IN THE

Supreme Court of the United States

October Term, 1968

No. 3

RICHARD ALLEN, ET AL.,
Appellants,

v.

STATE BOARD OF ELECTIONS, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Virginia

BRIEF ON BEHALF OF APPELLEES

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PRELIMINARY STATEMENT

On November 26, 1966, appellants instituted in the United States District Court for the Eastern District of Virginia this suit for preliminary and permanent injunctions allegedly to restrain the enforcement, operation and execution of Section 24-252 of the Code of Virginia (1950) by restraining the defendant election officials and their successors in office from failing or refusing to count, and from requiring or permitting any other election officials to fail or refuse to count, any vote hereafter given for any person solely because the name of such person was inserted on the official ballot otherwise than in the handwriting of the voter.

Jurisdiction was invoked under 28 U.S.C.A. 1331 and 1343(3), (4); the Voting Rights Act of 1965, 42 U.S.C.A. 1973 *et seq.*; the Fourteenth Amendment to the Constitution of the United States and 28 U.S.C.A. 2281 and 2284—the latter two statutes providing for the convening of a District Court of three judges to hear and determine suits in which restraint of the enforcement of a State statute, upon the ground of such statute's constitutionality, is sought.

A District Court of three judges having been designated by the Chief Judge of the United States Court of Appeals for the Fourth Circuit, the matter was heard on the merits on April 11, 1967. Subsequently, the District Court rendered its opinion denying the prayer of appellants' complaint and dismissing the suit. See, *Allen* v. *State Board of Elections,* 268 F. Supp. 218. On May 2, 1967, a final order effectuating this opinion was entered (App. 73a), from which an appeal to this Court was noted on June 29, 1967 (App. 3a, 74a).

On June 10, 1968, this Court entered its order postponing further consideration of the question of jurisdiction in this case to the hearing on the merits and placing the case on the summary calendar (App. 80a).

STATEMENT OF THE CASE

Appellants are citizens of the Commonwealth of Virginia. registered to vote in one of the precincts or wards of one of the several counties and cities comprising the Fourth Congressional District of Virginia, who are unable to spell accurately or write legibly. Appellees are the State Board of Elections of the Commonwealth of Virginia and various individuals who were, on November 8, 1966, either judges or clerks of election in certain precincts located in Greensville County, Cumberland County and Powhatan County, Virginia.

Appellants allege that, at the general election held on November 8, 1966, they were furnished official ballots on which were printed the names of two candidates for election to the House of Representatives of the United States from the Fourth Congressional District of Virginia. They further allege (1) that they inserted the name "S.W. Tucker" on the official ballot, immediately under the names of the two candidates printed thereon, by pasting on the official ballot a sticker or paster upon which the name "S. W. Tucker" had been printed and (2) that they made a check, cross mark or line on the ballot immediately preceding the name thus inserted and thereafter deposited such ballots in the ballot boxes. The ballots thus altered or marked were not officially counted or included in the official returns as votes validly cast for the said S. W. Tucker.

On August 6, 1965, the Voting Rights Act of 1965 (Public Law 89-110, 79 Stat. 437) enacted by the Congress of the United States became effective in Virginia. This Act had the effect of suspending literacy tests and similar voting qualifications throughout the Commonwealth for a specified period by prescribing that no person might be denied the right to vote in any election because of his failure to comply with a "test or device" as defined by the statute. As used throughout the Act, the phrase "test or device" means any requirement that a registrant or voter must (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any class.

On August 12, 1965—within a week of the effective date (August 6, 1965) of the Voting Rights Act of 1965—the Honorable Levin Nock Davis, Secretary of the appellee State Board of Elections, sent to all registrars of

the Commonwealth of Virginia a bulletin advising them that the Voting Rights Act of 1965 was in force in Virginia and that use of the Virginia registration form in the manner formerly required by Virginia law was prohibited. The above-mentioned bulletin contained the following instructions:

> "The Registrar shall review the forms in the presence of the applicant to insure that all questions are answered clearly and completely. If all questions are not answered clearly and completely, or if the applicant is not able personally to complete the forms in whole or in part because of lack of literacy or otherwise, or has difficulty in doing so, the Registrar shall orally examine the applicant and record the pertinent information on the forms or otherwise assist the applicant in completing the forms. After the forms are completed, the Registrar shall require the applicant to take an oath or affirmation as to the truth of the answers and to sign his name or make his mark thereon."

Subsequently, on October 15, 1965 Mr. Davis also sent to the general registrars and the secretaries of the various electoral boards throughout the Commonwealth—to be delivered by the latter to all judges of election—a further bulletin which informed and instructed all judges of election that:

> "On August 6, 1965, the 'Voting Rights Act of 1965' enacted by the Congress of the United States became effective and is now in force in Virginia. Under the provisions of this Act, any person qualified to vote in the General Election to be held November 2, 1965, who is unable to mark or cast his ballot, in whole or in part, because of a lack of literacy (in addition to any of the reasons set forth in Section 24-251 of the Virginia Code) shall, if he so requests, be aided in the preparation of his ballot by one of the judges of elec-

tion selected by the voter. The judge of election shall assist the voter, upon his request, in the preparation of his ballot in accordance with the voter's instructions, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any voter shall vote.

"These instructions also apply to precincts in which voting machines are used."

The instructions contained in the above-mentioned bulletins continue in full force in the Commonwealth so long as the Voting Rights Act of 1965 remains effective in Virginia.

THE STATUTES INVOLVED

Under consideration in the instant proceedings are Sections 24-251 and 24-252 of the Code of Virginia (1950) as amended which provide:

"§ 24-251.—Any person registered prior to the first of January, nineteen hundred and four, and any person registered thereafter who is physically unable to prepare his ballot without aid, may, if he so requests, be aided in the preparation of his ballot by one of the judges of election designated by himself, and any person registered, who is blind, may, if he so requests, be aided in the preparation of his ballot by a person of his choice. The judge of election, or other person, so designated shall assist the elector in the preparation of his ballot in accordance with his instructions, but the judge or other person shall not enter the booth with the voter unless requested by him, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any elector shall vote. For a corrupt violation of any of the provisions of this section, the person so violating shall be deemed guilty of a misdemeanor and be confined in jail not less than one nor more than twelve months."

"§ 24-252.—At all elections except primary elections

it shall be lawful for any voter to place on the official ballot the name of any person in his own handwriting thereon and to vote for such other person for any office for which he may desire to vote and mark the same by a check (V) or cross (X or +) mark or a line (—) immediately preceding the name inserted. Provided, however, that nothing contained in this section shall affect the operation of § 24-251 of the Code of Virginia. No ballot, with a name or names placed thereon in violation of this section, shall be counted for such person."

QUESTION PRESENTED

Is Section 24-252 of the Virginia Code, as implemented by the regulations of the State Board of Elections, violative of the Fourteenth Amendment to the Constitution of the United States or the Voting Rights Act of 1965?

SUMMARY OF ARGUMENT

Denial of the relief requested by appellants in the trial court and made the subject of their appeal in this case presents no question for consideration by this Court. In essence, appellants seek (1) a judgment declaring that the challenged Virginia statute is invalid to the extent that it purports to deny any voter—*solely because of his inability to write*—the privilege of casting a "write-in" ballot, and (2) an injunction restraining appellees from refusing to count votes cast for any person solely because the name of such person was inserted on the ballot *otherwise than in the handwriting of the voter*. However, the statute in question, as implemented by the regulations of the State Board of Elections, (1) does not purport to deny any person the privilege of casting a "write-in" vote upon such grounds and (2) does not permit appellees to refuse to count a "write-in" vote upon such grounds. On the contrary, "write-in" votes cast in accordance with the regulations of the

State Board of Elections are required to be counted, even though not in the handwriting of the voter. Thus, the denial of the requested relief does not present an issue for consideration by this Court.

The refusal of appellees to count "write-in" votes attempted to be cast by means of stickers or pasters infringes no rights secured to the appellants by the Fourteenth Amendment. The question of whether or not "write-in" votes may be cast in this manner is one for legislative determination, and Virginia law does not permit anyone to vote in this fashion, regardless of the physical or educational condition of the voter. This law is a reasonable expression of the will of the General Assembly of Virginia, does not discriminate against any individual or class of individuals and is not antagonistic to the Fourteenth Amendment.

Nor is the statute under attack violative of the Voting Rights Act of 1965. Under present Virginia law, as implemented by the regulations of the State Board of Elections, educationally handicapped voters may cast "write-in" votes by enlisting the assistance of a judge of election, and no citizen of Virginia is denied the right to vote in any election held in the Commonwealth because of his failure to comply with any "test or device" within the meaning of the Voting Rights Act. The regulations of the State Board of Elections in the case at bar implement the Voting Rights Act of 1965 in a manner which precisely conforms to the relief granted by various United States District Courts under the Voting Rights Act, and the election laws of Virginia, as thus implemented, are fully consistent with all requirements of Federal law.

Finally, the regulations of the State Board of Elections do not constitute a "practice or procedure" within the scope of Section 5 of the Voting Rights Act which requires prior scrutiny and approval of the Attorney General of the United States or the United States District Court for the District

of Columbia. On the contrary, such regulations were necessary in order to implement the Voting Rights Act which became effective on August 6, 1965, and was *then* in force in Virginia. If such regulations could not be put into effect without such prior scrutiny and approval, the effectiveness of the entire Voting Rights Act would be suspended pending receipt of such approval, and the Voting Rights Act contains no language evidencing a Congressional intent to delay the effectiveness of the Federal statute until such permission is first obtained.

ARGUMENT

Section 24-252 Of The Virginia Code, As Implemented By The Regulations Of The State Board of Elections, Is Not Violative Of The Fourteenth Amendment To The Constitution Of The United States Or The Voting Rights Act of 1965.

I.

JURISDICTION

In the instant case, it is important to realize at the outset that the Virginia statute under attack by appellants—Section 24-252 of the Virginia Code—*has been superseded by the Voting Rights Act of 1965.* With the advent of the Voting Rights Act, which suspended in Virginia any requirement that a voter be able to read, write or understand any matter in registering to vote or in voting, the requirement of Section 24-252 that the inserted name of a "write-in" candidate be in the handwriting of the voter was superseded and was no longer enforceable or enforced in Virginia.

Equally important is it to realize that the above-stated propositions *were conceded by appellees in this case from the beginning,* and no attempt whatever was made to assert the efficacy of the challenged enactment in this regard. On

the contrary, appellees established in evidence and emphasized in argument that within a week of the effective date of the Voting Rights Act of 1965—and before the case of *South Carolina* v. *Katzenbach,* 383 U. S. 301, was even instituted in this Court—the appellee State Board of Elections issued a bulletin instructing all registrars to register all persons who were unable themselves to register because of a lack of literacy. (App. 60a). The language in which this bulletin was couched was transposed almost verbatim from the Federal regulations implementing the Voting Rights Act, and the substantial identity of language clearly indicates that every effort was made to conform the applicable Virginia law precisely to the requirements of the Federal statute.[1] In addition, on October 15, 1965—some three weeks before the first general election held in Virginia after the effective date of the Voting Rights Act—the defendant State Board of Elections sent to all general registrars and to all secretaries of the various local electoral boards for transmittal to all judges of elections, a further

[1] FEDERAL REGISTER, VOLUME 30—NUMBER 152, August 7, 1965, Title 45—Chapter 8, CIVIL SERVICE COMMISSION, PART 801—VOTING RIGHTS PROGRAM.

§ 801.203. *Procedures for filing application.*

(a) An applicant may obtain an application at the place and during the times set out in Appendix A for the appropriate political subdivision. An application may be completed only at the place where it was obtained and shall be submitted by the applicant in person to an examiner at that place.

(b) An examiner shall review the application in the presence of the applicant to insure that all questions are answered clearly and completely. If all questions are not answered clearly and completely or if an applicant is not able personally to complete the application in whole or in part because of lack of literacy or otherwise, or has difficulty in doing so, an examiner shall orally examine the applicant and record the pertinent information on the application or otherwise assist the applicant in completing the application.

(c) After an application is completed, an examiner shall require the applicant to take the oath or affirmation prescribed on the application and to sign his name or make his mark thereon.

bulletin instructing all judges of elections to render assistance to any voter who was unable to mark or cast his ballot, in whole or in part, because of a lack of literacy. (App. 64a). As the District Court noted, the instructions contained in these bulletins continue in full force in the Commonwealth so long as the Voting Rights Act of 1965 remains effective in Virginia (App. 72a).

Despite the requirement of the challenged statute that the inserted name of a "write-in" candidate be placed on the ballot in the handwriting of the voter, provision is made, by reference to Section 24-251 of the Virginia Code—for the assistance of physically handicapped voters by the judges of election, who are (1) authorized by the latter provision to assist a physically handicapped voter "in the preparation of his ballot in accordance with" the instructions of the voter and (2) forbidden, under penal sanction, from divulging or indicating in any manner, by sign or otherwise, the name or names of the persons for whom any physically handicapped voter cast his ballot. When the Voting Rights Act of 1965 became effective in Virginia, the provisions of Section 24-251 of the Virginia Code were broadened by the instructions of the State Board of Elections to include the educationally handicapped as well as the physically handicapped within the provisions permitting assistance, and thus render Virginia law consistent with the commands of the Federal statute. These instructions of the State Board of Elections removed from the operative Virginia law any requirement that a person be able to comply with any "test or device" as defined in the Voting Rights Act.

So far as the jurisdictional aspect of the instant appeal is concerned, counsel for appellees believe it important to consider the appellants' appeal in light of the above-canvassed status of the Virginia election laws existing when

this suit was instituted. The relief sought by appellants in their complaint is specified in paragrahs B(1), B(2) and B(3) of their prayers for relief (App. 9a-10a). The injunction requested in paragraph B(2) related solely to the counting of votes cast in the general election held on November 8, 1966—some six months before the case was heard. This request was not pressed at the hearing, was not included in appellants' subsequent motion for summary judgment (App. 66a) and denial of this relief is not a subject of this appeal. See, Plaintiffs' Notice of Appeal, (App. 74a). Indeed, appellants acknowledge (Brief for Appellants, p. 13):

> "By their subsequent motion for summary judgment which asked for relief under prayers B(1) and (3) of the complaint, appellants indicated that they mainly sought relief for future elections and not for the 1966 election (A. 66a)."

Specifically, appellants' appeal from the final order of the District Court entered on May 2, 1967, "whereby prayers B(1) and (3) of the plaintiffs' complaint for a declaratory judgment and injunctive relief were denied and said complaint was dismissed." (App. 74a). In this connection, prayer B(1) of the complaint requested (App. 9a-10a):

> "That the Court enter a judgment declaring that the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and also that the Voting Rights Act of 1965, invalidates so much of Section 24-252 of the Code of Virginia, 1950, as amended *as purports to deny any voter, solely because of his inability to write,* the privilege of casting a secret ballot for a person whose name is not printed on the official ballots and having such ballot counted in the appropriate returns; such privilege having been reserved to voters generally by Section 28 of the Constitution of Virginia." (Italics supplied.)

In the trial court, appellants were wholly unable to establish any foundation for this relief, since appellees admitted that the provisions of Section 24-252 of the Virginia Code which required the name of a "write-in" candidate to be inserted on a ballot in the voter's own handwriting had been superseded by the Voting Rights Act of 1965 and was no longer enforceable in Virginia. No controversy whatever existed between the parties on this point, and no litigable issue —no present clash of contending legal interests—was presented to the District Court for resolution by this feature of the complaint. Indeed, appellees established by their undisputed evidence that no attempt was being made to enforce this aspect of the challenged statute and that regulations issued by the State Board of Elections implementing the Voting Rights Act of 1965 made it clear that no "write-in' vote was to be rejected solely because such vote was not in the handwriting of the voter. Quite to the contrary, provision had been made by such regulations for assistance to be rendered to educationally handicapped voters wishing to cast "write-in" votes, and votes of educationally handicapped persons cast in accordance with such regulations were required to be counted, even though not in the handwriting of the voter. Clearly then, the denial of the relief here under discussion does not present a question for consideration by this Court.

Equally manifest is it that denial of relief requested in prayer B(3) of the complaint presents no such question. The specific relief sought by this paragraph was (App. 10a):

> "That this Court enjoin and restrain the State Board of Elections and the other defendant election officials and their successors in office from failing or refusing to count and from requiring or permitting any other election official to fail or refuse to count any vote here-

> after given for any person *solely because the name of such person was inserted on the official ballot otherwise than in the handwriting of the voter.*" (Italics supplied.)

In the trial court, of course, it was unquestionably established that no Virginia election official *had refused,* or was *required* to refuse or was *permitted* to refuse to count any vote given for any person "solely because the name of such person was inserted on the official ballot otherwise than in the handwriting of the voter." Votes of educationally handicapped voters cast for a candidate whose name was inserted on the ballot in accordance with the regulations of the State Board of Election were required to be counted, even though not in the handwriting of the voter. Thus, according appellants this requested relief would have been superfluous for at least two reasons: (1) it would have enjoined Virginia election officials from actions which they were not permitted by Virginia law to take, had not taken and did not propose to take and (2) it would not have affected the action of Virginia election officials in refusing to count "write-in" votes cast by means of stickers or pasters, since such votes could still be rejected by such officials, even after entry of the requested injunction, without violating the terms of the injunctive order. For these reasons, counsel for appellees submit that the denial of the relief requested in paragraph B(3) of the complaint presents no issue for consideration by this Court.

II.

The Fourteenth Amendment

The General Assembly of Virginia has enacted a comprehensive body of law governing the conducting of elections throughout the Commonwealth which comprises Title 24

of the Code of Virginia (1950) as amended. With particular reference to the case at bar, Virginia law does not permit stickers or pasters to be utilized by voters in casting or marking their ballots under any circumstances—regardless of the physical or educational condition of the individual voter. On October 6, 1936, and again on October 18, 1943, the then Attorney General of Virginia, Abram P. Staples (later a Justice of the Supreme Court of Appeals of Virginia) *ruled* that the utilization of stickers or pasters would be violative of Section 27 of the Virginia Constitution providing for the secrecy of the ballot and was thus prohibited. See, Reports of the Attorney General of Virginia (1936-1937) pp. 63-65; (1943-1944) p. 48. In this connection, Judge Staples declared, Report of the Attorney General of Virginia (1943-1944) p. 49:

> "1. Your first question is whether it is permissible for a voter to use a sticker, consisting of a small strip of paper, upon which has been written or printed the name of a candidate for office for whom he desires to vote, and insert same by pasting it on the ballot at the appropriate place. I find that I had occasion to express my views on this question in an opinion given October 6, 1936, to the chairmen of the electoral boards of the cities of Norfolk and Portsmouth, and of the county of Norfolk. Since that opinion answers your question I quote the same as follows:
>
> " 'The third question is whether or not it is permissible for a voter to use a small sticker with the name of the candidate already checked which the voter may paste on the ballot.
>
> " 'It is my opinion that the addition of a sticker to the ballot constitutes adding thereto other material in the form of paper in addition to the actual ballot itself. No such practice has ever prevailed in Virginia. The pasting on of the additional strip of paper might not be permanent, as it is frequently the case that papers

> pasted together come apart and that stamps often come off envelopes. I am further of the opinion that the pasting of a sticker could be readily detected by the judge of election at the time the ballot is handed to him, as is required by law, to be deposited in the ballot box, and that voting in this manner would be in violation of the provision of the State Constitution providing for the secrecy of the ballot.' "

The view expressed by Judge Staples on these occasions has never been altered by the General Assembly of Virginia. Yet, in the case at bar, for some reason not readily apparent to the appellees, counsel for appellants now seem to assert that Section 24-252 of the Virginia Code—to the extent that it forbids them to utilize stickers or pasters in casting their ballots—infringes rights secured to them by the Fourteenth Amendment.

Initially in this connection, it is significant that no case supportive of appellants' contention can be found. As the District Court pointed out (App. 69a):

> "The plaintiffs' contention that Section 24-252 violates the Fourteenth Amendment because its discriminates against illiterates is not supported by authority."

However, as the District Court also noted, there is no want of authority upon this point, and decisions sustaining and justifying a legislative determination to forbid the use of stickers or pasters are legion. In this connection, the District Court observed (App. 68a):

> "The propriety of stickers is a matter for legislative, not judicial determination. *Arguments for and against their use abound. Stickers have been lauded for facilitating voting and denounced as conducive to fraud and confusion.* Their use has been approved under statutes permitting write-ins, Pace v. Hickey,

> 236 Ark. 792, 370 S.W. 2d 66 (1963); O'Brien v. Board of Elections Comm'rs, 257 Mass. 332, 153 N.E. 553 (1926); Dewalt v. Bartley, 146 Pa. 529, 24 A. 185, 15 L.R.A. 771 (1892); State on Complaint of Tank v. Anderson, 191 Wis. 538, 211 N.W. 938 (1927). Illinois forbade their use, Fletcher v. Wall, 172 Ill. 426, 50 N.E. 230, 40 L.R.A. 617 (1898), and the constitutionality of this ban has been upheld. Blackman v. Stone 101 F. 2d 500, 504 (7th Cir. 1939). (Italics supplied.)

Squarely in point is the decision of the United States Court of Appeals for the Seventh Circuit in *Blackman* v. *Stone,* 7 Cir., 101 F. (2d) 500. That case was a class action by certain residents of Illinois challenging various provisions of the election laws of that State. In a series of decisions, the Supreme Court of Illinois had held that the use of stickers or pasters by voters was forbidden. See, *McSorley* v. *Schroeder, supra; Roberts* v. *Quest,* 173 Ill. 427, 50 N.E. 1073; *Fletcher* v. *Wall, supra.* In the *Blackman* case, plaintiffs contended, *inter alia,* that this provision of the Illinois law was violative of the Fourteenth Amendment. Rejecting this contention the Court declared (101 F. (2d) at 504):

> "It is further contended by appellants that section 288 of the law is invalid because it requires all voters to vote by printed ballots furnished by the State and forbids the use of other ballots or pasters. There is no merit in this contention. *The section is a reasonable expression of the will of the Illinois Legislature and is not in any manner inconsistent with any provision of the Federal Constitution.* (Italics supplied.)"

A brief canvass of the more pertinent and comprehensive of the State court decisions sustaining the validity of statutes forbidding the use of stickers or pasters readily furnishes

the justification for such a legislative determination. In *Fletcher* v. *Wall,* 172 Ill. 427, 50 N.E. 230, the Supreme Court of Illinois sustained a determination of the board of canvassers of a village election rejecting and refusing to count ballots to which paster tickets had been attached. Holding that the use of such pasters was "violative of the spirit and intent of the Election law of this State", the Court observed (172 Ill. 430, 432-433, 50 N.E. 231-232):

> "It is true that, in order that no voter shall be deprived of the right to cast his ballot for whomsoever he will for any office, he is authorized by section 23, when the name is not printed thereon, to prepare his ballot by writing the name of the candidate of his choice in a blank space on said ticket, making an × opposite thereto. It is, however, plainly prescribed by the statute that the ballot furnished by the judges to the voter must be prepared by him individually, after he enters the booth, *except in so far as he may be assisted as an illiterate voter, under the provisions of section 24, and that he shall be allowed to do so uninfluenced or in any way controlled by being electioneered or furnished with tickets or pasters by outsiders.*
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> * * *
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> *"Under the method here adopted they could furnish the ticket as they desired it to be voted, marked, or with instructions to the voter how to mark it, and by the same methods induce him to attach it, as furnished, to the official ballot, and then procure it to be deposited in the ballot-box. The manner of voting prescribed by the act is thereby wholly changed and the secrecy of the ballot entirely destroyed."* (Italics supplied.)

Subsequently, in the later case of *McSorley* v. *Schroeder,* 196 Ill. 99, 63 N.E. 697, the Supreme Court of Illinois reaffirmed the views expressed in *Fletcher* v. *Wall, supra,* in the following language (63 N.E. at 700):

"*It does not follow that* because, under the provisions of section 23, the voter may prepare his ballot by writing the name of the candidate of his choice in a blank space on the said ticket, *he may also indicate his choice by pasting a printed name on the ticket.* Such pasting of the name does not come within the meaning of the words 'writing in the name of the candidate of his choice in a blank space on said ticket.' Fletcher v. Wall, supra. In Roberts v. Quest, supra, we held that under the election law of 1891, *a voter has no authority to insert the name of the candidate of his choice on the official ballot by using a paster, on which the name of such candidate is printed*: and we there said: 'It is, however, plainly prescribed by the statute that the ballot furnished by the judges to the voter must be prepared by him individually, after he enters the booth, except in so far as he may be assisted as an illiterate voter, under the provisions of section 24, and that he shall be allowed to do so uninfluenced or in any way controlled by being electioneered or furnished with tickets or pasters by outsiders. * * * *It is manifest that, if pasters may be resorted to by one candidate, they may be by all, and the official ballot might become but little more than a convenient card upon which to paste private tickets printed and circulated in secret. The use of such tickets would revive the evils sought to be guarded against by the ballot law.*' " (Italics supplied.)

Indeed, two of the cases cited by appellants contain dissenting opinions which furnish abundant support for the rationality and desirability of a statutory scheme which forbids the use of pasters or stickers. Dissenting from the opinion of the majority in *State* v. *Anderson,* 191 Wis. 538, 211 N.W. 938, which held that Wisconsin law permitted voters to use stickers in casting their ballots, two Justices of the Supreme Court of Wisconsin pointed out (211 N.W. at 940, 942):

"As stated in the opinion of the court, after the Australian ballot law was enacted, it was expressly provided that the voter, while in the election booth, could use stickers or pasters in voting, by pasting a slip with the name of the voter's choice on the ballot over the name of the candidate printed thereon. *But that plan evidently did not prove satisfactory, probably for the reason that it permitted one of the abuses prevailing prior to the adoption of the Australian ballot which, as stated by the Supreme Court of Michigan, was*:

" 'Secret organizations met on the night previous to election, and furnished their members with 'vest-pocket' tickets—a proceeding foreign to the spirit of our government.' Detroit v. Rush, 83 Mich. 532, 46 N.W. 951, 10 L.R.A. 171.

"The sticker or paster was substituted for the 'vest-pocket' ticket, and was subject to the same objection. (Italics supplied.)

* * *

Similarly, in the recent (1963) case of *Pace* v. *Hickey*, 236 Ark. 792, 370 S.W. (2d) 66, Chief Justice Harris dissented from so much of the opinion of the majority of the Supreme Court of Arkansas as perpetuated the use of stickers or pasters under Arkansas law and, during the course of his opinion, made the following forceful observations (370 S.W. (2d) at 68-69):

"I believe that the use of stickers makes fraud easier to perpetuate. If a voter does not care to vote for anyone in a particular race, he will make no mark on the ballot at all, and there is nothing to prevent an unscrupulous judge or clerk at an election from reaching into his pocket and placing a paste-on vote on such a ballot. It would be indeed difficult to establish that this paste-on vote was placed on the ballot by someone other than the voter—but, if we stay with the statute, the way is clear to eventually determine whether the voter

cast that vote, *i.e.*, through an examination of the handwriting.

"However, there is, in my view, an even better reason for holding paste-on votes invalid, viz., the use of the stickers destroys the secrecy of the ballot. Most people like to maintain secrecy in casting their votes; they desire to express themselves at the polls without fear of losing someone's good will, or business. Frequently, the voter may be friendly to both candidates, or both may be good customers, and he desires to maintain that friendship, or business, after the election. *He is entitled to cast his vote free from duress, and without fear of retaliation.* In most instances, at a general election, there would probably only be a single race where a 'write-in' candidate would go to the trouble and expense of preparing stickers in advance. (This has been the case in previous elections where such stickers were used.) When the voter approaches the polls, he is likely besieged and beseeched—by those offering the stickers. Let it be borne in mind that the offer of a sticker is entirely different from merely offering campaign literature, for a voter ostensibly could have but one purpose in taking a sticker—that purpose being to use it after he enters the polling booth. If he refuses to take a sticker, he is immediately marked by the person offering it—and by bystanders—as a voter who will cast his vote for the man whose name is already printed on the ballot. If, on the other hand, he takes the sticker, by-standers mark him as one who intends to cast his vote for the 'write-in' candidate—also he would not have taken the sticker. Actually, the voter might accept the sticker as a matter of avoiding embarrassment—but he is still labeled by those viewing the incident as a supporter of the write-in candidate. In addition, the voter's use of the sticker can certainly be detected after he enters the polling both, and prepares to cast his vote. One needs only to glance around to identify those who are pasting stickers on the ballots. *The secrecy of the ballot is thus utterly and completely destroyed."* (Italics supplied.)

Finally, a mere reference to the contested election case which the use of stickers or pasters presented to the Supreme Judicial Court of Massachusetts in *O'Brien* v. *Board of Election Comr's.*, 257 Mass. 332, 153 N.E. 553, is sufficient to demonstrate the numerous and difficult problems which this method of voting may proliferate. Commenting upon the situation there presented, the Court stated (153 N.E. at 555):

> "There was not a single designation of office to be voted for where a paster had not been placed. Some were attached between the various groups for the different offices, others in the corner, on the top, on the bottom, on the margin, and on the back of the ballot. Some were put on horizontally, others diagonally, vertically, upside down, and, in one instance a portion only of the paster was used. On many of the disputed ballots there was no cross or mark at the end of the paster or on the ballot at either end of the paster."

In that case, the use of pasters or stickers gave rise to no less than seven different categories of votes, each of which necessitated independent consideration by the Court to determine whether the votes in each case should be counted at all and, if so, for what candidate.

In light of the views expressed in the above-canvassed decisions, it is clear that the challenged statute forbidding the use of stickers or pasters in Virginia is not arbitrary or capricious but is, indeed, a reasonable, wise and desirable provision which contributes to the purity of elections, uniformity in voting and the secrecy of the ballot throughout the Commonwealth. Indeed, as the District Court expressly pointed out (App. 70a):

"No evidence has been presented that Virginia's prohibition of stickers has been administered in a discriminatory manner. It has not been used to disfranchise any class of citizens. We conclude that § 24-252 does not violate the Fourteenth Amendment by discriminating between literate and illiterate voters." (Italics supplied.)

III.

The Voting Rights Act of 1965

In light of the present status of the election laws of Virginia previously emphasized in this brief, it is difficult to conceive how appellants can assert that they are now required to be able to read or write in order to vote in Virginia, or that they are denied the right to vote for failure to comply with any test or device as defined in the Voting Rights Act of 1965. On the contrary, since the advent of the Voting Rights Act, Virginia law has made ample provision for the educationally handicapped voter to register and cast his ballot, and no citizen of Virginia, otherwise eligible to vote, is denied the right to vote in any election held in the Commonwealth because of his failure to comply with any "test or device" within the meaning of the Voting Rights Act. Precisely in this connection, the District Court declared (App. 72a):

> "The requirement that a write-in candidate's name be inserted in the voter's handwriting is not a test or device defined in 42 U.S.C. § 1973b(c). The requirement did not preclude the plaintiffs from registering or from voting. *Under present Virginia statutes and regulations of the Board of Elections, an illiterate can cast a valid write-in ballot by enlisting the assistance of a judge of election. No evidence was offered that any judge of election denied any illiterate voter the confidential assistance to which he is entitled."* (Italics supplied.)

The conclusion of the District Court in the case at bar is fully consistent with that reached by other Federal courts in which the question has been considered. In *United States* v. *Executive Committee,* 254 F.Supp. 543, the United States District Court for Alabama noted with approval the provisions made by State law for the casting of ballots by the educationally handicapped in the following language (254 F.Supp. at 546):

> "At Title 17, Section 359, Code of Alabama the procedure for assistance to voters who are unable to read when voting by paper ballot is stated. Title 17, Sec. 107, Code of Alabama, gives the procedure in such an instance when voting is conducted by machine. In essence, the statutes provide that the person who is unable to read or mark his ballot *may request assistance* and take an oath, attesting to his incapacity, *and then the two officials shall proceed to assist the voter.*
>
> "It therefore appears that the right to a secret ballot provided by the State of Alabama is subject to certain practical limitations where such secrecy is impossible, *as in the case of an illiterate asking assistance* or a person voting by absentee ballot." (Italics supplied.)

Similarly, in *United States* v. *State of Mississippi,* 256 F.Supp. 344, a three-judge District Court for the Southern District of Mississippi expressly decreed (256 F.Supp. at 349):

> "It is the duty and responsibility of *the precinct officials* at each election to provide *to each illiterate voter who may request it* such reasonable assistance as may be necessary to permit such voter to cast his ballot in accordance with the voter's own decision." (Italics supplied.)

In *Morris* v. *Fortson,* 261 F.Supp. 538, plaintiffs claimed to represent certain illiterate voters whose rights as electors

under the Federal Constitution and the Voting Rights Act of 1965 were alleged to have been infringed by those provisions of Georgia law which prohibited the use of stickers or stamps in casting "write-in" ballots. Rejecting this contention, the three-judge District Court for the Northern District of Georgia declared (261 F.Supp. at 540):

> "We hold that these Code Sections prohibiting the use of stamps or stickers are not unconstitutional or proscribed by the Voting Act of 1965 on their face. We also hold that they are not unconstitutional in application in view of what is hereafter said concerning assistance available to the illiterate voter under the Georgia law.
>
> [3] It is settled that illiterate voters may be rendered assistance. Katzenbach v. Morgan, 1966, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828. Indeed, illiterate voters *must* be rendered assistance in order to effectuate their constitutional right to vote."

Finally, in *United States* v. *State of Louisiana,* 265 F.Supp. 703, a three-judge District Court for the Eastern District of Louisiana, granting relief under the Voting Rights Act of 1965, ordered "election commissioners to give assistance to voters who are unable to read and write." Id. at 708. The relief granted in that case so precisely conforms to that authorized by the regulations of the State Board of Elections in the case at bar as to merit reproduction of certain provisions of the Court's order at length (265 F.Supp. at 709, 712):

> "It is hereby ordered, adjudged, and decreed that the defendants and their agents, *including parish registrars of voters and all parish, municipal and state primary and general election officials* and their officers, employees, and successors, and all those in active concert and participation with them, be and hereby are permanently enjoined from:"
>
> * * *

"c. *Failing to provide* at the polls during each federal, state, parish, and municipal election held in the State of Louisiana, including all primary elections, *assistance to each voter who because of inability to read or write needs assistance* in the operation of any mechanical voting device or in marking his ballot so that his vote be properly cast for the candidates and issues of his choice."

* * *

"A voter who declares *to a commissioner* that he is unable to read or write, shall receive the assistance *of a commissioner of his own selection* in the casting of his ballot. *The Commissioner shall* ascertain the wishes of the voter and *cast the assisted voter's ballot* accordingly. A commissioner shall first, however, require the voter to make a declaration of inability under oath. No person shall swear falsely in order to obtain assistance. Whenever a voter receives assistance, the commissioners in charge of the poll lists shall write the voter's name in the list and shall write in the column of remarks on the poll list opposite the name of the voter the words 'assisted and sworn.' No voter shall ask for or receive assistance from an unauthorized person. No person who is not a commissioner shall volunteer to assist a voter in physically casting his ballot. When a voter calls a commissioner to assist in casting his ballot, one other commissioner, if any, supporting a candidate opposing the elector's preferred candidate, shall enter the polling booth and view the casting of the ballot, *but no other person except commissioners shall give assistance* nor shall any person other than a commissioner at any time enter a polling booth while another voter is in the booth. *No commissioner shall make known the way an assisted voter casts his ballot, or cast the ballot contrary to the instructions of the voter. Nothing in this order affects assistance to blind or physically disabled voters.*" (Italics supplied.)

Counsel for appellees submit that the relief awarded in *United States* v. *State of Louisiana, supra,* in 1966 could easily have been copied from the regulations issued by the Virginia State Board of Elections in 1965. And, of course, the decision in that case was expressly affirmed by this Court. *Louisiana* v. *United States,* 386 U.S. 270. It is thus unarguably apparent that no citizen of Virginia, otherwise qualified to vote, is denied the right to vote in any election held in the Commonwealth because of his failure to comply with any "test or device" as defined in the Voting Rights Act of 1965. Indeed, it is clear that the election laws of Virginia as interpreted and applied by the appellee State Board of Elections since the Voting Rights Act of 1965 became operative in the Commonwealth are fully consistent with all requirements of Federal law.

IV.

Submission of Regulations Under Section 5 Of The Voting Rights Act of 1965

The contention that the regulations of the State Board of Elections under consideration in this case were required to be submitted to the Attorney General of the United States or the United States District Court for the District of Columbia before they could be put into effect fares no better in the hands of the appellants than it did in those of the Solicitor General who initially framed the contention in his Memorandum For The United States. In this connection, the Solicitor General (and now appellants) asserts that regulations of this character, particularly those issued on October 15, 1965, constitute a "practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" within the meaning of Section 5 of the

Voting Rights Act, 42 U.S.C. 1973c, and states that it "would appear to follow that the new requirement could not be used without first passing the scrutiny of either the Attorney General or the United States District Court for the District of Columbia." See, Memorandum for the United States, pp. 6-7. The latter statement is referable to that portion of Section 5 of the Voting Rights Act which suspends the efficacy of any State voting regulation promulgated after November 1, 1964, unless there has been (1) submission of the rule to the Attorney General, in which case it may be used if no objection is interposed within sixty days; or (2) a declaratory judgment from the United States District Court for the District of Columbia that the rule "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . ." See, Memorandum for the United States, p. 6; cf. Brief for Appellants, pp. 57-59.

This assertion of the Solicitor General is accorded only a half-hearted reception by the appellants, and rightly so, for the invalidity of the Solicitor General's position is easily demonstrable. If the instructions issued in the case at bar were subject to the provisions of Section 5 of the Voting Rights Act, it necessarily follows that a State to which the Act applies could not adjust its procedures to comply with the requirements of the Federal law until they received permission to do so from the Attorney General or the District Court for the District of Columbia. The Solicitor General's assertion overlooks the fact that the instructions under consideration were not promulgated to alter Virginia law as such, but were required to implement the Voting Rights Act which became effective on August 6, 1965. The Solicitor General's contention impels the conclusion that the Voting Rights Act, which became law on August 6, 1965, could not

be made effective in practice without the prior consent of the Attorney General or the District Court. Such a conclusion is tantamount to the proposition that the Voting Rights Act could be suspended until the Attorney General or the District Court approved of a State's instructions complying with the Act. Counsel for appellees submit that there is nothing in the Federal statute which even remotely evidences an intention on the part of the Congress to delay the effectiveness of the Voting Rights Act until such permission is first obtained.

No one can say how many illiterate voters were registered pursuant to the instructions of the State Board of Elections within the first sixty days of the enactment of the Voting Rights Act—persons who could not properly have been registered during this period if the position of the Solicitor General is sound. Similarly, there is no way to ascertain how many illiterate voters were assisted in casting their ballots at the general election in November of 1965, pursuant to the instructions in question—voters who could not have been thus assisted had it been necessary to await the expiration of a sixty-day period following issuance of the instruction on October 15, 1965.

Extending his contention, the Solicitor General suggested that this Court remand this case to the District Court with instructions "to grant such relief as is necessary to guarantee that Virginia will refrain from imposing restrictions upon the manner of casting write-in votes pending compliance" with the requirements of Section 5. This suggestion is obviously an attempt to convert the instant case into litigation of the character instituted by the United States in Alabama, Louisiana, Mississippi and South Carolina, as mentioned in the Solicitor General's memorandum. See, Memorandum for the United States, p. 6, fn. 3. Such a suggestion surely

undertakes to obscure the fact that no case warranting equitable relief has been made out in the instant litigation. As the District Court pointed out on two separate occasions in its opinion, no evidence was presented that Virginia's prohibition of stickers or pasters had been administered in a discriminatory manner and no evidence was offered that any judge of election denied any illiterate voter the confidential assistance to which he was entitled (App. 70a, 72a). Indeed, even the Solicitor General admits that Virginia's procedure for casting write-in votes by illiterates, on its face, has no purpose forbidden by the Voting Rights Act and that the Attorney General does not now have evidence that such a purpose existed. See, Memorandum for the United States, pp. 7-8. Thus, the suggestion that the case be remanded to the District Court is manifestly an effort to subject to the jurisdiction of a Federal court Virginia election officials against whom no suggestion of impropriety has been made. The instant case is not now—and never was—a suit to obtain relief from alleged discriminatory registration or voting practices of Virginia election officials, and counsel for appellees submit that neither the Solicitor General nor the appellants can now convert it into such a suit at the ultimate level of appellate review.

CONCLUSION

Virginia law does not permit stickers or pasters to be utilized by voters in casting or marking their ballots under any circumstances, regardless of the physical or educational condition of the individual voter. Notwithstanding, appellants appear to assert that they have the right to select the means which they will employ to vote for a "write-in" candidate (i.e., by use of pasters or stickers) regardless of whether or not Virginia law authorizes this method of voting. Ap-

parently, the right exists only in Virginia, for it is clear from the decisional authorities cited by the District Court that the propriety of utilizing stickers or pasters in this fashion is a matter for legislative determination by each State, and statutes of other States barring use of stickers or pasters are not subject to constitutional objection. Thus, as a constitutional proposition at least, appellants' assertion necessarily entails a determination that the Fourteenth Amendment guarantees educationally handicapped voters in Virginia a right which it does not equally secure to educationally handicapped voters in other States.

Implicit in appellants' position is the contention that the right to vote by means of stickers or pasters is a right granted by the Fourteenth Amendment and the Voting Rights Act of 1965 *to educationally handicaped voters only.* It is perfectly clear from the decisions canvassed in this brief, however, that the Fourteenth Amendment makes no such distinction between the educationally handicapped voter and the physically handicapped voter. Moreover, there is obviously nothing in the Voting Rights Act of 1965 or any of its implementing regulations which even remotely suggests that this method is even permissible, much less required, by the Federal statute.

Counsel for appellees submit that the provisions of Virginia law under attack in the instant case abridge no federally protected right of the appellants. Quite to the contrary, it is clear that in 1965 Virginia conformed its voting procedures to the requirements of the Voting Rights Act of 1965 in a manner substantially identical to that subsequently adopted by various Federal courts fashioning judicial relief under the statute. Surely, such procedures cannot be violative of either the Fourteenth Amendment or the Voting Rights Act of 1965.

In light of the foregoing, counsel for appellees submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. D. McIlwaine III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of the counsel for appellees in the above-captioned matter, hereby certify that copies of this Brief On Behalf Of Appellees have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office, with first-class postage prepaid, this 6th day of September, 1968, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Jack Greenberg, Esq., James M. Nabrit, III, Esq., Norman C. Amaker, Esq. and James N. Finney, Esq., 10 Columbus Circle, New York, New York 10019; and Oliver W. Hill, Esq., S. W. Tucker, Esq., Henry L. Marsh, III, Esq., Harold M. Marsh, Esq., 214 E. Clay Street, Richmond, Virginia 23219; and Anthony G. Amsterdam, Esq., 3400 Chestnut Street, Philadelphia, Pennsylvania, counsel for appellants. All parties required to be served have been served.

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