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CASES CITED

Supreme Court of the United States

OCTOBER TERM, 1931

No. 265

L. A. NIXON,

Petitioner,

against

JAMES CONDON and C. H. KOLLE,

Respondents.

MOTION FOR LEAVE TO FILE BRIEFS AND ARGUE CASE

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

C. N. Love, Julius White, The Houston Informer and Texas Freeman, individually and on behalf of all other Negroes in the City of Houston, in Harris County, and the State of Texas, who are not otherwise represented, hereby respectfully move this Honorable Court for leave to file a brief in support of the petition for writ of certiorari on file herein —a copy of which brief is hereto attached—and also for leave to file a brief and to argue the case upon the merits, in the event said petition for writ of certiorari is granted. In support of this motion your movants show:

The Movants

1. Your movant, C. N. Love, is a natural born citizen and resident of the State of Texas, and of the United States, is sixty-eight (68) years of age, is an American Negro; has resided in the City of Houston, Harris County, State of Texas, for sixty-six (66) years; and he is the owner of property and pays taxes thereon to said city, county and state.

Your said movant is a duly qualified elector and voter under the laws of the State of Texas and the United States, is a member of the Democratic Party, and is an adherent to the tenets of the Democratic Party.

Your said movant is the same C. N. Love, who was the appellant in this Court in the case of Love v. Griffith, 266 U. S. 32, where this Honorable Court declined to pass upon the merits of the case because the questions involved in the case, identical with the questions here, had become moot.

Your said movant is also the same C. N. Love who was plaintiff in the case of Love v. The Democratic Executive Committee of the City of Houston, Texas, et al., before the United States District Court for the Southern District of Texas, Houston Division, Numbered 438 in Equity, and involving the identical issues involved in Love v. Griffith, supra; which case was decided adversely to your movant on January 23, 1931, and which was not appealed, because, under Love v. Griffith, supra, decided by this court, no relief could have been granted on appeal because the questions involved would have been moot before the appeal could have been decided.

2. Your Movant, Julius White, is a natural born citizen of the United States and of the City of Houston, County of Harris, and State of Texas; is 43 years of age; is an American Negro; is a duly qualified elector and voter under the laws of the State of Texas and the United States; is a member of the Democratic Party and an adherent to the tenets of the Democratic Party; and is the owner of property in, and pays taxes thereon to said city, county and state.

Your said movant is president of the Harris County Negro Democratic Club, and is the same Julius White who was the relator in the case of White v. Lubbock, 30 S. W. (2nd) 722, where the Court of Civil Appeals at Galveston, Texas, in a case in which it was the Court of last resort, decided the identical questions involved in the instant case adverse-

ly to your movant. No attempt was made to have this court review said case because, under Love v. Griffith, supra, decided by this Court, no relief could have been granted because the questions involved would have become moot before such review could have been had.

3. Your movant, The Houston Informer and Texas Freeman, is a Negro weekly newspaper, published at Houston, Texas, dedicated to the progress and uplift of Negroes of Texas, with a wide circulation among the nearly million Negroes of that State. Your said movant has been especially interested in the elective franchise as it pertains to the Negroes of Texas, and by reason thereof, bore all of the expenses in connection with the case of Love v. The Democratic Executive Committee of the City of Houston, Texas, et al., supra, before the United States District Court for the Southern District of Texas, at Houston.

Grounds of the Motion

The grounds on which this motion is based, are as follows:

1. In the opinion of movants this is one of the most important cases, so far as the nine million Negroes of the South are concerned, that has been before this Honorable Court since the famous case of Dred Scott v. Sandford, 19 Howard 393. The device which has been created by the white majority through the exercise of the sovereign power of the State of Texas, and which is sought to be invalidated in this case, has effectively disfranchised approximately one-sixth of the total population of the entire State of Texas. It has jeopardized the lives of this huge population by depriving Negroes of adequate police protection, it has threatened the educational system for Negroes and placed the public school facilities for thousands of Negro children upon a basis of favor and discretion; it has kept thousands of tax-paying Negro citizens from representation in the expenditure of millions of dollars of their own

money; it has put millions of dollars of property and more than 800,000 lives in a state where rights and liberties yield to permission and tolerance, outside of the pale and protection of the strong sustaining arm of the laws and regulations of the State of Texas; and by reason thereof, the questions involved in this case are of such momentous import that your movants respectfully submit that every reasonable argument and point of view should have a hearing before the matter is finally determined by this Court.

2. Should this Court decide the questions involved in this case adversely to the petitioner, L. A. Nixon, not only he, but the 854,964 Negroes of the State of Texas, will be perpetually denied the right to vote, and, your movants respectfully submit that every Negro in the State of Texas, who has any reasonable argument and point of view to advance should have an opportunity to be heard in the attempt to prevent such a catastrophe.

3. In the opinion of your movants, there are reasonable arguments and points of view upon the questions involved in this case—as appears from the brief hereto attached —which have not otherwise been called to the attention of this Court, but which, your movants believe the Negroes of Texas are entitled to have this Court consider.

Here your movants are mindful of the opinion written by Mr. Justice Holmes in the case of Quong Wing v. Kirkendall, 223 U. S. 59, in which at page 64, he said: "There are many things that courts would notice if brought before them that beforehand they do not know."

4. The request of movants in this case is supported by precedent in this Court. In the case of Nixon v. Herndon, infra, this Court permitted a brief to be filed on behalf of the Attorney General of the State of Texas. In that case, Mr. Justice Holmes said:

> "Here no argument was made on behalf of the defendants, but a brief was allowed to be filed by the

> Attorney General of the State."
> Nixon v. Herndon, 273 U. S. 536, 540.

Your movants believe that the Negroes who are disfranchised by the device sought to be invalidated in this case have more interest in the outcome of this case than the State of Texas did in the Nixon Case, for there, although taking enough interest in the matter to file a brief, it was vigorously argued in such brief by the State of Texas that the wrong complained of was not a state affair. It is interesting to note that while denying Texas has anything to do with excluding Negroes from the statutory primary, yet the State gives the full force of all its sovereign powers in recognizing and protecting defendants in such exclusion. If this case should sustain the device sought to be invalidated, your movants will suffer direct and irreparable loss.

5. In the event that the prayer of this motion should be denied to movants, they request in the alternative that the attorneys for movants be permitted to file such briefs and argue the case as amici curiae. This, your movants submit, may be done within the discretion of this Court. In Northern Securities Co. v. United States, 191 U. S. 555, 48 L. ed. 299, speaking of the power of this court to allow the appearance of amicus curiae, it is said:

> "And doubtless it is within our discretion to allow it in any case when justified by the circumstances."

Your movants feel that the circumstances justify such allowance in this case.

WHEREFORE, premises considered, your movants pray that this Honorable Court grant them leave to file a brief in support of the petition for writ of certiorari, and also to file a brief and argue the case upon the merits, in the event that such petition is granted; and in the alternative your movants and their attorneys pray that, if for any reason, the above prayer of your movants is not granted, in that event that the attorneys for your movants be given leave

to file such briefs and make such argument as amici curiae.

Dated September 12, 1931.

C. N. LOVE
JULIUS WHITE
THE HOUSTON INFORMER AND TEXAS FREEMAN
By G. H. WEBSTER, President
J. ALSTON ATKINS
One of Attorneys for Movants
Office and Post Office Address
409 Smith Street, Houston, Texas.

THE STATE OF TEXAS
COUNTY OF HARRIS

Before me, the undersigned authority, on this day personally appeared C. N. Love, Julius White, G. H. Webster, and J. Alston Atkins, who, having been by me first duly sworn, on their oaths, depose and say:

That they are the identical persons who executed the within and foregoing motion, and that the allegations therein set forth are true, according to their best knowledge and belief.

Subscribed and sworn to before me this the 12th day of September, A. D. 1931.

LELAND D. EWING
Notary Public in and for Harris County, Texas.

My commission expires June 1, 1933.
SEAL

Certificate of Counsel

I hereby certify that in my opinion the foregoing motion for Leave to File Briefs and Argue Case is well founded in law, and is filed in good faith and not for delay.

J. ALSTON ATKINS
One of Attorneys for Movants.

Supreme Court of the United States

OCTOBER TERM, 1931

No. 265

L. A. NIXON,

Petitioner,

against

JAMES CONDON and C. H. KOLLE,

Respondents.

BRIEF OF MOVANTS ON MOTION FOR LEAVE TO FILE BRIEFS AND ARGUE CASE

Preliminary Statement

The preliminary statement in the brief of the petitioner for the writ of certiorari is adequate in the opinion of the movants, upon the application for the writ, but, in the event that the writ is granted and movants are also given leave to file a brief on the merits, movants may there enlarge upon such statement.

Jurisdiction

Movants believe that the jurisdiction of this court is adequately laid for purposes of the application for the writ, but might be enlarged upon in a brief upon the merits.

Grounds on Which Writ of Certiorari Is Sought

In the opinion of movants, petitioner clearly brings himself within the enumerated cases in the Rules of this Court in which the Court in its discretion will grant the writ, and no further statement seems necessary upon this matter.

Argument

A.

Upon the first ground upon which the writ is sought, namely, that the decision of the Circuit Court of Appeals in this case is in conflict with applicable decisions of this Court, movants submit the following additional argument:

Point 1

The petitioner, L. A. Nixon, had the same right to vote in the primary election involved in this case that he did in the general election.

This was determined by this Court in Nixon v. Herndon, 273 U. S. 536, and is conceded by the Circuit Court of Appeals in the instant case. On this point, the Court said:

> "It is of course to be conceded, since the decision in Nixon v. Herndon, supra, that the right of a qualified citizen to vote extends to primary elections as well as to general elections."
>
> Nixon v. Condon, et al.
> 49 Fed. (2nd) 1012, 1013.

Conceding this much, the Circuit Court of Appeals based its decision not upon the absence of such legal right, but squarely upon the proposition that the State of Texas was not infringing that right. The court, distinguishing Nixon v. Herndon, supra, said:

> "The distinction between appeallants' cases, the one under the 1923 statute and the other under the 1927 statute, is that he was denied the permission to vote in the former by state statute, and in the latter by resolution of the State Democratic Executive Committee."
>
> Ibid. 1013.

Holding that the State Democratic Executive Committee was not exercising state power in passing the resolution in question, the Circuit Court of Appeals in the instant case said:

> "A political party is a voluntary association, and as such has the inherent power to prescribe the qualifications of its members. The act of 1927 was not needed to confer such power; it merely recognized a power that already existed."
>
> Ibid. 1013.

This brings us to the questions:

1. What was the source and nature of the power exercised by the State Democratic Executive Committee in passing the resolution here complained of?

2. If this power was not created by state statute, is a state statute constitutional which recognizes and enforces as legal the power of private individuals to deprive persons of a legal right, which the state itself is without power to deny by direct enactment?

Point II

(a) Whatever power the State Democratic Executive Committee had in the premises it got from Article 3107 of the Revised Civil Statutes of Texas.

We are not at this moment concerned with what power the Democratic Party had. We shall attempt first to show that whatever may have been the power of the Democratic Party, the State Democratic Executive Committee had no power prior to the passage of said Article 3107 to pass the white primary resolution.

In the case of Love v. Wilcox, 28 S. W. (2nd) 515, beginning at page 523, the Supreme Court of Texas gives the history of the power of party committees to fix qualifications for participation in the statutory primaries of the State of Texas. Speaking of this power at the inauguration of the statutory primary, the Court says:

> "The initial 1903 regulation by statute of party primaries in Texas authorized the county executive committee of the party holding a primary to prescribe additional qualifications for primary participation." ("Additional" to those fixed by statute.)

After reviewing the history over a period of twenty years of the above provision, the court said:

> "The Second Called Session of the 38th Legislature in 1923 amended the statute, which since 1903 had conferred power on the county executive committee to prescribe additional qualifications for primary voters, so as to direct that 'all qualified voters

> under the laws and constitution of the State of Texas, who are bona fide members of the Democratic party, shall be eligible to participate in any Democratic Party primary election, provided such voter complies with all laws and rules governing party primary elections; however, in no event shall a Negro be eligible to participate in a Democratic party primary election held in the State of Texas.'
>
> "The amendment of 1923 was declared unconstitutional by the Supreme Court of the United States. Nixon v. Herndon, 273 U. S. 536, 47 S. Ct. page 446, 71 L. Ed. 759. The 40th Legislature at its First Called Session, in 1927, repealed the 1923 amendment, and enacted what is now Article 3107 in Texas Complete Statutes of 1928 * * * " (Which is the statute sought to be invalidated in this case.)
>
> Ibid. 523-524.

Thus, it will be seen that from the first enactment of the statutory primary in 1903, down to 1923, the state had, in the words of the Supreme Court of Texas, "conferred power on the county executive committee to prescribe additional qualifications for primary voters," that is, "additional" to those fixed by the statutes themselves.

From 1923 to 1927, the statute itself fixed the qualifications, but excluded Negroes by direct enactment.

It was not until the act of 1927 was passed by the Texas Legislature (because "an emergency and an imperative public necessity" had been created by Nixon v. Herndon, supra) that the State Democratic Executive Committee got whatever power it had to pass the resolution involved in this case.

Movants respectfully submit that it is strained to say that the State Democratic Executive Committee had "inherent power" to do this in the face of the history of the power of party committees to fix qualifications, as set out by the Supreme Court of Texas. It is also true that the State Democratic Executive Committee never sought to

fix such qualifications prior to the passage of the 1927 act.

(b) Assuming that the question in this case is one of party membership, which we deny, in the very nature of the Democratic Party no state committee has the power to prescribe qualifications for membership.

An absurdity will demonstrate this. If the State Democratic Executive Committee of Texas has power to say who may be Democrats, it can say that no Justice of the Supreme Court of the United States can be a Democrat? Would such a pronouncement be a determination by the Democratic Party?

The truth in this case is:

1. That there has been no action by the Democratic Party in the matter, the party being a national organization, which can settle such matters of policy, only by its national conventions and committees.

2. That the real question involved in this case does not involve party membership, but the legal right to participate in a Texas statutory primary election, and whether the defendants may legally infringe such right.

(c) The State Democratic Executive Committee in this case has not in fact undertaken to fix the qualifications of members of the Democratic Party.

The resolution says no more than "That all white Democrats who are qualified under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other" may vote in the statutory primary election.

The resolution makes no attempt to say who shall be Democrats, but rather what Democrats may exercise their legal rights and what Democrats shall be deprived of their legal rights.

Point III.

The resolution of the State Democratic Executive Com-

mittee is no defense to this suit for damages, for the wrong done to plaintiff in denying him his legal right to vote in the statutory primary.

That plaintiff had a legal right to vote in the primary election has been settled by this court in Nixon v. Herndon, supra, and that much is conceded by the Circuit Court of Appeals in this case.

That the action of defendants in denying plaintiff this right was a wrong has been settled by this court in Nixon v. Herndon, supra.

That a state statute authorizing the deprivation would be no defense is settled by Nixon v. Herndon, supra.

Assuming that the State Democratic Executive Committee was not exercising state power in passing the resolution here involved, which we deny, could it as a group of private individuals give legal immunity to the defendants in doing an act which would otherwise be a legal wrong? If so, that is a new principle in legal jurisprudence, and means, when applied elsewhere, that all one private individual would have to do to avoid liability for the infringement of the legal rights of another individual would be to have still a third individual execute a resolution justifying the infringement. In this connection a quotation from the opinion of Mr. Justice Bradley, in the Civil Rights Cases, 109 U. S. 3, is pertinent:

> "In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some

> way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed."

The Federal Courts have full authority to enforce those State laws in cases of which they have jurisdiction. A substantial Federal question is sufficient to confer that jurisdiction.

Chicago v. Kendall, 266 U. S. 94.
Greene v. Ry. 244 U. S. 499.

The Federal questions raised in this case are at least substantial.

If a substantial Federal question is present, the court has power to pass on all questions in the case and to grant whatever relief that plaintiff may be entitled to have, whether State or Federal; and this is true even though the court may decide the Federal questions against the plaintiff or not decide them at all.

Siles v. L. and N. Railway, 213 U. S. 175, 191.
L. and N. Railway v. Garrett, 231 U. S. 298, 304.

In this view whether the defendants who committed the wrong, or the State Democratic Executive Committee, which authorized defendants to commit the wrong, are state officers would be immaterial. At any rate the de-

fendants in this case have the same character that the defendants did in Nixon v. Herndon, supra. In both cases, they were judges of a Texas statutory primary election.

B.

Upon the second ground upon which the writ is sought, namely, that the decision of the Circuit Court of Appeals in this case is in conflict with a decision of another Circuit Court of Appeals upon the same matter, movants submit the following additional argument:

Point I

A state law which recognizes an unconstitutional classification is just as repugnant to the Federal Constitution as a State law which creates such an unconstitutional classification.

That the state law sought to be declared unconstitutional in this case does recognize and protect the power of the State Democratic Executive Committee to deprive Negroes of their legal rights upon the ground of color alone is clear.

In the case of White v. Lubbock, —Tex.—, 30 S. W. (2nd) 722, it is held that the resolution involved in this case was a "valid exercise through its proper officers of such party's inherent power, (recognized, but not created by R. S. Article 3107) * * * " In that case the Court of Civil Appeals was the court of last resort in Texas.

In the instant case, the Circuit Court of Appeals held "The act of 1927 was not needed to confer such power, it merely recognized a power that already existed."

As protection for themselves in the exercise of the power thus recognized, the State of Texas by statute clothed the defendants with, among others, the following sovereign powers of the state (See Articles 3002 and 3105 of the Revised Civil Statutes of Texas): To administer oaths; to act with the same power as a district judge to enforce order and keep the peace; to appoint special peace officers; to issue warrants of arrest for felony, misdemeanor

or breach of peace; to authorize confinement of persons arrested to jail; to compel observance of the law against loitering or electioneering within 100 feet of polling places; to arrest or cause to be arrested any one carrying voters to polls contrary to law.

No private individual or organization has any such powers as these.

As to the power of the State of Texas, thus to recognize and protect the State Democratic Executive Committee in depriving Negroes of their legal right to vote in the Texas statutory primary, the holding of Judge Groner in West v. Bliley, 33 Fed. (2nd) 177, 180, which was adopted by the Circuit Court of Appeals for the Fourth Circuit in Bliley v. West, 42 Fed. (2nd) 101, is pertinent:

> "That a law which recognizes or which authorizes a discrimatory test or standard does curtail and subvert them ("the provisions of the Constitution and the rights of voters") there can be no doubt, and such a law is therefore in conflict with the Fourteenth and Fifteenth Amendments to the Constitution of the United States."

With reference to the recognition and protection given by the State of Texas to this device to deprive Negroes of their legal right to vote in the Texas statutory primaries, it is a fact of the greatest significance that the appellate courts of Texas have uniformly held in every instance, except where Negroes were excluded, that the State Democratic Executive Committee, as well as other party committees, were without power to prescribe qualifications for participating in the Texas statutory primaries inconsistent with the qualifications fixed by the Constitution and statutes of the State.

The leading case is that by the Supreme Court of Texas in Love v. Wilcox —Texas—, 28 S. W. (2nd) 515, where it was held that the State Democratic Executive Committee was without power to prescribe qualifications that a person

seeking to participate in the statutory primary election must have supported the Democratic nominees and electors in 1928, and must also pledge himself without reservations to support the nominees of the Democratic Party.

To the same effect, among others, is the case of Clancy v. Clough, —Tex.—, 30 S. W. (2d) 569, which held that the committee was without power to place upon the statutory primary ballot "any pledge other than that prescribed by the statute, or one containing the additional word 'white' before the word 'Democrat' in the pledge prescribed by the statute." This case is cited with approval by the Supreme Court of Texas in Love v. Wilcox, supra.

The word "white" does not appear in the test pledge statute, Article 3110 of the Revised Civil Statutes of Texas, but the court authorized the Democratic Committee to insert the word "white" (forbidding of course any other addition or change) and this construction must be read into the statute, as if put there by the legislature. This is the effect of the holding in the case of Bailey v. Alabama, 219 U. S. 219, where Mr. Justice Hughes, now the Chief Justice, said:

> "There is also a rule of evidence enforced by the Courts of Alabama which must be regarded as having the same effect as if read into the statute itself * * * " etc.

It is also a fact that the case of Clancy v. Clough, supra, was decided by the Texas Court of Civil Appeals after Nixon v. Herndon, supra, was decided.

Conclusion

Believing that they have submitted sufficient reasons for this Honorable Court to exercise in their favor the Court's discretionary power in this case, movants pray the Court that they be granted leave to file this brief in support of the petition for writ of certiorari herein, and also to file a brief upon the merits and to argue the case in the

event said petition is granted; and, in the alternative, movants pray that, in the event for any reason, the motion of movants cannot be granted, the attorneys for movants be given leave to file said briefs and to make such argument as amici curiae.

Respectfully submitted,

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