SUPREME COURT OF THE UNITED STATES

CITY OF MONROE ET AL. *v.* UNITED STATES

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

No. 97–122. Decided November 17, 1997

JUSTICE BREYER, with whom JUSTICE SOUTER joins, dissenting.

City of Rome v. *United States*, 446 U. S. 156 (1980), focused upon a change in Rome, Georgia's, method of electing city officials– a change from "first-past-the-post" (plurality wins) to "run-off" (majority needed to win). The change took place in 1966. The change was of a kind that could have made it more difficult for newly enfranchised black voters to elect a mayor (*e.g.*, where the black population of a town amounted, say, to 35% of all voters). The change had not been precleared, though §5 of the Voting Rights Act of 1965, as amended, 42 U. S. C. §1973c, required preclearance. In 1968, however, Georgia had precleared a different change in its law. Georgia had submitted, and the Attorney General had precleared, a comprehensive Municipal Election Code that provided, in relevant part:

> "If the municipal charter . . . provides that a candidate may be nominated or elected by a plurality of the votes cast . . . , such provision shall prevail. Otherwise, no candidate shall be . . . elected to public office in any election unless such candidate shall have received a majority of the votes cast . . . ." Georgia Municipal Election Code, §34A–1407(a), 1968 Ga. Laws 977, as amended, Ga. Code Ann. §21–3–407(a) (1993).

Rome argued that the Attorney General's preclearance of this 1968 change in effect precleared the plurality-to-

majority change that Rome had made two years earlier. The Court rejected Rome's argument.

The case before us now involves another Georgia city, the city of Monroe. Monroe, like Rome, made a change in its system for electing city officials– a change from "first-past-the-post" (plurality wins) to "run-off" (majority needed to win). Monroe, like Rome, made the change in 1966. And, Monroe's change, like Rome's change, was not precleared. Monroe, like Rome, argues that the Attorney General's preclearance of Georgia's 1968 change in effect precleared its change to a majority system. Monroe acknowledges that this Court, in *City of Rome, supra,* rejected Rome's similar claim. But it asks us to note probable jurisdiction in part to "address the impact of the Attorney General's preclearance of the 1968 Municipal Elections Code as it relates to the majority vote requirement." Juris. Statement 17. In my view, the circumstances here are virtually identical to those at issue in *City of Rome*, and this Court's rejection of Rome's argument there requires us to reject Monroe's similar argument here.

I rest this conclusion upon what the parties argued before the Court in *City of Rome* and what the Court wrote. Rome, like Monroe, claimed that, in preclearing the 1968 statewide statute, the Attorney General had precleared its local majority system. The reply, by the United States, in *City of Rome*, included the following argument:

> "In its 1968 submission, the State did not 'submit' the changes as they applied to the City of Rome. There was no explanation of how, or even whether, the City's procedures were changed. In order to 'submit' a new procedure, the change must be clearly explained to the Attorney General, 28 C. F. R. 51.10; he cannot reasonably be held to be put on notice of the election procedures for every municipality when an act with statewide effect is submitted. As this Court [has]

> held, preclearance cannot occur until the particular change has been submitted to the Attorney General and he has been afforded an opportunity to assess its purpose and its effect on minority voting in *that* jurisdiction." Brief for Appellees in *City of Rome* v. *United States*, O. T. 1979, No. 78–1840, pp. 69–70 (citation omitted).

This Court, accepting the argument of the United States, wrote:

> "Both the relevant regulation, 28 CFR §51.10 (1979), and the decisions of this Court require that the jurisdiction 'in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act,' and that the Attorney General be afforded an adequate opportunity to determine the purpose of the electoral changes and whether they will adversely affect minority voting in that jurisdiction. Under this standard, the State's 1968 [preclearance] submission cannot be viewed as a submission of the city's 1966 electoral changes, for, as the District Court noted, the State's submission informed the Attorney General only of 'its decision to defer to local charters and ordinances regarding majority voting, . . .' and 'did not . . . submit in an "unambiguous and recordable manner" all municipal charter provisions, as written in 1968 or as amended thereafter, regarding th[is] issu[e].'" *City of Rome* v. *United States*, *supra*, at 169–170, n. 6 (citations omitted).

It seems to me that this statement disposes of the case before us. The statement points out that Georgia's 1968 submission did not describe the effect of its 1968 changes, town by town, in each of Georgia's more than 500 towns and cities. The statement specifically says that Georgia's

simple "submission" of its 1968 comprehensive municipal code did not preclear Rome's "1966 electoral change" because Georgia did not also "submit" the relevant "municipal charter provisions, as written in 1968 or as amended thereafter." Georgia did not submit Monroe's charter to the Attorney General in 1968 any more than it submitted Rome's; nor is there any reason to believe that the Attorney General knew the details of Monroe's circumstances any more than he knew the details of Rome's. Hence, as the District Court concluded in this case, the 1968 preclearance did not preclear Monroe's earlier 1966 change. *City of Rome*, *supra*.

The majority's decision to the contrary rests upon one factual difference between Rome and Monroe. The difference consists of the fact that Rome's original pre-1966 "first-past-the-post" plurality system was written into Rome's city charter. But Monroe's original pre-1966 "first-past-the-post" plurality system was a matter of practice. Its pre-1966 city charter was silent. This difference means that, had a court set aside the 1966 changes in each city, and were no other change to have taken place, then Rome would have been left with a city charter that prescribed a plurality rule, while Monroe would have been left with a silent city charter and a plurality practice. The precleared 1968 state law, if left free to operate on these different circumstances, would have left Rome with a plurality rule (for its pre-1966 city charter contained that rule), but would have changed Monroe's plurality practice to a majority practice (for its pre-1966 city charter was silent).

This complex difference, in my view, is irrelevant. The Attorney General, in 1968, was no more likely to have known about Monroe's change from "plurality-practice" to "majority-charter" than to have known about Rome's change from "plurality-charter" to "majority-charter." Nor is there any reason to believe the Attorney General, in 1968, would have wanted to approve previously unpre-

cleared changes of the former, but not of the latter, variety. There is no more reason to believe that the Attorney General, had he known about Monroe's 1966 change, would have approved the application of the 1968 law to Monroe, than to believe that the Attorney General, had he known about Rome's change, would have approved the application of the 1968 law to Rome. Indeed, if Monroe's black population in 1966 was as high as it is today (37% of the electorate), Monroe's change to a majority vote system could have been precisely the sort of discriminatory change at which the Voting Rights Act was directed.

The majority, and Justice Scalia, make a further argument resting upon a distinction between the first and second sentences of the 1968 code that the Attorney General precleared. The majority says, for example, that *City of Rome* "said nothing about the state-law default rule of majority voting in the second sentence," *ante*, at 4–5; and Justice Scalia refers to a "second sentence . . . default rule of majority voting for all municipalities that have not treated the matter in their charters," *ante*, at 1. The majority then finds that the Attorney General precleared the second-sentence default rule as applied to Monroe, apparently because it believes that "[t]he Government does not dispute that Georgia submitted the state-law default rule to the Attorney General in an 'unambiguous and recordable manner,'" *ante*, at 5. Justice Scalia reaches the same conclusion, not because of the Government's position, but because, in his view, the "burden was upon" the Attorney General to seek more information about the "city-by-city" effects of the statute at the time it was submitted. A*nte*, at 2.

A glance at the Georgia statute, *supra*, at 1, will make clear, however, just how finely the majority has had to parse the statute in its effort to escape the binding effect of precedent. That is because *City of Rome* (involving a city with a "majority" charter) and this case *both* concern

the statute's *second* sentence. See Brief for Appellants in *City of Rome* v. *United States*, O. T. 1979, No. 78–1840, p. 90; *City of Rome* v. *United States*, 472 F. Supp. 221, 233 (D. D. C. 1979) ("Rome argues that . . . the 1968 Code *mandated* majority voting") (emphasis added). And nowhere does either the statute's second sentence or *City of Rome* explicitly make the default/deference distinction that the majority finds critical.

More importantly, there is no reason to think the distinction is critical in respect to the matter here at issue. The Government has not conceded, silently or otherwise, that the Attorney General's preclearance of a statutory "default rule" somehow precleared the application of some such rule to Monroe. To the contrary, the Government's argument, which concerns *all* applications of the "majority" language in the 1968 code's second sentence, is that:

> "preclearance of the majority vote provision incorporated in the State of Georgia's 1968 Municipal Election Code did not also preclear the prior or subsequent adoption and implementation of a majority vote requirement by any particular municipality within the State." Motion to Affirm 11.

That argument rather clearly says that the Attorney General, in effect, precleared the Georgia statute on its face, not as applied to each of Georgia's several hundred municipalities. That is the very argument that the Government made, and the Court accepted, in *City of Rome*.

Justice Scalia does not take the majority's view of the Government's argument. Rather, he says that, in any event, the Attorney General's initial preclearance of the second sentence simultaneously precleared that sentence's application because the State's submission was detailed enough to impose upon the Attorney General the "burden" of seeking detailed city-by-city information. *Ante*, at 2. In my view, however, precedent compels a contrary conclu-

sion. In respect to the relevant point– whether the Attorney General cleared the statute on its face or also as applied– one cannot distinguish the issue before us from the (in this respect) identical issue in *City of Rome*. And that conclusion is consistent with well-established legal principle. See *Clark* v. *Roemer*, 500 U. S. 646, 656 (1991) ("any ambiguity in the scope of a preclearance request must be resolved against the submitting authority"); *McCain* v. *Lybrand*, 465 U. S. 236, 257 (1984) (same); 28 CFR §§51.26(d), 51.27(c) (1997) (requiring preclearance submissions to explain changes clearly and in detail).

In a nutshell, *City of Rome* turns on the practical fact that the Attorney General, in preclearing the 1968 Georgia statute, would not have intended to preclear earlier, potentially unlawful, local changes of which he had not specifically been told. Rome was one such city. Monroe was another. The District Court consequently concluded that the Attorney General's preclearance of the 1968 statute did not preclear Monroe's earlier change, any more than it did Rome's. I agree with the District Court and would affirm its judgment.