No. 01-1596 APR 26 2002

In The

Supreme Court of the United States

JOHN ROBERT SMITH; SHIRLEY HALL; GENE WALKER; and MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Cross-Appellants,

v.

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; ROBERT NORVEL; ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,

Cross-Appellees.

On Conditional Cross-Appeal From The United States District Court For The Southern District Of Mississippi

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether, as its plain language declares, 2 U.S.C. § 2a(c)(5) requires a State whose representation in Congress has been reduced after a census to elect its Representatives "from the State at large" "[u]ntil a State is redistricted in the manner provided by the law thereof."

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MISCELLANEOUS

JURISDICTIONAL STATEMENT

Pursuant to this Court's Rule 18.4, John Robert Smith, Shirley Hall, and Gene Walker, who were plaintiffs before the United States District Court for the Southern District of Mississippi, and the Mississippi Republican Executive Committee, one of the defendants, present their conditional cross-appeal from that Court's judgment entered February 26, 2002. Cross-appellants have filed a separate motion to affirm that judgment. Only in the event that this Court should decide to set this appeal for oral argument, cross-appellants ask the Court to review the District Court's failure to order Representatives to be elected at large, as required by 2 U.S.C. § 2a(c)(5).

OPINIONS BELOW

The judgment and opinion of the District Court have been reproduced in the Appendix to Jurisdictional Statement filed in conjunction with the appeal taken by Beatrice Branch, Rims Barber, L.C. Dorsey, David Rule, James Woodard, Joseph P. Hudson, and Robert Norvel, who intervened as defendants before the District Court. The final judgment of February 26, 2002, is reproduced beginning at 1a. The Court's several opinions are reproduced in the Appendix as follows: February 26, 2002, 4a; February 19, 2002, 25a; February 4, 2002, 62a; January 15, 2002, 90a; December 5, 2001, 107a. The five opinions have not been officially reported, but may be found in reverse

chronological order at 2002 WL 313219, 2002 WL 313216, 2002 WL 313212, 2002 WL 313208, and 2001 WL 1796507.

JURISDICTION

The judgment of the District Court was entered on February 26, 2002, App. 1a, and the intervening defendants filed a timely notice of appeal that same day. App. 239a. Their Jurisdictional Statement was filed with this Court on March 28, 2002, and placed on the docket that same day. This Jurisdictional Statement on conditional cross-appeal is being filed within the thirty days permitted by this Court's Rule 18.4.

STATUTES

2 U.S.C. § 2a provides in pertinent part:

* * *

> (c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: . . . (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

2 U.S.C. § 2c provides:

> In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an

> apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).

STATEMENT OF THE CASE

Mississippi is currently represented by five Members of the United States House of Representatives. Under the reapportionment occasioned by the 2000 census, Mississippi's delegation was reduced to four Representatives. Consistent with the prior apportionment, Mississippi law divides the state into five districts, Miss. Code Ann. § 23-15-1037 (Rev. 2001). The Mississippi Legislature was unable to agree on a redistricting plan after the 2000 census. The Chancery Court of the First Judicial District of Hinds County ordered into effect a new plan drafted by plaintiffs, who intervened as defendants before the District Court in this action, but the District Court's final judgment enjoined state election officials from enforcing that plan. App. 1a-2a. Instead, the District Court ordered into effect a plan, which it drafted, to divide the state into four new districts. App. 2a.

Plaintiffs in this action are three Mississippi voters. On November 1, 2001, they filed their complaint with the

District Court, seeking to enjoin enforcement of the old five-district plan and to require at-large elections under 2 U.S.C. § 2a(c)(5) and Miss. Code Ann. § 23-15-1039 (Rev. 2001). They named as defendants the three elected state officers who make up the State Board of Elections Commissioners, as well as the Mississippi Republican Executive Committee and Mississippi Democratic Executive Committee, who administer the Mississippi statutes governing nominations to Congress by primary or petition. Plaintiffs asked in the alternative that the District Court devise its own redistricting plan consistent with federal law.

The next day, process was served on the three elected state officials in a separate action filed by seven voters in the Chancery Court of the First Judicial District of Hinds County, seeking the imposition of a redistricting plan as a matter of state law. Those same voters moved to intervene as defendants before the District Court, and their motion was granted on December 5, 2001. App. 107a. On December 13, 2001, the Supreme Court of Mississippi entered an order in *In re Mauldin*, No. 2001-M-01891 (Miss. Dec. 13, 2001), authorizing the Chancery Court to begin trial the next day and to place a congressional redistricting plan into effect. App. 110a. The following Monday, December 17, 2001, plaintiffs moved to amend their complaint, seeking to enjoin the enforcement of the order entered in *In re Mauldin* and any redistricting plan to be entered by the Chancery Court for failure to obtain the necessary approval under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The District Court granted leave to amend by order entered January 7, 2002.

The intervening defendants never answered the amended complaint. However, in their response to the motion for leave to amend, they argued that the at-large election requirement of 2 U.S.C. § 2a(c)(5) had been repealed by implication in 1967, when Congress adopted 2 U.S.C. § 2c, mandating that Representatives be elected from districts. In its order of January 15, 2002, the District Court acknowledged that plaintiffs had sought enforcement of the at-large election statutes. App. 95a. The District Court's final judgment, however, imposed a redistricting plan devised by the Court. App. 1a. At no point did the District Court explain why plaintiffs were not entitled to enforcement of the at-large election statutes.

THE QUESTION IS SUBSTANTIAL

The District Court failed without explanation to enforce an Act of Congress. Twenty years ago, two other district courts disagreed as to whether 2 U.S.C. § 2a(c) had been repealed by implication by 2 U.S.C. § 2c. *Compare Carstens v. Lamm*, 543 F.Supp. 68, 77-78 & n.23 (D. Colo. 1982), *with Shayer v. Kirkpatrick*, 541 F.Supp. 922, 926-27 (W.D. Mo.), *aff'd mem.*, 456 U.S. 966 (1982).[1] Because this issue has arisen again, and because it can arise at each reapportionment after a census, the conflict should be resolved by this Court.

[1] The question of the application of § 2a(c)(5) was not presented to this Court on appeal from the judgment in *Shayer*.

I. SECTION 2a(c) HAS NEVER BEEN REPEALED.

The adoption of 2 U.S.C. § 2a(c) in 1941, Act of November 15, 1941, c. 470, § 1, 55 Stat. 761, followed long experience with the failure of elected officials to complete the reapportionment and redistricting process after a census. As this Court recounted the history in *Wood v. Broom*, 287 U.S. 1, 6 (1932), Congress had traditionally adopted a new reapportionment by statute after each census. However, Congress failed to pass a new reapportionment after the Fourteenth Census in 1920. For the Fifteenth Census, Congress delegated to the President the responsibility of preparing a new reapportionment after each census, subject to displacement by a subsequent Act of Congress. Act of June 18, 1929, c. 28, § 22, 46 Stat. 26. It was this provision which Congress amended in 1941.

The reapportionment after the 1930 census led to extensive redistricting disputes in the states. In *Wood*, this Court reversed a judgment enjoining enforcement of Mississippi's redistricting statute for failure to achieve compactness and substantially equal population; the Court found that statutory requirements to that effect adopted after the census of 1910 had not been carried forward into the 1929 Act. 287 U.S. at 6-7, *rev'g*, 1 F.Supp. 134 (S.D. Miss. 1932). In *Smiley v. Holm*, 285 U.S. 355 (1932), this Court upheld the validity of a veto by the Governor of Minnesota of a redistricting plan adopted by its Legislature. Because Minnesota had lost seats in the new reapportionment, this Court declared that, "unless and until new districts are created, all Representatives allotted to the state must be elected by the state at large." *Id.*, at 374-75. In *Carroll v. Becker*, 285 U.S. 380 (1932), this Court

affirmed a judgment compelling the same result in Missouri, which had lost three seats. In New York, which gained two seats, this Court affirmed a judgment requiring the old districts to be used and the two new Representatives to be elected at large. *Koenig v. Flynn*, 285 U.S. 375 (1932).

Congress would undoubtedly have been aware of this history when it amended the 1929 Act promptly after the 1940 census. Following the pattern set by this Court in *Smiley*, *Carroll*, and *Koenig*, it explicitly specified the method of election to be used "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment." As the fifth clause of § 2a(c) continues to read today, "if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large."

In 1967, after this Court's decisions in *Baker v. Carr*, 369 U.S. 186 (1962), and *Wesberry v. Sanders*, 376 U.S. 1 (1967), Congress turned again to the manner of election of Representatives. Congress did not amend the 1929 Act, but adopted a new provision, now codified as 2 U.S.C. § 2c, providing that, in each State with more than one Representative, "there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled." Act of December 14, 1967, Pub. L. 90-196, 81 Stat. 581. The Act bears the unusual title, "An Act for the Relief of Dr. Ricardo Vallejo Samala and to Provide for Congressional Redistricting," because it originated in the House of Representatives as a private relief bill. The language now codified as § 2c was adopted after a brief discussion on the floor of the Senate.

113 Cong.Rec. 31718-20 (1967). No committee report explaining the legislation was prepared in either House.

Although § 2c makes no mention of § 2a(c), the District Court in *Shayer* concluded that the 1967 statute repealed the 1941 statute by implication. Even through § 2c makes no mention of courts, the *Shayer* Court relied on the floor debate to conclude that it would be "mandatory for all Congressmen to be elected by single-Member districts, whether the reapportionment is done by the State legislatures or by a Federal court." 541 F.Supp. at 927, quoting 113 Cong.Rec. 31720 (Sen. Bayh). Acknowledging that repeals by implication are not favored, the Court concluded, "Here, the plain language of section 2c is inconsistent with section 2a(c)(5), warranting a finding of repeal by implication." 541 F.Supp. at 927. That conclusion was rejected just weeks later by another District Court, which concluded that "these two statutes are not necessarily inconsistent." *Carstens, supra,* 543 F.Supp. at 77.

This Court has repeatedly stated that "repeals by implication are not favored," *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n,* 393 U.S. 186, 193 (1968). Here, § 2c establishes the general principle that Representatives should be elected from districts, but § 2a(c) addresses the specific consequences of legislative inaction. This Court has explained the rule to be applied in such situations:

> "It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute governing a more generalized spectrum," *Radzanower v. Touche Ross & Co.,* 426

> U.S. 143, 148 (1976), unless the latter statute " 'expressly contradict[s] the original act' " or unless such a construction " 'is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.' " *Ibid.* (quoting T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874)). "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Supra, Morton v. Mancari,* 417 U.S. [535,] 551 [(1974)].

Traynor v. Turnage, 485 U.S. 535, 547-48 (1988).

Here, § 2c and § 2a(c) are plainly "capable of co-existence." On its face, § 2c is addressed, not to the courts, but solely to the lawmaking authority "[i]n each State entitled . . . to more than one Representative." The statute instructs each such authority that "there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled." Section 2c does not say what shall happen when, as in Mississippi, the lawmaking authority fails to establish those districts by law.

That issue is expressly addressed by § 2a(c), which applies "[u]ntil a State is redistricted in the manner provided by the law thereof." Some of those instructions may now be problematical; the requirement in § 2a(c)(1) that the old districts should continue to be used where there is no change in the size of the delegation will almost certainly conflict, because of population shifts, with the

requirement in *Wesberry* of population equality. However, there is no impediment to the enforcement of § 2a(c)(5), because *Wesberry* expressly declares that the Constitution is satisfied "when Representatives are chosen as a group on a statewide basis."[2] Thus, far from conflicting with § 2c, § 2a(c)(5) constitutes the remedy for its violation.

Because § 2c may be construed consistently with § 2a(c), this Court should conclude that the 1967 Act did not repeal the 1941 Act.

II. SECTION 2a(c) IS NOT LIMITED TO SITUATIONS WHERE A COURT LACKS TIME TO ACT.

Rejecting the conclusion in *Shayer* that § 2c and § 2a(c) are necessarily inconsistent, the District Court in *Carstens* perceived only a limited role for the at-large statute:

> Section 2c prohibits a legislature or court from deliberately designing a redistricting plan which would elect at-large representatives. Arguably, Congress did not repeal Section 2a(c)(2) because they did not want to leave a state without a remedy in the event that no constitutional redistricting plan exists on the eve of a congressional election, and there is not enough time for either the Legislature or the courts to develop an acceptable plan. In this very limited circumstance, we believe that Section 2a(c)(2) provides

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[2] Although § 5 of the Voting Rights Act in some circumstances has been held to invalidate state laws requiring election from multimember districts, *Thornburg v. Gingles*, 478 U.S. 30 (1986), § 5 on its face has no application to acts of Congress.

> emergency statutory relief from an otherwise unconstitutional situation.

543 F.Supp. at 77-78 (footnote omitted).[3]

The *Carstens* Court gave no explanation for its conclusion that § 2c places any prohibition upon a court. However, the assumption that the statutory scheme is addressed to courts as well as legislatures was central to its analysis. The Court's discussion concluded, "There is nothing in the language of Section 2a(c)(2) which indicates that Congress intended to bar the federal courts from providing timely assistance to the state in resolving a redistricting dispute." *Id.*, at 78. The Court assumed that Congress intended the federal courts to exercise power unless that power had been explicitly withdrawn.

Congress, however, could have entertained no such assumption in 1929, when it adopted § 2a(c). The Constitution in Article I, § 4 gives primary control over federal elections to the state legislatures, vesting supervisory authority in Congress, not the courts. In exercising that supervisory authority in 1929, Congress addressed § 2a(c) to legislatures and state election authorities, expecting them to execute its provisions. It was not intended as an emergency measure should the courts fail to act, because Congress would have had no reason to expect the courts to act.

Of course, by 1967, courts had begun to act, taking control of redistricting decisions after *Baker* and *Wesberry*.

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[3] The second clause of § 2a(c) applies where a state has increased its representation; until redistricting is completed, the new Representatives are to be elected at large.

It would not have been unreasonable to expect that § 2c would give explicit directions to courts for resolving those controversies. However, no such intent can be discerned from the language itself. The statute tells states that districts should be "established by law," but it gives no direction to courts.[4]

Certainly, nothing in § 2c modifies the explicit terms of § 2a(c). If the 1929 Act has not been implicitly repealed, then it retains the same meaning it had in 1929. It is an instruction to state election authorities to elect Representatives at large under the circumstances now presented in Mississippi. The District Court should have ordered those election officials to comply with the law.

CONCLUSION

In the event that this Court chooses to set this appeal for oral argument, then, for the reasons stated herein, the judgment of the District Court should be reversed, and

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[4] The *Carstens* Court quoted Senator Bayh's statement that § 2c was intended to bind federal courts, 548 F.Supp. at 77 n.23, but did not rely upon it to support its holding. This Court ordinarily will "give no weight to a single reference by a single Senator during floor debate in the Senate," *Bath Iron Works Corp. v. Director*, 506 U.S. 153, 166 (1993), particularly where the proposed construction "is in no way anchored in the text of the statute." *Shannon v. United States*, 512 U.S. 573, 583 (1994).

the Defendants should be ordered to conduct elections for Mississippi's Representatives at large.

Respectfully submitted,

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