IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969-70

No. 670

ERNEST PERKINS, et al.,
Appellants,

VS.

L. S. MATTHEWS, Mayor of the City of Canton, et al.,
Appellees.

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

BRIEF FOR APPELLEES

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STATEMENT OF CASE

The City of Canton, Mississippi is a code charter municipality under the Laws of the State of Mississippi, and operates under an aldermanic form of government, consisting of a mayor, an alderman at large and one alderman from each of the four wards into which the city is

divided, as shown on the map introduced in evidence at the trial. (See App. 95). The ward lines were established prior to November 1, 1964. (See paragraph 12 of the Stipulation, App. 93).

The population of the city according to the 1960 census was 9,707. The present estimated population is 12,000. At the time of the filing of the suit there were 5,995 qualified electors in the city of which 3,042 were black and 2,953 were white.

Since the enactment of the Voting Rights Act of 1965, the city has expanded its boundaries on three occasions, in 1965, 1966 and 1968. These expansions were made pursuant to a long range plan formulated by the governing authorities in late 1962 or early 1963, which provided for the future growth and development of the city, giving priority to the annexation of an area to the south (1965), then to the east (1966) and last to the north (1968). (See paragraph 5 of the Stipulation, App. 91). Because of the magnitude of the project and the expenditures involved, the annexations could not be made at one time but only over a period of years, and only after the expenditure of approximately $400,000.00 to extend and improve the city's sanitary sewerage collection and disposal system. The necessary sewerage improvements were completed in early 1964. (Paragraph 6 of the Stipulation, App. 92). In 1965 the city annexed the area to the south, in 1966 the area to the east and in 1968, the area to the north, as shown on the map introduced in evidence at the trial, App. 95, and as stated in paragraph 7 of the Stipulation, App. 92. Each of such annexations were done in accordance with the Laws of the State of Mississippi, including the ratification and approval thereof by the Chancery Court of Madison County, Mississippi, as stated in paragraph 8 of the Stipulation, App. 92. The municipality has expended

approximately $750,000.00 for utilities and sewerage improvements and extensions in these areas, as shown by paragraph 9 of the Stipulation, App. 92, 93. The parties stipulated and the lower Court found that the racial composition of the adult population of the annexed areas at the time of annexation was:

Annexation	Population	Black	White
1965[1]	46	46	0
1966[2]	92	28	64
1968[3]	120	8	112

Under Mississippi law, the City of Canton was required to hold its quadrennial elections in 1969 as follows: first primary, May 13; second primary, May 20, and general election, June 3. Prior to the elections the governing authorities are required to designate polling places.

In April of 1969, the Mayor and Board of Aldermen, as required by law, adopted a resolution designating the polling places to be used in the 1969 municipal primary and general elections. This resolution was published in the Madison County Herald, a newspaper published and of general circulation in the City of Canton, Mississippi, as required by law. In addition, the location of the polling places was widely advertised as a news item in the paper for several weeks. The polling places so designated were different from the ones used at the 1965 elections, which were the last municipal elections held after November 1, 1964, and prior to the filing of the complaint.

The laws of Mississippi governing municipal elections provide for the election of aldermen by wards, but by the election of them by a majority vote of the entire electorate

1. App. 66.
2. App. 77.
3. App. 66.

of the municipality. This statute is *Miss. Code Ann.* (1942-Recompiled) Section 3374-36.

Prior to the passage of the Voting Rights Act of 1965, the city elected to be divided into four wards. The ward lines have not been changed since November 1, 1964. (Paragraph 12 of the Stipulation, App. 92).

The municipal elections held in May and June of 1965 were not held in accordance with this statute in that instead of electing one alderman at large and four aldermen, one from each ward but by a majority vote of the entire electorate of the municipality, one alderman at large was elected and four aldermen were elected, one from each ward but by a majority vote of the electorate of the particular ward involved, as provided under the statute as it existed prior to the 1962 amendment. Thus, the city unintentionally followed the old law instead of the 1962 statute. Despite this error, it is specifically pointed out to the Court that the mayor and the alderman at large have always been elected by a majority vote of the entire electorate of the municipality.

On May 1, 1969, twelve days prior to the first primary election, the Appellants filed a complaint in the United States District Court for the Southern District of Mississippi, seeking to enjoin the 1969 primary and general elections on the grounds that the 1966 and 1968 annexations and the change of polling places were within Section 5 of the Voting Rights Act of 1965 and had not been approved either by the United States Attorney General or by a declaratory judgment of the United States District Court for the District of Columbia. The Appellants requested that the matter be heard by a Court of three judges and prayed for a temporary restraining order until the Court could be empaneled and convened.

On May 9, 1969, Honorable Walter L. Nixon, United States District Judge for the Southern District of Mississippi, issued an order temporarily restraining the elections until the complaint could be heard on its merits before a Three-Judge Court.

On May 30, 1969, the complaint was amended to include the method of electing the four aldermen as prescribed by *Miss. Code Ann.* (1942-Recompiled) Section 3374-36, as amended in 1962, on the ground that it had not been followed in past elections. (App. 27-30).

The Appellees included the 1965 annexation as an issue by way of their answer to the complaint. (Paragraph 8, App. 22). The original and amended complaint neglected to challenge this annexation, which was the first under the city's long range boundary extension program and which included only black residents.

On June 2, 1969, the case was heard on its merits before a Three-Judge Court composed of Honorable J. P. Coleman, Circuit Judge and Honorable W. H. Cox and Honorable Walter L. Nixon, Jr., District Judges, on the Section 5 issue. The Appellants introduced no evidence to support the allegations in the complaint pertaining to discriminatory purposes or practices in violation of the Fifteenth Amendment. On July 17, 1969, the Court rendered its opinion and on July 24, 1969, entered its judgment, dismissing the complaint, and finding that the issues raised by the complaint, as amended, did not come within Section 5 of the Voting Rights Act of 1965. (App. 31-37, 38).

Subsequent thereto, the governing authorities of the city reset the elections as follows: first primary, October 7, 1969, second primary, October 14, 1969, and general election, October 28, 1969.

The Appellants then moved the District Court for a stay of the elections pending appeal, which was denied by order entered September 12, 1969. (App. 41, 42). The Appellants next applied to this Court for a stay and injunction pending appeal, which was denied on October 1, 1969, by Mr. Justice Black.

Accordingly, the municipal primary and general elections were held on the above stated dates, and officers were elected. They have been properly qualified and commissioned to hold the offices to which elected and have served in such capacities since November 1, 1969.

SUMMARY OF ARGUMENT

This appeal presents the following propositions to the Court for decision:

I. Whether (a) the extension of municipal boundaries, (b) the election of municipal officers in accordance with the one person, one vote doctrine, and (c) the redesignation of polling places for good cause and with proper notice given, fall within the purview of Section 5 of the Voting Rights Act of 1965.

II. Whether, assuming the Appellees are in error in their contention that the above stated matters do not come within Section 5, should this Court require new elections to be held.

Proposition I (a). In regard to the extension of the municipal boundaries, the Appellees contend that this is a normal and necessary function of growing municipalities, and could not have been envisioned by Congress as being within Section 5, without granting unto the Attorney General and the United States Court of the District of Columbia the absolute power, exercised arbitrarily or otherwise, to control the rate and direction of municipal growth and development.

Proposition I (b). The Appellants further contend that Section 5 was never intended to result in requiring a municipality to clearly violate this Court's decisions requiring the vote of all electors to count equally, or one person, one vote, in the election of municipal governing authorities. Accordingly, the election of the four aldermen by a majority vote of the entire electorate of the municipality is not a Section 5 question, particularly under the facts of this case.

Proposition I (c). The Appellees next contend that surely Congress could not have intended to hold elections in abeyance simply because the last used polling places are found to be unavailable, and new ones must be selected. Thus, Section 5 does not apply to redesignation of polling places for a proper purpose.

Proposition II. The Appellees contend that even if the Court should decide that all of the above contentions are in error, the elections held in October, 1969, should not be voided. To do so would unjustly penalize a municipality and its taxpayers, which has admittedly acted in good faith, by causing additional expensive and most importantly causing an unwarranted disruption of the orderly conduct of municipal government.

ARGUMENT

I.(a)

Do Municipal Annexations Violate Section 5.

The constitutionality of the Voting Rights Act of 1965 has been clearly and definitely established by this Court. *South Carolina* v. *Katzenback,* 383 US 301 (1966), and, of course, the Appellees raise no question in that regard.

However, it defies the imagination to attempt to conjure up a set of facts such as those involved in this case

which more cogently reveal the pitfalls of Section 5 of the Voting Rights Act of 1965 as pointed out by Mr. Justice Black in his dissent in *Katzenback*, supra:

> "Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless."
>
> "I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in faraway places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces."
>
> "A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country. I cannot agree to any constitutional interpretation that leads inevitably to such a result."
>
> "I cannot agree with the Court that Congress—denied a power in itself to veto a state law—can delegate this same power to the Attorney General or the District Court for the District of Columbia. For the effect on the States is the same in both cases—they cannot pass their laws without sending their agents to the City of Washington to plead to federal officials for their advance approval."

Certainly if a discriminatory design or purpose was shown to exist, the rule of *Gomillion* v. *Lightfoot*, 364 US 399 (1960) and the many other decisions of this Court dealing with purely Fifteenth Amendment matters would apply. But this is not the case here. There is no evidence

that even remotely infers that the three expansions of municipal boundaries had or now have any discriminatory design or purpose. The stipulation between the parties clearly establishes otherwise. (Paragraphs 5, 6, 7, 8, 9, App. 91, 92, 93).

The Appellants represent to the Court that these expansions are manifestations of a sinister plot to discriminate against the black citizens of Canton. The evidence does not support them. Therefore, they say, that a mere possibility exists that these expansions may remotely affect somebody's vote at some time.

However, the underlying and basic fact is that all municipal corporations, regardless of size, are faced with this immutable principle: It must either grow, develop and expand or it must remain static, stagnate and die.

The City of Canton for the benefit and welfare of all citizens chose the former.

Appellees contend and respectfully submit that Congress, by the enactment of Section 5, did not intend to penalize progress and development of municipalities. Neither did it intend to make the Attorney General or the District Court of the District of Columbia, the final arbiter over the rate, extent and direction of municipal growth and expansion.

Also, Appellees respectfully submit, that the annexations are established by the evidence to have been required by the normal and orderly growth of a relatively small but progressive municipality, and not a sham to discriminate against the Appellants. Indeed, the city's expenditure of a sum in excess of $750,000.00, and the cost of other municipal services in the annexed areas, confirms this.

Appellees point out that an annexation in and of itself has no effect whatsoever upon the number of qualified

electors in the municipality or racial composition of the electorate. The inhabitants of an annexed area must still fulfill the residency requirements in order to register to vote, and even then may never choose to do so. If they do choose to register, it is a personal decision and act, not an act of any political subdivision. Therefore, the annexations cannot be seriously said to constitute "a voting qualification or prerequisite to voting or standard, practice or procedure with respect to voting".

To hold that these undisputedly non-discriminatory annexations come within Section 5 and are therefore void, would unleash numerous and insurmountable problems. Among them are the status of sales and ad valorem taxes collected over the years, in the annexed area, the jurisdiction of the police and fire departments, the effect on reduced fire insurance rates in the area, the status of municipal bonds issued for improvements in these areas, the status of zoning, building, housing and plumbing codes.

Thus, it is submitted that the District Court was correct in deciding that the annexations are not within the scope of Section 5. To do otherwise, would inevitably lead to the absurd conclusion which must surely follow: That every act of the municipality which may directly or indirectly result in population growth, i.e. industrialization, renewal, must first be approved by the Federal Government.

I.(b)

Did the Election of Four Aldermen by a Majority Vote of the Entire Electorate of the Municipality Violate Section Five.

Miss. Code Ann. (1942-Recompiled) Section 3374-36, approved May 24, 1962, provides for the number and method of election of the Board of Aldermen in cities with

a population of less than 10,000 population according to the last available census which was the 1960 census at the time of the elections in question. Canton falls within this category. The code section is as follows:

> § 3374-36. Number of aldermen and wards—selection of aldermen. *In all municipalities having a population of less than ten thousand (10,000) according to the latest available Federal Census, there shall be five (5) aldermen, which aldermen may be elected from the municipality at large, or in the discretion of the municipal authority, the municipality may be divided into four (4) wards, with one alderman to be selected from each ward and one from the municipality at large.* (Emphasis supplied). On a petition of twenty per cent (20%) of the qualified electors of any such municipality, the provisions of this Act as to whether or not the aldermen shall be elected from wards or from the city at large shall be determined by the vote of the majority of such qualified electors of such municipality voting in a special election called for that purpose. *All aldermen shall be selected by vote of the entire electorate of the municipality.* (Emphasis supplied). *Those municipalities which determine to select one alderman from each of the four (4) wards shall select one from the candidates for alderman from each particular ward who shall be a resident of said ward by majority vote of the entire electorate of the municipality.* (Emphasis supplied).

The Appellees admit that this statute was not followed in the 1965 elections, but was followed in the 1969 elections. In both elections the mayor and alderman at large were elected by a majority vote of the entire municipal electorate. However, in the 1965 election the other four aldermen were elected one from each ward by a ma-

jority vote of the ward's electorate rather than at large. This was not done intentionally or by design, but through sheer mistake or ignorance of the law. That it was done is a fact, but just as factual is that the record in this case does not suggest to say nothing of infer that this "was a sudden adherence to previously ignored laws as a discriminatory device" so as to come within the rule of the "freeze doctrine" cases such as *Louisiana* v. *United States,* 380 US 145 (1965).

The fact is that this was a bona fide effort by the City to not only comply with the Laws of Mississippi, but also to comply with the teachings of this Court as stated in *Baker* v. *Carr,* 369 US 186, and *Reynolds* v. *Sims,* 377 US 533, and the recent case of *Hadley* v. *Junior College District,* ..... US ..... (February 25, 1970) in which the Court speaking through Mr. Justice Black said in part:

> "We therefore held today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis which will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials."
>
> "In holding that the guarantee of equal voting strength for each voter applies in all elections of governmental officials, we do not feel that the States will be inhibited in finding ways to insure that legitimate political goals of representation are achieved. We have previously upheld against constitutional challenge an election scheme which required that candidates be residents of certain districts which did not contain equal numbers of people, *Dusch* v. *Davis,* 387 US 112

(1967). Since all the officials in that case were elected at large, the right of each voter was given equal treatment."

It should be pointed out that a majority of the voters were black. Thus, the city's action in effect extended the black majority to all four wards rather than confining it to two wards as it would have been under the method followed in the 1965 elections. It would be difficult indeed to discriminate against a majority of the electorate by extending voting power rather than confining it.

The effort was clearly made in good faith to correct a past mistake and not used as a discriminatory device. This contention is readily confirmed by common sense and the record does not suggest otherwise.

The Appellees submit that it is inconceivable that Congress could have intended Section 5 as a vehicle to thwart the "one person-one vote" rule repeatedly laid down by this Court, there being no discriminatory purpose or design shown to exist.

I.(c)

Does the Redesignation of Polling Places Come Within Section 5.

It is practically impossible to hold an election of any kind without a polling place. It is usually desirable that polling places be inside buildings with adequate shelter, space, accommodations, and parking areas, to encourage voter participation. It is also well known that when the owners of private property, used in the past for polling places, refuse future access for that purpose new polling places must be selected.

It is readily admitted that the polling places used in the 1969 elections were not the ones used in the 1965 elections. (Paragraph 13 of the Stipulation, App. 93). How-

ever, Appellees submit that the polling places were redesignated for a good and proper purpose and that their location was amply publicized well in advance of the elections.

In considering this point, the Court should note that at the time of the 1965 elections, the city had approximately 2,500 qualified electors. In 1969 it had almost 6,000.

The polling places were changed for reasons of necescity and for the convenience of the voters. The city is now and was on November 1, 1964, divided into four wards. (Paragraph 12 of the Stipulation, App. 93). The ward lines have not been changed since 1963, and are shown on the map at App. 95. Under Mississippi Law, there must be a polling place within each of the four wards. The polling places for Wards II and III at the 1965 elections were located in bank lobbies. The owners would not permit their use at the 1969 elections because of security reasons and the disruptive effect on business. (App. 80). These polls had to be moved, so new polling places were designated. The polling places for Wards I and II used in the 1965 elections did not have adequate parking facilities or space to accommodate the increased number of voters or voting machines, which were to be used for the first time, replacing paper ballots previously used. (App. 79). Therefore, these two were moved to insure an orderly and efficient election for the convenience of the electors. Thus, the change in polling places was a matter of necessity, and not of choice. There was nothing else the election officials could do and faithfully discharge their duties to the electorate of insuring conveniently accessible, spacious, and efficient facilities so that all who choose to vote might vote without undue delay.

For as Mr. Justice Douglas once said:

> "Common sense often makes good law". *Peak* v. *United States*, 353 US 43, 46.

Clearly, a matter such as this, when the only alternative was to hold the election in indefinite abeyance, was not intended by Congress to be covered by Section 5, and the District Court did not err in so holding.

II.

The Municipal Elections Held in November, 1969, Should Not Be Set Aside Even Though the Court May Find That the Acts Come Within Section Five.

After judgment of the District Court, the Appellants applied to the Court for a stay of the elections pending appeal. This motion was denied. The Appellants next applied to Mr. Justice Black for a stay of the elections. This also was denied.

Thereafter, acting in good faith and in the belief that the law so required, the city proceeded to hold its primary and general elections. The officers elected have been duly certified and commissioned and have conducted the governmental affairs of the city since November 1, 1969.

In addition the questions here presented are even more novel and complex than the issues in *Fairley* v. *Patterson,* 393 US 544 (1969), in which the Court refused to order new elections and stated:

> "The Solicitor General has also urged us to order new elections, if the State does not promptly institute § 5 approval proceedings. We decline to take corrective action of such consequence, however. These § 5 coverage questions involve complex issues of first impression—issues subject to rational disagreement. The state enactments were not so clearly subject to § 5 that the Appellee's failure to submit them for approval constituted deliberate defiance of the Act. Moreover, the discriminatory purpose or effect of these statutes, if any, has not been determined by any Court."

To order new elections, even if the Appellees are in error in the contentions herein presented, would seriously impair the orderly and efficient conduct of the municipal government. This is in accordance with the teachings of this Court in *Sims* v. *Reynolds,* supra, *Roman* v. *Sincock,* 377 US 695 and *Davis* v. *Mann,* 377 US 678.

CONCLUSION

Appellees therefore respectfully submit that the appeal must be dismissed for lack of jurisdiction or affirm the decision of the District Court of Three Judges for the Southern District of Mississippi.

Respectfully submitted,

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