No. 01-1437

Supreme Court, U.S.
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In The

Supreme Court of the United States

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL,

Appellants,

v.

JOHN ROBERT SMITH; SHIRLEY HALL; and GENE WALKER,

and

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,

Appellees.

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

BRIEF OPPOSING MOTION TO AFFIRM

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The appellees point out that if an appeal can be resolved on statutory grounds, this Court normally will not address constitutional questions. Motion to Affirm at 5 n.2. But here, the matter cannot be resolved simply on statutory grounds. As noted in the supplement to our jurisdictional statement, the United States Department of Justice (DOJ) has refused to consider the Section 5 preclearance submission any further because of the District Court's constitutional holding. Thus, even if this Court rejects the Section 5 arguments we have made and affirms the District Court's injunction on Section 5 grounds, the constitutional issue must be addressed. Otherwise, the State of Mississippi will be unable to obtain further preclearance review because of the spectre of the District Court's constitutional holding.

That holding prevents not only the implementation of the existing state court plan, but any future plan the state courts may adopt if, for any reason, the existing plan is vacated or modified in the course of the appeal to the Supreme Court of Mississippi. As mentioned at p. 5 n. 9 of the jurisdictional statement, this case will therefore remain alive irrespective of the outcome of that appeal.

The supplement to our jurisdictional statement attaches the April 23, 2002 motion we filed in the District Court seeking to have the state court plan declared precleared in light of the fact that the second sixty day statutory period expired without any Section 5 objection. The District Court, having retained jurisdiction of this case, J.S. App. 2a, likely will issue a ruling on that motion soon. But this Court should not await that ruling before deciding whether to note probable jurisdiction. The injunction will remain in place and review of this appeal will be required either way. It is important that the appeal move forward and, if probable jurisdiction is noted, that the briefing and argument occur sooner rather than later. While the resolution of this appeal likely will come too late to affect this

year's congressional elections, it will affect the 2004 elections. A reasonably prompt decision on the matters raised by this appeal will make it easier to plan for those elections not only in Mississippi, but in other states where state courts have adjudicated congressional redistricting cases in circumstances that the District Court here would have held to be unconstitutional. *See*, J.S. 14.[1]

The Article I, § 4 Issue

Perhaps recognizing the unsettling scope of the District Court's constitutional ruling, the appellees do not try to defend it. Instead, they offer a much narrower rationale for the outcome. They do not assert that Art. I, § 4 prevents state courts from enforcing federal law in congressional redistricting cases, but instead say the present case is an exception because no federal claim was raised in the complaint. They also contend that Miss. Code Ann. § 23-15-1039 — providing that representatives shall be chosen at-large if the number of congressional representatives is decreased and the next election is held "before the districts shall have changed to conform to the new apportionment" — precludes Mississippi's courts from adjudicating these cases as a matter of federal constitutional law.

Of course, that's not what the District Court held. Instead, it said state courts are powerless to adopt a congressional plan, even in the wake of a legislative default, unless an "enactment of the . . . legislature grants to the . . . court the power to redistrict . . . for congressional elections." J.S. App. 7a. State law provisions giving the courts general jurisdiction to enforce the law through equitable relief are insufficient, said the District

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[1] If this Court notes probable jurisdiction before the District Court motion is decided, the parties can tailor the briefing on the merits in light of any subsequent decision by the District Court.

Court. *Id.* 20a. At no point in its constitutional ruling did the District Court rely upon any failure to raise a federal claim in the state court complaint or upon the presence of § 1039. Instead, the District Court held that no state court could implement a congressional redistricting plan in the course of any type of lawsuit unless the power to do so is spelled out in a state statute.

The appellees come close to conceding that this holding is wrong with respect to state court cases raising federal claims. In the course of a discussion of Art. I, § 4, as well as other constitutional provisions that specify the power of state legislatures, the appellees admit that "[s]tate courts are obliged by the Supremacy Clause of Art. VI to enforce federal law. . . ." Mot. Aff. 18. *See also, id.* 22 ("federal claims may be litigated notwithstanding Art. I, § 4"). But because of their contention that only state law claims were raised in the complaint here, they argue that Art. I, § 4 precludes the state courts from adopting a plan. Had a federal claim been included in the complaint, they imply, it would be a different ball game.

But this ignores the fact that, to quote again the appellees' language from page 18 of the Motion to Affirm, "[s]tate courts are obliged by the Supremacy Clause of Art. VI to enforce federal law" even in cases where only state law claims are in the complaint. In *Hathorn v. Lovorn*, 457 U.S. 255, 258, 269-70 (1982), the complaint raised only state law claims, yet this Court held that the state courts had "the duty" to enforce federal law.

Of course, any congressional redistricting plan adopted by a state court must, of necessity, comply with federal law, including the equal population requirement of Art. I, § 2, the specification of a particular number of representatives pursuant to the apportionment required by Art. I, § 2, the use of districts to elect representatives pursuant to 2 U.S.C. § 2c, the equal

protection clause of the Fourteenth Amendment, and the Voting Rights Act. Moreover, in the present situation, as in most instances when state courts are called upon to adjudicate these matters, the pre-existing plan — designed prior to the last census — did not comply with either state or federal law. In Mississippi, it complied with neither the equal population requirement of Art. I, § 2 of the federal constitution nor what the Mississippi Supreme Court has described as "the one person, one vote standard . . . under Miss. Const. Art. 3, § 14." *Adams County Election Commission v. Sanders*, 586 So. 2d 829, 831 (Miss. 1991). Similarly, it did not comply with the new apportionment inasmuch as the state lost a seat, going from five to four. Thus, whether or not federal law claims were raised in the complaint, the state courts of Mississippi, in adopting a plan, were required to comply with federal law and cure a pre-existing federal law violation.

If, as the appellees suggest, the Supremacy Clause of Art. VI gives a state court the power and the duty to enforce federal law and cure federal violations in a congressional redistricting case where federal claims are raised in the complaint, surely that court also may enforce state law and cure state law violations in that case (as long as state law does not run afoul of federal law). If state courts can cure both federal and state law violations when federal claims are raised in the complaint, it follows that they also can do so when only state law claims are raised in the complaint. Nothing about the word "Legislature" in Art. I, § 4 suggests that a state court is precluded from implementing a new congressional districting plan and curing a clear violation of both federal and state law simply because the complaint only raises state law claims.

A different scenario would be presented if the legislature had adopted a plan that complied with federal law, and the state court cast aside the plan on the sole ground that it violated state law. Whether that would make a difference for purposes of Art.

I, § 4 is immaterial since that did not happen here.[2] Instead, the Mississippi legislature failed to adopt a new plan even though one was required by both federal and state law. The action of the Mississippi courts in curing the resulting federal and state law violations did not violate Art. I, § 4.[3]

According to the appellees, it is important that this Court be able to review congressional redistricting cases. Indeed, they say, "[t]he Framers surely would have understood that any litigation to enforce [the equal population requirement of] Art. I, § 2 would be fully reviewable by this Court." Mot. Aff. 22. But, of course, any congressional redistricting plan imposed by a state court *must* comply with all provisions of federal law. If it does not, a federal question exists and the plan can be reviewed and vacated by this Court. It matters not whether the complaint raises federal claims, state claims, or both.

In an effort to harmonize the District Court's decision with *Growe v. Emison*, 507 U.S. 25 (1993), the appellees mention not only the purported distinction between federal law and state law complaints, but also the presence of Miss. Code Ann. § 23-15-1039. According to the appellees:

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[2] The cases cited at J.S. 17-18 suggest that Art. I, § 4 would not prevent the state courts from acting in such a situation.

[3] In an ongoing effort to tarnish the courts of Mississippi, the appellees allege that legislators "continued their intrigues in . . . testimony before the Chancery Court," Mot. Aff. 21, and that allowing state courts to hear these cases "increases the likelihood that legislators may choose . . . to seek political results from selected state judges." *Id.* 21-22. No state judges were "selected" here. The state court case was filed in the court of equity in Hinds County, which is the seat of state government. It could have been assigned to any of four judges through the random assignment process in the clerk's office. Neither the state court plaintiffs nor their counsel had any inkling which of the four judges might be chosen. Only one legislator testified in state court, and he simply discussed, at a pretrial hearing, the status of the unsuccessful legislative efforts.

> [T]he legislature expressly considered its potential failure to agree on a [congressional] redistricting plan, and it did not choose to delegate authority to the courts. Instead, it provided in Miss. Code Ann. § 23-15-1039 that, under the circumstances presented here, all Representatives should be elected at large.

Mot. Aff. 28. Again, this was not the District Court's reasoning, which instead held that state courts have no power unless a statute specifically gives them the authority to adjudicate congressional redistricting cases. As explained at pages 13-14 of our jurisdictional statement, that holding would leave few state courts, including the Minnesota courts in *Growe*, with the power to hear these cases.

Moreover, as we previously stated when discussing § 1039 in the Section 5 context, J.S. 25-26, that statute says nothing about who can or should adopt redistricting plans, and in no way precludes the state courts from exercising their equitable authority to hear these cases. At-large elections are envisioned under § 1039 only if the election is held "before the districts shall have changed to conform to the new apportionment." If a state court, exercising its equitable power in the wake of a legislative default, draws a proper plan, the districts will have been "changed to conform to the new apportionment" and § 1039 will be satisfied. That statute has no relevance to the question of whether Art. I, § 4 precludes state courts from implementing congressional districting plans.

Furthermore, it does not distinguish Mississippi from other states. Although Art. I, § 4 authorizes legislatures to determine the time, place, and manner of choosing congressional representatives, it also provides that Congress may alter the time, place, and manner as it sees fit. Congress has passed 2 U.S.C. § 2a(c), which contains provisions almost identical to those in § 1039 for elections held when the number of

representatives has changed and the state is not redistricted prior to the next election. If, as the appellees contend, Mississippi's legislature has chosen the at-large alternative as the only possible remedy in the case of a legislative deadlock, thus precluding state court power under Art. I, § 4, it could as easily be said that Congress has chosen this alternative for all fifty states, and that state courts nowhere have power in congressional redistricting cases. But surely that is not correct, particularly in light of this Court's decision in *Growe*.[4]

The Section 5 Issue

In the supplement to our jurisdictional statement, we explained that the state court plan was precleared by the Attorney General's failure to impose an objection during the second sixty-day period, which expired April 22, 2001. We contend that the DOJ has no power under the statute to suspend or disregard the statutory review period simply because the federal court's injunction is based, in part, on constitutional grounds. *See, Morris v. Gressette*, 432 U.S. 491, 502 (1977) ("compliance with § 5 is measured solely by the absence, for whatever reason, of a timely objection on the part of the

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[4] There is a later federal statute, 2 U.S.C. § 2c, requiring congressional representative elections "only from Districts" that supersedes both 2 U.S.C. § 2(a)c and Miss. Code Ann. § 23-15-1039. Even if it does not supersede them, as at least one court has held, *Carstens v. Lamm*, 543 F. Supp. 68, 77-78 (D. Colo. 1982), it allows the at-large scheme to be used only "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." This also comports with the common-sense reading of § 1039, which would require at-large elections only if the election is held "before the districts shall have changed to conform to the new apportionment." *See also*, Miss. Code Ann. § 23-15-1033 (requiring congressional representative elections from "by districts").

Attorney General"). If we are correct about this point, there will be no need for this Court to resolve the other Section 5 issues raised in our jurisdictional statement and discussed in the motion to affirm. Nevertheless, we will briefly respond to some of the points in the motion to affirm.

The appellees repeatedly refer to the Mississippi Supreme Court's decision in *In Re Mauldin*, No. 2001-M-01891 (Miss. Dec. 13, 2001) as a "reassignment" of redistricting authority that requires federal approval under Section 5. This implies the authority was taken from the legislature and "reassigned" to the courts. But no authority was taken from the legislature. Instead, the courts simply exercised the equitable power they always have had to fill the breach caused by an unprecedented legislative failure to design a post-census redistricting plan in compliance with federal and state law principles that had evolved over the previous decades. In our view, the exercise of that equitable power does not constitute (to use the language of Section 5) a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964."[5]

The appellees argue that *In re Mauldin* was a change from Miss. Code Ann. § 23-15-1039 because that statute, they say, requires at-large elections whenever the number of seats is diminished and the legislature deadlocks. But as we explained at pages 25-26 of the jurisdictional statement, and again earlier

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[5] The appellees say that "neither the District Court nor the [DOJ] decided that a state court must obtain preclearance before adjudicating a federal claim." Mot. Aff. 11. The DOJ and the District Court, however, did not state their position with that limitation, instead suggesting that any state court assumption of jurisdiction is a voting change irrespective of the issues adjudicated. Moreover, in the present case, the Chancery Court did, in fact, cure federal law violations, and also adjudicated federal law issues by insuring that the new plan complied with federal law. J.S. App. 120a-124a.

in this brief, § 1039 mandates at-large elections only if the districts cannot be drawn in time for the new election. It in no way precludes courts from drawing the districts and is not inconsistent with *In re Mauldin*.

Our reading of § 1039, say the appellees, is "fanciful." Mot. Aff. 12. But the Mississippi Supreme Court already has rejected their position as a matter of Mississippi law. The Mississippi Republican Executive Committee (MREC), which is an appellee here, and the state court intervenors argued to the state supreme court in their petition for writ of prohibition that § 1039 was the legislature's exclusive remedy for a deadlock in this situation and that the state courts therefore had no power. We contended otherwise, making the same argument we make here. As is clear from the outcome in *In re Mauldin*, the Mississippi Supreme Court concluded that § 1039 is not, as a matter of Mississippi law, a barrier to the exercise of state court jurisdiction.

Our reading of § 1039, confirmed by *In re Mauldin*, is corroborated by the interpretation of the similar provisions of the federal statute, 2 U.S.C. § 2a(c)(5), by the federal court in *Carstens v. Lamm*. This is described more fully in footnote 4 of this brief. In addition, the Federal District Court here, which adopted a districting plan rather than the at-large elections requested by the appellees under § 2a(c)(5), apparently interpreted that federal statute the same way as did the *Carstens* court. Clearly, it is not "fanciful" to read either § 1039 or 2 U.S.C. § 2a(c)(5) to require at-large elections only if a legislature or a court is unable to draw districts in time for the election.

In response to our contention that the DOJ's February 14, 2001 request for unnecessary and irrelevant information did not suspend the initial sixty-day review period, the appellees point to *Foreman v. Dallas County*, 521 U.S. 979 (1997), and argue

as follows:

> If reassignment of electoral authority among state officials can ever be subject to § 5, as *Foreman* holds, then it can hardly be frivolous for the Department to investigate the possible consequences of that reassignment.

Mot. Aff. 15. But even if *In re Mauldin* somehow is a voting change, it is not a "reassignment" of authority. While *Foreman* involved the displacement of one procedure for selecting election judges who supervised voting at the polls with a different procedure, no displacement of redistricting authority occurred here. The courts of Mississippi were not substituted for the legislature. Instead, the equitable jurisdiction of the courts was invoked to implement a redistricting plan in accordance with the law. As explained at pages 26-29 of our jurisdictional statement, the information requested by the DOJ was not necessary to make the determination required by Section 5.

The appellees also claim that not only is *In re Mauldin* a voting change, but that the state court redistricting plan cannot be submitted for Section 5 review until the *In re Mauldin* decision has been approved by the United States Attorney General. Mot. Aff. 14, 16. However, even the DOJ, which has strained to find reasons to postpone a preclearance decision on the plan, has not used that excuse. *In re Mauldin* and the state court plan were submitted together by Mississippi's Attorney General. Nothing about Section 5 suggests that the plan itself has yet to be submitted under the statute.

Conclusion

This Court should note probable jurisdiction and reverse the decision of the District Court.

Respectfully Submitted,

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