In the

Supreme Court of the United States

PETER H. BEER, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA, et al,
and JOHNNY JACKSON, JR., et al,

Appellees.

No. 73-1869

Washington, D. C.
November 12, 1975

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Wednesday, November 12, 1975

The above-entitled matter came on for reargument at 1:36 p.m.

BEFORE:

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

APPEARANCES:

JAMES R. STONER, ESQ., Washington, D. C. , for the Appellants.

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C., for the appellee United States.

STANLEY A. HALPIN, JR., New Orleans, Louisiana, for the appellees Jackson, et al.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Beer against the United States.

Mr. Stoner, you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES R. STONER IN BEHALF OF APPELLANTS

MR. STONER: Mr. Chief Justice, and may it please the Court: The case before the Court this time is reargument of the New Orleans redistricting case. It involves the City of New Orleans. The case involves geography, the case involves the evolution of a political system whereby those people can express their views and be governed by their elected officials.

The City, as is most cities in our country, has a black population and a white population. The case comes before the Court pursuant to the Voting Rights Act of 1965. I refer the members of the Court to page 620 of the appendix and I call attention to a map of the City of New Orleans which shows the distribution of white and black voters in the City of New Orleans.

QUESTION: Isn't there a map in our appendix here?

MR. STONER: It is, your Honor. It is in the appendix at page 620.

QUESTION: 620.

MR. STONER: And it is a color map showing the

black voters in red and the white voters in green. And I should like to call the Court's attention to the fact that this map very graphically shows the distribution of black voters throughout the city of New Orleans, and it shows very graphically the distribution of white voters throughout the city of New Orleans, and it shows that there are substantial blocs of black voters in every section of the city of New Orleans.

Now, going back in time to May 1, 1954 -- and I might say that this was substantially before the Voting Rights Act of 1965 was enacted into legislation, it was substantially before the one-man-one-vote rule was decided by this Court -- the City of New Orleans adopted a reorganization of its city government. It adopted a city charter which was called the Home Rule Charter and which adopted the Mayor-Council type of government. It established for the first time a Mayor who had the primary responsibility of being Executive of the city, and it established a City Council with primarily the legislative function.

QUESTION: That was what year?

MR. STONER: That was on May 1, 1954. 1954.

The Home Rule City Charter established a City Council as the legislative body consisting of two members who would be elected at large, that is, from the entire city by the entire population of the city of New Orleans.

It also established five single-member districts, so that the entire City Council, the legislative body, consisted of seven members, two elected at large, five elected from individual districts within the city.

Now, the City Charter, the Home Rule Charter adopted on May 1, 1954, had another important provision, and that important provision made it mandatory for the City Council to redistrict itself, that is, the five individual districts, after every decennial census. This was an attempt to require that each single-member district would be made up as closely as possible an equal number of voters.

In 1961, following the first decennial census after the adoption of the Home Rule Charter, the City Council did in fact redistrict itself. Now, at that time there were no challenges to the redistricting, and members were elected from the five individual districts and also, of course, from the two at-large districts.

In 1969, the present City Council for the City of New Orleans was elected. They took office in May of 1970. Of course, 1970 was a census year, and under the requirement of the City Charter, the City Council was required to redistrict the five districts following that census and prior to the next election which would have been held, under normal schedules, in the fall of 1973 with the elected officials to take office in May of 1974.

QUESTION: These are four-year terms.

MR. STONER: They are four-year terms.

QUESTION: Yesterday we had a grandfather clause enacted by this Council.

MR. STONER: These are four-year terms for each member of the Council. That is the at-large members as well as the members from the single-member districts.

Now, in 1965 Congress passed the Voting Rights Act of 1965 and its application to the change of the redistricting is not attacked in this case. Everyone admits that it was the City Council, having redistricted itself following that Act, was required to submit the plan to the Attorney General.

Now, the City Council adopted a plan of redistricting. It held extensive public hearings. During the extensive public hearings, it was evident that large segments of the community felt that the size of the City Council should be increased. The Council adopted a plan to increase the size of the City Council from seven members to eleven members, retaining two at large and proposing to elect nine members from single-member districts. This was submitted to the electorate, it was defeated.

Again, the City Council adopted another plan whereby the City Council would be enlarged from a seven-member council to a nine-member council, two to be elected at large, seven from single-member districts. This plan was presented to the

electorate, it was defeated.

Now, at that point the City Council was faced with the mandatory requirement that it redistrict itself and that it redistrict itself in accordance with a seven-member Council, which was the law, it having submitted the eleven-member proposal and the nine-member proposal to the electorate and having been defeated. At that time the City Council adopted Plan II, and Plan II is the plan which is now before this Court.

It submitted the plan to the Attorney General for approval, the Attorney General did not approve the plan, whereupon the City Council believing that the plan was a reasonable and rational plan for redistricting itself filed suit in the United States District Court for the District of Columbia asking for a declaratory judgment. That court denied the request for the declaratory judgment, and it is from that decision which we have appealed and which brings this case to the Court at the present time.

May I refer the Court to page 621 of the appendix which shows a map of the City of New Orleans and the districts, the various districts as they were established in 1961, and indeed which is the present district plan.

QUESTION: What page? Is this 621?

MR. STONER: 621, Mr. Justice.

The City Charter required that the Council redistrict

itself. I should like to point out the geography. I mentioned in my opening statement that geography is involved in this matter. If you will look at the City of New Orleans, you will see that one of the predominant geographic features is the Mississippi River which flows through the city. There is only one part of the city that is west of the Mississippi, and that in the plan which I have referred to is a part identified A(part) and that section of the city is west of the Mississippi and is known as the Algiers section.

QUESTION: And it certainly is separated from the other part of A in 61, isn't it?

MR. STONER: It is, your Honor.

QUESTION: Not connected at all.

MR. STONER: It is substantially separated. And this is an important factual feature in the consideration of Plan II, which is before the Court.

Let me say that there is substantial evidence in the record which shows the citizens of Algiers were very interested in having a bridge across the Mississippi River. They wanted some way to get -- I should say another bridge. They wanted some way to get from the western part of the city on the west side of the Mississippi to the central and main part of the city. The many citizens across the river, that is, in the main section of the city were opposed to this, and this was a very hotly debated issue. Many people wanted the bridge to

be somewhere else in some other section of the city. So this factor was an important factor in considering the reapportionment, the redistricting of the city.

Referring to page 624, which is likewise a map of the city and which shows Plan II, which is the plan before the Court today. You will note that in the plan that has been adopted as Plan II, the section of Algiers is connected with a contiguous area across the Mississippi River so that District C comprises the entire Algiers section of the city as well as some of the riverfront section of the city and up into the major downtown area of the city and in fact running to Lake Pontchartrain, which is at the very top of the page.

QUESTION: Page 624?

MR. STONER: On 624. That is Plan II, namely, the plan which is presently before the Court.

QUESTION: Right. And I take it that's the same, really, as that on 620.

MR. STONER: It is, your Honor. It is, your Honor; 620, however, has the color added showing the distribution of black and white voters in the city.

Now, the City Council adopted this plan, taking into consideration numerous factors, not the least of which is the importance of the Mississippi River and the commerce and the industry that is along the river to the City of New Orleans, to the well-being of the people of the City of New Orleans.

And there is evidence in the record to show that Council members believed that it was important that each section in the city, that is, each district, should have a part of the geography of the riverfront in the district so that each member of the City Council would have the economic interest of the effect of the river on the population and on the life and industry and commerce of the city.

You will note that Plan II does in fact contain a part of the river frontage in each of the five member districts. We submit that Plan II is a reasonable plan, that it has been adopted taking into consideration reasonable, rational reasons for the adoption of the plan and the division of the city in the districts as presented.

QUESTION: Division D, of course, is pretty short on the river compared to the others, isn't it? Does it make any difference? Or maybe there is a concentration of industry along D.

MR. STONER: I believe that the lower part of the city is substantially a dock area with --

QUESTION: The river area for D is far less than all of the others.

MR. STONER: It would appear to be, yes, sir, it is.

This is the plan that was presented to the United States District Court for the District of Columbia, and this is the plan out of which has come the appeal which we have

before the Court today.

The most important aspect of the error which the district court made was its error in holding that the two at-large seats on the City Council were affected by and must be included in any plan that is considered under the Voting Rights Act of '65. We submit that this is patently wrong. The City Charter creates two seats whose members are elected at large, it creates the five districts also. There has been no change, no change, in the two at-large voting system since its adoption in May 1 of 1954.

Now, the Voting Rights Act applies to any changes that are made in voting procedures following, I believe the date is November 1, 1964.

QUESTION: I gather from the supplemental brief the Government agrees with you on this point.

MR. STONER: It does. That is my understanding, and I believe that is a change --

QUESTION: I gather they argued it last time, as I recall.

MR. STONER: I believe that is correct.

We submit that the lower court erred in holding that the two at-large seats were changed. We submit that there was in effect a two-segment voting procedure. One was electing two Council members at large, and the other was electing five members from single-member districts divided in equal

population numbers. We submit that the at-large seats are not in any way affected by this. We submit that they are not affected by the Voting Rights Act of '65, and that they should not be considered. The court erred and substantially erred in holding that the two at-large seats were affected by the redistricting plan.

I might point out that the two at-large seats, in addition to their regular responsibilities as Council members, have other responsibilities that are prescribed by the Charter. For instance, the chairmanship of the City Council rotates every four months between the two members at large. Furthermore, the two members at large sit on various city agencies. One is the reduction of debt -- that is not the correct term, but it is described in our brief -- the Stadium Commission, and so forth. So that the two members at large have somewhat different responsibilities and responsibilities that are over and above the responsibilities of all the other members of the City Council. So that in effect the plan -- and again I can't emphasize too strongly that this was a plan adopted back in 1954, long before the Voting Rights Act and before any other attacks. And that plan, incidentally, was never attacked by any voter, to my knowledge, that claimed that there was something constitutionally wrong with the City Charter adopted in 1954. It had never been attacked.

Now, in this respect, this case is different than

many other cases that have come before this Court under the Voting Rights Act of '65. This is not a case where a city has gone out and annexed land. It is not a case where a city has changed its basic philosophy of electing its legislative body. It is a case where there has been no change of any kind in the City Charter and in the establishment of this City Council, except that following the mandatory requirement that the charter required, namely, that every ten years, after every decennial census, it must redistrict itself so that each of the single-member districts are divided as nearly as possible into districts of equal population.

So I submit to the Court that this case is different than other cases that have come before the Court. It is not a case where there is any attempt or any blatant attempt or any apparent attempt or any so-called attempt to change a city form of government or to change an election procedure. It is merely changing the districts of the five individual districts as is required by the forward-looking, and I submit it was a forward-looking, City Charter that was adopted in 1954.

So the case is unique and the case is different from other cases that have come before the Court in that respect. And the only matter before the Court is whether or not the five-member plan encompassed in Plan II is a reasonable plan and a rational plan and that does not violate the Voting Rights Act of 1965 and does not deny or abridge the right of any

citizen to cast his vote in a municipal election.

Now, we submit that the court below erred in its application of the test. We say that the proper test to be applied to this plan is whether or not it is a reasonable plan, whether or not it is a rational plan, whether or not it is based on reasonable considerations that a city council should take into consideration when it adopts a plan of redistricting itself.

We have set forth the criteria which have been used in our brief which were used in adopting the plan.

I might say parenthetically that traditionally the lines of the various districts have run in a north-south manner. Now, this is not happenstance. The City of New Orleans, I guess, as we all know, is built basically on a swampland, and in recapturing the land numerous canals were built to take away the excess water, and so forth. Now, these canals basically run in a north-south direction, and they basically run from the Lake Pontchartrain area to the Mississippi River.

If you will note, the 1961 plan runs in a north-south direction. Indeed, the old ward lines in the city ran in a north-south direction. And I believe those wards were established in the late 1800's or early 1900's. So that traditionally in the city the main arteries of the city -- I am talking canals and in later years the streets, the

predominant streets, do run in a north-south direction.

The plan has great basis in reasonableness. It has followed the traditional lines of the city, it has followed the traditional movement of the city. It has taken into consideration the important economic interest of the Mississippi River and the commerce and jobs that it produces. In addition to that, referring again to the population spread, I must point out that the black population is spread throughout the city. It is not a population that is concentrated in one area of the city as we all know happens in many of our great urban areas. Rather, the black population is spread throughout the city, and I submit that indeed the plan that is before the Court is a plan which has members of the Council representing black voters, representing white voters, representing the interests of the Mississippi River, representing the interests of the Lake Pontchartrain area. It is a diversified interest, and I submit that in a plan of government this is a strength. It is the strength of the system and may in fact be the genius of the Mayor-Council form of government adopted by the City of New Orleans, namely, it has the two at-large seats which represent all of the people and are answerable to all of the people of the City of New Orleans. In addition to that, it has single-member districts which are answerable to the people within that district, but at the same time, rather than being answerable only to one segment

of the society, one segment of the community, they are answerable to a broad spread of interests and therefore it would appear that members of the Council who are answerable to broad segments of the population, that are answerable to broad economic interests, to broad social interests will together provide a better government, better form of government, than will a number of members on a City Council, each one of whom is answerable to a very tight segment of the population.

We submit that this is one of the great strengths of the plan that has been submitted and is before the Court.

Now, the lower court made one other serious error that we feel is important and should be brought to the attention of the Court at this time in addition to those fully expressed in our brief. And that is that the district court has said that the burden of proof on the city is the burden of proving that the plan presented is the only, and I quote "only" plan that is feasible. We submit that this is an improper burden of proof. We submit in a declaratory judgment the preponderance of the evidence should be the test that no reasonable person can assume that in the myriad problems involved in a redistricting that there can be only one plan. We submit that the court erred in that.

Mr. Chief Justice, may I reserve a few moments for rebuttal.

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

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE ON

BEHALF OF APPELLEE UNITED STATES

MR. WALLACE: Mr. Chief Justice, and may it please the Court: As we see the case, it presents two issues for review here. The first is a very narrow issue addressed in our supplemental brief, and that is whether the continued existence of the two at-large seats was a matter requiring preclearance under section 5 of the Voting Rights Act. As we explain in our supplemental brief, we take a generous view of what constitutes the change that requires review under section 5, but we don't take a view that stretches this far because there is no reconsideration or readoption of the two at-large seats and their status and voting strength on the City Council, on the seven-member Council, remains unchanged.

QUESTION: Is there a generality that as long as a change does not involve some harm to the black voters as compared to what it was before that the Attorney General has no power?

MR. WALLACE: That is not our standard, Mr. Justice. That seems to me to be a question going to the merits once section 5 applies. And it's a matter of approach to the merits.

QUESTION: Suppose someone says to you, Look, this plan may be bad, but it's no worse than the prior plan. We

didn't hurt anybody as compared to the prior plan. There is no change in that regard. Does section 5 apply?

MR. WALLACE: Well, if there is a change in the procedure, there is a redistricting, section 5 applies, and we think that's an erroneous substantive standard under section 5 which I will get to in a moment on the other aspect of the case.

We think the question of the two at-large seats is an extremely narrow one here. It was a question which was not necessary to the district court's judgment, but on reflection in this case, we think that this Court does have to say something addressed to it because otherwise it will govern what future plans can be cleared by the Attorney General upon submission by New Orleans.

QUESTION: What is the provision of the Act you rely on to support the district court's selecting as the standard the"only feasible plan"? What provision of the Act generates that as the test?

MR. WALLACE: I don't think that was based on any provision of the Act.

QUESTION: Where do they get the authority if it's not of the Act?

MR. WALLACE: I think that was the district court's approach to attempting to assess whether the plan has the purpose or it had the effect of abridging the right to vote,

purposes of section 5 than this Court articulated it in White v. Regester and Whitcomb v. Chavis in a quotation which appears on page 15 of our principal brief.

QUESTION: Even if there is an improvement, it still may violate the statute.

MR. WALLACE: If the effect or the purpose is to deny or abridge the right to vote on the basis of race, there is a statutory violation even though it's not as bad an abridgment as it was before. That's always been our reading of the Act and our administration of the Act.

QUESTION: And even though it would survive any sort of constitutional attack.

MR. WALLACE: Well, there is a difference in the burden of proof under the Act, and I would say, yes, substantive as well on the basis of the prophylactic intent expressed in the Act.

QUESTION: Mr. Wallace, what if the City Council sits down and says, this existing plan that we have now, that wasn't subject to the Voting Rights Act does seem to us a little bit unfair to blacks, so we are going to give them a better break. And they decide to pass this, assume that this corresponds to that description. You say, then, that even if it can be shown in the abstract that this plan has the purpose or effect, even though it's an improvement over their prior lot, that it's within the Act.

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MR. WALLACE: That is our view of the Act, because the Act was designed to enforce the 15th Amendment. And when someone submits a proposal to us under the Act, we have to see whether it meets that stutory purpose.

QUESTION: Don't you judge intent on the basis of the circumstances that existed at the time?

MR. WALLACE: It may be that they can show that the purpose was not to deny or abridge the right to vote, but they also have to show that the effect is not to abridge or deny the right to vote.

QUESTION: As compared with the previous plan?

MR. WALLACE: We don't think it's as compared with the previous plan, because that would put us and the district court here in the position of approving under the Act of plans that don't meet even the substantive standards of the 15th Amendment and then would be subject to suit under the 15th Amendment,where the Act was designed to have the opposite effect, a prophylactic effect.

QUESTION: I don't understand again why you say that the two at-large seats are implicated in this case, or at least by section 5.

MR. WALLACE: Well, if they were reconsidered or readopted in any way, we would have said that they were a change, but they have existed in the same status since 1954 under a City Charter which does not provide for their

readoption or reconsideration. The charter provides a separate provision that the five district seats should be redistricted, and that redistricting does not affect the status of the two at-large seats on the seven-member Council or the voting strength of the two at-large seats. There has been no reconsideration or readoption of the two at-large seats since the --

QUESTION: Do you think the Richmond case has any relevance to this case?

MR. WALLACE: Only marginally, Mr. Justice, because the annexation problem is a somewhat different one under the Act.

QUESTION: You confine Richmond to annexation and not providing some general standard for section 5 cases?

MR. WALLACE: Well, I think it's consistent with the general standard that's been adopted in the Allen case and all the subsequent cases as it applies in particular to the annexation context.

QUESTION: Would you have the same view of the two at-large seats, Mr. Wallace, if there had in fact been an annexation so that you had an enlargement of the --

MR. WALLACE: I think then you would have quite a different case because they would be representing different people.

QUESTION: The annexation unquestionably would, I see.

MR. WALLACE: Yes. The at-large seats would have a different electorate, and I'm quite sure we would take the position that there would be a change with respect to them. But here they have the same electorate. Otherwise there's a change every time someone dies and someone becomes 21 years old. But we don't interpret change in that fashion -- or 18 years old, I'm a little out of date on that.

The question, it seems to us, and the question resolved correctly by the district court is whether the standards adopted by this Court and developed by this Court in the context of multi-member districts in White v. Regester and Whitcomb v. Chavis, also apply to single-member districts, and I am talking about the standard that we have quoted on page 15 of our brief, that the political processes leading to nomination and election were not equally open to participation by the group in question, that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice.

QUESTION: In fact, that language is in the context of the 14th Amendment issue, and here we have a statutory issue which related, if to any part of the Constitution, to the 15th Amendment.

MR. WALLACE: That is correct. But if anything, the 15th Amendment would be an a fortiori case protecting the voting strength of the minority voters affected.

QUESTION: The issue here is a statutory issue, is it not?

MR. WALLACE: It is a statutory issue, your Honor.

QUESTION: Wholly.

MR. WALLACE: Wholly a statutory issue, but as we argue, the statute implicates constitutional standards because it was designed to enforce the guarantee of the 15th Amendment.

QUESTION: You have told us -- tell me if I am wrong in my understanding, Mr. Wallace -- that even though the previous plan would have been valid as against either a 14th or 15th Amendment attack and even though the change is an improvement, vis-a-vis giving minority races an opportunity to vote, nonetheless it might violate the statute.

MR. WALLACE: It might. That would be a quite extreme case.

QUESTION: That's what you told me.

MR. WALLACE: Well, I don't remember the previous plan had been valid. I didn't remember that as being part of the hypothetical. But I agree with it, but I think it would be an extreme case. My answer is yes, it could happen. It might be merely for failure of proof in the section 5 proceeding, but it could happen. I think that's unlikely, and that isn't what the administration of the Act has generally involved.

QUESTION: That may well be what this case involves, might it not?

MR. WALLACE: We think not. And let me try to explain why.

QUESTION: You said that the original plan was valid.

MR. WALLACE: No, your Honor. We were never asked to express a view on that, but I would have to say that it was not.

QUESTION: What? Under the Constitution of the United States?

MR. WALLACE: No. In terms of what we would approve for preclearance purposes under section 5.

QUESTION: But that only involved a change.

MR. WALLACE: If the original plan had been submitted to us, it's a change from a theretofore preexisting plan, it would have gotten the same reaction as Plan II did.

QUESTION: You didn't approve this one, this is an improvement over the old one. Obviously you wouldn't have approved the old one if it had been a change over some predecessor. That says nothing.

MR. WALLACE: Well, let me try to say something, which is that we think the standard for multi-member districts developed in these cases has to be the same standard that applies to single-member districts, and we would illustrate that with the hypothetical that if, for example, New Orleans were changed to a City Council with seven members, all elected at large, that obviously would satisfy 14th Amendment standards

and yet there would be a substantial basis for saying that the standards of White v. Regester could be shown to have been violated by such a districting. Yet, it seems to us the result would be the same if instead of seven at-large members the city were divided into seven districts so drawn -- and this would be theoretically possible, although difficult -- that each district contains exactly the same proportion of black and white voters of the city at large, roughly 35 percent black and 65 percent white. It seems to us that you would have the same result in terms of dilution of minority voting strength which is what we read the White and Whitcomb cases to involve, a standard for determining what constitutes dilution of minority voting strength that is to provide the guidance for assessing plans submitted under section 5 of the Act.

Now, what was done here was nothing quite so crude as to draw the districts in a way that each one would reflect exactly the proportion of voting strength of the minority group in the city as a whole, but it approaches that because, as you will notice in studying the plan -- and I am sorry my time is expiring here -- in each of the districts except one the blacks are merged into a district in which a majority of whites has been put into the district by extending the district in several cases from Lake Pontchartrain to the southern extremity of the city. This was done to perpetuate

a system of districting of the city which may have been quite understandable at a time when the blacks spread throughout the middle of the city were not voting, were not registered, were not being allowed to register to vote and it was necessary to have some voters in each district so the districts were elongated in that fashion. But it seems to us as it did to the district court inappropriate to attempt to perpetuate it in the present context in light of the particular findings of the district court which we elaborate in our brief involving a prevalent pattern of bloc voting, difficulties in getting responsiveness from the City Council to the needs of the black community, whether those problems involve employment in the city government, adequate park,streets, recreational facilities in the black neighborhoods, et cetera.

MR. CHIEF BURGER: You are using some of Mr. Halpin's time now, Mr. Wallace.

QUESTION: Mr. Wallace, before you sit down, may I ask you a question? The district court's opinion is based primarily on mathematical deductions which in turn are based on total population and registered voters. In note 19 of your original brief you include figures also showing the percentage of population of voting age, and if the voting age percentage is substituted for total population percentage, the figures change, whether significantly or not I don't know, but they do change from 45 percent of total population being

Negro to 39.8 percent being Negro. I would think, and I will ask you, which do you think is more relevant, total population or voting age population?

MR. WALLACE: I think voting age population is more relevant. We had to extrapolate it from census figures because it wasn't in the record, it wasn't dealt with in the district court or in the submission of these districting plans. And there is a considerable difference. It comes out about half-way between the percentage of registered voters and the percentage of total population.

QUESTION : If you apply voting age percentage to the five seats, you come out with an entitlement to one seat, it is almost two, but it's not quite two.

MR. WALLACE: If you apply it to the five seats.

QUESTION: Right.

MR. WALLACE: But we think that you have to take into account the fact that you are districting for five members of a seven-member council and that two members are --

QUESTION: Even though you have excluded the at-large seats?

MR. WALLACE: You look at the five districts for the purpose for which they are being districted and that's to elect five members of a seven-member council, as to which the findings are two members are already the expectancy of the white vote. You have to look at the political situation

realistically. That's the teaching of all the section 5 cases.

I believe my time has expired.

MR. CHIEF JUSTICE BURGER: Mr. Halpin.

ORAL ARGUMENT OF STANLEY A. HALPIN, JR.

ON BEHALF OF APPELLEES JACKSON ET AL.

MR. HALPIN: Thank you, Mr. Chief Justice, and may it please the Court: There were a number of questions posed by the Court to which our answer is a bit different, and I would like to just move right into that.

I would like to point out to the Court that our position that the section 5 standard involved here is considerably more stringent than the standard White v. Regester or Whitcomb v. Chavis and that the inquiry, the proper inquiry of a court under section 5 is considerably more limited.

Specifically, I point out, of course we have in our brief, that Congress has just reenacted section 5 for an additional seven years with the specific intention to have the Act cover redistricting for the 1980 Census. Congress is particularly concerned, and I think the hearings and the testimony and so forth indicate that it's particularly concerned that in these areas where racial discrimination continues to be practiced, the newly enfranchised black voters will be effectively disenfranchised by line-drawing districting which will divide up black concentrations in these areas.

I think specifically this was the matter that section 5 sought to remedy in this type of case, a line-drawing redistricting case. And the inquiry should be a narrow one,and that is whether there is a significant concentration of black voting strength and whether or not a districting plan divides up that population and spreads it out into predominantly white districts. I think that is the inquiry, and I think that's exactly what is before the Court in this case.

You have significant black concentrations of populations in New Orleans in spite of what Mr. Stoner has suggested. You can walk from Jefferson Parish throughout the city for eight or ten miles through the St. Bernard Parish line and not see a white face along that band, that black belt, that parallels the river in a curve fashion throughout the city. White people live in the very wealthy sections of town out by the lake and along St. Charles Avenue to the river. The rest is left over for blacks, and these are heavy concentrations, and that plan devised by the City Council slices up that population like so many pieces of baloney,and that's what Congress intended to prohibit.

Now, inquiry as to how do you compare the previous plans, what do you compare to? I think section 5 is, Congress is very explicit, there is one triggering device. When you have a voting change, then section 5 is triggered,

it's brought into effect. And then the inquiry becomes as to whether or not the matter is racially discriminatory or not.

In redistricting cases, particularly because you have operation of the one-man-one-vote mandate, you don't have anything to go back to. You don't have a previous plan that you can really compare to, like you do in an annexation.

QUESTION: Did the court of appeals resolve the purpose question?

MR. HALPIN: No, sir, they did not.

QUESTION: It went solely on effect?

MR. HALPIN: Yes, sir.

QUESTION: What if we disagreed with them on effect?

MR. HALPIN: Well, your Honor, if you disagree with them on effect, I think the only appropriate thing would be to have the court of appeals consider and decide the issue of purpose since that is primarily a fact question.

QUESTION: Or really, I mean it was a three-judge court.

MR. HALPIN: Yes, sir, the three-judge court.

QUESTION: Sorry.

MR. HALPIN: Yes, sir. But we would submit that the City Council however was under a mandate in the first plan. Plan I was rejected. To correct the defects of that plan, I think it was quite clear the Justice Department, the

Attorney General in that instance, said the thing that you did wrong is you divided up black population concentrations. And in plain truth they didn't attempt to remedy this, but rather continued the division. I think this was the fault of the second plan as well as the first.

QUESTION: Where do you say Congress -- what provision of the Act authorizes the standard that was used by the court here? "The only feasible plan." Is there any such thing as the only feasible plan?

MR. HALPIN: No, sir. Of course, there are always many plans, and I don't think the standard is that this was the only feasible plan.

QUESTION: We can only go by what the court said it was using as a yardstick.

MR. HALPIN: Yes, sir. I think where feasibility comes in, what the Act mandates, is that where feasible these lines not be drawn in such a way that they divide up the black community. And that's exactly what the Glickstein memorandum said was the meaning of section 5, which Senator Bayh indicated was the proper statement of what the committee recommending renewal of the Act thought the Act to mean. And that is that where feasible a line should not run right through the center of black population concentrations. I think it's quite clear on the feasibility issue that this is what Congress meant in this type of case.

The standard here that I believe is quite clear that Congress has mandated under section 5 has some very practical feasible effects as well. Some standards have been vaguely suggested, I don't think the Government has really suggested a clear standard as to what section 5 -- Mr. Stoner has suggested, just a general rationality standard which I suggest would open up the floodgates to all sorts of rationalizations to justify any type of discriminatory plan. The standard that we believe Congress provided of when feasible not dividing black population communities would have certain administrative advantages in that the court would not have to make the in-depth sort of inquiry as was done in White v. Regester and so on into some very sticky political and social issues as to whether blacks are better off in a majority or a minority and the like, but rather the administration would be rather simple. It would also provide fairly clear guidelines for a city such as New Orleans when they are attempting to draw a plan which would not fall afoul of section 5.

It, of course, also leaves this area properly, I think, in Congress' hands. Congress is setting up a limited remedy, that is limited in time, it's going to expire in 1982, to provide for this particular problem that it found to exist. And that was the division of black population by district lines. It also was well aware that this is the way the Attorney General had been applying that Act when he was

dealing with plans submitted to him which involved a question of line drawing gerrymandering, if you will.

QUESTION: Do I understand your argument to be that the obligation of the city is to so carve and arrange these districts as to produce the maximum concentrated vote of the minority?

MR. HALPIN: No, sir. Our contention is that section 5 is violated when lines are drawn to divide up black population concentrations. The other side of that remedy would be in future plans not to so divide up the black population concentrations. Now, that's going to have certain effects which to some extent are going to be predictable. For instance, in New Orleans, if you don't divide up those black concentrations, you are likely going to come out with two out of five or three out of seven districts. But that's not what's compelled, that's just what in reality is likely to happen. We don't think it's maximization. Besides, we are not talking about giving any preference at all. The likely result would merely be that blacks were no longer entirely excluded from being a majority in some districts.

QUESTION: Mr. Halpin, you have cited at page 5 of your supplemental brief Senator Bayh's statement with reference to Richmond. The sentence that section 5 requires a redistricting plan in which a comparable portion of the seats have substantial black majorities, does this suggest

that on the remand here, that the plan has to be one which comes up with 39 percent of seven seats?

MR. HALPIN: No. I think Richmond is what it is, it has limited its facts as an annexation case --

QUESTION: It's only a Richmond decision. It doesn't set any general principle which will be applicable in this case?

MR. HALPIN: Well, I am certainly not asking this Court to rule that there be a particular number. That's not the standard we are asking for. We are asking for a standard --

QUESTION: You just want to affirm the standard that the three-judge court --

MR. HALPIN: Yes, sir, and I think that standard could be elucidated more clearly as a clear standard in these kinds of cases against dividing black concentrations in the manner --

QUESTION: The standard goes beyond the Richmond standard or the standard that was applied in the Richmond case? As you know, I dissented from it.

MR. HALPIN: Yes, sir. The standard that we are suggesting today --

QUESTION: Goes beyond.

MR. HALPIN: No, I don't think it goes beyond at all. It's more narrow if anything.

The particular facts of this case call for this Court, if it's going to apply this standard, to affirm the district court's ruling. If this is in violation of section 5, it would be very difficult to imagine one that is, because in this case the black population has just been divided and divided rather consistently. It's clear that there is a strong concentration of black population in this city and this population has been divided up among many majority white districts.

QUESTION: Mr. Halpin, do you think this is an improvement over what existed before? And I take it you feel if it is, it still isn't enough.

MR. HALPIN: Over the 1961 redistricting plan? No, sir, I don't know that that is necessarily relevant, but in fact it is not, for a number of reasons. And the figures in the tables might sort of lead you to that conclusion, but they are misleading because in 1961 only 17 percent of the registered voters in New Orleans were black. In 1973 when we were in district court, something like 38 percent of the registered voters in the town are black. So it doesn't make a whole lot of difference in 1961 as to what happens because blacks simply weren't allowed to register and vote, but it does make a difference now that, because of the operation of other provisions of the Voting Rights Act, blacks have been allowed to register and vote in significant numbers and now

they are divided up so that they are still cut off from the political process and they still have no effective voice in what the city does.

QUESTION: Mr. Halpin, did you say in 1961 Negroes didn't vote in New Orleans?

MR. HALPIN: In 1961, your Honor, 17 percent of the electorate --

QUESTION: But they weren't prevented.

MR. HALPIN: In 1961?

QUESTION: Yes.

MR. HALPIN: There is indeed evidence they were prevented from registering and voting by literacy tests, other devices in the Register's office. There were many suits. Evidence in the district court shows that only after the effective 1965 Voting Rights Act was there a demonstrable increase in black registration.

QUESTION: Mr. Halpin, let me go back where I was. Suppose the Council were not under the 10-year obligation to redistrict and it just went ahead and redistricted hoping that this was an improvement over what it had a year ago. Do I understand, or at least I think I do, Mr. Wallace's position anyway, that if the effect still, even though an improvement, was to dilute voting strength of one or another group, it runs afoul of section 5.

MR. HALPIN: Yes, sir, I think that's the conclusion.

I don't think that's going to happen.

QUESTION: Then what would prevent the City Council from just sitting flat and doing nothing and letting what was bad before continue to be bad?

MR. HALPIN: Well, assuming that there was no requirement to redistrict, they could do that. But that is seldom the case, and it wasn't the case in this instance. In fact, the district court in Louisiana has held that in fact they were malapportioned inviolative of the one-man-one-vote standard and it has enjoined them from continuing that plan. So that's not the case here.

QUESTION: At least on the assumption I made, good intentions mean nothing.

MR. HALPIN: Well, good intentions are half the battle, your Honor. There may well be good intentions, but intentions are ambiguous sorts of things, but even if the City Council were with good intentions, if the effect is bad, it violates the Act because that's exactly what the Act says.

QUESTION: Even though it's an improvement over what there was before.

MR. HALPIN: Even if it was in fact an improvement. But I don't concede that that will ever really happen, your Honor.

Of course, readoption of the old in districting would amount to another change under section 5, like in

Georgia v. United States. I want to make it very clear that we hold that.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Stoner, you have about 4 minutes left.

REBUTTAL ARGUMENT OF JAMES R. STONER

ON BEHALF OF APPELLANTS

MR. STONER: Thank you, Mr. Chief Justice, and may it please the Court: There are two important issues that I should like to respond to. One, there has been a statement and it appears also in the briefs and appears in the lower court's decision that the two at-large seats automatically go to the white population. And as a basis for this the lower court refers to the fact that there never has been a black elected to the City Council of the City of New Orleans.

All right. I submit that, number one, there hasn't been an election in the City of New Orleans since 1969. Furthermore, the record clearly shows that blacks have won elections to substantial positions in the City of New Orleans, and I refer to the election of Judge Morial who was elected to the Fourth Circuit Court of Appeals on a citywide basis in the City of New Orleans. He is a black. I refer to Judge Israel Augustine who was elected to the criminal district court in the entire city of New Orleans. He is a black. I refer to Dr. Spears who is a black educator and who was elected

on a citywide basis to the New Orleans Parish School Board and indeed was elected as the president of that board on a citywide basis. In addition to that, since the trial of this case in the district court, in November 1974, a man by the name of Edwin J. Lombard, a black, was elected on a citywide basis to the clerk of the criminal district court, and he defeated a white incumbent of that office.

Now, I don't know what better evidence we can bring before any court to show that blacks in the city of New Orleans can be elected to office on a citywide basis. Of course, it requires that the black community nominate and bring forward responsible human beings. When responsible human beings are brought forward, it appears that the city of New Orleans and the electorate of the city of New Orleans will in fact elect them to office.

So we must take issue, and great issue, with the statements of the lower court that blacks cannot be elected in the city of New Orleans when running at large in the city of New Orleans. We do not concede that a black cannot be elected to the at-large seats in this case.

QUESTION: More broadly is what you are telling us directed to attacking the presumption or the hypothesis, the premise, of the district court that voters in New Orleans vote as a bloc racially?

MR. STONER: The court does allude to that.

QUESTION: And you say that experience shows that as fallacious.

MR. STONER: That's right.

QUESTION: The experience over the whole country demonstrated that that's a spurious theory with a number of Negroes elected mayors, Congressmen.

MR. STONER: I believe in the 1970's that certainly is the case, and I submit that this case must be decided on the facts as they exist in 1975. And the undue emphasis on the fact of the voting situation in Louisiana and New Orleans years back, years back, has no place in the decision of this Court. This case should be decided on the facts as they exist in 1975.

My second point. We were looking at maps earlier, and I would like to call the Court's attention to the map which appears at page 625. And I represent to the Court this is the proposal that was made by the National Association of Colored People for the City of New Orleans. Now, we must agree that they have been a responsible black organization. And this is their proposal for the redistricting of the City of New Orleans. You will note that the redistricting lines run north and south. You will note that district A and district B are practically the same as that in Plan II. You will note that the most significant difference is that the Algiers section across the river is connected with section D

rather than section C. The plan submitted puts Algiers with district C. We submit that this is a reasonable plan, that Plan II follows the thinking of the black community at the time that this plan was adopted. And we further submit that we take issue with the east-west idea of redistricting which runs throughout the briefs of the Government and also of the intervenors.

Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:40 p.m., the arguments in the above-entitled matter were concluded.]