In the

# Supreme Court of the United States

MARK WHITE, et al., )
)
Appellants, )
)
v. )
)
DIANA REGESTER, et al., )
)
Appellees. )



No. 73-1462

Washington, D. C.
February 19, 1975

Pages 1 thru 50



HOOVER REPORTING COMPANY, INC.
*Official Reporters*
Washington, D. C.
546-6666

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MARK WHITE, et al.,

Appellants,

v. No. 73-1462

DIANA REGESTER, et al.,

Appellees.

Washington, D. C.,

Wednesday, February 19, 1975.

The above-entitled matter came on for argument at 1:25 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MRS. ELIZABETH B. LEVATINO, Special Assistant Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711; on behalf of the Appellants.

DAVID RICHARDS, ESQ., 600 W. Seventh Street, Austin, Texas 78701; on behalf of Appellees Regester, et al., Moreno, et al., Chapman, et al., Wright, et al., and Warren, et al.

DON GLADDEN, ESQ., 702 Burk Burnett Building, Fort Worth, Texas 76102; on behalf of Appellees Escalante, et al.

# C O N T E N T S



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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 73-1462, White against Regester.

Mrs. Levatino, you may proceed when you're ready.

ORAL ARGUMENT OF MRS. ELIZABETH LEVATINO,

ON BEHALF OF THE APPELLANTS

MRS. LEVATINO: Mr. Chief Justice, and may it please the Court:

This is an appeal from an order issued by a three-judge federal court for the Western District of Texas, sitting in Austin, which held the multi-member district scheme embodied in the Texas Plan for Reapportionment unconstitutional.

The State of Texas believes that the plaintiffs in this case have failed to produce evidence which meets their burden of proof such as would warrant the suspension by a federal court of multi-member districts, a policy consistently utilized in the Texas system of appropriation for its State House of Representatives.

We are not here to debate or to defend the merits of whether or not single-member districts should be used or multi-member districts should be used. But, rather, viewed from the constitutional perspective set forth by this Court, that is a decision which at this point should be left to the Legislature. Because the record in this case simply does not

support the proposition that multi-member districts have resulted in a loss of access or in less opportunity of a minority group to participate in the political processes leading to nomination and election, and therefore does not support the action taken by the court below.

We are asking this Court to reverse the court below, because that decision was based on incorrect constitutional standards, evidence insufficient to support the correct constitutional standards, as well as the erroneous standards used, and the failure of the court to afford the Texas Legislature the opportunity to exercise its proper function of reapportionment.

The weakness of the plaintiffs' case and the opinion of the majority below,particularly in dealing with the evidence before the court, is strikingly shown by the well-reasoned and exhaustive dissent of Judge Wood.

Judge Wood, as you may remember, only two years before, clearly agreed with the other two members of the panel that adequate and sufficient evidence was presented to the court to invalidate the multi-member districts for Dallas and Bexar Counties.

This Court has consistently and repeatedly insisted that the challenger of multi-member districts produce evidence which is sufficient to show that because of the multi-member district members of the minority group within the district are

afforded less opportunity to participate in the political processes leading to nomination and election, thereby minimizing or cancelling out the voting strength of the racial or political element within that district.

QUESTION: Counsel, what was the issue when this case was remanded here? Was the only issue in this last phase of the case the multi-member districts?

MRS. LEVATINO: Basically, Your Honor, that is correct. It was the multi-member districts throughout the scheme, but --

QUESTION: But they existed only in certain areas?

MRS. LEVATINO: They exist -- there were eleven remaining multi-member districts. The plaintiffs intervened -- or plaintiffs --

QUESTION: But none of the -- but if relief was given in each -- if all the multi-member districts were made single-member districts, nothing would happen to all the other districts in the State?

MRS. LEVATINO: That is correct, Your Honor, depending on how the single-member districts were created. Additionally, the court below did find racial gerrymandering with regard to Galveston, which would require an actual redistricting, not on the basis of multi-member/single-member districts, but a changing of the scheme in that area, which could have a dominant effect to affect the entire district scheme.

QUESTION: Well, why was this multi-member district issue, since it affected only certain localities in the State, why was it a three-judge court issue?

MRS. LEVATINO: Your Honor, I believe that one of the major reasons that it is a three-judge court issue is that this case attacks all of the remaining districts, which is a Statewide policy, and as this Court has so recently held, in Chapman vs. Meir, subject matter of this kind is regular grasp for the three-judge court, and that typically has been employed under conditions similar to those present here.

And of course this Court took jurisdiction in --

QUESTION: If it had only concerned maybe one of the multi-member districts out of several that might be different?

MRS. LEVATINO: It may be different, Your Honor, but I don't believe that the posture of this case is attacking just one or just another. It really is attacking the policy decision of the Texas Legislature to utilize multi-member districts at all.

These districts range from two members up to eight -- up to nine members. It's the whole policy.

QUESTION: And all of the multi-member districts, without exception, were under attack on this remand?

MRS. LEVATINO: Yes, they were, Your Honor. I believe it -- I do not want to mislead the Court. At trial,

plaintiffs conceded that they could not find evidence of discrimination in one of the two-member districts, which was Hidalgo County, and they changed the challenge in Galveston County from a challenge to the multi-member district to the racial gerrymandering challenge; although the pleadings initially had challenged all of the multi-member districts that remained in the county.

It is the lack of access or opportunity to participate in the political processes which must be shown; yet the majority below saw fit to devise another new kind of test. This test can't be supported by the opinions of this Court, nor by basic logic.

Neither can it be used to bootstrap a record which would otherwise be insufficient to sustain holdings of unconstitutionality.

This new test consists of an aggregate of four factors. These factors are:

Restricted access of the minority to the slating process of particular party nominations;

The consistent use of racist campaign tactics to defeat minority candidates or those championing minority concerns;

The indifference or hostility of the district-wide representatives to particularized needs of the minority; and

The inability of minority groups to obtain representa-

tion in proportion to their percentage of the population in the district.

As set out in our brief, we believe these factors operate primarily in a "get one, win three" manner, therefore always adding up to an aggregate.

But beyond that I'd like to consider each factor individually.

Beginning with this --

QUESTION: What kind of a manner?

MRS. LEVATINO: You know, "get one, win three" manner. By that I mean, Your Honor, if you look at the three factors, if you could find that there was no access to the slating process --

QUESTION: Then you'd get the other two along with it?

MRS. LEVATINO: You automatically get the other two, so it adds up to three, and thereby you win the game.

QUESTION: I see. But they're not distinct and separate.

MRS. LEVATINO: Independent -- they are functions of each other, basically.

QUESTION: Right. I understand.

MRS. LEVATINO: Beginning with the factor regarding the election of a minority group in proportion to their population of the district, I believe this factor has

previously been rejected by this Court in Whitcomb, and more recently in Chapman, as evidence of non-access.

Indeed, the record in this case actually reflects that in two of the districts, Nueces and El Paso, members of the minority group have been consistently elected in the past decade to the House of Representatives, as well as to other district-wide government races.

In the 1968 and 1970 elections, Nueces sent a delegation to the House which consisted of Representative Truan, a Mexican American, Representative Hale, an honorary member of the Mexican American group, and Sissy Farenthal, widely known for her interest and concern for the minority people.

In the latest election, a third district, Travis, elected two members of two different minority groups to two out of four seats. And that delegation is now composed of its dean, Sarah Weddington, a 30-year-old woman; a Mexican American, Gonzalo Barrientos, who this time beat the then 17-year Anglo incumbent; Mrs. Delco, the black woman who the majority characterized her election, early election to the school board, as a distortion in the voting pattern; and finally a 32-year-old male Anglo.

Now, no one can guarantee that this pattern will continue. But then no one can guarantee that it won't continue.

At the very least it is and I believe should be considered as strong evidence that minority groups do have access to the political process.

Furthermore, while the plaintiffs in the court below were taking great pains to emphasize the relative failure of the minorities at the ballot box since reconstruction, the record also was reflecting that minority groups, both leaders and individuals endorsed and voted for non-minority candidates, thereby electing many of these candidates and making them legislators of their choice.

Proceeding to the next factor, the indifference or hostility of the representatives to the particularized minority interests, this, too, has never been referred to by this Court --

QUESTION: Well, counsel, just a -- before you leave this one factor.

Suppose there's a ten-man multi-member district, ten Representatives of a multi-member district, and at each election one party slates three out of the ten as -- slates three Negroes out of the ten, which is roughly proportional to the population, let's assume; and there's an opposing slate from another party. Each time all but three, all but the three Negroes are elected. And when the party slates all ten Anglos, all ten win. This party is clearly in a majority, let's assume; the only thing is the three Negroes lose all the

time, in this multi-member district.

MRS. LEVATINO: Yes. I think, Your Honor, that that is relevant access, -- I mean relevent evidence of access. However, this Court has said that election is not paramount to their --

QUESTION: Yes, but we didn't have any -- in Whitcomb, you have suggested Whitcomb, but Whitcomb never had anything like that. There, in Indianapolis, the minority won if the party won.

MRS. LEVATINO: I submit --

QUESTION: And in the example I just gave you, the minority didn't win even if the party wins.

MRS. LEVATINO: Your Honor, I submit to you that we don't really have the situation that you're suggesting in this case, either. Much has been made that Texas is --

QUESTION: Well, what is you did, though?

MRS. LEVATINO: If you did, I believe that, first of all, the fact that the minority --

QUESTION: Because arguably -- arguably that is the situation in some of these; at least it's argued to be the situation in some of them.

MRS. LEVATINO: It is argued to be the situation.

QUESTION: Yes.

MRS. LEVATINO: Yes.

If we had the situation, first of all, that the

minority candidates were consistently slated, I believe that is evidence of access.

QUESTION: Yes.

MRS. LEVATINO: But I believe you also have to look to why some of these candidates were not elected. I believe that, as you well know, the function of election includes issues, personalities, many things other than merely blacks only voting for blacks and whites only voting for whites.

In the county I believe you're referring to, Mr. Bobby Webber received 48 percent of the vote in that particular multi-member district, the Tarrant County District.

Now, that certainly shows that he got more than just the black votes in that ares.

I think that would be a very close question, but I do not -- I think that the question is that close in these districts, as the hypothetical which you presented.

With regard to the ability to represent the minority, this also has been rejected as significant or has never been affirmatively said to be significant in evaluating the particular access to the political process.

But the Court -- even if it were relevant, the Court below didn't really apply this factor. They applied their own factor which required some kind of affirmative legislative action on behalf of all the members of the delegation. The reason for this change was that the record generally reflected

non-hostile or even sympathetic voting records. In some districts clear concessions of excellent voting records. And certainly sympathy for the needs of the minority.

In one county the majority went even further from its pronounced test, by finding that a delegate was deficient because he could not empathize with the minority, even if he could sympathize with it.

This is only one more example of the weakness of the plaintiffs' case, and the obvious attempt by the majority to provide that which the plaintiffs did not.

The third factor, of course, is the consistent use of racist campaign tactics, a policy or a strategy which we all deplore; but again which this Court has never related specifically to the issue of access.

The mention of it in declaring Dallas County multi-member district unconstitutional included the inference that such tactics must be successful. An element now discarded by the majority.

Additionally, as pointed out by Judge Wood, the few cited instance of the use of such tactics, a whisper campaign in El Paso for the Mayor's race, or a School Board race as in the Fifties and Sixties in Nueces County. This kind of evidence hardly rises to the level of consistent, and certainly not to the level of proof required in a case of this nature.

QUESTION: Well, do you concede that a court may appropriately take into account what they label, for purposes of this case, racist campaign tactics?

MRS. LEVATINO: I believe that they could take it into account, Your Honor, but I do not believe it could be one in a factor, in a checklist of factors, the way these are set up; but would -- especially if they had not been successful, as the record generally shows, that it would rise to the leve of proof which this Court has required.

QUESTION: For what purpose could the district court take it into account?

MRS. LEVATINO: I believe the reason it could be taken into account would be to show that black or brown minority candidates could never be elected, or that their election was totally impossible in especially a large district. This is not reflected in this record, however.

QUESTION: This position doesn't give you any trouble with the First Amendment? Doesn't the First Amendment guarantee candidates the right even to engage in what everyone would condemn, in terms of decent campaigning, but doesn't the First Amendment guarantee them the right to say what they want to say in a campaign?

MRS. LEVATINO: I believe that everyone can say what they want to say in a campaign, Your Honor.

QUESTION: Couldn't a Negro candidate go out and

campaign,directly attacking whites as whites, and couldn't a Mexican American do the same thing, or a white?

MRS. LEVATINO: I believe he would have the possibility of doing that, Your Honor.

QUESTION: Then are you saying that a court may take into account conduct which is protected by the First Amendment to -- in this formula? As the court obviously did here.

MRS. LEVATINO: Take into account conduct which is --

QUESTION: Took into account what are labeled in this case as racist campaign tactics.

MRS. LEVATINO: Your Honor, I do believe that the court can take this into account, but, as I said, the way this Court used a checklist factor, the youth of these candidates, in adding it all up independent -- supposedly independent of each other, the factors didn't work that way.

And additionally, the racist campaign tactics cited by the Court, as pointed out by Judge Wood, were not, certainly not consistent and in most of the instances were not successful.

So what -- its relevance to the access in this case, I believe is not sufficient to sustain a finding of unconstitutionality.

QUESTION: Well, certainly the meaning of a democratic government, I would think, is that when I go into the ballot box and vote for a candidate, I can vote for him for a good

reason, a bad reason, or for no reason at all. If I want to vote against a man because he's black, if I want to vote for him because he's black or white or brown, but that's my privilege as a citizen, I would think.

MRS. LEVATINO: Yes, sir. And I don't -- I do not pretend to say that you can't vote for any person for any reason.

QUESTION: But the question is whether -- whether consistently -- consistent voting discrimination against any kind of a minority is enough of a reason to disestablish a multi-member district. That's the question.

MRS. LEVATINO: No, Your Honor, I do not believe, on its own grounds, that is enough of a reason. This Court has said you have to show denial of the opportunity to participate.

The fact that a racist campaign tactic is used does not say that the minority group in question is not participating in it. It may be noted, it may go into the totality of circumstances; but in and of itself it is not a grounds for declaring a multi-member district unconstitutional.

The final factor is the restricted access of the minority to the slating of candidates for party nominations.

This, we believe, is a valid factor, and we believe it's the only one which this Court has heretofore approved and set out as something that should be shown, in fact must

be shown.

However, it should be pointed out that while Texas -- much has been made of the fact that Texas is a one-party State. The primary elections and activity prior to the primary election reflect just as intense political battles between conservatives, liberals, business labor, as is reflected between the major parties in any other States. And I believe you must view the slating procedure in that nature.

The record reflects that in one two counties, Tarrant and Jefferson, are there any cognizable formalized groups which consistently endorse candidates. Minorities have received that endorsement in both counties.

This is a far cry from the situation found by this Court to exist in Round One of this particular case, where virtually complete control over the candidates and political processes in Dallas County was exercised by the Dallas Citizens for a Responsible Government; the DCRG.

Additionally, in this case, the record shows that endorsement of any one group, in any one district, is not tantamount to election.

However convenient this checklist approach of the majority may be, it cannot be supported by the record nor by the constitutional standards set out by this Court.

This Court, in fact, has never utilized a checklist, and inferentially rejected its use in Whitcomb, as the dissent

of Justice Douglas showed. All of the factors which were previously set out in Burns vs. Richardson were existing in the Whitcomb, Indiana, district, and yet it was upheld as constitutional.

Furthermore, the districts in question are smaller than any heretofore invalidated by this Court. These districts range in size from one electing only six percent of the Texas House of Representatives down to ones electing barely one percent or two out of 150 members of the Texas Legislature.

This simply is not a case involved extremely large districts electing a high percentage of Legislative Representatives.

The State of Texas believes that whether or not single-member districts are desirable in any of these districts, and,if so, the specific design of the districts are political questions at this point and are not constitutionally required.

The Texas Legislature does not act in the area of reapportionment only when pushed and pulled by a federal court, although their actions may be subsequently challenged; and at least in this decade we're two-for-two on that score.

In fact, the Legislature meeting in regular session right now, for the first time since this Court issued its opinion in Round One of White vs. Regester, is today, this Wednesday, conducting a hearing on two single-member district bills for Tarrant County. Single-member district bills have

also been introduced for other counties, and are being drafted for the remainder.

On the basis of the record in this case, on the erroneous constitutional standards used by the majority, and on the failure of the court below to afford the Texas Legislature its rightful opportunity to reapportion, we ask that the decision of the district court be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Richards.

ORAL ARGUMENT OF DAVID RICHARDS, ESQ.,
ON BEHALF OF APPELLEES REGESTER, ET AL.,
MORENO, ET AL., CHAPMAN, ET AL., WRIGHT,
ET AL., AND WARREN, ET AL.

MR. RICHARDS: Mr. Chief Justice and may it please the Court:

This case involved, on remand, the challenge of nine multi-member districts existing in the State; as it now stands, seven of those districts were invalidated under the principles of Regester, and are here before the Court.

Mr. Gladden, with whom I'm sharing time, is going to discuss the Tarrent County District; I'm going to attempt to discuss the balance.

From 1900 to 1966, no Negro citizen of Texas was a nominee of either the Republican or Democratic Party for any public office in Texas, any elective office.

It was not until 1966 that a Negro for the first time was elected to the Texas Legislature. One of those is now serving in Congress, and that's Congresswoman Barbara Jordan.

When I came up yesterday on the airplane I picked up the current Atlantic Monthly -- to go outside the record for a moment -- which was devoted this month to Texas. And there was an article by Miss Jordan in it. And she says what I think is quite accurate.

Until this Court decided to get into apportionment, there was no chance in Texas or in the South for blacks to be elected to office. It was only when Harris County, as a consequence of this Court's decision requiring one-man/one-vote in both Houses of the Legislature, required redistricting in Harris County that she had an opportunity to be elected to office.

And, frankly, that situation remained unchanged until this Court decided Regester last term.

With the advent of Regester and the effect of single-member districts in Dallas, Bexar, and Harris County now, there has been a dramatic increase in both black and Mexican American representation in the Texas Legislature; and, as we see it, it solely is attributable to this Court's involvement in reapportionment litigation.

And we would hate at this point to see a retreat, very frankly.

The contrast with Whitcomb is just that, which I think Justice White alluded to, in Whitcomb, the Court characterized a typical legislative race as a head-to-head race between two opposing parties; with -- in Marion County, Indiana, if the Democrats won, typically the ghetto would have adequate representation, if I recall the language.

That's simply not the case in Texas. Texas is a one-party State, which we have a majority place system, all races are determined in the Primary, and what it results in is a head-to-head race with a minority candidate pitted against an Anglo candidate, and the result has been, almost without exception, defeat for the minority candidate.

Texas is peculiar in several regards, and this is a special system; but the result has been clear, it's been virtual exclusion for minority elections.

We have today what we think to be just simply the sequel to both the Bexar and Dallas cases.

In some cases it seems to me, in some of the counties, the evidence is stronger than it was with respect to Bexar or even in Dallas; that is, with respect to some of the counties before the Court.

The record is, at this point, something like 14 printed volumes. The original seven volumes of the Regester case, together with, I think, an additional six printed volumes today.

For example, we would suggest that the plight of the blacks in most of these counties is significantly worse than it was for the blacks in Dallas County, because at least in Dallas there was sort of a white man's burden assumed that they would occasionally slate a black, put him on the ticket, have him elected.

In Jefferson County, for example, that's never been the case, and it looks to me as if it never will be the case. There the testimony is that politics in that county have been dominated by COPE, the arm of Texas AFL-CIO, and that slating by COPE was tantamount to election.

The testimony --

QUESTION: How many Representatives from Jefferson County?

MR. RICHARDS: How large --?

QUESTION: How many Representatives?

MR. RICHARDS: Three. I'm sorry.

QUESTION: Three.

MR. RICHARDS: Jefferson County at this stage is carved really into one three-member multi-member district, and a portion of the county is tacked on another single-member district, and a portion of the county is tacked onto yet another single-member district. We are concerned, of course, only with --

QUESTION: What's that, is that Beaumont?

MR. RICHARDS: That's Beaumont, Port Arthur are the base -- are the towns; both Beaumont and Port Arthur are within the multi-member districts.

And the record shows that when blacks went to COPE leadership and said: Why can't you slate us? Why can't you make us one of the recommended candidates?

The leadership's response was: We're afraid of rank-and-file pressures, hostility toward blacks; if we put you on the ticket and endorse you, we might not be reelected to our offices.

Now, that's pretty strong stuff. And that's exactly the situation that prevails today.

In McLennan County, where I grew up, the State's witness testified -- not our witnesses, the State's witness testified -- that it still, the people of McLennan County weren't prepared to vote for a Negro candidate. They were still light-years away from that sophistication.

QUESTION: What area is McLennan County? Or what cities?

MR. RICHARDS: That's in central Texas, on the Brazos River, --

QUESTION: Any town or city of any size?

MR. RICHARDS: Waco -- I'm sorry -- Waco is --

QUESTION: Waco.

MR. RICHARDS: -- Waco is the county seat, and

occupies essentially the entire legislative district.

QUESTION: Unh-hunh.

MR. RICHARDS: In Bexar County we heard -- you heard Bexar County before, there was evidence of reasonable access to -- reasonable success, in some instances, of Mexican American candidates.

The success of Mexican American candidates, in the counties that we're looking at today, El Paso, Nueces and Lubbock, is dramatically less than it was in Bexar County.

And, unlike Bexar County, where there was no suggestion of racial campaign tactics ever being utilized. There is evidence that they were regularly utilized in these other counties to defeat Mexican American candidates.

Granted, there may be a First Amendment right to utilize racial campaign tactics, but our concern is: How does a multi-member district operate on minority access and it's our view that this is a relevant consideration, that this, in fact, fore-ordained lack of success by the minority candidate.

Although we're dealing with six counties, and they are each different and each, I suppose, had a particularized appraisal by the trial court, there are some similarities.

At the time of trial no black had ever been a nominee for the Democratic Primary for any office in any of those counties.

The one pattern that emerged in at least three of

the places we looked at was the recurrence of a certain theme; that is, when minority candidates threatened success at the polls, the game was changed. In Waco, the first time a black candidate ever ran for City Council, at that point Waco had a ward system, essentially a single-member district system.

The black candidate ran. The next time around they changed the rules, went back to an at-large election, voted on by the entire electorate.

In Travis County also, the same pattern emerged. The first City Council candidate, black, Arthur DeWitte ran for City Council and ran a good race. What did they do? They changed the rules; went from a plurality to a majority system the next time around.

In Nueces County, the first time the Mexican American candidates there seriously threatened the School Board elections, they moved from a plurality to a majority system.

And what we're really saying, I think, in part, is that this at-large, majority, place system links up in a very realy way to deny access to minority candidates.

And I think that's precisely what the court found the first time. That's what this Court found when it affirmed unanimously Regester, and we think it's the same case again.

To the extent, at one stage, the defense suggests

that part of our burden is to prove that these districts were designed to disenfranchise minority candidates, I take it that means that we must show an unlawful motive. We do not think that's the proper equal protection test, but to the extent that that's the test, or to the extent that that's our burden, the evidence is here just as it was before; that is, it's the same record, it's the same people acting, it's the same action of the Legislative Redistricting Board that created the districts that are now beofre the Court that were here before.

It seems to me, at least, that one thing comes through quite clearly: the Texas Supreme Court said in Mauzy vs. Redistricting Board that the Legislative Redistricting Board in structuring these districts should consider carefully whether any multi-member district might result in discrimination against minority candidates.

And yet the testimony is quite clear that the Legislative Redistricting Board totally ignored this question, and indeed one member of the Board characterized the appearance and testimony of the minority candidates with an epithet, a profane epithet, and characterized it as being ignored entirely.

So, I suppose, that one can assume that they intended the logical consequences of their act; they did not undertake to consider the impact upon minorities, and in so doing, it seems to us, supplied the necessary motive, if in fact it was a

requirement.

I have one or two asides about how deeply imbedded the State policy is with respect to multi-member districts. There is one oddity in this case, to me: that is with respect to McLennan County, one of the smallest ones involved.

When the Legislature redistricted McLennan County in 1971, it created two single-member districts in McLennan County.

When the Legislative Redistricting Board came about this task, they reconstituted that county in a multi-member district.

QUESTION: What has been the history of McLennan before 1971, as to number of districts?

MR. RICHARDS: It had been a multi-member district before 1970 -- or at least in terms of when its population justified it; and it had been a multi-member district for some time. In 19-- --

QUESTION: It was two, wasn't it?

MR. RICHARDS: With two at one point, yes, sir. One, years ago, that was larger and had a territorial representative, too, as I recall.

In any event, when the Legislature came to deal with it in 1970, after the Census, for the first time the Legislature cut it into two single-member districts; and then it was the Legislative Redistricting Board, after they were im-

pelled to act, that they reconstituted the multi-member district.

And it was almost the same seesaw, too, because the Legislature did not create single-member districts in Harris County, it created districts of -- three districts in which representatives ran, I think, six in one and seven in another; and it was the Legislative Redistricting Board that constituted single-member districts there.

So from the top and the bottom of the spectrum, you would have sort of wavering policies, as we view it.

Finally, it seems to us that one question that is in the case that I want to speak a moment to, and that's the matter of remedy.

The State argues, and I guess by virtue of the State it was granted here, there must be maybe some concern because the Court implemented its own plans or the plaintiffs' plans for the single-member districts.

We think under the circumstances it was entirely proper.

As the record reflects, the trial court ordered the State -- it didn't order the State; requested the State to produce any proposed redistricting plans it had by January 18th, 1974. The State produced no plans by that date.

The court then scheduled a hearing for January 28th, at which time the question of what remedy was going to be

applied. At that point the State did appear and adopt certain plans.

But with respect to the six counties that we're concerned with, I would like to point out that with respect to McLennan County and Travis County and El Paso County the State offered no plan in opposition to the plan offered by the plaintiffs; in effect, acquiesced in it.

In Nueces County, the State, in effect, adopted two plans; said either one was satisfactory. One of those plans being the plan proffered by the plaintiffs.

Only in Lubbock and Jefferson Counties did the State offer plans in opposition to those proposed by the plaintiffs. And in both instances, the State plan was less faithful to the State policy than the plaintiffs' plan. Because in each instance the State plan would have required redrawing adjoining single-member districts. Thus, in Jefferson County they would have restructured not only the multi-member district but altered single-member districts there were abuting it on either side, which was not even in issue.

The same pattern emerged in Lubbock County, where they sponsored a plan, the State's plan would have required not only to create a single-member district but alteration of adjoining single-member districts.

So we would suggest the court, trial court, in adopting our proposals was more faithful to this Court's

decision in Weiser vs. White, that is, because the plans we sponsored were faithful to the State policy, did not in fact intrude upon the adjoining districts, and for that reason, too, it was abuse of discretion.

Further, the plan sponsored by the State in Jefferson County, assuming that the concern of the case was to enfranchise or disenfranchise Negro minority of that city, of that district, the State's plan would have drawn the Negro population of Jefferson County into four nice slices: twenty percent in each of the four districts. Which would be, it seems to me, to worsen the situation, where now they constitute thirty percent of the multi-member district; under the State's proposal they would have been reduced down to roughly 20 to 25 percent in each of the four proposed single-member districts.

We do not -- it is our view that the record, as I say, is exactly the record that we presented to this Court in the first round. All of the same references here, we have gone back and done exactly what we did the first time around: developed evidence on a local basis, how the multi-member district operated in fact in those counties upon the minority of those counties.

In two counties, where the proof simply didn't sustain itself, one in Hidalgo, we all conceded that the multi-member district there could not be demonstrated to

deprive the minority of that county of access.

The same was true in Galveston County, where again a particularized local appraisal led us, everyone to the conclusion that the multi-member district there did not in fact deny access.

In Galveston County, the trial court -- I'm sorry?

QUESTION: Mr. Richards, you're speaking about evidence in these counties. Would you take a look at El Paso and tell me how, with sixty percent of the voters, --

MR. RICHARDS: I can tell you some of it, yes, Your Honor.

QUESTION: -- minority citizens, it can be said that the members of the Legislature from El Paso were not responsive to the needs of sixty percent of the people whom they represent?

MR. RICHARDS: Well, first, let me point out -- or let me at least point out first that the fact that there was perhaps a numerical majority, it was also the argument made by the State with respect to Bexar County in the initial case.

The fact is, however, that in El Paso County, whereas there was a numerical majority, there was 38 percent of the registered voters were Mexican American, and participation figures were even lower than that.

And I think what the court was saying in El Paso County was the same thing the court said in respect to Bexar

County. That taken together with historical factors, including the poll tax and all the things that have served to diminish Mexical American participation in Texas, operated very frankly in El Paso County with a great deal more force than it did in Bexar County.

I don't like to get into numbers, but the numbers, frankly, are that -- as my good friend, Judge Cobaugh says, -- since reconstruction there have been at least five Mexican Americans elected to the Legislature from Bexar County, and from El Paso only four. At the time the case was tried, not a single member of the El Paso Delegation in the Legislature was Mexican American. I think --

QUESTION: What evidence is there that the members of the Legislature were unresponsive to a majority of the population?

MR. RICHARDS: Well, I --

QUESTION: Is there evidence in the record?

MR. RICHARDS: I would not argue as to the current delegation of the Legislature, I do not think that there is evidence that supported that particular finding. There certainly is evidence in a finding that historically there had been unresponsiveness. In fact, one of the persons who testified was a former Senator there, and he testified that he had proposed an abolition of the poll tax, which the trial court, I think, quite properly found to be evidence of

unresponsiveness in light of the history of the poll tax, as it fell upon Mexican Americans and blacks in Texas.

QUESTION: Well, why shouldn't the district court pay attention to the actual current situation when it makes its judgment? If at the time it decides there are representatives of the minority being slated and elected in a district, should the district court nevertheless say that historically this hasn't been so, and therefore we're going to disestablish the multi-member district?

MR. RICHARDS: Well, I think it could -- excuse me, I think it should pay attention, and I think it did pay attention. I'm saying here that in El Paso County, for example, at the time this case was tried, no Mexican American served in the -- none of the four-member delegation or five-member delegation actually from El Paso had served in the Texas Legislature. And that was part of the facts of that case.

QUESTION: Unh-hunh.

MR. RICHARDS: In Nueces County, when the facts --

QUESTION: What about at the time of the court's opinion; is that true?

MR. RICHARDS: Yes, the district -- I'm sorry, that is the fact, at the time of the court's opinion. There were only, as I say, four -- four in the history, in a county that constitutes a numerical majority. And I don't mean to suggest

that this is purely a numbers game.

The testimony in El Paso County is, from a former Democratic County Chairman, that there was sufficient --

QUESTION: Well, what if between decision and appeal the fact situation changes dramatically?

MR. RICHARDS: Well, all right. I don't know that they have changed dramatically -- well,the facts --

QUESTION: Well, let's assume that they did, what would you suggest that the appellate court should do?

MR. RICHARDS: Well, I suppose the facts could change to moot the case, the facts could change so dramatically that it might require a reconsideration.

I would suggest that there has been no such dramatic change in Texas. There is now Representative Paul Moreno who has been elected from El Paso, so there now sits one Mexican American in the El Paso Delegation.

But -- and Bobby Webber lost again in Fort Worth; Al Price lost again in Jefferson County. I mean, we can go either way, that the black candidates that we were proving about, and they say well if they just try again it will be better; they tried again and they lost. So, I mean, it really cuts both ways.

We suggest that there has not been a significant change in the picture in Texas, with the possible exception of Travis County, which is a very specialized breed of cat,

and, as Mrs. Levatino points out, there has been a change there; more attributable, I think, to the 18-year-old vote than to any diminishing of prejudice on the part of the electorate.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Richards.

Mr. Gladden.

ORAL ARGUMENT OF DON GLADDEN, ESQ.,

ON BEHALF OF APPELLEES ESCALANTE, ET AL.

MR. GLADDEN: Mr. Chief Justice, and may it please the Court:

I will be discussing Tarrant County, which the primary city in Tarrant County is Fort Worth; we're adjacent immediately to the east of Dallas County, and I feel sort of that what's good for Dallas County perhaps is good for Tarrant County. And that we would like to participate and share their benefits of this Court's action relative to multi-member districts.

QUESTION: Before you get on with that, let me ask you this: If a particular district, with sixty percent representation of a minority, or any other group, consistently elects a non-minority group, what inferences are to be drawn from that?

MR. GLADDEN: If a sixty percent --

QUESTION: Minority consistently elects someone

not in the minority group --

MR. GLADDEN: I don't understand the Court, I'm sorry, about the sixty percent minority. In minorities --

QUESTION: Well, suppose the district is sixty percent combined Mexican Americans and Negroes.

MR. GLADDEN: Black, oh, I see. Okay.

QUESTION: But they consistently elect whites, what argument is to be made of that?

MR. GLADDEN: I don't think that situation exists in Texas, unless it perhaps exists in Hidalgo County, where there is a substantial Mexican American, in essence a majority; and they elect both whites and Mexican Americans.

In Tarrant County we've got a situation which, unlike Mrs. Levatino suggested, is not a small district. It has a population of 675,000. Some 60,000 more than the State of North Dakota, that this Court considered in the Chapman case.

It has nine members that are all elected at large. It has 82 percent white, or about 550,000; it has 12 percent black, or about 80,000; and 6 percent Chicano or Mexican American, or about 40,000 population.

No blacks have ever been elected from Tarrant County to the Texas Legislature.

Now, I'd like to qualify the words "Tarrant County" and "District 32", because actually I'm talking about District 32 here.

Prior to 1972, Tarrant County was a single-member district. As of 1972, the Legislative Redistricting Board trimmed the excess population from the rural areas of Tarrant County and put them in an adjoining district as to as to reduce it to a nine-member district.

QUESTION: The elections there, are they by Party?

MR. GLADDEN: No, Your Honor, they --

QUESTION: So it's a one-party operation, but it's just a head-to-head race, is it?

MR. GLADDEN: We have a Primary system in Texas. A nomination in the Democratic Party in Tarrant County is tantamount to election in Tarrant County. No Republican -- just as Blacks and Chicanos, there has never been a Republican elected in Tarrant County or in District 32.

QUESTION: How difficult is it to get on the Primary ballot?

MR. GLADDEN: It is not difficult at all to get on the Primary ballot. We have $100 -- we used to have $100 filing fee, I guess no filing fee now, thanks to this Court.

QUESTION: How many signatures are required?

MR. GLADDEN: None. You can just go in and sign up and get on the ballot; but I think --

QUESTION: Do you have to sign up for a place in your county?

MR. GLADDEN: Yes, you do have. It is a place

system.

QUESTION: You have to pick your opponent.

MR. GLADDEN: This is a place system. Or your opponent picks you.

We have not only a place system, and this again --

QUESTION: But you're not going to get picked unless you're in.

MR. GLADDEN: That's very true.

May I suggest to the Court, first of all, an error in our brief. On page 46 we cited Whitcomb for the proposition that there were sub-districts within Marion County. And I apologize, that is not true. There are no sub-districts in Tarrant County or in District 32, to require a person to live in any geographical area.

We do have a placing system, where you've got to pick place one, place two, place three, place four, place five, so on through to nine. The numbers of people who pick a particular place depends upon, first of all, the confusion of the circumstances, and the fellow that you want to run against.

QUESTION: So you say that -- you must say, then, that there's complete access to the ballot.

MR. GLADDEN: I don't think there's any question but what blacks, even --

QUESTION: And slating -- slating is beside the point

as far as access to the ballot is concerned.

MR. GLADDEN: No, no, slating is not --

QUESTION: It may not be beside the point as to who wins.

MR. GLADDEN: Slating is of concern only on who wins, not as to access of the ballot.

QUESTION: So there's complete access to the ballot.

MR. GLADDEN: No question about it. Any black or any Chicano that has --

QUESTION: So you say that it really is a function of discriminatory voting that has kept blacks off the --

MR. GLADDEN: No, I do not, Your Honor. I say that it is an action of discriminating slating. There are slating procedures --

QUESTION: Well, I know, but if all a Negro has to do is to go ahead and pay his hundred dollars, he's on the ballot.

MR. GLADDEN: Okay. But the evidence is that there are slating pre-Primary slating procedures, there is a Downtown Seventh Street Business Group that slates candidates.

QUESTION: Well, I know, but it nevertheless -- whatever the results are, they are -- they can't keep Negroes off the ballot.

MR. GLADDEN: That's very true.

QUESTION: All they can do is just --

MR. GLADDEN: Just keep them --

QUESTION: -- organize the vote.

MR. GLADDEN: All they can do is just keep them from winning, Your Honor.

QUESTION: Well, that's what I mean. Then, so the discrimination is a function of the results of the polls.

MR. GLADDEN: Yes, there's no question about that, that practice.

QUESTION: And you're suggesting that consistent discrimination at the polls against blacks who are running for office, a systematic discrimination against them, is a sufficient reason for disestablishing a multi-member district?

MR. GLADDEN: Taking into consideration all the other factors --

QUESTION: Which wasn't the issue at all in Whitcomb.

MR. GLADDEN: No, it wasn't the issue in Whitcomb.

What I'm saying is, in this instance, that slating processes go on, that in order for a person -- that the evidence in this case is that in order for a person to have a meaninful opportunity to be elected, he must have been slated either by the Labor Liberal slate --

QUESTION: Or by the Seventh Street group.

MR. GLADDEN: -- or by the Seventh Street group.

QUESTION: Or get enough votes at the polls.

MR. GLADDEN: Well, the evidence is that you don't get enough votes, and the State's witnesses, when called upon to cite one example of one Legislator who had been elected from Tarrant County that did not have either one, the business community on the one hand, or the Labor Liberal community support slating on the other hand, and Representative Gib Lewis thought and thought and thought and could not come up with one single member of the Legislature in the history he had been aware of.

So it doesn't get you elected to be slated by the labor people, it doesn't get you elected to be slated by the business group; but you can't make it without being slated by one of them.

QUESTION: That's a little bit like the situation would be in many States, you have to be supported by the Republicans or by the Democrats.

MR. GLADDEN: That's very true; that's very true.

If I may go ahead and talk about --

QUESTION: In order to realistically have a chance to be reelected.

MR. GLADDEN: Yes. And again, from a meaningful opportunity of getting your name on the ballot and a meaningful opportunity to be endorsed and elected is the question. No black has ever been elected, and if I may show --

QUESTION: Were blacks ever slated?

MR. GLADDEN: Blacks were slated twice.

QUESTION: Were they elected?

MR. GLADDEN: No, sir. No, Your Honor. The first in 1968, the first black ran in 1968. In 1968 the white community voted 75 percent for the white candidate, 25 percent for the black. The black community voted 89 percent for the black candidate and 11 percent for the white candidate. And he lost.

In 1972, --

QUESTION: So I guess the fellow from the other slate won?

MR. GLADDEN: Yes, the fellow from the business slate won. The black was slated by the Liberal community.

QUESTION: It would be interesting if both slating organizations slated a black sometime.

MR. GLADDEN: It sure would, but the business slate has never slated a black.

In 1972, the -- a black was slated by the labor group, and he ran a very respectable race. He spent $25,000 of his own money, and drawing only 1400 or so from the black community. He was a prominent businessman. He ran a no-distinguishing type campaign and did not make disclosures that he was black. And in the circumstance cited again in the Chapman case, with a confused nine-place system, the community

probably didn't know about Mr. Webber being black, they knew about the fact that he was a prominent businessman, and he again picked up 25 percent of the white community; but lost 75 percent. And about 85 percent of the black community. And he --

QUESTION: Is this any different than if you had, instead of the Seventh Street Group and the Liberal Labor quota, the Republican and Democratic Parties, and your argument was that neither one is ever -- has ever chosen a Negro?

MR. GLADDEN: In essence, yes. And it's also the same circumstance that Justice White raised about the fact that if you do slate a black, does he ever win?

And the answer is, no, he never wins; he never has won, and Bobby Webber, the black who ran in 1972 and came close, the State made issue at the trial of the case, saying, Well, boy, you know old Bobby just ran so close with his $25,000, don't you think he's going to win next time?

He dropped to 43 percent, because it was suggested in the trial of this case that it was because there was a greater familiarity with --

QUESTION: But I don't think you've answered my question.

MR. GLADDEN: Oh, I'm sorry, Mr. Justice; would you repeat the question?

QUESTION: Well, I won't repeat it, I'll ask you

another one.

MR. GLADDEN: All right.

QUESTION: Is your argument basically that in a system where you have open access to the ballot, as you apparently do in Fort Worth, that if the two major political factions don't nominat Negroes, the federal court has to step in and do something about the districting?

MR. GLADDEN: I think that if in Fort Worth, if in a multi-member district, where you see a submergence of a minority interest, that does not have access to the slating process,yes, I feel like --

QUESTION: Well, you wouldn't say the same thing if the multi-member district were disestablished and the same thing occurred within the single-member districts? You wouldn't say that?

You say it couldn't happen because of the majority -- because the so-called minority would be a minority in some districts; but it could happen?

MR. GLADDEN: I would say it was --

QUESTION: Apathy could make it happen even in single-member districts, and then you wouldn't have much to complain about.

MR. GLADDEN: Yes, I would -- I would say that --

QUESTION: Well, I doubt if you could win.

MR. GLADDEN: I would say if it was done with

intent to dilute the minority strength, that it would.

QUESTION: Well, dilute -- intent to dilute, like if somebody intends to beat a Negro by the vote at the polls, you're not going to upset that very easily.

MR. GLADDEN: Well, this is very true.

Now, then, if I may --

QUESTION: Mr. Gladden, before you leave this point --

MR. GLADDEN: Yes, Your Honor.

QUESTION: -- has a Republican ever been slated in Fort Worth?

MR. GLADDEN: Not to my knowledge by the business group or the labor group.

QUESTION: But you said there had never been one elected.

MR. GLADDEN: Well, there have never been any serious challenges in House races. There is presently in the southern part of the county a senatorial district that a Republican presently holds. But there's never been one County Legislator, countywide.

QUESTION: Are Republicans a party to this litigation?

MR. GLADDEN: Republicans were parties plaintiff to this litigation --

QUESTION: Are they still in the case?

MR. GLADDEN: Yes, they filed claims, and --

QUESTION: Which counsel represents them?

MR. GLADDEN: Mr. --

QUESTION: It's hard to tell, isn't it?

[Laughter]

MR. GLADDEN: Some doubt as to that.

Okay. Okay. Mr. Jim George of Austin, Texas, Your Honor, represented the Republican Party.

QUESTION: And so you are making the same claim of discrimination against Republicans that you are against minorities?

MR. GLADDEN: The Republicans made that same claim, Your Honor.

QUESTION: Well, are you making it?

MR. GLADDEN: We carry it forward, yes. We feel --

QUESTION: You are making it? You are making it?

MR. GLADDEN: I think so. I think that political philosophy and economics also was an issue in our case, of economic discrimination.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mrs. Levatino?

REBUTTAL ARGUMENT OF MRS. ELIZABETH B. LEVATINO,

ON BEHALF OF THE APPELLANTS

MRS. LEVATINO: Yes, Your Honor, I would like to make just a few very short and brief comments.

First of all, to answer the question which you posed to Mr. Gladden, Mr. Chief Justice -- in other words, what would be the comment on a minority, high minority inhabited district which consistently elects a non-minority person. I think that the inference from that must be that they like the people that they represent, and those non-minority members do represent their interests well.

I think, with regard to Tarrant County, it must be remembered that blacks are part of these coalitions, that blacks have backed Anglo people who have also won, and that the Labor Liberal coalition needs the black votes and searches for them.

This is not the case of the DCRG, as you saw in Dallas County two years ago.

Mr. Richards mentioned that according to Barbara Jordan the change in the Texas -- the racial makeup of the Texas Legislature was solely attributable to reapportionment. I would like this Court -- I would like to point out to this Court that we now have permanent voting registration in this -- in our State, which was not the case when this first round of Regester was fir heard. The voting rolls have risen from

3.8 million to 5.2 million since 1971.

Additionally, the poll tax has now been gone since approximately 1966.

The filing fees have been abolished, basically are brought down very low, either $150 or one percent of the people voting in the prior race, not to exceed 5,000 signatures.

The access to voting has certainly improved dramatically. We have roving -- deputy registrars for voting, you can register to vote by mail, and your registration is automatically renewed if you vote once every three years.

I submit that these are some of the reasons that there also has been a dramatic change in Texas.

Additionally, the statement was made that in Jefferson County, COPE, the political arm of AFL-CIO, never endorsed a minority. I would submit that the record reflects that Mr. Price was endorsed as an acceptable candidate in 1972. He then received 48 percent of the vote.

And also an endorsement by COPE was not tantamount to election, as the record reflects, both Representatives Powers and Doyle, who were in that Delegation at the time of the trial of this case, were elected without that endorsement.

With regard to McLennan and Travis Counties going from Ward City Council politics to the at-large election, I would like to point out that those at-large elections have resulted in two blacks being elected to the McLennan City

Council, and one black being elected twice to the Austin -- or -- Austin, which is the major city in Travis County, Council.

Again I do not want to get into plans in the various presentation of the plans, I only want to say that while the State never acquiesced by not presenting plans, we maintained throughout the trial that the court, if it found any districts unconstitutional, should allow the Legislature to reapportion. It had never been given that opportunity under court order.

Additionally, with regard to the plan presented in Jefferson County, as was stated here earlier, Jefferson County is composed of Beaumont and Port Arthur; the plan which was submitted, as agreed to by the members of the Delegation from Jefferson County, would have made Beaumont one district, the mid-county area one district, and Port Arthur one district.

However, admittedly, splitting up the black votes -- however, previous plans started at one end of Beaumont, picking up as many blacks as they could, coming all the way through the mid-county area and down into Port Arthur; thereby, admittedly, maximizing the minority strength in that district.

I submit that the legislative intent is reflected in the plans we did submit, was that of the members of the Delegations, and we sought to do no more, while maintaining our position that the Legislature should have been given

the right to redistrict if necessary.

Again I submit that the record in this case is insufficient for a federal court to wipe out the entire State policy of multi-member districts, based on the evidence and based on the factors utilized by the federal court below.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Levatino.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:21 o'clock, p.m., the case in the above-entitled matter was submitted.]

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