SUPREME COURT OF THE UNITED STATES

No. 91–2012

JACKIE HOLDER, ETC., ET AL., PETITIONERS *v.*
E. K. HALL, SR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 30, 1994]

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I agree with JUSTICES KENNEDY and THOMAS that a plaintiff cannot maintain a §2 vote dilution challenge to the size of a governing authority, though I reach that conclusion by a somewhat different rationale. JUSTICE THOMAS rejects the notion that §2 covers *any* dilution challenges, and would hold that §2 is limited to "state enactments that regulate citizens' access to the ballot or the processes for counting a ballot." *Post*, at 59. As JUSTICE STEVENS points out, however, *stare decisis* concerns weigh heavily here. *Post*, at 7–10 (opinion of STEVENS, J.); see also *Thornburg* v. *Gingles*, 478 U. S. 30, 84 (1986) (O'CONNOR, J., concurring in judgment) ("We know that Congress intended to allow vote dilution claims to be brought under §2"); *id.*, at 87 ("I agree with the Court that proof of vote dilution can establish a violation of §2"). These concerns require me to reject Justice THOMAS' suggestion that we overhaul our established reading of §2.

I also agree with JUSTICE BLACKMUN, see *post*, at 1–6, that our precedents compel the conclusion that the size of the Bleckley County Commission is both a "standard, practice, or procedure" under §2 and a "standard, practice, or procedure with respect to voting" under §5. See, *e.g.*, *Presley* v. *Etowah County Comm'n*, 502 U. S. ___, ___ (1992) (slip op., at 11) (change in size is a change in a "standard, practice, or procedure" because the change "increase[s] or

diminish[es] the number of officials for whom the electorate may vote"); *Lockhart* v. *United States*, 460 U. S. 125, 131–132 (1983) (change from three-member commission to five-member commission is subject to §5 preclearance); *City of Rome* v. *United States*, 446 U. S. 156, 160–161 (1980) (it "is not disputed" that an expansion in the size of a Board of Education is subject to §5 preclearance); *Bunton* v. *Patterson*, decided with *Allen* v. *State Board of Elections*, 393 U. S. 544, 569–571 (1969) (change from elected to appointed office is subject to §5 preclearance); *Allen*, *supra*, at 566–567 (§2 should be given "the broadest possible scope").

As JUSTICES KENNEDY and BLACKMUN both recognize, in these cases we have consistently said that a change in size is a "standard, practice, or procedure with respect to voting" that is subject to §5 preclearance. See *ante*, at 7 (opinion of KENNEDY, J.); *post*, at 2–4 (BLACKMUN, J., dissenting). And though our cases involving size have concerned §5, I do not think it possible to read the terms of §2 more narrowly than the terms of §5. Section 2 covers any "standard, practice, or procedure," while §5 covers any "standard, practice, or procedure with respect to voting." As a textual matter, I cannot see how a practice can be a "standard, practice, or procedure with respect to voting," yet not be a "standard, practice, or procedure." Indeed, the similarity in language led to our conclusion in *Chisom* v. *Roemer*, 501 U. S. 380, 401–402 (1991), that, at least for determining threshold coverage, §§2 and 5 have parallel scope.

But determining the threshold scope of coverage does not end the inquiry, at least so far as §2 dilution challenges are concerned. As JUSTICES KENNEDY and BLACKMUN agree, the fact that the size of a governing authority is a "standard, practice, or procedure" does not answer the question whether respondents may maintain a §2 vote dilution challenge. See *ante*, at 5 (opinion of KENNEDY, J.); *post*, at 6 (BLACKMUN, J., dissenting). Section 2 vote dilution plaintiffs must establish that the challenged practice is dilutive. In order for an electoral system to dilute a minority group's voting power, there must be an alternative system that would provide greater electoral opportunity to minority voters. "Put simply, in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it `should' be for minority voters to elect their preferred candidates under an acceptable system." *Gingles*, 478 U. S., at 88 (O'CONNOR, J., concurring in judgment). As we have said, "[u]nless minority

voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Id.*, at 50, n. 17 (emphasis in original); see also *id.*, at 99 (O'CONNOR, J., concurring in judgment) ("the relative lack of minority electoral success under a challenged plan, *when compared with the success that would be predicted under the measure of undiluted minority voting strength the court is employing*, can constitute powerful evidence of vote dilution") (emphasis added).

Accordingly, to determine whether voters possess the potential to elect representatives of choice in the absence of the challenged structure, courts must choose an objectively reasonable alternative practice as a benchmark for the dilution comparison. On this, there is general agreement. See *ante*, at 5 (opinion of KENNEDY, J.) ("a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice"); *post*, at 6 (BLACKMUN, J., dissenting) ("the allegedly dilutive mechanism must be measured against the benchmark of an alternative structure or practice that is reasonable and workable under the facts of the specific case"). We require preclearance of changes in size under §5, because in a §5 case the question of an alternative benchmark never arises—the benchmark is simply the former practice employed by the jurisdiction seeking approval of a change. See *ante*, at 8 (opinion of KENNEDY, J.).

But §2 dilution challenges raise more difficult questions. This case presents the question whether, in a §2 dilution challenge to size, there can ever be an objective alternative benchmark for comparison. And I agree with JUSTICE KENNEDY that there cannot be. As JUSTICE KENNEDY points out, *ante*, at 5, the alternative benchmark is often self-evident. In a challenge to a multimember at-large system, for example, a court may compare it to a system of multiple single-

member districts. See *Gingles*, *supra*, at 38, 50; Davidson, Minority Vote Dilution: An Overview, in Minority Vote Dilution 5 (C. Davidson ed. 1984). Similarly, a court may assess the dilutive effect of majority vote requirements, numbered posts, staggered terms, residency requirements, or anti-single shot rules by comparing the election results under a system with the challenged practice to the results under a system without the challenged practice. Cf. *City of Rome*, *supra*, at 183–185; U. S. Comm'n on Civil Rights, The Voting Rights Act: Ten Years After, pp. 206–208 (1975). Note, Application of Section 2 of the Voting Rights Act to Runoff Primary Election Laws, 91 Colum. L. Rev. 1127, 1148 (1991). Though there may be disagreements about the precise appropriate alternative practice in these cases, see *Gingles*, *supra*, at 88–89 (O'CONNOR, J., concurring in judgment), there are at least some objectively determinable constraints on the dilution inquiry. This is not so with §2 dilution challenges to size, however. In a dilution challenge to the size of a governing authority, choosing the alternative for comparison—a hypothetical larger (or smaller) governing authority—is extremely problematic. See *ante*, at 6–7 (opinion of KENNEDY, J.). The wide range of possibilities makes the choice inherently standardless. Here, for example, respondents argued that the single-member commission structure was dilutive in comparison to a five-member structure, in which African-Americans would probably have been able to elect one representative of their choice. Some groups, however, will not be able to constitute a majority in one of five districts. Once a court accepts respondents' reasoning, it will have to allow a plaintiff group insufficiently large or geographically compact to form a majority in one of five districts to argue that the jurisdiction's failure to establish a 10–, 15–, or 25–commissioner structure is dilutive. See, *e. g.*, *Romero* v. *Pomona*, 883 F. 2d 1418, 1425, n. 10

(CA9 1989); Heath, Managing the Political Thicket: Developing Objective Standards in Voting Rights Litigation, 21 Stetson L. Rev. 819, 827 (1992) ("[O]nce one departs from the current number of districts or other objective standard, the test loses its validity as a threshold standard").

Respondents argue that this concern with arbitrary and standardless intrusions into the size of local governing authority is overstated. Respondents' principal support for this conclusion is that a five-member commission is the *most* common size for Georgia. But a five-member commission is not the *only* common size in Georgia: 22 Georgia counties have three-member commissions (and one county has an 11–member commission). Moreover, there is no good reason why the search for benchmarks should be limited to Georgia. Expanding the search nationwide produces many 20–person county commissions in Tennessee, and 40–member commissions in Wisconsin. DeSantis, County Government: A Century of Change, in The Municipal Yearbook 1989, pp. 80, 83. In sum, respondents do not explain how common an alternative practice must be before it can be a reliable alternative benchmark for the dilution comparison, nor do they explain where the search for alternative benchmarks should begin and end.

Respondents' failure to provide any meaningful principles for deciding future cases demonstrates the difficulty with allowing dilution challenges to the size of a governing authority. Under respondents' open-ended test, a wide range of state governmental bodies may be subject to a dilution challenge. Within each State there are many forms of government, including county commissions that range dramatically in size. For example, the majority of county commissions in New Jersey have seven members, but three counties have smaller commissions and one has a larger commission. DeSantis, Municipal

Yearbook 1989, at 76. Similarly, in South Carolina the norm is a seven-member commission, but a number of counties deviate. *Id.*, at 79. In Tennessee, the average size for a county commission is 19 members, but one county has as few as 9 and another has as many as 40. *Id.*, at 80. And in Wisconsin the average size is 27 members, but the commission sizes range from 7 to 46. *Id.*, at 83.

Nor are deviations from the norm limited to counties. Statewide governing authorities also range dramatically in size, and often do not correlate to the size of the State. For example, Texas has only 31 members in its State Senate, while tiny Rhode Island has 50. Council of State Governments, State Elective Officials and the Legislatures 1993–94, p. vi. The Texas Senate is smaller than the national average and the Rhode Island Senate is larger. Similarly, California has an unusually small 80–person Assembly, while New Hampshire has a 400–person House. *Ibid*.

The discrepancies in size among state and local governing authorities reinforce my concern that the limiting principle offered by respondents will in practice limit very little. Though respondents purport to present Bleckley County as unique, it is not. County commissions throughout New Jersey, South Carolina, Tennessee, and Wisconsin, and the State Legislatures of Texas, Rhode Island, California, and New Hampshire are ripe for a dilution challenge under respondents' theory, since they do not fit the norm for their State. Moreover, though my examples are some of the more extreme ones, they are not alone. In these cases, and perhaps in many more, the potential reach of allowing dilution challenges to size will not be meaningfully circumscribed by the open-ended requirement that the alternative benchmark be "reasonable and workable." *Post*, at 6 (BLACKMUN, J., dissenting).

For these reasons, I concur in the conclusion that

respondents' dilution challenge to the size of the Bleckley County Commission cannot be maintained under §2 of the Voting Rights Act, and I join Parts I, II-A, and III of JUSTICE KENNEDY's opinion. Because the Court appropriately reverses the judgment below and remands for consideration of respondents' constitutional claim of intentional discrimination, I also concur in the judgment.