IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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

SUPPLEMENTAL BRIEF FOR THE APPELLANTS ON REARGUMENT

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Appellants, Appellees and the United States as *amicus* variously state the questions presented in this case, which is to be reargued in tandem with, but not consolidated with, a case involving the partisan elections of the Mobile County School Board.[1] This brief on reargument is submitted to call attention to events occuring since the original argument of

[1] *Williams v. Brown*, No. 78-357.

this City of Mobile case in the spring of 1979. These events bear on two of the questions presented: (1) the quality of proof of discriminatory intent necessary to invalidate on Fourteenth Amendment grounds Mobile's Commission form of government which has existed without material change since 1911; and (2) the propriety of a judge-made remedy gerrymandering the City into wards and writing a 63-page charter of government for the sole purpose of guaranteeing and maintaining proportional representation for the black race.

ARGUMENT

These are the only two questions necessary to the decision of this case. Appellees[2] and *amici*[3] are eager to raise claims based on the Fifteenth Amendment and the Voting Rights statute. However, the Court of Appeals below held that the Fifteenth Amendment required a showing of discriminatory intent indistinguishable from that necessary to satisfy the Equal Protection Clause of the Fourteenth Amendment;[4] there has been no cross-appeal of that holding. The District Court below refused to hold in favor of plaintiffs on any of their several statutory claims. The Court of Appeals below affirmed that decision,[5] and, again, no cross-appeal has been taken. This leaves only Appellees' Fourteenth Amendment claim for disposition by this Court.

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[2]Brief for Appellees, p. 2 (Questions Presented, no. 3).

[3]Brief for the United States as Amicus Curiae, p. 2 (Questions Presented, no. 2).

[4]Pet., p. 2a, n. 1 (571 F.2d 238, 241 n. 1), incorporating opinion in *Nevett v. Sides,* 571 F.2d 209, 221. *Nevett* is pending certiorari here, as No. 78-492.

[5]See Pet., p. 4a, n. 3 (571 F.2d 238, 242 n. 3).

Appellants therefore submit that the newly decided cases discussed below support their position first raised on the original argument respecting the intent and remedy issues, and that these intervening events counsel even more strongly the reversal of the judgment below.

I.

MOBILE'S COMMISSIONERS DO NOT MAINTAIN THE CURRENT FORM OF CITY GOVERNMENT FOR THE PURPOSE OF INHIBITING BLACK ELECTORAL PARTICIPATION.

The Court of Appeals below held that intent to discriminate was an essential element of a Fourteenth Amendment claim of vote dilution.[6] Several alternatives were open to the Court in fixing intent on the record of this case. The Court made these choices.

The Court held that the intent of the Alabama legislature, rather than that of the City Commissioners, the only defendants here, was the relevant intent.[7] The Court made no attempt to reconcile its focus on the legislators in Montgomery for this purpose, with its focus on Mobile's Commissioners for all other purposes. The Court retained as

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[6]The Court of Appeals then "harmonized" the entire corpus of its voting cases decided prior to *Washington v. Davis*, 426 U.S. 229 (1976), and interpreted *White v. Regester*, 412 U.S. 755 (1973) to have included an implicit finding of discriminatory intent. See *Nevett, supra*, 571 F.2d 209, 219 n. 13.

[7]Pet., pp. 14a (571 F.2d 238, 246) and 28b-30b (423 F. Supp. 384, 397).

good law its *Zimmer*[8] analysis, which, applied here, inquired into the City Commissioners' appointments,[9] employment,[10] paving and drainage[11] and citizen complaint[12] activities.

Second, the Court held that an intent to discriminate was proved by the failure of the Alabama legislature, *sua sponte*, to change Mobile's Commission form of government to a mayor-council form elected from districts. This, we refer to as "maintenance intent". The Court nonetheless affirmed the finding and conclusion that Mobile's preference since 1911 for at-large Commission elections was a legitimate means of insuring city-wide representation, and that the Appellees had not satisfied their burden of proving that the governmental policy in favor of at-large elections was tenuous.[13]

Finally, the Court held that Alabama's maintenance intent was adequately proved by the tort method: that an actor intends the predictable consequences of his actions. As applied here, the tort must have been that a government which maintains a form of government for 68 years must intend the predictable consequences of maintaining the *status quo*.[14]

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[8]*Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), affirmed ("without approval of the constitutional views expressed") sub. nom. *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).

[9]Pet., p. 6b (423 F. Supp. 384, 387).

[10]Pet., p. 11b (423 F. Supp. 384, 389).

[11]Pet., p. 15b (423 F. Supp. 384, 391).

[12]Pet., p. 17b (423 F. Supp. 384, 392).

[13]As the District Court below found, a Commission government could not be elected by districts. Pet., 5b (423 F. Supp. 384, 387).

[14]Compare *United Jewish Organizations v. Carey*, 430 U.S. 144, 162 (1977) (plurality opinion) (government may change *status quo* to guarantee proportional representation by race) with *Beer v. United*

(continued)

Some comments concerning the first two choices of the Court of Appeals in divining a discriminatory intent are in order.

First, the choice of the Alabama legislators, rather than the City Commissioners, was jurisdictional and substantive error. This is not a suit to invalidate the Commission form of government throughout Alabama, or to remove the Alabama legislative authorization for cities, on a local option basis, to organize themselves according to the Commission form.[15] Indeed, under the "redemption" of the *Zimmer* factors in the companion *Nevett* opinion, it is unlikely that any court in the Fifth Circuit could entertain a suit challenging the organization of local governments on a state-wide basis; each city must be considered on its facts. No State legislator or official was sued here.[16] The only defendants were the three Mobile City Commissioners. Theirs is the relevant intent, and it is most appropriately demonstrated by the Commissioners'

(footnote continued from preceding page)

States, 425 U.S. 130, 136 n. 8 (1975) (Constitution does not require government to change *status quo* so as to guarantee proportional representation by race).

[15]Appellees devote pages 25 to 33 of their Brief to a demonstration, from the federal jurisprudence involving Alabama, that plaintiffs alleging invidiously motivated state action know how to obtain proper jurisdiction over state officials.

[16]The evidence of legislators' intent consisted of the testimony of a sponsor of a pending bill concerning the traditions and habits of the legislature, as well as his recollection of the comments of other legislators outside the chamber. See I Appendix, pp. 248, 254. In a more traditional legislative intent case, where the intent of the legislature is clearly relevant, this record would not do to prove intent. See 2A Sutherland, *Statutes and Statutory Construction* § §48.16 and 48.17 (4th ed. C. Sands 1973).

Here, the proffered explanation was not of the meaning of a statute, but the meaning attending the absence of a statute changing the *status quo.*

activity in electoral campaigns.[17]

Having held it proper to ignore the intent of campaigning Commissioners, neither Court below made the findings which the unrebutted record of testimony compel:[18] that the plaintiffs and other black community leaders in the City, who have never run for Commissioner, participate in the electoral system by endorsing candidates and collecting the corresponding political debts after election day by influencing municipal policy. No less self-serving than the testimony of these black leaders was the unrebutted testimony of the Commissioners that they campaigned actively for the black vote and fully recognized the effective marshalling of that vote by the plaintiffs. No one can say on the record of this case that a black candidate who would have been elected from a black-majority district was defeated in or by the at-large electoral system.[19]

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[17]See *Nevett*, 571 F.2d 209, 222:

"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."

[18]See Brief for the Appellants, pp. 6-10.

[19]The only 3 black candidates for Commissioner failed to carry the areas populated by blacks according to the census tracts. Pet., p. 8b (423 F. Supp. 384, 388).

Prediction of a white backlash, see Pet., p. 8b (423 F. Supp. 384, 388), if a qualified black were to run for a Commission seat is just that, a prediction. Moreover, it is the product of a school of voter psychoanalysis which also gave us the headline "Dewey Defeats Truman." The historical facts are that a qualified black can be elected at-large in a black minority city. See Brief for the Appellants, p. 11 n. 14 (examples from Detroit, Newark, East Orange, Berkeley, Richmond (California), Los Angeles, Atlanta, Raleigh, Richmond (Virginia), New Orleans and Birmingham.

Second, proof of discriminatory intent by maintenance of the *status quo* has been rejected recently. *Aranda v. Van Sickle,* 600 F.2d 1267 (9th Cir. 1979). Having rejected the argument that the failure of the city council to submit a districting plan to the electorate was intentional discrimination, the Court in *Aranda* found the only evidence of vote dilution remaining to be the dismal failure of minority candidates in elections over 25 years. That showing was insufficient, and compelled summary judgement for the city. 600 F.2d at 1275 (Kennedy, J., concurring.)

We have argued that the third choice of the Court of Appeals, the tort theory of intent, is inconsistent with *Washington v. Davis*[20] and its progeny, such as *Arlington Heights.*[21] The *Feeney* case last Term lends additional support to the rejection of the tort theory.

In *Personnel Administrator v. Feeney,* No. 78-233,[22] Ms. Feeney challenged a preference in public hiring given to veterans, citing the disproportionate representation of women among veterans. Focusing on the positive re-enactments of the preference (not merely a failure to rescind earlier legislation), the Court in terms rejected the tort method of proof.[23] Here, as there, "'discriminatory purpose'... implies more than intent... as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group."[24]

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[20] 426 U.S. 229 (1976).

[21] *Village of Arlington Heights v. Metropolitan Housing Devel. Corp.,* 429 U.S. 252 (1977).

[22] 99 S. Ct. 2282.

[23] See slip op., p. 13, No. 78-233 (Jun. 5, 1979).

[24] *Feeney, supra,* slip op., pp. 21-22.

See also *Sandstrom v. Montana,* No. 78-5384 (99 S. Ct. 2450), slip op., pp. 11-13 (June 18, 1979) (criminal instruction based on tort proof of intent, unconstitutional).

The finding and conclusion of the governmental interest of Mobile in retaining the functional specialization and city-wide representation attending at-large Commission elections forecloses, under *Feeney,* a holding of discriminatory electoral intent. For, unlike the case in *Columbus Board of Education v. Penick,*[25] "adherence to a particular policy... 'with full knowledge of the predictable effects... upon racial imbalance' " was not " ' one factor among others. . . in determining whether an inference of segregative intent should be drawn.' "[26] Here, the tort inference was the only factor supporting the finding of purposeful maintenance of an at-large Commission government.

II.

A REMEDY NOT MERELY MAINTAINING, BUT CHANGING MOBILE'S ENTIRE GOVERNMENT TO GUARANTEE, PROPORTIONAL REPRESENTATION BY RACE IS NECESSARY HERE UNLESS THE JUDGEMENT IS REVERSED.

The desideratum of both courts below was to create for Mobile an electoral plan in which votes would be counted not for candidates, but for racial interests. At-large elections conform perfectly to one-person — one-vote. Where a change to at-large[27] is proved to have been racially motivated, an appropriate remedy is to undo the change.[28]

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[25]No. 78-610 (99 S.Ct. 2941) (Jul. 2, 1979).

[26]*Penick, supra,* slip op., p. 13, No. 78-610.

[27]See, e.g., *Zimmer v. McKeithen,* 485 F.2d 1297, 1301 (5th Cir. 1973) (en banc).

[28]This is the office of the Voting Rights Act, which is not applicable here, and whose applicability is not presented by any cross-appeal. See footnote 5 *supra.*

Here, there is no change to undo. We have addressed the inappropriateness of holding that maintenance of an at-large system without any change or any other electoral act (such as campaigning against black support or black interests and maintaining the at-large system to preserve effective power to do so with electoral impunity) requires that the system be changed.[29]

But, beyond the liability phase of this litigation, the creation of a remedy for the sole purpose of counting votes so as to guarantee representation of special interests, racial or otherwise, is frought with dangers, both practical and constitutional.

Both courts below had this remedial goal: to "provide blacks a realistic opportunity to elect blacks to the city governing body."[30] But, the proof had shown no meritorious black candidate to have offered himself for election. The remedial goal is one of guaranteeing the representation of a

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[29]An article by Paul Brest has been cited by the Court below on the intent question. *Nevett,* 571 F.2d 209, 224 nn. 20, 22; and 571 F.2d at 233 n.1 (Wisdom, J., concurring specially).

Brest also addresses the remedy problem in a way which distinguishes maintenance intent from action intent. He points out that the evil of an illicitly motivated decision is to rob the governed of a proper official assessment of the factors governing a decision to act. The proper remedy is to invalidate the illicit decision, forcing the official to decide properly. Brest, *Palmer v. Thompson:* An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95, 116-18.

Here, the assertedly illicit conduct of the government officials was to fail to guarantee proportional representation by race, a desideratum no decision of this Court requires. By finding and concluding a strong governmental interest in the at-large system, the courts below have already conceded that maintenance of the at-large system was a proper course of conduct. See *Mt. Healthy Board v. Doyle,* 429 U.S. 274, 285-87 (1977).

[30]Pet., p. 42b (423 F. Supp 384, 403).

black interest — however that is to be determined — by any candidate who is black. But, beyond the offensive notion that a candidate should be favored in spite of, rather than because of, his qualifications, administration of the remedy will provoke troubles which should not lightly be unleashed.

We have pointed out before that the presumption that any black is better able to represent black interests than is any white, is not a presumption shared by all political scientists who have studied the jurisdictions.[31]

Moreover, the remedial order dilutes black political power in Mobile. Blacks in Mobile, including Appellees, filled this record with their many visits to the Commissioners and how effective those visits had been in securing fulfillment of black needs. Now blacks meet with Commissioners who can "do it all" in that they are clothed with all the executive and legislative power the City of Mobile has under state law.

Blacks under the orders of the Courts below get 3 guaranteed black, part-time, poorly paid representatives in a 9-person legislative council. These new black representatives are required to meet one time per week for a few hours. They are provided no staff. Why should the 6-person white council majority do very much for the blacks who cannot vote them in or out of office?

To be blunt about it, blacks lose the "clout" they now testify they have due to their votes and the electoral participation of Appelles other than by standing election, and through which they now get their needs met. Under the District Court's plan and order they get an almost powerless and almost worthless 3 out of 9 votes. What can the 3 court-ordered black district councilmen do for their segregated district in a city legislative body where 6 other councilmen are there to represent whites only?

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[31]Brief for the Appellants, pp. 32-33.

Instead of guaranteeing blacks "effective participation" in Mobile's political processes, the court orders below herein effectively strip them of that "guarantee." Those orders effectively dilute that participation. In sum, the lower courts destroy a system of government that serves blacks much better than the 3 guaranteed blacks out of 9 on the court-ordered council can possibly serve them. If dilution of political access and participation and power is the true constitutional test, then one must conclude the court orders are flagrantly misrepresented if claimed to be an enhancement of black rights. Reasonable analysis proves the opposite is true.

We have pointed out that a single-member district plan maximizes guaranteed black representation — even if it were to be effective representation — only where blacks constitute a residentially segregated minority.[32] If Mobile becomes a black majority city, guaranteed representation by race for blacks would be maximized by returning to at-large elections in which the majority could vote as a racial block for each candidate in the City. Perhaps, in that event, the courts would entertain a suit by whites or some non-black minority claiming that their rights to proportional representation by race require a district plan.

At the same time, if blacks achieve the goal of the melting pot and of the several federal community development programs, the goal of residential integration, then the single-member district remedy will no longer serve them as well. If blacks become truly integrated, it will not serve them at all.

Therefore, a court conscientiously attempting to guarantee and preserve a remedy of proportional representation by race will have to keep abreast of these trends.

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[32] *Id.*, p. 31.

The court will have to identify citizens by race,[33] and determine where they live. The court will have to satisfy itself that the goal of continued black electoral success is indeed working to inhibit residential racial integration. Then, the court can retain electoral districts. But, as people move, the court must redraw the districts if it is to perpetuate the guarantee of the holding of the courts below.

These considerations are not fanciful, as proceedings in a currently pending case in this city illustrate. At the Term before last, this Court held Dallas' mixed single-member district and at-large plan for electing city councilmen to be constitutional as a legislative plan.[34] Thereupon, Dallas filed suit in the District of Columbia under § 5 of the Voting Rights Act to have the plan approved.[35] Blacks and Mexican-American groups intervened. Blacks wanted either 11 single-member districts or a redrawing of lines for the 8 districts extant, a remedy neither unexpected (given the degree of black residential segregation) nor catastrophic to the governance of Dallas. The Mexican-Americans, on the other hand could not so easily profit from the drawing of

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[33]See Brief of Anti-Defamation League of B'nai B'rith, Amicus Curiae, pp. 6-12, in *Fullilove v. Kreps,* No. 78-1007 (statutory preference for "citizens... who are... Negroes..." unconstitutionally arbitrary, vague and overbroad) (citing cases of disputed racial identity).

That the remedy in this case is a judicial one assertedly compelled by the Constitution while the statute in *Fullilove* is a congressional remedy assertedly compelled by the Constitution, makes no less applicable these words (Anti-Defamation League Brief, pp. 9-10):

> "Moreover, stamping the imprimatur of the Federal government upon a particular racial or ethnic definition. . . calls to mind notorious attempts by other governments to define racial or ethnic groups [and] establishes the government as a sort of racial Inquisition, even if for a benign purpose."

[34]*Wise v. Lipscomb,* 437 U.S. 535 (1978).

[35]*City of Dallas v. United States,* C.A. No. 78-1666 (D.D.C., filed Sep. 5, 1978).

district lines; constituting only 10% of the city's population, they are well dispersed within Dallas.[36] Claiming the same abuse of dilution, and the same right to a remedy as Appellees here, the Mexican-Americans in Dallas urged the court to create 20 districts so that they might have a majority in one of them.[37]

A 20-member council is beyond the point at which a reviewing court can approve a remedy as reasonable.[38] Indeed, the ward-heeling of large single-member councils is precisely the reason for the establishment of Mobile's Commission form in 1911.[39]

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[36]The Dallas City demography was part of the Dallas County demography presented to this Court in 1973 as *White v. Regester*, 412 U.S. 755.

[37]Stipulation of Facts, Nos. 32-34, *City of Dallas, supra* (filed Jul. 18, 1979).

[38]Twelve percent of mayor-council cities, and 0.2% of council-manager cities have councils of 16 or more members. Int'l City Mgmt. Ass'n, *The Municipal Year Book 1979*, p. 100 (Table 4/3).

[39]See Jurisdictional Statement, p. 10.

CONCLUSION

We have reached the point in America where the qualifications of candidates rather than the color of their skin determine elections. We urge that this Court so hold and in doing so uphold Mobile's Commission form of government with its at-large elections. Thus will the people in Mobile continue to choose to vote on a candidate's qualifications as will the voters who reside in 67% of our cities which now have elections at-large. This is real equality: one person, one vote. That is what the Constitution requires. All voters are entitled to that equal vote and now get it in Mobile. The court-ordered 6-white 3-black district plan dilutes the black vote rather than enhancing it. So, on the record and remedy of this case, if the black Appellees win in this Court, they lose political and electoral power in Mobile.

Respectfully submitted,

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