10-1978

Rogers v. Lodge

Lewis F. Powell Jr.

Supreme Court of the United States
Washington, D. C. 20543

November 1, 1978

MEMORANDUM FOR MR. JUSTICE POWELL

Subject: A-417, Rogers v. Lodge
(Application for Stay Pending CA Appeal)
Federal/Civil

Immediate Situation: Applicants, representing Burke County, Ga., seek a stay pending appeal to CA 5 of the order of USDC (SD Ga.)(Alaimo) directing that a special election be held on November 7, 1978, to fill single-district seats on the county Board of Elections, under a plan adopted by the DC after it found that the existing at-large system unconstitutionally diluted the voting strength of black voters. The DC and CA 5 (order, Thornberry, Godbold, Rubin) denied stays.

Facts and DC Decision: The county has elected its commissioners at large since 1911; there is no claim that this system was created with discriminatory purpose but the DC found it was being maintained for that purpose. The five commissioners are elected together every four years, and run for specified numbered positions. No black has ever been elected, although historically the county has had more blacks than whites. Respondents, all black citizens of the county, challenged the use of numbered positions (which was begun in 1964 pursuant to general state law), majority vote, run-offs, and election at large.

The DC found that the present system violated the Fourteenth and Fifteenth Amendments, relying primarily on Zimmer v. McKeithen, 485 F.2d 1297 (CA 5), aff'd sub nom East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). Applying Zimmer's multifactor circumstantial evidence test, the DC found the following "primary" factors: a history of past discrimination; unresponsiveness of elected officials; depressed socio-economic status of blacks; lack of black access to the political process; and neutral state policy towards at-large election. The following factors enhanced the dilution: the large size of the county; the requirement of election by majority vote and election to specific positions; and the lack of a residency requirement.

The satisfaction of these criteria raise an inference of discriminatory intent.

The DC adopted the plan submitted by the respondents, cut short the four-year terms to which the present commissioners had been elected in 1976, and directed the special election.

The DC denied a stay because there was ample time for the county to overcome any administrative problems; the plan selected tracks the district lines of an existing militia district; and further denial or postponement of the rights of black citizens is not justified.

Applicants' Contentions: Applicants intend to raise on appeal at least the following issues: whether the doctrine of dilution applies to districting plans of county and municipal bodies; whether the requirement of discriminatory intent was satisfied; whether there is such a requirement; whether the DC should have afforded local officials an opportunity to devise their own plan; and whether the plan adopted dilutes white voting strength.

Discussion: This case appears to present the issues before the Court in Williams v. Brown, No. 78-357, probable jurisdiction noted October 30, 1978, and City of Mobile v. Bolden, No. 77-1844, noted October 2, 1978. It also presents the issue noted in Justice Rehnquist's ~~concurring~~ dissenting opinion in Wise v. Lipscomb, No. 77-529, decided June 22, 1978, in which you, the Chief Justice, and Justice Stewart joined. These facts would seem to justify a stay, although you might want to refer the application to Friday's Conference, particularly because we have not yet received a response.

I recommend that you refer this to Friday's Conference.

There is no response; however, respondents have told the Clerk's office that they will try to mail their response today, by express mail, for delivery tomorrow.

The DC opinion and the CA order are in the application.

MR

Marc Richman

1. DC did not order election under a single district plan until Sept 29 - 6 weeks before election date

2. Findings & op. not handed down until Oct 26 (not available until Oct 29)

Grant (but I [illegible] easy about doing so before the candidates [illegible] in and [illegible] Richmond

3. Issues - as to whether there was discriminatory intent, whether resps' vote is diluted by alleged gerrymandering of new districts, & whether the DC erred in failing to afford hearing on Resp's Plan that it adopted - are not insubstantial.

4. Similar to Mobile case

5. No irreparable injury to allow system in effect for 67 years to remain two more yrs.

But if DC's plan is effectuated, the new Board may moot case by withdrawing appeal

November 3, 1978 Conference
Second Supplemental List

No. A-417

ROGERS (representing Burke County, Ga.)

v.

LODGE (and all black citizens of county)

Application for Stay Pending Appeal to CA 5, Presented to Justice Powell and by him Referred to the Court

<u>SUMMARY</u>: Applicants seek a stay pending appeal to CA 5 of the order of USDC (SD Ga.)(<u>Alaimo</u>) directing that a special election be held on November 7, 1978, to fill single-district seats on the county Board of Commissioners, under a plan adopted by the DC after finding that the existing at-large system unconstitutionally diluted the voting strength of black voters. The DC and CA 5 (order, Thornberry, Godbold, Rubin) denied stays.

<u>FACTS</u>: The county has had an at-large system since 1911. There are five commissioners, who are elected together every four years. Each candidate runs for a specified numbered position, and a majority vote is required for election; these requirements were

added in 1964, pursuant to a general state statute. Candidates may reside anywhere in the county. No black has ever been elected, although historically blacks have been in the majority (ranging from 78% in 1930 to 58% in 1975).

Resps brought this suit in April, 1976; the bench trial ran from June to September 1978. On September 29, the DC held that the present commissioners had been unconstitutionally elected in 1976; adopted the districting plan proposed by resps; and ordered that a special election be held at the general election scheduled for six weeks hence. On October 26, the DC issued its findings and conclusions.

DC DECISION: The DC found that the at-large system violated the Fourteenth and Fifteenth Amendments, relying primarily on Zimmer v. McKeithen, 485 F.2d 1297 (CA 5), aff'd sub nom East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). Although the existing scheme of electing county commissioners was racially neutral when adopted, it was being maintained for invidious purposes. This the DC inferred from application of Zimmer's multi-factor circumstantial evidence test. The DC found the following "primary" factors: a history of past discrimination; unresponsiveness of elected officials; depressed socio-economic status of blacks; lack of black access to the political process; and neutral state policy towards at-large election. The following factors enhanced the dilution: the large size of the county; the requirements of election by majority vote and election to specific positions; and the lack of a residency requirement.

The DC adopted the districting plan submitted by resps; it was held "superior" to that of applicants because the population deviation

between districts was substantially less.

The DC denied a stay because there was ample time for the county to overcome any administrative problems (the plan tracked the district lines of an existing militia district) and because further denial of postponement of the rights of black citizens was not justified.

APPLICANTS CONTENTIONS: Applicants intend to raise on appeal at least the following issues: (1) whether the doctrine of dilution applies to districting plans of county and municipal bodies; (2) whether the requirement of discriminatory intent was satisfied; (3) whether the DC should have afforded local officials an opportunity to devise their own plan; whether the DC should have rejected the remedial plan submitted by applicants without having first found it to be invalid; and whether the plan adopted dilutes white voting strength.

As grounds for a stay, applicants assert the substantial likelihood of success on appeal (or on cert). Implementation of this plan pending appeal will cause the county and its citizens irreparable harm because the newly elected commissioners will answer to a small, single district constituency, and may even direct that the appeal be dismissed. Resps can show no irreparable injury, because at most the system in existence for 67 years will remain, with blacks free to vote without hindrance and with the ability to control the outcome (if the appeals last beyond 1980).

DISCUSSION: This case appears to present the issues presently before the Court in Williams v. Brown, No. 78-357, probable jurisdiction noted October 30, 1978, and City of Mobile v. Bolden, No. 77-1844, noted October 2, 1978, and the issue noted in Justice Rehnquist's

separate opinion in Wise v. Lipscomb, No. 77-529, decided June 22, 1978. These facts would seem to justify a stay. However, the Court probably should wait for the response, which was mailed from Georgia at 10 p.m. on November 1 (by express mail), possibly even if it means waiting until Monday, November 6.*/

A response is in the mail.

11/2/78 Richman DC order and Op and CA order in applic.

PJC

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*/It would lead to chaos if the Court granted a stay Friday, and then had to vacate it Monday, after consideration of the response; it would be better to delay the decision initially to avoid that risk.

November 3, 1978

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

A-417
No.

QUENTIN ROGERS

vs.

HERMAN LODGE

~~Application for stay presented to Justice Powell and by him referred to~~ the Court.

CA5 law is settled. We should take this to review it.

Granted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.										✓			
Brennan, J.							Pass						
Stewart, J.										✓			
White, J.											✓		
Marshall, J.										✓			
Blackmun, J.										✓			
Powell, J.										✓			
Rehnquist, J.										✓			
Stevens, J.											✓		
.....													

Supreme Court of the United States
Washington, D. C. 20543

November 6, 1978

MEMORANDUM FOR THE CONFERENCE

Subject: Rogers v. Lodge, A-417

On Friday, the Court stayed the election which the DC had ordered to be held tomorrow. November 3, 1978 Conference, p. 15a.

The response to the application has now been received. Respondents argue primarily that the evidence was sufficient to sustain the finding of dilution; that the remedy was not too drastic and was well within the DC's powers; and that there is accordingly little chance of reversal on appeal. Respondents also argue that the evidence showed statutory violations, but the DC did not address those claims in view of its constitutional holding. As mitigating against a stay, respondents point out that the election campaign has been completed and that the candidates have spent a considerable amount of time and money.

Nothing in the response changes the premises upon which the Court acted on Friday.

A copy of the response is attached.

MR

Marc Richman

Note: A reply to the response was just received. It responds to several fact statements in the response, but has little else to add.

MR

The Response does not contain any information not before the Court last Friday. Accordingly, no action is necessary.

Brennan

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

NO. A-417

QUENTIN ROGERS, RAY DELAIGLE, ROBERT L. WEBSTER, CHARLES H. KITCHENS, AND THOMAS M. LOVETT, AS MEMBERS OF THE BOARD OF COMMISSIONERS OF BURKE COUNTY, GEORGIA, AND A. HOLLAND GNANN, OTTO B. JOHNSON AND WALL T. THOMPSON, AS MEMBERS OF THE BOARD OF ELECTIONS OF BURKE COUNTY, GEORGIA

APPLICANTS

VS:

HERMAN LODGE, SHELLEY COLEMAN, LIZZIE M. SAMS, K. C. CHILDERS, REV. DAVID NELSON, TALMADGE D. LODGE, WOODROW HARVEY AND LEVI CRANFORD

RESPONDENTS

APPLICATION FOR STAY PENDING APPEAL OF AN ORDER OF THE UNITED STATED DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, ORDERING A SPECIAL ELECTION OF ALL FIVE MEMBERS OF THE BOARD OF COMMISSIONERS OF BURKE COUNTY, GEORGIA, ON NOVEMBER 7, 1978

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BEARD, LEVERETT & ADAMS

IN THE

SUPREME COURT OF THE UNITED STATES

QUENTIN ROGERS, et al	)	
	)	
Applicants	)	NO._____
	)	
VS:	)	
	)	
HERMAN LODGE, et al	)	OCTOBER TERM, 1978
	)	
Respondents	)	

APPLICATION FOR STAY PENDING APPEAL OF AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, ORDERING A SPECIAL ELECTION OF ALL FIVE MEMBERS OF THE BOARD OF COMMISSIONERS OF BURKE COUNTY, GEORGIA ON NOVEMBER 7, 1978

TO THE HONORABLE LEWIS F. POWELL, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES:

Come now Applicants, defendants in the District Court below, and pursuant to Rule 51 of the Rules of this Court, move for a stay pending appeal of the final judgment and injunction issued by the United States District Court for the Southern District of Georgia, Augusta Division, on September 29, 1978, declaring unconstitutional an Act of the General Assembly of Georgia (Ga. Laws 1911, p. 380) providing for the election at-large of the five (5) members of the Board of Commissioners of Burke County, Georgia, ordering the terms of the five incumbents elected for four (4) year terms in 1976 to be cut in half, and ordering that a special election be held on November 7, 1978, to elect successors for the incumbent commissioners, to take office on January 1, 1979, and by way of grounds therefor, show as follows:

1.

Unless stayed, the order as entered by the Court below will be effectuated at the November General Election to be held on November 7, 1978, within less than one week, and therefore time is of the essence. Consequently, the Court should act immediately to grant the stay.

2.

Application for stay was made to the district court and denied on October 10, 1978. Application to the Court of Appeals for the Fifth Circuit was denied on October 26, 1978, and received by applicants on October 29, 1978.

3.

The effect of the injunction entered below is to strike down an election system which has been in effect in Burke County, Georgia for 67 years, and which the district court below found was racially neutral when adopted (Findings, p. 7). The basis of the Court's decision was that the county-wide or at-large voting system in Burke County unconstitutionally diluted the strength of black votes, within the meaning of a number of decisions of the United States Court of Appeals for the Fifth Circuit, beginning with Zimmer v. McKeithen, 485 F2d 1297 (C.A. 5th 1973), aff'd sub nom East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976), "but without approval of the constitutional views expressed by the Court of Appeals" (424 U.S. at 638).

of equal population, but deliberately gerrymandered so as (1) Create two districts containing 74.9 and 77.6% black population, designed to insure election of 2 black candidates; (2) Place three (3)[1] of the present white incumbents in the largest black district (Dist. No. 1, 77.6% black - see Findings, p. 28), so as to dilute the white voting strength, while (3) Carefully placing two of the black plaintiffs in the two separate, overwhelmingly black districts to avoid their having to run against each other. The two plaintiffs, Messrs. Herman Lodge and Woodrow Harvey, have qualified to run from the two overwhelmingly black districts, Harvey in District 1, and Lodge in District 2. Consequently, rather than remedying racial voting dilution, the Court's order below has mandated it in an egregious form.

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1. The deliberate, intentional election rigging purpose of plaintiffs' plan, adopted by the district court below, is graphically demonstrated by events transpiring below in connection with submissions of the plaintiffs' plans. As originally filed, the Complaint erroneously named "Raymond DeLaigle" as one of the 5 Commissioners. Raymond DeLaigle was not a Commissioner, but was a retired clerk of the Superior Court who lives on the West side of Ga. Highway 56. The proper defendant should have been "Ray DeLaigle", who lives just across the road from Raymond DeLaigle on the East side of Ga. Highway 56. At an early stage in the proceedings, the district judge below directed the parties to submit proposed plans for use in the event the Court should rule for plaintiffs. The plan then submitted by plaintiffs, and finally adopted by the Court below, included three white incumbents in District 1 (77.6% black), and the same "Raymond DeLaigle", erroneously named as a defendant Commissioner, who lives on the west side of Georgia Highway 56. At the conclusion of the trial on September 12, 1978, the district court directed the parties to submit plans. This time, having discovered that the proper defendant was "Ray DeLaigle" and not "Raymond DeLaigle", plaintiffs submitted a modification of their plan which differed only slightly by shifting the line from Highway 56 to a point just east of State Highway 56, for the purpose of including Ray DeLaigle in District 1, thereby placing 4 of the 5 white incumbents in the same district. Shortly after announcing his order, the district judge left on vacation, and counsel for defendants were advised by the district judge's law clerk that the judge had made an error in ordering defendants to use the original plan, but really intended to order in effect the revised plan which placed 4 incumbents in the same district.

5.

This case was instituted on April 5, 1976, by Herman Lodge, and seven (7) other black citizens of Burke County, Georgia, against the five individuals constituting the Board of Commissioners of Burke County, as well as the probate judge of said County,[2] and was brought under 42 USCA 1983, attacking the county-wide method of electing the five members of the Board of Commissioners, the governing authority of Burke County, Georgia, as being an unconstitutional dilution of black voting power in said county.

6.

The trial commenced in Augusta, Georgia, on June 22, 1978, and after several recesses, was finally concluded in Brunswick, Georgia, on September 12, 1978.

7.

On September 29, 1978, the district court entered order holding that plaintiffs were entitled to recover, and ordering that a special election be held at the same time as the General Election for Governor and U. S. Congressmen on November 7, 1978, at which time successors to the five (5) incumbent members of the Board of Commissioners would be elected to take office in January, 1979, and serve for a two year term until their successors are elected at the general election to be held in November, 1980, when elections for Commissioners are regularly scheduled by law. As the incumbent commissioners were all elected in 1976 to serve four (4) year terms, the effect of

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2. By order entered July 28, 1976, the Court dropped Mrs. Mary Herrington, probate judge of Burke County as a party defendant, and substituted in her place the three (3) members of the recently created Board of Elections (Ga. Laws 1975, Vol. II, p. 4506), which assumed the duties of holding elections previously exercised by the probate judge.

the order was to cut these four (4) year terms in half, and order that a special election be held within the short period of approximately five (5) weeks. The order also recites that findings of fact and conclusions of law had not then been prepared, but would be filed later. A copy of said order is attached hereto, marked "Exhibit A" and by reference is made a part hereof. Findings of Fact and Conclusions of Law were later entered on October 26, 1978, and a copy is attached hereto as "Exhibit B".

8.

The order further provides that Burke County will be divided into five (5) districts, with one member to be elected from each district by the qualified voters thereof, according to a plan submitted by plaintiffs as Plaintiffs' Exhibit 300. In so doing, the district court adopted a plan submitted by plaintiffs in lieu of plans submitted by defendants without having first found and declared such latter plans to be invalid or insufficient in law, contrary to the ruling in Wise v. Lipscomb, ____U.S.____, 57 L.Ed.2d 411 (1978).

9.

Notice of appeal was filed below on October 2, 1978, and an amended notice was filed on or about October 11, 1978.

10.

The plan struck down by the district court was one which had been in effect in Burke County for 67 years, having been enacted in 1911 (Ga. Laws 1911, p. 380).[3]

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3. In 1929, the Act was amended to provide for appointment of the 5 commissioners by the grand jury in 1932 (Ga. Laws 1929, p. 548), but before the Act was ever put into effect, it was again amended in 1931 so as to revert back to election by the people (Ga. Laws 1931, p. 400).

11.

The evidence without dispute shows that the Act of 1911 (Ga. Laws 1911, p. 380) was enacted without any purpose to discriminate on the basis of race. The district court below held that the present scheme was racially neutral when adopted (Findings, p. 7).

12.

The decision of the district court in this case therefore strikes down a law and election plan in effect for 67 years without the showing of intentional discrimination held requisite in Washington v. Davis, 426 U.S. 229 (1976); Dayton Board of Education v. Brinkman, 53 L.Ed.2d 851, 859 (1977); Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977); Metropolitan School District v. Buckley, 429 U.S. 1068 (1977); Austin Indep. School District v. United States, 429 U.S. 990 (1976); and compare Keyes v. School District No. 1, 413 U.S. 189, 208 (1973); and is therefore error.

13.

In striking down the 67 year old Burke County election plan in this case which the district court admitted was not enacted for a discriminatory purpose, the Court below purported to follow a line of decisions of the United States Court of Appeals for the Fifth Circuit which began with Zimmer v. McKeithen, 485 F2d 1297 (C.A. 5th 1973), affirmed

"impact" or "effect" test, for in that case, the Court stated the test to be "that designedly or otherwise, an 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. . . " 485 F2d at 1304 (emphasis supplied). In order to apply this "effect" or "impact" standard the Court articulated a list of 4 considerations which have come to be known as the "Zimmer criteria", and four enhancing factors, viz.

> "* * * where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in White v. Regester, supra, demonstrates, however, that all these factors need not be proved in order to obtain relief."
> (485 F2d at 1305).

This same "discriminatory impact" approach has been applied unremittingly in a number of subsequent decisions. Paige v. Gray, 538 F2d 1108 (C.A. 5th 1976); Wallace v. House, 538 F2d 1138 (C.A. 5th 1976); Parnell v. Rapides Parish School Board, 563 F2d 180 (C.A. 5th 1977); Kirksey v. Board of Supervisors, 554 F2d 139 (C.A. 5th 1977), cert. den. 54 L.Ed.2d 454 (1977); David v. Garrison, 553 F2d 923 (C.A. 5th 1977); Nevett v. Sides, 533 F2d 1361 (C.A. 5th 1976); United States v. Supervisors of Forrest County, Mississippi, 571 F2d 951 (C.A. 5th 1978); Nevett v. Sides, 571 F2d 209 (C.A. 5th 1978); Bolden v. City of Mobile, 571 F2d 238 (C.A. 5th 1978); Blacks United v. Shreveport, 571 F2d 248 (C.A. 5th 1978); and Thomasville Branch, NAACP v. Thomas County, 571 F2d 257 (C.A. 5th 1978). In Kirksey v. Board of Supervisors, supra, the en banc Court held that racially gerrymandered districting was mandated in plans designed as a remedy for existing election schemes found to be unconstitutional under the dilution doctrine (554 F2d at 151).

In four decisions decided March 29, 1978, a panel of the Court of Appeals took note of this Court's holdings that under the Fourteenth Amendment, a case of intentional discrimination must be shown, and held that whether considered under the Fourteenth or Fifteenth Amendments, intentional dis-

on a showing that the at-large plan had been maintained for such a purpose, and that the Zimmer criteria had survived Washington v. Davis as being a means of determining whether the at-large plan was being maintained for a discriminatory purpose: "Whether the plan is recent or remote, the Zimmer criteria provide a factual basis from which the necessary intent may be inferred." Nevett v. Sides, 571 F2d at 223. The net effect of this exercise in semantics therefore was that despite the "discriminatory impact" basis of the Zimmer criteria, the Court of Appeals has held that they have survived the intentional discrimination rationale of Washington v. Davis, and that really Washington v. Davis has not changed anything. In this case, the district judge observed that "Functionally, this added requirement has not changed the district court's task since 'a finding of racially discriminatory dilution under the Zimmer criteria raises an inference of intent and, therefore. . . a finding under the criteria satisfies the intent requirement. . . '" (Findings, pp. 4-5).

15.

The decisions of the United States Court of Appeals in dilution cases, followed by the district court below, therefore arecontrary to Washington v. Davis, supra, and the other cases cited above in paragraph 12.

16.

Contrary to the conclusion reached by the district court below by applying the Zimmer criteria, the evidence below without dispute shows that the at-large system had not been maintained for a discriminatory purpose. What the evidence does show is that in fact the question of county-wide versus district voting has never been an issue or even discussed in Burke County prior to the filing of this case in 1976. Consequently, there is direct evidence that the county-wide system

was not maintained for a discriminatory purpose, and therefore, the so-called Zimmer criteria (485 F2d 1297), a species of circumstantial evidence giving rise to an inference that county-wide voting was being maintained for discriminatory purposes, could have no application whatever to this case.

17.

The recent action of this Court on October 2, 1978, in noting probable jurisdiction in City of Mobile, Alabama v. Bolden, No. 77-1844 (S.C., 571 F2d 238), 47 U. S. Law Week 3221, further indicates the unsettled and evolving nature of the law in this area, for some of the questions presented for decision in that case are whether the decisions of the Court of Appeals in this area are in conflict with principles established in Whitcomb v. Chavis, 403 U.S. 124 (1971), Washington v. Davis, 426 U.S. 229 (1976), and other cases, and whether the Constitution authorizes a federal court to legislate an entirely new form of government for a city "for no purpose except that of guaranteeing that black citizens. . . will be elected to city offices." 47 U.S. Law Week 3190-1.

18.

According to the Census of 1970, the population of Burke County is 18,255, of which 10,988, or 60.19% are black. Blacks constitute 53.56% of the voting age population, and 38% of the registered voters. Since the evidence shows without

that it has not been maintained for such a purpose, defendants show that the Zimmer criteria (485 F2d 1297, 1305) are not applicable here. However, even conceding the applicability of the Zimmer criteria to the facts of this case, the undisputed evidence is that two of the factors do not exist at all. To begin with, county-wide voting in Burke County is rooted in a strong state policy divorced from discrimination, having been in effect in Burke County for 67 years, and in effect in at least eleven elective bodies in adjoining or nearby counties.[5] The district court below recognized that this Zimmer issue was neutral (Findings, pp. 21-2).

The evidence also requires the finding that blacks have equal access to the slating of candidates. The evidence shows that there is no formal slating of candidates in Burke County, and no powerful organizations or individuals through whom candidacies are customarily cleared. In order to run, a person merely goes to party officials and pays the entrance fee. Black candidates have run, and have had no difficulty doing so. Also, the evidence showed that the blacks are better organized politically than the whites, in that there are two black organizations which conduct political meetings at which

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5. Jefferson County, Ga. Laws 1935, p. 713; Columbia County, Ga. Laws 1968, Vol. I, p. 2338 (county-wide voting for commissioners running from districts); Taliaferro County, Ga. Laws 1877, p. 269; Warren County, Ga. Laws 1877, p. 269; Lincoln

candidates are invited to attend and speak, and at least one of these organizations publishes a ticket of approved candidates which is circulated at the polls. The findings of the district court below, while conceding that blacks have not been discriminated against with respect to voting or running for office (Findings, p. 19), attempts to gloss over this fact, by embarking upon an inquiry which confuses this issue with the entirely separate Zimmer factor relating to whether "past discrimination in general precludes the effective participation in the election system. . . " (485 F2d at 1305). In other words, in order to support its finding, the Court below confuses analysis by holding that a finding on one Zimmer criteria also establishes another factor. See Findings, pp. 19-21.[6]

21.

Third, the overwhelming weight of the evidence shows that Burke County officials have been responsive to the particularized needs of blacks. Contrary to the finding below (p. 12), the evidence shows that blacks have been appointed to the Jury Commissioners, Board of Education, Voters Registration Board, Waynesboro-Burke County Recreation Commission, Department of Family and Children Services Board, Central Savannah River Area Board, and one black has been elected to the City Council in Waynesboro. With respect to road paving, the district court's findings disregard the undisputed evidence

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6. The emphasis placed by the Court below upon the role of the local Democratic Executive Committee is puzzling. The undisputed evidence below was to the effect that the Committee had little or nothing to do, most of the members had never attended a meeting, that anyone was free to run for the positions, widespread public announcement of which was made before each primary, and there was no evidence whatever that the Committee had ever made a substituted nomination. As one member of the Committee testified, it functioned mainly in the past to conduct the primary election, and after that function was taken over in Georgia by the probate court and in Burke County by the Election Board, the local committee now has little or nothing to do.

that there are 640 miles of unpaved roads in Burke County; defendants identified 14 unpaved roads on which the majority of citizens are white, and with respect to the 20 unpaved roads pointed out by plaintiffs as being inhabitated mainly by blacks, defendants showed that a number of them were not paved by the county commissioners at all, but by state authorities as part of a patronage system for local citizens who had supported successful state-wide candidates. The reference to the Commissioners donating public funds to buy band uniforms for the private, all-white school (Findings, p. 15) is incorrect. The Commissioners once contributed funds to purchase band uniforms for the public schools, but on a later occasion declined to do so again on advice of the county attorney. The Court's finding below that 3 additional registration sites provided by the commissioners were not added until after "friendly persuasion" by the Court at a pretrial conference (Findings, p. 14), is not correct. These sites were approved on February 10, 1976 (D.Exh. 4), and the present case was not even filed until April 5, 1976, and it was several months thereafter before any pretrial hearing was held before the Court, probably after the election had been held. The Court's reference to the fact that there are 2 schools in the county that are still segregated (Findings, p. 9), also neglects to explain that this is because of an order entered by this same federal court for the Southern District of Georgia, (D. Exh. 55), permitting students who are

to 22%, meaning that there has been less resistance to school desegregation in Burke County than in Washington, D. C., Newark, New Jersey, and any other Northern cities. Moreover, Applicants submit that there is no basis in the Constitution for a federal court to adjudicate constitutional issues on the basis of whether or not, in its opinion, the governing body of a political subdivision of a state has been responsive to the particularized interests of any segment of the population. In this case, there was launched an investigation into every resolution or other action taken by the governing body of Burke County during the last 25 years. Such an inquiry places the federal courts in the position of rewarding or punishing political subdivisions of a state depending upon whether or not the federal court approves or disapproves of the political philosophies of the governing bodies of those subdivisions as reflected by their legislative enactments. These are political questions, pure and simple, for which judicially-manageable standards simply do not exist.

The finding of the Court below that there is a history of past discrimination in Burke County (Findings, pp. 6-11) misses the point. Certainly, there has been discrimination in Burke County in the past with respect to school segregation, as well as segregation in other areas. However, this case deals with voting, and there is no evidence whatever that during

Election Board, 360 U.S. 45, 51-2 (1960), and the undisputed testimony in this case is that very few, if any, blacks were ever denied registration in Burke County because of their inability to successfully complete this test. To the contrary, the undisputed testimony was that blacks had been treated fairly in the registration process. The Court's finding that the sudden increase in registration following enactment of the Voting Rights Act is merely a conclusion without any facts to support it. To begin with, the 41.8% black registration is incorrect, and plaintiffs and defendants both agreed that this figure, although included in discovery documents but never admitted in evidence, was based upon errors in tabulation. The segregated laundromat referred to by the Court (Findings, p. 11), was an isolated instance which was not even known to any of the defendants until this trial. More to the point, however, there was no evidence whatever that the past segregation in education or in other facilities, operated in the least during the present to prevent blacks from voting or registering to vote, and that, and not segregated schools or other facilities, is the touchstone of this litigation.

23.

Defendants further show that the doctrine of dilution relied on in this case has no applicability to the districting plans of county and municipally elected bodies. Wise v. Lipscomb, 57 L.Ed.2d 411, 423 (1978) (concurring opinion of 4 justicies).

Court of Appeals. Nevett v. Sides, 533 F2d 1361 (C.A. 5th 1976); David v. Garrison, 553 F2d 923 (C.A. 5th 1977); Blacks United For Lasting Leadership v. Shreveport, 571 F2d 248 (C.A. 5th 1978).

25.

The Court's order below also is erroneous for the reason that a districting plan can no longer be held invalid simply because of a history of past discrimination. McGill v. Gadsden County Commission, 535 F2d 277 (C.A. 5th 1976), disapproving a contrary holding in Wallace v. House, 515 F2d 619 (C.A. 5th 1975), vacated and remanded 425 U.S. 947 (1976). Even so, in this case the evidence of past discrimination related to such things as segregated schools, and not discrimination in the denial of voting or registering.

26.

The Court's order below is erroneous for the reason that it violates the principle that the Court should not mandate a court-ordered plan without first affording local officials an opportunity to devise their own plan, Wise v. Lipscomb, supra, and submit it under Section 5. Berry v. Doles, _____U.S._____, 57 L.Ed.2d 693 (1978).

27.

Applicants show that because there is a delay of over a year in getting transcripts typed up in the Southern District of Georgia, and a delay of 1 to 2 years in deciding cases in the Fifth Circuit, it is impossible for the case to reach this Court until after the persons elected in November take office, and doubtful that the case can even reach this Court until after the regularly scheduled elections in 1980 take place. The end effect may therefore be that the case will

become moot before the decision below is ever reviewed on the merits, for regardless of whether black or white candidates are elected in November 1978 or November 1980, those candidates will have answered to a small, single district constituency, and cognizant thereof, may and likely will direct that the pending appeal be dismissed, notwithstanding the fact that heretofore there has been no agitation in Burke County for district voting. Consequently, the order of the Court below contains built-in means for insuring that its correctness will never be considered, with the end result being that a state law will have been struck down and the political structure of the county altered by the exercise of federal judicial power which was erroneous when made but practically immune to review.

A stay therefore should be granted because:

(1) The importance and novelty of the issue presented as to the effect of the requirement of a showing of intentional discrimination in Fourteenth and Fifteenth Amendment cases, and its effect upon the "discriminatory impact" rationale of the Zimmer criteria. See International Boxing Club v. United States, 2 L.Ed.2d 15 (1957).

(2) The importance and novelty of the issue as to whether the dilution doctrine of White v. Regester, 412 U.S. 755, 765 (1973), applies to county or municipal governments.

which the Court below found was not enacted for a discriminatory purpose, and in effect ordering a redistricting of county government under a plan deliberately gerrymandered to insure election of two black commissioners by creation of two districts over 70% black. International Boxing Club v. United States, supra.

(4) The ordering in effect of a plan proposed by plaintiffs which on its face is calculated to dilute white voting strength by placing 3 of the incumbent commissioners in one district, while being careful to place two of the plaintiff-candidates in the separate, predominantly black districts.

(5) The pendency of somewhat similar questions in the Mobile case (No. 77-1844, 47 Law Week 3221) now before this Court. See Yasa v. Esperdy, 4 L.Ed.2d 1717 (1960).

(6) The existence of substantial reasons to believe that the findings made below will be held to be clearly erroneous so that applicants might then prevail. Board of Education v. Taylor, 82 S.Ct. 10 (Opinion of Mr. Justice Brennan).

(7) The likelihood that four members of this Court will vote to grant review. Appalachian Power Co. v. American Institute of C.P.A., 4 L.Ed.2d 30, 32 (1959) (Opinion of Mr. Justice Brennan); City of Boston v. Anderson, 47 L.W. 3277 (October 24, 1978 - Opinion of Mr. Justice Brennan). See Wise v. Lipscomb, supra, where 4 Justices of this Court recently posed the question as to whether the dilution doctrine even

case. (See Par. No. 27, supra). On the other hand, there is no such prospect of irreparable injury being inflicted on plaintiffs even assuming the judgment below is held to be correct on appeal. At most, an election would be held in the same manner that they have been held for 67 years, in which the undisputed evidence shows that blacks are free to vote, without hindrance, and with the present capability to control the outcome. The balance of equities clearly preponderates in favor of applicants. City of Boston v. Anderson, 47 L.W. 3277 (Oct. 24, 1978, Opinion of Mr. Justice Brennan).

WHEREFORE, Applicants pray that a stay be granted of the district court's order and judgment, pending appeal.

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ATTORNEYS FOR APPLICANTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3241

HERMAN LODGE, ET AL.,

Plaintiffs-Appellees,

versus

J. F. BUXTON, ET AL.,

Defendants,

RAY DeLAIGLE, ET AL.,

Defendants-Appellants.

- - - - -

Appeal from the United States District Court for the
Southern District of Georgia

- - - - -

Before THORNBERRY, GODBOLD and RUBIN, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' motion for stay pending appeal is DENIED.

jgr 1ff

dbr

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

HERMAN LODGE, SHELLY COLEMAN, LIZZIE M. SAMS, K. C. CHILDERS, REV. DAVID NELSON, TALMADGE D. LODGE, WOODROW HARVEY, and LEVI CRAWFORD, individually and on behalf of all those similarly situated,	*	CIVIL ACTION
Plaintiffs	*	NO. 176-55
VS.	*	
J. F. BUXTON, QUINTON ROGERS, ROY MARCHMAN and RAY HARPER, individually and as members of the Board of Commissioners of Roads and Revenues for Burke County, and their successors in office; A. HOLLAND GNANN, OTTO B. JOHNSON, and WALL T. THOMPSON, Individually and in their official capacities as members of the Board of Elections for Burke County, Georgia, and RAY DeLAIGLE, Individually and in his official capacity as a member of the Board of Commissioners of Burke County,	*	
Defendants	*	

U. S. DISTRICT COURT
Southern District of Ga.
Filed in office
5:00 P.M.
SEP 29 1978 19
Deputy Clerk

ATTEST: A TRUE COPY
OCT 11 1978 19
Certified to
Deputy Clerk

O R D E R

Following a bench trial lasting several days in this voting dilution case, the Court has come to the conclusion:

1. that the plaintiffs are entitled to prevail,

2. that the present members of the Board of Commissioners

4. that the duly qualified voters of each such district shall elect one of its residents otherwise qualified by Georgia law who may or may not be freeholders of such district as one of the County Commissioners of Burke County for the five-member commission,

5. that defendants shall open and accept qualifications for candidates for said positions commencing immediately and until 12:00 o'clock noon, October 16, 1978, (the qualifying fee shall be the same as otherwise provided by Georgia law in special elections for such positions), and

6. that the election for said new commissioners shall be held at the same time as the General Election to be held in 1978 for the election of the Governor of the State and the members of the United States Congress from Georgia.

The individuals elected as Commissioners of Burke County pursuant to this Order shall serve for a period of two years, after which their successors shall be elected in 1980 for four-year terms, as otherwise provided by law.

This Order will presently be supplemented and supported by the entry of appropriate findings of fact and conclusions of law. The Court, because of other pressing business, has been unable to place its findings and conclusions in proper final form. Accordingly, the Court deemed it imperative to enter the instant Order so that the maximum amount of time could be accorded the candidates to prepare for the election ordered herein.

The parties are directed to cooperate in technical aspects of holding said election so as to eliminate any unnecessary problems therein.

So Ordered, this 29th day of September, 1978.

Chief Judge, United States District Court, Southern District of Georgia

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

HERMAN LODGE, SHELLY COLEMAN, LIZZIE M. SAMS, K. C. CHILDERS, REV. DAVID NELSON, TALMADGE D. LODGE, WOODROW HARVEY, and LEVI CRAWFORD, individually and on behalf of all those similarly situated,	*	CIVIL ACTION NO. 176-55
Plaintiffs	*	
VS.	*	
J. F. BUXTON, QUINTON ROGERS, ROY MARCHMAN and RAY HARPER, individually and as members of the Board of Commissioners of Roads and Revenues for Burke County, and their successors in office; A. HOLLAND GNANN, OTTO B. JOHNSON, and WALL T. THOMPSON, Individually and in their official Capacities as members of the Board of Elections For Burke County, Georgia, and RAY DeLAIGLE, Individually and in his official capacity as a member of the Board of Commissioners of Burke County,	*	
Defendants	*	

U. S. DISTRICT COURT
Southern District of Ga.
Filed in office
4:50 P.M.
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Deputy Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action for declaratory judgment was tried by the Court without a jury. The named plaintiffs and other black residents[1] of Burke County, Georgia, brought this action to challenge the existing method of selecting their five county

commissioners,[2] charging the method unlawfully diluted the strength of their votes. Plaintiffs pray that the County be divided into single-member districts in order to eliminate the conditions producing the unlawful dilution. For the reasons that are set out below, the Court finds for the plaintiffs.

According to plaintiffs, Blacks are not and cannot be elected to the County Commission, or generally to other elected positions, because the "at-large" system in use minimizes and dilutes black voting strength. No Black has ever been elected to the County Commission, in spite of the fact that historically

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[2] The Board of Commissioners of Burke County, as presently constituted, derives from Georgia Laws of 1911, p. 390. According to Section 1 of that Act, the Board of Commissioners of Roads and Revenues for Burke County consisted of five persons elected by the qualified voters of the county, all to be elected at the same time. Candidates were required to be resident freeholders of the county for at least three years prior to the election and, in addition, had to attain at least 28 years of age and be eligible to election as a member of the General Assembly of the State.

The 1911 law was amended in 1929 by Georgia Laws of 1929, p. 548, to provide that the members of the County Commission be appointed by the Grand Jury of Burke County.

This law was in turn amended by Georgia Laws of 1931, p. 400, providing again that the county commissioners be elected by the qualified voters of the County. That Act requires that any candidate be a resident freeholder of the county for at least three years prior to election, and that property ownership requirement has been continued in the law to this date.

All five county commissioners in Burke County are elected at the same time and for terms of four years, so that there are County Commission elections only once every four years.

A majority vote is required for the nomination and election of any county commissioner, and county commissioners must run, both in primary and general elections for specific numbered posts. Neither of these practices was implemented in Burke County until they were imposed by general state law in 1964. Ga. Code Ann. §§ 34-1015 and 1513. (Defendants' Answer, ¶ 9).

The next regularly scheduled election for county commissioners in Burke County is November, 1980, with primaries to be held several months prior thereto.

No residency requirements, or subdistrict requirement exists for the election of individuals to the Burke County Commission.

Burke County has more Blacks than Whites.[3] However, as defendants are quick to point out,

> "[t]he Constitution does not demand that each cognizeable element of a constituency elect representatives in proportion to its voting strength. Even consistent defeat of a group's candidates, standing alone, does not cross constitutional bounds." (Citations omitted).

Nevett v. Sides, 571 F.2d 209, 216 (5th Cir. 1978) (hereinafter Nevett II). It is the plaintiffs' burden to go beneath the surface and show the Court, regardless of form, an unlawful voting dilution of constitutional dimensions "[b]y producing evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question . . . ." Id.

Plaintiffs' complaint alleges that the present method of nominating and electing the Board of Commissioners of Roads and Revenues for Burke County, including the use of numbered

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[3] The following is the population and percentage of population by race in Burke County between 1930 and 1970 according to plaintiffs' exhibits 59, 108, 109, 110, and 191, of which the Court takes judicial notice:

YEAR *c	TOTAL POPULATION	PERCENTAGE *a *b WHITE	BLACK
1975	10,700	42%	58%
1970	10,988	40%	60%
1960	20,596	34%	66%
1950	23,458	29%	78%
1940	26,520	25%	75%
1930	29,224	22%	78%

*a Percentage is to the nearest whole percent.

posts, majority vote, run-offs and elections at-large,[4] dilutes the relative strength of their vote in violation of the rights guaranteed them by the first, thirteenth, fourteenth, and fifteenth amendments of the Constitution. Plaintiffs also claim that Burke County's election system violated 42 U.S.C. §§ 1971, 1973, and 1983.

Although plaintiffs assert a statutory theory of relief, the Court does not reach the issues raised by this theory, only recently discussed in special concurrence by Judge Wisdom, in Nevett II, 571 F.2d at 231. Since the Fifth Circuit has not addressed this theory in an operative context, and since plaintiffs have presented a strong case with respect to the fourteenth and fifteenth amendments, the Court follows the test enunciated in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), en banc, aff'd sub nom.; East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976) and Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir.) (en banc), cert. denied, 46 U.S.L.W. 3354 (1977); recently described in United States v. Board of Supervisors of Forrest County, 571 F.2d 951, 953-54 (5th Cir. 1978), as a "multi-step inquiry."

Before describing and undertaking the "multi-step inquiry," the Court notes that the Fifth Circuit Court of Appeals recently decided in Nevett II that ". . . [a demonstration of intention] . . . is necessary under both fourteenth and fifteenth amendments," as a requisite to a finding of unconstitutional vote dilution. Nevett II, 571 F.2d at 221. Functionally, this added requirement has not changed the district court's task

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[4] Of course, multi-member districts, or county-wide elections systems are not per se unconstitutional. Fortson v. Dorsey, 379 U.S. 433 (1965).

since "a finding of racially discriminatory dilution under the Zimmer criteria raises an inference of intent and, therefore, . . . a finding under the criteria satisfies the intent requirement. . . ." Nevett II, 571 F.2d at 217.

As stated above, "Zimmer and Kirksey have established a multi-step inquiry for determining whether a districting plan [or election system] unlawfully dilutes a minority's participation in the political process. The testing seeks to determine whether the plan either is a racially motivated gerrymander or perpetuates an existent denial of access to the political process." United States v. Board of Supervisors of Forrest County, 571 F.2d 951, 953 (S.D. Miss. 1978). There is no question of a racial gerrymander involved here; rather, the question is whether the system perpetuates an existent denial of access to the political process. This question requires "that the court first investigate whether the minority community is presently denied access to the political process. Zimmer enumerates several tests to guide this investigation." United States v. Board of Supervisors of Forrest County, 571 F.2d at 953.

> "The court in Zimmer established two categories [of factors], one containing criteria going primarily to the issue of denial of access or dilution, the other containing inquiries as to the existence of certain structural voting devices that may enhance the underlying dilution. The 'primary' factors include: the group's accessibility to political processes (such as the slating of candidates), the responsiveness of representatives to the 'particularized interests' of the group, the weight of the state policy behind at-large districting, and the effect of past discrimination upon the group's participation in the

It must be remembered that the Court is not limited in its determination only to the Zimmer factors, rather the Court may consider the Zimmer factors, "or similar ones." Kirksey v. Board of Supervisors of Hinds County, 554 F.2d at 143. One "similar factor" considered in Kirksey which did not seem to be an explicit primary factor in the Zimmer formula, is a depressed socio-economic status, "which makes participation in community processes difficult." Id. This is an important factor and it must be considered here.

Finally, in order to succeed, plaintiffs need not demonstrate the existence of each of the primary factors, rather

> "[b]y proof of an aggregation of at least some of these factors, or similar ones, a plaintiff can demonstrate that the members of the particular group in question are being denied access."

Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139, 143 (S.D. Miss, 1977).

The Court will discuss the primary factors in Part I, enhancing factors in Part II, conclusion in Part III, and relief in Part IV.

I.

A.

HISTORY OF PAST DISCRIMINATION

The history of past discrimination is included as a factor in the dilution equation because the legacy of past discrimination may preclude a minority group's effective participation in the political process. The Court finds plaintiffs have produced sufficient evidence of past discrimination to demonstrate that they have been unfairly denied

such effective participation. Moreover, it is evident that the present scheme of electing county commissioners, although racially neutral when adopted, is being maintained for invidious purposes. Compare Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978).

The first fact which plaintiffs have established demonstrating this element of the Zimmer-Kirksey recipe is a link between past discrimination and low black voter registration. Before enactment of the 1965 Voting Rights Act, Black suffrage in Burke County was virtually non-existent. As of December 19, 1962 only 427, or 6.5% of the eligible Blacks were even registered.[5] Following the Act's passage and by August 31, 1967, Black voter registration increased to 2,760 or 41.8% of the eligible Blacks. Today, approximately 38% of the eligible Blacks are registered to vote in Burke County.[6] The marked increase in the registration of Blacks following the enactment of the 1965 Voting Rights Act clearly indicates that past discrimination has had an adverse effect on Black voter registration which lingers to this date.

There was a clear evidence of bloc voting the only time Blacks ran for County Commissioner. Obviously, this must be ascribed in part to past discrimination. There are three

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[5] Plaintiffs' Request of Judicial Notice filed February 16, 1977, Exhibit "E".

Militia Districts in which Blacks are in a clear majority, the 66th, 72d and 74th.[7] In a fourth district, the 69th, as of 1978, there were only a few more Blacks than Whites. One black candidate, Mr. Childers, won in the four black districts, losing in all of the others. The other black candidate, Mr. Reynolds, won in three of the black districts losing in all of the others.[8]

Similarly, in 1970 Dr. John Palmer, a white physician from Waynewboro, who opened the first integrated waiting room in Burke County, ran for County Commissioner. Generally, he was thought of as being sympathetic to black political interests. He was soundly defeated.

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[7] The Court finds the following to be a reasonably accurate estimate of the registered voters by race in each district, as of 1978.

Precinct		Black	White	Total
Waynesboro	60-62 District	1,050	2,149	3,199
Munnerlyn	61st District	44	50	94
Alexander	63rd District	75	104	179
Sardis	64th District	211	478	689
Keysville	65th District	163	214	377
Shell Bluff	66th District	167	82	249
Greenscutt	67th District	49	215	264
Girard	68th District	110	195	305
St. Clair	69th District	29	26	55
Vidette	71st District	52	112	164
Gough	72d District	201	68	269
Midville	73rd District	184	195	379
Scotts Store	74th District	98	52	150
	Total	2,433	3,940	6,373

[8] Plaintiffs' Request for Admissions, filed June 5, 1978, Exhibits I-3 and I-4.

In the recent city council election in Waynesboro, the county seat, a Black was elected to the council for the first time in history. This event can be attributed to the high degree of bloc voting, and to the fact that the elected Black ran in a district with a high percentage of black residents.[9]

Past discrimination in education has also precluded effective black political participation. Burke County schools discriminated against Blacks as recently as 1968. Bennet v. Evans, Civil No. 1369 (S.D. Ga), Order entered June 20, 1969. Plaintiffs' Exhibit 59. And there are still schools like Gough Elementary and Girard Elementary that remain essentially segregated. Plaintiffs' Exhibit 233. Moreover, the Court finds that, as a group, Burke County Blacks have completed less formal education than Whites. Of the 4,476 black inhabitants of the County over 25 years of age, 346 (7.7%) never attended high school, 247 (5.5%) finished high school, and 123 (2.7%) finished college; while of the 4,281 white residents of the same age, 83 (1.9%) never attended school, 661 (15.2%) finished high school, and 308 (7.1%) finished college.[10] Based on the testimony of the experts, one reason Blacks, as a group, have been ineffective in the political process, is the fact that they have completed less formal education. The Court concludes that this condition is a direct result of the history of invidious discrimination in Burke County.

Past discrmination has also directly chilled the opportunity for Blacks' becoming involved in the Democratic Party Primary. The Court notes it was not until 1946 that the "white primary" was struck down in Chapman v. King, 154 F.2d 460 (5th Cir.), cert. denied, 327 U.S. 800 (1946). The Court also finds past

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[9] This was possible because this Court created single-member districts. See Sullivan v. DeLoach, Civil No. 176-238 (S.D. Ga.) Order entered September 11, 1977.

[10] Plaintiffs' Supplementary Answer to Defendants' First Interrogatories, filed March 2, 1977, Exhibit "A".

discrimination has kept Blacks from becoming members of the Burke County Democratic Executive Committee. It was not until after this lawsuit was filed that the Executive Committee, which conducts the only party primary in the county, gained a Black as one of its twenty-four members.

The Court finds evidence of present discrimination unfairly precluding Blacks from effective political participation in the requirements established by Ga. Code Ann. § 34-605, which states in pertinent part that "[n]o person shall be eligible to serve as chief registrar unless such person owns interest in real property . . . ." A reference to Plaintiffs' Exhibits 66-69 makes it readily apparent that significantly fewer Blacks than Whites are freeholders. The Court finds this is in part due to past discrimination, thus buttressing the Court's conclusion that Blacks are being unfairly precluded from participating in the political process.

Moreover, Burke County Blacks were compelled to turn to this Court to eliminate the existing racially discriminatory system of selecting Grand Jurors. See Sapp v. Rowland, Civil No. 176-94 (S.D. Ga.) Order entered May 20, 1977.

Without specifically reiterating the statistics on hiring, the Court finds that as a result of the lingering effects of past discrimination, the County's hiring pattern has been carried out in a manner detrimental to the black community, particularly when one compares the number of Blacks hired to the number of Whites, or the salaries and positions they respectively hold.[11] The Court also notes that many of the Blacks employed by the county are not in fact paid by the county, but from federal fundings.

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[11] Plaintiffs' Request for Admissions, filed June 5, 1978, Exhibit I-1. Defendants' Answers to Plaintiffs' First Interrogatories filed June 14, 1976, Exhibit "C".

The Court finds that the effects of past discrimination has been a direct influence on the County Commissioners' failure to appoint more Blacks to the various committees and boards which oversee, or direct the execution of the county government. Without enumerating such committees and boards and the related statistics, the Court points to one symbolic example of the Commissioners' attitude in this respect. In appointing persons to serve on the Bi-Centennial Committee, the Commissioners appointed fourteen Whites and one Black.[12]

The Court also takes notice of Georgia laws demonstrating a discriminatory intent.[13] See generally Plaintiffs' Supplementary Answers to Defendants' First Interrogatories, filed June 25, 1976, Answer 1, for a history of racial discrimination in Georgia.

The Court also finds discrimination present in the form of a segregated laundromat's being operated within a few blocks of the county courthouse.[14]

The Court concludes, based on the evidence discussed above, plaintiffs have demonstrated ample evidence of present effects of past discrimination for the purpose of establishing this element of the Zimmer-Kirksey test.

B.

UNRESPONSIVENESS OF ELECTED OFFICIALS

Unresponsiveness to the needs of Burke County Blacks "may be proved by present evidence and by lingering effects of past

discrimination." United States v. Board of Supervisors of Forrest County, 571 F.2d 951, 954-55 n. 6 (5th Cir. 1978) (quoting from Kirksey, 554 F.2d at 144-45).

While the County Commissioners have taken advantage of most federally funded programs which were designed to meet the needs of the disenfranchised, the Court finds the County Commissioners, as an elected body, have acted with an insensitivity to the particularized needs of the black community amounting to unresponsiveness. For instance, "lingering effects of past discrimination" still haunt the county courthouse; there is a "Nigger-hook" at the water fountain, and the toilet signs for "Coloreds" and "Whites" still appear through faded paint.

One of the important functions of the County Commissioners is to appoint people to the various boards and committees which oversee execution of the county government. See Section A above. Although Blacks may not be entitled to be represented on the boards or committees in proportion to their frequency in the general population, the rare appointment of Blacks amounts to nothing more than a token afterthought, or simply to meet federal guidelines. It is the Court's impression that Blacks of Burke County desire, and desperately need, to play a meaningful role in their local government; to be able to work within the system, rather than to be forced to attack it from without. The Commissioners have been singularly unresponsive to this need. This is particularly evident when one considers the racially unbalanced committee appointments. It is highlighted by the fact that Blacks are just beginning to break into the

with racial impartiality as well as their unresponsiveness is shown by the procedures used to select the Judge for the Burke County Small Claims Court. That court was created at the request of the small, local merchants, the majority of whom are White, to collect unpaid consumer debts. The judge selection process is of note here in that the Commissioners selected a committee to pick the Judge. However, they failed to appoint anyone to the committee who could fairly consider potential interests of defendants, most of whom are Black. The Court finds that much in the same manner that the Commissioners have been unresponsive in committee appointments, they have also been unresponsive in their hiring policies. Although the Commissioners do not hire everyone who works for the county, their policy sets the tenor for the county's hiring. As noted above in Section A, most Blacks hold lower paying jobs, and from the testimony, it appeared that the majority of Blacks employed by the county were paid with federal money, whereas white employees were usually paid from county funds.

The Commissioners have also shown unresponsiveness in the paving of county roads. Although the evidence in this regard was not presented with precision or complete clarity, the Court finds that the Commissioners' paving decisions have exhibited a racially discriminatory pattern, thus demonstrating unresponsiveness.[15] In particular, the Court notes the following: (1) The Mamie Jo Rhodes Subdivision, inhabited by Blacks, is unpaved. It is directly across from a subdivision inhabited by Whites. The latter has paved roads. (2) Millers Pond Road

a White; yet Blacks live on the remainder of the unpaved road. (4) The streets of Alexander are paved in the section of town inhabited by Whites; but the roads in the black section are not paved. And (5) county road 284 is paved to the point where the last white lives, but beyond, where the road is inhabited by Blacks, the road is unpaved. It is of interest to note that the road to the dog trial field[16] is paved even though trials are held but once a year. By contrast, there is still an unpaved road to a school. Although the last unpaved road to a white school was paved in 1930, it seems as if the road to the Palmer Elementary School, formerly an all-black school, and still predominatly black, remains unpaved. While the defendants point out instances where Whites were living on unpaved roads, and that they had recently paved "Lodge Circle" of primary benefit to one of the named plaintiffs, the Court finds plaintiffs have adequately demonstrated defendants' unresponsiveness in the form of their paving decisions.[17]

The Court finds that once Blacks have made their needs known, the sluggishness, or bureaucratic "run-a-round" to which they repeatedly have been subjected amounts to unresponsiveness. As a result, Blacks have been forced outside the local government for relief. They went to the courts to seek school and Grand Jury integration (see Section A above), and to the streets to "agitate," as defendants have said, to get lighting at the Davis Park ball field. Outside pressure had to come to bear before the county budged.

The county did, indeed, establish additional registration sites. But only after a pre-trial conference before and "friendly persuasion" by this Court. The defendants' tepidity

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[16] Burke County is famous as a center for bird dog field trials.

[17] There was also testimony about "political roads," i.e., pork-barrel projects whereby the local state representative could bequeath a road to a political friend. According to defendants' testimony, the County Commissioners had little control over these roads. However, the Court still finds such "political roads" indicative of Blacks' lack of access to the system, since no witness could remember a Black who had been blessed with such a road.

was further demonstrated by the fact that a period of four months was required to get the registration cards to the new sites; and that the new sites were operative only a short while before the registration period ended. Admittedly, the County Commissioners recently approved a transportation system that should help solve access problems for some; but only after being prodded by the prosecution of this lawsuit. The Commissioners' sluggishness in this respect is another example of their unresponsiveness to the black members of the community.

Another area in which the defendants have exhibited unresponsiveness has been in public education. This manifested itself in the form of conflicts of interest, if not outright breaches of the public trust. There was evidence that in the early sixties, when desegregation of public schools was beginning to become an inevitable reality, the County Commissioners showed their colors by being among the incorporators of the all-white Edmund Burke Academy. There is more. The Commissioners then donated public funds to buy band uniforms for the private school's band, despite advice to the contrary by the county attorney.

The Court finds, based primarily on the defendants' continued failure to make Blacks a viable part of the county government, that the Commissioneers, as a result of the lingering effects of past discrimination, have been unresponsive to plaintiffs' needs. The Court finds this factor must be included as part of the aggregate of factors to be considered in determining

C.

DEPRESSED SOCIO-ECONOMIC STATUS

One of the factors the Kirksey court identified as being indicative of denial of access to political process is "a depressed socioeconomic status." Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139, 143 (5th Cir. 1977).

The socio-economic status of Blacks in Burke County is clearly depressed.[18] According to Plaintiffs' Exhibits 66 and 67, of the 1,731 families in Burke County with incomes below the poverty level, 1,467 were Black and 274 were White. Given that Blacks are 60% of the population, there are approximately 25% more Blacks whose income is at a poverty level than should be expected. The picture looks even worse when one notices that nearly 53% of black families had incomes three-fourths, or less, of a poverty level income. The Court finds this is in part caused by past discrimination.

In Goldberg v. Kelly, 397 U.S. 254 (1970), the Supreme Court stressed that the plaintiffs' lack of resources was one of the primary reasons for its holding. Admittedly, Goldberg was not a voting rights case, but the same careful consideration must be given by this Court to the factor of income because to more than half of the plaintiffs, the "need to concentrate upon finding the means for daily sustenance, in turn, adversely affects [their] ability to seek redress from . . . [the local] bureaucracy." Goldberg, supra at 264.[19] To this end, the opportunity to cast an undiluted vote becomes indispensable. Accordingly, the Court is constrained to find, within the context

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[18] It appears that Burke County must be an undesirable place for Blacks considering the steady decrease in the county's black population. Between 1930 and 1970, Burke County's black population has decreased from 78% to 58% of the total population. Moreover, 99% of Burke County's Blacks were born in Georgia, while 24% of Burke County's Whites were born out of state. This exodus is probably tied, in part, to past discrimination, and present economic inequality between the races. Plaintiffs' Exhibits 59, 108, 109, 110, and 191.

[19] The verity of this statement was supported by the testimony of both experts.

of the Zimmer-Kirksey aggregate test, that the economic plight of a substantial majority of plaintiffs is tied to past discrimination, and is indicative of their lack of access to the political process. See also Lubin v. Panish, 415 U.S. 709 (1974).

In addition to a depressed economic status, Blacks in Burke County are subject to a depressed social status. Although there is no single indicia which the social scientists have identified as determinative of social status, some of the factors identified are present here. The first index to which the Court turns is education. Education, or the lack thereof, is an indicator of social status, and according to the experts, would influence the likelihood of a minority group's effective participation in the political process. Objective statistics show that Blacks have completed less formal education than Whites.[20] It appears without serious dispute that what education Blacks did receive was qualitatively inferior to a marked degree. Per capita spending for the education of black students was much less than for their white counterpart.[21] The Court finds that the unbroken history of an inferior formal education has had an does now have a strong tendency to preclude Blacks' effective participation in the political process.

There is additional evidence which illustrates the fact that Blacks in Burke County have a depressed socio-economic status. When one examines Plaintiffs' Exhibits 64 and 65, he learns that Blacks tend to receive less pay for similar work, and that Blacks tend to have the more menial jobs. Housing for

Supplementary Answers to Defendants' First Interrogatories, filed June 25, 1976, Exhibit A. This exhibit depicts that 73% of the houses occupied by Blacks lacked some, or all, plumbing facilities, while only 16% of the houses occupied by Whites suffered the same shortcomings.

The Court must conclude that, unfortunately, Blacks in Burke County suffer a depressed socio-economic status due in part to the lingering effects of past discrimination.

D.

LACK OF ACCESS TO THE POLITICAL PROCESS

The political process, in a voting dilution context, has received both a literal and a broad interpretation. It not only has been interpreted to mean physical access to the voting and election processes, i.e., "access of the individual to the ballot box or voting booth. . ." but also to include ". . . whether a group has input into the political decision-making process . . . ." Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139, 143 n. 10. The Court finds that in the past, as well as in the present, plaintiffs have been denied equal access to the political process.

Prior to the passage of the Voting Rights Acts of 1965, Blacks in Georgia were unfairly denied access to the election processes by such devices as literacy tests, poll taxes, and white primaries.[22] Plaintiffs tried to demonstrate that the Georgia "purge law" (Ga. Code Ann. § 34-624), was such a device,[23] and presently works an unfair denial of access on plaintiffs. The Court finds plaintiffs have failed to prove

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22 Plaintiffs' Supplementary Answers to Defendants' First Interrogatories, filed June 25, 1976, Answer 1.

23 The 1976 Georgia Constitution still demands a literacy and "good character and understanding" test as a requisite for voting, although this provision is suspended by the 1965 Voting Rights Act.

this theory for their failure to demonstrate adequately that more Blacks than Whites are purged; or that a two-year period is unduly restrictive towards Blacks. The Court makes this finding even though plaintiffs have successfully shown that Blacks, by virtue of their relatively severe degree of poverty, the size of the county (Part II, Section A below), and the absence of a public transportation system, are more likely than Whites to have a problem physically getting to the polling places where they may exercise their most fundamental of rights.

Although plaintiffs here were unable to show a denial of access to specific voting processes, similar to the obviously eggregious denials in Kirksey, i.e., disqualification of certain black candidates by the county election commission, or a conditioning of primary participation upon a pledge of party loyalty, the Court finds a denial of access, in part, caused by the lingering effects of past discrimination, in the virtual absence of Blacks on the Democratic Executive Committee. Defendants attempted to refute a potential finding of this nature by minimizing the role played by the Democratic Executive Committee in Burke County politics. Defendants pointed out that primary slating is open, and that the Executive Committee has never actively supported a candidate. These facts, however, must be viewed in a proper context rather than in a vacuum. The context demonstrates that by state law, the committee may provide poll officers, Ga. Code Ann. § 34-501; poll watchers, Ga. Code Ann. § 34-1310(b); and, substituted nominations, Ga Code Ann. § 34A-903. Election in

In addition to the tasks listed above, the Executive Committee is required by its national and state charters to "insure full participation by all segments of society."[24] The lingering effects of past discrimination are highlighted by the fact that in spite of these affirmative action requirements, when the Committee recently designed a sub-district election scheme for the election of its twenty-four members, no Blacks were asked for their input to the plan.[25] The Court finds the lingering effects of past discrimination to be an important cause of a virtual "lilly-white" Democratic Executive Committee. This fact must be added into the sum producing the unfair exclusion of Blacks from the political process.

The Court also finds that the effects of past discrimination exclude Blacks from the personal contact politics of Burke County. Many of defendants' witnesses testified that success in Burke County politics is based on the number of friends one has. Defendants' witnesses stated this was the case because Burke County has a small population, so that most of its inhabitants know each other on a personal level. As a result there is little need for debate at election time for the Whites who have for centuries dominated the public scene. As is further evidenced by testimony of these witnesses, if the voter personally knows the candidate, he or she knows the candidate's political stance. When this factor is combined with the virtual segregation of all social, religious, and business organizations excepting that the only significant

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[24] Article 9, Section 3, of Georgia Democratic Party State Charter. Plaintiffs' Exhibit 225.

[25] It is more than interesting to note that the former and present commission members testified that the political division caused by a single-member district plan would create an unworkable County Commission. Yet, Mr. Thompson, himself, a former Commissioner and Chairman of the Democratic Executive Committee, admitted that even though the Executive Committee members were now elected by districts, this new system had not impaired the functioning of the Committee.

black-white relationships are on an employee-employer basis, the result obtains that Blacks are shut out of the normal course of politics in this tightly-knit rural county.[27] This is not to say, however, that it is the Court's opinion that meaningful political dialogue, which fosters responsive action, cannot develop between an employee and employer. Rather, the Court notes and finds that the combination of factors discussed above, all of which seem to be related to past discrimination, operate unfairly to exclude Blacks from the normal course of personal contact politics in Burke County.

As a final factor to be considered in the Blacks' lack of meaningful input into the political process, the Court finds, as discussed above in Section B, that the Commissioners' failure to appoint Blacks to the committees and boards in sufficient numbers, or a meaningful fashion, is without doubt an unfair denial of access of input into the political process.

While the denials of access in this case have not been especially blatant, the Court finds in the circumstances of this rural, tightly-knit, racially-separate society, that such denials, subtle though they may be, have operated unfairly to keep Blacks from meaningful political input.

E.

STATE POLICY BEHIND THE AT-LARGE ELECTION SYSTEM

The Court adopts the reasoning of Chief Judge Edenfield in Pitts v. Busbee, Governor, 395 F. Supp. 35, 39 (N.D. Ga. 1975),

remanded on other grounds, 536 F.2d 56 (5th Cir. 1976), with respect to the finding that this factor is neutral.

But while neutral in origin, it has been subverted to invidious purposes. Since it is a statute of local application, its enactment, maintenance or alteration is determined by the desires of representatives in the state legislature of the county affected. Burke's representatives have always been Whites. Accordingly, they have retained a system which has minimized the ability of Burke County Blacks to participate in the political system.

II.

THE ENHANCING FACTORS

It appears that the "enhancing" factors have become part of the dilution "equation" for at least two reasons. First, their existence is relatively easy to determine and, second, their effect on a minority group, though somewhat limited in comparison to the "primary" factors, is obvious.

As mentioned earlier, the Zimmer "enhancing" factors are: the size of the district; the portion of the vote necessary for election (majority or plurality); the number of candidates for which an elector must vote, where the positions are not contested individually; and whether candidates must reside in subdistricts. Nevett II, 571 F.2d at 217.

A.

DISTRICT SIZE

Burke County is nearly two-thirds the size of Rhode Island, comprising an area of approximately 832 square miles.

The raison d'etre of this lawsuit is the fact that the district is undivided in any way. That is, it is as large as it can be in a relative sense. The geographic size has made it more difficult for Blacks to get to polling places or to compaign for office. There was no evidence to show that other counties in Georgia which have recently adopted single-member districts compare pejoratively to the "at large" counties in their ability to function. On the contrary, there was testimony by defendants' witness, Mr. Thompson, that the districting requirement for election to the Democratic Executive Committee has not impaired that organizations' ability to function.

The Court finds, as a matter of law, that the size of the county tends to impair the access of Blacks in Burke County to the political process.

B.

MAJORITY VOTE REQUIREMENT

Defendants, in paragraph 9 of their answer filed April 4, 1976, admit that by the original act, county commissioners are to run at-large, that the victor must be elected by a majority vote, Ga. Code Ann. § 34-1513, and that candidates run for specific seats, Ga. Code Ann. § 34-1015.

As has been found by Zimmer v. McKeithen, 485 F.2d 1297

C.

ANTI-SINGLE SHOT RULE

As in Nevitt II, there is no anti-single shot voting provision. The candidates now run for numbered positions. However, this Court concludes, as did Judge Pointer in Nevitt II, that the numbered position method has some of the same consequences as an anti-single shot, multi-member contest because a cohesive political group, such as the Blacks here, is unable to concentrate on a single candidate.

D.

LACK OF RESIDENCY REQUIREMENT

The present system has no residency requirement. All candidates could reside in Waynesboro, or in "lilly-white" neighborhoods. To that extent, the denial of access becomes enhanced.

II.

CONCLUSION

The Court has considered each of the Zimmer-Kirksey primary and enhancing factors. It concludes that eight of the eleven factors are present, here, which were present in the recent finding of dilution by the Fifth Circuit Court of Appeals in United States v. Board of Supervisors of Forrest County, 571 F.2d 951 (5th Cir. 1978), that is, factors numbered 1, 2, 3, 5,

8, 10, and 11.[28] Since this is a dilution case founded upon "'an intensely local appraisal of the design and impact of the [at-large] district in the light of past and present reality, political and otherwise,'" Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248, 255 (5th Cir. 1978) [quoting from White v. Regester, 412 U.S. 755, 769-70 (W.D. Tex. 1973)], the Court follows the aggregate test of Zimmer-Kirksey.

The evidence on the lingering effects of past discrimination, from the "Nigger-hooks" in the courthouse to the segregated laundermat, is clearly established. The direct effect of past discrimination on access to the political process is demonstrated by bloc voting by the County's hiring practices, and, to a greater extent, the County's committee and board appointment practices. The Court also finds past discrimination has played a part in today's Black low voter registration. Past discrimination has also unfairly affected the quantity and quality of the

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[28] Based on Kirksey v. Hinds County, 554 F.2d 139 (5th Cir. 1977), the court in United States v. Forrest County, 571 F.2d 951, 954 (5th Cir. 1978), found the following evidence constituted a successful claim of voting dilution:

1. no black had been elected to a county office;
2. retention of the poll tax as a requisite to voting until 1966;
3. retention of a literacy test until 1966;
4. conditioning of primary participation upon a pledge of party loyalty;
5. property requirements for candidates

education received by Burke County's Blacks in the same way it has affected their social status. In turn, their social status, as the experts stated, has had an adverse effect on their access to the political process.

The Court concludes that defendants are heedless of the needs of the black community, whether it be in the Blacks' concern for the quality of education or the quantity of paving. The sluggishness with which the Commission moves in response to Black demands is well-nigh the equivalent of callous indifference to that class which has fallen heir to the evil of two centuries of discrimination. The Commissioners' lack of responsiveness is merely an extension of a culture which could view the vestiges of slavery with unseeing eyes. Such indifference attests to the Commissioners' realization of the Blacks' political impotence, both individually and collectively.

It is clear that Blacks in Burke County have a depressed socio-economic status, due in part to past discrimination. The fact that a substantial majority of Blacks have incomes of three-fourths, or less than, a poverty level income is an important factor with respect to access both to the machinery of the political processes, and to the social avenues of political access, each of which is most important in this tightly-knit, rural county.

As stated before, the Court finds Blacks have been overtly denied input into the political process by the Commissioners' failure to appoint Blacks to committees and boards in a meaningful fashion. While the above is the most blatant and pervasive denial of access which plaintiffs established, the Court finds another more subtle denial of access caused in great part by past discrimination, and that is the proscription of black participation in the personal contact politics of Burke

County Whites.

The only enhancing factor that the Court considers has a special bearing on the aggregate is the size of the district. The County is large and can reasonably be divided into districts. But more importantly, the Court finds the size of the County, in conjunction with the fact that its residents are not concentrated in the county seat, has an adverse effect on many of the plaintiffs' access to the political process.

In the aggregate, defendants' unresponsiveness is perpetuating the effects of past discrimination against plaintiffs, a group in a depressed socio-economic status, who have unfairly been denied a role in the political destiny of Burke County. Accordingly, the Court finds plaintiffs have shown a violation of the rights guaranteed them by the Fourteenth and Fifteenth Amendments. It is unnecessary to consider the complaints of violation of the First and Thirteenth Amendments.

IV.

RELIEF

In light of the Court's findings above, the Court orders, for purposes of electing the five County Commissioners for Burke County, that the County be divided into five districts as delineated in Plaintiffs' Exhibit 300.

Although various districting proposals were submitted, the Court finds plaintiffs' original

plan.[29]

The Court selects a five-district plan over a plan in which any member is elected at-large because no "special circumstances" [Paige v. Gray, 538 F.2d 1108, 1111 (5th Cir. 1976)], could be found which would justify such an exception in view of the testimony indicating the Chair has little added responsibility or authority in comparison to the other Commissioners.

The Court has considered defendants' request for a stay, but under the circumstances denied that request. There is ample time to overcome any administrative problems. The plan selected by the Court tracks existing Militia District lines to a great extent and should pose few problems in the conduct of the election. Moreover, on balance, the plaintiffs have the better of it. Further denial or postponement of the Blacks' right to participate fully and freely in the society of Burke County is not properly justified.

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[29] The following statistics show the breakdown of population of the districts in the plan selected by the Court as to race and voting age and percentage deviation by district:

District	Total Population	Black Population (%)	White Population (%)	% Deviation
1	3,736	2,899 (77.6)	837 (22.4)	+2.3
2	3,673	2,753 (74.9)	920 (25.1)	+0.5
3	3,595	1,914 (53.2)	1,681 (46.8)	-1.6
4	3,590	1,852 (51.6)	1,738 (48.4)	-1.7
5	3,661	1,570 (42.9)	2,091 (57.1)	+0.3

District	Voting Age Population	Black Voting Age Population (%)	White Voting Age Population (%)
1	2,048	1,482 (72.4)	556 (27.6)
2	2,029	1,407 (69.3)	622 (30.7)
3	2,115	978 (46.2)	1,137 (53.8)
4	2,112	947 (44.6)	1,175 (55.4)
5	2,217	803 (36.2)	1,414 (63.8)

The foregoing findings and conclusions supplement the Order heretofore entered by the Court directing the election of the five Commissioners for Burke County at the same time as the general election, Tuesday, November 8, 1978.

So Ordered, this 26th day of October, 1978.

Chief Judge, United States District Court, Southern District of Georgia

CERTIFICATE OF SERVICE

I hereby certify that I have, prior to filing, served copy of the foregoing Application for Stay upon Mr. David F. Walbert, 1210 First National Bank Tower, Atlanta, Georgia 30303 and upon Mr. Robert W. Cullen, 322 Tenth Street, Augusta, Georgia 30902, Attorneys for Respondents, by mail, duly addressed and postage paid.

This October 30, 1978.

Attorney for Applicants

IN THE

SUPREME COURT OF THE UNITED STATES

QUENTIN ROGERS, et al	)	
	)	
Applicants	)	NO. A-417
	)	
VS:	)	
	)	
HERMAN LODGE, et al	)	OCTOBER TERM, 1978
	)	
Respondents	)	

REQUEST FOR ORAL ARGUMENT ON
APPLICATION FOR STAY

Applicants hereby request the opportunity of presenting oral argument on their application for stay.

This October 30, 1978.

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Waynesboro, Georgia 30830

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ATTORNEYS FOR APPLICANTS

CERTIFICATE OF SERVICE

I hereby certify that I have, prior to filing, served copy of the foregoing Request for Oral Argument on Application for Stay upon Mr. David F. Walbert, 1210 First National Bank Tower, Atlanta, Georgia 30303, and upon Mr. Robert M. Cullen, 322 Tenth Street, Augusta, Georgia 30902, Attorneys for Respondents, by mail, duly addressed and postage prepaid.

This October 30, 1978.

E. Freeman Leverett
Attorney for Applicants

IN THE

SUPREME COURT OF THE UNITED STATES

QUENTIN ROGERS, et al Applicants VS: HERMAN LODGE, et al Respondents	OCTOBER TERM, 1978 APPLICATION FOR STAY #A 417 C.A. #176-55-U.S. DISTRICT COURT AND #78-3241 U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF ON BEHALF OF APPLICANTS
IN SUPPORT OF APPLICATION FOR STAY

Several factual statements in respondents' brief in opposition require refutation.

Enhancing Factors. At Page 5, respondents state that all four enhancing factors have been found to exist here. This is not correct. Burke County does not constitute a large district, having only approximately 10,000 persons of voting age. Nor does Georgia Law contain an anti-single shot voting provision.

State Policies Favoring County-Wide Elections. Also, at Page 5, respondents state that the policies favoring county-wide elections arose only after passage of the Voting Rights Act of 1965, and also were designed to prevent blacks from voting. There is no evidence supporting this contention. County-wide voting has been in effect in Burke County as in many counties for many years. It is true that after Baker v. Carr was decided, a number of counties having district type elections went to county-wide voting, retaining the districts, however, for residency purposes, in order to avoid problems attendant upon restructuring the districts to comply with the one-man one-vote principle. Respondents' statement that the adoption of county-wide voting during the 1960's was for racially discriminatory purposes lacks evidence to support it.

Fear and Intimidation. Respondents also state on Pages 5-6, "Blacks were kept from the ballot through fear and intimidation, chicanery, economic controls, the discriminatory use of the literacy test, and

Georgia's 'question and answer' test, and by other means. When the Voting Rights Act was passed, the County Commission recommended eliminating all the polling places in the County except one to thwart black voters. Even to this day, the County has taken every possible step to make registration as difficult as possible for black residents."

There is no evidence whatever that fear or intimidation has ever been exercised against black citizens in Burke County with respect to voting, nor that chicanery, economic control, or discriminatory use of the literacy test was ever employed in the County. The only evidence on the use of the literacy test was that it was administered very fairly, and that few blacks, not in excess of five percent of those taking it, were ever disqualified. There was evidence that one County Commissioner at one time proposed consolidating polling places, but there was no evidence whatever that this was to thwart black voters. The statement that the County has taken every possible step to make registration as difficult as possible for black residents is completely without evidence, the evidence showing instead that when the plaintiff in this case requested additional registration places, the County Commissioners provided them although the relatively small number of people registering at the three new sites since their establishment has raised serious doubt as to whether the registration sites were needed in the first instance.

RESPECTFULLY SUBMITTED,

404-554-3521

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

NO. A-417

QUENTIN ROGERS, RAY DELAIGLE, ROBERT L. WEBSTER, CHARLES H. KITCHENS, AND THOMAS M. LOVETT, AS MEMBERS OF THE BOARD OF COMMISSIONERS OF BURKE COUNTY, GEORGIA, AND A. HOLLAND GNANN, OTTO B. JOHNSON AND WALL T. THOMPSON, AS MEMBERS OF THE BOARD OF ELECTIONS OF BURKE COUNTY, GEORGIA

APPLICANTS

-VERSUS-

HERMAN LODGE, SHELLEY COLEMAN, LIZZIE M. SAMS, K. C. CHILDERS, REV. DAVID NELSON, TALMADGE D. LODGE, WOODROW HARVEY AND LEVI CRANFORD

RESPONDENTS

APPLICATION FOR STAY NUMBER A417

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BRIEF OF RESPONDENTS IN OPPOSITION
TO APPLICATION FOR STAY

As the applicants point out, an order was entered in this action calling for the elimination of the at-large method of electing county commissioners in Burke County, Georgia. This order was supplemented by full findings of fact and conclusions of law. The clerk was directed to enter a final judgment by order of the district judge on October 30, 1978.[1/]

The District Court denied applicants' motion for a stay, and they then moved the Circuit for a stay. After submission of briefs by both parties and consideration of the order of the District Court, a three-judge panel of the Fifth Circuit also denied applicants' motion for a stay. The defendants are now in this Court seeking a stay, although this is not the routine situation where a party is appealing or applying for certiorari to this Court, and seeking a stay at the same time. Instead, the order of the trial court will be appealed directly to the Fifth Circuit for full consideration there, prior to any possible application for certiorari here. And it is extremely unlikely that this Court will ever hear this case on the merits. There is no issue here that would merit granting certiorari -- applicants complain for the most part of allegedly erroneous findings of fact by the trial court -- and there is no right to an appeal to this Court in this case.

In their application, petitioners completely ignore the standards applicable in seeking the kind of extraordinary

> Unless an appellant can demonstrate to the Court on such an emergency motion as this that there is great likelihood, approaching near certainty, that he will prevail when his case finally comes to be heard on the merits, he does not meet the standard which all courts recognize must be reached to warrant the entering of an emergency order of this kind. Greene v. Fair, 314 F.2d 200, 202 (5th Cir. 1963).

Of course, the standard for the present motion is even far more stringent because of its particularly extraordinary nature. Normally a single Justice will not intervene in a proceeding that is still pending in a Court of Appeals in the absence of the most compelling and unusual circumstances. And it is especially inappropriate to review a determination by the Court of Appeals that a District Court's order should not be stayed pending the appeal therefrom. Four judges, including the District Court judge who is most familiar with the facts and the law of this case, have unanimously concluded that a stay should not be granted. Justice Harlan clearly expressed the philosophy of this Court in passing on the present type of application for interim action when a case is actively pending in a District Court. O'Rourke v. Levine, 80 S.Ct. 623 (1960). Such action will be taken only "upon the weightiest consideration," and where there is "the most unequivocal showing of a right" to such interim relief. Even in cases that are directly appealable to this Court from a district court, stays are granted only in "unusual circumstances." Breswick & Co. v. United States, 75 S.Ct. 912 (1955). As Justice Harlan said there, single Justice's "stay powers . . . should be exercised most sparingly, both in fairness to the prevailing parties below and out of deference to the Court. A single Justice may also be expected to give due regard to a lower court's denial of a stay." Those comments are particularly appropriate here, where not only the District Court denied the stay, but where the full panel of the Court of Appeals similarly considered the application and denied it.

Not only have the applicants completely failed to establish, or even allege, any "great likelihood, approaching near certainty" of success in their appeal, they do not even present a slight possibility of prevailing. This action is a voting dilution case where the plaintiffs successfully proved that the maintenance of the at-large election system had the purpose and effect of completely obliterating the power of their vote contrary to the many holdings of this Court and the Fifth Circuit Court of Appeals. White v. Regester, 412 U.S. 755, 765-770 (1973); United States v. Board of Supervisors of Forrest County, 571 F.2d 951 (5th Cir. 1978); Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978); Thomasville Branch of the NAACP v. Thomas County, 571 F.2d 257 (5th Cir. 1978); Parnell v. Rapides Parish School Board, 563 F.2d 180 (5th Cir. 1977); Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir.) (en banc), cert. denied, 98 S.Ct. 512 (1977); Paige v. Gray, 538 F.2d 1108 (5th Cir. 1976); Wallace v. House, 538 F.2d 1138 (5th Cir. 1976); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1978) (en banc), aff'd sub nom, East Carroll School Board v. Marshall, 424 U.S. 636 (1976). There was extensive live testimony and hundreds of documentary exhibits presented to The Honorable Anthony A. Alaimo for his consideration in arriving at a decision. Of all the dilution cases that have been before courts of the Fifth Circuit, the evidence in this case of dilution far transcends that presented in any other case. In particular, the plaintiffs in this case presented a great amount of testimony and evidence concerning the current racial practices of the defendants and the current efforts of the defendants to keep blacks from entering the poli-

Clark stated in his opinion in the Forrest County case, a plaintiff may produce facts that are "concerned with the past" in order to "demonstrate a history of dilution of access by blacks to the political process," 571 F.2d at 955, and once that has been done, it is the duty of the federal court to adopt a reapportionment scheme that will "assure 'effective black minority participation in democracy.'" Id. at 955.

It is also interesting to note that the petitioners' application for stay differs from their application in the District Court and the Court of Appeals in one and only one respect. In those courts, the petitioners cried that the holding of this election would create undue confusion (even though the timetable adopted by the District Court's order fit precisely within the timetable established by the Georgia state law that governs special elections). Now, plaintiffs make no allegation of confusion, and the reason for that is quite obvious. A stay at this point would not minimize confusion, but would instead cause unnecessary confusion. Pursuant to the Court's order, candidates began qualifying immediately, and the period of qualification has been closed for over two weeks. Candidates have been actively campaigning and everyone in the county is prepared for an election to occur almost immediately. Candidates have expended funds and presented their platforms in an effort to seek office. It would be a completely unjustified exercise of power for this Court to now step in, overrule the other judges who have considered this problem, and enter an order that would throw into confusion all the political expectations of candidates and electorate only hours before the election itself is supposed to occur. That should certainly not be done where there is no opportunity to evaluate the evidence presented in the case, and this Court is presented only with the general allegations, gross hyperboles, and misrepresentations that are presented in petitioners' application.

Evidence of Dilution and Discrimination. While the defendants contend in their motion that the White v. Regester and Zimmer factors have not been proved in this case, that contention is completely without merit. Not only has every single enhancing factor identified in any reported case been found to exist here, there is also compelling proof of all the so-called primary Zimmer factors. The evidence presented in this case is vastly greater than the evidence presented in the White v. Regester decision which upheld the claim of dilution in the at-large elections used in certain counties in the State of Texas.

Although defendants represent that state policy favors countywide elections, that is not true. To the contrary, plaintiffs showed at trial that, to the extent there is a state policy favoring at-large elections, it is specifically rooted in racial discrimination. This is shown by the many local governments in Georgia that switched from district elections to at-large elections shortly after the Voting Rights Act of 1965 was passed, the time when blacks were first allowed to vote in most counties in the State of Georgia. Moreover, it is simply irrelevant what the state policy might be, since this is a case involving federal constitutional and statutory questions, and it is certainly somewhat late for the appellants to contend that state laws are superior to federal statutes and constitutional provisions once discrimination has been shown.

Defendants also make the extraordinary representation in their motion that there has never been any discrimination in the electoral and registration process. To the contrary, hardly any blacks were registered in Burke County before the Congress intervened by exercising the full force of federal power in the form of the Voting Rights Act of 1965. Blacks were kept from the ballot through fear and intimidation, chicanery economic control, the discriminatory use of the literacy test and Georgia's "question and answer" test, and

by other means. When the Voting Rights Act was passed, the County Commission recommended eliminating all the polling places in the county except one to thwart black voters. Even to this day, the county has taken every possible step to make registration as difficult as possible for black residents. The effect of these practices has been to continue the great underrepresentation of blacks-on the voter registration books. While the number of blacks of voting age in the county is almost the same as the number of whites of voting age, only 38% of the registered voters in Burke County are black, while 62% are white.[2/]

On the issue of responsiveness, plaintiffs proved that defendants had discriminated overwhelmingly against black residents in employment, appointments to boards, municipal services, voter registration, support of government-sponsored projects within the county, and virtually every other activity in which the county has participated in the past decade. Yet, defendants assert in their motion that the defendants have been responsive to black interests. To prevail on this point in their appeal, the defendants have the burden of showing that the trial court was "clearly erroneous" in concluding that the petitioners have been unresponsive to black interests. To prevail on this application for stay, the petitioners would have to do far more. They have not done that, and in fact, this is not even the time or place to hear appellants challenge a District Court order claiming that the trial court's findings were clearly erroneous. That argument should be presented during the regular course of an appeal to the Court of Appeals, not to a single Justice of the Supreme Court of the United States.

2/ Registered voters, not population, are the "barometer" of dilution. Zimmer v. McKeithen, supra.

Petitioners' Legal Objections. Petitioners point out that the City of Mobile decision is pending before the Supreme Court at this time, and they feel that that is a sufficient ground for a stay here. But certainly the pendency of a voting rights case before the Supreme Court cannot be the basis for a stay, or stays would be granted invariably since there is nearly always one or more such cases pending before the Supreme Court.[3/]

Moreover, it is extremely unlikely that any issue presented in the Mobile appeal could affect the present case. The Mobile case differs from all other dilution cases in one and only one respect, and that is the fact that the specialized city commission form of government was disestablished by the district court, and affirmed by the Court of Appeals for the Fifth Circuit after full review, and a city council form of government was put in its place in order to remedy the dilution that had occurred. Thus, there is a very substantial question presented for the Supreme Court as to the limit on the equitable power in a dilution case. City of Mobile v. Bolden, No. 77-1844, 47 U.S.L.W. 3190 (1978) (questions presented in certiorari petition).[4/]

In this case, no modification in the actual form and operation of the government will be effected in any way by the District Court's order. The sole change will be that the county commissioners will be elected from the subdistricts within the county, rather than from the county at large. There can be no question that this degree of relief is authorized in a dilution case, since that is precisely what the United States

decision five years ago.

Secondly, defendants contend that their at-large election system is insulated from a dilution attack because it has been in effect for 67 years and was enacted at a time when blacks were disenfranchised through other, cruder means in Burke County. This argument was rejected out of hand by the Fifth Circuit Court of Appeals in Thomasville Branch of the NAACP v. Thomas County, Georgia, 571 F.2d 257 (5th Cir. 1978). The defendants' contention is also explicitly contrary to the Supreme Court's decision in White v. Regester again, since in that case, the multi-member district system invalidated by the District Court had been in effect since the turn of the century. E.g., Vernon's Tex. Stat., 1914, Art. 26. Similarly, this Court struck down a Tennessee apportionment statute in Baker v. Carr, 369 U.S. 186 (1962), which had been in effect, unchanged since 1901. Clearly, in a voting case based on dilution and one-person/one-vote arguments, the date of the enactment of the legislation is generally insignificant. If there are intervening facts which cause the challenged apportionment scheme to discriminate against certain groups, and particularly where the discrimination is based on race, then the election scheme is subject to challenge, and the federal courts have the power to remedy the illegality.

Defendants also cite to the Supreme Court's recent decision in Wise v. Lipscomb, 57 L.E.2d 411 (1978). Wise provides defendants no ground for appeal, however, much less a certain ground. Wise indicated that, in the circumstances of that case, it would have been appropriate to allow local government an opportunity to reapportion itself after the declaration of unconstitutionality.[5/] Wise expressly recognized two exceptions, even under the facts of that case. A district court

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5/ The defendants complain they did not have an opportunity to present a plan, but the Court did request that the parties present plans at the hearing. The defendants simply failed to tender as to that request any plan that was remotely acceptable under the rules of evidence, much less one that comported with the Constitution.

need not stay its hand where there are imminent elections, and a district court need not stay its hand where the legislative body fails to undertake reapportionment. Both exceptions apply here since elections were very "imminent" and were scheduled for November. The trial court's order calls for elections to be held simultaneously with those regular elections. The second exception is also applicable since the defendants have already announced their intention not to pursue a legislative remedy. In the trial court, their brief stated their intention to appeal to the Court of Appeals and then to this Court. The petitioners admit that that process will require years, so the District Court would obviously have to act, at the very latest, a year from now in advance of the 1980 elections. Under these circumstances, Wise certainly does not require the District Court to blind itself to the admitted refusal of the defendants to undertake voluntary reapportionment.

Moreover, Wise expressly omitted any discussion of the significance of Section 5 of the Voting Rights Act of 1965 since that issue had not been raised there. In the present case, the application of Section 5 is especially important and again renders the dictum in Wise inapplicable. For one thing, Section 5 is a clear congressional finding and mandate to the courts to ensure that voting-related remedies be adopted and implemented with as much haste as possible in any jurisdiction where Section 5 applies, as it does in Burke County. Congress imposed Section 5 restrictions only in those areas where it determined that resistance to equal voting rights was most

consider whether the proffered plan was constitutional, simply cannot be applied in any jurisdiction where Section 5 is in effect.

And finally, the petitioners' suggestion that Wise will be the end of dilution cases for any state subdivision is certainly erroneous. The four Justices that commented in Wise that there had not yet been a definitive decision applying White v. Regester to such political subdivisions certainly cannot be translated into an opinion by the Court that there is no such cause of action. No case by any court, and certainly by this Court, has ever held that the Fourteenth and Fifteenth Amendments do not apply to subdivisions of a state, and the four concurring Justices in the Wise case certainly do not state any such opinion. Petitioners seem to forget that a civil war was fought in order to obtain the Thirteenth, Fourteenth, and Fifteenth Amendments. It is an extraordinary suggestion to imply that this Court would ever effectively repeal those amendments by holding that they did not apply to elections for subdivisions of a state. Indeed, the Supreme Court itself has held that at-large elections for political subdivisions may be objected to under Section 5 of the Voting Rights Act of 1965. Allen v. State Board of Elections, 393 U.S. 544 (1969); Perkins v. Matthews, 400 U.S. 379 (1971). But anything that can be challenged under Section 5 of that Act, 42 U.S.C. §1973c, can surely be challenged as well under Section 2 of that Act, 42 U.S.C. §1973, since the substantive language is essentially the same. See also, 42 U.S.C. §1971. The only difference is that the plaintiffs have the burden of proof in a §1973 case, while the government has the burden of proof in a Section 5 proceeding. In this case, the plaintiffs have relied on the statutory provisions, as well as the constitutional provisions. Thus, even if a completely unprecedented decision was rendered by the Supreme Court to the effect that the Fourteenth and Fifteenth Amendments did not

apply to local government, the plaintiffs here would still prevail because of their statutory claims. Cf. Nevett v. Sides, 571 F.2d 209, 213 n. 3, 237 (5th Cir. 1978).

Thus, the District Court's decision to require a prompt remedy to the clearly unconstitutional election system here is entirely in accordance with the decisions of the Fifth Circuit, and it is most certainly in accordance with the decisions of this Court. In Parnell v. Rapides Parish School Board, 563 F.2d 180, 185-86 (5th Cir. 1977), the Fifth Circuit held that it was an abuse of discretion for a district court to allow incumbents to hold office while awaiting far distant elections. In many other cases, the Court of Appeals has similarly granted immediate and summary relief in voting discrimination cases. Many of these cases are compiled by Judge Dawkins in the Louisiana case of Wallace v. House, 377 F.Supp. 1192, 1201 (W.D.La. 1974), aff'd, 538 F.2d 1138 (5th Cir. 1976). The Fifth Circuit and the District Courts of the Fifth Circuit have far more knowledge than this Court, or a single Justice acting in this Court, of the facts and circumstances surrounding the egregious-voting discrimination that remains in the South today. Those Courts should be accorded a normal courtesy of allowing them to pass on any arguments presented by the petitioners before intervention by this Court. The arguments raised by petitioners simply are not appropriately raised in this Court.

Finally, repondents cannot fail to mention that there are serious and substantial misrepresentations on many grounds in the petitioners' motion. Possibly the most egregious is the shocking allegation that the parties and the Court have "deliberately gerrymandered" a plan to dilute the white vote and to guarantee election of certain individuals in the county. Although the very plan adopted by the District Court was produced first well over a year ago, at no time prior to final judgment in the trial court had there ever been a single

objection to that plan by defendants. Now, in this Court, and without any shred of supporting evidence or testimony or even insinuation in the trial court, petitioners' attorneys make these completely improper accusations. Misrepresentations and arguments of this sort, particularly where there has been no prior objection or supporting evidence tendered into the record, are no basis for consideration by this Court. To the contrary, they are a firm basis for sanctions to be taken against the offending individuals, for members of the Bar should certainly not be condoned when they make such malicious and unprofessional accusations, particularly where the sole purpose of counsels' misrepresentations is to induce this Court to act under a misimpression and assist the defendants in perpetuating the white supremacy that has continued to exist in Burke County, Georgia, to the present date.

Petitioners make many other factual misrepresentations, some of which are shorn of their substance simply by reviewing the District Court's order. Among these is the extraordinary notion that blacks have been able to register and vote in Burke County "without difficulty" for at least the past 30 years. That representation has no relation to the evidence actually presented in this case. As the District Court notes, blacks were virtually a voting nonentity prior to federal intervention in 1965 by way of the Voting Rights Act. Defendants' own witnesses admitted that the Georgia "question and answer" test -- the very purpose of which was indisputably to prevent blacks from registering -- eliminated many, many prospective registrants. Petitioners also failed to mention that public facilities in Burke County are still segregated by race, 115 years after the Civil War, and 14 years after passage of the 1964 Civil Rights Act. They fail to mention that, according to the very testimony of one of the defendant county commissioners the county commissioners still refer to blacks as "niggers" in

Burke County Commission meetings. Defendants also fail to refer to the days and days of other testimony as to the intense racism that has characterized Burke County up to the present, evidence of racism that makes all the testimony presented in this Court's White v. Regester decision pale by comparison.

In sum, there is no ground here that would conceivably justify the extraordinary action requested. Action by this Court at this time would not only be unjustifiable under the law and facts, it would cause great confusion in the orderly election process of Burke County. Nor can defendants possibly complain that the election plan adopted by the District Court is an improper one. While petitioners state that blacks predominate in two districts, the percentages in the court-ordered reapportionment plan are not particularly different than in the plan tendered by defendants themselves. It is inconceivable how defendants can now challenge those very numbers.

The true point of petitioners' application is probably most clearly shown by their admission of the possibility that this case will be settled if county commissioners are elected under an election plan that does in fact give blacks equal access to the political system. Since the at-large system used completely excludes blacks from political input, there is no possibility of settlement or fair treatment of the plaintiffs' interests as long as the at-large system is maintained. But as defendants admit, election of county commissioners under a fair district-based election system would substantially tend to undercut the present control of the white supremacists in Burke County, raising a realistic possibility of fair treatment of the interests of black citizens, including settlement of this suit and the adoption and continued use of a nondiscriminatory election system. The defendants' interest in a stay, and their very interest in an appeal at all, is solely and specifically

to perpetuate the kind of white supremacy that has been the rule of the Burke County Commission, and which can be remedied solely by the kind of relief granted by the District Court.

Respectfully submitted,

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