IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

INTERNATIONAL ALLIANCE OF THEATER STAGE EMPLOYEES LOCAL 927,

Plaintiff,

v.

AARON JOHNSON, in his official capacity as member of the Fulton County Registration and Elections Board, *et al.*

Defendants.

Case No. 1:23-cv-04929-JPB

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BRIEF OF THE UNITED STATES ON THE CONSTITUTIONALITY AND INTERPRETATION OF SECTION 202 OF THE VOTING RIGHTS ACT

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PRELIMINARY STATEMENT

The United States has intervened to defend the constitutionality of Section 202 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10502. Section 202 sets federal standards for absentee voting in presidential elections, including subsection (d)'s requirement that states allow voters to request an absentee ballot "not later than seven days" before presidential Election Day. 52 U.S.C. § 10502(d). As explained below, the Supreme Court in *Oregon v. Mitchell*, 400 U.S. 112 (1970), definitively upheld the constitutionality of Section 202's absentee ballot requirements, including subsection (d)'s absentee request provision. This binding precedent precludes constitutional attack on Section 202.[1]

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FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff challenges a Georgia law limiting absentee voting to voters who have applied for an absentee ballot by eleven days before Election Day, including presidential Election Day. *See* Am. Compl. ¶ 3 (citing O.C.G.A. § 21-2-381(a)(1)(A)). The Amended Complaint alleges that this provision violates Section 202(d). *Id.* at ¶¶ 29-31; *see also* 52 U.S.C. § 10502(d). Section 202(d) mandates that "each State shall provide by law for the casting of absentee ballots" in presidential elections "by all duly qualified residents of such State who may be

[1] At this time, the United States takes no position on any factual dispute before the Court, nor on any legal question other than those described herein.

absent from their election district or unit in such State" on Election Day, "and who have applied therefor not later than *seven days* immediately prior to such election." 52 U.S.C. § 10502(d) (emphasis added).

Plaintiff sued under 42 U.S.C. § 1983. *See* Am. Compl. at ¶ 7. Members of the Georgia State Election Board ("State Defendants") moved to dismiss Plaintiff's Amended Complaint, arguing that a private plaintiff cannot bring a Section 202 claim under Section 1983 and that the Plaintiff lacks standing. Defs.' Mot. to Dismiss Plf.'s Am. Compl. at 3–21, ECF No. 68-1. The United States filed a Statement of Interest, setting forth that 42 U.S.C. § 1983 provides a private right of action to enforce Section 202.[2] U.S. Stmt., ECF No. 70. This Court granted the Motion to Dismiss on standing grounds. Order, ECF No. 97. The case proceeds against the Fulton County Registration and Elections Board Defendants.

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[2] A federal statute is "presumptively enforceable" under Section 1983 if it "unambiguously confer[s]" individual federal rights. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283–284 (2002). To rebut the presumption, defendants must "demonstrate that Congress shut the door to private enforcement either [1] expressly, through specific evidence from the statute itself" or "[2] impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under [Section] 1983." *Gonzaga*, 536 U.S. at 284 n.4 (citations and internal quotation marks omitted). Section 202 unequivocally contains "rights-creating" language. *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 183 (2023) (quoting *Gonzaga*, 536 U.S. at 284, 287). And Defendants cannot rebut this presumption because they have not shown that enforcement under Section 1983 would "distort" Congress' enforcement scheme for Section 202. *Id.* at 190 (quoting *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 127 (2005)).

The Republican National Committee and Georgia Republican Party (together, "Intervenors") have intervened as defendants. Mot. Intervene, ECF No. 52; Order, ECF No. 84. Intervenors moved to dismiss on the ground that Section 202 is unconstitutional. Ints.' Mot. to Dismiss, ECF No. 66. The United States intervened to defend the statute's constitutionality. Notice of Intervention, ECF No. 101. The United States now submits this brief, demonstrating that Section 202 of the Voting Rights Act is constitutional.

Plaintiff's fully briefed motion for preliminary injunction is pending before this Court. Mot. for Prelim. Inj., ECF No. 83; Ints.' Resp. in Opp., ECF No. 96; Plf.'s Reply, ECF No. 99.

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STATUTORY BACKGROUND

As Congress considered reauthorizing and expanding the VRA in 1970, Senator Barry Goldwater offered an amendment, for himself and 28 other senators, "as a substitute" for a narrower House-passed provision regulating presidential elections. *See Amendments to the Voting Rights Act of 1965: Hearings Before the Subcomm. on Const. Rights of the S. Comm. on the Judiciary* 277 (1969) ("VRA Hearings") (statement of Sen. Goldwater). The amendment changed absentee ballot rules to expand opportunities to vote for President. *Id.* at 282-83; *see* 116 Cong. Rec. 5689-90 (text of amendment).

In committee hearings and on the floor, Senator Goldwater explained the justifications for his proposed absentee ballot requirements. In 1968, "[a]pproximately 3 to 5 million . . . fully qualified American citizens were denied the right to vote for President because they were away from home on election day and were not allowed to obtain absentee ballots." 116 Cong. Rec. 6991 (1970) (statement of Sen. Goldwater); *see* VRA Hearings 281. Most states allowed absentee voting by at least some voters, but "some of these same States impose[d] cutoff dates on the time when persons can apply for absentee ballots," which "result[ed] in the disqualification of great numbers of citizens who do not know early enough that they will be away at the time of voting." 116 Cong. Rec. 6991 (statement of Sen. Goldwater); *see* VRA Hearings 281.

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Senator Goldwater laid out four constitutional grounds for proposed amendment: Congress's power (1) to enforce the Fourteenth Amendment's right to vote; (2) under the Necessary and Proper Clause to protect the right to vote for federal officers, a right "inherent in national citizenship"; (3) "to protect the freedom of movement by citizens across State lines"; and (4) under the Necessary and Proper Clause to enforce Article IV's Privileges and Immunities Clause, to prevent "unequal treatment among citizens" and "to enable the citizens of one State to better have the same opportunity to choose the President that is enjoyed by citizens of most States." 116 Cong. Rec. at 6992-94 (statement of Sen.

Goldwater); VRA Hearings 285, 289-91. Senator Goldwater also explained that states had no basis for requiring an earlier ballot request deadline: "37 States" already "permit[ted] some voters to apply for absentee ballots 7 days before an election," which "indicate[d] that more restrictive rules are not necessary." 116 Cong. Rec. at 6993 (statement of Sen. Goldwater); VRA Hearings 289.

Congress adopted Senator Goldwater's amendment as Section 202 of the VRA. *See* VRA Amendments of 1970, Pub. L. No. 91-285, § 202, 84 Stat. 316-17. And Congress agreed with Senator Goldwater's constitutional rationales, making express findings about each of the constitutional ills caused by "the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections." 52 U.S.C. § 10502(a). To that end, Congress "establish[ed] nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections." 52 U.S.C. § 10502(b).

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Section 202(d) requires each state to allow absentee ballots for President and Vice President "by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held *and who have applied therefor not later than seven days immediately prior to such election* and have returned such ballots . . . not later than the time of closing of the polls in such State on the day of such election." 52 U.S.C. § 10502(d) (emphasis

added). It merely sets a floor; states may impose more generous absentee balloting rules. *See* 52 U.S.C. § 10502(g).

ARGUMENT

A. The Supreme Court has held that Section 202 is constitutional.

The Supreme Court has unequivocally held that Section 202 is constitutional. In *Oregon v. Mitchell*, the Court adjudicated Oregon's and Texas's original actions against the Attorney General challenging portions of the 1970 VRA Amendments, as well as the Attorney General's original actions against Arizona and Idaho for violations of those Amendments. U.S. Compl. against Idaho, ECF No. 66-1; s*ee Mitchell*, 400 U.S. at 117 n.1 (op. of Black, J.). The Idaho suit required the Court to adjudicate Section 202's constitutionality. *Mitchell*, 400 U.S. at 117 n.1. Eight Justices upheld Section 202, "concur[ring] in th[e] judgment" that "Congress can set residency requirements and provide for absentee balloting in elections for presidential and vice-presidential electors." *Id.* at 118-19.

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Intervenors ignore the clear language of the Court's opinion in contending that *Oregon v. Mitchell* stopped short of deciding that Section 202's absentee balloting provisions were constitutional. Ints.' Mot. to Dismiss at 7. That decision upheld *all* of Section 202, including Section 202(d)'s seven-day absentee ballot request provision; there was no specific carveout made for the seven-day request

provision. *Mitchell*, 400 U.S. at 119. Justice Black stated that "Congress can . . . *provide for absentee balloting* in elections for presidential and vice-presidential electors," and noted that "my Brothers THE CHIEF JUSTICE, DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN concur in this judgment." *Id.* at 118 (emphasis added) (op. of Black, J.). "Therefore," he announced, "the . . . *absentee balloting provisions* of the Act are upheld." *Id.* at 119 (emphasis added). Thus, the Court's judgment on its face applies to all of Section 202's absentee ballot requirements—including Congress's outer bound for absentee ballot request deadlines.

The Justices' opinions confirm that they considered Section 202's absentee ballot rules when concluding that Section 202 was constitutional. Justice Black expressly noted that "Congress provided uniform national rules for absentee voting in presidential and vice-presidential elections," and upheld those rules. *Id.* at 134. Justices Brennan, White, and Marshall observed that "the States are compelled" under Section 202 "to permit the casting of absentee ballots by all properly qualified persons who have made application not less than seven days prior to the election," *id.* at 236 (op. of Brennan, White, & Marshall, JJ.), and they rejected Idaho's concerns about administrative infeasibility by echoing Senator Goldwater's finding that "[t]hirty-seven States allow application within a week of

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the election," *id.* at 239. Justice Douglas also noted that Section 202 "provides for absentee voting." *Id.* at 147-48.[3]

Intervenors also incorrectly insist that the seven-day absentee ballot request provision was not at issue in *Mitchell* because Idaho—the only State whose laws were alleged to violate Section 202—had no precise deadline for requesting absentee ballots. *See* Ints.' Mot. at 6-7, 12-13. Despite the lack of an across-the-board absentee ballot application deadline in Idaho, *see Mitchell*, 400 U.S. at 227 (Harlan, J., concurring in part and dissenting in part) (reprinting Idaho Code § 34-1101 (1969)), provisions of Idaho law placed Section 202's ballot request provision at issue. New residents who wished "to vote for presidential and vice-presidential electors" were required, "on or before *ten (10) days* prior to the date of the general election," to "make an application in the form of an affidavit executed in duplicate in the presence of the county auditor." *Id.* at 226 (reprinting Idaho Code § 34-409 (1969)) (emphasis added). And Idaho prohibited new residents

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[3] Even Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, who did not expressly mention Section 202's absentee ballot provisions, stated that he would uphold "Section 202" as a *whole*, and described the Section as "a comprehensive provision aimed at insuring that a citizen will not be deprived of the opportunity to vote for the offices of President and Vice President because of a change of residence." *Mitchell*, 400 U.S. at 285 (Stewart, J., concurring in part and dissenting in part); *see* Ints.' Mot. at 5-6 (acknowledging that these Justices "described their decision as broadly upholding 'Section 202 [of] the Voting Rights Act Amendments of 1970,' which contains the uniform absentee voting rules" (alteration in original)).

from voting absentee in presidential elections, instead requiring them to "mark forthwith the ballot in the presence of the county auditor." *Id.* at 226-27 (reprinting Idaho Code § 34-413 (1969)). Thus, for new residents at least, Idaho law directly conflicted with Section 202(d), which requires states to allow absentee ballots by *all* qualified, absent voters who apply not later than seven days prior to presidential Election Day. 52 U.S.C. § 10502(d).

Both sides' arguments reflected that Section 202(d)'s absentee ballot request provision was at issue. Paragraphs 4 and 5 of the United States' complaint discussed Idaho's ten-day presidential ballot request deadline for new residents and its prohibition on absentee ballots for new residents. *See* U.S. Compl. against Ida., ECF No. 66-1, at 4. The complaint then included the VRA's seven-day absentee ballot request provision in its discussion of the relevant portions of Section 202. *Id.* at 5. And it sought declaratory and injunctive relief regarding Idaho's absentee voting provisions. *Id.* at 7-8. Idaho's answer, in turn, denied that its "absentee voting provisions" were preempted "to the extent inconsistent with Section 202," and requested "a declaratory judgment that Section[] 202"—in its entirety—is unconstitutional. Answer at 2, *United States v. Idaho*, 400 U.S. 112 (1970) (No. 47, Original) (Ex. 1).

The parties' briefs likewise directly addressed Section 202(d)'s absentee ballot request provision. Citing the above-mentioned Idaho Code sections, the

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United States' brief emphasized that "Idaho law does not permit persons who have lived within the state for less than six months to register by mail *or to vote by absentee ballot*." *U.S. Mitchell* Br. at 15 (Ex. 2) (emphasis added; citations omitted). Idaho's merits brief likewise pointed to the state law provisions setting a ten-day ballot request deadline and forbidding absentee voting for new residents. Br. for Idaho at 9 n.1, *United States v. Idaho*, 400 U.S. 112 (1970) (No. 47, Original) (Idaho *Mitchell* Br.) (Ex. 3). It acknowledged that those provisions "set forth standards for non-resident voting," *id.* at 25, and defended the State's "absentee ballot provisions" as serving the "compelling state interest[s]" of preventing fraud and "aid[ing] ease of administration," *id.* at 26-27; *see Mitchell*, 400 U.S. at 238-39 (op. of Brennan, White, & Marshall, JJ.) (rejecting these rationales by citing data regarding other states' absentee ballot request deadlines). The Question Presented in both sides' Supreme Court briefs was framed broadly enough to include the absentee ballot request provision, asking whether the 1970 VRA amendments were constitutional "insofar as they . . . prescribe uniform standards regarding absentee registration and absentee balloting in presidential elections." U.S. *Mitchell* Br. at 2; Idaho *Mitchell* Br. at 1-2. It therefore cannot seriously be argued that Section 202(d)'s absentee ballot request provision was not at issue in *Mitchell*.

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Further, contrary to Intervenors' argument, later cases applying different standards do not undermine the Court's decision in *Mitchell*. *See* Ints.' Reply to Mot. to Dismiss, ECF No. 93, at 2, 9. "'If a precedent of th[e Supreme] Court has direct application in a case,' . . . a lower court 'should follow the case which directly controls,' . . . . even if the lower court thinks the precedent is in tension with 'some other line of decisions.'" *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023) (citations omitted). *Mitchell* directly controls.

Moreover, *Mitchell*'s holding also encompasses Section 202(d)'s absentee ballot *receipt* provision. Section 202(d) requires each State to accept any absentee ballot that is "returned . . . not later than the time of closing of the polls in such State on the day of such election." 52 U.S.C. § 10502(d). Intervenors acknowledge that the United States' suit challenged Idaho's law that required all absentee ballots to be "received by the issuing officer by 12:00 o'clock noon on the day of the election," rather than by the close of polls. *Mitchell*, 400 U.S. at 227 (Harlan, J., concurring in part and dissenting in part); Ints.' Mot. at 6-7; *see* U.S. Compl. Against Ida., ECF No. 66-4, at 4 ("Absentee ballots must be received by the issuing officer by noon on the day of an election.").

The constitutionality of the VRA's contrary absentee ballot receipt provision thus plainly was before the Court. And the Court's rationales for upholding Section 202(d)'s absentee ballot *receipt* deadline equally apply to its absentee

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ballot *request* floor. Both measures regulate the timing of the absentee balloting process in presidential elections and protect the voting rights of those who travel during such elections. Each ground on which the Justices upheld Section 202 generally covers Section 202(d)'s ballot request provision, just as it does the ballot receipt provision. The Supreme Court's reasoning is necessary to its decision and thus forms part of its holding, which binds this Court. *See Del Valle v. Secretary of State*, 16 F.4th 832, 841 (11th Cir. 2021). But "[e]ven if the relevant language in [*Mitchell*] is dicta," lower courts "are obligated to respect it." *Henderson v. McMurray*, 987 F.3d 997, 1006 (11th Cir. 2021). Because *Mitchell* is apposite and binding, this Court should uphold Section 202's absentee ballot request provision.

B. Congress has constitutional authority to regulate federal elections.

Mitchell resolved Section 202(d)'s constitutionality. Still, the seven-day absentee ballot request provision is easily sustained on numerous grounds, each of which independently supports the constitutionality of the statute. As explained further below, Congress can limit states' absentee ballot request deadlines under its Article II power to pick the time of choosing presidential electors, its power to effectuate Article II under the Necessary and Proper Clause, and its inherent authority to maintain a national government.

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1. Congress has the power under Article II to set limits on the deadlines states can set for absentee ballot requests.

Section 202(d)'s ballot request provision is also constitutional under Article II. The Constitution provides that "[t]he Congress may determine *the Time of ch[oo]sing the Electors*, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." U.S. Const. art. II, § 1, cl. 4 (emphasis added). Congress's constitutional authority to "regulate the time of the election" includes power to prescribe timing for "the combined actions of voters and officials meant to make a final selection of an officeholder." *Foster v. Love*, 522 U.S. 67, 71 (1997); *cf. Ex parte Siebold*, 100 U.S. 371, 396 (1879) (allowing Congress to regulate "the times of voting").

In *Foster*, the Court held that Louisiana's open primary system—which placed all congressional candidates on the ballot in October and dropped the general election if one candidate received a majority—"does purport to affect the timing of federal elections" by allowing the actions of voters and officials needed to elect members of Congress to be completed before Congress's chosen Election Day. 522 U.S. at 73. While *Foster* directly addressed Congress's power to regulate congressional elections under the Article I Elections Clause, both it and Article II's Electors Clause identically authorize Congress to regulate the "Time" of federal elections, U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 4. *Foster* also recognized Congress's Article II time-regulation authority as the Elections

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Clause's "counterpart for the Executive Branch," 522 U.S. at 69. Congress's power to issue time-related rules under each clause, therefore, is coterminous. *Cf. id.* Accordingly, Congress may regulate the timing of the activities that constitute the choice of presidential electors.

Likewise, Article II's grant of power to determine the "Time" of choosing presidential electors "does not require that individual voters all choose the Electors on the same day." *Harris v. Fla. Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317, 1324 (N.D. Fla.) (citation omitted), *aff'd*, 235 F.3d 578 (11th Cir. 2000). Courts have thus uniformly rejected challenges to state laws allowing early voting, noting that, while Congress has set a single date for the presidential "election," it also has required absentee voting for federal elections in Section 202 and other statutes. *See Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001); *Millsaps v. Thompson*, 259 F.3d 535, 544-545 (6th Cir. 2001); *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 776-777 (5th Cir. 2000). Congress thus has power to decide "which" of the actions of voters and officials needed to choose electors "must occur on federal election day" versus some other day. *Millsaps*, 259 F.3d at 544. Congress may set a multi-day voting period or set varied deadlines related to different forms of voting. *Cf. Foster*, 522 U.S. at 72.

Article II, particularly when read with the Necessary and Proper Clause, authorizes Congress to regulate absentee ballot request deadlines in regulating the

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timing of the choice of electors. Congress's authority under the Necessary and Proper Clause "leaves to the Congress the choice of means by which its constitutional powers are to be carried into execution," *United States v. Classic*, 313 U.S. 299, 320 (1941), including its powers to regulate the timing of presidential elections. "[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 560 U.S. 126, 134 (2010).

Hence, there need only be a rational relationship between setting an outer bound on states' deadlines for applying for absentee ballots and regulating the "Time of ch[oo]sing the Electors." U.S. Const. art. II, § 1, cl. 4. Such a connection is easy to find. Congress rationally could determine that, if presidential electors are to be chosen at Congress's specified time in a world with absentee voting, *id.*, it must regulate when voters must request and return such ballots, just as it must regulate when in-person voters must appear and cast their ballots. *Cf. United States v. Louisiana*, 196 F. Supp. 3d 612, 625 (M.D. La. 2016) ("[T]he Necessary and Proper Clause has been read to authorize legislation deemed essential to the realization of principal aims animating the Elections Clause."), *vacated on other grounds*, 2017 WL 4118968 (Aug. 21, 2017).

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The seven-day absentee ballot request provision falls squarely within Congress's power to specify the times of choosing electors. *Mitchell* approved, and this case does not implicate, Section 202's baseline requirement that states furnish absentee ballots to all those who may be absent from their election districts on the date of a presidential election. *See Mitchell*, 400 U.S. at 118-119 (op. of Black, J.). Rather, as Intervenors themselves note, "[t]his case concerns" only "a narrow portion of" Section 202: "the federal seven-day deadline for absentee ballot applications." Ints.' Mot. at 6, 12. Taking the existence of absentee voting requirements as a given, the seven-day ballot request provision plainly constitutes a regulation of the *time* by which states may require voters to take an action that is necessary "to make a final selection of an officeholder." *Foster*, 522 U.S. at 71. Indeed, Congress explicitly tied the time for requesting a ballot to the date of the "presidential election." 52 U.S.C. § 10502(d). Thus, the ballot request provision itself is a permissible regulation of the "Time of ch[oo]sing the Electors." U.S. Const. art. II, § 1, cl. 4.[4]

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[4] Intervenors wrongly assert that a majority in *Mitchell* "agreed that Congress could not have enacted Section 202 under" Article II. Ints.' Mot. at 16. Justice Black relied on Article II to uphold Section 202, and only Justice Harlan expressly rejected Justice Black's rationale. *See Mitchell*, 400 U.S. at 213 (Harlan, J., concurring in part and dissenting in part). The other Justices did not opine on the issue.

2. Congress has the power to enact legislation to preserve the national government.

Additionally, Congress's authority encompasses any legislation Congress deems necessary and proper to protect and maintain the federal government. *Buckley v. Valeo*, 424 U.S. 1, 13 n.16 (1976) (per curiam). Congress may act to protect "the purity of presidential and vice presidential elections," as long as it does not unduly "interfere with the power of a state" under Article II's Electors Clause "to appoint electors or the manner in which their appointment shall be made." *Burroughs v. United States*, 290 U.S. 534, 544 (1934). Indeed, Article II's Electors Clause "has been interpreted to grant Congress power over Presidential elections coextensive with that which Article I section 4 grants it over congressional elections." *Ass'n of Cmty. Organizations for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995); *accord Ass'n of Cmty. Organizations for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997); *Voting Rts. Coal. v. Wilson*, 60 F.3d 1411, 1414 (9th Cir. 1995); *see Fish v. Kobach*, 840 F.3d 710, 719 n.7 (10th Cir. 2016). Justice Black upheld Section 202 based on this congressional power "to regulate federal elections." *Mitchell*, 400 U.S. at 134.

As the Framers recognized, "'every government ought to contain in itself the means of its own preservation,' and 'an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy.'" *Arizona v. Inter Tribal Council of*

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Ariz., Inc., 570 U.S. 1, 8 (2013) (quoting *The Federalist No. 59*, at 362-63 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). The Elections Clause and Article II "reflect the idea that the Constitution treats both the President and Members of Congress as federal officers." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 n.17 (1995). "Essential to the survival and to the growth of our national government is its power to fill its elective offices and to insure that the officials who fill those offices are as responsive as possible to the will of the people whom they represent." *Mitchell*, 400 U.S. at 134 (op. of Black, J.).

More than 140 years ago, the Court in *Ex parte Yarbrough* held that Congress could protect the right to vote in presidential elections against state and private interference. 110 U.S. 651, 662, 666 (1883). Both "the interest of the party concerned" and "the necessity of the government itself" require "that the votes by which its members of congress *and its president* are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice." *Id.* at 662 (first emphasis added). The Court pointed directly to the Necessary and Proper Clause to refute the argument that Congress has "no *express* power to provide for preventing violence exercised on the voter as a means of controlling his vote." *Id.* at 658.

Fifty years later, in *Burroughs*, the Court upheld a federal disclosure law for presidential campaigns. 290 U.S. at 534. The challengers asserted that Congress

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had power only to set the time for choosing electors, but the Court held that "[s]o narrow a view of the powers of Congress in respect of the matter is without warrant." *Id.* at 544. The Court determined that Congress possesses the power to regulate campaign finance for the same reasons "it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption." *Id.* at 545, 547. The Court held that "[t]he power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress." *Id.* at 547-548. *See also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 187 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Buckley*, 424 U.S. at 13, 90 (per curiam).

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These precedents provide ample authority to sustain Section 202(d)'s absentee ballot request provision as a permissible exercise of Congress's power to regulate presidential elections. Setting a date by which voters must be allowed to request absentee ballots fits snugly within Congress's Article II and Necessary and Proper Clause powers, as well as within its inherent authority to protect the smooth functioning of presidential elections and to ensure that the President and Vice President are "as responsive as possible to the will of the people whom they represent." *Mitchell*, 400 U.S. at 134 (op. of Black, J.).

C. Section 202 protects the constitutional right to travel.

In passing Section 202, Congress found that the lack of opportunity to cast absentee ballots in presidential elections "denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines." 52 U.S.C. § 10502(a)(2). Six Justices in *Mitchell* agreed that Section 202 was a permissible means of protecting the right to travel. 400 U.S. at 239 (op. of Brennan, White, & Marshall, JJ.); *id.* at 285-286 (Stewart, J., concurring in part and dissenting in part).

"Th[e Supreme] Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974). "A state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (citations and internal quotation marks omitted). Intervenors are therefore incorrect asserting that a law must be targeted solely at interstate travelers to trigger this constitutional right. *See* Ints.' Mot. at 10.

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Too-early deadlines for requesting absentee ballots, Congress found, "denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines." 52 U.S.C. § 10502(a)(2). Such deadlines require voters to request an absentee ballot significantly ahead of time, even if they do not yet know that they will be traveling that day. They thus "force a person who wishes to travel . . . to choose between travel and the basic right to vote. Absent a compelling state interest, a State may not burden the right to travel in this way."[5] *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) (citation omitted); *see also Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004) (condemning as "an especially malignant unconstitutional condition" a situation in which "citizens are being required to surrender a constitutional right . . . not merely to receive a discretionary benefit but to exercise . . . other fundamental rights"). Such deadlines also "result[] in the unequal distribution of" the right to vote based on whether residents seek to exercise their right to travel during an election. *Soto-Lopez*, 476 U.S. at

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[5] As explained further below, p. 27, *infra*, no compelling state interest justifies having deadlines earlier than seven days before presidential elections. 52 U.S.C. 10502(a)(6) (congressional finding that earlier absentee ballot request deadlines "do[] not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections."); *see also* 116 Cong. Rec. at 6991 (statement of Sen. Goldwater); *Mitchell*, 400 U.S. at 239 (opinion of Brennan, White, & Marshall, JJ.) (citation omitted) (explaining the assertion that earlier deadlines were necessary for administrability reasons is "difficult to credit" when "[t]he provisions for absentee voting" in Section 202 were "drawn from the proven practice of the States themselves").

903. Congress has authority to limit states' ability to so impede voters' right to travel. *Griffin v. Breckenridge*, 403 U.S. 88, 106 (1971).

Intervenors incorrectly insist that Section 202(d) cannot survive review under the "congruence and proportionality" standard that *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), held applies to enforcement legislation under Section 5 of the Fourteenth Amendment. Ints.' Mot. at 8-15. *City of Boerne* does not apply here, because "the right to travel freely from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment." *United States v. Guest*, 383 U.S. 745, 759 n.17 (1966). The Court repeatedly has refused to "identify the source" of the "right to free interstate movement," as "[t]he right of 'free ingress and regress to and from' neighboring States . . . may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'" *Saenz v. Roe*, 526 U.S. 489, 501 (1999) (citations omitted)). Thus, the "constitutional right of interstate travel is a right secured against interference from any source whatever, whether governmental or private." *Guest*, 383 U.S. at 759 n.17; *see Saenz*, 526 U.S. at 498.

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Even if *City of Boerne* applied (which it does not), Intervenors' objections about the adequacy of Congress's findings would fall short. *See* Ints.' Mot. at 11-12. Congress found that a small minority of states inflicted an outsized burden on the right to travel by imposing unreasonable deadlines for requesting and returning

absentee ballots. 116 Cong. Rec. at 6992-6994 (Statement of Sen. Goldwater). And Congress reasonably determined that states lack an administrative interest in imposing earlier request deadlines when nearly three quarters of the states already imposed deadlines of seven days or less. *Id.* at 6993. Regardless, "[j]udicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide.'" *City of Boerne*, 521 U.S. at 531-532 (quoting *Mitchell*, 400 U.S., at 207 (opinion of Harlan, J.)). And, thus, "[a]s a general matter, it is for Congress to determine the method by which it will reach a decision." *Id.*

Intervenors get no further by claiming Section 202(d) is overinclusive. Ints.' Mot. at 10. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *City of Boerne*, 521 U.S. at 518 (citation omitted). In short, "Congress may paint with a much broader brush than may this Court." *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1560 (11th Cir. 1984) (quoting *Mitchell*, 400 U.S. at 284 (Stewart, J., concurring in part and dissenting in part)).[6]

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[6] Intervenors' charge of under inclusiveness—because Section 202 applies only in presidential elections—also rings hollow. *See* Ints.' Mot. at 11. Congruence and

Shelby County v. Holder, 570 U.S. 529 (2013), also does not apply. *See* Ints.' Mot. at 9, 11; Ints. Reply at 7-8. Congress need not constantly re-justify Section 202. Nothing in the Reconstruction Amendments' text or history, nor in *City of Boerne*, causes statutes to lapse if not continually tended to by Congress. In fact, the Court in *City of Boerne* expressly disclaimed "that § 5 legislation requires termination dates." 521 U.S. at 553. To the contrary, courts routinely have upheld decades-old statutes based on the scope of the problem at the time of enactment, relying on the enacting Congress's legislative record.[7]

D. Section 202 validly protects the right to vote under the Fourteenth Amendment.

Finally, Congress had authority under Section 5 of the Fourteenth Amendment to protect voters' right to vote for president, which Section 1 of that Amendment guarantees. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam).

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proportionality review does not require the narrow tailoring to which legislative acts must conform under strict scrutiny. *See City of Boerne*, 521 U.S. at 517-520, 531-532, 536 (noting high level of deference the Court owed to Congress's judgment). And even under strict scrutiny review, a legislature "need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015). After all, it is "somewhat counterintuitive to argue that a law" exceeds Congress's constitutional authority by infringing "*too little*" on state power. *Id.* at 448.

[7] *See*, *e.g.*, *Vote.Org v. Callanen*, 89 F.4th 459, 486-87 & n.11 (5th Cir. 2023) (1964 statute); *Nat'l Ass'n of the Deaf*, 980 F.3d at 773-74 (11th Cir. 2020) (1990 statute); *In re Employment Discrimination Litig. Against State of Ala.*, 198 F.3d 1305, 1323 (11th Cir. 1999) (1972 provision); *Hundertmark v. State of Fla. Dep't of Transp.*, 205 F.3d 1272, 1276 (11th Cir. 2000) (1973 provision).

Voters also "have a First Amendment right 'to associate for the advancement of political beliefs.'" *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019) (citation omitted). As a protection of voters' First and Fourteenth Amendment rights to vote, or as a protection of a privilege and immunity of national citizenship, Congress's ballot request provision was a congruent and proportional response to the denial of voting rights it found.

1. Congress may impose an outer limit on states' absentee ballot request deadlines to protect voters' First and Fourteenth Amendment right to vote.

Section 202(d)'s absentee ballot request provision appropriately addresses the burden on voting rights caused by unreasonably early request deadlines. In enacting Section 202, Congress expressly found that "the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections . . . denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President" and "has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment." 52 U.S.C. §§ 10502(a)(1) and (a)(5). Congress was permitted to remedy these violations by setting an outer limit on absentee ballot request deadlines in presidential elections.

The Supreme Court has recognized an individual right to vote in presidential elections. It stated that once "the state legislature vests the right to vote for

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President in its people," which Georgia has done, Article II nationalizes this choice and provides a "federal constitutional right to vote for electors for the President of the United States." *Bush*, 531 U.S. at 104; *see also McPherson v. Blacker*, 146 U.S. 1, 35-36 (1892) (stating that "public opinion had gradually brought all the states as matter of fact to the pursuit of a uniform system of popular election by general ticket" of presidential electors). This right "is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter" under the Fourteenth Amendment. *Bush*, 531 U.S. at 104. Voters also "have a First Amendment right 'to associate for the advancement of political beliefs.'" *Lee*, 915 F.3d at 1319 (citation omitted).

"Here, the burden falls on vote-by-mail . . . voters' fundamental right to vote," specifically on the rights of those who cannot vote in person because they may not be physically present in their jurisdiction. *Id.* "Plaintiffs d[o] not need to show that they were legally prohibited from voting, but only that 'burdened voters have few alternate means of access to the ballot.'" *Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) (citation omitted). Congress had good reason to conclude that early ballot request deadlines imposed severe burdens on the right to vote: voters who are absent from their home jurisdictions on Election Day on short notice are entirely deprived of their right to vote. *See Obama for Am.*, 697 F.3d at 434 ("[A]bsent voters obviously cannot cast ballots in person."). "[A]ny voter

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could be suddenly called away and prevented from voting on Election Day" due to "personal contingencies like medical emergencies or sudden business trips." *Id.* at 435. In 1968, states' ballot request deadlines prevented three to five million Americans from voting. 116 Cong. Rec. at 6991 (statement of Sen. Goldwater).

Congress demonstrated that states' early absentee ballot request deadlines "do[] not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections." 52 U.S.C. 10502(a)(6). Congress had data before it that only 13 states had absentee ballot request deadlines more than seven days before the election. *See* 116 Cong. Rec. at 6991 (statement of Sen. Goldwater). Any assertion that earlier deadlines were (or are now) necessary for administrative feasibility or fraud prevention is "difficult to credit" when "[t]he provisions for absentee voting" were "drawn from the proven practice of the States themselves." *Mitchell*, 400 U.S. at 239 (opinion of Brennan, White, & Marshall, JJ.) (citation omitted). And over five decades' experience with the seven-day floor shows that states can administer elections without earlier absentee ballot deadlines.

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Congress has particularly strong authority to regulate states' absentee ballot deadlines to protect individuals' voting rights in *presidential* elections. Indeed, "the Fourteenth Amendment grants new power to Congress to enforce the provisions of the Amendment against the States." *Trump v. Anderson*, 601 U.S. 100, 112 (2024) (per curiam). And "[i]n the context of a Presidential election,

state-imposed restrictions implicate a uniquely important national interest." *Id.* at 115-116 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983)). Because "'the impact of the votes cast [for President] in each State is affected by the votes cast'—or, in this case, the votes not allowed to be cast—'for the various candidates in other States,'" the imposition of overly stringent absentee ballot request deadlines by states "would 'sever the direct link that the Framers found so critical between the National Government and the people of the United States' as a whole." *Trump*, 601 U.S. at 116 (citations omitted). Likewise, each "State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson*, 460 U.S. at 795; *see also* Ints.' Mot. at 3 (recognizing "presidential elections [a]re unique" in that "candidates are on the ballot in multiple states," "[t]hey campaign on national platforms, address national issues, and are chosen by the electors across the country, not just in one State").

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Congress's absentee ballot request provision is a congruent and proportional response to the harm inflicted on the Fourteenth Amendment's right to vote by early absentee ballot request deadlines, satisfying the *City of Boerne* test. *See City of Boerne*, 521 U.S. at 508. [8] As discussed, Congress enacted Section 202 because

[8] *Cf., Anderson*, 460 U.S. at 780; *Burdick v. Takushi*, 504 U.S. 428 (1992); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020). The *Anderson-*

"the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections . . . denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President" and "has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment." 52 U.S.C. §§ 10502(a)(1) and (a)(5). Congress reasonably based this finding on the data discussed above. *See* pp. 4, 26-27, *supra*. In limiting the advance notice states may require of absentee voters, Congress was validly enforcing rather than "decree[ing] the substance of the Fourteenth Amendment's restrictions on the States." *City of Boerne*, 521 U.S. at 519.

2. Section 202 protects the right to vote as a privilege or immunity of national citizenship under the Fourteenth Amendment.

Finally, Congress had authority to impose an outer limit on absentee ballot request deadlines to enforce the Privileges or Immunities Clause. *See* U.S. Const. Amend. XIV, § 1. The Supreme Court has long recognized that "[t]he right to vote for national officers is a privilege and immunity of national citizenship." *Mitchell*, 400 U.S. at 149 (op. of Douglas, J.). *Ex parte Yarbrough* held that the right to vote

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Burdick test involves "weigh[ing] the character and magnitude of the asserted First and Fourteenth Amendment injury against the state's proffered justifications for the burdens imposed by the rule, taking into consideration the extent to which those justifications require the burden to plaintiffs' rights." *Lee*, 915 F.3d at 1318. "The more a challenged law burdens the right to vote, the stricter the scrutiny to which we subject that law." *Id.* at 1319.

in federal elections "is guarant[ee]d by the constitution, and should be kept free and pure by congressional enactments whenever that is necessary." 110 U.S. at 665. Then, the Court declared that "[a]mong the rights and privileges which have been recognized by this court to be secured to citizens of the United States by the constitution are . . . the right to vote for presidential electors." *In re Quarles*, 158 U.S. 532, 535 (1895). Later cases have likewise recognized the right to vote as a privilege of national citizenship that Congress may protect.[9]

Section 202(d)'s absentee ballot request provision is a congruent and proportional response to enforcing the Privileges and Immunities Clause. Congress found that "the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections . . . denies or abridges the privileges and immunities guaranteed to the citizens of each State." 52 U.S.C. § 10502(a)(3). It reasonably based this finding on data showing millions of voters deprived of their right to vote because of unreasonably early absentee ballot request

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[9] *See, e.g.*, *Classic*, 313 U.S. at 314-315; *Twining v. New Jersey*, 211 U.S. 78, 97 (1908), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964); *Chen v. City of Houston*, 206 F.3d 502, 524 n.16 (5th Cir. 2000); *Hall v. Louisiana*, 12 F. Supp. 3d 878, 888 (M.D. La. 2014); *Morris v. Douglas Cnty. Bd. of Educ.*, No. 1:07-CV-00162, 2007 WL 9710488, at *6 n.12 (N.D. Ga. Oct. 12, 2007); *U.S. ex rel. Katzenbach v. Original Knights of Ku Klux Klan*, 250 F. Supp. 330, 355 (E.D. La. 1965) (three-judge court).

deadlines.[10] *See* pp. 4, 27, *supra*. And in limiting the advance notice states may require of absentee voters, Congress was properly enforcing "the substance of the Fourteenth Amendment's restrictions on the States." *City of Boerne*, 521 U.S. at 519. As Justice Douglas noted, the Court already "had determined that voting for national officers is a privilege and immunity of national citizenship" before Congress passed Section 202, so "[n]o congressional declaration was necessary." *Mitchell*, 400 U.S. at 149 n.13. Thus, Congress validly enforced the Privileges and Immunities Clause.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court hold that Section 202 is constitutional.

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[10] Classifications that discriminate on a basis protected by the Clause generally are subject to strict scrutiny. *See, e.g.*, *Saenz*, 526 U.S. at 504. The Court in *Anderson* examined the application of a State's general ballot access law to presidential elections under the more flexible standard that became *Anderson-Burdick*, *see* 460 U.S. at 788-789. But under either standard, Congress's response to the record before it satisfies the *City of Boerne* test for legislation passed pursuant to Section 5 of the Fourteenth Amendment. *City of Boerne*, 521 U.S. at 508.

July 22, 2024

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CERTIFICATE OF SERVICE

I certify that on July 22, 2024, I filed the foregoing via the CM/ECF system, which sends notice to counsel of record.

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with Local Rule 5.1(C) because it is prepared in Times New Roman font at size 14.

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EXHIBIT

1

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 47, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF IDAHO

Defendant

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SOLICITOR GENERAL

ANSWER FOR THE STATE OF IDAHO

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State of Idaho

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Attorneys for Defendant

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 47, Original

UNITED STATES OF AMERICA,)
Plaintiff,)
v.)
STATE OF IDAHO)
Defendant)

ANSWER FOR THE STATE OF IDAHO

The State of Idaho, Defendant, for its answer to the Complaint heretofore filed in the above captioned cause, admits, denies, and alleges as follows:

In answer to the first cause of action, the State of Idaho:

I.

Admits all the allegations contained in the first cause of action in Plaintiff's Complaint except that allegation contained in Paragraph VII thereof which alleges that the continued enforcement of durational residency requirements and absentee voting provisions to the extent inconsistent with Section 202 of the Voting Rights Act of 1965,

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as amended, is unlawful under Article VI of the Constitution of the United States, which allegation is specifically denied.

In answer to the second cause of action alleged:

II.

Admits all the allegations contained in the second cause of action in Plaintiff's Complaint except that allegation contained in Paragraph XIII of the Complaint which alleges that the continued enforcement of age requirements for registration and voting contained in the constitution and statutes of the State of Idaho in conflict with Section 302 of the Voting Rights Act of 1965, as amended, is violative of the Constitution of the United States, which allegation is specifically denied.

III.

Defendant specifically alleges that the enforcement of Section 202 of Title II of the Voting Rights Act of 1965, as amended, and Section 302, Title III, of the Voting Rights Act of 1965, as amended, against Defendant is prohibited by the Constitution of the United States.

Defendant having answered the Complaint, prays this Court to enter a declaratory judgment that Sections 202 and 302 of the Voting Rights Act of 1965, as amended, are in violation of the Constitution of the United States and unenforceable against the Defendant and to render to the Defendant such other relief as it may deem proper in the above entitled matter.

DATED this 15 day of October, 1970.

Robert M. Robson

ROBERT M. ROBSON
Attorney General
State of Idaho
Statehouse, Boise, Idaho 83707

ATTORNEY FOR DEFENDANT

PROOF OF SERVICE

I, Robert M. Robson, Attorney General of Idaho, hereby certify that on the 15 day of October, 1970, I served the foregoing Answer for the Defendant upon the Plaintiff by depositing a copy in the United States Mail, postage prepaid, and addressed to Honorable John N. Mitchell, Attorney General of the United States, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530.

Robert M. Robson

ROBERT M. ROBSON

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EXHIBIT 2

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Nos. 46, Original and 47, Original

In the Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES, PLAINTIFF

v.

STATE OF ARIZONA, DEFENDANT

UNITED STATES, PLAINTIFF

v.

STATE OF IDAHO, DEFENDANT

BRIEF FOR THE UNITED STATES

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ERWIN N. GRISWOLD,
Solicitor General,
JERRIS LEONARD,
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FOR YOUR APPROVAL

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Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 46, Original

UNITED STATES, PLAINTIFF

v.

STATE OF ARIZONA, DEFENDANT

No. 47, Original

UNITED STATES, PLAINTIFF

v.

STATE OF IDAHO, DEFENDANT

BRIEF FOR THE UNITED STATES

JURISDICTION

The government's complaints were filed August 17, 1970. On August 25, 1970, the Chief Justice entered an order setting the cases for oral argument on October 19, 1970, together with original actions brought by Oregon and Texas (*Oregon* v. *Mitchell*, No. 43, Original; *Texas* v. *Mitchell*, No. 44, Original) and directing that any oppositions to the motions for leave to file, answers, and briefs be filed at stated times prior to that date. On August 26, 1970, Arizona urged

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the Court to permit the filing of the government's complaint; on August 28, 1970, Idaho also moved that the government's complaint against it be accepted.

This Court has original jurisdiction over a suit brought by the United States against a state. Const. Art. III, Section 2; see also 28 U.S.C. 1251(b)(2).

QUESTION PRESENTED

Whether the Voting Rights Act Amendments of 1970, 84 Stat. 314, are constitutional insofar as they (1) suspend the use of literacy tests as prerequisites for voting in states or their political subdivisions not subject to suspension under the Voting Rights Act of 1965, (2) restrict durational residency requirements in regard to voting for President and Vice President and prescribe uniform standards regarding absentee registration and absentee balloting in presidential elections and (3) prohibit the states from denying the vote on account of age to any otherwise qualified person 18 years of age or older in any election.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides in pertinent part as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Fifteenth Amendment provides as follows:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

The Voting Rights Act Amendments of 1970, P.L. 91-285, 84 Stat. 314, *et seq.*, are set forth in Appendix A, *infra*, pp. 77–85.

The pertinent provisions of Article 7, Section 2 of the Arizona Constitution and Sections 16–101 and 16–107 of the Arizona Revised Statutes are set forth in Appendix B, *infra*, pp. 86–87.

The pertinent provisions of Article 6, Section 2 of the Idaho Constitution and Sections 34–401, 34–408, 34–409, 34–413, 34–1101, 34–1105 of the Idaho Code are set forth in Appendix C, *infra*, pp. 88–90.

STATEMENT

The United States has invoked the original jurisdiction of this Court seeking declaratory and injunctive relief to enforce the Voting Rights Act Amendments of 1970, 84 Stat. 314. The defendant states, through their Attorneys General, have formally advised the Attorney General of the United States that

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they will not comply with portions of the act, necessitating these actions for its enforcement.

I. THE STATUTE AND ITS EFFECT

The Voting Rights Act Amendments of 1970 were signed by the President on June 22, 1970. Title I of the new law extends for five years the operation of Section 4(a) and related sections of the Voting Rights Act of 1965,[1] a principal effect of which was to suspend the use of literacy tests in six southern states and parts of three other states. Sections 3, 4 and 5 of the 1970 Amendments. This title is not at issue in the present suits. The 1970 Amendments also add two new titles to the 1965 Act, and these are the focus of the present disputes. Title II suspends the use of literacy tests in all states and counties not subject to suspension by reason of the 1965 Act, Section 201, and seeks to assure the right to vote in future presidential elections to otherwise qualified voters who change their residence in the months preceding the election, or who cannot register or vote in person. Section 202. Title III prohibits the states from denying the vote on account of age to any otherwise qualified person 18 years of age or older in any election occurring after December 31, 1970.

A. SECTION 201—LITERACY

Section 201 suspends, until August 6, 1975, the use of literacy tests and any similar "test or device"[2]

[1] 79 Stat. 438, 42 U.S.C. (Supp. V) 1973b(a).

[2] The term "test or device" is defined in Section 201(b) and includes any prerequisite for voting which involves literacy,

in any state or political subdivision not subject to suspension by reason of Section 4(a) of the 1965 Act.[3] The literacy test areas which are covered by Section 201 are the States of Alaska, Arizona (except Yuma County), California, Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New York, Oregon, Washington and Wyoming, and 61 counties in North Carolina.[4] It has been estimated that more than 1.9 million persons otherwise eligible to vote in these states (excluding North Carolina)—including 73,200 persons in Arizona—are unable to

educational achievement, moral character or proving qualification by voucher of other persons. The definition is identical to that contained in Section 4(c) of the 1965 Act, 42 U.S.C. (Supp. V) 1973b(c).

[3] The jurisdictions presently subject to suspension under Section 4(a) of the Voting Rights Act are the States of Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia, 39 counties in North Carolina, one county in Arizona, and one county in Hawaii.

The date when the period of suspension under Section 201 is to end, August 6, 1975, corresponds for the most part with the time of operation of Section 4(a), as amended, since literacy tests in most of the jurisdictions subject to Section 4(a) will have been suspended for 10 years as of that date.

[4] A table setting forth the state laws providing for a "test or device" is contained in the Hearings on Voting Rights Act Extension before Subcommittee No. 5 of the House Judiciary Committee, 91st Cong., 1st Sess., p. 90. (Hereinafter "House Hearings.") The literacy requirement of the Hawaii Constitution (included in the above-cited table) was repealed as a result of a referendum on November 5, 1968. The statutory provision implementing the literacy requirement was deleted in 1969. See Hawaii Rev. Stat., § 11-4, as amended.

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qualify under present state laws because of their illiteracy.[5]

B. SECTION 202—RESIDENCE AND ABSENTEE PARTICIPATION

The objective of Section 202 is twofold. First, it is intended to insure that no citizen otherwise qualified to vote for President and Vice President will be prevented from doing so because of a change of residence within the United States, or because of a state or local residence requirement of more than 30 days. Section 202(c). Second, it requires each state to provide for absentee registration and prescribes uniform standards for absentee balloting in presidential elections. Sections 202(c) and (f).

1. Residency

Section 202(c)'s provisions regarding the requirement of state residence in presidential elections are implemented by Sections 202(d) and (e). Section 202(d) requires each state to provide for the registration (or other means of qualifying) of all otherwise qualified residents who apply at least 30 days before a presidential election for registration to vote in that election—in effect, creating a maximum durational residency test of 30 days for presidential elections. Section 202(e) provides that any otherwise qualified person who moves to a state or political subdivision within 30 days of a presidential election, and

[5] See Hearings on Amendments to the Voting Rights Act before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 91st Cong., 1st and 2d Sess., p. 216 (hereinafter "Voting Rights Hearings"). These estimates are likely to be high, since they are based on census tables reflecting educational levels and do not account for the possibility of lenity or nonenforcement of the literacy requirement.

by virtue of that fact is not eligible to vote in his new location, must be allowed to vote for President and Vice President, in person or by absentee ballot, in the state or political subdivision of his prior residence. Section 202(e) does not apply to persons whose previous residence did not entitle them to vote—for example, citizens resident in Puerto Rico or London, England, who have no right to absentee voting or to registration elsewhere. With this exception, Sections 202 (d) and (e) make it possible for any otherwise qualified person to vote in a presidential election, regardless of the date on which he changes his residence.

The requirement that 30-day residents be qualified to vote in presidential elections will affect the laws of thirty-eight states (and the District of Columbia).[6] In only 12 states do existing laws provide for a residency period of 30 days or less in regard to voting by new residents in a presidential election.[7] In a bare majority

[6] According to a study submitted by Senator Goldwater, 16 states prescribe one year's residence in the state as a precondition for voting for President and Vice President; and, in one state (Mississippi), the minimum period is two years. In three states, a new resident's eligibility to vote in a presidential election is conditioned upon his satisfying a six-month waiting period. In Massachusetts the period is only 31 days. See 116 Cong. Rec. 3542–3543 (daily ed., March 11, 1970), table 1.

Table 1, cited above, lists 37 states and the District of Columbia as requiring more than 30 days' residence for voting in presidential elections. Subsequently, the Florida statute was amended to provide for a minimum of 45 days (as opposed to the prior minimum of 30). See Fla. Stat. Ann., § 97.031(2) as amended by Ch. 69–280, 1969 Sess. Laws.

[7] In two states (Oregon and Wisconsin), the existing requirement as to presidential elections is one day. (See Ore. Rev. Stat., § 247.420(1), as amended by Ore. Laws 1969, Ch. 153.)

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of the states (27), Section 202 also affects local residence rules requiring longer than 30 days residence in a new county, city or precinct within the same state.[8] Section 202 renders all such provisions unenforceable in presidential elections. The state provisions affected would disfranchise as many as 5 million American citizens in a presidential election today.[9]

2. Absentee participation

The portions of Section 202 which relate to absentee registration and absentee voting in presidential elections apply to all state residents, whether recent or long-term, who are absent from their election dis-

Five other states (Alaska, Hawaii, Nebraska, North Dakota and Oklahoma) have requirements of less than 30 days. The remainder (Georgia, Maine, Michigan, Minnesota and New Hampshire) prescribe a 30-day period. 116 Cong. Rec. 3542 (daily ed., March 11, 1970), table 1. Section 202(g) provides that: "Nothing in * * * [Section 202] shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein."

[8] See 116 Cong. Rec. 3542 (daily ed., March 11, 1970), table 2. The cited table shows Florida as requiring six months' residence in the county. The Florida statute was subsequently amended so as to permit a registered voter who moves from one Florida county to another to vote for President (and statewide offices) in the county of former residence, during the six months after the move. See Fla. Stat. Ann., § 97.100 as added by Ch. 69-280, 1969 Sess. Laws.

[9] 116 Cong. Rec. 3003 (daily ed., March 4, 1970; Sen. Baker), *id.* at 3538 (daily ed., March 11, 1970; Sen. Randolph); see Bureau of the Census, *Estimates of the Population of Voting Age*, Current Population Reports, Series P-25, No. 406 (1968), table 1 (but see footnote 1 of the table); and *Voting and Registration in the Election of November 1968*, Series P-20, No. 192 (1969), table 16. See also Gallup Opinion Index, Report No. 42 (1968), p. 6.

See also Schmidhauser, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 Mich. L. Rev. 823, 824-830 (1963).

tricts at or prior to the election. Section 202(d) requires each state to provide for absentee voting by any duly qualified resident "who may be absent from * * * [his] election district * * * [on election day]," who has applied for such ballot at least seven days prior to the election and who returns the ballot to the appropriate official before the polls close. Section 202(f) requires the states to make some form of absentee registration available to all persons entitled to vote absentee in a presidential election. These provisions affect state laws in many ways—for example, only 20 states presently allow civilians generally to register absentee. "Approximately 3 to 5 million * * * fully qualified American citizens" are affected by the absentee voting provision alone. 116 Cong. Rec. 3538 (daily ed., March 11, 1970); see also *id.* at 2884 (daily ed., March 3, 1970).

C. TITLE III—AGE

Section 302 of the Act prohibits a denial of the right to vote to any citizen of the United States 18 years of age or older who is otherwise qualified to vote in any state or political subdivision. The provision is to take effect with respect to any election or primary held on or after January 1, 1971 (Section 305), and will result in lowering the voting age from 21 to 18 in forty-six states and the District of Columbia, and from 20 to 18 in the State of Hawaii. The States of Georgia, Kentucky and Alaska will not be affected by Section 302 since 18-year olds there already have the vote. (Alaskan voters approved a referendum reducing the voting age to 18 in its primary elections held August 25, 1970.) It has been estimated that close to 10 million persons who would

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be eligible to vote under this provision are presently disfranchised because of age alone. Voting Rights Hearings, p. 328; 116 Cong. Rec. 3060 (daily ed., March 5, 1970; Sen. Kennedy).

II. LEGISLATIVE HISTORY

The Voting Rights Act Amendments of 1970 had their genesis in bills to extend the operation of the literacy test and related provisions of the 1965 Act.[10] After considering alternative proposals, the House of Representatives enacted a bill which would have replaced Section 4(a) and its enforcement provisions with a nationwide suspension of literacy tests.[11] This bill also provided for controls on state laws imposing durational residency requirements as they applied to presidential elections.[12]

The legislation took its present form in the Senate, after extensive hearings [13] and debate. While agreeing that the requirement of literacy as a precondition to

[10] See H. Rep. No. 397, 91st Cong., 1st Sess. (1969) p. 2.

[11] See H.R. 4249, as passed by the House of Representatives on December 11, 1969. 115 Cong. Rec. 12184 (daily ed.). The substance of the bill adopted by the House is set forth at 115 Cong. Rec. 12074 (daily ed., December 10, 1969).

[12] As passed by the House, H.R. 4249, *supra*, Section 2(c), would have prohibited states from denying the vote in presidential elections on account of residence to anyone who had established residence by September 1 of the presidential election year, or who had maintained his residence until that date and could not qualify elsewhere. The section required provision for absentee registration, but made no general provision for absentee voting.

[13] Voting Rights Hearings; Hearings on Lowering the Voting Age to 18 before the Subcommittee on Constitutional Amendments

voting inevitably has discriminatory effects upon minority groups and the poor wherever applied, yet reflects no sufficient interest of the states,[14] the Senate concluded that Section 4(a) and its enforcement provisions should be retained where applicable. It therefore provided both for continued operation of Section 4(a) of the 1965 Act and for temporary suspension of literacy tests in all jurisdictions not subject to that section. The Senate also concluded that somewhat more restrictive limitations should be imposed on state residency requirements and absentee participation provisions than had been adopted by the House.[15]

It was in the Senate that the matter of voting age restrictions first arose. The question of restricting the states' authority to deny the vote on account of age had arisen in the Voting Age Hearings and in the Voting Rights Hearings, nos. 5, 13, *supra*, and in both it had been suggested that this might be accomplished by statute rather than by constitutional amendment.[16] Beginning on March 4, 1970, and especially on March 11, the question was debated on the Senate

of the Senate Judiciary Committee, 91st Cong., 2d Sess. (1970) (hereinafter, "Voting Age Hearings.")

[14] See, *e.g.*, 116 Cong. Rec. 2758 (daily ed., March 2, 1970) (statement of ten members of Senate Judiciary Committee).

[15] See, *e.g.*, 116 Cong. Rec. 3537 (daily ed., March 11, 1970) (Sen. Goldwater). Compare Section 202 with Section 2(c) of the House bill, n. 12, *supra*.

[16] See, *e.g.*, Voting Age Hearings, pp. 134, 158, 221 (Sen. Goldwater; Sen. Kennedy; Rep. Railsback); Voting Rights Hearings, pp. 322, 330 (Sen. Kennedy; Prof. Cox); but see Voting Age Hearings, pp. 233–249; 249–273 (Assist. Atty. Gen. Rehnquist; Dean Pollak).

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floor.[17] In these debates, there was apparently almost universal agreement that continued denial of the right to vote, on account of age, to persons aged 18, 19 and 20 was unwarranted.[18] The fundamental issue was whether elimination of that discrimination could properly be accomplished by legislation. The Senate concluded that, in light of the maturity of and the obligations upon citizens between 18 and 21 years of age, the states lacked any compelling interest justifying disfranchisement; given that conclusion, it believed, Congress could restrict state authority to set a minimum age for voting under its Fourteenth Amendment enforcement power just as, on similar findings, it had restricted state authority to use literacy tests or to set residence standards in presidential elections.[19]

The measure was passed by the Senate, 116 Cong. Rec. 3585 (daily ed. March 13, 1970), and returned to the House of Representatives. There, after additional debate on the constitutionality of a statutory reduction of voting age, it was adopted without amendment. 116 Cong. Rec. 5679 (daily ed., June 17, 1970).

[17] 116 Cong. Rec. 2938–2940 (daily ed., March 4, 1970); *id.* at 3474–3525, 3544–3548, 3552–3558, 3572–3585 (daily ed., March 11, 1970).

[18] See, *e.g.*, 116 Cong. Rec. 3517 (daily ed., March 11, 1970) (Sen. Randolph).

[19] *E.g.*, Voting Rights Hearings, pp. 330, 337 (Sen. Ervin), 702ff; 116 Cong. Rec. 3487 (daily ed., March 11, 1970; Sen. Kennedy); *id.* at 5643 (Rep. McCulloch), 5644 (Rep. Anderson), and 5644 (Rep. McClory) (daily ed., June 17, 1970).

III. APPLICATION OF THE ACT TO ARIZONA AND IDAHO

The Voting Rights Act Amendments authorize and direct the Attorney General to enforce their provisions. Sections 203 and 303(a)(1). In order to meet this responsibility, the Attorney General wrote to the Governor of each state explaining the new law and seeking an affirmative assurance that the state would comply with it (See, *e.g.*, Exhibit A to each complaint in these suits). The Attorneys General of Arizona and Idaho replied that their states would not comply with portions of the statute (Exhibit B to each complaint).[20] Accordingly, the United States instituted these actions against the States of Arizona and Idaho to enjoin operation of provisions of their constitutions and statutes that are inconsistent with the Voting Rights Act Amendments.

[20] Forty-eight states replied to the letters sent by Attorney General Mitchell.

With respect to Section 201's suspension of literary tests, ten of the thirteen affected states replied that they would comply with the federal statute and three states, including Arizona, refused to suspend their literacy requirements.

Regarding the residency and absentee provisions of Section 202, 28 states indicated that they would comply and three, including Idaho, stated that they would not comply. The letters of the remaining states either made no mention of Section 202 or were indefinite. (Four of the states which refused, on constitutional grounds, to implement Section 201 or Section 302 expressed willingness to comply with Section 202. This number includes Arizona, Oregon and Texas.)

Of the 47 states affected by Section 302's reduction of voting age, 46 responded. Twenty-three states said that they would carry out the federal statute. Seven states refused to accept its constitutionality. The remainder of the replies were in-

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The suit against Arizona seeks to enforce compliance with Sections 201 and 302 of the Act, the literacy and voting age provisions.[21] (Arizona does not contest the validity of Section 202, the residency and absentee provision, although the state has conflicting laws, *e.g.*, Ariz. Rev. Stat. 16–172 (1969 Supp.).) Sections 16–101(A) (4) and (5) of the Arizona Revised Statutes require as a prerequisite to registration that an applicant must be able to write his name and to read the Constitution of the United States in the English language. Article 7, Section 2 of the Constitution of Arizona and Section 16–101(A)(2) of the Arizona Revised Statutes provide, as a prerequisite to registration and voting, that an otherwise qualified citizen must have attained the age of 21 prior to the ensuing general election.

The action against Idaho seeks to compel that state to implement Sections 202 and 302 of the Act. Article 6, Section 2 of the Idaho Constitution and Section 34–401 of the Idaho Code provide that, as a prerequisite to registration and voting, otherwise qualified citizens must have attained the age of 21 prior to the ensuing general election. While Idaho has a special provision permitting new residents of the state to vote for President and Vice President, the minimum period of residency prescribed is 60 days. Ida. Const. Art. 6, § 2 (as amended in 1962), Ida. Code, § 34–408. Idaho makes no provision for voting in presidential elections by former Idaho residents who do not satisfy the registration requirements of their new location. Nor is voting in presidential elections permitted for persons who, within 30 days of the election, move from one Idaho county to another. (A previously registered voter who moves *within* an Idaho county, less than 30 but more than 3 days before an election, may transfer his registration to the new precinct. Ida. Code, § 34–809.) Idaho law does not permit persons who have lived within the state for less than six months to register by mail, Ida. Code, § 34–409, or to vote by absentee ballot, Ida. Code, § 34–413, and requires that all absentee ballots be returned by noon of election day. Ida. Code § 34–1105 (1969 Supp.).

definite, many of them indicating that the state's action would depend upon the timing of this Court's adjudication of the validity of the statute.

[21] Because Section 201 took effect upon enactment, the United States sought interim relief requiring Arizona to permit illiterate, but otherwise qualified, persons to register on a provisional basis in order to preserve the possibility that they might vote in the November 3, 1970, general elections. Arizona stated that it would make arrangements to permit such registration and, by order of August 21, 1970, Mr. Justice Douglas granted the motion for interim relief.

SUMMARY OF ARGUMENT

I

The legal principles by which the constitutional validity of all three challenged provisions of the 1970 Amendments can be established are, we believe, essentially the same for each.

First, Congress' authority to enforce the Fourteenth and Fifteenth Amendments is fully as extensive as its authority to carry out its Article I powers under the Necessary and Proper Clause. In *South*

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Carolina v. *Katzenbach,* 383 U.S. 301, this Court unanimously agreed that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." 383 U.S. at 326, 355. *Katzenbach* v. *Morgan,* 384 U.S. 641, established the same principle with respect to Section 5 of the Fourteenth Amendment. *Morgan* held that Congress' authority extends not only to devising remedies, but also to identifying violations of the constitutional guarantee. In each instance, the Court held, it was sufficient that the Court be able to "perceive a basis" on which Congress had acted. 384 U.S. at 653, 655–656. In sum, Section 5 is a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." 384 U.S. at 651.

Second, it is by now firmly established that exclusions from the franchise are warranted under the Equal Protection Clause only if supported by "compelling" state interests. The unanimous opinion of this Court last Term in *Evans* v. *Cornman,* 398 U.S. 419, 422, recognizes "no doubt at this date that 'once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.' * * * And before that right can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." As *Kramer* v. *Union School*

District, 395 U.S. 621, 627–628, explained, before a state classification of potential voters which excludes some persons from the franchise can be upheld, "the Court must determine whether the expulsions are necessary to promote a compelling state interest." 395 U.S. at 627.

While *Kramer* reserved decision regarding the standard of review to be applied in assessing general state voting qualifications as to literacy, residency, and age, 395 U.S. at 625; compare *Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 45, we believe that the more stringent standard of review properly applies in that assessment. The difference between the qualifications involved here and those examined in prior cases is one only of degree. State power over suffrage, as in other areas of primary state responsibility, may be exercised only within the limitations prescribed by the Constitution. The right to vote in general elections is plainly no less important than the right to vote in special elections, or to cast a vote that is given its appropriate weight. Compare *Reynolds* v. *Sims,* 377 U.S. 533; *Harper* v. *Virginia Board of Elections,* 383 U.S. 663.

Of course, the states do have a significant interest in voting qualifications in the abstract. But that observation does not solve the constitutional question posed in concrete cases. That question can be answered only by examining the *particular* exclusion adopted, and its relationship to the state's interest in limiting the franchise to those classes which will vote responsibly

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and honestly. For the assessment required by the Equal Protection Clause cannot be made in the abstract; while some standards of residency or age will pass muster in some or all circumstances, others will not.

Congress is particularly well suited to make this inquiry. At least as to the residency and age issues, it was necessary to fix the line at which state interests could no longer be said to be "compelling." This assigning of numerical limits comfortably fits the legislative function, however difficult it may be for the judiciary. Moreover, the congressional action here merely limits state power to exclude persons from the franchise, and does not purport to restrict the franchise itself. If Congress had declared that such-and-such a class must be denied the vote, entirely different questions would be presented. But there is no issue here of congressional power to *require* a literacy test, a stated period of residency, or a certain level of age. *Morgan, supra,* 384 U.S. at 651–652, n. 10. Congress' constitutional power to impose on state laws those restrictions which enforce the Equal Protection Clause and the Fifteenth Amendment is fully recognized by the prior opinions of this Court.

II

Section 201's suspension of literacy tests is a valid exercise of Congress' power to remove unwarranted restrictions on the right to vote. This Court's opinion in *Gaston County* v. *United States,* 395 U.S. 285, both called attention to the residual effects of school

segregation, and held that those effects justify the suspension of literacy tests under Section 4(a) of the 1965 Act, whether or not the tests themselves are objectively administered. That holding controls here.

In enacting Section 201, Congress learned that states and localities not subject to Section 4(a) had practiced discrimination in the provision of education, and that similar residual effects were found in those areas. The migration of citizens who had suffered this discrimination was also a matter of concern. This Court noted in *Gaston County,* 395 U.S. at 293, n. 9: "It would seem a matter of no legal significance that [potential voters in Gaston County] may have been educated in other counties or States also maintaining segregated and unequal school systems." And Congress heard that substantial numbers of Negroes had migrated to states outside of the South, where their ability to satisfy literacy tests suffered on account of their prior unequal educational opportunities. Taken together, these factors gave ample basis to find that the use of literacy tests penalizes minority groups for their failure to attain the same levels of education attained by others throughout the country, even though the educational opportunities available to them were inferior. Especially given *Gaston County,* and the broad grant of legislative power contained in the Fourteenth and Fifteenth Amendments, Congress had all necessary authority to remedy these effects by suspending the use of literacy tests nationwide.

An independent and alternative basis for Section 201 is Congress' conclusion that the possible interests

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of the state in maintaining literacy requirements are not sufficient to justify the resulting disfranchisement. That conclusion finds its basis in the testimony of many witnesses that the widespread availability of radio and television and the coverage given to both local and national issues in those media make it no longer necessary that a person be able to read in order to be informed. The conclusion is reinforced by the experience of the states—of states not subject to Section 4(a) of the 1965 Act, very few have statutes requiring literacy tests, and those which do have them often do not enforce them. The history of those tests as, primarily, a means for disfranchising various racial, ethnic and religious groups also casts serious doubt on the notion that they are required to assure an intelligent electorate.

III

While several constitutional bases are stated for Section 202, Congress' principal reliance was on its authority to enforce the Equal Protection Clause. It found that the states lack any compelling interest warranting classifications more restrictive of the right to vote in presidential elections on the basis of duration of residence or absence from the polls than those set forth in the section.

The section relates only to elections for President and Vice President. Thus, there can be no proper reliance on such considerations as a need for knowledge of local politicians and issues. The other possible justification for the state measures which come under the control of Section 202 is administrative

convenience—either the need for adequate time in which to investigate proposed voters and do necessary paperwork, or the need for time in which to discover and prevent fraud. Upon these issues, Congress carefully considered the experience of the states and, on that basis, determined that times longer than those which it proposed were not justified. So far as the prevention of fraudulent practices is concerned, that can readily be accomplished by measures which do not result in the wholesale disfranchisement of voters who would never consider such practices. See, *Shapiro* v. *Thompson,* 394 U.S. 618, 637. In general, the possible interest of a state in avoiding administrative tasks is not the type of interest which warrants denial of the right to vote. *Carrington* v. *Rash,* 380 U.S. 89, 96.

Since, at the least, this Court can "perceive a basis" for the congressional action embodied in Section 202, it is unnecessary to reach the other possible constitutional bases for the section, which are stated in its preamble but did not figure importantly in the debates. The first of these is that, as selection of the President and Vice President is an especially federal event, the Congress has special powers to govern that election. See, *Ex parte Yarbrough,* 110 U.S. 651, *Burroughs and Cannon* v. *United States,* 290 U.S. 534. To the extent the states have chosen to make the process elective, the right to participate in presidential elections is a privilege of national citizenship whose exercise Congress may regulate. Second, the questions of residence and absentee voting each have an evident relationship to the constitutional right to travel freely among the several states, which this Court has consist-

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ently identified as "fundamental." *Shapiro* v. *Thompson,* 394 U.S. 618, 627, 629–631. As in the case of the right to vote, because the right is fundamental, any state regulation which tends to impose a penalty on its exercise must be supported by a "compelling" state interest. In presidential elections, for the reasons shown above, states have no such interest in their residency and absentee provisions which conflict with section 202.

IV

Title III is also a proper exercise of Congress' power to enforce the rights guaranteed by Section 1 of the Fourteenth Amendment. Although most states presently set the minimum voting age at 21, Congress found that this level no longer has any rational connection with the state's interest in promoting mature and responsible use of the ballot. Persons between the ages of 18 and 21 are called upon to bear heavy burdens of military service and have reached a level of educational and intellectual achievement which compares very favorably with that reached by the 21-year olds of 100 years ago. The majority of them are counted in the work force, where they receive salaries which account for substantial amounts of taxes paid to federal, state and local governments. They are adults for purposes of the criminal laws, and many other laws adopted by the state and federal governments. Those states which have had practical experience with the matter uniformly report that extension of the franchise to persons between 18 and 21 has been successful.

In sum, it can no longer be said that there exists a valid basis on which to differentiate the 18-20-year-old group from the 21-year-old group on grounds of maturity and political awareness, or that that class is "substantially less interested" than other state residents in the many electoral decisions affecting state laws on crime, taxes, unemployment, workmens' compensation and education, to mention but a few examples. Cf. *Evans* v. *Cornman, supra,* 398 U.S. at 423–425. These findings warrant the enactment of Title III; in any event they surely enable this Court to "perceive a basis" on which the Congress might have enacted that title.

ARGUMENT

I. INTRODUCTION AND GOVERNING CONSTITUTIONAL PRINCIPLES

Two lines of authority in this Court converge on the issues presented in these cases. One, represented by *South Carolina* v. *Katzenbach,* 383 U.S. 301, *Katzenbach* v. *Morgan,* 384 U.S. 641, and *Ex Parte Virginia,* 100 U.S. 339, 345–346, *inter alia,* makes clear Congress' broad power to enforce the prohibitions of the Fourteenth and Fifteenth Amendments, including that embodied in the Equal Protection Clause. The other, stated as recently as this Court's unanimous decision last Term in *Evans* v. *Cornman,* 398 U.S. 419, recognizes "no doubt at this date that 'once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.' * * * And before that right can be restricted, the purpose of the restriction and the assertedly overriding interests

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served by it must meet close constitutional scrutiny." 398 U.S. at 422. These lines of authority firmly establish the constitutional basis of the 1970 Amendments.

A. CONGRESS' AUTHORITY TO ENFORCE THE FOURTEENTH AND FIFTEENTH AMENDMENTS IS FULLY AS EXTENSIVE AS ITS AUTHORITY TO CARRY OUT ITS ARTICLE I POWERS UNDER THE "NECESSARY AND PROPER" CLAUSE.

With the renewal of litigation over the scope of Congress' authority to enforce the Civil Rights Amendments, it has become clear that that authority is congruent with its power, generally, to make laws for carrying into execution the powers granted to it by the Constitution. The Thirteenth, Fourteenth, and Fifteenth Amendments each specifically grants Congress the power to enforce its provisions by appropriate legislation. Thirteenth Amendment, Section 2; Fourteenth Amendment, Section 5; Fifteenth Amendment, Section 2. It was early recognized that these enforcement clauses enlarged the powers of Congress, that "[s]ome legislation is contemplated to make the amendments fully effective." *Ex Parte Virginia,* 100 U.S. 339, 345; see also *Slaughter-House Cases,* 16 Wall. 36, 81; *Civil Rights Cases,* 109 U.S. 3, 11; *Strauder* v. *West Virginia,* 100 U.S. 303; *Clyatt* v. *United States,* 197 U.S. 207. In *South Carolina* v. *Katzenbach, supra,* and *Katzenbach* v. *Morgan, supra,* reflecting the renewal of civil rights legislation after Reconstruction, this Court held that that enlargement of power made Congress' authority coextensive with that which it enjoys under the Necessary and Proper clause of the Constitution. Art. 1, Sec. 8, Para. 18.

See Cox, *Constitutional Adjudication and the Promotion of Human Rights,* 80 Harv. L. Rev. 91 (1966); *Developments in the Law—Equal Protection,* 82 Harv. L. Rev. 1065, 1072–1076 (1969).

The principle was first established with respect to the enforcement clause of the Fifteenth Amendment. In *South Carolina* v. *Katzenbach, supra,* the Court upheld provisions of the Voting Rights Act of 1965—including a suspension of literacy tests in states and counties which came within a specified coverage formula, 42 U.S.C. (Supp. V) 1973b(a)—as an appropriate exercise of Congress' enforcement authority:

> The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:
>
> > "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch* v. *Maryland,* 4 Wheat. 316, 421.
>
> * * * * *
>
> We therefore reject South Carolina's argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts. Congress is not

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> circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment. * * * [383 U.S. at 326–327.]

It is, of course, a principle of general application that the Congress, when exercising its express powers, may paint with a broader brush than the courts. See *Everard's Breweries* v. *Day,* 265 U.S. 545; *Currin* v. *Wallace,* 306 U.S. 1; *United States* v. *Darby,* 312 U.S. 100; *Katzenbach* v. *McClung,* 379 U.S. 294, 303–304. That is, in part, a necessary corollary of the regulatory function of legislation. But it implies also a recognition that the marking of constitutional boundaries often involves judgments which are best left to the legislative branch. *South Carolina* v. *Katzenbach, supra; Fay* v. *New York,* 332 U.S. 261, 282–284; *Cox, op. cit. supra,* 80 Harv. L. Rev. at 105. Both factors figured importantly in the second of the two opinions here discussed, *Katzenbach* v. *Morgan.*

The *Morgan* case arose out of a challenge to the constitutionality of Section 4(e) of the Voting Rights Act of 1965, 42 U.S.C. (Supp. V) 1973b(e). Section 4(e) in effect prohibits the application of English language literacy tests to persons educated in Puerto Rico. In enacting it, Congress appeared to rely on its authority to "use its judgment as to what is equal protection of the laws * * *" (111 Cong. Rec. 11066, Sen. Javits) and to take the initiative in marking the limits of permissible state action under the Fourteenth Amendment (*id.* at 11062, Sen. R. Kennedy). In this Court, however, the appellees contended that congressional authority to prohibit enforcement of a state law under Section 5 of the fourteenth Amendment is restricted to situations

where a court has found or would find the state law to be unconstitutional. The Court expressly rejected that view:

> Neither the language nor history of § 5 supports such a construction. As was said with regard to § 5 in *Ex Parte Virginia,* 100 U.S. 339, 345, "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibition by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. * * * [384 U.S. at 648.]

Section 5 was described (384 U.S. at 651) as a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."

The Court considered two bases for subsection 4(e) in *Morgan.* First, Congress might have believed it would enable Puerto Ricans in New York and the other states to eliminate, through increased voting strength, discriminatory treatment they received in public services (*e.g.,* schools). The Court stated that it was for Congress to weigh the various conflicting considerations, including alternative means of remedying discrimination in governmental services, and to determine whether subsection 4(e) was needed to

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further the aim of the Equal Protection Clause. As to judicial review, "It is enough that [the Court] be able to perceive a basis upon which the Congress might resolve the conflict as it did." 384 U.S. at 653.

Second, Congress might have believed that the English language literacy requirement was itself a deprivation of equal protection. Here, too, the Court held that there must be deference to congressional judgment. After referring to the fundamental importance of the right to vote, on the one hand, and possible interests of the state in requiring English literacy on the other, the Court said (384 U.S. at 655–656):

> Since Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting * * * to which it brought a specially informed legislative competence, it was Congress' prerogative to weigh these competing considerations. Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that [the New York requirement violated] the Equal Protection Clause.

Insofar as *Morgan* and *South Carolina* v. *Katzenbach* interpreted Congress' power to devise remedies for judicially cognizable violations of the Equal Protection Clause, they were unanimous. See 383 U.S. at 355, Black, J., dissenting; 384 U.S. at 666, Harlan and Stewart, JJ., dissenting. The only disagreement arose in *Morgan,* over the question whether congressional

authority also extends to the identification of violations of the Amendment's guarantee. The majority held that Congress' authority to find that state conduct violates equal protection rights is coextensive with its power to devise a remedy for such violations; in each respect, it is sufficient that the Court be able to "perceive a basis" on which the Congress might have acted. 384 U.S. at 653, 655–656. The two dissenters, while willing to give legislative findings due respect and to base judicial determinations upon them, *id.* at 668–669, felt that the judiciary must make its own determination whether or not equal protection rights have been violated. On the meager legislative record in that cause they characterized the congressional finding of a violation of equal protection rights as "mere *ipse dixit*" (*id.* at 671); while the dissent then concluded that the state action in question did not violate the Equal Protection Clause, it did so on the basis of a permissive equal protection test, under which "a state enactment or practice may be struck down * * * only if it cannot be justified as founded upon a rational and permissible state policy." *Id.* at 660.

II. RESTRICTIONS ON VOTING QUALIFICATIONS ARE WARRANTED UNDER THE EQUAL PROTECTION CLAUSE ONLY IF SUPPORTED BY A COMPELLING STATE INTEREST.

While the states unquestionably possess broad initiative to set qualifications for voting, as in all other election matters not the subject of a specific constitutional prohibition, it is settled that that initiative can be exercised only in a manner which does not offend constitutional strictures—in particular, here, the

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Equal Protection Clause. *Evans* v. *Cornman, supra.* Indeed, that proposition seems beyond dispute; states could hardly have an exemption from the clause in a matter so important to our democracy as the conduct of elections.

What has been at issue in this Court's recent decisions has been the standard by which the clause is to be applied. In the area of economics and social welfare, the classifications of a state law satisfy the equal protection requirement so long as they are "rationally based and free from invidious discrimination." *Dandridge* v. *Williams,* 397 U.S. 471, 487. In matters involving speech or personal liberty, on the other hand, a higher standard of precision is required, and the state may be required to justify the classifications it creates by some compelling interest sufficient to override the personal interests denied. *E.g., Shelton* v. *Tucker,* 364 U.S. 479; *Shapiro* v. *Thompson,* 394 U.S. 618; *Developments in the Law—Equal Protection, op. cit., supra.*

When faced with the choice between these two standards in recent voting cases, the Court's uniform response has been that the higher standard must be met. This Court long ago recognized that the franchise is a fundamental personal right and an essential attribute of citizenship.[22] *Yick Wo* v. *Hopkins,*

[22] We cannot agree with the observation sometimes made that the Constitution recognizes no right to vote. While it is true that "the Constitution * * * does not confer the right of suffrage upon any one," *Minor* v. *Happersett,* 21 Wall. 162, 178, in the sense of defining the qualifications for voting in federal and state elections, it expressly confers the vote in certain federal elections (Article I, Section 2; Seventeenth Amendment; see *United States* v. *Classic,* 313 U.S. 299, 314–315; *Lassiter,*

118 U.S. 356, 370; *Guinn* v. *United States,* 238 U.S. 347, 366; *United States* v. *Carolene Prod. Co.,* 304 U.S. 144, 152–153, n. 4. Thus, when the question of standards arose in the apportionment cases, the Court held that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims,* 377 U.S. 533, 562; see also *id.* at 554–555; *Wesberry* v. *Sanders,* 376 U.S. 1, 17; *Gray* v. *Sanders,* 372 U.S. 368.

While these cases dealt with the weighting of votes of persons qualified to vote under state law, the same result has been reached regarding state voting qualifications. For example, in *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, holding that general property or fee-paying qualifications for voting violated the Equal Protection Clause, the Court reiterated the

supra, 360 U.S. at 51) and implicitly requires it in the states as well. Article I, Section 2, and the Republican Form of Government Clause, together, surely require that at least one house of each state legislature be elective. *In re Duncan,* 139 U.S. 449, 461. And the Fifteenth and Nineteenth Amendments, as well as Section 2 of the Fourteenth, are otherwise incomprehensible. Indeed, the right to vote is also central to the First Amendment. As a comprehensive charter of freedom of political expression, that Amendment embraces not only the rights specifically enumerated, but also those additional rights necessary for their full exercise and enjoyment. See, *e.g., NAACP* v. *Alabama,* 357 U.S. 449; *NAACP* v. *Button,* 371 U.S. 415, 429–430. Voting is indisputably a form of political expression—for most people, the only practical form. The difficulty experienced by persons denied their proper vote in general elections in securing a remedy for that condition in the political arena is, indeed, one of the principal reasons why the Court has insisted upon the more stringent rule of review regarding voting matters. *Reynolds* v. *Sims, supra,* 377 U.S. at 554–555; *Kramer* v. *Union School District, supra,* 395 U.S. at 639–640 (dissent).

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need for close scrutiny and confinement of state classifications which denied to some the fundamental right to vote. 383 U.S. at 670. The unanimous opinion in *Evans* v. *Cornman,* last Term, holding that a state could not constitutionally interpret its own residence requirement to exclude persons living on federal enclaves who otherwise met its tests of residence, stated again that "before [the right to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." 398 U.S. at 422; compare *Carrington* v. *Rash,* 380 U.S. 89, 96.

This Court's strongest statement of the principle came in a case in which the state had sought to impose a qualification for voting in special elections in addition to the qualifications it ordinarily required in general elections:

> * * * [I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. See *Carrington* v. *Rash, supra,* at 96.
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> * * * * * *
>
> * * * [W]hen we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable. See *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663, 670 (1966). The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge to this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality. * * * [*Kramer* v. *Union Free School District,* 395 U.S. 621, 627–628; footnotes omitted.]

See also *Cipriano* v. *City of Houma,* 395 U.S. 701, 706; *Phoenix* v. *Kolodziejski,* 399 U.S. 204, 208–209. And see *Williams* v. *Rhodes,* 393 U.S. 23, 31.

We recognize that the holdings in these cases do not necessarily control the standards to be applied in the present cases. The three provisions of the Voting Rights Act Amendments here at issue directly affect the voting qualifications generally required of a state's citizens in areas which must be conceded to be, and which this Court has emphasized are, at least initially, legitimate matters of state concern: literacy, residency, and age. *E.g., Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 45. And the majority in *Kramer* qualified its observations by repeated reference to the "special" nature of the voting qualification under examination and a reaffirmation of the states' general prerogatives in the areas of citizenship, age, and residency, 395 U.S. at 625.

We believe, however, that the more stringent standard of review properly applies in these cases as well. The right to vote is plainly no less central to the foundation of our representative society when denied in a general rather than a special election—rather,

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more so, as the dissent in *Kramer* points out. 395 U.S. at 639, 640 n. 10. And a person excluded from voting in *all* elections is not less discriminated against than one who is permitted to vote in some, as in *Kramer*, or whose vote is given less than its appropriate weight, as in the reapportionment cases. This Court has several times invoked the Equal Protection Clause in cases involving total denial of the vote. See *Harper*, *supra*, 383 U.S. at 670; *Carrington* v. *Rash*, *supra*; *Evans* v. *Cornman*, *supra*. The difference between the qualifications involved here and those examined in prior cases is one only of degree. *Kramer*, *supra*, 395 U.S. at 637 (dissent). State power over suffrage, as in other areas of primary state responsibility, may be exercised only within the limitations prescribed by the Federal Constitution. Since it is the intrinsic importance of the vote to each citizen which has led this Court consistently to apply a more stringent standard of review,[23] that rule must also be applied in this case.

C. ALTHOUGH THE STATES HAVE A SIGNIFICANT INTEREST IN BASIC VOTING QUALIFICATIONS, CONGRESS IS THE APPROPRIATE BODY TO DETERMINE THE PRACTICAL LIMITS BEYOND WHICH PARTICULAR CLASSIFICATIONS REFLECTING THOSE INTERESTS ARE NO LONGER "COMPELLING" IN VIEW OF THE IMPORTANT PERSONAL RIGHTS INVOLVED

We do not mean to suggest by the above discussion that state residency, age, and literacy qualifications are *prima facie* suspect. There can be no doubt, as a general matter, that the states have the primary re-

[23] *E.g.*, *Reynolds* v. *Sims*, *supra*, 377 U.S. at 554–555, 561–562; *Harper* v. *Virginia Board of Elections*, *supra*, 383 U.S. at 667; *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 652–653; *Evans* v. *Cornman*, 398 U.S. at 422.

sponsibility for setting voting qualifications, and that in making the classifications required by that responsibility they also have a "compelling interest," in terms of the review standard, in limiting the franchise to those classes which will vote responsibly[24] and honestly. Comment, 1970 Utah L. Rev. 143, 146–147. The standard qualifications of citizenship, age, and residency, if not literacy,[25] directly respond to these interests.

To say in general, however, that a state has a compelling interest in assuring that its voters are qualified as to some standard—for example, residency—no more answers a specific question of constitutionality than to say, in general, that in First Amendment cases the government has a compelling interest in protecting itself against violent overthrow. The countervailing interest, the excluded citizen's fundamental interest in voting, remains constant whatever qualifying standard a state may adopt. As a particular standard is made more and more exclusive or, in the situation

[24] This Court has stated, and emphasized by repetition, that "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible," *Carrington* v. *Rash*, *supra*, 380 U.S. at 94. As we understand the proposition, it refers to the fencing out of groups that might tend to vote for a particular party or point of view, and not to the fencing out of groups that would vote capriciously or without understanding.

[25] One of the bases for the suspension of state literacy tests is Congress' conclusion that, in an electronic age, there is no longer a "compelling interest" in literacy as a means of assuring an informed electorate. *Infra*, pp. 48–49; compare *Harper* v. *Virginia County Board of Elections*, *supra*. In any event, independent Fourteenth and Fifteenth Amendments grounds support Congress' action in suspending the literacy tests. *Infra*, pp. 40–48.

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governed by Section 202, as it is applied to elections where knowledge of local issues is unneeded, the interest in *that particular standard* may no longer be compelling in comparison to the personal rights frustrated by its application. The assessment required by the Equal Protection Clause cannot be made in the abstract; it is a particular standard which must be examined. And it is evident that while some standards of residency (or age) will pass muster, in some or all circumstances, others will not.

It is at this point, we believe, that the involvement of the Congress becomes particularly significant. Like most legislation setting limits, voting qualifications embody a necessarily arbitrary element in stating the precise point at which eligibility begins. One is eligible after 365 days residency, not 363; at the age of 21, not 20. It is precisely the exclusion created by this element which is challenged on the equal protection ground; yet, even if it were agreed that a particular exclusion was too great for the state interests relied upon to justify it, the judiciary would have substantial difficulty in defining a new, and proper, line.[25] Congress, on the other hand, is well equipped

[25] Significantly, where the Court has not encountered such difficulties, it has not hesitated to act. In *Evans* v. *Cornman*, *supra*, the State of Maryland sought to distinguish between persons universally affected by its laws and persons resident on federal enclaves within the state, who were only partially so affected, by denying the vote to the latter group. Although it is undoubtedly possible to "perceive a basis" on which Maryland might have concluded that the latter group would have been less than fully responsible voters, this Court nonetheless unanimously concluded, on equal protection grounds, that the vote was improperly withheld. Its method was to apply essentially *federal* standards regarding the minimum content of state residence for the purpose of voting qualifications. In *Evans*, unlike the present cases, the entire excluded class either were or were not state residents; there was no necessity to draw or recognize a new or different line at which a state might properly divide those excluded from the vote from those who must be permitted to vote. But in terms of the application of federal rather than state standards to determine which classes must be permitted to vote, *Evans* is identical to these cases.

to do so. Not only does its intimate acquaintance with electoral matters give it special competence in the area; unlike the judiciary, it is readily equipped to fix as a practical matter the lines of minimum qualification which it determines equal protection to require.[27] See Burt, *Miranda and Title II: A Morgantic Marriage*, 1969 The Supreme Court Review 81, 110–118. While the judiciary is institutionally ill-equipped, for example, to choose between 17 years and 18 years for purposes of a minimum standard of age, that is precisely a task for which the legislature is well suited; it involves the kind of line-drawing that Congress traditionally performs. Cf. *Ferguson* v. *Skrupa*, 372 U.S. 726, 729.

In making such choices, we emphasize, Congress is *not* supplanting the states' responsibilities in the area. With the few exceptions required by the Constitu-

[27] It of course remains possible that the congressional minimum would still permit some persons to be excluded from the vote who might be thought suitably qualified for it. There may be, for example, many persons seventeen or younger fully as mature and responsible as those who presently exercise the franchise. The propriety of their exclusion from the vote by any state remains open as a judicial matter; what Congress has done, even if not as extensive as might be, cannot be impeached on that ground. *Morgan*, *supra*, 384 U.S. at 657–658.

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tion, it is the states which determine which matters are to be presented to the electorate. The states, as well, have the initiative in declaring what voter qualifications are to be. The congressional role, reflected in this statute, is only to lift those state restrictions which it determines to violate, or to contribute to or perpetuate violations of, the Equal Protection Clause. This is in essence a setting of minimum standards, which in no way hinders states from going beyond them; a residence period of 10 days, or a voting age of 17 years, would be fully consistent with the federal statute should a state decide to adopt it. Cf. Section 202(g).

Most importantly, in setting minimum standards, Congress is not creating voting qualifications of its own. That is, in no respect do its acts *restrict* the franchise. There is no issue here of congressional power to *require* a literacy test, a stated period of residency, or a certain level of age for voting. We do not contend that Congress has any such power under the Equal Protection Clause. *Morgan, supra,* 384 U.S. at 651–652 n. 10. Unless given to Congress by other provisions of the Constitution, the power to *restrict* the franchise by the adoption of reasonable voting qualifications remains entirely in the states.

In its *Lassiter* opinion, this Court was careful to preserve the possibility of congressional action restricting state alternatives regarding voter qualification. It said, 360 U.S. at 51:

> [W]hile the right of suffrage is established and guaranteed by the Constitution * * * it is subject to the imposition of state standards which are not discriminatory *and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.* * * * [Emphasis supplied.]

Congress has constitutional power to impose those restrictions which enforce the Equal Protection Clause and the Fifteenth Amendment. It has done so here, by determining the extent to which the states lack a compelling interest in particular qualifications regarding literacy, residency, and age. As a result, these cases do not involve simply a collision between state laws and the unadorned constitutional provision. We now show in each instance that, with due regard for the legislative findings made,[28] Congress' determinations were correct. In any event, even if this Court might itself have reached a different assessment, under *Morgan* it must honor the congressional assessment so long as it can "perceive a basis" on which that assessment might have been made.

II. IN SUSPENDING LITERACY TESTS IN SECTION 201, CONGRESS VALIDLY EXERCISED ITS POWER UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS TO REMOVE UNWARRANTED RESTRICTIONS ON THE RIGHT TO VOTE

In enacting Section 201, Congress concluded both that the imposition of literacy tests as a precondition

[28] Compare *South Carolina* v. *Katzenbach*, *supra;* see generally, Karst, *Legislative Facts in Constitutional Litigation*, 1960 The Supreme Court Review 75; Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. Pa. L. Rev. 637 (1966); and Cox, *op. cit. supra*, 80 Harv. L. Rev. at 105.

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for voting has a discriminatory impact on minority groups and that the imposition of these tests is not justified by any overriding state interests.[29] These findings were sound; Section 201 is constitutionally valid under either of the lines of authority discussed above.

A. CONGRESS PROPERLY DETERMINED THAT THE IMPOSITION OF LITERACY TESTS HAS THE EFFECT OF DISCRIMINATING AGAINST NEGROES, OTHER MINORITY GROUPS AND THE POOR

In *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 329, the Court noted that literacy tests had been purposely administered so as to disfranchise Negroes in most of the states covered by the Voting Rights Act of 1965. With respect to the states subject to suspension under Section 201, Congress did not have similar evidence of *intentional* abuse in the administration of such tests. As decisions of this Court following *South Carolina* v. *Katzenbach* have made clear,

[29] See the joint statement of the ten members (constituting a majority) of the Senate Judiciary Committee who supported the bill which included Section 201 and which, with modifications was ultimately adopted (116 Cong. Rec. 2758 (daily ed., March 2, 1970)):

> * * * this extension [of the suspension of tests to areas not covered by the 1965 Act] is justified for two reasons: (1) because of the discriminatory impact which the requirement of literacy as a precondition to voting may have on minority groups and the poor; and (2) because there is insufficient relationship between literacy and responsible, interested voting to justify such a broad restriction of the franchise.

Because of an agreement to discharge the bill by a fixed date, there was no Senate committee report on the Voting Rights Act Amendments. Thus, this statement by a majority of its members may be taken as expressing the views of the Senate Judiciary Committee on the abolition of literacy tests.

however, Congress' power to suspend literacy tests is not confined to the suspension of tests administered to effect *intentional* discrimination. *Katzenbach* v. *Morgan,* 384 U.S. 641; *Gaston County* v. *United States,* 395 U.S. 285.

In *Gaston County,* a suit under Section 4(a) of the Voting Rights Act of 1965, the Court refused to permit reinstitution of a literacy test. In seeking to establish that its literacy test had not been used during the preceding five years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color"—as Section 4(a) requires as a prerequisite to reinstitution—the county claimed that the test had been administered in a fair and impartial manner and that the county had made significant strides toward equalizing and integrating its school system. Noting that these claims fell "wide of the mark," this Court said:

> Affording today's Negro youth equal educational opportunities will doubtless prepare them to meet, on equal terms, whatever standards of literacy are required when they reach voting age. It does nothing for their parents, however. From this record, we cannot escape the sad truth that throughout the years Gaston County systematically deprived its black citizens of the educational opportunities it granted to its white citizens. "Impartial" administration of the literacy test today would serve only to perpetuate these inequities in a different form. [395 U.S. at 296–297.]

The Court further indicated that it was immaterial where the educational "inequities" arose. Although

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it was assumed that most of the adult residents of Gaston County had been educated there, "[i]t would seem a matter of no legal significance that they may have been educated in other counties or States also maintaining segregated and unequal school systems." [30] 395 U.S. at 293 n. 9.

In focusing on the proposed nationwide suspension of literacy tests, Congress was fully aware of the *Gaston County* decision and its implications.[31] It received substantial evidence that Negroes, other minorities, and the poor had been denied equal educational opportunities in various parts of the country and that substantial numbers of Negroes had migrated to states outside of the South imposing literacy tests. A review of that evidence demonstrates that Congress was justified in relying on the rationale of *Gaston County* to support the enactment of legislation under the Fourteenth and Fifteenth Amendments abolishing literacy tests as a precondition to voting.[32]

With respect to the discriminatory effects of literacy tests on Negroes, Attorney General Mitchell testified

[30] In a prior footnote, however, the Court had stated: "We have no occasion to decide whether the Act would permit reinstatement of a literacy test in the face of racially disparate educational or literacy achievements for which a government bore no responsibility." 395 U.S. at 293, n. 8.

[31] See House Hearings, pp. 54–56 (testimony of Howard A. Glickstein), 221–225 (Attorney General Mitchell); Voting Rights Hearings, pp. 184–188 (Attorney General Mitchell); 116 Cong. Rec. 2770 (daily ed., March 2, 1970; Senator Hruska).

[32] Section 2 of the Thirteenth Amendment, authorizing Congress to deal with and eliminate the vestiges of slavery, might also have been relied upon.

before the House and Senate subcommittees considering the voting rights legislation that the *Gaston County* decision was relevant in several ways. First, he pointed out, the principle of that case is directly applicable to states or political subdivisions which had limited Negroes to inferior, *de jure* segregated schools. Prior to 1954, such school systems existed in southern and border states—including Delaware and North Carolina, two of the states affected by Section 201—and in the District of Columbia.[33] Clearly, the administration of literacy tests in Delaware and North Carolina would serve to perpetuate the "inequities" of the segregated schools formerly maintained by those states.

Second, the Attorney General noted that Congress could properly rely upon the fact that large numbers of Negroes have migrated from the South to other parts of the United States.[34] According to the Bureau of the Census, net migration of Negroes from the South between 1940 and 1969 totaled some 3.8 million persons.[35] Other evidence available to Congress established that part of this migration of Negroes was to northern and western states which employ literacy

[33] House Hearings, p. 222; Voting Rights Hearings, p. 185. As to the inferiority of Negro schools in Delaware, see, *e.g.*, *Evans* v. *Ennis*, 281 F. 2d 385, 392, n. 2 (C.A. 3), certiorari denied, 364 U.S. 933.

[34] See House Hearings, p. 223; Voting Rights Hearings, p. 186.

[35] Bureau of the Census, *The Social and Economic Status of Negroes in the United States, 1969*, Current Population Reports, Series P–23, No. 29, p. 5.

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tests.[36] That such persons received inferior education in segregated systems, both before and after 1954, is indicated by numerous court decisions.[37]

Finally, both the Attorney General [38] and other witnesses testified that denial of equal educational opportunity occurs not only in school systems which had *de jure* segregation, but also in systems characterized by *de facto* segregation or racial isolation. The latter condition exists throughout the United States,[39] in-

[36] The 1960 Census, for example, indicates that even during the limited period, 1955–1960, there was substantial migration of Negroes from the South to such states as Arizona (4,388 persons, both adults and children), California (74,804), Massachusetts (7,418) and New York, (74,821). See Bureau of the Census, *1960 Census of the Population*, vol. I, pts. 4, 6, 23 and 34, table 100.

[37] See, *e.g.*, *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458, 471–472 (M.D. Ala.), affirmed, 389 U.S. 215; *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 891–892 (C.A. 5), affirmed on rehearing *en banc*, 380 F.2d 385, certiorari denied, 389 U.S. 840; *United States* v. *Mississippi*, 229 F. Supp. 925, 990 (S.D. Miss.) (dissenting opinion), reversed, 380 U.S. 128.

[38] See House Hearings, p. 224; Voting Rights Hearings, p. 186.

[39] Howard A. Glickstein, then Acting Staff Director of the United States Commission on Civil Rights, testified as follows (House Hearings, p. 56):

> * * * Nationally, a wide gap has existed—and continues to exist—between the quality of the public education afforded to white students and the quality of the public education available to Negroes, Mexican-Americans, and members of other minority groups.
>
> Studies such as the Coleman report ["Equality of Educational Opportunity" (1966)] and the Commission's "Racial Isolation in the Public Schools" show the educationally harmful effects upon Negro students of attending—as they do across the Nation—schools isolated by race and

cluding the states whose tests are suspended by Section 201,[40] and is reflected in statistics on educational attainment.[41] Other persuasive evidence before Con-

> social class. Evidence at our recent hearing in San Antonio, Tex., indicated that similar damage is being done to Mexican-American students.
>
> In addition, evidence at Commission hearings in Cleveland, Boston, Rochester, and San Antonio indicates that schools attended predominantly by minority students often have inferior facilities. * * *

[40] Indeed even apart from the matter of *de facto* segregation, official discrimination against Negroes or Mexican-Americans has been found in a number of public school systems in literacy-test states other than southern or border states. See *Gonzales* v. *Sheely*, 96 F. Supp. 1004, 1007 (D. Ariz.) (inferior schools afforded Mexican-Americans); *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501 (C.D. Cal.) discrimination against Negroes); *Crawford* v. *Board of Education of the City of Los Angeles*, No. 822, 854, Super. Ct. for L.A. County (May 12, 1970) (discrimination against Negroes); *Taylor* v. *Board of Ed. of City Sch. Dist. of New Rochelle*, 294 F. 2d 36 (C.A. 2), certiorari denied, 368 U.S. 940 (racial segregation); and *Blocker* v. *Board of Education of Manhasset, New York*, 226 F. Supp. 208 (E.D. N.Y.) (racial segregation).

[41] Available data establishes that substantial disparities between the races exist throughout the United States with respect to years of school completed. See, *e.g.*, House Hearings, p. 224; Voting Rights Hearings, p. 186 (Attorney General Mitchell; Bureau of the Census, *Educational Attainment* (March 1968); Current Population Reports, Series P-20, No. 182 (1969), table 3.

The 1960 Census indicates that similar disparities exist in particular literacy-test states. In New York, for example, 10.9 percent of Negro adults had completed no more than 4 years of school, as opposed to 7 percent of the white adults. In California, the corresponding figures were 10.9 percent for Negroes and 4.9 percent for whites; in Arizona, 34.7 for nonwhites and 7.4 percent for whites; and in Massachusetts, the figures were 8.8 percent for Negroes and 5.6 percent for whites. 1960 Census of the Population, vol. I, pts. 4, 6, 23 and 24, tables 94, 102 and 103.

gress established that the discriminatory impact of literacy tests is not limited to Negroes, but falls as well upon the poor[42] and other minorities.[43] Cf. *Harper* v. *Virginia Board of Elections, supra,* 383 U.S. at 666.

A statement of Raymond Nakai, the Chairman of the Navajo Tribal Council, recited that Navajos in New Mexico (a state which has no literacy test) are much more likely to be registered voters than are members of the tribe residing in Arizona. According to Mr. Nakai, a major cause of the difference is the Arizona literacy requirement, which prevents Navajos who cannot read English or are unsure of their command of English from attempting to register. Voting Rights Hearings, p. 678. The Attorney General of Arizona

[42] The 1960 Census showed that only a small percentage of persons (25 and over) with substantial income ($7,000 to $9,999 per year) had completed no more than 4 years of school, but that a sizeable percentage of persons with income of $1,999 or less had had no more than 4 years of school.

In Arizona, only 1.3 percent of the persons with income of $7,000 to $9,000 had failed to complete more than 4 years of school, while 15.1 percent of the persons with income below $1,999 were in that category of education. For California, the corresponding percentages were 1.2 percent ($7,000–$9,999) and 9.2 percent ($0 to $1,999); the percentages for New York were 1.6 percent ($7,000–$9,000) and 11.5 percent ($0 to $1,999).

Bureau of the Census, *1960 Census of the Population*, vol. I, pts. 4, 6 and 34, table 138.

[43] A study conducted by the United States Commission on Civil Rights regarding northern and western states, based upon Bureau of the Census tabulations, indicated that "literacy tests do have a negative effect on voter registration and that this impact of literacy tests falls most heavily on blacks and persons of Spanish surname." See Voting Rights Hearings, pp. 399–407.

pointed out that: "Many of the older Indians were never privileged to attend a formal school * * *." Voting Rights Hearings, p. 675.

In short, Congress had ample evidence before it that the administration of literacy tests as a precondition to voting penalizes identifiable minority groups for their failure to attain the same levels of education attained by others, even though that failure is attributable to inferior educational opportunities. This evidence confirmed this Court's reasoning in *Gaston County* that the imposition of literacy tests to such persons (whether or not administered to effect intentional discrimination) perpetuates the discriminatory effects of educational inequities. Surely, given the broad grants of legislative power contained in the Fourteenth and Fifteenth Amendments, Congress was not powerless to remedy these effects of discrimination in education by suspending the use of literacy tests."

Nothing in this Court's decision in *Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 45—holding that the North Carolina literacy test requirement was not unconstitutional on its face—compels a contrary conclusion. *Lassiter* did not involve the power of Congress to implement the Fourteenth and Fifteenth Amendments. 360 U.S. at 51; and see *Katzenbach*

[44] In light of the fact that Congress found the problem to be a substantial one in all states, its determination that the application of a uniform remedy to all of the states not covered by Section 4(a) would be "appropriate" surely was a permissible one—regardless of whether the dimensions of the problem are precisely the same in those states newly subject to the suspension as in those that were previously subject to it. Cf. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489–490.

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v. *Morgan, supra,* 384 U.S. at 649. Nor was the matter of inequality of education [redacted] there put in issue. The Court did take judicial notice in *Lassiter* that "[l]iteracy and illiteracy are neutral on race, creed, color, and sex," 360 U.S. at 51. That assertion, however, is now plainly rebutted both by *Gaston County* and by the record compiled by Congress in considering the Voting Rights Act Amendments.

B. NO COMPELLING STATE INTERESTS JUSTIFY THE IMPOSITION OF LITERACY TESTS

In addition to the purpose of Congres to eliminate the effects of unequal educational opportunity upon voter registration, Congress independently determined, as an alternate basis for enacting Section 201, that the possible interests of a state in maintaining a literacy requirement are not sufficient to justify the resulting disfranchisement. See 116 Cong. Rec. 2758 (daily ed., March 2, 1970).

At the hearings on the legislation, many witnesses stated that, in view of the widespread availability of radio and television and the coverage given to local and national issues, a person need not be able to read to be informed.[45] In recommending the abolition of literacy tests, the Report of the President's Commission on Registration and Voting Participation (November 1963) reached the same conclusion (p. 40):

[45] See, *e.g.*, House Hearings, pp. 59 (Mr. Glickstein) 222 (Attorney General Mitchell); and Voting Rights Hearings, pp. 185 (Attorney General Mitchell) 468 (Bar. Assn. of City of N.Y.).

> Many media are available other than the printed word to supply information to potential voters. The Commission is not impressed by the argument that only those who can read and write or have a sixth grade education should have a voice in determining their future. This is the right of every citizen no matter what his formal education or possession of material wealth. The Commission recommends that no literacy test interfere with the basic right to suffrage.[46]

Furthermore, most states do not have and never have had a literacy requirement as a precondition for voting. And certain of the states which retain such laws either have ceased applying the requirement (as in the case of Delaware and Oregon) or leave the matter to the discretion of local registrars (reportedly, the case in California). See House Hearings, pp. 96, 102 and 104; Voting Rights Hearings, pp. 407–409, 672, 676 and 677. This at least creates substantial doubt whether any "compelling state interest," in terms of either the quality of the electorate or administrative convenience, supports the classification which disfranchises persons unable to read and write.[47]

[46] See also pp. 55–59 of the Report.

[47] The history of literacy requirements also puts the notion that the purpose of the requirements was to assure an intelligent electorate in serious doubt.

As a memorandum of the Commission on Civil Rights pointed out, even outside the South, "a primary motivation behind [literacy] requirements" was to render politically impotent "various racial, ethnic * * * [and] religious * * * groups." See Vot-

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III. THE PROVISIONS OF SECTION 202 CONCERNING RESIDENCY REQUIREMENTS AND ABSENTEE REGISTRATION AND BALLOTING IN PRESIDENTIAL ELECTIONS ARE A PROPER EXERCISE OF CONGRESSIONAL AUTHORITY UNDER THE FOURTEENTH AMENDMENT

Section 202 as enacted refers to a number of alternative constitutional bases. Section 202(a). However, except for some mention of the alternative grounds by Senator Goldwater, who sponsored the residency and absentee-voting provisions in the Senate,[48] virtually all discussion of the constitutionality of Section 202, in both hearings[49] and debates,[50] pertained to the Four-

ing Rights Hearings, pp. 413–414. See also *id.* at pp. 185–188 (Attorney General Mitchell); *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 654, *Castro* v. *State*, 85 Cal. Rptr. 20, 466 P. 2d 244, 248–249; Leibowitz, *English Literacy: Legal Sanction for Discrimination*, 45 Notre Dame Law. 7 (1969).

[48] See Voting Rights Hearings, pp. 289–291; 116 Cong. Rec. 3541 (daily ed., March 11, 1970). In general, Senator Goldwater's discussion, too, dealt mainly with the Fourteenth Amendment and the decision in *Katzenbach* v. *Morgan*. See Voting Rights Hearings, pp. 284–289; 116 Cong. Rec. 3540–3541 (daily ed., March 11, 1970).

[49] House Hearings, p. 224, Voting Rights Hearings, p. 188 (Attorney General Mitchell); House Hearings, p. 277 and Voting Rights Hearings, p. 684 (Department of Justice memorandum); Voting Rights Hearings, p. 330 (Professor Cox); [*id.*, p. 302 (memorandum prepared by Library of Congress); p. 473 (Association of the Bar of the City of New York); and p. 702 (memorandum of Professor Cox)].

[50] *E.g.*, 116 Cong. Rec. 3391 (daily ed., March 10, 1970; Sen. Hart), 3487 (daily ed., March 11, 1970; Sen. Kennedy); 116 Cong. Rec. 5643 (Rep. McCulloch), 5644 (Rep. Anderson) and 5644 (Rep. McClory), (daily ed., June 17, 1970).

teenth Amendment and this Court's decision in *Katzenbach* v. *Morgan*, *supra*. Accordingly, we deal primarily with the Fourteenth Amendment ground and refer only briefly to the alternative constitutional theories.

A. CONGRESS CORRECTLY CONCLUDED THAT THE STATES LACK ANY COMPELLING INTEREST WARRANTING CLASSIFICATIONS MORE RESTRICTIVE OF THE RIGHT TO VOTE IN PRESIDENTIAL ELECTIONS THAN THOSE SET FORTH IN SECTION 202.

1. Residency

Although this Court has repeatedly acknowledged the initiative of the states in setting residence qualifications for participation in all elections, including presidential elections,[51] in this respect as in all others Congress may impose restrictions on such qualifications if necessary and proper to enforce the provisions of the Constitution. *Lassiter*, *supra*, 360 U.S. at 51; see text and cases cited, *supra*, pp. 29–39. Without regard to whether lengthy state residence requirements violate the Equal Protection Clause or other constitutional rights in and of themselves as applied to presidential elections,[52] here Congress has made findings appropriate and adequate to the exercise of its enforcement power under the Fourteenth Amendment.

[51] *Evans* v. *Cornman*, *supra*, 398 U.S. at 422; *Kramer* v. *Union School District*, 395 U.S. at 625; *Dreuding* v. *Devlin*, 380 U.S. 125, affirming 234 F. Supp. 721 (D. Md.); *Carrington* v. *Rash*, 380 U.S. 89, 91; *Lassister* v. *Northampton County Board of Elections*, 360 U.S. 45, 51; *Pope* v. *Williams*, 193 U.S. 621, 633; *McPherson* v. *Blacker*, 146 U.S. 1, 35.

[52] The question was presented last Term, but not decided, in *Hall* v. *Beals*, 396 U.S. 45. See *infra* p. 61 n. 61. We understand

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The debates established that the state law classifications of voters according to duration of residence which are affected by Section 202 operate to prevent a large class of citizens from voting in presidential elections who otherwise would be able to do so. *Supra*, p. 8, n. 9. The class is thus excluded from a significant aspect of the franchise, for the general principle as to the importance of the right to vote (see, *e.g.*, *Kramer* v. *Union School District, supra*) certainly applies with respect to selection of the President and Vice President.[53] *Burroughs and Cannon* v. *United States*, 290 U.S. 534, 545; *Williams* v. *Rhodes, supra*, 393 U.S. at 31. As to that aspect, Congress found that:

> * * * the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President * * * does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections. [Section 202(a)(6).]

that an equal protection challenge to all lengthy residence requirements may be brought before this Court on appeal in *Burg* v. *Canniffe*, Civ. No. 69–855–C, D. Mass., decided July 8, 1970; see also *Blumstein* v. *Ellington*, Civ. No. 5815, M.D. Tenn., decided August 31, 1970.

[53] Application of the Equal Protection Clause to voting in presidential elections is not affected by the fact that a state might provide for appointment, rather than election, of presidential electors. Once it is decided to rely upon popular election, the state must, as with regard to any election, comply with the Fourteenth Amendment in determining eligibility to vote. *Williams* v. *Rhodes*, *supra*. Cf. *Kramer* v. *Union School District*, *supra*, 395 U.S. at 628.

The validity of this finding can be demonstrated by appraising the various justifications offered for the durational residency requirements.[54]

The general basis for such limits on the franchise is to insure that the voter has sufficient roots in the community to give him familiarity with local conditions, candidates and issues. While this objective may be valid with respect to congressional, state and local elections, it is inapplicable to presidential elections. The President is selected by and is responsible to the entire nation. Since the issues and personalities involved in presidential elections are of nationwide significance, the new resident of a jurisdiction is just as familiar with the candidates for President and their platforms as is the resident of long standing.[55]

Related to the objective of insuring knowledge of local conditions—and equally invalid—is the notion that a presidential election may involve certain parochial interests of the state or city and that a long period of residence is warranted to impress local view-

[54] It is important to distinguish between the basic requirement that the person be a *bona fide* resident of the jurisdiction and the separate qualification as to length of residency. Section 202 deals with the latter and in general does not affect the former.

[55] See, *e.g.*, 115 Cong. Rec. 12156 (daily ed., December 11, 1969) (Rep. Rhodes); 116 Cong. Rec. 2758 (daily ed., March 2, 1970) (ten Senate Judiciary Committee members); 116 Cong. Rec. 3003 (daily ed., March 4, 1970) (Sen. Baker). See also Commissioners' Prefatory Note to Uniform Voting by New Residents in Presidential Elections Act, 9C U.L.A. p. 201 (1967 Supp.); and Schmidhauser, *op. cit.*, *supra*, p. 828.

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points upon voters. Responding to this asserted rationale, Congress expressly found that the imposition of the durational residency requirement as a precondition to voting for President and Vice President "in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote." Section 202(a)(4). " 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Carrington* v. *Rash, supra,* 380 U.S. at 94. See also *Evans* v. *Cornman, supra.*

The other broad heading of asserted justification for lengthy state residence requirements is administrative convenience: the need for adequate time in which to investigate prospective voters, to prevent fraud, and to do necessary paperwork; and the convenience of applying the same standards in presidential elections as in other elections which may be conducted simultaneously by the state and which *are* subject to its residence standards. Where fundamental rights are concerned, of course, overbreadth of classification can not be justified by mere administrative convenience. *Carrington* v. *Rash, supra,* 380 U.S. at 96; *Harman* v. *Forssenius,* 380 U.S. 528, 542–543; *Shapiro* v. *Thompson,* 394 U.S. 618, 637. But beyond that, Congress carefully investigated the matter and determined in each instance that, as applied to a residence period of more than thirty days, the administrative convenience arguments are without force.

Thus, Congress' examination made it quite clear that investigation of new voters, paperwork, and the prevention of fraud require no more than thirty days. Four-fifths of the states permit registration or qualification for the vote by at least some classes of citizens up to the thirtieth day prior to a presidential election.[56] As Section 202's sponsor, Senator Goldwater, stated (Voting Rights Hearings, p. 282):

> When these requirements are applied in a reasonable way, they can serve a valid purpose by protecting against fraudulent voting and allowing the election officials to carry out the paperwork and mechanics of holding an election.
>
> But whatever the reasons for permitting a State to set a closeout date for registering to vote for President, there is no compelling reason for imposing a separate and additional requirement that voters also must have been residents of the State for a particular length of time. If a State can satisfy its logistical needs by keeping its voting lists open up to 30 days before an election—as 40 States now do—what is the justification for barring citizens from balloting for President unless they have been residents of the State for 6 months or 1 year?
>
> So long as a citizen is a good-faith resident of a State and the State has adequate time to check on his qualifications, the duration of his residency should have no bearing on his right to participate in the election of the President.

If so many states are able to accommodate their legitimate logistical needs in thirty days or less, Congress

[56] See 116 Cong. Rec. 3543 (daily ed., March 11, 1970).

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was correct in concluding that the "administrative convenience" of a longer period is insubstantial, and is not in fact its real rationale.

The prevention of double voting and other fraudulent practices, moreover, can readily be accomplished by measures which do not result in the wholesale disfranchisement of voters, very few of whom would ever consider such practices. The federal statute itself prescribes criminal penalties for false registration and other fraudulent acts relating to the residency provisions. Section 202(i). Many states have similar prohibitions against improper voting practices, and other means of protecting the integrity of the registration and electoral process are available.[57] Since fundamental rights are in the balance, compare *Shapiro* v. *Thompson, supra,* 394 N.S. at 637, Congress was warranted in limiting the states to the use of these less drastic means of accomplishing their purposes. See also *Kramer, supra,* 395 U.S. at 632–633; *Cipriano* v. *City of Houma,* 395 U.S. 701, 706–707.

[57] For example, the Uniform Voting by New Residents in Presidential Elections Act, 9C U.L.A. pp. 198–207 (1967 Supp.), contains a number of administrative safeguards, including (1) requiring a sworn statement describing past and present residences and an express denial that the individual will vote elsewhere in the particular election, § 2; (2) prescribing criminal penalties for providing false information, § 10; (3) informing the state where the individual formerly resided of his application for a presidential ballot, § 3; (4) maintaining a file and index of such information received from other states regarding former residents of the particular state, § 4; (5) maintaining and making available for public inspection lists of the applications of new residents for presidential ballots, § 7, and (6) permitting the vote of new residents to be challenged for cause, § 9.

Of course, where necessary, election officials can communicate with their counterparts in other states or counties by telephone, as well as by mail. Presumably, where it is available for use by election officials, data processing equipment can also facilitate implementation of Section 202. See Note, 45 Notre Dame Law. 150 (1969).

Nor is it compelling that a state may have to adopt a wholly separate registration qualification procedure for presidential elections if it wishes to retain its longer residency period for its other elections. Three-fifths of the states have created a special method for voting in presidential elections in the case of new residents who cannot meet the usual residence requirements, permitting these citizens to vote for presidential electors but not for other purposes. 116 Cong. Rec. 3539 (daily ed., March 11, 1970). But beyond that lesson of experience, the fact that it may be somewhat more expensive to recognize fundamental rights than to ignore them has never been given substantial weight in the balance. *Shapiro, supra,* 394 U.S. at 633; *Gideon* v. *Wainwright,* 372 U.S. 335, 344; *Griffin* v. *Illinois,* 351 U.S. 12.

Finally, no compelling interests mark the other side of the ledger, where states are compelled to permit voting, absentee or in person, by former residents who for reasons of time have not been able to register in their new state of residence. By the terms of Section 202(e), the former resident must be qualified (except as to his residence at the time of the election) as a voter of the state he has departed. As above, the state has no cognizable *political* interests in preventing his vote for President and Vice President; as to these voters, who will almost always have been registered to vote for some time in the state they have left, the arguments of administrative convenience are wholly

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unpersuasive. As the experience of ten states has shown (116 Cong. Rec. 3543 (daily ed., March 11, 1970); compare *id.* at 3542, Table 2), the reform is easily accomplished.

In sum, Congress intended to give, and did give, fully adequate weight to the needs and interests of state election officials. "[E]very standard set forth in the amendment has been modeled after practices that are used by the States themselves and are proven to be workable." 116 Cong. Rec. 3539 (daily ed., March 11, 1970; Sen. Goldwater). In acting *by statute*[58] to prevent denials of the vote which it properly determined to be unjustified, Congress fully honored the bounds of its Fourteenth Amendment enforcement power.

2. Absentee voting and registration

The validity of the absentee voting and registration provisions is demonstrated by a quite similar analysis. The basic problem which Congress identified was abridgement of the right to vote in presidential

[58] Idaho may contend that this case is controlled by *Dreuding* v. *Devlin*, 380 U.S. 125, summarily affirming 234 F. Supp. 721 (D. Md.), a district court decision which upheld against constitutional attack Maryland's one-year residency requirement as applied to presidential elections. Passing the question whether *Dreuding* would be decided the same way today (see *Hall* v. *Beals*, *supra*, 396 U.S. at 52 (dissent)), in that case, as in *Lassiter* and all the other cases upholding state voter qualification provisions against constitutional attack on the ground of state prerogative, there was no congressional legislation on the point. Where such legislation has been enacted, relieving the judiciary of any need itself to set standards of a legislative nature, compare pp. 36–39 *supra*, congressional power to act has been upheld. *Katzenbach* v. *Morgan*, *supra*; *South Carolina* v. *Katzenbach*, *supra*.

elections because of the "lack of sufficient opportunities for absentee registration and absentee balloting in * * * [such] elections." Section 202(a). Congress believed that many states impose undue limits upon the availability and use of absentee ballots; only 20 states permit civilians generally to register absentee.[59] Congress expressly found that these restrictions upon the franchise were not justified by any "compelling State interest in the conduct of presidential elections." Section 202(a)(6). In some states, the provisions of Section 202 designed to benefit persons absent from their election district will cause additional tasks for those responsible for administering registration and election laws. However, as is true with respect to the matter of durational residence requirements, the possible interest of a state in avoiding such administrative tasks is not the type of interest which warrants denial of the right to vote. *Carrington* v. *Rash*, *supra*.

That Congress had a proper basis for "[resolving] the conflict as it did" (*Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 653) is demonstrated by the following statement of Senator Goldwater [116 Cong. Rec. 3539 (daily ed., March 11, 1970)]:

> * * * [M]y amendment [Section 202] will permit all categories of citizens, both civilian and military, to register absentee and to vote by absentee ballot.
>
> Specifically, the amendment provides that citizens may apply for absentee ballots for President and Vice President up to 7 days before the election and may return their

[59] See 116 Cong. Rec. 3543–3544 (daily ed., March 11, 1970).

marked ballots as late as the close of the polls on election day. Once again, the features of my measure are drawn from the proven practice of the States themselves. At present 37 States allow certain voters to make application for absentee ballots up to a week before the election and 40 States provide that the marked ballots need not be returned until election day itself.

* * * * *

My amendment will also allow citizens who are away from their homes to register absentee. Forty-nine States now permit servicemen to register absentee or do not even require them to register at all * * *.

* * * * *

* * * [I]t seems entirely appropriate to ask that the same rule shall be applied on behalf of civilian citizens who are temporarily living away from their regular homes, whether they are visiting relatives or friends abroad, attending college outside their own State, working for a U.S. firm overseas, or serving as Federal employees away from their normal homes.[60]

See also 116 Cong. Rec. 3543–3544 (daily ed., March 11, 1970).

[60] We do not believe it could properly be argued that a state has any legitimate political basis for distinguishing between civilian and military citizens for the purpose of permitting absentee registration only by the latter. Considerations of the "worthiness" of the reason for a person's inability to register could not warrant the penalty of denying registration. And the administrative difficulties of registering and dealing by mail with military personnel, many of whom at present are in remote areas of the world, is evidently no less than that of dealing with civilians on a business trip or away from home at school.

In conclusion, in light of (1) the interests of citizens disfranchised by durational requirements and by inadequate provisions for absentee voting and registration and (2) lack of any sufficient countervailing state interest, Congress determined that the state laws affected by Section 202 embody classifications which are inconsistent with the guarantees of the Fourteenth Amendment. That determination, we submit, was fully warranted, and the remedies adopted by Congress are appropriate ones. At the very least, the Court can "perceive a basis" for the federal legislation. Cf. *Katzenbach* v. *Morgan, supra.* It follows that Section 202 is a valid exercise of congressional authority.

B. OTHER CONSTITUTIONAL BASES FOR SECTION 202.

While the Fourteenth Amendment analysis above is the principal, and we believe adequate, support for Section 202, other considerations can also be adduced.[61] First, the selection of the President and Vice President is, perforce, an especially *federal* event, and it may therefore be argued that Congress has special powers to govern it. While the states are not obligated by the written instrument of the Constitution to make that process elective, all have done so. That choice having been made, the right to participate in such elections becomes "a privilege of *national* citizenship derived from the Constitution." *United States* v. *Original Knights of the Klu Klux Klan,* 250 F. Supp.

[61] These arguments were set out at greater length in the Brief *Amicus Curiae* filed by the United States last Term in *Hall* v. *Beals*, No. 39, O.T., 1969, pp. 12–18. In view of the recency of that filing, we merely summarize them here.

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330, 353 (E.D.La.; emphasis added); *Twining* v. *New Jersey*, 211 U.S. 78, 97; *United States* v. *Classic*, *supra*; *Smith* v. *Allwright*, 321 U.S. 649; *Terry* v. *Adams*, 345 U.S. 461; see *Williams* v. *Rhodes*, 393 U.S. 23. It has long been established that Congress may enact laws ensuring the proper conduct of those elections. See *Ex Parte Yarbrough*, 110 U.S. 651; *Burroughs and Cannon* v. *United States*, 290 U.S. 534.[62]

Second, the questions of residence and absentee voting each have an evident relationship to the right to travel freely among the several states, which has consistently been identified by this Court as "fundamental." *Shapiro* v. *Thompson*, 394 U.S. 618, 629, 638; *United States* v. *Guest*, 383 U.S. 745, 757–758; *Edwards* v. *California*, 314 U.S. 160; *Twining* v. *New Jersey*, *supra*; *Williams* v. *Fears*, 179 U.S. 270, 274; *Crandall* v. *Nevada*, 6 Wall. 35; *Passenger Cases*, 7 How. 283, 492. While residency requirements are not intended as a penalty on that right, they have that effect—in a very large number of cases, as was shown in the debates. Under the cited cases, it is therefore clear that a "compelling" state interest in exclusion from the vote must be shown, whether or not the right to vote is also considered "fundamental." In presidential elections, for the reasons shown above, states have no such interest.

[62] The Constitution does not link the voting qualifications for participating in a presidential election to state voting qualifications generally. Such a link *is* made for congressional elections (Article I, Section 2; Seventeenth Amendment), suggesting another basis for argument that Congress has relatively broad power over the conduct of presidential elections.

IV. TITLE III, IN PROHIBITING THE STATES FROM DENYING THE VOTE TO OTHERWISE QUALIFIED CITIZENS EIGHTEEN YEARS OF AGE AND OLDER BECAUSE OF AGE, IS A PROPER EXERCISE OF CONGRESS' POWER UNDER THE FOURTEENTH AMENDMENT TO REMOVE UNWARRANTED RESTRICTIONS ON THE RIGHT TO VOTE

Section 302 of the 1970 Amendments provides that:

> * * * no citizen * * * who is otherwise qualified to vote in any State or political subdivision in a primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

While this provision has been the subject of more public controversy than the others at issue in these cases and is the only one which rests solely on Congress' power to enforce the Equal Protection Clause, the issues here are the same so far as that power is concerned: the scope of that power, and the standard of rationality which state exclusions from the franchise must satisfy under the Equal Protection Clause. That is, in each provision, Congress has confronted a state exclusion from the franchise which it concluded after careful examination vindicated no important state interest; in each, it has restricted state power to deny the franchise on the examined ground, to the extent it found such denial to be unwarranted.

There is no basis for applying one standard to judge the exclusion from voting of citizens between the ages of 18 and 21 while at the same time applying

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another standard to judge the exclusion of a different group.[63] All are "locked into [a] self-perpetuating status of exclusion from the electoral process." *Kramer, supra,* 395 U.S. at 640 (Stewart, Black and Harlan, JJ., dissenting). The exclusion of 18–20 year-olds "from any voice in the decisions" of legislators and from any "voice in selecting" legislators, 395 U.S. at 628, is no less complete than that felt by any other disfranchised group. The legal analysis, in each case, is then the same.[64]

The framework of that analysis is set out at length in Part I of this argument *supra,* pp. 23–39. In summary, we believe it settled that the general prerogative of states to fix voter qualifications in state, local, and national elections is subject to the strictures of the Equal Protection Clause. As applied to classifications which have the effect of excluding some persons from the vote while granting the vote to others, that clause

[63] On those occasions when this Court has mentioned the age qualification, it has in the same breath linked this qualification with others, such as residency. *E.g., Kramer* v. *Union School District, supra,* 395 U.S. at 626; *Lassiter* v. *Northampton County Board of Elections, supra,* 360 U.S. at 51; and see generally cases cited at n. 51 *supra.*

[64] Professor Archibald Cox made the point in these terms: "* * * [T]he constitutional underpinning for abolishing residency requirements and literacy tests is equally applicable to legislation reducing the voting age to eighteen. * * * Under the Fourteenth Amendment the question is whether the classification is reasonable or arbitrary and capricious * * *. Under Section 5 of the Fourteenth Amendment * * * the Congress has the power to make its own determination." Voting Rights Hearings, pp. 704–705; Voting Age Hearings, p. 177. See also 116 Cong. Rec. 3063 (daily ed., March 5, 1970); Voting Age Hearings, p. 169 (Sen. Kennedy); n. 19 *supra.*

requires that there be a "compelling state interest" to support the exclusion made. The responsibility to effectuate adherence to this standard lies with Congress as well as the courts. Indeed, Section 5 of the Fourteenth Amendment gives Congress particularly broad powers, both to identify violations of the standard and to remedy them. *Katzenbach* v. *Morgan, supra.* Where Congress on its own initiative investigates state voter qualifications and concludes that they deny equal protection to a class of otherwise qualified voters, the enforcement clause authorizes legislation to remove the disqualification and thus cure the defect; such legislation will be upheld if this Court can "perceive a basis" for it.

Here, Congress has found that the exclusion of 18–20 year-olds from the ballot denies them the vote in the absence of any "compelling state interest" to do so. Although it may be conceded that the states have an important interest in protecting their elections from irresponsible voting, Congress determined that the particular application of that principle to this age group did not support their exclusion. To a much greater extent than *Katzenbach* v. *Morgan, supra,* it did so on the basis of a voluminous legislative history, reflecting full congressional analysis of the factors relevant to the constitutional question, careful evaluation of the conflicting interests, and virtual unanimity on the underlying issue of the readiness of this age group for the vote. See 116 Cong. Rec. 3501, 3517 (daily ed., March 11, 1970; Sens. Mansfield and Randolph). Particularly since the subject of voter qualifications involves an area in which elected representatives have a special

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informed competence, that determination is entitled to deference. We now turn to examine the bases on which it was made.

1. *Historic origins.* Congress discovered that the use of 21 as the age of majority is something of an "historical accident," *Williams* v. *Florida,* 399 U.S. 78, 89, which today has no necessary relation to the qualities which warrant age restrictions—maturity and responsibility in exercising the franchise. A frequently mentioned explanation was that in medieval times "a young man was deemed to have become capable at that age of bearing the heavy armor of a knight." 116 Cong. Rec. 3503 (daily ed., March 11, 1970). While one readily understands how that age might have become associated with participation in governmental affairs and majority generally, the basis is no more than tradition. As this Court has remarked, "[r]epresentation schemes once fair and equitable become archaic and outdated." *Reynolds* v. *Sims, supra,* 377 U.S. at 567; See also *Levy* v. *Louisiana,* 391 U.S. 68, 71; *Missouri* v. *Holland,* 252 U.S. 416, 433.

2. *Military service.* Congress found that to deny citizens between the ages of 18 and 21 the right to participate in the election of those who shape this nation's affairs is "particularly unfair * * * in view of the national defense responsibilities imposed upon such citizens." Section 301(a)(1). The burden of participation in government affairs, through military service, today falls heavily on the young men of this

age group.[65] With the recent change to a system of random selection in administering the draft,[66] they can expect to bear virtually the entire burden of compulsory service.[67] Statistically, "[a]bout 30% of our forces in Vietnam are under 21.[68] Over 19,000 or almost half of those who have died in action there, were under 21." 116 Cong. Rec. 3058 (daily ed., March 5, 1970; Sen. Kennedy). As one of the co-sponsors of the Senate bill remarked, the imposition of this burden makes access to the franchise particularly important:

> The well-known proposition—"old enough to fight, old enough to vote"—deserves special mention. To me, this part of the argument for granting the vote to 18 year-olds has great appeal. At the very least, the opportunity to vote should be granted as a benefit in return for the risks an 18 year-old is obliged to assume when he is sent off to fight for this country. * * *
>
> To be sure, as many critics have pointed out, the abilities required for good soldiers are not

[65] With limited exceptions all males in the United States must register for the daft upon attaining age 18 (50 U.S.C. App. 453); men between 18½ and 26 are liable for training and service in the Armed Forces (50 U.S.C. App. (Supp. IV) 454). Enlistment without parental consent is permitted in the Army, Air Force, Navy and Marine Corps at age 18 for males and 21 for females. 10 U.S.C. 3256(a), 8256(a) and 5533(a) and (b); but see 14 U.S.C. 368.

[66] See Presidential Proclamation No. 3945, 34 Fed. Reg. 19017. See also remarks of Representative Robison, 116 Cong. Rec. 5673 (daily ed., June 17, 1970): "our recent actions and those of the President place more of the burden of carrying on our wars on the younger men of our country."

[67] During the first half of 1970, 55.4 percent of the inductees were 20 and 2.6 percent 19.

[68] The comparable figure for the Armed Forces as a whole is 26.4 percent.

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the same abilities required for good voters. Nevertheless, I believe that we can accept the logic of the argument without making it dispositive. A society that imposes the extraordinary burden of war and death on its youth should also grant the benefit of full citizenship and representation, especially in sensitive and basic areas like the right to vote. [116 Cong. Rec. 3058 (daily ed., March 5, 1970; Sen. Kennedy).]

3. *Participation in the work force and civic responsibility.* Persons older than 18, as a class, engage in other activities which, Congress found, give them important interests in the vote. According to the Department of Labor, 66.8 percent of the men and 49.3 percent of the women aged 18 and 19 were in the labor force as of May, 1970.[69] While separate figures are not available for 20-year olds,[70] it stands to reason that a corresponding large percentage of that group also hold jobs. The salaries they earn account for substantial amounts of taxes paid to the federal and

[69] See Department of Labor, Bureau of Labor Statistics, *Employment and Earnings*, Vol. 16, No. 12 (June 1970), table A–3. The term "labor force" includes both civilian and military employment, it also includes full-time and part-time employees and persons who are in the labor force though currently unemployed. For both males and females, aged 18 and 19, the unemployment rate was approximately 10.6 percent. Of the males in this age group *not* in the labor force, the vast majority were enrolled in school. Of the females, aged 18–19, not in the labor force, almost all were either in school or "keeping house."

The percentages of 16-and 17-year olds in the labor force (*i.e.*, 44.1 percent of the males; 30.4 percent of the females) were substantially lower than those for the 18-to 19-year olds.

[70] The pertinent tables include 20-year olds in a 20-to-24 age category.

state governments;[71] however, in most states, as Senator Mansfield pointed out, these citizens "have no voice in the imposition of those taxes." 116 Cong. Rec. 2939 (daily ed., March 4, 1970).

Of course, the group is subject to the laws of the state and nation. The criminal laws, which control their behavior, generally treat them as adults. 116 Cong. Rec. 3518 (daily ed., March 11, 1970; Sen. Randolph); See Voting Age Hearings, pp. 5–8. And their broad participation in adult affairs generally gives them a pervasive and personal interest—no longer necessarily or adequately represented by their parents—in how laws are framed and executed. In sum, it cannot be said that persons older than 18, but not yet 21, are "substantially less interested" than their elders in the many electoral decisions affecting laws on crime, taxes, unemployment, foreign policy, and military service, to mention but a few examples. See *Evans* v. *Cornman*, 398 U.S. 423–425.

4. *Readiness for the vote.* Congress' findings were not restricted to the proposition that the vote is important or a matter of substantial interest to persons over eighteen; it also learned that those persons, as a class, are ready for responsible voting.

In one respect, this readiness is reflected in the class' educational achievements. While in "1900 only 6% of Americans who had reached 18 were high

[71] Unpublished data of the Office of Research and Statistics of the Social Security Administration indicates that persons between the ages of 18 and 20 had income (subject to Social Security tax) of approximately 15 billion dollars in 1967 (the latest year for which such calculations have been made).

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school graduates," today 81 percent of them are in this category.[72] 116 Cong. Rec. 3216 (daily ed., March 9, 1970; Sen. Goldwater); Voting Age Hearings, p. 133. Of the current graduates, "[a]lmost 50% * * * are enrolled in college [and] the education which they are receiving is more advanced and intense than at any time in our history." *Ibid.* Complementing this is the obvious fact that we are now living in "the age of instant communications, all-news radio stations, [and] T.V. news." *Ibid.* On this evidence, Congress unquestionably was correct in its judgment that "youth today is better informed and better equipped than any previous generation." *Ibid.*

It is not only a matter of education, however. Congress heard expert testimony that young people reach physical and mental maturity several years earlier today than they did a century ago.[73] The large number of persons who join the work force (*supra* p. 68), or marry before they reach twenty-one, 116 Cong. Rec. 3216 (daily ed., March 9, 1970; Sen. Goldwater), is further indication of their adult status. See Voting Age Hearings, p. 5. There was ample basis for the conclusion that the denial of the franchise

[72] A report of the Bureau of the Census entitled *Educational Attainment* (March 1968) showed that the median number of school years completed was 12.2 for persons aged 18 and 19, but only 8.8 for persons aged 65 to 74. Current Population Reports, Series P-20, No. 182 (1969), table 1. See 116 Cong. Rec. 5675 (daily ed., June 17, 1970). As late as 1940, only one-half of all 18-year-olds had completed high schools. 116 Cong. Rec. 3216 (daily ed., March 19, 1970; Sen. Goldwater); Voting Age Hearings, p. 133.

[73] Senator Bayh, referring to testimony of Dr. Margaret Mead (Voting Age Hearings, pp. 223–233), stated: "Dr. Mead told us that in the last hundred years, the age of maturing young people has lessened by 3 years. So we can say reasonably, scientifically, and medically that a young person today is as mature at 18 as a young person 100 years ago was at age 21." 116 Cong. Rec. 3510 (daily ed., March 11, 1970); Voting Rights Hearings, p. 323 and 116 Cong. Rec. 3057, (daily ed., March 5, 1970; Sen. Kennedy); 116 Cong. Rec. 3216 (daily ed., March 9, 1970; Sen. Goldwater).

was not warranted by any concern that it would not be responsibly used:[74]

> It is plain—indeed, conspicuous—that today's 18-year olds are far better educated and far more sophisticated than those of even a generation ago. It can be argued convincingly, in fact, that contemporary youth is more keenly aware of the problems confronting American society and more ardently committed to solving those problems than many of their elders. At the age of 18, young men and women have completed their secondary education. They are entering college, joining the Armed Forces, taking jobs. They are more intellectually mature and more politically responsible than any generation in the country's history. It was nearly two centuries ago—in a small, rural, agrarian society—that most States set the voting age at 21. It made sense then. It no longer makes sense today. [116 Cong. Rec. 5654 (daily ed., June 17, 1970; Rep. Boland)]

[74] Virtually the same arguments advanced today against lowering the voting age were also made "against the enfranchisement of women 50 years ago, the enfranchisement of freed slaves 100 years ago, and the enfranchisement of men who didn't own property 150 years ago," Chapman, *The Right to Vote at 18*, Voting Age Hearings, pp. 425, 427. See also Voting Rights Hearings, p. 323; 116 Cong. Rec. 3058 (daily ed., March 5, 1970; Sen. Kennedy).

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5. *Practical experience.* Congress' determination was not merely the result of abstract analysis. It also considered the experience of the four states—Georgia since 1943, Kentucky since 1955 and Alaska and Hawaii since they entered the Union in 1959—which presently grant the franchise to persons under 21.[75] On investigation, Congress discerned "no evidence that the reduced voting age has caused any difficulty whatever in [these] states."[76] Indeed, two "former governors * * * of Georgia * * * [had] testified in the past that giving the franchise to 18-year-olds in their [state had] been a highly successful experiment." Voting Age Hearings, pp. 162–163; Voting Rights Hearings, p. 324. Moreover, as Representative Burlison pointed out (116 Cong. Rec. 5668 (daily ed., June 17, 1970)):

> In 1960, a study was undertaken at the University of Kentucky to study student voting habits. The test showed that in Kentucky where 18-year-olds can vote, 80 percent did so. Contrast this with the statewide figures which indicate that only 59 percent of the general public voted in the same election. * * *

Taken as a whole, these findings amply support Congress' conclusion that the denial of the vote on account of age to persons 18 years of age and older is not warranted by any "compelling State interest," and constitutes a denial of equal protection which Congress

[75] Congress also took note of the fact that a significant number of foreign nations, including, recently, Great Britain, now permit 18-year-olds to vote. Voting Age Hearings, p. 163; 116 Cong. Rec. 3058 (daily ed., March 5, 1970). A study of the issue in Great Britain led to conclusions identical to those reached by the Congress. Report of the Committee on the Age of Majority. H.M.S.O. Cmnd. 3342 (1967), pp. 39–40.

[76] See, *e.g.*, 116 Cong. Rec. 3475 (daily ed., March 11, 1970);

may remedy under Section 5 of the Fourteenth Amendment. While the states have an interest in assuring responsible and honest use of the ballot, the material Congress considered reflects both the importance of the vote to the affected class, and the absence, today, of any sufficient basis on which to differentiate the class[77] of 18–20-year olds from those 21 and above on grounds of their likely responsibility or political awareness. Of course there may be marginal differences. Cf. *Katzenbach* v. *Morgan, supra* (Spanish compared to English literacy); *Evans* v. *Cornman, supra* (full state residence compared to residence in federal enclave). But it was for Congress to find, and on this record it rationally did find, that those differences were so slight as not to justify exclusion of this class from the franchise.[78] *Katzenbach* v. *McClung*, 379 U.S. 294, 303–304; *Katzenbach* v. *Morgan, supra*, 384 U.S. at 648–651.

There remains the contention that the 18-year old provision is invalid because the Constitution in several places recognize state power to fix voting standards, and, therefore, limitations on that power must also be set by the Constitution. But the Equal Protec-

[77] The class as a whole is surely not to be penalized because a very small percentage of its members have engaged in riotous demonstrations. Voting Age Hearings, p. 16. Individuals, if convicted of crime, remain subject to individual loss of the franchise for that reason.

[78] There is, of course, no basis for complaint in the fact that Congress set the figure at 18, rather than some lower figure which, if it had considered the matter, it might conceivably have found proper. See 116 Cong. Rec. 3063 (daily ed., March 5, 1970; Prof. Cox). It is inherently the legislative function to draw lines at the point most clearly warranted by the findings made. See p. 37 and n. 27 *supra*.

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tion Clause, under which Congress acted here, is one of the restraints which the Constitution imposes on the states. Thus, the contention that there is no constitutional limitation here is a variant of the argument that the Equal Protection Clause cannot apply to matters of voting qualification, else the Fifteenth Amendment would be rendered nugatory and Section 2 of the Fourteenth Amendment, an anachronism. While that argument was briefed in *Katzenbach* v. *Morgan, supra,* (Brief for Appellees, No. 847, O.T. 1965, p. 8 and Appendix), the Court there unanimously agreed that the Equal Protection Clause does apply to voting matters. It apparently found the argument so insubstantial as not to warrant mention. Since Congress legislated here to enforce the Equal Protection Clause, the requirement that there be a constitutional basis for restricting state power over voting matters has been met and the only issue is as framed above—whether the age provision, like the residence and literacy provisions of the 1970 Act—is a proper exercise of the power Congress has been given to enforce that constitutional provision.

Similarly, it cannot be said that Section 2 of the Fourteenth Amendment establishes 21 as the only appropriate age for equal protection purposes, any more than it establishes that literacy or durational-residency requirements are inappropriate.[79] That section was intended to set a wholly internal, administrative remedy for a different type of discriminatory denial of

[79] The section refers to a denial of the right to vote "to any of the male *inhabitants* of such State, being twenty-one years of age, and citizens of the United States," (emphasis added), making no reference to literacy or duration of residence.

the right to vote—that is, it was designed to assure the franchise to emancipated slaves who met the then existing voting qualifications.[80] "[M]ale inhabitants * * * twenty-one years of age, and citizens of the United States" is no more than descriptive of voting laws as they then stood, and cannot be read as fixing constitutional standards, one way or the other. As has amply been shown, conditions have changed, and Congress properly so found.

Finally, there is no substance to the contention that exclusion of persons younger than 21 by the states must be permitted because in some states proposals to lower the voting age have been defeated by referendum. First, as this Court has repeatedly said, the need for careful scrutiny of exclusions from the franchise arises precisely because those exclusions tend to be self-perpetuating. *E.g., Kramer* v. *Union School District, supra,* 395 U.S. at 628; see *supra,* pp. 30–34. In any event, the existence or absence of a sufficient state interest in the exclusion is not to be measured by voter disinterest. "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas* v. *Colorado General Assembly,* 377 U.S. 713, 736–737; see also *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 638.

Accordingly, Title III is fully warranted as legislation which enforces the provisions of the Fourteenth Amendment. Even if this Court might not fully agree with the informed judgment of Congress, "the legislators, in light of the facts and testimony before them,

[80] This section has never been enforced. See, *e.g., Dennis* v. *United States,* 171 F. 2d 986, 993 (C.A.D.C.).

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[had] a rational basis for finding" that the steps they took were necessary to enforcement of the Equal Protection Clause. *Katzenbach* v. *McClung, supra,* 379 U.S. at 303–304. Certainly, the Court can readily "perceive a basis" for Congress' considered conclusion that nullification of those classifications which exclude otherwise qualified persons over the age of 18 from the vote on account of age was necessary to that end. In that circumstance, the government is entitled to have Title III enforced.

CONCLUSION

For the reasons given, the United States should be granted the relief requested in its complaint.

Respectfully submitted.

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APPENDIX A

VOTING RIGHTS ACT AMENDMENTS OF 1970, P.L. 91–285, 84 STAT. 314

AN ACT To extend the Voting Rights Act of 1965 with respect to the discriminatory use of tests, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled That this Act may be cited as the "Voting Rights Act Amendments of 1970".

SEC. 2. The Voting Rights Act of 1965 (79 Stat. 437; 42 U.S.C. 1973 et seq.) is amended by inserting therein, immediately after the first section thereof, the following title caption:

"TITLE I—VOTING RIGHTS".

SEC. 3. Section 4(a) of the Voting Rights Act of 1965 (79 Stat. 438; 42 U.S.C. 1973b) is amended by striking out the words "five years" wherever they appear in the first and third paragraphs thereof, and inserting in lieu thereof the words "ten years".

SEC. 4. Section 4(b) of the Voting Rights Act of 1965 (79 Stat. 438; 42 U.S.C. 1973b) is amended by adding at the end of the first paragraph thereof the following new sentence: "On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous sentence, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney Gen-

eral determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968."

SEC. 5. Section 5 of the Voting Rights Act of 1965 (79 Stat. 439; 42 U.S.C. 1973c) is amended by (1) inserting after "section 4(a)" the following: "based upon determinations made under the first sentence of section 4(b)", and (2) inserting after "1964," the following: "or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968,".

SEC. 6. The Voting Rights Act of 1965 (79 Stat. 437; 42 U.S.C. 1973 et seq.) is amended by adding at the end thereof the following new titles:

"TITLE II—SUPPLEMENTAL PROVISIONS

"APPLICATION OF PROHIBITION TO OTHER STATES

"SEC. 201. (a) Prior to August 6, 1975, no citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State as to which the provisions of section 4(a) of this Act are not in effect by reason of determinations made under section 4(b) of this Act.

"(b) As used in this section, the term 'test or device' means any requirement that a person as a prerequisite for voting or registration for voting (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 other class.

"RESIDENCE REQUIREMENTS FOR VOTING

"SEC. 202. (a) The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections—

"(1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;

"(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

"(3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution;

"(4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;

"(5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and

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"(6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.

"(b) Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution, to enable citizens to better obtain the enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment, it is necessary (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

"(c) No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to be physically present in such State or political subdivision at the time of such election, if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

"(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for

registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

"(e) If any citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any election for President and Vice President has begun residence in such State or political subdivision after the thirtieth day next preceding such election and, for that reason, does not satisfy the registration requirements of such State or political subdivision he shall be allowed to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election, (1) in person in the State or political subdivision in which he resided immediately prior to his removal if he had satisfied, as of the date of his change of residence, the requirements to vote in that State or political subdivision, or (2) by absentee ballot in the State or political subdivision in which he resided immediately prior to his removal if he satisfies, but for his nonresident status and the reason for his absence, the requirements for absentee voting in that State or political subdivision.

"(f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President

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and Vice President shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement of a registration that does not include a provision for absentee registration.

"(g) Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein.

"(h) The term 'State' as used in this section includes each of the several States and the District of Columbia.

"(i) The provisions of section 11(c) shall apply to false registration, and other fraudulent acts and conspiracies, committed under this section.

"JUDICIAL RELIEF

"SEC. 203. Whenever the Attorney General has reason to believe that a State or political subdivision (a) has enacted or is seeking to administer any test or device as a prerequisite to voting in violation of the prohibition contained in section 201, or (b) undertakes to deny the right to vote in any election in violation of section 202, he may institute for the United States, or in the name of the United States, an action in a district court of the United States, in accordance with sections 1391 through 1393 of title 28, United States Code, for a restraining order, a preliminary or permanent injunction, or such other order as he deems appropriate. An action under this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2282 of title 28 of the United States Code and any appeal shall be to the Supreme Court.

"PENALTY

"SEC. 204. Whoever shall deprive or attempt to deprive any person of any right secured by section 201 or 202 of this title shall be fined not more than $5,000, or imprisoned not more than five years, or both.

"SEPARABILITY

"SEC. 205. If any provision of this Act or the application of any provision thereof to any person or circumstance is judicially determined to be invalid, the remainder of this Act or the application of such provision to other persons or circumstances shall not be affected by such determination.

"TITLE III—REDUCING VOTING AGE TO EIGHTEEN IN FEDERAL, STATE, AND LOCAL ELECTIONS

"DECLARATION AND FINDINGS

"SEC. 301. (a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

"(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

"(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

"(3) does not bear a reasonable relationship to any compelling State interest.

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"(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

"PROHIBITION

"SEC. 302. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

"ENFORCEMENT

"SEC. 303. (a)(1) In the exercise of the powers of the Congress under the necessary and proper clause of section 8, article I of the Constitution, and section 5 of the fourteenth amendment of the Constitution, the Attorney General is authorized and directed to institute in the name of the United States such actions against States or political subdivisions, including actions for injunctive relief, as he may determine to be necessary to implement the purposes of this title.

"(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title, which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

"(b) Whoever shall deny or attempt to deny any person of any right secured by this title shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"DEFINITION

"SEC. 304. As used in this title the term 'State' includes the District of Columbia.

"EFFECTIVE DATE

"SEC. 305. The provisions of title III shall take effect with respect to any primary or election held on or after January 1, 1971."

Approved June 22, 1970.

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APPENDIX B

Article 7, Section 2 of the Arizona Constitution provides: No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or upon any question which may be submitted to a vote of the people, unless such person be a citizen of the United States of the age of twenty-one years or over, and shall have resided in the State one year immediately preceding such election, provided that qualifications for voters at a general election for the purpose of electing presidential electors shall be as prescribed by law. The word 'citizen' shall include persons of the male and female sex.

The rights of citizens of the United States to vote and hold office shall not be denied or abridged by the state, or any political division or municipality thereof, on account of sex, and the right to register, to vote and to hold office under any law now in effect, or which may hereafter be enacted, is hereby extended to, and conferred upon males and females alike.

No person under guardianship, non compos mentis, or insane, shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to civil rights.

Sections 16–101 and 16–107 of the Arizona Revised Statutes provide as follows:

§ 16–101. Qualifications of elector

A. Every resident of the state is qualified to become an elector and may register to vote at all elections authorized by law if he:

1. Is a citizen of the United States.
2. Will be twenty-one years or more of age prior to the regular general election next following his registration.
3. Will have been a resident of the state one year and of the county and precinct in which he claims the right to vote thirty days next preceding the election.
4. Is able to read the Constitution of the United States in the English language in a manner showing that he is neither prompted nor reciting from memory, unless prevented from so doing by physical disability.
5. Is able to write his name, unless prevented from so doing by physical disability.

B. At an election held between the date of registration and the next regular general election, the elector is eligible to vote if at the date of the intervening election he is twenty-one years of age and has been a resident of the state one year and the county and precinct thirty days.

C. A person convicted of treason or a felony, unless restored to civil rights, or an idiot, insane person or person under guardianship is not qualified to register.

§ 16–107. Closing of registrations

A. No elector shall be registered to vote in a primary election between five o'clock p.m. of the day which is four months preceding the date of the next general election and six o'clock p.m. of the day of the primary election.

B. No elector shall be registered between five o'clock p.m. of the seventh Monday preceding a general election and six o'clock p.m. of the day thereof. As amended Laws 1958, Ch. 48, § 1.

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APPENDIX C

Article 6, Section 2 of the Idaho Constitution provides:

Qualifications of electors.—Except as in this article otherwise provided, every male or female citizen of the United States, twenty-one years old, who has actually resided in this state or territory for six months, and in the county where he or she offers to vote, thirty days next preceding the day of election, if registered as provided by law, is a qualified elector; provided however, that every citizen of the United States, twenty-one years old, who has actually resided in this state for sixty days next preceding the day of election, if registered as required by law, is a qualified elector for the sole purpose of voting for presidential electors; and until otherwise provided by the legislature, women who have the qualifications prescribed in this article may continue to hold such school offices and vote at such school elections as provided by the laws of Idaho territory.

Sections 34–401, 34–408, 34–409, 34–1101 and 34–1105 provide in pertinent part:

34–401. Qualifications of voters.—Every person over the age of twenty-one (21) years, possessing the qualifications following, shall be entitled to vote at all elections: He shall be a citizen of the United States and shall have resided in this state six (6) months immediately preceding the election at which he offers to vote, and in the county thirty (30) days: provided, that no person shall be permitted to vote at any county seat election who has not resided in the county six (6) months, and in the precinct ninety (90) days,

where he offers to vote; nor shall any person be permitted to vote at any election for the division of the county, or striking off from any county any part thereof, who has not the qualifications provided for in section 3, article 18, of the constitution; nor shall any person be denied the right to vote at any school district election, nor to hold any school district office on account of sex.

34–408. Eligibility of new residents to vote.—Each citizen of the United States, who, immediately prior to his removal to this state, was a citizen of another state and who has been a resident of this state for sixty (60) days next preceding the day of election but for less than the six (6) month period of required residence for voting prior to a presidential election, is entitled to vote for presidential and vice-presidential electors at that election, but for no other offices, if

(1) he otherwise possesses the substantive qualifications to vote in this state (except the requirement of residence and registration, and

(2) he complies with the provisions of this act.

34–409. Application for presidential ballot by new residents.—A person desiring to qualify under this act in order to vote for presidential and vice-presidential electors shall be considered as registered within the meaning of this act if on or before ten (10) days prior to the date of the general election, he shall make an application in the form of an affidavit executed in duplicate in the presence of the county auditor, substantially as follows * * *.

34–413. Voting by new residents.—(1) The applicant, upon receiving the ballot for presidential and vice-presidential electors shall mark forthwith the ballot in the presence of the county auditor, but in a manner that the official cannot know how the ballot is marked. He shall then fold the ballot in the county

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auditor's presence so as to conceal the markings, and deposit and seal it in an envelope furnished by the county auditor.

34–1101. Absent voting authorized.—Any qualified elector of the state of Idaho who is absent or expects to be absent from the election precinct in which he resides on the day of holding any election under any of the laws of this state in which an official ballot is required, or who is within the election precinct and is, or will be, unable, because of physical disability, or because of blindness, to go to the voting place, and if registration is required for such election, who is duly registered therefor, may vote at any such election, as hereinafter provided.

34–1105. Return of ballot.—On marking such ballot or ballots such absent or disabled or blind elector shall refold same as theretofore folded and shall inclose the same in said official envelope and seal said envelope securely and mail by registered or certified mail or deliver it in person to the officer who issued same; provided, that an absentee ballot must be received by the issuing officer by 12:00 o'clock noon on the day of the election before such ballot may be counted. Said ballot or ballots shall be so marked, folded and sealed by said voter in private and secretly. Provided, that whenever the disability or blindness makes it necessary that the voter shall be assisted in marking his ballot, such voter may have the assistance of any person of his choice in marking his ballot.

U.S. GOVERNMENT PRINTING OFFICE: 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 43, 44, 46 & 47
Original

STATE OF OREGON,
—v.—
JOHN N. MITCHELL.

STATE OF TEXAS,
—v.—
JOHN N. MITCHELL.

UNITED STATES,
—v.—
STATE OF ARIZONA.

UNITED STATES,
—v.—
STATE OF IDAHO.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

MELVIN L. WULF
LAWRENCE G. SAGER
156 Fifth Avenue
New York, N. Y. 10010
Attorneys for Amicus Curiae

EXHIBIT

3

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G. ESPINOSA MORENO
County Recorder

COUNTY RECORDER
SANTA CRUZ COUNTY
NOGALES, ARIZONA, 85621

Received 40 Pages
OCT 7 10 AM
COUNTY RECORDER
DEPUTY RECORDER

ATTORNEY GENERAL
STATE OF ARIZONA

AFFIDAVIT

STATE OF ARIZONA)
: ss.
County of Santa Cruz)

I, G. ESPINOSA MORENO, being first duly sworn upon my oath depose and say:

In accordance with the agreement with the Attorney General I allowed any persons who could not read the Constitution of the United States in the English language or write their names or both, to provisionally register to vote between August 24, 1970 and September 14, 1970.

I arranged for publicity on all media, newspapers, radio and television so that any person who was an illiterate and wished to register to vote, would be aware that he could do so during this period of time.

During this period two (2) persons, out of a total of 14,500 according to the preliminary figures of the 1970 census, availed themselves of this opportunity to provisionally register to vote, even though they could not pass the literacy test of the State of Arizona.

G. Espinosa Moreno
Santa Cruz County Recorder

Subscribed and sworn to before me at Nogales, Arizona, this 6th day of October, 1970 by G. Espinosa Moreno.

Notary Public
MY COMMISSION EXPIRES MAY 31, 1972

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970
No. 47 Original

NITED STATES,
Plaintiff,

TE OF IDAHO
Defendant.

BRIEF FOR THE STATE OF IDAHO

BERT M. ROBSON
rney General
e of Idaho

HARD H. GREENER
istant Attorney General
e of Idaho
house
, Idaho 83707

rneys for Defendant

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 47 Original

UNITED STATES	)
Plaintiff,	)
v.	)
STATE OF IDAHO	)
Defendant.	)

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BRIEF FOR THE STATE OF IDAHO

JURISDICTION

The State of Idaho accepts and agrees with the jurisdictional arguments set forth in the Plaintiff's Brief.

QUESTION PRESENTED

The question as presented to the Court in this matter, is accurately stated in Plaintiff's Brief as:

Whether the Voting Rights Act Amendments of 1970, 84 Stat. 314, are constitutional insofar as they (1) restrict durational residency requirements in regard to voting for president and vice-president and pre-

scribe uniform standards regarding absentee registration and absentee balloting in presidential elections and (2) prohibit the states from denying the vote on account of age to any otherwise qualified person 18 years of age or older in any election. The statutory and constitutional provisions involved.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Const. art. I, §2:

> "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature. * * *"

U. S. Const. art. II, §2:

> "Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress: * * *"

U.S. Const. amend. X:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

U. S. Const. amend. XIV:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> "Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of the State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall

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be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

* * *

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

U. S. Const. amend. XV:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous conditions of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

U. S. Const. amend. XVII:

"The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures."

Article 6, Section 2 of the Idaho Constitution provides:

Qualifications of electors.--Except as in this

article otherwise provided, every male or female citizen of the United States, twenty-one years old, who has actually resided in this state or territory for six months, and in the county where he or she offers to vote, thirty days next preceding the day of election, if registered as provided by law, is a qualified elector; provided however, that every citizen of the United States, twenty-one years old, who has actually resided in this state for sixty days next preceding the day of election, if registered as required by law, is a qualified elector for the sole purpose of voting for presidential electors; and until otherwise provided by the legislature, women who have the qualifications prescribed in this article may continue to hold such school offices and vote at such school elections as provided by the laws of Idaho territory.

Section 34-401, 34-408, 34-409, 34-413, 34-1101 and 34-1105 provide in pertinent part:

34-401. Qualifications of voters.--Every person over the age of twenty-one (21) years, possessing the qualifications following, shall be entitled to vote at all elections: He shall be a citizen of the United States and shall have resided in this state six (6) months im-

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mediately preceding the election at which he offers to vote, and in the county thirty (30) days: provided, that no person shall be permitted to vote at any county seat election who has not resided in the county six (6) months, and in the precinct ninety (90) days where he offers to vote; nor shall any person be permitted to vote at any election for the division of the county, or striking off from any county any part thereof, who has not the qualifications provided for in section 3, article 18, of the constitution; nor shall any person be denied the right to vote at any school district election, nor to hold any school district office on account of sex.

34-408. Eligibility of new residents to vote.--Each citizen of the United States, who, immediately prior to his removal to this state, was a citizen of another state and who has been a resident of this state for sixty (60) days next preceding the day of election but for less than the six (6) month period of required residence for voting prior to a presidential election, is entitled to vote for presidential and vice-presidential electors at that election, but for no other offices, if

(1) he otherwise possesses the substantive qualifications to vote in this state, except

the requirement of residence and registration, and

(2) he complies with the provisions of this act.

34-409. Application for presidential ballot by new residents.--A person desiring to qualify under this act in order to vote for presidential and vice-presidential electors shall be considered as registered within the meaning of this act if on or before ten (10) days prior to the date of the general election he shall make an application in the form of an affidavit executed in duplicate in the presence of the county auditor, substantially as follows * * *.

34-413. Voting by new residents.--(1) The applicant, upon receiving the ballot for presidential and vice-presidential electors shall mark forthwith the ballot in the presence of the county auditor, but in a manner that the official cannot know how the ballot is marked. He shall then fold the ballot in the county auditor's presence so as to conceal the markings, and deposit and seal it in an envelope furnished by the county auditor.

34-1101. Absent voting authorized.--Any qualified elector of the state of Idaho who is absent or expects to be absent from the

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election precinct in which he resides on the day of holding any election under any of the laws of this state in which an official ballot is required, or who is within the election precinct and is, or will be, unable, because of physical disability, or because of blindness, to go to the voting place, and if registration is required for such election, who is duly registered therefor, may vote at any such election, as hereinafter provided.

34-1105. Return of ballot.--On marking such ballot or ballots such absent or disabled or blind elector shall refold same as theretofore folded and shall inclose the same in said official envelope and seal said envelope securely and mail by registered or certified mail or deliver it in person to the officer who issued same; provided, that an absentee ballot must be received by the issuing officer by 12:00 o'clock noon on the day of the election before such ballot may be counted. Said ballot or ballots shall be so marked, folded and sealed by said voter in private and secretely. Provided, that whenever the disability or blindness makes it necessary that the voter shall be assisted in marking his ballot, such voter may have the assistance of any person of his choice in marking his ballot.

STATEMENT

The Voting Rights Act Amendments of 1970, 84 Stat. 314 (hereinafter referred to as the "Act") was passed by Congress and signed into law by the President of the United States on June 22, 1970. There are two provisions in this Act relevant to the case at bar. These are Titles II and III, which purport to abrogate the individual states' right to set qualifications for voting.

Title II of the Act seeks to make uniform all residency and absentee voter requirements (hereinafter referred to generally as residency requirements) for presidential and vice-presidential elections. The relevant provision would restrict this requirement in any state to thirty (30) days. This is in direct conflict with Idaho's constitutional and statutory law.[1]

Title III of the Act seeks to preclude the state from setting age requirements in excess of eighteen years as a qualification for voting in all types of elections. This provision is in direct conflict with Article 6, Section 2 of the Idaho Constitution which sets the mandatory age of twenty-one years as a requirement to exercise enfranchisement privileges in the State of Idaho.

The Governor of the State of Idaho was informed by the Attorney General of the United States, the official

1. Article 6, Section 2 of the Idaho Constitution; Section 34-101, Section 34-408, Section 34-409, Section 34-413, Section 34-1101, Section 34-1105 of the Idaho Code.

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statutorily charged with the enforcement of the Act, that the State of Idaho was to comply with the new Act. The Governor contacted the Attorney General for the State of Idaho who advised the Governor that he had grave doubts as to the constitutionality of Titles II and III of the Act. The State of Idaho has, as a result of this advice, respectfully refused to accede to the request of the United States Attorney General. This action followed to compel the State of Idaho to comply with Title II and III of the Act.

SUMMARY OF ARGUMENT

The Congress of the United States has enacted legislation which abrogates certain voter qualification standards required by the Idaho State Constitution and Idaho statutory law. These are Titles II and III of the Act. The provisions found in the Idaho Constitution and statutory law condition the right to vote upon reasonable residency and age requirements.

Congress in so legislating has relied upon Section 5 of the Fourteenth Amendment. This provision is sought to be used by Congress as a means to circumvent the enumerated powers doctrine and satisfy the requirement that a specific enumerated power exists, thereby enabling Congress to so legislate.

The right to set voter qualification standards has since the framing of the United States Constitution rested with the states. This usurpation of this state function is in

contravention of the principles espoused in the United States Constitution and decisions of this Court. The state has the right to establish such standards so long as they are not discriminating.

The State of Idaho argues that this reliance upon Section 5 of the Fourteenth Amendment is illfounded and contrary to other provisions in the United States Constitution. The state would assert that the express requirements of provisions of the United States Constitution vest the right to set voter qualification standards pertaining to residency and age requirements in the individual states. The State additionally submits that this is not a denial of equal protection rights set forth in the Fourteenth Amendment. The legislation, then, is an over amplification of Congressional prerogatives pursuant to Section 5 of the Fourteenth Amendment.

The abrogation of the right of the individual states in these instances is in total opposition to the letter and spirit of the United States Constitution. These statutes must be held unconstitutional.

ARGUMENT

I.

THE PROVISIONS OF THE UNITED STATES CONSTITUTION AND DECISIONS OF THIS COURT REQUIRE THAT THE INDIVIDUAL STATES BE PERMITTED TO ESTABLISH VOTER QUALIFICATIONS PERTAINING TO RESIDENCY AND AGE.

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The express language of the United States Constitution and the great weight of case law clearly require that the standards for voter qualification insofar as residency and age requirements are concerned be left to the discretion of the individual states. This principle finds its origin in the history of the United States and, indeed, is reflected in such documents as the Federalist.[2]

The Congress of the United States by enacting Titles II and III of the Act obviate this mandate. The following analysis will consider provisions of the United States Constitution and holdings of this Court which are relevant to this issue and clearly support this assertion.

The most logical point to initiate this analysis is with the relevant constitutional provisions. Article I, Section 2 of the United States Constitution provides a primary basis for the assertion that the right to set voter qualifications rests with the individual states. This provision states in relevant part:

> "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state lagislature."

The above provision referring to requirements for election of members of the House of Representatives expressly keys the election to this national body upon state law.

2. The Federalist, No. 59, at 404-405 (Bourne ed. 1901) (Hamilton).

The offices of President and Vice-President are referred to in Article II, Section 2 of the Constitution as amended by the Twelfth Amendment which provide for their manner of election, the pertinent portions of Article II, Section 2 state:

> "Each state shall appoint, in such manner as the legislature thereof may direct, the number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress:. . ."

The individual states, then, are recognized by the above constitutional provision as exercising control over the appointment of electors to determine who will be President and Vice-President of the United States.

The Seventeenth Amendment to the United States Constitution provides further indication that voter qualifications are left to the discretion of the individual states. The relevant portions of this Amendment provide:

> "The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; . . .The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures."

It is clear from these articles and amendments to the United States Constitution that the states are vested with the power to determine qualifications for the electors of President, Vice-President, Senators and Representatives.

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Implicit in the vesting of this power in the individual states is the lesser included power to establish non-discriminatory residency and age standards.

The assertion that the individual states may restrict the legal voting age to twenty-one years and over is substantiated by express language of the Constitution found in certain portions of Section 2 of the Fourteenth Amendment. These state:

> ". . . But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state." (emphasis added)

The Fourteenth Amendment, in Section 2, then, prescribes a penalty for a state's refusal to allow individuals of twenty-one years of age to vote. An obvious conclusion to be drawn from this penalty based upon the age of twenty-one years is that the states may set forth standards requiring that individual voters attain a certain age so long as the standards do not require an age in excess of twenty-one years. Thus, this recognizes that the state may set voter age qualifications so long as they do not

restrict enfranchisement to individuals twenty-one years or more.

The Tenth Amendment to the United States Constitution is also of significance to this problem. The state urges that this provision lends support to its argument that the express language, spirit, and intent of the Consitution require that the states be left the prerogative to establish non-discriminatory residency and age requirements for voters. This Constitutional provision is the basis for the Doctrine of Enumeration of Powers and provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Thus, unless there is a provision existent in the United States Constitution which may be said to authorize Congress to legislate standards effecting residency and age voter requirements in individual states, that power does not exist. The Tenth Amendment evinces an intent on the part of the framers of the Amendment to reserve to the individual states authority over all matters absent a clear enumeration otherwise set forth in the United States Constitution. The state would argue that there is no enumerated power to be found in the United States Constitution which authorizes Congress to legislate as it has done in the case at bar. This argument will be more fully developed in a subsequent portion of the brief.

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An additional argument may be made for the proposition that the United States Constitution, its articles and amendments, reflect the theory that voter qualification standards are reserved to the individual states. This may be drawn from the history of the Constitution concerning the expansion of voter rights.

The State of Idaho asserts that the Constitution itself clearly demonstrates that the proper method by which to extend the vote to 18 year olds is by constitutional amendment. This is the sole means by which the basic expansion of voting rights has been accomplished in the past.

Examples of such amendments are found in the Fifteenth Amendment which expressly abolished racial cirteria as being determinative of the right to vote; the Nineteenth Amendment which extended the right to vote to women; and the Twenty-fourth Amendment which eliminated the requirement of a poll tax.

The Fifteenth Amendment is of particular significance insofar as the recognized manner in which the extension of the right to vote has been accomplished in the past. It is worthy of note that this amendment was subsequent to the Fourteenth Amendment and was intended to insure that the blacks would be given the right to vote.

It is apparent from this amendment that it was widely feared that the blacks would be denied the right to vote. However, Congress apparently did not feel it could legislate

in order to enfranchise the black man. This is certainly a clear indication that the Fourteenth Amendment was not considered to be a sufficient authorization or enumerated power upon which to enact such legislation.[3]

Thus, the State asserts that this theory may be extended to the problem at bar. That is, a constitutional amendment is the proper vehicle by which to provide the 18 year old with the right to vote.

There is a wealth of case law which supports the state of Idaho's contention that voter requirements relating to residency and age are reserved to the individual states. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) denied women's suffrage absent a constitutional amendment. This case stated that women did not have the right to vote under the Fourteenth Amendment due to the Constitution of the United States and the laws of the State of Missouri which restricted that right to male citizens. Minor v. Happersett, 162-178. This court states at page 178:

> "...No argument as to women's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we find it is within the power of a state to withhold."

The above provision quite clearly recognizes that the states have the right to restrict the right to vote if done in a manner which is not violative of other constitutional provisions.

Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).

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The decision Pope v. Williams, 193 U.S. 621 (1907) dealt with the right to vote and concluded that the privilege to vote was not granted by the Federal Constitution nor by any of its amendments. Indeed, this decision states that the right to vote is not a privilege springing from United States citizenship. The court in so concluding stated at page 632-633:

> "The privilege to vote in any state is not given by the federal constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. Minor v. Happersett, 21 Wall. 162. . . It may not be refused on account of race, color, or previous conditions of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the federal constitution. The state might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in Minor v. Happersett, . . . such persons were allowed to vote in several of the states upon having declared their intentions to become citizens of the United States. Some states permit women to vote; others refuse them that privilege. A state, so far as the federal constitution is concerned, might provide by its own constitution and laws that none but native born citizens shall be permitted to vote, as the federal constitution does not confer the right of suffrage upon any one, and the conditions under which the right is to be exercised are matters for the states alone to prescribe, subject to the conditions of the federal

> constitution, already stated; although it may be observed that the right to vote for a member of Congress is not derived exclusively from the state law. See Federal Constitution, Art. I, Sec. 2; . . ." (emphasis added)

The state's prerogative insofar as residency requirements are concerned has long been recognized in case law. This has been espoused most recently in the decision, Carrington v. Rash, 380 U.S. 89 (1965). The court in this decision, while invalidating a residency requirement placed upon servicemen for other reasons, recognized that the state had the ultimate power in imposing residency requirements provided they were not discriminatory in nature. The court states at page 632:

> "Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot. . . There can be no doubt either of the historic function of the state to establish, on a non-discriminatory basis, and in accordance with the constitution, other qualifications for the exercise of the franchise. Indeed, 'the states have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.' Lassiter v. Northampton Election Board, 360 U.S. 45, 50. . . Compare United States v. Classic, 313 U.S. 299; Exparte Yarbrough, 110 U.S. 651. 'In other words, the privilege to vote in the state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.' See also Pope v. Williams, 193 U.S. 621 (1907)."

The decision Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959), cited in the above quotation, provides an additional statement in support of the right of the individual states to regulate voter qualifications in a reasonable manner. This decision involved the validity and constitutionality of literacy tests. The court stated on page 51:

> "We do not suggest that any standards which a state desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record. . . are obvious examples indicating factors which a state may take into consideration in determining the qualifications of voters . . ." (emphasis ours)

The above quotations certainly express recognition of this state right. Moreover, recent United States Supreme Court decision's striking down state statutory requirements found to be unconstitutional as resulting in invidious discriminations, Kramer v. Union Free School District, 395 U.S. 621 (1969), Cipriano v. City of Houma, 395 U.S. 701 (1969) and City of Phoenix v. Kolodeziegjski, 399 U.S. 204 (1970) tacitly recognize the state's prerogative insofar as establishment of qualifications as to age and residence conditioning the right to vote, provided such standards did not violate constitutional requirements.

A most significant decision involving the rights of voters, Baker v. Carr, 369 U.S. 186 (1962) contains passages relevant to the problem of the extent of state's rights

insofar as voter qualifications are concerned. Mr. Justice Douglas stated in concurring with the majority opinion at page 243-244:

> ". . . "That the states may specify the qualifications for voters is implicit in Article I, Section 2, Clause 1, which provides that "the House of Representatives shall be chosen by the people and that the Electors (voters) in each State shall have the Qualifications requisite for Electors (voters) of the most numerous Branch of the State Legislature." The same provision, contained in the Seventeenth Amendment, governs the election of Senators."

See also Gray v. Sanders, 372 U.S. 368 (1963).

The above decisional law quite clearly reflects an attitude on the part of this Court that the states may set voter qualifications pertaining to residency and age requirements. These qualifications remain subject to other constitutional guarantees by which the vested right to vote may be protected. Ex parte Yarbrough, 110 U.S. 651 (1884), United States v. Moseley, 238 U.S. 383 (1915); Smith v. Allwright, 321 U.S. 649 (1944). The historical analysis viewed together with the express provisions of the United States Constitution and decisions of this court support the State of Idaho's contention that the individual states may establish voter standards for residency and age requirements.

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II.

A STATE MAY ESTABLISH REASONABLE VOTER QUALIFICATION STANDARDS BASED UPON RESIDENCY, AGE AND APPLICABLE TO ABSENTEE VOTING WHICH DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT SO LONG AS THE QUALIFICATION STANDARDS ARE NOT DISCRIMINATORY.

The Plaintiff, relying upon a decision, Katzenbach v. Morgan, 384 U.S. 641 (1966), asserts that it does have authorization pursuant to Section 5 of the Fourteenth Amendment to legislate in this area due to denial of equal protection of the laws. Consideration must now be given to this problem in an effort to determine if the Idaho residency requirements and the denial of the vote to individuals between the age of eighteen and twenty-one is, in fact, a denial of equal protection.

The equal protection standard which would appear to be relevant to inquiry at the case at bar is set forth in Reynolds v. Simms, 377 U.S. 533 (1964). This criteria has been expanded by recent decisions which seem to require that there exist not only a rational basis for the distinction, but also a compelling state interest. Kramer v Union Free School District, 395 U.S. 621 (1969), Ciprtano v. City of Houma, 395 U.S. 701 (1969), City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970). While these cases did consider the right of enfranchisement, they did not touch upon the validity of residency nor age voting requirements.

A. The denial of the right to vote to eighteen year olds is not a denial of equal protection.

The State of Idaho submits that there is a rational basis for denial of the voting privilege to eighteen year olds and that this classification does promote legitimate state interests which are sufficient to justify these restrictions. The following considerations lead to this conclusion.

The age requirement does not distinguish on the basis of race, creed or religion. It is, rather, a rational line of demarcation which has historically served as the basis for enfranchising citizens of the United States. Indeed, a statute which restricts the right to vote to individuals who are twenty-one years of age and older has the effect of denying the right to vote to all individuals who do not meet that certain qualification. This denial is not arbitrarily based on any characteristic other than age. That is, it does not have that fatal defect that was presented before the court in Katzenbach v. Morgan, supra, wherein the literacy test could have discriminated against certain ethnic groups who did not have sufficient knowledge of the English language.

There is, then, a distinct group of individuals in any given state who are classified as not being able to vote, but this classification is not again based upon race, ethnic origin, creed or sex. Moreover, an individual in a given class has the ability and theoretical prospect of reaching the age of twenty-one. Thus, the state asserts that the

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classification of voters on the basis of age is a rational classification.

The compelling state interest is also present in age classification. The individual states have a compelling interest to be able to continue to set forth the standards by which citizens of their state are entitled to vote. This is a vital element of states' rights and must not be relinquished. Consequently, this state right in and of itself constitutes a compelling state interest. The usurpation of this power by National Congress pursuant to legislation is a severe infringement upon this state interest and right. The abrogation of the individual state restriction absent a Constitution Amendment is necessarily harmful to this state interest.

There are additional state interests which bear reference. It is important to this state to maintain an electorate which is sufficiently educated and informed to vote intelligently on candidates and issues. It certainly may be observed that an individual who is twenty-one years of age is generally speaking more mature and capable of making a reasoned choice than an individual eighteen years of age.

The state maintains that the restriction on the right of enfranchisement to those twenty-one years of age and older is a rational classification and serves a compelling state interest. Thus, such a qualification is not a denial of the equal protection required by the Fourteenth Amendment.

~~A.~~ B. The residency and absentee voter requirements found in Idaho statutes and constitutional law do not constitute a denial of equal protection.

The residency and absentee voting qualifications in the State of Idaho are found in Article 6, Section 2 of the Idaho Constitution and Chapter 3, Title 34, Idaho Code. The statutory measures are more fully set forth in the portion of this brief concerning relevant and constitutional statutory provisions. These provisions basically require a certain prescribed minimum period of residency in order to exercise the right to vote. In addition, these provisions set forth standards for non-resident voting.

The Idaho residency requirements relating to duration of residency and the absentee voter provisions do not discriminate against any voter on the basis of race, color, creed or religion. There is no method by which a voter could be disqualified pursuant to this provision provided he resided within the state for the requisite period of time and complied with the absentee voter requirements.

Thus, there is no identifiable group which is sought to be discriminated against by the application of these residency and absentee voting requirements. That is, all individuals are treated equally under the law. Additionally, there is a rational basis for these restrictions which is based upon durational status in the State of Idaho.

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Consequently, there is no invidious discrimination being applied to a distinct section of the population. Carrington v. Rash, supra.

The durational residency and absentee voter requirements found in Idaho law support a compelling state interest. These are: (1) protection against fraud and (2) administration. The State of Idaho has an interest in precluding the dilution of the votes of its citizens for the presidential and vice-presidential officers by the importation of non or fictitious state residents into the state. This interest extends to the dilution of the individual county residents' votes by any such importation from one county into another.

The residency and absentee voting provisions have been regarded as preventing this type of fraud. These residency requirements would, it is submitted, prevent such fraud.

Finally, the State of Idaho has a compelling interest to maintain the residency and absenteeism voting requirements as directly set forth by the Idaho Constitution and the accompanying statutory provisions in that they aid ease of administration. The state asserts that residency and absentee voter requirements for presidential and vice-presidential elections which differ from those pertaining to other state elections would create an efficiency gap in the over all elective process. The standards have been established and apply to the entire voting process within the state. Thus, to require a change in their standards for presidential and vice-presidential elections would require the state to increase the staff necessary to supervise and administer the elections.

The State of Idaho, then, asserts that the durational residency requirements and absentee voting requirements do not constitute an invidious or irrational discrimination against any group of voters and serve a compelling state interest. Consequently, it is asserted that these voting qualification standards do not constitute a denial of equal protection which is prohibited by the Fourteenth Amendment.

III.

THERE IS NO POWER ENUMERATED IN THE UNITED STATES CONSTITUTION WHICH VESTS IN CONGRESS THE RIGHT TO LEGISLATE IN CONTRAVENTION OF STATE LAWS WHICH PRESCRIBE VOTER QUALIFICATIONS BASED UPON RESIDENCY AND AGE.

The Doctrine of Enumerated Powers has been referred to above and is, as indicated, based upon the Tenth Amendment of the United States Constitution. This doctrine is given further validity by decisional law. Martin v. Hunters Lessee, 4 U.S. (1 Wheat) 304 (1816), initially recognized the doctrine and in referring to the Tenth Amendment stated at page 325:

> ". . . On the other hand, it is perfectly clear that the sovereign powers vested in state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States."

See also Carter v. Carter Coal Company, 298 U.S. 238 (1936); Kansas v. Colorado, 206 U.S. 46

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(1907), Givens v. Ogden, 22 U.S. (9 Wheat) 1 (1824); McCulloch v. Maryland, 17 U.S. (4 Wheat) 301 (1810). Thus, it is clear that Congress must be able to rely upon a specific enumerated power which authorizes the passage of the legislation in question.

The Plaintiff in its brief seeks to rely upon Section 5 of the Fourteenth Amendment for this enumerated power to enact Titles II & III of the Act. This section provides:

> "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

A determination must now be made whether the legislation in question is appropriate within the meaning of the Fourteenth Amendment. Plaintiff, in support of this legislation, relies upon the Katzenbach v. Morgan, 384 U.S. 642 (1966), a decision upholding a congressional enactment which struck down a certain type of literacy test.

This court in the Morgan decision recognized that Congress could legislate in order to prohibit a state practice that was not in and of itself repugnant to the requirements of the Fourteenth Amendment if the elimination of this practice was necessary to prevent resulting practices which did, in fact, violate the Fourteenth Amendment. Katzenbach v. Morgan at pages 650-653. The court in so doing equated the fifth section of the Fourteenth Amendment with the "necessary and proper clause" of Article 1, Section 8 of the United States Constitution.

In reaching this conclusion, the court relied upon decisional law construing the "necessary and proper clause" as not requiring Congress to do other than perceive "a basis upon which Congress might resolve a conflict as it did". Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). In each, the court equated Section 5, with the "necessary and proper clause" insofar as abrogating acts which, although not violative in of themselves of the Fourteenth Amendment, were propagating conditions which were, in fact, violative of that amendment. The court reasoned it could do this and look no further provided ample basis was found in the record of the legislative proceedings for the congressional legislation which was the subject of the Morgan, supra, decision.

The State of Idaho has argued that the state law in issue is not violative of equal protection requirements. Thus, if this argument found in Katzenbach v. Morgan, supra, is to be relied upon as the authority for congressional action pursuant to Section 5 of the Fourteenth Amendment, the congressional record must be searched in an effort to determine if Congress had some rational basis for concluding that Titles II and III of the Act would eliminate action on the part of the state which could result in invidious discrimination based upon race, creed, color or sex.

The state submits that nothing in the [illegible] record attendant to

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act would support a finding that the state law sought to be superceded resulted in an invidious discrimination based upon race, color, creed or sex. In fact, the record discloses contrary testimony.[4] Indeed, the record discloses nothing more insofar as the voting age requirement other than the fact that eighteen year olds are required to fight wars, may be tried as adults for crimes, take on the responsibility of marriage and in some states drink liquor.[5]

Thus, the State of Idaho asserts that the rationale of the Katzenbach v. Morgan, supra, decision may not be relied upon to determine that Congress has the power pursuant to Section 5 of the Fourteenth Amendment to so legislate. This, again, is due to the fact that Congress could not have found from testimony in the Congressional proceeding prior to the passage of Titles II and III of the Act that the Idaho law in question resulted in discrimination based on race, sex, color or creed.[6]

The State of Idaho argues that the Congressional Record does not disclose "a basis upon which Congress might resolve a conflict as it did". This court, then, must make this determination as to whether there is an actual denial of equal protection resulting from the Idaho law at issue. To do otherwise would clearly result in a usurpation of the judicial function by Congress. Marbury v. Madison, 5 U.S. 137 (1803). The State of Idaho concludes that

4. 116 Cong. Rec. §3513 (daily ed. March 11, 1970)
5. 116 Cong. Rec. §3057, §3060-63 (daily ed. March 5, 1970)
6. 116 Cong. Rec., supra.

there is no finding by Congress and no basis in fact for determining that the Idaho requirements result in a denial of equal protection. Thus, the State maintains that the Morgan, supra, decision does not apply to the case at bar.

The State, then, would argue that the fifth Section of the Fourteenth Amendment may not for the purposes of this legislation, be equated within the "necessary and proper clause" which enables Congress to legislate in certain instances. Consequently, Congress may not rely upon this provision as an "enumerated power" or authorization to so legislate. The legislation, then, does not have constitutional authorization and should be held unconstitutional.

CONCLUSION

Titles II and III of the Voting Rights Act Amendment of 1970 are contrary to the express provisions of the United States Constitution, decisions of this court, and the historical basis upon which this nation was founded. Congress has acted entirely without constitutional authorization and the provisions so enacted must be held unconstitutional.

Respectfully submitted,

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