In the

ORIGINAL

Supreme Court of the United States

In the Matter of:	:	
	:	
QUENTIN ROGERS ET AL.,	:	
	:	
Appellants,	:	
	:	No. 80-2100
v.	:	
	:	
HERMAN LODGE ET AL	:	

Washington, D. C.

Thursday, February 23, 1982

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IN THE SUPREME COURT OF THE UNITED STATES

QUENTIN ROGERS ET AL.,
Appellants,
v. No. 80-2100
HERMAN LODGE ET AL

Washington, D. C.

Tuesday, February 23, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:50 o'clock a.m.

APPEARANCES:

E. FREEMAN LEVERETT, ESQ., Heard, Leverett & Adams, P.O. Box 399, Elberton, Georgia 30635; on behalf of Appellants.

DAVID F. WALBERT, ESQ., Messerman & Messerman Co., L.P.A., 1525 Ohio Savings Plaza, Cleveland, Ohio 44114; on behalf of the Appellees.

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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

CHIEF JUSTICE BURGER: We will hear arguments next in Rogers against Lodge. Mr. Leverett, you may proceed whenever you're ready.

ORAL ARGUMENT OF E. FREEMAN LEVERETT, ESQ.

ON BEHALF OF THE APPELLANTS

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

The question in this case is whether the Court of Appeals for the Fifth Circuit duly followed this Court's decision in City of Mobile versus Bolden, in holding that the effect of that decision was to still retain the so-called Zimmer criteria of voting dilution as being sufficient to establish an inference rather than simply requiring a presumption. The appellants in this case respectfully submit that the court of appeals did not follow this Court's decision.

This case was filed in 1976 and attacked as an unconstitutional dilution of Black voting rights the at-large method of electing the five county commissioners of Burke County, Georgia, which had been in effect continuously since 1911.

According to the 1970 census, Burke County has a population, or had a population of 18,235, 60.91% of which were Black. This case was tried subsequent to the

court of appeals' 1978 decision in Nevett v. Sides, holding that while discriminatory purpose must now be shown in a voting dilution case, that it could still be proven by the four discriminatory impact factors which had been identified in Zimmer versus McKeithen. However, the trial was before this Court's decision in Mobile holding that the Zimmer criteria were no longer sufficient.

The trial court below specifically held that the 1911 law had not been enacted with a discriminatory purpose, and that Blacks had not been able to show a denial of specific voting processes. The court concluded, however, based upon the socio-economic factors of Zimmer which the court of appeals previously had resuscitated in Nevett II that the system, quote, "is being maintained for invidious purposes."

Prior to the decision in the court of appeals on the appeal, this Court decided Mobile versus Bolden. Nevertheless, the court of appeals affirmed the district court, concluding that the Zimmer criteria or factors were still sufficient to establish an inference of discriminatory intent, but that the only effect of this Court's decision in Mobile had been that they were no longer sufficient to establish a presumption. And that secondly, a finding of responsiveness was now of major

consideration in that without a finding of responsiveness, the Court said, there could be no establishment of dilution. This apparently was based upon the fact that in the Zimmer case, there had been no showing of lack of responsiveness.

In this case, the courts below relied upon the same three Zimmer factors which had been found insufficient in Mobile -- slating, unresponsiveness and past discrimination. The added factor relied upon here, which was socio-economic status that had been depressed, was also present in Mobile, although not denominated or articulated as such.

In fact, we submit that the evidence in this case was even stronger than it was in Mobile, for here, unlike Mobile, there was no evidence that there had been efforts to change the system, which as pointed out in Justice White's dissent in Mobile, had been done in such a manner as to indicate the possible inference of discrimination by the timetable or the manner in which the attempted repeal was made, as well as the effort to come in and bolster the system by in 1965 conferring executive responsibilities upon the three city commissioners in Mobile.

Notwithstanding this, the court of appeals adhered to the socio-economic disparity impact analysis

of the Zimmer. In the companion case involving Thomas County, Georgia, the court specifically reversed a holding of the district court which said that Zimmer is no longer sufficient after the Supreme Court's decision in the Mobile case.

We submit that the court of appeals erred in its evaluation of this Court's decision in Mobile, and we say that even assuming that the Zimmer analysis is still sufficient to establish purposeful discrimination, that the plaintiffs in this case failed to carry the burden, and the decision below is clearly erroneous.

Firstly, we submit that under no reading of this Court's decision in the Mobile case, can this distinction between presumption versus inference that the court of appeals read into it be sustained. Both in Nevett, which is a 1978 decision, as well as in its companion case of Mobile which later was decided by this Court, the court of appeals below stated the Zimmer test in terms of an inference, and applied it as simply one form of circumstantial evidence subject to the clearly erroneous standard of Rule 52 of the Federal Rules of Civil Procedure.

It is significant I think that the plaintiffs do not make any belated or any great effort to support or to defend the decision of the court of appeals on

this distinction.

The court's decision continuing to treat the Zimmer criteria as being sufficient is contrary to that court's own decision less than a month earlier --

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, Mr. Leverett.

(Whereupon, at 12:00 o'clock p.m., the oral argument in the above-entitled matter was recessed for lunch, to reconvene at 1:00 o'clock p.m. the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Counsel, you may continue.

ORAL ARGUMENT OF E. FREEMAN LEVERETT, ESQ.

ON BEHALF OF THE APPELLANTS (Resumed)

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

I think I was simply commenting when we recessed that the decision of the Fifth Circuit in this case was contrary to a decision of another panel of the same court less than a month earlier in the Escambia County, Florida case, and also, it is contrary to a recent decision of the Fourth Circuit which was decided about a month or so ago.

Now, with respect to the other aspect of the --

QUESTION: Both in the same wing of the -- what was formerly the Fifth Circuit?

MR. LEVERETT: The Eleventh Circuit, yes, sir, that is correct.

With respect to the other part of the court's decision on the question of unresponsiveness, the appellants and the appellees are apparently in agreement that the court is in error with respect to that aspect of the holding. We submit further, on behalf of the

appellants, that while the matter of unresponsiveness was mentioned in White versus Regester without any discussion as to whether it was a proper subject for judicial resolution, that consideration of that type of inquiry should be precluded by the political question doctrine.

Justice Harlan stated it better than anyone in Whitcomb versus Chavis. If there are less appropriate subjects for federal judicial inquiry, they do not readily come to mind.

Now, White versus Regester itself does contain the discriminatory intent requirement. Zimmer, however, does not, and in footnote 16 of that decision, the Fifth Circuit stated unequivocally that the focus of the inquiry should be on the effect or impact of the legislation being challenged.

As applied to Burke County, Georgia, we submit that since the court below found that the at-large system was not enacted for a discriminatory purpose, that there is no basis for striking it down in this case without at the same time recognizing some constitutional basis of at least some degree of proportionate representation. This is so, we submit, because the touchstone of dilution seems to be access. The evidence here is that in Burke County Blacks have never had any

difficulty registering, voting or getting on the ballot. Certainly, since the white primary was stricken down in 1946.

Plaintiff Lodge himself testified that Blacks are better organized politically in Burke County than Whites, that they hold rallies at churches, they have organizations that invite candidates, they even distribute a ticket --

QUESTION: Mr. Leverett, do you agree or don't you that the court of appeals interpreted the district court's action as having found intentional discrimination.

MR. LEVERETT: Yes, sir, by doing this --

QUESTION: But they concluded that the district court's findings should be read as finding intentional discrimination.

MR. LEVERETT: That is correct, but by relying on the same Zimmer analysis which we submit this Court had held was not sufficient to do that in City of Mobile versus Bolden.

QUESTION: But if we -- but assume that we were -- assume the court of appeals was correct that the district court findings overall should be read as finding discriminatory intent, and the court of appeals agreed with that.

MR. LEVERETT: Well, if you assume that, you've assumed the case, it would seem to me.

QUESTION: Well, no, I suppose we could still say that both were clearly erroneous.

MR. LEVERETT: That is the point. We are making that point, too, Justice White.

QUESTION: I know you are, I know you are. But is that the only issue, that two courts below found intentional discrimination and that that finding was clearly erroneous? Is that the point?

MR. LEVERETT: No, sir. The basic question that we are making here is that the process by which the court found discriminatory intent is fallacious because it is a continuation of the Zimmer criteria which this Court said were impact-type only and did not establish discriminatory purpose or intent.

QUESTION: Well, do you agree -- however the district court arrived at it, do you agree that it found intentional discrimination?

MR. LEVERETT: Yes, sir. According to the language of the opinion, it --

QUESTION: Then how can we disagree with that, especially if it's been accepted by the court of appeals without finding it is clearly erroneous? Do you say that it's because they had an erroneous rule of law.

MR. LEVERETT: They applied an erroneous legal standard. We say that even assuming, in this case, that the Zimmer criteria are still valid, assuming that Mobile had not even been decided, that in this case the plaintiffs did not carry the burden and that the finding --

QUESTION: But would you agree that the thrust of Judge Henderson's dissent was that it should go back because they had not given appropriate weight to the Mobile holding?

MR. LEVERETT: Yes, sir. I might say that the Fourth Circuit's decision in Washington versus Findley that just came down deals with this question and said that there was no need to send it back because in that case, at the time the case was tried, the Washington v. Davis had been decided, the parties were on notice that discriminatory intent was necessary and therefore, having not shown it, the case should be dismissed and judgment entered for the defendants.

QUESTION: Mr. Leverett, do you agree that the district court can properly look at circumstantial evidence in meeting the Mobile --

MR. LEVERETT: Oh, sure, sure. I think the proper approach is set forth in this Court's opinion in Arlington. The four or five factors, the sequence of

events, whether what was done represented a substantial departure procedurally-wise, or substantive-wise. I think the proper application of that is well illustrated by the decision of the Fifth Circuit itself in the Escambia County cases where the court considered that at the time Escambia County adopted at-large voting, it went to it right after there had been -- the white primary had been stricken down and there was some arguments made in the newspapers along racial lines. That is the type of proper inquiry that we submit is appropriate in the light of this Court's decision in Mobile.

QUESTION: Of course, the district court didn't have Mobile before it.

MR. LEVERETT: That's correct, sir, it did not. But the Fifth Circuit, of course, tried to rationalize that by, in effect, saying that Judge Alaimo anticipated Bolden and that he did find discriminatory intent. And, of course, we agree that he found it but the process by which he found it is the question. And that is, through use of the Zimmer criteria which are disparate impact analysis.

Contrary to what district court held below, Georgia abolished its poll tax in 1945. District court seems to assume that it was not superseded until the

Voting Rights Act. Georgia did have a literacy test which was enforced until the Voting Rights Act. It was recently repealed in the 1981 Constitution which will be voted on this year.

However, in Burke County the evidence is that in the memory of no witness has any black person ever been unable to pass the literacy test. Moreover, the evidence was that there had never been any effort to change the at-large system up until this case was filed. We submit that in applying all of this, in light of the evidence in the case, the contention in this case ultimately gets down to this: and that is, is inaction unconstitutional; is there a constitutional duty on a political subdivision to continually assess its political structure and change it simply in order to favor one group that says that they are entitled to elect candidates of their choice? We submit that the answer is no, and that's what this Court said in the City of Mobile case.

We submit that the Zimmer analysis is incorrect not only because it reflects a discriminatory impact or disparate impact analysis, but also because of the methodology that it employs, in that it permits the court to grant relief in a voting-related case based upon violations in other areas, such as public

education, public employment.

We submit that in doing this, the court in the decision violates the rule that the nature of the violation determines the scope of the remedy. It puts the courts in the business of pronouncing condemnation rather than judgment in granting reparations rather than judicial relief.

The tendency of the Zimmer analysis to become preoccupied with this very thing is demonstrated by what happened to it as an evolutionary matter in the Fifth Circuit. Originally, there were four factors in the Zimmer analysis. One of those factors was slating. In an early case, Hendricks versus Josephs, the Fifth Circuit said this: It is the ability of Blacks to get on the ballot which is at the core of slating. Yet, in 1979 in Cross versus Baxter, the Moultrie, Georgia case and the Adarian case from McIntosh County, Georgia, the Fifth Circuit completely switched over and said in all, it's a question of success, and that the effect of it was to tend to merge the issue of slating with a separate Zimmer factor of a history of prior discrimination which affects present ability of Blacks to have access.

In this case, for example, the district court denied -- or held that there was a -- that the

plaintiffs had established a lack of slating requirement, because of the fact that there were not anymore Blacks on the Democratic Executive Committee. This was inspite of the fact that the undisputed evidence was that these posts are filled by open election on the same single-member district basis that the plaintiffs were asking for in this case, aside from the fact that about the most unimportant and insignificant job in Georgia is being a member of a county Democratic Executive Committee in a rural county. They've never done very much. They were originally -- their original function was to conduct the primaries, and that was taken over by the probate court in 1970.

QUESTION: Well, the county commissioners are rather important, aren't they?

MR. LEVERETT: Yes, sir.

QUESTION: How many Negroes have ever been elected?

MR. LEVERETT: None in the history of Burke County, so far as we can determine, Justice.

The complete submergence, however, of the three other Zimmer factors by the one dealing with a history of discrimination came in a 1978 decision of the Fifth Circuit in Kirksey versus Supervisors where a

sharply-divided court held that it was now only necessary to show a past history of discrimination and show that that carried forward present effects.

The court in that case said that it was not even necessary to even consider Washington versus Davis and the question of discriminatory intent. In other words, this is a remedy case, not a violation case.

We submit that the bottom line of the Zimmer analysis which the Fifth Circuit has continued to apply in this case was and is, as the dissent in that case in the Fifth Circuit pointed out, reverse discrimination.

I would like now to address the question of Section 2 of the Voting Rights Act which has been argued by the appellees and mentioned by I think all of the four amicus briefs that have been filed in this Court. We submit that Section 2 of the Voting Rights Act does not adopt a disparate impact standard. This Court rejected that argument, we submit, in the Mobile case. The Fourth Circuit recently rejected it in the Columbia, South Carolina case in the same terms as has been submitted to this Court by essentially the same parties.

The Court of Appeals of the Fifth Circuit in this case rejected that argument at page 1364 in footnote 11, and there was no cross-appeal from that holding. And we submit that there are valid reasons

independently of precedent for rejecting that construction of Section 2.

First, you begin with a rule that you look at the language of the statute. The language of the statute uses "deny and abridge", and as the district court in the Uvalde case recognized, these terms themselves connote intent or purpose.

Secondly, the Section, in using deny or abridge utilizes the language of the Fourteenth Amendment, and most specifically, the Fifteenth Amendment. And those amendments have unquestionably been interpreted as imposing a discriminatory intent standard.

Thirdly, when Congress wanted to adopt a disparate impact analysis, it knew very well how to do so in Sections 3, 4 and 5 of the Voting Rights Act. And, of course, the rule of statutory construction is that where in one statute Congress uses words in one section and it does not use them in another section, the inference is that it did not intend for that section to have the effect of the other sections.

Fourth, the statement of Attorney General Katzenbach that has been relied upon by appellees does not support the interpretation that they place upon it. The Attorney General was not asked whether or not

Section 2 had a disparate impact test, or a discriminatory purpose test. He was specifically asked whether or not the word "procedure" as used in Section 2 would cover a situation where a political subdivision simply just didn't open its registration offices. The Attorney General replied, I suppose that you could if it had that purpose.

So here we have the Attorney General himself reading a discriminatory purpose requirement into the statute. Now, it is certainly true that immediately after that, he proceeded to paraphrase the section, and in doing so, we submit, inadvertently utilized the language of Sections 3, 4 and 5 rather than the language of Section 2.

The casualness, however, with which he did this invokes and brings into effect, we submit, what this Court held in Allen versus State Board of Elections, which was to the effect that in any case where the legislative hearings and debate are so voluminous no single statement or excerpt of testimony can be conclusive. In that case, the court applied that principle to disregard the statement of Assistant Attorney General Burton Marshall as to the meaning of voting as used in the Voting Rights Act, and held that the statute would be given a much broader scope than the

words of the statute would themselves indicate.

Now, weighed against this is the statement of Senator Dirksen, -- stated twice, not just once, as this Court's opinion in Mobile had indicated, both at pages 171 and 208 of the record before the Senate -- to the effect that Section 2 was simply a restatement of the Fifteenth Amendment, to which Attorney General Katzenbach acquiesced.

Fifth, we submit that as a policy matter, this Court should not construe Section 2 as having a disparate impact analysis in the absence of more compelling language or legislative history than the Court is confronted with here. The reason for this is as follows. Section 2 applies to all 50 states, not just to a few colored states. So being a disparate impact standard might well not have the limiting construction that this Court placed upon the effect, purpose and effect language in Section 5 in the Bier case where you held that the law was concerned only with laws that led to retrogression.

Now, if you do not apply that restriction on the language in Section 2, this would place in doubt the validity of election codes, governmental organizations, the districting schemes and congressional districts, state legislative districts and local political

subdivision districts all over the country. It would also raise serious questions about the validity of candidate and voter qualifications, and possibly require a validation procedure similar to that used with respect to employment tests under Title VII of the Civil Rights Act of 1964.

Moreover, imposing a disparate impact requirement on Section 2 would create a lot more mischief than it would even, for example, in the Fourteenth Amendment. The reason is that the Fourteenth Amendment does not purport to protect only certain people, whereas Section 2 does. And at least under the Fourteenth you would have to consider the impact on everyone, not just on a few. Under 2, however, it protects only racial and language minority citizens, and a disparate impact test there would be almost mandate for reverse discrimination.

I'd like to reserve what time I have left.

CHIEF JUSTICE BURGER: Mr. Walbert?

ORAL ARGUMENT OF DAVID F. WALBERT, ESQ.

ON BEHALF OF THE APPELLEES

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

I think that one issue underlies every decision of this Court that has dealt with this matter

of legislative reapportionment of racial discrimination, starting with Whitcomb and going to White versus Regester, Burns versus Fordsen and the Mobile case.

That issue is when the normal political process is going on in any community, when there is the regular give and take and black people or any racial minority may lose at the polls in that circumstance, that's too bad. And that's part of the political process, that's the give and take that I think Justice Stevens is talking about in the Mobile case.

It's not the role of this Court to sit back as the political arbiter for the United States and say well, there are not enough Blacks elected in this county, there's not enough in this county and so on and intercede. That's obviously a political question and is not a constitutional question.

But I think the one thing that does characterize all of the Court's decisions and starting with Whitcomb versus Chavis where again there was complete intercourse politically among Blacks and Whites. Black people and white people were in all the parties together, they ran together, they were slated together and so on. And the difference is when black people, when the racial minority is totally excluded from the political process on account of purposeful

discrimination, you've got a constitutional problem and you don't have the normal give and take of the political process where this Court has no function.

QUESTION: Well, would there be any question about that if you -- if the fulcrum of your statement is purposeful discrimination?

MR. WALBERT: Well, Your Honor, --

QUESTION: I suspect your friend would not disagree with that.

MR. WALBERT: Well, I think what I'm referring to what the Court has held, for example, in White versus Regester, and I would like to look at the findings in that case and what was relied upon to find exclusion of the political process.

And in White versus Regester -- and again, Justice Stevens and the whole Court in the plurality opinion distinguishes white on what ground? The fact that there was no evidence in Mobile -- rather, in distinguishing Mobile from White they say there's no evidence there of any real exclusion from the political process that is a result of any kind of discrimination, purposeful or not.

And the question here, I think, the first question is what is this kind of exclusion from the political process. Now, I think this case -- the

findings of this case in the trial court and the court of appeals show as strong an exclusion and omission from the political process of the black people in Burke County as you could possibly have in any case.

The first thing that -- and again, let me refer to Mobile. The district court in Mobile made a finding that black people did not have access to the political process. That finding was based on one thing and only one thing, and that was racial block voting.

QUESTION: Is it probably not true that there are more women of voting age in the United States than there are men?

MR. WALBERT: I think that's slightly true, statistically.

QUESTION: What's the ratio of women holding elective public offices as --

MR. WALBERT: Your Honor, I don't think at-large elections I don't think could have the purpose or the effect of discriminating against women since they don't live in segregated areas.

QUESTION: Well, I'm getting at a different aspect of it.

MR. WALBERT: All right.

QUESTION: There is only a small percentage of elective offices in this country that are held by

women. Is that not so?

MR. WALBERT: I think that varies from where you go, place to place, and as obviously in any political question you've got to look at the facts of that political environment to determine --

QUESTION: Well in the country as a whole.

MR. WALBERT: I suppose that's probably true.

QUESTION: Is that a result of some purposeful discrimination, or is it just the disinclination of women to run for elective office, or maybe the disinclination of some voters to vote for them?

MR. WALBERT: With all due respect, Mr. Chief Justice, I don't know what the cause of that is, but I do know what the cause is in Burke County. I think, with all respect, the findings of fact of the district court here show quite clearly why it is. We do have findings here.

QUESTION: Surely, women were subject for many, many years before the Constitution was amended, to an exclusion from the political process, were they not?

MR. WALBERT: I'm sure that's true.

QUESTION: Conscious in the sense that they were not permitted to vote.

MR. WALBERT: I'm sure that's true, and possibly this Court should address that issue in another

case. But I don't think it has to do with the Burke County facts and what the issue is in this case. Because we show --

QUESTION: Well, does it not bear? You said no one has been elected to public office in this jurisdiction, and relatively few women are elected to public office in this country.

MR. WALBERT: Well, Mr. Chief Justice, let me --

QUESTION: But that doesn't mean that someone is discriminating against women.

MR. WALBERT: Certainly not.

QUESTION: You can't draw that inference, can you?

MR. WALBERT: I would certainly not draw that inference in terms of any constitutional conclusion. We're not trying to do that in this case by any stretch of the imagination. We are certainly not trying to do that.

I think that what we have shown -- and I would like to point out that it is certainly, it is not accurate to say that the district court found no violations of the explicit right to vote in terms of casting your ballot and registering in this case. I think that we ought to read exactly what was found, and

that sentence which is quoted in the appellant's brief leaves off after the sentence. Which is that there were no violations exactly like those in Hinds County found here.

QUESTION: What are you reading from now, so we can --

MR. WALBERT: In the Jurisdictional Statement in the court of appeals' opinion, an in footnote 38 they're referring to the district --

QUESTION: What page is that on?

MR. WALBERT: I'm sorry, 44a of the Jurisdictional Statement in the Appendix. Reading from that it says, Of particular significance, given the plurality position in Bolden that the Fifteenth Amendment violation occurs only when there's proof that the right to register and vote was directly impinged, is the district court's finding that such overt conduct was taking place even at the time the present lawsuit was filed.

Now, the evidence to support those findings, which I don't think are shown is clearly erroneous in this case, were overwhelming. Because if you go back to when the 1964 Voting Rights Act was passed, you find a refusal by the county from then on to provide registration opportunities for black people. There was

on registration site that was in the county, in the county seat. That was a 829-square mile county. The evidence is undisputed in the findings of the trial court are that black people, because of their tremendous --

QUESTION: Mr. Walbert, did the district court grant any relief for this particular interference with access to the polls? And if not, why not?

MR. WALBERT: Well, I think for this reason, Your Honor. I think that there's obviously a more major issue. We did not ask for specific relief on that question.

QUESTION: Well, I wonder if it is a more major issue, because if there were unrestricted access to the polls, if everybody of voting age voted, it would seem to me that your clients would be better off with the at-large system because you'd have a majority of the voting age population.

MR. WALBERT: Again, with all due respect, Justice Stevens, I think that would be not looking at all the findings in this case, and the showing that the exclusion from the political process, the inability to deal in it, is more than just a product of registration discrimination.

QUESTION: But is the exclusion from the

political process something that the court had the power to remedy?

MR. WALBERT: I think it did in the sense of this particular statute. That statute is --

QUESTION: Then why didn't it do that? That's what puzzles me about the case.

MR. WALBERT: Well, the court of appeals I think addresses that very well, because it talks about -- and I think that may be on page 55a. And they say there, Justice Stevens, and I think this is the best answer to that question, "We conclude that the remedy ordered is not only permitted, but under the facts presented it may be required. The picture the plaintiffs paint is all too clear. The vestiges of rascism encompass the totality of life in Burke County, discriminatory acts of public officials enjoy a symbiotic relationship with those of the private sector, and the situation is not susceptible to isolated remedy."

QUESTION: That doesn't clearly answer my question.

MR. WALBERT: Well, this is no longer --

QUESTION: Why didn't it do anything in that regard if there is a problem of access? Maybe it wouldn't have been enough, but the judge apparently didn't find impediments to the polls that needed to be

removed.

MR. WALBERT: Well, I don't think that's true. As the court says, it was only because of the court's pressure that there was any addition in registration sites. The court did pressure that. That's the finding of the court.

QUESTION: But he didn't enter a decree that had anything to do with registration sites.

MR. WALBERT: I think he was able to accomplish the addition --

QUESTION: And that puzzles me, because if it was as serious a problem as you indicate, I just can't understand why a district judge wouldn't have done something to correct the situation.

MR. WALBERT: Well, Your Honor, there was no specific request for that. The district court did quadruple the --

QUESTION: Well, even more surprisingly then, why would there be no request for that kind of protection?

MR. WALBERT: Because I think it was very clear to us that it really would not have remedied the problem. The exlusion --

QUESTION: Well, but it doesn't have to be a total remedy to be something that would be appropriate

as part of an overall remedy.

MR. WALBERT: Your Honor, under -- the at-large election system is really the lynchpin in the entire structure here which keeps black people out of the pri --

QUESTION: Well it wouldn't be if there were unrestricted access to the polls. Then you'd be better off with the at-large system.

MR. WALBERT: That's not true, Your Honor. It's not a Black majority county anymore. I'd like correct that allegation.

QUESTION: Well, it was according to the allegations in the complaint.

MR. WALBERT: It was at the time of the 1960 Census, they were saying. At the time of trial, and --

QUESTION: Well, the allegation in the complaint speaks as of the present. It doesn't say anything about the Census. Paragraph 11 alleges the population.

MR. WALBERT: Your Honor, speaking of majority. The voting age population. There is a substantial disparity between actual population and voting age population in this county. If you go to voting age population --

QUESTION: Paragraph 11 deals with voting age,

yes.

MR. WALBERT: At the time of trial and according to the 1980 Census, which is the most recent thing we have, it is a black minority county by voting age population.

QUESTION: What was that figure again?

MR. WALBERT: It was the 1980 Census.

QUESTION: 1980. But what was the figure?

MR. WALBERT: It's about 47% is the percentage of Blacks at this time in the county.

QUESTION: How would you characterize the 53? Is that one solid homogeneous unit, are there any Hispanics or any other ethnic groups?

MR. WALBERT: No, it's essentially homogenous in terms of --

QUESTION: Does the record show that?

MR. WALBERT: The census data that is in the record shows that, yes.

I think, Your Honor, too, to look at these other exclusionary factors. Let's look at the Democratic Party which is being always continually belittled as being insignificant in this county. The Democratic Party, the Democratic Executive -- it's a one-county party. It's still the old traditional one-county -- one-party county. The Democrats are

always elected to local office. The Democratic Executive Committee contains all those people who are elected to office. You can belittle being a member of the Democratic Executive Committee, but unless you are a Democratic Executive Committee member, as a matter of fact you do not hold office in this county. So you can say it's not important, but it obviously is very important.

QUESTION: Well, which comes first, here? Are they elected first and then become a member of the committee or do they become a member of the committee first and then get elected?

MR. WALBERT: Well, there's more than just elected officials in the party. To take some examples, people --

QUESTION: I'm talking about the Executive Committee. Do they get on the Executive Committee because they hold an elective office?

MR. WALBERT: No, there's no formality like that. No, Your Honor.

QUESTION: Mr. Walbert, I'm puzzled by the district court's methodology here. On page 71a, the district courts makes the finding which you quote on the first page of your brief, I think, that moreover, it is evident that the present scheme of electing county

commissioners, although racially neutral when adopted, is being maintained for invidious purposes.

Now, there are two findings on the question of intent. One, there was no intent when adopted but is presently being maintained with a discriminatory purpose. And I can understand a district court's summarizing the evidence which led it to that conclusion. But if the district court's approach is consistent with Mobile, I'm at a loss to know why you went through all these so-called Zimmer factors later in the opinion, as if he still hadn't covered the ground.

MR. WALBERT: I think there's two reasons for that, Justice Rehnquist. I think the district court in a way -- Zimmer was still the law, in a way, in the Fifth Circuit. And as the Fifth Circuit clearly says, though, in this case, Judge Alaimo did something more than just a Zimmer analysis. And remember what the Zimmer analysis used to be before Mobile. That was, you add up three categories and if you win on two or three, it's a legal presumption. It's sort of like -- it's a game almost, in a sense.

Judge Alaimo did this. He categorized the evidence according to the Zimmer categories, and I think he was right in doing that. But it does not create a legal problem like Mr. Leverett says because of this:

all the evidence you could think of to prove intentional discrimination fits in one Zimmer category or another. To say that you outline the evidence by the Zimmer categories almost says nothing. There's no defect in the district court's opinion because he organized it under the Zimmer categories.

For example, the very first one, the first Zimmer category, is access to the political system. Now, I can't think of any evidence of intentional discrimination in using the at-large system that really wouldn't fit under that category.

I think the question here is -- and this has always been the problem with Zimmer because it's so, kind of an amorphous thing, but the question is what was the evidence and what were the findings underneath those Zimmer categories. That's the key thing. Not whether or not he outlined it according to Zimmer.

And again, let's look at Mobile because Mobile made a finding that there was no access to the political system in that case. That was based one thing, and that was racial block voting. In this case, it was based on much more than that -- registration discrimination, exclusion from the Democratic Party, which is vastly more exclusionary type of evidence than occurred in White versus Regester where it was just some kind of a

private slating organization.

We had the freeholder requirement. There's always been a freeholder requirement to run for county commissioner, and that has a devastating impact on the ability of the black people to run.

So I think that, again, just the fact that Zimmer is used by the district court as a method of organizing the evidence does not tell us that there's something wrong as a matter of law. And the court of appeals looked very closely and said that the district court did, in fact, make a separate and independent finding of intent. And I think this Court should, in some part, defer to that decision as well.

QUESTION: Mr. Walbert, I guess one of the important things we have to resolve in this case is whether the court of appeals appropriately articulated the standards under Mobile versus Bolden, and the court of appeals in its opinion placed great emphasis on the finding of unresponsiveness. Is that a requirement in your view of Mobile, or is that sufficient under Mobile, and would you address yourself to the court of appeals and whether it adhered to the Mobile standard.

MR. WALBERT: Yes. I think Justice O'Connor has added in a new burden on the plaintiffs. It said it as a sine qua non of prevailing, you just prove it as an

essential element of the case even if you proved intentional discrimination. So I think in that regard, it adds something in that Mobile never talked about or never suggested and we would say A, that's wrong, but B, it has nothing to do with this appeal. Because all that could have done was hurt us; it could not have hurt the defendant.

The court does not give controlling weight to the question of responsiveness; only controlling against the plaintiffs. It does not say if you prove it, that's a strong inference or presumption of discrimination. It expressly says that in one of the footnotes, number of which I can't recall offhand, but it says that responsiveness is significant only in its absence because that's failed. It does not accord undue significance at all to proof of responsiveness, in terms of inferring discrimination.

QUESTION: Isn't this, in your view, this is based on the facts of this case.

MR. WALBERT: Absolutely, Your Honor.

QUESTION: That the district court made the finding of discrimination, and you don't want us to go any further than that, do you?

MR. WALBERT: That's correct, Justice Marshall. And it is clear and the court of appeals

reviews the whole record and it says, this is what was done. There was a finding of intentional discrimination in maintaining the system.

QUESTION: And that's all you want.

MR. WALBERT: And that's all that needs to be assessed.

I think that we have the question of whether or not Zimmer, or Mobile, was followed. And I think there's a tremendous scholastic analysis of Zimmer and the law in the Fifth Circuit's opinion. And you can look here and you can look there and you can make something out of this language or that language. But fortunately, the Fifth Circuit has a little section in its opinion which says what is the rule established by Zimmer? And that is on page 39a of the Appendix of the Jurisdictional Statement.

And I think if this Court finds that that is inadequate, then I think Mr. Leverett's right. I think the case should be reversed as to the finding of intent. But I think that decision of what the rule established is entirely correct and totally in accord of what the plurality -- even the plurality opinion said in Mobile.

And that's this: First of all, the court says that according to the plurality -- and again, the

Mobile, the Fifth Circuit, rather, in this case tried to follow the Mobile plurality. It didn't try and go off in any other direction; it tried to follow the plurality opinion. It said discriminatory purpose is necessary in challenging the maintenance of an at-large election system. That's the first thing, and that's certainly consistent with the plurality.

Secondly, it says that you may infer intent from the totality of the circumstantial evidence. There now is no dispute over that, Mr. Leverett agrees with that.

The third thing it says is an essential element of the prima facie case is unresponsiveness and we just talked about that.

Now, the next thing in here is really where he talks about Zimmer and I'd like to read this portion. It's about three sentences and it says this: --

QUESTION: What page are you on?

MR. WALBERT: This is page 39a of the Jurisdictional Statement toward about six lines up, eight lines up from the bottom. And it says, The Zimmer critiera may be indicative but not dispositive on the question of intent. Those factors are relevant only to the extent that they allow the trial court to draw an inference of intent. The Zimmer criteria are not the

exclusive indicia of discriminatory purpose, and to the extent that they are not factually relevant in a given case, they may be replaced or supplemented by more meaningful factors. Even if all the Zimmer and other factors are established, an inference of discriminatory purpose is not necessarily to be drawn.

The trial court must consider the totality of the circumstances and ultimately on the precise issue of discriminatory purpose, and that is the rule established by the court of appeals in this case, and that complies, in my opinion, absolutely 100% with the plurality opinion in Mobile.

The court of appeals then went on to apply it to the facts of this case and said that's just what the district court did; it made that ultimate, precise finding of intentional discrimination and intentional motivation and purpose in using the at-large system, based on all the circumstantial evidence available to it.

And the evidence here -- again, it just pales by comparison in the Mobile case, if we look at that case. There was no evidence whatsoever of anybody being excluded from the political process except by racial block voting. There was no evidence at all of being excluded from the process. District court found as a matter of fact that black people participated openly and

without hindrance of any sort in the political process in Mobile. True, they lost at the polls, but that's certainly not enough.

In this case we've got continued efforts to exclude people from the political process through the findings of the district court on voter registration and not allowing voter registration to be accessible. And you know, it's interesting, you know voter registration has been restricted in this county since the Voting Rights Act was passed.

You say well, is that discriminatory? Well, 99.7% of the white people in Burke County were registered as of 1968, according to the facts in the record. We had judicial notice of that taken on I think page 220 of the record. So when you talk about having restricted access, and making it very difficult --

QUESTION: That's a very high percentage, isn't it?

MR. WALBERT: It's a very civic-minded, white community.

QUESTION: Throughout the country, have you anything in this record to suggest what's the national --

MR. WALBERT: We have. The only thing there is, Chief Justice Burger, is as to Georgia. We have a

number of the Georgia counties in there. We do not have the national average.

There is also evidence -- and again, I --

QUESTION: What percentage of the minority population are registered?

MR. WALBERT: Well, it was negligible in 1965 and it has finally --

QUESTION: It was practically zero in 1965.

QUESTION: But currently.

MR. WALBERT: I think it's about 40%.

QUESTION: 38% was the figure that I thought I recalled.

MR. WALBERT: 38% of the registered voters are black, and 62% are white, but I'm not sure what the percentage of whites and blacks are.

QUESTION: And 40% of them are registered, is that it?

MR. WALBERT: I think that's not right. I'm not sure what the exact number is on that and I wouldn't want to say without actually calculating that, at this time.

QUESTION: Mr. Walbert, isn't it probable that in every colored jurisdiction in the South where there was substantial impediment to voting prior to 65 that you would have a case proved upon the Zimmer factors by

virtue of that history?

MR. WALBERT: Your Honor, again --

QUESTION: Regardless of whether it's at-large or what. Whatever it is, these factors would prove invidious intent, wouldn't they?

MR. WALBERT: I think maybe the best answer to that is the only other written order I know of that Judge Alaimo rendered in this case showed Zimmer-type factors in the sense Your Honor may mean, and then they lost. That's the McIntosh County case that Mr. Leverett referred to.

QUESTION: Is that right?

MR. WALBERT: So I think that's absolutely not true. I think you can look at the record and see that that did not occur.

And this case is an extreme case in terms of the facts. I mean, to have manipulation of the voter registration process in 1976 I think tells us a lot. I think to have the county commissioners calling black people niggers in the county commissioner meetings, which is the evidence in this case, that says something about racial attitudes. I think the refusal to --

QUESTION: And tests asking such questions as how many windows there are in the White House. That was another one, wasn't it?

MR. WALBERT: Well, sure, the voting -- yes. I mean, I don't think anybody here could pass the voter registration test. Nobody in this courtroom, and not any member of the bar of this Court could pass the Georgia test.

QUESTION: I tried and I failed.

MR. WALBERT: I think Constance Baker Motley failed, too, from what I heard at one time.

But I think that, again, the evidence --

QUESTION: That's true in so many -- the thing that puzzles me is whether it's the district boundaries that are the remedy for that kind of very plain evil. It certainly --

MR. WALBERT: Your Honor, all I can say is the best answer to that is to just read the district court's opinion and read the Fifth Circuit opinion, and I honestly think there can't be much doubt about the inadequacy of that one little remedy. That is part of the problem. But I think, you've got --

QUESTION: Well he didn't do anything to remedy this kind of impediment to access to the --

MR. WALBERT: That would not help the Democratic Party exclusion; that would not help the finding of the district court that black people cannot campaign in this county because of the deep-rooted

racism in the county. That would not have touched that. You're excluded from the political party -- you can't campaign in Burke County if you're a Black, according to the findings of the district court, which were affirmed by the court of appeals. That's extreme findings.

There is no political process here going on, Justice Stevens, in the sense that you talk about it in Mobile. There is no give and take. That doesn't exist in Burke County, and by no stretch of the imagination is that characteristic of the South today.

In fact, --

QUESTION: Well, if all those things are true, I don't care what your boundaries are, they just don't have a chance.

MR. WALBERT: Well, I think that an interesting thing happened after the district court's order in 1978 which was ultimately studied by this Court, but five districts were set up, and we immediately saw for the first time in the history of the county five black people qualified for each of those district election posts, pursuant to the district court order.

I think that speaks quite loudly in terms of what would happen to the political process if you had

majority black districts, which is inevitable if you re-district the system. That is absolutely inevitable. Then I think you're going to see a complete change in the political behavior in the political process. I think that's inevitable.

And I don't think that isolated remedies, -- as the court of appeals said, an isolated remedy will not do it in Burke County. There is too many dimensions to this problem, and the lynchpin of it is the intentional maintenance of the system -- and again, --

QUESTION: The irony of the remedy is that in a county which according to the facts found by the district court -- you tell me the 1980 Census is different now -- the majority black county, he divides up five districts and gives majority whites -- the whites are in the majority in three of the five. I could imagine people with the racially-discriminatory purpose on the white side of the ledger wanting that remedy. I suppose it would be unconstitutional if they did.

MR. WALBERT: I think the key is to look at what the purpose was. I don't know if we should conjecture about this or that. I mean, there was found to be a discriminatory -- the purpose here was to discriminate in the use of at-large elections, in this

case under these facts. And I think that's really the key to it. And we shouldn't say what might have happened over in Mobile or what might happen in the next county over in Wilkes County, what might happen in Augusta, Georgia.

What happened here is that the district court found, based on all this incredible evidence, that there was --

QUESTION: Would this remedy be unconstitutional if there were evidence in the record that some white bigots favored this way of getting the three-to-two majority control? I could imagine that could -- you know, sometimes people of the same race have different views as to what's in their best interest.

MR. WALBERT: Sure. I think not, Your Honor, because I think, again, something is very clear from this record. And that is black people will be excluded so long as the at-large system is maintained, period. That can be remedied only by having a district election system, period. Those two things are unequivocal.

So, to remedy the existing exclusion, if you can't do it by keeping at-large, you must have a district system. Now certainly, I can conceive of gerrymandering the system so you could have allegations of racism or racial discrimination as a gerrymander, and

that's conceivable. But to say that districting somehow has a purpose or intent to discriminate or is unconstitutional I do not see that that is possible on the record or the facts of this case. That isn't possible.

QUESTION: You would be making the same argument if 60% of the population were black -- 60% of the voting age population were black.

MR. WALBERT: Your Honor, I think we don't have that case. I think, again, I think the key thing --

QUESTION: But when this suit was filed you had, what, 53%?

MR. WALBERT: Well, the voting -- it had been -- if you look at from 1920 on --

QUESTION: Let's assume you had 60%.

MR. WALBERT: It would depend entirely on the facts of the particular county.

QUESTION: Same facts, except 60%.

MR. WALBERT: 60% black voter registration?

QUESTION: Yes.

MR. WALBERT: I suppose you'd have to decide whether or not blacks had any possibility of becoming a majority of the registered voters. If all the other barriers were removed, and in this county it is clearly

impossible, so I think --

QUESTION: Why? Why?

MR. WALBERT: Well, as the findings show, the --

QUESTION: I'm talking about now and not 15 years ago. You mean if a Black shows up to be registered, he is not allowed to register?

MR. WALBERT: Your Honor, I think that the registration has been made inaccessible. We have black people who are too poor to get to the polling places, according to the finding. They can't even get to the polling places in this county and the state law will not allow you to vote by absentee ballot if you have no money to buy transportation. If you're physically handicapped, you can vote that way. But if you're too poor to get to the polls -- and I think an expert witness called by Mr. Leverett, Dr. Robinson, testified that he was astounded at the percentage of black people who had no transportation to even get to the polls in this county. He was astounded by that fact.

So I think you've got to -- you know, under the precise circumstances of this county, you've got a very severe case, Justice Powell. You can't really say what would happen over here if you changed this fact, because you don't have that fact in this county.

QUESTION: In some states there are statutory prohibitions against rounding up voters and taking them in in a truck or car or a bus. Any such statutes in Georgia? Anything wrong --

MR. WALBERT: Of driving somebody to the polls?

QUESTION: Yes.

MR. WALBERT: I've never heard of a statute like that in any state, Mr. Chief Justice.

QUESTION: Well, there are some.

MR. WALBERT: It is not illegal to take --

QUESTION: There's nothing in Georgia that would prevent someone from renting a bus and going around and getting voters.

MR. WALBERT: It is legal to take somebody else to the polls, and I don't know of any number limitations. I mean, there's limitations on how many people you can assist at the polls that might be construed -- maybe that's the kind of law Your Honor is referring to. Maybe that can be construed to make it illegal to even do that.

I think --

QUESTION: Is this a rural county.

MR. WALBERT: Yes, it is.

QUESTION: So one limitation would be money, wouldn't it?

MR. WALBERT: Fifty-three percent of the black people in Burke County live under 75% of the poverty level. They're poorer than poor in Burke County. The people in Burke County don't have the money to rent a bus to take the other people to the polls. That's not even a practicual situation in this situation. It is an intense and extreme case. It is not something you can transfer from one place to another.

I think I would finally, Your Honors, like to mention the Voting Rights Act here and Section 2 which Mr. Leverett addressed because I think that that provision, of course, has not really been ruled on by this Court yet. And frankly, I think this Court ought to decide this case based on Section 2 rather than getting into these constitutional issues.

Our position on Section 2 was addressed by the court in Mobile by, I think, five or six of the justices and there was no majority opinion under Section 2. The plurality said that it's the same thing as the Fifteenth Amendment, no more. And in dissent, Justice Marshall and Justice Brennan said it is -- it covers effect as well, and it covers these kind of practices, and Justice White and Justice Blackmun and Justice Stevens took no position on Section 2. So there's no opinion of this Court, and I think that this Court ought to seriously

consider that issue.

And our position is not, as Mr. Leverett says, that everything with any impact or effect on black voters is illegal under Section 2. Our position is simply that where you have a neutral device that perpetuates these clear cosequences of past purposeful discrimination, then that is reached -- those kind of effects and only those are reached by Section 2 of the Voting Rights Act.

I think that if we look at the plurality opinion we can see one problem with it right away, and that is that it holds that Section 2 applies only to outright and absolute denials of the right to vote only if you are not allowed into the voting booth, and that's a problem. Because the coverage provision of Section 2 is exactly like the coverage provision of Section 5. That is, the kind of practices that are covered has exactly the same language. There's no question about that.

This Court held unanimously I think it was in Allen versus Board of Elections that that language covers at-large elections. So the only question I think we really have to recognize that the plurality was in error was with regard to that construction, that aspect of Section 2. And it really should seriously -- I think

the Court should seriously consider that issue and dispose of this case on a Section 2 ground.

Now, --

QUESTION: What did the court of appeals say about that issue?

MR. WALBERT: They followed the plurality. They followed the plurality ruling, Your Honor, and they just followed the plurality. They said that we did not -- that Section 2 did not give a cause of action above and beyond what the Constitution or the Fifteenth Amendment would in its own right.

QUESTION: So your Section 2 argument was presented --

MR. WALBERT: Oh absolutely. We pled it in our complaint, we raised it at all stages of the case, and we presented it to the court of appeals and it was rejected. But we do rely on that in appeal.

Now, I think that the legislative history is very clear on this, too. There is Attorney General Katzenbach's statement. This court has said over and over that Attorney General Katzenbach's statements about what the Voting Rights Act meant are very important because he wrote it. This is an administration proposal.

And finally, Your Honors, the 1981 legislative history confirms all this where the members of Congress

have testified that it is supposed to be an impact test.

Thank you very much.

CHIEF JUSTICE BURGER: Mr. Leverett, do you have anything further?

ORAL ARGUMENT OF E. FREEMAN LEVERETT, ESQ.

ON BEHALF OF THE APPELLANTS -- Rebuttal

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

We take issue with counsel when he says that this case differs from the facts in Mobile. All I can suggest is that the Court read the district court decision and compare the findings and the facts there with those in this case.

Counsel says that the court pressured the registration sites and achieved the three additional registration sites. The commissioners voted on February 10, 1976 to add these new registration sites in response to the request of the organization that brought this case. This case was not filed until April 5th, approximately two months later. It is certainly true that the sites were not opened until a week or ten days prior to the election, but they were opened in response to a request and not in accordance with any pressuring from the court, and the district court's statement to that effect is completely without any evidence at all

and is, in fact, not true.

Counsel made the statement that registration has been restrictive in Burke County. I cannot equate the fact that until 1976 there was only one registration site to indicate restriction of the right to register.

Burke County has only 18,000 people. The plaintiff himself admitted that there were probably not more than 2000 people who even were potential voters who had not registered.

QUESTION: How many square miles is it?

MR. LEVERETT: About 800 square miles, which is about a square about 28 to 29 miles, with approximately 18,000 people.

And I would further submit that the evidence in this case shows that notwithstanding the cries about we need these registration sites, the undisputed evidence is that in one of these registration places, only 50 or 60 voters had been registered by the time of the trial there, and another one less than 100. Before I came up here this past week I checked on it and it's still less than 100 in each of the new registration sites, which indicates that they were not needed that much after all, anyway.

QUESTION: How many registration sites now?

MR. LEVERETT: Mr. Chief Justice, there are at

least three. I'm not sure about the one in Goth. I asked Mr. Lewis and he is not sure. There would be three at least, one at Sardis, one at Midville and one at the county site in Waynesboro. There may be one at Goth, I'm not sure. It was originally established, the man had some problems, he didn't know how to function. They finally had to pick up the cards and it was put somewhere else.

Then the last statement was made that the -- just look what happened when the court order relief. Of course, two of the plaintiffs in this case ran in that election, and I'm sure that there was some encouraging of others to run to make a demonstration of response. And of course, I might say that one of the plaintiffs ran after the plaintiff's plan had been approved, which deliberately gerrymandered the lines to put there of the incumbent commissioners in one district against Mr. Lodge, and they even tried to amend it to put a fourth one in, but the court did not go that far.

We submit that the judgment below should be reversed.

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

(Whereupon, at 1:55 o'clock p.m., the oral argument in the above-entitled matter was concluded.)

CERTIFICATION

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Quentin Rogers Et Al., Appellants, v. Herman Lodge Et Al., No. 80-2100

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BY Suzanne Young