IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1965

No. 22, Original

STATE OF SOUTH CAROLINA, *Plaintiff,*

—VS.—

NICHOLAS DEB. KATZENBACH, Attorney General of the United States, *Defendant.*

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

THOMAS C. LYNCH,
Attorney General.

MILES J. RUBIN,
Senior Assistant Attorney General,

DAN KAUFMANN,
Assistant Attorney General,

CHARLES B. MCKESSON,

DAVID N. RAKOV,

PHILIP M. ROSTEN,
Deputy Attorneys General,

600 State Building,
Los Angeles, Calif. 90012,

Attorneys for Amicus Curiae.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Miscellaneous Page

Statutes

Textbook

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BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE.

Interest of Amicus Curiae.

California is submitting a brief *amicus curiae* in support of the United States Attorney General because it is imperative that all legitimate means be adopted to enhance the right of universal suffrage. For as President Johnson stated when he urged passage of the Voting Rights Bill:

> "In our system, the first right and most vital of all our rights is the right to vote . . . It is from the exercise of this right that the guarantee of all our other rights flow.
>
> Unless the right to vote be secure and undenied, all other rights are insecure and subject to denial for all our citizens. The challenge to this right is a challenge to America itself."[1]

[1]President Lyndon B. Johnson's message to Congress, March 15, 1965; 111 Cong. Rec. 4927 (daily ed. Mar. 15, 1965).

It is a truism that California, as a state of the Union, has a vital interest in assuring that the voice which speaks for America is truly representative of all its people, a representation which cannot be achieved if there is unjustifiable restriction of suffrage.

But more particularly, California, as a sovereign state, is concerned with the voting rights of its own residents. She seeks assurance that no state erect or maintain barriers which unfairly abridge the right to vote, for such barriers leave individuals new to California inexperienced and apathetic in their political participation, the most important aspect of which is the exercise of the vote. Equally, California is anxious that none of her citizens lose political rights when they emigrate, for surely no man should be subjected to the possibility of a stripping of constitutional guarantees simply because circumstances lead him to live elsewhere.[2]

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[2]California cannot limit her concern over suffrage to those Americans who presently live within her borders. The precepts of the Constitution and the practical necessities of life do not permit such a restricted attitude.

Every day brings new citizens to California from other sections of the nation. For the 5-year period from 1955 to 1960, 2,148,255 residents of other parts of the Union moved to this state. (U.S. Bureau of Census P.C. (2)-2B). During the year ending July 1, 1965, California's population showed an approximate net increase of 340,000 attributable solely to migration from within the United States. (Information supplied to our office by the Office of Population Studies, California Department of Finance).

President Kennedy expressed the necessity of such a national concern in another context when he spoke at San Diego State College on June 6, 1963. Given the fundamental importance of the right to vote, his words have equal meaning here. ". . . American children today do not yet enjoy equal educational opportunities for two primary reasons: One is economic and the other is racial. . . . It does no good, as you in California know better than any, to say that that is the business of another state. It is the business of our country. These young, uneducated boys and girls know no state boundaries and they come West as well as North and East.

As one of the 21 states with literacy[3] or other voting qualification tests,[4] California is concerned that there be no impropriety in the administration of these tests, so that no disparaging reflection be cast upon their use. Congress, however, after extensive hearings, has found that voting tests are being used to disenfranchise certain racial groups and economic classes. Its findings suggest that a fundamental principle of our nation is being ignored, a principle which James Madison enunciated so well when he discussed the qualifications of voters in *The Federalist*. As electors, he said, the Union should have,

> "Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States."[5]

They are your citizens as well as citizens of this country." *The Burden and the Glory: The Hopes and Purposes of President Kennedy's Second and Third Years in Office as Revealed in his Public Statements and Addresses.* (New York: Harper & Row, (1964), page 260.)

Conversely, 938,455 Californians between 1955 and 1960 emigrated to other regions of the nation, oft-times attributable to the exigencies of California business and commercial interests. It cannot be denied that discrimination elsewhere based upon race or color bears upon the mobility of California citizens who participate in California-based industry with interests in other parts of the country.

[3]California Constitution, article II, section 1.

[4][Hearings on S. 1564 Before the Committee on the Judiciary, 89th Cong., 1st Sess., pt. 2, at 1462-1463].

[5]*The Federalist* No. 57, p. 371 (Modern Library Ed.).

When Madison contributed to *The Federalist*, he was concerned solely with the adoption of the Constitution, and thus his words were directed toward federal elections. But his views are pertinent and significant today, for since his writing the right of suffrage has been continually expanded, through amendments such as the fifteenth and seventeenth. And those amendments speak in terms of state as well as federal elections.

The Voting Rights Act represents the conclusion of Congress that this principle must be re-affirmed and that no state frustrate it with sophisticated techniques. California submits that there was ample evidence before Congress to warrant this re-affirmation and to preclude its frustration. California therefore supports the legislation.

In California, Madison's beliefs are reflected in article II, section 1 of the state constitution which proclaims:

> "Every native citizen of the United States of America, every person who shall have acquired the rights of citizenship under and by virtue of the Treaty of Queretaro, and every naturalized citizen thereof, who shall have become such 90 days prior to any election, of the age of 21 years . . . shall be entitled to vote at all elections which are now or may hereafter be authorized by law; . . ."

For the past 75 years the thrust of California law at all levels, from popular referendums to judicial decisions, has been directed toward the advancement of universal suffrage.[6]

Nevertheless, California believes her efforts may often be insufficient, for she cannot protect her citizens

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[6]For example, California voters voluntarily removed a restriction against "Natives of China" through a constitutional amendment in 1926. Her legislature has continually sought to implement equal suffrage through amendments to the California Election Code. Most recently, it passed Election Code section 223, which states that "no county clerk may refuse to deputize any person to register to vote because of race, creed, color, or national origin or ancestry." Previous sections included section 201, where encouragement of registration is declared as the express intent of the legislature, and where "co-operation of interested citizens and organizations" is solicited; and sections

once they leave the state. And while California can offer to all the opportunity to vote, she cannot easily instill a desire to exercise this right here in people made apathetic by unconstitutional disenfranchisement elsewhere. Apathy and non-participation, however, are not the only results of disenfranchisement which concern California, for the denial of the right to vote may also produce mistrust and suspicion of elected officials. The disenfranchised may come to believe their representatives are oblivious to their needs and unaware of their interests, attitudes which have no place in America.[7]

In preparing this brief, California attempted to gauge the extent of this apathy by studying the 1960 voting behavior of Negro migrants from the South.[8] Five areas of Los Angeles County were chosen from the 14 areas with the highest concentration of Negroes according to the 1960 census data. Three of these areas

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29000 ff, where penal provisions are directed against individuals or groups who threaten or intimidate prospective voters. California courts have long echoed this philosophy (see, for example, *Spier v. Baker,* 120 Cal. 370, 375 (1898); *People v. Elkus,* 59 Cal. App. 396, 398 (1922)), and defeated what few attempts have been made to limit suffrage. See, for example, *Regan v. King,* 49 F. Supp. 223 (1942), where an endeavor to disenfranchise people of Japanese origin was prevented. It should be noted that *Regan* was an action where the defendant-registrar was attacked not because he refused to register Japanese-Americans, but because he refused to remove those already on the rolls.

[7]Testimony to this effect was presented to Congress during its deliberations on the Voting Rights Bill. See, for example, the statements of Mrs. Victoria J. Gray, on behalf of the Mississippi Freedom Democratic Party [Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., Ser. 14 at p. 522] and those of Mrs. Virginia Y. Collins, Chairman, Ad Hoc Committee of Concerned Citizens of New Orleans [*id.* at p. 533].

[8]This group was chosen for primary study because the congressional hearings revealed they were the people most often affected by improper voting test administration.

had the highest percentage of new residents from the South. The remaining two reflected the exact opposite —the highest percentage of migration from the West, North and East. By analyzing the two, it was possible to determine how areas with high Southern migration compared with areas with high non-Southern migration.

The results, which are detailed in Appendix A, are of more than passing interest. For in the "High Southern Migration" area, not only did fewer of the eligible population register to vote, but fewer of those registered actually voted. and thus the area participated less in the 1960 presidential election. The table also reveals that the "High Southern Migration" area manifests less participation than either Los Angeles County or the state as a whole.

Perhaps, with time, apathy and mistrust can be overcome. But the surest means of overcoming both apathy and disillusionment is to prevent their occurrence by insuring that the mandate of the fifteenth amendment be effectively enforced.

Through the enactment of the Voting Rights Act of 1965, Congress is seeking to meet this mandate and finally end an evil, which after 100 years of patience, our Union can no longer tolerate. The law is well within the constitutional power of Congress and its appropriateness is beyond question.

ARGUMENT.

I.

Congress Has the Power Under the Constitution to Enact the Voting Rights Act of 1965.

There is no doubt that the Constitution gives Congress the power to enact the Voting Rights Act of 1965. (Public Law 89-110.) The fifteenth amendment provides:

> "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> "Section 2. The Congress shall have power to enforce this article by appropriate legislation."

Additionally, article I, section 4, grants Congress the power to make or alter any state regulations as to the time, place and manner of holding elections for senators and representatives, "except as to the places of choosing senators."

It has long been held that when Congress has been granted such specific and plenary power as that granted by the fifteenth amendment and article I, section 4, its power to enact legislation pursuant to such a grant is very broad and unfettered. As Justice Marshall succinctly stated in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 421 (1819):

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constituiton, are constitutional."

More recently, this was reiterated in *Heart of Atlanta Motel Inc. v. United States,* 379 U.S. 241, 258 (1964), where it was said in reference to the commerce clause and the Civil Rights Act of 1964:

> "The Commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate."

Past cases upholding legislation under the fifteenth amendment reveal the breadth of congressional power under that amendment. For example, in *United States v. Mississippi,* 380 U.S. 128, 141 (1965), this Court upheld the power of Congress to make a state a defendant in a suit seeking preventive relief from voting discrimination. In *Hannah v. Larche,* 363 U.S. 420, 452 (1960), the 1957 Civil Rights Act was held to be appropriate legislation under the fifteenth amendment. Also in *United States v. Raines,* 362 U.S. 17, 25 (1960), the 1957 Civil Rights Act, including provisions giving the Attorney General power to bring suits for preventive relief, was held constitutional.

It has been contended that the total effect of sections two and four of article I, the first section of article II, and the seventeenth amendment, is to vest in each state the exclusive power to decide the qualifications for its electors for representatives, senators, president and vice president. See Hearings on S. 1564 Before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., Pt. 1 at pp. 664-666 (1965).

The words of the late Justice Frankfurter in *Gomillion v. Lightfoot,* 364 U.S. 339, 347 (1960), provide a reply to such a contention.

> "When a Senate exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

The fifteenth amendment makes the right to be free from the abridgment of voting rights on account of race or color a federally protected right. In a continuous line of cases since 1880 this Court has held that the right of a state to fix the qualifications of her electors is qualified and restricted by the fifteenth amendment. In addition to *Gomillion v. Lightfoot, supra,* see *Carrington v. Rash,* 380 U.S. 89, 91 (1965); *Louisiana v. United States,* 380 U.S. 145, 153 (1965); *United States v. Mississippi, supra,* at page 138 (1965); *Lassiter v. Northampton Election Bd.,* 360 U.S. 45, 50, 53 (1959) (dictum); *Lane v. Wilson,* 307 U.S. 268, 275 (1939); *Guinn v. United States,* 238 U.S. 347, 362 (1915); *Pope v. Williams,* 193 U.S. 621, 633 (1903); *Neal v. Delaware,* 103 U.S. 370, 389 (1880).

The language found in *Guinn v. United States, supra,* at page 362 is especially appropriate to illustrate the point.

> "But it is equally beyond the possibility of question that the [fifteenth] Amendment in express terms restricts the power of the United States or the States to abridge or deny the right of a citizen of the United States to vote on account of race, color or previous condition of servitude."

There is no doubt that a state may prescribe that a person be literate as a pre-condition to his right to vote. See *Lassiter v. Northampton Election Bd., supra,* at 50-51. However, the act in question does not seek to abolish literacy tests *per se,* but only those literacy tests which are used for the purpose or with the effect of denying or abridging the right to vote on account of race or color. Congress was faced with the following considerations. On the one hand there was extensive evidence pointing to an unquestioned abuse of literacy tests leading to an unjustified restriction of the suffrage. On the other hand, any means used to correct the situation created the possibility of some persons being permitted to vote who might not meet the requirement of a bona fide literacy test. The solution need not be perfect, and bearing in mind the ineffectiveness of past Congressional attempts and the heavy preponderance of evidence that the conditions still persisted, Congress had no choice but to enact the Voting Rights Act of 1965. What better way to attack the evil than by suspending the instrument of the evil! Congress has not exceeded the power given to it under the fifteenth amendment because the incidental effect of the suspension of a particular literacy test may result in allowing some who are actually illiterate to vote. *Cf. Guinn v. United States, supra* at 362, 363; *Neal v. Delaware, supra* at 389.

II.

The Voting Rights Act of 1965 Is Appropriate Legislation Under the Fifteenth Amendment and Is Not a Bill of Attainder, Ex Post Facto Law, nor a Violation of Due Process.

(a) The Voting Rights Act of 1965 Is Manifestly Appropriate Legislation Under the Fifteenth Amendment.

In deciding on the appropriateness of past legislation, this Court has repeatedly stated that it would not inquire into the necessity or wisdom of the enactment.

> "It is . . . well settled that where the means adopted by Congress are not prohibited and are calculated to effect the object entrusted to it, this Court may not inquire into the degree of their necessity; as this would be to pass the line which circumscribes the judicial department and to tread upon legislative ground. [citations omitted.] Nor may it enquire as to the wisdom of the legislation." *Everard's Breweries v. Day,* 265 U.S. 545, 559 (1924). See *e.g., Williamson v. Lee Optical Co.,* 348 U.S. 483, 492 (1955); *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 425 (1952).

Similarly, this Court has held that if there is any rational basis for Congress to find that the regulatory plan it chooses is necessary to enforce the fifteenth amendment, then the investigation into the appropriateness of that plan is at an end. See *Katzenbach v. McClung,* 379 U.S. 294, 303-04 (1965); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 250 (1964).

An examination of the records of the hearings before both the Senate and House Committees reveals ample evidence to give Congress a rational basis to conclude that the particular plan it enacted was necessary. For example, testimony indicated that in a great

majority of cases low voter participation is related to racial discrimination. (See Hearings Before Subcommittee number 5 of the House Committee on the Judiciary 89th Cong., 1st sess., ser. 14 at p. 24 (1965).) Furthermore, there was evidence that in states and counties where less than 50 per cent of those residents of voting age were registered or voted, the percentage of Negroes who were registered was extremely low. (See House Hearings, *supra,* at p. 26; Hearings on S. 1564. Before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., Pt. 1 at p. 33 (1965).) In general, these are the areas where complaints about discrimination have been made (See House Hearings, *supra,* at 27) and where the Department of Justice has filed and won voting discrimination suits under previous law. (See House Hearings, *supra,* at 27; Senate Hearings, *supra,* at p. 33). Statistics presented to Congress bear this out. (See House Hearings, *supra,* at pp. 29-33.)

The act creates a presumption that any state or political subdivision thereof which uses some form of voting test or device and wherein less than 50% of those residents of voting age were either registered on November 1, 1964, or voted in the 1964 presidential election, is using that voting test or device to deny or abridge voting rights on account of race or color. (See sections 4(a) and 4(b) of the Voting Rights Act of 1965.) In the light of the evidence before Congress, the rationality of this presumption is amply supported.

(b) Sections 4(a) and 4(b) Are Not a Bill of Attainder, nor Ex Post Facto Law, nor Do They Violate Due Process.

The multiplicity of contentions concerning bills of attainder, *ex post facto* laws, and violations of due process only serve to confuse the issues before the Court.

The contentions invoking these doctrines are but variants of one basic argument—that the Voting Rights Act of 1965 is invalid because it works a punishment or deprivation upon certain citizens.

The cases condemning a statute as a bill of attainder all involve situations where an individual or group was being punished or deprived of a valuable right. See *United States v. Brown,* 381 U.S. 437 (1965) (denial of the right to be an officer or employee of a labor union); *United States v. Lovett,* 328 U.S. 303 (1946) (withholding an individual's salary); *Ex parte Garland,* 71 U.S. (4 Wall.) 333 (1866) (denial of right to engage in the practice of a profession); *Cummings v. Missouri,* 71 U.S. (4 Wall.) 277 (1866) (same).

The same requirement is applicable to an *ex post facto* law. See *Flemming v. Nestor,* 363 U.S. 603, 613 (1960). Furthermore, the due process clause of the fifth amendment requires a deprivation "of life, liberty, or property."

The Voting Rights Act of 1965 does not punish or deprive anyone of any rights. No person or group loses life, liberty, property, or job because a voting test is suspended. A particular state or county cannot be heard to complain because it has lost the right to discriminate on account of race or color. It never had such a right. Nor can they argue that the operation of the presumption works a punishment in the form of a dilution of some of their citizens' vote. Every exercise of power under the fifteenth amendment must have an impact on those who have enjoyed the benefit of an unjustifiably restricted suffrage. "Dilution" in this sense is not a deprivation. To consider it so is to limit Congress to previously used methods of enforcing the fifteenth amendment, which experience has

demonstrated are ineffective. Consequently, to impose such a limitation on congressional power would render the fifteenth amendment nugatory.

Nor can it be argued that the Voting Rights Act of 1965 is a bill of attainder on any theory that it allegedly violates the principle of separation of powers. It is a proper legislative function to formulate policy through the expression of rules, and to state what set of circumstances amount to a violation of those rules. It is equally proper for the legislature to decide the consequences of a violation. In enacting the Voting Rights Act, Congress has merely decided what set of circumstances amount to a violation of the commands of the fifteenth amendment, and that suspension of a voting test or device is one of the consequences of such a violation. It is true that the Director of the Census and the Attorney General, both members of the executive branch, make the simple ministerial determination as to the existence of those circumstances which amount to a violation. (See Sec. 4(b).) Even greater delegations of Congressional power have long been held valid. See *Bowles v. Willingham,* 321 U.S. 503, 515 (1944); *Yakus v. United States,* 321 U.S. 414, 424 (1944). It is not true that Congress has attempted to usurp judicial power. Congress has scrupulously preserved separation of powers. This follows since section 4(a) provides a mechanism by which the courts decide the ultimate issue of whether a test or device is being used in a discriminatory manner. It is this legislative recognition of judicial control which distinguishes the situation here from that which troubled this Court in *United States v. Brown, supra.* No state need be finally subjected to the consequences of the Voting Rights Act of 1965 without this judicial determination.

Conclusion.

The fifteenth amendment affirmatively grants Congress the power to enact the Voting Rights Act of 1965. Furthermore, the act is appropriate legislation and is not a bill of attainder, nor an *ex post facto* law, nor a violation of due process. For these reasons, the State of California submits that the Voting Rights Act of 1965 of 1965 is constitutional. Therefore, the State of California prays that a decree be entered adjudging the Voting Rights Act constitutional, and that the request for an injunction preventing the Attorney General from enforcing it be denied.

Dated: January 5, 1966.

THOMAS C. LYNCH,
Attorney General,
MILES J. RUBIN,
Senior Assistant Attorney General,
DAN KAUFMANN,
Assistant Attorney General,
CHARLES B. MCKESSON,
DAVID N. RAKOV,
PHILIP M. ROSTEN,
Deputy Attorneys General,
Attorneys for Amicus Curiae.

APPENDIX A.[1]

	High Southern Migration Area	High-Non-Southern Migration Area	Los Angeles County	California
Total Population	206,235	129,232	6,038,771	15,717,204
% migrants from South	61.6	25.3	*	26.3
% migrants from outside South	38.4	74.7	*	73.7
Total Population Eligible[2] to Vote, 1960	112,699	79,328	3,830,926	9,660,178
% of Eligible[2] who registered	69.2	73.0	78.6	77.2
% of Registered who voted	81.7	87.3	87.4	87.1
% of eligible[2] who voted	56.1	63.8	68.7	67.3

*No available statistics.

[1]The material used in this table was prepared in the following manner. First, through information supplied by Edward Freudenberg and Lloyd Street's *Social Profile: Los Angeles County;* a determination was made of which areas in Los Angeles County reflected the highest and lowest rate of Negro migration from the South. Only those areas with a 20% or higher Negro population were considered. "Migration" was based upon the number of people who moved to Los Angeles during the five-year period from 1955-1960.

Since these study areas were based upon census tracts, it was felt that an adequate comparison could be made if voting statistics for the same tracts were available. This data was acquired from studies of Professor Dwaine Marvick of the University of California at Los Angeles, who correlated voting records with census tracts for the Falk Archives of Political Science. The two sets of material were then combined to produce the above table.

The data for the Los Angeles County and California columns was obtained from the United States Bureau of Census and the Los Angeles County Registrar's Office.

Because of incomplete statistics, a few census tracts in both the High Southern and High Non-Southern Migration areas had to be omitted. Also, the table reflects areas in Los Angeles County rather than the individuals within those areas.

[2]The "eligible" figure was determined by subtracting the 1960 population under 21 from the overall population in each census tract.