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No. 83-1015

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

National Association for the Advancement of Colored People, et al.,

Appellants,

vs.

Hampton County Election Commission, et al.,

Appellees.

ON APPEAL FROM THE THREE-JUDGE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEES HAMPTON COUNTY SCHOOL DISTRICT NO. 1, STANLEY, BROOKER, HUTTO, FREEMAN AND ULMER and HAMPTON COUNTY SCHOOL DISTRICT NO. 2, DIXON, ORR, JOHNSON, GORDON AND MANIGO

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Appellees.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1(c) and (d) of the Rules of the Supreme Court of the United States, the appellees Hampton County School District No. 1 and its Trustees, Philip Stanley, Lenon Brooker, Jerlyn Hutto, Miles Freeman and Gerald Ulmer and Hampton County School District No. 2 and its Trustees, T. M. Dixon, Willie J. Orr, Virgin Johnson, Jr., Rufus Gordon and Lee Manigo ("appellees Districts and Trustees" or "these appellees") move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the three-judge United States District Court for the District of South Carolina on

the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

The order of the three-judge district court is set forth in the appellants' jurisdictional statement. J. S., App. 1a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the appellants' jurisdictional statement. J.S. 2.

STATUTES INVOLVED

Pertinent provisions of Section 5 of the Voting Rights Act of 1965 [42 U.S.C. § 1973c] are set forth in the appellants' jurisdictional statement. J.S., App. 14a.

The provisions of Acts Nos. 547 and 549 of the 1982 South Carolina General Assembly are also set forth in the jurisdictional statement. J.S., App. 17a and 19a.

STATEMENT

This appeal is from the order of the three-judge district court dated September 9, 1983, holding that the provisions of Act No. 549 of the 1982 South Carolina General Assembly have not been put into effect in violation of Section 5 of the Voting Rights Act and denying the appellants' request for injunctive relief.

Prior to November 1, 1964, and until the enactment of the 1982 legislation whose implementation is challenged by the appellants, the public school system of Hampton County was governed by the Hampton County Board of Education ("County Board"), the Hampton County Superintendent of Education ("Superintendent") and the boards of trustees of Hampton County School Districts Nos. 1 and

2 ("Boards of Trustees"). [1] The County Board was composed of six members and was appointed by the Hampton County members of the South Carolina Senate and the South Carolina House of Representatives. The County Board in turn appointed the six members of each of the two Boards of Trustees. The Superintendent was elected at large by the qualified voters of Hampton County and served as an advisor to the teachers and trustees of each district. Each school district operated separately under the general supervision of district superintendents.

Then, on February 18, 1982, the South Carolina General Assembly passed Act No. 547 of 1982, which changed the method of selection and the composition of the County Board. It provided for an elected County Board of six members elected at large from Hampton County beginning with the 1982 general

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[1] Approximately 68% of Hampton County's public school students are black; District No. 1 students are 54% black and 46% white and District No. 2 students are 92% black and 8% white.

election. The Superintendent, while continuing to be elected at large, was to serve as an ex officio County Board member with all rights and privileges of other members, including the right to vote. Act No. 547 did not affect the composition or functioning of the two Boards of Trustees. The legislation was submitted by the South Carolina Attorney General to the United States Attorney General who precleared it under Section 5 of the Voting Rights Act on April 28, 1982.

Before Act No. 547 was approved, however, it was superseded by another piece of legislation, Act No. 549, [2] which abolished the County Board as of June 30, 1983, and abolished the office of the Superintendent as of June 30, 1985. Once abolished, their respective duties were to be assumed and

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[2] The appellants' assertions in their Statement [J.S.3] as to the purpose of Act No. 547 and the reasons for the enactment of Act No. 549 were originally made in their complaint. They have been denied by the appellees and do not constitute facts in this appeal.

separately performed by the two Boards of Trustees. Beginning with the November, 1982, general election the Boards of Trustees were to be elected at large by a plurality vote of the electors within each respective district. The number of members of each board was changed from six to five. Act No. 549 provided that a candidate offering for election in November, 1982, had to file with the Hampton County Election Commission during the period August 16-31, 1982. It included no language giving local election officials the authority to open a filing period other than the one specified.

The changes to be effected by Act No. 549 were contingent upon approval by a majority of the qualified electors voting in a county-wide referendum in May, 1982. The referendum was conducted on May 25, 1982, and a majority of the voters approved Act No. 549. [3/] According to the mandate of the

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3/ Over 46% of the registered voters in Hampton County voted in the referendum, which carried by a 55% affirmative vote.

voters of Hampton County, then, the County Board and the office of Superintendent were to cease to exist on June 30, 1982, and June 30, 1985, respectively.

As required by Section 5 of the Voting Rights Act, Act No. 549 was submitted to the United States Attorney General for preclearance on June 16, 1982. [4/] As stated earlier, Act No. 547 had already been precleared by the Attorney General and Act No. 549 likewise had to receive preclearance in order to be effective. The Attorney General's failure to preclear Act No. 549 would have rendered it unenforceable and would have revived the provisions of Act No. 547. On the other hand, if the Attorney General precleared Act No. 549, it would be the controlling piece

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[4/] The appellants characterize the local officials' action in submitting the referendum results as evidencing deliberate delay. J.S.4. Although the Department of Justice regulations authorize consideration of a preclearance request prior to the holding of an approving referendum, there are also sound reasons as well as authority for not making a submission of referendum results until "after [the changes] become final." 28 C.F.R. §51.19.

of legislation. Because the Attorney General is authorized to take as long as 120 days from the date of submission to perform his Section 5 review, there existed the possibility that the filing period for candidates for the two Boards of Trustees, August 16-31, 1982, might pass long before the Attorney General precleared Act No. 549. But if preclearance came after August 31, 1982, the first election for the Boards of Trustees could not be held as scheduled because no candidate would have qualified by filing during the specified filing period.

To avoid this situation, the Hampton County Election Commission began accepting filings on August 16, 1982. On August 23, 1982, a full 60 days after after Act No. 549 was submitted, the Attorney General objected to a portion of Act No. 549. Regarding the change in the method of selection from appointed to elected boards of trustees, the Attorney General found neither a discriminatory purpose nor effect. But the

Attorney General was unable to conclude that the abolishment of the County Board was not discriminatory toward Hampton County blacks. The Attorney General noted, however, in his objection letter that the "Procedures for the Administration of Section 5 (28 C.F.R. 51.44) permit you to request the Attorney General to reconsider the objection."

Because the Attorney General's objection was received in the middle of the filing period and because a decision regarding whether or not to request reconsideration was pending, the Hampton County Election Commission continued to accept filings until the end of the statutorily prescribed period. Hampton County submitted a request for reconsideration on August 31, 1982. Nevertheless, because the possibility existed that the request for reconsideration would be denied, the Election Commission had also accepted filings for the elected County Board under Act No. 547. Any candidate who filed for one of the two Boards of Trustees was not

precluded from also filing for the County Board. As of November 2, 1982, the Attorney General had not responded to the request for reconsideration and, accordingly, the Hampton County Election Commission held the County Board election on that date.

Shortly thereafter, on November 19, 1982, the Attorney General withdrew his objection to the abolishment of the County Board because "a reappraisal of South Carolina law establish[ed] that the county board lacks authority to effect a consolidation and its abolition ... will not have the potentially discriminatory impact we had initially perceived." Despite the fact that the election for the County Board had already been held pursuant to Act No. 547, that legislation became a nullity when the Attorney General precleared Act No. 549.

Thereafter, the Hampton County Election Commission prepared to implement Act No. 549. It sought the advice of the South Carolina Attorney General as to whether or not an election should be held for the two Boards

of Trustees and, if so, the date of the election. It also sought advice as to whether or not the filing for the two Boards of Trustees should be re-opened.

The South Carolina Attorney General concluded that "the provisions of Act [No. 549] are now in effect and it requires that an election be held for the school trustees," that it should be held "[a]s soon as possible" and, finally, regarding the question as to whether the filing period should be re-opened, he concluded that "there is no reason to reopen filing as only the date of the election has changed." Acting upon this legal advice, the Hampton County Election Commission published a Notice of Election setting March 15, 1983, as the date for the election. The five members of each of the two Boards of Trustees were elected on that date. One of the members of the District No. 1 Board of Trustees is black and all five members of the District No. 2 Board of Trustees are black.

ARGUMENT

There is no substantial question presented.

The lower court rejected the appellants' arguments that the implementation of Act No. 549 resulted in at least five violations of Section 5 of the Voting Rights Act by concluding that the allegedly unprecleared changes are either not changes within the meaning of Section 5 or have now been precleared. J.S., App. 11a.

A. Certification of referendum results to South Carolina Code Commissioner.

The appellants' argument concerning the alleged "change" effected by the failure to certify the referendum results to the South Carolina Code Commissioner has apparently been abandoned because they now agree that the certification was in fact made. J.S. 6, n. 2. Accordingly, their argument regarding the lower court's declaration that an allegation of discriminatory intent or effect is necessary to a Section 5 action need not be

reached by the Court because that declaration was made with reference to the certification "change". J.S., App. 8a. These appellees would note, however, that the lower court correctly declared the law in this regard. See, e.g., United States v. Saint Landry Parish School Board, 601 F.2d 859, 865 (5th Cir. 1979); Powell v. Power, 436 F.2d 84, 87 (2nd Cir. 1970); cf., White v. Dougherty County Board of Education, 439 U.S. 32, 42 (1978); Georgia v. United States, 411 U.S. 526 at 534 (1973) (§5 changes are those "which have the potential for diluting the value of the Negro vote and are within the definitional terms of §5"); United States v. Georgia, Civil Action No. C76-1531A, slip op. at 7 (N.D. Ga. September 30, 1977), aff'd 436 U.S. 941 (1978).

B. Opening of statutorily prescribed filing period pending preclearance.

The lower court upheld the opening of the statutorily prescribed filing period, August 16-31, 1982, notwithstanding Section 5

preclearance was then pending. It first found that the action was not a "change" but merely a ministerial or administrative decision necessary to accomplish the purpose of Act No. 549. J.S., App. 8a-9a. In this respect, it is similar to running the public notices of the election or printing the ballots, both of which were necessary actions to bring about the change effected by the statute, i.e., elected rather than appointed boards of trustees, but neither of which is itself a change. The preclearance requirement of Section 5 does not apply to every task performed by local officials in order to execute Act No. 549 for, if that were true, the notices could not have been published nor the ballots circulated unless and until precleared.

The statutorily prescribed filing period began before completion of the Attorney General's Section 5 review. The decision to accept filings was an appropriate exercise of administrative discretion aimed at complying

with both the Voting Rights Act and state law. The local officials were attempting to prevent the disruption of Hampton County's educational system and to avoid the expense and confusion of a special election. Inasmuch as Act No. 549 had been submitted to the Attorney General in June, it was not unreasonable to anticipate (and prepare for) its preclearance in time for the November, 1982, general election. Opening the filing period in August as the legislation directed enabled the election to be held in November, 1982, assuming preclearance by then. This good faith attempt to comply with both federal and state law is further evidenced by the fact that, at the same time that filings were allowed for the Boards of Trustees pursuant to Act No. 549, filings were being accepted for the County Board pursuant to Act No. 547. Candidates were permitted to file for either or both offices with the expectation that the matter would be resolved by November and that Hampton County voters would then be able to elect candidates to fill

whichever governing body was the functioning one.

The lower court further found that, even assuming the opening of the August filing period was a Section 5 "change", it was precleared when the Attorney General withdrew his outstanding objection to Act No.549 in late November, 1982. Relying on Berry v. Doles, 438 U.S. 190 (1978), the lower court concluded that the "fact that the eventual preclearance of Act No. 549 followed the filing period for the Trustees' position is not a bar under Section 5." J.S., App. 9a. Act No. 549 has now been precleared by the Attorney General and thus has been found not to have a discriminatory purpose or effect. "[T]he matter [is] at an end." Berry v. Doles, 438 U.S. at 193. Assuming arguendo that the opening of the August filing period before preclearance was technically a violation of Section 5, no Section 5 claim exists now. An injunction against implementation of an unprecleared change is

the only remedy for a violation of Section 5 and that remedy is no longer available because the alleged change has been precleared. The appellants' complaint regarding the local officials' decision to complete the filing period after receipt of the Attorney General's objection on August 26, 1982, is likewise moot because that objection was subsequently withdrawn.

C. Conducting of election in March, 1983, instead of November, 1982, and without re-opening filing period.

The third and fourth allegedly unprecleared changes concern the holding of the election as soon as practicable after preclearance but on a date different from the one prescribed in the statute and without re-opening the filing for candidates. These appellees submit, however, that when the statutorily prescribed date cannot be met because of an outstanding objection from the Attorney General and literal compliance with the statute is thus impossible, the mere

change in the date does not constitute a change which requires Section 5 preclearance. There are legal and practical reasons for this conclusion. First, the Attorney General, who administers the Voting Rights Act and whose interpretation is entitled to great weight [cf., United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. 110 (1978)], manifestly did not consider the statutory date of the first election of the boards of trustees to be a change subject to preclearance because he precleared the statute seventeen days after the statutory date and did not caution, as he has often done, [5/] that any further submission was required. The holding of the initial election for the boards of trustees in March, 1983, rather than during the general election on November 2,1982, due solely to the outstanding Justice Department objection at the time of the general election,

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[5/] See, e.g. United States v. Board of Commissioners of Sheffield, Ala., 435 U.S. 110, 115 (1978).

merely implemented the statute which had, in the meantime, been precleared. Cf., Berry v. Doles, supra. Factually, it is a de minimis change and legally it is no change. Moreover, the decision to hold the initial election as soon as practicable after preclearance, made, as it was, on the advice of the South Carolina Attorney General, represents a good faith effort to implement a statute whose preclearance reflects that it is more racially equitable and furthers the purpose of the Voting Rights Act to a greater extent than the former appointment process.

Finally, there are practical reasons underlying the decision to elect the boards of trustees as soon as possible without amending the precleared statute. There was the real possibility that an amendment expressly authorizing a later election date would not have been precleared in a timely fashion thereby necessitating another amendment. The amendment process could have gone on indefinitely. Furthermore, the March, 1983,

initial election represents merely a one-time special election held in order to implement the statute and will not recur inasmuch as successive elections will be held on the general election schedule in accordance with the statute.

The failure to re-open filing for candidates for the March, 1983, initial election is not a change at all because the filing had already occurred pursuant to the statute on August 16-31, 1982. Indeed, the re-opening of filing would have constituted a change, arguably requiring preclearance before implementation because no authority existed for a second filing. But the decision not to re-open the filing period conformed with rather than changed the authorized procedure. Furthermore, the appellants' theory for this alleged change is based on the erroneous assumption that a Section 5 change occurred in state law by virtue of the Attorney General's outstanding objection. They contend in effect that the opening of the

filing period in August, 1982, instead of after November 19, 1982, constituted a covered change by reason of the outstanding objection. The outstanding objection, however, was not a change in state law. South Carolina law did not require that a filing period be opened subsequent to the Attorney General's preclearance of Act No. 549. Whether or not that enactment receives Section 5 preclearance is relevant only under federal law; it is not relevant in determining whether a change in state law has occurred because it is not a matter of state law. Therefore, the failure to re-open a filing period after preclearance cannot constitute a change in South Carolina law with respect to voting.

D. Abolishment of the office of Hampton County Superintendent of Education and devolution of his duties on elected boards of trustees.

The final allegedly unprecleared change is the abolishment of the elective office of county superintendent of education and the devolution of his duties on the

elected boards of trustees. This change is precisely one of the changes effected by Act No. 549, [J.S., App. 19a] which has now been precleared in its entirety. The appellants also assert that the local officials have devolved the duties prematurely. J.S. 12. This assertion is vigorously denied by these appellees; moreover, even if it were true, the remedy is an action in state court to enjoin a violation of state law, not a Justice Department review of the unauthorized "change."

The appellants apparently disagree with the Attorney General's preclearance of the provisions of Act No. 549. But they cannot seek judicial review of that official's failure to object even though it "may have been erroneous" because judicial review of the Attorney General's preclearance action is foreclosed. Morris v. Gressette, 432 U.S. 491, 5107, n. 24 (1977). They may now challenge the legislation only in a traditional action questioning its

constitutionality [Allen v. State Board of Elections, 393 U.S. 544, 549-50], an action which is currently pending here. J.S. 6, n.3.

CONCLUSION

These appellees respectfully submit that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument and, therefore, respectfully move this Court to dismiss the appeal or, in the alternative, to affirm the judgment entered in the cause by the three-judge District Court for the District of South Carolina.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, KAREN LeCRAFT HENDERSON, counsel of record for these Appellees and a member of the Bar of this Court, do hereby certify that, in accordance with Rule 28, three (3) copies of the foregoing Motion to Dismiss or Affirm were served on all parties required to be served on this date by depositing same in the United States mail, first-class postage prepaid, and addressed as follows:

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This 18th day of January, 1984.

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