No. 84-1244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SUSAN J. DAVIS, *et al.*,

Appellants,

vs.

IRWIN C. BANDEMER, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the court below in addressing a claim of political gerrymandering refused to follow the decisions of this Court.

2. Whether the decision of the court below in addressing a claim of political gerrymandering is in conflict with other decisions of the U.S. Court of Appeals for the Seventh Circuit.

3. Whether a major political party in Indiana with complete access to the political process and which elects candidates to the Indiana General Assembly in great numbers (Appendix at A-12) and to statewide office on a regular basis (Appendix at A-11) and with enough "safe" seats and "competitive" seats to control both the Indiana House of Representatives and the Indiana State Senate, is a "political group" entitled to the same constitutional protection as racial minority groups.

4. Whether the Indiana Reapportionment Acts can be found to be unconstitutional solely because of a finding of political gerrymandering, where the court below found that they followed the principal neutral criterion of "one man, one vote" (Appendix at A-17) and then the neutral criterion of no minority vote dilution and preserving Black voting strength so that Black representation is proportional to Black population in Indiana (Appendix at A-17), and then in fact followed the neutral criterion of "least changed plan" by preserving the cores of previous districts and avoiding incumbent contests for both Republicans and Democrats and by preserving multi-member districts in the House for both Republicans and Democrats unless all the representatives from any such multi-member districts, of either party or race, requested their district become a single member district (Appendix at A-18).

5. Whether the court below can make a finding of unconstitutional political gerrymandering, based in part

on a finding that proportional representation is not required (Appendix at A-25), but with no finding as to what representation for the minority party is required, and where there is no finding how the court measured baseline political strength.

6. Whether the court below can find political gerrymandering based on the 1982 elections (Appendix at A-11, A-12), where the minority party would have won control of the Indiana General Assembly by wide margins if it had won all "safe" seats and all seats found "competitive" (Appendix at A-11) and where some "vote dilution" will inevitably result from residential patterns regardless of district lines.

7. Whether the court below can place the burden of proof on the Indiana General Assembly itself to prove that its 1981-82 Reapportionment Acts are "necessary in order that the 'one person, one vote' constitutional tenet be preserved" (Appendix at A-30) even though the Indiana General Assembly was found to have followed the principal neutral criterion of one man, one vote (Appendix at A-17) and then the neutral criterion of preserving Black voting strength (Appendix at A-17) and where the two alternate plans of the Plaintiffs were not even presented until 1982 and then did not follow these same neutral criteria.

8. Whether the court below can find an unconstitutional "stacking" of Democrats (Appendix at A-13, A-17, A-19, A-30) concentrated in urban areas (Appendix at A-12, A-18), where Democrats that were Black and concentrated in urban areas were placed in the same district to preserve the same number of Black majority districts as before.

9. Whether the scope of the remedy exceeds the constitutional violations found.

10. Whether there are sufficient findings to support the conclusion of unconstitutional political gerrymandering in the Indiana General Assembly and any evidence to support some of the findings made.

THE PARTIES

Appellants in this proceeding are *Susan J. Davis*, *John Livengood*, and *Thomas S. Milligan*, as members of the Indiana State Election Board, *Laurie Potter Christie*, as Executive Director of the Indiana State Election Board, and *Edwin J. Simcox*, Secretary of State of the State of Indiana. Appellees from Cause No. IP 82-56-C are *Irwin C. Bandemer*, *Obi Badili*, *Ra-Nelle Pearson*, *George Womack Jr.*, *Edward O'Rea*, *John Higbee*, and *David Scott Richards*. Appellees who were originally plaintiffs in the consolidated case, Cause No. IP 82-164-C, are *Indiana N.A.A.C.P. State Conference of Branches*, *Indianapolis Branch N.A.A.C.P.*, *Fort Wayne Branch N.A.A.C.P.*, *East Chicago Branch N.A.A.C.P. Thomas Bunnell*, *Edward Richardson*, *James E. Clark*, *Bervin E. Caesar*, *Elizabeth Dobynes*, *Dr. Benjamin Grant*, *John Stott*, and *Eunice Roper Allen*. Appellees by virtue of their status as defendants in the consolidated case (who are not appellants) are *Robert D. Orr*, Governor of the State of Indiana, *J. Roberts Dailey*, Speaker of the Indiana House of Representatives, *Robert D. Garton*, President Pro Tem of the Indiana State Senate, *Richard Mangus*, Chairman of the Standing Committee on Elections and Apportionment in the Indiana House of Representatives, and *Charles Bosma*, Chairman of the Standing Committee of Legislative Apportionment and Elections in the Indiana State Senate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Constitution and Statutes

Federal Rules of Court

Other Authorities

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JURISDICTIONAL STATEMENT

In compliance with Rules 12.3 and 15 of the revised rules of this Court, Appellants submit this statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment and decision of the United States District Court for the Southern District of Indiana, sitting as a three-judge court, entered on December 13, 1984, which (1) declared unconstitutional under the Equal Protection Clause of the Fourteenth

Amendment the 1981 Indiana House of Representatives and Senate reapportionment acts and the 1982 amendments thereto; (2) enjoined the Indiana state officers responsible for implementing the election laws and holding elections thereunder from holding elections pursuant to the 1981 House and Senate reapportionment acts and 1982 amendments thereto; and (3) ordered the Indiana General Assembly to enact legislation in 1985 to redistrict the State and reapportion the legislative seats in the General Assembly.

OPINIONS BELOW

The opinion of the three-judge court below is not reported, but the majority opinion and order and the related dissenting opinion by Judge Pell are set out in Appendix A. The court's opinion and order denying Appellants' Motion to Modify or Amend, together with a dissenting opinion by Judge Pell, are set out in Appendix C.

JURISDICTION

This action was initially brought by appellees Bandemer, Badili, Pearson, Womack, O'Rea, Higbee and Richards challenging the 1981 Indiana House and Senate reapportionment acts under the Fourteenth Amendment to the Constitution of the United States, under 42 U.S.C. §1983, and under the Constitution of the State of Indiana.[1] Jurisdiction in the court below was based on 28 U.S.C. §§1331, 1343(a), 2201 and 2284 for the federal constitutional and statutory claims and on pendent jurisdiction for the state constitutional claims. A three-judge panel was appointed pursuant to 28 U.S.C. §2284.

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[1]A second action, with a different group of plaintiffs (the NAACP plaintiffs) and challenging the reapportionment acts on different grounds, was subsequently filed as Civil Action No. IP82-164-C. By order dated May 3, 1982, the two actions were consolidated by the court below. The issues raised in the second action are not a part of this appeal.

After trial, the three-judge court entered its opinion and order, including injunctive relief, on December 13, 1984. Appellants filed a timely Motion to Modify or Amend (Appendix B) on December 18, 1984, requesting that the court alter or amend its opinion and order. This motion was denied on December 27, 1984 (Appendix C). A notice of appeal (Appendix D) was filed in the United States District Court for the Southern District of Indiana on January 11, 1985, its timeliness and the timeliness of this Statement being governed by 28 U.S.C. § 2101(b) and Rule 12.1 of the revised rules of this Court.

Jurisdiction of this appeal is conferred on this Court by 28 U.S.C. §1253 since the order appealed from involved the granting of an injunction after hearing by a three-judge court. Cases sustaining the jurisdiction of this Court on appeal are *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194-95 (1972).

STATUTES INVOLVED

Section 1 of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The 1981 Indiana House of Representatives and Senate reapportionment acts as amended by the 1982 amendments thereto appear at Ind. Code §§2-1-1.5 and 2-1-2.2 and are set out in Appendix E.

STATEMENT OF THE CASE

Following the 1980 census conducted by the United States Census Bureau, the Indiana General Assembly[2] began the process of reapportioning the State based on compilations it received from that agency.

On January 13, 1981, House Bill 1475 was introduced in the Indiana House as being relevant to reapportionment. Similarly, Senate Bill 80 was introduced on February 24, 1981. These bills were characterized as "vehicle bills" and were devoid of significant content as filed. Such vehicle bills are used by the legislative leadership of both parties, the Democratic leader in the State Senate, Senator O'Bannon, introducing, for example, nine such vehicle bills in 1981. The reapportionment bills were passed in that form and were referred to the other house where amendments were made. In practical terms, the bills were blank, the amendments insignificant, and the sole purpose for this particular legislative process is to refer both bills to a conference committee.

The reapportionment bills were thus referred to a conference committee for action. The Senate Democratic leadership told the Senate Republican leadership that no Democrat would vote for any reapportionment plan prepared by the Republicans. To advance the legislative process all conferees appointed were Republicans—State Senators Charles E. Bosma and James Abraham and State

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[2]The General Assembly is Indiana's bicameral legislature, consisting of a House of Representatives with 100 members and a Senate with 50 members. House members serve a term of two years and Senate members serve a term of four years with one-half of the Senate members elected every two years. The General Assembly is not a full-time legislature. Rather, in odd numbered years it meets for a maximum of 61 session days, and in even numbered years for a maximum of 30 session days. Apportionment of the state into districts represented in the General Assembly is done by legislative act, signed by the Governor into law. The opinion of the court below gives a more detailed description of the General Assembly (Appendix at A-5, A-6).

Representatives Richard W. Mangus and Norman L. Gerig. All were members of their legislative body's respective elections and apportionment committees. Certain Democratic advisors were appointed, but they had no committee vote.

To aid in the process of legislative map making, the Republican State Committee, a political organization, contracted with a Detroit, Michigan computer firm, Market Opinion Research, Inc. ("MOR"). The Republican State Committee paid Two Hundred Fifty Thousand Dollars ($250,000.00) for MOR's services and the computer equipment was housed in State Committee headquarters. There was limited access to the equipment and its output. Generally speaking, minority party members had no direct access to the information provided to MOR or to the output from the computers. During reapportionment, however, at the request of minority legislators changes were made in the reapportionment bills to accommodate Democrats and to avoid putting Democratic incumbent Senators into the same district.

Meanwhile, the minority party members did have census compilations provided by the United States Census Bureau from which they began drawing their own map, albeit by less sophisticated means than their Republican counterparts. During these early months of 1981, there were no hearings of any kind with respect to reapportionment. The reapportionment maps and the district lines could not be determined until the computer information was available, and computer tapes were not even available until some time in the middle or latter part of April, 1981.

The majority party, through its conference committee, revealed the product of the MOR-aided map drawing during the last week of the regular 1981 session. After floor debate, certain changes were made in the reapportionment bills to accommodate the wishes of members of the minority party. The conference committee report was

introduced for vote in both houses of the General Assembly on April 30, the final day of the 1981 Regular Session. The Senate adopted the report (Roll Call 673) along party lines, 33 to 15. The House similarly adopted the report (Roll Call 844) along party lines, 59 to 40. The Indiana Journal reports comments by Senator Townsend for April 30, 1981, that the Democrats had forty hours to review the districting of more than 4,000 precincts. The Governor signed the bill into law on May 5, 1981. The procedures followed in the passage of these Acts were in accordance with all rules and legislative procedures of the General Assembly and were substantially the same as those procedures followed in 1965 and 1971. In each of those years the conference committee members were all members of the majority party, which in 1965 was the Democratic Party, and in each case the bills were passed at the very end of the Session.

The General Assembly followed certain neutral criteria in adopting the Indiana Reapportionment Acts in 1981 ("House Plan" or "Senate Plan" or "Acts"). The principal criterion was "one man, one vote", resulting in a population deviation of approximately one percent. Next, the General Assembly tried not to dilute Black voting strength. By the use of a "no retrogression" rule, Black representation was made proportionate to Black population in Indiana and the number of Black majority districts existing before reapportionment was preserved, in spite of the fact that there was a tremendous drop in population in the Black majority districts in the urban areas since the prior reapportionment.[3]

Subject to these priority guidelines, the General Assembly then followed the neutral criterion of "least changed plan" by not placing two or more incumbents in

[3]By following these guidelines. the court below found the Indiana General Assembly protected the voting rights of Blacks as Blacks as required by the U.S. Constitution and §2 of the Voting Rights Act of 1965, as amended in 1982.

the same district, by preserving the cores of existing districts, and by continuing existing multi-member districts in the House except where all of the Representatives from any such multi-member district, of either party or race, requested a change to single member districts. Multi-member House districts have been used in Indiana during this century and are used in urban areas with heavy Black population and also in other areas with predominantly white population. A higher percentage of Blacks than whites reside in multi-member districts. They are used whether the members are Democrats, Republicans or both Democrats and Republicans in the same multi-member district. Representation is not proportional between the political parties in the multi-member districts in Marion and Allen Counties in that 86% of the House seats in Marion and Allen Counties are now held by Republicans, but 46.6% of the population, the court below held, are identifiable as Democratic voters.

After passage of the Acts on April 30, 1981, the matter was settled until 1982 when certain revisions were made. During the 1982 Session the Plaintiffs presented the "Crawford Plan" for the House and the "Carson Plan" for the State Senate.

The Crawford Plan changed existing multi-member districts to single member districts and adopted as its own the sixty single-member districts contained in the current House Plan. It changed the districts in Marion, Allen and Lake Counties to maximize the Black vote in those three counties.[4] The impact on Black voting strength of the Crawford Plan is only known, however, in fifteen of the forty districts it created (listed in Plaintiffs' Exhibit 215, p.6).

The impact on Black voting strength in any of the forty-

[4]These changes were not approved by the court below.

five Senate districts in the Carson Plan not listed in Plaintiffs' Exhibit 215, p. 7, is also not known. The Carson Plan also would have maximized Black voting strength in Marion, Lake and Allen Counties.[5]

In Indiana, there is a heavy concentration of Democratic voters, including Blacks, in the urban counties, but only a minority of Democratic voters scattered throughout the rest of the districts. In the 1980 election, before reapportionment, thirty-five Republicans and fifteen Democrats were elected to the Indiana Senate, and sixty-three Republicans and thirty-seven Democrats were elected to the Indiana House. In the 1982 election, following reapportionment, there was an increase of three Democrats in the State Senate and six Democrats in the Indiana House.

In the Indiana House in 1982, all 100 seats were up for election. Fifty-seven Republican candidates were elected to serve in the Indiana House; forty-three Democrats were elected to the House. In the Indiana Senate, twenty-five seats were up for election. Thirteen Democrats and twelve Republicans were elected to Senate seats.

Based on the 1982 election (called "most significant" by the court below), in the Senate there would have been thirteen "safe" Democratic seats and eighteen seats in the "competitive" range of 45%-55%, totaling thirty-one of the fifty Senate seats. The 1982 election in fact resulted in proportional representation of the two political parties in the Indiana Senate.

In the House, based on the 1982 election there were twenty-eight "safe" Democratic seats and thirty-nine "competitive" seats in the 45%-55% range which gave the minority party an opportunity to win a total of sixty-seven of the 100 House seats if they had won all "safe" and "competitive" seats.

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[5]These changes were also not approved by the court below.

In January, 1982, prior to the 1982 elections, this lawsuit was filed by certain Indiana Democratic Party members. In summary, the plaintiffs alleged that the Acts were intended to, and do, discriminate against Indiana Democrats. They claimed that such "political discrimination" is a violation of Fourteenth Amendment guarantees of equal protection as well as Indiana constitutional prohibitions against treating electors unequally and unnecessary division of counties in Senate districting.

A majority of the three-judge court agreed that the Acts were unconstitutional under the Fourteenth Amendment. The court below found the unusual shapes of certain specified House Districts, which however observed township lines, indicated a lack of consistent application of community-of-interest principles.[6]

The court below entered an opinion and order ("Order") December 13, 1984, enjoining Indiana officials from holding elections pursuant to the Acts at any time subsequent to November 6, 1984 and giving the 1985 Session of the Indiana General Assembly, presumably either the regular session or a special session if necessary, the opportunity to enact legislation to comply with the court's order. The court retained jurisdiction to take such further action as it deemed necessary if the General Assembly did not act.

Judge Wilbur Pell of the United States Court of Appeals for the Seventh Circuit, a member of the three-judge panel, concurred in part and dissented in part. He concurred that there was no finding of constitutional or statutory violations insofar as the NAACP plaintiffs were concerned, but dissented from the majority's decision that the Indiana General Assembly had violated the Equal Protection

[6]Compactness was a neutral criterion followed during reapportionment if the "numbers fit". Mangus Deposition. p.52.

clause of the Fourteenth Amendment by diluting the voting strength of the Plaintiffs as Democrats.

On December 18, 1984, State officials asked the court below to clarify its order in certain specific respects, including what priority to assign to its new constitutional prohibition against partisan political gerrymandering, which conflicts in certain important aspects with the neutral criterion used by the Indiana General Assembly of not diluting Black voting strength. (*See* Appendix B) The court denied this request for clarification by order entered December 27, 1984, Judge Pell concurring in part and dissenting in part. (Appendix C).

THE QUESTIONS ARE SUBSTANTIAL

I. The Decision is Based on a Nonjusticiable Issue and is in Conflict with Prior Decisions of this Court and the Court of Appeals

The court below recognized that in striking down Indiana's reapportionment Acts based upon political considerations alone, it was doing something which no court had ever done before (Appendix at A-21, A-22). Such a lack of supporting precedent is understandable. This Court and the United States Court of Appeals for the Seventh Circuit have consistently held that claims of partisan political gerrymandering are not justiciable, and for good reason.

In *Wiser v. Hughes*, 459 U.S. 962 (1982) and *Andrews v. Hughes*, 459 U.S. 962 (1982), allegations of political gerrymandering of the Maryland Legislature were appealed to this Court. On November 1, 1982, these appeals were dismissed for want of a substantial federal question. *See also Graves v. Barnes* (Graves I), 343 F.Supp. 704 (W.D. Tex. 1972), *aff'd. sub nom. Archer v. Smith*, 409 U.S. 808 (1972); *Kelly v. Bumpers*, 340 F.Supp. 568 (E.D. Ark. 1972), *aff'd*, 413 U.S. 901 (1973); *Wells v. Rockefeller*, 311 F.Supp. 48, 56 (S.D.N.Y. 1970) (Cannella J. concurring), *aff'd*, 398

U.S. 901 (1970) (per curiam); *Kilgarlin v. Martin*, 252 F.Supp. 404 (S.D. Tex. 1966), *aff'd in part and rev'd in part sub nom. Kilgarlin v. Hill*, 386 U.S. 120 (1967); *WMCA, Inc. v. Lomenzo*, 238 F.Supp. 916 (S.D.N.Y. 1965), *aff'd*, 382 U.S. 4 (1965) (per curiam).

Similar authority can be found in the decisions of the Court of Appeals for the Seventh Circuit. In *Russo v. Vacin*, 528 F.2d 27 (7th Cir. 1976) a claim that ward district lines in Chicago were drawn to minimize the strength of political opponents was dimissed, the Court of Appeals holding that partisan gerrymandering is not justiciable unless absolutely irrational. In *Cousins v. Chicago City Council*, 466 F.2d 830 (7th Cir. 1972) the Court of Appeals held that a claim by a political group that it was disfavored by the drawing of ward district lines "remains among the non-justiciable political questions," relying on *WMCA v. Lomenzo*, 382 U.S. 4 (1965).

Justice John Paul Stevens was a member of the *Cousins* panel. Justice Stevens held that where there is compliance with the population standard, "judicial intervention is not warranted unless the facts dramatically and convincingly foreclose any permissible construction of the Legislature's work", 446 F.2d at 860. Where there is "an attempt to adhere to pre-existing standards", *id*, or if the district follows natural boundaries, or is compact or is contiguous, and if the said population requirement is met, "rarely if ever would a plan be attacked as wholly irrational", 446 F.2d at 859. As the lower court stated in *Wells v. Rockefeller*, 311 F. Supp. 48, 51 (S.D.N.Y. 1970) *aff'd*, 398 U.S. 901 (1970) (per curiam) (quoting *Jones v. Falcey*, 48 N.J. 25, 222 A.2d 101, 105 (1966)), "it would seem impossible for a court to pass upon the validity of political interests without itself making a political judgment or appearing to do so."

Despite this great weight of authority that the issue of political gerrymandering is not justiciable, the court below relied heavily upon the analysis of Justice Stevens'

concurrence in *Karcher v. Daggett*, 462 U.S. 725 (1983), (Appendix at A-21), a case which turned upon substantially different facts and considerations.

Karcher, of course, was not a Fourteenth Amendment challenge to state legislative districting but an Article I, section 2 challenge to Congressional districting in New Jersey involving competing plans. In addition, even if under the more extreme circumstances present in *Karcher* a "political group" might be considered to have a right to be heard on a contention of political gerrymandering, this is not that case. In *Karcher* it was admitted without dispute that the majority party purposely and intentionally for partisan advantage attempted to place incumbent members of the minority party in the same district, and that an alternate plan, not pitting one minority party incumbent against another and with less population deviation, was presented to the lower court and approved by it. The only proferred justification other than "one man, one vote" for the plan disapproved by the lower court was "no dilution of the Black vote", which the lower court held in fact was not adhered to in the New Jersey redistricting. This markedly contrasts with the situation in Indiana. No incumbent Democratic Senators were placed in the same district, and there was no evidence or finding that House members of either party were placed in the same district where it was not necessary or appropriate because of population shifts to meet the "one man, one vote" requirement.

Some of the questions that must arise in determining what is a "political group" are set out in *Mobile v. Bolden*, 446 U.S. 55, 77, 78 n. 26 (1980). It may well be that the interests of one particular racial or political group may conflict with that of another racial or political group, or even members of the same group. *See id.* at 91 n. 13 (Justice Stevens, concurring). None of these considerations are dealt with in the Order of the court below, despite Appellants' request for clarification (Appendix B).

For any political group to require special constitutional protection under the Equal Protection Clause on account of "vote dilution", it may have to prove that "historical and social factors render it largely incapable of effectively utilizing alternative avenues of influencing public policy" because "in contrast to a racial group, however, a political group will bear a rather substantial burden of showing it is sufficiently discrete to suffer vote dilution." *See id.* at 111-112 n. 7, 120 n. 19 (Justice Marshall, dissenting). This Court has never held that the issue of political gerrymandering is justiciable, and the prior decisions of both this Court and the Seventh Circuit Court of Appeals establish that it is not. The constitutional "leap" undertaken by the court below, being thus without foundation in precedent and contrary to existing precedent, is unwarranted and erroneous.

II. The Findings of the Court Below and the Evidence Do Not Support a Conclusion of Unconstitutional Political Gerrymandering.

Even if this Court were prepared to recognize political gerrymandering as a justiciable issue, the findings made by the court below—as well as the findings not made—demonstrate that it was not necessary to reach this constitutional issue. The facts simply do not show a political gerrymander.

It is significant that the court's Order specifically found that the Acts were based upon a series of approved, neutral criteria. Additionally, the Order wholly failed to address issues deemed crucial in *Karcher v. Daggett*, 462 U.S. 725 (1983), the very case upon which the court below relies.

A. Approved, Neutral Criteria Were Used

1. "One Man, One Vote"

The Order finds that the Acts comply with the principal neutral criterion of "one man, one vote" (Appendix at A-17) with a population deviation of 1% (Appendix at A-10). This deviation is well within the range permitted in state

legislative redistricting. In *Brown v. Thomson*, 462 U.S. 835, 77 L.Ed.2d 214, 222 (1983), this Court in approving Wyoming's state legislative redistricting reaffirmed that "an apportionment plan with a maximum population deviation under 10%" requires no justification by the state.

2. "No Minority Vote Dilution"

The Order also finds that when allowable the General Assembly then followed the approved neutral criterion of "no minority vote dilution" and preserved Black voting strength by following the rule of "no retrogression" (Appendix at A-10, A-17). *See Karcher v. Daggett*, 462 U.S. 725 (1983). This resulted in Black majority districts proportional to Black population (Appendix at A-17) despite a ten-year population loss by Senate District 34 in Marion County, a Black majority district, of 34,064, by House District 45 (now 51) in Marion County, a Black majority district, of 56,226 and by House District 5 (now 14) in Lake County, a Black majority district, of 29,592 (SEN 1971 "Black %" and HR 1972 "Black %" in Defendants' Exhibit 1 at Appendix F; Defendants' Exhibit Z).[7] The court below accordingly found no violation of the Voting Rights Act (Appendix at A-21).

The relative size of racial groups before and after redistricting is, of course, an important consideration in determining the constitutionality of any reapportionment plan, including Indiana's. *See, e.g., Ketchum v. Byrne*, 740 F.2d 1398, 1407 (7th Cir. 1984). In *Rome v. United States*, 446 U.S. 156, 185 (1980), this Court held that electoral changes which lead to retrogression in the position of racial minorities in the exercise of their electoral rights cannot be

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[7] The use of the neutral criterion of not diluting Black voting strength also is evident from the reduction of the Black percentages in Old House District 5 (now 14) from 91.2% to 69.9%, in Old House District 45 (now 51) from 63.8% to 61.2%, in Senate District 3 from 84.8% to 71.9%, and in Senate District 34, from 68.1% to 58.4% (SEN 1971 "Black %", HR 1972 Black %, SEN 1982 "Black %" and HR 1982 "Black %" in Defendants' Exhibit 1 at Appendix F).

permitted. *See also Beer v. United States*, 425 U.S. 130, 141 (1976).

The sensitivity of the General Assembly to this criterion is illustrated by Marion County, which preserved its fifteen seat delegation to the Indiana House despite a population decrease (Appendix at A-15). Although House District 45 (now 51) in Marion County had lost more population than the ideal district population size of 54,801 ("HR 1972" in Defendants' Exhibit 1 at Appendix F), the Acts preserved Black voting strength and representation and also maintained Marion County urban representation, rather than converting this Black majority three-member district to a two-member district.

The court below seemed to recognize that the Acts followed the guideline of preserving Black voting strength, but it explained this away by intimating that this was the result of "hindsight and chance" (Appendix at A-18). In fact, contemporaneous newspaper articles report that the neutral criterion of "no dilution of the minority vote" guided the General Assembly throughout reapportionment (Plaintiffs' Exhibits 241, 244, 253; Mangus Deposition Exhibits 2, 8).

Although the court below also found a "stacking" of Democrats (Appendix at A-13, A-17, A-19, A-30) concentrated in urban areas (Appendix at A-12, A-18), this was simply the neutral result of Democrats that were Black and concentrated in urban areas being placed in the same district to preserve Black voting strength as it existed before reapportionment. This was a neutral legislative goal adhered to at all times during the reapportionment process. (Bosma Deposition, pp. 20-1, 52-3, 69; Mangus Deposition, pp. 29-31; Dailey Deposition p. 91). The court below does not suggest that this is any way unconstitutional. There is no evidence or finding that any less "stacking" would not result in the Blacks losing Black majority districts in some or all of these urban areas in Indiana.

In the House, although there are general comments

about "stacking" there are findings of "stacking" only in Marion and Allen Counties (Appendix at A-15, A-16), and there is no finding that this "stacking" was any more than necessary to preserve Black voting strength. The decision discusses in great detail the "bizarre" shapes of certain specific House districts (Appendix at A-14, A-17, A-28, A-29), but concludes only that this indicates no community of interest (*id.*). Several House districts were found to lack compactness, but there is no finding that this lack of compactness resulted in gerrymandering favoring the Republicans. In fact, some of these House districts[8] were held by Democrats following the 1982 election (Defendants' Exhibit JJ, p. 22). The district lines for three of these House districts held by Democrats were drawn at least in part by the Democratic representatives themselves (Mangus Deposition pp. 54, 57-9).

There is no finding that the configuration of any particular House district or districts was not in fact the result of the neutral criteria of "one man, one vote" and of not diluting Black voting strength. House districts observed township lines (Appendix at A-29), which constitutes a legitimate state interest. *Mahan v. Howell*, 410 U.S. 315, 328 (1973), *modified* 411 U.S. 922 (1973). Compactness itself is not, of course, a federal requirement under the federal constitution, *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973), and was followed when the "numbers fit" (Mangus Deposition, p. 52).

3. "Least Changed Plan"

The Acts followed when allowable the neutral criterion of "least changed plan", recognized as proper by this Court, *LaComb v. Growe*, 541 F.Supp. 145 (D. Minn. 1982), *aff'd sub nom. Orwoll v. LaComb*, 456 U.S. 966 (1982). The Acts preserved the cores of prior districts, *Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. 2653, 2663 (1983), and avoided where feasible contests between incumbent members of the

[8]District Nos. 25, 42, 43, 66, 70 and 73.

Indiana General Assembly of both parties, *Burns v. Richardson*, 384 U.S. 73, 89 n. 16 (1966); *White v. Weiser*, 412 U.S. 783, 797 (1973).

The Acts also followed the neutral criterion of "least changed plan" by preserving multi-member districts in the House unless the Representatives from any particular multi-member district, regardless of party or race, requested that their district become single-member districts (Appendix at A-18; November Transcript, pp. 140-41; Mangus Deposition pp. 20, 29; Dailey Deposition p. 23; Campbell Deposition p. 143-7, 151-2, 167). The combined use of single-member districts and multi-member districts is quite common in legislatures, occurring in thirteen legislatures in 1981 (Defendants' Exhibit GG). In *Burns v. Richardson*, 384 U.S. 73, 89 n. 16 (1966) this Court found it relevant that the Hawaiian Legislature was dominated by multi-member districts in both houses before statehood and that this feature did not originate with a particular reapportionment plan then under consideration. Similarly, multi-member districts have been used during this century (Appendix at A-19), have had a long and continuous history in Indiana (Defendants' Exhibit EE) and were expressly found to be constitutional by this Court in *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

Moreover, multi-member districts exist in both urban areas and rural areas and are represented by legislators that are Democrats, Republicans, or both Democrats and Republicans in the same district (Defendants' Exhibit HH at Appendix F). For example, House District 31, a two-member district, is represented by a Republican farmer and a Democratic businessman from Gas City, Indiana (Defendants' Exhibit JJ, pp. 22, 29 and 42). This lack of political specificity negates a claim of purposeful discrimination. *Cosner v. Dalton*, 522 F.Supp 350, 362 (E.D.Va. 1981).

Attempting to find other evidence of political discrimination, the court below holds instead that a higher

percentage of Blacks than whites resides in multi-member districts (Appendix at A-18), that 46.6% of the population in Marion and Allen Counties is identified as Democratic while the Republicans won 86% of the House seats in Marion and Allen Counties, all from multi-member districts, and that "such a disparity speaks for itself" (Appendix at A-20). This phenomenon does not, however, connote unconstitutionality. In *Whitcomb v. Chavis*, 403 U.S. 124 (1966), quoted approvingly in *Mobile v. Bolden*, 446 U.S. 55, 79-80, this Court considered a charge of political gerrymandering made in oral argument (403 U.S. at 156 n. 35) and held that the fifteen person multi-member district in Marion County, Indiana, was constitutional even though the minority party had won only one race in five from 1960 to 1968, *id.* at 150. *Whitcomb* thus held it constitutional for the minority party to win exactly the same number of House seats—fifteen—in this ten year period as it would now have if it won only the three seats in Marion County in House District 51 in the next five elections.

B. The Elements Outlined in *Karcher* Were Not Found

The court below made no attempt to relate the concept of "political gerrymandering" to the specific facts of this case. This Court held in *Karcher* that the plan rejected had greater population variances, *Karcher v. Daggett*, ___ U.S. ___, 104 S.Ct. 1691 (1984) (Justice Stevens concurring in denial of stay), and "was designed to produce contests among certain Republican incumbents", *Daggett v. Kimmelman*, 580 F.Supp. 1259, 1263 (1984) (on remand), *aff'd sub nom. Karcher v. Daggett*, ___ U.S. ___, 104 S.Ct. 2672 (1984). There is no evidence or finding by the court below that the Acts were designed to, or resulted in, contests among incumbents of either party which were not unavoidable because of one man, one vote considerations.

The court below also made no finding on the measurement of the baseline strength of a political party in Indiana. The "political group" found disadvantaged by the court was defined as persons who are "Democrats or at least have Democratic voting tendencies" (Appendix at A-19). This group was also defined as those voting for Democratic candidates in either 1956, 1958, 1964, 1972, 1974 or 1980 (Appendix at A-11), as those voting for all Democratic candidates for the House of Representatives in 1982, and as those voting for all Democratic candidates for the Indiana State Senate in 1982 (Appendix at A-12). As Justice Stevens recognized in his concurring opinion in *Karcher*, relied upon heavily by the court below (Appendix at A-21), measurement of baseline strength is "difficult for a political party". *Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. 2653, 2672 n. 13 (1983). The court below simply avoided this difficult task and did not attempt to set forth specifically what measurement it had used.

C. The Finding of Intent is Unsupported

This Court has determined that discriminatory purpose is critical to a vote-dilution claim under the Equal Protection clause of the Fourteenth Amendment. *Mobile v. Bolden*, 446 U.S. 55 (1980). In an effort to find such intent, the court below quoted the partisan comments of two Republican legislative leaders (Appendix at A-8 — A-9) and found largely from these comments that the purpose and intent of the General Assembly was to deprive the minority party of its constitutional rights to equal protection. There is no reason to believe, however, that these particular legislative leaders were in any way authorized to speak for the Indiana General Assembly as a whole, or that they were authorized to make these statements in any representative capacity whatever. This Court has held that no member of a legislature, outside the legislature, is empowered to speak with authority for the body. *Regional Rail Reorganization Act Cases*, 419 U.S. 102

(1974). *Accord Strauch v. United States*, 637 F.2d 477 (7th Cir. 1980) (statements by a government official outside the scope of his authority are not binding); *Department of Energy v. Westland*, 565 F.2d 685, 691 (3d Cir. 1977).

Partisan comments and partisan influences are to be expected during the legislative process. In *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973), this Court stated:

> Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when over-laid on a census map, it requires no special genius to recognize the political consequences of drawing a district along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area.... The reality is that districting inevitably has and is intended to have substantial political consequences.

Moreover, the experience in Indiana demonstrates that political partisan intentions are not always borne out by subsequent events. Before reapportionment in the 1980 election, thirty-five Republicans and fifteen Democrats were elected to the Indiana State Senate, and sixty-three Republicans and thirty-seven Democrats to the Indiana House (Defendants' Exhibit II and Defendants' Exhibit SS). Following reapportionment, in the 1982 election there was an increase of three Democrats in the State Senate and six Democrats in the Indiana House (Defendants' Exhibit JJ, p. 1).

D. The Minority Party Was Not Disadvantaged.

Based on the 1982 election, called "most significant" by the court below (Appendix at A-11), in the Indiana Senate there would have been thirteen "safe" Democrat seats and eighteen seats in the "competitive" range of 45%-55%, *id.*, as

shown in a chart prepared by the Plaintiffs (Plaintiffs' Exhibit 39 at Appendix F), totaling thirty-one of the fifty Senate seats. The 1982 election in fact resulted in proportional representation of the two political parties in the Indiana Senate, as pointed out by the dissenting opinion of Judge Pell (Appendix at A-44).

In the Indiana House, according to a chart prepared by the Plaintiffs but introduced into evidence by the Defendants as Defendants' Exhibit HH (Appendix F), the 1982 election resulted in twenty-eight "safe" Democrat seats and thirty-nine "competitive" seats in the 45%-55% range (Appendix at A-12) which gave the minority party an opportunity to win a total of 67 of the 100 House seats if they had won all "safe" and "competitive" seats. It is inconceivable that a reapportionment scheme which allows the minority party the opportunity to obtain a two-thirds majority could reflect political gerrymandering.

In comparing state-wide races and legislative races the court below apparently again ignored the comments of Justice Stevens in his concurring opinion in *Karcher*, wherein he stated that some "vote dilution" will inevitably result from "residential patterns" where one party is heavily concentrated in the urban areas (as in Indiana). 103 S.Ct. at 2675 n. 27. The source cited by Justice Stevens, Backstrom, Robins & Eller, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 Minn. L. Rev. 1121, 1127 (1978), expands upon this point:

> Aside from those analysts who emphasize physical appearance as a means of identifying gerrymandering, others purport to measure gerrymandering by focusing on the partisan outcome of the legislative election following a redistricting. Analysts using this approach compare the percentage of a party's legislative vote statewide with a percentage of seats gained. Marked disparities

> between the two figures are said to indicate the existence of a gerrymander.
>
> This method of identifying gerrymandering, like the first, has major flaws. First, the approach fails to account for the fact that the difference between percentage of vote and number of seats captured may in fact be the result of natural advantages—the inordinate concentration of partisans in one place—rather than any deliberate partisan districting scheme. For example, it is well known that Michigan Democrats are heavily concentrated in Detroit but are in a minority in many other parts of the state. Thus, in every election, Detroit Democrats will win heavily but their excess votes—those above 50%—do their party no good. Similarly, Democrats in out-state Michigan waste votes in those districts where they are a strong but persistent minority. No tolerable districting plan can effectively use either kind of votes, but typical post-election bias measures would show a gerrymander in favor of Michigan Republicans.

There is no evidence or finding that *any* alternate plan of reapportionment in Indiana, regardless of the map maker, with either multi-member or only single member districts, would not also reflect this "wasting" of Democratic votes in areas of high Democratic concentration, assuming that Black majority districts are maintained.

The lower court in *Karcher* on remand also recognized that lack of proportional representation based on state-wide votes and legislative seats won does not prove partisan political gerrymandering. The court held the "computer generated analysis" of the results in each of the proposed congressional districts of several state-wide elections had no "real relevance". *Daggett v. Kimmelman*, 580 F.Supp. 1259, 1263 (1984), *aff'd sub nom. Karcher v. Daggett*, ___ U.S. ___, 104 S.Ct. 2672 (1984). The court stated:

> While it is true that congressional elections are frequently affected by the same issues that influence the outcome of the presidential and senatorial

> contests, the patent reality is that they are strongly influenced by the more direct relationship of a Representative with the voters in his own district. Thus the fact that a district may have voted in favor of a senatorial or presidential candidate of one party is hardly a strong predictor of the outcome of a congressional race.

Nevertheless, the court below found "most significant" the results of a 1982 election wherein Democrats were said to have won 51.9% of the legislative votes state-wide, but elected only forty-three Democrats to the House (Appendix at A-12).

III. The Court Below Improperly Shifted the Burden of Proof to the State to Justify its Reapportionment Acts.

In reaching its conclusion of unconstitutional political gerrymandering, the court below improperly shifted the burden of proof to the Indiana General Assembly to prove that its reapportionment plan was "necessary in order that the 'one person, one vote' constitutional tenant be preserved" (Appendix at A-30). This approach was based on the concurrence of Justice Stevens in *Karcher*, "in conjunction with" *Mobile v. Bolden*, 446 U.S. 67 (1980). Appendix at A-21.

Under the burden of proof test in *Bolden*, however, the burden of proof never shifts to the state to prove the absence of racial discrimination. The plaintiff must always prove his case in racial voting discrimination cases, except in cases arising under Section 5 of the Voting Rights Act of 1965, not applicable here. *Rome v. United States*, 446 U.S. 156 (1980); *Beer v. United States*, 425 U.S. 130 (1976). In *Bolden*, this Court held that a plaintiff in alleging voting discrimination on account of race "must prove that the disputed plan was 'conceived or operated' as [a] purposeful devic[e] to further racial. . . discrimination", 446 U.S. at 66, and noted that in *White v. Regester*, 412 U.S. 755, (1973) it held that

> the plaintiffs had been able to "produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group(s) in question"....In so holding, the Court relied upon evidence in the record that included a long history of official discrimination against minorities as well as indifference to their needs and interests on the part of white elected officials. *Id.*

Karcher, the other case relied upon by the court below in shifting the burden of proof, was not a Fourteenth Amendment challenge to state legislative districting but an Article I, section 2 challenge to Congressional districting with an entirely different standard of proof. *Karcher* holds that as between two standards—equality or something less than equality—only the former reflects the aspirations of Article I, section 2. 103 S.Ct. at 2659.

The burden shifted to the state in *Karcher* to justify its Congressional redistricting plan under Article I, section 2 where it could present no acceptable justification for its population variance, and where an alternate plan approved by the court had greater population equality and did not pit incumbents of the minority party against each other. The court below incorrectly assumed that the burden also shifted to the State of Indiana to justify its Acts against a claim of political gerrymandering under the Equal Protection clause of the Fourteenth Amendment, even though the population variances were *prima facie* constitutional and needed no justification, and neutral criteria recognized by this Court in many cases were scrupulously followed.

The alternate plans offered by the Plaintiffs in 1982, after the Acts had been considered and passed in 1981 (Plaintiffs' Exhibits 24, 25), could not possibly allow a presumption against the constitutionality of the Acts because they do not even purport to follow the same neutral

criteria as the Acts themselves. The impact on Black voting strength of the Crawford Plan is only known in fifteen of the forty districts it created. (Plaintiffs' Exhibit 215, p. 6.) The impact on Black voting strength in any of the forty-five Senate districts in the Carson Plan not listed in Plaintiffs' Exhibit 215, p. 7, is also not known. The Crawford Plan changed multi-member districts to single member districts but used the same single member district lines as the House Plan (Mangus Deposition Exhibit 5) which were severely criticized by the court below (Appendix at A-14 — A-17, A-28 — A-29), and it also created unusual district shapes to maximize Black representation in Marion, Lake and Allen Counties (Plaintiffs' Exhibits 202, 207 and 212; Defendants' Exhibits QQ, RR) that were not acceptable or approved by the court below (Appendix at A-20). The Carson Plan did not even purport to concern itself with preserving Black voting strength throughout the State of Indiana, and also created unusual shapes in Marion, Lake and Allen Counties to maximize Black representation (Plaintiffs' Exhibits 204, 209 and 214) that also were not accepted or approved by the court below. *Id.* In sum, the court's shift of the burden of proof to the State was without justification and was erroneous.

IV. The Remedy is Overbroad

The court below made no specific finding of any unconstitutionality in the Senate reapportionment Plan. The opinion referred only to the House Plan as Exhibit A (Appendix at A-14, A-29) and to specific House districts. There is no reference to any specific Senate district that in any way violates any of the neutral criteria established by the decisions of this Court. There are no multi-member districts in the Senate. No incumbents of the party claiming to be disadvantaged were placed in the same Senate district, which was the basis of the political gerrymandering charge in *Karcher*. The 1982 election resulted in proportional representation of the two political parties in the Senate (Appendix at A-44). In short, the court's opinion did not find, and could not have found, any

unconstitutional political gerrymandering in the Senate Plan.

Nevertheless, the court's remedy swept broadly over the Senate Plan as well as the House Plan. Appellants obviously cannot correct any perceived deficiencies in the Senate apportionment plan when none are stated or exist. Accordingly, the injunction is overbroad in its coverage of the Senate Plan and should be vacated.

CONCLUSION

In his separate opinion addressed to Appellants' motion to modify the Order, Judge Pell appropriately characterized the opinion of the court below as one which "roams far and wide into untrod territory with no previous guidelines or prior decisional constitutional justification." (Appendix at A-64) Moreover, the new constitutional doctrine announced by the court was unnecessary since the court's findings and evidence do not support a conclusion of unconstitutionality even under this new rule. For the reasons outlined in this Statement, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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