No. 99-11145

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

_____

DEAN BUTCH WILSON, et al.,

Plaintiffs-Appellees

v.

JOHN W. JONES, JR., et al.,

Defendants-Appellants

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

_____

BRIEF FOR THE UNITED STATES AS APPELLANT

_____

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STATEMENT REGARDING ORAL ARGUMENT

Because this case involves complex factual and legal issues, oral argument may be helpful to the Court.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES:

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CONSTITUTION AND STATUTES:

STATUTES (continued): **PAGE**

RULES:

LEGISLATIVE HISTORY:

MISCELLANEOUS:

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* Authorities chiefly relied upon are marked with asterisks.

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STATEMENT OF JURISDICTION

This is an appeal from a judgment of the federal district court dissolving an injunction this Court ordered in an earlier case and enjoining elections pursuant to the existing districting plan. Plaintiffs brought this action under 42 U.S.C. 1973 et seq., 42 U.S.C. 1983, 42 U.S.C. 1988, 28 U.S.C. 2201 et seq., and 28 U.S.C. 1651 (R1-1).[1] The district court had jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1343, and 42 U.S.C. 1973j(f). The district court entered judgment for plaintiffs on March 29, 1999 (R7-137). The Dallas County Commissioners filed a timely

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[1] References to "R_-_-_" are to volume number, docket entry number, and (where applicable) the page number of the original record. When citing to the transcripts,"R_-_(name)" refers to the volume number and page number only, as the trial transcripts do not have docket entry numbers. References to "Def. Exh.__" are to defendants' trial exhibits.

notice of appeal on May 3, 1999 (R7-146). The United States filed a timely notice of appeal on May 26, 1999 (R7-157). This Court has jurisdiction under 28 U.S.C. 1292(a).

STATEMENT OF ISSUE

Whether the district court properly held that the injunction this Court ordered to be entered in 1988 in United States v. Dallas County Commission, 850 F.2d 1430 (1988), cert. denied, 490 U.S. 1030 (1989), requiring the election of the five members of the Dallas County Commission from single member districts, should be vacated as an improper remedy for a violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, in light of the Supreme Court's decision in Holder v. Hall, 512 U.S. 874 (1994).

STATEMENT OF THE CASE

A. Background Facts

This case involves the County Commission of Dallas County, Alabama, which is located in the south-central part of the state (R5-114-14-15). According to the 1990 Census, Dallas County had a total population of 48,130 persons, of whom 41.7% were white and 57.8% were black; 46.6% of the total voting age population was white and 52.8% was black (R5-114-15). At least in part because of the lingering effects of discrimination, the socio-economic condition of black citizens of Dallas County is -- and has always been -- significantly depressed compared to the condition of the county's white residents (R7-136-42; R5-114-17-22).

The origins of the current Dallas County Commission are found in a 1901 act of the Alabama legislature establishing a court of county revenues "composed of the judge of probate as principal judge, and four commissioners" to govern Dallas County. 1900-1901 Ala. Acts 328, §§ 1, 6 (Act No. 328) (Def. Exh. 1 at Tab 34). The act provided for the at-large election of the members of the court of county revenues and authorized them to "perform all of the duties and services, and have and exercise all of the powers which are or may be required of the several members of courts of county commissioners of this State." Act No. 328, §§ 3, 6. The probate judge presided over the body and cast the deciding vote in case of a tie. Act No. 328, § 2. The probate judge and the other members of the commission were each paid $4.00 "for each day they are actually engaged in the performance of their duties as members of said court." Act No. 328, § 5. A 1949 amendment gave the chairperson a vote in filling certain county vacancies (R5-114-6; Def. Exh. 1, Tab 30 at 745; see R8-188 (Jones); 1949 Ala. Acts 196, 197). The probate judge had other, quasi-judicial duties, including adoptions, estate proceedings, guardianships, condemnations, name changes, document recordings, civil commitments, and other duties unrelated to the work of the commission (R8-130, 144, 153 (Jones); Def. Exh. 1, Tab 17 at 3032).

Dallas County has a lengthy record of discrimination against black citizens. United States v. Dallas County Comm'n, 739 F.2d 1529, 1537-1539 (11th Cir. 1984); United States v. Alabama, 252

F. Supp. 95, 101 (M.D. Ala. 1966); R5-114-28. As a result of this discrimination, there was a marked disparity in voter registration in Dallas County when Congress enacted the Voting Rights Act in 1965 (R5-114-27). Only 2.1% of the 1960 black voting age population was registered to vote, as compared to 65.7% of the 1960 white voting age population (R5-114- 27-28). Even after federal examiners had registered black citizens of Dallas County and many of the discriminatory impediments to registration and voting had been removed, black citizens still had no voice in county government, primarily because extreme racially polarized voting, in conjunction with the at-large method of electing the county governing body, effectively foreclosed any chance for blacks to elect candidates of their choice. United States v. Dallas County Comm'n, 739 F.2d 1529, 1536-1537 (11th Cir. 1984); R7-136-43. No black person was ever elected to the Dallas County Commission under the at-large method of election enacted in 1901 (R7-136-43; R5-114-37).

B. Prior Proceedings

In 1978, the United States challenged the at-large method of electing members to the Dallas County Commission and Board of Education under Section 2 of the Voting Rights Act, 42 U.S.C. 1973. See United States v. Dallas County Comm'n, 548 F. Supp. 875, 877 (S.D. Ala. 1982). In 1982, the district court held that the at-large method of electing county commissioners did not violate Section 2. The court found that the United States had not proved that the 1901 statute under which the at-large method

of election was established was motivated by discriminatory intent or diluted black voting strength in Dallas County. 548 F. Supp. at 919. This Court reversed and remanded to the district court with instructions to consider the role of racially polarized voting and the lingering effects of discrimination in Dallas County. United States v. Dallas County Comm'n, 739 F.2d 1529 (11th Cir. 1984). On remand, the district court found that the at-large election scheme for the Dallas County Commission and Board of Education diluted minority voting strength and thereby violated Section 2. United States v. Dallas County Comm'n, 636 F. Supp. 704 (S.D. Ala. 1986).

To remedy the Section 2 violation, the district court ordered the county to adopt a method of election that created four single-member districts. The district court retained the the probate judge, elected at large, as chairperson, concluding that the inclusion of the probate judge elected at large was a "fair election plan," even though the violation of Section 2 involved the at-large election of the commission "as a whole." United States v. Dallas County Comm'n, 661 F. Supp. 955, 958-959 (S.D. Ala. 1987). This Court again reversed, finding that the election of only four members of the commission from single-member districts, allowing the chairperson to continue to be elected at large, did not completely remedy the prior dilution of minority voting strength caused by the at-large method of electing county commissioners. United States v. Dallas County Comm'n, 850 F.2d 1430, 1432 (11th Cir. 1988), cert. denied, 490

U.S. 1030 (1989); see also United States v. Dallas County Comm'n, 850 F.2d 1433, 1442 (11th Cir. 1988) (companion school board case), cert. denied, 490 U.S. 1030 (1989). This Court ordered Dallas County to adopt a five single-member districting plan for both the Board of Education and the County Commission. As a result, black citizens were elected to the county commission for the first time since Reconstruction (R7-136-44). The chairperson of the county commission, a position no longer held by the probate judge, was chosen from among the five county commissioners (R7-136-44).[2]

The release of the 1990 Census data revealed that the 1988 court-ordered plan was malapportioned (R7-136-45). In March 1992, the Dallas County Commission adopted a new redistricting plan that, under the 1990 Census figures, maintained approximately the same racial population breakdown as the 1988 court-ordered plan (R5-114-9-11). The Attorney General precleared this plan under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c (R7-136-39; R5-114-11). In 1992, under the new redistricting plan, two black members and three white members were elected to the five-member Dallas County Commission; in District 2, the "swing" district, a white candidate defeated the black incumbent in the primary election and a black independent candidate in the general election. United States v. Jones, 846

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[2] In United States v. Dallas County Commission, 904 F.2d 26 (1990), this Court again reversed the district court and held that the commissioners elected in 1988 were entitled under Alabama law to four-year rather than two-year terms and would not be up for re-election until 1992.

F. Supp. 955 (S.D. Ala. 1994), aff'd, 57 F.3d 1020 (11th Cir. 1995).[3]

In the 1996 general election, a black independent candidate defeated the white incumbent in District 2 (R5-114-41). The Dallas County Commission presently consists of two white and three black commissioners; the commission has elected a white chairperson from among its membership (R5-114-41).

C. Proceedings Below

1. On October 25, 1996, two white residents of Dallas County filed suit against the Dallas County Commission, various county officials, and the United States (based on its role as the plaintiff in the Section 2 case) (R1-1). The complaint alleged that the elimination of the probate judge, elected at large, as chairperson of the county commission is not a proper remedy for violations of the Voting Rights Act as interpreted by the Supreme Court in Holder v. Hall, 512 U.S. 874 (1994), and "is beyond the authority conferred on this Court by Congress, and by the Constitution" (R1-1-7). Plaintiffs further asserted that circumstances had changed since 1988 so that, under current

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[3] In a 1992 challenge to the county commission redistricting plan, in which white plaintiffs sought to reinstate the pre-1988 at-large method of electing all of the commissioners, the district court found that the newly-drawn district lines did not violate the Voting Rights Act or the Constitution, and that the five single-member district plan was the proper form of government for Dallas County on grounds that conditions had not changed sufficiently in Dallas County since United States v. Dallas County Commission, 850 F.2d 1430 (11th Cir. 1988), cert. denied, 490 U.S. 1030 (1989), to warrant the court's intervention. Rollins v. Dallas County Comm'n, No. 92-0242, 1992 WL 611861 (S.D. Ala. Mar. 13, 1992).

conditions, returning the probate judge to the county commission would "no longer [be] dilutive of the vote of any citizens, and does not deprive minority voters of a fair opportunity to elect persons of their choice to the commission" (R1-1-8). On October 17, 1997, the plaintiffs amended their complaint to add claims that "[t]he order of this Court which prevents the probate judge, elected by all the voters of Dallas County, from sitting as a member of the County Commission, and in his place, adds another elected official chosen exclusively by the voters of one limited subdistrict," violates the Voting Rights Act and the Fourteenth Amendment (R2-47-2).

2. The district court conducted a four-day bench trial in May 1998. In support of their claim that the five single-member district method of election was a change in the size of the commission, plaintiffs presented evidence that the creation of an additional part-time elected official in the county (the chairperson elected from a single-member district) resulted in additional county expense (R6-129-23-25; R8-127-128 (Jones); R5-114-7). Plaintiffs submitted evidence that under the prior system, the probate judge had only a tie-breaking vote, while the new chairperson can vote on all commission matters (R6-129-24-25; R8-110 (Jones); R9-242 (Minor)). Finally, plaintiffs relied on evidence that the probate judge was elected to a six-year term and the post-1988 chairperson of the commission, like the other commissioners, runs for election every four years (R6-129-25).

The United States and the county presented evidence that the 1988 injunction did not change the size of the five-member commission, but changed only the method of electing county commissioners. The record showed that before the 1988 Court order providing for the election of the commission members from five single-member districts, Probate Judge John W. Jones acted as "an integral part of the commission" when serving as chairperson of the county commission (R8-176 (Jones)), and "all five" members of the commission set commission policy (R9-440 (Barber); see also R9-441 (Barber)). Probate Judge Jones set the agenda for the commission, presided at the meetings, worked with the other commissioners on budget issues and on monitoring county funds, and signed the checks on behalf of the commission (R8-130-133 (Jones)). Jones, as chairperson, often represented the commission in meetings, discussions, and on various committees and commissions, and was a vocal spokesperson for the commission (R8-135-140, 203-204 (Jones)). As chairperson, Jones had a vote in the event of a tie and had a vote in approving the appointments of certain county officials (Def. Exh. 1, Tab 30 at 745; see R8-188 (Jones); R5-114-6).

Based on this evidence, the United States argued that the Supreme Court's decision in Holder v. Hall, 512 U.S. 874 (1994), did not invalidate the current plan. Holder v. Hall dealt only with challenges to the size of the elected body and the 1988 court order did not change the size of the Dallas County Commission. The United States argued that the chairperson had

always been and remains a member of the five-member commission and only the method by which he was elected changed (R7-132-5-10). The United States argued further that plaintiffs had no independent cause of action because relief from the injunction under Fed. R. Civ. P. 60(b) must be sought in the case in which the injunction was entered, not in an independent action (R1-24).

Plaintiffs also claimed that the injunction was no longer warranted as a Section 2 remedy (R6-129-26-27). Plaintiffs presented evidence that because of changed circumstances, black voters in Dallas County were able elect their candidate of choice in situations in which there was some white cross-over vote (R6-129-28-33). Plaintiffs contended finally that the redistricting in 1992 and the removal of the probate judge from the commission "reflects excessively race-based government actions," violating the Fourteenth Amendment and the Voting Rights Act (R6-129-42).[4]

The United States countered with evidence (including the expert's analysis of polarized voting in recent Dallas County elections) of the existence in Dallas County of the factors supporting a finding that the at-large election of a member of the county commission would continue to violate Section 2 under the totality of the circumstances (R7-132-53-59; R10-571-586, 607-609 (Lichtman); Def. Exh. 19). With regard to the Fourteenth

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[4] Because the district court based its judgment solely on whether the 1988 injunction changed the size of the commission, this brief will not detail the voluminous evidence presented below regarding the continued existence of vote dilution in Dallas County, nor will it describe the evidence supporting and countering the claim that race predominated in the 1988 and 1992 districting plans.

Amendment claim, the defendants presented evidence that racial considerations did not subordinate traditional districting principles in the creation of the 1988 court-ordered districting plan or the 1992 redistricting plan for the county commission (see generally R7-132-24-41). The United States also argued that complying with Section 2 and Section 5 of the Voting Rights Act is a compelling interest and that the five single-member district plan for electing the Dallas County Commission is narrowly tailored (R7-132-41-51).

3. On March 29, 1999, the district court entered judgment for plaintiffs, finding that this Court's 1988 injunction establishing the present five single-member district method of electing the Dallas County Commission "impermissibly altered the size of that governing body" (R7-136-3). Rejecting the arguments that plaintiffs were required to seek relief from the injunction in the original United States v. Dallas County Commission Section 2 case and that the subsequent Supreme Court case should not be applied here retroactively (see R7-136-6-7, 22-26),[5] the district court concluded that this Court's order creating a five single-member district method of election for the Dallas County Commission violated Holder v. Hall, 512 U.S. 874 (1994). It reasoned that if, under Holder, plaintiffs cannot challenge the size of a governing body under Section 2, a court cannot remedy a

[5] The United States had argued below that Holder v. Hall should not be applied retroactively under the circumstances presented here, an argument the United States is not pursuing on appeal.

Section 2 violation by changing the size of the body (R7-136-20). The court did not address defendants' evidence showing that the probate judge was considered, and had effectively served as, a member of the commission even before 1988. The court did note that the probate judge held a full-time position, was elected to a six-year term, and voted in case of a tie, while the new chairperson was part-time, was elected for a four-year term, and could vote on all commission matters (R7-136-19 n.8). The court dismissed the United States' argument that the commission was comprised of five members before and after 1988 as a comparison of "apples with oranges in an effort to avoid the limitations which are now recognized as legitimate proscriptions against judicial overreaching" (R7-136-19).

The district court did not reach the plaintiffs' claims that the five single-member district method of election and districting plan violated plaintiffs' rights under the Voting Rights Act or the Equal Protection Clause of Fourteenth Amendment. The court found only that it could not accord the commission's 1992 districting plan the deference that a court normally grants a legislative plan since the 1992 plan was "irreparably intertwined" with the plan this Court entered as the remedy to the Section 2 violation in 1988 (R7-136-14).

The district court essentially reinstated its 1987 remedial decision in United States v. Dallas County Commission, 661 F. Supp. 955 (S.D. Ala. 1987). It ordered the development and implementation of a four single-member districting plan for four

commissioners and a return of the probate judge elected at large as commission chairperson (R7-136-31-32).

4. On May 3, 1999, the county commission filed a notice of appeal (R7-146). The United States filed a notice of appeal on May 26, 1999 (R7-157).

STANDARD OF REVIEW

The district court's application of the law the Supreme Court announced in Holder v. Hall, 512 U.S. 874 (1994), to the facts in this case is subject to de novo review. Simmons v. Conger, 86 F.3d 1080, 1084 (11th Cir. 1996).

SUMMARY OF ARGUMENT

The district court erred in vacating the remedy to the Section 2 violation this Court ordered in United States v. Dallas County Commission in 1988. The court erred initially in allowing plaintiffs to bring an independent action challenging the scope of the injunction in the earlier case, rather than requiring plaintiffs to seek to intervene in United States v. Dallas County Commission. But even if plaintiffs had properly asserted the challenge to the Court's 1988 injunction, the district court erred in his implicit finding that the 1988 court order changed the size of the commission and in assuming, contrary to this Court's holding in Dillard v. Crenshaw County, 831 F.2d 246 (11th Cir. 1987), that the chairperson should not be considered a member of the commission. A necessary predicate for the 1988 injunction was this Court's determination that the Dallas County Commission was comprised of five members, and that to fully

remedy the vote dilution caused by the at-large system, all members of the commission must be elected from single-member districts. The Supreme Court's later holding in Holder v. Hall, 512 U.S. 874 (1994), is simply not implicated here because the Section 2 remedy this Court ordered did not increase the size of the elected body. State law, the historic evidence, and prior findings regarding the role of the chairperson of the county commission, as well as the contemporary evidence of the actual operation of the commission, confirm that the Dallas County Commission chairperson was not a separate officeholder but one member of a five-member commission in which all five members set policy for Dallas County.

ARGUMENT

THE DISTRICT COURT ERRED IN VACATING THE 1988 INJUNCTION THIS COURT ORDERED IN UNITED STATES v. DALLAS COUNTY COMMISSION

A. The Injunction This Court Ordered Was A Valid Remedy For The Section 2 Violation When Entered In 1988[6]

In 1987, after this Court reversed the district court's initial finding of no liability and the district court held that the United States had proved the at-large election of Dallas County commissioners violated Section 2 of the Voting Rights Act, 42 U.S.C. 1973, the district court entered its remedial order. United States v. Dallas County Comm'n, 661 F. Supp. 955 (S.D.

[6] As noted at n.4, supra, the district court's decision was limited to the Holder v. Hall issue. If this Court were to reverse the district court's judgment, the district court would then be called upon to resolve the remaining fact-intensive issues under Section 2 and the Fourteenth Amendment.

Ala. 1987). In that order, the district court recognized that "the at-large scheme of election for the Dallas County Commission, as a whole, is violative of Section 2," and considered the proper remedy for the Section 2 violation to involve the "five member governing body." 661 F. Supp. at 958. The district court concluded that a remedy that would allow the probate judge to continue to serve as chairperson and be elected at large, while requiring the election of the other commissioners from single-member districts, was "a fair election plan." 661 F. Supp. at 959.

This Court reversed, holding that the district court's proposed remedy did "not fully cure the infirmities which caused the district court in the first instance to declare the county's at-large electoral system violative of Section 2." United States v. Dallas County Comm'n, 850 F.2d 1430, 1432 (11th Cir. 1988), cert. denied, 490 U.S. 1030 (1989) (citing United States v. Dallas County Comm'n, 850 F.2d 1433, 1438 (11th Cir. 1988), cert. denied, 490 U.S. 1030 (1989)). In the companion school board case, the Court explained that at-large election systems are not per se unconstitutional, but when an at-large scheme violates Section 2, "'federal courts, absent special circumstances, [should] employ single member districts when . . . impos[ing] remedial [election] plans . . . .'" Dallas County Comm'n, 850 F.2d at 1438 (quoting Wise v. Lipscomb, 437 U.S. 535, 540 (1978)). This Court held in both the school board case and the county commission case that all five members of the two bodies

should be elected from single-member districts to remedy fully the Section 2 violations.

Significantly, in considering the role of the probate judge, this Court noted that it was permissible for that official to be elected at large "with respect to the judicial aspects of that office." 850 F.2d at 1432 n.1. The Court thus necessarily recognized that when the probate judge was serving on the commission, he was performing non-judicial, legislative duties that made him a fifth member of the commission, so the Section 2 remedy required election of all five members from single-member districts.

B. The District Court Improperly Considered This Independent Challenge To The Judgment Rendered In A Separate Action

The district court improperly allowed the plaintiffs to challenge the injunction this Court ordered in 1988 in United States v. Dallas County Commission, rather than requiring them to seek to intervene in the action in which the judgment was entered (see R7-136-6-7). With regard to their claim under Holder v. Hall, plaintiffs had no separate cause of action under federal law since they did not allege that the at-large election of all five members of the Dallas County Commission was inherently violative of the Tenth Amendment or any other federal right. Rather, they alleged that this Court could no longer impose such an election system as a remedy to the Section 2 violation proved in United States v. Dallas County Commission after the Supreme Court issued its decision in Holder v. Hall.

Simply put, we are aware of no precedent that provides an individual an independent cause of action to object to an injunction entered by a court in another action based solely on the allegation that the other court exceeded its authority under federal law. This Court's cases on which the district court relied (see R37-136-8) in allowing this action, Seniors Civil Liberties Ass'n v. Kemp, 965 F.2d 1030 (11th Cir. 1992), and Atlanta Gas Light Co. v. Dept. of Energy, 666 F.2d 1359 (11th Cir.), cert. denied, 459 U.S. 836 (1982), are inapposite. In both cases, this Court acknowledged that private parties may have a private right of action under the Tenth Amendment to challenge federal legislation that improperly overrode state sovereignty, but ultimately upheld the challenged legislation as constitutional. Seniors Civil Liberties Ass'n, 965 F.2d at 1034 n.6; Atlanta Gas Light Co,, 666 F.2d at 1368 n.16. Here, plaintiffs do not assert either that the Voting Rights Act or the election of commissioners from single-member districts violates the Tenth Amendment, but that the injunction this Court ordered in United States v. Dallas County Commission should be revised because of changes in intervening law. This is not grounds for an independent action under the Tenth Amendment.[7]

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[7] Plaintiffs' challenge is distinguishable from the cause of action recognized in Martin v. Wilks, 490 U.S. 755 (1989), in which the plaintiffs alleged violations of their Fourteenth Amendment and federal statutory rights resulting from the operation of a consent decree in the prior case in which they were not joined as a party. The basis of plaintiffs' complaint in Wilks was not that the earlier court had exceeded its authority, but that the defendant employer's remedial actions

(continued...)

At most, plaintiffs have asserted an interest in modifying the injunction under Fed. R. Civ. P. 60(b) under which parties may seek relief from a judgment when "it is no longer equitable that the judgment should have prospective application." Such relief "should come from the court that gave the judgment [and] [o]ther courts should refuse to entertain an independent action seeking relief from the judgment on this ground, so long as it is apparent that a remedy by motion is available in the court that gave judgment." 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Civil 2d § 2863 at 350 (2d ed. 1995). If the individual seeking to amend the earlier judgment was not a party to that lawsuit, however, he must seek to intervene in the earlier action, assuming he is able to establish standing and meet the requirements for intervention under Fed. R. Civ. P. 24.

Considerations favoring judicial economy, effective management of complex ongoing litigation, fairness to parties in the original litigation, and the interest in avoiding conflicting judicial orders on the same subject matter counsel against such collateral attacks. 11A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure Civil 2d § 2961 at 410 (2d ed. 1995). If an individual has an interest in modifying the relief entered in another action, it should be left to the original court, the court most familiar with the history of the case, to

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[7](...continued)
violated their federal rights, irrespective of the reasons for the employer's actions.

decide whether relief from a continuing injunction is warranted. See Jackson v. DeSoto Parish Sch. Bd., 585 F.2d 726, 730 n.1 (5th Cir. 1978)[8]; Lapin v. Shulton, Inc., 333 F.2d 169, 171 (9th Cir.) (citing Deposit Bank v. Board of Councilmen, 191 U.S. 499 (1903)), cert. denied, 379 U.S. 904 (1964). The Fifth Circuit in similar circumstances -- a school desegregation case -- thus required parental groups seeking to challenge the way in which desgregation orders were being implemented to intervene in the prior action rather than collaterally attack the ongoing order. Hines v. Rapides Parish Sch. Bd., 479 F.2d 762, 765 (5th Cir. 1973). There are no relevant distinctions between the school desegregation orders challenged in Hines and the Section 2 injunction this Court ordered in the earlier action that continues to be in effect that would make collateral attack any more appropriate here than in Hines. Federal district courts have no authority to modify the injunctions of other federal district courts absent extraordinary circumstances or independent violations of federal law, and plaintiffs' claim under Holder v. Halls alleges neither.

Under the circumstances here, some of the reasons for not allowing collateral attacks on relief entered in other cases may not be present, and we recognize that, as a practical matter, the ultimate result may have been the same. The district court judge who presided over United States v. Dallas County Commission heard

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[8] Opinions of the Fifth Circuit issued before October 1, 1981, are binding precedent in the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1209-1211 (11th Cir. 1981) (en banc).

this collateral attack on the decree and determined that the court's earlier injunction should be vacated. The court thus had background in the case. Nevertheless, a collateral attack raises the possibility of prejudice to the parties in the first action. Allowing the collateral attack also means that the voluminous evidence in the earlier case must be made part of the record in this case, resulting in unnecessary duplication and inefficiency. There was thus no basis for allowing the collateral attack on the judgment entered in United States v. Dallas County Commission.

C. The Supreme Court's Decision In Holder v. Hall Did Not Affect The Validity Of The Section 2 Remedy

Even if collateral attack were appropriate, the district court misapplied Holder v. Hall, 512 U.S. 874 (1994), in invalidating this Court's 1988 judgment ordering the injunction in United States v. Dallas County Commission (R7-136-3). In Holder, the Supreme Court reversed the lower court's holding that the single-commissioner form of government in Bleckley County, Georgia, violated Section 2. The concern in that case was that there was no "objectively reasonable alternative practice," i.e., an alternative commission size, to which the Court could look "as a benchmark for the dilution comparison." 512 U.S. at 887 (O'Connor, J., concurring in part). Because there was no objective basis on which to say, for example, that there should be five commissioners rather than the single commissioner, a majority of the Court thus agreed that "a plaintiff cannot maintain a § 2 challenge to the size of a government body." 512 U.S. at 885 (plurality opinion); see 512 U.S. at 885 (O'Connor,

J., concurring in part); 512 U.S. at 891 (Thomas, J., concurring in the judgment).

The Holder plurality expressly distinguished the question of the size of an elected body from the numerous other situations in which a benchmark comparison will be "obvious," 512 U.S. at 880 (plurality opinion), or "self-evident," 512 U.S. at 888 (O'Connor, J., concurring in part). For example, "[i]n a challenge to a multimember at-large system, * * * a court may compare it to a system of multiple single-member districts." 512 U.S. at 888 (O'Connor, J., concurring in part).

While the district court is correct that Holder prohibits Section 2 challenges to the size of an elected body, that case is inapplicable here. The United States' Section 2 challenge in United States v. Dallas County Commission, and the Court's remedial decision in 1988, properly related only to the method of election -- not to the number of members of the Dallas County Commission. Once the at-large method of electing the commission's membership was proven to be dilutive, a finding not challenged here, this Court correctly ordered election of the five members of the commission from single-member districts. See generally Wise v. Lipscomb, 437 U.S. 535, 540 (1978) ("[a]mong other requirements, a court-drawn plan should prefer single-member districts over multi-member districts, absent persuasive justification to the contrary"),

The district court's decision overturning this Court's order requiring five single-member districts can be sustained only if

the role of chairperson of the commission before 1988 was a single-office position, thus resulting in a four-member commission and a separate chairperson. The record here, however, clearly shows that the probate judge, acting as chairperson, was one of the five members of the commission.

The historical view, expressed by plaintiffs' expert, was that the chairperson of Dallas County Commission was "a member of the County Commission" when doing commission work (R9-380 (Stewart)). The 1901 Act provided that the probate judge and the members of the commission will be paid the same amount ($4.00) "for each day they are actually engaged in the performance of their duties as members of said [commission]." Act No. 328, § 6 (emphasis added). Act No. 328 thus established that the probate judge was a member of the commission when doing commission business, and thus should be paid the same as the other members.

The many decisions in United States v. Dallas County Commission confirm that the probate judge, when acting as chairperson, was always considered to be a member of the commission. When the district court entered its original Section 2 remedy of four single-member districts in 1987, the court recognized that the Section 2 violation went to the commission "as a whole," which the court described as a "five member governing body." United States v. Dallas County Comm'n, 661 F. Supp. 955, 958 (S.D. Ala. 1987). The district court also recognized in 1987 that the chairperson was "a member of the commission." 661 F. Supp. at 957. State courts similarly have

considered the state legislation establishing the county commissions and found the probate judge, as chairman ex-officio, to be acting as a commissioner. See e.g., City of Prattville v. City of Milbrook, 621 So. 2d 267, 268-269 (Ala. 1993); Schell v. Turner, 324 So. 2d 274 (Ala. Civ. App. 1975).

This historical view of the chairperson of the commission is consistent with the undisputed evidence presented below that the chairperson shared legislative duties with the other members of the multi-member body and acted as a commission member. Probate Judge John W. Jones, the commission chairperson before 1988, represented the commission in meetings and on various committees and commissions, and was a vocal -- and often the only -- spokesperson for the commission at private and public functions (R8-131-140, 202-203 (Jones)). Before 1988, Jones, who had an office in the courthouse, was the locus of citizen complaints and concerns regarding the Dallas County Commission and the public considered him to be an important member of the commission (R8-129-173-174, 203 (Jones)). As chairperson of the county commission, he attended all commission meetings, set the agenda, and routinely presented his views during debate as to the matters that came before the commission (R8-130-131, 203-205 (Jones)). He also represented the county commission in matters involving the state legislature, federal agencies, and the other branches of municipal government (R8-135-139 (Jones)). Not only did he have voting power in the event of a tie, but he had a vote when

it came to appointing certain county officials (R5-114-6; Def. Exh. 1, Tab 30 at 745; see R8-188 (Jones)).

The other evidence in the record does not compel a different conclusion. Plaintiffs' evidence that the probate judge is a full-time county employee, while the chairperson of the present commission is a "part-time" employee whose duties relate solely to the commission, is irrelevant to determining whether the size of the commission changed. But, in any event, at the same time the probate judge served as chairperson of the county commission, he had significant duties as probate judge unrelated to the work of the commission, including responsibility for adoptions, estate proceedings, guardianships, condemnations, name changes, document recordings, civil commitments, and other work (R8-130, 144, 153; Def. Exh. 1, Tab 17 at 3032). Now that he no longer serves as a member of the commission, he performs those duties as probate judge full-time, with the help of six employees (R8-139-143 (Jones)). For that reason, the probate judge was a part-time commissioner when he served as the chairperson, just as the present chairperson of the county commission serves part-time.

Neither is the voting power of the probate judge compared to the new chairperson determinative of whether the Section 2 remedy increased the size of the commission in conflict with Holder v. Hall. The evidence showed that the probate judge participated fully as "an integral part of the commission" in developing commission policy (R8-176 (Jones)). He set the agenda and expressed his opinion on the issues he presented to the

commission (R8-130-131, 203-205 (Jones)). Indeed, he did wield the all-important authority to be the deciding vote in the event of a tie. In addition, the probate judge voted to fill commission vacancies, certainly an important commission responsibility (R5-114-6; Def. Exh. 1, Tab 30 at 745; see R8-188 (Jones)). This record establishes that commission policy was set by "all five," not just four, members of the commission, and the role of the chairperson was at least as significant as the role of the other four commissioners (R9-439 (Barber); see also R8-176-177, R8-201-205 (Jones)).

Finally, evidence that the current chairperson receives compensation not previously authorized from county revenues is not proof that the size of the governing body at issue in this case -- the county commission -- changed. In concluding that the election from five single-member districts was necessary to fully cure the Section 2 violation, this Court acknowledged that its determination required the creation of another official in Dallas County. 850 F.2d at 1432 n.2. Contrary to the district court's conclusion, the Court merely recognized that prior to 1988 the Dallas County probate judge essentially fulfilled two roles: that of a part-time county commission chairperson and of a part-time quasi-judicial probate official. This Court's ruling that the commission had to be purged of all its at-large components to cure the Section 2 violation required that the person serving as the chairperson be elected from a single-member district. This determination, in combination with the continued

at-large election of the probate judge, led to the incidental creation of an additional part-time elected official in the county, but it did not change the five-member size of the commission, as defined by Act No. 328, and did not violate Holder v. Hall.

It also has long been the rule that, where vote dilution exists, some alterations in the state's election system may be necessary to remedy the violation. See S. Rep. No. 417, 97th Cong., 2d Sess. 31 (1982) ("[t]he court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice"). To be sure, the remedy must not "intrude upon state policy any more than necessary." Whitcomb v. Chavis, 403 U.S. 124, 160 (1971). But the fact that an adequate remedy may require some limited additional expenditure of government funds does not foreclose relief. See Voinovich v. Quilter, 507 U.S. 146, 159 (1993) (where state Constitution is in conflict with Voting Rights Act, Supremacy Clause requires giving preference to federal law).

In almost identical circumstances, this Court in Dillard v. Crenshaw County, 831 F.2d 246 (1987), held that to fully remedy a Section 2 violation, the chairperson of the Calhoun County Commission, because he was acting as a member of the commission, could not be elected at large. The court noted that Section 2

focuses on whether a post is an elected position and that "once a post is opened to the electorate, and if it is shown that the context of that election creates a discriminatory but corrigible election practice, it must be open in a way that allows racial groups to participate equally." 831 F.2d at 251. Whether the chairperson may be elected at large depends on the "full context." 831 F.2d at 251.

In Dillard, the Court found it relevant that even though the chairperson voted only in case of a tie, the "overlap between the roles of the commission and the chairperson do not allow [the court] to consider this office as a separate, single-office position." 831 F.2d at 251. The court distinguished the chairperson from other single-office holders, noting that the chairperson presides over commission meetings and "is more directly tied to the work of the county commission than any vice president or lieutenant governor is tied to the work of the legislature." 831 F.2d at 251; cf. Butts v. City of N.Y., 779 F.2d 141 (2d Cir. 1985) (standards for determining a violation of Section 2 different in a challenge to a single-member office), cert. denied, 478 U.S. 1021 (1986). In Dillard, the list of the duties of the proposed chairperson in Calhoun County included resolving citizen complaints about county services, representing the county on various local and state boards, lobbying the county's interests to the legislature, overseeing county construction projects, and assuring the execution of commission policies -- all duties in which the Dallas County Commission

chairperson engaged. This Court's holding in Dillard that the chairperson in such governmental bodies must be considered a member of the commission for Section 2 purposes and must be elected from single-member districts controls here.

The Dallas County Commission chairperson was a member of a five-member commission, and this Court properly held in 1988 that all five members of the Dallas County Commission should be elected from single-member districts to remedy the Section 2 violation. That judgment is unaffected by the Supreme Court's decision in Holder v. Hall.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Based on the word-count in the word-processing system, the brief contains 7530 words. If the court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word printout.

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Rebecca K. Troth

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July 1999, I served by first-class mail two copies of the Brief of the United States as Appellant and one copy of the Record Excerpts of the United States to the following counsel of record:

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