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JOHN F. DAVIS, CLERK

No. 701

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In the Supreme Court of the United States

OCTOBER TERM, 1968

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GASTON COUNTY, NORTH CAROLINA, APPELLANT

v.

UNITED STATES OF AMERICA

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

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MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

**OPINION BELOW**

The opinion of the district court (J.S. 9-40) is reported at 288 F. Supp. 678.

**JURISDICTION**

The opinion of the three-judge district court was filed on August 16, 1968. A notice of appeal was filed on September 13, 1968. The Jurisdictional Statement was filed October 31, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

(1)

## QUESTIONS PRESENTED

1. Whether during the five years prior to the institution of this action, the use by Gaston County of a literacy test for voting registration had the purpose or the effect of denying or abridging the right of persons to register and vote on account of race.

2. Whether, in an action for declaratory judgment brought by Gaston County under Section 4 of the Voting Rights Act of 1965, 42 U.S.C. 1973b, the county must establish that, during the five years immediately preceding the filing of this action, no registration official operating within its territorial limits engaged in practices which had the purpose or effect of violating the Fifteenth Amendment.

## STATEMENT

Section 4(a) of the Voting Rights Act of 1965, 42 U.S.C. 1973b(a), which took effect on August 6, 1965, suspended the use of literacy tests as a prerequisite for registration or for voting in any county or political subdivision previously maintaining such tests where fewer than 50 percent of the persons of voting age were registered for or voted in the 1964 presidential election.<sup>1</sup> On March 29, 1966, the Attorney General and the Director of the Census certified that a factual situation within this statistical standard existed in Gaston County, North Carolina (31 Fed. Reg. 5080-5081) and it thereby became subject to the suspension provisions of the Act.

On August 11, 1966, the County instituted this declaratory judgment action under the provision of

<sup>1</sup> The constitutionality of Section 4 was upheld by this Court in *South Carolina v. Katzenbach*, 383 U.S. 301.

Section 4(a) which terminates the suspension of literacy tests upon a finding by a three-judge district court in the District of Columbia that for five years preceding the filing of the action no test or device has been used in the plaintiff State or political subdivision for the purpose or with the effect of denying or abridging the right to register or to vote on account of race.

The evidence presented at the hearing before the three-judge court established the following facts:

(1) The North Carolina Constitution (Art. VI, § 4) provides that in order to register to vote a person must demonstrate ability to read any section of the state constitution in the English language. See, also, N.C. Gen. Stat. § 163-28. North Carolina law assigns to individual registrars the duty to enforce the literacy requirement. *Ibid.* Prior to July 1964, it was the Board's practice to give an oral reading test; applicants were required to read the registration oath aloud to the satisfaction of the registrar. After the effective date of the Civil Rights Act of 1964—which prohibited the imposition of oral tests as a precondition for voting in a federal election—the Board changed its procedures and instituted a written literacy test. Applicants were required to copy, to the registrar's satisfaction, any one of three sentences from the North Carolina Constitution set forth on a written form prepared by the Board. In the spring of 1966, after the Attorney General and the Director of the Census had made the statutory determinations which placed

Gaston County under the Voting Rights Act, the Board suspended the use of all literacy tests.

(2) Gaston County is divided into 43 election precincts, each of which has its own registrar of voters. Registrars are appointed by the Gaston County Board of Elections, and this body is generally responsible for the administration of the electoral processes of the County. All federal, state, county and township elections are controlled by the County Board. There are also at least eleven municipalities in Gaston County which hold separate elections. Registration for these municipalities is conducted separately by municipal registrars. The County Board of Elections has no control over municipal elections. N.C. Gen. Stat. §§ 160-364, 160-365, 160-366, 163-31.3. The County offered no proof at all at the hearing with respect to the practices of the municipal registrars (see J.S. 32-33).

(3) Prior to 1962, registration in Gaston County was conducted under a "precinct registration" system. In 1962, a general re-registration was instituted, and the County inaugurated the so-called "loose-leaf system." During the course of the 1962 re-registration, the fact that the re-registration was to be conducted in accordance with the North Carolina literacy law was publicized in the press.

After the registration period began in April 1962, and despite the public announcement of the Board's policy to enforce the literacy requirement, white applicants were permitted to register without meeting the literacy requirement. Illiterate whites thereby registered and are still on the rolls in Gaston

County. No public announcement was made of the fact that the literacy requirement was frequently waived.<sup>2</sup>

(4) Evidence was also introduced to establish that racial segregation and discrimination based on color permeated most facets of life in the County for most of the County's Negroes of voting age. All of the voting-age Negroes attended schools at a time when the County public schools were racially segregated by law and the educational opportunities provided for Negroes were inferior to those provided for whites.

The court below denied the County's request for a declaratory judgment. A majority of the court (Judges Wright and Robinson) held that, irrespective of whether the North Carolina Constitution's literacy requirement was evenhandedly administered, it had the effect of discriminating on account of race because "Negroes of voting age in Gaston County were, as children, denied a public education equal to that provided white children" (J.S. 24). Accordingly, the court concluded that "*any* literacy test imposed upon Negroes as a precondition to voting would have the effect of abridging the right of many Negroes to vote on account of race or color" (J.S. 26, emphasis added). Judge Gasch concurred in the result on the ground that the County had failed

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<sup>2</sup> Accordingly, Negro leaders active in voter registration basing their conclusions on what they observed or, in one case, following the explicit direction of a registrar, confined their registration efforts to persons who could read and write; and there was evidence that Negroes of low literacy did not attempt to register because they thought they would fail the test.

to meet its burden of proof that *all* elections held within the County—including the independently supervised municipal elections—had been conducted non-discriminatorily (J.S. 29-33).

#### ARGUMENT

1. The majority of the court below properly concluded that a literacy test requiring the copying of a sentence from the North Carolina constitution had the effect of discriminating against Negro applicants in a county where the census figures showed the percentage of adult Negroes having no schooling whatever was twice as large as the corresponding percentage of whites, where the percentage of adult Negroes having no more than four years of education was almost twice as large as that of whites, and where the Negro schools had been substantially inferior to the white schools during the period in which the County's voting age citizens were of school age. Since the evidence also showed that the quality of the Negro schools, during much of this period, was very poor indeed, the court justifiably inferred that *any* literacy test administered in these circumstances would have the effect of discriminating on account of race.

The existence of inferior educational opportunities for Negroes in the Southern states was one of the considerations behind the congressional suspension of literacy tests.<sup>3</sup> It was the view of the Attorney General and of Congress that it was unfair to allow a State or county to disfranchise people for a lack

<sup>3</sup> See, *e.g.*, Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., pp. 16-17 (Attorney General Katzenbach).

of capacity to pass a literacy test, when that capacity was denied them as a result of discriminatory state action (see J.S. 27). Twelve of the sixteen members of the Senate Judiciary Committee stated:

[T]he educational differences between whites and Negroes in the areas to be covered by the prohibitions—differences which are reflected in the record before the committee—would mean that equal application of the tests would abridge 15th amendment rights. This advantage to whites is directly attributable to the States and localities involved.<sup>4</sup>

There is no merit to the claim that the evidence below was inadequate to support the majority's conclusion in this regard. For, as the majority opinion noted (J.S. 25, n. 20), the burden of proof in an action of this kind rests with the political subdivision seeking to have the suspension removed. In this case, the County failed to establish that the standard of the literacy requirement was so low that it could be satisfied even by those who received the inferior education given Negro children in segregated schools.

2. Affirmance of the judgment below may also be reached on the ground articulated by the concurring judge. It was incumbent on the County, as a part of its case, to make a showing that the literacy test has not been used by municipal registrars with the purpose or effect of abridging the right to register and vote on account of race or color. The County offered no such proof.

At the trial, the County's witnesses disclaimed all knowledge of, or responsibility for, municipal elections

<sup>4</sup>S. Rep. No. 162, Part 3, 89th Cong., 1st Sess. p. 16.

and offered no proof with respect to them. They took the position that since municipal elections are not subject to the control of the Gaston County Board of Elections, such proof could not be required from the plaintiff. The statute, however, provides for suits by the County, and not by its Board of Elections. The relief would also extend to municipal elections, as well as to those conducted by the County's Board of Elections. Hence it was obligatory for the County to join the municipal registrars as plaintiffs or to call them as witnesses with respect to their registration practices. Having failed to take any of these steps, Gaston County has failed to establish that it is a political subdivision "in"<sup>5</sup> which no proscribed test or device has been used. Denial of the request for declaratory relief was, therefore, proper.

3. While the court below did not ground its decision on the evidence that the test had not been applied as written (J.S. 18), it was established that white illiterates were permitted to register notwithstanding the literacy requirement<sup>6</sup> and that the waiver practice was not publicized. Such a selective waiver of the literacy requirement—originally designed to disfranchise Negroes<sup>7</sup>—if it is not communicated to the Negro

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<sup>5</sup> Note also the use of the phrase "anywhere in the territory of such plaintiff" in a related context in another part of the same section of the Voting Rights Act. 42 U.S.C. 1973(a).

<sup>6</sup> In addition to the depositions of 29 illiterate white voters residing in 18 voting precincts located in all parts of the County, the record contains a notebook of copies of the applications for registration of approximately 70 additional white voters whose forms show that they were incapable of satisfying the literacy requirements of North Carolina law.

<sup>7</sup> See footnote 11 to the opinion of the District Court.

community, will, of course, tend to abridge the right of Negroes to vote. This effect is amply illustrated by the evidence here: Negroes did not go to register, and leaders did not encourage them to register, because they were unable to read and write; white illiterates were registered throughout the County.<sup>8</sup>

#### CONCLUSION

For the foregoing reasons, the judgment of the three-judge district court should be affirmed.

Respectfully submitted.

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<sup>8</sup> Section 101(a) of the Civil Rights Act of 1964, 42 U.S.C. 1971(a)(2)(A) also precludes the entry of a judgment which would permit the County now to reinstitute a literacy test. That statute provides that in determining whether an individual is qualified to register or to vote under a particular State law no registrar may apply any standard different from or more stringent than the standards applied under such law to other individuals who have been found qualified to vote. Since numerous illiterates, most of them white, were registered in Gaston County in the past and, in the absence of a total re-registration, remain eligible to vote; and since the responsible Gaston County official testified that no such re-registration is intended, Gaston County is precluded now from reinstituting its literacy test.