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In the

Supreme Court of the United States

CONNOR V. FINCH	76-777
V.	
FINCH V. CONNOR	76-933
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Washington, D. C.
February 28, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

PEGGY J. CONNOR, ET AL., Appellants, v. CLIFF FINCH, GOVERNOR OF MISSISSIPPI, ET AL., Appellees.	No. 76-777
CLIFF FINCH, GOVERNOR OF MISSISSIPPI, ET AL., Appellants, v. PEGGY J. CONNOR, ET AL., Appellees.	No. 76-933
UNITED STATES, Appellant, v. CLIFF FINCH, GOVERNOR OF MISSISSIPPI, ET AL., Appellees.	No. 76-934
PEGGY J. CONNOR, ET AL., Appellants, v. CLIFF FINCH, GOVERNOR OF MISSISSIPPI, ET AL., Appellants.	No. 76-935

Washington, D. C.,

Monday, February 28, 1977.

The above-entitled matters came on for argument at 11:05 a.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
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

FRANK R. PARKER, ESQ., Lawyers' Committee for Civil Rights Under Law, P. O. Box 1971, Jackson, Mississippi 39205; on behalf of Appellants, Peggy J. Connor, et al.

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

A. F. SUMMER, ESQ., Attorney General of Mississippi, Jackson, Mississippi; on behalf of the State of Mississippi

JERRIS LEONARD, ESQ., 1747 Pennsylvania Avenue, N.W., Washington, D. C. 20006; on behalf of State Parties.

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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 will next hear arguments in 76-777, Peggy J. Connor, et al. v. Cliff Finch, Governor of Mississippi, et al., and related cases.

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

ORAL ARGUMENT OF FRANK R. PARKER, ESQ.,

ON BEHALF OF APPELLANTS, PEGGY J. CONNOR, ET AL.

MR. PARKER: Thank you, Mr. Chief Justice, and may it please the Court:

This case involves the reapportionment of the Mississippi Legislature. The case was filed on October 19, 1965, by black voters in Mississippi. It is here for the fifth time, following a final hearing directed by this Court last term in Connor v. Coleman. In that case, this Court directed the District Court to hold a final hearing to the end of entering a permanent court ordered legislative reapportionment plans to be applicable in the 1979 elections, and also ordering any necessary special elections to be held to coincide with November 1976 presidential elections or at the earliest practicable date thereafter.

In November of 1976, the District Court entered a final judgment which was amended by its order of December 21st ordering permanent court ordered legislative reapportionment plans for Mississippi which provided single-member districts statewide. No special elections have yet been held under that

plan pursuant to the order of the court.

For the first time in this case, the District Court complied with the 1971 injunction and the 1975 injunction of this Court that in court-ordered legislative reapportionment plans, single-member district are to be preferred.

Plaintiffs contend first that the District Court's Senate plan is excessively malapportioned; secondly, that the District Court's permanent plan unnecessarily minimizes and cancels out the black voting strength in the Senate and in certain districts in the District Court's House plan; three, that the District Court erred in ordering special elections in only two House districts and in no new Senate districts; and, fourth, that the District Court erred in denying plaintiffs their motion for an award of reasonable attorneys fees.

The District Court in deciding the case and in entering final judgment employed two criteria which are directly relevant here. First of all, the District Court held in its opinion reported at 419 Fed Sup, on page 1076, paragraph 4, there shall be no minimization or cancellation of black voting strength. That was the criterion employed by the District Court and, as far as we can understand from the briefs of the defendants, that criterion is not questioned on appeal, that everyone agrees that it was proper for the District Court to promulgate a plan in which there is no minimization or cancellation of black voting strength.

And fifth, population variances are to be as near de minimis as possible, and that criterion is not questioned. It was the failure of the District Court to follow these criteria, in implementing its single-member districting plan which plaintiffs question on appeal.

The Senate plan is excessively malapportioned. In Gaffney v. Cummings and in White v. Regester, 1973 cases, this Court held that in legislatively enacted reapportionment plans, a plan with a total deviation, which exceeds 10 percent, is prima facie unconstitutional and must be rationally justified by legitimate state policies.

In Chapman v. Meier, the Court held that in court-ordered legislative reapportionment plans, that the court must ordinarily achieve the goal of population equality with little more than de minimis variation.

QUESTION: And why is this a provision of the Constitution?

MR. PARKER: This is the applicable -- in Chapman v. Meier, the Court laid down standards applicable to --

QUESTION: Well, it is the Constitution that lays down standards?

MR. PARKER: That is correct.

QUESTION: What provision of the Constitution?

MR. PARKER: The Fourteenth Amendment, the equal protection clause.

QUESTION: The equal protection clause. So is this a Reynolds v. Sims-type case or is it a Lightfoot-type case? Is this the Fourteenth Amendment or the Fifteenth Amendment, is my question?

MR. PARKER: The case involves both issues. The case involves both issues. We challenge the District Court's plan on both grounds, failure to conform to one person-one vote, and for racial dilution.

QUESTION: There has only been I think one case in this Court involving the impact of the Fifteenth Amendment on the electoral franchise, hasn't there?

MR. PARKER: Well, we believe that White v. Regester also involved the Fifteenth Amendment.

QUESTION: Would you say so?

MR. PARKER: Yes, sir.

QUESTION: Did the opinion say so?

MR. PARKER: I believe it did, Your Honor, because it involved dilution of minority voting strength in Dallas and Baylor Counties, in Texas.

QUESTION: I thought that was the Fourteenth Amendment case, wasn't it?

MR. PARKER: Well, of course, the Court has failed to distinguish between equal protection of the Fourteenth Amendment as it prohibits racial discrimination and the Fifteenth Amendment as it prohibits racial discrimination in

the right to vote. The same standards very often apply in both cases.

QUESTION: Well, Reynolds v. Sims and that whole line of cases has nothing to do with racial discrimination, does it?

MR. PARKER: That's correct. That has to do with malapportionment, and both issues are involved here.

QUESTION: And a case like Lightfoot has everything to do with the Fifteenth Amendment?

MR. PARKER: That's right.

QUESTION: Except for Mr. Justice Whitaker's concurrence.

MR. PARKER: That's right.

QUESTION: Correct.

MR. PARKER: That's correct.

QUESTION: And my question is which provisions -- which amendments of the Constitution are at issue here?

MR. PARKER: When we say that the District Court's plan is excessively malapportioned, that involves Reynolds v. Sims and the equal protection clause of the Fourteenth Amendment as it relates to population disparities. When we say that the District Court's Senate and House plan of certain districts dilute black voting strength, we're applying both the racial discrimination prohibitions of the equal protection clause of the Fourteenth Amendment and more specifically the Fifteenth

Amendment's prohibitions against abridgement of the right to vote on account of race.

QUESTION: And is it -- while I have interrupted you -- your contention that it was incumbent upon the District Court under the Fifteenth Amendment to maximize black voting strength?

MR. PARKER: No, that is not our contention. We do not at all contend that the District Court was under a duty to maximize black voting strength. Our only contention is that the District Court, as the District Court itself recognized, was under a duty to avoid dilution of black voting strength, to avoid minimizing or cancelling out black voting strength. We are not after reverse gerrymandering, we're not after maximizing black voting strength. We simply say that the District Court, as the District Court itself recognized, was under a duty to avoid dilution, and it failed to do so.

QUESTION: Mr. Parker, just to follow up on Justice Stewart's question, avoid dilution as compared with what?

MR. PARKER: Avoid dilution in terms of -- and I will demonstrate this on the map. For example, Claiborne County is 74 percent black and has black county elected officials, almost all the elected officials in Claiborne County are black.

Claiborne County was combined with Copiah County District 3, and Lincoln County, which is majority white, to create a district-wide white majority in that Senate district.

And that is dilution, when a substantial black population concentration is combined with a more populous white population concentration to create a district-wide white majority, then dilution occurs.

QUESTION: Well, the facts speak very loudly. I understand your argument, but I am not quite sure you have answered my question, dilution as compared to what. As compared with the racial make-up of the population?

MR. PARKER: That is correct.

QUESTION: So that anything less than the proportion that the population itself bears is at least suspect?

MR. PARKER: If a plan can be drawn which meets one person-one vote requirements and also does not fragment or disperse the heavy black population concentration, resulting in the opportunity of black voters to elect legislators of their choice, then that alternative should be selected, all other things being equal, if it meets constitutional requirements.

Our contention is that the District Court, in promulgating its plan, failed to accept the alternatives proposed by the plaintiffs and by the plaintiff intervenor which alleviated or cured the dilution of black voting strength in the District Court's plan. In other words, there were alternatives presented to the District Court which did not dilute black voting strength, and it is the failure of the District Court to select

these alternatives which is erroneous and on which we base our appeal.

QUESTION: Under the District Court's plan are there now districts where whites are in the minority?

MR. PARKER: Yes, there are districts --

QUESTION: And are there any such districts where those whites under the former plan were not in the minority?

MR. PARKER: Yes, there are.

QUESTION: Well, wouldn't white people have the same kind of a claim that you are asserting on behalf of Negro people?

MR. PARKER: Mr. Justice Stewart, the Mississippi Legislature has been all white until 1967, in this century.

QUESTION: I know.

MR. PARKER: There are now four blacks in the House and the Mississippi Senate is all white. No claim has ever been made in Mississippi that white people are deprived of legislative representation either by the --.

QUESTION: Well, I am talking about the District Court's plan.

MR. PARKER: There is no claim presented to this Court that it deprives white people of legislative representation.

QUESTION: But under the District Court's plan there are districts where whites are now in the minority --

MR. PARKER: That's right.

QUESTION: -- and those same voters used to be in a district that was majority white?

MR. PARKER: That's right. They are not discriminated against because legislative representation is based more on interest groups than individuals. At most, blacks under the District Court's plan could elect legislators of their choice in possibly 24, 25 or 26 districts; thus, in a 122-member Mississippi House, the Mississippi House of Representatives will be still predominantly white. The Senate will have at most possibly seven or eight black Senators. The Senate will be predominantly white. So there is no real claim of discrimination against white people in the District Court's plan.

QUESTION: What is the population, 63-37, is that it?

MR. PARKER: Mississippi is 36.8 percent black.

QUESTION: 37-63 --

MR. PARKER: 37 percent black.

QUESTION: -- plus a fraction of one percent of others.

MR. PARKER: Right. That's correct.

Now, the District Court's plan has a total deviation from population equality of 16.57 percent prima facie unconstitutional.

QUESTION: Let me get one thing clarified, one of your responses. Are you suggesting that the population ratio of 37 must be reflected?

MR. PARKER: No, we have not made that argument.

QUESTION: In other words, you are standing on your response to Justice Marshall, I think, that there is no claim on your part of the constitutional right to, the term is, to maximize the --

MR. PARKER: No, we don't make that claim. We simply say that the District Court was under an obligation to avoid dilution, and that is as far as our plan goes.

QUESTION: Well, one man's dilution is another man's maximization, is it not?

MR. PARKER: No, that is not necessarily true, because the District Court was providing a remedy here. The District Court was providing a remedy for the failure of the Mississippi Legislature to adequately apportion itself, number one; And also, number two, although the District Court failed to recognize it, the District Court was providing a remedy for the extensive past history of racial discrimination affecting the right to vote in Mississippi, and this Court has never held in the race cases that when a District Court is fashioning a remedy it must be color-blind remedies. Certainly, a remedy must be race conscious, otherwise the remedy might have the same effect as the violation.

For example, in the employment cases, in the jury cases, in the other school cases, the Court has indicated that the District Courts may take race into account in formulating a

remedy. So we are not maximizing black -- our claim is not that black voting strength should be maximized. This is a false issue. It is an issue raised by the defendants which is not in the case. Our claim is only that the District Court was under an obligation to avoid dilution of black voting strength, and they failed to do that.

The alternative, the modified Henderson plan, which was proposed by the plaintiffs, has a total deviation of only 13.66 percent, and therefore is a better plan.

QUESTION: Mr. Parker, when was the modified Henderson plan first proposed by the three-judge court?

MR. PARKER: It was proposed on October 8, 1976 as a supplement to our motion in the District Court to alter our mandus judgment. The District Court gave no reason for rejecting the modified Henderson plan which provides greater equality of population among the districts, over its own plan which provides less equality of population among the districts.

The plan was presented to the District Court on October 8, and the final judgment was not rendered until November 18. The District Court failed to state any reason for preferring its own plan with higher variances over the Henderson plan with lower variances.

QUESTION: Can you tell me again what the percentage variations were in the October 8 proposal?

MR. PARKER: The District Court's plan is 16.57. The

plaintiff's alternative, the modified Henderson plan was 13.66, was based exclusively on county boundaries, supervisors' districts and voting precincts, breaks up only 15 counties, as opposed to 19 counties in the District Court's plan.

The District Court's plan also in the Senate unnecessarily fragments and dilutes black voting strength. This map illustrates the 11 instances in which black majority counties, which are colored in red, are combined with more populous white majority counties to create districts which have white voting majorities. And the particular illustration of this is Claiborne County, which is combined with Beat 3 of Copiah County and the more populous white majority of Lincoln County, to put Claiborne County, which is 74 percent black, in a white majority district.

Similarly, Jefferson County, which is just to the south, is 75 percent black -- Mayor Charles Evers is Mayor of the county seat, Fayette -- is combined with two beats in Adams in the top and two beats in Adams in the bottom, and has the largest deviation of any of the District Court's districts, minus 8.3 percent.

The plaintiffs' alternative plan would have -- the districts are not compact. The plaintiffs' alternative plan would have been to put Claiborne, Jefferson and Copiah in a single compact district, not break any county lines, result in a black majority district, with a total deviation of only 3.5

percent. So thus plaintiffs' alternative would have alleviated the dilution of black voting strength, would have cured the malapportionment, would have provided a more compact district, and would not have broken any county lines.

QUESTION: I take it you are arguing that the three-judge court plan is unconstitutional as well as being an abuse of its discretion in adopting it?

MR. PARKER: That is correct.

QUESTION: Is that right?

MR. PARKER: We believe that under Chapman v. Meier the discretion of the District Court is more limited than if the legislature had enacted this plan, that in a court ordered plan a District Court has a more strict, a more rigid responsibility to avoid dilution of black voting strength, and the standard is a more strict one than under a legislatively enacted plan.

Hinds County, the District Court's Senate districts, 69 percent of the black population of Hinds County is concentrated in this red shaded area which looks like a boot in the central city of Jackson, which is the state capital. All five of the districts, the Senatorial districts adopted by the District Court in the Senatorial plan, cut into this heavy black population concentration, sliced it up, dispersed it among all five districts. This is a copy of Exhibit P-44, which is in the Kirksey case, of which the District Court has

taken judicial notice and which is in the record.

Districts 2 and 5 have slight black population majorities, but measured in terms of voting age population, all five districts have white voting age population majorities under 1977 Census data. So black people in Hinds County, 84,000 black people live in Hinds County, has a greater black population concentration than any county in the state. Hinds County is 39 percent black. Those 84,000 black people living in Hinds County are deprived of the opportunity to elect state Senators of their choice in any of the five districts.

The District Court's --

QUESTION: You can complain about that only because the accident of residence?

MR. PARKER: It is residence and where the lines are drawn.

QUESTION: Yes.

MR. PARKER: The District Court did not --

QUESTION: But they are evenly dispersed throughout the county and you have a tough time making your argument, I take it.

MR. PARKER: Well, we make the argument because they are not. The lines cut through them and break up and disperse. It is an apple pie plan. It just slices them up among all five districts.

QUESTION: And what cases do you rely on -- or maybe

you don't rely on them. What cases do you think apply the Fifteenth Amendment to representation rather than just the voting?

MR. PARKER: Well, we --

QUESTION: Do you think anything besides Gamillion or not?

MR. PARKER: We rely very heavily on White -- we say that White v. Regester indicates standards which are applicable to legislatively enacted plans, and that provides some indication. But we think that Chapman v. Meiers is the principal case. Chapman v. Meiers said that multi-member districts in court ordered plans are no good, among other reasons because of charges and complaints made that the multi-member districts dilute minority voting strength.

QUESTION: I know. I understand your dilution argument, but I am asking you where it came from. Is it under the Fifteenth Amendment, do you think, Chapman v. Meiers?

MR. PARKER: It comes under the Fifteenth Amendment, abridgment of the right to vote --

QUESTION: Did it in Chapman, was it expressly under the Fifteenth Amendment?

MR. PARKER: No, Chapman was under the Fourteenth Amendment, no claim of racial grouping was made.

QUESTION: That is what I am asking you. Give me the cases that talk about dilution of representation as a

Fifteenth Amendment violation.

MR. PARKER: Well, Reynolds v. Sims, the goal of Reynolds v. Sims was fair and effective representation.

QUESTION: Under the Fourteenth Amendment?

MR. PARKER: Under the Fourteenth Amendment.

QUESTION: It didn't mention the Fifteenth, did it?

MR. PARKER: It did not mention the Fifteenth Amendment.

QUESTION: Well, I am asking you about Fifteenth Amendment cases.

MR. PARKER: White v. Regester.

QUESTION: Do you think that -- I am frank to say I don't remember that, but you think that one --

MR. PARKER: I believe you wrote the decisions, Mr. Justice --

QUESTION: I know. You think that is expressly on the Fifteenth, too?

MR. PARKER: That was my understanding of the case, yes, Your Honor. It specifically -- White v. Regester specifically refers to a legislative reapportionment plan which operates to deprive minorities of the opportunity to elect legislators of their choice.

QUESTION: I understand that. I am talking about the Fifteenth Amendment now. Did it say under the Fifteenth Amendment?

MR. PARKER: That was my understanding, that it did. It is my understanding that the Fifteenth Amendment was involved.

QUESTION: Any others?

MR. PARKER: We cite the lower court --

QUESTION: You are --

MR. PARKER: -- in Taylor v. McKeithen. Taylor v. McKeithen was a Fifteenth Amendment case. So the lower court decisions, we cite Robinson, we cite Moore v. Leflore County, in lower court cases.

QUESTION: Before you leave Hinds County, are you supporting the Department of Justice plan as to Hinds County?

MR. PARKER: Yes, there were several Hinds County plans that were placed in the record. Our preferred plan is the Hinds County Census Tract Plan, which I believe was Exhibit P-14 in the trial court record, which is based exclusively on Census tracts determined by the Bureau of the Census in Hinds County.

The Justice Department also put forth a Hinds County plan and plaintiffs put forth an additional Hinds County plan in the record. So there are several Hinds County plans in the record.

QUESTION: I suppose one merit of the three-judge court plan for Hinds County is the small variance?

MR. PARKER: All of the plans in the record have very

small variances. The Hinds County census tract plan had a variance --

QUESTION: The Department of Justice plan is 12 percent.

MR. PARKER: The plan which was favored by the plaintiff only has a total variance of about 3.5 percent.

QUESTION: Which is greater than the three-judge court's plan?

MR. PARKER: It is not my understanding that there is a substantial difference between our proposed plan and the three-judge court's plan.

QUESTION: Well, there is two percentage points approximately.

MR. PARKER: There are a number of alternatives which could avoid dilution of black voting strength and still conform to one person-one vote requirements. The other maps relating to the House districts are contained at the back of the reply brief, and I would simply refer the Court to those maps, showing dilution of black voting strength in the House districts of which we complain.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE JUSTICE DEPARTMENT

MR. WALLACE: Mr. Chief Justice, and may it please

the Court:

The United States has taken no position in either the District Court or this Court with respect to the controversy about the adequacy of the District Court's plan under the one person-one vote criteria.

We have, however, taken a position with respect to a dilution of black voting strength and with respect to the need for additional special elections besides those required for two House districts by the District Court.

In neither of those instances, however, have we found it necessary to reach any constitutional question, nor do we see any reason why this Court should do so. We have been taking our law from Chapman v. Meier, which distinguishes very sharply between what is constitutionally permissible if adopted by a state legislature pursuant to state policy and the proper remedial criteria to be used by a District Court in the absence of an acceptable state plan in formulating relief, and as a matter of the proper exercise of the court's discretion of an equitable matter, we believe that there were errors here in the court's plan which we have specified.

But before getting to those errors, I should point out that much of the court's plan is acceptable and, after a course of very long litigation, substantial progress was made with the formulation of this plan. The litigation began in 1965. Our own participation is much more recent. We intervened

in June of 1975 in the District Court. But even so, I think that some of the contentions before this Court by the state parties have lost sight of what has already been decided. The case has been in this Court on four previous occasions and a great deal has been decided.

For example, a question has been raised about the propriety of the District Court's adopting a plan involving all single-member districts. Well, the decisions in Connor v. Johnson, in 402 U.S., and the next Connor case, 404 U.S., said that the District Court was to favor single-member districting in the court ordered plan. This is what has become known as the Connor rule. And it is late in the day -- not just as a matter of stare decisus -- it is late in the day as a matter of res judicata for the state now to be arguing that because of Mississippi's longstanding policy in favor of multi-member districting, the Connor rule should not be applied in the case in which it originated and in which this Court's instructions to the District Court were quite clear.

If that question should be reconsidered at all, it is improper to ask that it be reconsidered in this case, in which it is the law of the case. And the District Court therefore quite properly favored a single-member district plan and in working that out adhered to the extent that it could to the state's longstanding policy of trying to maintain the boundary lines of the counties, the beats and precincts, and

largely succeeded in doing so.

We think that those aspects of the decision are really behind us in this case, and the question is whether, despite the criteria that the court said it was utilizing in adopting its final plan, the plan fell short in achieving those criteria. We don't really attack the guidelines individually. We don't have any quarrel with any one of them in particular as an appropriate guideline adopted by the District Court in formulating its final plan.

We do, however, attack the criteria that the District Court used in refusing to order additional special elections, so that our stance is a little different with respect to the two issues in that way. We think that those were inherently erroneous reasons for refusing to order special elections. We don't think the guidelines adopted by the District Court in formulating its final plan were individually inherently erroneous, although we may quarrel with the weight given one as against another.

The main shortcomings there were errors of omissions, as we see it, a failure to adequately remedy the longstanding use of apportionment as a method of diluting minority voting strength, and the failure to recognize the importance in the case of voting age population rather than just general population statistics, which differ considerably in the state of Mississippi from the realistic measure of voting strength that

is all we realistically talk about in assessing their opportunity for all elements of the community to participate meaningfully in the electoral process.

The principle of Chapman v. Meier specifies that it applies to multi-member districting and to population deviations, and it seems to us that the same principle almost necessarily must also apply to remedying a pattern of dilution of minority voting strength such as has been shown in this case, which we have detailed in the record and in a lengthy appendix to our brief. And we have shown the extent to which these problems persist.

Now, I want to address briefly the question of maximization against dilution as it is involved in this case. In Mississippi, the black voting age population constitutes 31.4 percent of the population. And I am sorry we never drew these figures together in the brief in discussing the dilution question. We have compiled them just in the course of preparing this argument.

Under the court plan, in the Senate, where there are 52 districts, there would be only four or 7.7 percent as against the 31.4 percent which would have what we think the record shows is the minimum needed 54 percent of black voting age population in order for the black electorate to have a working majority. We have cited the references in the record which show that all of the estimate that was needed for an

effective working majority are 54 percent and on up.

But even if you look at 50 percent black voting age population, there would be nine districts, 17.3 percent, as against the total of 31.4 percent.

Under the alternative plans which were before the court which we have pointed to in our brief, most of the difference between the plaintiffs and ourselves arise from the fact that the plaintiffs attempted -- and we don't say that this was improper at all -- to project their figures from the 1970 Census to approximate the 1975 population distributions, whereas in our participation we limited ourselves to the 1970 Census figures which the District Court indicated that it planned to follow.

Under the alternatives that we propose for the Senate, the number of districts with 54 percent or more black voting age population would be increased from four to six or from 7.7 percent to 11.5 percent; and those 50 percent or more would be increased from nine to eleven, or 17.3 percent to 21.2 percent, still well under the 31.4 percent which can be used as a starting point to see whether unnecessary fragmentation of black voting strength constitutes a dilution that should be avoided by a court of equity undertaking to remedy a long-standing pattern of discriminatory dilution of black voting strength.

And the same thing can be said of the House figures.

There is 122 membership figure for the House. There, under the court's plan, 17 of those districts or 13.9 percent would have 54 percent or more black voting age population, and 24 of the districts or 19.7 percent would have 50 percent or more black voting age population.

Under the alternatives that we point to, those figures would be increased from 17 to 22 for the 54 percent figure, which would give 18 percent black voting age population, 18 percent of the districts; or, in the 50 percent black voting age population, the increase would be from 24 to 26 districts or 22.1 percent of the total 122 districts, in each case still well under the 31.4 percent of the total population that is accounted for by the blacks of voting age.

QUESTION: Mr. Wallace, focus again for me why you suggest with some emphasis the use of 54 percent.

MR. WALLACE: Well, the testimony in the record, and we have summarized it in Footnote 46, page 53 of our brief, indicates in one instance an estimate of 58 percent and the other an estimate of 54 to 65 percent as the percentage needed in order for black voters to have an effective voting majority. There is other evidence in the record to indicate that blacks are registered in lower proportion than whites, so if you are using voting age population statistics, they don't really reflect the strength at the polls. There is testimony that whereas very few whites who are registered consistently failed

to vote; about 10 percent of the blacks who are registered have never voted.

QUESTION: Well, I just asked the question. Isn't the answer to that to get out the vote? Why should the federal courts of this country take into consideration that kind of a feature and kick it up to 54 percent rather than 50 percent?

MR. WALLACE: Ideally, that is the answer, but the testimony indicates, and there are no findings to the contrary, there are just no specific findings on this at all by the District Court, that the difficulties with getting out the vote are to a large extent a result of the prior pattern of discrimination, that many of the older blacks are afraid of economic reprisals if they vote, that there has been a long history of intimidation and fear with --

QUESTION: Can you say the same thing, make the same argument about the sexes? I think there are patterns between the masculine and feminine sexes and who votes more.

MR. WALLACE: Well, I wouldn't make --

QUESTION: Why not?

MR. WALLACE: -- any such argument without basing it on testimony in a record, in evidence. I don't think it is the kind of thing that can be hypothesized. We are really addressing ourselves with the 54 percent figure to very specific evidence developed in the course of this long trial. And there

is the additional distinction that there hasn't been since the adoption of the constitutional amendment entitling women to vote sex state imposed discrimination that might result in intimiation of women.

At any rate, we are confining ourselves in this case to what this record has shown. But even if we go down to the lower figure of 50 percent, as I indicated, we would still be well under the 31.4 percent figure if the remedies that we have proposed were adopted.

I just would like to say a word about the kind of dilution we are concerned with. One example which I think is fairly graphic is to be seen on page 55a of our brief, one of these pullouts. This one happens to involve Warren County.

The point has been made before this Court that you can have the same kind of dilution as a result of splitting up a multi-member district so that each single-member district has the same basic percentages as would be true of the multi-member district. And the figures under the court's plan for Warren County provide almost a classic example of that, where there is almost uniformity in the three districts here in the House in the percentage of blacks in each district. And each case has a percentage of total population between 40 and 45 percent. The black voting age population is more uniform, in each case between 39 and 41 percent.

And under our alternative plan, the alternative plan

that was before the court, which we mention there, one of those districts could be drawn in actually a more compact way, as shown by the maps on the preceding pages, so as to have a 56.6 percent black voting age population, whereas the other two would be majority white. And here in a district in which the black voting age population is close to 40 percent, instead of having three majority white districts, one of the three would be a majority black district.

That is the kind of deficiency that we have found in the plan. I just want to say one more word about a complaint that the state has made on page 40 of this reply brief, Footnote 32, that somehow the difficulty here has been the failure of the Attorney General to apply the criteria of this Court's decision in Beer to the state's legislatively adopted plan.

The Court decided in 421 U.S., in one of the previous decisions in this case, that that legislative plan would have no legal effect until and unless cleared pursuant to section 5. The plan was then submitted to the Attorney General who interposed an objection on June 10, 1975, many months before Beer was decided by this Court, on March 30, 1976. Of course, since this Court's decision in Beer, we used the criteria enunciated by this Court. But at the time this objection was interposed, the District Court's decision in Beer was the authoritative determination of the meaning of the Voting Rights Act, and there has been no submission by the state

since that time, and there is no section 5 issue in this case. There is nothing before the District Court under section 5 that would have had to be before the District Court of the District of Columbia.

I believe we are reserving the remainder of our time for rebuttal.

QUESTION: Mr. Wallace, before you sit down, there seems to be some difference in the variance figures employed by the three-judge court and in those that you proposed in your brief here. On which are we to rely?

MR. WALLACE: Well, we have had great difficulty determining how the court's figures were calculated. We have done some reexamining of our own figures and have explained in the course of our brief the modifications, simple ones, that can be made in our proposals, and we in Appendix B of our brief recounted in detail exactly how our figures were compiled. And I can't verify anything but our own figures. I feel that they are reliable as we have reexamined them.

If they had been put to a test in a hearing in the District Court, I think some of the refinements that we have made would have been made in the course of the District Court proceedings. That is all I can say about the figures. We feel that we have presented reliable figures here. We don't know what the District Court's are.

QUESTION: Normally that is something for the District

Court rather than for us to work out.

MR. WALLACE: Well, we understand that.

QUESTION: One last question. Do you support the private parties claims with respect to the House districts in Adams County?

MR. WALLACE: We haven't taken a position on them but we see nothing wrong with their claims. We see nothing wrong with their projections to the 1975 figures, which are all based on undisputed testimony and a study made by a state university. Nothing has been introduced in the case to controvert any of their contentions.

MR. CHIEF JUSTICE BURGER: Mr. Attorney General.

ORAL ARGUMENT OF A. F. SUMMER, ESQ.,

ON BEHALF OF THE STATE OF MISSISSIPPI

MR. SUMMER: Thank you, Mr. Chief Justice, and may it please the Court:

Our appeal here is from the 1979 court ordered single-member plan for Mississippi and for two special elections ordered under that plan. I will present our appeal in regard to the fractionalization of county lines and special elections. Mr. Leonard will present, associate counsel will present our argument in response to the racial dilution argument that has just been given.

I might say, however, at the beginning that I am quite surprised --I have been in this case for seven years --

to find the plaintiffs' attorney say this morning that they had not progressed from the one man-one vote to a guaranteed black district. It comes as quite a surprise to me because I believe about five -- well, I won't say that -- a good portion of this time has been spent developing that progress in each case.

I also was surprised to hear the government's attorney say that we had been foreclosed in making our argument against a single-member plan that was ordered by this Court for the first time in 1976, in view of the fact that this case has been here, this does make the fifth time that the case has been before this Court, but unfortunately it has never been here on the merits. We have never had the opportunity to orally argue the case, and this is the first time that it has been here on the merits itself, and we are delighted that that time has finally come, because in the instance where this Court first spoke to the lower court in regard to its 1975 plan -- and we do advocate the acceptance by this Court of the 1975 plan as drawn by the court, we feel that that plan has never been declared unconstitutional by any court. In fact, it has been specifically, the things that were spoken to here this morning were set out specifically by the trial court in reaching all of the objections they made there.

And when this Court first spoke to the lower court in regard to -- it was in regard to Hinds County. Hinds County

is the largest county in the State of Mississippi. We have 82 counties in Mississippi. We only have one metropolitan district. We are not a large state in that we have cities like Chicago or Detroit. Jackson, Mississippi is the capital. It has approximately 200,000 people. It is within Hinds County.

So as a result, Hinds County is entitled under the 1970 Census to twelve legislators. This Court sent word back to the lower court that the plaintiffs have shown us that within three days they could prepare four -- if I am not mistaken, either two or four -- different plans for Hinds County to be single-member districted. Therefore, District Court, you should be able to do so, and we stay your order until June 14, 1975, until you prepare a single-member plan for Hinds County absent insurmountable difficulties.

Well, when we held the first hearing back in Jackson, plaintiffs' counsel frankly admitted that the plans that he had submitted to this Court were based on erroneous information, and there was no possibility of those plans working at all. The court appointed a master and found that there were insurmountable possibilities because the census was taken by enumeration districts and not by the governmental districts, that is the county and the beat lines. So as a result of that, it was impossible within that short period of time, and the lower court so notified this Court.

And the next time when it came up, I think this Court having seen it several times sent it back to the lower court and said, look, you have prepared a plan, you have kept jurisdiction of Hinds, Harrison and Jackson County -- Harrison and Jackson County on the Mississippi Gulf Coast -- and next to the most populous counties in the state.

QUESTION: Is that Beloxi down there?

MR. SUMMER: Yes, sir, that's correct. That is in Harrison County. Jackson is just to the east of that.

They said -- you gentlemen said fix Hinds, Harrison and Jackson Counties. In the meantime, we are going to dismiss the appeal, we are going to vacate the judgment so that when you fix Harrison and Hinds and Jackson County, we can get the whole case before us up here, and that was your oder then. And then you admonished them, of course, that -- the lower court had said it would be ideal to single-member district Hinds County. You agreed with that and said to the effect what is now known as the Connor rule, that single-member districts are preferable if most member districts can't be articulated.

So here we were with a situation that began to -- a rule had begun to go all around the country that specifically, as it applied to us -- this Court had spoken to Hinds, Harrison and Jackson County. They said you single-member district Hinds, Harrison and Jackson County and send us the whole plan back,

then we will decide on the constitutionality or unconstitutionality of that plan.

Eventually that was done, and I say eventually because there is implication here that there were people who were dragging their feet. Throughout this entire period of time, the legislature has been acting and acting and acting. Every time this Court came down with a case, they would pass another reapportionment plan, trying to conform with it, preventing the lower court down there from taking, from going forward, because you also said that it is better for the legislature to do it. So the court said if the legislature is going to do it, we are going to let them do it. And then as soon as they got to the District Court, of course, then the constitutional challenge was made and the plans that were referred to by the plaintiffs' attorneys here were plans that violated a longstanding state policy which this Court has recognized in Mahon and Chapman of never breaking or fractionalizing a county line since it has been a state of this Union.

When it was admitted to the union, in 1817, a congressional act called the Mississippi constitution together, provided that two to six members be represented from each county in that constitutional convention. That was even before we became a state. In the constitution of 1817, there were provisions for multi-member districts in the State of Mississippi. In the constitution of 1832, there was provision

for multi-member districts. In 1869, right after the Civil War, when the carpetbaggers and the scalawags, they were so-called, all joined hands, and they kept the multi-member districts and made no effort to change them whatsoever, speaking to the dilution, the racial dilution aspects. And in 1890, it was not changed.

So for 150 years there has never been a person elected to the Mississippi Legislature by the breaking of a county line. We have 82 counties. Each county is divided into five supervisory districts. Those supervisory districts are --

QUESTION: They are called beats, are they?

MR. SUMMER: Yes, sir, they are called beats. And a supervisory --

QUESTION: Just as a matter of curiosity, where does that word come from?

MR. SUMMER: When it was old -- it used to be the old police jury, and I guess they got the beats from that police beats, and they just continued that on.

QUESTION: B-e-a-t?

MR. SUMMER: B-e-a-t-s, beats. Actually, officially, it is a supervisory district, but the words are synonymous, and it is referred to as beats.

A supervisor is elected from each beat, which is well defined, as he was pointing out here on this map, there

has been litigation here in Hinds County going on now for a considerable period of time, and it is up for a rehearing back in the Fifth Circuit Court of Appeals now. Of course, Mr. Leonard will address what the judge had to say in regard to the dilution question in that.

So there are 410 beats, but the five supervisors in each county is the governing body. They have a chancery clerk, a circuit clerk, a sherrif and so forth. Now, the main thing about that is that they are autonomously elected by the people of those counties and, of course, they are answerable to nobody. But the big difference is that the counties that they act in only an administrative capacity. They have no power to tax. They have no power to set a judge's salary, for instance, as the judges' salaries are set by Congress, I guess, for the entire United States, everybody gets the same. That is not true in Mississippi. That legislator from that county, if he wants his judge a raise, has got to come and get that judge a raise. There are as many different salaries for judges, county judges in Mississippi as there are county judges. The same thing is true for the county attorneys. In fact, even whether or not a county will have a county attorney must be decided by the legislature.

So if you fractionalize a county, you destroy the very fabric of which the government of Mississippi is made up, and this is why we object so strongly to a single-member plan.

We are not against single-member plans and certainly we are not promoting multi-member plans. We are simply saying that, as this Court spoke to the issue in Mahon and spoke to the issue in Chapman and other cases, that it spoke specifically to the fact that longstanding state policies qualify to create variances that would not be acceptable in any other standard. In fact, the Court in Swann said that -- it spoke to the fact that there were about 30 to 35 percent, and even indicated by stating in that case that -- and it was a court-drawn plan -- that the results may have been different if the state policy had been articulated by the judge that drew it.

And in this case, in the 1975 plan, the District Court articulated very clearly and very outstandingly the necessity for this longstanding policy in Mississippi.

I see that it is 12 o'clock and --

MR. CHIEF JUSTICE BURGER: That is all right. The red light will go on.

MR. SUMMER: I'm sorry. But they did articulate, they took the test that was laid down in Chavez, they took the test in White v. Regester, and they specifically spoke to each one of those tests insofar as dilution is concerned.

But then going to the county government qualifying as a rational --

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

MR. SUMMER: Thank you.

[Whereupon, at 12:00 o'clock noon, the Court was recessed until 1:00 o'clock p.m.]

AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mr. Attorney General, you may proceed.

MR. SUMMER: Mr. Chief Justice, I was speaking to the importance of the county government as a unit in the State of Mississippi, and I had already enumerated a few of the most important facts and I would like to add a few more to that because the counties without special legislative authority cannot issue bonds even to build a courthouse or to provide for industrial improvements or to levy taxes for those things. In fact, everything they do must be authorized by the legislature because they act, as I say, administratively. And, of course, this is not done on a blanket basis, it is done on a county-by-county basis because Mississippi has a private and -- local and private section in its constitution very similar to that which Virginia has, and perhaps even more stringent, that the Court alluded to in the Mahon case.

So you can see very clearly that to vulcanize or fractionalize county lines would change the whole structure of government in Mississippi, a structure that has existed since before its statehood, and to diminish that would simply make beggers out of the fractionalized counties, and it would affect the system of justice, it could affect crime prevention, cause electoral problems, cause economic problems, and it would affect the county's ability to aid the poor, the disadvantaged,

the old, the sick, through the various county programs that they have for that, because each of those have to be approved by the legislative plan.

And to familiarize the Court with the '79 court plan, 42 of the 82 counties have been broken or fractionalized, and at least 44 of these supervisory beats have been fractionalized.

Another important factor to point out there is that the precincts that the people of Mississippi vote in are contained entirely within a supervisory district or a beat, and if you change a supervisory line or if you change a beat line, as the plans of the plaintiffs have submitted to this Court do, they cross street lines, they cross county -- I mean the voting precinct lines, it would call for an entire new registration, and I think all of us would agree that as long and as hard and as difficult as it has been over the years to finally get the black population of Mississippi registered, and in Mississippi once you are registered, you are registered for life unless you move out of the district, so you don't have to go register every year, you stay registered for life, and a chance in this system, if you had to change all of that, could cause a massive registration and perhaps a dropping from the rolls of many of the people who now can vote.

Speaking to one question that was brought up by the plaintiffs, in the new plan, the '79 plan that fractionalizes

the county lines, there are in the Mississippi House of Representatives, there are 30 districts with a black population of over 50 percent. There are 40 districts with a black population from 36 to 50 percent. So 70 of 122 representatives would be elected from a 36 percent, which is basically the percentage in the House; 70 of those district representatives would be elected from districts with 36 percent or more; and in the Senate 14 majority black population over 15 percent districts, and 12 districts between 36 and 50 percent, which makes a total of 22 Senators who could be elcted.

And as one of you said in an opinion, I believe it was the Fifth Circuit opinion, though, in the Florida case, that said if you have got that type population you are going to be receptive to them if you expect to get their vote. And certainly they participated very strongly in the '75 elections to the end that it was stated that the black vote was primarily responsible for the election of the present Governor. But again, I am not going to get into my brother's argument.

I would like to address as my last point the fact that the District Court had no authority to order the two elections in the '79 plan. Before the district plan can order a remedy, it must find a constitutional infirmity. This Court spoke to that in Swann v. Mecklenburg when it said that there had to be a constitutional violation before the great equity powers of the federal court could reach it. And the District

Court found that this '75 plan was in fact constitutional, and it has never been found unconstitutional by any other court.

And even if this Court were to find that the District Court was required to formulate single-member districts statewide and thus affirmed the '79 plan, the District Court would still lack the authority to order the elections, the reason being that the plan was not found constitutional, and therefore all of the legislators who were elected under the 1975 court plan were constitutionally elected, and there is no decision to the contrary anywhere, regardless of the fact that the plaintiffs and the intervenors would like to convince this Court that somewhere these facts are all new that are being presented to this Court. Everything that has been spoken here has been presented many times.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well, General.

Mr. Leonard.

ORAL ARGUMENT OF JERRIS LEONARD, ESQ.,

ON BEHALF OF THE UNITED STATES

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

My name is Jerris Leonard and, as the Attorney General has said, I will address the question of the relief requested by the plaintiffs and by the plaintiff-intervenors

and their entitlement thereto, and also the question of racial dilution which was alluded to in the questioning this morning.

I would frame the issue raised in this case in this manner: In a state where blacks have total access to the political process, evidenced by the fact that 65 to 75 percent of the voting age blacks are registered to vote, against a national average of only 55 percent, and where 60 to 70 percent of those blacks who are eligible to vote actually do vote, as compared to only 34 percent on a nationwide basis, and where blacks hold over 200 local offices, hold 25 of the 100 seats on the Democratic State Executive Committee, as well as the state's co-chairmanship of the Democratic Party of the State of Mississippi, where blacks have played important roles in both the Republican and Democratic campaigns for Governor in 1975, and are credited with carrying the state for the President in 1976, where a report by the Department of Justice fails to disclose a single actionable violation of black voting rights, where the plaintiffs' key witness and their important evidence fails to disclose any vestage of racial discrimination against blacks in the electoral process and in the political process of this state, and where a reapportionment plan has been fashioned by a Federal District Court, and it is found to be racially nondiscriminatory.

Based on those facts, the issue I believe is whether under such circumstances a Federal District Court in fashioning

such a plan of reapportionment must first abandon a 150-year policy of non-fracturing of county boundaries; second, abandon a 150-year policy of using multi-member districts; and, finally, affirmatively racially gerrymander the legislature in order to guarantee or attempt to guarantee the election of a certain percentage of blacks to that legislature.

Now, that is what I believe the issue is that has been framed in this case over its long history. Gen. Summer has addressed the question of the state's policy and history relative to the multi-member districts and their use and the non-fracturing of county boundaries. My argument will be confined to the constitutional rights of the plaintiffs or the lack thereof, to a remedy and to the remedy that they seek. And I trust that the Solicitor General will not take umbrage if I take the position that I think the Constitution is definitely involved in this case, and that constitutional standards are applicable whether the plan of reapportionment is drafted by a federal court or whether it is drafted by the legislature.

The Legislature in the State of Mississippi is one of the six coequal branches of government of our federal system, and its reapportionment as in the case of its 49 sister states should be judged by constitutional standards and not by the supervisory power of this Court to direct something to a lower federal court.

So I think without question the Constitution is

involved, and I think it is a Fourteenth Amendment question, Justice White, and not a Fifteenth Amendment question.

Now, the plaintiffs' argument is fashioned around a scarlet letter philosophy, having sinned in the past, no amount of reform, no matter how extensive and complete, will be recognized as having overcome the past and the citizens of the state must forever bear the stigma of that past.

Every constitutional question, it seems, that is raised by every action taken by the state must be viewed in the perspective of the past and not by the facts as they exist today, if we accept the argument of the plaintiffs.

I submit to the Court that things have changed in the State of Mississippi. It is not the Tuskeegee, Alabama of Gomillion v. Lightfoot, nor is it the Bexar and Dallas Counties of White v. Regestar.

The findings with respect to this case are contained in this case, contrary to a statement made by our opposition earlier today that there are few findings, there are extensive findings in this case made by Judge Coleman at 396 Fed Supp. Now, that was a 1975 decision. But all of the evidence in the case except for some of the new reworking of the reapportionment plans, all the basic evidence was in the case, and Judge Coleman made extensive findings in that decision.

He found that the political process in the state was totally and completely open to black voters, and that finding

is really not seriously disputed by the plaintiffs.

In a companion case, in Kirksey v. Board of Supervisors of Hinds County --

QUESTION: Well, that fact is irrelevant to the dilution argument, I take it?

MR. LEONARD: That fact is relevant to the dilution argument --

QUESTION: But not to the population variance?

MR. LEONARD: That is correct, Justice White.

QUESTION: Now, are you addressing all these arguments together or are you going to separate them?

MR. LEONARD: The thrust of my argument --

QUESTION: What are you arguing, just dilution?

MR. LEONARD: -- relates to the racial dilution and the affirmative gerrymandering. That is the thrust of it. I would be happy to answer those other questions also, but that is the thrust of --

QUESTION: Well, I was just wondering, on the variance, population variance issue, what is your submission as to -- or is there any limit to the population variation that might be -- that you claim to be justified by following county lines?

MR. LEONARD: There must be -- let me point out one small --

QUESTION: Well, is the state's submission here that

none of the county line-breaking should be countenanced, that everywhere the District Court broke a county line --

MR. LEONARD: No.

QUESTION: -- it should be reversed?

MR. LEONARD: No, it is not, Your Honor.

QUESTION: Well, then, what is it arguing in that respect?

MR. LEONARD: Our point is that if there is to be any fracturing whatsoever, it should be de minimis and only when the clock runs out, and that is what happened in the '75 plan.

QUESTION: Well, when does the clock run out? When do you get to such a population variation that you have to break a county line?

MR. LEONARD: Well, the population --

QUESTION: Do you make a submission on that or don't you?

MR. LEONARD: I would make a submission, yes. I would say that the variation in this case which, because of the fact that the figures are -- none of the figures are as certain as they should be, appears to be about 20 percent. Now --

QUESTION: And that is not enough?

MR. LEONARD: And I would say that is not enough, and let me -- it is off the dilution argument, but let me follow up and say why. In just the time between 1970 and 1973, the

population of Hinds County, the largest county, changed by 18 percent. That is enough for one House member alone, just in three years. So if we get too hung up on the figures and their absoluteness, we delude ourselves because the figures are changing, the population changes so fast in almost every state.

QUESTION: But do you think --

MR. LEONARD: And I would submit that the 20 percent variation, which is the approximate variation in the '75 plan, is not a --

QUESTION: I take it then that -- do you support the '75 plan right across the board or not?

MR. LEONARD: Yes, we do, Justice White, and we would ask the Court -- and I will in my closing point that out -- we support the '75 plan.

QUESTION: And you say that it is a Fourteenth Amendment case and not a Fifteenth Amendment case?

MR. LEONARD: Yes, I do.

QUESTION: Well, was the Fifteenth Amendment relied on in this case?

MR. LEONARD: No, it was not.

QUESTION: By the plaintiffs?

MR. LEONARD: The plaintiffs so stated this morning. I don't see how this question is a Fifteenth Amendment question. This is an equal protection question. It is a question of

compelling state interests for having certain laws relating to the ways in which a legislature is reapportioned in order to avoid the other process. The process which will result logically from the plaintiffs' argument is eventually a political gerrymandering. Those who have the power, whether they be the conservatives or the liberals in the legislature, whatever their political situation may be, will use that philosophy in the 1980's and beyond to exclude others with whom they have political differences.

And this Court in a dissent, Justice Douglas, in Wright v. Rockefeller, Justice Stevens, then Judge Stevens, in Cousins v. City of Chicago, laid out in those dissents all of the horribles that come about from that process.

But on the dilution theory, Judge Nixon, in a companion case, said this: This court does not find that any of the electoral laws presently in effect in Hinds County or this state operate to make it more difficult for blacks to equally participate in the electoral process.

Judge Coleman, in the decision I referred to, said this: We have no difficulty in holding that at the present day interference with the right of black citizens to case their ballots is a myth.

Then does there not come a time in the evolution of the political process when the yoke and the burden of the past is lifted from state government, when its political

institutions to the extent that the allegations of racial discrimination are made must be established based on present-day conditions, and with credible evidence, and not with recitations of the litanies of by-gone years.

Judge Nixon put it this way in his decision: There is a point in time when past instances or examples of racial discrimination become remote, a time when a past history becomes a remote history. That time has arrived for Hinds County and, on behalf of the state, we submit that it has also arrived for the State of Mississippi.

QUESTION: Mr. Leonard, getting to the present, as I understand your other side says that the lines that have been drawn in the last few years have effectively diluted the vote of the Negro.

MR. LEONARD: That's right.

QUESTION: Well, that is not the past. He is talking about the present.

MR. LEONARD: Justice Marshall, that is not the finding of the District Court in this case.

QUESTION: Well, what plan is he talking about?

MR. LEONARD: I do not know, but the District Court made --

QUESTION: Well, you heard him?

MR. LEONARD: I heard him. The District Court made extensive findings, Judge Coleman made extensive findings --

QUESTION: Well, extensive findings that Negroes are not denied the right to vote means nothing to this case.

MR. LEONARD: Justice Marshall, I can only tell you that the '75 court plan --

QUESTION: Of course, he can vote --

MR. LEONARD: -- provides for 14 Senators that will be elected from populations with over 55 percent black --

QUESTION: Right. My only --

MR. LEONARD: -- 30 representatives from the House, a total of 76, as the Attorney General pointed out --

QUESTION: What about the way Hinds County was broken up?

MR. LEONARD: That is part of the Hinds County case which has been affirmed by the Firth Circuit thus far --

QUESTION: Is it here?

MR. LEONARD: It is not here.

QUESTION: It is not here?

MR. LEONARD: Do you mean is it involved in this case?

QUESTION: Yes.

MR. LEONARD: Yes, because it was incorporated in -- the Hinds County apportionment was incorporated --

QUESTION: That is not -- that is recent, that is not ancient history.

MR. LEONARD: Justice Marshall, what I am trying to

point out is that the Fifth Circuit affirmed Judge Nixon, the Fifth Circuit has ordered a hearing en banc so its treatment of the Hinds County question has not yet been disposed of. But the Hinds County districts that are in this case now, in the '75 apportionment, '79 apportionment plan and the '75, have been approved in the Kirksey decision. That is my understanding of it.

QUESTION: Mr. Leonard, is it not correct that they have been approved only with respect to the numerical problem, not the dilution problem?

MR. LEONARD: No, I believe Judge Nixon addressed the dilution problem in the Kirksey decision, as did the Fifth Circuit in affirming --

QUESTION: The Fifth Circuit addressed the dilution problem, did it?

MR. LEONARD: It addressed the racial discrimination problem, whether it was raised in the terms of dilution is -- the point is that the issue of racial discrimination by virtue of dilution and the apportionment of the county was raised.

QUESTION: Let me just ask one other question, so that I can find the answer in the written materials, that are quite voluminous. Your opponent put the map up with the senatorial districts in Hinds County with the two long fingers in Districts 32 and 33 going into the town, which are somewhat reminescent of Gomillion and so forth. Where is the state's

explanation of how those -- why it was necessary to draw those rather unusual boundaries?

MR. LEONARD: I believe, Justice Stevens, that the explanation is that because, as Attorney General Summer pointed out, the county is an administrative unit more than it is -- administrative and judicial more than it is a legislative unit, unlike our concept of county boards in the north, where county boards have broad home rule powers, broad legislative functions. Such is not the case in Mississippi.

The county supervisor -- and this is the history of the term "beat" -- had a beat that he walked apparently because he supervised the roads, saw to it that the roads were taken care of, he acts more like an alderman in a city, taking care of the ministerial, municipal functions of the government, as opposed to acting as a legislator.

Now, that is not and of itself justification, as this Court has taught, but it is one of the factors that needs to be considered when you draw an apportionment plan for that kind of a governmental unit.

QUESTION: But is there anything in the written materials, including anything the District Court said, which explains why the lines were drawn in Hinds County the way they were?

MR. LEONARD: My recollection, Justice Stevens, is that the District Court, in 396, addressed all of those issues,

including the apportionment of Hinds, Harrison and Jackson County, and why it made the choices that it did.

QUESTION: There is nothing in your brief on that precise point?

MR. LEONARD: I think that there is not on that precise point.

We believe that this Court means what it says in its decisions and that its teachings are equally applicable to Mississippi as they are to Marion County, Indiana, to the State of Texas, to Washington, D. C., and Arlington Heights, Illinois.

This Court said in Whitcomb v. Chavis, which was the Marion County, Indiana case, that the challenger must carry the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political minorities. There is no such proof in this case.

This Court said further that such schemes or devices must be purposeful in order to further racial or economic discrimination. There is no such proof in this case.

And this Court said further in Whitcomb that the failure to win elections is not the test but, rather, evaluation -- but, rather, exclusion from the elective process is the test that must be applied. And the proof in this case gives no indication that blacks are excluded from the process.

The opposite is true, they fully participate.

QUESTION: How do you feel about a case a little while ago, United States v. Classic, said that although the man wasn't denied the right to participate, his vote wasn't counted. Do you remember that one?

MR. LEONARD: Well, if his vote wasn't counted because the election officials were corrupt --

QUESTION: It said that it had to be a meaningful vote, that is what Classic said.

MR. LEONARD: Well --

QUESTION: And that was about thirty years ago.

MR. LEONARD: Justice Marshall, I think that the proof in this case indicates that the blacks not only participate but that they are a political power in the State of Mississippi.

QUESTION: They have how many people in the legislature?

MR. LEONARD: They have four members of a 122-member House this time. But there is historical reasons for that, and that is that the blacks did not participate in the party elections prior to 1970 --

QUESTION: There is another historical reason, too.

MR. LEONARD: Yes. This Court said in White v. Regester that there must be a showing of invidious discrimination that excludes minorities from the political process by a

practice of slating of candidates, was the practice in Texas, so that they were unable to gain access to the party primaries. That is not the case here. The primaries are open primaries, any candidate can run in either primary of his choice, and there is no slating of candidates as was countenanced in Texas.

This Court also said in White that multi-member districts are not per se unconstitutional. In the 1975 plan that is before this Court, the multi-member districts are few in number, they are small in the number of members in each multi-member district, and they are compact in size.

This Court reiterated in White that it was the plaintiffs' burden to prove that the political process leading to nomination and election was not open to all groups on an equal basis.

This Court said just last year in Washington v. Davis that official acts are not unconstitutional solely because of a racially disproportionate impact, without showing of a racially discriminatory purpose. And the Court in that case cited Wright v. Rockefeller.

This Court said that there must be motivation based on racial consideration, there must be a contrivance to segregate on the basis of race. Only where the totality of the facts disclose an invidious discriminatory purpose would a statute otherwise neutral on its face be struck down.

And we are taught in Arlington Heights the same

thing. The reference in that case to Gomillion as to stark discrimination, it could hardly be said that the situation in this case can be referred or compared to Gomillion and that the facts in this case are stark.

Now, in the case at bar, the plaintiffs and the intervenors allege but have not shown that the three-judge District Court's plans were, either '75 or '79, racially discriminatory as they are applied to black citizens in Mississippi.

We are not here defending the United States District Court. We have appealed from its decision. However, the record in this case is barren of any proof that either of these plans, the '75 or the '79 court ordered plan, are tainted with any racial motive for discriminatory purpose.

I opened by phrasing the issue; let me close, may it please the Court, by seeking this as relief, that in the State of Mississippi all citizens enjoy the privilege of franchise irrespective of their race, color or creed; that the political processes, including the seeking and holding of elective office, are open to all; that black citizens participate in that process in the party of their choice and to the extent that their desires and abilities carry them in that process; that the three-judge federal District Court found its 1975 plan of apportionment of the state legislature to be constitutional, to be in conformity with 150 years of official

history of that state in the use of multi-member districts and in keeping county boundaries intact; that the deviation from the norm of the two houses in that plan is within constitutional limits and governed by the facts in this case; and that such plan shall remain in full force and effect until the legislature shall reapportion based on the 1980 Census according to the laws and constitution of the State of Mississippi and the United States of America; and that this case be remanded to the District Court with instructions to enter its final order in conformity with such opinion.

In that way, may it please the Court, will this long-standing litigation be drawn to a close and thus end the constitutional inquiry.

Thank you.

MR. CHIEF JUSTICE BURGER: You have about four minutes left.

ORAL ARGUMENT OF RANK R. PARKER, ESQ.,

ON BEHALF OF APPELLANTS -- REBUTTAL

MR. PARKER: Thank you, Your Honor.

QUESTION: Let me put this hypothetical question to you. It may or may not be too relevant. Suppose hypothetically that the State of Mississippi could be reapportioned, lines drawn irrespective of counties, so that in every county, in every voting district rather, the voting strength would be a reflection of the total state population, that is 37-63. Would

that meet all constitutional standards?

MR. PARKER: If a court ordered plan both --

QUESTION: Anybody's plan.

MR. PARKER: -- conform to one person-one vote and also provide a proportional representation?

QUESTION: Yes.

MR. PARKER: I don't think it would be unconstitutional, no.

QUESTION: Well, wouldn't that be the acme of perfection?

MR. PARKER: Yes, it would not be unconstitutional.

QUESTION: It would certainly dilute some of the voting strength, wouldn't it?

MR. PARKER: Not if it provided for proportional representation to all interest groups.

QUESTION: Has the court now ordered proportional representation?

MR. PARKER: No, and we don't insist upon that in this case.

QUESTION: Lay aside proportional representation, which is not in this case, as I understand it --

MR. PARKER: Do you mean if every legislative district was 37 percent black and 63 percent white?

QUESTION: Yes.

MR. PARKER: Oh, I'm sorry, I misunderstood the

hypothetical. No, that wouldn't be adequate.

QUESTION: It wouldn't be adequate?

MR. PARKER: It wouldn't be adequate. In Mississippi, there is a history of racial block voting. White voters refuse to vote for black candidates or candidates favored by the black community. In that hypothetical, the result would inevitably be an all-white Mississippi legislature. We have gained four already in this case; please don't deprive us of them.

QUESTION: I thought you were prepared to concede that that was the acme of perfection?

MR. PARKER: Not if every legislative district was 37 percent black, no, not at all. That would deprive blacks of the opportunity to elect legislators of their choice in the state.

QUESTION: How are the courts going to reach the subjective attitudes of the voters, either Negro or white, in terms of how they should vote? How does any decree of any court reach that?

MR. PARKER: That is in the evidence of this case, Mr. Chief Justice. A number of political scientists and sociologists testified with regard to voting patterns in this case.

Let me rebut several arguments made by the defendants. First of all, they rely on the District Court's findings at 396 Fed. Supp. 1308. Unfortunately, that District Court

decision made those findings upon which defendants rely was reversed by this Court at 421 U.S. And this Court in reversing that District Court decision upon which defendants rely, stated specifically that the District Court accordingly also erred in deciding the constitutional challenges to the acts based upon claims of racial discrimination. So in reversing 396 Fed. Supp., this Court vacated those findings by the District Court, and the defendants can't rely on them here because they have been reversed.

None of the alternative plans relied upon by the plaintiffs -- split voting precincts -- are based on supervisor statistics. All of the alternatives upon which plaintiffs relief are based either on county lines, supervisor districts or voting precincts. So those could be implemented immediately without any required re-registration of the voters.

Now, the plan upon which the defendants rely, the 1975 plan, is totally invalid under this Court's decisions in Chapman v. Meier and the other cases upon which we rely. In other words, in order for the Court to accept defendant's proposal to reinstitute the 1975 plan, the Court would have to overrule East Carroll Parish School Board v. Marshall, Chapman v. Meier, Mahan v. Howell, Connor v. Williams and Connor v. Johnson.

Now, the defendants made a big argument about what was in the record with regard to county government. There was

nothing in the record with regard to the question of how the legislature runs county government. Judge Coleman was a former Governor of the state and a member of the legislature, and would not have ordered this plan into effect if it had been unfeasible.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 1:34 o'clock p.m., the case in the above-entitled matters was submitted.]

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