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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No.

CHARLES W. BAKER, ET AL.,
Appellants,

v.

JOE C. CARR, ET AL.,
Appellees

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

JURISDICTIONAL STATEMENT

This is an appeal by Charles W. Baker, *et al.* from an Order of February 4, 1960, entered in accordance with a *per curiam* Opinion of the District Court of the United States for the Middle District of Tennessee, as a three judge statutory Court specially invoked by virtue of the provisions of 28 U.S.C. § 2281. This Statement is submitted by Appellants to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINIONS BELOW

The Opinion of the District Court of the United States for the Middle District of Tennessee is reported at 179 F. Supp. 824 (M. D. Tenn. 1959) and is attached to this Jurisdictional Statement as Appendix A, *infra* at page 27. The Order of the District Court is attached to this Statement as Appendix B, *infra* at page 34. The Opinion of District Judge William E. Miller is attached to this Statement as Appendix J, *infra* at page 48.

JURISDICTION

This suit was brought under 28 U.S.C. § 1343 (3) and (4); 42 U.S.C. §§ 1983 and 1988; and 28 U.S.C. §§ 2201-2202, seeking a declaratory judgment as well as an interlocutory and permanent injunction restraining the enforcement, operation, and execution of an Act of Apportionment, Public Acts of Tennessee, Ch. 122 (1901), now TENN. CODE ANN. §§ 3-101 through 3-107 (1956).

The Opinion of the District Court was rendered on December 21, 1959 and its Order was entered on February 4, 1960. Notice of Appeal was filed in the District Court on March 29, 1960. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *United States* v. *Cruikshank,* 92 U.S. 542; *Nixon* v. *Herndon,* 273 U. S. 536; *Smiley* v. *Holm,* 285 U.S. 355; *Colegrove* v. *Green,* 328 U.S. 549; *Turman* v. *Duckworth,* 329 U.S. 675; *Cook* v. *Fortson,* 329 U.S. 675; *Terry* v. *Adams,* 345 U.S. 461; *Cooper* v. *Aaron,* 358 U.S. 1.

STATUTES INVOLVED AND CONSTITUTIONAL PROVISION

Act of Apportionment, Public Acts of Tennessee, Ch. 122 (1901), now TENN. CODE ANN. §§ 3-101 to 3-107 (1956), which is set forth in Appendix C, *infra* at page 35. 28 U.S.C. § 1343 (3) and (4) and 42 U.S.C. §§ 1983 and 1988 which are set forth in Appendix N, *infra* at page 59. The UNITED STATES CONSTITUTION, amend. XIV, §§ 1 and 2, which is set forth in Appendix C, *infra* at page 37.

QUESTIONS PRESENTED

1. Whether a state statute which, in 1901, created an inequality of legislative representation and has been since retained by systematic and purposeful inaction through legislative refusal to obey the periodic reapportionment requirement of the State Constitution and the State constitutional guarantee of free and equal elections, is a denial of equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution?

2. Whether the inequality of legislative representation created by this same State statute is also an abridgement of the right to vote guaranteed by Section 2 of the Fourteenth Amendment?

3. Whether the systematic discriminatory allocation of tax burdens and tax benefits created by the inequality of State legislative representation under this State statute is a denial of the equal protection of the laws and the due process of law guaranteed by the Fourteenth Amendment?

4. Whether a District Court of the United States is precluded by rulings of the United States Supreme Court from granting any form of relief where the District Court has found (a) that a State statute un-

equally apportions legislative representation in violation of a State Constitutional mandate requiring equal apportionment of legislative seats according to the number of qualified voters of the several counties and districts of the State, (b) that in consequence the State Legislature is guilty of a clear violation of the State Constitution and of the rights of the plaintiff voters under the Federal and State Constitutions, and (c) that the evil is a serious one which should be corrected without delay?

5. Whether a Federal Court can, and is under obligation, to declare invalid a State statute which clearly denies equal voting rights to Appellants when both the State Constitution and the Fourteenth Amendment clearly require equal voting rights?

6. Whether in declaring such a State statute invalid, the Federal Court need inquire at this time into the ultimate political solution or whether the Court can assume such solution will be provided by the State?

7. Whether implementation of the declaration of invalidity is a question which need be determined now, or whether the determination of this question may be held in abeyance?

8. Whether Federal Courts are under an obligation to protect federally guaranteed voting rights with appropriate relief, including, if necessary, injunction to restrain enforcement of an unconstitutional State statute when it is clear that there is no other means of obtaining relief.

9. Whether the Civil Rights Act amendments of 1957 and particularly 28 U.S.C. 1343 (4) require the Federal Courts to grant relief where there is a violation of equal voting rights?

STATEMENT OF THE CASE

This action was brought by Appellants, qualified voters and taxpayers in the State of Tennessee, against

election officials under the Civil Rights Acts,[1] to invalidate a statute which denies the equal voting rights guaranteed to them by the Constitution of Tennessee [2] and by the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

The Tennessee Constitution requires an enumeration of qualified voters and an apportionment every ten years following the year 1871 of representatives and senators in the General Assembly by counties or districts according to the number of qualified voters.[3] The last Act reapportioning the number of legislators was passed in 1901.[4] This Act was violative of the state and Federal Constitutions at that time because an enumeration of qualified voters was not made and the actual number of qualified voters in the state was ignored. Furthermore, after 1911, the Act of 1901 was no longer a constitutional basis for the election of representatives and senators because a new enumeration of qualified voters as well as a new apportionment of representation in the General Assembly was required in 1911 and every ten years thereafter.[5] Each and every Tennessee legislature since 1901, including the legislature in office at the time the Complaint in this case was filed, has failed to reapportion the number of legislators required to be elected from the several counties and districts of the state. Systematically and purposefully, the General Assemblies elected since 1901 have

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[1] 17 Stat. 13 (1871), as amended, 42 U.S.C. § 1983 (1952); 16 Stat. 144 (1870) as amended, 42 U.S.C. § 1988 (1952); 62 Stat. 932 (1944) as amended, 28 U.S.C. § 1343 (3) and (4) (1957).

[2] TENN. CONST., art. I, § 5 (1870).

[3] TENN. CONST., art. II, §§ 4, 5 and 6 (1870).

[4] Public Acts of Tennessee, Ch. 122 (1901), now TENN. CODE ANN. §§ 3-101—3-107 (1956).

[5] TENN. CONST., art. II, §§ 4, 5 and 6 (1870).

defeated all bills proposing reapportionment of the legislature.[6]

The Appellants have on the average one-tenth (1/10) of a vote and here seek a full vote in choosing members of the state legislature. Other citizens of Tennessee have a full vote while still other members of a selected minority in the state have the equivalent of ten times the vote allowed the Appellants. The right to a full rather than a fractional vote is both recognized and guaranteed by the Fourteenth Amendment of the Federal Constitution and the Tennessee Constitution.[7] Significant state population changes since 1901 and the failure and refusal of the various Tennessee legislatures to reapportion themselves since that date have caused discrimination against the Appellants because their votes are nowhere near as effective as those of voters residing in other state counties and electoral districts. The geographical areas in which Appellants reside are experiencing an explosion in population growth, and the disenfranchisement will be intensified with the passage of time.

The record proves that the Act of 1901 violates the Tennessee and Federal Constitutions and has had the effect of conferring control of the State General Assembly upon a selected minority of the Tennessee voting population. A purposeful and systematic plan to discriminate against a geographical class of persons in their voting rights now exists in Tennessee by the continued enforcement of the statute here challenged.

The statute in issue has caused a denial of both equal protection of the laws and due process of law to Appel-

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[6] EXHIBIT I, INTERVENING PETITION OF BEN WEST, MAYOR, entitled HISTORICAL STUDY, etc.

[7] TENN. CONST., art. I, § 5 (1870).

lants through the discriminatory allocation of tax burdens and the unequal and unjust distribution of funds derived from that taxation. State legislation is passed for the support of public schools, for the maintenance of roads, and highways, and for other purposes. The money collected as a result of such legislation is distributed by an unconstitutionally apportioned legislature through arbitrary, unreasonable and discriminatory formulas[8] to Tennessee county and municipal governments in proportion to their under or over representation in the General Assembly. For example, a voter in Moore County (with a population of 2340) has 23 times as much representation in the lower House as does a voter in Shelby County (with a population of 312,345), and Moore County receives 17 times the apportionment per vehicle of state gasoline and motor fuel taxes as does Shelby County. See Appendices F, G and H, *infra* at pages 41, 43, 45.

These discriminatory apportionment formulas directly affect the share in Federal tax moneys accruing to the several counties in which Appellants' reside because Federal grants-in-aid to the state for highway construction and other Federal purposes are made on a "fund matching basis." See Appendix I, *infra* at page 47.

Similar discriminatory practices exist in the allocation of sales and use taxes, alcoholic beverage taxes, income taxes, beer taxes and other taxes. This situation in Tennessee is clearly a case of taxation without fair representation since it requires the unfavored many to pay higher taxes then the favored few.

A remedy which would contemplate direct action against the state legislature or its members requiring

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[8] See Appendices D and E, *infra* at pages 39, 40.

them to reapportion membership in the legislature among the counties and districts has not been sought in this case. The District Court was asked to do three things: (1) to declare unconstitutional and to enjoin enforcement of the Act of Apportionment of 1901 and those provisions of the Tennessee Code which have further exaggerated its original inequalities, (2) to order an election at large without regard to the counties or districts, and (3) in the alternative, to direct the Appellees to hold an election in accordance with the formula for legislative representation provided in the State Constitution using the 1950 or subsequent federal census to determine the number of qualified state voters.

The District Court found that the issues presented in this case were "of such a character that they should be evaluated by a three-judge court." In referring the matter to the statutory court, District Judge Miller's Opinion of July 31, 1959, cited the difference between the case of *Colegrove* v. *Green,* 328 U.S. 549, and the case at bar. He pointed out that while there had been no violation of the Illinois constitution or any provision of federal law in the *Colegrove* case, *supra,* relief for inequitable legislative districting could have been obtained there from the United States Congress. Judge Miller said that absent judicial action there is no remedy at all in the Tennessee situation. His decision is set forth in Appendix J, *infra* at page 48.

A motion to dismiss was filed by the Appellees upon the grounds that the statutory Court did not have jurisdiction of the subject matter of the suit, that there had been a failure to state a claim upon which relief could be granted, and that certain alleged indispensable parties had not been joined. The case was heard by a three-judge Court on November 23, 1959.

The three-judge Court on December 21, 1959 in a *per curiam* Opinion, denied the relief prayed for by Appellants, stating:

> "With the plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees. It also agrees that the evil is a serious one which should be corrected without further delay." Appendix A, *infra* at page 27.

On February 4, 1960, an Order dismissing the Complaint in this case was entered by the District Court on the grounds that the court lacked jurisdiction of the subject matter and that the Complaint failed to state a claim upon which relief could be granted. This appeal is from that final Order, pursuant to 28 U.S.C. § 1253.

THE QUESTIONS ARE SUBSTANTIAL

The instant appeal presents on the record herein one of the clearest denials of constitutional rights yet brought before this Court. The right to vote is the cornerstone of civil rights. The discrimination suffered by the Appellants is shocking to the conscience and violative of the guarantees of the Fourteenth Amendment to the Federal Constitution.

Because of its unique facts, this is a case of first impression. The validity of a state statute which grossly dilutes the right of a citizen to an equal vote and equal representation in the face of state constitutional commands requiring equal elections and equal representation (and thereby abridges rights under the Fourteenth Amendment) has never before been passed upon by this Court. The Act attacked in effect

prohibits equality of representation and prescribes the election of a majority of the legislature by a minority of the people of Tennessee. It thus repeals the commands of the State constitution.

The record in this appeal makes it unmistakeably clear that all avenues for relief (other than this Court) are closed to the Appellants because of the unique circumstances which exist in Tennessee. All remedies through state legislative, executive, and judicial avenues are closed to Appellants. The record proves this beyond dispute. Unless this Court acts to end a flagrant instance of State interference with Federal rights, there will never be a restoration of full voting rights for Appellants and all others similarly situated nor will there be a termination of its related circumstances.

The Court is here urged to correct one of the most vicious malignancies in American government.[9] The issues involved directly affect millions of American citizens who are now deprived of rights guaranteed by our Federal Constitution.

This case therefore presents not only the inequalities in Tennessee legislative representation, but the inequalities in legislative representation throughout the United States. It pleads for judicial aid as the means of preserving a liberty basic to a democratic form of government, that is, the right to vote and have one's vote counted equally with that of other voters.

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[9] Fleming, *America's Rotten Borough,* Nation Magazine, January 10, 1959, Vol. 188, p. 26.

Kennedy, *The Shame of the States,* N. Y. Times, May 18, 1958, § 6 (Magazine) p. 12.

Lewis, *Legislative Apportionment and the Federal Courts,* 71 Harv. L Rev. 1057 (1958).

Strout, *The Next Election is Already Rigged,* Harper's Magazine, November 1959, Vol. 219, p. 25.

This Court on March 22, 1960 granted certiorari in the case of *Gomillion* v. *Lightfoot,* 270 F. 2d 594 (5th Cir., 1959) which is concerned with a state legislative alteration of a municipality's boundaries to impair the voting rights of a group of Negroes. There is no substantive difference between the deprivation of the right to vote in Tuskegee municipal elections and the refusal to count at full value votes cast by hundreds of thousands of Negroes and whites in certain Tennessee counties and districts at a state election. Minority decisions in both *Colegrove* v. *Green,* 328 U.S. 549, and *South* v. *Peters,* 339 U.S. 276, found no basis for distinguishing the latter cases from other cases involving the rights of Negroes.

Judicial failure to act under the circumstances of this case cannot be justified by any precedent of law or equity. As stated in the Opinion of Judge William E. Miller, Appendix J, *infra* at page 48.

> "In the present case, as pointed out, not only is there a specific constitutional provision requiring periodic reapportionment on the basis of equality but the legislature of the state has refused to act after repeated efforts and demands to obtain relief. The situation is such that if there is no judicial remedy there would appear to be no practical remedy at all.
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> "If it should be assumed that jurisdiction does exist, it would appear that the courts should hesitate to dismiss actions of this character hastily or summarily, especially where a violation of individual constitutional rights is clearly established. Under such circumstances a court of equity should at least be willing from time to time to re-evaluate

the problem and to re-explore the possibilities of devising an appropriate and effective remedy—a remedy which would safeguard the integrity of the state government and at the same time protect and enforce the rights of the individual citizen."

I

THE TENNESSEE STATUTE IS UNCONSTITUTIONAL BECAUSE, CONTRARY TO LAW, IT REQUIRES UNEQUAL LEGISLATIVE REPRESENTATION AND CAUSES GROSS DISCRIMINATION IN STATE VOTING RIGHTS.

A. The Tennessee Voting Right is Diluted By Fractional Representation In Direct Violation of the Fourteenth Amendment.

Unquestionably, the failure of the Tennessee legislature since 1901 to take the action required of it has resulted in the giving of a full vote or better to a minority of state voters and a fraction of a vote to a majority of state voters. This action has caused a denial of the equal protection of the laws to the Appellants as much so as if discrimination had occurred because of race, color, or creed. As plainly stated by a minority of this Court in *South* v. *Peters,* 339 U.S. 276:

> "It is said that the dilution of plaintiff's votes . . . is justified . . . If that premise is allowed, then the whole ground is cut from under our primary cases since *Nixon* v. *Herndon,* which have insisted that where there is voting there be equality . . . (T)here shall be no inequality in voting power by reason of race, creed, color, or other invidious discrimination." 339 U.S. at 281.

Geographical discrimination and racial discrimination are equally onerous. Although the Federal constitution does not give rise to the individual citizen's right

to vote, since this franchise springs from the individual states themselves, *Minor* v. *Happerset,* 88 U.S. (21 Wall.) 162; *McPherson* v. *Blacker,* 146 U.S. 1, nonetheless, where state law grants such a right, each citizen must be equally protected in the operation of that law. *United States* v. *Reese,* 92 U.S. 214; *United States* v. *Cruikshank,* 92 U.S. 542. The Tennessee Constitution grants the full right of suffrage to Appellants. There can be no dilution by the state of that right to vote through the medium of fractional representation for certain voters and full representation for other voters. *United States* v. *Mosley,* 238 U.S. 383; *Nixon* v. *Herndon,* 273 U.S. 536; *United States* v. *Classic,* 313 U.S. 299; *Smith* v. *Allwright,* 321 U.S. 649; *United States* v. *Saylor,* 322 U.S. 385; *Terry* v. *Adams,* 345 U.S. 461.

Otherwise, and this is now the case in Tennessee, an elective franchise to all intents and purposes is lost. An unequal voice in elections and a complete denial of participation in an election are of the same offensive order. Because of great changes in the population of Tennessee Counties as indicated in Appendix K, *infra* at page 54, the existing legislative apportionment has become progressively discriminatory in character.

The Tennessee Constitution requires a specific reapportionment every ten years. Various legislatures, including the one presently in session, have adamantly refused to pass a valid apportionment statute for these sixty-odd years. Because of this complete disregard for the commands of the Tennessee Constitution, Shelby County now lacks seven Representatives and two Senators; Davidson County now lacks three Representatives and a Senator; and Knox County and Hamilton County now lack three Representatives and a Senator to which each of these counties is constitutionally entitled.

As shown by Appendix F, *infra* at page 41, population changes and certain amendments to the Act of 1901 by the year 1950, as reflected by the Census of the United States population taken in 1950, found twenty-three Tennessee counties possessed of twenty-five direct representatives when their voting population entitled them to only two direct representatives. As of the year 1950, ten Tennessee counties, as shown in Appendix F, *infra* at page 41, although entitled to forty-five direct representatives under the State Constitutional formula, actually had only twenty direct representatives. Similar disparity in the voting population of the Senatorial districts is indicated in Appendix L, *infra* at page 55, as reflected by the 1950 census. The over-represented counties, on a *per capita* basis, are allowed a 500% participation in state shared funds, as compared to under-represented counties. See Appendix M, *infra* at page 57.

The overall result of this discrimination is that 37% of the qualified voters in Tennessee elect twenty of the thirty-three members of the State Senate, and 63% elect but thirteen members of the Senate. In the Tennessee House of Representatives, 40% of the voters elect sixty-three of the ninety-nine members of the House, while 60% of the voters elect only thirty-six members of the House. No Bill seeking to reapportion since 1901 has received more than 13 votes in the State Senate nor more than 36 votes in the House.

B. The Validity of A State Statute Violating State Constitutional Guarantees of Equal Voting Rights And Abridging Federal Constitutional Rights Presents A Question Which Has Not Been Determined By This Court.

A state statute which dilutes the right of a citizen to an equal vote in the face of state constitutional com-

mands requiring equal representation and free and equal elections, and which thereby abridges rights under the Fourteenth Amendment, has never before been passed upon by this Court.

The case at bar is distinguishable from *Colegrove* v. *Green, supra.* Whereas the plaintiffs there contended that the Illinois congressional apportionment law deprived them of constitutional rights to equal representation, the Court found that the act [10] governing redistricting for Federal representation contained no requirements as to compactness, contiguity or equality in the population of Congressional districts. In neither the *Colegrove* case nor its predecessor, *Wood* v. *Broom,* 287 U.S. 1, was there a declared policy of representation or equal voting rights, in organic or statutory law. Tennessee's 1901 Apportionment Act violates a specific constitutional command couched in language depriving the legislature of any "political" discretion to deviate from the command.

McDougal v. *Green,* 335 U.S. 281, was only concerned with a claim which had been made by a political party that an Illinois statute denied rights under the Fourteenth Amendment. The statute required that a petition to form and nominate candidates for a new political party be signed by a representative group of qualified voters encompassing at least 50 of the state counties.

In *South* v. *Peters, supra,* this Court held that the lower court had properly dismissed a suit to set aside the Georgia county unit vote in connection with a primary election involving United States Senators. The lower Federal Court had decided that under the Georgia

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[10] 46 Stat. 26 (1929) (later amended by 54 Stat. 162 (1941), 2 U.S.C. § 2a (1959).

Constitution there was no guarantee of a substantially equal vote in such an election. Clearly the *South* case could not have presented or decided the constitutional issue in the case at bar.

Thus, in the leading cases on voting rights as well as in other similar cases before this Court both prior and subsequent to *South* v. *Peters, supra,* the issue of the constitutionality of a reapportionment act under the circumstances now existing in Tennessee has remained undecided.[11] This Court has not yet reached that constitutional question.

In the case at bar, the 1901 Act of Apportionment, applies to rural, sparsely settled counties and to populous counties a numerical formula which completely ignores the state constitutional requirement of representation based upon population. The result is an abridgement of the right to vote for members of the state legislature, and a denial of the equal protection of the laws, under the Fourteenth Amendment. A large-scale dilution of political rights has occurred in Tennessee through an obviously discriminatory practice. It is of the greatest importance that this Court now lend its support to terminate injustices which if permitted would continue indefinitely in Tennessee.

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[11] *Hartsfield* v. *Sloan,* 357 U.S. 96.
Kidd v. McCanless, 352 U. S. 920.
Radford v. *Gary,* 352 U. S. 991.
Anderson v. *Jordan,* 343 U.S. 912.
Cox v. *Peters,* 342 U.S. 936.
Remmey v. *Smith,* 342 U.S. 916.
Colegrove v. *Barrett,* 330 U.S. 804.
Cook v. *Fortson,* 329 U.S. 675.
Turman v. *Duckworth,* 329 U.S. 675.
Wood v. *Broom,* 287 U.S. 1.

II

RESTORATION OF A FULL VOTING RIGHT AND AN END TO DISCRIMINATION CAN ONLY BE ACHIEVED WITH ASSISTANCE OF THIS COURT BECAUSE APPELLANTS HAVE EXHAUSTED ALL AVENUES OF RELIEF.

Appellants present here a case and controversy where a federally guaranteed right has been violated and where it is obvious under the circumstances that no relief can ever be obtained unless this Court intervenes.

A. The Tennessee Legislature has Refused to Act.

Historical data in the record shows that for over half a century the Tennessee General Assembly has refused to rectify its unlawful composition to afford Appellants and other persons similarly situated their lawful voting rights. It is no longer reasonable to expect that those who benefit, and who control the state legislature, by reason of an unlawful apportionment will of their own volition relinquish the advantage or terminate the control.

B. The Highest Court of the State Has Refused to Act.

In *Kidd* v. *McCanless,* 200 Tenn. 282, 292 S.W. 2d 40 (1956), *appeal dismissed* 352 U.S. 920, the Tennessee Supreme Court failed to hold that the 1901 Act of Apportionment was unconstitutional and denied declaratory and injunctive relief.[12] The Tennessee Constitution does not provide for initiative or referendum action by state citizens to correct the abuse which has

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[12] This decision nullified the remedy proposed to be given by the Chancery Court of Tennessee.

been sustained by Appellants. A state Constitutional Convention is not an available remedy to correct the injustice now being perpetuated because such a Convention could only be called by a majority vote of two successive General Assemblies,[13] and that vote could never be obtained from the legislature as it is now constituted. All such proposals have for sixty years been rejected. Even if such a Convention were held, its delegates would be chosen in an unrepresentative manner reflecting the present legislative apportionment. The governor has no authority to assemble a constitutional convention.

Tennessee voters such as the Appellants are *in extremis*. The utter lack of remery makes the Appellants' cause unique. In *Colegrove* v. *Green, supra,* the Court expressed the view that recourse to the Congress of the United States was possible to correct the inequities in a congressional reapportionment act. The same remedy was also available in *Wood* v. *Broom, supra,* which was relied upon in the *Colegrove* case. In Oklahoma, as evidenced by *Radford* v. *Gary,* 145 F. Supp. 541 (W. D. Okla. 1956), *affirmed without opinion,* 352 U.S. 991, the state constitution contains initiative and referendum provisions. In *Remmey* v. *Smith,* 102 F. Supp. 708 (E. D. Penn. 1951) *appeal dismissed for want of a substantial federal question,* 342 U.S. 916, a remedy was said to be available in the state courts of Pennsylvania. A local judicial remedy was also available in *Perry* v. *Folsom,* 144 F. Supp. 874 (N. D. Ala. 1956).

A refusal by this Court to act in the Tennessee situation will permit the continuation of a shocking violation of Federal Constitutional guarantees, as well as

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[13] TENN. CONST., art. XI, § 3 (1870).

a degeneration of the very principles upon which representative government in the United States is grounded.

III

THIS COURT HAS JURISDICTION OVER A CASE INVOLVING THE DENIAL OF STATE VOTING RIGHTS BY STATE ACTION UNDER COLOR OF LAW.

This Court's reluctance to grant equitable relief in *South* v. *Peters,* 339 U.S. 276, must not be construed as being based upon a lack of jurisdiction over the subject matter of state voting rights or upon the constitutional doctrine of separation of powers.[14] This Court has in many instances assumed jurisdiction where political rights, such as the right to vote, were in issue.

This was clearly true in *Colegrove* v. *Green, supra,* where a majority of the justices believed that *Smiley* v. *Holm,* 285 U.S. 355, had decisively determined the right to seek judicial review of a state act regarding legislative representation where it was questioned whether state constitutional requirements essential to the validity of the act had been met.

The holding in *Colegrove* v. *Green, supra,* was aptly summarized by Mr. Justice Rutledge in *Turman* v. *Duckworth,* 329 U.S. 675, as follows:

> "A majority of the Justices participating refused to find there was a want of jurisdiction, but at the same time a majority, differently composed, concluded that the relief sought should be denied."
> 329 U.S. at 678

[14] This Court held that Federal Courts consistently refuse *to exercise* the equity powers of which they are possessed in cases pertaining to a state's geographical distribution of electoral strength among its political subdivisions.

The point that cases involving the right to vote are justiciable is clearly shown in *McDougal* v. *Green, supra,* where there was unqualified assumption of jurisdiction, and in *South* v. *Peters, supra,* where a simple majority of this Court refused to exercise its equity powers, but did not disclaim the case on purely jurisdictional grounds.

While there may be some confusion in lower court cases attempting to distinguish between jurisdiction and remedy in situations involving state voting rights, the foregoing cases concerned with fractional representation buttressed by substantial authority in the area of voting discrimination should dispose of any contention that the case at bar is outside the jurisdiction of this Court.[15]

IV

THIS COURT SHOULD EXERCISE ITS EQUITY JURISDICTION UNDER THE SPECIAL CIRCUMSTANCES OF THIS CASE—A BASIS FOR SUCH ACTION IS PROVIDED BY CASE PRECEDENT AND THE CIVIL RIGHTS ACTS.

There are several cases such as *Smiley* v. *Holm, supra,* and *Rice* v. *Elmore,* 165 F. 2d 387 (4th Cir. 1947) *cert. denied* 333 U.S. 875, were declaratory and injunctive relief has been exercised to protect the right of American citizens to vote. As stated in *Snowden* v. *Hughes,* 321 U.S. 1, the right to relief under the Fourteenth Amendment is not diminished by the fact that the discrimination in question relates to political rights.[16] As this Court stated in the case of *Cooper* v. *Aaron,* 358 U.S. 1:

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[15] *Nixon* v. *Herndon,* 273 U.S. 536; *Terry* v. *Adams,* 345 U. S. 461.

[16] See also *Nixon* v. *Herndon,* 273 U.S. 536; *Nixon* v. *Condon,* 286 U.S. 73; and *Smith* v. *Allwright,* 321 U.S. 649, where this Court has exercised jurisdiction over suits at law for damages arising from a deprivation of the federally protected right of suffrage.

> "... The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a States government ... denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." 358 U.S. at 16-17.

The question before this Court is whether or not a declaratory judgment and injunctive relief be granted where state voting rights have been abridged under color of law in violation of the Fourteenth Amendment in a particular set of circumstances never before considered by this Court. Whereas other voting rights cases have contained only an argument (albeit a good argument) that there was unfairness in legislative representation, the Tennessee Constitution in the case at bar *requires* fair representation pursuant to free and equal elections. Whereas other voting rights cases have contained some ostensible avenue of alternative redress, the case at hand is completely devoid of such possibilities.

28 U.S.C. § 2201 provides for a declaration of the rights of interested parties where a case presents justiciable issues.[17] It is submitted that such issues exist in the case at bar.

The specific means of enforcing the Appellants right in equity is granted by 42 U.S.C. § 1983, *supra,* in conjunction with 28 U.S.C. § 1343(4) *supra,* both printed in Appendix N, *infra,* at page 59. In Part III

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[17] *Altvater* v. *Freeman,* 319 U.S. 359.

of the Civil Rights Act of 1957, specifically, 28 U.S.C. 1343(4), Congress has unequivocally provided for equitable relief in cases involving the right to vote. The language of this provision is quite clear. It states that the district courts shall have original jurisdiction of any civil action:

> "To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, *including the right to vote.*" [emphasis added]

The coordinate effect of these several statutes is to provide ample procedural and substantive authority for this Court to exercise declarative and equitable jurisdiction and thereby restore to Appellants their right to vote bestowed by the Tennessee Constitution and guaranteed by the Fourteenth Amendment.[18]

With the added impetus of 28 U.S.C. § 1343(4), Federal Courts are no longer justified in refusing to exercise equity jurisdiction as in *Giles* v. *Harris,* 189 U.S. 475, and in *South* v. *Peters, supra.*

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[18] In the recent racial segregation case, *Willie* v. *Harris County, Texas,* 180 F. Supp. 560 (S.D. Tex. 1960), plaintiff sought an action for declaratory judgment and permanent injunction to restrain county authorities, and relied upon 28 U.S.C. §§ 1331 and 1343 in conjunction with 42 U.S.C. §§ 1981 and 1983. The court found that the action was brought prematurely but did not dismiss the case for want of jurisdiction. See also *Dyer* v. *Kazuhisa Abe,* 138 F. Supp. 220 (D. Hawaii 1956).

V

VOTING INEQUALITY IN TENNESSEE CAN BE TERMINATED WITHOUT DIFFICULTY THROUGH INITIAL USE OF ONE OF SEVERAL PRELIMINARY ALTERNATIVE STEPS.

We are confident that this Court will have no difficulty in accepting the finding of the three-judge District Court below that Appellants' constitutional rights have been violated, and that the only problem is achieving the corrective action. In this connection we are mindful that *Colegrove* v. *Green, supra,* and *McDougal* v. *Green, supra,* indicate the concern of this Court for practical considerations when relief is sought in cases involving voting rights. In actuality, it is very likely that voting inequality in Tennessee could be terminated without encountering the difficulties anticipated in these cases. This has been shown to be true in Minnesota where citizens obtained a declaration from a three judge District Court in *McGraw* v. *Donovan,* 163 F. Supp. 184 (D. Minn. 1958) after which the state legislature promptly assembled and reapportioned its seats. Similarly, citizens of Hawaii found the United States Congress respectful of a declaration by a District Court in *Dyer* v. *Kazuhisa Abe,* 138 F. Supp. 220 (D. Hawaii 1956).

A step-by-step approach by this Court utilizing certain alternative forms of relief is both feasible and important in the case at bar. It is almost certain that a declaratory judgment, by this Court or by the District Court, which invalidated the Tennessee Reapportionment Act of 1901 would prompt the state legislature to pass the required electoral redistricting Act.[19] Faced

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[19] Jurisdiction would be retained by the Court until suitable action was taken.

with such a declaration, it is apparent that the Tennessee legislature would not assume the risk of functioning as it has in the past because by doing so it would jeopardize the future validity of its numerous fiscal, economic, social, and political programs.

It is possible that this Court may be reluctant to issue a declaratory judgment because of the Tennessee Supreme Court decision in *Kidd* v. *McCanless,* 200 Tenn. 282, 292 S.W. 2d. 40 (1956). In our view the Court would not be bound to accept the finding in the *Kidd* case, *supra,* that an invalidation of the 1901 Act of Apportionment would prevent the state legislature from functioning in a *de facto* capacity to provide for a new reapportionment.[20] Furthermore Tennessee's Supreme Court, in part, placed its refusal to act on the failure of the complainants to point to a prior valid Act of Apportionment.[21]

If the Court is inclined to follow, or at the initial stage not dispute, the reasoning of *Kidd* v. *McCanless, supra,* there are two other forms of preliminary relief which it could grant. The Court could enjoin state election officials from holding any future election under the Act of 1901.[22] As in the case of declaratory judgment, this form of injunctive relief is almost certain to evoke corrective action by the Tennessee legislature

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[20] *Hanover Fire Insurance Co.*, v. *Carr.*, 272 U.S. 494, 509.

[21] This reasoning implies that the existence of a state legislature depends upon some act of apportionment validly enacted by it in spite of TENN. CONST., art II, § 9 which declares that the legislature "shall be dependent upon the people".

[22] This form of relief is not similar to that sought in *Perry* v. *Folsom,* 144 F. Supp. 874 (W.D. Ala. 1956), or *Remmey* v. *Smith,* 102 F. Supp. 708 (E.D. Penn). In those cases, affirmative remedies were sought against the legislature and executive branches themselves to force and require the passage of reapportionment statutes.

without there being encountered the legal difficulty envisioned in the *Kidd* case, *supra,* regarding the effects of a declaratory judgment.

As another alternative preliminary step the Court could affirm the District Court's finding that a violation of the Appellants' rights had occurred, and announce its intention to consider at a future date, if necessary, the question of relief. The Court would not initially decide whether declaratory or injunctive relief should be granted. The interval of time permitted by the Court would be sufficient to permit the General Assembly of Tennessee the opportunity to reconsider and act upon a lawful reapportionment.

The latter alternative is a course of action preferred by the Appellants because it may eliminate entirely any necessity for considering the grant of future judicial relief. However, if the need for such relief is not eliminated, this Court would then hear counsel for the parties to determine with specificity the form of equitable or declaratory relief. Whether the result would entail a directive to state election officials (by this Court or by the District Court) for an election at large, or for a revision, in accordance with the 1950 census of the numbers of legislators to be elected from each county and district or other form of remedy, could properly be considered at that time.

CONCLUSION

It is submitted that the Court has jurisdiction and should hear this appeal from a judgment denying a state voting right granted by the Tennessee Constitution and guaranteed by the United States Constitution.

Respectfully submitted,

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