IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 44 ORIGINAL

* * *

STATE OF TEXAS,

Plaintiff

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES,

Defendant

* * *

BRIEF ON MOTION FOR LEAVE TO FILE COMPLAINT

* * *

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STATEMENT OF THE CASE

The State of Texas, as Plaintiff, seeks to invoke the original jurisdiction of the Supreme Court of the United States under Article III, Section 2 of the Constitution of the United States, and Section 1251(b)(3) of Title 28, United States Code, for the purpose of having this Court declare that Title III of Public Law 91-285, known as the Voting Rights Act Amendments of 1970, (hereinafter referred to as the Act) is unconstitutional and beyond the power of Congress and enjoining John N. Mitchell, Attorney General of the United States, from taking action against the Plaintiff or its agents and officers to enforce these provisions of the Act.

Article VI, Sections 1 and 2, Constitution of Texas, (Vernon's) and Articles 5.01 and 5.02, Texas Election

Code (Vernon's), provide, as one of the qualifications for voting in the State of Texas, that a person shall have attained the age of twenty-one years. This requirement applies to all elections: federal, state and local.

Title III of the Act provides that no citizen of the United States, otherwise qualified to vote in any state, shall be denied the right to vote in any election if they are eighteen years of age or older. The Defendant, John N. Mitchell, Attorney General of the United States, is authorized and directed to take action against Plaintiff, State of Texas, and its officers and agents to compel compliance with Title III of the Act.

In enacting Title III of the Act, Congress has exceeded the powers, either express or implied, reposed in it under the Constitution of the United States, and has usurped the power of the states to determine the qualifications of voters as provided in Article I, Section 2; Article II, Section 1; the Seventeenth Amendment; and the Tenth Amendment of the Constitution of the United States.

Plaintiff has no other competent forum in which it may protect and preserve its Constitution and statutes from the unconstitutional enactment of Congress and the imminent and threatened enforcement of such Act by the Defendant.

I. THE COMPLAINT PRESENTS A JUSTICIABLE CONTROVERSY WITHIN THE ORIGINAL JURISDICTION OF THE COURT.

Article III, Section 2 of the Constitution of the United States provides in part as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution,

> the Laws of the United States, and Treaties made, or which shall be made, under their authority; . . . to Controversies to which the United States shall be a Party;—to Controveries between two or more States;—between a State and Citizens of another State; . . .
>
> In all Cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. . . .

Section 1251 of Title 28, United States Code, provides in part:

> §1251. Original Jurisdiction
>
> . . .
>
> (b) The Supreme Court shall have original but not exclusive jurisdiction of:
>
> . . .
>
> (3) All actions or proceedings by a State against the citizens of another State or against aliens.

The Plaintiff, State of Texas, is a state of the United States and the Defendant, John N. Mitchell, Attorney General of the United States, is a citizen of the State of New York. The question whether the Congress, in enacting Title III of the Act, has exceeded its constitutional powers and thereby usurped powers reposed in the states, presents conflicting claims of governmental powers with regard to the same subject matter and constitutes a controversy over whether the states or the Congress has authority under the Constitution of the United States to act in the area in question. Therefore, the action set forth in the Complaint presents both the parties and a controversy appropriate for the original jurisdiction of this Court. *South Car-*

olina v. Katzenbach, 383 U.S. 301 (1966); *United States v. California,* 332 U.S. 19 (1945); See *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439 (1945).

II. IT IS IMPERATIVE THAT THE SUPREME COURT ASSERT ITS JURISDICTION.

This is not a case where the Plaintiff state is suing on behalf of private or individual interests rather than as a sovereign, as in *New Hampshire v. Louisiana,* 108 U.S. 76 (1882) and *Massachusetts v. Missouri,* 308 U.S. 1 (1939). Nor is it a case in which the state seeks to sue as representative of its citizens, as in *Massachusetts v. Mellon,* 262 U.S. 447 (1923). The Plaintiff here asserts rights secured to it as a sovereign state of the Union under the provisions of Article I, Section 2; Article II, Section 1; the Seventeenth Amendment; and the Tenth Amendment of the Constitution of the United States, and protests the abridgment of those rights by the Congress through Title III of the Act.

The issue then posed is clearly a substantial one. The decisions of this Court have long held that each state has a wide scope of authority for the imposition of standards and conditions upon the right to vote. The right to vote is a privilege to be exercised as the state may direct, upon such terms as may seem proper to the state, provided there is no discrimination between individuals or classes in violation of the Constitution of the United States. As long as qualifications and conditions regarding voting are reasonable and nondiscriminatory, they are permissible. *Pope v. Williams,* 193 U.S. 621 (1904); *Lassiter v. Northampton County Bd. of Elections,* 360 U.S. 45 (1959); *McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802 (1969); *Carrington v. Rash,* 380 U.S. 89 (1965).

Article I, Section 2, of the Constitution and the Seventeenth Amendment, respectively, provide for the election of members of the House of Representatives and Senate. Each provides that the "Electors in each state shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Likewise Article II, Section 1 of the Constitution provides that the electors for President and Vice President shall be appointed in such manner as the legislature of each state may direct. Thus, while it may be said that the Constitution of the United States establishes and guarantees a right of suffrage with respect to these offices, it expressly adopts as the qualifications for exercising that right, those that may be established by the states. *Ex parte Yarbrough,* 110 U.S. 651 (1884); *United States v. Classic,* 313 U.S. 299 (1940); *Drueding v. Devlin,* 234 F.Supp. 721 (D.C. Md. 1964) aff'd. 380 U.S. 125 (1965); *Gray v. Sanders,* 372 U.S. 368 (1963).

Undoubtedly the right of the states to prescribe qualifications for voting includes the right to provide a limitation upon that right based upon age. This Court has recognized age as being one of the qualifications which the states may fix with regard to voting.

> We do not suggest that any standard 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* (Davis v. Beason, 133 U.S. 333, 345-347) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. (Emphasis added.) *Lassiter v. Northampton County Bd. of Elections,* 360 U.S. 45, 51 (1959).

See also *Kramer v. Union Free School District,* 395 U.S. 621, 625-627 (1969). The right of the states in this respect is also explicitly recognized in Section 2 of the Fourteenth Amendment. That section provides:

> 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 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.)

If it were not recognized that the states had the power to establish the age necessary for qualification as a voter, there would be no necessity for prescribing a penalty for denying the right to vote to persons who are twenty-one years of age. Even so, there is no absolute prohibition against a state establishing a voting age above twenty-one years, as long as it is willing to suffer the accompanying reduction in representation in the House of Representatives.

The power of Congress under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article" goes no further, insofar as establishment of a voting age is concerned,

than to authorize legislation to enforce the reduction in representation of those states that establish a voting age above twenty-one years. It does not authorize Congress to impose upon the states its own criteria for a maximum voting age and prescribe its own penalty for states that provide otherwise. Nor does any other provision of the Constitution of the United States give Congress such authority.

The substantiality of the constitutional question posed by this case was clearly recognized in the congressional debates that led to the adoption of Title III of the Act. The supporters of Title III, no less than its opponents, recognized that the constitutionality of a federal statute permitting persons 18 and over to vote was a debatable issue that would have to be resolved by this Court. Senator Bayh, for example, said that "* * * we must all recognize that this is a gray area. A reasonable question can be raised." 116 Cong. Rec. S3509 (daily ed. March 11, 1970). Speaker McCormick told the House:

> I realize that there are some honest differences on the constitutional question. But on that question I urge that any doubts be resolved in favor of constitutionality, because the Supreme Court is going to pass upon the question.

116 Cong. Rec. H5675 (daily ed. June 17, 1970).

Section 303(a)(2) of the Act, granting jurisdiction to three-judge district courts, is no barrier to the exercise by this Court of jurisdiction in this case. It does not even purport to give those courts exclusive jurisdiction. Even if it did, it would be ineffective. Section 14(b) of the Voting Rights Act of 1965, 42 U.S.C. § 1973*l*(b), was a deliberate attempt to channel all

litigation about that statute to the District Court for the District of Columbia, yet this did not bar this Court from exercising original jurisdiction in *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). As the Solicitor General correctly said in that case, § 14(b) was "not intended to deprive this Court of jurisdiction of appropriate original actions challenging the Act's constitutionality, in view of the constitutional basis of this Court's original jurisdiction." Memorandum for Defendant at 2 n. 1, *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). There is clear evidence in the legislative history that Congress contemplated that the present statute would be tested by an original action here. See the remarks of Rep. McCulloch, 116 Cong. Rec. H5643 (daily ed. June 17, 1970), and of Rep. Bingham, quoting a letter from Professor Paul Freund suggesting such a course. Id. at H5674.

Although the jurisdiction of this Court of actions by a state against a citizen of another state is concurrent with that of the district courts, 28 U.S.C. § 1251(b)(3), and the Court therefore has discretion whether to entertain the suit, this is the kind of case that is especially appropriate for exercise of original jurisdiction. As the United States said in a similar situation:

> This is the happily rare, and indisputably momentous, situation of direct confrontation between the State and federal governments. It is, we submit, precisely for the resolution of such serious disputes that this Court's original jurisdiction * * * is most appropriately invoked.

Brief in Support of Motions for Leave to File Original Complaints at 15-16, *United States v. Alabama,* 382 U.S. 897 (1965). There are no obstacles here to the

exercise of this Court's jurisdiction. The complaint that we ask the Court's leave to file presents only questions of law. No factual issues are involved that might prove burdensome to the Court. No trial will be required and the Attorney General is the only party called upon to respond. The issue that is dispositive of this litigation is the constitutionality of Title III of the 1970 Act, a question that must reach this Court in due course and that can appropriately be resolved here in the first instance.

III. CONSIDERATION OF THIS CASE SHOULD BE EXPEDITED

Section 305 of the Act provides that the provisions of Title III shall take effect with respect to any primary or election held on or after January 1, 1971. It is imperative that the validity of Title III be resolved prior to that date in order to avoid what Representative Celler described as "calamity and chaos in our electoral process." 116 Cong. Rec. H5642 (daily ed. June 17, 1970). See also id. at H5643 (Rep. Railsback), 5643 (Rep. McCulloch), 5673 (Rep. Robison), and 116 Cong. Rec. S3491 (daily ed. March 11, 1970) (Sen. Cook).

To that end Plaintiff urges that this Court grant leave to file the Complaint as soon as the Court's processes permit and that, if leave is granted, it fix dates for filing of briefs on the merits and oral arguments that will permit prompt disposition of the case.

CONCLUSION

The question presented in this case is of national concern and affects all of the states. It is imperative that this Court take jurisdiction and grant Plaintiff's

Motions for Leave to File Complaint and for Expedited Consideration in order that Plaintiff's rights may be preserved and protected.

Respectfully submitted,

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PROOF OF SERVICE

I Crawford C. Martin, Attorney General of Texas, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of _____, 1970, I served the foregoing Brief on Motion for Leave to File Complaint upon the Defendant 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.

CRAWFORD C. MARTIN

APPENDICES

APPENDIX A

Relevant Provisions of the Constitution of Texas and Texas Statutes

ARTICLE VI, CONSTITUTION OF TEXAS

§1. Classes of persons not allowed to vote

Section 1. The following classes of persons shall not be allowed to vote in this State, to wit:

First: Persons under twenty-one (21) years of age.

Second: Idiots and lunatics.

Third: All paupers supported by any county.

Fourth: All persons convicted of any felony, subject to such exceptions as the Legislature may make.

§2. Qualified elector; registration; absentee voting

Sec. 2. Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one (21) years and who shall be a citizen of the United States and who shall have resided in this State one (1) year next preceding an election and the last six (6) months within the district or county in which such person offers to vote, shall be deemed a qualified elector; provided, however, that before offering to vote at an election a voter shall have registered annually, but such requirement for registration shall not be considered a qualification of an elector within the meaning of the term "qualified elector" as used in any other Article of this Constitution in respect to any matter except qualification and

eligibility to vote at an election. Any legislation enacted in anticipation of the adoption of this Amendment shall not be invalid because of its anticipatory nature. The Legislature may authorize absentee voting. And this provision of the Constitution shall be self-enacting without the necessity of further legislation.

TEXAS ELECTION CODE

Article 5.01 Classes of persons not qualified to vote

The following classes of persons shall not be allowed to vote in this state:

1. Persons under twenty-one years of age.

2. Idiots and lunatics.

3. All paupers supported by the county.

4. All persons convicted of any felony except those restored to full citizenship and right of suffrage or pardoned.

Art. 5.02 Qualification and requirements for voting

Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years and who shall be a citizen of the United States and who shall have resided in this state one year next preceding an election and the last six months within the district or county in which such person offers to vote, and who shall have registered as a voter, shall be deemed a qualified elector. No person shall be permitted to vote unless he has registered in accordance with the provisions of this code. The provisions of this section, as modified by Sections 35 and 39 of this code, shall apply to all elections, in-

cluding general, special, and primary elections, whether held by the state, by a county, municipality, or other political subdivision of the state, or by a political party.

APPENDIX B

Relevant Provisions of the Statutes and Constitution of the United States

PUBLIC LAW 91-285

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.

(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.

CONSTITUTION OF THE UNITED STATES

ARTICLE I

Section 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.

ARTICLE II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

AMENDMENT 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.

AMENDMENT 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 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.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice

President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

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

AMENDMENT 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.

When vacancies happen in the representation of any State in the Senate, the executive authority of such

State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.