IN THE

# Supreme Court of the United States

October Term, 1970

**No. 46, Original**

UNITED STATES, *Plaintiff,*

— v. —

STATE OF ARIZONA, *Defendant.*

## ANSWER and BRIEF FOR THE STATE OF ARIZONA

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## ANSWER

The State of Arizona, defendant, for its answer to the complaint heretofore filed in the above captioned cause, admits, denies, and alleges as follows:

As to the first cause of action alleged:

I

Admits all of the allegations contained in the first cause of action in plaintiff's complaint except that allegation contained in paragraph VI thereof which alleges that the continued enforcement of Sections 16-101(A)(4) and (5) of the Arizona Revised Statutes in conflict with Section 201 of the Voting Rights Act of 1965, as amended, is violative of the Constitution of the United States, which allegation is specifically denied.

As to the second cause of action alleged:

II

Admits all of the allegations contained in the second cause of action in plaintiff's complaint except that allegation contained in paragraph XII of the complaint which alleges that the continued enforcement of the age requirement for registration and voting contained in the Constitution and Statutes of the State of Arizona 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 Sections 201 and 302 of the Voting Rights Act of 1965, as amended, against defendant is prohibited by the Constitution of the United States.

Defendant, having fully answered the complaint herein, prays this Court to enter a declaratory judgment that Sections 201 and 302 of the Voting Rights Act of 1965, as amended, are in violation of the Constitution of the United States and unenforceable against defendant and to render to defendant such other relief as it may be entitled to in the premises.

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## BRIEF FOR THE STATE OF ARIZONA

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions set forth in plaintiff's brief, the defendant deems the following constitutional and statutory provisions to be involved in this case:

U.S. Const. art. I, § 2, in 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 Legislature. * * *"

U.S. Const. art. I, § 4, in part:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators. * * *"

U.S. Const. amend. XIV, in part:

"Section 2. * * * But when the right to vote at an 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."

U.S. Const. amend XVIII, in part:

"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."

## SUMMARY OF ARGUMENT

While Arizona does not question Congress' authority to enact appropriate legislation to enforce the Four-

teenth and Fifteenth Amendments, this authority can only be upheld when Congress possesses a "special legislative competence" which has not been shown in this case. *South Carolina v. Katzenbach,* 383 U.S. 301 and *Katzenbach v. Morgan,* 384 U.S. 641, carefully read, express the Court's conviction that Congress had ample factual basis for its enactment of the Voting Rights Act of 1965 and that the statute was carefully tailored to remedy a particular constitutional ill.

There is nothing before this Court which indicates that Congress has given the same attention and care to the 1970 Voting Rights Act Amendments. Nothing advanced from the legislative history of the new Act shows that Congress had knowledge of situations peculiar to Arizona or any other state affected. For instance, there is no indication that Congress considered the almost total lack of effective mass communication in northern Arizona where the vast Navajo Reservation is located.

The United States places great reliance on *Gaston County v. United States,* 395 U.S. 285, in support of the proposition that if illiteracy is the result of racially disparate educational opportunities, then any literacy test operates unfairly. That reliance is entirely misplaced. The *Gaston* opinion clearly states, "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 the government bore no responsibilities." 395 U.S. at 293, n. 8. Arizona cannot be held responsible for racially disparate educational achievements caused by policies of other governments. There is ample indication that Congress, in deciding the wisdom of suspending all literacy tests, was led to a similar mistaken reliance on this overbroad reading of *Gaston.* This Court cannot, under these circumstances, "perceive a basis upon which Congress might predicate a judgment" that literacy as a voter qualification served no legitimate state interest.

In considering the standard by which the statute is to be measured, we remind the Court that there is a presumption of constitutional validity which applies to statutes which fairly and reasonably classify citizens and therefore Arizona need show no "compelling" interest.

While in voting rights cases, a higher standard has apparently been inferred, it is to be noted that these cases involved classifications which had the potential of permanently disfranchising an identifiable minority. Unlike color or sex, illiteracy need not be a permanent condition.

Nor can it be argued that Arizona is attempting to perpetuate illiteracy as a means of keeping any class from exercising the franchise. On the contrary, over 70 percent of the total state budget is spent on education at all levels. Home study courses, including televised teaching, are available and encouraged in order to combat illiteracy. Considering the negligible number of persons who took advantage of the opportunity to provisionally register under this Court's order, disfranchisement of illiterates has apparently become a *de minimus* problem in Arizona. (Appendix).

Assuming *arguendo* that such an interest must be shown, Arizona does have a "compelling state interest" in literacy as a voter qualification. In addition to Arizona's interest in promoting the honest, responsible and intelligent use of the ballot to insure meaningful elections, the direct government provisions of our State Constitution indicate that Arizona has an especially valid interest in literate voters. The Arizona Constitution provides for initiative and referendum measures to be directly voted on by the qualified state electors. The Arizona Supreme Court long ago said that the voters are thus exercising the legislative function. *Tillotson v. Frohmiller,* 34 Ariz. 394, 271 P. 867. Since the voter is given substantial powers to legislate in Arizona, he must be especially responsible and well-read in order to make

rational decisions. Holding Arizona voters to a minimal standard — literacy — is therefore an especially valid and compelling state interest.

A further indication of the reasonableness and necessity of literacy as a voter qualification is the use of that classification for purposes of naturalization. If literacy in English is necessary to fully integrate foreign born persons into the American political community, it is not unreasonable to require the same of United States natives.

The Congress cannot, regardless of the circumstances of a given case, or the demonstrated desire or need for action by their constituents, pass a statute which alters the plain letter of the Constitution of the United States. The minimum age of 21 years for exercising the voting franchise is engrafted into the Constitution by Section 2 of the Fourteenth Amendment and the several states cannot be prohibited from setting and enforcing that standard by congressional legislation enacted under presumed authority of the Equal Protection Clause of the same Fourteenth Amendment.

If a federal minimum age for voting is to be set at 18 years of age, or otherwise, it must be done through Constitutional Amendment as provided for in Article V of the United States Constitution.

## ARGUMENT

### I

### CONGRESS' AUTHORITY TO ENFORCE THE FOURTEENTH AND FIFTEENTH AMENDMENTS BY ENACTING LEGISLATION WHICH SUPERSEDES STATE STATUTES, WHILE EXTENSIVE, CAN BE UPHELD ONLY WHERE CONGRESS POSSESSES A "SPECIAL LEGISLATIVE COMPETENCE" NOT PRESENT IN THIS CASE.

Plaintiff relies principally on two opinions by this Court, *South Carolina v. Katzenbach,* 383 U.S. 301, and *Katzenbach v. Morgan,* 384 U.S. 641, in support of the contention that the 1970 Voting Rights Act Amendments were "appropriate legislation" to enforce the Equal Protection Clause of the 14th Amendment. While we do not dispute the Court's holdings in those cases, it must be pointed out that they decided the constitutionality only of an earlier enactment, namely the 1965 Voting Rights Act. We further note that the opinions in both those cases are very carefully written to express this Court's conviction that Congress had ample factual basis for its enactment of the 1965 Act and that the legislation was carefully tailored to remedy the particular constitutional ill.

For instance, in *South Carolina v. Katzenbach, supra,* the Chief Justice points out that "Congress began work with reliable evidence of actual voting discrimination in a great majority of the states and political subdivisions affected by the new remedies of the Act." 383 U.S. at 329. The opinion also commends Congress' accuracy, saying: "In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary." Sprinkled throughout the opinion are the references to "what Congress knew" or "what Congress realized".

Likewise, in *Katzenbach v. Morgan,* Mr. Justice Brennan held that Congress' enactment of § 4(e) of the 1965 Act granting the franchise to Puerto Ricans who have successfully completed the sixth primary grade in an American-flag school in which the language of instruction was other than English reflected "Congress' greater familiarity with the quality of instruction in American-flag schools, a recognition of the unique historic relationship between the Congress and the Commonwealth of Puerto Rico, an awareness of the federal government's acceptance of the desirability of the use of Spanish as the language of instruction in Commonwealth

schools, and the fact that Congress has fostered policies encouraging migration from the Commonwealth to the States." 384 U.S. at 658. It is obvious that the Court was quite convinced that Congress considered ample evidence to give them the "specially informed legislative competence" necessary for them to impartially weigh the competing considerations.

In the case at bar, plaintiff has put nothing before this tribunal from which it can gain assurance that Congress has given the same attention and care to the 1970 Voting Rights Act Amendments.

There is nothing advanced from the legislative history to indicate that Congress had knowledge of situations peculiar to Arizona or any other affected state. The rather vague statement by Chairman Raymond Nakai of the Navajo Tribal Council that New Mexico Navajos are more likely to register than Arizona Navajos is not substantiated by any statistics. (Plaintiff's brief, p. 46). Nor is there any indication in the record that Congress, while considering the wisdom of granting the franchise to Arizona illiterates, had knowledge, for instance, that in many areas of the vast Navajo Reservation in northern Arizona there is practically no mass communications media of any language which effectively penetrates the area. There are no full time Navajo language broadcast stations, television is practically non-existent except on the fringes or by expensive cable hookup, and the only Navajo newspaper, the *Navajo Times*, is printed in English.

Under these circumstances, can this Court "perceive a basis upon which Congress might predicate a judgment" that Arizona's literacy qualification did not fulfill a legitimate state interest in maintaining meaningful elections through responsible and intelligent exercise of the ballot? We think not.

Arizona is one of only sixteen states with a literacy requirement. It would have been entirely feasible for

Congress to have held hearings in the states affected by the new amendments in order to perfect its "specially informed legislative competence". No such local hearings were held. Instead, Congress enacted sweeping legislation which affected Arizona and other states without any knowledge of special factors which pertain to local elections. From its determination of the discriminatory effects of literacy tests in some regions, it appears that Congress inferred that such tests were *per se* unfair and could serve no useful state interest. We urge the Court to note the overbreadth of this inference.

## II

### NO DUTY IS IMPOSED ON ARIZONA TO RECTIFY THE INEQUITIES RESULTING FROM PAST GOVERNMENTAL POLICIES OF OTHER GOVERNMENTS BY THE FACT THAT UNFAIRLY TREATED MINORITY GROUP MEMBERS MAY HAVE MOVED HERE.

In plaintiff's brief, great reliance is placed upon a broad construction of the opinion in *Gaston County v. United States,* 395 U.S. 285. The United States Attorney General has apparently construed the Court's language in that case to say, in effect, that if a member of an identifiable minority has suffered educational inequities because of invidious discrimination by any state or political subdivision, the obligation to rectify this inequity follows that person to any state to which he might migrate. In short, if a Negro is illiterate because of segregated schooling policies in his native state, it becomes Arizona's duty to "make it right" by granting him the franchise if he moves here. While we express no view as to the fairness of such a doctrine, we most urgently point out that the *Gaston* opinion does not admit of such a broad reading. Mr. Justice Harlan quite carefully noted, "We conclude that . . . it is appropriate

for a court to consider whether a literacy or educational requirement has the 'effect of denying the right to vote on account of race or color' because *the State or political subdivision which seeks to impose the requirement* has maintained separate and inferior schools for its Negro residents who are now of voting age." (Emphasis added). 395 U.S. at 293. But then, just as carefully, Mr. Justice Harlan states, "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 the government bore no responsibility.*" (Emphasis added). 395 U.S. at 293, n.8.

The policy of the Court in adjudging the constitutionality of United States statutes is firm: "In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of Constitutional law in advance of the necessity of deciding it; the other, *never to formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.*" (Emphasis added). *United States v. Raines,* 362 U.S. 17, 21.

We further point out that Congress relied on this erroneously broad reading of *Gaston* when considering the enactment now in question. 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). While this Court stated in *Katzenbach v. Morgan* that "it is not for us to review the congressional resolution of these factors", 384 U.S. at 653, judicial action is assuredly called for when erroneous factors are used in the congressional resolution.

In any event, this Court stated in *Warren Trading Post v. Arizona Tax Comm.,* 380 U.S. 685, that, ". . . in compliance with its treaty obligations the *Federal Govern-*

*ment* has provided for roads, education and other services needed by the Indians." The Court concluded that, ". . . since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this [state privilege] tax." 380 U.S. at 691-692. (Emphasis added).

By the very language of *Warren Trading Post,* Arizona is brought within the exception provided for in Footnote 8 of the *Gaston* decision. As was determined in the *Warren Trading Post* case, Arizona clearly has "no responsibility" for the literacy or lack of it of a large part of its citizens by virtue of federal responsibility. True, as this Court said on June 15, 1970, in *Evans v. Cornman,* 398 U.S. 419, the fiction of a "state within a state" has been rejected and cannot now be revived. But it is the contention of Arizona that the plain words of *Warren Trading Post* relieve it of responsibility and give to the State of Arizona the protection of the *Gaston* case.

## III

THERE IS A PRESUMPTION OF CONSTITUTIONAL VALIDITY WHICH APPLIES TO STATE STATUTES WHICH FAIRLY AND REASONABLY CLASSIFY CITIZENS. ARIZONA NEED SHOW NO "COMPELLING INTEREST".

Not all classifications are a denial of equal protection. "To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. 'The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same.' *Tignor v. Texas,* 310 U.S. 141, 147. Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends." *Rinaldi v. Yeager,* 384 U.S. 305, 309.

While it is true that "notions of what constitutes equal treatment for purposes of the equal protection clause *do* change", as this Court pointed out in *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 669, the logic of the language of the *Rinaldi* opinion cannot be disputed. There is a measurable difference between those who can read and write and those who have not mastered such basic skills. They are "different in fact". Barring some extraordinary circumstance, there is no justification for requiring them to be "treated in law as through they were the same".

While the United States takes the view that extraordinary circumstances, namely, invidious discrimination, are present, the plain truth is that, "Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show." *Lassiter v. Northampton County Board of Elections,* 360 U.S. 44, 51. While Arizona does not deny that literacy tests have been unfairly administered in some states, there is no allegation that this state uses its literacy test in a manner designed to unfairly discriminate against any specified group. We have already shown the fallacy of the United States' reliance upon *Gaston* as a basis for any transferrable responsibility for earlier inequalities and will not dwell upon that further.

As Mr. Justice Black pointed out in his well-reasoned dissent in *Harper v. Virginia State Board of Elections,* 383 U.S. 663, "The equal protection cases carefully analyzed boil down to the principle that distinctions drawn and even discriminations imposed by state laws do not violate the Equal Protection Clause so long as these distinctions and discriminations are not 'irrational', 'irrelevant', 'unreasonable', 'arbitrary', or 'invidious'." No serious claim has been made that Arizona's classification of voters by literacy falls into one of these categories. Unlike the case of *Katzenbach v. Morgan,* no showing has been made that Arizona's literacy test effectively disfranchises any identifiable minority.

"Of course it has always been recognized that nearly all legislation involves some sort of classification, and the Equal Protection test applied by this Court is a narrow one: a state enactment or practice may be struck down under the clause only if it cannot be justified as founded upon a rational and permissible state policy." Mr. Justice Harlan, dissenting in *Katzenbach v. Morgan*, 384 U.S. 641, 660.

Although it is suggested by the United States that because voting is a "fundamental liberty" a broader standard should be applied in this case, Arizona agrees with Mr. Justice Harlan that, "no such dual-level test has ever been articulated by this Court . . . ". 384 U.S. at 661 (dissent).

The cases from which the so-called "compelling state interest" standard is inferred have invariably dealt with a classification which had the potential for permanent disfranchisement. See, e.g. *Baker v. Carr*, 369 U.S. 186; *Reynolds v. Sims*, 377 U.S. 533; *Carrington v. Rash*, 380 U.S. 89; *Cipriano v. City of Houma*, 395 U.S. 701; *City of Phoenix v. Kolodziejski*, 399 U.S. 204; *Kramer v. Union Free School District*, 395 U.S. 621.

The rationale for the usual presumption of validity given to statutes is that the Legislature is presumed to reflect the will of the people as they speak through their ballots. *Kramer v. Union Free School District*, 395 U.S. 621. But when that voice is distorted through malapportionment or invidious classifications drawn along the lines of wealth or race, then the presumption must fall and the restriction on the franchise must be more closely examined. Without this safeguard, governmental units could simply classify out of the voting booth those voters who might oppose them, smugly relying on the presumed constitutionality of the classification.

But such is not the case here. No attempt is made to permanently disfranchise any class. Illiteracy, unlike

color or sex, need not be a permanent condition. Little children are learning to read every day, just as are adults in special education classes. Arizona expends almost 70 per cent of the total state budget appropriation on the state's common and high schools alone. Home study courses, including televised teaching, provide educational opportunities for those who can't attend regular classes. Considering the wide availability of basic education, promoted and encouraged by Arizona, those who cripple themselves by remaining illiterate must be deemed to have done so by choice. If Arizona citizens choose to remain illiterate, it is not unfair for the state to refuse to register them as voters, no more than it is unfair for a state to refuse to register those who choose to live in another state.

We further point out that illiteracy is a problem which has been largely solved in this country. The United States enjoys one of the highest literacy rates in the world. Arizona is no exception to this general rule. Upon the order of this Court, Arizona allowed illiterates to register provisionally pending the outcome of this litigation. The availability of this provisional registration was widely publicized by statewide news media, especially broadcast outlets. Nonetheless, only eighteen illiterates were registered under this provision. (See Appendix of Affidavits).

In Maricopa County, Arizona's most populous, only twelve persons out of a total population of 962,918 took the opportunity to register. This small turnout in the face of both statewide and national discussion of the issue can only be taken as an indication that the problem of disfranchisement of illiterates in Arizona is *de minimus*.

Thus, in determining the constitutionality of Arizona's statute, the Court need not scrutinize the classification as closely as is required to determine a "compelling state interest". As was stated in *Harper v. Vir-*

*ginia State Board of Elections,* 383 U.S. 663, 86 S. Ct. 1079, ". . . under a proper interpretation of the Equal Protection Clause states are to have the broadest kind of leeway in areas where they have a general constitutional competence to act."

Nor is there any question that Arizona has a "general constitutional competence to act" in setting reasonable voter qualifications. "It has long been settled law that the states have the power to prescribe reasonable and nondiscriminatory qualifications for voting in federal as well as state elections." *Hall v. Beals,* 292 F. Supp. 610 (1968). Literacy tests have never been deemed *per se* discriminatory. Contrarily, it was held in *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45, that the constitutionality of literacy tests as such is clear.

In short, Arizona need show no "compelling state interest" in requiring literacy as a prerequisite to voting. It suffices to show a rational relationship of the statute to a legitimate end.

The general rule was best stated in *Metropolitan Casualty Insurance Co. of New York v. Brownell,* 294 U.S. 580 at 584, where Justice Stone said: "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it."

## IV

## ARIZONA DOES HAVE A "COMPELLING INTEREST" IN MAINTAINING LITERACY AS A VOTING QUALIFICATION, ASSUMING *ARGUENDO* THAT SUCH AN INTEREST MUST BE SHOWN.

Generally speaking, it can hardly be denied that pro-

moting the honest, responsible and intelligent use of the ballot to insure meaningful elections is a compelling state interest. But Arizona has an especially compelling interest in requiring its voters to be literate.

The Arizona Constitution specifically reserves to the voters the power to enact laws and constitutional amendments and the power to review the acts of the formal Legislature. The Arizona Constitution, Article IV, Section 1 (1) states: ". . . [T]he people reserve the power to propose laws and amendments to the Constitution and to enact or reject such laws and amendments at the polls, independently of the Legislature; and they also reserve . . . the power to approve or reject at the polls any Act, or item, section, or part of any Act, of the Legislature." The people acting under this section, are exercising the legislative function. *Tillotson v. Frohmiller,* 34 Ariz. 394, 271 P. 867. No statute in Arizona, unless passed by a two thirds' majority of the Legislature, becomes law for ninety days in order to give five per centum of the qualified electors an opportunity to refer to the people the statute in question. *(Constitution of Arizona, Art. 4 Pt. 1 § 3).*

The voter, thus given substantial power to legislate in our state, must be fully able to understand the text of the laws he has the power to make or revise in order to make rational and intelligent decisions rather than choices based on emotion or on somebody else's interpretation of the issues.

The vote of the uninformed or the illiterate counts just as heavily as the carefully considered ballot of the responsible and well-read voter who seeks to exercise the legislative function reserved to him by the State Constitution. The franchise is thus a potential danger in the hands of those who do not fully understand the implications of the laws they have the power to pass on.

"The ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot." *Lassiter v. Northampton County Board of Elections,* 360 U.S. 44. We urge the Court to note that this relationship applies *a fortiori* where, as in Arizona, the voter is given substantial powers to exercise the legislative function above and beyond the usual power of the ballot.

## V

## THE REASONABLENESS AND NECESSITY OF LITERACY AS A VOTER QUALIFICATION IS FURTHER INDICATED BY THE USE OF THAT CLASSIFICATION FOR PURPOSES OF NATURALIZATION.

As Mr. Justice Harlan points out in his dissent to *Katzenbach v. Morgan,* "It is noteworthy that the Federal Government requires literacy in English as a prerequisite to naturalization, 66 Stat. 239, 8 U.S.C. § 1423 (1964 ed.), attesting to the national view of its importance as a prerequisite to full integration into the American political community." 384 U.S. at 663.

Consider the curious posture of the law if foreign-born illiterates are disfranchised while native illiterates are allowed to vote. In light of the application of the Equal Protection Clause to "any person" within the jurisdiction of the United States, rather than applicability being restricted to citizens, such a classification may well be viewed as running afoul of the constitutional guarantee. The possible result would be voting by aliens familiar with neither American culture nor our democratic governmental system.

## VI

THE CONSTITUTION OF THE UNITED STATES DOES NOT CONFER UPON THE CONGRESS, EITHER EXPRESSLY OR BY ANY REASONABLE IMPLICATION, THE RIGHT TO SET THE NATIONWIDE MINIMUM VOTING AGE AT 18 YEARS, OR ANY AGE OTHER THAN THE 21 YEARS SPECIFICALLY REFERRED TO IN THE CONSTITUTION.

At the outset, several matters should be made perfectly clear as to Arizona's position regarding Title III, Voting Rights Act Amendments of 1970, P.L. 91-285, 84 Stat. 314.

We are in complete agreement with the United States that the legislative process is much better suited to developing what is admittedly an arbitrary standard of age when everyone is constitutionally presumed to be old enough to intelligently exercise the franchise, whether he or she does so or not.

Arizona does not take issue with the factual determination of Congress concerning why the 18 year old should be given the franchise, even though there will always be individual citizens who will disagree with those conclusions.

Nor does Arizona contend for a review or revision of the decisions of this Court, both old or new, setting forth standards for interpreting the power of Congress in enforcing the provisions of the Federal Constitution, particularly § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment. *E.g. McCulloch v. Maryland,* 4 Wheat. 316; *South Carolina v. Katzenbach,* 383 U.S. 301; *Katzenbach v. Morgan,* 384 U.S. 641; *Kramer v. Union Free School District,* 395 U.S. 621; *Cipriano v. City of Houma,* 395 U.S. 701; *Phoenix v. Kolodziejski,* 399 U.S. 204; *Evans v. Cornman,* 398 U.S. 419.

Insofar as is consistent with the preceding three paragraphs, and so as to avoid as much as possible unnecessary duplication of argument, Arizona adopts the argument of its sister states of Oregon (No. 43 Original) and Texas (No. 44 Original) as presented in their briefs to this Court in those aforementioned cases now consolidated with this case for consideration of this identical question.

There still remains the question of applicability of the standards and principles to the case at bar. It is here that principles and standards of constitutional interpretation, as well as the findings of the Congress must give way when faced with the language of the Constitution itself. Section 2 of the Fourteenth Amendment provides, in pertinent part:

> "But when the right to vote at an 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."

The United States brushes aside this specific constitutional acceptance of the age of 21 years as the minimum age which can be enforced against the States by the Federal Government with a one paragraph reference to an earlier paragraph emphasizing that the Equal Protection Clause of the Fourteenth Amendment applies to voting matters (Brief for the United States, pages 73-75). The only case cited is *Dennis v. United States,* 171 F.

2d 986 (CA. D.C.) for the proposition that the specific machinery of reducing a state's representation in the Federal Congress has never been invoked. The logic or legal conclusion that would lead from there to the ultimate conclusion that the amendment thus has nothing to say of a constitutional nature concerning the minimum age of citizens for exercising the franchise, escapes this defendant.

The decisions of this Court, as has been pointed out by Texas and Oregon, *supra,* are absolutely consistent in leaving to the states the fundamental responsibility placed there by the Constitution to establish, on a nondiscriminatory basis, and in accordance with the specific directions or prohibitions of the Constitution, qualifications for the exercise of the franchise. E.g., *Kramer v. Union Free School Dist., supra; Carrington v. Rash,* 380 U.S. 89; *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45. The United States does not dispute this general point.

It is clear that had Justice Douglas been writing for the Court in *Lassiter v. Northampton County Board of Elections, supra,* in 1919, instead of 1959, he could well have included sex, along with residency requirement, age, and previous criminal record as obvious factors a state could take into consideration in determining qualifications for voters. *Minor v. Happersett,* 21 Wall. 162.

Thus it was on August 26, 1920, with the Proclamation by the Secretary of State, the 19th Amendment of the Constitution was declared ratified. 41 Stat. 1823; U.S. Const. Amend. XIX. The matter of universal male suffrage was changed to universal suffrage in the only way contemplated by the Constitution — by a subsequent amendment (U.S. Const. Art. V).

It goes without saying that the cry for women's suffrage was as forceful and as fully documented as was

the case for the 18 year old vote. The matter was continuously debated for almost 40 years before an amendment was proposed. Ida Husted Harper, *The History of Women's Suffrage,* Vol. V (1922); Catt and Shuler, *Women's Suffrage and Politics* (1926). Once proposed, the amendment was quickly ratified by the requisite number of states. 41 Stat. 362; 41 Stat. 1823, supra; U.S. Const. Amend. XIX.

Even as late as 1962, the Congress felt compelled to submit to the several states a constitutional amendment to prohibit the imposition of a poll tax on the right to vote for federal officers. U.S. Const. Amend. XXIV.

We cannot now question the wisdom of the framers at the time either the original Constitution or the Amendments were adopted. Their genius was such that the document could be changed from time to time as conditions required — not by Congress alone, but by the people, through their elected representatives at both the federal and state level. U.S. Const. Art. V, *supra.*

This Court put it very succinctly in its decision of *Dillon v. Gloss,* 256 U.S. 368:

> "Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several states and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the states shall be taken as a decisive expression of the people's will and be binding on all." 256 U.S. at 374.

All the decisions on construction and all the factual reasons developed by the Congress, regardless of their validity in the abstract, or in cases other than ones specifically covered by the Constitution itself, cannot justify amendment of the letter of the Constitution except by constitutionally dictated methods.

We thus face here the acid test of our system. Recognizing an almost universally acclaimed failing in our present governmental structure as regards the extension of the franchise to citizens between the ages of 18—21 years, can we still maintain the discipline necessary to follow the Constitution as it is written, wherein the remedy is clearly set forth? If we can, the people will still continue to govern. If we fail here, it will only be a matter of time till other clear constitutional statements will be similarly expeditiously abrogated. The end of constitutional government, as we know it, will not be far behind.

## CONCLUSION

For the foregoing reasons, the United States should be denied the relief sought in its complaint herein.

Respectfully submitted,

GARY K. NELSON
*Attorney General of Arizona*

JOHN M. McGOWAN II
*Special Assistant Attorney General*

JAMES BOND
Student Intern
*Of Counsel*

October, 1970

H. LYLE GRANT
COUNTY RECORDER

ETHEL SHERMAN
DEPUTY RECORDER

OCT 7 '70 AM

OFFICE OF COUNTY RECORDER

# County of Graham

STATE OF ARIZONA

SAFFORD

ATTORNEY GENERAL
STATE OF ARIZONA

STATE OF ARIZONA

COUNTY OF GRAHAM

I, H. Lyle Grant, County Recorder in and for the County and State aforesaid, being first duly sworn upon oath deposes and saith:

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

Publicity regarding this was on all media, newspapers, radio, and television so that all persons who were illiterate who wished to register to vote would be aware that he could do so during this period of time.

During this period no illiterate person in the County of Graham, according to the preliminary figures of the 1970 Census, * availed themselves of this support to personally register to vote even though they could not pass the literacy test of the State of Arizona.

WITNESS my hand and official seal this fifth day of October, 1970.

H. Lyle Grant
Graham County Recorder

* The foregoing is based upon a 1970 county census of 16,327, preliminary count.

IDA MAE SMYTH
RECORDER

PIMA COUNTY
STATE OF ARIZONA
TUCSON
OFFICE OF THE RECORDER

NORMA [illegible]
CHIEF DEPUTY

ATTORNEY GENERAL
STATE OF ARIZONA

AFFIDAVIT

STATE OF ARIZONA
County of Pima ss

I, Ida Mae Smyth, being first duly sworn upon oath, deposes and says:

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 name, or both, to provisionally register to vote between August 24, 1970 and Sept. 14, 1970.

I arranged for publicity on all media; Newspapers, Radio and Television, so that any person who was illiterate who wished to register to vote would be aware that he could do so during this period of time. During this period 0 number of people out of the total of 344,635 people in the County 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.

Dated: Oct 6, 1970 Ida Mae Smyth
Ida Mae Smyth, County Recorder

CARA N. BETTS
RECORDER

HOWARD W. WALDIE
DEPUTY

OFFICE OF THE

**COUNTY RECORDER**

**YUMA COUNTY**

YUMA, ARIZONA

October 5, 1970

CARA N. BETTS, being first fuly sworn upon oath, deposes and says: In accordance with the agreement with the Attorney General, I allowed any person who could not read the Constitution of the United States in the english language or write their name or both to provisionally register to vote between August 24, 1970 and September 14, 1970.

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

During this period then _____ _of people

__X__ none at all

out of a total of 60,077 people in the county according to the preliminary figure 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.

Cara N. Betts
County Recorder

Subscribed and sworn to before me. this ___ day of Oct., 1970 by Cara N. Betts, County Recorder of Yuma County, Arizona.

Barbara Ali
Barbara Ali, Notary Public

My Comm. Expires May 19, 1973

STATE OF ARIZONA )
) ss.
County of Yavapai )

Norma R. Marquart, Recorder of Yavapai County, Arizona, being first duly sworn, upon oath, deposes and says: That in accordance with the agreement with the Attorney General of the State of Arizona, I allowed any persons who could not read the Constitution of the United States in the English language or write their name, or both, to provisionally register between August 24, 1970 and September 14, 1970, to vote in Yavapai County. To affiant's knowledge, no persons availed themselves of this opportunity to provisionally register to vote. *

Norma R. Marquart
Yavapai County Recorder

SUBSCRIBED and sworn to before me this 5th day of October, 1970.

John C. Bailey
Notary Public

My Commission expires August 18, 1971.

* The foregoing is based upon a 1970 county census of 35,869, preliminary count.

OCT 7 '70 AM

ATTORNEY GENERAL
STATE OF ARIZONA

A F F I D A V I T

STATE OF ARIZONA,)
: ss.
County of Apache.)

VIRGIE B. HEAP, being first duly sworn upon oath, deposes and says: 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 name or both, to provisionally register to vote between August 24, 1970, and September 14, 1970. I arranged for publicity by a letter to all registration officers so that any person who wished to register to vote could be aware that he could do so during the period of time. During this period of time, two people out of a total of 32,237 people in the County 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.

Virgie B. Heap
VIRGIE B. HEAP
APACHE COUNTY RECORDER

Subscribed and sworn to before me this 5th day of October, 1970.

(SEAL)

J. K. Hansen
Notary Public

My Commission Expires August 4, 1973.

OCT 7 '70 AM

ATTORNEY GENERAL
STATE OF ARIZONA

A F F I D A V I T

STATE OF ARIZONA, )
: ss.
County of Navajo. )

JAY H. TURLEY, being first duly sworn upon oath, deposes and says 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 name, or both, to provisionally register to vote between August 24, 1970 and September 14, 1970.

I, ~~arranged~~ DID NOT ARRANGE for publicity on all media, newspapers, radio and television so that any person who was illiterate who wished to register to vote would be aware that he could do so during this period of time. During this period 1 number of people out of a total of 45,951 people in the county 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.

Jay H. Turley
Navajo County Recorder

Subscribed and sworn to before me this 6 day of October, 1970.

Lee McCleve
Notary Public, Navajo County, Arizona

My Commission expires:
May 2, 1972

STATE OF ARIZONA)
) ss.
COUNTY OF PINAL )

I, SOPHIE M. SMITH, the duly elected and qualified County Recorder of Pinal County, State of Arizona, being first duly sworn, on my oath depose and say:

By agreement with the Attorney General of Arizona, and in compliance with the order of the Supreme Court of the United States, I allowed persons who could not read the Constitution of the United States in the English language, or who could not write their name, or both, to provisionally register to vote between August 24th, 1970, and September 14th, 1970. This was publicized in all media so that any person who was illiterate and who wished to register to vote would be aware that he could do so during this period.

During this period of time, 1 person out of 67,876 total population in the county, according to the preliminary figures of the 1970 census, availed himself of this opportunity to provisionally register to vote, even though he could not meet the literacy qualifications as provided for by Arizona Statutes.

It should be noted in this context that this person was unable to write his name and therefore was identifiable as an illiterate. Previously in this county, the statutes have been interpreted to mean that the literacy qualification was exactly that and nothing else. This meant that if a person could write his name and was willing to subscribe on his oath that he met all qualifications, including the literacy qualification, he was considered so qualified.

Birth certificates were not required to be produced as proof of age, and neither was actual testing of ability to read performed, as such testing was not considered to be the duty of the Registration Officer. Accordingly, it is possible and even probable that there are now registered in this county persons who would be baffled by such words and phrases as "concurrence", "emolument", or "domestic Tranquility", and therefore are not literate within the strictest construction of the statutes.

Given under my hand and seal this 5th day of October, 1970.

Sophie M. Smith
SOPHIE M. SMITH
Pinal County Recorder

SUBSCRIBED AND SWORN TO before me this 5th day of October, 1970.

Evelyn Jones
Notary Public

My Commission Expires
May 31st, 1973

# A F F I D A V I T

STATE OF ARIZONA )
) ss.
COUNTY OF MARICOPA )

PAUL N. MARSTON, being first duly sworn upon oath deposes and says:

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 name 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 illiterate who wished to register to vote would be aware that he could do so during this period of time. During this period twelve (12) people out of a total of 962,918 people in the county 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.

Paul N. Marston
Paul N. Marston
Maricopa County Recorder

Subscribed and sworn to before me this 2nd day of October 1970.

Lois C. Hoate
Notary Public

My commission expires:
May 17, 1972

PEGGY B. SMITH
RECORDER

ANNIE J. KAUBE
CHIEF DEPUTY

OCT 7 '70 AM

OFFICE OF THE
**RECORDER**
OF MOHAVE COUNTY
KINGMAN, ARIZONA

ATTORNEY GENERAL
OF ARIZONA

STATE OF ARIZONA, )
) SS.
COUNTY OF MOHAVE. )

I, PEGGY B. SMITH, Recorder of the County of Mohave, State of Arizona, being first duly sworn upon oath depose and says, in accordance with agreement with the Attorney General I allowed any person who could not read the Constitution of these United States in the English language or write their name or both, to provisionally register to vote between August 24, 1970 and September 14, 1970.

During the period between August 24, 1970 and September 14, 1970 no person out of a total of 25,110 people in the county according to the preliminary census of 1970 availed themselves of this opportunity to provisionally register to vote even though they could not pass the literacy test of the State of Arizona.

Witness my hand this 6th day of October, 1970.

Peggy B. Smith
Peggy B. Smith
Mohave County Recorder

Subscribed and sworn to before me this 6th day of October, 1970, by Peggy B. Smith.

Robert L. Spear
Notary Public

My Commission Expires:
My Commission Expires Mar. 15, 1974

*Edna Mae Thornton*
OFFICE OF THE RECORDER
Coconino County

STATE OF ARIZONA COUNTY OF COCONINO

Edna Mae Thornton being first duly sworn upon oath deposes and activates out the agreement with the Attorney General allowing any persons who could not read the Constitution of the United States in the English language or write their name 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 illiterate, who wished to register to vote would be arranged that he could do so during this period of time.

During this period no people out of a total of 47,355 of people in the county according to the preliminary figure of the 1970 census availed themself of this opportunity to previously register to vote even though they could not pass the literacy test of the State of Arizona.

Edna Mae Thornton
County Recorder

Subscribed and sworn to before me this 5th day of October, 1970.

My commission expires:
July 21, 1972

Beatrice B. Lawrence
Notary Republic

COCONINO COUNTY ARIZONA 1891

BOX 267 • FLAGSTAFF, ARIZONA 86001 • PHONE 774-5011 EXT. 63 OR 64

JAMES O. DIXON
RECORDER

LUCILE VEAZEY
CHIEF DEPUTY

OCT 7 1970 AM
W. WHITE
DEPUTY
BEVERLY LOPEZ
DEPUTY
BERNICE BETTSELL
DEPUTY

# COUNTY OF COCHISE

OFFICE OF THE RECORDER
BISBEE, ARIZONA

ATTORNEY GENERAL
STATE OF ARIZONA

## AFFIDAVIT

State of Arizona ) ss
County of Cochise )

October 5, 1970

James O. Dixon, first duly sworn upon oath, deposes and says, in accordance with the agreement with the Attorney General, he allowed, any persons who could not read the Constitution of the United States in the English language or write their name or both, to provisionally register to vote between August 24, 1970 andSeptember 14, 1970.

To the best of his knowledge, no deputy registrar, Justice of the Peace, or any employee in the Recorder's office turned away any otherwise qualified person who wished to register upon the basis of illiteracy in any form. In other words, there was no one provisionally registered in Cochise County. *

James O. Dixon
James O. Dixon
Cochise County Recorder

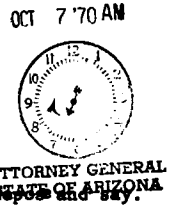
State of Arizona ) ss
County of Cochise)

This instrument was acknowledged before me this 6th day of October 1970 by

Bonnie Faulconer
~~Notary Public~~ Deputy Clerk
Superior Court

~~My commission will expire~~

* The foregoing is based upon a 1970 county census of 60,394 and an unofficial 1970 voter registration of 19,960.




STATE OF ARIZONA )
: SS
COUNTY OF GILA )

I, DORIS PARKIN, being first duly sworn upon oath ~~depose and say.~~ In accordance with the agreement with the Attorney General I allowed any person who could not read the constitution of the United States in the English language or write their name or both to provisionally register to vote between August 24, 1970 and September 14, 1970. I arranged for publicity on all media - newspapers - radio - T.V. so that any person who was illiterate who wished to register to vote would be aware that he could do so during this period of time.

During the period NONE people out of a total of 28,412 people according to the prelimary figures of the 1970 census availed themselves of the opportunity to provisionally register to vote even though they could not pass the literacy test of the State of Arizona.

Gila County Recorder.

Subscribed and sworn to before me this 5 day of October, 1970.

Notary Public.

My Commission Expires November 11, 1973.

G. ESPINOSA MORENO
COUNTY RECORDER

# COUNTY RECORDER
SANTA CRUZ COUNTY
NOGALES, ARIZONA, 85621

OCT 7 10 AM
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 JULY 20, 1972