No. 14-803

IN THE

Supreme Court of the United States

RUTHELLE FRANK, *et al.*,
Petitioners,
v.
SCOTT WALKER, *et al.*,
Respondents,
-and-
LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC) OF WISCONSIN, *et al.*,
Petitioners,
v.
THOMAS BARLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CIVIL RIGHTS CLINIC AT HOWARD UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ADERSON BELLEGARDE FRANCOIS
Counsel of Record
Associate Professor of Law &
Supervising Attorney
Civil Rights Clinic
HOWARD UNIVERSITY
SCHOOL OF LAW
2900 Van Ness Street, N.W.
Washington, DC 20008
(202) 806-8065
afrancois@law.howard.edu

February 9, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATEMENT OF INTEREST

Amicus Curiae, the Civil Rights Clinic at Howard University School of Law, submits this brief in support of the petitioners' request for a writ of certiorari in order to respectfully urge this Honorable Court to hold that Wisconsin's Act 23 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Section 2 of the Voting Rights Act of 1965.[1]

Since its founding nearly one hundred and fifty years ago, Howard University School of Law has trained lawyers to be public servants and social engineers and has placed the defense of human dignity at the heart of its educational practice. In pursuit of that mission, the Civil Rights Clinic engages in trial and appellate litigation in the service of social justice, economic fairness, and political equality. Few rights are as central to social justice, economic fairness, and political equality as a citizen's ability to meaningfully participate in the political process without undue interference from the state.

The direct questions petitioners have submitted to the Court for review are whether Wisconsin's Act 23 violates both the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because the law illegitimately burdens the voting rights of hundreds of thousands of the state's voters, and Section 2 of the Voting Rights Act because it

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. Counsel of Record for all parties received notice of amicus curiae's intent to file this brief at least ten days prior to the due date of the brief. The parties have consented to amicus briefs.

disproportionately abridges the voting rights of African American and Latino voters as compared to White voters. To be sure, these two questions, taken separately or considered together, hold enormous significance not just for large numbers of Wisconsin citizens, but for all Americans. How (and when) the Court resolves these questions will in no small part determine whether meaningful access to the ballot box will be the privilege of a favored class or the birthright of all Americans. However, underlying these central questions is also the equally fundamental issue of the proper role of the judiciary in general, and this Court in particular, in defending voting rights.

The two overriding lessons to be learned from the Court's own voting rights jurisprudence come to these: first, from the adoption of the 1787 Constitution to the present day, jurisdictions have never lacked for schemes that appear neutral and benign on their face, but are actually pernicious and effectively discriminatory in denying voting rights to segments of the population who are deemed unworthy of participating in the political process; and second, since ratification of the Fifteenth Amendment in 1870, there has never been a moment in American history – not one – when federal judicial supervision, intervention, and enforcement was not necessary to guarantee full and meaningful voting rights for African-Americans, Latinos and other politically disenfranchised groups.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Between ratification of the Fifteenth Amendment in 1870 and passage of the Voting Rights Act of 1965, the struggle for equal voting rights for African-Americans in America and other minorities is largely a story of

terror, violence, and murder. Whether one speaks of the Colfax Massacre on April 13, 1873, when a white Democrat mob burned down the courthouse in Grant Parrish, Louisiana and murdered between sixty and seventy free Blacks who had gathered to uphold the election of Republican local representatives, or Bloody Sunday on March 7, 1965, when horse-mounted state troopers charged into a peaceful assembly of civil rights workers marching from Selma to Montgomery, Alabama to demand equal voting rights, it is difficult to recount the narrative of voting rights without speaking of rope, fire, mobs and death. Yet, while it is important to tell and retell that story, it is equally important to remember that the most effective means by which African-Americans and other minorities were (and continue to be) denied access to the ballot box have been through measures that appeared neutral and benign on their face, but were racially discriminatory in purpose and effect. Schemes and practices such as literacy tests, grandfather and good moral character clauses, poll taxes, and residency requirements were at one time or another adopted and enforced as necessary to defend the legitimate and intelligent exercise of the political franchise. However, the true purpose and undeniable effect of these allegedly neutral practices was to systematically suppress and deny voting rights to generations of African-Americans and Latinos.

Wisconsin's Act 23 is no different. Behind the Act's neutral language and beneath the seemingly bland pronouncements of its defenders, there hides a neo-voter-suppression scheme whose ultimate effect will be to exclude hundreds of thousands of Wisconsin residents from the ballot box.

If the past narrative of voting rights has been one of exclusion and suppression, it has also been one in which this Court has often served as the last best defender of equal access to the political process. To be sure, there were times when the Court believed itself – not always credibly – to be lacking in the requisite grant of constitutional or statutory power to stop what were attempts by state officials to deny the political franchise to Blacks.[2] But at its best, in the years between Ratification of the Fifteenth Amendment and passage of the Voting Rights Act of 1965, the Court was the one institution that saw through the pretense of neutrality of voter suppression schemes. In those years, the Court learned that as soon as it struck down one method of voter suppression, states would quickly respond with "schemes intended to emasculate constitutional provisions or circumvent [the Court's] constitutional decisions."[3] Wisconsin's Act 23 is a perfect example of how in the modern era states now attempt to emasculate the Fifteenth Amendment and circumvent this Court's constitutional decisions regarding the Voting Rights Act.

---

[2] *See United States v. Reese*, 92 U.S. 214, 218 (1875) (holding that Congress lacked the power under the Fifteenth Amendment to require state election officials to count the ballots of all qualified voters); *United States v. Cruikshank*, 92 U.S. 542 (1876) (finding that the Fourteenth Amendment did not provide Congress the authority to indict a mob of private citizens for the killing of freedmen in the disputed 1872 Louisiana elections); *Giles v. Harris*, 189 U.S. 475 (1903) *and Giles v. Teasley*, 193 U.S. 146 (1904) (upholding good character clauses); *Love v. Griffith*, 266 U.S. 32 (1924) and *Grovey v. Townsend*, 295 U.S. 45, 55 (1935) (declining to outlaw white primaries); *Lassiter v. Northampton Cnty Bd. of Elections*, 360 U.S. 45, 51 (1959) (upholding constitutionality of literacy tests).

[3] *Harrison v. NAACP*, 360 U.S. 167, 182 (1959) (Douglas, J., dissenting).

REASONS FOR GRANTING WRIT

I. BETWEEN RATIFICATION OF THE FIFTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN 1870 AND PASSAGE OF THE VOTING RIGHTS ACT IN 1965, THE MOST EFFECTIVE MEANS BY WHICH BLACKS WERE DELIBERATELY AND SYSTEMATICALLY STRIPPED OF THEIR RIGHT TO VOTE WERE THROUGH FACIALLY NEUTRAL MEASURES WHOSE TRUE PURPOSE AND ACTUAL EFFECT WAS TO EXCLUDE BLACKS FROM MEANINGFUL PARTICIPATION IN THE POLITICAL PROCESS.

With Ratification of the Fifteenth Amendment to the United States Constitution, more than one million Black men became enfranchised to participate in the American Political System.[4] This resulted in Blacks gaining state and federal elected offices, and becoming the majority voting population in formerly Confederate states.[5] In response to this new Black political power, many states, especially in the south, began implementing a series of laws that, like Wisconsin's Act 23, were neutral on their face, but racially discriminatory in their intent and effect.

To be sure, at times some jurisdictions either did not care to disguise their discriminatory intent or were too inept at doing so. *See Bliley v. West*, 42 F.2d 101, 102 (4th Cir. 1930) (requiring Democratic party of Virginia members to be qualified white voters); *Grigsby v.*

---

[4] JOHN LEWIS, WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT (1999).

[5] *Id*.

Harris, 27 F.2d 942, 943 (D. Tex. 1928) (allowing only qualified white voters to participate in primary elections in Texas); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (Alabama statute redefined city boundaries so as to exclude all but five of its Black residents as qualified voters.) However, more often than not, even in the darkest days of the Jim Crow Era, most jurisdictions were careful to disguise their racially discriminatory voter suppression schemes as legitimate neutral practices.

One of the earliest of such practices was the requirement that voters be literate in English in order to register to vote. These literacy tests were seen as early as 1850 in Massachusetts and Connecticut, and soon became widespread across many of the southern states soon after ratification of the Fifteenth Amendment in 1870.[6] At the time, jurisdictions with literacy requirements insisted that illiteracy was an indication of unintelligence and denoted a lack of mental capacity to be an adequate and informed voter.[7] Jurisdictions also maintained that English literacy was "essential for the foreign-born to become properly acquainted with American values and institutions."[8] However, while seemingly neutral on their face, literacy requirements had the pernicious effect of not only blocking the votes of many immigrants, but also disenfranchising large numbers of African Americans and Latinos who were American

---

[6] *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF THE UNITED STATES, at 114-15 (2009).

[7] *Id.* at 115-116.

[8] *Id.*

citizens but not proficient in English.[9] This was particularly true in Southern states where poverty and racial discrimination in public education meant that illiteracy ran rampant.[10] But even when Blacks were literate, literacy tests went far beyond basic reading and writing skills, and were administered in ways specifically designed to preclude Blacks from voting.

For example, Alabama "adopted a qualification requiring not only that an applicant be able to 'read and write' but also that he be able to 'understand and explain any article of the constitution of the United States in the English language.'"[11] In Mississippi, applicants were required to: copy a section of the state constitution as chosen by the registrar; write a "reasonable interpretation" of the section that was copied; and write a "statement setting forth [their] understanding of the duties and obligations of citizenship under a constitutional form of government."[12] In

---

[9] *Id.* at 216.

[10] *See* Burton D. Wechsler, *Black and White Disenfranchisement: Populism, Race, and Class*, 52 Am. U. L. Rev. 23, 30 (2002).

[11] *Davis v. Schnell*, 81 F. Supp. 872, 877 (S.D. Ala.) *aff'd*, 336 U.S. 933 (1949).

[12] Applicants were asked to copy and interpret sections of the state constitution such as article 7 Section 182:

> The power to tax corporations and their property shall never be surrendered or abridged by any contract or grant to which the state or any political subdivision thereof may be a party, except that the Legislature may grant exemption from taxation in the encouragement of manufactures and other new enterprises of public utility extending for a period of not exceeding ten (10) years on each such enterprise hereafter constructed, and may grant exemptions not exceeding ten (10) years on each addition thereto or expansion thereof, and may grant exemptions not exceeding

Louisiana, literacy tests did not even pertain to citizenship, but instead were nothing short of absurd and impossible mind games.[13] One such test contained questions that required one to: "draw a triangle with a blackened circle that overlaps only its left corner;" "spell backwards, forwards;" "print the word vote upside down;" etc.[14] More disturbingly, Louisiana required applicants to complete the tests in under ten minutes, answer every question correctly, and determining if the applicant passed was entirely

---

> ten (10) years on future additions to or expansions of existing manufactures and other enterprises of public utility. The time of each exemption shall commence from the date of completion of the new enterprise, and from the date of completion of each addition or expansion, for which an exemption is granted. When the Legislature grants such exemptions for a period of ten (10) years or less, it shall be done by general laws, which shall distinctly enumerate the classes of manufactures and other new enterprises of public utility, entitled to such exemptions, and shall prescribe the mode and manner in which the right to such exemptions shall be determined. SOURCES: Laws 1961, ch. 9, 1st Extraordinary Session, effective October 16, 1961. NOTE: The 1961 amendment to Section 182 was proposed by Laws 1961, ch. 9, 1st Extraordinary Session, and upon ratification by the electorate on October 3, 1961, was inserted by proclamation of the Secretary of State on October 16, 1961.

See Civil Rights Movement Veterans, Mississippi Voter Registration and Literacy Test 1950's, http://www.crmvet.org/info/ms-littest55.pdf.

[13] Tennessee State Library and Archives, *The State of Louisiana Literacy Test*, http://www.tn.gov/tsla/exhibits/blackhistory/pdfs/Voter%20Test%20LA.pdf.

[14] *Id*.

within the discretion of the registrar administering the test, and was not subject to appeal.[15]

Louisiana's practice of leaving the results of the test to the discretion of registrars and other local election officials was not unique. More often than not, the very point of these tests was to empower election officials with the means to exercise their discretion to disqualify Black voters and still permit Whites with similar results to vote.[16] Thus, in order to solve the problem of poor illiterate Whites, a number of Southern states adopted grandfather clauses in their constitutions, exempting anyone who would have been entitled to vote prior to 1866 – a time period when only White men had the ability to vote – from the literacy test requirement.[17] For example, North Carolina's 1959 Constitution mandated:

> Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language. But no male person who was, on January 1, 1867, or at any time prior thereto, entitled to vote under the laws of any state in the United states wherein he then resided, and no lineal descendant of any such person, shall be denied the right to register and vote at any election in this State by reason of his

---

[15] *See* Jeff Schwartz, CORE Freedom Summer: My Experience in Louisiana, at http://www.crmvet.org/nars/schwartz.htm#core littest.

[16] *See Giles v. Harris*, 189 U.S. at 482 (stating that the plaintiff, along with other large numbers of African Americans, were refused voter registration, while all white men were registered).

[17] *See Guinn v. United States*, 238 U.S. 347, 357 (1915) (quoting the clause in Oklahoma's constitution which allowed for anyone who may have been entitled to vote prior to 1866 to be exempt from any literacy test).

> failure to possess the educational qualifications herein prescribed: Provided, he shall have registered in accordance with the terms of this section prior to December 1, 1908.[18]

These grandfather clauses also exempted those "of good character and who understand the duties and obligations of citizenship under a republican form of government", from being subject to these literacy tests.[19] This put broad discretion in the hands of registrars, and paved the way for some states to require non-White registrants to understand and explain articles of the Federal Constitution before being eligible to register to vote.[20] It was not until this Court and Congress banned the requirement of literacy tests that these practices were eradicated.[21]

Another facially neutral scheme that successfully disenfranchised African American voters was the institution of the poll tax. For instance Texas adopted this practice by placing the following clause in their Constitution:

> 'Every person subject to none of the foregoing disqualifications (Art. 5.01, Election Code) who shall have attained the age of twenty-one (21) years and who shall be a citizen of the United States, and who shall have resided in this State one (1) year next preceding an election, and the

---

[18] *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 47 (1959).

[19] *Giles v. Harris*, 189 U.S. at 475.

[20] Aderson Bellegarde Francois, *To Make Freedom Happen: Shelby County v. Holder, the Supreme Court, and the Creation Myth of American Voting Rights*, 34 N. Ill. U. L. Rev. 529, 550 (2014) (hereinafter *To Make Freedom Happen*).

[21] 42 U.S.C. § 1973 (2006).

> last six (6) months within the county in which he or she offers to vote, shall be deemed a qualified elector, provided that any voter who is subject to pay a poll tax under the laws of this State, shall have paid said tax before offering to vote at any election in this State and holds a receipt showing that said poll tax was paid before the first day of February next preceding such election; ...'[22]

Although the payment of a fee bore no relation to voter qualifications, the practice became widespread among Southern states, effectively precluding thousands of poor Blacks from accessing the ballot box. This practice continued until this Court held that "the right to vote is too precious, too fundamental to be so burdened or conditioned."[23]

The passage of facially neutral state laws that required an extended period of residency in order to vote further restricted voting rights. For example, Section 178 of Alabama's 1903 Constitution mandated that to be eligible to vote, "a person …must have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election, have paid his poll taxes, and have been duly registered as an elector."[24] As with literacy requirements, jurisdictions that imposed minimum residency periods insisted that these measures were necessary because voters "needed time to become identified with the interests

---

[22] *Willis v. Duncan*, 294 S.W.2d 914, 915 (Tex. Civ. App. 1956) *aff'd*, 157 Tex. 316, 302 S.W.2d 627 (1957).

[23] *Harper v. Virginia State Bd. of Elections,* 383 U.S. 663, 670 (1966).

[24] Ala. Const. § 178 (1903); s*ee also Giles v. Harris*, 189 U.S. at 483.

of the community" and because the community's interests would be diluted by temporary residents.[25] In order to establish residency, citizens were required to not only be physically present, but also had to intend to remain in that community for "an indefinite period."[26] This led to large numbers of migrant workers and laborers being systematically denied their right to vote, as the very nature of their work frequently compelled them to move from month to month.

Last but not least, many jurisdictions relied on so-called white primaries. While it would seem at first blush that white primaries were discriminatory on their face, jurisdictions that used them claimed in all seriousness that states were not engaged in racial discrimination because the primaries were run by private volunteer political clubs. *See e.g*. *Nixon v. Condon*, 286 U.S. 73, 82 (1932). Prior to this Court's 1944 decision, declaring the White Primary unconstitutional, this tactic guaranteed that Blacks had virtually no political power in the democratic-controlled South.[27] Once this practice was eliminated, the strength of the African American vote drastically increased. The number of registered African American voters in the South rose by approximately 200,000 to 300,000 between 1948 and 1952.[28]

---

[25] *See* KEYSSAR, at 120.

[26] *Id.* at 118.

[27] *See* KEYSSAR, at 197; s*ee also, Smith v. Allwright*, 321 U.S 649 (1944).

[28] Rachel Suppé, *A Right in Theory but Not in Practice: Voter Discrimination and Trap Laws As Barriers to Exercising A Constitutional Right*, 23 Am. U. J. Gender Soc. Pol'y & L. 107, 113 (2014).

It was always evident from the political context and legislative history of these allegedly neutral measures, that their real purpose was to "let in all whites and ke[ep] out a large part, if not all, of the blacks."[29] And they worked.

Immediately after Emancipation, Blacks "began acting like independent men and women."[30] Former slaves who had lived for generations under the control of white slave masters, who were not permitted to learn to read, who could not control the destiny of their own families, and who certainly could not vote, were beginning to participate in civic life in unprecedented ways. In 1868, 700,000 African Americans, mostly freed slaves, voted for the first time in Ulysses Grant's presidential election.[31] "The Census of 1870 showed that African Americans made up a majority of the population in three of the former Confederate states, Louisiana, Mississippi, and South Carolina. They were over 40% in Alabama, Florida, Georgia, and Virginia; and more than a third in North Carolina. In no former confederate state were African Americans less than a quarter of the population."[32]

This translated into political power. As Professor Foner, the foremost historian on Reconstruction has shown, "[b]y the early 1870s, biracial democratic government, something unknown in American history, was functioning effectively in many parts of the South,

---

[29] *Giles v. Harris*, 189 U.S. at 475.

[30] HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES, 195 (Harper Perennial Modern Classics, 5th ed. 2003).

[31] *Id.* at 194.

[32] *See* Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 89 (2008).

and men only recently released from bondage were exercising genuine political power."[33] Newly freed Black men were elected to state legislatures in former Confederate States. In South Carolina, Blacks were the majority in the lower house.[34] In states such as Louisiana, Mississippi, and South Carolina, Blacks outnumbered Whites in voter registration.[35] In other states, such as Alabama and Georgia, Blacks constituted nearly 40% of registered voters.[36] By 1880, "African Americans were an absolute majority in Louisiana, Mississippi, and South Carolina; and were over 40% of the population in Alabama, Florida, Georgia and Virginia."[37] By 1898, Mississippi had 190,000 Black voters and only 69,000 White voters.[38] At the federal level, in 1869, Hiram Rhoades Revels and Blanche Bruce, two African Americans – one a former slave – were elected to the United States Senate, along with twenty Black Congressmen.[39] By late 1870, all the former Confederate states that had been readmitted to the Union were controlled by the Republican Party, due primarily to the support of Black voters.[40]

This racial progress was not the natural trajectory of emancipation, nor was it coincidental; it was the

---

[33] ERIC FONER, FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION 129 (2006).

[34] ZINN, A People's History at 195

[35] *See* Chin & Wagner, *The Tyranny of the Minority* at 89.

[36] *See id.*; *see also* Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 Harv. L. Rev. 1348, 1357-58 (1993-94).

[37] Chin & Wagner, *The Tyranny of the Minority* at 66.

[38] *Williams v. Mississippi*, 170 U.S. 213, 215 (1898).

[39] ZINN, A People's History at 195.

[40] *See* Francois, *To Make Freedom Happen* at 542.

direct result of the federal government's presence throughout the southern United States.[41] With the removal of federal troops from the South, state legislatures and vigilante groups such as the Ku Klux Klan demonstrated "direct and positive disregard of the 15th Amendment."[42] During floor debates on the Civil Rights Act of 1871, African American representative Robert B. Elliot reminded his fellow legislators that, "the declared purpose [of the Democratic party of the South is] to defeat the ballot with the bullet and other coercive means. . . ."[43] His prediction came to pass. Between 1890 and 1908, ten of the eleven former Confederate states adopted poll taxes, literacy tests, and residency requirements, among other obligations. The enormous political, social and economic progress Blacks had achieved during Reconstruction was wiped away and would not be regained for almost a century.[44]

II. BETWEEN RATIFICATION OF THE FIFTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN 1870 AND PASSAGE OF THE VOTING RIGHTS ACT IN 1965, THIS COURT WAS THE ONE INSTITUTION THAT SAW THROUGH THE PRETENSE OF NEUTRALITY OF VOTER SUPPRESSION SCHEMES WHOSE TRUE PURPOSE AND EFFECT WAS TO DISENFRANCHISE MINORITY VOTERS

In the long span between the end of Reconstruction and enactment of the Voting Rights Act of 1965, when

---

[41] *Id*. at 543.

[42] *Guinn v. United States*, 238 U.S. 347, 365 (1915).

[43] CONG. GLOBE, 42nd Cong. 1st Sess. 389-92 (1871).

[44] *See* Francois, *To Make Freedom Happen* at 544.

the social, economic and political gains Blacks had achieved at the end of the Civil War were wiped away, the federal judiciary in general – and this Court in particular – was the one institution that, more often than not, saw through the pretense of voter suppression schemes masquerading as legitimate neural policies.

After initially holding in *Neal v. Delaware*, 103 U.S. 370 (1880), that the Fifteenth Amendment voided state constitutional provisions explicitly limiting the right to vote to whites, for a while the Court believed itself – not always credibly – to be lacking in the requisite grant of constitutional or statutory power to stop voter suppression schemes that were neutral on their face yet discriminatory in effect. Thus, in *Williams v. Mississippi*, 170 U.S. 213 (1898), the state of Mississippi amended its constitution to establish literacy tests and poll taxes as a prerequisite to register for all voters. The implemented literacy test and poll taxes essentially eliminated African-Americans from registering to vote, and, therefore, prevented them from performing jury services. The Court, however, ruled that it had not been established that the effects of this disenfranchising tactic were sufficiently discriminatory.[45]

---

[45] In time, the Court would invalidate literacy tests that either were applied in a racially discriminatory manner or were so vague as to grant too much discretion to individual election officials. *See Guinn v. United States,* 238 U.S. 347 (1915); *Louisiana v. United States*, 380 U.S. 145, 151-153 (1965); *United States v. Mississippi*, 380 U.S. 142-43 (1965). Nonetheless, the Court continued to find the tests themselves constitutional as a valid exercise of state police power. *See Lassiter v. Northampton Cnty Bd. of Elections*, 360 U.S. 45, 51 (1959). It would not be until after the passage of the Voting Rights Act of 1965 that banned literacy tests when the Court acknowledged the "long history of

In the wake of the Court's ruling, ten of the eleven former confederate states passed disfranchising constitutions or amendments that included poll taxes, residency requirements, literacy tests, and grandfather clauses that effectively disfranchised most African American voters from 1890 to 1908.[46] Yet, the Court remained reluctant to intervene, as demonstrated by two turn-of-the-century cases: *Giles v. Harris*, 189 U.S. 475 (1903), and *Giles v. Teasley*, 193 U.S. 136 (1904). In 1903, the Alabama legislature created a provision in the state's constitution that required any person not registered to vote before January 1, 1903, to pass a series of tests before the state would allow registration. *Harris*, 189 U.S. at 483. A person was exempted from the tests who was "of good character and who understands the duties and obligations of citizenship under a republican form of government." *Id*. Although the Court observed that the Alabama statute "opened a wide door to the exercise of discretionary power by the registrars," the Court ruled in both cases it lacked the power to grant the requested relief. *Harris*, at 485; *Teasley*, at 163.

The tide began to turn in 1915, when the Court outlawed grandfather clauses in *Guinn v. United States*, 238 U.S. 347, 355 (1915). In that case, Oklahoma's constitution contained a provision that required prospective voters to pass a literacy test in order to qualify to vote, but it also contained a grandfather clause exception. *Guinn*, 238 U.S. at 355-56. The Court held that while states have the right to

---

the discriminatory use of literacy tests to disenfranchise voters on account of their race." *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970).

[46] *See*, Francois, *To Make Freedom Happen* at 549.

determine race neutral voter qualifications, the grandfather clause "re-create[d] and perpetuate[d] the very conditions which the Amendment was intended to destroy." *Id.* at 360.[47] Following the invalidation of the original grandfather clause, Oklahoma quickly enacted a slightly modified version of the grandfather clause the Court earlier invalidated. The new law created a twelve-day one-time voter registration window but essentially exempted white voters from adhering to the limited time frame. In time, the Court would invalidate that grandfather clause as well, finding that the narrow registration window and grandfather clause were in violation of the Fifteenth Amendment, and that the Amendment "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U.S. 268, 269 (1930).

This would become a recurring pattern and familiar tactic in many jurisdictions. No sooner would the Court invalidate one scheme than states would conjure up a new one. For example, in the 1920s, jurisdictions began holding white-only primaries. Initially, the Court upheld the practice in *Love v. Griffith*, 266 U.S. 32 (1924). However, three years later, in *Nixon v. Herndon*, 273 U.S. 536, 540 (1927), the Court found the practice to violate the Fourteenth Amendment when it invalidated a Texas law that forbade African Americans from voting in the democratic primary. Following the *Herndon* decision, the Texas legislature promptly enacted a new statute that allowed each political party to determine who shall be

[47] The Court would also hold in a companion case, *Myers v. Anderson*, that state officials could be held liable for civil damages for enforcing a state's grandfather clause. 238 U.S. 368, 383 (1915).

qualified to vote and participate in their political party. *Nixon v. Condon*, 286 U.S. 73, 82 (1932). The Court again invalidated the statute under the Equal Protection Clause of the Fourteenth Amendment, only to have the Democratic Party in Texas bar African Americans from participating in the party nominating conventions. *Grovey v. Townsend*, 295 U.S. 45, 55 (1935). It would take two more decisions from the Court in *Smith v. Allwright*, 321 U.S. 649 (1944) and *Terry v. Adams*, 345 U.S. 461 (1953) before Texas and other states finally got the message and gave up on enacting variations of white primaries.

CONCLUSION

In 1949, a special panel of three district court judges tried a voting rights case in the United States District Court for the Southern District of Alabama. The Black plaintiffs challenged a recent amendment to the Alabama Constitution, providing that only persons who can "understand and explain" any article of the federal Constitution were eligible to vote. *Davis v. Schnell*, 81 F. Supp. 872, 873 (D. Al. 1949). Plaintiffs argued that the so called Boswell Amendment was in fact intended to disenfranchise Black voters because, as far as they knew, local officials never seemed to be satisfied that Black voters could understand the Constitution. *Id*. Local officials responded that the Amendment made no mention of race. *Id.* In a unanimous decision, the special panel explained: "*We cannot ignore the impact of the Boswell Amendment upon the Negro citizens because it avoids mention of race or color; 'To do this would be to shut our eyes to what all others than we can see and understand*.'" *Id*. at 881 (emphasis added).

Of course, it is of some comfort that today, in part because of the Voting Rights Act of 1965 and in part

because of this Court's own work, there are no more residency requirements, no more white primaries, no more literacy tests, and no more grandfather clauses. But, if Wisconsin's Act 23 (and others like it) shows anything, it is that jurisdictions have never ceased (and perhaps will never cease) devising clever ways of disfranchising voters, and that this Court's role in unmasking and defeating these schemes remains as vital as ever. Today's literacy tests, grandfather clauses, white primaries, and residency requirements take the form of discriminatory redistricting and annexation plans, voter identification and verification laws, at-large election schemes, unexpected re-registration requirements, sudden polling place changes, and last minute addition of new rules for candidate qualification.

We pray, then, that the Court not ignore the impact of Wisconsin's Act 23 upon racial minorities and other disenfranchised voters just because it avoids mention of race or color. To do so would be for the Court to shut its eyes to what all who care to look can see and understand.

Respectfully submitted,

ADERSON BELLEGARDE FRANCOIS
Counsel of Record
Associate Professor of Law &
Supervising Attorney
Civil Rights Clinic
HOWARD UNIVERSITY
SCHOOL OF LAW
2900 Van Ness Street, N.W.
Washington, DC 20008
(202) 806-8065
afrancois@law.howard.edu

February 9, 2015