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 THE MERITS IN SUPPORT OF PLAINTIFF, THE STATE OF TEXAS, SUBMITTED BY THE STATE OF INDIANA, JOINED BY THE STATES OF IDAHO, LOUISIANA, OHIO, UTAH, WEST VIRGINIA AND WYOMING, AS AMICI CURIAE

THEODORE L. SENDAK
Attorney General of Indiana

RICHARD C. JOHNSON
Chief Deputy Attorney General

WILLIAM F. THOMPSON
Assistant Attorney General

Attorneys for *Amici Curiae*

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: 317-633-5512

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INTEREST OF AMICI CURIAE

This brief is submitted by Theodore L. Sendak, Attorney General for the State of Indiana, on behalf of the State of Indiana and is joined by other states having a similar interest in the outcome in this case.

The Voting Rights Amendment of 1970, Public Law 91-285, signed into law by the President of the United

States on June 22, 1970, *inter alia,* lowered the minimum voting age to eighteen in all states for all elections.

Article 2, § 2 of the Indiana Constitution setting out qualifications for voters in the State of Indiana provides for a twenty-one year old minimum voting age requirement. The minimum voting age requirement of the 1970 Amendment to the Voting Rights Act, Public Law 91-285, if enforced, would effectively abolish and nullify the minimum voting age provision of Article 2, § 2 of the Constitution of Indiana. The State of Indiana is joined in this brief by other States similarly affected.[1]

The State of Texas initiated an original action in this Court on August 3, 1970, with the filing of its Motion For

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1. For example listed below are those states setting twenty-one year old age requirements (unless otherwise noted) for voting:

State	Constitutional Provisions	Statutory Provisions
Alabama	Art. 8, § 177	
Alaska	Art. 4, § 1, sets nineteen years as the age required for voting	
Arizona	Art. 7, § 2	
Arkansas	Art. 3, § 1	
California	Art. 2, § 1	
Colorado	Art. 3, § 49-3-1	
Connecticut	Art. 6, § 1	
Delaware	Art. 5, § 2	
Washington, D. C.		Title 1, § 1-1102
Florida	Art. 6, § 1	
Georgia	Art. II, § 1, Ch. 2-702 sets eighteen years as the age required for voting	
Hawaii	Art. 2, § 1, sets 20 years as the age required for voting	
Idaho	Art. 6, § 2	
Illinois	Art. 7, § 1	
Indiana	Art. 2, § 2	
Iowa	Art. 2, § 1	
Kansas	Art. 5, § 1	
Kentucky	Sec. 145 Const. sets nineteen years as the age required for voting	
Louisiana	Art. 8, § 1	
Maine	Art. 2, § 1	
Maryland	Art. 1, § 1	
Massachusetts	Art. 3, (amend.) p. 492, Mass. Gen. Laws Ann.	

Leave to File Complaint, and Brief in support. This Court has ordered Briefs and Arguments on the merits. The State of Texas has put before this Court a significant and important controversy. The State of Indiana, joined by other states as *amici,* respectfully urges this Court to grant the Prayer of the Complaint submitted by the State of Texas in this cause.

Michigan	Art. 2, § 1	
Minnesota	Art. 7, § 1	
Mississippi	Art. 12, § 241	
Missouri	Art. 8, § 2	
Montana	Art. 9, § 2	
Nebraska	Art. 6, § 1	
Nevada	Art. 2, § 1	
New Hampshire		Title 4, Ch. 54:1
New Jersey	Art. 2, Para. 3	
New Mexico	Art. 7, § 1	
New York	Art. 2, § 1	
North Carolina	Art. 4, § 1	
North Dakota	Art. 5, § 121	
Ohio	Art. 5, § 1	
Oklahoma	Art. 3, § 1	
Oregon	Art. 2, § 2	
Pennsylvania	Art. 7, § 1	
Rhode Island	Art. 7, § 1	
South Carolina	Art. 2, § 3	
South Dakota		Part III, Ch. 16.0604
Tennessee	Art. 4, § 1	
Texas	Art. 6, § 2	
Utah	Art. 4, § 2	
Vermont		Vermont Stat. Ann. Title 17, Ch. 3, § 62
Virginia	Art. 2, § 18	
Washington	Art. 6, § 1	
*West Virginia	Art. IV, § 1	
Wisconsin	Art. 3, § 1	
Wyoming	Art. 6, § 2	

*Constitution does not provide an age but refers to "minors" as being ineligible to vote. Opinion Attorney General, July 21, 1965, established that "minors" means a person under the age of twenty-one.

ARGUMENT

THIS COURT SHOULD GRANT THE PRAYER OF THE COMPLAINT SUBMITTED BY THE STATE OF TEXAS IN THIS CAUSE.

When the voting rights Amendment of 1970, Public Law 91-285, hereafter referred to as the Act, became law, the affect of the state constitutions of the respective *amici,* providing for a minimum voting age higher than that provided by the Act, became uncertain. It is the position of *amici* that Congress exceeded its authority under the Constitution of the United States in providing for a minimum voting age of eighteen, applicable to all the States in all elections.

Article 1, § 2 of the Constitution of the United States provides that members of the House of Representatives be selected by voters in each state having the qualifications requisite for voters participating in elections for candidates for the most numerous branch of the state legislature. Similarly, the Seventeenth Amendment to the Constitution of the United States provides that members of the Senate be selected by voters in each state having qualifications requisite for voters participating in elections for candidates for the most numerous branch of the state legislature. And finally, the Tenth Amendment to the Constitution of the United States provides that all powers not delegated to the United States by the Constitution, nor prohibited by the Constitution to the states, are reserved to the states.

By these provisions of the Constitution of the United States, the states are expressly left the right to determine

the qualifications of voters for candidates for all elections, state and federal. This view is supported by the Case *Breedlove v. Suttles,* 302 U.S. 277 (1937). There, this Court said:

> ". . . Privilege of voting is not derived from the United States, but is conferred by the state and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the state may condition suffrage as it deems appropriate. . . ." 302 U.S., at p. 283.

See also, *Lassiter, v. Northampton County Board of Elections,* 360 U.S. 45, 51 (1959); *Snowden v. Hughes,* 369 U.S. 1, 7 (1944); *Pope v. Williams,* 193 U.S. 621 (1904). Significantly, *Breedlove* involved the constitutionality of the Georgia Poll Tax, which this Court upheld in that case. An Amendment to the Constitution, the Twenty-Fourth, was required to eliminate state poll taxes.

Pursuant to the authority of the Constitution of the United States, the State of Indiana by Article 2, § 2, of the Indiana Constitution required that:

> "In all elections not otherwise provided for by this Constitution, every citizen of the United States, *of the age twenty-one years and upwards,* who shall have resided in the State during the six months, and in the township sixty days, and in the ward or precinct thirty days immediately preceeding such election, shall be entitled to vote in the township or precinct where he or she may preside." (Emphasis added).

All *amici* have similar constitutional provisions. See Footnote 1.

The twenty-one year old age requirement of Article 2, § 2 of the Indiana Constitution conforms with the common

law rule of majority that individuals do not reach majority until they have reached the age of twenty-one.

Bearing on the authority of Congress to enact federal legislation setting minimum age requirements for voting in all elections, is the restraint shown by previous Congresses. No other Congress has thought itself authorized to set minimum voting age requirements for the states. Traditionally, it has been necessary to ratify an Amendment to the Constitution of the United States in order to impose uniform voter qualifications throughout the states. Examples of this are the Fifteenth Amendment guaranteeing the right to vote regardless of race, color or previous condition of servitude; the Seventeenth Amendment providing for the direct election of Senators to the Congress of the United States; the Nineteenth Amendment granting women the right to vote; the Twenty-third Amendment giving to the residents of the District of Columbia the right to vote for the President and the Vice President of the United States; and the Twenty-fourth Amendment eliminating the payment of a poll tax as a prerequisite to voting in a federal election.

That the drafters of the Constitution of the United States intended to leave voting age qualifications to be set by the states is obvious from a reading of Federalist Paper No. 52 written by James Madison who kept the records of the debates of the Constitutional Convention. There Madison wrote:

> "[They are to be] the same with those of the electors of the more numerous branch of the State Legislature. The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention, therefore, to define and establish this right in the Constitution. *To have left it open for the occasional regulation of the*

> *Congress, would have been improper for the reason just mentioned.* . . . To have reduced the different qualifications of the different States to one uniform rule would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention. The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State, because it is conformable to the standard already established, or which may be established, by the State itself. It will be safe to the United States, because, being fixed by the State Constitutions, it is not alterable by the State governments, and it cannot be feared that the people of the States will alter this part of their Constitutions in such a manner as to abridge the rights secured to them by the federal Constitution." (emphasis added)

The proponents of the Act rely primarily upon Section 5 of the Fourteenth Amendment to the Constitution of the United States, *Katzenbach v. Morgan,* 384 U.S. 641 (1966), applying Section 5 of the Fourteenth Amendment to the Constitution of the United States and the Supremacy Clause of Article 6 of the Constitution of the United States as authorizing the Act and its enforcement. The applicability of the Supremacy Clause depends on whether the Act is "appropriate legislation" with the meaning of Section 5 of the Fourteenth Amendment to the Constitution of the United States, hereafter referred to as Section 5, as construed by this Court in the case *Katzenbach v. Morgan, supra.* Thus, the applicability of the Supremacy Clause would be an issue only if this Court were to hold the Act to be "appropriate legislation" within the meaning of Section 5, as construed by this Court in *Katzenbach.*

Amici submit that the Act is not "appropriate legislation" within the meaning of that phrase as it appears in Section 5. Furthermore, to the extent to which *Katzenbach*

might be construed as authorizing the Act, it should be overruled.

The phrase "appropriate legislation" must be reasonably construed. Congress, in the Act, purports to enforce Section 1 of the Fourteenth Amendment to the Constitution of the United States, hereafter referred to as Section 1. Section 1 prohibits certain specified state acts. Section 5 authorizes Congress to enforce "by appropriate legislation" the prohibitions of Section 1. The phrase "the provisions of this article" of Section 5 clearly limits the scope of what is "appropriate legislation." But for the enactment of the Fourteenth Amendment Congress would have no legislative authority in the area. Section 1 is the substance of the Fourteenth Amendment. Section 5, the authority of Congress under the Fourteenth Amendment, can neither add to nor subtract from the substantive provisions of Section 1. Thus, the authority of Congress to enact "appropriate legislation" is limited to guaranteeing the rights of citizens in those areas in which the states are prohibited from abridging, depriving or denying the rights of any citizen. The phrase "appropriate legislation" cannot be construed in a vacuum. It must be construed against the background of Section 1. A construction of Section 5 authorizing Congress to enact legislation in areas outside the proscriptions of Section 1 is unreasonable and unwarranted. Thus, turning to the case at hand, if the minimum voting age requirements of *amici* do not abridge the privileges or immunities of citizens of the United States, do not deprive any person of life, liberty or property without due process of law or do not deny to any person within their respective jurisdiction the equal protection of the laws, then Congress has no authority to enact legislation providing for a uniform minimum age of eighteen in all state elections.

This Court has never found a state minimum age requirement to be in violation of the Fourteenth Amendment. This Court has, by way of *dicta,* declared that minimum voting age requirements are within the exclusive authority of the states absent a showing of unreasonableness or discrimination, invidious or otherwise. See *Lassiter v. Northampton County Board of Elections, supra; Snowden v. Hughes, supra; Breedlove v. Suttles, supra; Pope v. Williams, supra.* The states' minimum voting age requirements, none setting limits above the age of twenty-one, are patently reasonable. At common law, an individual did not reach majority until the age of twenty-one. In conformance with this policy, most states have laws favoring individuals under the age of twenty-one. These laws all reflect a judgment on the part of the states involved that an individual does not achieve mature judgment until the age of twenty-one. The judgment of the states in this regard is not unreasonable.

To justify Title III of the Act, Congress expressed concern for eighteen to twenty-one year olds who have been required to shoulder national defense responsibilities, but who cannot vote in most state elections. Congress would give the vote to all eighteen year olds solely because some serve in the Armed Services. If this justifies Title III of the Act, then all those who serve in the Armed Services should be entitled to vote, such as seventeen year olds. Conversely, those who are not required to serve, should not be entitled to vote, male or female. Furthermore, if military service is rational criteron for qualifying an individual to vote, it would be just as rational a criterion for denying the vote. In other words, military service might be required to qualify a citizen to vote.

On the other hand, age as a qualifying criterion is embedded in the United States Constitution itself. For in-

stance, the age requirement for holding office is contained in Article I, § 2(2), requiring Representatives to Congress be at least twenty-five years of age, and is contained in Article 1, § 3(3) requiring that Senators be at least thirty years of age. Finally, Article 2, § 1(5) and the Twelfth Amendment require that the President and Vice President be at least thirty-five years of age to hold those offices. Another example is found in Section 2 of the Fourteenth Amendment requiring Representatives to be apportioned among the states on the basis of the number of citizens at least twenty-one years of age. Moreover, *amici* submit that *age is* an entirely *reasonable basis* to classify individuals.

Katzenbach v. Morgan, supra, may not be construed to authorize Congress to enact legislation which would not otherwise be authorized by Section 5 itself. As *amici* have argued already, Section 5 does not itself authorize the Act in issue. Similarly if Section 5 does not authorize the Act, then *Katzenbach* may not be construed to authorize the Act. *Katzenbach* may be construed reasonably to have held that that the New York English literacy requirement in issue there perpetrated an invidious discrimination against those literate in a foreign language in violation of the Equal Protection Clause of the Fourteenth Amendment. Although the majority chose to analyze the constitutionality of the congressional act involved in that case in terms of whether it was "appropriate legislation" within the meaning of Section 5, the majority went on to say that:

> "The result is no different if we confine our inquiry to the question of whether § 4(e) was merely legislation aimed at the elimination of an *invidious discrimination* in establishing voter qualifications." (emphasis added). 384 U.S. 653-654.

See also the dissent in *Cardona v. Power,* 384 U.S. 672 (1966), 675-677, a companion case to *Katzenbach,* written by Justice Douglas and joined by Justice Fortas, members of the majority in *Katzenbach,* for the proposition that Congress was authorized to enact § 4(e) of the Voting Rights Act of 1965 to prevent violation of the Equal Protection Clause by the enforcement of its English literacy provision. So limited, *Katzenbach* does not authorize unlimited Congressional legislation. Thus, the issue is whether the Act is "appropriate legislation." *Amici,* as argued in the preceding pages, submit that it is not. It attempts to amend the Constitution of the United States (Art. I, Sec. 2) by an act of Congress.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant the Prayer of the Complaint submitted by the State of Texas, urging this Court to declare unconstitutional Title III of the Act, Public Law 91-285.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

RICHARD C. JOHNSON
Chief Deputy Attorney General

WILLIAM F. THOMPSON
Assistant Attorney General

Attorneys for *Amici Curiae*

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: 317-633-5512

The following Attorneys General join in the submission of this brief:

IDAHO
HON. ROBERT M. ROBSON
Attorney General
Boise, Idaho 83702

LOUISIANA
HON. JACK P. F. GREMILLION
Attorney General
Baton Rouge, Louisiana 70804

WEST VIRGINIA
HON. CHAUNCEY H. BROWNING, JR.
Attorney General
Charleston, West Virginia 25305

OHIO
HON. PAUL W. BROWN
Attorney General
Columbus, Ohio 43215

UTAH
HON. VERNON B. ROMNEY
Attorney General
Salt Lake City, Utah 84114

WYOMING
HON. JAMES E. BARRETT
Attorney General
Cheyenne, Wyoming 82001