TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutions and Statutes

Legislative Materials

Other Authorities

IN THE

Supreme Court of the United States

October Term, 1964

No. 835

ANNIE E. HARPER, ET AL., APPELLANTS,

v.

VIRGINIA STATE BOARD OF ELECTIONS, ET AL.

On Appeal from the United States District Court for the Eastern District of Virginia

APPELLEES' MOTION TO AFFIRM

The Appellees move this Court to affirm on the ground that the questions presented by this appeal are so unsubstantial as not to need further argument.

STATEMENT

As is clearly set forth in the Jurisdictional Statement, this is an appeal from an order of dismissal in the court below.

This action was instituted as an attack upon those provisions of the Constitution and laws of Virginia which require the payment of a poll tax as a prerequisite to registration and voting in state and local elections. The Appellants based their attack upon the sole ground that they lacked

the economic means to pay the poll tax and that, therefore, as to them, the tax was violative of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

Following the filing by the Appellees of a Motion to Dismiss in the court below, on the ground, among others, that the Appellants lacked the capacity and standing to bring this suit because Section 23 of the Constitution of Virginia excludes "paupers" from registration and voting, the Appellants, with the consent of the court below, amended their Complaint, adding thereto an attack upon Section 23 of the Constitution of Virginia and upon § 24-18 of the Code of Virginia of 1950 (which is a codification of Section 23 of the Constitution) as being violative of the Fourteenth Amendment.

The foundation of the Appellees' contention that the Appellants lacked the capacity to sue was that Appellants, by their affidavits filed *in forma pauperis* under the provisions of 28 U.S.C., § 1915(a) (1958), and by their allegations in the Complaint with reference to themselves and to the members of the class on behalf of which they allegedly brought suit, established themselves and the members of the class as "paupers" within the meaning of the use of that word in Section 23 of the Virginia Constitution.

In dismissing the Complaint, the court below found that this Court's opinion in *Breedlove* v. *Suttles,* 302 U.S. 277, 283 (1937) was squarely dispositive of the Appellants' denunciation of Virginia's constitutional and statutory poll tax requirements. The court below further found that there was no substance to the Appellants' attack on the "pauper" exclusion provision of the Virginia Constitution because Appellants did not allege or prove that this exclusion had been employed to prevent them or their class from voting, or that

they or anyone else had ever been designated a "pauper" within the meaning of the Constitution of Virginia.

ARGUMENT

I

As is recognized by the Appellants (Jurisdictional Statement at p. 10) and as was stated by the court below in its opinion (Jurisdictional Statement, App. 8a), *Breedlove* v. *Suttles,* 302 U.S. 277 (1937) is dispositive of the questions presented by this appeal. Appellants suggest that *Breedlove* did not resolve the questions which are presented in this case "in the context" in which they are presented, that is, in the context of economic inability to pay the tax (Jurisdictional Statement at p. 9). As the court below noted, the ground upon which the Appellants attack the poll tax here was one of the grounds upon which it was attacked in *Breedlove*. (See Record on Appeal in this Court in *Breedlove* v. *Suttles,* No. 9, Oct. Term, 1937, paragraphs 27, 28, 29, 30, 34(d) and (g) of the Petition filed in the Superior Court of Fulton County, Ga., beg. R. 9. See, also, R. 20 of *Breedlove* in this Court, amendments to the original Petition. In addition, see in *Breedlove* record, p. 3-5 of Appellant's Brief in Opposition to Appellee's Motion to Dismiss the Appeal, p. 3 of Jurisdictional Statement, p. 5, 6, 13, 14 of Appellant's Brief.) For example, at p. 14 of Appellant's Brief filed in this Court in *Breedlove,* this statement appears:

> "There is certainly very little correlation between the ability of a man to vote and his ability to pay a poll tax. Many of the world's great thinkers would have undoubtedly been deprived of the right of franchise under this Georgia statute. Certainly the great literary figures of times past, who were properly, by mental equipment, most qualified to exercise the right of suff-

> rage, would have been precluded from voting in Georgia."

In reply to this contention, as well as to the contention that an exemption of certain classes was improper, this Court noted that:

> "Levy by poll tax has long been a familiar form of taxation, much used in some countries and to a considerable extent here, at first in the colonies and later in the states. To prevent burdens deemed grievous and oppressive, the Constitutions of some states prohibit or limit poll taxes. That of Georgia prevents more than a dollar a year. Article 7, § 2, par. 3, Code, § 2-5004. Poll taxes are laid upon persons without regard to their occupations or property to raise money for the support of government or some more specific end. The equal protection clause does not require absolute equality. While possible by statutory declaration to levy a poll tax upon every inhabitant of whatsoever sex, age or condition, collection from all would be impossible for *always there are many too poor to pay.* Attempt equally to enforce such a measure would justify condemnation of the tax as harsh and unjust. * * *" *Breedlove* v. *Suttles*, 302 U.S. 277, 281 (1937). (Italics added).

(Note that the Constitution of Virginia, as does that of Georgia, limits the amount of the poll tax. See Virginia Constitution, Section 173.)

In its unanimous opinion in *Breedlove*, this Court further stated that (302 U.S. at 283-4):

> "Payment (of the tax) as a prerequisite (to voting) is not required for the purpose of denying or abridging the privilege of voting. * * * Exaction of payment before registration undoubtedly serves to aid collection from electors desiring to vote, but that use of the state's

power is not prevented by the Federal Constitution. Cf. *Magnano Co.* v. *Hamilton,* 292 U.S. 40, 44.

"To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. Privilege of voting is not derived from the United States, but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate. *Minor* v. *Happersett,* 21 Wall. 162, 170 et seq. *Ex parte Yarbrough,* 110 U.S. 651, 664-665. *McPherson* v. *Blacker,* 146 U.S. 1, 37-38. *Guinn* v. *United States,* 238 U.S. 347, 362. The privileges and immunities protected are only those that arise from the Constitution and laws of the United States and not those that spring from other sources. *Hamilton* v. *Regents,* 293 U.S. 245, 261.

"* * * The payment of poll taxes as a prerequisite to voting is a familiar and reasonable regulation long enforced in many States and for more than a century in Georgia. That measure reasonably may be deemed essential to that form of levy. Imposition without enforcement would be futile. Power to levy and power to collect are equally necessary. And, by the exaction of payment before registration, the right to vote is neither denied nor abridged on account of sex. It is fanciful to suggest that the Georgia law is a mere disguise under which to deny or abridge the right of men to vote on account of their sex. The challenged enactment is not repugnant to the Nineteenth Amendment."

Following the *Breedlove* case, the Tennessee poll tax was attacked. In *Pirtle* v. *Brown, et al.,* 118 F. 2d 218 (6th Cir. 1941), *cert. den.* 314 U.S. 621, the question, as stated by the court, was whether the Constitution and statutes of Tennessee, which made the payment of a poll tax a condition precedent to the right to vote for members of Con-

gress, were repugnant to any provisions of the Constitution of the United States. This question was answered in the negative and poll tax payment as a prerequisite to voting was held to be valid in all respects, as a legitimate and proper exercise of the power of the state. The court relied on *Breedlove, supra*, as having already conclusively decided the issue.

In *Saunders* v. *Wilkins,* 152 F. 2d 235 (4th Cir. 1945), *cert. den.* 328 U.S. 870, *reh. den.* 329 U.S. 824, an indirect attack was made on the provisions of the Constitution and laws of Virginia imposing poll tax payment as a prerequisite to voting. Plaintiff alleged that 60% of the inhabitants of the state were disenfranchised by the poll tax requirement (see 152 F. 2d at 236-8), presumably on the theory that economically they could not afford to pay it. The court adhered to the precedent established by *Breedlove* and upheld the validity of the Virginia Constitution and laws requiring poll tax payment as a prerequisite to voting.

In *Butler* v. *Thompson,* 97 F. Supp. 17 (E.D. Va. 1951), *affm'd per curiam* 341 U.S. 937, the Virginia poll tax was again attacked on grounds similar, and in some instances identical, to those alleged by the Appellants in the instant case. The court, again adhering to *Breedlove,* held the tax to be a valid exercise of state power.

Finally, an early decision holding the poll tax to be valid as a prerequisite of the right to vote, after an attack upon it on the ground that payment of the tax discriminated against the poor and was, therefore, a denial of rights protected by the Fourteenth Amendment, is *Frieszleben* v. *Shallcross,* 9 Houst. (Del.) 1, 19 A. 576, 8 L.R.A. 337 (1890).

See, also, Annot. 82 L. Ed. 257 (1937).

II

The Twenty-fourth Amendment to the Constitution of the United States, as ratified on February 4, 1964, reads as follows:

> "Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.
>
> "Section 2. The Congress shall have power to enforce this article by appropriate legislation."

An examination of this wording reveals that the amendment was clearly intended to in no way prevent the states from making payment of a poll tax a condition of the right to vote in state and local elections. Its single and only purpose was to prevent the states from making payment of a poll tax a condition of the right to vote in federal elections. This would appear to be obvious from the terms of the amendment itself; nothing at all is said about the power of the states to regulate their own elections. If Congress had intended to affect the states' long-established powers in this respect, it would certainly have declared this intent in the amendment.

That the above is a proper conclusion as to the intent of Congress is further demonstrated by a comparison of the Twenty-fourth Amendment with two other amendments also concerning the right to vote: the Fifteenth and Nineteenth Amendments. The latter two amendments commence in the same language as the Twenty-fourth Amendment: "The right of citizens of the United States to vote. . . ." But these latter amendments immediately go on to state con-

ditions which may not be used by the states to deny or abridge the right to vote, *without* specifying in what types of elections the conditions may not be so used. In contrast, the Twenty-fourth Amendment specifies the types of elections in which the right to vote may not be conditioned upon payment of a poll tax.

Thus, while the Fifteenth and Nineteenth Amendments were intended to apply to *all* elections (local, state and federal), the Twenty-fourth Amendment was clearly intended to apply to federal elections only and was not intended to forbid the states from retaining or imposing payment of a poll tax as a prerequisite for voting in any state or local election.

This conclusion from the wording of the Twenty-fourth Amendment is amply supported by its legislative history. The amendment was proposed to the states by Senate Joint Resolution 29, adopted by the 87th Congress (2d Sess. 1962). As originally reported out of committee in the Senate, S. J. R. 29 provided for the establishment of a former dwelling house of Alexander Hamilton as a national shrine. However, on the floor of the Senate, Senator Holland of Florida offered an amendment striking out the language of the original resolution and inserting the above wording of the Twenty-fourth Amendment. Debate on the measure extended from March 14-24, 1962, and fills 1,000 pages of the Congressional Record. Senator Holland's amendment was ultimately adopted by voice vote, and the amended resolution was passed by a vote of 77 to 16 in the Senate. 108 Cong. Rec. 5105 (1962).

In the House, S.J.R. 29 was heard by Subcommittee No. 5 of the House Committee on the Judiciary, which conducted two days of hearings on S.J.R. 29 and nine separate House joint resolutions also dealing with amendments to the

U. S. Constitution to abolish tax and property qualifications for voting in federal elections or in all elections. *Hearings before Subcommittee No. 5 of the House Committee on the Judiciary,* 87th Cong., 2d Sess., ser. 25 (1962). Only S.J.R. 29 was reported out by the subcommittee, and all House joint resolutions were rejected. *H. R. Report No. 1821,* 87th Cong., 2d Sess. (1962).

S. J. R. 29 was reported out of the House Judiciary Committee on June 13, 1962. After a brief debate of about 40 minutes on August 27, 1962, the resolution was passed by a two-thirds vote of the House of Representatives. 108 Cong. Rec. 17670 (1962).

The legislative record abounds with statements of intent as to the scope and effect of the Twenty-fourth Amendment as embodied in S. J. R. 29. Examples from the extended Senate debate are as follows:

> "MR. HOLLAND. My second question is this: Does not the Senator from Alabama know that the amendment which I and 66 other Senators propose does not prohibit the imposition of a poll tax as a prerequisite to voting in State and local elections, but relates only to the election of President, Vice President, and Members of Congress?" 108 Cong. Rec. 4199 (1962).
>
> "MR. HOLLAND. I understood that the proposal in Virginia [1949 referendum] was related to the complete elimination of the poll tax. Whereas the present proposal, in an undoubted constitutional form, has to do only with the imposition of the poll tax as a requirement for voting for Federal elective officials and does not relate to or interfere with the affairs of the State of Virginia in connection with its State elections." 108 Cong. Rec. 4529 (1962).
>
> "MR. HOLLAND. Does not the Senator know that the proposed amendment which the Senator from Florida hopes he will have an opportunity to offer does not

> affect in the slightest the right of the State of Arkansas, under its present poll tax law, to continue to collect the poll tax and to continue to require the payment of a poll tax as a condition for voting for State, county, and local offices? Does not the Senator think it is almost unkind of him to allow the official in Arkansas who has written him to believe that this amendment really affects him in that way at all?" 108 Cong. Rec. 4836 (1962).
>
> "MR. YARBOROUGH. This proposed constitutional amendment, if adopted, would apply only to elections to Federal office; it would not apply to elections for State, county, city, or any other local office. In this respect, it is more restricted than the 15th Amendment, which provides that the right to vote 'shall not be denied or abridged on account of race, color, or previous condition of servitude' in any election, State or Federal. It is also more restrictive than the 19th Amendment—the woman's suffrage amendment—which provides that the right to vote shall not be denied or abridged on account of sex, in any State or Federal election." 108 Cong. Rec. 4911 (1962).

See, also, 108 Cong. Rec. 4892 (1962) (remarks of Senator Holland to Senator McClellan) where Senator Holland again states during debate that the amendment applies only to federal elections.

The hearings of the House subcommittee also make it abundantly clear that Senate Joint Resolution 29 was to apply solely to federal elections. Senator Holland's repeated statement is set forth on page 25 of the hearings as follows:

> "... it prohibits poll taxes only with reference to the right to vote for certain specified Federal offices. It does not prevent the imposition of a poll tax as a prerequisite for voting for State or local officials or upon State or local issues. I emphasize this point, Mr. Chair-

> man, because many of us who are cosponsors of this joint resolution strongly feel that the election of State and local officials and the making of decisions on strictly local matters, such as bond issues, tax mileage questions, referendums, recall procedures, and the like, are properly and more effectively handled on the State and local level, and we would strenuously oppose any effort to control such matters by Federal law." *Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary,* 87th Cong., 2d Sess., ser. 25, at 25 (1962).

In addition, exchanges between the subcommittee and Representative Henry B. Gonzalez in respect to his House Joint Resolution 594, which proposed a constitutional amendment abolishing the poll tax in *all* elections, highlight the salient difference between the two approaches to abolishing the poll tax and emphasize the significance of the approval of the approach of S. J. R. 29, rather than H. J. R. 594, which was rejected. *Id.* at 15.

The House Report on S. J. R. 29 specifically states the following:

> "Section 1 of the proposed article would eliminate as a prerequisite to vote in any primary or other election for President or Vice President, for electors for President or Vice President or for Senator or Representative in Congress the requirement to pay any poll tax or other tax. The limitation proposed by this section includes not only any State but also the United States. It would also prevent both the United States and any State from setting up any substitute tax in lieu of a poll tax as a prerequisite for voting in primary elections for those specified Federal officials. This prevents the nullification of the amendment's effect by a resort to subterfuge in the form of other types of taxes. However, this section would not prevent a State from imposing a poll tax in purely State or local elections." *H. R. Report No. 1821,* 87th Cong., 2d Sess., at 5 (1962).

The Minority Views also conceded that "The proposed amendment would outlaw the poll tax in Federal elections only." *Id.* at 6. The minority noted that "[T]he joint resolution owes much of its support to the fact that it does not affect State elections but only Federal elections . . . ." *Id* at 9. Finally, to make its intent unmistakably clear, the House Committee rejected H.J.R. 594, sponsored by Representative Gonzalez of Texas and intended by him to apply to *all* elections, at the same time it approved and reported out S.J.R. 29.

While statements of the Representatives were necessarily brief in the short House debate, it was made clear repeatedly that the proposed constitutional amendment applied solely to federal elections. Representative Celler stated the following in this regard:

> "I am aware that this resolution only affects voting in Federal elections. States could inflict the tax on ballots in State or local elections. This might mean double or bobtail ballots." 108 Cong. Rec. 17656 (1962).

Representative Lindsay of New York expressed his concern that Senate Joint Resolution 29 was not broad enough, stating:

> "Such an amendment should abolish impediments to voting in local elections as well as State elections. It should not be confined to Members of Congress." 108 Cong. Rec. 17660 (1962).

Representative Poff of Virginia explained why he was going to vote in favor of this constitutional amendment as follows:

> "I am opposed to a Constitutional amendment if that amendment reaches into State and local elections.
>
> "However, a Constitutional amendment which is confined to Federal elections and which is ratified by the States as the Constitution provides is not an unconstitutional invasion of States rights, and such an amendment I feel obliged to support." 108 Cong. Rec. 17661 (1962).

Similar comments as to the resolution being limited solely to federal elections were made by Congressmen Ryan and Whitten, 108 Cong. Rec. 17663-4 and 17666-7 (1962).

In addition to the record with respect to S. J. R. 29, there are voluminous materials from prior sessions of Congress dealing with similar attempts to eliminate poll taxes, either by constitutional amendment or by statute. Anti-poll tax legislation was introduced in every Congress from 1939 to 1962. The House passed five bills and the Senate two proposed constitutional amendments before S. J. R. 29 was finally adopted by both Houses. *H. R. Report No. 1821, supra,* at 2.

Throughout this period, Senator Holland was not only the chief draftsman and patron of the constitutional amendment approach, but the acknowledged expert of Congress on poll tax laws. Senator Holland repeatedly, clearly and emphatically stated that his proposed amendment applied to federal elections only and was not intended to affect state or local elections in any way. See Hearings on S. J. R. 58, *Hearings before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary,* 87th Cong., 1st Sess., pt. 1, at 86, 100, 159-61 (1961); Hearings on S. J. R. 126, *Hearings Before a Subcommittee on Poll Tax and Enfranchisement of the District of Columbia of the Senate Committee on the Judiciary,* 86th Cong., 1st Sess., at 5, 6, 10, 14, 18, 46 (1959); Senate Debate on S. J. R. 39,

86th Cong., 2d Sess. (1960), 106 Cong. Rec. 1517; Hearings on S. J. R. 29, *Hearings Before a Subcommittee on Qualifications of Electors of the Senate Committee on the Judiciary,* 84th Cong., 2d Sess., at 33 (1956).

Seldom has the legislative history of an enactment been so clear. It was intended to abolish the poll tax in federal elections only and leave the states free to regulate state and local elections as they saw fit. As already mentioned, the proposed amendment was ratified by the necessary number of states on February 4, 1964.

We have set forth this history at such great length to make it abundantly clear that over a period of many years, in many sessions and before many committees of Congress, in meetings and debates throughout the land, the question of the poll tax was the subject of long and thoughtful consideration. From this history and from the history of the adoption and ratification of the Senate Joint Resolution which became Amendment Twenty-four only one conclusion can be drawn. That conclusion is that the Congress, the states and the people of the entire United States, after years of serious and almost never ending discussion and debate, have just expressed themselves beyond the shadow of the slighest doubt as desiring the retention of the right of the states to require a poll tax as a prerequisite for voting in state and local elections.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the questions presented by this appeal are so unsubstantial as not to need further argument and that, therefore, the decision of the court below should be affirmed.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

RICHARD N. HARRIS
Assistant Attorney General

Supreme Court—State Library Building
Richmond, Virginia 23219

PROOF OF SERVICE

I hereby certify that on the 15th day of February, 1965 I served the foregoing Motion on the Appellants herein by mailing a copy thereof in duly addressed envelopes, with first-class postage prepaid, to their respective counsel of record as follows: Lawrence Speiser and Allison W. Brown, Jr., Esquires, c/o American Civil Liberties Union, Suite 803, 1101 Vermont Ave., N.W., Washington 5, D.C.; Ira M. Lechner and Philip Schwartz, Esquires, 2054 14th Street, North, Arlington, Virginia.

RICHARD N. HARRIS
Assistant Attorney General