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 BLACKMUN, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

Five Justices today agree that the size of a governing body is a "standard, practice, or procedure" under §2 of the Voting Rights Act of 1965, as amended (Act), 42 U. S. C. §1973. A different five Justices decide, under three separate theories, that voting rights plaintiffs cannot bring §2 dilution challenges based on size. I, however, believe that the Act, its history, and our own precedent require us to conclude not only that the size of a governing body is a "standard, practice, or procedure" under §2, but also that minority voters may challenge the dilutive effects of this practice by demonstrating their potential to elect representatives under an objectively reasonable alternative practice. Accordingly, I dissent from the Court's decision that minority voters cannot bring §2 vote dilution challenges based on the size of an existing government body.

Section 2(a) of the Act prohibits the imposition or application of any "voting qualification or prerequisite to voting, or *standard, practice, or procedure*" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account or race or color." 42 U. S. C. §1973(a) (emphasis added). Section 5 parallels §2 by requiring certain jurisdictions to preclear with the Attorney General a change in "any voting qualification or prerequisite to voting, or

standard, practice, or procedure with respect to voting." 42 U. S. C. §1973c (emphasis added). Under the broad interpretation that this Court, Congress, and the Attorney General consistently have given the Act in general and §5 in particular, the practice of electing a single commissioner, as opposed to a multimember commission, constitutes a "standard, practice, or procedure" under §2.

Nearly 30 years of precedent admonish us that the Act, which was adopted "for the broad remedial purpose of `rid[ding] the country of racial discrimination in voting,'" *Chisom*, ___ U. S., at ___ (slip op. 22), quoting *South Carolina* v. *Katzenbach*, 383 U. S. 301, 315 (1966), should be given "the broadest possible scope." *Allen* v. *State Board of Elections*, 393 U. S. 544, 567 (1969). Because "the Act itself nowhere amplifies the meaning of the phrase `standard, practice, or procedure with respect to voting,' the Court "ha[s] sought guidance from the history and purpose of the Act." *Dougherty County Bd. of Ed.* v. *White*, 439 U. S. 32, 37 (1978); see also *McCain* v. *Lybrand*, 465 U. S. 236, 246 (1984) (the Act must "be interpreted in light of its prophylactic purpose and the historical experience which it reflects").

Consistent with the Act's remedial purposes, this Court has held that a wide variety of election- and voting-related practices fit within the term "standard, practice, or procedure." Among the covered practices are the annexation of land to enlarge city boundaries, see *Perkins* v. *Matthews*, 400 U. S. 379, 388 (1971), and *Pleasant Grove* v. *United States*, 479 U. S. 462, 467 (1987); a rule requiring employees to take leaves of absence while they campaign for elective office, see *Dougherty County Bd. of Ed.*, 439 U. S., at 34; candidate filing dates and other procedural requirements, see *Whitley* v. *Williams*, decided with *Allen* v. *State Board of Elections*, *supra*; *Hadnott* v. *Amos*, 394 U. S. 358, 365 (1969); *NAACP* v. *Hampton County Election Comm'n*, 470 U. S. 166, 176–177 (1985); and candidate residency requirements, see *City of Rome* v. *United States*, 446 U. S., at 160.

Specifically, this Court long has treated a change in the size of a governing authority as a change in a "standard, practice, or procedure" with respect to voting. In *City of Rome*, 446 U. S., at 161, it noted

that it "is not disputed" that an expansion in the size of a Board of Education was "within the purview of the Act" and subject to preclearance under §5. In *Lockhart* v. *United States*, 460 U. S. 125, 131 (1983), it stated that a change from a three-member commission to a five-member commission was subject to §5 preclearance. And, most recently, it said that the term "standard, practice, or procedure with respect to voting" included a change in the size of a governing authority or an increase or decrease in the number of elected offices. *Presley* v. *Etowah County Comm'n*, 502 U. S. ___, ___ (1992).

This conclusion flowed naturally from the holding in *Bunton* v. *Patterson*, 393 U. S. 544 (1969), that a change from an elected to an appointed office was a "standard, practice, or procedure with respect to voting." In *Bunton*, the Court reasoned that the power of a citizen's vote is affected by the change because the citizen has been "prohibited from electing an officer formerly subject to the approval of the voters." *Id.*, at 570. The reverse is also true: a change from an appointed to an elected office affects a citizen's voting power by increasing the number of officials for whom he may vote. See *McCain* v. *Lybrand*, 465 U. S. 236 (1984). And, as the Court recognized in *Presley*, a change in the size of a governing authority is a "standard, practice, or procedure with respect to voting" because the change "increase[s] or diminish[es] the number of officials for whom the electorate may vote," 502 U. S., at ___ (slip op. 11); this change bears "on the substance of voting power" and has "a direct relation to voting and the election process." *Ibid.*

To date, our precedent has dealt with §5 challenges to a change in the size of a governing authority, rather than §2 challenges to the existing size of a governing body. I agree with JUSTICE O'CONNOR, *ante*, at 2, that, as a textual matter, "standard, practice, or procedure" under §2 is at least as broad as "standard,

practice, or procedure with respect to voting" under §5. In fact, because of the "close connection" between §2 and §5, we interpret them similarly. See *Chisom* v. *Roemer*, 501 U. S. ___, ___ (1991) (slip op. 22) (concluding that it would be "anomalous" to do otherwise). And in the context of §2, the Court stated: "Section 2 protected the right to vote, and it did so without making any distinctions or imposing any limitations as to which elections would fall within its purview." *Chisom*, ___ U. S., at ___ (slip op. 10). See also *Houston Lawyers' Assn.* v. *Texas Attorney Gen.*, ___ U. S. ___ (1991) (rejecting a "single-member-office" exception to §2).

Congress repeatedly has endorsed the broad construction this Court has given the Act in general and §5 in particular.[1] Significantly, when Congress considered the 1982 amendments to the Voting Rights Act, it made no effort to curtail the application of §5 to changes in size, in the face of the longstanding practice of submitting such changes for preclearance, and on the heels of this Court's recognition just two years earlier that it was "not disputed" that a change in the size of a governing body was covered under §5. See *City of Rome*, 446

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[1]See *Georgia* v. *United States*, 411 U. S. 526, 533 (1973) ("After extensive deliberations in 1970 on bills to extend the Voting Rights Act, during which the *Allen* case was repeatedly discussed, the Act was extended for five years, without any substantive modification of §5"). (footnote omitted); *Dougherty County Bd. of Education* v. *White*, 439 U. S. 32, 39 (1978) ("Again in 1975, both the House and Senate Judiciary Committees, in recommending extension of the Act, noted with approval the `broad interpretations to the scope of Section 5' in *Allen* and *Perkins* v. *Matthews* [400 U. S. 379 (1971)]"); *NAACP* v. *Hampton County Election Comm'n*, 470 U. S. 166, 176 (1985) (in the 1982 extension of the Act, "Congress specifically endorsed a broad construction" of §5).

U. S., at 161. Similarly, the Attorney General, whose construction of the Act "is entitled to considerable deference," *NAACP* v. *Hampton County Election Comm'n*, 470 U. S. 166, 178–179 (1985), for years has required §5 preclearance of the expansion or reduction of a governing body.[2] It is not surprising that no party to this case argued that the size of a governing authority is not a "standard, practice, or procedure."

In light of this consistent and expansive interpretation of the Act by this Court, Congress, and the Attorney General, the Act's "all-inclusive" definition of "standard, practice, or procedure," cannot be read to exclude threshold coverage of challenges to the size of a governing authority. As five members of the Court today agree, the size of a

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[2]See Hearings on S. 1992 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess., 1748 (1982) (noting Attorney General's objection in 1971 to proposed reduction in the size of a school board); *id.*, at 1751 (1971 objection to expansion of a parish council); *id.*, at 1782 (1980 objection to decrease in number of city council members); *id.*, at 1384–1385 (the Voting Rights Act afforded protection against "[s]hifts from ward to at-large elections, from plurality win to majority vote, from slating to numbered posts, annexations and *changes in the size of electoral bodies*," that "could . . . deprive minority voters of fair and effective procedures for electing candidates of their choice") (statement of Drew S. Days, III, former assistant attorney general for civil rights) (emphasis added).

Since covered jurisdictions routinely have submitted changes in the size of their legislative bodies for preclearance, it is not surprising that petitioners concede that a *change* in the size of the Bleckley County Commission would be subject to §5 preclearance. Tr. of Oral Arg. 4, 13.

governing authority is a "standard, practice, or procedure" with respect to voting for purposes of §2 as well as §5 of the Voting Rights Act.

Although five Justices agree that the size of a governing body is a "standard, practice, or procedure" under §2, a like number of Justices conclude, under varying rationales, that Voting Rights plaintiffs nonetheless cannot bring size challenges under §2. This conclusion is inconsistent with our precedent giving the Act "`the broadest possible scope' in combatting racial discrimination," *Chisom*, ___ U. S., at ___, quoting *Allen*, 393 U. S., at 567, and with the vote-dilution analysis prescribed in *Thornburg* v. *Gingles*, 478 U. S. 30 (1986).

To prevail in a vote-dilution challenge, minority voters must show that they "possess the *potential* to elect representatives *in the absence of the challenged structure* or practice." *Id.*, at 50, n. 17 (second emphasis supplied).[3] There is widespread agreement, see *ante*, at 5 (opinion of KENNEDY, J., and REHNQUIST, C.J.); *ante*, at 3 (opinion of O'CONNOR, J.), that minority voters' potential "in the absence of" 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.[4]

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[3]Although *Gingles* dealt with the use of multimember districts, the analysis it prescribes is applicable in certain other vote-dilution contexts, such as a claim of "vote fragmentation" through single-member districts, see *Growe* v. *Emison*, ___ U. S. ___, ___ (1993), or the case before us.

[4]As the United States explains, the minority group must be permitted to establish that, under "a proposed alternative voting arrangement that is reasonable in the legal and factual context of a particular case," it could constitute a

By all objective measures, the proposed five-member Bleckley County Commission presents a reasonable, workable benchmark against which to measure the practice of electing a sole commissioner. First, the Georgia Legislature specifically authorized a five-member commission for Bleckley County. 1985 Ga. Laws 4406. Moreover, a five-member commission is the most common form of governing authority in Georgia. See Georgia Dept of Community Affairs, County Government Information Catalog (1989) (Table 1.A: Form of Government) (76 of Georgia's 159 counties had five commissioners, including 25 counties smaller than Bleckley County). Bleckley County, as one of a small and dwindling number of counties in Georgia still employing a sole commissioner, markedly departs from practices elsewhere in Georgia. This marked "depart[ure] . . . from practices elsewhere in the jurisdiction . . . bears on the fairness of [the sole commissioner's] impact." S. Rep. No. 97–417, p. 29, n. 117 (1982). Finally, the county itself has moved from a single superintendent of education to a school board with five members elected from single-member districts, providing a workable and readily available model for commission districts. Thus, the proposed five-member baseline is reasonable and workable.

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majority. Brief for United States as *Amicus Curiae* 8. The Court of Appeals followed this approach, concluding that "it is appropriate to consider the size and geographical compactness of the minority group within a restructured form of the challenged system when the *existing structure* is being challenged as dilutive" (emphasis in original). 955 F. 2d 1563, 1569 (CA7 1992). See also *Carrollton Branch of NAACP* v. *Stallings*, 829 F. 2d 1547 (CA11 1987) (remand of challenge to sole-commissioner system with instructions to consider size and geographic compactness within proposed three- and five-member commission forms of government).

In this case, identifying an appropriate baseline against which to measure dilution is not difficult. In other cases, it may be harder. But the need to make difficult judgments does not "justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress." *Chisom*, ___ U. S., at ___ (slip op. 22). Vote dilution is inherently a relative concept, requiring a highly "flexible, fact-intensive" inquiry, *Gingles*, 478 U. S., at 46, and calling for an exercise of the "court's overall judgment, based on the totality of the circumstances and guided by those relevant factors in the particular case," as mandated by Congress. S. Rep. No. 97–417, p. 29, n. 118. Certainly judges who engage in the complex task of evaluating reapportionment plans and examining district lines will be able to determine whether a proposed baseline is an appropriate one against which to measure a claim of vote dilution based on the size of a county commission.

There are, to be sure, significant constraints on size challenges. Minority plaintiffs, who bear the burden of demonstrating dilution, also bear the burden of demonstrating that their proposed benchmark is reasonable and workable. One indication of benchmark's reasonableness is its grounding in history, custom, or practice. This consideration will discourage size challenges to traditional single-member executive offices, such as governors and mayors, or even sheriffs or clerks of court. By tradition and practice, these executive positions are occupied by one person, so plaintiffs could rarely point to an objectively reasonable alternative size that has any foundation in the past or present. Cf. The Federalist No. 69, p. 415 (C. Rossiter ed. 1961) (A. Hamilton) ("[T]he executive authority, with few exceptions, is to be vested in a single magistrate"). The sole commissioner, by contrast, holds plenary legislative, as well as executive, power. Ga. Code

Ann. §36–5–22.1 (1993). A one-member legislature, far from being the norm, is an anomaly. Accordingly, the Eleventh Circuit, while permitting §2 challenges to the practice of electing a sole commissioner, has held that this provision cannot be used to alter the practice of electing a single person to offices such as lieutenant governor, sheriff, probate judge, and tax collector. See *Dillard* v. *Crenshaw County*, 831 F. 2d 246, 251 (1987); *United States* v. *Dallas County Comm'n*, 850 F. 2d 1430, 1432, n. 1 (1988), cert. denied, 490 U. S. 1030 (1989).[5]

Additionally, every successful vote-dilution challenge will be based on the "totality of the circumstances," often including the lingering effects of past discrimination. S. Rep. No. 97–417, pp. 28–30. Not every racial or language minority that constitutes 5% of the population has a claim to have a governing authority expanded to 20 members in order to give them an opportunity to elect a representative. Instead, the voters would have to prove that a 20–member governing authority was a reasonable benchmark—which, of course, respondents could not do here—and that their claim satisfied the three *Gingles* preconditions, 478 U. S., at 49, and was warranted under the totality of the circumstances.[6]

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[5]Of course, this is not to suggest that single-member executive offices are not within the scope of §2, see *Houston Lawyers' Assn.* v. *Texas Attorney Gen.*, ___ U. S. ___, ___ (1991), but only that they are not generally susceptible to size challenges under §2.

[6]The Senate Report accompanying the 1982 amendments to the Act directed that the vote dilution inquiry include an examination of the factors identified in *White* v. *Regester*, 412 U. S. 755 (1973), and refined and developed in *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (CA5 1973) (en banc), aff'd, 424 U. S. 636 (1976) (*per curiam*). This nonexclusive list of factors, now known variously as the *Regester-Zimmer* factors or "Senate Report factors,"

With these limitations, successful vote-dilution challenges to the size of a governing authority always will be based not on abstract manipulation of numbers, but on a "searching practical evaluation of `past and present reality.'" S. Rep. No. 97–417, p. 30, quoting *White* v. *Regester*, 412 U. S. 755, 770 (1973). These limitations protect against a proliferation of vote-dilution challenges premised on eccentric or

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includes "the extent of any history of official discrimination . . . that touched the right of the members of the minority group to register to vote, to vote, or otherwise to participate in the democratic process; . . . the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; . . . [and] the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas a education, employment and health, which hinder their ability to participate effectively in the political process." S. Rep. No. 97–417, pp. 28–29.

In this case, for example, the District Court found that, until the passage of federal civil rights laws, Bleckley County "enforced racial segregation in all aspects of local government—courthouse, jails, public housing, governmental services—and deprived its black citizens of the opportunity to participate in local government." *Hall* v. *Holder*, 757 F. Supp. 1560, 1562 (MD Ga. 1991). Until the passage of the Voting Rights Act of 1965, "black citizens were virtually prohibited from registering to vote in Bleckley County." *Id.*, at 1563. Until 1984, there were no African-American voting registrars and no voter registration in places where African-Americans normally congregated. *Ibid.* From 1978 until 1986, the respondent probate judge appointed 224 poll managers, all white, and 509 poll clerks, 479 of whom were white. *Ibid.* Since 1964, the election of Bleckley County's sole commissioner

impracticable alternative methods of redistricting.

The Voting Rights Act of 1965 was bold and ambitious legislation, designed to eradicate the vestiges of past discrimination and to make members of racial and language minorities full participants in American political life. Nearly 30 years after the passage of this landmark civil rights legislation, its goals remain unfulfilled. Today, the most blatant forms of discrimination—including poll taxes, literacy tests, and "white" primaries—have been eliminated. But subtler, more complex means of infringing minority voting strength—including submergence or dispersion of minority voters—are still present and indeed prevalent. We have recognized over the years that seemingly innocuous and even well-intentioned election practices may impede minority voters' ability not only to vote, but to have their votes count. It is clear that the practice of electing a single-member county commission can be one such dilutive practice. It is equally clear that a five-member commission is an appropriate benchmark against which to measure the alleged dilutive effects of Bleckley County's

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has been subject to a majority-vote requirement. Although official segregation is no longer imposed, its vestiges remain, as "more black than white residents of Bleckley County continue to endure a depressed socio-economic status," *id.*, at 1562, which "hinders the ability of and deters black residents of Bleckley County from running for public office, voting and otherwise participating in the political process," *id.*, at 1563. The "barriers to active participation in the political process are . . . compounded by the fact that Bleckley County now has only one voting precinct for the entire 219 square-mile area." *Id.*, at 1563, n. 3. That single polling place is located at an all-white civic club. 955 F. 2d 1563, 1566 (CA11 1992).

practice of electing a sole commissioner. I respectfully dissent.