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No. 94-203

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

FORTIS MORSE, KENNETH CURTIS BARTHOLOMEW, AND KIMBERLY J. ENDERSON,
APPELLANTS,

v.

REPUBLICAN PARTY OF VIRGINIA AND ALBEMARLE COUNTY REPUBLICAN COMMITTEE,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

APPELLEES' MOTION TO AFFIRM OR DISMISS

J. Robert Brame, III
901 East Cary Street
Richmond, VA 23219
(804) 775-4305

General Counsel
Republican Party of Virginia

Patrick M. McSweeney
11 South 12th Street
Richmond, VA 23219
(804) 783-6802

Chairman
Republican Party of Virginia

Daniel A. Carrell
951 East Byrd Street
Richmond, VA 23219
(804) 788-8297

Donald W. Lemons
600 E. Main Street
Richmond, VA 23219
(804) 780-0505

E. Duncan Getchell, Jr., *Counsel of Record*
Robert L. Hodges
McGUIRE, WOODS, BATTLE & BOOTHE
901 East Cary Street
Richmond, VA 23219
(804) 775-4319

Counsel for Appellees

LANTAGNE DUPLICATING SERVICES
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

1. Do the preclearance requirements of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, apply to voting in elections, as stated in the text of the Act and implementing regulations, and as determined by existing case law, or should it be held that those requirements extend to delegate filing fees and other rules for party political conventions?

2. Does Section 10 of the Voting Rights Act of 1965, 42 U.S.C. § 1973h, authorizing the Attorney General to institute suit, at his or her discretion, to enjoin those poll taxes in certain areas that meet the criteria specified in that Section, create a private cause of action under the Voting Rights Act?

3. Does a requirement that those who offer themselves as candidate for delegate to a state party convention pay a delegate filing fee constitute a "poll tax" within the meaning of the Voting Rights Act?

4. Is this appeal moot where individual plaintiffs have challenged a private political party's filing fee for delegates attending its state nominating convention where the convention has been held and concluded?

PARTIES TO PROCEEDINGS BELOW

Fortis Morse, Kenneth Curtis Bartholomew, and Kimberly J. Enderson were plaintiffs in the court below. The Oliver North for U.S. Senate Committee, Inc., The Republican Party of Virginia, and The Albemarle County (Virginia) Republican Committee were defendants in the court below. The Oliver North for U.S. Senate Committee, Inc. has been dismissed from this case pursuant to plaintiffs' Fed.R.Civ.P. 41(a)(1)(i) motion filed contemporaneously with their notice of appeal.

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Appellees The Republican Party of Virginia and The Albemarle County Republican Committee (collectively, "the Party") move to summarily affirm the decision below or to dismiss the appeal filed on behalf of Fortis Morse, Kenneth Curtis Bartholomew and Kimberly J. Enderson. The Party respectfully suggests that this case fails to present a substantial question in that the Appellants can show no error by the court below. Instead, Appellants ask this Court to extend Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c ("Section 5") to apply to political conventions contrary to the definitions in the Act and regulations adopted thereunder. Appellants also ask this Court to denominate as a "poll tax" that which has never been so con-

sidered and to create a private cause of action under Section 10 of the Voting Rights Act contrary to the intent of Congress. The court below properly contented itself with construing the language of the statute and following the guidance of precedent, and thus wisely rejected the invitation to extend federal oversight to the internal affairs of those voluntary associations known as political parties.

In the alternative, dismissal is appropriate because the case is moot in that the Party's statewide convention, the filing fee for which was challenged in this action, has been held and concluded. Absent summary affirmance, the case should be dismissed as moot.

I. STATEMENT OF THE CASE

On December 16, 1993 the Party issued a call for a state convention, to be held on June 3, 1994, to nominate the Party's candidate for United States Senator. Pursuant to the call, all registered voters who were in accord with the Party's principles and who were willing if asked to state their intent to support the nominee of the Party were permitted to participate in local mass meetings, canvasses or conventions conducted exclusively by officials of the Party. Those who wished to be selected by such methods as delegates to the state convention were required to pay a registration fee. Under the Party rules, election as a delegate is not automatic. Candidates for delegate may be slated off and, even if elected, may be instructed. In recent years, the campaign organizations of competing candidates for party nomination have eschewed such tactics as a party unity measure. Hence, for purposes of ruling on a motion to dismiss, the court below accepted Appellants' contention that payment of the fee was tantamount to election.

Appellants, three law students at the University of Virginia Law School (collectively, "the Law Students"), are registered voters of Virginia. Appellant Bartholomew alleges that he was deterred from filing as a delegate by the $45.00 fee collected by the Albemarle County Committee. Appellant Enderson alleges that she was deterred from filing as a delegate in Hampton, Virginia by the $45.00 fee collected in Hampton. Appellant Morse paid the fee under complicated circumstances no longer relevant to his claim.

Five months after the call, and five weeks before the convention was scheduled to be held, the Law Students filed suit seeking an injunction against the delegate selection process. The Party timely filed an answer and motion to dismiss under Fed.R.Civ.P. 12(b)(6), which the Party supplemented with an affidavit. The affidavit established that the Party had decided to nominate its candidate for United States Senate by convention in 1964, 1966, 1970, 1972, 1976, 1978, 1982, 1984, and 1988,[1] and that the delegate fee had increased with time since 1964. For purposes of its analysis, the court below found that no fee had been charged in 1964.

After briefing and argument, the three-judge court convened pursuant to the Voting Rights Act denied the Law Students' motion for a preliminary injunction and granted the Party's motion to dismiss the Voting Rights Act claims, holding that Section 5 of the Act applies to voting in elections, and not to delegate selection rules, and that Section 10 of the Act does not support a private right of action. The three-judge court declined jurisdic-

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[1] The Party's Central Committee filled vacancies in 1964 when the convention refused to oppose Sen. Harry F. Byrd, and in 1978 when the convention's nominee was killed in a plane crash. A primary planned in 1990 was cancelled when no opposition candidate came forward.

tion over several claims not made under the Voting Rights Act, leaving the plaintiffs free to pursue such claims before a single judge if they were so advised. The Law Students do not challenge this jurisdictional ruling. This appeal followed.

II. ARGUMENT

A. THE LAW STUDENTS SEEK TO EXTEND THE PRECLEARANCE REQUIREMENTS OF SECTION 5 OF THE VOTING RIGHTS ACT BEYOND THE STATUTE'S EXPRESS DEFINITION OF "VOTING" TO INTRUDE ON FUNDAMENTAL RIGHTS OF FREE POLITICAL ASSOCIATION.

The decision of the court below should be summarily affirmed because the Law Students have failed to present a substantial issue of federal law to the Court. Instead, the Law Students ask this Court to take precisely the step rejected in *O'Brien v. Brown*, 409 U.S. 1, 4-5 (1972)(per curiam), to interject the federal courts into the issue of seating delegates at a political convention. In *O'Brien v. Brown*, the Court found a complete absence of authority for such action, saying:

> . . . [N]o holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do, relationships of great delicacy that are essentially political in nature. . . . Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties.

Id. The decisions of this Court and of the courts below in applying the Voting Rights Act have, consistent with the intent and language of the Act, restricted the Act to matters affecting voting in general, primary, or special elections, not political party conventions. The Law Students thus ask for a radical ruling from this Court, a ruling that no court has ever made, that is contrary to such case authority as does exist, and contrary as well to the clear language of the Voting Rights Act.

1. Section 5 applies to voting in elections, not to the internal procedures of political parties.

The Law Students claim that the charging of a filing fee to delegates to the Party's convention is a change that requires preclearance under Section 5 of the Voting Rights Act. Section 5 requires preclearance of any change by a state or political subdivision of ". . . any voting qualification or prerequisite to voting or standard practice or procedure for voting . . ." that is different from what was in effect on November 1, 1964. 42 U.S.C. § 1973c.

The applicability of Section 5 to the Party's filing fee is refuted on the face of the statute. There must be a change in a standard or precondition to voting. "Voting" is a defined term in Section 14 of the Voting Rights Act, and voting is defined in terms of voting in an election. It includes " ... all action necessary to make a vote effective in any primary, special or general *election* ...". 42 U.S.C. § 1973l (emphasis added). "Voting" means voting in a public election, not participation in a party convention.

In its recent treatment of Section 5 of the Voting Rights Act, *Presley v. Etowah County Commission*, ___ U.S.___, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992), the Court held that the Voting Rights Act is not an all-purpose antidiscrimination statute. The Court reviewed its decisions under the Act since *Allen v. State Board of Elections*, 393 U.S. 544 (1969), and summed them up as revealing "a consistent requirement that changes subject to § 5 pertain only to voting." *Id.* at ___, 112 S.Ct. at 828, 117 L.Ed.2d at 63. *Presley* concerned a resolution to change the authority of individual county commissioners over road maintenance funds. Under the facts presented in *Presley*, the Court said:

> The . . . Resolution is not a change within any of the categories recognized in *Allen* or our later cases. It has no connection to voting procedures: It does not affect the manner of holding elections, it alters or imposes no candidacy qualifications or requirements, and it leaves undisturbed the composition of the electorate. It also has no bearing on the substance of voting power, for its does not increase or diminish the number of officials for whom the electorate may vote. Rather, the Common Fund Resolution concerns the internal operations of an elected body.

Id. at ___, 112 S.Ct. at 829, 117 L.Ed.2d at 64. No more can be said of the conduct challenged here, conduct which does not affect voting or voting power, yet the Court said in *Presley*, "[A] faithful effort to implement the statute must begin by drawing lines between those *governmental* decisions that involve voting and those that do not." *Id.* (emphasis added).

The Court rejected arguments that Section 5 covered changes in government operations affecting an elected official's authority, saying such a result would expand the coverage of

Section 5 well beyond the statutory language and the intent of Congress. *Id.* at ___, 112 S.Ct. at 830, 117 L.Ed.2d at 65. The Court continued:

> The all but limitless minor changes in the allocation of power among officials and the constant adjustments required for the efficient governance of every covered state illustrate the necessity for us to formulate workable rules to confine the coverage of § 5 to its legitimate sphere: voting.

Id.

If Section 5 cannot reach the internal operations of an elected body, there is no reasonable construction of its terms that will support its reaching the internal deliberations of a private body, particularly the decisions of a political party as to who may attend its convention. Indeed, if the delegate fee requires preclearance, what convention or pre-convention rule does not? And what "workable rule" could be devised for preclearing the rules of a convention, which are not adopted until the convention itself, and remain subject to change by the convention? For that matter, if the Attorney General of one party were responsible for preclearing the rules of the opposing party, would the motivation toward "workable rules" always be present?

Not only are convention rules outside the sweep of the Act, but any attempt artificially to extend the sweep of the Act should be viewed with disfavor. In *Democratic Party of U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1980), this Court considered a Wisconsin law purporting to bind the delegates to the National Democratic Party convention to vote for the candidates on whose slate they ran. The Court rejected the State's argument that the statute was authorized by Art. II, § 1, cl. 2 of the U.S. Constitution, conferring power on the states to appoint presidential electors, saying:

> Any connection between the process of selecting electors and the means by which political party members in a State associate to elect delegates to party nominating conventions is so remote and tenuous as to be wholly without constitutional significance. In [*Cousins v. Wigoda*, 419 U.S. 477 (1975)], despite similar arguments by Illinois, all nine justices agreed that a State cannot constitutionally compel a national political convention to seat delegates against its will.

Id. at 125 n. 31.

2. Section 5's limited applicability to political parties depends upon the presence of delegated state electoral functions.

The challenged action of the Party does not relate to "voting" as defined in the Act. Furthermore, the Law Students have failed to demonstrate that the challenged conduct involves the delegation of a public electoral function. The regulation relied upon by both the lower court and the Law Students, 28 C.F.R. § 51.7, defines the applicability of Section 5's preclearance requirements to political parties. A change affecting voting (*i.e.*, as defined in the Act) made by a political party is subject to preclearance if the change relates to a public electoral function of the party, and the party acts under authority explicitly or implicitly granted by a covered jurisdiction or subunit itself subject to the preclearance requirement of Section 5. 28 C.F.R. § 51.7 (1993). The sole example given by the regulation of a covered change is a change with respect to the conduct of primary elections. *Id.*

The Law Students' construction of the Virginia statutes cited, Jurisdictional Statement ("J.S.") at 10, 11, is an attempt to shoehorn the present case into the delegated state function provisions of 28 C.F.R. § 51.7 or the rule of pre-Voting Rights Act cases such as *Smith v. Allwright*, 321 U.S. 649 (1944). The Virginia statutes cited will not bear the construction advanced by the Law Students. Va. Code § 24.2-509(A) is declaratory of rights a political party has independent of the state. There is no delegation of state power or authority to the party. Va. Code § 24.2-509(A) is merely prefatory to § 24.2-509(B), which purports to grant incumbent General Assembly members limited rights in the decision concerning nomination methods. The latter provision has no application to the Party's 1994 convention, and moreover is itself of dubious constitutionality. *See Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 227 (1989). Va. Code § 24.2-510 merely sets deadlines for parties to complete their nominating process in order to get their candidate on the general election ballot. Va. Code § 24.2-511 sets the procedure for notifying state officials of the nominees to be placed on the general election ballot. By no stretch of construction can these statutes be held to constitute a delegation of state authority in a political party's exercise of its associational rights in conducting a political convention.

The pre-Voting Rights Act cases relied upon by the Law Students are equally inapposite. *Smith v. Allwright* involved the exclusion of black voters from state Democratic primary elections in Texas. Once the Court determined that there was state action sufficient to invoke the 15th Amendment, it voided the challenged conduct, 321 U.S. at 662.

Terry v. Adams, 345 U.S. 461 (1953), also cited by the Law Students, represented the Court's invalidation of what it called "a plan purposefully designed to exclude Negroes from voting and at the same time escape the 15th Amendment." *Id.* at

463-464. It is not, as the Law Students suggest, J.S. at 18, a blanket extension of federal authority over pre-primary political activity, but rather a determination that a state cannot evade the 15th Amendment by subterfuge. In *O'Brien v. Brown*, *supra*, the Court, in considering a challenge to convention delegate selection, distinguished *Smith v. Allwright* and *Terry v. Adams* as cases involving claims of invidious racial discrimination *in a primary contest*. 409 U.S. at 4 n. 1 (emphasis added). Here, of course, there has been no suggestion of an allegation that the delegate fee was intended to or actually had a racially discriminatory impact. Moreover, the cases relied on by the Law Students were decided on constitutional grounds long before the Voting Rights Act was enacted. As the District Court noted in *Williams v. Democratic Party of Ga.*, No. 16286 (N.D.Ga. April 6, 1972), *aff'd.*, 409 U.S. 809 (1972), the meaning of state action in Section 5 is a question of statutory construction separate and apart from the meaning of state action in other contexts. *Williams*, *supra*, Slip Op. at 5.

The Party's selection of delegates to attend its convention, and its selection of methods to choose those delegates, are intra-Party matters, not delegated public electoral functions. Neither the Commonwealth of Virginia, nor any political subdivision thereof, has authority over such proceedings which it could delegate. Indeed, any assertion of such authority would violate the 14th Amendment. *Democratic Party of U.S.*, 450 U.S. at 121-122.

3. The Law Students' contention that Section 5 covers the Party's delegate filing fee is contrary to existing case authority.

The court below not only relied upon the statute and regulations, and but also followed existing case law, particularly *Williams v. Democratic Party of Ga.*, *supra*. Despite the attempts

of the Law Students to turn this decision on its head, the court in *Williams* squarely held that the Voting Rights Act does not apply to procedures for the selection of convention delegates.

Williams involved a Section 5 challenge to new rules promulgated by the Georgia State Democratic Party for selection of delegates to the National Convention in open conventions, replacing a system of appointment by the party's previous gubernatorial candidate. *Williams*, Slip Op. at 2. The court cited the requirement of Section 5 for state action, and the definition of voting in Section 14, and concluded that Section 5 did not reach the party delegate selection rules. The court reasoned that the party's adoption of the rules did not constitute state action as required under Section 5. Slip Op. at 5. Contrary to the suggestion of the Law Students, the holding of the Court could hardly be less ambiguous. Slip Op. at 6.

The court in *Williams* explicitly considered, even to the extent of quoting, the language in the House Judiciary Committee report on the definition of "voting" in the Voting Rights Act upon which the Law Students now rely:

> Clause (1) of this subsection contains a definition of the term "vote" for the purposes of all sections of the Act. The definition makes it clear that the act extends to all elections - Federal, State, local, primary special or general - and to all actions connected with registration, voting, or having a ballot counted in such elections. The definition also states that the act applies to election of candidates for "party" offices. *Thus, for example, an election of delegates to a State party convention would be covered by the Act.*

Williams, Slip Op. at 4 (citing 1965 U.S. Code Cong. & Admin. News, 2464) (emphasis in original). Nevertheless, the court went on to hold that Section 5 of the Act did not reach a change in state party rules for the selection of delegates to the national party convention. Contrary to the argument of the Law Students, J.S. at 12, the *ejusdem generis* rule of construction confines the general word "election" to the class and may not be used to enlarge it. *See, e.g., Cleveland v. U.S.*, 329 U.S. 14, 18 (1946).

The construction advanced by the Law Students is further undermined by the regulations of the Attorney General, whose interpretation the Law Students argue is entitled to "considerable deference". J.S. at 9. The regulation states: "Changes with respect to the conduct of *primary elections* at which party nominees, delegates to party, conventions, or party officials are chosen are subject to the preclearance requirement of section 5." 28 C.F.R. § 51.7 (emphasis added).

Obviously, the Voting Rights Act applies to, for example, presidential preference primary elections in which national convention delegates are chosen. But the definitions in the Act and the regulations are consistent in limiting coverage under Section 5 to changes involving voting in elections.

The Law Students argue that the court in *Williams* would reach a different result now that the Attorney General has created a mechanism for political parties to apply directly for preclearance of items covered by Section 5. For purposes of this case, those regulations, which can shed no light Congress' intent in passing the Voting Rights Act, are a mere tautology. The fact that a procedure exists for preclearing primary election rule changes in no way suggests that the Act should be extended to rules for conducting political conventions.

The Law Students themselves cite *MacGuire v. Amos*, 343 F.Supp. 119 (M.D.Ala. 1972)(three-judge court)(per curiam), J.S. at 8, which relies on *Williams* in concluding that the Voting Rights Act does not protect an individual's right to participate in local conventions. 343 F. Supp. at 121 n. 3. The remaining authority cited by the Law Students is not to the contrary. *Hawthorne v. Baker*, 750 F.Supp. 1090, 1095 (M.D.Ala. 1990)(three-judge court), *vacated,* 499 U.S. 933 (1991), held that the State Democratic Party was covered by Section 5 to the extent it was empowered to conduct primary elections under state law, and in any event was vacated by this Court. *Fortune v. Kings County Democratic County Comm.*, 598 F.Supp. 761, 765 (E.D.N.Y. 1984)(three-judge court), held that election rules for the county executive committee were covered by Section 5 because of delegated public electoral functions. *Wilson v. N.C. State Bd. of Elections*, 317 F.Supp. 1299, 1302 (M.D.N.C. 1970)(three-judge court), held that an intra-party agreement was subject to Section 5 when it was given force of law under a state statute.

The Law Students' citation of cases dealing with filing fees for candidacy for public office are simply inapposite. *Dougherty County Board of Education v. White*, 439 U.S. 32 (1978), involved a regulation by a local school board, as a political subdivision of the state, affecting employees who were candidates for public office. *Id.* at 45, 36. *See also Bullock v. Carter*, 405 U.S. 134, 138 (1972)(filing fee in state primary election). Like "voting", the terms "filing fees", "candidates", and "party office" must all be understood in the context of elections.

Simply put, the Voting Rights Act applies to voting in public elections. It does not apply to party nominating conventions. Even where Section 5 reaches party primary elections, coverage is premised on state involvement or state delegation of public election functions to the political party. 28 C.F.R. § 51.7.

The Court's decisions concerning the First Amendment associational rights of political parties further support the decision below. The Court has consistently and repeatedly rejected state attempts to regulate political parties' internal affairs. *Democratic Party of U.S.*, *supra*, at 121-122. *See also Eu v. San Francisco County Democratic Central Committee*, 489 U.S. at 227 (state cannot enact law to prevent parties from taking internal steps affecting their own process for selection of candidates). As *O'Brien v. Brown*, *supra*, observed, the federal courts cannot undertake to regulate selection of convention delegates without implicating First Amendment associational rights.

In holding that the distinction between a party's exercise of delegated public electoral functions and its conduct of its own convention was dispositive as to the issue of Section 5 coverage, the court below honored the language of the Act, and regulations, sound precedent, and good policy. By all of these standards, the Party's conduct of its own nominating convention is not covered by Section 5.

4. There is no basis in law or fact for treating the Republican convention as a *sub rosa* primary.

Tacitly acknowledging the overwhelming authority against extending the Voting Rights Act to cover political conventions, the Law Students argue that the Republican convention in Virginia should be treated as though it were a primary. The argument, however, is extralegal and entirely metaphorical.

The Law Students quote from a book by Frank B. Atkinson, *The Dynamic Dominion*, for the proposition that Virginia Republican conventions have been called a "great indoor primary" because of their size. The description in the Atkinson

book was itself a quotation from a newspaper column by Charles McDowell in the Richmond *Times-Dispatch* describing the 1978 Republican convention. *Id.* at 354.

Having argued that the Republican Party of Virginia has been successful in conducting large popular conventions over the last sixteen years and that in recent years such conventions have been relatively open, the Law Students are at an analytical loss in explaining why these facts should affect the proper construction of the Voting Rights Act. Although the Law Students cite *Terry v. Adams*, *supra*, for the proposition that courts will not permit white primaries to be conducted by subterfuge, they admit that nothing of the sort is going on here. J.S. at 3, 11 n. 9, 19. Far from charging subterfuge or racial animus, the gravamen of the Law Students' complaint is that *anybody* may attend if he or she pays a modest fee and is prepared to state his or her intent to support the Party's nominee.

Lacking applicable law or legally significant facts, the Law Students' position appears to reflect nothing more than a distrust of unregulated associations and a disapproval of fees.

B. BY ITS NATURE, CONTENT AND HISTORY, SECTION 10 OF THE VOTING RIGHTS ACT CANNOT SUPPORT A PRIVATE RIGHT OF ACTION.

The court below disposed of the Law Students' poll tax claim on the procedural ground that Section 10 of the Voting Rights Act, 42 U.S.C. § 1973h ("Section 10"), authorized the Attorney General, but not a private citizen, to bring an action before a three-judge court. Although the Law Students vigorously challenge this holding, the conclusion of the lower court was certainly correct. As this Court said twenty-five years ago in *Allen v. State Board of Elections*, *supra*, Section 10 "... con-

tains a provision authorizing a three-judge court *when the Attorney General brings an action* 'against the enforcement of any requirement of the payment of a poll tax as a precondition to voting ...'". 393 U.S. at 563 (emphasis added).

The Law Students' claim that there exists a private right of action under Section 10 ignores the history of poll tax legislation. The necessary premise of the Law Students' argument is that Section 10 outlawed poll taxes. J.S. at 19. It did not. Poll taxes in federal elections were abolished by the 24th Amendment. Poll taxes in state elections were held unconstitutional under the Equal Protection Clause of the 14th Amendment in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), *after* the enactment of the Voting Rights Act in 1965. If the Law Students' construction of Section 10 were correct, the Court need not have wasted its time deciding *Harper*, which would have been mooted by enactment of the Voting Rights Act the year before.

A review of the enactment of Section 10 is instructive. The House Judiciary Committee reported a bill that would have abolished the poll tax in any State or subdivision where it still existed. H.R.Rep. 439, *reprinted in* 1965 U.S. Code Cong. & Admin. News 2437. But the Report shows that Congress entertained substantial doubt concerning its power to abolish poll taxes by legislation. *See* H.R.Rep. 439, 1965 U.S. Code Cong & Admin. News at 2479, 2480 (citing the Attorney General's testimony that Congressional abolishment of poll taxes without evidence of specific discriminatory effect raised "the substantial risk of unconstitutionality", and other authorities to the same effect); *see also Harper*, 383 U.S. at 580 n. 2 (Harlan, J., dissenting) (citing doubt expressed in Senate hearings on passage of the Voting Rights Act whether state poll taxes validly could be abolished through exercise of Congress' legislative power). In the end, Congress rejected the House bill's flat prohibitior

and enacted the present Section 10. Conference Report No. 711 *reprinted in* 1965 U.S. Code Cong. & Admin. News 2578, 2580.

In *Harper*, the Court understood that it was outlawing state poll taxes and that up to that time Congress had not done so. 383 U.S. at 666 n. 4, and 680 (Harlan, J., dissenting). Indeed, the majority opinion does not even reference Section 10 or the Voting Rights Act, although it refers to two three-judge district court decisions in cases brought under Section 10, holding poll taxes unconstitutional in Texas and Alabama, respectively. 383 U.S. at 555 n. 4 (citing *U.S. v. Texas*, 252 F.Supp. 234 (W.D.Tex.)(three-judge court), *aff'd.*, 384 U.S. 155 (1966), and *U.S. v. Alabama*, 252 F.Supp. 95 (M.D.Ala. 1966)(three-judge court)).

Section 10 was a narrow compromise authorizing the Attorney General to bring suit where he found that certain conditions were met. This is what the statute says on its face. The Section contemplated specific evidentiary determination of discriminatory purpose or effect before a state law could be held unconstitutional. *See U.S. v. Texas*, 252 F.Supp. at 236; *U.S. v. Alabama*, 252 F.Supp. at 98-99. The Law Students' contention that Section 10 abolished state poll taxes is at odds with *Harper* and the case law as well as the statute and its legislative history.

A statute which does not ban the poll tax, but which grants discretion to the Attorney General to selectively attack poll tax provisions obviously does not create a private cause of action. Whatever rights citizens may have under the 24th Amendment or *Harper*, those claims, the lower court held, cannot be pursued under the Voting Rights Act. Having failed to appeal the jurisdictional ruling that a three-judge court will not hear non-Voting Rights issues, the Law Students' appeal fails absolutely once the standing determination is affirmed.

C. A DELEGATE REGISTRATION FEE AT A STATE CONVENTION IS NOT A POLL TAX.

Historically, it is clear what a poll tax is. A poll tax is a head tax imposed by the state. *U.S. v. Alabama*, 252 F.Supp. at 97. This head tax must be paid before the right of franchise can be enjoyed. *Harper*, 383 U.S. at 664 n. 1, 666 n. 3. Because of the tendency for states which wished to depress the votes of racial minorities or the non-affluent to require the payment of poll taxes at times or in places which were difficult and inconvenient, *see Harman v. Forssenius*, 380 U.S. 528, 539-540 (1965), poll taxes as a condition for voting were prohibited by the 24th Amendment in federal elections and proscribed in state elections by *Harper*'s determination that the right to vote could not be burdened financially.

The payment at issue here is not a poll tax. Not being imposed by the state, it is not a tax at all. Not being a burden on the right to vote in an election, it is not a poll tax. Once again, the Law Students confuse legal categories with metaphor. The fact that a delegate filing fee and a poll tax both involve the payment of money hardly permits the former to be redefined into the latter.

D. THE LAW STUDENTS FAILED TO CHALLENGE THE METHOD OF SELECTION OF DELEGATES BELOW AND CANNOT RAISE THIS ISSUE ON APPEAL.

At points in their brief, *e.g.*, J.S. at 14-16, the Law Students appear to complain that the abortive change from convention to primary in 1990 required preclearance. The Law Students emphasize this point in suggesting, contrary to the ruling below, that the lower court has approved a change in methods

of public election. *Id.* It is difficult to see why the events of 1990 would affect the Party's entitlement to continue its consistent practice of conventions. But in any event, this issue was not pled, briefed, argued or decided in the court below. As a natural and proper result, the lower court's decision does not address it. This Court will not decide a question not raised or addressed in the lower court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

E. THE LAW STUDENTS' CLAIMS CONCERNING THE CONVENTION FILING FEE ARE MOOT BECAUSE THE CONVENTION HAS BEEN HELD AND CONCLUDED.

This Court has consistently held that claims concerning conventions and elections are moot once the activity to which the challenge pertains has been concluded. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 188 (1979); *Cousins v. Wigoda*, 409 U.S. 1201, 1204 (1979)(per curiam); *Brockington v. Rhodes*, 396 U.S. 41, 43 (1969)(per curiam); *Hall v. Beals*, 396 U.S. 45, 48 (1969)(per curiam); *Richardson v. McChesney*, 218 U.S. 487, 492 (1910); *Mills v. Green*, 159 U.S. 651, 657-658 (1895).

The Court on occasions has held that occurrence of the election or convention will not moot a challenge when the matter challenged is "capable of repetition, yet evading review." This exception to mootness applies when (1) the duration of the challenged action is too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

Here it is clear that the issues are capable of litigation in the time permitted. As the court below found, the Law Students delayed five months in bringing the action originally. J.S. App. at A-5. Only four months later, the case has been decided below and briefed in this Court. A timely challenge can be litigated on its merits in the time available.

Moreover, the Law Students have failed to show that there is any reasonable expectation that they will be subject to the same action in the future. In the context of elections or conventions, challenged practices are deemed likely to recur where they are required by statute or other generally applicable requirement. *See, e.g., Fishman v. Schaffer*, 429 U.S. 1325, 1329 n. 4 (1969)(state statute governing access to ballot through nominating petitions); *Democratic Party of U.S.*, 450 U.S. at 115 n. 13 (order of state's highest court applicable to future elections); *Anderson v. Celebrezze*, 460 U.S. 780, 784 n. 3 (1983) (action challenging constitutionality of a state's early filing deadline); *Storer v. Brown*, 415 U.S. 724, 737 n. 8, *reh'g denied*, 417 U.S. 926 (1974) (action challenging constitutionality of state election laws governing access to ballot for independent candidates); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969)(Illinois state nominating petition statute). Here, the Party is not required by any law or rule to impose a fee. In the future the Party could abolish the fee, increase it, decrease it, or make it waivable as suggested by the Law Students.

Furthermore, there is nothing in the allegations of the Law Students or the facts found by the court below to indicate that the Law Students intend to participate in any future Party convention. In *Brockington v. Rhodes, supra*, this Court held that an action challenging the validity of a state statute which required signatures on a nominating petition for an independent candidate to the United States Congress was rendered moot by the occurrence of the election in which he sought to run. The

candidate did not allege that he intended to run for office in any future election, nor did he attempt to maintain a class action on behalf of other putative individual candidates, present or future, or on behalf of other independent voters. 396 U.S. at 42-43. Here, of course, it is unknown whether the Law Students will desire to be delegates in the future, will be charged fees in the future, or, indeed, will be qualified to be delegates at all by residence or party affiliation. Lawsuits should not proceed on hypothetical, abstract or pedagogical interests.

CONCLUSION

For the reasons set forth above, the court should summarily affirm the well-reasoned decision of the three-judge district court or dismiss the appeal.

Respectfully submitted,

J. Robert Brame, III
One James Center
901 E. Cary Street
Richmond, VA 23219
(804) 775-4305

General Counsel
Republican Party of Virginia

Patrick M. McSweeney
11 South 12th Street
Richmond, VA 23219
(804) 783-6802

Chairman
Republican Party of Virginia

Daniel A. Carrell
Riverfront Plaza, East Tower
951 E. Byrd Street
Richmond, VA 23219
(804) 788-8297

Donald W. Lemons
600 E. Main Street
Richmond, VA 23219
(804) 780-0505

E. Duncan Getchell, Jr., *Counsel of Record*
Robert L. Hodges
McGUIRE, WOODS, BATTLE & BOOTHE
One James Center
901 E. Cary Street
Richmond, VA 23219
(804) 775-4319