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

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

CHARLES A. BANE
THOMAS D. BARR
Co-Chairmen

NORMAN REDLICH
Trustee

FRANK R. PARKER
Staff Attorney
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
720 Milner Building
210 South Lamar Street
Jackson, Mississippi 39201

ROBERT A. MURPHY
Staff Attorney
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 Fifteenth Street, N.W.
Suite 520
Washington, D.C. 20005

Attorneys for Amicus Curiae

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

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law, proposed *amicus curiae* herein, respectfully seeks leave of this Court to file the attached brief in order to assist the Court in resolving the constitutional questions presented in this voting rights case.

As set forth in the attached brief, the Lawyers' Committee has been intimately involved for a number of years in voting rights litigation on behalf of minority-race voters, and we have participated, both as *amicus*

curiae and as the representative of parties, in many of this Court's important voting rights cases. The instant case is of particular concern to us, involving the effect of at-large voting schemes on the participation of minority voters in the electoral process. We bring to this case a familiarity with, and understanding of, the applicable decisions of this Court. We also bring to this case—as a result of our extensive litigation in this area —a close familiarity with the exclusionary purpose and effect at-large municipal voting has had on minority participation in municipal government, particularly in the South where most of our litigation has taken place. By filing this brief, we wish to present to the Court a perspective based on our litigation experience in the South which is not likely to be presented by any of the parties.

Appellees have consented to the filing of this brief. Consent was sought from appellants, but not granted.

WHEREFORE, the Lawyers' Committee for Civil Rights Under Law respectfully moves that its brief *amicus curiae* be filed in this case.

January 10, 1979.

Respectfully submitted,

CHARLES A. BANE
THOMAS D. BARR
Co-Chairmen

NORMAN REDLICH
Trustee

FRANK R. PARKER
Staff Attorney
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
720 Milner Building
210 South Lamar Street
Jackson, Mississippi 39201
(601) 948-5400

ROBERT A. MURPHY
Staff Attorney
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 Fifteenth Street, N.W.
Suite 520
Washington, D.C. 20005
(202) 628-6700

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

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 LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes two former Attorneys General, ten past Presidents of the American Bar Association, a number of law school deans, and many of the Nation's leading

lawyers. Through its national office in Washington, D.C., and offices in Jackson, Mississippi, and eight other cities, the Lawyers' Committee over the past fifteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in voting, employment, education, housing, municipal services, the administration of justice, and law enforcement.

In the past, the Lawyers' Committee has filed briefs *amicus curiae* by consent of the parties or by leave of this Court in a number of important civil rights cases. The interest of the Lawyers' Committee in this case arises from its dedication to and interest in the full and effective enforcement and administration of the Nation's constitutional and statutory provisions securing the voting rights of minorities. As a result of providing legal representation to litigants in voting rights cases for the past thirteen years, the Committee has gained considerable experience and expertise in problems of racial discrimination relating to the voting rights of minority citizens, and in the requirements and guarantees of the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965. Attorneys associated with the Lawyers' Committee represented the minority plaintiffs in two of the first four cases to reach this Court on the scope of the requirements of § 5 of the Voting Rights Act of 1965, *Fairley* v. *Patterson* and *Bunton* v. *Patterson*, decided *sub nom. Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), and have provided continuing representation since 1970 to the plaintiff voters in the Mississippi state legislative reapportionment case, in which this Court has rendered five decisions in this decade, the latest of which was *Connor* v. *Finch*, 431 U.S. 407 (1977). The Committee also represented the minority voters in *City of Richmond* v. *United States*, 422 U.S. 358 (1975); and, we filed *amicus* briefs in *Wise*

v. *Lipscomb*, No. 77-529 (June 22, 1978); *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976), and *Georgia* v. *United States*, 411 U.S. 526 (1973).

In this case the Committee is interested in (1) the constitutional and Federal statutory implications of the exclusion of minority representation in municipal government by at-large municipal voting in majority white communities, (2) the applicability to at-large municipal elections, of the principles announced by this Court in *White* v. *Regester*, 412 U.S. 755 (1973), that at-large voting unconstitutionally dilutes black voting strength when blacks have been denied equal access to the political process, and (3) the question of the applicability of the racial purpose requirements to an at-large municipal voting system which has been in effect for a long time. In addition, attorneys associated with the Jackson, Mississippi office of the Lawyers' Committee currently have pending four cases challenging at-large municipal elections for city council members, and the decision of the Court in this case is likely to have a direct impact on the decisions in those cases.

Because of our extensive and intimate involvement in voting rights cases involving state legislatures, counties, and municipalities, our extensive knowledge of the case law in the area, and our familiarity with the exclusionary purpose and effect at-large municipal voting has had on minority participation in municipal government, particularly in the South, we have a perspective on this case which has not been presented by the petitioners, and which will not be presented in its entirety by the respondents.

The Lawyers' Committee therefore files this brief as friend of the Court urging affirmance of the judgment below.

DISCUSSION

I. AT-LARGE ELECTIONS IN MUNICIPALITIES IN WHICH MINORITY VOTERS HAVE BEEN DENIED EQUAL ACCESS TO THE POLITICAL PROCESS AND IN WHICH MINORITY VOTERS HAVE HAD LESS OPPORTUNITY THAN WHITES TO ELECT CITY COUNCIL MEMBERS OF THEIR CHOICE UNCONSTITUTIONALLY DILUTE, MINIMIZE, AND CANCEL OUT BLACK VOTING STRENGTH.

While at-large elections are "not per se illegal under the Equal Protection Clause," *Whitcomb* v. *Chavis*, 403 U.S. 124, 142 (1971), the Court has repeatedly held that at-large voting is unconstitutional when "designedly *or otherwise*, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." (emphasis supplied) *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966); *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965); *accord*, *Dallas County* v. *Reese*, 421 U.S. 477, 480 (1975); *White* v. *Regester*, 412 U.S. 755, 765 (1973); *Whitcomb* v. *Chavis*, *supra*, 403 U.S. at 143. In *Fairley* v. *Patterson*, decided *sub nom. Allen* v. *State Board of Elections*, 393 U.S. 544, 569 (1969), the Court in considering whether a switch to at-large county supervisor elections was subject to Federal preclearance under § 5 of the Voting Rights Act of 1965 held:

> The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See *Reynolds* v. *Sims*, 377 U.S. 533, 555. Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.

In many parts of the South—and possibly elsewhere—at-large elections "designedly or otherwise" are the last vestige of racial segregation in voting.[1] Although blacks and other minorities in the South are now permitted to register and vote in large numbers—primarily as a result of the Voting Rights Act of 1965—at-large elections which dilute minority voting strength "nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting."

In *White* v. *Regester*, 412 U.S. 755, 766 (1973), *aff'g in relevant part, Graves* v. *Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972) (three-judge court), the Court held that at-large elections unconstitutionally dilute minority voting strength when plaintiffs have produced

> evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in ques-

---

[1] WASHINGTON RESEARCH PROJECT, THE SHAMEFUL BLIGHT: THE SURVIVAL OF RACIAL DISCRIMINATION IN VOTING IN THE SOUTH 109-26 (1972); UNITED STATES COMMISSION ON CIVIL RIGHTS, POLITICAL PARTICIPATION 21-25 (1968); *see also* Carpeneti, *Legislative Apportionment: Multi-Member Districts and Fair Representation*, 120 U. Pa.L. Rev. 666 (1972); Banzhaf, *Multi-Member Electoral Districts—Do they Violate the "One Man, One Vote" Principle*, 75 YALE L.J. 1309 (1966). There can be no doubt that in some instances at-large municipal elections have been instituted for purposes of discrimination, e.g., *Stewart* v. *Waller*, 404 F. Supp. 206 (N.D. Miss. 1975) (three-judge court) (1962 Mississippi statute requiring switch to at-large municipal voting held unconstitutional as racially motivated). In other instances, the justification advanced is to eliminate ward politics and to promote government reform, but the effect on minority participation is equally discriminatory:

> In a fundamental sense, the Black American has fallen victim of governmental reform. In their zeal for efficiency, democratic government, and the elimination of corruption, the reformers have led us to new political systems which operate to the detriment of minority groups.

Sloane, *"Good Government" and the Politics of Race*, 17 SOCIAL PROBLEMS 156, 174 (1969).

> tion—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

White held at-large voting for the Texas Legislature in Dallas County unconstitutional on a showing of (1) "the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes"; (2) Texas law "requiring a majority vote as a prerequisite to nomination in a primary election"; (3) the "so-called 'place' rule limiting candidacy for legislative office from a multi-member district to a specified 'place' on the ticket"; (4) since Reconstruction, only two black candidates from Dallas County had been elected to the House of Representatives, and these were the only two blacks ever slated by the white-controlled Dallas Committee for Responsible Government (DCRG); and (5) the DCRG did not require the support of black voters, and "did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community." 412 U.S. at 766-67.

The Court made similar findings with respect to Mexican-American voters in Texas. The Court found that the Mexican-American community of Bexar County (San Antonio) was effectively removed from the political processes on proof that it "had long suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others"; that the state poll tax and restrictive voter registration procedures had foreclosed effective political participation; and that "the Bexar County legislative delegation in the House was insufficiently responsive to Mexican-American interests." *Id.* at 767-69. Single-member legislative districts were required "to remedy 'the effects of past and present discrimination against

Mexican-Americans' . . . and to bring the community into the full stream of political life of the county and State by encouraging their further registration, voting, and other political activities." *Id.* at 769.[2]

White is the first case in which this Court struck down at-large voting—there in multi-member legislative districts—for unconstitutional dilution of minority voting strength. But in *Wise* v. *Lipscomb*, 46 U.S.L.W. 4777, 4781 (U.S. June 22, 1978) (No. 77-529), four Justices noted that the Court had not yet decided whether the principles of *White* v. *Regester* were applicable to municipal governments. We believe that they are, and that no significant distinction can be made between at-large legislative voting and at-large municipal voting.

First, every Court of Appeals which has been presented with the issue has held the principles of *White* equally applicable to at-large voting in county and municipal government, and has sustained or rejected dilution challenges to local at-large voting depending on

---

[2] The District Court's judgment affirmed by this Court also rested on evidence of racial bloc voting, 343 F. Supp. at 731, 732:

> The population of the West Side of San Antonio tends to vote overwhelmingly for Mexican-American candidates when running against Anglo-Americans in party primary or special elections, to split when Mexican-Americans run against each other, and to support the Democratic Party nominee regardless of ethnic background in the general elections. The record shows that the Anglo-Americans tend to vote overwhelmingly against Mexican-American candidates except in a general election when they tend to vote for the Democratic Party nominee whoever he may be although in a somewhat smaller proportion than they vote for Anglo-American candidates. * * * It is not suggested that minorities have a constitutional right to elect candidates of their own race, but elections in which minority candidates have run often provide the best evidence to determine whether votes are cast on racial lines. All these factors confirm the fact that race is still an important issue in Bexar County and that because of it, Mexican-Americans are frozen into permanent political minorities destined for constant defeat at the hands of the controlling political majorities.

whether or not the *White* criteria had been met on the facts of each individual case. Thus, the *White* v. *Regester* criteria have been applied to local at-large voting challenges by the First,[3] Fifth,[4] Sixth,[5] Seventh,[6] and Eighth [7] Circuits.

Second, the reasoning of the Court's decision in *White* v. *Regester* is sound, and there is no good reason to limit its application to at-large legislative elections. Where—as in this case (423 F. Supp. at 393-94)—the election law of the State applicable to municipal elections requires at-large, citywide voting, city council members must receive a majority vote for nomination or election, and candidates are restricted to a place or number on the ballot, blacks are effectively excluded from the opportunity to elect candidates of their choice to city government in majority white communities where racial bloc voting prevails—not "as a function of losing elections," *Whitcomb* v. *Chavis*, 403 U.S. 124, 153 (1971), but as a result of the "built-in bias" (*id.*) of the State's electoral mechanisms. Further, where—as here (423 F. Supp. at 393)—in the past black citizens have been disenfranchised by racially discriminatory state voter regis-

---

[3] *Black Voters* v. *McDonough*, 565 F.2d 1 (1st Cir. 1977) (Boston City School Committee).

[4] *Parnell* v. *Rapides Parish Police Jury*, 563 F.2d 180 (5th Cir. 1977) (parish police jury and school board); *Paige* v. *Gray*, 538 F.2d 1108 (5th Cir. 1976) (Albany, Ga., City Council); *Perry* v. *City of Opelousas*, 515 F.2d 639 (5th Cir. 1975) (city council); *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish Police Jury* v. *Marshall*, 424 U.S. 636 (1976) (parish policy jury and school board).

[5] *Seals* v. *Quarterly County Court*, 526 F.2d 216 (6th Cir. 1975) (Madison County, Tenn., county governing board).

[6] *Kendrick* v. *Walder*, 527 F.2d 44 (7th Cir. 1975) (Cairo, Ill., City Commission).

[7] *Dove* v. *Moore*, 539 F.2d 1152 (8th Cir. 1976) (Pine Bluff, Ark., City Council).

tration statutes and mechanisms, the requirement of at-large municipal voting under these conditions unconstitutionally perpetuates the past purposeful and intentional exclusion of blacks from the political and electoral processes of the municipality, cf. *Kirksey* v. *Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139 (5th Cir. 1977) (*en banc*), *cert. denied*, 434 U.S. 968 (1977), and distinguishes the exclusion of the disenfranchised racial minority from exclusion of other interest groups, cf. *Whitcomb* v. *Chavis*, *supra*, 403 U.S. at 156. In addition, where—as the proof here shows (423 F. Supp. at 389-92)—the at-large elected city government has been unresponsive to the needs and interests of the minority community, the presumption that each city commissioner represents and serves all of those who elect him in citywide voting, cf. *Dallas County* v. *Reese*, 421 U.S. 477, 480 (1975), is overcome, and the exclusion of minority representation goes to the heart of the democratic process:

> Racial minorities protest this institutionalized bar to their effective exercise of political power. They point out that, because of racial discrimination, they have been and are being denied adequate educational, employment, and housing opportunities and consequently have common interests in these substantive areas which are unique to them because of their race. In a system dominated by the majority, racial minorities complain, they are powerless to improve their condition because the government in which they lack representation and political influence is unconcerned about their problems. In particular, racial minorities urge that they must be given the opportunity to elect members of their own race who, having experienced similar difficulties, are more understanding of the minority's problems and better able to articulate the minority's viewpoint. Noting that in a ward system they would be thus represented and able to exploit their political power, minorities contend that

> an at-large electoral system which precludes this access is invalid: the inability to elect a share of representatives substantially proportionate to their numbers is alleged to be a denial of the effective representation to which they are entitled under the Constitution.[8]

Third, no meaningful distinction can be drawn between at-large legislative voting and at-large municipal voting. Multi-member legislative districts "in logic of analysis are merely one form of at-large voting . . ." *Zimmer* v. *McKeithen, supra,* 485 F.2d 1315 (Clark, J., dissenting). While certain differences may exist in the evils attributable to at-large legislative elections and at-large municipal voting,[9] they are identical in their one distinguishing feature—both multi-member districts and citywide municipal voting "[allow] the majority to defeat the minority on all fronts," *Kilgarlin* v. *Hill,* 386 U.S. 120, 126 (1967) (Douglas, J., concurring). It is this winner-take-all feature that permits the overrepresenta-

---

[8] Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem,* 10 Ga. L. Rev. 353, 360 (1976) (footnotes omitted).

[9] In *Corder* v. *Kirksey,* 585 F.2d 708, 713 n. 11 (5th Cir. 1978), the Fifth Circuit noted that there were certain differences between multi-member legislative districts and local at-large districts. But most of the recognized evils of multi-member legislative districts cited by this Court for preferring single-member districts in court-ordered legislative reapportionment plans are equally applicable to at-large municipal voting. In court-ordered plans, single-member districts are preferred "[b]ecause the practice of mutimember districting can contribute to voter confusion, make legislative representatives more remote from their constituents, and tend to submerge electoral minorities and overrepresent electoral majorities . . ." *Connor* v. *Finch,* 431 U.S. 407, 415 (1977); see also, *Chapman* v. *Meier,* 420 U.S. 1, 15-19 (1975). All of these disadvantageous characteristics of multi-member legislative districts are shared by at-large municipal voting, and the Court has held that single-member districts are preferred in court-ordered plans in both cases involving multi-member legislative districts and in cases involving at-large county and municipal voting. *Wise* v. *Lipscomb,* 46 U.S.L.W. 4777, 4779 (U.S. June 22, 1978) (No. 77-529); *East Carroll Parish School Bd.* v. *Marshall, supra.*

tion of the majority and the exclusion of the minority—which might gain representation under single-member districts—under both multi-member legislative districts and at-large municipal voting.

Indeed, there is a close analogy with malapportioned voting districts, since both at-large voting and malapportioned districts involve claims of dilution of voting power. *Allen* v. *State Board of Elections, supra,* 393 U.S. at 569. The Court has not limited dilution claims involving malapportionment to state legislative districts, but has applied the dilution criteria based upon numerically unequal districts to all "units of local government having general governmental powers over the entire geographic area served by the body," *Avery* v. *Midland County,* 390 U.S. 474, 485 (1968). It would be anomalous indeed for the Court to sustain dilution challenges based on malapportionment of municipal voting districts in the context of municipal voting to allow one kind of dilution challenge—based on malapportioned municipal voting districts—but not to allow another—based on minimizing and cancelling out black voting strength. Certainly nothing can be found in the Fourteenth Amendment—which was enacted specifically to protect racial minorities—which would support such a bizarre distinction.

II. AS OUR EXPERIENCE IN MISSISSIPPI INDICATES, THE FIFTH CIRCUIT'S DECISION IN THIS CASE IS CORRECT AND SHOULD BE AFFIRMED.

The Fifth Circuit correctly decided that an at-large municipal voting system is unconstitutional when it is enacted for a racial purpose, maintained for a racial purpose, or operates to deny the minority community equal access to the electoral process. *Bolden* v. *City of Mobile, Ala.,* 571 F.2d 238 (5th Cir. 1978); see also, *Nevett* v. *Sides,* 571 F.2d 209 (5th Cir. 1978). These legal principles represent a proper application of the

holdings in this Court's prior decisions in *Whitcomb* v. *Chavis, supra,* and *White* v. *Regester, supra.*

The Fifth Circuit's decision in this case addresses a serious and continuing problem of exclusion of minority representation from equal participation in municipal government which exists throughout the South and possibly in some Northern communities as well. In Mississippi, where we are familiar with local conditions because of our extensive voting rights litigation there, at-large municipal voting has been both instituted and maintained for purposes of minimizing and cancelling out black voting strength. In 1962—after the first massive voter registration drives were getting underway—the Mississippi Legislature enacted a statute, Miss. Laws, 1962, ch. 537, requiring all code charter municipalities with a mayor-alderman form of government to switch from ward to at-large, citywide election of aldermen. *Stewart* v. *Waller,* 404 F. Supp. 206 (N.D. Miss. 1975) (three-judge court). Prior to 1962, cities with populations over 10,000 were required to elect six aldermen by ward and one at-large, and cities with populations under 10,000 had an option of electing four aldermen by ward and one at-large, or of electing all five aldermen at-large. An action was filed challenging the constitutionality of this statute. In 1975, on evidence showing that "it was a foreseeable certainty that in many wards in many municipalities the electorate would contain a majority of black citizens" (404 F. Supp. at 213), and that the author of the statute argued during the legislative debates that "this is needed to maintain our southern way of life" (*id.*), a three-judge District Court declared the statute violative of the Fourteenth and Fifteenth Amendments for the reason that it was designed "to forestall the possibility that black aldermen might in some instances win election" and was passed with the "intent to thwart the election of minority candidates

to the office of alderman." *Stewart* v. *Waller*, *supra*, 404 F. Supp. at 214.

As a result of the *Stewart* injunction enjoining enforcement of the 1962 statute, 29 cities which had switched to at-large elections were required to revert to ward elections. In the 1977 municipal elections—the first since the *Stewart* decision—twenty black aldermen were elected for the first time to formerly all-white boards of aldermen in fourteen cities covered by the *Stewart* decree.

Similarly, after the passage of the Voting Rights Act of 1965, 42 U.S.C. § 1973, allowing black citizens to register and vote in large numbers in the South, the Mississippi Legislature enacted several statutes requiring and allowing county boards of supervisors and county boards of education to switch from district to at-large, countywide elections. See United States Commission on Civil Rights, POLITICAL PARTICIPATION 21-23 (1968). In *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 569-70, this Court held that such statutes were covered by the Federal preclearance requirement of § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, in part because of their potential for diluting and minimizing minority voting strength. The statutes were submitted to the Attorney General of the United States, and an objection was lodged based upon dilution of black voting strength.

These statutes were enacted purposefully and intentionally to prevent the election of black candidates and to deprive black voters of the opportunity to elect candidates of their choice. But as here when a municipality maintains an at-large, citywide voting scheme for the purpose of diluting black voting strength, the result is the same and the constitutional rights of minority voters are equally violated. In Mississippi, the Lawyers' Com-

mittee has represented black voters in filing at-large municipal voting challenges against ten Mississippi cities, involving the cities of Aberdeen, Columbus, Greenville, Greenwood, Hattiesburg, Hazlehurst, Jackson, Picayune, West Point, and Yazoo City. In each instance, all members of the city council were elected in at-large, citywide voting, and despite the fact black candidates had run for the city council, and blacks constituted more than 20% of the voting population (but less than a registered majority), in only one instance[10] had any black candidate been elected to the city council when the suit was filed. These municipalities—and others—are not covered by the injunction issued in *Stewart* v. *Waller*, *supra*, either because they have commission forms of government or because they are private charter municipalities in which their at-large voting systems are not mandated by state statute. Like Mobile, some of these municipalities instituted at-large voting systems in the early 1900's; others are of more recent vintage. But in each case, the maintenance of at-large municipal voting has resulted in the almost total exclusion of any black representation in city government, although black persons constitute 20% or more of the city population.[11] To the best of our knowledge, of the more than 1,300 elected city council members in Mississippi, only seven

[10] In 1974 Mrs. Sarah Johnson was elected to the six-person Greenville City Council with less than a majority of the vote in a three-person race. After these suits were filed, two black council members were elected in at-large voting in Greenville (Mrs. Johnson was reelected) and Picayune.

[11] Because of *White* v. *Regester* and other related Fifth Circuit decisions, six of the ten cases have been settled and single-member ward districting plans have been substituted for all at-large elections. In each case, the new ward plans provide for two majority black wards. In two cases, ward election plans went into effect for the 1977 and 1978 municipal elections in West Point and Yazoo City; in West Point one black alderman was elected to the previously all-white board of aldermen and in Yazoo City two black aldermen were elected for the first time.

black city council members have been elected in at-large voting from white majority constituencies or in ward voting from white majority wards.

Under circumstances such as these, public officials in the South can hardly claim to be unaware that the maintenance of at-large municipal voting schemes, particularly in face of a recent past history of exclusion of black citizens from the political process through disenfranchisement, operates to dilute, minimize, and cancel out black voting strength and to exclude the possibility of black representation in municipal government, whatever the particular form that municipal government may take.

In the circumstances of this case, the constitutional claims of black voters and the findings of the District Court that at-large municipal elections have been maintained for a racially discriminatory purpose and have operated to exclude black representation should outweigh the purely administrative claims of the city that a city-wide perspective is needed in city government. In *Connor* v. *Finch, supra,* the Mississippi Legislative reapportionment case, the State official defendants made similar claims that at-large voting in multi-member legislative districts were needed to maintain a countywide perspective in the Legislature, but these arguments were rejected by the Court last Term in rejecting pleas for multi-member districts in a court-ordered plan, *Connor* v. *Finch, supra,* 431 U.S. at 415. Many Mississippi municipalities have been forced to abolish at-large voting and revert to ward elections, but no claim has been made that this has destroyed or seriously impaired the orderly functioning of municipal government.

III. PLAINTIFFS CHALLENGING AT-LARGE MUNICIPAL VOTING FOR DILUTION OF BLACK VOTING STRENGTH SHOULD NOT BE REQUIRED TO PROVE THAT THE AT-LARGE SYSTEM WAS ADOPTED FOR A SPECIFIC RACIAL PURPOSE IF THE PROOF SHOWS THAT AT-LARGE MUNICIPAL VOTING HAS BEEN MAINTAINED TO EXCLUDE BLACK REPRESENTATION OR OPERATES, IN THE FACE OF A PAST HISTORY OF EXCLUSION OF MINORITIES FROM THE POLITICAL PROCESS, TO DENY BLACK VOTERS THE OPPORTUNITY TO ELECT CANDIDATES OF THEIR CHOICE.

In *White* v. *Regester, supra,* a unanimous Court held that at-large legislative voting in multi-member districts is unconstitutional if plaintiffs produce evidence (412 U.S. at 766)

> that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. *Whitcomb* v. *Chavis, supra,* at 149-50.

In neither *Whitcomb* nor *White* did the Court establish a specific requirement that plaintiffs must prove that the at-large system had been instituted for a racially discriminatory purpose, if the proof showed that at-large voting had operated to deny minority citizens an equal opportunity to participate in the political and electoral processes. Therefore, there seems to be no way for this Court to reverse the decision of the Fifth Circuit in this case without overruling this Court's unanimous decision in *White.*

In cases such as this, where the at-large voting scheme was adopted with the commission form of government in

1911, a requirement that plaintiffs prove specific racial intent with the adoption of at-large elections would place an impossible burden on minority plaintiffs. Virtually no witnesses to the change would be alive today, and newspaper accounts may be nonexistent or unreliable.

Nor do this Court's subsequent decisions governing the Fourteenth Amendment racial purpose requirement require such a burden. Thus, in *Washington* v. *Davis*, 426 U.S. 229, 241-42 (1976), this Court was careful to say:

> This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. *Yick Wo.* v. *Hopkins*, 118 US 356 (1886). It is clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an "unequal application of the law . . . as to show intentional discrimination." *Akins* v. *Texas*, *supra*, at 404. *Smith* v. *Texas*, 311 US 128 (1940); *Pierre* v. *Louisiana*, 306 US 354 (1939); *Neal* v. *Delaware*, 103 US 370 (1881). A prima facie case of discriminatory purpose may be proved as well by the absence of Negroes on a particular jury combined with the failure of the jury commissioners to be informed of eligible Negro jurors in a community, *Hill* v. *Texas*, 316 US 400 (1942), or with racial nonneutral selection procedures, *Alexander* v. *Louisiana*, 405 US 625 (1972); *Avery* v. *Georgia*, 345 US 559 (1953); *Whitus* v. *Georgia*, 385 US 545 (1967).
>
> * * * *
>
> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the

> law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact—in the jury cases for example, the total of seriously disproportionate exclusion of Negroes from jury venires—may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.

In looking at the scheme at issue here, both the District Court, after "an intensely local appraisal of [its] design and impact", *White* v. *Regester*, *supra*, 412 U.S. at 769, and the Court of Appeals were convinced that the evidence clearly demonstrated that at-large voting in Mobile had been maintained for a racial discriminatory purpose. It has operated for almost 70 years to exclude black representation totally from Mobile's governing body, and certainly the City Fathers could not be ignorant of this preeminent fact. As Mr. Justice Stevens wrote in his concurring opinion in *Washington* v. *Davis*, *supra*, 426 U.S. at 253:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds.

A requirement that plaintiffs must prove intentional discrimination with the enactment of at-large voting schemes also overlooks the firmly established principle of constitutional law that a statute or official action may be constitutional at the time it was adopted, but may become unconstitutional over time as conditions change. "A statute valid when enacted may become invalid by change in the conditions to which it is applied." *Nashville, C. & St. Louis R. Co.* v. *Walters*, 294 U.S. 405, 415 (1935). Thus, in the reapportionment cases, a legis-

lative reapportionment plan which provided equi-populous and perfectly valid districts when adopted may become unconstitutional over time as a result of legislative inaction in not responding to shifts of population which render the legislative districts malapportioned. *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Baker* v. *Carr*, 369 U.S. 186, 192-93 (1962).

Thus, in this case, even if the at-large voting scheme was adopted in 1911 in a "race-proof" circumstance in which there was no racial intent because Mobile blacks were denied the right to vote, nevertheless the at-large scheme became unconstitutional through legislative inaction as blacks were later permitted to register and vote and the city commission recognized that at-large elections operated completely to deny black voters of Mobile the opportunity to elect city council members of their choice and to exclude black representation on the Mobile city commission.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

CHARLES A. BANE
THOMAS D. BARR
Co-Chairmen

NORMAN REDLICH
Trustee

FRANK R. PARKER
Staff Attorney
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
720 Milner Building
210 South Lamar Street
Jackson, Mississippi 39201
(601) 948-5400

ROBERT A. MURPHY
Staff Attorney
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 Fifteenth Street, N.W.
Suite 520
Washington, D.C. 20005
(202) 628-6700

Attorneys for Amicus Curiae