IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 47 Original

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

BRIEF FOR THE STATE OF IDAHO

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JURISDICTION

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

QUESTION PRESENTED

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Const. art. I, §2:

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

U. S. Const. art. II, §2:

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

U.S. Const. amend. X:

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

U. S. Const. amend. XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of the State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall

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

* * *

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

U. S. Const. amend. XV:

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

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

U. S. Const. amend. XVII:

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

Article 6, Section 2 of the Idaho Constitution provides:

Qualifications of electors.--Except as in this

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

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

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

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

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

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

the requirement of residence and registration, and

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

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

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

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

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

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

STATEMENT

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

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

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

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

1. Article 6, Section 2 of the Idaho Constitution; Section 34-401, Section 34-408, Section 34-409, Section 34-413, Section 34-1101, Section 34-1105 of the Idaho Code.

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

ARGUMENT

I.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

restrict enfranchisement to individuals twenty-one years or more.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.

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

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

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

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

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

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

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

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

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

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

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

A. 8. The residency and absentee voter requirements found in Idaho statutes and constitutional law do not constitute a denial of equal protection.

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

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

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

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

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

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

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

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

III.

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

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

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

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

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

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

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

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

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

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

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

The state submits that nothing in the Congressional record attendant to the passage of Titles II and III of the

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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October, 1970

PROOF OF SERVICE

I, Robert M. Robson, Attorney General of Idaho, ~~and a member of the Bar of the Supreme Court of the United States~~, hereby certify that on the 10th day of October, 1970 I served the foregoing Brief for the Defendant upon the Plaintiff by depositing a copy in the United States Mail, postage prepaid, and addressed to Honorable John N. Mitchell, Attorney General of the United States, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530.

Robert M. Robson

ROBERT M. ROBSON

APPENDIX

TITLE II -- SUPPLEMENTAL PROVISIONS

"Application of Prohibition to other states:

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

" (b) As used in this section, the term 'test or device' means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

"Residence Requirements for Voting

"Sec. 202. (a) The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient

opportunities for absentee registration and absentee balloting in presidential elections--

> " (1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;
>
> " (2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;
>
> " (3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2 clause 1, of the Constitution;
>
> " (4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;
>
> " (5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and
>
> " (6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.

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

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

" (d) For the purposes of this section, each State

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

" (e) If any citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any election for President and Vice President has begun residence in such State or political subdivision after the thirtieth day next preceding such election and, for that reason, does not satisfy the registration requirements of such State or political subdivision he shall be allowed to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election (1) in person in the State or political subdivision in which he resided immediately prior to his

removal if he had satisfied, as of the date of his change of residence, the requirements to vote in that State or political subdivision, or (2) by absentee ballot in the State or political subdivision in which he resided immediately prior to his removal if he satisfies, but for his nonresident status and the reason for his absence, the requirements for absentee voting in that State or political subdivision.

" (f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement of a registration that does not include a provision for absentee registration.

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

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

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

"JUDICIAL RELIEF"

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

"Penalty"

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

"Separability"

Sec. 205. If any provision of this Act or the application of any provision thereof to any person or circumstance is judicially determined to be invalid, the remainder

of this Act or the application of such provision to other persons or circumstances shall not be affected by such determination.

"Title III -- REDUCING VOTING AGE TO EIGHTTEEN IN FEDERAL, STATE, AND LOCAL ELECTIONS

"Declaration and Findings"

"Sec. 301. (q) 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 consti-

tutional 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 older.

"Prohibition"

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

"Enforcement"

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

" (2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title, which shall be heard and determined by a court of three judges in accordance with the provisions of

section 2284 of title 28 of the United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

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

"Definition"

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

"Effective Date"

"Sec. 305. The provisions of title III shall take effect with respect to any primary or election held on or after January 1, 1971." (Approved June 22, 1970).