IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

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

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States Court of Appeals for the Fifth Circuit, entered on March 29, 1978, affirming the judgment and orders of the United States District Court for the Southern District of Alabama, decided October 21, 1976. These hold the existing Commission form of government and at-large electoral system of the City of Mobile unconstitutional under the Fourteenth and Fifteenth Amendments to the U.S. Constitution as denying black citizens access to the City's political processes. The anti-corruption purposes of the Commission form of government and the equal access and

control provided to all voters by this form have never been reviewed as to constitutional compliance by this Court.

Also affirmed were orders of the District Court that the 67 year old City Government be disestablished and replaced by a strong mayor-council government elected by a single-member districts pursuant to a new City Charter imposed by the District Court. Since the Commission form of government vests in the Commissioners both legislative and specialized, individual administrative powers, the District Court's remedial order established an entire new administrative structure fixing salaries, powers and duties to operate under the mayor-council form.

By order of May 31, 1978, the District Court has set November 21, 1978, as the time for election of Mobile's new mayor-council government. However, the order provides that these elections shall be stayed if this Court grants review before that date.

Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and the substantial new and novel questions are presented under the Constitution of the United States.

OPINION BELOW

The Opinion of the Court of Appeals for the Fifth Circuit is reported in 571 F.2d 238, and that of the District Court is reported in 423 F.Supp. 384. Both Opinions are attached hereto as Appendices A and B, 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, are both unreported. Copies are attached hereto as Appendices C

and D, respectively. The Order of the District Court, entered May 31, 1978, setting November 21, 1978 as the time for election of Mobile's new mayor-council government unless this Court sooner grants review, is set forth as Appendix E hereto.

JURISDICTION

This suit was brought as a class action in behalf of all black citizens of Mobile under 28 U.S.C. §1343(3)-(4), alleging that the present at-large system of electing City Commissioners abridges the rights of black citizens under the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution; under the Civil Rights Act of 1871, 42 U.S.C. §1983; and under the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973 *et seq.*[1] The judgment of the District Court was entered on October 21, 1976; and appeal was taken to the Court of Appeals, which rendered judgment affirming the District Court on March 29, 1978. Notice of appeal was filed in the Court of Appeals June 19, 1978 (Appendix H).

The City's existing Commission Government was adopted in 1911 pursuant to State statute, Ala. Act No. 281 (1911).[2] Because the subject of this appeal is a judgment holding this local application of a State statute unconstitutional, the jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. §1254(2). *Dusch v. Davis*, 387 U.S. 112, 114; *Clark v. Peters*, 422 U.S. 1031. *Cf. New Orleans v. Dukes*, 472 U.S. 297, 301.

[1]Neither Court below relied upon the Voting Rights Act of 1965 for jurisdiction.

[2]This statute, as amended, is presently codified at Code of Alabama 1975 §§11-44-70 through 11-44-105 (1977).

QUESTIONS PRESENTED

1. Whether the Commission form of Government designed to fix in the head of each administrative department responsibility directly to the voters and thereby eliminate corruption and ward-heeling through direct election of each Commissioner by each voter of the City, violates the Federal Constitution because the Commission form of government cannot guarantee that one or more of the Commissioners will come from black residents who comprise one-third of the City's population?

2. Whether the holdings of the Courts below conflict with the constitutional principles established by this Court in *Whitcomb v. Chavis*, 403 U.S. 124, *White v. Regester*, 412 U.S. 755, *Washington v. Davis*, 426 U.S. 229, and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252?

3. Whether discriminatory effect has been proved when no qualified black candidate has run for the office of Commissioner under the challenged at-large city commission electoral system?

4. Whether the Courts below, in disregarding active and effective black voter and leader participation in Mobile's elections as irrelevant, have erroneously given the effects of racially polarized voting independent and controlling significance as a constitutional violation?

5. Whether the Constitution authorizes a Federal Court to legislate an entirely new form of government for the City for no purpose except that of guaranteeing that black citizens who constitute a minority of the City's voters will be elected to City offices?

STATUTES INVOLVED

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

Also involved is Alabama Act No. 823 (1965), set forth in Appendix G hereto.

STATEMENT

The following central facts were found by the District Court or undisputed below (see *infra*, pp. 10-12): (1) no formal or legal barriers exist to black citizens' registering to vote, voting, or running for the office of City Commissioner; (2) support of black citizens was actively sought by all candidates in recent City elections, with two of three present Commissioners having been elected with the endorsement of the City's most influential black political organization; (3) one of the three present Commissioners was elected on the strength of the black "swing vote;" and (4) only 3 blacks have ever run for the City Commission, the District Court finding that they were "young, inexperienced and mounted extremely limited campaigns" (423 F.Supp. at 388; App. B, p. 8b), and they failed even to carry predominantly black census wards.

At the outset it should be noted that at-large dilution

cases such as this one are not municipal services cases;[3] nor are they cases guaranteeing the election of blacks.[4] Finally, they are not cases justiciable under the Voting Rights Act as involving recent changes. The Courts of Appeals, particularly the Fifth Circuit, have for the last five years struggled in vain to develop a test for evaluating the quality of required constitutional black political participation short of a constitutional guarantee of election of black candidates.[5] The starting points have been this Court's decisions in *Whitcomb v. Chavis*, 403 U.S. 124 and *White v. Regester*, 412 U.S. 755. The latest effort is a quartet of cases, of which *Nevett v. Sides (Nevett II)*, 571 F.2d 209 (5th Cir. 1978) is the principal exposition, and which includes the instant case. *Nevett II* focused on the activities, principally activities in the electoral process, of white elected incumbents. This quartet of decisions does in fact guarantee that a black minority has a constitutional right to elect a black person to city office.

Heretofore at-large dilution decisions of this Court did not guarantee black voters who are a minority of the voters the constitutional right that a black win public office. These cases only guarantee black voters the right to have their

[3]The paradigm municipal services case is *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), *aff'd on rehearing en banc*, 461 F.2d 1171 (1972).

[4]Such a desideratum is not a constitutional imperative. *Whitcomb v. Chavis*, 403 U.S. 124, 153.

[5]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).

vote count in a meaningful fashion. If white officials ignore black voters, on the campaign stump and at City Hall, and if white officials resist a change from an at-large to a district electoral system in order to rely upon the white majority vote to insulate such insensitivity from electoral accountability, a constitutional violation is made out. *Nevett II,* 571 F.2d at 223.

Plaintiffs, to prevail in a Fourteenth[6] or Fifteenth[7] Amendment voting dilution case, must prove each element of electoral arrogance by white candidates and incumbents: white polarized voting which negates any electoral significance of black polarized voting; white campaigning with this effect in mind; and white officials' intentional action to create, or resist change to, an at-large system in order to perpetuate this effect.

The activities of white incumbents must evince a purposeful discrimination. *Nevett II,* 571 F.2d at 219, 221. The adoption of a "tort" standard—that the officials intend the natural consequences of their acts—facilitates proof of discriminatory purpose, required under *Washington v. Davis*, 462 U.S. 229, and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252.

As applied in this case, the *Nevett II* "tort" is not an act, but inaction: the failure of the Commissioners *sua sponte* to change their form of government to guarantee proportional representation by race.

In this case, the record reflects vigorous black political participation: endorsing white candidates, constituting the "swing" vote in the most recent contested elections, and success in dealing with white incumbent officials after election day to secure black needs.

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[6]*Nevett II*, 571 F.2d at 217-18.

[7]*Nevett II*, 571 F.2d at 220-21.

The record reflects no change in the at-large electoral system of Mobile since 1911; proposed changes to a mayor-council form were defeated in referenda in 1963 and 1973. The record reflects the substantial justification and constitutional necessity of the Commission form of government which includes new factors which have never been reviewed by this Court as to their constitutional significance.

Mobile's 1970 population was 190,026, with approximately 35.4% of its residents black.

In 1911, the City adopted, pursuant to Ala. Act 281 (1911), its present three-member Commission Government. Each Commissioner performs both legislative and specific City-wide administrative functions as head of one of three municipal departments: Finance and Administration, Public Safety, and Public Works and Services (571 F.2d at 241-42,App. A, pp. 3a-4a; 423 F. Supp. 386,App. B, p. 5b).[8] Because each Commissioner administers a separate department with City-wide functions, each of constitutional necessity is elected at-large by the entire electorate.[9]

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[8]Prior to 1965, assignment of administrative responsibilities was by agreement of the Commissioners among themselves. In 1965, this longstanding practice was codified under Ala. Act 823 (1965) to add one of these three functional designations to the already numbered place on the ballot for which every candidate had to announce and run, thus informing the voters of the area of municipal services for which the candidates sought responsibility.

[9]Under the Court-ordered plan, in contrast, the Mayor becomes an elected chief executive who oversees an executive branch of non-elective officials (App. D, Art. IV, Sect. 32, p. 26d), while the City Council becomes a purely legislative body which may deal with City administration "solely through the mayor" (App. D, Art. III, Sect. 16, p. 14d).

This being so, the decision of which review is sought if upheld by this Court sounds the death knell of the Commission form of government now in force in hundreds of municipalities in our nation. Any change in the administrative structure of the City would be considered submissible under the Voting Rights Act.[10] The Attorney General of the United States would perforce disapprove the change, because of longstanding objection to the at-large election requirement of the Commissioners.

This case, therefore, involves the inability of any Commission form City to alter its administrative structure[11] without Federal approval. And it in fact renders most commission forms of government unconstitutional as all commission government cities have small or large numbers of minorities among their residents.

A. Mobile's Form of Government Was Adopted With Racially-Neutral, Good Government Purposes.

Mobile's Commission Government was adopted in 1911

[10]Both the District Court and the Court of Appeals below (see 571 F.2d at 242 n. 3; App. A, p. 4a) took great pains to limit their holdings to the constitutional challenge to the at-large system in Mobile. The Attorney General had disapproved a Voting Rights Act submission (under jurisdictional protest) of the designation of functional duties of each Commissioner, on the ground solely that the Commission form "locks the city into the use of the at-large system." The Court of Appeals in this case treated the submission only as circumstantial evidence of intent to maintain the Commission form, extant since 1911. (571 F.2d at 241 n. 2; App. A, p. 3a).

[11]The Commission form is unique in electing all its administrative department heads.

It is for this reason that the remedial Order in this case is unique in its breadth. (App. D)

within the context of the progressive reform movement which prompted many other municipalities through the Nation to do likewise. (Tr. 24-25). Mobilians, like citizens of other cities swept by the reform movement, sought a city government both more efficient and business-like, and less susceptible to ward parochialism and corruption than the aldermanic or councilmanic forms. (Tr. 24-25, 36-37).

Both Courts accepted the legitimacy of at-large elections as a means of assuring City-wide perspective and representation by elected officials (423 F. Supp. at 403, App. B, p. 43b; 571 F.2d at 244, App. A, p. 9a). In the words of the Court of Appeals, the City's existing form of government was "neutral at its inception" (571 F.2d at 246, App. A, p. 13a).

B. Mobile's Electoral System Is Entirely Open To Participation By Black Citizens, Who Do In Fact Participate Actively And Exercise Significant Voting Power.

In Mobile, every phase of the electoral process—registration, voting, and qualification for candidacy—is as open to blacks as to whites. (423 F.Supp. at 387; App. B, p. 76). In Mobile, "any person interested in running for the position of city commissioner is able to do so." (423 F.Supp. at 399; App. B, p. 35b).

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; App. B, p. 7b). Drawing upon statistical evidence that voting in the City had been polarized along racial lines (423 F.Supp. at 388-89; App. B, pp. 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 citywide 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 (App. B, p. 10b).[12]

But in Mobile, no black candidate for the Commission has ever suffered defeat as a result of polarized voting. As the District Court recognized, only three blacks had sought election to the Commission; and they "were young, inexperienced, and mounted extremely limited campaigns." (423 F.Supp. at 388; App. B, p. 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).

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; App. B, p. 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:

> 1. Commission candidates actively seek black votes, and the endorsement of the Non-Partisan Voters League ("NPVL"), the City's principal black political organization (Tr. 264, 320-22, 412-414, 539-40, 752, 824, 927, 1141).

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[12]The Court relied upon the testimony of "active candidates for public office," and upon Plaintiffs' statistical evidence of racially polarized voting (423 F. Supp. at 388; App. B, p. 9b-10b).

2. In the City's most recent elections, held in 1973,[13] 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).

The District Court did note that one past Commissioner, a white "identif[ied] with attempting to meet the needs of the black people of the city", had been elected and re-elected with black support during the over 25-year period from 1953 to 1969 (423 F.Supp. at 388; App. B, p. 9b).[14]

C. The Courts' Treatment Of The Issue Of Racial Purpose Or Intent

Although the District Court relied entirely upon the Equal Protection Clause of the Fourteenth Amendment in invalidating Mobile's at-large commission form of government (423 F.Supp. at 402-03; App. B, pp. 40b-42b), the Court held that the principle of *Washington v. Davis*, 426 U.S. 229, 242—that facially neutral government actions must be shown to be not simply racially disproportionate in impact, but the result of invidious racial purpose—had no application in a voting "dilution" case such as this (423 F.Supp. at 394-398; App. B, pp. 22b-32b). However, the Court went on to make ancillary findings involving application of a "tort standard" of proof of intent.

[13]This was the election in which the three "young, inexperienced" black candidates ran (423 F.Supp. at 388; App. B, p. 8b).

[14]Though the Court's opinion attributes his ultimate defeat in 1969 to white "backlash" and polarized voting (423 F.Supp. at 388-89; App. B, p. 9b), the testimony of the former Commissioner himself attributes his defeat to the failure of black voters to turn out at the polls (Tr. 299-304).

The District Court acknowledged that the City's government was racially neutral at its inception in 1911, but offered this remarkable "tort" analysis:

> "A legislature in 1911, less than 50 years after a bitter and bloody civil war which resulted in the emancipation of the black slaves, should have resonably expected that the blacks would not stay disenfranchised. It is reasonable to hold that the present dilution of black Mobilians is a natural and foreseeable consequence of the at-large election system imposed in 1911." 423 F.Supp. at 397 (App. B, p. 29b).

The District Court's second ancillary finding on intent involved a permutation of its tort theory applied to State legislative "inaction." Finding that the Alabama Legislature, when faced with redistricting bills, had in the past showed concern over their impact on election of black candidates, and had avoided redistricting itself until Federal court order in 1972, the Court concluded that in Mobile

> "There is a 'current' condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as intentional State action . . ." 423 F.Supp. at 398 (App. B, p. 31b) (emphasis original).

The Court did not suggest that, but for racial animus, the City would now have a different form of government.[15]

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 subse-

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[15]The Court did not rely upon the fact that in 1963 and again in 1973, the people of Mobile rejected proposals to change from the commission form to a mayor-council government. (R. 435)

quent cases of this Court following its principle.[16] Nonetheless, the Court held that the element of intent had been properly established.

First, the Court of Appeals held that the findings of the District Court under its *Zimmer* analysis "compel the inference that the [at-large commission] system has been maintained with the purpose of diluting the black vote . . ." (571 F.2d at 245; App. A, p. 12a). Second, 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; App. A, p. 14a). Finally, the Court relied upon the 1965 Act designating specific functions (which the District Court had found desirable and conducive only to the voters' "intelligent choice", 423 F.Supp. at 394 n. 9; App. B, p. 21b) as further probative of an invidious "intent to maintain the plan . . ." (571 F.2d at 246; App. A, p. 14a).

The Court of Appeals also gave no indication that the City would now be operating under some other mode of government were it not for the racial animus imputed to the Legislature.

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[16]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 (App. A, p. 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.

D. The Remedy Ordered, and Subsequent Proceedings

Because at-large elections are an integral and legally indispensable feature of the City's Commission Government, the District Court felt obligated to disestablish the City's present government, and substitute another form to "provide blacks a realistic opportunity to elect blacks to the city governing body" (423 F.Supp. at 403; App. B, p. 42b).[17]

The District Court ultimately ordered implementation of a "strong mayor-council" plan in which the 9-member council is to be elected by single-member district, with the mayor to be elected at-large (App. D, pp. 7d-8d). The Court-ordered plan is so comprehensive as to constitute a new City Charter, setting not only the form of government and electoral system, but such details as salaries and budget procedures (App. D, pp. 12d-13d, 25d, 30d-41d).

Recognizing the substantial disruption to the City and its citizens should its order be reversed on appeal, the District Court stayed its order pending appeal; and at oral argument, the Court of Appeals stayed the holding of all elections pending appeal (571 F.2d at 242; App. A, pp. 5a-6a).

Upon its affirmance of the holding and the propriety of the relief ordered below, the Court of Appeals reinstated the remedial order of the District Court and dissolved its own

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[17]The Court rejected as "undesirable" the "weak mayor-council" plan available under State law, even where elected by single-member district (423 F. Supp. at 404; App. B, p. 45b).

stay of elections (571 F.2d at 247; App. A, p. 17a).[18]

By order of May 31, 1978, the District Court has set November 21, 1978, as the time for election of Mobile's new mayor-council government. However, the order provides that these elections shall be stayed if this Court grants review before that date. (App. E, p. 3e).

THE QUESTIONS ARE SUBSTANTIAL

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.[19] Earlier cases have involved the validity of at-large or multimember districting in circumstances where the form of government was equally able to exist and function under other electoral plans such as pure single-member dis-

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[18]Appellants sought from the Court of Appeals a Stay of Mandate pending their seeking review in this Court. The motion was denied on April 24, 1978. Whereupon, Appellants sought by application to Mr. Justice Powell, as Circuit Justice, a Stay and Recall of Mandate pending review. This application was denied on May 15, 1978, after referral to the Court, of which only Mr. Justice Stewart and Mr. Justice Rehnquist would have granted application.

[19]Particularly in a case such as this, involving not only the form and structure of local government but the constitutional guarantees of citizen participation in selecting officials, it is especially important

> "to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review [for] which this Court sits." *Watts v. Indiana*, 338 U.S. 49, 51.

tricting.[20]

The instant case illustrates how far the "denial of access" test in *White v. Regester* has been carried: undisputed evidence of active and effective black political participation in an electoral system concededly neutral on its face and free of formal impediments to blacks' registering, voting, and becoming candidates is to be deemed constitutionally deficient "access to the political process" where the courts conclude that black voters are presently unable to elect black officials in an at-large electorate found to be racially polarized and the blacks are not numerous enough to elect a black.

In effect, the Courts below have given controlling constitutional significance to the effects of racially polarized voting,[21] contrary to *United Jewish Organizations v. Carey*, 430 U.S. 144, 166-67; and in so doing, have effectively required that electoral systems be so structured as 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. If continuation of a neutral and reasonable governmental policy or action even with awareness of its racial effects actually required the conclusion of invidious racial intent,

[20]In *White v. Regester*, 412 U.S. 755, for example, this Court for the first time upheld the disestablishment of multimember legislative districts under Fourteenth Amendment equal protection principles, affirming holdings below that Texas' electoral system "effectively excluded" Dallas County blacks and "effectively removed" Bexar County Mexican-Americans from the political process. 412 U.S. at 767, 769.

[21]In contrast to its application to the facts of this case, the Fifth Circuit's test, articulated in *Nevett II*, takes polarized voting merely as the starting point for further constitutional analysis. 571 F.2d 209, 223 n. 16.

this Court's decisions in *Washington v. Davis* and *Village of Arlington Heights* would necessary have reached different outcomes.

This case, being the first one to present to this Court the constitutionality of the commission form of local government, has national importance far beyond the City's boundaries. Hundreds of other local governments also employ commission forms of government; over 67% of all city governments and over 40% of all county governments employ at-large elections.[22] 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 area-wide perspective afforded by elections at-large.

A. The Courts Below Have Erroneously Created A Constitutional Guarantee Not Of Effective Political Participation, But Of Certain Political Victory.

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." *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

[22]Appellants are aware of 80 reported dilution cases.

political process. *Chavis, supra*, 403 U.S. at 149-155; *Regester, supra*, 412 U.S. at 766.

Nor is this right impermissibly infringed where a minority finds itself consistently outvoted at the polls, even where the elections happen to be characterized by racially polarized voting. *United Jewish Organizations of Williamsburgh, Inc. v. Carey, supra*, 430 U.S. at 166; *cf. Chavis, supra*, 403 U.S. at 153. Contrary to the decision here appealed, in this Court's decisions the focus of the proper constitutional test remains minority political access and participation, *Chavis, supra*, at 149-156.

1. To disregard active and effective black political participation simply because it produces white officials is fundamental constitutional error.

The District Court, upon concluding that a minority of black citizens were presently unable to elect black City Commissioners, deemed it unnecessary to address, much less consider, the undisputed evidence of effective black political participation and electoral clout (see *supra*, pp. 10-12). Such a lapse is explicable only if the Court labored under the erroneous assumption that only black participation which led to the election of black Commissioners could indicate constitutionally sufficient access to Mobile's political process.[23]

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[23]The implicit view of the District Court here was openly expressed by the Court in *Blacks United for Lasting Leadership, Inc. v. City of Shreveport*, 71 F.R.D. 623 (W.D. La. 1976), which considered similar facts — (1) open slating, (2) black vote sought by all candidates, and (3) black votes clearly influential and sometime the decisive "swing" vote — but did not

> "view this as the sort of meaningful access to political processes intended by the fourteenth Amendment as interpreted by *White [v. Regester]* . . ." 71 F.R.D. at 635.

(continued)

This is patently *not* a case in which the power of the City's black electorate has been effectively "submerged." No black candidate for the Commission has ever received the full support of the black community only to be defeated by racially polarized voting (see *supra*, p. 11). Indeed, unless one makes an official's race the litmus test of his representativeness,[24] it is clear that black Mobilians have long enjoyed representation roughly proportionate to their numbers, *i.e.*, one Commissioner indisputably responsive to black interests served continuously from 1953 to 1969; and in 1973, black voters chose the winners in the only two contested Commission seats in preference to less experienced candidates of their own race (see *supra*, pp. 11-12).

(footnote continued from preceding page)

The Fifth Circuit has remanded the *Shreveport* case for further explication of the Court's *Zimmer* findings under F.R.Civ.P. 52(a). 571 F.2d 248, 255.

If a constitutional violation can exist apart from the failure of qualified black candidates to be elected, then the evil must be as described by the Fifth Circuit in *Nevett II*:

> "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 their 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." 571 F.2d at 222.

[24]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).

2. The courts below have erroneously given present inability of blacks, a minority of the voters, to elect black officials the status of constitutional violation, contrary to *Whitcomb v. Chavis, White v. Regester,* and *United Jewish Organizations of Williamsburgh, Inc. v. Carey.*

Though the absence of serious black candidacies was not attributable to any formal barrier and the Commission races are open to "any person interested" (*supra*, p. 10), the District Court accepted the bootstrap argument of Plaintiffs below—the failure of prospective black candidates even to try the City's political processes was deemed to have constitutional significance. Thus, the District Court found, there exists in Mobile "a pattern of racially polarized voting" which "discourage[s] black citizens from seeking office or being elected." (423 F.Supp. at 389; App. B, p. 11b).

The "black discouragement" theory, of course, served in lieu of proof that any black Commission candidate had ever been defeated by polarized voting, and allowed proof of the very existence of polarized voting in Commission races to depend on statistical analyses of the votes cast for white candidates. The Court of Appeals uncritically accepted this substitution of "discouragement" for the more concrete barriers[25] to black candidacy and participation required by this Court. In the electoral system upheld in *Whitcomb v. 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

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[25]In *White v. Regester, supra,* 412 U.S. at 766-67, for example, black candadacies had been effectively blocked by a white slating organization, descendant of the white primaries.

have served in lieu of white control of the slating process[26] as a factor supporting invalidation of the electoral scheme struck down in *White v. Regester.*

Even if racially polarized voting were a political fact of life in Mobile, it would not render an otherwise neutral electoral system constitutionally infirm.[27]

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[26]In contrast to the partisan primaries requiring invalidation in *Regester,* elections are non-partisan in Mobile. This is considered an essential reform feature of the Commission form. C. Adrian & C. Press, *Governing Urban America* 221 (4th ed. 1972). The strong-mayor form, ordered by the District Court below, is characterized by partisan elections and intense mayoral political activity while in office. J. Straayer, *American State & Local Government* 238 (1974).

Nonpartisan elections, as well as at-large elections, are essential features of the council-manager form. Council-manager was the successor reform movement to the commission form. International City Management Ass'n, *Municipal Year Book* 68-69 (1976).

Therefore, this case will affect not only the Commission reform, but also the Council-Manager reform.

[27]

"Where it occurs, voting or for against a candidate because of his race is an unfortunate practice. But it is not rare; and in any district where it regularly happens, it is unlikely that any candidate will be elected who is a member of the race that is in the minority in that district. However, disagreeable this result may be, *there is no authority for the proposition that the candidates who are found racially unacceptable by the majority and the minority voters supporting those candidates, have had their Fourteenth or Fifteenth Amendment rights infringed by this process.* Their position is similar to that of the Democratic or Republican minority that is submerged year after year by the adherents to the majority party who tend to vote a straight party line." *United Jewish Organizations, supra,* 430 U.S. at 167-77 (emphasis added).

B. The Courts' Conclusion That The Maintenance Of Mobile's Existing Form Of Government Is Tainted With Invidious Racial Purpose Cannot Be Squared With *Washington v. Davis* And Other Recent Cases Of This Court Requiring Such Purpose Be Shown.

A principal error in the 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 232-33:

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

The role of the constitutional requirement that invidious purpose be shown is to protect the ability of government to function by facially neutral actions which serve rational and legitimate ends, but which incidentally operate with racially disproportionate impact. *Davis, supra*, 426 U.S. at 248. An inadequate standard of proof can subvert this vital rule as absolutely as its disregard.

1. The courts' tort standard of proof renders vulnerable even the continuation of facially neutral government practices supported by entirely legitimate and racially neutral policies, wherever 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. 9-10). 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.

This Court has correctly observed that "viable local governments may need considerable flexibility in local arrangements" in order to meet local needs. *Abate v. Mundt*, 403 U.S. 182, 186-87 (1971). At-large electoral systems, integral and constitutionally necessary to the commission form of government used by approximately 3% of this Nation's 18,500 municipalities, further valid governmental objectives and are entitled to at least "limited deference." *Wise v. Lipscomb*, ____ U.S. ____, 98 S.Ct. 15, 17 n. 2. (Powell, J., as Circuit Justice), *staying* 551 F.2d 1043 (5th Cir. 1977), *cert. granted*, ____ U.S. ____, 98 S.Ct. 716.

This is the function of the purpose or intent as applied in *Washington v. Davis* and *Village of Arlington Heights*—to assure that government actions which are designed to further valid objectives are accorded such 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.

However, where the challenged action is indeed necessary to serve valid ends, *i.e.*, here to prevent corruption, it is insufficient to show that it has been "motivated in part by a racially discriminatory purpose." *Id.* at 270 n. 21. Where such an action "would have resulted" even absent a racial purpose, it can not 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.

The test of invidious intent applied below stands

"deference" on its head. The City's long history of incorrupt Commission Government is anomalously used to rationalize its abolition. See 571 F.2d at 244 (App. A, p. 10a).

2. The courts' tort standard effectively imposes an affirmative duty of racially-conscious electoral restructuring upon legislatures, lest maintenance of the status quo be deemed invidiously discriminatory.

The essence of the Court of Appeals' holding is that where application of its *Zimmer* criteria indicates a current condition of voting dilution, the maintenance of such a system without affirmative corrective action compels the inference of purposeful dilution (571 F.2d at 245; App. A, p. 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.[28]

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[28]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. 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 Court's decision in effect retroactively imposes just such a duty here.

CONCLUSION

On the substantial issues of new and novel constitutional and Federal law presented herein by the commission form of government and its record in Mobile, the Court should note probable jurisdiction.

Because the District Court has ordered elections under the newly imposed mayor-council plan to take place on November 21, 1978, but has indicated that these elections will be stayed if this Court shall earlier grant review, Appellants urge that this Court note jurisdiction of this appeal as promptly in the October 1978 Term as possible.

Respectfully submitted,

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