No. 97-29

In the
Supreme Court of the United States

October Term, 1997

State of Texas,
Appellant,

v.

United States of America, *Appellee.*

On Appeal from the United States District Court for the District of Columbia

Brief for *Amici Curiae American Civil Liberties Union and NAACP Legal Defense and Educational Fund, Inc. in Support of Appellee*

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU has been active in defending the right of racial and other minorities to participate in the electoral process. Specifically, the ACLU has provided legal representation to minorities in numerous jurisdictions throughout the country, and has frequently participated in voting rights cases before this Court, both as direct counsel, *see, e.g., Abrams v. Johnson, 117 S. Ct. 1925 (1997); Holder v. Hall, 114 S. Ct. 2581 (1994); McCain v. Lybrand, 465 U.S. 236 (1984); and Rogers v. Lodge, 458 U.S. 613 (1982), and as amicus curiae, see, e.g., Reno v. Bossier Parish School Board, 117 S. Ct. 1491 (1997); and United States v. Hays, 115 S. Ct. 2431 (1995).*

The NAACP Legal Defense and Educational Fund, Inc., is a nonprofit corporation chartered by the Appellate Division of the New York Supreme Court as a legal aid society. The Fund was established for the purpose of assisting African Americans in securing their constitutional and civil rights and this Court has recognized the Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button, 371 U.S. 415, 422 (1963). The Fund has participated in many of the*

significant voting rights cases before this Court. See, e.g., Bush v. Vera, 116 S. Ct. 1941 (1996); Shaw v. Hunt, 116 S. Ct. 1894 (1996); Chisom v. Roemer, 501 U.S. 380 (1991); Houston Lawyers' Association v. Attorney General of Texas, 501 U.S. 419 (1991); Thornburg v. Gingles, 478 U.S. 30 (1986); United Jewish Organizations v. Carey, 430 U.S. 144 (1977); Allen v. State Board of Elections, 393 U.S. 544 (1969).

SUMMARY OF ARGUMENT

In this case, Texas seeks to invent a new cause of action under the Voting Rights Act. Its proposal -- to allow jurisdictions covered under section 5 of the Act to obtain a declaratory judgment that a particular change in state law does not affect "voting" -- defies the careful architecture of the Voting Rights Act as a whole.

With respect to covered jurisdictions, Congress created two, and only two, causes of action. First, states or subdivisions that are covered jurisdictions may seek preclearance of changes in their electoral laws under section 5 of the Act. Second, covered jurisdictions may seek complete relief from the obligation to seek preclearance by filing a "bailout" lawsuit under section 4(a) of the Act. Congress has required both types of lawsuits to be brought in the United States District Court for the District of Columbia ("the D.D.C.").

With respect to contested questions of coverage, Congress did not provide jurisdictions with the opportunity Texas demands here: essentially the right to have a federal court issue an advisory opinion confirming Texas's interpretation of the Voting Rights Act. Rather, Congress expected that section 5 would be self-executing, and that federal courts would intervene in the state's everyday implementation of its laws only if and when citizens disagreed with the state's interpretation of its duties under section 5.2 The function of so-called "coverage lawsuits" is to determine whether a jurisdiction that contends that a particular change does not affect voting must nonetheless seek preclearance. These lawsuits are to be brought, not in the D.D.C., but in local federal district courts or state courts. Texas cannot circumvent this carefully designed scheme by creating a kind of hybrid lawsuit.

The potential doctrinal and practical difficulties with Texas's proposal are illustrated by this case. First, as the district court recognized in dismissing the case on ripeness grounds, determining whether a particular enactment represents a change with respect to voting may require a searching practical evaluation of political reality within a covered jurisdiction. In particular, this Court's experience with laws regulating educational matters shows that these laws can have racially discriminatory effects on voting or candidacy or may mask racially discriminatory purposes to bring about such effects. Given Congress's determination that racial discrimination in voting was often both a cause and an effect of racial discrimination within the educational system, Texas's "federalism" argument rings especially hollow. Second, given the overall statutory scheme, even if Texas received the declaratory judgment it seeks, this would not preclude either a private section 5 coverage suit in a local district court or other litigation challenging a given implementation of Texas Educ. Code Ann. § 39.131(a)(7) or (a)(8) (West 1996). Finally, permitting jurisdictions in Texas's position to bring declaratory judgment actions poses a significant danger of substantially increasing the burdens on both the D.D.C. and this Court.

ARGUMENT

I. Texas's Proposed Cause of Action Undercuts the Structure of the Voting Rights Act

As this Court reiterated last Term in *City of Boerne v. Flores, 117 S. Ct. 2157 (1997), the preclearance regime established by sections 4 and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973b, 1973c (1994), represents "`Congress' considered determination,'" 117 S. Ct. at 2167 (quoting City of Rome v. United States, 446 U.S. 156, 182 (1980)), about how to combat "`the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century'" 117 S. Ct. at 2167 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)). Into this intricate regulatory system, in which Congress has successfully balanced the national constitutional commitment to eradicating discrimination in voting with states' interests in self-government, Texas seeks to inject a completely unprecedented cause of action.*

In 1965 -- and again when it amended and extended the Act in 1970, 1975, and 1982 -- Congress established the following regime. Section 4 employs an objective formula to identify jurisdictions with a history of depressed voter turnout and the use of constitutionally suspect "tests or devices." Section 5 forbids such "covered jurisdictions" from administering changes in any "standard, practice, or procedure with respect to voting" unless and until they receive federal approval.

Congress provided two mechanisms for obtaining this approval or "preclearance." First, a jurisdiction may seek a declaratory judgment from the D.D.C. Second, a jurisdiction may obtain "administrative" preclearance by submitting its proposed changes to the Attorney General of the United States. The Attorney General is to apply the same substantive standards that the district court would have used; if he or she does not interpose an objection within sixty days, the change may be implemented.

Congress recognized that the preclearance regime marked an "extraordinary departure" from the usual relationship between the federal government and the states. *Presley v. Etowah County Commission, 502 U.S. 491, 500 (1992). It responded to this insight in three ways. First, Congress limited preclearance to "regions of the country where voting discrimination had been most flagrant" and reached only "a discrete class of state laws, i.e., state voting laws." Flores, 117 S. Ct. at 2170; see, e.g., Presley, 502 U.S. at 510 ("Congress meant . . . what it said when it made § 5 applicable to changes `with respect to voting' rather than, say, changes `with respect to governance.'"). Second, the entire preclearance regime is only temporary; absent renewed congressional action, it will expire in 2007. See 42 U.S.C. § 1973b(a)(8). Finally, Congress provided states and jurisdictions with an opportunity to seek a declaratory judgment relieving them altogether of the obligation to comply with section 5. The substantive and procedural requirements for this so-called "bailout action" are laid out in section 4(a)(1) of the Act. Such declaratory judgments can be granted only by the D.D.C.; they are to be heard by three-judge courts with direct appeal to this Court; and there are detailed provisions for the retention of jurisdiction and for the court's ability to reopen the case in the event of subsequent discrimination. Bailout is available only if the jurisdiction can show complete compliance during the preceding ten years with constitutional and statutory protections of the right to vote as well as constructive efforts to provide equal access to all aspects of the electoral process. See 42 U.S.C. § 1973b(a)(1). See also City of Fairfax v. Reno, No. 97-2212-JR (D.D.C. Oct. 21, 1997) (three-judge court) (granting a bailout to Fairfax, Virginia).*

What Congress did not do was create a declaratory judgment action for a determination of "non-coverage." Congress expressly provided covered jurisdictions with two, and only two, forms of declaratory judgment action: one, under section 5 of the Act, provides for the approval of particular changes with respect to voting; the other, under section 4, relieves them of the obligation to comply with the preclearance requirement altogether. Congress did not, by contrast, make available the kind of declaratory judgment Texas seeks in this proceeding: namely, a declaration of non-coverage of a particular type of government decision. The text of the statute expressly provides that covered jurisdictions "may institute an action" whenever they "enact or seek to administer" any new "*voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting," 42 U.S.C. § 1973c (emphasis added), not that they may institute an action whenever they enact or seek to administer any new law regardless of its subject.*

What Texas is trying to accomplish here is the creation of a kind of hybrid cause of action in which it gets a partial bailout: a judicial declaration that it does not have to comply with section 5 with regard to a subset of decisions. But section 4 was deliberately written to permit bailout only by jurisdictions that have complied fully with constitutional and statutory protections of the right to vote for ten years, and Texas is undeniably not such a jurisdiction.

Nor is the absence of any congressional authorization for the kind of lawsuit Texas has tried to bring at all surprising. Covered jurisdictions enact, and seek to administer, roughly 17,000 electoral changes a year. *See Clark v. Roemer, 500 U.S. 646, 658 (1991). Given the likely ratio of new laws and procedures "with respect to voting" to new laws and procedures with respect to everything else state and local governments do, there may well be millions of changes unrelated to voting each year. Congress had no intention, under the Voting Rights Act, of interfering with the states' implementation of these other laws. Nor would Congress have intended to saddle the D.D.C. with the responsibility of confirming states' correct legal conclusions that particular enactments did not require preclearance. Congress and this Court expected that scrupulous "self-monitoring," Clark, 500 U.S. at 659, would largely determine which changes were related to voting and required preclearance. And the Attorney General has expressly provided for the possibility that a state might err on the side of caution and submit for preclearance a change that is not covered by the Act. The regulations governing administrative preclearance provide that the Attorney General will notify a jurisdiction "as promptly as possible and no later than the 60th day following receipt" of a submission if the submission is "inappropriate" because the changes "do not affect voting." 28 C.F.R. § 51.35 (1997).*

Of course, although most enactments fall clearly inside or outside the scope of section 5, there are some that lie close to the line. Thus, it is possible that a state will reasonably conclude in good faith that a particular statute does not require preclearance and that either the Attorney General or individual citizens within the jurisdiction

will disagree. The overall architecture of section 5 shows, however, that Congress has chosen a very different mechanism for resolving the question Texas seeks to have answered. As this Court explained in *Allen v. State Board of Elections, 393 U.S. 544, 554-57 (1969), section 5 confers upon private citizens (as well as the Attorney General) the right to enforce the state's preclearance obligation. These "coverage" actions are brought in local federal district courts (or state courts, see Hathorn v. Lovorn, 457 U.S. 255, 269 (1982)), rather than in the D.D.C. See Allen, 393 U.S. at 558-60. The Court's determination that coverage cases be tried locally was quite deliberate; as the Court recognized, individual litigants might lack the resources to litigate their claim that a challenged act affected voting if they were forced to travel to Washington. See id. at 559-60.*

Texas's lawsuit turns section 5's commitment "to shift the advantage of time and inertia from the perpetrators of the evil to its victims," *South Carolina v. Katzenbach, 383 U.S. at 328, on its head. Under Texas's theory, it can force all individuals who can foresee any set of circumstances under which the appointment of a master or a management team might abridge their voting rights to litigate now, in a far-off forum, without the jurisdiction-specific facts that might show the court how a particular implementation of a generally innocuous statute posed a serious threat of racial discrimination in the election process. For reasons we explain in the next section, this theory is unavailing.*

II.Section 5 Contemplates That Decisions About Whether Preclearance is Required Will Be Made in the Context of Concrete Cases

As the previous section showed, Texas seeks to dismantle the well-developed and longstanding structure of section 5. The district court and the United States have explained why Texas's claim is not ripe. Rather than repeat those arguments, this section focuses on two other deficiencies in Texas's theory that also stem from the fact that the operation of §§ 39.191(a)(7) and (a)(8) has not yet "sufficiently crystallized," *Better Government Association v. Department of State, 780 F.2d 86, 92 (D.C. Cir. 1986), to be the subject of an orthodox section 5 coverage or preclearance proceeding. First, the lack of a concrete context may obscure the potential for racial discrimination in voting which would become evident in the course of particular applications of §§ 39.191(a)(7) and (a)(8). Second, Texas's attempt to shoe-horn this case into the D.D.C. -- since there is clearly no provision in the Act under which the state can sue in a local district court -- means that any judgment would be little more than an advisory opinion; any individual whose right to vote is affected by a particular implementation of the statute would remain free to bring a traditional section 5 coverage lawsuit seeking injunctive relief. These factors further confirm the imprudence of engrafting onto the Act a new cause of action for "non-coverage."*

Texas's proposed cause of action rests on the implicit assumption that state educational policy is unlikely to involve discrimination in voting. That implication is belied by two of this Court's most significant section 5 coverage cases. Both *Allen v. State Board of Elections and Dougherty County Board of Education v. White, 439 U.S. 32 (1978), involved decisions ostensibly about educational policy that were in fact attempts to suppress minority voting strength or had the potential for doing so. Bunton v. Patterson, one of the four cases decided together in Allen, involved Mississippi's decision to require eleven counties to appoint their county superintendent of education. See 393 U.S. at 551. The most thorough study of voting rights in Mississippi during the 1960s shows that these counties were singled out by the state precisely because of a threat that black voters within them might soon form a majority of the electorate and thereby elect black school superintendents. See Frank R. Parker, Jr., Black Votes Count: Political Empowerment in Mississippi After 1965, at 56-58 (1990). Similarly, Dougherty County involved a "personnel rule" passed by the County Board of Education requiring candidates for political office to take unpaid leaves of absence during the campaign. As the Court explained:*

> [T]he circumstances surrounding its adoption and its effect on the political process are sufficiently suggestive of the potential for discrimination to demonstrate the need for preclearance. Appellee [who was an administrator in the Dougherty County schools] was the first Negro in recent years to seek election to the General Assembly from Dougherty County, an area with a long history of racial discrimination in voting. Less than a month after appellee announced his candidacy, the Board adopted Rule 58, concededly without any prior experience of absenteeism among employees seeking office.

Dougherty County, 439 U.S. at 42.

In light of *Allen and Dougherty County, it is certainly possible to imagine circumstances under which a particular decision to appoint a master or a management team or to delegate certain powers to them stems from the desire to reassert white control over a school board whose members were elected primarily by minority*

voters. Suppose, for example, that the Commissioner delegates so much power to the master or management teams that the delegation "rise[s] to the level of a de facto replacement of an elective office with an appointive one, within the rule of Bunton v. Patterson." Presley, 502 U.S. at 508. That surely would affect voting. The very fact that Texas thought it necessary to provide that masters and management teams "may not take any action concerning a district election" and "may not change the number of or method of electing the board of trustees," Tex. Educ. Code Ann. §§ 39.191(e)(3), (e)(4), suggests that the state was well aware that masters and management teams might trench on voting rights if they were not carefully regulated. Or suppose, more invidiously, that a future Commissioner of Education decides which districts to sanction, or the relative severity of the sanction, by looking at whether a majority of the members of the board are racial or language minorities. If minority voters are more likely than other similarly situated voters to have their elected boards subjected to outside intervention, this too poses the threat of abridging minority voting rights.

If Texas is correct that under no circumstances could the Commissioner of Education's exercise of power under §§ 39.131(a)(7) and (a)(8) involve changes affecting voting, then it should simply exercise those powers. If individual citizens or the United States disagree and bring a coverage action, the action will be dismissed. Only if Texas is wrong, and a particular exercise of power under §§ 39.131(a)(7) or (a)(8) actually *does affect voting -- and there is good reason for thinking Texas might be mistaken*[3] *-- will the State be enjoined from implementing that change, and then only until it can convince the Attorney General or the D.D.C. that the change has neither a discriminatory purpose nor a discriminatory effect. Only if Texas fails to demonstrate that its use of its power to appoint masters or management teams is not in fact racially discriminatory will the state be permanently barred from implementing a change.*

Stripped of its federalism rhetoric, Texas's claim is that it should have the right to trade off its minority citizens' federally protected voting rights in the service of the state Commissioner of Education's judgments about good educational policy. Given the importance in the constitutional hierarchy of the right to vote, *see, e.g., Kramer v. Union Free School District, 395 U.S. 621 (1969), Congress clearly has the power to require Texas to pursue its educational objectives only through policies that respect the equal political rights of its minority citizens.*

Texas correctly recognized that declaratory judgment actions brought by covered jurisdictions must be brought in the D.D.C. But it fails to see the practical implications of this requirement for the action it seeks to bring in this case. In a conventional section 5 case, only the D.D.C. *can decide the contested issue. If the D.D.C. grants a declaratory judgment, then section 5 drops out of the picture entirely; the jurisdiction is free to administer the new practice or procedure. If the D.D.C. denies a declaratory judgment, then it will issue a permanent injunction against the jurisdiction. Similarly, in a conventional bailout declaratory judgment, either the D.D.C. grants or denies the requested relief.*

By contrast, if the D.D.C. were to entertain Texas's "non-coverage" lawsuit, any declaratory judgment it might grant would be binding only upon the parties. *See Hathorn v. Lavorn, 457 U.S. at 268 n.23 (a plaintiff "is not bound by the resolution of § 5 issues in cases to which he was not a party"). Texas cannot make individual voters parties to a section 5 proceeding in the D.D.C.; for one thing, the D.D.C. likely lacks personal jurisdiction over them. Thus, any judgment the D.D.C. might grant, even if it might preclude the United States Attorney General from bringing a section 5 enforcement action in local district court, would not preclude individual voters from bringing such an action. For this reason, it is entirely possible that a local district court, particularly based upon a different trial record, would still enjoin a particular exercise of §§ 39.191(a)(7) or (a)(8).*

Not only would this Court have mandatory appellate jurisdiction over the flood of "non-coverage" lawsuits, but it might have to hear some cases three times: once on an appeal from the D.D.C. over the non-coverage question; once on an appeal from the local district court on the more concretely presented coverage question; and perhaps again when the jurisdiction seeks judicial preclearance in the D.D.C. Further, Texas suggests no limitations upon the scope of the new declaratory judgment action it would engraft upon the Voting Rights Act. The state's theory that it is entitled to preempt local enforcement actions by suing first in the D.D.C. could by its logic, and unfettered by the explicit provisions of the Act, conceivably apply as well to potential suits under section 2 of the Act (which applies nationwide and reaches *all voting practices and procedures, regardless of whether they are either changes or have been precleared) as it does to section 5 cases. Indeed, given the burgeoning and duplicative litigation that seems now to attend the decennial census, see Pamela S. Karlan, The Rights To Vote: Some Pessimism About Formalism, 71 Tex. L. Rev. 1705, 1726-29 (1993), the hope of a preclusive declaratory judgment might encourage many jurisdictions to file such lawsuits, which of course*

would be subject to direct appeal to this Court. Thus, Texas's proposal may be only the beginning of a wholly unnecessary jurisdictional morass.

CONCLUSION

Amici urge this Court to affirm the judgment of the United States District Court for the District of Columbia dismissing Texas's complaint.

Respectfully submitted,

Pamela S. Karlan
Counsel of Record
580 Massie Road
Charlottesville, VA 22903

Laughlin McDonald
Neil Bradley
Maha S. Zaki
Cristina Correia
American Civil Liberties Union Foundation
44 Forsyth Street
Suite 202
Atlanta, GA 30303

Elaine R. Jones
Director-Counsel
Theodore M. Shaw
Norman J. Chachkin
Jacqueline A. Berrien
Victor A. Bolden
NAACP Legal Defense &
Educational Fund,Inc.
99 Hudson Street, 16th fl.
New York, NY 10013

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004

Attorneys for Amici Curiae

NOTES

1Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. No counsel for any party had any role in authoring this brief, and no person or entity other than the named *amici curiae or their counsel have made any monetary contribution to the preparation or submission of this brief.*

2Congress also gave the United States Attorney General the right to institute an action for "preventive relief." 42 U.S.C. § 1973j(d) (1994).

3*See Casias v. Moses, No. SA-95-CA-0221 (W.D. Tex. May 11, 1995) (granting a preliminary injunction under section 5 against a predecessor to § 39.131(a)(8), on the grounds that the plaintiffs were likely to prevail in showing that the appointment of a management team affected voting).*

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