Case No. 95-2031

(10)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THOMAS YOUNG, et al.,

Appellants,

vs.

KIRK FORDICE, et al.,

Appellees.

ON APPEAL FROM THE THREE-JUDGE DISTRICT COURT, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE COMMUNITY SERVICE SOCIETY OF NEW YORK AND AMERICAN ASSOCIATION OF RETIRED PERSONS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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The Community Service Society of New York and the American Association of Retired Persons seek leave to file the annexed brief as *amici curiae* in support of the appellants herein.

The Community Service Society of New York ("CSS") is a non-profit corporation that advocates for, and provides material relief to the poor with a history dating back 150 years. Since 1987 CSS has been authorized to practice law and, accordingly, has represented individuals and organizations that seek to enforce constitutional and statutory

provisions regarding the right to vote, and the right to vote free of unnecessary and discriminatory barriers. *United Parents Associations* v. *Board of Elections of the City of New York*, U.S.D.C., E.D.N.Y., 89 Civ. 612; *League of Women Voters* v. *Merrill*, U.S.D.C., D.N.H., Docket No. 1:95-232-M; *National Congress for Puerto Rican Rights* v. *Sweeney*, U.S.D.C., S.D.N.Y., Civ. No. 95-8742 (RO); *Disabled in Action* v. *Hammons*, U.S.D.C., S.D.N.Y. Civ. No. 96-7661 (WK); *Disabled in Action* v. *Giuliani*, N.Y. Sup. Ct., N.Y. Co., Index # 95-110646; *100% VOTE* v. *New York State Board of Elections*, N.Y. Sup. Ct., N.Y. Co., Index # 21920/90; *Cartagena* v. *Hooks*, N.J. Superior Court, Mercer Co., Docket No. _____.

The issues presented in this appeal are of great importance to CSS. CSS has consistently supported the goals of the National Voter Registration Act of 1993 ("NVRA") and presently serves as a national clearinghouse for all litigation under this Act. A network of over 50 attorneys around the country use the resources CSS provides to monitor NVRA implementation and to promote our goal of ensuring full and fair implementation of this Act. Moreover, CSS is directly involved in NVRA litigation in a number of states as well. The decision appealed to this Court directly affects every jurisdiction covered under Section 5 of the Voting Rights Act. In ruling that new programs designed to comply with the NVRA need not be reviewed for Section 5 purposes the court below effectively nullified the protections of the Voting Rights Act of 1965 in this critical area.

An affirmance of the ruling below would directly impair the ability of CSS to vindicate the rights of minority citizens and the poor. CSS, therefore, has a substantial interest in the outcome of this case. We accordingly request that this motion for leave to file the attached brief be granted.

The American Association of Retired Persons ("AARP") also joins this motion for leave to file this *amicus curiae* brief in support of the appellants. AARP is a not-for-profit membership organization of approximately 32 million

persons, age 50 and older, dedicated to addressing the needs and interests of older Americans. AARP strongly supports unrestricted access to voter registration regardless of economic circumstance, disability, race, or other factors and has sought to increase participation in the vote -- on a nonpartisan basis -- among all Americans. Since AARP has been involved in voter education and voter registration activities for many years, the affirmance of the ruling below which limits the reach of the Voting Rights Act would also impede the ability of AARP to further its goals in the area of political participation, especially for older Mississippi residents. Accordingly, AARP joins CSS in requesting that this motion for leave to file the attached brief be granted.

Counsel for the appellees withheld their consent to the filing of this brief, necessitating this motion to the Court.

Dated: New York, New York
11 November 1996

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The *Community Service Society of New York* (CSS) has served the poor for 150 years. Throughout this time CSS has provided direct services to the poor and immigrant communities of New York and has been a voice in promoting policies that enable these communities to escape poverty. CSS has spent considerable resources to promote the political participation of poor communities in the City of New York, and more recently, in the Northeast as well. To this end it was an early advocate of the proposition, now embodied in the National Voter Registration Act of 1993 (NVRA), that our government needs to play an active role in registering citizens to vote and in maintaining current voter registrations as valid and up-to-date. CSS has acted as counsel to individuals and organizations seeking to enforce the NVRA in New York, New Jersey and New Hampshire. Finally, CSS serves as a resource clearinghouse for all NVRA litigation in the country in the hope that the active political participation of our citizens who receive public assistance will improve our democracy and improve the conditions of the poor as a whole.

The *American Association of Retired Persons* (AARP) is a not-for-profit membership organization of approximately 32 million persons, age 50 and older, dedicated to addressing the needs and interests of older Americans. As the largest membership organization in the United States serving older persons, AARP strongly supports unrestricted access to voter registration regardless of economic circumstance, disability, race, or other factors. AARP has sought to increase participation in the vote -- on a nonpartisan basis -- among all Americans and has been involved in voter education and voter registration activities for many years. Moreover, AARP collaborated with dozens of national groups in advocating for passage of the National Voter Registration Act of 1993. Many of those most in need of easier voter registration are older Americans who want to participate but find it is hard to do so for reasons related to age and health. Given the potential ramifications of this case for older Mississippi residents who want to exercise their vote and AARP's commitment to total

access to the franchise, AARP joins in this brief as *amicus curiae*.

SUMMARY OF ARGUMENT

The Congress that passed the National Voter Registration Act of 1993 (NVRA) was fully cognizant of the discriminatory barriers to voting and voter registration that have historically disenfranchised eligible citizens, particularly minorities. The NVRA Congress recognized the importance of the Voting Rights Act of 1965 as a tool for combatting such discrimination. In passing the NVRA, Congress resolved to expand upon, not replace, the guarantees of the Voting Rights Act. Both the plain language and the legislative history of the NVRA, Section 11, confirm that the NVRA Congress intended the Voting Rights Act to be preserved as a source of rights and remedies independent of the NVRA.

The district court panel below failed to probe the meaning of Section 11 of the NVRA, in ruling that NVRA-related voting changes need not comply with the preclearance requirements set forth in Section 5 of the Voting Rights Act. Application of the NVRA, Section 11, compels the opposite conclusion, necessitating that the decision below be reversed.

ARGUMENT

I. CONGRESS CLEARLY INTENDED THAT COMPLIANCE WITH THE NVRA DOES NOT SUBSTITUTE FOR, NOR EXCUSE A STATE FROM COMPLIANCE WITH THE VOTING RIGHTS ACT OF 1965

The National Voter Registration Act of 1993 is the culmination of an extensive effort to eliminate the final barriers to discriminatory voter registration laws and policies. In passing the NVRA the 103rd Congress found that

> discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office

> and disproportionately harm voter participation by various groups, including racial minorities.[1]

In recognizing the discriminatory nature of certain registration practices, the NVRA can be considered an extension of the rights guaranteed by the Voting Rights Act of 1965.[2]

Clearly, however, its passage must be placed in the historical context in which the Congress has worked to ensure that the right to vote is made a reality for all citizens, especially those citizens who have been excluded from the franchise. Enfranchisement has been expanded through several constitutional amendments. The Fifteenth Amendment gave former Black slaves the right to vote in 1870;[3] the Nineteenth Amendment granted women's suffrage;[4] the Twenty-fourth Amendment outlawed the imposition of poll taxes;[5] and the Twenty-Sixth Amendment granted the right to vote to 18-year olds.[6] Congress continued to seek to enforce these constitutional guarantees with additional legislation including the Enforcement Act of 1870[7] which enforced the right to vote; the

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[1] 42 U.S.C. § 1973gg(a)(3).

[2] 42 U.S.C. § 1973, *et seq.*

[3] U.S. CONST. amend. XV states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

[4] U.S. CONST. amend. XIX states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

[5] U.S. CONST. amend. XXIV states that "[t]he right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

[6] U.S. CONST. amend. XXVI states that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or any State on account of age."

[7] *See*, "Voter Registration," 69 CONG. DIG. 98, 99, n.17 (Apr. 1990).

Civil Rights Act of 1957[8] which provided for legal action to challenge discriminatory practices that interfered with the right to vote; the Civil Rights Act of 1960,[9] which afforded the federal government additional remedies to prevent the states from depriving citizens of the right to vote; and the Civil Rights Act of 1964[10] which increased access to voter registration for racial minorities in the country and provided for, *inter alia*, uniform standards of determining literacy.[11] All of this legislation was clearly insufficient to stem the tide of discriminatory voting laws, which led Congress to pass the comprehensive Voting Rights Act of 1965, signed by President Lyndon B. Johnson on August 6, 1965.

Congress was fully aware of this history when it passed the National Voter Registration Act of 1993[12] and in particular,

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[8] Pub. L. No. 85-315, 71 Stat. 634 (1957), codified in numerous sections of 42 U.S.C..

[9] Pub. L. No. 86-449, 74 Stat. 86 (1960), codified in numerous sections of 42 U.S.C..

[10] Pub. L. No. 88-352, 78 Stat. 241 (1964), codified in numerous sections of 42 U.S.C..

[11] For example, the Civil Rights Act of 1960 provided that any applicant for voter registration that achieved a sixth grade education predominately in English was presumed literate. "Voter Registration," 69 CONG. DIG. at 99, n.17. With the Voting Rights Act of 1965 Congress eliminated the English education requirement for all United States citizens who achieved an equivalent education in schools in Puerto Rico where the language of instruction was Spanish. 42 U.S.C. § 1973b(e).

[12] "Restrictive registration laws and administrative procedures were introduced in the United States in the late nineteenth and early twentieth centuries to keep certain groups of citizens from voting; in the North, the wave of immigrants pouring into the industrial cities; in the South, blacks and the rural poor." H.R. REP. No. 9, 103rd Congress, 1st Sess. 2 (1993). The Senate similarly recognized this history: "Throughout the history of this country there have been attempts to keep certain groups of citizens from registering to vote -- which groups specifically depending on the decade and the locale. Among the techniques developed in the various localities to inhibit or exclude potential voters were annual registration, selective purging of the voter rolls, literacy tests and poll taxes. The

(Footnote continued)

when it specifically recognized the intersection of the nascent NVRA and the Voting Rights Act of 1965, as amended. In Section 11 of the NVRA Congress mandated that:

> **(1) The rights and remedies established by this section are in addition to all other rights and remedies provided by law, and neither the rights and remedies established by this section nor any other provision of this subchapter shall supersede, restrict, or limit the application of the Voting Rights Act of 1965.**
>
> **(2) Nothing in this subchapter authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965.**[13]

Section 11 of the NVRA reflects a congressional intent to ensure that the NVRA and the Voting Rights Act are two complementary vehicles towards a non-discriminatory system of voter registration for federal elections. The reach of the Voting Rights Act cannot be understood as having been curtailed under any reading of this provision. Yet the decision below by the three-judge district court fails to follow, or even acknowledge, this mandate. Instead, the district court ruled that Mississippi need not comply with the preclearance provisions of Section 5 of the Voting Rights Act[14] when it

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Voting Rights Act of 1965 made most of these restrictive practices illegal, yet discriminatory and unfair practices still exist and deprive some citizens of their right to vote. This legislation will provide uniform national voter registration procedures for Federal elections and thereby further the procedural reform intended by the Voting Rights Act." S. REP. No. 6, 103rd Cong., 1st Sess. 3.

[13] 42 U.S.C. § 1973gg-9(d)(citations omitted; emphasis added).

[14] 42 U.S.C. § 1973c. Preclearance refers to the process in which covered jurisdictions under the Voting Rights Act must first obtain approval of changes in voting practices or procedures before implementation. Preclearance can be obtained administratively before the United States Attorney General or via a special court proceeding in the United States District Court for the District of Columbia.

changed from a unitary system of voter registration to a dual system because

> "[t]he fact that Mississippi election officials maintain the NVRA registrants on a separate registration roll for purposes of voting in federal elections only, does not constitute a change subject to § 5 preclearance."

Young v. Fordice.[15] This ruling,[16] *amici* submit, runs directly counter to Section 11 of the NVRA in at least two ways. It is inconsistent with Section 11(a) because it clearly limits, and in fact nullifies, the application of Section 5 of the Voting Rights Act where a state establishes new voting procedures to comply with the NVRA. Secondly, the ruling below is inconsistent with Section 11(b) because it authorizes conduct, here the implementation of a new dual voter registration system to replace a unitary system, without the requisite preclearance, which is directly prohibited by Section 5 of the Voting Rights Act.

Simply put, compliance with the NVRA does not substitute for, nor excuse one from compliance with the Voting Rights Act.

This proposition is also fully supported by the legislative history of the NVRA. Such legislative history may properly be considered under these circumstances. Although the judicial inquiry may end when the plain meaning of a statute has been discerned, it is appropriate to consult legislative history

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[15] U.S.D.C., S.D. Miss., Civil Action No. 3:95CV197 (L)(N), July 24, 1996, ¶20. The decision apparently is unreported but appears in Appellants' Appendix to the Jurisdictional Statement ("J.S. App.") at 1a.

[16] The district court below also ruled that a "state may correct a misapplication of its laws, which by its conduct it has not ratified, without obtaining preclearance of the United States Attorney General." J.S. App. at ¶19. *Amici* rely upon, and fully support, the arguments set forth by the Appellants in their main brief to this Court challenging this portion of the ruling as inconsistent with this Court's precedent.

in order to confirm the conclusion as to the statute's plain language.[17] Here, the legislative history contains assurances that Congress truly meant what it said and that the NVRA and the Voting Rights Act constitute two separate and complementary schemes.

In the deliberations in the House of Representatives, the minority members of the Committee on House Administration proposed doing exactly what the district court did below -- exempting from § 5 coverage procedures adopted in response to the NVRA. This proposal was discussed, incorporated into a proposed amendment to the NVRA, and rejected in Committee.[18] Specifically, the minority members of this Committee proposed an amendment to the NVRA

> "[p]roviding that mandates in the bill that are subject to pre-clearance for the nine southern states as required by the Voting Rights Act of 1965 be applied to all 50 states, **or in the alternative eliminating the pre-clearance requirements of the Voting Rights Act for any new mandates required by the bill."**[19]

Ironically, the proposed and rejected amendment would have included Mississippi in its exemption. Congress instead rejected the amendment and, accordingly, intended that preclearance go forward in states like Mississippi.

In the Senate the written legislative history regarding the NVRA also supports the proposition that compliance with the

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[17] *Central Intelligence Agency* v. *Sims*, 471 U.S. 159, 167-68 (1985); *Garcia* v. *United States*, 469 U.S. 70, 75 (1984). In *Garcia*, the Court found that only in "rare and exceptional circumstances" should legislative history be elevated above plain meaning as a tool of statutory interpretation. *Id.* (citation omitted). Nevertheless, in both *Central Intelligence Agency* and *Garcia*, the Court turned to legislative history as a tool for confirming a statute's plain meaning, the approach adopted here.

[18] H.R. REP. No. 9, 103rd Cong., 1st Sess. 36-37 (1993).

[19] *Id.* at 37 (emphasis added).

NVRA does not substitute for compliance with the Voting Rights Act. In its deliberations regarding the "list cleaning" devices authorized by the NVRA (i.e., procedures to eliminate the names of ineligible voters from official voter rolls) the Senate Report accompanying the NVRA states:

> Merely because a program was conducted under the National Voter Registration Act would not be a defense to any claim which might be asserted under the Voting Rights Act. **The requirements of the two acts are distinct and complementary. The States must comply with the National Voter Registration Act in a manner which does not violate the Voting Rights Act.**[20]

Finally, the report of the Committee of Conference of both houses, accompanying the NVRA, also repeats the theme of ensuring that nothing in the proposed NVRA be deemed to supersede the mandates of the Voting Rights Act. A proposed amendment to the NVRA that would have allowed States to require documentation of citizenship for voter registration applicants was rejected by the Conference Committee because of concerns regarding the impact on the Voting Rights Act, *inter alia*:

> "In addition, [the proposed amendment] creates confusion with regard to the relationship of this Act to the Voting Rights Act. **Except for this [amendment], this Act has been carefully drafted to assure that it would not supersede, restrict or limit the application of the Voting Rights Act.** These concerns lead the conferees to conclude that this [amendment] should be deleted."[21]

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[20] S. REP. No. 6, 103rd Cong., 1st Sess. 18 (emphasis added).

[21] H.R. CONF. REP. No. 66 (accompanying H.R.2), 103rd Cong., 1st Sess. 23-24 (1993) (emphasis added).

The Voting Rights Act protections embodied in Section 11 of the NVRA were also the source of discussion during the floor debates. The requirement that governmental actors comply both with the NVRA and the Voting Rights Act was first introduced in the National Voter Registration Act of 1989, an unsuccessful predecessor to the National Voter Registration Act of 1993. In the 1989 Act, section 111 (d) provided:

> (d) Relation to Other Laws -- The remedies under this section are in addition to the Voting Rights Act of 1965 as amended and to any other remedy provided by law.

Floor statements confirmed that, by introducing this provision, Congress intended the NVRA to supplement, rather than supersede, the rights and remedies available under the Voting Rights Act. For example, Representative Swift[22] stated:

> "Does this bill have any affect [sic] on the Voting Rights Act as amended? Here too, the answer is no. As I mentioned earlier, this bill establishes a new legal framework addressing registration in addition to existing law, in particular, the Voting Rights Act. Nothing in this bill is meant to change the existing rights and remedies provided under the Voting Rights Act or to undercut the standards of proof governing that act."[23]

In 1991, a new version of the Act was introduced, in which the intent underlying the 1989 clause was preserved. Congress introduced a clause with language that was essentially identical to the clause eventually enacted as Section 11 of the

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[22] Representative Swift was a sponsor of the NVRA, as well as a signatory to the 1993 House report and the 1993 Conference Committee report, both described above.

[23] 136 CONG. REC. H255 (daily ed. Feb. 6, 1990) (discussing H.R. 2190, the National Voter Registration Act of 1989, predecessor to the National Voter Registration Act of 1993).

NVRA. The Senate Report confirmed that, by including such language, Congress intended the Voting Rights Act to be preserved as a source of rights and remedies independent of the NVRA. In fact this Senate Report uses virtually identical language to the Senate Report of 1993 accompanying the NVRA and cited above.[24]

In every version of the NVRA introduced since 1989, Congress consistently stated that compliance with the NVRA would not excuse a State from also complying with the Voting Rights Act. For example, during the floor debates on the National Voter Registration Act of 1991, the following colloquy confirmed the congressional intent:

> Senator Hatfield:[25] "A question has been raised about language in the committee report regarding the Voting Rights Act of 1965. It suggests that use of the National Change of Address Program would be deemed to be in compliance with the requirements of the bill that a voting list verification program be uniform, nondiscriminatory and in compliance with the Voting Rights Act of 1965. Is it the intent of the committee that S. 250 would insulate all State or local programs using the NCOA from challenge under the Voting Rights Act of 1965?"

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[24] "Merely because a program was conducted under the National Voter Registration Act would not be a defense to any claim which might be asserted under the Voting Rights Act. The requirements of the two acts are distinct and complementary. The States must comply with the National Voter Registration Act in a manner which does not violate the Voting Rights Act." *Establishing National Voter Registration Procedures for Federal Elections, and for Other Purposes*, S. REP. No. 60, 102nd Cong., 2nd Sess. ___ (1991), *available in* LEXIS, CMTRPT file, at *17. This language is identical to the excerpt cited above from S. REP. No. 6, 103rd Congress, 1st Sess. 18 (1993).

[25] Senator Hatfield is a signatory to the 1993 Senate Report cited above.

> Senator Ford:[26] "No. The committee did not intend to insulate State or local list verification programs that used the NCOA from challenge under the Voting Rights Act of 1965. The bill is quite clear in this regard."[27]

Finally, during the debates on H.R. 2, the National Voter Registration Act of 1993, Congress addressed the specific question at issue in this case, namely, whether States covered under section 5 of the Voting Rights Act can use compliance with the NVRA as grounds for failing to seek preclearance. Congress answered this question in the negative, requiring covered jurisdictions to continue to seek preclearance for any voting changes.[28] A member of Congress from Louisiana, one of the covered jurisdictions, stated:

> The motor vehicle licensing provision becomes, by the way, subject to the Voting Rights Act. And for those people that live in Alabama, Mississippi, Louisiana, and all of the nine States covered by the Voting Rights Act of 1965, those people may or may not know that the election representatives in all of their counties already have to report to the Justice Department to preclear any changes, any changes that they have to their election laws with the Justice Department before those laws can go into effect. . .
>
> What this means is that they are also going to have to check out all of their changes with the Justice Department once this law is passed. And in order to comply with this law they are going to have to make

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[26] Senator Ford was a sponsor of the NVRA, as well as a signatory to the Senate and Conference Reports, cited above, that accompany the NVRA.

[27] 138 CONG. REC. S6860 (daily ed. May 19, 1992) (discussing S. 250, the National Voter Registration Act of 1991, predecessor to the National Voter Registration Act of 1993).

[28] *See supra* text accompanying notes 18-19, regarding the House Committee's explicit rejection in 1993 of such an amendment to the NVRA.

> massive changes, so we are talking about untold bureaucratic hours, manhours wasted and just thrown away because of compliance with this unnecessary and terribly expensive and terribly burdensome law.[29]

Regardless of the concerns as to the possible burdens imposed by the § 5 preclearance requirement, the floor debates make clear that the plain meaning of Section 11 of the NVRA is amply supported by the legislative history.

The plain meaning and legislative history both confirm that compliance with the NVRA cannot be deemed a defense to non-compliance with the Voting Rights Act. Therefore, the decision of the district court below, which effectively ruled otherwise without addressing the meaning of Section 11, is erroneous as a matter of law.

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[29] 139 CONG. REC. H294 (daily ed. Jan. 27, 1993) (statement of Representative Livingston) (discussing H.R. 2, the National Voter Registration Act of 1993).

CONCLUSION

For all the foregoing reasons *amici* respectfully request that this Court reverse the decision of the three-judge district court for the Southern District of Mississippi.

Dated: New York, New York
11 November 1996

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