No. 01-1596

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

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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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The judgment and opinion of the District Court have been reproduced in the Appendix to the Jurisdictional Statement filed in conjunction with the appeal in *Branch v. Smith*, No. 01-1437, which has been consolidated with this appeal for argument. The final judgment of February 26, 2002, is reproduced beginning at App. 1a.[1] The Court's several opinions are reproduced in the Appendix as follows: February 26, 2002, App. 4a; February 19, 2002, App. 25a; February 4, 2002, App. 62a; January 15, 2002, App. 90a; December 5, 2001, App. 107a. The five opinions may be found in chronological order at *Smith v. Clark*, 189 F. Supp. 2d 502 (S.D. Miss. 2001), 189 F. Supp. 2d 503, 189 F. Supp. 2d 512, 189 F. Supp. 2d 529, and 189 F. Supp. 2d 548 (S.D. Miss. 2002).

JURISDICTION

The judgment of the three-judge 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. The Jurisdictional Statement in No. 01-1437 was filed with this Court on March 28, 2002, and placed on the docket that same day. The Jurisdictional Statement on conditional cross-appeal in No. 01-1596 was filed by plaintiffs and defendant Mississippi Republican

[1] The citation "App." refers to the Appendix to the Jurisdictional Statement in No. 01-1437. The citation "J.App." refers to the Joint Appendix prepared for both of these consolidated appeals pursuant to this Court's Rule 26.

Executive Committee on April 26, 2002, within the thirty days permitted by this Court's Rule 18.4. It was placed on the docket on April 29, 2002. On June 10, 2002, this Court noted probable jurisdiction in both appeals and consolidated them for oral argument. Jurisdiction is appropriate under 28 U.S.C. § 1253.

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 Election Commissioners, *see* Miss. Code Ann. § 23-15-211(1) (Rev. 2001), as well as the Mississippi Republican Executive Committee and Mississippi Democratic Executive Committee, who administer the Mississippi statutes governing nominations to Congress by primary. *See, e.g.*, Miss. Code Ann.

§§ 23-15-299, -331, -923, and -963 (Rev. 2001). Plaintiffs asked in the alternative that the District Court devise its own redistricting plan consistent with federal law.

The next day, November 2, 2001, 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 were allowed to intervene as defendants before the District Court by order of 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. However, the Court announced from the bench the next day that it intended to draw new districts rather than to

order the election of Representatives at large. J.App. 27. The District Court's final judgment 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.

SUMMARY OF THE ARGUMENT

1. The question presented by this appeal is properly before this Court. In both their complaint and their amended complaint, plaintiffs asked the District Court to order the election of Representatives at large, as required by 2 U.S.C. § 2a(c)(5). The Court announced from the bench, without explanation, that it would not do so. J.App. 27a.

2. After extensive recent experience with the failure of States to redistrict following a new apportionment, Congress adopted § 2a(c) in 1941 to deal with that eventuality. In a series of cases during the previous decade, this Court had approved judgments requiring States to elect added Representatives at large, and to elect all Representatives at large when losing representation. In 1941 Congress wrote precisely that course of action into law. States followed those dictates with regularity over the ensuing quarter century.

In 1967 Congress adopted 2 U.S.C. § 2c, which generally requires the election of Representatives by districts; the new statute, however, made no mention of § 2a(c). Although one District Court found the 1967 statute to have repealed the 1941 statute by implication, the difficult standard set by this Court has not been met: "[W]hen 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." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

On its face, § 2c does not anticipate enforcement by courts; in requiring districts to be "established by law," it directs its force to state legislatures, which adopt laws. In the face of an earlier statute requiring districts to be established, this Court in *Smiley v. Holm*, 285 U.S. 355 (1932), required elections to be held at large when the Minnesota Legislature failed to act. Section 2a(c) codifies the result reached by this Court. Far from being inconsistent, § 2a(c) provides the remedy for the violation of § 2c by legislative inaction.

Neither is there any evidence of a clear congressional intention to repeal § 2a(c). To the contrary, earlier in 1967 Congress considered legislation which would have explicitly repealed the existing version of § 2a(c). After the repealer was excised in conference, the House defeated a motion to restore it, before the Senate defeated the conference report altogether. This Court has recognized that contemporaneously rejected proposals may shed light on the meaning of statutes actually adopted by Congress. This rule has special force with regard to implied repeals; where Congress has rejected an effort at explicit repeal, it will not be held to have repealed an existing statute implicitly. Because Congress explicitly refused to repeal § 2a(c), it should not be held to have implicitly done so in adopting § 2c.

3. There is no basis for the suggestion that the adoption of § 2c leaves § 2a(c) to operate only in cases where a court lacks time to perform its own redistricting. In adopting § 2a(c) in 1941, Congress would not have

expected courts to play any role in redistricting. The instructions of the 1941 statute are directed only to state election officials. Courts should resist the invitation of political actors to mediate their redistricting disputes; instead, they should implement § 2a(c) precisely as it reads. In previous circumstances where courts have ordered Representatives to be elected at large, legislatures have promptly proceeded to discharge their duty to adopt redistricting plans.

4. Finally, compliance with § 2a(c)(5) does not violate the Voting Rights Act. This Court has already held that compliance with federal law does not require preclearance under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *Young v. Fordice*, 520 U.S. 273 (1997). Nor is there any textual suggestion in § 2 of the Voting Rights Act, 42 U.S.C. § 1973, that its strictures apply to compliance with acts of Congress. Of course, any discretionary decisions made by Mississippi in implementing § 2a(c)(5) must be consistent with the Voting Rights Act. If Mississippi fails to make the decisions necessary for implementation of the statute, it can be expected that the District Court will implement election procedures consistent with the Voting Rights Act and other provisions of federal law.

ARGUMENT

I. THE CLAIM FOR AT-LARGE ELECTIONS WAS PRESSED BY PLAINTIFFS AND PASSED ON BY THE DISTRICT COURT.

In their conditional motion to affirm, intervenors contended that plaintiffs had waived their claim for at-large elections, even though intervenors admitted that

plaintiffs requested such relief in their complaint and their amended complaint. Before the trial ever took place, the District Court announced from the bench that it was not planning to order that Representatives be elected at large. J.App. 27. The Court gave no reasons and sought no argument. The parties proceeded to present their evidence on the understanding that the Court intended to develop its own redistricting plan.

It was in this context that the District Court issued its order of February 4, 2002, announcing its proposed redistricting plan. App. 62a-63a. That order instructed the parties to make any objections, comments, or suggestions with regard to the plan itself; it did not invite the parties to ask the Court to reconsider its decision to devise a plan in the first place. The plain purpose of the order was to give the parties an opportunity to be heard on a plan they had not previously seen, not to invite them to revisit a decision that had already been made.

Under these circumstances, the question presented by the cross-appeal is properly before this Court. As this Court has explained, "The standard we previously have employed is that we will not review a question not pressed *or* passed on by the courts below." *United States v. Williams*, 504 U.S. 36, 42 (1992), quoting *Springfield v. Kibbe*, 480 U.S. 257, 266 (1987) (O'Connor, J., dissenting) (emphasis in original; citations omitted). Indeed, the rule "permit[s] review of an issue not pressed so long as it has been passed upon." *United States v. Williams*, 504 U.S. at 41. "It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration

of federal law." *Id.*, at 41-42, quoting *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

The method of election of Members of the House of Representatives is obviously one of great importance in federal law. The applicability of § 2a(c)(5) in these circumstances was plainly passed upon by the District Court; intervenors do not contend to the contrary. Moreover, the issue was pressed upon the District Court by plaintiffs, as intervenors admit; their only complaint is that plaintiffs did not continue to press the issue after the District Court had already ruled upon it. Because the applicability of § 2a(c)(5) was both pressed by plaintiffs and passed upon by the District Court, it is properly before this Court for review.[2]

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

There is no ambiguity in § 2a(c)(5). On its face, it plainly requires the election of Representatives at large where, as here, a State has lost representation but has failed to redistrict. Against the plain language of the statute, intervenors set the contention that the adoption of § 2c in 1967 implicitly repealed the earlier statute. Both the text and the history of the two statutes belie any such suggestion.

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[2] Nothing in the District Court's order of February 4 indicates that the Court, by inviting objections, intended to terminate plaintiffs' right of review of decisions previously made. In any event, intervenors offer no authority to suggest that, even if intended, the District Court's order could have that effect. This Court's power of review is governed by its practices as explained in *United States v. Williams*, not by any order the District Court might enter.

The adoption of § 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) *rev'g*, 1 F. Supp. 134 (S.D. Miss. 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. *See generally Utah v. Evans*, ___ U.S. ___, 122 S.Ct. 2191, 2198 (2002) (discussing procedures under statute). 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; the Court found that statutory requirements of compactness and substantially equal population adopted after the census of 1910 had not been carried forward into the 1929 Act. 287 U.S. at 6-7. 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." The second clause of § 2a(c), which provides that, "if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large," was implemented immediately after its adoption. New Mexico acquired its second Representative after the 1940 census, but it elected both Representatives at large. *See Norton v. Campbell*, 359 F.2d 608, 609 (10th Cir. 1966). The Tenth Circuit expressly noted that such a procedure is required by § 2a(c)(2) until the redistricting is accomplished. *Id.*, at 609-10. The Court went on to hold that neither the statute or the Constitution requires that a State be divided into districts for the purpose of electing Representatives. *Id.*, at 610-12. The New Mexico course was followed by five other States after the 1960 census, when Connecticut, Maryland, Michigan, Ohio and Texas each elected one Representative at large. *See* A. HACKER, CONGRESSIONAL DISTRICTING: THE ISSUE OF EQUAL REPRESENTATION 92-93 (1963).

At issue in this case is the fifth clause of § 2a(c), which declares that, "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." That clause was implemented in Alabama when its delegation was reduced from nine Members to eight after the census of 1960. An act of the Alabama Legislature requiring all Representatives to be elected at large was held by a three-judge district court "to be in strict accord with" § 2a(c)(5). *Alsup v. Mayhall*, 208 F. Supp. 715, 716 (S.D. Ala. 1962). Two years later, when Alabama's peculiar method of nomination[3] was held unconstitutional in light of this Court's decisions in *Baker v. Carr*, 369 U.S. 186 (1962), and *Wesberry v. Sanders*, 376 U.S. 1 (1964), the three-judge district court nevertheless found it "entirely valid and legal to choose congressional representatives as a group on a statewide basis." *Moore v. Moore*, 229 F. Supp. 435, 439 (S.D. Ala. 1964).

The upheaval wrought by *Baker v. Carr* and *Wesberry v. Sanders* caused Congress to turn again to the manner of election of Representatives in 1967. 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

[3] The Legislature had provided that the nine old districts would nominate candidates who would compete in a statewide run-off, in which the top eight participants would be nominated for the statewide general election. *See Alsup*, 208 F. Supp. at 714.

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. 31,718-20 (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 v. Kirkpatrick*, 541 F. Supp. 922, 926-27 (W.D. Mo.), *aff'd mem.*, 456 U.S. 966 (1982), concluded that the 1967 statute repealed the 1941 statute by implication.[4] Even though § 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. 31,720 (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

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[4] This Court has held that a summary affirmance merely approves the judgment of the court below, not its reasoning. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). A summary affirmance does no more than to "reject the specific challenges presented in the statement of jurisdiction." *Id.* The specific challenges made in this Court to the judgment in *Shayer* were as follows:

1. whether the district court erred in view of the principles of comity and federalism, in adopting its own plan instead of adopting a plan considered by the Missouri legislature; and
2. whether *Kirkpatrick v. Preisler*, 394 U.S. 526, 89 S.Ct. 1225 (1969) should be overruled.

Schatzle v. Kirkpatrick, No. 81-1731, Jurisdictional Statement at i. Thus, this Court did not address the conclusion of the District Court in *Shayer* that § 2a(c) had been repealed by implication.

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 v. Lamm*, 543 F. Supp. 68, 77 (D. Colo. 1982).

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. 148, 143 (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).[5]

It cannot be said that the requirement of § 2c that "Representatives shall be elected only from districts" expressly contradicts § 2a(c)(5). Section 2c declares that elections shall be held "from districts so established," which obviously refers to the requirement earlier in the same sentence that "there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled." The words "by law," given their ordinary meaning, would refer to legislation,[6] not to any form of litigation, particularly in light of the fact that Article I, § 4 of the Constitution

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[5] As one scholar described the principle set down in *Radzanower*, "The Court will reconcile the two statutes in order to give maximum effect to the policy of each, and to give greater effect to the statute that more clearly focuses on the issue in the case." Eskridge, *Public Values in Statutory Interpretation*, 137 U.Pa.L.Rev. 1007, 1040-41 (1989). Citing this article, this Court has acknowledged the kinship between the presumption against implied repeals and other clear statement rules of statutory construction. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109 (1991). In adopting § 2c Congress made no statement, much less a clear one, about the continuing vitality of § 2a(c).

[6] Interpreting the phrase "by law" in another statute, the Ninth Circuit said, "The reference to authorization 'by law' connects this statute assigning authority to the Attorney General, with the statute quoted above, assigning duties directly 'by law' to United States Attorneys." *Thomas v. I.N.S.*, 35 F.3d 1332, 1339 (9th Cir. 1994), construing 28 U.S.C. §§ 515(a), 547.

commits redistricting authority to state legislatures.[7] No such districts have been "so established" by legislation in Mississippi, but surely Congress did not intend to prohibit elections altogether in those circumstances.

Seventy years ago in *Smiley v. Holm*, *supra*, this Court found that statutory language requiring Representatives to be elected by districts did not bar the conduct of elections at large. The statute authorizing the Thirteenth Census provided that Representatives "shall be elected by districts." 285 U.S. at 362 n.1, quoting Act of August 8, 1911, c.5, § 3, 37 Stat. 13. Notwithstanding this apparently mandatory language, § 4 of the same statute provided that any new Representatives should be elected at large "until such State shall be redistricted in the manner provided by the laws thereof," *id.*, just as § 2a(c)(2) continues to provide today.[8] Even though the statute contained no express

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[7] The Mississippi Legislature has provided "by law" for the resolution of this dilemma in a manner entirely consistent with § 2a(c)(5):

> Should an election of representatives in Congress occur after the number of representatives to which the state is entitled shall be changed, in consequence of a new apportionment being made by Congress, and before the districts shall have been changed to conform to the new apportionment, representatives shall be chosen as follows: . . . if the number of representatives shall be diminished, then the whole number shall be chosen by the electors of the state at large.

Miss. Code Ann. § 23-15-1039 (Rev. 2001).

[8] Because this Court found no inconsistency with the 1929 statute, it decided *Smiley* on the assumption that § 3 of the 1911 statute remained in effect. *Id.*, at 374-75. Not until the next Term did this Court rule that §§ 3 and 4 of the 1911 statute "expired by their own limitation," because they applied by their terms only to the Thirteenth Census. *Wood v. Broom*, *supra*, 287 U.S. at 7.

provision concerning the loss of seats, the Court held that Minnesota, which had failed to redistrict after losing a seat, would hold elections at large "in order to afford the representation to which the state is constitutionally entitled, and the general provisions of the act of 1911 cannot be regarded as intended to have a different import." 285 U.S. at 375. Just as the 1911 statute requiring districts was not inconsistent with at-large elections, so § 2c is not inconsistent with § 2a(c)(5), which requires exactly the remedy mandated by this Court in *Smiley*.

Indeed, § 2c and § 2a(c) are plainly "capable of coexistence." *Morton v. Mancari*, *supra*, 417 U.S. at 551. 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."[9] Thus, far from conflicting with § 2c, § 2a(c)(5) constitutes the remedy for its violation.

Here, the presumption against implied repeal is reinforced by the fact that, earlier in 1967, Congress considered four different versions of a bill, H.R. 2508, 90th Cong. (1967), the first three of which repealed the existing version of § 2a(c) and replaced it with different language:

(1) the version passed by the House in April, *see* H. Rep. No. 90-191 (1967); 113 Cong. Rec. 11,089 (1967);

(2) the version passed by the Senate in June, after adopting an amendment proposed by Senator Kennedy, *see* S. Rep. No. 90-291 (1967); 113 Cong. Rec. 14,779 (1967) (text of amendment); 113 Cong. Rec. 15,244 (1967) (passage of bill);

(3) the version proposed by the conference committee in June, *see* H. Rep. No. 90-435 (1967), but recommitted to conference by the House, *see* 113 Cong. Rec. 17,738 (1967).

After recommittal, the conference committee reported a fourth version, which abandoned any amendment to § 2a(c), providing instead for temporary measures applicable only to the elections of 1968 and 1970. *See* H. Rep. No. 90-795 (1967).[10] An effort to reinstate the permanent

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[9] 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.

[10] The author of the conference report, Chairman Celler of the Judiciary Committee, was thoroughly familiar with the origin and effect of § 2a(c). He had been working for two decades to restore

(Continued on following page)

amendment to § 2a(c) was soundly defeated, *see* 113 Cong. Rec. 30,250 (1967), before passage of the conference report. *See* 113 Cong. Rec. 30,251 (1967). The Senate, however, rejected the new version. *See* 113 Cong. Rec. 31,712 (1967).

A short time later, on the same day that the Senate defeated H.R. 2508, Sen. Baker proposed the language that became § 2c, but did *not* replace the language in § 2a(c). 113 Cong. Rec. 31,718-20 (1967). Further, the Senate adopted its amendment in lieu of a very similar amendment, proposed by Sen. Bayh, that omitted the "by law" restriction discussed above. *See* 113 Cong. Rec. 31,718 (1967) (proposed language requiring that "there shall be established a number of districts" where statute now has "there shall be established *by law* a number of districts"). After the House added the parenthetical exception for Hawaii and New Mexico for the 1968 election, *see* 113 Cong. Rec. 34,038-39 (1967), the Senate approved the final version. *See* 113 Cong. Rec. 34,369-70 (1967).

This Court has repeatedly used contemporaneously-rejected proposals to illuminate the meaning of the text actually adopted. *See, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 378 n.13 (2000) ("The fact that Congress repeatedly considered and rejected targeting a broader range of conduct lends additional support to our view."); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000) (relevant that Congress "squarely rejected proposals to give the FDA jurisdiction

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statutory standards to guide districting decisions. *See* Celler, *Congressional Apportionment – Past, Present, and Future*, 17 Law & Contemp. Prob. 268 (1952).

over tobacco"); *Thompson v. Thompson*, 484 U.S. 174, 183-85 (1988) (finding an "unusually clear indication that Congress did not intend the federal courts to play the enforcement role that petitioner urges" in the fact that "Congress considered and rejected [a similar] approach to the problem"). The importance of Congressional rejection takes on particular force when it concerns the repeal of an existing statute:

> The question of whether existing statutes should be continued in force or repealed is, under our system of government, one which is wholly within the domain of Congress. When the repeal of a highly significant law is urged upon that body and that repeal is rejected after careful consideration and discussion, the normal expectation is that courts will be faithful to their trust and abide by that decision. This is especially so where the fact of the controversy over repeal and the resolution of that controversy in Congress plainly appears in the formal legislative history of its proceedings. Indeed, not a single instance has been called to our attention in which a carefully considered and rejected proposal for repeal has been revived and adopted by this Court under the guise of "accommodation" or any other pseudonym.

Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 210 (1962) (footnote omitted). *See also United States v. Hansen*, 772 F.2d 940, 945 (D.C. Cir. 1985) (no implied repeal where the possibility of repeal "was explicitly brought to the attention of a House committee . . . and to the attention of the full House, in floor debate").

The tortured path of redistricting legislation through Congress in 1967 demonstrates why that body should be

entitled to expect that the presumption against implied repeals will be regularly followed. As the *Hansen* Court explained:

> A steady adherence to it is important, primarily to facilitate not the task of judging but the task of legislating. It is one of the fundamental ground rules under which laws are framed. Without it, determining the effect of a bill upon the body of preexisting law would be inordinately difficult, and the legislative process would become distorted by a sort of blind gamesmanship, in which Members of Congress vote for or against a particular measure according to their varying estimations of whether its implications will be held to suspend the effects of an earlier law that they favor or oppose.

Id., at 944. Scholars agree that the rule is important for effective congressional deliberations: "This principle is the product of a set of beliefs about the legislative process – in particular, a belief that Congress, focused as it usually is on a particular problem, should not be understood to have eliminated without specific consideration a program that was likely the product of sustained attention." Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv.L.Rev. 403, 475 (1989). Here, in its deliberations over H.R. 2508, Congress gave "specific consideration" to the repeal of § 2a(c) and declined to do so. In adopting § 2c, which made no mention of § 2a(c), Congress should not be deemed to have reversed course.

Because § 2c may be construed consistently with § 2a(c), and because there is no clearly expressed congressional intention to the contrary, this Court should conclude that the 1967 Act did not repeal the 1941 Act.

III. 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 emergency statutory relief from an otherwise unconstitutional situation.

543 F. Supp. at 77-78 (footnote omitted).[11]

The *Carstens* Court gave no explanation for its conclusion that § 2c has any effect 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

[11] 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.

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 1941, 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*. 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.[12] Certainly, nothing in § 2c modifies the explicit terms of § 2a(c). If the 1929 Act has not been

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[12] The *Carstens* Court quoted Senator Bayh's statement that § 2c was intended to bind federal courts, 543 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).

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.

At least one judge has concluded that § 2a(c)(5) retains its full vitality even where a court has time to draw a redistricting plan. In *Alexander v. Taylor*, 2002 Ok. 59, ___ P.3d ___ (June 25, 2002), the Supreme Court of Oklahoma affirmed a redistricting plan fashioned by a trial court after the Oklahoma Legislature failed to redistrict following the loss of a Representative. In dissent, Justice Opala found that plaintiffs had suffered no legal injury from the Legislature's inaction because § 2a(c)(5) dictated the proper course of action. *Id.*, at ¶ 10 (Opala, J., dissenting).[13] Justice Opala described the contending parties as "manipulating the judiciary into filling a political vacuum with a judicially-created districting plan," *id.*, at ¶ 1 (Opala, J., dissenting), and concluded by describing the practical necessity of relying on the plain language of § 2a(c)(5):

> It is only when courts discipline the parties involved by refusing to function as a safety valve for political actors (who increasingly favor using the judiciary as a forum for resolving their disputes) that they will truly feel compelled to negotiate a solution on their own. The court has no

[13] The majority did not address the continued vitality of § 2a(c)(5), presumably because the issue had not been addressed by the parties. *Id.*, at ¶ 6 (Opala, J., dissenting).

> business cleaning up this political mess, and I retreat from any such enterprise.

Id., at ¶ 17 (Opala, J., dissenting).

The willingness of the District Court in this case to clean up the mess made by the Mississippi Legislature will discourage compromise in future disputes over redistricting. Here, as in Oklahoma, various parties on both sides of the political dispute apparently believed that they could obtain a better result if they were able to enlist the aid of a friendly court. This Court can spare future courts such ordeals and bring certainty to the law by requiring that § 2a(c)(5) be implemented exactly as Congress wrote it. Because, as Justice Opala observed, at-large elections are "likely unpalatable to all here involved," *id.*, at ¶ 5 (Opala, J., dissenting), the knowledge that the statute will be followed will serve as the strongest possible encouragement to political compromise.[14]

Indeed, history shows that at-large elections have led to exactly that result:

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[14] This is not to suggest that Congress in 1941 intended to create a private right of action to enforce § 2a(c). Rather, where a State's districting plan is invalidated on other grounds, a court should be careful that its remedial plan is consistent with relevant statutory provisions. In an earlier congressional redistricting case, this Court declared that adherence in remedial plans to standards set by § 5 of the Voting Rights Act "is a reasonable standard, at the very least as an equitable factor to take into account, if not as a statutory mandate." *Abrams v. Johnson*, 521 U.S. 74, 96 (1997). Here, by ordering the implementation of its own four-district plan, the District Court not only failed to take § 2a(c)(5) into account, but it positively forbade the State from complying with it.

> Four times large states have been required by court orders to elect their entire congressional delegations at large. This followed from the Supreme Court decisions in *Smiley v. Holm* and *Carroll v. Becker*, the Virginia court's decision in *Brown v. Saunders*, [159 Va. 28, 166 S.E. 105 (1932),] and the decision of a federal district court in *Hume v. Mahan* [, 1 F. Supp. 142 (E.D. Ky. 1932)]. In all four instances the states proceeded to elect their representatives at large, and the House seated each delegation without recorded objection. And in the three cases in which the decrees were final the legislatures redistricted before the next election.

Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv.L.Rev. 1057, 1087-88 (1958) (footnotes omitted).

This recent history would have been well known to Congress in 1941. Indeed, by adopting § 2a(c) after the political failures of the previous decade, Congress may well have intended to bring exactly such pressures to bear on state legislatures to make sure that they would carry out their responsibilities under Article I, § 4 of the Constitution. There is no reason for this Court to displace the judgment that Congress made six decades ago.

IV. COMPLIANCE WITH SECTION 2a(c)(5) DOES NOT VIOLATE THE VOTING RIGHTS ACT.

Intervenors contend that the election of four Representatives at large in Mississippi would violate both § 2 and § 5 of the Voting Rights Act, 42 U.S.C. §§ 1973, 1973c. This Court has already held that compliance with federal law does not require preclearance under § 5 of the Voting Rights Act. In *Young v. Fordice*, 520 U.S. 273

(1997), this Court considered Mississippi's compliance with the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. §§ 1973gg *et seq.*, and declared, "The decision to adopt the NVRA federal registration system is not, by itself, a change for the purposes of § 5, for the State has no choice but to do so." 520 U.S. at 290. Here, Mississippi has not chosen to elect its Representatives at large. Indeed, Mississippi has made no choice at all; that is why the choice made by Congress in § 2a(c)(5) must be implemented. Nothing in either § 2 or § 5 remotely suggests that a choice by Congress must be evaluated under the Voting Rights Act.

Of course, any choices which Mississippi might make in complying with § 2a(c)(5) are subject to the strictures of the Voting Rights Act. This Court so held in *Young*: "It is the discretionary elements of the new federal system that the State must preclear." *Id.* For instance, federal law does not determine whether candidates must compete for individual seats, as opposed to running collectively on a single list; any decision made by Mississippi in this regard would have to comply with the Voting Rights Act. The Voting Rights Act would also apply to any decision by Mississippi to require a majority vote for election, as Louisiana does. *See Foster v. Love*, 522 U.S. 67 (1997).[15] If the District Court on remand were required to make such decisions because of Mississippi's continuing inability to decide, it would certainly design rules consistent with the Voting Rights Act, as the District Court did in *Jordan*

[15] On remand, the Court retained Louisiana's majority vote requirement while changing the election dates. *Love v. Foster*, 147 F.3d 383, 384-85 (5th Cir. 1998).

v. Winter, 604 F. Supp. 807 (N.D. Miss.), *aff'd mem.*, 469 U.S. 1002 (1984).

It should be noted, contrary to intervenors' contentions, that it is by no means obvious that the election of four Representatives at large would dilute black voting strength, even if § 2 applied. Two decades ago, *Jordan v. Winter* held that one Representative out of five must be elected from a district with a black majority. However, after the 1990 census, the District Court held that § 2 did not require that one of the three districts from which Supreme Court Justices are elected should contain a black majority. *Magnolia Bar Ass'n, Inc., v. Lee*, 793 F. Supp. 1386 (S.D. Miss. 1992), *aff'd*, 994 F.2d 1143 (5th Cir.), *cert. den.*, 510 U.S. 994 (1993). *Accord*, *National Ass'n for the Advancement of Colored People v. Fordice*, 252 F.3d 361 (5th Cir. 2001) (election of Public Service and Transportation Commissioners from identical districts). Whether, 20 years after *Jordan v. Winter*, the totality of the circumstances would require that one district out of four contain a black majority[16] is a question that would require careful consideration on a proper evidentiary record.[17]

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[16] It is possible, of course, that a decision by the State to eliminate a black majority district might constitute retrogression under § 5, although there appears to be no precedent considering the application of the retrogression standard where the total number of seats has been reduced.

[17] Plaintiffs declined to present such evidence because of the District Court's announcement that at-large elections would not be imposed. If this Court agrees that the Voting Rights Act has no application to the decision to comply with § 2a(c)(5), then no remand is necessary for the presentation of such evidence.

For these reasons, the Voting Rights Act presents no impediment to compliance with § 2a(c)(5).

CONCLUSION

For the reasons stated herein, plaintiffs and the Mississippi Republican Executive Committee ask this Court to reverse the judgment of the District Court and to remand for entry of a judgment requiring the defendants to conduct elections for Mississippi's Representatives in accordance with 2 U.S.C. § 2a(c)(5).

Respectfully submitted,

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