No. 32

In the Supreme Court of the United States

OCTOBER TERM, 1960

C. G. GOMILLION, ET AL., PETITIONERS

v.

PHIL M. LIGHTFOOT, AS MAYOR OF THE CITY OF TUSKEGEE, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

CITATIONS

562461—60——1

Cases—Continued

Cases—Continued

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STATEMENT

Petitioners, Negro citizens, filed a complaint (R. 2–9) in the United States District Court for the Middle District of Alabama alleging that a 1957 Act of the State of Alabama (Act 140) changing the boundaries of the City of Tuskegee, Alabama, deprived them, "on account of their race and color" (R. 7–8), of their right to vote in Tuskegee municipal elections and of certain municipal services,[1] in vio-

[1] It was alleged (R. 7) that petitioners have been deprived of the services of city policemen to patrol school-zoned areas during certain hours, the benefits of general street improvement, and the paving of a certain street as promised by the city prior to the passage of the Act.

lation of the due process and equal protection clauses of the Fourteenth and Fifteenth Amendments.[2] The defendants are officials of Tuskegee and of Macon County, in which it is located (R. 4–5). The relief sought was (1) an adjudication that, as applied to petitioners, the Act is unconstitutional as charged; and (2) that the defendants be enjoined from enforcing the Act against petitioners and others similarly situated, and from denying them "the right to vote in Tuskegee municipal elections, and to be recognized and treated in all respects as citizens of the City of Tuskegee" (R. 8–9). The district court dismissed the complaint on the ground that it had no authority to invalidate Act 140, and the Court of Appeals for the Fifth Circuit affirmed by a divided court.

The pertinent allegations of the complaint—which must be accepted as true for purposes of testing its sufficiency—are as follows:

Prior to Act 140, Tuskegee was a square-shaped city containing approximately 5,397 Negroes and approximately 1,310 white persons. Approximately 400 Negroes and 600 white persons were qualified voters in the city. As a result of the altering of the city's boundaries by Act 140, several thousand Negroes, including all but 4 or 5 qualified voters, have been "excluded or 'removed'" from the city. No white persons were removed. "As redefined by said Act 140, Tuskegee resembles a 'sea dragon', with Negro neighborhoods, including the site of the Tuskegee In-

[2] The action was brought as a class suit on behalf of petitioners and all other Negro citizens who reside within the city limits of Tuskegee as they existed prior to Act 140 (R. 3–4).

stitute, eliminated" (R. 5). (A map showing the changes made in the configuration of the city by Act 140 is included at pages 12–13 of the record.)

Although Act 140 "recites no reasons for the change in boundaries * * * its necessary effect and obvious purpose" (R. 5) was to deprive plaintiffs "on account of their race and color" of their "right to vote" in Tuskegee municipal elections, to deny them "their rights to effective participation in Tuskegee's municipal affairs" (R. 8), and to deprive them of certain municipal services (R. 7). "Act No. 140 is another device in a continuing attempt on the part of the State of Alabama to disenfranchise Negro citizens" (R. 6).[3]

The district court dismissed the complaint on the ground that "regardless of the motive of the Legislature of the State of Alabama and regardless of the effect of its actions, insofar as these plaintiffs' right to vote in the municipal elections is concerned, this Court has no authority to declare said Act invalid after

[3] The complaint stated (R. 6–7) that Macon County had no Board of Registrars for more than 18 months between January, 1956, and June, 1957, for the reason that "almost all of the white persons possessing the qualification to vote in said County are already registered, whereas thousands of Negroes, who possess the qualifications, are not registered and cannot vote"; that Act 140 was introduced into the Alabama Legislature by State Senator Sam Engelhardt of Macon County, who was then Executive Secretary for the White Citizens' Council for Alabama, "an organization dedicated to the principles of white supremacy and prevention of integration of the white and Negro races"; and that a local newspaper article, published shortly before the bill was introduced, "cited the 'obvious' purpose of the bill, *i.e.*, 'to assure continued white control in Tuskegee City elections.'"

measuring it by any yardstick made known by the Constitution of the United States," and has no "control" or "supervision over, and no power to change any boundaries of municipal corporations fixed by a duly convened and elected legislative body, acting for the people in the State of Alabama" (R. 30).

In affirming, the majority opinion of the court of appeals concluded (R. 41) that

> in the absence of any racial or class discrimination appearing on the face of the statute, the courts will not hold an act, which decreases the area of a municipality by changing its boundaries, to be invalid as violative of the Fourteenth and Fifteenth Amendments to the United States Constitution, although it is alleged that the enactment was made for the purpose, not appearing in the Act, and with the effect of excluding or removing Negroes from the City and depriving them of the privileges and benefits of municipal membership, including the right to vote in City elections.

Judge Brown, dissenting, was of the view that "the courts are open to hear and determine the serious charge here asserted" (R. 43). He stated that because the redistricting of Tuskegee and prescribing the qualifications for voting in its municipal elections "are solely, or primarily, the initial concerns of Alabama alone does not mean that when it acts it may act without regard for the Constitution" (R. 49–50); and that it is of "little significance" that Act 140 "does not * * * demonstrate on its face that [it] is directed at the Negro citizens of that community. If the Act is discriminatory in purpose and effect,

'whether accomplished ingeniously or ingenuously' [it] cannot stand" (R. 57).

ARGUMENT

If a state statute expressly prohibited Negroes in a particular city from voting in municipal elections, or denied them municipal services available to white residents of the city, we think it beyond dispute that any court in the country would invalidate it as an obviously unconstitutional abridgment of the rights of Negro citizens guaranteed by the Fourteenth and Fifteenth Amendments. The issue in this case is whether the Alabama statute which, according to the allegations of the complaint, is designed to, and does, achieve the same result, is beyond judicial review because that result is accomplished by changing the boundaries of the City of Tuskegee rather than by affirmatively imposing such prohibitions. Stated differently, the question is whether the State of Alabama can use its admittedly broad power to define the boundaries of its municipalities as a method for accomplishing indirectly what it could not do directly, namely, depriving its Negro citizens of their constitutional rights because of their race.

The majority opinion below held (R. 41) that, since the "enactment by a state legislature of a statute creating, enlarging, diminishing or abolishing a municipal corporation is * * * a political function", the courts will not, "in the absence of any racial or class discrimination appearing on the face of the statute," hold a statute "which decreases an area of a municipality by changing its boundaries" invalid under the Fourteenth

562461—60——2

and Fifteenth Amendments, even though it is alleged "that the enactment was made for the purpose * * * and with the effect of excluding or removing Negroes from the City and depriving them of the privileges and benefits of municipal membership, including the right to vote in City elections." We shall show, however, that the allegations of this complaint go far beyond "political questions" which courts have frequently refused to decide; and that the grounds upon which courts abstain from involvement in "political questions" are not applicable where, as here, the denial of constitutional rights is allegedly based on the facts that the victims of the discrimination are Negroes. We shall further show that, once it be established that this is an appropriate case for judicial intervention, the allegations of the complaint, if proven, clearly establish a violation of petitioners' constitutional rights and warrant the relief sought.

1. The leading recent case in this Court dealing with "political questions" involving the electoral process is *Colegrove* v. *Green,* 328 U.S. 549. This Court there upheld the dismissal of a complaint challenging the constitutionality of the apportionment of Congressional districts in Illinois. The complaint charged that, by reason of subsequent changes in population, the Congressional districts that Illinois had created in 1901 were invalid, and it sought, in effect, to enjoin the state officials from conducting the 1946 Congressional elections on the basis of the 1901 districts. Mr. Justice Frankfurter, in an opinion in which Justices Reed and Burton concurred, stated (p. 552) that this

Court "from time to time" "has refused to intervene in controversies" of this character "because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination." The opinion pointed out that "[t]he basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity" (p. 552); that a court cannot "affirmatively re-map the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system" but, "[a]t best", "could only declare the existing electoral system invalid"—the result of which "would be to leave Illinois undistricted and to bring into operation, if the Illinois legislature chose not to act, the choice of members for the House of Representatives on a state-wide ticket" (p. 553); that "this controversy concerns matters that bring courts into immediate and active relations with party contests," issues from which "this Court has traditionally held aloof" (*ibid.*); and that the "remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress" (p. 556). "Courts ought not to enter this political thicket" (*ibid.*).

Subsequently, in affirming the dismissal of a suit challenging the constitutionality of Georgia's county unit system, this Court stated that "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among

its political subdivisions." *South* v. *Peters,* 339 U.S. 276, 277.

None of these considerations in favor of judicial abstention is, however, applicable to the violations of petitioners' constitutional rights charged in the instant case.

The disenfranchisement here is not the result of a long-term population shift, but of a particular statute allegedly directed against a particular group solely because of its race. Cf. *infra,* pp. 14–18. Furthermore, the racial aspect of the discrimination is not merely one of the effects of the Act (cf. *South* v. *Peters, supra*), but is its basic vice. Therefore, here, unlike *Colegrove,* "[t]he basis for the suit *is* * * * a private wrong" (emphasis added). The alleged wrong has not been suffered by the State of Alabama "as a polity," but by these petitioners, who allege that as a result of the Alabama Act they "are suffering irreparable injury to *their* rights to vote, to free speech, press, and petition, and to property" (R. 8; emphasis added). These rights "are personal rights" (*Shelley* v. *Kraemer,* 334 U.S. 1, 22). This Court has examined on the merits even non-racial cases involving state distribution of political power where the personal rights of a particular group were directly impinged. *MacDougall* v. *Green,* 335 U.S. 281.

In *Colegrove,* invalidation of "the existing electoral system" involved would have left Illinois "undistricted" and, if the Illinois legislature did not act, might have "defeat[ed] the vital political principle which led Congress, more than a hundred years ago,

to require districting" (p. 553). Invalidation of Alabama Act 140, however, would do no more than restore the situation as it existed prior to the summer of 1957—namely, the Negro community of Tuskegee would again become a part of that City, and would again be able to exercise the voting and other civic rights which it had previously enjoyed.

Finally, and perhaps most significant of all, this case does not involve "matters that bring courts into immediate and active relations with party contests" and would not "involve the judiciary in the politics of the people" (*Colegrove,* at pp. 553–554); and it does not pose "political issues arising from a state's geographical distribution of an electoral strength among its political subdivisions" (*South* v. *Peters*). For although Law 140 on its face purports merely to "alter, re-arrange, and re-define the boundaries of the City of Tuskegee" (R. 9), the complaint alleges that its true purpose and effect is to deny petitioners, "on account of their race and color," their voting and other constitutional rights guaranteed by the Fourteenth and Fifteenth Amendments. Particularly in the field of civil rights, this Court has repeatedly looked beneath the surface of innocuous-appearing legislation to determine its true intent and effect, and has tested its constitutionality on the basis of what it actually does, not what it merely says. *E.g., Yick Wo* v. *Hopkins,* 118 U.S. 356; *Guinn* v. *United States,* 238 U.S. 347, 364–365; *Myers* v. *Anderson,* 238 U.S. 368; *Korematsu* v. *United States,* 323 U.S. 214, 216; see *Lassiter* v. *Northampton Election Board,* 360 U.S.

45, 53. "[T]he constitutional rights of [petitioners] not to be discriminated against * * * on grounds of race or color * * * can neither be nullified openly and directly by state legislators * * * nor nullified indirectly by them through evasive schemes * * * whether attempted 'ingeniously or ingenuously'" (*Cooper* v. *Aaron,* 358 U.S. 1, 17). Thus, in *Myers* v. *Anderson, supra,* this Court struck down a Maryland statute which required, as a condition to voting in municipal elections, that the voter or his ancestor must have voted prior to a certain date. Although innocuous on its face, this condition was invalidated because its clear effect and design was to disfranchise Negro citizens.

If there is one area from which "this Court has traditionally [not] held aloof" (*Colegrove*), it has been attempts by the States to discriminate against members of the Negro race. In one of the first cases which arose under the Fourteenth Amendment (*Strauder* v. *West Virginia,* 100 U.S. 303), this Court, in striking down a state statute that excluded Negroes from serving on juries, unequivocally stated (p. 307) that the Fourteenth Amendment

> declar[es] that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color.

See, also, the cases cited *infra,* pp. 14–16.

In short, *Colegrove* and *South* v. *Peters* dealt with the "political question" of the diminution of the effectiveness of voting rights in certain geographical areas resulting from lack of redistricting. They "dealt not with racial discrimination at the ballot box" (*Terry* v. *Adams,* 345 U.S. 461, 481, opinion of Mr. Justice Clark) or in the provision of municipal services. Thus, assuming *arguendo* the correctness of the holdings in those cases that the question there involved was not judicially cognizable (but see Lewis, *Legislative Apportionment and the Federal Courts,* 71 Harv. L. Rev. 1057), they are not applicable to the instant case. For it does not involve a "political question," but the power of the State of Alabama to use the device of the gerrymander to deprive Negro citizens of their constitutional rights guaranteed by the Fourteenth and Fifteenth Amendments.

There is no magic in the words "apportionment" or "redistricting" which includes an immunity from judicial review. Cases involving purely political questions may fall within a special area of governmental concern which judges should refrain from entering; but it does not follow that every legislative "apportionment" or "redistricting" is automatically such a case. If a state were to gerrymander its school districts in such a way as to continue racial segregation of pupils, and for that very purpose, we cannot conceive that this Court would hold it outside the judicial power to review such action, even though the "redistricting" was overtly cast in terms of geographical boundaries and there was no explicit reference to race. The same considerations apply here.

2. Mr. Justice Frankfurter's opinion in *Colegrove* also adverted to the problems of relief in political cases. He stated (pp. 552–553) that petitioners were "ask[ing] of this Court what is beyond its competence to grant," since "no court can affirmatively re-map the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system." The relief issue also looms large in the concurring opinion of Judge Wisdom below. He stated (R. 66) that since "[c]ourts, any courts, are incompetent to remap city limits", petitioners "ask for something courts cannot give"; and that "any decree in this case purporting to give relief would be a sham: the relief sought will give no relief." "[T]here is no effective remedy" (R. 72).

We submit that Judge Wisdom is in error in concluding that relief cannot here be provided. Petitioners do not, as he suggests (R. 72), ask the court to undertake "the determination of * * * boundaries" of "political subdivisions of the state" (R. 71). They ask only for an adjudication that this particular alteration of the boundaries of Tuskegee, alleged to be part of "a continuing attempt on the part of the State of Alabama to disenfranchise Negro citizens" (R. 6), violates the Fourteenth and Fifteenth Amendments; and that the state officials be enjoined from enforcing the Act against them and from denying them the right to vote in Tuskegee municipal elections (R. 8–9). Thus, the relief here requested is fundamentally the same as that recognized as appropriate in *Smiley* v. *Holm,* 285 U.S. 355, namely, the power of an equity court "to declare a state apportionment

bill invalid and to enjoin state officials from enforcing it" (Mr. Justice Black, dissenting, in *Colegrove* v. *Green,* 328 U.S. at 573).

It is of course true, as Judge Wisdom pointed out (R. 72), that if the court declares Act 140 invalid, "[t]here is nothing to prevent the legislature of Alabama from adopting a new law redefining Tuskegee town limits, perhaps with small changes, or perhaps a series of laws, each of which might also be held unconstitutional * * *." But it cannot fairly be assumed that, if this Act is declared unconstitutional, the State of Alabama will endeavor to evade that ruling by reenacting the same law with "small changes" in the city boundaries. In any event, the court can certainly give effective relief against this statute, and that is enough to allow petitioners to go to trial. While the relief sought in this case may not protect petitioners against future attempts by the state to achieve the same illegal result by similar means, it can nevertheless effectively eliminate the deprivation of constitutional rights resulting from this statute. No more is necessary to warrant a court of equity hearing the case on the merits. It is time enough to worry about future cases involving minor modifications of the statute if and when they arise.

Indeed, in the delicate constitutional area here involved, the mere declaration by a court that the state cannot wipe out petitioners' voting rights by gerrymandering, is itself an important element of relief. For such a ruling will necessarily have a salutary effect in discouraging future attempts in other areas to employ like devices for denying the right to vote.

"Where * * * it is clear that the action of the state violates the terms of the fundamental charter, it is the obligation of this Court so to declare" (*Shelley* v. *Kraemer,* 334 U.S. 1, 23). On the other hand, a holding that the courts are powerless to intervene in this situation would provide a new and dangerous method for avoiding the constitutional mandate that "[t]he right of citizens of the United States to vote shall not be denied or abridged * * * by any State on account of race [or] color * * *."

3. Once it be established that this case does not involve the kind of "political question" that is not subject to judicial scrutiny, there can be no doubt that the complaint sets forth a clear violation of the constitutional prohibitions of the Fourteenth and Fifteenth Amendments.

Petitioners allege (R. 7–8) that they have been gerrymandered out of the City of Tuskegee "on account of their race and color." Although "[s]tates may do a good deal of classifying that it is difficult to believe rational, * * * there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case [right to vote]" (Mr. Justice Holmes, in *Nixon* v. *Herndon,* 273 U.S. 536, 541).

This basic constitutional precept that Negroes cannot be singled out and treated differently because of their race and color is fundamental to our democracy. It has repeatedly been reasserted and applied in a long list of cases that have unequivocally condemned, in whatever form, attempts by the states to deny Negro

citizens their constitutional rights. Since *Brown* v. *Board of Education,* 347 U.S. 483, held segregation in the public schools to be unconstitutional, this Court and the lower federal courts have condemned segregation in a wide variety of public facilities, including beaches and bathhouses,[4] golf courses,[5] restaurants in public buildings,[6] intrastate bus lines,[7] parks and recreational areas,[8] and public theatres.[9] It would make a mockery of all of these cases now to hold that the states can create a segregated community of Negro citizens. The effect would be to enable the states, by

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[4] *Dawson* v. *Mayor and City Council of Baltimore City*, 220 F. 2d 386 (C.A. 4), affirmed, 350 U.S. 877; see also *City of Petersburg* v. *Alsup*, 238 F. 2d 830 (C.A. 5), certiorari denied, 353 U.S. 922.

[5] *Holmes* v. *City of Atlanta*, 350 U.S. 879, reversing, 223 F. 2d 93 (C.A. 5); see also *Moorhead* v. *City of Ft. Lauderdale*, 152 F. Supp. 131 (S.D. Fla.), affirmed, 248 F. 2d 544 (C.A. 5); *Ward* v. *City of Miami*, 151 F. Supp. 593 (S.D. Fla.) affirmed, 252 F. 2d 787 (C.A. 5); *Holley* v. *City of Portsmouth*, 150 F. Supp. 6 (E.D. Va.); *Hayes* v. *Crutcher*, 137 F. Supp. 853 (M.D. Tenn.); *Augustus* v. *City of Pensacola*, 1 R.R.L.R. 681.

[6] *Derrington* v. *Plummer*, 240 F. 2d 922 (C.A. 5), certiorari denied, 353 U.S. 924.

[7] *Gayle* v. *Browder*, 352 U.S. 903, affirming, 142 F. Supp. 707 (M.D. Ala.).

[8] *New Orleans City Park Improvement Association* v. *Detiege*, 358 U.S. 54, affirming, 252 F. 2d 122 (C.A. 5). See also *Lonesome* v. *Maxwell*, 220 F. 2d 386 (C.A. 4); *Augustus* v. *City of Pensacola, supra; Moorman* v. *Morgan*, 285 S.W. 2d 146 (Ky.).

[9] *Muir* v. *Louisville Park Theatrical Ass'n.*, 347 U.S. 971, reversing 202 F. 2d 275 (C.A. 6) and remanding for consideration in light of *Brown* v. *Board of Education* and "conditions that now prevail." See also *Henry* v. *Greenville Airport Commission* (C.A. 4), decided April 20, 1960 (waiting room in a municipal airport).

the simple device of redrawing municipal boundaries, to bar Negroes from enjoying many of the public facilities that have been finally opened to them only after protracted and difficult litigation. The ghetto has no place in American life, and the Fourteenth Amendment prohibits state enactments, the "purpose * * * and * * * ultimate effect" of which are "to require by law, at least in residential districts, the compulsory separation of the races on account of color" (*Buchanan* v. *Warley,* 245 U.S. 60, 81).

The fact that the forbidden discrimination is accomplished through the exercise of the state's admittedly broad power to redefine municipal boundaries cannot save this Act. For "all * * * state activity, must be exercised consistently with federal constitutional requirements as they apply to state action" (*Cooper* v. *Aaron,* 358 U.S. 1, 19), and the Fourteenth and Fifteenth Amendment each "refers to exertions of state power in all forms" (*Shelley* v. *Kramer,* 334 U.S. 1, 20). It is undisputed that Act 140 eliminated from the City of Tuskegee its Negro neighborhoods and all but 4 or 5 of its approximately 400 Negro voters, but eliminated no white voters. Petitioners allege (R. 6) that the Act "is another device in a continuing attempt on the part of the State of Alabama to disenfranchise Negro citizens." [10] No other reason

[10] The difficulties that Negro citizens of Macon County, Alabama, have had in attempting to register are well known. See *Mitchell* v. *Wright,* 154 F. 2d 924 (C.A. 5), certiorari denied, 329 U.S. 733; Report of the United States Commission on Civil Rights, 1959 (Government Printing Office), pp. 75–76.

than disenfranchisement of the Negroes of Tuskegee has been given for the Act. See New York Times, March 2, 1960, p. 28, col. 7–8. In these circumstances, we submit that it is immaterial that there is no "racial or class discrimination appearing on the *face* of the statute" (R. 41; emphasis added). For the issue is not whether petitioners' rights were denied in "express terms," but whether they were "denied in substance and effect" (*Norris* v. *Alabama,* 294 U.S. 587, 590).[11]

In "substance and effect" the State of Alabama, under the guise of merely changing the boundaries of Tuskegee, has denied a substantial number of Negro citizens important rights which white citizens in the same area continue to enjoy. The attempt by the State of Alabama to deny the Negro citizens of Tuskegee their right to vote flies in the face of this Court's admonition in *Smith* v. *Allwright,* 321 U.S. 649,

[11] To the same effect, see *Bailey* v. *Alabama,* 219 U.S. 219, 244; *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373–374; *Ho Ah Kow* v. *Nunan,* 5 Sawyer 552, 560–564 (Circuit Court of California); *Cooper* v. *Aaron,* 358 U.S. 1; *Terry* v. *Adams,* 345 U.S. 461; *Smith* v. *Allwright,* 321 U.S. 649; *Miller* v. *Milwaukee,* 272 U.S. 713, 715; *Home Insurance Co.* v. *New York,* 134 U.S. 594; *Henderson* v. *Mayor of New York,* 92 U.S. 259; *Frost Trucking Co.* v. *Railroad Commission,* 271 U.S. 583; *Rice* v. *Elmore,* 165 F. 2d 387, 392 (C.A. 4), certiorari denied, 333 U.S. 875; *Baskin* v. *Brown,* 174 F. 2d 391, 393 (C.A. 4). And in order to discern purpose, the courts do not hesitate to consider the legislative setting. See *Davis* v. *Schnell,* 81 F. Supp. 872, 880–881 (S.D. Ala.), affirmed, 336 U.S. 933; *Lassiter* v. *Northampton Election Board,* 360 U.S. 45, 53; *United States* v. *Butler,* 297 U.S. 1.

662, that "[u]nder our Constitution the great privilege of the ballot may not be denied a man by the State because of his color." The patent discrimination of this Act further violates the constitutional "declaration" in the Fourteenth Amendment that "no distinction shall be made against [the colored race] by law because of their color" (*Strauder* v. *West Virginia*, 100 U.S. 303, 307).

CONCLUSION

As we have shown, the controversy in this case does not involve a non-racial dilution of the right to vote, but the total deprivation not merely of that right but of all rights to benefits of citizenship in a municipality, solely on account of race. If the allegations of the complaint are proved, we think it clear that Alabama Act 140 is patently unconstitutional under both the Fourteenth and Fifteenth Amendments,[12] and that the trial court has ample power to grant effective relief against the operation of *this* Act. Plainly, petitioners are entitled to an opportunity to go to trial and to prove their case.

[12] If this case is remanded for trial, the state would, of course, have an opportunity to introduce evidence to overcome the prima facie unconstitutionality of the discriminatory operation of the statute. However, the state would have a heavy burden to justify the patent discrimination here involved. See *United States* v. *McElveen*, 180 F. Supp. 10, affirmed *sub nom. United States* v. *Thomas*, 362 U.S. 58; *Eubanks* v. *Louisiana*, 356 U.S. 584.

The judgment of the Court of Appeals should be reversed, and the cause remanded with instructions to proceed to trial.

Respectfully submitted.

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