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No. 10,299

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN T. REGAN,

Appellant,

vs.

CAMERON KING, as Registrar of Voters
in the City and County of San Francisco,
State of California,

Appellee.

APPELLANT'S REPLY TO THE BRIEFS OF THE CIVIL
LIBERTIES UNION AND NATIONAL LAWYERS GUILD.

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Appellee.

**APPELLANT'S REPLY TO THE BRIEFS OF THE CIVIL
LIBERTIES UNION AND NATIONAL LAWYERS GUILD.**

In the brief of appellant heretofore presented, the facts involved are fully stated and in appellee's reply brief it is stated the facts "have been fully and fairly set forth in appellant's brief". Appellee's brief agrees also that the legal question involved has been fully and fairly stated by appellant.

JURISDICTION.

Prior to the commencement of this action the question of jurisdiction was thoroughly investigated and the conclusion reached that the District Court, and

likewise this Court, had jurisdiction of the cause of action, and there was presented to the lower Court a carefully prepared brief on the subject and the District Court entertained the cause. In that Court, the appellee did not question the jurisdiction, nor does he do so in his brief filed in this Court. The American Civil Liberties Union Inc. and the National Lawyers Guild each appeared by brief in the Court below and jurisdiction was not questioned by either of such organizations.

In appellant's brief at pages 1 to 14, the constitutional and statutory provisions and the rules of procedure upon which jurisdiction is based are fully set forth.

In the Court below many authorities were presented and discussed, but it was thought not necessary to extend appellant's opening brief by citation of such authorities.

**BRIEFS OF AMERICAN CIVIL LIBERTIES UNION INC.
AND SAN FRANCISCO AND LOS ANGELES CHAPTERS
OF NATIONAL LAWYERS GUILD.**

The brief presented by the Lawyers Guild in this Court does not question jurisdiction, but that question is mildly presented by the brief of the Civil Liberties Union. At page 3 of the brief of the Civil Liberties Union it is said:

"The question whether the District Court had and the Circuit Court of Appeals has jurisdiction of the suit at all is doubtful as hereinafter argued."

We have considered the cases and the constitutional and statutory provisions cited in such brief, and the propositions advanced and authorities cited we proceed to answer.

We do not repeat the statements made in the brief, but submit the following as a complete answer to every contention made:

**THE RIGHT TO VOTE FOR MEMBERS OF CONGRESS AND FOR
PRESIDENTIAL ELECTORS IS BASED UPON THE CONSTITUTION
OF THE UNITED STATES, AND ANY IMPAIRMENT
OF THAT RIGHT IS WITHIN THE ORIGINAL JURISDICTION
OF THE DISTRICT COURTS OF THE UNITED STATES.**

A. Constitutional provisions upon which the right to vote for members of Congress and for Presidential Electors is based.

1. Sec. 2 of Article I of the Constitution of the United States provides in part as follows:

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of of the State Legislature."

2. Sec. 4 of Article I of the Constitution of the United States provides in part as follows:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

3. Sec. 1 of Article II of the Constitution of the United States respecting election of the President of the United States provides in part as follows:

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

4. Sec. 1 of the Fifteenth Amendment of the Constitution of the United States provides as follows:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

5. The Seventeenth Amendment to the Constitution of the United States provides in part as follows:

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

6. Sec. 1 of Article II of the Constitution of the State of California provides in part as follows:

"*Who are and who are not electors—Absent voters.* Every citizen of the United States, every person who shall have acquired the rights of citizenship under and by virtue of the treaty of

Queretaro, and every naturalized citizen thereof, who shall have become such ninety days prior to any election, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the day of the election, and of the county in which he or she claims his or her vote ninety days, and in the election precinct forty days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law; * * * provided, further, no alien ineligible to citizenship, * * * shall ever exercise the privileges of an elector in this state; * * *."

B. Statutory provisions under which the District Courts are expressly vested with jurisdiction of actions respecting impairment or interference with the right to vote for members of Congress and for Presidential Electors.

1. 8 U. S. C. A., Sec. 31 (Act of May 31, 1870, c. 114, Sec. 1, 16 Stat. 140), provides:

"*Race, color, or previous condition not to affect right to vote.* All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

2. 8 U. S. C. A., Sec. 43 (Act of April 20, 1871, c. 22, Sec. 1, 17 Stat. 13), provides as follows:

“Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

3. 28 U. S. C. A., Sec. 41, subsection 1, provides in part as follows:

“The district courts shall have original jurisdiction as follows:

*(1) United States as plaintiff; civil suits at common law or in equity. First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, * * *.”*

4. 28 U. S. C. A., Sec. 41, subsection 14, provides as follows:

“Suits to redress deprivation of civil rights. Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of

the United States, or of all persons within the jurisdiction of the United States.”

C. Decisions of the Supreme Court and of the Circuit Courts of the United States holding that the United States District Courts have original jurisdiction of actions respecting impairment of the right of an elector to vote for members of Congress and for Presidential Electors.

In *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274 (1884), the Supreme Court in denying a writ of habeas corpus to one who had been convicted under the Federal conspiracy statute for intimidating a citizen in his right and privilege to vote for a member of Congress, and in sustaining the validity of the Federal statute under which the defendant had been convicted, stated and held:

“The States in prescribing the qualifications of voters for the most numerous branch of their own Legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those eo nomine. They define who are to vote for the popular branch of their own Legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.

It is not true, therefore, that electors for members of Congress owe their right to vote to the state law in any sense which makes the exercise of the right to depend exclusively on the law of the State.” (Emphasis supplied.)

The doctrine thus announced has never been deviated from and has been affirmed in many subsequent cases.

In *Wiley v. Sinkler*, 179 U. S. 58, 45 L. ed. 84 (1900), upon authority of the *Yarbrough* case, the Court recognized original jurisdiction in the District Court of an action for damages brought against election officials for their rejection of the plaintiff's vote for a member of the House of Representatives of the United States, stating:

"The complaint, by alleging that the plaintiff was at the time, under the Constitution and laws of the state of South Carolina and the Constitution and laws of the United States, a duly qualified elector of the state, shows that the action is brought under the Constitution and laws of the United States."

Further, with respect to the jurisdictional amount, the Court said:

"The damages are laid at the sum of \$2,500. What amount of damages the plaintiff shall recover in such an action is peculiarly appropriate for the determination of a jury, and no opinion of the court upon that subject can justify it in holding that the amount in controversy was insufficient to support the jurisdiction of the circuit court. *Barry v. Edmunds*, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; *Scott v. Donald*, 165 U. S. 58, 89, 41 L. ed. 632, 638, 17 Sup. Ct. Rep. 265; *Vance v. W. A. Vandercook Co.*, 170 U. S. 468, 472, 42 L. ed. 1111, 1112, 18 Sup. Ct. Rep. 674; *North American Transp. & Trading Co. v. Morrison*, 178 U. S. 262, 267, 44 L. ed. 1061, 20 Sup. Ct. Rep. 869.

The circuit court therefore clearly had jurisdiction of this action, and we are brought to the consideration of the other objections presented by the demurrer to the complaint."

Swafford v. Templeton, 185 U. S. 488, 46 L. ed. 1005 (1902), involved an action to recover damages from state election officials for their asserted wrongful refusal to permit the plaintiff to vote for a member of the House of Representatives. In reversing the ruling of the Circuit Court dismissing the action on the ground that it was not one within the jurisdiction of the court, the Supreme Court in referring to *Wiley v. Sinkler*, supra, stated and held:

"That is to say, the ruling was that the case was equally one arising under the Constitution or laws of the United States, whether the illegal act complained of arose from a charged violation of some specific provision of the Constitution or laws of the United States, or from the violation of a state law which affected the exercise of the right to vote for a member of Congress, since the Constitution of the United States had adopted, as the qualifications of electors for members of Congress, those prescribed by the state of electors of the most numerous branch of the legislature of the state.

It results from what has just been said that the court erred in dismissing the action for want of jurisdiction, since the right which it was claimed had been unlawfully invaded was one in the very nature of things arising under the Constitution and laws of the United States, and that this inhered in the very substance of the claim."

Giles v. Harris, 189 U. S. 475, 47 L. ed. 909 (1903), involved a bill in equity to compel a board of registrars to enroll a negro upon the voting lists. The Supreme Court recognized jurisdiction of the Circuit Court to entertain the action by reason of the provisions of Rev. Stat. par. 629, cl. 16 (28 U. S. C. 41, subsection 14), coupled with Rev. Stat. par. 1979 (8 U. S. C. A. 43), but sustained the action of the lower court in dismissing the bill on other grounds not here involved.

In *Guinn v. U. S.*, 238 U. S. 347, 59 L. ed. 1340 (1914), state election officials who conspired to deprive negro citizens of their right to vote secured by the Fifteenth Amendment to the Constitution of the United States were held indictable under the Federal conspiracy statute, making it a criminal offense to "conspire to injure, oppress, threaten, or intimidate, any citizen in the free exercise and enjoyment of any right or privilege secured to him by the Constitution or laws of the United States".

In *Myers v. Anderson*, 238 U. S. 367, 59 L. ed. 1349 (1915), the Supreme Court affirmed judgments awarding damages against state election officials for denying the right of suffrage to negro citizens. Jurisdiction was held to exist under Rev. Stat. Sec. 1979 (8 U. S. C. Sec. 43), and this irrespective of the amount in controversy.

In *U. S. v. Mosley*, 238 U. S. 383, 59 L. ed. 1355 (1914), the judgment of the lower court sustaining a demurrer to an indictment charging state election officials with a conspiracy to omit the returns from certain precincts at a general election for members of

Congress from their count and return to the state election board was reversed, the court holding, upon the authority of the *Yarbrough* case, that the Federal conspiracy statute was constitutional, and then stating:

"We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in the box."

Nixon v. Herndon, 273 U. S. 536, 71 L. ed. 759 (1927), involved an action for damages against the judges of elections for refusing to permit the plaintiff to vote at a primary election for the nomination of candidates for a senator and representatives of Congress and state and other officers. The plaintiff, a negro, had been refused the right to vote under a state statute. Upon motion by the defendants, the District Court dismissed the complaint upon the ground that the subject matter of the suit was political and not within the jurisdiction of the court, and that no violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States was shown.

In reversing the action of the lower court, the Supreme Court stated:

"The objection that the subject-matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political action, and may be recovered for in a suit at law, hardly has been doubted for over two hundred years, since *Ashby v. White*, 2 Ld. Raym. 938, 92 Eng. Reprint, 126, 1 Eng.

Rul. Cas. 521, 3 Ld. Raym. 320, 92 Eng. Reprint, 710, and has been recognized by this court. *Wiley v. Sinkler*, 179 U. S. 58, 64, 65, 45 L. ed. 84, 88, 89, 21 Sup. Ct. Rep. 17; *Giles v. Harris*, 189 U. S. 475, 485, 47 L. ed. 909, 911, 23 Sup. Ct. Rep. 639. See also Judicial Code, sec. 24 (11), (12), (14). Act of March 3, 1911, chap. 231, 36 Stat. at L. 1087, 1092, Comp. Stat. Sec. 991, 4 Fed. Stat. Anno. 2d ed. p. 840. If the defendants' conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result."

U. S. v. Classic, 313 U. S. 299, 85 L. ed. 1368 (1941), involved an indictment under the Federal criminal statute respecting freedom of elections. The specific charge was that the defendants, conducting a primary election for nomination of a candidate of the Democratic Party for a representative in Congress, wilfully altered and falsely counted and certified the ballots of voters cast in the primary election. The action of the lower court sustaining a demurrer to the indictment was reversed. In an able opinion, Mr. Justice Stone considers and affirms the decisions above referred to and approves the doctrine of those cases. He recognizes and reiterates that it is the right of qualified voters to vote at Congressional elections and to have their ballots counted as cast, and that such right is one secured by the Constitution of the United States and also protected by Section 1 of the Civil Rights Act of 1871 (8 U. S. C. Sec. 43).

Wayne v. Venable (8th C. C. A. 1919), 260 Fed. 65, involved an action for damages for wrongful deprivation for his right to vote for a member of Congress. The Court after holding that such right of action existed in the plaintiff and original jurisdiction to be in the District Court upon the authority of *Wiley v. Sinkler*, supra, and *Swafford v. Templeton*, supra, stated at page 66:

"In the eyes of the law this right is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right. *Scott v. Donald*, 165 U. S. 89, 17 Sup. Ct. 265, 41 L. ed. 632; *Wiley v. Sinkler*, 179 U. S. 58, 65, 21 Sup. Ct. 17, 45 L. ed. 84."

In *Walker v. U. S.* (8th C. C. A. 1937), 93 Fed. (2d) 383, a conviction under the Federal conspiracy statute for conspiracy to injure citizens in their right to vote for members of Congress and to have their votes counted as cast was affirmed. The specific charge was that after voters had marked and cast their ballots and deposited them in the ballot box, the defendants caused them to be counted and recorded other and differently than they had been cast. The indictment was assailed by the defendants upon the ground that the right protected by the conspiracy statute is a personal and individual one, while the conspiracy charged was one affecting the public right in result of all the votes.

It was argued by defendants that when the voter cast his ballot, his personal interest ceased and merged in the general public interest. The court, however, was not of this view and stated:

“‘In view of the decision in the Mosley Case, supra, it seems unnecessary to do more than point out that this indictment charges the conspiracy as one to injure and oppress voters, not candidates for office, and that it is self-evident that a legal voter is injured unless he is not only permitted to vote, but to have his vote counted as cast.’”

Berry v. Davis (8th C. C. A. 1926), 15 Fed. (2d) 488, involves a petition for mandamus which alleged the county and precinct registrar had refused to register negroes for a Presidential and Congressional election.

Issuance of a peremptory writ of mandamus by the District Court was sustained, the court holding jurisdiction to be in the lower court under Sections 24 (1) and 24 (11) of the Judicial Code (28 U. S. C. 41 (1 and 11) solely upon the fact that the action arose under the Constitution of the United States. (Fourteenth and Fifteenth Amendments thereto).

No diversity of citizenship or other basis of jurisdiction was pleaded or claimed.

Further, writs of error to the Circuit Court were dismissed upon the same basis that jurisdiction was held to be in the trial court, since under Section 238 of the Judicial Code (Section 1215 Comp. Stat.) in a “case that involves the construction or application

of the Constitution of the United States”, jurisdiction to review the judgment of the District Court is exclusively in the Supreme Court of the United States, and the Circuit Court has no such jurisdiction or power.

See also:

Knight v. Shelton (1905), 134 Fed. 423;

Brickhouse v. Brooks (1908), 165 Fed. 534;

Anderson v. Myers (1910), 182 Fed. 223, affirmed by the Supreme Court in *Myers v. Anderson*, supra.

D. Other decisions respecting the nature of the right to vote.

In *Ex parte Yarbrough*, supra, the Supreme Court in sustaining and referring to the power of Congress in its enactment of the Federal conspiracy statute to control elections stated:

“This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself that its service shall be free from the adverse influence of force and fraud practiced on its agents, and that the votes by which its members of Congress and its President are elected shall be the *free votes of the electors*, and the officers thus chosen the free and uncorrupted choice of *those who have the right to take part in that choice*.” (Emphasis supplied.)

In *Swindall v. State Election Board*, 32 Pac. (2d) 691 (Okla. 1934), the Court in discussing the intrinsic

nature of the right to vote quoted from the case of *Dove v. Oglesby*, 114 Okl. 144, 244 P. 798, as follows:

“ ‘While the right of suffrage does not inhere in the mere right to live or to exist, yet it does inhere in the right of self-government, and the free exercise of such right is essential to the maintenance of self-government.’ ”

In *McKinney v. Barker*, 180 Ky. 526, 203 S. W. 303, 1918 E. L. R. A. 581, the Court in disapproving legislation which would permit election of persons to public office by less than a majority of votes and in interpreting the word “election” as used in the state constitution, stated and held:

“Applying then the rule just stated to the case in hand, what, may we inquire, did the framers of the Constitution mean by the use of the word ‘election’ as employed in that instrument, when applied to the selection of officers by the people? We have seen that the meaning universally given to that term by the courts, at least throughout the United States, was a selection of choice by the legally qualified voters participating therein, casting for the successful candidate a *majority* or a *plurality* of the votes, and that no one could be declared elected at such an election who did not receive votes sufficient to give him either a majority or a plurality. This being true, it necessarily follows that the Constitution used the word in that sense as completely as if the definition had been so written therein, and that any act of the legislature restricting that meaning, so as to make a less number of votes sufficient to elect, contravenes the Constitution, and is necessarily null and void. To hold otherwise would not only be to sanction a perversion of the plain intent

and meaning of the Constitution, but it would enable the legislature to strike a blow at the very foundation stone of our boasted republican form of government, for when we cease to be governed and have public affairs administered by officers elected by a majority or a plurality of *the legal votes of those entitled to exercise the right of suffrage*, we turn aside from the idea of such form of government, and put its administration into the hands of the minority, * * *.” (Emphasis supplied.)

In *Edmonds v. Banbury*, 28 Iowa 267, 4 Am. Rep. 177 (1869), Supreme Court of Iowa, in discussing the right of suffrage, stated:

“Every citizen who is entitled to vote is interested in having excluded from the box the ballots of those not entitled.”

In *Ladd v. Holmes*, 40 Or. 167, 91 Am. St. Rep. 457, 66 Pac. 714 (1901), the Court stated:

“Every elector has the right to have his vote count for all it is worth, in proportion to the whole number of qualified electors desiring to exercise their privilege. Now, if persons not legitimately entitled to vote are permitted to do so, the legal voter is denied his adequate, proportionate share of influence and the result is that the election, as to him, is unequal; that is, he is denied the equal influence to which he is entitled with all other qualified electors: ‘Ballot Reform, Its Constitutionality’ (John H. Wigmore), 23 Am. Law Rev. 719; *Edmonds v. Banbury*, 28 Iowa 267, 271, 4 Am. Rep. 177; *Davis v. School Dist.*, 44 N. H. 398, 404; *Commonwealth v. McClelland*, 83 Ky. 686.”

E. Decisions of the Federal Courts respecting original jurisdiction of the District Courts of the United States in actions involving enforcement of civil rights generally.

The cases which follow hold original jurisdiction to exist in the District Courts in actions to enjoin acts by state officers in derogation of civil rights.

In *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 83 L. ed. 1423 (1938), the Supreme Court affirmed a decree of the Circuit Court affirming a decree of the District Court enjoining city officials from enforcing a municipal ordinance which prohibited public assemblies and distribution of literature except under certain stringent conditions.

The Court, after observing that the right involved was a civil right inherent in citizenship of the United States and protected by the Fourteenth Amendment, held original jurisdiction to exist in the District Court under Section 24, subsection 14 of the Federal Judicial Code (28 U. S. C. 41 (14)).

Chadiali v. Delaware State Medical Society, 28 Fed. Supp. 841 (1939), the District Court retained jurisdiction in an action against state officials respecting interference with plaintiff's freedom of speech. In so holding, the Court stated:

"The conclusion seems inescapable that the right conferred by the Act of 1871 (8 U. S. C. 43) to maintain a suit in equity in the federal courts to protect the suitor against a deprivation of rights or immunities secured by the Constitution,

has been preserved, and that whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights, there is jurisdiction in the district court under Sec. 24 (14) of the Judicial Code to entertain it without proof that the amount in controversy exceeds \$3,000. * * * "

In *Sweeny v. Pennsylvania Dept. of Public Assistance Board*, 33 Fed. Supp. 587 (1940), the District Court retained jurisdiction of an action against city officials charging infringement of personal liberty through enforcement of regulation adopted under a public relief law. Upon the authority of the *Hague* case, supra, original jurisdiction was expressly held to exist under 28 U. S. C. 41(14) without allegation of diversity of citizenship, and without proof that the amount in controversy was of a value in excess of \$3000.

In *Oney v. Oklahoma City* (10th C. C. A. 1941), 120 Fed. (2d) 861, the Court held sufficient a complaint for injunctive relief charging law enforcement officers of the city with wrongful construction and application of an ordinance respecting dissemination of literature.

The Court held that the particular civil rights involved were privileges and immunities secured by the due process clause of the Fourteenth Amendment, and were within the ambit of 8 U. S. C. 43 and 28 U. S. C. 41 (14), and concluded that jurisdiction as to the individual plaintiffs existed under 28 U. S. C. 41 (14).

A. Interference with the right of plaintiff as a qualified elector.

The right to vote for members of Congress and for presidential electors is a personal civil right based upon the Constitution of the United States.

This right is grounded upon the Constitution as originally adopted and is further secured by the Fourteenth and Fifteenth Amendments thereto. It is also protected by those provisions of the Civil Rights Act, which comprise 8 U. S. C. 31 and 43, respectively enacted in 1870 and 1871.

This individual right finds its real basis in the principle of free self government upon which the United States is founded. It is the right of a qualified elector to participate in the choice of those who shall fill the public offices of his Government.

The right embraces not only the prerogative of a qualified elector to cast his vote, but also consists of the privilege of such elector to cast his vote in a legal election with all other qualified electors only and to have his vote counted and recorded as cast with the votes of all other qualified electors only—all to the end that the qualified elector shall be accorded his true, adequate and proportionate share of influence in the ultimate selection of the officers of his Government.

Under the qualifications prescribed by Section 1 of Article II of the Constitution of the State of California and adopted by the Constitution of the United States, this right is given and confined to citizens of the United States and is expressly withheld from

and denied to aliens ineligible to citizenship to the United States.

Manifestly, if, as charged by the complaint, the Japanese who have been registered as electors and have been permitted to and will in the future be enabled by such registration to vote at congressional and presidential elections are aliens ineligible to citizenship and are, in fact, alien enemies, the right of plaintiff as a duly qualified and registered elector has been and will continue to be interfered with and impaired.

B. Original jurisdiction of the United States District Court in the present action.

Jurisdiction of the present action primarily exists in the United States District Court under the Constitution of the United States, since the plaintiff is seeking protection and enforcement of a Federal civil right as a qualified elector.

More specifically, jurisdiction exists under the following statutes:

(1) 8 U. S. C. 31, which further secures and protects the right; 8 U. S. C. 43, which gives rise to a cause of action for impairment of any civil right secured by the Constitution and laws of the United States (as distinguished from general property rights); and 28 U. S. C. 41 (14), which expressly vests the Court with jurisdiction of the cause of action.

The jurisdiction thus conferred exists without regard to the amount in controversy.

(2) Independent of the foregoing statutes, jurisdiction also exists under the provisions of 28 U. S. C.

41 (1), which vests jurisdiction in the U. S. District Court of all suits of a civil nature at common law or in equity where the matter in controversy exceeds exclusive of interest and costs, the sum of \$3000 and arises under the Constitution and laws of the United States.

Plaintiff has alleged that the right in controversy exceeds the jurisdictional amount and such allegation with respect to the civil right of an elector is held to confer jurisdiction under the statute considered without further allegation or proof as to the value of that right.

(3) Further, upon the authority of *Berry v. Davis*, *supra*, and independent of the statutes above considered, jurisdiction exists by virtue of 28 U. S. C. 41 (11).

THE FOURTEENTH AMENDMENT.

Both briefs of amici curiae assert that the Fourteenth Amendment extends citizenship to Japanese born in the United States, but that is the exact question which this action presents.

In support of the assertion, *U. S. v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890; *Morrison v. State of California*, 291 U. S. 82, 78 L. ed. 664; and *Perkins v. Elg*, 307 U. S. 325, 83 L. ed. 1320, are cited.

In appellant's brief at pages 20 to 22 and at pages 33 to 38 the *Wong Kim Ark* case is fully discussed, and at pages 38 to 40 analysis is made of *Morrison v. State of California* and *Perkins v. Elg*.

THE PREAMBLE OF THE FEDERAL CONSTITUTION.

At pages 40 to 48 of appellant's brief under the above caption, the *Wong Kim Ark* case is further discussed, and it is shown that the prevailing decision in that case disregards the provisions of the Preamble, and we shall here later cite additional authorities bearing upon this question.

The briefs to which this is in reply make but feeble attempt to answer appellant's contention that the provisions of the Fourteenth Amendment involved extend citizenship to white persons only, and no attempt at all to answer appellant's contention that a construction of the Fourteenth Amendment whereby citizenship is extended to Japanese is in direct conflict with the purposes and objects of the Constitution of the United States, as set forth in the Preamble of the Constitution, by reason of the racial characteristics of the Japanese people and the aims, purposes, and ambitions of their government.

Appellant's brief was a challenge to show, if they could, that the extension of citizenship to Japanese did not defeat constitutional purposes. They have not attempted to answer this challenge. It was also contended in appellant's opening brief that a construction of the Fourteenth Amendment that would extend citizenship to all peoples eligible to naturalization under the steadily pursued naturalization policy would be in accord with the intentions of the framers of the Fourteenth Amendment, and no attempt is made in either brief to show that such would not be the reasonable and proper construction of the lan-

guage of that amendment. At pages 42 and 43 of appellant's opening brief the characteristics of the Japanese people and the Japanese government were mentioned and some of the outstanding traits specified. It is not even claimed that the Japanese in these respects were not correctly characterized.

At pages 36 and 37 of the Civil Liberties brief it seems that the correctness of the characterization of these people is not disputed. It is there said "They are no better and no worse on the average than individuals of other races". This action is brought to test the citizenship of Japanese and it is a poor argument in their defense that there may be some other people in the world than whom the Japanese are "no worse". Very likely if this action involved the citizenship of a German, the Civil Liberties Union would ooze its way into the defense of such German and very likely would urge that the German is "no worse" than the Japanese. Note too the declaration that "The Japanese government, however, is worse than most governments, saving those of present-day Germany, Italy, Hungary and Roumania".

There is no government that is now being more loyally supported by its people than the government of Japan, and the only Japanese who disclaim loyalty to the Japanese government are some Japanese who are now domiciled in the United States, some of whom proclaim their loyalty to this country, and it was found by investigation of the military authorities of the United States and of the investigators of the United States that these protestations of loyalty

mainly date from a time subsequent to December 7, 1941. Since presenting the opening brief, we have concluded that additional authorities in support of our construction of the Preamble of the Constitution might well be cited and this thought is confirmed by the repeated statements in the briefs of amici curiae that our construction of the Preamble is erroneous.

ADDITIONAL AUTHORITIES ON CONSTRUCTION.

In our opening brief we cited and quoted from Story on the Constitution, the general rule stating, in effect, that such rule was universally followed.

We believe the first reference to the Preamble in a decision of the Supreme Court of the United States was made in *Chisholm v. Georgia*, 2 Dall. R. 419, decided in the February term, 1793. This was the eighth case decided by that Court and the first one in which a grave constitutional question was involved. Mr. Chief Justice Jay, at page 475 said:

"Let us now turn to the Constitution. The people therein declare, that their design in establishing it, comprehended *six* objects. 1st. To form a more perfect union. 2d. To establish justice. 3d. To ensure domestic tranquillity. 4th. To provide for the common defence. 5th. To promote the general welfare. 6th. To secure the blessings of liberty to themselves and their posterity. It would be pleasing and useful to consider and trace the relations which each of these objects bears to the others; * * * and to shew that they collectively comprise every thing requisite,

with the blessing of Divine Providence, to render a people prosperous and happy; on the present occasion such disquisitions would be unreasonable, because foreign to the subject immediately under consideration."

The opinion from which the above quotation is made was written by the first Chief Justice of that Court who was appointed by President Washington within a few months after his inauguration. The first Chief Justice had fresh in mind the colonial period which he had helped in making. He was a member of the First Continental Congress. In 1779 he was sent by Congress to Spain in an effort to secure from that country a loan. In 1782 he was sent by Congress to Paris as a representative of this country and with Jefferson, Franklin, Adams and Laurens, negotiated and signed the Treaty of Peace of 1783. In 1784 he was elected to the Congress of the Confederation. He was active with Hamilton and others in securing the ratification of the Constitution. No one was better qualified than he to speak of the "design" of the framers of the Constitution.

In *Cohen v. Virginia*, 6 Wheaton 264, 5 L. ed. 257, Chief Justice Marshall said:

"The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the Constitution; and if there be any who deny its necessity, none can deny its authority.

"To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided,

the people of the United States have declared, that they are given 'in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity'.

"With the ample powers confided to this supreme government for these interesting purposes are connected many express and important limitations on the sovereignty of the States, which are made for the same purposes."

In 1816 Mr. Justice Story in *Martin v. Hunter's Lessee*, 1 Wheaton 304, 4 L. ed. 97, referred to the language of the Preamble as determining by whom the Constitution was ordained. He said:

"The Constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the Preamble of the Constitution declares, by 'the people of the United States'."

Seventeen years later Justice Story devoted 38 pages of his great work on the Constitution to an expression of his views of the significance of the Preamble and to the regard that should be given it in the construction of the substantive provisions of the Constitution. So complete and so conclusive was his analysis of that paragraph of the Constitution that Courts have not subsequently questioned its correctness, nor has it been questioned by other writers on the Constitution. We shall later quote further from Justice Story.

The "great purposes" of the Constitution referred to by Justice Marshall in *Cohen v. Virginia*, *supra*,

are the same "great purposes" contemplated by Mr. Justice Stone when in *U. S. v. Classic*, 313 U. S. 299, 85 L. ed. 1378, less than two years ago, it was said:

"But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government. Cf. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Brown v. Walker*, 161 U. S. 591, 595, 40 L. ed. 819, 820, 16 S. Ct. 644, 5 Inters. Com. Rep. 369; *Robertson v. Baldwin*, 165 U. S. 275, 281, 282, 41 L. ed. 715, 717, 718, 17 S. Ct. 326. If we remember that 'it is a Constitution we are expounding', we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose."

True, in this case the Preamble of the Constitution was not specifically mentioned, but it is only in the Preamble that the "great purposes" are declared.

Chief Justice Stone, speaking for a unanimous Court, again evidences the Court's resort to the Preamble as an aid and guide to construction of con-

stitutional provisions. Only a few months ago in *Ex parte Richard Quirin*, reported in Vol. 87, No. 1 of Advance Opinions of the Supreme Court of the United States, it was said:

"Congress and the President, like the Courts, possess no power not derived from the Constitution. But one of the objects of the Constitution, as declared by its Preamble, is to 'provide for the common defense'."

From these quotations, it will be seen that the Supreme Court of the United States has always turned to the Preamble of the Constitution to ascertain constitutional purposes and has construed substantive provisions of the Constitution following so as not to "defeat", but so as to "effectuate the constitutional purpose".

James M. Beck in an address on the subject of the Preamble said:

"When regard is thus had to the mighty spirit that breathes through the preamble of the Constitution, and to the unmeasurable consequences of the formation of the most powerful Republic of all time, this solemn declaration that 'We the People of the United States * * * do ordain and establish this Constitution for the United States of America' has a noble simplicity and dignity.

"I must not be understood as suggesting that all this was in the minds of the draftsman of the Preamble—whoever he may have been, and we do not know who he was. I am prepared to concede that its framers were not attempting any grandiloquent pose, but were simply giving a

formal enacting clause to the Constitution by an assertion, in simplest language, of who its creators were and what its mighty purposes."

14 *Georgetown Law Journal* 219.

Though Justice Story's work on the Constitution was written 110 years ago, it is still universally accepted as the outstanding authority.

Quoting further from the 5th Edition of his work, Chapter 6, we call attention that he reverts to the subject of the construction of the Constitution:

"Sec. 460. There does not seem any reason why, in a fundamental law or constitution of government, an equal attention should not be given to the intention of the framers, as stated in the preamble. And accordingly we find that it has been constantly referred to by statesmen and jurists to aid them in the exposition of its provisions."

"Sec. 462. And here we must guard ourselves against an error which is too often allowed to creep into the discussions upon this subject. The preamble never can be resorted to to enlarge the powers confided to the general government or any of its departments. It cannot confer any power *per se*; it can never amount, by implication, to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the Constitution. Its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. For example, the preamble declares one object to be, 'to provide

for the common defense'. No one can doubt that this does not enlarge the powers of Congress to pass any measures which they may deem useful for the common defense. But suppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be, governed by the intent of the power; if one would promote and the other defeat the common defense, ought not the former, upon the soundest principles of interpretation, to be adopted? Are we at liberty, upon any principles of reason or common-sense, to adopt a restrictive meaning which will defeat an avowed object of the Constitution, when another equally natural and more appropriate to the object is before us? Would not this be to destroy an instrument by a measure of its words, which that instrument itself repudiates?"

It is not only interesting, but exceedingly helpful to note that the guiding principle of construction as here declared by Justice Story is the same as that expressed by the Supreme Court a hundred years later in *U. S. v. Lefkowitz*, 285 U. S. 452, 76 L. ed. 877, hereinbefore cited, where it was declared:

"And this Court has always construed provisions of the Constitution having regard to the principles upon which it was established. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions."

and in *U. S. v. Classic*, *supra*, where the following expression of the rule was given:

"If we remember that 'it is a Constitution we are expounding', we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose."

Other authorities could be cited, but there is no occasion for doing so. Enough has been presented to show that the controlling force of the Preamble as first declared by the Supreme Court speaking through Chief Justice Jay has been continuously recognized by that court down to its latest expression on the subject. Likewise, the philosophy of constitutional construction as expressed by Justice Story has undergone no change, but is still applied and followed finding, perhaps, its latest application in *Ex parte Quirin* above cited.

At page 21 of the Civil Liberties Union brief it is said:

"By reason of the universality of the language of the 14th Amendment the court decided that the place of birth was the criterion of nationality and citizenship in the United States and that citizenship was not confined to white persons."

It is true that the expression "all persons" is used in the Fourteenth Amendment and literally pursued, it is all inclusive. It is true, also, that in the Nationality Act of 1940 the expression is "a person born in the United States". This expression may be construed as general, as comprehensive, but authorities already cited establish the rule to be that language of a constitutional provision or of a statute is not to be literally

followed when by so following it the legislative purpose will not be accomplished.

Congress passed a number of acts liberalizing conditions under which aliens serving in the armed forces of the union might be naturalized. In these acts generally the term "any alien" was used. In at least one the expression "any person of foreign birth" was used. As to all of these the courts have held that while the term was all comprehensive, the language should not be literally followed, but that the expression should be given a more limited or restricted meaning. The meaning that the courts have attributed to these expressions has restricted the right to aliens eligible to citizenship under the Uniform Naturalization Law. This is the holding of *Tayoto v. U. S.*, 268 U. S. 402, 69 L. ed. 1016, and of the numerous cases referred to in the opinion. This case was cited and discussed in appellant's opening brief and a short quotation from it is here particularly applicable. It was said:

"As it has long been the national policy to maintain the distinction of color and race, radical change is not lightly deemed to have been intended."

It would seem that if "all persons" as used in the Fourteenth Amendment be given the restricted meaning, certainly the same rule would be applied to "a person" as used in the Nationality Act. It could hardly be held that Congress intended by that Act to abandon the policy to which it had steadfastly adhered for one hundred fifty years.

The rule of construction which we are urging upon the attention of the court is perhaps nowhere better stated than in *Ozawa v. United States*, 260 U. S. 178, 67 L. ed. 199, references to which have already been made. The Court, at p. 194, states the rule to be:

"It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance; but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail. See *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; *Heydenfeldt v. Daney Gold & S. Min. Co.*, 93 U. S. 634, 638, 23 L. ed. 995, 996, 13 Mor. Min. Rep. 204."

AMICI CURIAE BRIEFS ASSERT APPELLANT TO BE
PREJUDICED AGAINST THE JAPANESE.

The two briefs to which we are replying assert in effect that this suit springs from a prejudice against the Japanese. Prejudice is defined to be:

"An opinion or decision of mind formed without due examination of the facts or arguments which are necessary to a just and impartial determination."

Under this definition appellant is not prejudiced against the Japanese or their government.

This suit is based on an accurate knowledge of the characteristics of the Japanese race and of the character, ambitions and intentions of the Japanese government, and based upon that knowledge appellant claims that Japanese citizenship is in conflict with and in direct antagonism to each of the "six great purposes of the Constitution". In the opening brief of appellant Japanese racial characteristics were discussed and some of them particularly specified and the accuracy of the statements there made is not denied.

In the opening brief the aims, purposes and methods of the Japanese government were to some extent described. The accuracy of the charges there made is not questioned. Reference was also made to the false, hypocritical, dishonest and misleading course pursued by the Japanese government with the United States for more than a score of years and no error on the part of appellant in this regard is claimed.

The brief of the Lawyers Guild is silent upon the subject while the brief of the Civil Liberties Union declares at page 36 that the Japanese people "are no better and no worse on the average than individuals of other races" and that "the Japanese government, however, is worse than most governments, save those of present day Italy, Germany, Hungary and Roumania". As to the government, at page 37, it adds:

"* * * the Japanese government which consists of an ambitious, reckless and treacherous group of military parasites who hold the Japanese people in thrall and exploits them for their own purposes."

It asserts that our quarrel is with the government and not with the people and flamboyantly promises the Japanese people we shall free them "from their chains when we have achieved final victory".

When the opening brief was written and filed, we to a large extent had to depend upon common knowledge for proof of the correctness of our characterization of the Japanese people and the Japanese government. However, since then there has been issued by the Department of State a book entitled "Peace and War, United States Foreign Policy, 1931-1941", commonly referred to as the "White Book", which we now have before us. In its 144 pages is given a detailed history of the relations existing between the Japanese Empire and the United States from 1931 to Pearl Harbor. In this history is set forth official communications, proposals, conferences, and conversations between this Government and the Empire of Japan, and this history proves incontestably every assertion we have made in the opening brief or that we have here made. It presents a record of duplicity, misrepresentation and dishonesty that should shock even the most ardent of Japanese sympathizers. The last of these conferences was concluded about one hour after the assault on Pearl Harbor had begun. The limits of this brief will not permit extensive quotations from this book of disclosure. It is doubtless now available to this Court. We cannot refrain, however, from quoting the last expression of Secretary Hull to the Japanese representatives with whom he was in conference while Pearl Harbor was being

destroyed, though before the news of the attack had been received. Quoting from page 142, Secretary Hull said to the Japanese representatives:

"I have never seen a document that was more crowded with infamous falsehoods and distortions—infamous falsehoods and distortions on a scale so huge that I never imagined until today that any Government on this planet was capable of uttering them."

It may be reasonably inferred that those sponsoring this suit are not enamored of the Japanese and that they do not admire the Japanese government.

RACE SUPERIORITY.

Both briefs assert that this action is based upon a claim of race superiority. Race superiority has not been advanced or claimed by appellant either in this Court or in the Court below, nor is the suit based upon such claim. Race superiority is not involved. Whether the white race is inferior or superior does not affect the question.

THE CHINESE.

The authors of the two briefs appear greatly concerned lest by the decision of this case the status of Chinese may be affected.

If the *Wong Kim Ark* case be overruled, it would be the establishment of the fact that under the law neither Japanese nor Chinese have ever been citizens

of the United States, and even *amici curiae* should be able to survive correct constructions of the constitution. They should not argue for a continuance of citizenship which these people never had, nor contend for the continued exercise of privileges to which they were never legally entitled. However, should Wong Kim Ark be overruled, this suit offers no real threat to the Chinese. Congress can in a fortnight pass an act which will extend specifically to Chinese born in the United States citizenship, and the passage of such act is now being considered in Congress. If such act be not passed before this case is determined by the Supreme Court of the United States, such action doubtless would follow a decision overruling Wong Kim Ark.

**NO ASIATICS IN THIS COUNTRY DURING THE
COLONIAL PERIOD.**

At page 25 of appellant's opening brief it is said:

"During the Colonial period there were no Asiatics in this country,"

and this statement was made because the history of the period shows its accuracy. Nevertheless, in both briefs feeble efforts are made in an attempt to question the correctness of the statement. In the brief of the Civil Liberties Union at page 26, among other things, it is said:

"It is not unlikely that a few Asiatics were here at the time the Constitution was drafted and adopted. * * * A few persons of Asiatic deriva-

tion were doubtlessly engaged as sailors in the maritime service and when their vessels periodically put in at our ports they commingled freely with our early inhabitants. * * * It is not improbable that Congress, in passing it, desired to exclude itinerant Asiatics from being naturalized, etc."

We submit these statements to the Court merely suggesting that they appear to be triumphant in puerility.

Nor is the Guild more successful in its attack upon the correctness of appellant's statement here being discussed. At page 9 of its brief it asserts that during the Colonial period there were Poles here. Certainly there were Poles here, but Poles are not Asiatics and Poland is not an Asiatic country. Poland, including Lithuania, where Kosciuszko was born, is in Europe and the Poles had maintained their government for more than a thousand years prior to the Revolution. The Poles are not a colored race. They are not Asiatics. Certainly they are not Japanese. They were among the first settlers in the Colonies and shared the hardships and the triumphs of the colonial people, performed their part in the Revolution and are included in the words of the preamble, "We, the People of the United States", and likewise included in "Ourselves and Our Posterity". It is true that Kosciuszko was a Pole, that he received military training in France and Germany, that like Lafayette, he joined the Colonies in their struggle for liberty, that he rendered distinctive service as a general in the colonial armies, and that "he was highly honored

both by Washington and the Congress", and that there was "conferred on him the rank of Major General", but all of this does not show that Japanese are entitled to citizenship under the Constitution of the United States.

Amici Curiae appear to be quite unable to understand what is meant by "white person", as used in the naturalization laws enacted by Congress, though the Supreme Court of the United States has made the meaning of that term as so used entirely plain to all others.

In appellant's opening brief, at page 32, reference was made to *Ozawa v. U. S.*, 260 U. S. 178, 67 L. ed. 199, in which the Supreme Court held that a Japanese was not entitled to naturalization because he was not a "white person", and to *U. S. v. Thind*, 261 U. S. 206, 67 L. ed. 617, in which that Court held that a Hindu for the same reason was not entitled to naturalization, and in the latter case the Court at considerable length explained what was meant by "white person", and it seems advisable to here make rather liberal quotation from that case. At page 207, in discussing the construction to be placed upon the words "white persons", the Court said:

"The words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken. See *Maillard v. Lawrence*, 16 How. 251, 261, 14 L. ed. 925, 930.

"They imply, as we have said, a racial test; but the term 'race' is one which, for the practical purposes of the statute, must be applied to a group

of living persons *now* possessing in common the requisite characteristics; not to groups of persons who are supposed to be or really are descended from some remote, common ancestor, but who, whether they both resemble him to a greater or less extent, have, at any rate, ceased altogether to resemble one another. It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today; and it is not impossible, if that common ancestor could be materialized in the flesh, we should discover that he was himself sufficiently differentiated from both of his descendants to preclude his racial classification with either. The question for determination is not, therefore, whether, by the speculative processes of ethnological reasoning, we may present probability to the scientific mind that they have the same origin, but whether we can satisfy the common understanding that they are now the same, or sufficiently the same, to justify the interpreters of a statute—written in the words of common speech, for common understanding, by unscientific men—in classifying them together in the statutory category as white persons. In 1790 the Adamite theory of creation—which gave a common ancestor to all mankind—was generally accepted, and it is not at all probable that it was intended by the legislators of that day to submit the question of the application of the words 'white persons' to the mere test of an indefinitely remote common ancestry, without regard to the extent of the subsequent divergence of the various branches from such common ancestry or from one another."

After discussing at length the views of ethnologists, the Court at page 214 continues:

"It does not seem necessary to pursue the matter of scientific classification further. We are unable to agree with the district court, or with other lower Federal courts, in the conclusion that a native Hindu is eligible for naturalization under Sec. 2169. *The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white.* The immigration of that day was almost exclusively from the British Isles and northwestern Europe, whence they and their forebears had come. When they extended the privilege of American citizenship to 'any alien being a free white person', it was these immigrants—bone of their bone and flesh of their flesh—and their kind whom they must have had affirmatively in mind. The succeeding years brought immigrants from eastern, southern, and middle Europe, among them the Slavs and the dark-eyed, swarthy people of Alpine and Mediterranean stock, and these were received as unquestionably akin to those already here, and readily amalgamated with them. It was the descendants of these, and other immigrants of like origin, who constituted the white population of the country when Sec. 2169, re-enacting the naturalization test of 1790, was adopted; and, there is no reason to doubt, with like intent and meaning.

"What, if any, people of primarily Asiatic stock, come within the words of the section, we do not deem it necessary now to decide. *There is much in the origin and historic development of the statute to suggest that no Asiatic whatever*

was included. The debates in Congress, during the consideration of the subject in 1870 and 1875, are persuasively of this character. In 1873, for example, the words 'free white persons' were unintentionally omitted from the compilation of the Revised Statutes. This omission was supplied in 1875 by the Act to Correct Errors and Supply Omissions. February 18, 1875, 18 Stat. at L. chap. 80, p. 318. When this act was under consideration by Congress, efforts were made to strike out the words quoted, and it was insisted, upon the one hand, and conceded, upon the other, that the effect of their retention was to exclude Asiatics generally from citizenship. While what was said upon that occasion, to be sure, furnishes no basis for judicial construction of the statute, it is, nevertheless, an important historic incident, which may not be altogether ignored in the search for the true meaning of words which are themselves historic. That question, however, may well be left for final determination until the details have been more completely disclosed by the consideration of particular cases, as they, from time to time, arise. The words of the statute, it must be conceded, do not readily yield to exact interpretation, and it is probably better to leave them as they are than to risk undue extension or undue limitation of their meaning by any general paraphrase at this time.

"What we now hold is that the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is popularly understood."

This decision was by an unanimous court and is an exhaustive review of the subject. It affirms the decision of *Ozawa v. U. S.*, *supra*, and discusses the principle involved at greater length. Whenever in this or our opening brief we have used the term "white person", we have used it as its meaning was so determined and applied. *Amici curiae* may not like "white persons" as here defined, but they will have to endure such temporary inconvenience as the settled law imposes.

"DISCUSSION OF APPELLANT'S RACIAL THEORY."

Under the above heading, at page 6, the brief of the Lawyers Guild opens a discussion in which reference is made to the Declaration of Independence, to the Articles of Confederation, to an ordinance adopted by the confederate Congress in 1787 and to *Mein Kampf*, which merits little, if any consideration.

The position of appellant is in entire harmony with the Declaration of Independence.

The Articles of Confederation did not survive the adoption of the Federal Constitution. In truth, the convention met for the purpose of revising the Articles of Confederation, but after long deliberation, found that instrument so defective that the convention abandoned the idea for which they assembled. At a subsequent session they addressed themselves to the task of framing a Constitution, and the Articles of Confederation furnish no aid to construction of the instrument finally adopted, nor is the ordinance of 1787 in

any fashion an aid to the contentions of *amici curiae*. The quotation from Hitler made at page 12 of the brief is not more helpful to their cause. Following these several references and quotations, it is said at page 12:

"There is absolutely no evidence whatsoever in the great historical documents of American liberty that any of them were motivated by theories of white racial superiority."

Under an earlier heading we have stated that the question of race superiority is in no manner involved in this case. In the closing paragraph at page 15 reference is made to "a narrow, bigoted and intolerant oligarchy based on the infamous and detestable conception of race superiority". As the superiority of race is not here involved, we are not interested in the views of the Guild on that subject. If at any time we should be called upon to defend the white race against the charge of inferiority, the task would be neither disagreeable nor difficult.

"THE LEGEND OF THE WHITE RACE."

At page 39 of the Civil Liberties Union brief, under the above heading, an effort is made, as we understand the effort, to show that there are no whites. The contentions under that heading are somewhat modified by a reference at page 37, where prejudice of appellant is being urged, to which reply has heretofore been made. It is said:

"The bias extends, apparently, to the white Ainu, the aboriginal inhabitants of Honshu and Hokkaido, whose purity and definiteness of white lineage is probably older than that of any other whites in the world."

and later in the same paragraph asserts that "no Japanese can with verity assert freedom from Ainu blood the appellant appears to have been declaiming against the whites the while he has been lauding them". This diatribe is noticeable because of its crudity as well as its inaccuracy. The Japanese found these people on the islands, made war against them and conquered them, and have since kept them upon the unproductive part of a small island where they have dwindled to the present number of about fifteen thousand. Ethnologists do not agree they are Caucasians and historians do not profess to know from whence they came. Professor Yoshi S. Kuno, a Japanese, for a long period head of the Department of Languages and Literature at the University of California, says of the Ainu:

"At the present time, the total number of Ainus who live in Japan scarcely reaches 15,000. They are at present like the American Indian, rather mild and spiritless, and possessed by a strong desire for liquor. Above all, they are noted for being dirty. The habit of bathing is not only entirely unknown among them but it never even occurs to them to wash their hands and faces."

We have no disposition to question the statement quoted above that "no Japanese can with verity assert freedom from Ainu blood * * *". However, nothing

can be gained by pursuing this subject. History shows that there is definitely a white race, that definitely there are white people, and in the Ozawa and Thind cases, the Supreme Court has definitely determined the meaning of "white persons" as that term is here involved.

There are many expressions in the two briefs to which we have here made no reference, but such failure to refer to them is not to be construed as a concurrence in the views expressed.

APPELLANT'S POSITION AGAIN STATED.

Because of the obvious attempt of amici curiae to inject questions not involved in this case, appellant again states his position.

(1) Citizenship of Japanese, because of racial characteristics and the objectives of their government, offend against each of the "great purposes" of the Federal Constitution as declared in its Preamble.

(2) If color could be disregarded, Japanese citizenship, because of other racial characteristics and the objectives of the Japanese government, offends against each of the "great purposes" of the Constitution as declared in the Preamble.

(3) The Fourteenth Amendment should be construed as a grant of citizenship to all persons born in the United States who are eligible to citizenship under the Uniform Naturalization Law.

CONCLUSION.

It has been the effort of appellant to fully and fairly present to this Court the questions involved, and it is believed that such presentation shows that the judgment of the District Court should be reversed.

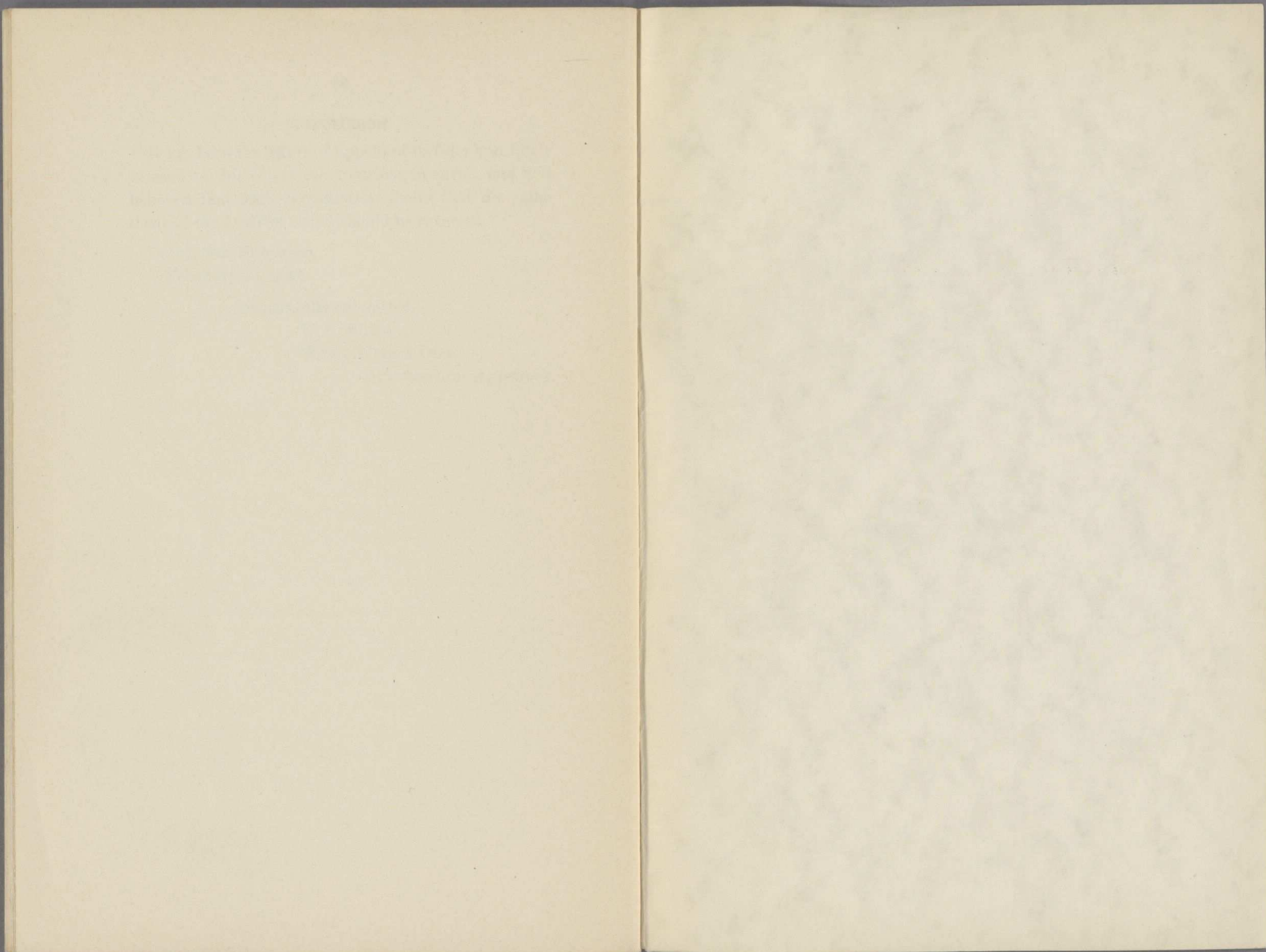
Dated, San Francisco,
February 15, 1943.

Respectfully submitted,

U. S. WEBB,

WEBB, WEBB & OLDS,

Attorneys for Appellant.



Due service and receipt of a copy of the within is hereby admitted

this.....day of February, 1943.

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*Counsel, American Civil Liberties Union, Inc.
and A. C. L. U., Northern California Branch,
Amici Curiae.*

.....
*San Francisco and Los Angeles Chapters of the
National Lawyers Guild appearing as Amici
Curiae.*