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THE SUPREME COURT OF THE UNITED STATES

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WASHINGTON, D.C. 20543

DKT/CASE NO. No. 83-1015

TITLE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED
PEOPLE, ETC. ET AL., Appellants v. HAMPTON COUNTY
ELECTION COMMISSION, ETC., ET AL.
PLACE Washington, D. C.

DATE Wednesday, November 28, 1984

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NATIONAL ASSOCIATION FOR :
4 THE ADVANCEMENT OF :
5 COLORED PEOPLE, ETC., ET AL., :
6 Appellants :
7 v. : No. 83-1015
8 HAMPTON COUNTY ELECTION :
9 COMMISSION, ETC., ET AL. :
10 - - - - -x

11 Washington, D.C.

12 Wednesday, November 28, 1984

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 2:05 o'clock p.m.

16 APPEARANCES:

17 ARMAND DERFNER, ESQ., Washington, D.C.;

18 on behalf of appellants.

19 DAVID A. STRAUSS, ESQ., Assistant to the Solicitor

20 General, Department of Justice, Washington, D.C.;

21 as amicus curiae supporting appellants.

22 TREVA G. ASHWORTH, ESQ., Senior Assistant Attorney

23 General of South Carolina, Columbia, South

24 Carolina; on behalf of appellees.
25

C O N T E N T S

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DAVID A. STRAUSS, ESQ.,	
as amicus curiae supporting the Appellants	16
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on behalf of Appellees	25
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on behalf of the Appellants - Rebuttal	30

1 between supporters of a strong countywide board of
2 education who have been mostly black, and those
3 supporters of strong autonomous district boards who have
4 been mostly whites, especially in the northern part of
5 the county.

6 In 1982 this controversy culminated in the
7 General Assembly's passing Act 549. Act 549 abolished
8 the county board and changed the district boards from
9 appointed boards to elected district boards. It
10 provided that the elections for the district boards
11 would be held in November along with the general
12 elections, and it also provided that the first filing,
13 that is, for the elections in 1982, would be conducted
14 in August, on specified dates between August 16 and 31.

15 For reasons that will probably become clear,
16 preclearance of this statute, which was passed in the
17 spring of 1982, was not obtained until after the
18 November election date, that is, until mid-November
19 1982. Because preclearance had not been obtained, the
20 election did not go forward.

21 However, despite the absence of preclearance,
22 the Appellees, the election commission, had gone ahead
23 with a filing period in August of 1982.

24 After preclearance was obtained, in the middle
25 of November, the election commission then set about to

1 set a special election. They did so selecting a date in
2 March 1983 without preclearing that date, and they also
3 then selected a filing period also without
4 preclearance. The filing period happened to be the same
5 dates¹ in August of 1982 that they had previously had
6 the previous year at a time when the statute had not
7 been precleared. In fact, that filing period was
8 enforced in 1983 by turning away several candidates,
9 including one of the plaintiffs, who appeared after the
10 announcement of the March election and wanted to run in
11 that election. Those people were turned away.

12 This suit, therefore, was brought to stop the
13 special election in March, chiefly because there had
14 been no preclearance of the election date with filing
15 period.

16 The District Court upheld the Appellees in
17 both the setting of the special election without
18 preclearance, and the setting of the filing period
19 without preclearance on the grounds essentially that
20 election dates and filing periods are in effect not
21 covered by Section 5 because they are ministerial,
22 administrative, or things of that sort, and in the
23 alternative, the District Court held that when the
24 department had cleared the statute at 549 in November,
25 that that clearance was essentially blanket approval of

1 all that had gone before as well as all that might come
2 afterward, even though at the time of the Department's
3 clearance in November it was not even known whether or
4 when there would be a special election or what filing
5 arrangements would be made.

6 QUESTION: It was at least known then, though,
7 that there would have to be a special election, wasn't
8 it?

9 MR. DERFNER: It was known that -- it would
10 have been known that if the county, if the state wanted
11 to proceed with the enforcement of Act 549, they would
12 have to have an election at some point. Whether they
13 were going to have a special election or wait until the
14 following November period in 1984, that wasn't known.

15 QUESTION: Well, do you think it was very
16 likely they would wait two years?

17 MR. DERFNER: I don't know. I don't think
18 there's any basis for having any idea what was going to
19 happen. There were people who had been elected because
20 of a complicated procedural situation, and there were
21 people there running the school systems who had been
22 duly elected.

23 Before I leave the facts, I would like to
24 address briefly the question of what happened just
25 before the preclearance because the date may be

1 puzzling.

2 The Act 549 was passed in April of 1982. It
3 was not, however, submitted for preclearance for more
4 than two months, for approximately two and a half
5 months, in June. It was then, an answer was due in
6 August, and at that time the Justice Department objected
7 to Act 549 on the grounds that the abolition of the
8 county board would dilute the votes of black voters in
9 their attempts to exercise political influence over
10 schools in Hampton County.

11 A petition for reconsideration was made, and
12 in November the Department withdrew its objection.
13 That's when preclearance was first obtained. It
14 withdrew its objection because it read state law to
15 indicate that certain powers didn't reside in the county
16 board. We happen to think that the Department misread
17 the state law in that. That is neither here nor there
18 because obviously we can't complain about the
19 Department's decision. I mention it only to indicate
20 that the objection that the Department had entered was
21 quite a serious one, responding to a serious situation,
22 and that therefore the time that passed before the
23 department had finally precleared it was not simply an
24 accident.

25 The question before this Court then is whether

1 there was any basis for the District Court to make its
2 broad exceptions and in effect to, we believe, to read
3 out of the law this Court's prior holdings and the
4 clear language of the statute. In connection with the
5 setting of a special election date, we think that there
6 could hardly be anything which is more clearly a
7 standard practice or procedure regarding an election.
8 The specific language of the statute seems to cover
9 that. The prior cases of this Court, the consistent
10 practice of the United States Department of Justice, the
11 potential for discrimination that resides in the ability
12 to set an election date with essentially no standards,
13 no guidance, and finally, we think that --

14 QUESTION: Let me get your reaction.

15 MR. DERFNER: Yes, Mr. Chief Justice.

16 QUESTION: In setting the time, what are the
17 factors that could be used for or against? How would
18 the time enter into it?

19 I can see you wouldn't -- sometimes time is a
20 factor that the farmers can't come in if they are
21 engaged in harvesting and things of that kind?

22 What would be the factors here?

23 MR. DERFNER: Okay. The question is, I gather
24 you are asking that in what way could the setting of an
25 election date be discriminatory? It could be set so

1 quickly that nonincumbents had no right to campaign. It
2 could be set so far back that other factors intruded.
3 It could be set at a time when migrants -- and there are
4 migrants in Hampton County -- were there or were not
5 there. It could be set at a time when students were
6 there or not there.

7 And I should remark that in the last two
8 categories, there have been cases in the lower courts,
9 not from South Carolina, which have found election dates
10 to be discriminatory because of those reasons, both
11 cases from Texas, as I recall.

12 So there is a lot of potential for
13 discrimination in the setting of a date, and that is the
14 factor which leads the Voting Rights Act to say that
15 this is something that the Department of Justice ought
16 to consider.

17 QUESTION: So that a Section 5 inquiry would
18 be a neutral eye cast on that?

19 MR. DERFNER: Yes, although in this case the
20 Section 5 inquiry I would think would also look at the
21 conditions precedent to the election, specifically, what
22 is the filing period? And I would think that the
23 department could have found in this situation that
24 holding a March election without a new filing period
25 would make that election date itself discriminatory.

1 So there are a world of ways.

2 I should say that the Appellees, I think they
3 do not really challenge this view because on page 27 of
4 the Election -- I'm sorry, the School Board's brief,
5 they say we agree -- they agree, in effect, that an
6 election date set by statute would have to be
7 precleared, and they seek to draw an exception for
8 something which is set by simple administrative
9 decision.

10 I would think that there is certainly no
11 exception, that this Court's cases have dealt with
12 administrative decisions, informal, ad hoc decisions, as
13 well as they have with statutes, and in fact, if
14 anything is more of a danger under the Voting Rights
15 Act, I should think it would be nonstatutory changes.

16 As to the filing period, as to the filing
17 period, I think it is equally clear, in fact, the cases
18 of this Court make it clearer because the very first
19 couple of cases, the Allen case, the Hadnott case, dealt
20 specifically with filing periods. So I think there
21 could hardly be an argument that setting a filing period
22 is not something that has to be covered by Section 5.

23 The Appellees say, though, following the
24 District Court, that in this case the Attorney General
25 did preclear the filing period because when he sent his

1 letter in November of 1982, that letter precleared Act
2 549 which had an August filing period, and they said
3 that's all we were doing, we were putting that same
4 filing period back

5 But the Attorney General says that he didn't
6 preclear that filing period; he says that he precleared
7 an August filing period for a November election, and I
8 think that the Attorney General's view, first of all, is
9 entitled to great weight. Congress has given him great
10 weight. This Court has always accorded his views great
11 weight.

12 Moreover, what the Attorney General says about
13 the inseparability of filing periods and elections
14 makes, it seems to me to make all the sense in the
15 world. If you said that a filing period can exist in
16 the abstract without being tied to an election date,
17 then I suppose we could have a situation, to use an
18 example, of if this Court were to agree with us on the
19 election date and not agree with us on the filing
20 period, we could conceivably go back. The District
21 Court could order a new election in 1985, and the
22 Appellees could come back and say fine, we will still
23 use the 1982 filing period.

24 In addition to the Attorney General's
25 statement with which we agree that the filing period was

1 attached only to the November election, and that's all
2 he precleared, we think there is another reason why the
3 Appellees shouldn't have been able to use the old filing
4 period, and that is that it would be enforcing a filing
5 period or enforcing an act at a time when the act we
6 believe was unenforceable because it had not been
7 precleared. This is a problem that Congress has
8 addressed most clearly in the most recent extension of
9 the act because Congress frankly was fed up, no simpler
10 way to say it than that, was fed up with the numerous
11 instances of premature implementation of unprecleared
12 statutes.

13 The statutory language says unless and until,
14 and that is not what happened here with the filing
15 period. We believe the District Court made some broad
16 exceptions to Section 5 in this case, that it
17 mischaracterized the Attorney General's decision. This
18 is, with all due respect, the third year in a row that
19 this Court has been faced with a case from South
20 Carolina involving much the same situation. Exceptions
21 to Section 5 and mischaracterizations of the Attorney
22 General's decision in the first two cases, Blanding v.
23 Dubose and McCain v. Lybrand, this Court reversed the
24 District Court unanimously.

25 We believe this case is equally clear, and we

1 would ask that the judgment below be reversed.

2 QUESTION: May I ask just one question?

3 MR. DERFNER: Yes.

4 QUESTION: Supposing the Attorney General had
5 cleared the Act 549 in October, would you make the same
6 argument?

7 MR. DERFNER: Yes, I think I would, Justice
8 Stevens, because while it is true that there have been a
9 number of instances in which filing periods or other
10 situations have gone forward without somebody suing
11 them, I think the law is clear that an act may not be
12 enforced, and what you have is citizens who read the
13 that Voting Rights Act says nothing can be enforced
14 until it is precleared, and if a citizen is entitled to
15 rely on the law, then I think a citizen should not be
16 forced to the choice of going to file at a time when the
17 law has not been precleared.

18 So if what you are saying is that --

19 QUESTION: But, see, presumably if that had
20 happened, the Attorney General would have known the
21 filing date, and he was advised that the procedure was
22 followed that you did follow, that you told them to
23 register, to file under both statutes.

24 MR. DERFNER: We don't know -- no, with all
25 due respect, Justice Stevens, there is nothing in the

1 recrd to show what the Attorney General was advised of
2 in the reconsideration. And I have looked through the
3 Section 5 file in the Justice Department. There is
4 nothing to indicate what the Attorney General knew had
5 or hadn't happened in August.

6 I have to think that the Attorney General is
7 entitled to rely on the law and so that if anything --

8 QUESTION: Let me change my hypothetical.
9 Supposing he was fully advised, there was adequate
10 advice, and the question was whether he could then
11 approve of an election in November based on filings that
12 had taken place just before othe preclearance, and he
13 knew all about what had happened.

14 MR. DERFNER: I think he shouldn't do that.
15 If he did, then I think what we would have is a statute
16 that is found by the constituted authority of the
17 Attorney General to be nondiscriminatory, but I think we
18 would still have the right to go to the equity court if
19 we filed a lawsuit, as we did here, and say that because
20 there was a procedural violation, we think it is unfair
21 to have gone ahead, and therefore we are entitled to
22 relief.

23 I am not sure if that answers the question.

24 QUESTION: Oh, it does.

25 QUESTION: Mr. Derfner.

1 MR. DERFNER: Yes, Justice O'Connor.

2 QUESTION: Was evidence submitted before the
3 District Court about the premature removal of the county
4 superintendent?

5 MR. DERFNER: Justice O'Connor, no. There was
6 an affidavit, and I believe the affidavit is in the
7 joint appendix. Unfortunately, because of the way the
8 opinion of the District Court addressed it and because
9 of the limited record on that issue, I frankly am bound
10 to believe that that case really isn't appropriate for
11 consideration by this Court at this stage. We would
12 prefer not to pursue the appeal on that issue.

13 QUESTION: Mm-hmm. Yes. I know the SC takes
14 the position that it was precleared, but the position
15 had just been abolished, and there wasn't any other
16 evidence of some preclearing.

17 MR. DERFNER: What was precleared was the
18 abolition of the position as of this coming June, and so
19 that it in fact, if the Court were to decide the
20 question, it would be moot as of June.

21 What there were -- there is an affidavit in
22 the record that indicates that in practice the position
23 was effectively abolished before the time that was
24 precleared, but that's what we didn't adequately --

25 QUESTION: So what is your suggestion that we

1 do?

2 MR. DERFNER: My suggestion, frankly, is that
3 we are -- I would prefer not to pursue that portion of
4 the appeal at this stage, and if the Court would like, I
5 might even be, if you thought it appropriate, I could
6 dismiss that portion of the appeal. But we don't -- we
7 think it is inappropriate to pursue it at this stage
8 based on the record that we have.

9 QUESTION: Thank you.

10 MR. DERFNER: Thank you very much.

11 CHIEF JUSTICE BURGER: Mr. Strauss?

12 ORAL ARGUMENT OF DAVID A. STRAUSS, ESQ.

13 AS AMICUS CURIAE SUPPORTING APPELLANTS

14 MR. STRAUSS: Thank you, Mr. Chief Justice,
15 and may it please the Court:

16 Before I turn to the merits of this case, I
17 would like to say a word about why the resolution of the
18 questions presented can have an important effect on the
19 Attorney General's ability to carry out his
20 responsibilities under Section 5 of the Voting Rights
21 Act.

22 The major theme of the Appellees' argument and
23 the District Court's opinion, as I read it, is that the
24 Attorney General can be deemed to have precleared
25 changes implicitly, that is to say, he can be deemed to

1 have cleared them even though he was not aware that he
2 was clearing them, and even though in this case he did
3 not know of the changes and could not possibly have
4 known about the changes because they had not even been
5 instituted at the time he issued his preclearance.

6 Now, this argument in one form or another has
7 been made to the Court on several occasions in Allen, in
8 Sheffield County, and just last term in McCain, and as
9 Mr. Derfner pointed out, it has been repeatedly rejected
10 by the Court. But the point I would like to emphasize
11 is that the practicalities of administering Section 5
12 make it very important that as the Attorney General's
13 regulations require, covered jurisdictions make a clear
14 statement in their submission of exactly what changes
15 they are seeking to have precleared, and that no changes
16 be deemed precleared except on the basis of such a clear
17 submission.

18 Now, the reason that is important is that as
19 Congress recognized, and as our experience in
20 administering Section 5 has shown, a lot of the threats
21 to equality in voting occur at the level of low
22 visibility nuts and bolts electoral decisions that can
23 only be properly evaluated in a particular local
24 context. For example, the legislative history of the
25 Voting Rights Act mentions a change from paper ballots

1 to voting machines as the kind of change that would have
2 to be precleared, and in Perkins, an early decision,
3 this Court held that a change in voting places had to be
4 precleared.

5 So when the Attorney General is presented with
6 a scheme, he doesn't just decide in the abstract, on the
7 basis of some broad presumption, whether the scheme is
8 discriminatory. He has to look at whether the
9 particular elements of that scheme, in the particular
10 context, will have a discriminatory purpose and effect.
11 And in doing so, of course, he has to rely to a large
12 extent on input from people at the local level who are
13 familiar with the scheme.

14 Now, this whole process just can't operate
15 unless the Attorney General and people in the local
16 community know exactly what changes they are addressing
17 and what problems they are examining in the local
18 context.

19 Here the jurisdiction did not specify the
20 particular elements of the scheme that they now claim
21 were precleared, and in fact, the election date, as I
22 said, hadn't even been set at the time that the Attorney
23 General precleared Act 549.

24 Now, the jurisdiction -- the Appellees, that
25 is, point out that when the Attorney General cleared Act

1 549, the filing period had taken place. As Mr. Derfner
2 said, it is not clear whether the Attorney General was
3 even apprised of that, but even assuming he was, the
4 most the Attorney General can be said to have cleared
5 was the use of that August filing period with a November
6 election. He did not preclear the use of that August
7 filing period with a March special election, which he
8 had no idea was scheduled, and he certainly did not
9 preclear a situation in which local officials could look
10 at the results of the August filing period, see who had
11 filed and who hadn't, and on the basis of that make
12 their decision about whether to use that filing
13 qualification in a special election.

14 The minor theme, it seems to me, of the
15 Appellees' argument in this case is that essentially
16 they did all they could to try to carry out the sudden
17 change in the laws governing school governance in
18 Hampton County, and they got into a time bind because of
19 confusion at the Attorney General's end, and that time
20 binds like this, they suggest, will be fairly common in
21 the administration of the Act, and some leeway should be
22 allowed the districts to deal with them.

23 That I think is completely incorrect. There
24 is no doubt that the Appellees were in a bind, but the
25 principal reason they got in a bind was that they waited

1 two and a half months after the first enactment of Act
2 549 before they submitted it at all. And since the
3 Attorney General must act within sixty days, a delay of
4 two and a half months was what put them in the
5 predicament they found themselves in.

6 The second contributing factor to the
7 confusion in this case was the fact that the Attorney
8 General initially interposed an objection. But as Mr.
9 Derfner explained that objection, the interposition of
10 that objection and subsequent withdrawal were not the
11 result of confusion or bureaucratic ineptitude; there
12 was a very serious, very substantial question whether
13 that act was discriminatory, and that was the basis for
14 the initial objection.

15 I have one final point. The Section 5 was, of
16 course, very controversial when the Voting Rights Act
17 was first passed because it was thought by some to
18 intrude unreasonably into state and local government
19 affairs, but our experience suggests that now, almost 20
20 years later, the covered jurisdictions have accommodated
21 themselves to Section 5 and find it to be an acceptable
22 and minimal burden at most. The Attorney General has
23 issued regulations specifying the form that submissions
24 are to take. The covered jurisdictions know that all
25 changes are submitted. They submit them routinely. The

1 Attorney General acts very promptly, and nearly every
2 change is promptly precleared.

3 Ambiguities in the scope of the preclearance
4 requirement, such as those that are said to exist here,
5 are quite atypical. They are very much the exception
6 and not the rule.

7 But if the Appellees and others -- excuse
8 me -- are successful in carving out exceptions to this
9 preclearance regime, even though nothing in Section 5
10 supports the creation of such exceptions, not only would
11 the result be inconsistent with Congress' intent, but in
12 the long run, this disintegrating erosion of particular
13 exceptions, as Justice Cardoza said, would not ever be
14 of particular benefit to the covered jurisdictions
15 because it would inject elements of uncertainty and
16 confusion and litigation into what has become an
17 essentially stable and mutually acceptable state of
18 affairs under Section 5.

19 QUESTION: You don't really think it is
20 mutually acceptable, do you?

21 MR. STRAUSS: I think for the most part it is,
22 Justice White. I think this is something that at least
23 as far as our experience suggests the covered
24 jurisdictions have adjusted to, and they find it to be
25 very little of an interference anymore.

1 QUESTION: Mr. Strauss, approximately how many
2 applications for preclearance are now received by the
3 Attorney General per week?

4 MR. STRAUSS: I can't do the arithmetic that
5 quickly, Justice Powell.

6 QUESTION: How many were received last year?

7 MR. STRAUSS: There were 8600 in the first six
8 months of this year.

9 QUESTION: 8600?

10 MR. STRAUSS: That's right.

11 QUESTION: How many is that per working day?

12 MR. STRAUSS: That also, that's even a harder
13 arithmetical problem, Justice Powell.

14 (General laughter.)

15 QUESTION: It keeps the Attorney General
16 busy?

17 MR. STRAUSS: Well, not all of these reach the
18 Attorney General, or even the Assistant Attorney General
19 in charge of the Civil Rights Division.

20 QUESTION: The statute says the Attorney
21 General.

22 MR. STRAUSS: Well, he has delegated his
23 authority pursuant to the statute to the Assistant
24 Attorney General. This is -- this is --

25 QUESTION: Well, may I ask you just one other

1 question? I haven't given you time to answer my first
2 yet.

3 Is the number increasing or decreasing?

4 MR. STRAUSS: I believe the number is
5 increasing slightly.

6 QUESTION: That's my impression.

7 MR. STRAUSS: Yes, I think that's right.

8 There are differences depending on the rate of
9 reapportionment changes in response to the Census and so
10 on. So I am not sure a secular trend can be
11 identified. But to the extent it can, they are
12 increasing.

13 My understanding of the procedure for handling
14 submissions, Justice Powell, is that if the staff people
15 in the Justice Department in the Voting -- in the
16 Section 5 section of the Civil Rights Division, conclude
17 that a change should be cleared, then that change
18 reaches only the head of that section and does not reach
19 the Assistant Attorney General. But if they are of the
20 view that a change should not be cleared, that an
21 objection should be interposed, then that objection is
22 passed on personally by the Assistant Attorney General,
23 so that his concentration really is on the very small
24 percentage, although not insignificant number, of
25 objections or possible objections.

1 QUESTION: Mr. Strauss --

2 QUESTION: Have you any idea what percentage
3 of the total are pro forma?

4 MR. STRAUSS: I don't think any of them are
5 pro forma in the sense that they are given no review.

6 QUESTION: Well, I didn't mean -- a lot of
7 things are pro forma which get a review, but that they
8 are in clear compliance, and they go back. There must
9 be a substantial proportion of them that give no trouble
10 at all at the first level.

11 MR. STRAUSS: My impression is that that is
12 so, Mr. Chief Justice, a substantial proportion.

13 QUESTION: Mr. Strauss, would you regard 1984
14 as an atypical year because this is an election year?

15 MR. STRAUSS: No, my impression is that it is
16 not an atypical year.

17 QUESTION: Do you anticipate 8600 more the
18 first six months of '85?

19 MR. STRAUSS: We have no reason to think
20 otherwise.

21 QUESTION: So 40 a day?

22 MR. STRAUSS: Is that right?

23 QUESTION: Whatever it is.

24 How much of a staff is devoted to this, do you
25 know?

1 MR. STRAUSS: No, I don't know the answer to
2 that.

3 Thank you.

4 CHIEF JUSTICE BURGER: Ms. Ashworth?

5 ORAL ARGUMENT OF TREVIA G. ASHWORTH, ESQ.

6 ON BEHALF OF APPELLEES

7 MS. ASHWORTH: Mr. Chief Justice, and may it
8 please the Court:

9 The Voting Rights Act requires a county
10 jurisdiction to submit changes before implementing those
11 changes. There is no question but that the Act that
12 created election law changes were submitted to the
13 Justice Department for preclearance.

14 This case arises purely over whether or not
15 the preliminary step of filing, and whether or not an
16 election date which must be postponed because
17 preclearance comes too late to hold it at the time
18 scheduled, must be submitted to the Justice Department
19 for preclearance. The facts of this case involves two
20 acts which were enacted within three weeks of each other
21 which created substantially different governing bodies
22 for the Hampton County School Board.

23 The first act, Act 2 -- 547, excuse me -- made
24 the position for County Board of Education elective.
25 This act was submitted and precleared by the Justice

1 Department.

2 Subsequently, Act 549 was enacted which
3 abolished this board and devolved its powers and duties
4 upon the second two boards of trustees. This Act, as
5 has been pointed out, was not submitted for two and a
6 half months. The reason, I have been told by our
7 office, is because it took that long to gather the
8 information necessary to comply with the requirements as
9 to the information they want submitted with the act.

10 This act was submitted and initially objected
11 by the Justice Department. The Justice Department was
12 requested to withdraw their objection, which they did,
13 on November 19.

14 The problems that are at issue in this case
15 arise purely over the timing of this preclearance of the
16 second act. The second act provides specific, one-time
17 filings of August 16 to 31st, and required an election
18 to be held on November 2. As of August 16, there had
19 been no preclearance or objection from the Justice
20 Department.

21 The county election commission therefore was
22 faced with the implementation of two conflicting acts,
23 the second one, should it become precleared, would
24 abolish the first act and abolish the board established
25 by the first act.

1 To comply and to create a good faith effort,
2 they allowed filing to begin for both offices. This
3 filing, pursuant to the second act, admittedly began
4 before preclearance was received. The District Court
5 found filing to not be a Section 5 violation in that
6 filing did not constitute implementation of an act but
7 merely an administrative or ministerial action
8 necessary to accomplish the act's purpose, and not a
9 change from Section 5.

10 The Court further found that even should this
11 be a Section 5 change, it was precleared retroactively
12 when the act was precleared.

13 We would submit that filing is not
14 implementation of an act. It is purely a preliminary
15 step that will be null and void if the act is initially
16 or subsequently -- excuse me -- subsequently objected
17 to. It is an administrative or ministerial step so
18 that orderly elections can proceed.

19 The Justice Department has until recently not
20 objected to these preliminary steps occurring. Two
21 months before filing began in Hampton County the Justice
22 Department allowed filing to begin and include the
23 county offices pursuant to an act which established
24 filing dates before they precleared this one act. In
25 Herron v. Koch, a Federal District Court case, the

1 Justice Department, apparently as late as 1981, urged
2 the Court to allow a primary to continue in the hopes
3 that they would be able to preclear the act before the
4 general election. The Justice Department has also
5 retroactively approved changes that have happened, and
6 this Court has acknowledged the possibility of
7 retroactive approval.

8 The actual implementation of the act, we would
9 submit, would have been to have held the election before
10 preclearance or in violation of an objection, but that
11 did not happen. When the Justice Department interposed
12 an objection, an election was not held pursuant to the
13 second act, but the first act, even though that board
14 would, of course, be abolished by the second act should
15 preclearance come.

16 And seventeen days after the general election,
17 that's exactly what happened, the first board was
18 abolished by an approval of the second act. Following
19 preclearance of the act on November 19, the Election
20 Commission set a March election date for an election to
21 be held now pursuant to the now precleared act. The
22 appellants claim this date should have been precleared.
23 The District Court found that setting an election date
24 and conducting this election was not a change in South
25 Carolina law but an effort to comply with the law and the

1 precleared changes.

2 Section 5 has been variously interpreted by
3 this Court as having the effect of suspending, freezing,
4 delaying or postponing the implementation of an act.
5 Submission of an act to the Justice Department is
6 supposed to be a rapid alternative, a speedy method of
7 enforcement.

8 Setting an election date in this instance is
9 simply an unfreezing of a postponed election. The
10 election date is therefore a substitute election for an
11 election that could not be timely held at the time
12 provided for in the act purely because the act was not
13 precleared timely. If now there is added on an
14 additional requirement of preclearing the date every
15 time approval should come later than the anticipated
16 time for the election, the alternate remedy of a speedy
17 alternative of submission to the Justice Department
18 would never be realized.

19 Certainly we would submit that the filing is
20 not implementation of an act but merely a preliminary
21 step that is null and void should the act be ultimately
22 objected to. Likewise, the election date was simply
23 unfrozen and reset following preclearance of this act.

24 For these reasons, we would urge the District
25 Court be affirmed.

1 CHIEF JUSTICE BURGER: Do you have anything
2 further, Mr. Derfner or Mr. Strauss?

3 CRAL ARGUMENT OF ARMAND DERFNER, ESQ.

4 ON BEHALF OF APPELLANTS -- REBUTTAL

5 MR. DERFNER: I have a point or two.

6 Although I don't think it is the central issue
7 of the case, the issue came up about what the
8 jurisdiction was doing in the two and a half months,
9 and obviously there is no record of that. What there
10 is, what there is a file of, although it is not in the
11 record of this case, is the submission file, which is
12 here on five microfiche cards. It is not in the
13 record. And frankly, there is nothing in here that
14 would take more than a couple of hours to put together.

15 Thank you very much.

16 CHIEF JUSTICE BURGER: Thank you, counsel.

17 The case is submitted.

18 (Whereupon, at 2:38 p.m., the case in the
19 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 83-1015 - NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF

COLORED PEOPLE , ETC, ET AL., APPELLANTS v HAMPTON COUNTY ELECTION COMM. ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY

Paul A. Richardson

(REPORTER)

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