 F. Supp. 903 (1966); *South Carolina v. Katzenbach,* 383 U.S. 301, 332 (1966).

The majority in the Court below held that Appellant did not refute the Government's evidence that literacy tests in Gaston County were used both "for the purpose" and "with the effect of denying or abridging the right to register on account of race or color." In regard to the matter of purposeful discrimination, the majority stated, however, that "Insofar as we are here concerned with the language of the Act which speaks of purposeful discrimination, we must agree that the Gaston County Board of Elections has made commendable efforts to promote registration of all citizens residing in that County, irrespective of race or color." (A. 450).

The majority then proceeded to discuss evidence of the United States pertaining to the words "with the effect." The opinion went on to say:

> "The United States introduced evidence which indicates the difference between White and Negro education in Gaston County. The evidence is admittedly fragmentary in nature, but the conclusion is inescapable that proportionately less money has been spent on Negro education than on White." (A. 453)

In spite of this admittedly fragmentary evidence, which, by the way, is the same type of statistical evidence offered by the Government but rejected by the Court in *United States v. State of Texas,* 252 F. Supp. 234, 241 (1966), *affirmed per curiam,* 384 U.S. 155 (1966), the majority reached the conclusion that Appellant has used the literacy test "with the effect" of denying or abridging the right to register to vote on account of race or color.

Appellant offered Mr. Thebaud Jeffers, a Negro who was a principal of a Negro high school in Gaston County prior to integration of the Gaston County public schools (A. 142). It is apparent from the record that Mr. Jeffers was an expert in his field. He came to Gaston County in 1932 and has been in the school system since that time. After showing the witness Pl. Ex. A containing the test used in Gaston County, he testified as follows: (A. 169)

> Q. "Mr. Jeffers, do you have an opinion as to whether or not the schools in 1932 had sufficient facilities and were equipped to teach a person to read and write well enough to be able to pass that test, or to write any portion of the words that you see there?" (A. 169)
>
> A. "All of our schools, just about,–I think all of them would have been able to teach any Negro child to read and to write so that he could read a newspaper, so that he could read any simple material that didn't have any foreign words or words of foreign extraction in them. This has always been true and I don't think that there was an argument anywhere, except that maybe the facilities were different. But they have been basically able to teach this and this is what they have done." (A. 169)
>
> Q. "Yes, it is your opinion then that this test could be just copied or written as was required prior to the time we were placed under the '65 Voting Rights Act? Is that your opinion that a person could do that or–" (A. 169)
>
> A. "Yes, I am certain." (A. 169)

The majority opinion in Footnote 19 (A. 456-457) stated that Gaston County relied on the testimony of Mr. Jeffers as proof that educational facilities in Gaston County, although segregated, were of sufficient quality to enable Negroes to pass the literacy test. It is true, Appellant did indeed rely on that testimony, but only as a part of its proof. Other witnesses and many exhibits were offered by Appellant to support its request for declaratory relief. In

Footnote 19 (A. 456-457) the majority said in regard to the testimony of Mr. Jeffers:

> "We do not agree. Not only is the testimony itself unpersuasive, but Mr. Jeffers came to Gaston County in 1932 and his knowledge, therefore, dates only from that time." (A. 457)

The testimony of Mr. Jeffers was completely disregarded by the majority even though, as stated by Judge Gasch:

> "Whatever weight may be accorded the respondent's cold statistics is, in my opinion, dispelled by the testimony of petitioner's expert witness who expressed the unqualified and unchallenged opinion that the Negro schools prior to integration were sufficient to enable the students to pass the type of test required. There it is important to note that the present test is ability to copy a single sentence." (A. 468)

Appellant contends that the statistical data used by the majority as a basis for the conclusion reached was never contemplated by the Act as a basis for denying declaratory judgment relief.

It is interesting to note that the Attorney General entered into several consent judgments granting relief to some certified units, one of which was *Wake County, North Carolina v. United States,* D.D.C. Civil Action No. 1198-66 (January 23, 1967). Wake County is a political subdivision of the State of North Carolina operating under the same school system as discussed in the majority opinion. Also, the literacy test requirement in Gaston County is the same required in Wake County. The effect of the majority opinion then is to place a greater burden on Gaston County than the Department of Justice or the Court has placed on other certified units.

In *United States v. Texas,* 252 F. Supp. 234 (W.D. Tex. 1966), *affirmed per curiam,* 384 U.S. 155 (1966) the Court refused to find that there was a discriminatory effect in the use of a poll tax on the theory that Negroes, because of a

segregated school system, were less able to succeed financially, therefore, less able to pay the poll tax required before being permitted to vote. The Court went on to say:

> "That figures most favorable to the United States' position indicate that of the eligible persons between 21 and 60, 57.3 per cent of the Whites and 45.3 per cent of the Negroes pay their poll tax. It is to be noted that both of these figures, although not commendable in terms of the total electorate, are substantial and that the difference between them is only 12 per cent. If the disparity had been larger, we might have been more inclined to accept the evidence of a historical background of discrimination and the result of the poll tax sales as sufficient to justify a finding that the poll tax discriminates against Negroes. The disparity, however, is not glaring. Indeed, it is relatively small. The evidence points to other possible reasons for this difference." *United States v. Texas,* 252 F. Supp. 234, 245 (1966), *affirmed per curiam,* 384 U.S. 155 (1966).

The special census of 1966 showed that 69,252 White persons and 8,407 Negroes of voting age lived within Gaston County. As already pointed out, 63.3 per cent of the Whites (43,874) and 52.2 per cent of the Negroes (4,388) were registered to vote in November, 1964. This is a disparity of only 11.1 per cent between the number of Negroes eligible to register and the number of Whites eligible to register. Following the theory of *United States v. Texas, supra,* it would seem that a difference of only 11.1 per cent between Negroes eligible to register and Whites eligible to register is not sufficient to justify a finding that discrimination in public education in Gaston County made it more difficult for Negroes to pass the literacy test than Whites.

To deny Appellant declaratory judgment relief on the grounds that its schools have been segregated is to attempt to do judicially what Congress chose not to do legislatively. In spite of all the testimony before the House and Senate Committees, including that of former Attorney General Kat-

senbach, Congress did not choose to abolish literacy tests in the dual school system states. In fact, Congress provided that if a test or device was used "for the purpose of with the effect" of denying or abridging the right to vote on account of race or color, but such incidents had been few in number and had been promptly and effectively corrected; the continuing effects of such incidents had been eliminated; and no reasonable probability of their recurrence in the future, no state or political subdivision would be certified. Judge Wright, in the majority opinion, states this section only applies in cases of purposeful discriminattion (A. 450). That portion of the Act also speaks of both "for the purpose *or with the effect*." (Emphasis added). Appellant contends that the percentage of Negroes eligible to register in 1964 in Gaston County (52.2 per cent) in itself as compared with 63.3 per cent of Whites is substantial evidence that incidents of use of a test or device in a disciriminatory fashion have been few in number, if any at all, in Gaston County.

Congress did not elect to suspend literacy tests in all areas where segregated school systems had flourished. Had it so intended, it would have so stated. The opinion of the majority, if allowed to stand, obviates any opportunity for reinstatement of literacy tests in any state that has had a dual educational system.

III.

DOES GASTON COUNTY, IN ORDER TO SUCCESSFULLY RESIST CONTINUED SUSPENSION OF ITS LITERACY TEST, HAVE THE BURDEN OF PROVING THAT ALL MUNICIPAL ELECTIONS WITHIN ITS BOUNDARIES ARE FREE FROM DISCRIMINATION EVEN THOUGH GASTON COUNTY HAS NO JURISDICTION OR CONTROL OVER MUNICIPAL ELECTIONS?

It is uncontested that there were eleven separate municipalities within the boundaries of Gaston County during the period of time in question. (A. 16). It is further uncontested that Gaston County had no jurisdiction or control

over any municipal elections held within the County During said period (A. 19, 82).

Gaston County agrees that the Voting Rights Act of 1965 is applicable to municipal elections, as stated in the concurring opinion of District Judge Gasch. However, Gaston County respectfully contends that the Director of the Census must first make the determinations required by Section 4(B) of the Voting Rights Act of 1965 as to the municipality or municipalities in question before said municipality or municipalities would become subject to the provisions of the Act. In the case at bar, the Director of the Census did not make such determinations as to any municipality within Gaston County.

Section 4(B) of the Voting Rights Act of 1965 states that the provisions of subsection (A) shall not apply to any State or political subdivision thereof *until* (emphasis added) the Attorney General determines that said State or political subdivision maintained a test or device on November 1, 1964 with respect to which "(2) The Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964 or that less than 50 per centum of such persons voted in the Presidential Election of November, 1964." The plaintiff specifically argues that the Director of the Census has not made the necessary determinations as required by Section 4(B) as to any municipality within Gaston County, which would place any of said municipalities under the Voting Rights Act of 1965. Obviously, the Act contemplates that a municipality is a political subdivision of a State since the Act does apply to municipalities. However, the determinations made by the Director of the Census in the 1966 Special Census by which Gaston County was certified under the Voting Rights Act of 1965 contains no reference or references whatsoever as to whether fewer than 50 per centum of the persons of voting age residing within the corporate limits of any municipality within Gaston County did or did not vote in the Presidential Election of November, 1964. Therefore, it would have been impossible for Gaston

County to ascertain which municipality within its borders, if any, had failed to vote 50 per centum of the persons of voting age within such municipality in the Presidential Election of 1964. It is also entirely possible that more than 50 per centum of the residents of voting age in all municipalities within Gaston County voted in the Presidential Election of 1964, and the reason that Gaston County did not have 50 per centum of its residents of voting age vote in that election was due to non-participation in the election by persons residing in the rural areas of the county. Certainly, the information pertaining to the participation in said election by residents of voting age within each municipality in Gaston County was readily obtainable by the Director of the Census. If Gaston County had jurisdiction and control of the municipal elections within its boundaries, there would be no reason for the Director of the Census to make the determinations required by Section 4(B) as to each municipality, which are political subdivisions of the State of North Carolina.

Furthermore, the legislative history of the Voting Rights Act of 1965 does not mention that a State or any political subdivision thereof has the burden of showing non-discrimination in an election over which it has no jurisdiction or control. Gaston County respectfully contends that in the absence of any such legislative history, a fair interpretation of the statutory requirement is that a State or any political subdivision thereof has the burden of showing non-discrimination only in elections over which it has jurisdiction or control. To hold otherwise would place an unreasonable and arbitrary burden of proof upon Gaston County or any other county that might seek relief from the Act which did not have jurisdiction over municipal elections within its borders.

CONCLUSION

Through the years, Gaston County has attempted to give every citizen the opportunity to register and vote. At great expense, it adopted a modern system of registration which is not widespread in the State of North Carolina. It did so in order to make it easier and more convenient for all its citizens to register. For many years, Negroes have held elective office in the City of Gastonia. The Human Relations Committee (A. 94) and other committees (A. 93) of like import were established to improve relations between the races. Schools have been integrated and no incidents of racial violence have occurred in the County. With a history of efforts of this type, together with the evidence in the record, the Appellant contends that it has presented a case which entitles it to declaratory judgment relief. Appellant respectfully requests this Court to reverse the ruling of the Court below and order that Gaston County be granted the relief prayed for in its complaint.

Respectfully submitted,

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