LaRouche takes voting rights case to U.S. Supreme Court

The following brief was submitted to the U.S. Supreme Court on Jan. 18 by attorneys for Lyndon H. LaRouche, Jr. et al., plaintiffs in a suit against former Democratic Party National Committee Chairman Donald L. Fowler et al. LaRouche et al. accused Fowler and the DNC of violating their rights, under Section 5 the Voting Rights Act of 1965.*

Statement of the Case

This case arises from Lyndon H. LaRouche, Jr.'s campaign for President in 1996. Appellants, other than LaRouche, are Democratic Party voters of African-American or Hispanic descent who voted for LaRouche, or wished to vote for LaRouche as their preferred candidate for the Democratic Presidential nomination, in jurisdictions which are covered by the Voting Rights Act of 1965. Appellants, other than LaRouche, were also themselves potential candidates for election as delegates to the Democratic National Convention or were qualified to vote for delegates to the Democratic National Convention as a result of the 1996 Democratic Party primary or caucus procedures. In January 1996, the then Chairman of the Democratic National Committee, Donald L. Fowler, declared LaRouche not to be "a bona fide Democrat" and instructed state parties in their National Convention delegate elections to "disregard any votes that might be cast for Mr. LaRouche" and "not to recognize the selection of delegates pledged to him at any stage of the delegate selection process."[1] (J.S. App. p. 74a). As a result of Fowler's directive and the accompanying threat that if it was not followed by state parties, their delegations would not be seated at the National Convention:

- The Arizona Democratic Primary, where LaRouche was on the ballot, was successfully cancelled by the Democratic Party and a private Democratic party primary, excluding LaRouche, was held in its stead;
- Virginia Democrats dissolved a Congressional District Caucus which had enough Democratic voters pledged to LaRouche to elect a delegate to the National Convention and instructed the delegates at the Caucus that they would only be allowed to vote and run for delegate if they supported Bill Clinton for President;
- Texas Democrats stripped delegates of their elected party positions because they were pledged to LaRouche and substituted other Democrats as State Convention delegates;
- Louisiana Democrats refused to hold a caucus to

* The full list of plaintiffs is Lyndon H. LaRouche, Jr.; Committee to Reverse the Accelerating Economic and Strategic Crisis—A LaRouche Exploratory Committee; Alex D. Promise; Charles Shaw; Delores Whitaker; Nathaniel Sawyer; Joel Dejean; Eloi Morales; Geneva Jones; Grace Littlejohn; Maria Elena Leyva Milton. The defendants are Donald L. Fowler, as Chairman Democratic National Committee; Democratic National Committee; James L. Brady, as Chairman Louisiana Democratic Party; Louisiana Democratic Party; Louisiana State Democratic Party Central Committee; Sue Wrenn, as Chairman Virginia Democratic Party; Kenneth Geroe, as Chair of the Virginia Second Congressional District Caucus; Virginia Democratic Party; William White, as Chairman Texas Democratic Party; Texas Democratic Party; Texas State Democratic Executive Committee; William Simons, as Chairman, District of Columbia State Committee; District of Columbia Democratic Party; District of Columbia Democratic Committee; Samuel Coppersmith, as Chairman Arizona Democratic Party; Arizona Democratic Party; Arizona State Democratic Committee.

1. To justify his order to disregard and nullify the votes of Democratic party members, Fowler penned a crude and scurrilous diatribe falsely accusing LaRouche of racism, anti-Semitism and fraud. Despite efforts by leading Democrats, including former Congressmen and African-American elected officials to challenge Fowler's actions within the Party, their protests were ignored. (J.S. App. p. 77a.)

Donald Fowler (left), then-Chairman of the Democratic National Committee, instructed state party organizations during the 1996 Presidential primaries that votes for Lyndon H. LaRouche, Jr. (right) should be "disregarded," and refused to seat delegates pledged to LaRouche at the National Convention.

> elect a LaRouche delegate to the National Convention despite the fact that LaRouche received sufficient votes in the Louisiana Presidential Preference Primary to qualify a delegate for the convention and despite the fact that state law mandated that a delegate be chosen.

None of these changes in rules concerning who might be a Presidential candidate or Delegate to the Democratic National Convention, who could vote, and what the effect of votes would be, were precleared with the Attorney General or the United States District Court for the District of Columbia as required by Section 5 of the Voting Rights Act.

In *Morse v. Republican Party of Virginia,* 517 U.S. 186 (1996), this Court held that electoral nominating activities of political parties in covered jurisdictions for public or party office are subject to preclearance under Section 5. The Court applied the legal framework of the White Primary Cases in interpreting the Voting Rights Act, and rejected the claim that this framework did not apply because the nominating procedure in question did not operate in a racially discriminatory fashion:

> "[T]he decision whether discrimination has occurred or was intended to occur, as we have explained on many occasions," is for the Attorney General or the District Court of the District of Columbia to make in the first instance. . . . The critical question for us, as for the District Court below, is whether "the challenged alteration has the potential for discrimination." *Hampton County Election Comm'n,* 470 U.S. at 181 (emphasis in original.)

Morse, 517 U.S. 186 at pp. 216-217 (internal citations omitted).

Despite this Court's clear judgment in *Morse,* the three judge district court below declared itself unable to discern "clear instruction" from the case and found *Morse* "difficult to apply as binding precedent." (J.S. App. pp. 6a, 7a). The district court held that the Democratic Party was not required to preclear national party electoral nominating rules intended for implementation in covered jurisdictions because the "delegation theory of *Morse* does not extend that far." (J.S. App. p. 7a). It further held that if Section 5 is construed to require state parties to preclear rules specifying who can run for public or party office, who can be listed on Democratic Party primary ballots, and who can vote for candidates and which votes will be counted, then Section 5 "impermissibly intrudes upon the Party's constitutional right to associate." (J.S. App. pp. 7a, 12a). History shows, however, that nothing has more potential to discriminate than the unchecked and unreviewed power of Party officials to define who may vote and who may be candidates for public or party office. The White Primary Cases also show that the absolute right the Democratic Party now claims it has—the right to define itself as an exclusive private club—was used for decades as the primary means to disenfranchise minority voters. The district court's decision thus revives and legitimizes the Democratic Party's principal legal claim in the White Primary Cases while effectively tak-

ing the most important nominating activity of all—the nominating process for President of the United States—outside the purview of the Voting Rights Act.

The Voting Rights Act was passed in 1965 by a Congress which was "confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach,* 383 U.S. 301, 309 (1966). Despite the 14th, 15th, and 24th Amendments to the Constitution barring discrimination in voting, and despite court rulings and positive laws enforcing these provisions, various states and the Democratic Party politicians who governed those states, bent on perpetuating the white status quo and subverting the Constitution, created ever new devices by which to deny minorities the right to vote. As soon as court decrees enforcing the Constitution or Civil Rights Acts were obtained, often after years of litigation, "the states affected . . . merely switched to discriminatory devices not covered by the federal decrees or enacted difficult new tests designed to prolong the existing disparity between white and Negro registration." *Id.* at 311-314. Section 5 is the central and most stringent of the remedies for discrimination in the Act. It prohibits the enactment or enforcement in a covered jurisdiction of changes in voting qualifications or procedures that differ from those in effect on November l, 1964 or two subsequent dates. In order to obtain preclearance:

> the covered jurisdiction must demonstrate that its new procedure "does not have the purpose and *will not have the effect of denying or abridging the right to vote on account of race or color or [membership in a language minority group].*" The fact that such a showing could have been made, but was not, will not excuse the failure to follow the statutory preclearance procedure. "Failure to obtain either judicial or administrative preclearance 'renders the change unenforceable.' "

Morse, 587 U.S. at 595, & F.N. 5 quoting *Clark v. Roemer,* 500 U.S. 646, 652, (1991) (emphasis supplied).

In *Morse,* this Court reiterated its previous broad construction of Section 5:

> §5, like the Constitutional provisions it is designed to implement, applies to all entities *having power over any aspect of the electoral process within designated jurisdictions*. . . "§5 is expansive within its sphere of operation and comprehends all changes to rules governing voting." *Presley v. Etowah County Comm'n,* 502 U.S. 491, 501 (1992).
>
> * * *
>
> We have consistently construed the Act to require preclearance of any change in procedures or practices that may bear on the "effectiveness" of a vote cast. . . . Rules concerning candidacy requirements and qualifications, we have held, fall into this category because of their potential to "undermine the effectiveness of voters who wish to elect [particular candidates]." *Allen,* 393 U.S., at 570. In its reenactments and extensions of the Act, moreover, Congress has endorsed these broad constructions of §5.

Morse, 517 U.S. at 204-205, emphasis supplied.[2]

In 1996, LaRouche qualified for the ballot and amassed 597,853 votes in 26 Democratic Party primaries.[3] In Louisiana, which is a covered jurisdiction subject to §5's preclearance requirements, LaRouche received sufficient votes in the Louisiana Presidential Preference Primary to elect a delegate to the Democratic National Convention in the 6th Congressional District. Appellants Charles Shaw and Alex Promise were registered Democratic voters of African-American descent who voted for LaRouche in that District.

The Louisiana Presidential Preference primary statute specifies a two-step procedure for election of delegates to the Democratic National Convention. The state holds a primary election in which Democratic voters express their Presidential preference. La. Rev. Stat. §18:1280.21. After that election, the Democratic Party holds caucuses to select delegates which must be apportioned according to the Presidential primary vote. La. Rev. Stat. §18:1280.27. Rather than award LaRouche the delegate to which he was entitled under Louisiana law, the Louisiana Democratic Party appellees refused, citing the Fowler letter, and thereby nullified the votes of Shaw and Promise. The Louisiana Democrats did not preclear the procedures and rules which nullified the effect of votes cast for LaRouche in the Primary.

Under Virginia state law, political parties nominate candidates for office through primary elections or through convention or caucus procedures at the party's option. Va. Code §24.2-508. In 1996, the Virginia Democratic Party chose a caucus and convention procedure to select delegates to the Democratic National Convention and to nominate candidates for other offices. District level delegates to the Democratic National Convention were elected as a result of a two-step process: election at the city and county caucuses, followed by election at Congressional District conventions.

LaRouche's delegate slate in the Second Congressional District was 25% African-American and included other minorities. Delegates pledged to LaRouche, including appellants Delores A. Whitaker and Nathaniel H. Sawyer, partici-

---

2. Congress extended the provisions of Section 5 for 25 years in 1982, citing the "fragility" of the gains made by minorities to date and the fact that the task of insuring minority voters equal protection under the laws was far from complete. "Without the preclearance of new laws, many of the advances of the past decade could be wiped out overnight by new schemes and devices." S. Rep. No. 417 reprinted in 1982 U.S. Code Cong. & Admin. News at p.186.

3. This case is before the Court following the district court's dismissal for failure to state a claim. Accordingly, the facts are taken from appellants' complaint and various affidavits and statements made by appellees.

pated in the city and county caucus procedures and were elected as delegates to attend the Second Congressional District Convention called to directly elect delegates to the National Convention. At the Second Congressional District Convention, however, their ability to pursue their candidacies and to vote was abruptly terminated. The LaRouche caucus composed 24.58% of those attending, and under the Delegate Selection Rules, the LaRouche delegates were entitled to vote for and elect, from their caucus, one LaRouche delegate to attend the Democratic National Convention. Stating that he had just been handed the Fowler letter directive by the Democratic Party's attorney at the Convention, Second Congressional District Democratic Chair Kenneth Geroe, cited the Fowler letter directive and hastily passed "temporary rules" to disband the LaRouche caucus, declaring it "non-viable." He stated that the delegates pledged to LaRouche could vote and participate in the caucus proceedings if they changed their votes to support Bill Clinton. Timely challenges to this procedure were ignored by both the Virginia Democratic Party and the Rules and Bylaws Committees of the National Democratic Party.

Virginia is a covered jurisdiction and the Virginia Democratic Party appellees precleared their Delegate Selection Plan for the National Convention with the Attorney General. The temporary rules employed at the Second Congressional District Caucus, the Fowler letter directive, and the other procedures used to disenfranchise LaRouche delegates were not precleared.

In Arizona, state law established a Presidential preference primary in which Democratic voters could express their preference for a candidate for President. Arizona Rev. Stat. §16-241. The Arizona statute also required that each delegate to the convention use his or her best efforts to reflect the choices of Democratic voters at the Democratic Party National Convention. Arizona Rev. Stat. §16-243. LaRouche was qualified by Arizona for the state's Presidential primary ballot and Arizona precleared its proposed primary election with the Attorney General. Citing the Fowler letter directive, the Arizona Democratic Party defendants successfully sued in the Superior Court of Maricopa County to cancel the Democratic Primary. A Democratic Party-financed primary, which excluded LaRouche's candidacy, was held instead of the state primary election. Appellant Maria Elena Leyva-Milton is a registered Democratic voter of Hispanic descent who wished to vote for LaRouche. She was disenfranchised by this action. The cancellation of the Arizona Democratic Primary and the substituted Democratic Party run primary elections were not precleared.

Texas held a Presidential preference primary followed by caucus procedures in order to elect delegates to the Texas State Democratic Convention which would, in turn, elect delegates to the Democratic National Convention. Texas Election Code §191.001-191.032. LaRouche received 28,258 votes in the Texas Democratic Party primary. Appellants Joel Dejean, a Democratic voter of Haitian descent and Eloi Morales, a Democratic voter of Hispanic descent, were both elected as senate district caucus delegates, pledged to LaRouche, from precinct caucuses. Dejean was elected as a delegate from his senate district caucus to attend the State Convention.

The Virginia Democratic State Convention, June 1996. The Virginia Democratic leadership dissolved a Congressional District Caucus which had enough Democratic voters pledged to LaRouche to elect a delegate to the National Convention.

Citing the Fowler letter, Texas Democratic Appellees denied Morales and other LaRouche delegates elected from precinct caucuses credentials to attend the 17th Senatorial District Caucus. At the State Convention, the same Fowler letter directive was cited to deny credentials to Dejean and other LaRouche delegates who had been duly elected as State Convention delegates from the 6th Senatorial District. As a result of this action, appellants Morales and Dejean and others similarly situated were stripped of the party office to which they had been elected and other Democrats, who had not been elected, filled their seats. The LaRouche Democrats were denied the opportunity to vote for delegates to the National Convention and their own right to be candidates

for open National Convention delegate slots. The Texas Appellees did not preclear the changes in voting procedures and candidacy criteria.

Louisiana, Virginia, Texas, and Arizona each provide the Democratic Party Presidential nominee with a preferred place on their general election ballots. See La. Rev. Stat. §§18:465, :1254,:1257; Va. Code §§24.2-101, -542,-543, Tex. Elec. Code §§52.091, 192.031; Ariz. Rev. Stat. §§16-243.

The Fowler letter directive cited Article VI of the Call to the Democratic National Convention and Rule llK of the 1996 Delegate Selection Rules vesting the Chairman of the Democratic Party with the ability to declare that Presidential candidates are not "bona fide" Democrats. Fowler's orders to state party organizations were directly contrary to other Party rules, most significantly the Party's 1996 Delegate Selection Rule respecting an "open party" which states:

> 4. An Open Party.
>
> (1) race, sex, age, color, creed, national origin, religion, ethnic identity, sexual orientation, economic status, philosophical persuasion, or physical disability (hereinafter collectively referred to as "status").
>
> (2) No test for membership in, nor any oath of loyalty to, the Democratic Party in any state should be required or used which has the effect of requiring prospective or current members of the Democratic Party to acquiesce in, condone or support discrimination based on "status."

Neither the Fowler letter directive nor the party provisions upon which it relied were precleared, despite the fact that they were promulgated with the clear intent to change voting procedures and candidate qualifications in covered jurisdictions. State parties were threatened that their delegations would not be seated at the National Convention, however, unless the directives were followed. Far from being able to participate in any process at the Democratic National Convention itself,[4] the enforcement of Fowler's directives prevented LaRouche delegates from even reaching the temporary roll of the convention and the credentials committee. In addition to violating the provisions of Section 5, the actions of the Democratic Party appellees contravened 42 U.S.C. 1971(b) which states:

> (b). Intimidation, threats, or coercion. No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives . . . at any general, special or primary election held solely or in part for the purpose of selecting or electing any such candidate.

In August 1996, Appellants brought suit in the United States District Court for the District of Columbia seeking declaratory and injunctive relief and damages and alleging violation of Section 5 of the Voting Rights Act, other provisions of the Act, Constitutional Rights and 28 U.S.C. 1983. The District Court denied the application for a three-judge court and dismissed the entire complaint with prejudice as to all defendants pursuant to Fed. R. Civ. P. 12(b)(6). The D.C. Circuit Court of Appeals sustained the dismissal of appellants' 1983 and Constitutional claims, but reversed the dismissal of the Section 5 claim, remanding that claim to a three-judge District Court for further proceedings in light of this Court's decision in *Morse*.

When the three-judge Court convened, the DNC and Fowler argued that the national party was not a "covered jurisdiction" subject to Section 5 of the Voting Rights Act on renewed motions to dismiss. The state parties argued that they were only implementing mandatory national party rules. All of the Democratic appellees asserted that if Section 5 applies to voting and candidacy criteria for the offices of delegate to the Democratic National Convention and President of the United States, Section 5 is unconstitutional, because it invades the Party's absolute right to "define itself." The motions to dismiss were granted, without discovery or further proceedings.

The Questions Presented Are Substantial

The Voting Rights Act of 1965 was the culmination of a century-long struggle, dating from the Emancipation Proclamation, to secure the right to vote for black Americans and other minorities. It was a century in which the Democratic Party, the Party which had promoted slavery, secession, and segregation completely dominated political processes in the South and connived, with seemingly endless ingenuity, to insure that the voting rights of newly enfranchised blacks were stillborn. No sooner were blacks granted the right to participate in political processes and vote after the Civil War than they were removed from the rolls and once again disenfranchised by a series of machinations in the various states.[5] Thereafter, massive resistance survived Constitutional

4. The Circuit Court of Appeals erroneously assumed in its decision that LaRouche and his delegates had avenues for relief open to them in the party or could somehow to take this fight to the convention floor. (J.S. App. p. 60a). Nothing could be further from the case.

5. Professor C. Van Woodward, one of America's leading Southern historians, testified in graphic detail in the House hearings concerning the 1982 extensions of Section 5, about how quickly the gains made in voting rights "over a century ago were wiped out, as if overnight." House Hearings p. 2027, cited in 1982 U.S. Code Cong. & Admin. News at p. 189.

amendments, decisions of this Court enforcing the Constitution, Presidential executive orders, and the Civil Rights Acts of 1957 and 1964. The main weapons of war against the right to vote and the right to have votes counted did not consist, however, of the artifices and sophistries employed by racism's legal apologists. Citizens who sought to participate in the political process by registering to vote or running for office were lynched, murdered, beaten, jailed, extorted, and endlessly intimidated. Dr. Martin Luther King was demonized and vilified through a government sponsored defamation and harassment campaign. His case was not unique.

In response to this Court's efforts to enforce the 14th and 15th Amendments and the Civil Rights Acts, the Democratic Party privatized its nominating processes. Since the 14th and 15th Amendments are triggered, on literal reading, by the actions of states, the Democratic strategy was to remove the state from a conspicuous role in the electoral process—thereby placing its discriminatory practices beyond the Constitution's purview. The White Primary cases document how the Democratic Party used the same arguments and procedures *which it now employs and argues in this case,* to deny blacks the right to vote for decades in the South. Then, as now, it was argued that since the Democratic nominating processes are private and since Democrats have a right to define their membership and freely associate without external interference, violations of the voting rights of party members voting in party elections are without legal remedy, since the law does not reach "purely private" or "party stages" of the electoral process. When this Court first heard this argument it sustained the Democratic Party's "privatization" scheme against constitutional challenge in *Grovey v. Townsend,* 295 U.S. 45 (1935). While *Grovey* was firmly repudiated years later in *Smith v. Allright* 321 U.S. 649 (1944) and *Terry v. Adams,* 345 U.S. 461 (1953), these decisions were only met with new and violent obstructions of the right to vote and to have votes counted.

The district court's decision explicitly resuscitates the discredited reasoning of *Grovey*. In so doing, it ignores the text and history of the Voting Rights Act, long-standing regulations by the Attorney General implementing the Act, this Court's holding in *Morse,* and other applicable precedents. It also ignores the reality of the present Democratic Party nominating process. This is not a privatized or internal process. Presidential preference primaries are held at public expense in most states of the union, resulting in the selection of the two candidates, Democratic and Republican, who will appear at the top of state ballots nationally. The Democratic Party receives the maximum federal subsidy for its convention, a subsidy in the millions of dollars as adjusted by the Consumer Price Index. 26 U.S.C. 9008, 11 C.F.R. 9008.1 *et seq*. In *Morse* this Court held that Section 5 applies to all entities having "power over any aspect of the electoral process within designated jurisdictions." *Morse,* 517 U.S. at 204-205. If the Democratic Party's Presidential nominating process is taken out of this coverage, as the district court would have it, it is difficult to fathom how "*Morse's* delegation theory" has any reach at all.

The district court's decision opens "a loophole in the statute the size of a mountain." *Morse,* 517 U.S. at 235. If the district court's sanctioning of Democratic appellees' claims to "private club" status holds, it invests the Democratic National Committee with the power to coerce state Democratic party organizations into violating state law and the Voting Rights Act (42 U.S.C. 1971(b) and 1973(c)) without anyone being held accountable for these violations. The state party elections at issue were being conducted under both state law and, in the case of Arizona and Virginia, under procedures which had been precleared. Under threat of having their delegations to the Democratic National Convention disqualified, the state Democratic parties of Virginia, Louisiana, Texas and Arizona abruptly instituted new procedures which had not been precleared. In the case of Louisiana, the DNC's coercion resulted in violation of the state law requiring that delegates be apportioned according to the votes cast in the primary election.

Accordingly, this Court should summarily reverse, or, alternatively, note probable jurisdiction.

I. §5 of the Voting Rights Act clearly applies to Democratic Party Presidential nominating activities

Justice Stevens' opinion announcing the judgment of the Court in *Morse* and Justice Breyer's concurring opinion, both concentrate on the history of discriminatory party practices, from the White Primary Cases to the ouster of the Mississippi Freedom Democrats from the 1964 Democratic National Convention, in finding that Section 5 was intended to cover Party nominating procedures. Filling out these historical references brings the long and infamous history of the "private club" justification for discriminatory practices into sharp focus.

The White Primary Cases

By 1930, Democratic Party rules barring blacks from participation in Democratic Party primaries were in force in eleven Southern states. The Louisiana rule was typical: "no one shall be permitted to vote at said primary election except electors of the white race." Weeks, "The White Primary," *Mississippi Law Journal,* December 1935. The South Carolina Democratic Party rule was unique:

> Every negro applying for membership in a Democratic Party club, or offering to vote in a primary, must produce a written statement of ten reputable white men, who shall swear that they know of their own knowledge that the applicant or voter voted for General Hampton

in 1876, and has voted the Democratic ticket continuously since.

Id. at 141.[6]

Texas, unlike other Southern states, put its white primary policy officially on the statute books, resulting in this Court's ruling in *Nixon v. Herndon,* that the Texas statute clearly violated the 14th Amendment. 273 U.S. 536 (1926). Texas responded within days by delegating the power to run primaries to the Democratic party executive committee, which quickly passed a resolution stating that only whites would be allowed to participate. This Court, by a 5-4 vote, struck down the new scheme also, but only because the rule did not originate from the Democratic Party State Convention. *Nixon v. Condon,* 286 U.S. 73, 88-89 (1932). Justice McReynolds' dissent in *Nixon v. Condon,* asserted a political party's absolute right to exclude:

> Political parties are fruits of voluntary action. Where there is no unlawful purpose, citizens may create them at will and limit their membership as seems wise. The state may not interfere. White men may organize. Blacks may do likewise. A woman's party may exclude males. This much is essential to free government.

Nixon v. Condon, 286 U.S. at 104.

Texas Democrats proceeded to completely privatize their primary elections. Elections were paid for and administered by the Party, the ballots were provided and counted by the Party, and the resolution limiting participation to whites had been passed by the Texas Democratic Party Convention. The Texas state courts ruled that the First Amendment to the Texas Constitution provided the Democratic Party with an absolute constitutional freedom to associate and define its own membership free from state interference. Presented with these new circumstances, the *Grovey* Court ruled that there was no remedy for the black voter denied a ballot by the Texas Democratic Party because there was no "state action." *Grovey,* 295 U.S. 50-55.[7]

Smith v. Allright, 321 U.S. 649 (1944) presented exactly the same complaint by another black citizen of Harris County, Texas nine years later. This time, however, the Court chose to deal with the reality of the discriminatory scheme rather than the abstract and false legal constructs of its apologists. In repudiating *Grovey,* this Court held:

> The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied . . . the privilege of membership in a political party may be, as this Court said in *Grovey v. Townsend* . . . no concern of a state. *But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state.*

321 U.S. at 664-665 (internal citations omitted, emphasis supplied).

In response to *Smith v. Allright,* the Governor of South Carolina convened the state legislature in special session and all state laws governing primaries were repealed. When the NAACP challenged the all-white private Democratic primaries in Court, South Carolina Democrats argued that their political party was a mere private aggregation of individuals, and that blacks had no more right to vote in the Democratic Party primary in South Carolina than to vote in the "election of officers of the Forest Lake Country Club or the Colonial Dames of America." *Rice v. Elmore,* 165 F.2d 387, 392 & F.N. 1 (4th Cir. 1947). Again, the federal court saw through the Democrats' scheme:

> The fundamental error in defendant's position consists in the premise that a political party is a mere private aggregation of individuals, like a country club, and the primary is a mere piece of party machinery . . . The party may, indeed, have been a mere private aggregation of individuals in the early days of the Republic, but with the passage of years political parties have become in effect state institutions, governmental agencies through which sovereign power is exercised by the people . . . [t]he likelihood of a candidate succeeding in an election without a party nomination is practically negligible . . . *Those who control the Democratic Party as well as the state government cannot by placing the first steps under the officials of the party rather than the state, absolve such officials from the limitations which the federal Constitution imposes.*

Rice v. Elmore, 165 F. 2d at 389, 393-393 (Emphasis supplied).

Rice only resulted in a new South Carolina Democratic Party scheme. Control of the primaries remained in clubs which excluded blacks from membership but blacks could vote in primaries if they swore an oath supporting segregation

---

6. General Hampton was the Governor of South Carolina and a leader of the "red shirts," the South Carolina version of the Klan. Wellman, M., *Giant in Grey,* New York, Scribner, 1949.

7. At oral argument in *Morse,* Justice Scalia expressed the view that if a political party wanted to hold a primary election restricted to party members and limit party membership to white voters only, they would be entitled to do so, so long as the Party paid for the primary. (Transcript *Morse v. Republican Party,* No. 94-203 p. 55).

and opposing the Federal Fair Employment Practices Act—President Franklin Roosevelt's early effort to end segregation. In Court, the Party argued that the new rules were a protected exercise and a non-discriminatory effort to "define" the party and its membership. When South Carolina sought reconsideration of *Rice* based upon its new scheme, the Fourth Circuit again dismissed these arguments:

> the devices adopted showed plainly the unconstitutional purpose for which they were designed; *but even if they had appeared innocent, they should be enjoined if their purpose or effect* is to discriminate against voters on account of race . . . Courts of equity are neither blind nor impotent . . . and when it appears that discrimination is being practiced through rules of a party which controls the primary elections, these must be enjoined much as any other practice which threatens to corrupt elections or divert them from their constitutional purpose.

Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949) (Emphasis supplied).

Terry v. Adams, 345 U.S. 461 (1953) was the last of the White Primary Cases. Like many counties in the South, blacks were in the majority in Fort Bend, Texas following Emancipation.[8] To address this situation, the Jaybird association was founded to "promote good government" and to hold all-white private pre-primary elections prior to the Democratic Party primary sponsored by the State of Texas in which blacks participated. Jaybird endorsed candidates entered the public primaries and almost always won those elections and the subsequent general election. Three justices of this Court found the Jaybird scheme unconstitutional based on simple reality:

> The only election that has counted in this Texas County for more than fifty years has been that held by the Jaybirds from which Negroes were excluded. . . . *It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage. The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and who shall govern in this County. The effect of the whole procedure, Jaybird primary plus Democratic Party primary plus general election, is to do precisely that which the Fifteenth Amendment forbids—strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens.*

Terry v. Adams, 345 U.S. 461 at 469. (Emphasis supplied).

Three other Justices concurred, finding that the Jaybird Association was a subterfuge for the activities of the Democratic Party and that under *Smith v. Allright,* the Democratic Party and any part of "the machinery for choosing officials" were subject to the Fifteenth Amendment:

> Quite evidently the Jaybird Democratic Association operates as an auxiliary of the local Democratic Party organization, selecting its nominees and using its machinery for carrying out an admitted design of *destroying the weight and effect of Negro ballots in Fort Bend County*. To be sure, the Democratic Primary and the general election are nominally open to the colored elector. But his must be an empty vote cast after the real decisions are made. And because the Jaybird endorsed nominee meets no opposition in the Democratic primary, the Negro minority's vote is nullified at the sole stage of the local political process where the bargaining and interplay of rival political forces would make it count.

Id. at 483-484.

The Events of 1964 and 1965

Despite the Civil Rights Acts of 1957 and 1964, black voter participation did not substantively increase. In Dallas County, Alabama, of which Selma is the county seat, there were 29,500 voting age individuals in 1961 of which 14,500 persons were white and 15,000 were black. 156 blacks had succeeded in both registering to vote and remaining on the rolls. The Justice Department's voting discrimination suit languished for four years in the federal courts and even when it was won, discrimination, in the form of extensive and complicated literacy tests, closing of registrar's offices, and slow processing of applications continued unabated. In Mississippi, despite years of registration efforts, the "Freedom Summer" voter registration campaign of 1964, and national outrage at the murder of three students attempting to register voters, registration remained at only 6.4%. H. R. Rep. 439, 89th Congress First Session, reprinted in 1965 U.S. Code Cong. & Admin. News pp. 2441-2442.

During the summer of 1964, the Mississippi Freedom Democratic Party ran a parallel election for delegates to the National Convention in which blacks, who wished to affiliate with the Democratic Party, could participate. When the Freedom Democrats arrived at the Convention, their every move was followed and reported by the FBI, their phones were tapped and, after contentious hearings, they were ousted from the floor of the Convention.[9] In Selma, in early 1965, Dr. King sought to overcome the resistance and inertia of the legal process by direct action. "Bloody Sunday," the March 7th

8. In the registration of voters from May to September 1867, there were admitted to registry 153 white voters and 1334 colored voters in the county. *Terry v. Adams,* 90 F. Supp. 595, 597 (S.D. Texas 1950)

9. O'Reilly, Kenneth, *Racial Matters,* pp. 186-190, the Free Press, New York, 1989.

Civil rights leader Amelia Boynton, a heroine of "Bloody Sunday," March 7, 1965, in Selma, Alabama, is greeted by President Lyndon Johnson at the White House, following the signing of the Voting Rights Act in 1965. (Today, Amelia Boynton Robinson is the vice chairman of the Schiller Institute and a friend and collaborator of Lyndon H. LaRouche, Jr.)

police assault on demonstrators seeking to dramatize the denial of the right to vote, left 18 individuals hospitalized with serious injuries. Subsequently, the Reverend James L. Reeb who had come to Selma to protest, was set upon and beaten to death. These events formed the backdrop for President Johnson's extraordinary appearance, one week after Bloody Sunday, before a joint session of Congress to introduce the Voting Rights Act. He spoke of Selma as a turning point in "man's unending search for freedom":

> At times history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Ala. There, long-suffering men and women peacefully protested the denial of their rights as Americans. Many were brutally assaulted. One good man—a man of God—was killed. . . . Our mission is at once the oldest and most basic of this country: to right wrong, to do justice, to serve man. . . . Many of the issues of civil rights are very complex and difficult. But about this there can and should be no argument. Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of this right. There is no duty which weighs more heavily upon us than the duty we have to insure that right. . . . Experience has clearly shown that the existing process of law cannot overcome systematic and ingenious discrimination. No law that we now have on the books—and I have helped to put three of them there—can insure the right to vote when local officials are determined to deny it. . . . This bill will strike down restrictions to voting in all elections—federal, state and local—which have been used to deny Negroes the right to vote . . . this legislation will insure that properly registered individuals are not prohibited from voting.

House Document No. 117, 89th Congress, 1st Session.

As noted in *Morse,* in order to "avoid a dispute" about Congressional intent, Rep. Jonathan Bingham requested that the bill be clarified to insure that voting for party offices was specifically covered. *Morse,* 517 U.S. at 208,236. He cited the White Primary Cases and:

> The events of 1964. . . . The State of Mississippi selected its Democratic National Convention delegates through a process that started at the precinct level meeting. Negroes were barred from these meetings. Alabama required those who wished to run in the Democratic Primary to secure the necessary forms by applying to party officials. . . . In State after State party officials either control, materially influence, or directly affect the process by which a candidate for nomination or election can achieve his goal.

Hearings Before the Committee on the Judiciary, H.R. 6400, Testimony March 25, 1965 pp. 456-457.

According to Representative Bingham, the method chosen of reaching the problem was to add to the bill's definition of vote:

> the concept that voting for party office was covered as well as voting for public office. The Judiciary Committee report made clear that the intention was to include

within the protections of the bill election of such party officers as delegates to national conventions.

Congressional Record July 9, 1965 p. 16273.

The Judiciary Committee Report Representative Bingham references states:

> Clause 1 of this subsection contains a definition of the term "vote" for purposes of all sections of this act. The definition makes it clear that the act extends to all elections—federal, state, local, primary, special or general—and to all actions connected with registration, voting or having a ballot counted in such elections. The definition also states that the act applies to elections for "party offices."

H.R. No 439, 1965 U.S. Code Cong. & Admin. News p. 2464.

These definitions are presently set forth at 42 U.S.C. 1973*l*(c)(1) which states, in pertinent part:

> The terms "vote" or "voting" shall include *all action to make a vote effective in any primary, special or general election,* including, but not limited to . . . casting a ballot and having such ballot counted properly and included in the appropriate totals cast *with respect to candidates for public or party office*.

Under 42 U.S.C. 1973(c) §5 preclearance is required for:

> any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting.

The Attorney General's Regulations for administering §5 also mandate that the types of voting changes at issue in this case, involving who may be candidates for delegate or President of the United States and how votes will be counted at elections for these offices and the effect of those votes, must be precleared by the Attorney General:

> A change affecting voting effected by a political party is subject to the preclearance requirement a) if the change relates to a public electoral function of the party and b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or subunit subject to the preclearance requirement of Section 5. For example, changes with respect to recruitment of party members, the conduct of political campaigns and the drafting of party platforms are not subject to the preclearance requirement. Changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions or party officials are chosen are subject to the preclearance requirement of Section 5.

28 C.F.R. §51.7

II. Neither the source of the change in voting procedure nor the First Amendment absolves the Democratic Party of its obligation to comply with the Voting Rights Act

Both *Morse* and this Court's decision in *Presley v. Etowah,* 502 U.S. 491, 502-503 (1992) make very clear that each of the changes in delegate election and candidate criteria in this case require §5 preclearance. Each involves changes in delegate and Presidential candidacy requirements and qualifications, changes involving the manner of voting, and changes involving the composition of the electorate which may vote. *Morse,* 517 U.S. pp. 228-229 & F.N. 38 and pp. 238-239. Arizona's change of its primary election procedure required preclearance irrespective of whether it bore the imprimatur of a state court decision. *NAACP v. Hampton County Election Comm'n,* 470 U.S. 166, 178 (1985). See also *Allen v. State Board of Elections,* 393 U.S. 544, 569-570 (1969), Attorney General's Regulations, 28 C.F.R. §51.12 and this Court's summary affirmance in *Grenada, Miss. v. Hubbard,* 67 USLW 3374 (1998).

Lopez v. Monterey County, 119 S.Ct. 693 (1999) also makes very clear that where, as here, the Democratic National Committee dictates to state parties in covered jurisdictions what rules they must follow in national convention delegate and Presidential nominating elections in covered jurisdictions, either the Democratic National Committee or the state parties must preclear the changes ordered.

If the district court had addressed the straightforward question before it, and determined whether these changes in voting procedures required preclearance, it would have had to answer this question in the affirmative. Under Section 5, the Democratic Party would then be required to prove that these rules changes did not have the purpose and would not have the effect of discriminating against minority voters, making this case to either the Attorney General or the District of Columbia District Court. Rather than addressing this issue squarely, however, the district court, at the behest of the Democratic Party undertook to re-examine the constitutionality of the Voting Rights Act based upon the Party's *conclusory* claim that the state parties' associational privileges would be violated by the application of Section 5. The district court concluded that to read the Act as applying to the Presidential nominating and delegate election procedures at issue in this case, would render it unconstitutional and therefore, the state parties were immune from preclearing these changes. (J.S. App. pp. 12a-16a).

In reaching this decision, the district court concluded that the framework of the White Primary Cases did not apply because appellants' constitutional claims were dismissed. (J.S. App. p.15a)

This reasoning is plainly erroneous. See *Morse,* 517 U.S. at pp. 192-193 and 204-205. The Voting Rights Act covers all changes in voting procedures, no matter how minor or neutral on their face. As explained by former Solicitor General and constitutional scholar Archibald Cox:

> Congress has the power to outlaw all voting arrangements that result in a denial or abridgement of the right to vote *even though not all such arrangements are unconstitutional, because this is a means of preventing their use as engines of purposive and therefore unconstitutional racial discrimination.*

1982 U.S. Cong. & Admin. News p. 218.

The reason for placing the burden of proof on those performing functions "integral to the electoral process" in covered jurisdictions was to end "evasion" once and for all and to "shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach,* 383 U.S. at 328, *Morse,* 517 U.S. at 213.

The Democratic Party appellees have never demonstrated that submitting these rules and procedures for preclearance would excessively burden their associational rights and the court below never asked them to. In fact, the Virginia Democrats precleared the original rules for their elections prior to the DNC's imposition of the changed requirements and political parties have, on numerous occasions in the past, precleared electoral rules with the Attorney General. *Morse,* 517 U.S. at 200 & F.N. 18.

The changes in voting and candidacy procedures in this case are neither minor nor neutral nor are they in the nature of protected "party rules" as the district court opinion erroneously states. (J.S. App. pp. 9a, 14a). The Attorney General's Regulations 28 C.F.R. §51.7 distinguish the party candidacy and voting requirements at issue here which require preclearance from such matters as party recruitment and party platforms which do not. See also *Smith v. Allright,* 321 U.S. at 664-655.

In holding that the party's claimed right to define itself trumps the Voting Rights Act, the district court effectively nullifies the holdings in the White Primary Cases. The district court's decision does not explain, nor could it explain the difference between the Democratic Party's legal claim to be able to nominate its candidate in a "privatized" National Convention exempt from the results of votes cast by Democratic voters who cast their votes pursuant to state law, and the "private club" processes of the South Carolina Democratic Party or the Jaybird Association in Texas. Under the district court's decision, the "real votes" can once again be counted in the "private club," rendering meaningless the votes which were cast in publicly sponsored primaries or convention processes. There is also no meaningful distinction between the Democratic Party's current claim to an absolute right to exclude, to cancel the votes of minority voters and annul minority candidacies that the party establishment views as subversive, and the "special qualifications" the South Carolina Democratic Party formerly imposed on minority candidates and voters. The expressed purpose of the Jaybird Club was "good government," which in the view of its members meant "all white" government. The only means to preserve this viewpoint was to exclude blacks from effective participation in Fort Bend County's electoral process—preventing any candidate, white or black, from being elected in Fort Bend County who opposed discrimination based on race.

Under traditional First Amendment analysis the Democratic Party's claim and the district court's decision fare no better. The district court made no effort to balance the First Amendment right claimed by the Party against the "state interest" extant in the Voting Rights Act. If this balancing is undertaken, it is immediately apparent that the substantial state interest implicated in the Voting Rights Act is distinguishable from the state interests advanced in the First Amendment associational cases upon which the district court and the Democratic Party rely. See *Democratic Party of U.S. v. Wisconsin,* 450 U.S. 125-126 (1981), *Cousins v. Wigoda,* 419 U.S. 477, 491 (1975), *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 213-223 (1986). In sustaining the Voting Rights Act against a constitutional challenge based upon intrusion of the rights of the states under the Constitution, this Court held that the extraordinary significance of the Act trumped important concerns for Federalism. See *Lopez v. Monterey County,* 119 S.Ct. 693 at 703. The district court's discussion of the Act as only a statute of "some importance" in applying the First Amendment's balancing test, clearly fails to appreciate both the history of the Act and this Court's holdings. (J.S. App. p.14a)

The district court also made no meaningful attempt to balance the First Amendment Rights of the minority appellants who were stripped of party office by the Democratic Party, denied their rights of candidacy and denied the right to vote and to have those votes effectively counted, against the associational claims of the Democratic Party. The absolute First Amendment claim made by the party and sustained by the District Court:

> fails when the interests of "the party" (as defined by the party leadership) and the interests of its "adherents" diverge. In such a case, interference with the freedom of a party might be necessary to protect the freedom of its adherents. Moreover, the Court has held that "the right to associate for expressive purposes is not . . . absolute." Infringement on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associative freedom.

Note, Harvard Law Review Vol. 110:135, 1996, pp. 356-366, discussing *Morse*.

This Court has repeatedly noted that the rights of voters and the rights of candidates do not lend themselves to neat separation. *Bullock v. Carter,* 405 U.S. 134 (1972); *Anderson v. Celebrezze,* 460 U.S. 780, 787 (1987). Because candidacy restrictions have the "potential to undermine the effectiveness of voters who wish to elect particular candidates, they are required to be precleared." *Allen v. State Board of Elections,* 393 U.S. at 570. In this case, that potential was realized. It is noteworthy that the modern Democratic Party, which aspires to a centrist platform which some have characterized as little different than the Republican Party and which functions as an established national institution and receives massive public funding, has few of the qualities of selectivity, intimacy, privacy, or small size characteristic of a genuinely private association. It also lacks the clearly defined ideological and political platforms which this Court has found to implicate the highest levels of concern for freedom of association and freedom of speech. See *Board of Directors of Rotary International v. Rotary Club of Duarte,* 481 U.S. 537 (1987). See also, *Democratic Party of United States v. Wisconsin,* 450 U.S. 107, 131-133; Tribe, American Constitutional Law 1988 Edition, §13-22, p. 1115; 1996 Democratic Party Delegate Selection Rule 4. None of the precedents relied upon by the appellees and the district court support the "absolute" associational privilege for the Democratic Party set forth in the district court's opinion. Each reserves the ability of the courts to intervene when the Party acts in a discriminatory or illegal fashion. See, e.g. *Tashjian v. Republican Party,* 479 U.S. at 224 & F.N. 12b, *Cousins v. Wigoda,* 419 U.S. at 477. Rotunda, "Constitutional and Statutory Restrictions on Political Parties in the Wake of *Cousins v. Wigoda,*" *Texas Law Review,* Vol. 58:873 pp. 935, 945-951 (1975).

In conducting its balancing test, the district court also ignored the deference which is due to the Attorney General's Regulations which themselves balance political party associational claims against the requirements of the Voting Rights Act. *Lopez,* 119 S. Ct. 693 at 702. Under those Regulations the voting changes at issue in this case are required to be precleared.

Conclusion

The decision of the district court represents a substantial departure from well settled precedent considering the scope of §5 of the Voting Rights Act. Accordingly, this Court should summarily reverse or note probable jurisdiction.