IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1844

CITY OF MOBILE, ALABAMA, et al., *Appellants,*

v.

WILEY L. BOLDEN, et al., *Appellees.*

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE APPELLANTS

C.B. ARENDALL, JR.
WILLIAM C. TIDWELL, III
TRAVIS M. BEDSOLE, JR.
Post Office Box 123
Mobile, Alabama 36601

FRED G. COLLINS
City Attorney, City Hall
Mobile, Alabama 36602

CHARLES S. RHYNE
WILLIAM S. RHYNE
DONALD A. CARR
MARTIN W. MATZEN
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1844

CITY OF MOBILE, ALABAMA, *et al.*,

Appellants,

v.

WILEY L. BOLDEN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit is reported at 571 F.2d 238, and that of the District Court is reported at 423 F. Supp. 384. Those Opinions are reproduced in Appendices A and B to the Jurisdictional Statement, respectively. The Judgment of the District Court, entered on October 22, 1976, and the Order of the District Court, entered March 9, 1977, setting forth the new City Charter imposed by that

Court, and constructing an entire administrative structure to replace the present admixture of legislative and administrative functions in Mobile's 3-member Commission Government, are both unreported. Those Orders are reproduced in Appendices C and D to the Jurisdictional Statement.

On October 3, 1978, the District Court entered a stay of elections, which is reproduced at App. 37. On October 16, 1978, this Court, App. 38, denied Appellees' motion to vacate that stay. The effect of these last orders was to preserve *pendente lite* Mobile's Commission form of government which has existed without substantial change since 1911.

JURISDICTION

The jurisdiction of this Court to review this decision by appeal is conferred by 28 U.S.C. §1254(2); the only issues in this case are constitutional in nature since there has been no change to Mobile's at-large election of Commissioners cognizable under the Voting Rights Act, 42 U.S.C. §1973 *et seq.*

The judgment of the District Court was entered October 22, 1976, and that Court's "remedial" Order creating an entirely new legislative, executive and administrative structure was entered March 9, 1977. Notice of Appeal to the Fifth Circuit was filed on March 18, 1977. The judgment of the Court of Appeals was entered March 29, 1978. (The Fifth Circuit docket entries are reproduced, App. 10). Notice of Appeal to this Court was filed on June 19, 1978. The Jurisdictional Statement was filed on June 27, 1978, and probable jurisdiction was noted October 2, 1978.

STATUTES INVOLVED

This case involves the constitutionality under the Fourteenth and Fifteenth Amendments, of Alabama Act No. 281 (1911), as locally implemented by a vote of the electorate in 1911 providing a Commission Government for the City of Mobile.[1]

QUESTION PRESENTED

1. Whether the Commission form of Government designed to make the head of each administrative department responsible directly to each of the City's voters (thereby to eliminate corruption and ward-heeling), and thus necessarily elected at-large, violates the Federal Constitution because this form of government cannot guarantee that one or more of the Commissioners will be elected solely by black residents who comprise one-third of the City's population.

   a. Whether the holdings of the Courts below conflict with the constitutional principles set forth by this Court in *Whitcomb v. Chavis*, 403 U.S. 124, *White v. Regester*, 412 U.S. 755 (no constitutional right to proportional representation by race), *Washington v. Davis*, 426 U.S. 229, and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (mere passive knowledge of discriminatory effect of *status quo* insufficient proof of discriminatory intent).

---

[1]This statute, as amended, is now codified at Code of Alabama 1975 §§11-44-70 through 11-44-105 (1977), set forth in pertinent part in Appendix F to the Jurisdictional Statement. Also involved is Alabama Act No. 823 (1965), set forth in Appendix G to the Jurisdictional Statement.

b. Whether even discriminatory effect has been proved in this case where, as the Courts below found, no outstanding black citizen has attempted to mount a serious candidacy for the office of Commissioner.
c. Whether the Courts below, in disregarding active and effective black voter and leader participation in Mobile's at-large elections as irrelevant, have erroneously expanded the constitutional protection of unfettered participation by all races in the electoral process, to a rule of constitutional law requiring the result of the electoral process to be proportional representation by race.

STATEMENT

I.

INTRODUCTION

The City of Mobile operates presently, and has operated since 1911, under the Commission form of government designed to combine in the Commissioners both legislative and administrative functions, and to make each functionally specialized Commissioner accountable equally to each voter, black and white, in the City. The challenge is solely to the at-large feature necessary to Commission form. The Order (Juris. St. 1d-63d) entered by the District Court and affirmed by the Court of Appeals disestablishes this form of government and substitutes two features: (1) the remedial Order guarantees that some City legislators will be accountable only to voters in black-majority

districts while other City legislators will be accountable only in white majority districts; and (2) the Order prescribes in the most minute detail[2] a reorganization of the administrative structure under which the City must operate henceforth. The predicate for that Order and its affirmance was that the existing Commission government with its integral at-large elections could not guarantee a black candidate for Commissioner electoral victory in a City whose population is some thirty-five percent black. It is to that predicate, asserted under the Fourteenth and Fifteenth Amendments, that this appeal principally is directed.[3]

II.

THE HISTORICAL CONTEXT OF MOBILE'S CHOICE OF COMMISSION GOVERNMENT

The City of Mobile adopted the Commission form of government in 1911. Mobile was one of some 500 local governments to do so in the first quarter of this century.[4]

---

[2]The District Court's Order establishes a "strong mayor-council" plan, with a 9-member council elected by single-member districts. The Court-ordered plan constitutes a new City charter, edicting not only the form of government and electoral system, but such matters as salaries and budget procedures. (Juris. St. 12d-13d, 25d, 30d-41d).

[3]Therefore, inapposite are such remedy cases as *Connor v. Finch*, 431 U.S. 407, and *Kirksey v. Board of Supervisors*, 554 F.2d 139(5th Cir.) (*en banc*), *cert. denied*, 434 U.S. 968 (1977).

[4]Historians attribute the rise of the Commission form to an interest in businesslike government and an aversion to the ward politics and the corruption that often attended aldermanic or councilmanic systems in those times. Commission government is founded upon two funda-

(continued)

The Court of Appeals held that the City's choice of at-large government was "neutral at its inception." 571 F.2d at 246 (Juris. St. 13a).[5]

Mobile has made no substantial change[6] in its governmental system since that time.

III.

THE CURRENT SCENE IN MOBILE ELECTIONS: UNIMPEDED MINORITY VOTING, ENDORSING AND INFLUENCING THE RESULTS

The deplorable past of disenfranchisement has given way to a present in which there are no obstacles to

(footnote continued from preceding page)
mental principles. First, its structure is designed to foster corporate-management-type accountability through the creation of clear lines of known public responsibility for specific aspects of governmental affairs. Second, each voter is to be a constituent of each Commissioner, thereby eliminating any institutional incentives to logrolling.

[5] Blacks were not a political force in Alabama in 1911—they as well as most poor whites, had been effectively disenfranchised by a State constitutional provision of 1901. The adoption of Commission government was not directed toward the reduction of any black voting power. There was then no black voting power to be reduced.

[6] In 1965, the Alabama Legislature passed a law assigning specific duties to each of the three Commission posts (Public Works Commissioner, Public Safety Commissioner and Finance Commissioner). The previous practice, codified by a 1940 statute, had been that the allocation of duties was determined by a majority of the Commission. Each Commissioner continued to stand election at-large, before all the voters of the City. The Court of Appeals deemed the 1965 legislation originated by Commissioner Langan (Tr. 330-32) designating Commissioners' functions supportive of a conclusion of impermissible racial purpose in the maintenance since 1911 of the at-large feature challenged in this case. The District Court had considered the 1965 act to be salutary in identifying for the voters the functional specialization to which each Commissioner aspired. 423 F. Supp. at 394 n. 9 (Juris. St. 21b).

equal electoral voter participation and in which black voters and groups are a pivotal frequently decisive, force in Mobile elections.

It was undisputed below that every phase of the political process of registration, voting, qualification and candidacy for the Mobile City Commission is as open to blacks as to whites. 423 F. Supp. at 387, 399 (Juris. St. 7b, 35b).[7]

---

[7]Beneath this "first blush" neutrality, the District Court found that "[o]ne indication that local electoral processes are not equally open is the fact that no black has ever been elected to the at-large City Commission." 423 F. Supp. at 387-88 (Juris. St. 7b). Drawing upon statistical evidence that voting in the City has been polarized along racial lines (423 F. Supp. at 388-89; Juris. St. 7b-11b), the Court found:

> "Black candidates at this time can only have a reasonable chance of being elected where they have a majority or a near majority. There is no reasonable expectation that a black candidate could be elected in a city-wide election race because of race polarization. The court concludes that an at-large system is an effective barrier to blacks seeking public life." 423 F. Supp. at 388 (Juris. St. 10b).

But in Mobile, no black candidate for the Commission has ever suffered defeat as a result of at-large voting. As the District Court recognized, the only three blacks to have sought election to the Commission "were young, inexperienced, and mounted extremely limited campaigns." 423 F. Supp. at 388 (Juris. St. 8b). These candidates were of such limited appeal even to black voters that they admittedly failed even to carry predominantly black census wards (Tr. 175; App. 68).

In the view of the District Court, this failure of qualified black candidates even to try the political process was attributable to "discouragement" at their perceived chances for victory in at-large City elections. 423 F. Supp. at 389 (Juris. St. 11b). The District Court did not address these undisputed facts of record—often adduced through Plaintiffs' own witnesses—which clearly demonstrate that blacks do participate actively and effectively in City politics, not as Commissioners but as Commission "makers":

> 1. Commission candidates actively seek black votes, and the endorsement of the Non-Partisan Voters League ("NPVL"), the

(continued)

This is not a case like *White v. Regester,* 412 U.S. 755, 766-67, where, despite the lack of formal prohibitions on registration or voting, minorities were effectively excluded by white-dominated political party structures or slating organizations which discourage or ignore minority input. Mobile's elections are conducted upon a wholly non-partisan basis.[8] There is but one important slating organization—a black organization.

A. The Sixteen Year Tenure Of "A Staunch Friend of the Blacks"

The tenure of former Commissioner Joseph Langan is unassailable evidence of the electoral power of Mobile blacks. Langan, a white former State Senator whose ardent opposition to literacy tests, segregated buses and unequal pay for black and white school teachers had resulted in his defeat in a State Senate contest in 1951, was first elected to the City Commission in 1953. Throughout the ensuing sixteen years he campaigned for black voter support on the strength of his advocacy for the equalization of services through the paving of streets, installation of water and sewer facilities and dedication of parks in black neighborhoods. He

(footnote continued from preceding page)

City's principal black political organization (Tr. 264, 320-22, 412-414, 539-40, 752, 824, 927, 1141; App. 121-23, 140-42, 185-86, 262, 307, 397, 509).

2. In the City's most recent elections, held in 1973, two of the three present Commissioners ran and won with the endorsement of the NPVL. The third Commissioner ran unopposed.

3. One of the present Commissioners was elected on the strength of the black "swing" vote (Tr. 413-14; App. 141-42).

[8]In this respect Mobile is like many reform local governments (Commission and Council-Manager) and unlike all State legislative systems.

appointed black citizens to important posts, including a controversial activist (John LeFlore) to the City Housing Board.

Langan was openly and widely acknowledged to be, in the District Court's words, "a staunch friend of the blacks." (Tr. 286). He was elected and re-elected four times.[9]

B. The Strength Of The Non-Partisan Voters League

The Langan victories were largely the product of the efforts of the only slating organization in Mobile, the Non-Partisan Voters League (NPVL), a local branch of the National Association for the Advancement of Colored People. A black State legislator testified that "because of the credibility and strength that [the NPVL] had," it was capable of producing a 90% level of support in the black community for the candidate of its choice. Langan testified that "whoever's name was on [the NPVL endorsement flyer] within the black community obtained an outstanding vote." (Tr. 322; App. 123).

An organization with so much electoral influence amongst so sizeable a group of voters could not be ignored by candidates or by incumbents. Each candidate[10] for the City Commission in 1973 sought the NPVL's

[9]Langan's analysis of his unsuccessful 1969 bid for a fifth consecutive term attributed his defeat to a reduced black turnout occasioned by intimidation from a militant black group advocating a total boycott of the political system. (Tr. 299, 304; App. 111, 115).

[10]The Rev. Robert L. Hope, the President of the NPVL, testified on cross examination (Tr. 413-14; App. 141-42) to the "notable success" the NPVL enjoyed in electing candidates it supported:

(continued)

endorsement. The two[11] who received it were the winners[12] of the elections.

(footnote continued from preceding page)

Q Isn't it a fact, Reverend Hope, in the course of your connection with the league, its endorsement has been actively sought by candidates over the years that you have been connected with it?
A Yes, sir. Definitely so. I explained that to start with.
Q And wasn't that true in the last City Commission race in 1973?
A Yes, sir.
Q Every candidate in the race sought your endorsement, didn't they?
A Yes, sir.

* * * * * *

Q Let me ask you this. Didn't the black vote in effect put Gary Greenough [one of three current Mobile City Commissioners elected in 1973] in office?
A I wouldn't say the black vote alone, sir.

THE COURT: Was it the difference?

A I believe so.

THE COURT: All right.

On redirect, Rev. Hope attested (Tr. 417-18; App. 143-44) to the practical post-election results of such clout:

Q Reverend Hope, in answering [counsel for Mobile's] questions, did you mean to say that every candidate that the Non-Partisan Voters League has endorsed has turned out to represent the interests of the black community fairly?
A In recent years they have.
Q How recent do you mean when you say recent years?
A In this last election and maybe the election prior. I think, in my opinion, they have done a very good job in carrying out their obligations toward trying to be fair to all people.
Q Is that your opinion or the opinion of the entire League?
A Yes, that is the opinion—that is what I am trying to speak for. They feel that the candidates they have elected in recent years have done a very good job along that line.

[11]Commissioners Greenough and Mims received NPVL support. Commissioner Doyle was unopposed. The NPVL endorsed Greenough and Mims over black candidates. See note 7, *supra*.

[12]Mims had also sought and received NPVL endorsement in his successful 1969 re-election campaign.

IV.

THE PREMISES OF THE DECISIONS BELOW

The opinions of the Courts below attempted to address the traditional Fifth Circuit analysis of voting dilution cases, in light of the foregoing realities of Mobile electoral politics: there is no obstacle to full electoral participation.

The Court of Appeals took as an indication of lack of access to the political process the fact that "[n]o black had achieved election to the City Commission due, in part, to racially polarized voting of an acute nature." 571 F.2d at 243 (Juris. St. 7a).[13] No outstanding black citizen has ever attempted to mount a serious candidacy for the City Commission. Therefore, the District Court erroneously applied the traditional statistical analyses of polarized voting[14] not to City elections, but to elections in

[13]The District Court described the phenomenon of polarized voting, 423 F. Supp. at 387-88 (Juris. St. 7b-8b), and also described the quantification of the phenomenon, 423 F. Supp. at 389 (Juris. St. 9b).

[14]The theory is that an at-large system "submerges", *Nevett v. Sides*, 571 F.2d 209, 216 (5th Cir. 1978), black voting preferences by causing the defeat at-large of a candidate who could carry a (black majority) district. Proof of the theory requires evidence of a candidate expressing black desires who could (quantified as the racially polarized vote) carry a district. *Able* black candidates can carry not only a district but a City as well. They are being elected in at-large elections across the country, regardless of the percentage of black voting population. Black mayors have recently been elected in cities where blacks are in the minority, as, for example, in Detroit, Michigan (39.4%), Newark, New Jersey (48.6%), East Orange, New Jersey (47.0%), Berkeley, California (20.2%), Richmond, California (31.5%), Los Angeles, California (18.0%), Atlanta, Georgia (47.3%), and Raleigh, North Carolina (21.3%). *National Roster of Black Elected Officials*, Joint Center for Political Studies (1974).

The Hon. Henry Marsh, the current Mayor of Richmond, Virginia (42% black population), was first elected at-large to that City's Council

(continued)

other jurisdictions: County Commission, County School Board and State legislative districts. 423 F. Supp. at 388-389 (Juris. St. 8b-9b).

Neither Court below in their clearly erroneous findings based upon the facts irrelevant to Mobile City elections, addressed the fact that these elections upon which the Courts founded their decisions were from geographically and demographically different constituencies; *a fortiori*, neither Court addressed the governmental distinctions between State legislative districts and local governments, adumbrated in *Wise v. Lipscomb*, ____ U.S. ____, 98 S. Ct. 2493, 2502 (separate opinion of Rehnquist, J.).

In order to discuss City elections at all, the District Court was constrained to compare the votes received, not by a white and a black candidate, but by two white candidates. Thus, the Court was required by its own analysis and by the logic of statistics to find one of the white candidates (*i.e.* Langan) a surrogate black. The Court's characterization of campaign tactics and issues was

---

(footnote continued from preceding page)

in 1966, also a time when only a minority of the population was black.

The Hon. Ernest Morial was elected Mayor of New Orleans, Louisiana, in 1978. New Orleans' population is 45% black, while only 35% of its registered voters are black. *Beer v. United States*, 425 U.S. 130, 134.

Plaintiffs' witness Roberts, an Alabama State Senator, testified that in Birmingham, which is "most comparable with Mobile," (Tr. 738; App. __), black candidates had won two at-large seats on the City Council. A recent study of southern politics found that 37 of the South's 46 largest cities employed solely at-large elections, and black officials had been elected in 18. D. Campbell & J. Feagin, *Black Politics in the South: A Descriptive Analysis*, 37 Journal of Politics 129, 143-45 (1975).

The only 3 black candidates who ever have run for Mobile City Commissioner could not carry even a black majority district. The candidate who could (Langan), whose vote was racially polarized, also won elections at-large.

accompanied by a similarly unsubstantiated psychoanalysis of the voters themselves as involved in a white "backlash." 423 F. Supp. at 388-89 (Juris. St. 7b-10b).

Finally in its treatment of electoral access and participation, the Court of Appeals concluded that a prerequisite to a violation of either the Fourteenth or the Fifteenth Amendments is proof of racially discriminatory intent. 571 F.2d at 245 (Juris. St. 12a).

Finding no discriminatory intent in the adoption in 1911 of the at-large Commission form, the Court held that the form was discriminatorily maintained.[15]

To evidence the requirement that maintenance of the at-large system be intended with discriminatory animus,[16] the Court of Appeals cited maintaining inaction, not by the City Commissioners, but by the Alabama Legislature.[17]

---

[15]The Court of Appeals clearly relied on a theory of discriminatory maintenance. 571 F.2d at 245-46 (Juris. St. 13a-15a). Nothing in that opinion conforms to Appellees' characterization (Motion to Affirm 8) of the case as governed by *Gomillion v. Lightfoot*, 364 U.S. 339, a case involving a stark electoral change. The change declared unconstitutional in *Gomillion* would today be submissible under §5 of the Voting Rights Act, 42 U.S.C. §1973d, and the City put properly to its proof in justification. See also, *City of Richmond v. United States*, 422 U.S. 358.

The only actions cited by the Court of Appeals to show the Commissioners maintaining their form of government (as opposed to performing their administrative duties under it) were these two: (1) the formalization in 1965 of the prior practice of giving functional specialization (finance, public works, public safety) to the Commissioners and (2) the submission of this formalization to the Attorney General. 571 F.2d at 246 (Juris. St. 14a). This formalization did not alter the at-large feature of the Commission form, extant since 1911.

[16]*Nevett v. Sides*, 571 F.2d 209, 217 (5th Cir. 1978)

[17]571 F.2d at 247 (Juris. St. 14a). The Alabama Legislature itself is single-member districted. 423 F. Supp. at 389 (Juris. St. 10b). The District Court attached substantial importance to the Court-ordered reapportionment of the Legislature in altering the at-large structure of local jurisdictions neighboring Mobile. 423 F. Supp. at 397 (Juris. St. 30b).

(continued)

A factor considered by the Fifth Circuit and its District Courts in assessing the efficacy of black voter participation is the responsiveness of white incumbents to black needs, not on the electoral stump, but at City Hall after election day.

The most recent analysis of the relevance of responsiveness evidence viewed evidence of a lack of administrative responsiveness as helpful to a voting challenge in explaining the existence of electoral obstacles to black electoral access:

> "The *Zimmer* [*v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636] criteria go to the issue of intentional discrimination, first of all, because they would be irrelevant if motivation were not an issue. If, as the appellants suggest, it is sufficient that 'the combination of a legal system (at-large election) with the minority status of blacks and a societal system (racially polarized voting) has the effect of diluting black voting strength' then of what relevance is the accessibility of political processes to blacks, the responsiveness of the city council to the needs of blacks, the weight of the state policy behind the at-large plan, or the existence of past discrimination in the electoral process? Moreover, the Supreme Court has squarely rejected the contention that at-large elections are unconstitutional merely because fewer minority candidates are elected, due to polarized voting, than would correspond to the minority's portion of the district population. *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858,

(footnote continued from preceding page)

Appellants already have suggested the consistency—both constitutionally and under the tenets of political science—of a districted State Legislature and a variety of forms, including at-large Commission or Council-Manager forms, of local government. Oppos. to Mot. to Affirm 2-6.

29 L.Ed. 2d 363 (1971). It is clear, therefore, that mere disproportionate effects are not enough to invalidate an at-large plan and hence that the *Zimmer* criteria purport to establish something more.

"Perhaps the most useful approach to analyzing the *Zimmer* criteria as they relate to the existence of intentional discrimination is to assume that an at-large scheme is being used as a vehicle for achieving the constitutionally prohibited end. The objective of such a scheme would be to prevent a group from effectively participating in elections so that the governing body need not respond to the group's needs. This objective would be achieved by insuring that a cohesive group remains a minority in the voting population, thus preventing that group from electing minority representatives or from holding nonminority representatives accountable."

Nevett v. Sides (*Nevett II*), 571 F.2d 209, 222 (5th Cir. 1978).[18]

---

[18]The *Nevett II* panel continued, applying its analysis to this, a companion, case:

"Where evidence of discriminatory intent is lacking in the enacting processes, the *Zimmer* criteria become acutely relevant. They may demonstrate as in *Kirksey*, that the neutral plan is an 'instrumentality for carrying forward patterns of purposeful and intentional discrimination.' 554 F.2d at 147. In *Kirksey*, the plan was recently formulated, and it perpetuated past intentional discrimination. A remotely enacted plan, such as the 1909 plan in this case, that was adopted without racial motivations may become a vehicle for the exclusion of meaningful minority input because intervening circumstances cause the plan to work that way. When the more blatant obstacles to black access are struck down, such an at-large plan may operate to devalue black participation so as to allow representatives to ignore black needs. Where the plan is maintained with the purpose of excluding minority input, the necessary intent is established, and the plan is unconstitutional. We so hold today in *Bolden v. City of Mobile*."

571 F.2d at 222.

By this analysis, incumbent responsiveness evidence bears on the issue in a voting case only after some electoral obstacle to black electoral participation has been shown to exist presently. Here no electoral obstacle to black voters was proven.

The record in this case shows that the performance in office of white incumbents is not perfect. But the record is clear that the trend in incumbent responsiveness is improving; blacks are sharing more of municipal jobs, appointments and services than they did a few years ago, and many more than they did many years ago.[19]

Structurally, the Commission form of government is most likely to encourage incumbent responsiveness.[20] Under this form, the administrators are elected and must defend their administrative performance in electoral campaigns. Moreover, Commissioners are, of constitutional necessity,[21] elected at-large; each commissioner (Finance, Public Works and Public Safety)[22] must therefore defend his balancing of needs and resources among all Mobilians, before the entire electorate.

[19]The Courts gave weight to evidence concerning municipal employment, appointments and services. The Courts did not credit the existence of independent remedies for any alleged inadequacies in these areas. *Cf. Washington v. Davis*, 426 U.S. 229, 244 n. 12; *James v. Wallace*, 533 F.2d 963 (5th Cir. 1976); *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), *aff'd on rehearing en banc*, 461 F.2d 1171 (1972).

[20]The record reflects that it does in fact. In the uniform experience of Plaintiffs' own witnesses, one or more Commissioners was personally available to hear black needs or grievances; and, more often than not, this access produced positive tangible results—street lighting, paving, sewers and sidewalks. (Tr. 433-34, 572-73, 583, 621-25; App. 148-49, 200-01, 204, 215-19).

[21]The District Court below so concluded. 423 F. Supp. at 387, 402 n. 19 (Juris. St. 5b, 40b).

[22]423 F. Supp. at 387 (Juris. St. 5b).

At present the Commissioners must take a City-wide view on service requests. They can use taxes paid by the affluent to improve services for those less fortunate economically. But under the District Court's Order of 3 or perhaps 4 out of 9 Councilmen representing blacks it must be assumed (based on the same polarized vote used here to find unconstitutionality) that black Councilmen will not be able to command this City-wide support on expenditures for poor blacks so essential under the present Commission system of government. It is reasonable to conclude the white members of the Council (from racially homogeneous districts) will be less responsive to black requests. It is therefore reasonable to assume blacks will get what their taxes can pay for and thus lose more than they will gain from this governmental change.

SUMMARY OF ARGUMENT

This case is the first to come before this Court in which an entire form of government, not merely the manner of its election, has been struck down by the Federal courts under the constitutional rubric of "dilution" of black votes. Earlier cases have involved the validity of at-large or multimember districting in circumstances where the administrative form of government was equally able to continue under other electoral plans such as pure single-member districting. This distinguishes State legislatures from any municipal governments of the reform model (Commission and Council-Manager), to which at-large elections are integral. In *White v. Regester,* 412 U.S. 755, for example, this Court for the first time upheld the

disestablishment of multimember State legislative districts, in order to minimize both geographically and qualitatively the dilutive impact of such prohibited obstacles to black electoral participation as white slating organizations.

The instant case illustrates how far the "denial of [electoral] access" test in *White v. Regester* has been carried under the "dilution" banner: undisputed evidence of active and effective black participation in an electoral system concededly neutral on its face and free of formal impediments to blacks' registering, voting, and becoming candidates was here deemed constitutionally deficient "access to the political process" because black voters are not numerous enough to elect black officials in an at-large electorate found to be racially polarized. It is worth repeating that *no* able black has run for election as a Mobile Commissioner, so no one can justly conclude an election defect for such a candidate when able black candidates all over the Nation have won at-large elections even though blacks were a minority of the voters.

In effect, the Courts below have found a constitutional violation solely in the effect of racially polarized voting, contrary to *United Jewish Organizations v. Carey*, 430 U.S. 144, 166-67; and in so doing, they have effectively required that electoral systems (and here, the entire City administration) be so structured as to use racially polarized voting to guarantee the election of minority candidates, contrary to *White v. Regester, supra*, 412 U.S. at 765-66, and *Whitcomb v. Chavis, supra*, 403 U.S. at 153.

The Court of Appeals below recognized that a racially discriminatory intent must be shown to prove a violation of either the Fourteenth or Fifteenth Amendments; that intent motivates incumbents to maintain an

at-large electoral system to avoid the necessity of campaigning for black votes. *Nevett v. Sides*, 571 F.2d 209, 222 (5th Cir. 1978). In the face of evidence of plenary and effective black voter participation in the at-large system, the Courts below found compelling proof of racially discriminatory purpose in: (1) the failure to alter Mobile's existing governmental structure so as to guarantee proportional minority representation, coupled with (2) imputed legislative awareness that blacks might fare better electorally under elections by single-member district. Yet, if continuation of a neutral and reasonable governmental policy or action even with awareness of its racially disparate effect requires (without more, or, as here, in the face of contrary evidence of intent) the conclusion of invidious racial intent, this Court's decisions in *Washington v. Davis*, 426 U.S. 229, and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, would necessarily have reached different outcomes.

The holdings below, if affirmed, portend the substantial erosion of local governments' necessary flexibility in structuring their electoral systems to satisfy their legitimate and racially neutral need for officials with the citywide perspective afforded by elections at-large.

ARGUMENT

I.

THE CONSTITUTIONAL RULE OF MANDATORY RACIAL VICTORY AND PROPORTIONAL REPRESENTATION BY RACE, FORMULATED BY THE COURTS BELOW, IS SQUARELY IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT

This Court has rejected the proposition that "a white official represents his race and not the electorate as a whole and *cannot* represent black citizens." *Vollin v. Kimbel*, 519 F.2d 790, 791 (4th Cir. 1975) (emphasis original), citing *Dallas County v. Reese*, 421 U.S. 477, and *Dusch v. Davis*, 387 U.S. 112. *A fortiori*, no racial group has a constitutional right to elect minority officials "in proportion to its voting potential." *White v. Regester, supra*, 412 U.S. at 765; *Whitcomb v. Chavis, supra*, 403 U.S. at 153; *Beer v. United States*, 425 U.S. 130, 136 n. 8. The protected right is that of effective access to, and participation in, the electoral process. *Chavis, supra*, 403 U.S. at 149-155; *Regester, supra*, 412 U.S. at 766.

In both *Chavis* and *Regester*, this Court accepted the proposition that the use of multimember districts in a State legislative apportionment plan may be invalid if "used invidiously to cancel out or minimize the voting strength of racial groups," *Regester*, 412 U.S. at 765, but reached different results on the merits. Because this case represents the first occasion on which this Court is to consider the application of this "highly amorphous

theory" to a municipal form of government and at-large electoral system, *Wise v. Lipscomb*, ___ U.S. ___, 98 S.Ct. 2493, 2502, it is crucial to recognize that the focus in both cases was upon the relatively concrete facts of minority electoral access and participation, and *not* upon the hazy and problematic concept of "representation."[23]

The instant case raises the identical claim rejected in *Chavis*—that at-large electoral structures are constitutionally infirm where minority-sponsored candidates would prevail at the polls more often, or at least sometimes, under a single member districting scheme.[24] Plaintiffs there asserted that:

> "With single-member districting . . . the ghetto area would elect three members of the house and one senator, whereas under the present [multi-member] districting [black voters] 'have almost no political force or control over legislators because

[23]"Dilution occurs when an individual is deprived of his constitutional right of access to the political process, while representation refers to the claim (which has never been recognized as a constitutional right) that an individual is entitled to a voice in the legislature to further his particular interests. The lower courts, however, have not always recognized the important distinction between these two concepts. ***Because the Constitution provides a right to access, and not to representation, the inability of a racial minority to obtain legislative seats in proportion to its population cannot, in itself, constitute a constitutional violation." *Proportional Representation by Race*, 80 Mich. L. Rev. 820, 826 (1976).

[24]What was discredited in *Chavis* was not just the concept of racially *proportional* representation but rather the broader concept that *any* direct racial representation is a constitutional mandate. Even the District Court in *Chavis* had purported to so limit its ruling. 403 U.S. at 138.

> the effect of their vote is cancelled out by other contrary interest groups' . . ."

403 U.S. at 129.

The *Chavis* Court explicitly rejected the notion that the Constitution is a guarantor of the outcome of elections.

The Court did, however, suggest a case in which, unlike *Chavis*, at-large elections might work a constitutionally impermissible exclusion:

> "We have discovered nothing in the record or the Court's findings indicating that Negroes were not allowed to register or vote, or choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. *Nor did the evidence purport to show or the court find that the inhabitants of the ghetto were regularly excluded from the slates of both major parties. . . It appears reasonably clear that . . . ghetto votes were critical to Democratic Party success [and therefore] it seems unlikely that the Democratic Party could afford to overlook the ghetto in slating its candidates.*" 403 U.S. at 149-50 (emphasis added).

Regester was exactly that egregious case, and only that case. The critical facts there were that a white-dominated organization (the Dallas Committee for Responsible Government) effectively in control of Democratic Party slating in Dallas County[25] had virtually

[25]The conclusion, 412 U.S. at 768, that multimember district elections impermissibly excluded Bexar County Mexican-Americans from the political process was based on the fact that Mexican-Americans had been barred from participation by the institutional obstacle of extremely restrictive registration rules (annual re-registration requirements which had replaced unconstitutional poll tax, and discriminatory prohibitions on assistance to illiterate voters) which were still in effect in the year the *Regester* litigation was brought. See *Breare v. Smith*, 321 F. Supp. 1100 (S.D. Tex. 1971); *Garza v. Smith*, 320 F. Supp. 131 (W.D. Tex. 1970).

never slated black candidates or candidates favored by the black community, and that incumbent legislators did not need black voters' support to win elections and therefore disdained it. It was this finding of an institutional barrier to black electoral participation which justified the holding that there was an "exclusion" of constitutional dimension.

Because the constitutionally protected right is *not* one of minority political victory,[26] it is not impermissibly infringed even where a minority finds itself consistently defeated at the polls by racially polarized voting. *United Jewish Organizations of Williamsburgh v. Carey*, 430 U.S. 144, 166-67.

The District Court below in this case accepted the bootstrap argument of Plaintiffs, that the failure of prospective black candidates even to try the City's political processes was an "exclusion" or electoral obstacle of constitutional significance. The Court of Appeals uncritically accepted this substitution of "discouragement" for the more concrete barriers to black candidacy and participation required by this Court.[27]

In the electoral system upheld in *Chavis*, for example, blacks had ample reason to be discouraged at their prospects for political victory; and there is no reason to suppose that discouragement would have served in lieu of white control of the slating process as a factor supporting invalidation of the electoral scheme struck down in *Regester*. In their disregard of the

[26] "By acknowledging the right of *access*, however, the Court does not force the judiciary to influence the outcome of political elections. Rather, where a claim of dilution is made, the courts need only assess the ability of minority voters to participate on an equal basis with other citizens in the community's political processes." *Proportional Representation By Race, supra*, 80 Mich. L. Rev. at 827. (emphasis original).

[27] In this voting case, the Fifth Circuit accepted uncritically the absence of proof of a qualified applicant (candidate) pool in a way which it refused to do in *Robinson v. City of Dallas*, 514 F.2d 1271,

(continued)

undisputed evidence of effective black participation and political clout, and their eagerness to invoke a remedy to "provide blacks a realistic opportunity to elect blacks" (423 F. Supp. at 403; Juris. St. 42b), the Courts below have disestablished Mobile's existing form of government on a claim no more substantial than *Chavis'* "mere euphemism for defeat at the polls," 403 U.S. at 153.

While no interest group, racial or otherwise, is constitutionally entitled to proportional representation, *e.g., Beer v. United States, supra,* 425 U.S. at 136 n. 8, certainly any group which in fact achieves roughly proportional representation by "legislators of [its] choice" has not been denied access to the political process. *Chavis, supra*, 403 U.S. at 149. The contrary holdings below, therefore, have directly injected the concept of proportional representation by race into an electoral system heretofore racially neutral, and can be perceived only as a sanction for the view that no white official can adequately represent blacks, and *vice versa.* Only if this Court is now prepared to accept proportional representation by race as not only a desideratum but a constitutional requirement, can the holdings below be affirmed.

(footnote continued from preceding page)

1273-74 (5th Cir. 1975). Even more expansive statistical treatments require proof that the test would exclude applicants otherwise shown to be eligible. *E.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 430 n. 6. This Court in *Mayor v. Educational Equality League*, 415 U.S. 605, 620-21, distinguished the jury selection and other cases of starkly disparate impact "in which it can be asumed that all citizens are fungible," holding that in determining unlawful exclusion in municipal appointment, "the relevant universe for comparison purposes consists of the highest-ranking officers of the categories of organizations and institutions specified in the city charter, not the population at large."

II.

THE COURTS' DIVINATION OF RACIALLY DISCRIMINATORY INTENT FROM PASSIVE STATE LEGISLATIVE FAILURE TO CHANGE THE ELECTORAL SYSTEM TO GUARANTEE BLACK VICTORIES IS ERROR WHICH, IF UNCORRECTED, WILL INJECT THE FEDERAL COURTS INTO THE SUPERVISION OF EVERY FACET OF MUNICIPAL ADMINISTRATION

The Court of Appeals held, as the District Court had not, that proof of invidious racial purpose is here a necessary element under *Washington v. Davis, supra*, and subsequent cases of this Court following its principle.[28] Nonetheless, the Court held that the element of intent had been properly established.

The Court of Appeals held that the findings of the District Court "compel the inference that the [at-large

---

[28]The reasoning of the Court of Appeals is developed at length in the companion case of *Nevett v. Sides* (*Nevett II*), 571 F.2d 209, 217-221, and incorporated by reference in its *Mobile* decision. 571 F.2d at 241 (Juris. St. 2a).

The District Court had rendered its decision prior to such cases as *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252; *United Jewish Organizations of Williamsburgh v. Carey*, 430 U.S. 144; *Board of School Commissioners of Indianapolis v. Buckley*, 429 U.S. 1068; and *Austin Independent School District v. United States*, 429 U.S. 990.

commission] system has been *maintained* with the purpose of diluting the black vote. . . ." 571 F.2d at 245 (Juris. St. 12a) (emphasis added). The Court concluded that the finding that the Alabama Legislature had failed to change the City's at-large Commission Government, coupled with a general legislative awareness that districting has "racial consequences," constituted "direct evidence of the intent behind the maintenance of the at-large plan." 571 F.2d at 246 (Juris. St. 14a).[29]

The error in the Court of Appeals majority opinion's legal analysis is clearly expressed in the concurring opinion of Wisdom, J., in the companion case of *Nevett II, supra*, 571 F.2d at 232-233:

> "I agree that is is reasonable to argue, for example, that proof of the invidious effects of multi-member districts or at-large voting raises an inference, perhaps, in some cases, a strong presumption, of discriminatory purpose. That formulation is run-of-the-mine, acceptable, legal semantics—in some cases. It will not cover those cases in which the voting scheme was neutral when initiated or even benign but had unintended or inadequately considered invidious effects on the voting rights of minorities. In those cases, as the majority was driven to say, the discriminatory purpose is found in maintaining the voting plan,

---

[29]Finally, the Court relied upon the 1965 Act designating specific administrative functions, but not altering the at-large election of each Commissioner, as further probative of invidious "intent to maintain the plan. . . ." 571 F.2d at 246 (Juris. St. 14a).

that is, taking no affirmative curative action. This view of inaction *is* inconsistent with *Washington v. Davis*." (emphasis original).

A. The Courts' "Tort" Standard Of Proof Would Invalidate Even The Continuation Of Facially Neutral Government Practices Supported By Entirely Legitimate and Racially Neutral Policies, Simply Because There Is General Awareness Of Racial Effect.

Both Courts below found that the City's existing form of government, together with its at-large electoral system necessarily attendant thereto, are facially neutral and were adopted for racially neutral, good-government purposes at a time when invidious racial motivations could have played no part (see *supra*, pp. 5-6). Yet the holding below deems the failure to alter Mobile's existing governmental structure (its "maintenance"), coupled with imputed legislative awareness that blacks might fare better politically under elections by single-member district, compelling proof of racial purpose.

This Court's recent decisions condemn this approach. For example, if awareness of racially disproportionate impact were equivalent to an invidious intent to accomplish such impact, the outcome of *Washington v. Davis*, where the police department continued to administer its employment test despite its awareness that a disproportionate number of black applicants failed, 426 U.S. at 252, would necessarily have been different. Similarly in *Village of Arlington Heights*, zoning officials were well aware that existing policies had the effect of maintaining the "nearly all

white" status of the village, and the Court of Appeals had held that they "could not simply ignore this problem," 429 U.S. at 260. Yet this Court upheld the maintenance of these policies for reasons racially neutral, despite their exclusionary effect.

The function of the purpose or intent requirement as applied in *Washington v. Davis* and *Village of Arlington Heights* is to assure that government actions which are designed to further valid objectives are accorded deference, and that those designed to further impermissible racial purposes are not. *Davis, supra*, 426 U.S. at 242-248; *Arlington Heights, supra*, 429 U.S. at 265-66.

The test of invidious intent applied below stands "deference" on its head. The City's long history of incorrupt Commission government and the uninterrupted maintenance of its integral at-large feature is anomalously used to rationalize the government's abolition. 571 F.2d at 244 (Juris. St. 10a).

Where the challenged action is indeed necessary to serve valid ends, *i.e.*, here to provide citywide perspective and responsibility for actions equally to each voter, it is insufficient to show that it has been "motivated in part by a racially discriminatory purpose." *Arlington Heights, supra,* 429 U.S. at 270 n. 21. Where such an action "would have resulted" even absent a racial purpose, it cannot be fairly attributed to racial motivations and "there would be no justification for judicial interference. . . ." *Id. See Davis, supra*, 426 U.S. at 253 (Stevens, J., concurring); *see also Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-87.

B. The Courts' Tort Standard Therefore Imposes An Affirmative Duty Of Constant Racially-Conscious Electoral Restructuring Upon Legislatures.

The essence of the Court of Appeals' holding is that where application of its *Zimmer*[30] criteria indicates a current condition of polarized voting and black candidates' defeat, the maintenance of such a system without affirmative corrective action compels the inference of purposeful dilution. 571 F.2d at 245 (Juris. St. 12a).

The creation of such an "affirmative duty" might be compared to that imposed upon school boards following this Court's second decision in *Brown v. Board of Education*, 349 U.S. 294, 299 (*Brown II*). School boards which had operated State-compelled dual school systems were:

> "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. School Board of New Kent County*, 391 U.S. 430, 437-38.

Yet such school systems had been adjudged unconstitutional *per se*. *Brown II, supra*, 349 U.S. at 298.

In contrast, at-large and multi-member electoral systems are clearly not unconstitutional *per se*. *Whitcomb v. Chavis, supra*, 403 U.S. at 159-60; *White v. Regester*, 412 U.S. at 765.

---

[30]Both Courts below based their analysis upon the multifactor test presently controlling "dilution" cases such as this in the Fifth Circuit, *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *affirmed sub. nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (but "without approval of the constitutional views" expressed in *Zimmer*. 424 U.S. at 638).

Even in the context of mandatory redistricting to conform to the one man-one vote principle, neither the Voting Rights Act of 1965, 42 U.S.C. §1973 *et seq.*, nor the Constitution requires legislative elimination of at-large electoral components. *Beer v. United States*, 425 U.S. 130, 138-39, 142 n. 14.[31] And, by implication, this failure to eliminate at-large seats required no inference that the reapportionment was tainted with racial purpose. *Id.*

It is equally clear that even where minority voters are in fact substantially disadvantaged in their ability to elect minority candidates by an existing electoral plan in the presence of racially polarized voting, no *per se* constitutional violation exists and there arises no constitutional or statutory duty of "affirmative action" by the legislature to correct the situation. *United Jewish Organizations, supra*, 430 U.S. at 166-67. Yet the Courts' decision imposes just such a duty here.

Finally, the existence of racially polarized voting is turned on its head in the remedy. This unfortunate

[31]In *Beer*, this Court upheld New Orleans' redistricting plan which retained two at-large seats and which contained single-member districts drawn in a pattern which the Attorney General urged would slice up predominantly black districts and "almost inevitably" dilute the effectiveness of the black vote. 425 U.S. at 136. Although New Orleans' plan clearly afforded blacks less than maximum voting power, it passed the statutory standard of §5, 42 U.S.C. §1973c. 425 U.S. at 141. And it did not even "remotely approach a violation of the constitutional standards" set forth in *Regester*. *Id.* at 142 n. 14. While *Beer* demonstrates that legislative plans *need not* under the Constitution be so drawn as to assure proportional representation, 425 U.S. at 136 n. 8, *United Jewish Organizations* holds that a State legislature *may* constitutionally gerrymander along racial lines to assure proportional representation, at least in the course of redistricting subject to scrutiny under the Voting Rights Act. 430 U.S. at 162-65 (plurality opinion per White, J., joined by Stevens, Brennan, and Blackmun, J.J.).

feature of voter behavior is cited to declare at-large elections invalid. But without polarized voting (and residential housing segregation), a districting remedy would be a nugatory gain for blacks. The remedial Orders of the Courts must hope for, and indeed perpetuate, racially polarized voting and racially segregated residential housing for the future.

If either of two events occur, the Courts must then, under the rule of this case, redo their electoral handiwork. (1) If a decrease in residential segregation produces a black demographic shift (without a net change in the number of voters in a district), the District Court must redraw its district lines, even though this is not compelled by one-person-one-vote. At the other extreme, if blacks constitute over 50% of the voters,[32] then their benefit is maximized by a Court Order returning to elections at large. (2) Any other ethnic group, residentially segregated, can compete with blacks for the benefit of the Courts' electoral tinkering.[33]

---

[32]As they did in the companion case, *Nevett v. Sides*, 571 F.2d 209, 214 n. 6 (5th Cir. 1978).

[33]Fortuitously, in *Wise v. Lipscomb*, ____ U.S. ____, 98 S. Ct. 2493, it was the City and not the Court which struck a balance between the electoral desires of blacks and of Mexican-Americans.

III.

AFFIRMANCE HERE WILL AFFECT NOT ONLY MOBILE, BUT THE THOUSANDS OF LOCAL GOVERNMENTS NATIONWIDE THAT EMPLOY AT-LARGE ELECTIONS.

The Equal Protection Clause "was never intended to destroy the States' power to govern themselves" in this area. *Oregon v. Mitchell*, 400 U.S. 112, 126. Nor does it place State and local governments within a "uniform straitjacket" which precludes their choice of the form of government and electoral system thought to best suit local needs and preferences. *Avery v. Midland County*, 390 U.S. 474, 485. This Court has not held that local governments must district, but only that if they do, such districts must not contain "substantially unequal population." *Id.* at 485-86.

Such a course would be good constitutional jurisprudence even if the precise effects of form of government and electoral system upon "representation" were clear. But they are not. The question of how minorities are best assured of meaningful political participation is highly problematic. To guarantee election of blacks by creation of "safe" single-member districts is not necessarily to maximize black political effectiveness.[34] Jewell, *Local Systems of Representation: Political*

[34]Indeed opponents of at-large elections have suggested that elections by single-member geographical districts may not adequately guarantee minority representation. Note, *Ghetto Voting and At-Large Elections: A Subtle Infringement Upon Minority Rights*, 59 Geo. L. Rev. 989, 1009-11 (1970). Institutionalized systems of proportional representation of interest groups (such as those formerly used in New York City and Cincinnati, Ohio) and enlargement of city councils "to the size of state legislatures" have been proposed as the ultimate solution. *Id.*

Consequences and Judicial Choices, 36 Geo. Wash. L. Rev. 790, 803 (1968). A black minority may

> "have greater influence on a legislative delegation of a city council elected at-large than on one elected by districts. All the legislators or councilmen elected at-large would have Negro constituents; only a minority of those elected by districts would represent Negroes. Whether Negro voters could affect decisions more through greater influence on a few representatives or a smaller degree of influence on all representatives might be a difficult question for Negro leaders to answer. It would be an even more difficult decision for a court attempting to determine the constitutionality of at-large elections." *Id.*

Mobile does not assert that its Commission form of government and at-large electoral system are necessarily the "best" for all times and all communities. Mobile does assert that its system serves important policy considerations relating to a city-wide perspective in government, and that the City's electoral system in no way precludes full unfettered black participation in all phases of the political process.

Whitcomb v. Chavis, supra, 403 U.S. at 156-160, makes it quite clear that the Federal judiciary does not sit as a body of political scientists weighing the efficacy of varying theories of government or political representation. At the municipal level, "the question of districting has been at the heart of the controversies over the form of government to be adopted, and the advocates of at-large and single-member districting have articulated conflicting theories about the representative process." Jewell, *supra,* 36 Geo. Wash. L. Rev. at 804. In their earnest desire to assure black Mobilians "a reasonable opportunity to elect blacks"

(423 F. Supp. at 403; Juris. St. 42b), the Courts below have fallen into a trap of choosing "among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate form of government. . ." *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting).

This was the inevitable result of the focus of the Courts below on what they concluded black political participation *cannot* presently accomplish (*i.e.*, electing a black Commissioner), to the exclusion of what it *has* accomplished (*i.e.*, substantially influencing or even "swinging" election outcomes, making black electoral clout a force to be reckoned with). The patent error of this approach is to transmute the constitutional right of equal access and participation into one of guaranteed "representation" by officials of one's race. And the patent danger is that few existing forms of local government assure such a result. *Cf. Chavis, supra,* 403 U.S. at 156-57.[35]

---

[35]As in *Chavis, supra*, 403 U.S. at 157:

> "At the very least, affirmance [here] would spawn endless litigation concerning the [at-large electoral] systems now widely employed in this country."

Over 67% of this Nation's 18,500 municipal governments employ at-large elections. (Derived from Table 3/15, *The Municipal Year Book*, International City Management Association (1972)). Some 41% of this Country's over 3,000 counties also elect officials at-large. (Derived from Table 2, *Governing Boards of County Governments: 1973*, U.S. Bureau of the Census 1974)).

CONCLUSION

Since 67% of cities have at-large elections, it is important to put into perspective the impact of the rule of this case unless reversed. The rule is that an at-large jurisdiction with residential segregation and ethnically polarized voting must be districted to guarantee proportional representation to each minority group.

This rule is as applicable to Poles, Jews and all other ethnic groups as to blacks. This rule ironically places a political premium on maintaining the residential segregation which gives electoral efficacy to a districting remedy. And, the "passive maintenance" rule of intent puts municipal officials under a constant duty to evaluate—not only as to voting but in any area where a Fourteenth Amendment challenge might lie—whether *inaction* has an ethnically disparate effect.

Moreover, the remedy under such a rule is to order ethnically proportional government *action*. And this remedial standard would be applicable as broadly as the Fourteenth Amendment: it would impel Federal Courts to order ethnically proportional streetlights, jobs (*cf., Washington v. Davis*), rezonings (*cf., Village of Arlington Heights v. Metropolitan Housing Development Corp.*) and all other municipal services. This rule forces the Federal Courts to intrude into the daily actions and inactions of each municipality to a degree neither warranted by the Constitution nor within the technical competence of said Federal Courts.

Respectfully submitted,

C.B. Arendall, Jr.
William C. Tidwell, III
Travis M. Bedsole, Jr.
Post Office Box 123
Mobile, Alabama 36601

Fred G. Collins
City Attorney
City Hall
Mobile, Alabama 36602

Charles S. Rhyne
William S. Rhyne
Donald A. Carr
Martin W. Matzen
1000 Connecticut
Avenue, N.W.
Suite 800
Washington, D.C. 20036

Counsel for Appellants