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

REPLY BRIEF OF CROSS-APPELLANTS

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REPLY BRIEF OF CROSS-APPELLANTS

The briefs of the parties and of the United States in this cross-appeal, concerning the meaning and continued validity of 2 U.S.C. § 2a(c)(5), offer this Court a clear choice between legislative language and legislative history. Intervenors and the United States argue that those Members of Congress who were cognizant of the issue in 1967 hoped to protect themselves and their colleagues against the possibility of having to run for election at large. This Court must decide whether the language they chose in 2 U.S.C. § 2c accomplished that purpose. Under traditional rules of statutory construction, § 2a(c)(5) remains in effect and compels the election of Mississippi's four Representatives at large.

ARGUMENT

I. SECTION 2a(c) HAS NEVER BEEN REPEALED.

Neither the United States nor intervenors contest the standard by which an implied repeal is to be determined. This Court has plainly stated that "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." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Applying this undisputed test, it is clear that § 2a(c)(5) has not been repealed.

A. *Smiley v. Holm* demonstrates that § 2a(c)(5) and § 2c are capable of co-existence.

Section 2c is not the first statute to require that Members of the House of Representatives be elected by

districts. In *Smiley v. Holm*, 285 U.S. 355 (1932), this Court considered the language of the statute authorizing the Thirteenth Census, which, like § 2c, provided that Representatives "shall be elected by districts." *Id.*, at 362 n.1, quoting Act of August 8, 1911, c.5, § 3, 37 Stat. 13. Section 4 of the same statute required, as § 2a(c)(2) does today, that Representatives added by a new apportionment should be elected at large "until such State shall be redistricted in the manner provided by the laws thereof." Notwithstanding the statutory requirement that Representatives be elected by districts, this Court in *Koenig v. Flynn*, 285 U.S. 375 (1932), affirmed the judgment by the New York Court of Appeals that its two new Representatives be elected at large. Moreover, even though no provision of the 1911 statute expressly so provided, this Court held in *Smiley* that, where Minnesota had lost a seat, "unless and until new districts are created, all Representatives allotted to the state must be elected by the state at large." 285 U.S. at 374-75. In *Carroll v. Becker*, 285 U.S. 380 (1932), the Court affirmed the judgment of the Supreme Court of Missouri requiring the same result. Just as at-large elections in New York, Missouri, and Minnesota could co-exist with § 3 of the 1911 statute, so also can at-large elections under § 2a(c)(5) co-exist with § 2c.

The United States never addresses *Smiley* at all, and intervenors do so only ineffectively. They observe that *Wood v. Broom*, 287 U.S. 1, 7 (1932), held that the 1911 statute had expired, Cross-Appellees' Brief at 12 n.2, but *Wood* was decided months after *Smiley*. Although the defendant in *Smiley* "insisted that the act of Congress of August 8, 1911, was no longer in force," 285 U.S. at 362-63, this Court found no need to resolve that question, instead approving elections from the State at large and

declaring that "the general provisions of the act of 1911 cannot be regarded as intended to have a different import." *Id.*, at 375.

Unable to distinguish *Smiley*, intervenors simply disparage it as a relic of "the era of *Colegrove v. Green*, 328 U.S. 549 (1946)." Cross-Appellees' Brief at 12 n.2. *Smiley* and *Colegrove* are not relics, however, but form the foundation of this Court's redistricting jurisprudence. This Court explicitly relied on *Colegrove* in *Baker v. Carr*, 369 U.S. 186, 232 (1962), explaining, "On the issue of justiciability, all four Justices comprising a majority relied upon *Smiley v. Holm*, but in two opinions, one for three Justices, 328 U.S. at 566, 568, and a separate one by Mr. Justice Rutledge, 328 U.S. at 564." Indeed, *Smiley* found a redistricting claim to be justiciable and held elections at large to be the proper relief.

While ignoring *Smiley*, the United States relies on the undisputed proposition that a subsequently enacted statute like § 2c must be given full effect. Brief for the United States at 10. The only civil case on which the United States relies,[1] *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), concerns the relationship between the Securities Exchange Act and previously enacted antitrust statutes. Plaintiffs challenged fixed commission

[1] Both *United States v. Yuginovich*, 256 U.S. 450 (1921), and *United States v. Tynen*, 78 U.S. (11 Wall.) 88 (1870), concern the effect of new criminal enactments on earlier statutes. In the more recent case, this Court explained, "In construing penal statutes, it is the rule that more recent enactments repeal former ones practically covering the same acts, but fixing a lesser penalty." 256 U.S. at 463. Plainly, this principle has no application here.

rates as an antitrust violation, even though the Securities Exchange Commission had frequently reviewed those rates over the years and had approved their continuation before their ultimate abolition. This Court did not find the antitrust acts to have been repealed, but it did find that Congress had intended to exempt rate regulation from their scope:

> The Securities Exchange Act was intended by the Congress to leave the supervision of the fixing of reasonable rates of commission to the SEC. Interposition of the antitrust laws, which would bar fixed commission rates as per se violations of the Sherman Act, in the face of positive SEC action, would preclude and prevent the operation of the Exchange Act as intended by Congress and as effectuated through SEC regulatory activity.

Id., at 691. In short, approval of fixed rates under the Exchange Act and their abolition under the Sherman Act could not co-exist.

No such direct conflict is presented between § 2c and § 2a(c)(5). Section 2c, like § 3 of the 1911 statute, provides generally that Representatives should be elected by districts. This Court in *Smiley* found that the general rule could co-exist peacefully with the special requirement of elections at large where legislatures are unable to agree. In the face of the holding in *Smiley*, it cannot be said that § 2c cannot co-exist with § 2a(c)(5).

B. Congress did not clearly express an intent to repeal § 2a(c)(5).

Even though § 2c and § 2a(c)(5) are capable of co-existence, the courts need not continue to regard each

statute as effective if there is "a clearly expressed congressional intention to the contrary." *Morton*, *supra*, 417 U.S. at 551. Because no such clearly expressed intention emerges from an analysis of § 2c, § 2a(c)(5) remains in effect.

Both intervenors and the United States examine the legislative history as if this were a contract dispute between Senator Baker and Senator Bayh. Senator Baker originally understood his amendment exactly as do plaintiffs and the Mississippi Republican Executive Committee. When Senator Bayh asked him whether the term "by law" in his amendment would apply to both legislatures and courts, Senator Baker replied, "So, in answer to the question, this language would imply, to me, without equivocation, that it would be the duty of the State legislature by law to create these districts." 113 Cong. Rec. 31,719 (1967). After a few minutes of prodding from Senator Bayh, however, Senator Baker did equivocate and ultimately agreed that his amendment would govern both legislatures and courts. *Id.*, at 31,720. While that admission would probably bind Senator Baker in a contract case, neither the United States nor intervenors cite any authority to suggest that this parol evidence would bind the 98 other Senators and 435 Representatives who may have had no knowledge of it.[2]

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[2] The colloquy does negate any argument that Senator Baker's amendment was facially inconsistent with § 2a(c)(5). Senator Baker himself originally understood the language as being directed only to the actions of legislatures. In the House, Representative Denney of Nebraska read the language the same way. In opposing the resolution to consider Senator Baker's amendment, Representative Denney said:

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An intent to repeal an earlier statute, like legislative intent generally, must be apparent from the language of the new statute itself. This Court has plainly stated that "an implied repeal must ordinarily be evident from the language or operation of a statute." *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 470 (1982). It is not uncommon for "the language or operation of a statute" to differ significantly from the expressed opinions of its supporters. Answering a contention that the drafters of one statute would have been surprised by its breadth, this Court replied, "Congress' 'inklings' are best determined by the statutory language that it chooses, and the language it chose here extends far beyond the limits drawn by the Court of Appeals." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 n.13 (1985). Here, the language Senator Baker chose may have been narrower than he and Senator Bayh thought, but that does not authorize this Court to disregard the rules of statutory construction by elevating their conversation above the statutory language itself.

The rules of construction begin with statutory language because Members of Congress vote on that language, not on colloquies between their colleagues. This Court presumes "that Congress legislates with knowledge of our basic rules of statutory construction," *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991), and

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> Mr. Speaker, let us assume that the State Legislature of Nebraska could not agree upon new boundary lines by March 15. This bill says that the State of Nebraska Representatives cannot run at large, and the Federal courts have ruled that we must run at large. We are at an impasse.

Id., at 34,037. Representative Denney, at least, did not view the language as having any effect on courts.

one of those rules, as expressed in *Morton v. Mancari*, *supra*, is that implied repeals are not favored. This Court also presumes that Congress knows existing law, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998), and any Member who had paid the slightest attention to the efforts over the previous months to repeal § 2a(c)(5) would certainly have been aware of its existence. Finally, this Court is conscious of the effect of its own prior decisions: "When the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary." *Williams v. Taylor*, 529 U.S. 420, 434 (2000). In *Smiley* this Court had considered a previous statute requiring election by districts, but it had found that language to be fully consistent with other statutory language and remedial decrees requiring the election of some Representatives at large. For this Court to disregard its prior result in *Smiley* would require more "specific direction to the contrary" than a brief and confused conversation between Senator Bayh and Senator Baker.

Applying the standard rules of statutory construction to the adoption of § 2c, it is impossible to find "a clearly expressed congressional intention," *Morton*, *supra*, 417 U.S at 551, to repeal § 2a(c)(5). That statute remains in effect, and this Court must now determine its proper effect on the judgment in this case.

II. A REMEDIAL ORDER IN A CONGRESSIONAL REDISTRICTING CASE MUST BE CONSISTENT WITH § 2a(c)(5).

All parties and all amici agree that the District Court acted with proper authority in enjoining the enforcement

of Mississippi's old five-district plan for elections to the House of Representatives, Miss. Code Ann. § 23-15-1037 (Rev. 2001). App. 2a. Likewise, there is common agreement that any remedial judgment entered in such circumstances must be consistent with applicable federal statutes. For instance, this Court in *Abrams v. Johnson*, 521 U.S. 74, 96 (1997), required adherence to standards set by § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. Moreover, intervenors and the United States argue that § 2c must be enforced by remedial decrees. Brief for the United States at 9-12; Cross-Appellees' Brief at 13-15. Accordingly, if § 2c did not repeal § 2a(c)(5), there can be no real dispute that remedial decrees should comply with § 2a(c)(5), to the extent that statute applies.[3] The real question before this Court, then, is how, if at all, § 2a(c)(5) applies to the facts of this case.

As an initial matter, § 2c does not apply here for two reasons. First, as previously explained, Cross-Appellants' Brief at 15-16, § 2c is directed to legislatures, not courts.[4]

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[3] Under the circumstances of this case, then, there is no need to determine whether Congress intended to create a private right of action under either § 2c or § 2a(c). *Compare* Cross-Appellants' Brief at 25 n.14 *with* Cross-Appellees' Brief at 14 n.3. All parties agree that the District Court had authority to issue a remedial order and that the order should have been consistent with whatever statutes may be applicable.

[4] The argument of the United States to the contrary is based on its analysis of the term "established law," Brief for the United States at 11-12, not the language actually chosen by Congress in 1967. By contrast, the Appointments Clause of the Constitution, Art. II, § 2, cl. 2, uses the same phrase as § 2c in requiring that federal offices "shall be established by law." This Court has noted regarding that phrase:

> [T]he Framers added language to both halves of the Appointments Clause specifically to address the concern that the President might attempt unilaterally to create and fill

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Indeed, as demonstrated earlier, *supra*, at 5 & n.2, some Members during the debate read § 2c as having no application to courts. Second, to the extent § 2c also applies here, the specific language of § 2a(c)(5) must be enforced, because "a more specific statute will be given precedence over a more general one." *Busic v. United States*, 446 U.S. 398, 406 (1980). That is exactly what this Court did in *Koenig v. Flynn, supra,* when it enforced the at-large election requirement of § 4 of the 1911 statute notwithstanding the general requirement of § 3 that Representatives be elected by districts.

As for § 2a(c)(5), the United States argues that, even if it has not been repealed, it does not apply here because

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> federal offices. See C. Warren, The Making of the Constitution 642 (1937) (discussing references in the Appointments Clause to principal offices " 'established by Law,' " and to the power of appointing inferior officers which " 'Congress may by law' " vest as specified).

Weiss v. United States, 510 U.S. 163, 187 n.2 (1994). This Court has similarly noted that officials appointed by courts are not "established by law", which means established by statute:

> The office of special trial judge is "established by Law," Art. II, § 2, cl. 2, and the duties, salary, and means of appointment for that office are specified by statute. See *Burnap v. United States*, 252 U.S. 512, 516-517 (1920); *United States v. Germaine*, 99 U.S. 508, 511-512 (1879). These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute.

Freytag v. C.I.R., 501 U.S. 868, 881 (1991). If "shall be established by law" in the Appointments Clause allows only legislative, and not judicial or executive, creation of offices, "shall be established by law" in § 2c similarly allows only legislative, and not judicial or executive, creation of districts.

"the State was 'redistricted in the manner provided by the law thereof' by virtue of the federal court order in this case." Brief for the United States at 11 n.4. There are two problems with this argument. First, while each State is undoubtedly bound by federal law, the natural reading of "the law thereof" refers to the law of each State, not the law of the federal government. Indeed, then-Justice Rehnquist appeared to read to the statute as referring to state law in his opinion in *Republican Nat'l Committee v. Burton*, 455 U.S. 1301, 1302 n.* (Rehnquist, J., in chambers), *appeal dismissed & cert. denied*, 456 U.S. 941 (1982).[5] Second, at the time the District Court rendered its judgment, Mississippi had not been redistricted in the manner provided by any law, state or federal. Thus, when the District Court was deciding the case, § 2a(c)(5) still applied by its terms and should have been followed.

By the same token, § 2a(c) has no application whatsoever after "a State is redistricted in the manner provided by the law thereof." The plain language of the statute indicates that, once a legislature has adopted a new plan, the five options listed in the statute have no further legal effect. Thus, there is no basis for the fear expressed by the United States and intervenors that legislatures might try to evade § 2c by adopting statutes requiring the election of some or all Representatives at large. Brief for the United States at 27; Cross-Appellees' Brief at 15. There is no evidence that any legislature has ever disregarded the

[5] Similar language in the general criminal jurisdiction statute, 18 U.S.C. § 3231, indisputably refers to state, not federal, law: "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

clear command of Congress,[6] and, even if one did, § 2a(c) would not restrict the remedial authority of the federal courts after a legislature had completed the redistricting procedure required by its law.

Intervenors and the United States argue that the fifth clause of § 2a(c) should not be applied because some of the other clauses may be presently unenforceable. Brief for the United States at 27-29; Cross-Appellees' Brief at 11-12. Any difficulty in enforcing the earlier clauses, however, arises, not from incompatibility with § 2c, but from this Court's constitutional decisions after 1941.[7] Indeed, the retention of existing districts where there has been no change in the number of Representatives, as required by § 2a(c)(1), is fully consistent with § 2c, even where population shifts may have rendered their populations unequal. Congress in 1967 was well aware of the complications created by this Court's redistricting jurisprudence, and it had developed comprehensive plans to address those problems; it simply refused to enact any of them. *See* Cross-Appellants' Brief at 18-19. In declining to act,

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[6] As previously discussed, Cross-Appellants' Brief at 11-12, some legislatures did require Representatives to be elected at large in the years after this Court announced in *Wood v. Broom*, *supra*, that the statutory requirement of election from districts had expired. However, no legislature has repeated that practice since § 2c took effect.

[7] Of course, there is no decision of this Court directly applying those principles to an act of Congress. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), this Court invalidated state statutes for failure to comply with the equal population requirement of Art. I, § 2, but there is no case which invalidates election procedures required by Congress acting under the power delegated by Art. I, § 4. That issue need not be addressed in this case, because no party suggests that § 2a(c)(5) is unconstitutional.

Congress was certainly aware that § 2a(c)(5) might require some States to elect their entire delegations at large, but it may also have been satisfied that such threats in the past had always produced a redistricting compromise. *See* Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv.L.Rev. 1057, 1087-88 (1958). Whatever subjective intentions or expectations Members of Congress may have had, the fact remains that the enactment of § 2c did not remove any of the provisions of § 2a(c) from the books.

Finally, intervenors contend that Congress intended to subordinate § 2a(c)(5) to the requirements of § 2 and § 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973, 1973c. Cross-Appellees' Brief at 16-17. The United States does not support intervenors' suggestion that the failure of a State to act must be reviewed under § 5 before federal law can be enforced. That question need not be resolved here, because the Attorney General reviewed and approved exactly the same decision when Miss. Code Ann. § 23-15-1039 (Rev. 2001), requiring elections at large when Mississippi loses a seat and fails to redistrict, was reenacted in 1986. 1986 Miss. Gen. Laws ch. 495, § 308. Because the Attorney General has already expressly approved Mississippi's decision to elect Representatives at large, as § 2a(c)(5) requires, there is no need for further review under § 5. In addition, not only did intervenors fail to prove that such elections would violate § 2, they present no reason to suppose that Congress intended its own enactments to be subject to challenge under § 2.[8] Absent

[8] The statutes considered here and the National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg *et seq.*, considered in *Young v. Fordice*, 520 U.S. 273 (1997), are not the only instances in which Congress has

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any indication that Congress intended § 2 as a mechanism to avoid enforcement of its own enactments, § 2a(c)(5) should have been followed by the District Court.

In short, neither the United States nor intervenors offer any reason why the District Court's remedial judgment should have disregarded § 2a(c)(5). That statute remains in effect, and the District Court erred in entering a judgment which precludes Mississippi from complying with it. Because both federal law and Mississippi law, properly approved by the Attorney General under § 5, provide for Representatives to be elected at large under these circumstances, the District Court's judgment should be reversed.

CONCLUSION

For the reasons stated herein and in their original brief, 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

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imposed election duties on the States. For instance, the question of the proper enforcement of the Uniformed Overseas Citizens Absentee Voting Act, 42 U.S.C. §§ 1973ff *et seq.*, is presently presented to this Court by the petition for certiorari pending in *Forrester v. New Jersey Democratic Party, Inc.*, No. 02-555.

Mississippi's Representatives in accordance with 2 U.S.C. § 2a(c)(5).

Respectfully submitted,

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