No. 72-75

In the Supreme Court of the United States

OCTOBER TERM, 1972

STATE OF GEORGIA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The United States instituted this action in the United States District Court for the Northern District of Georgia under Section 12(d) of the Voting Rights Act of 1965, 42 U.S.C. 1973j(d), seeking to enjoin elections pursuant to the 1971 and 1972 reapportionment plans for the Georgia House of Representatives. Implementation of these plans was resisted on the ground that an objection had been properly interposed by the Attorney General under Section 5 of the Act, 42 U.S.C. 1973c, as he was "unable to conclude that the plan[s] [did] not have a discriminatory racial effect" (J.S. 21).

The material facts are not in dispute. In the autumn of 1971, the Georgia General Assembly reapportioned its legislative (state Senate and House) and congressional districts under three reapportionment plans which were submitted to the Attorney General of the United States on November 5, 1971, for Section 5 review.[1] On November 19, 1971, the Attorney General, pursuant to regulation (28 C.F.R. 51.1-51. 29), requested additional information, deemed essential for a proper evaluation by the Department of Justice, for all three plans; this information was furnished by the State on January 6, 1972.

On March 3, 1972, the Attorney General interposed objections to various aspects of the plans. Based on these objections, new state senatorial and congressional plans were adopted by the Georgia General Assembly, and, upon resubmission to the Attorney General under Section 5, they were approved.

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[1] Section 5 provides that States and political subdivisions subject to that Section which "enact or seek to administer any 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 * * *," shall before enforcement thereof obtain a declaratory judgment from the United States District Court for the District of Columbia that the new law, regulation or procedure is not racially discriminatory in purpose or effect, or alternatively, may submit the qualification, prerequisite, standard or procedure to the Attorney General for review. See J.S. 3-4.

On September 10, 1971, the United States Attorney General promulgated detailed Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, which serve as procedural and interpretative guidelines for the administration of Section 5. See J.S. 4-5; J.S. App. 3b-9b.

With respect to the 1971 reapportionment plan pertaining to the Georgia House of Representatives —which is involved here—the Attorney General's letter of objection stated in relevant part (J.S. 21):

> An analysis of several recent federal court decisions dealing with similar issues persuades me that a court would conclude with respect to this plan that the combination of multi-member districts, numbered posts, and a majority (runoff) requirement, along with the extensive splitting and regrouping of counties within multi-member districts, would occasion a serious potential abridgment of minority voting rights. Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting.

In response to these objections, the Georgia General Assembly repealed the plan submitted on November 5, 1971, and adopted a revised reapportionment plan for the House of Representatives. The new plan eliminated only 18 of the previous 50 multi-member districts (J.S. 7), and failed to remove either the numerical post provision for candidates' qualification or the majority (runoff) requirement for election in primary and general elections. The House of Representatives, on March 9, 1972, also adopted a resolution formally declining to eliminate the features of the initial plan to which the Attorney General had objected.

The revised House reapportionment plan was then submitted to the Attorney General for Section 5 review; on March 24, 1972, the Attorney General

issued an objection, relying essentially on the same reasons that he had earlier stated with respect to the 1971 House reapportionment plan. The present action was commenced on March 27, 1972.

A three-judge court was convened to hear the matter, as required by Section 5 of the Act.[2] The State argued (1) that Section 5 of the Voting Rights Act of 1965 cannot constitutionally be applied to reapportionment Acts of state legislatures; (2) that the House reapportionment plans involved here were in any event not "changes" subject to the provisions of Section 5; (3) that the Attorney General did not apply the appropriate standard in reviewing the House plans submitted to him; and (4) that the objections interposed by the Attorney General were untimely.

Following a hearing, the district court held (J.S. App. 1a-5a) that Section 5 does apply to state reapportionment plans and, as so construed, is constitutional. Concluding that the plans involved here constituted "a change from prior Georgia procedures" (J.S. App. 3a), the court upheld the Attorney General's objections as both properly made and timely. It enjoined the state "from proceeding to hold elections under the present reapportionment plan" (J.S. 4a).

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[2] The Section reads in pertinent part (J.S. 4): "Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

On April 21, 1972, this Court stayed the order of the district court (No. A-1106); a motion by the United States to vacate the stay was denied on May 5, 1972.

We think that the decision of the district court is correct. The language of this Court's opinion in *Allen* v. *State Board of Elections*, 393 U.S. 544, and *Perkins* v. *Matthews*, 400 U.S. 379, strongly supports the conclusion below that the review procedures provided in Section 5 apply with equal force to state reapportionment plans.[3] Moreover, it follows from *South Carolina* v. *Katzenbach*, 383 U.S. 301, that the statute, as so applied, is valid under the Constitution.

On the basis of this Court's decisions in *Allen* and *Perkins*, the Attorney General has consistently treated reapportionment plans submitted to him as generally subject to the requirements of Section 5. See 28 C.F.R. 51.4(c)(3). Whether he should continue to do so is a matter of the utmost importance, not only to the United States and the State of Georgia, but also to a number of other States and political subdivisions subject to Section 5. Pursuant to this Court's decisions in *Baker* v. *Carr*, 369 U.S. 186, *Avery* v. *Midland County*, 390 U.S. 474, and

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[3] In view of *Allen* and *Perkins*, the State's contention that its House reapportionment plans were not "changes" within the meaning of Section 5 was, we submit, also properly rejected (compare *Whitcomb* v. *Chavis*, 403 U.S. 124).

In addition, we agree with the district court that the Attorney General, in interposing his objections, applied the appropriate standard (see 28 C.F.R. 51.19), and acted within the 60-day time limit (see 28 C.F.R. 51.18).

related cases, reapportionments and redistrictings regularly occur at both state and local levels, and compliance with Section 5 is a requirement for six States and all of their political subdivisions, as well as for more than 50 counties in other States.

The present case provides an appropriate opportunity for this Court to speak directly to substantial issues concerning the scope of Section 5 in matters of state reapportionment, and to settle whatever doubts may exist concerning the authority of the Attorney General to adopt procedures for the implementation of the statute.[4]

Accordingly, while we are in agreement with the decision of the district court, it is our view that the issues involved here warrant plenary consideration by the Court.

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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[4] Appellants have here challenged the regulatory procedures adopted by the Attorney General insofar as they relate to the burden of proof allocated to the submitting State and to the timing of the Attorney General's action.

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