No. 07-1124

IN THE
Supreme Court of the United States

GILBERT GREEN AND CALVIN JONES, JR.,
Petitioners,

v.

CHILTON COUNTY COMMISSION, *ET AL.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case concerns a challenge to two provisions of a 1988 consent decree governing the composition of the Chilton County (Alabama) Commission. The questions presented are:

1. In light of the district court's recent order deleting the provision of the consent decree governing selection of the Commission chair, is petitioners' claim regarding that provision now moot?

2. Did the court of appeals correctly hold that petitioners lacked standing to challenge the provision regarding the size and method of electing the Commission?

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BRIEF IN OPPOSITION

Petitioners seek review of two features of a 1988 consent decree governing the election and structure of the Chilton County (Alabama) Commission. Petitioners' challenge to a provision requiring that black commissioners be given an opportunity to chair the Commission no longer presents a live controversy. Subsequent to the filing of this petition for writ of certiorari, the district court issued an order deleting that provision from the consent decree. *See* BIO App. 1a-2a.[1] Accordingly, that issue is moot, and does not warrant this Court's review.

Nor does petitioners' challenge to the provision increasing the size of the Commission present an issue worthy of this Court's review. Petitioners' claim is unlikely ever to arise anywhere else in light of recent Alabama legislation ratifying every other consent decree increasing the size and changing the method of electing a governing body within the state. *See* Ala. Code § 11-80-12. In light of these developments, the lack of any conflict among the circuits, and the court of appeals' correct application of this Court's recent decision in *Lance v. Coffman*,

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[1] In addition to the opinions reprinted in the petition for writ of certiorari, the district court issued relevant orders and an opinion subsequent to the issuance of the mandate from the court of appeals. The district court's December 10, 2007, order is reported at 525 F. Supp. 2d 1315 and is reprinted in the appendix to this brief in opposition at pages 10a-11a. The district court's April 3, 2008, opinion explaining its modification of the consent decree is reported at 2008 U.S. Dist. Court LEXIS 27287 and is reprinted at pages 3a-9a. The district court's April 3, 2008, order modifying the decree is unreported and is reprinted at pages 1a-2a.

127 S. Ct. 1194 (2007), to the distinctive facts of this case, certiorari should be denied.

STATEMENT OF THE CASE

1. This case originated in 1985, when respondent John Dillard and several other black citizens and voters in Alabama brought suit under section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973, challenging the use of at-large elections to choose members of county commissions in nine Alabama jurisdictions. They alleged that this practice denied black voters an equal opportunity to participate in the political process and to elect representatives of their choice. *See Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986). In light of the district court's finding that the State of Alabama had engaged for nearly a century in extensive intentional racial discrimination in the design, modification, and maintenance of at-large election systems statewide, *see id.* at 1356-60, the Dillard respondents expanded their complaint to challenge the continued use of at-large elections in additional jurisdictions across Alabama. Among these jurisdictions was respondent Chilton County Commission (hereafter "the Commission").[2]

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[2] Originally, the district court certified a defendant class of county commissions, boards of education, and municipal governments, but the court later decertified the class, instead treating each challenge as an individual, albeit consolidated, case. *See Dillard v. Chilton County Bd. of Educ.*, 1988 U.S. Dist. LEXIS 18249 at *1, n. 1 (M.D. Ala. 1988). When the cases were decertified, respondents Robert R. Binion and John Wright intervened as plaintiffs representing the interests of black citizens and voters in Chilton County.

The Commission admitted that its use of at-large elections, under which black voters had had no opportunity to elect commissioners of their choice, violated the Voting Rights Act. *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870, 871 (M.D. Ala. 1988); *see also id.* at 875 (finding that "[t]he at-large system used to elect the Chilton County Commission . . . was a product of this state-wide legislative scheme to deny Alabama black citizens their right of equal access to the state's political process"). In light of this concession of liability and the court's findings, the parties jointly proposed a remedy that increased the size of the county commission from five to seven members and modified the method of conducting at-large elections from one using numbered places and a majority-vote requirement to one using cumulative voting.[3]

After a fairness hearing before a magistrate judge at which both supporters and opponents of the proposed plan testified, the district court approved the proposed remedy in June 1988. *See Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. at 875; *see*

As the district court noted, this case is "the last of the 180 court-ordered election plans still active in the longstanding set of *Dillard* cases" because all the other plans were adopted as an affirmative matter of state law by Ala. Acts No. 2006-252 and 2007-488 (codified at Ala. Code §§ 11-80-12 and 11-3-1(c)). BIO App. 4a-5a.

[3] Cumulative voting was adopted as a remedy in several of the consolidated *Dillard* cases. *See Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. at 876 & n.7.

Originally, the decree also contained a provision dealing with the selection of the commission chairperson, but that provision was subsequently deleted from the decree. *See supra* p. 1; *infra* pp. 11-12; BIO App. 1a-2a.

also Pet. App. 97a-100a (reprinting the consent decree). The district court found that the proposed system would "provide[] black voters in the county with a realistic opportunity to elect candidates of their choice, even in the presence of substantial racially polarized voting." *Dillard*, 699 F. Supp. at 875. The court of appeals affirmed without opinion. *Dillard v. Chilton County Commission*, 868 F.2d 1274 (11th Cir. 1989). The case then entered a "long period of quiescence," Pet. App. 29a, during which the county's voters consistently used the procedure set out in the consent decree to select the members of the Commission.

2. More than a dozen years later, in February 2003, petitioners filed what they styled a complaint in intervention. Pet. App. 79a-95a. Petitioners "[took] their cue," Pet. App. 39a, from a recent collateral challenge to another remedial plan adopted as part of the *Dillard* litigation. See *Dillard v. Baldwin County Comm'n*, 53 F. Supp. 2d 1266 (M.D. Ala. 1999), *rev'd*, 225 F.3d 1271 (11th Cir. 2000), *on remand*, 222 F. Supp. 2d 1283 (M.D. Ala. 2002), and 282 F. Supp. 2d 1302 (M.D. Ala. 2003), *aff'd*, 376 F.3d 1260 (11th Cir. 2004). The *Baldwin County* litigation involved a remedial order that had increased the size of a governing body over the defendant jurisdiction's objection, rather than pursuant to a consent decree. The collateral challenge resulted in the district court's vacating that remedial order in light of intervening decisions by this Court and the court of appeals holding that federal courts lack the power to modify the size of elected bodies to remedy section 2 violations. *See Holder v. Hall*, 512 U.S. 874 (1994); *White v.*

Alabama, 74 F. 3d 1058 (11th Cir. 1996); *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc), *cert. denied*, 514 U.S. 1083 (1995). Petitioners relied on the *Baldwin County* litigation to argue that the consent decree in Chilton County, which had not been imposed over the defendant jurisdiction's objection, also should be vacated.

Petitioners identified themselves as "residents, citizens, and qualified elect[ors] of Chilton County," *id.* at 81a, who were "adversely affected" by the increase in the size of the commission, by the use of cumulative voting, and by the provision regarding selection of the commission chairperson, *id.* They alleged violations of section 2 of the Voting Rights Act and of the Fifth, Tenth, Eleventh, and Fourteenth Amendments.

3. The district court permitted petitioners to intervene. After trial in 2006, the district court entered an order vacating the existing remedial decree in Chilton County. Pet. App. 49a. The court noted that petitioners had not established a "traditional" section 2 claim because they had not proven "that they have personally suffered vote dilution because there are seven instead of four commissioners, or that cumulative voting has impaired their equal opportunity to participate fully in the political process and elect the candidate of their choice." *Id.* at 44a. They had "allege[d], and have shown, only that, as a result of the consent decree, Chilton County now uses cumulative voting instead of at-large voting to elect its commissioners." *Id.*

The district court reiterated its observation that "[r]ecent Supreme Court cases" had "cast doubt" on

petitioners' standing "not only under the tenth amendment but also under the eleventh amendment and the Voting Rights Act as well." Pet. App. 48a (quoting *Dillard v. Baldwin County*, 53 F. Supp. 2d at 1270 n.7 (citing *Raines v. Byrd*, 521 U.S. 811 (1997), *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), and *United States v. Hays*, 515 U.S. 737 (1995))). But the district court considered itself bound, "like it or not," Pet. App. 48a, by the contrary approach taken by the Eleventh Circuit in the *Baldwin County* litigation, which had held both that the proposed intervenors had standing to challenge the remedial injunction and that the injunction exceeded the district court's powers under section 2 of the Voting Rights Act.

4. On appeal, the Eleventh Circuit reversed, holding that "in light of recent Supreme Court precedent," petitioners lacked standing to challenge the 1988 consent decree. Pet. App. 2a.

The court of appeals noted that there were two ways in which parties in petitioners' position could establish their standing. First, such parties might "independently fulfill the familiar requisites of injury-in-fact, causation, and redressability" required by Article III. Pet. App. 8a. Second, such parties might "be permitted to 'piggyback' upon the standing of original parties to satisfy the standing requirement." *Id.*; *see also Diamond v. Charles*, 476 U.S. 54, 64 (1986) (describing the concept of piggyback standing). The court of appeals concluded that petitioners failed to satisfy either standard.

With respect to the question whether petitioners had independent standing, the court of appeals determined that petitioners had not shown the

required personalized and concrete injury in fact. The court of appeals found dispositive this Court's decision in *Lance v. Coffman*, 127 S.Ct. 1194 (2007) (per curiam), which was announced after the district court had entered its judgment.[4] The plaintiffs in *Lance* challenged Colorado's use of court-ordered (rather than legislatively drawn) congressional districts, arguing that the resulting plan violated the Elections Clause of Art. I, § 4 (which provides in pertinent part that the "Manner" of electing members of the House of Representatives "shall be prescribed in each State by the Legislature thereof"). This Court held that the plaintiffs' claim should have been dismissed for lack of standing:

> [T]he problem with [the plaintiffs'] allegation should be obvious: The only injury plaintiffs allege is that the law – specifically the Elections Clause – has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.

127 S. Ct. at 1198. Petitioners, the Eleventh Circuit noted, had "consistently described their claims in terms that underscore the lack of particularized harm, and they echo the allegations found to be insufficient in *Lance* . . . , fram[ing] their claims not as personal ones, but rather as citizens' claims seeking to force the district court and the County Commission to follow federal law." Pet. App. at 17a.

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[4] The court of appeals received supplemental briefing from the parties on the applicability of *Lance*. *See* Pet. App. 16a n.6.

"The only 'constitutional right' to which [petitioners] advert," the court of appeals remarked, "is the putative rights shared by all citizens to be governed by their 'democratically chosen form of local government.'" *Id.* at 19a (quoting petitioners' brief). Since petitioners did not "seriously argue" that the consent decree "constitutes an affirmative violation of § 2 of the Voting Rights Act" and "expressly disclaim[ed] any injuries based on vote dilution or other, more concrete harms," Pet. App. 20a, the court of appeals held that their alleged injury was "'precisely the kind of undifferentiated, generalized grievance' that the Supreme Court has warned must not be countenanced." Pet. App. 21a-22a (quoting *Lance*, 127 S. Ct. at 1198).[5]

With respect to the availability of piggyback standing, the court of appeals explained that under Eleventh Circuit precedent, while a piggybacking intervenor "need not demonstrate that he has standing in addition to meeting the requirements of Rule 24" of the Federal Rules of Civil Procedure,[6] this "general policy . . . 'presumes that there is a

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[5] The court of appeals also held that petitioners lacked standing to challenge the provision regarding the rotation of the Commission chairmanship because here too petitioners did not claim that their "personally held rights under the Equal Protection Clause" had been violated. Pet. App. 19a n. 9. The court found that this claim "suffer[ed] from the further defect" that it failed to allege that the rotation provision had ever been used or was ever likely to be used in the future. *Id.* at 20a n.9.

[6] The court of appeals noted that the Dillard respondents had conceded that under existing Eleventh Circuit precedent petitioners were entitled to intervene, but the court "offer[ed] no view on the propriety of the Green intervention under the standards imposed by Fed. R. Civ. P. 24(a)." Pet. App. 4a n.3.

justiciable case into which an individual wants to intervene.'" Pet. App. 23a (quoting *Chiles v. Thornburgh*, 865 F.2d 1197, 1213, 1212 (11th Cir. 1989)). Thus, "when the original parties have settled the claims between them, and the intervenor wishes to challenge the settlement, we have required the intervenor to have independent standing." Pet. App. 24a (citing *Cox Cable Communications, Inc. v. United States*, 992 F.2d 1178 (11th Cir. 1993)).

In this case, the court of appeals pointed out the absence of any "unsettled adverse claims in litigation between the original parties, either in the district court or on appeal." Pet. App. 25a. The 1988 entry of the consent decree had "ended the adversarial character of the original controversy," *id.*, and the "long period of quiescence which followed the entry of the consent decree" confirmed that the existing dispute between the Dillard respondents and the Commission had been resolved. *Id.* at 29a. Because neither the Dillard respondents nor the Commission sought to reopen the consent decree between them, "there was no existing case or controversy between the Commission and Dillard as to which the Intervenors could ride piggyback." *Id.* at 27a.

In light of its decision that petitioners lacked standing, the court of appeals vacated the district court's orders terminating the 1988 consent decree and remanded the case with instructions to dismiss petitioners' complaint. Pet. App. 33a.[7]

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[7] In light of this disposition, the court of appeals did not reach the question whether the restrictions in *Holder* and *Nipper* on a federal court's power to order unilaterally an increase in the size of a governing body as a remedy for a

5. Petitioners did not seek a stay of the mandate from the court of appeals. Accordingly, on December 6, 2007, the mandate issued and the case returned to the district court. In light of the court of appeals' decision, the district court then entered an order dismissing petitioners' complaint in intervention for lack of standing and reinstating the 1988 consent decree. *Dillard v. Chilton County Commission*, 525 F. Supp. 2d 1315, 1316 (M.D. Ala. 2007); Pet. App. 10a-11a.

Subsequently, the Dillard respondents and the Commission – the only remaining parties before the district court – jointly filed a motion to amend the consent decree to eliminate the race-specific provision governing selection of the Commission chairperson. After notice and a fairness hearing, *see* BIO App. 6a-7a, the district court granted the parties' motion. It concluded that elimination of the provision, which had never been used, *id.* at 9a, would serve the public interest "by eliminating an unnecessary racial classification from the consent decree." *Id.* Accordingly, the district court ordered that the provision be deleted. *Id.* at 1a.

REASONS FOR DENYING THE WRIT

Recent decisions by this Court and the district court confirm that this case raises no issues warranting this Court's review. Petitioners' challenge to the race-conscious provision of the consent decree has become moot in light of the district court's recent modification of the consent

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section 2 violation "apply to consent decrees where the form of the relief has been agreed to by the parties." Pet. App. 3a n.2.

judgment. Petitioners lack standing to challenge the provision of the consent decree increasing the size of the Commission in light of this Court's recent decision in *Lance v. Coffman*, 127 S. Ct. 1194 (2007). Finally, the second question presented by the petition was neither raised before nor decided by the courts below, and presents no conflict among the circuits requiring this Court's attention.

I. PETITIONERS' CHALLENGE TO THE CONSENT DECREE PROVISION REGARDING THE COMMISSION CHAIRMANSHIP IS MOOT.

Petitioners' first argument for review focuses on their challenge to paragraph 4 of the 1988 consent decree, Pet. App. 98a, which contained a provision governing how the chair of the Chilton County Commission would be selected. In particular, petitioners claim that this Court should grant review to hold that they have standing to challenge the inclusion of a "race-specific proviso," BIO App. 9a, designed to ensure that black commissioners would have an opportunity to serve as chairman of the Commission. *See* Pet. Cert. 12-19.

Whatever the merits of petitioners' assertion of standing or their underlying challenge to the race-specific proviso, those questions are now moot. Following the issuance of the mandate from the court of appeals, the district court deleted that proviso from the consent decree, BIO App. 1a, finding that "[t]he public interest will be served by eliminating an unnecessary racial classification from the consent decree." BIO App. 9a. Because "[t]here is no provision in Alabama law" that would authorize

taking race into account in selecting the chair of a county commission, *see* BIO App. 6a, there is no possibility that such a provision will be reinstated. Given that the race-specific proviso was never used, BIO App. 9a, and that petitioners' complaint sought only prospective relief, *see* Pet. App. 92a-94a, there is no longer any live controversy over whether the Chilton County Commission must or can take race into account in selecting its chairman.

This Court's decisions make clear that under these circumstances, petitioners' challenge to paragraph 4 is moot and this Court lacks jurisdiction to consider it. To sustain this Court's jurisdiction, "it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990). Rather, this Court "must review the judgment of the [Eleventh Circuit] in light of [Alabama] law as it now stands, not as it stood when the judgment below was entered." *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972) (per curiam); *see also, e.g., Burke v. Barnes*, 479 U.S. 361, 363 (1987); *Kremens v. Bartley*, 431 U.S. 119, 128 (1977); *Fusari v. Steinberg*, 419 U.S. 379, 380, 387 (1975). As the law now stands, petitioners can no longer allege that they are "subject to a classification based solely on race." Pet. Cert. 14. Nor can they allege that a judicial decree currently in force "reserves the office of chairman for a black member." Pet. Cert. 13. And because petitioners can no longer allege that the Chilton County Commission is subject to a "racial quota system," they cannot credibly allege that they are "directly affected by" one. Pet. Cert. 17.

The fact that the consent decree was amended "after the decision below does not save the [petitioners'] claims from mootness." *Kremens*, 431 U.S. at 128. As this Court explained in *County of Los Angeles v. Davis*, 440 U.S. 625 (1979), a case becomes moot when

> (1) it can be said with assurance that "there is no reasonable expectation . . ." that the alleged violation will recur, and
>
> (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

Id. at 631 (internal citations omitted). Both those criteria are satisfied here. Given the deletion of the race-specific proviso from the consent decree and the lack of any authorization for such a provision under Alabama law, petitioners can have no fear that they will be subjected to any race-conscious practice in the future. And because the proviso was never actually invoked, BIO App. 9a, and petitioners sought only prospective remedies, the only relief they seek "is, of course, inappropriate now that the [challenged proviso] has been repealed." *Diffenderfer*, 404 U.S. at 415; *see also Burke*, 479 U.S. at 363. Under these circumstances, any opinion this Court might offer as to whether petitioners have standing to challenge the method by which a county commission selects its chairman would be entirely advisory. Such a challenge does not warrant this Court's review.

II. THE COURT OF APPEALS CORRECTLY HELD, IN LIGHT OF THIS COURT'S DECISION IN *LANCE v. COFFMAN*, THAT PETITIONERS LACK STANDING TO CHALLENGE THE REMAINING PROVISIONS IN THE CONSENT DECREE.

The court of appeals held that petitioners lacked standing to challenge the consent decree because they had alleged nothing more than a generalized grievance shared by all the county's citizens. That holding was clearly correct, is entirely consistent with this Court's decisions, and creates no conflict with the decisions of any other court of appeals.

Under Eleventh Circuit precedent, petitioners might have established their standing in one of two ways. First, they might have independently met the familiar requirements of Article III, including that they had "suffered a concrete and particularized injury." *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007). Second, even if they were unable to show such an injury, they might have been permitted to "piggyback" on the standing of the original parties to the *Dillard* lawsuit, but this piggyback standing would be available only if, at the time they sought to intervene, Pet. App. 30a, there was an ongoing, justiciable controversy between the original parties, Pet. App. 24a.

1. The court of appeals correctly applied this Court's intervening decision in *Lance v. Coffman*, 127 S. Ct. 1194 (2007) (per curiam), to the question whether petitioners could satisfy the concrete and

personalized injury-in-fact prong of the test for independent standing. In *Lance*, this Court confronted a challenge to Colorado's decision to use a congressional redistricting plan developed by a state court rather than a plan later developed by the state legislature. The plaintiffs claimed that that decision violated the Elections Clause of Article I, § 4, which provides, in pertinent part, that the "Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the *Legislature* thereof." (Emphasis added).

This Court held that the plaintiffs lacked standing. It reiterated its consistent position that "a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." 127 S. Ct. at 1196 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992)). And it found that the plaintiffs' allegation that "the law – specifically the Elections Clause – has not been followed" was "precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." 127 S. Ct. at 1198. The Court contrasted cases like *Lance* with its earlier decision in *Baker v. Carr*, 369 U.S. 186, 207-08 (1962), where the voters challenging an apportionment that produced districts with vastly different populations alleged that their votes were being diluted "vis-à-vis voters" in less populous districts.

As the court of appeals correctly found here, petitioners "expressly disclaim[ed] any injury based on vote dilution," Pet. App. 20a, the type of claim that conferred standing in *Baker* (involving allegations of quantitative vote dilution), *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (involving allegations of racial vote dilution under the equal protection clause), and *Thornburg v. Gingles*, 478 U.S. 30 (1986) (involving allegations of racial vote dilution under section 2 of the Voting Rights Act), *see* Pet. App. 15a-16a. Instead, petitioners "assert[ed] only the generalized incompatibility of the consent decree with the rights of all citizens in the county to be free of judicial interference . . . with the democratically selected form of local governance." *Id.* at 17a.

Petitioners seek to avoid the clearly correct conclusion that their claims simply "echo the allegations found to be insufficient in *Lance*," *id.*, by pointing to those aspects of their complaint that alleged the use of an unconstitutional racial classification in the selection of the Commission chair. *See* Pet. Cert. 13-14, 16-19. But even if those allegations would have been sufficient to confer standing to challenge the now-superseded race-specific proviso of paragraph 4, *see supra* pp. 11-13 (explaining why that challenge is now moot), they provide no basis for challenging the race-neutral increase in the size of the Commission and the use of cumulative voting rules. Petitioners must prove their standing with respect to each of the provisions they seek to challenge. *Lewis v. Casey*, 518 U.S. 343, 358 (1996) ("standing is not dispensed in gross" but must be satisfied as to each practice about which a plaintiff complains); *see Friends of the Earth, Inc. v.*

Laidlaw Environ. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000) ("a plaintiff must demonstrate standing separately for each form of relief sought"). Nothing in their petition shows any way in which petitioners have suffered a particularized or concrete injury with respect to the consent decree's increase in the size of the Commission.[8] Particularly given that petitioners do not allege any uncertainty or conflict in the lower courts, the Eleventh Circuit's correct application of *Lance* to the facts of this case does not warrant this Court's review.

2. The court of appeals' conclusion that petitioners had not established piggyback standing is even less worthy of this Court's review.[9] The availability of piggyback standing depends on there being some live, ongoing litigation on which to piggyback. As this Court noted in *Diamond v.*

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[8] Because elections under the 1988 consent decree remain at large – cumulative voting simply changes the way in which voters cast their ballots – the weight of every citizen's vote in Chilton County is mathematically equal to the weight of every other citizen's vote. Thus, even if under some circumstances a plaintiff could claim dilution of the weight of his vote if the size of an elected body were increased – so that, for example, he now participated in electing one of seven representatives rather than one of four – that claim is not available in this case to challenge an at-large cumulative voting plan.

[9] As the court of appeals noted, there is a conflict among the circuits as to the availability of piggyback standing for proposed intervenors who cannot independently show their standing. *See* Pet. App. 25a n.11. But because the Eleventh Circuit has taken the liberal approach, this case does not provide an appropriate vehicle for resolving that conflict: petitioners have already received the benefit of the more intervention-friendly rule, and even under that rule, they fail to satisfy the prerequisites for piggyback standing.

Charles, 476 U.S. 54 (1986), where a pediatrician whose own conduct was not implicated by Illinois' abortion statute had intervened in the district court to defend the constitutionality of the statute, an intervenor's "ability to ride 'piggyback' on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no case for [the intervenor] to join." *Id.* at 64. Here, the court of appeals found that there was no live controversy between the original parties to this lawsuit – namely, the Dillard respondents and the Commission. Indeed, the court noted that the Commission "scrupulously avoided" reviving any controversy. Pet. App. 31a. Given that clearly correct and factbound determination, petitioners cannot circumvent the requirement of proving the concrete and particularized injury they failed to allege in their complaint or to prove at trial. *See* Pet. App. 44a.

3. In any event, petitioners' challenge to the provision of the 1988 consent decree that increased the number of members on the Chilton County Commission may well be moot. In 2006 and 2007, the State of Alabama enacted legislation that categorically ratifies, as a matter of state law, existing federal court orders setting the size or method of electing most county commissions. Ala. Code § 11-80-12 provides that any county commission (or board of education or municipal governing body) "whose currently serving members have been elected by a method of election and a specific number of seats prescribed by a federal court shall retain that manner of election and composition"

until such time as new legislation is adopted. That provision itself does not apply to the Chilton County Commission.[10] But "an even broader statutory provision," BIO App. 5a, Ala. Code § 11-3-1(c), provides, in pertinent part that "[u]nless otherwise provided by local law, *by court order,* or governed by Section 11-80-12," county commissions in Alabama shall be "composed of the judge of probate, who shall serve as chairman, and four commissioners." (Emphasis added). The plain language of section 11-3-1(c) covers the Chilton County Commission, and arguably ratifies as a matter of state law, the adoption of a seven-member commission pursuant to the 1988 consent decree, rendering petitioners' challenge moot.[11] Because mootness goes to this Court's jurisdiction, *see supra* pp. 12-13, the Court would have to resolve that issue – which turns on a series of questions of state law – before ever reaching the question presented by the petition. To the extent that the question of standing to challenge these sorts of provisions in consent decrees involves an

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[10] Section 11-80-12, enacted by Ala. Act 2006-252, specifically excluded "any county where there is currently pending litigation**,** or appeals relating thereto, challenging previous court orders or consent orders." On the effective date of Act 2006-252, this lawsuit was pending. To the best of respondents' knowledge, the Chilton County Commission is the *only* governing body to which this exemption applies.

[11] The current version of section 11-3-1 (c) was amended by Ala. Act 2007-488, whose effective date was September 1, 2007, eleven days after the court of appeals' decision vacating the district court's orders terminating the consent decree, *see* Pet. App. 1a. Thus, the 1988 consent decree arguably constitutes a court order exempting the Chilton County Commission from the default rules governing the size and composition of county commissions.

important issue worthy of this Court's review, another case will surely arise that raises the issue unencumbered by a potentially fatal jurisdictional defect.

III. IN THE ABSENCE OF A LIVE CASE BEFORE IT, THE COURT OF APPEALS LACKED THE POWER TO VACATE THE 1988 CONSENT JUDGMENT ON ITS OWN INITIATIVE.

Petitioners' final argument as to why this Court should grant review rests on their claim that, because the 1988 consent decree's provision increasing the size of the Chilton County Commission exceeded the district court's power, the court of appeals erred in not reaching the merits of that challenge even after it had concluded that petitioners lacked standing. *See* Pet. Cert. 19 ("Both the scope of the 1988 Decree and its impact on local government are features which the Eleventh Circuit should consider on its own. It need not wait for a party with standing to make a proper motion.").

Petitioners' argument simply ignores the basic requisites of Article III, not to mention the structure of the federal judiciary. Federal courts lack the authority to "consider" legal questions "on [their] own." They can decide questions only in the context of live cases or controversies. The court of appeals' holding that petitioners lacked standing was the equivalent of a holding that there was no Article III case or controversy properly pending before it. At that point, the court of appeals could no more reach out to decide that the 1988 Chilton County Commission consent decree was invalid than it could

reach out to strike down any of the hundreds of other consent judgments entered during the last quarter century in other voting rights cases throughout the circuit as to which petitioners also lack standing.

To be sure, *district courts* have continuing jurisdiction over consent decrees they have approved. But nothing about that jurisdiction, whatever its scope, gives the courts of appeals a roving warrant to decide the validity of consent decrees without waiting to have adversarial parties before them.

1. Petitioners' assertion that the court of appeals' decision here conflicts with the decision of the Seventh Circuit in *Association of Comm. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791 (7th Cir. 1995), is completely misplaced. *ACORN* involved a lawsuit brought by the United States and several voting rights groups seeking to force the state of Illinois to comply with the National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg *et seq*. The state argued that the NVRA was unconstitutional. The district court disagreed, upheld the Act, and entered a sweeping remedial injunction. *See* 56 F.3d at 793.

The state appealed, reasserting its claim that the NVRA constituted an impermissible interference with state sovereignty under the Tenth Amendment. The Seventh Circuit upheld the Act itself against the Tenth Amendment challenge, *see id.* at 796, but found that the district court's injunction was too sweeping because it "failed to exhibit an adequate sensitivity to the principle of federalism," *id.* at 798. Thus, it ordered that the injunction be modified to remove the offending provision. *Id.*

Petitioners place great emphasis on the fact that the court of appeals reached the propriety of the scope of the injunctive relief "[n]otwithstanding the State's failure to appeal the remedy." Pet. Cert. 21. But the state did appeal the *judgment* of the district court entering an injunction against it. So the *case* was properly before the court of appeals. There is a world of difference between a court of appeals deciding a case in favor of a proper party – as the State of Illinois undeniably was – on the basis of a ground for reversal not urged by that party, *see* 56 F.3d at 796-97 – and the court of appeals deciding a case in favor of a party not properly before the court at all.

Moreover, petitioners are wrong to claim that in *ACORN* the state was "indifferen[t]" to the scope of the injunction, Pet. Cert. 21, or that *ACORN* held that courts of appeals could set aside injunctions "even though those directly affected find them acceptable," Pet. Cert. 22, based on their independent assessment of an injunction's federalism costs. In sharp contrast to this case, *ACORN* involved an appeal by the government bound by the injunction. Illinois clearly objected to the imposition of any injunction at all. As the court of appeals described it, the state had "staked its all on persuading [the court of appeals] that the law on which the injunction was based is unconstitutional," 56 F.3d at 796. If the underlying statute was unconstitutional, then by necessity an injunction enforcing the statute would be unconstitutional as well. Thus, as a functional matter, the state had vigorously contested the remedial injunction.

Here, by contrast, "[t]he Commission itself *never made any claim of its own for judicial relief*" from the consent decree, Pet. App. 27a (emphasis in the original), and "on appeal, the Commission has scrupulously avoided arguing that the district court order vacating the consent decree should be upheld," Pet. App. 31a. Thus, the party with standing (and best situated) to raise a federalism-based challenge to the continued operation of the consent decree chose *not* to invoke the court of appeals' jurisdiction. Nothing in the court of appeals' decision here conflicts with the Seventh Circuit's approach in *ACORN*.

2. Petitioners' final argument as to why this Court should grant review points to an acknowledged conflict among the courts of appeals over whether district courts can grant relief from an existing injunction *sua sponte* under Fed. R. Civ. P. 60(b). To be sure, such a conflict exists. *See United States v. Pauley*, 321 F.3d 578, 581 n.1 (6th Cir.) (describing the split), *cert. denied*, 540 U.S. 877 (2003). But any conflict among the courts of appeals over the operation of Rule 60(b)(6) has literally nothing to do with this case.

First, none of the cases petitioners cite involves the question presented by the petition, which was whether the *Eleventh Circuit* could *sua sponte* modify or vacate the 1988 consent decree. *See* Pet. Cert. i, 19. The plain language of the federal rules of civil procedure provides that they "govern the procedure in all civil actions and proceedings in the United States *district courts*." Fed. R. Civ. P. 1 (emphasis added). So cases construing district courts' powers under Rule 60(b)(6) have no direct

bearing on the appropriate role for the courts of appeals. *See Pauley*, 321 F.3d at 581 n.1 (noting that the "[c]ircuits are split on the question whether *a district court* may grant Rule 60(b) relief *sua sponte*") (emphasis added).

That question – namely, whether the district court could have decided on its own motion to vacate or modify the 1988 consent judgment – was neither presented to nor decided by either court below. More fundamentally, the conflict among the circuits that petitioners identify goes to whether district courts have the *power* to grant Rule 60(b) relief *sua sponte*. The cases cited by petitioners all involve challenges to district courts' decisions to exercise that power. None of them says anything at all to suggest that district courts have any *obligation* to revisit existing decrees *sua sponte* – the claim petitioners are making here.

Finally, the court of appeals expressly declined to address whether the intervening decisions of this Court in *Holder v. Hall*, 512 U.S. 874 (1994), and the Eleventh Circuit in *Nipper v. Smith*, 39 F.3d 1494 (1994) (en banc), *cert. denied*, 514 U.S. 1083 (1995), would justify or require modifying the 1998 consent decree. *See* Pet. App. 3a n.2. On remand, the district court, "[u]pon consideration of the [court of appeals'] opinion," BIO App. 10a, decided to reinstate the 1998 decree. Thus, even if this Court were to resolve the conflict identified by petitioners in petitioners' favor, it would have no effect on this case: the courts below have already declined to exercise the equitable power petitioners claim they possess.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 23, 2008

[April 3, 2008, Judgment of the District Court]

IN THE DISTRICT COURT OF THE UNITED STATES OF THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JOHN DILLARD, et al.,	)	
	)	
Plaintiffs,	)	
	)	
ROBERT R. BINION and JOHN WRIGHT,	)	
	)	
Plaintiff-Intervenors,	)	
	)	CIVIL ACTION NO.
v.	)	2:87-cv1179-MHT
	)	(WO)
CHILTON COUNTY COMMISSION, et al.,	)	
	)	
Defendants.	)	

JUDGMENT

In accordance with the opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) The joint motion to amend consent decree (Doc. No. 215) is granted.

(2) The following proviso in the 1988 consent decree is deleted:

> "provided, however, that the procedures used by the commission for that purpose shall ensure that, if a black citizen is elected to the

> county commission, he or she shall be offered the opportunity to serve a term as chair of not less that [sic] six months duration during each four year term of office. If more than one black citizen is elected to the commission, the proviso herein shall only require that one six month term as chair be guaranteed."

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

DONE, this the 3rd day of April, 2008.

/s/ Myron H. Thompson

UNITED STATES DISTRICT JUDGE

[April 3, 2008, Opinion of the District Court]

IN THE DISTRICT COURT OF THE UNITED STATES OF THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JOHN DILLARD, et al.,	)	
	)	
Plaintiffs,	)	
	)	
ROBERT R. BINION and JOHN WRIGHT,	)	
	)	
Plaintiff-Intervenors,	)	
	)	CIVIL ACTION NO.
v.	)	2:87-cv1179-MHT
	)	(WO)
CHILTON COUNTY COMMISSION, et al.,	)	
	)	
Defendants.	)	

OPINION

This matter is before the court on the question of whether it should give final approval to the modification of the consent decree approved by this court on June 23, 1988 (Doc. Nos. 46 and 47), *Dillard v. Chilton County Bd. of Educ.,* 699 F.Supp. 870 (M.D. Ala. 1988), *aff'd, Dillard v. Chilton County Comm'n,* 868 F.2d 1274 (11th Cir. 1989) (table), and which provides for seven Chilton County Commissioners to be elected by the voters of the county at large using cumulative voting rules. The question is presented in a joint motion filed by

plaintiffs John Dillard, et al., plaintiffs-intervenors Robert R. Binion and John Wright, and defendant Chilton County Commission, seeking the court's approval to strike the following proviso from ¶ 4 of the consent decree:

> "provided, however, that the procedures used by the commission for that purpose shall ensure that, if a black citizen is elected to the county commission, he or she shall be offered the opportunity to serve a term as chair of not less that [sic] six months duration during each four year term of office. If more than one black citizen is elected to the commission, the proviso herein shall only require that one six month term as chair be guaranteed."

For the reasons that follow, the court is of the opinion that the modification should be approved and the joint motion granted.

I. BACKGROUND

The motion to amend the consent decree is joined by all parties to this action. The claims of Gilbert Green and Calvin Jones, Jr., who were allowed to intervene in 2003, were dismissed by order entered on December 10, 2007, pursuant to a mandate of the Eleventh Circuit Court of Appeals. *Dillard v. Chilton County Comm'n,* 495 F.3d 1324 (11th Cir. 2007). Green and Jones have filed a petition for writ of certiorari. *Gilbert Green and Calvin Jones, Jr., v. Chilton County Comm'n,* No. 07-1124 (U.S.).

The consent decree in this action is the last of the 180 court-ordered election plans still active in the longstanding set of *Dillard* cases, which began with

Dillard v. Crenshaw County, 640 F.Supp. 1347 (M.D. Ala. 1986), and which eventually involved the governing bodies in 192 local jurisdictions in Alabama. By passing Act 2006-252, now codified at 1975 Ala. Code § 11-80-12, the Alabama Legislature adopted under state law all court-ordered election plans with respect to which there is no pending litigation challenging the plan. Act 2007-488 incorporated Act 2006-252 in an even broader statutory provision, now codified at 1975 Ala. Code § 11-3-1(c). Section 11-3-1(c), as amended by Act 2007-488, provides:

> "Unless otherwise provided by local law, *by court order,* or governed by Section 11-80-12, and as otherwise provided in subsection (d), there shall be in every county a county commission, composed of the judge of probate, who shall serve as chairman, and four commissioners, who shall be elected at the time prescribed by law and shall hold office for four years until their successors are elected and qualified."

(Emphasis added.) Section 11-80-12, provides:

> "Notwithstanding any other provision of law to the contrary, any board of education, county commission, or municipal governing body whose currently serving members have been elected by a method of election and a specific number of seats prescribed by a federal court shall retain that manner of election and composition until such time as the method of election or number of seats is changed in accordance with general or local law. This section shall not apply in any

> county where a federal court has overturned the previous order concerning the manner of election and the number of members of a county commission and shall not apply in any county where there is currently pending litigation, or appeals relating thereto, challenging previous court orders or consent orders concerning the manner of elections or the number of members or districts of a county commission."

There is no provision in Alabama law, however, for the above quoted proviso in ¶ 4 of the 1988 consent decree in this action, nor could such a racial classification be enacted by the Legislature unless it was narrowly tailored to serve a compelling state interest.

II. NOTICE TO THE CLASS AND FAIRNESS HEARING

Before addressing the merits of approving the amendment to the consent decree, the court must ensure that all members of the plaintiff class of black voters have been informed of the proposed amendment and have had the opportunity to voice any objections. Fed.R.Civ.P. 23(e). By order entered March 6, 2008, the court gave preliminary approval to the proposed modification of the consent decree and approved a notice to the plaintiff class. The notice to the class provided that all written objections must be submitted to the clerk of the court no later than by March 25, 2008. The court further stated that all objections by class members must be timely submitted in writing to be considered by the court. A fairness hearing was scheduled for April 3, 2008.

Defendant Chilton County Commission has certified that the notice to the class was published, as ordered, once a week for two weeks in the Chilton County News. The court finds that this was adequate notice that satisfies Fed.R.Civ.P. 23(e)(1), and constitutional requirements of due process. A fairness hearing was conducted on April 3, 2008, at which no written or oral objections were received from members of the plaintiff class.

III. WHETHER THE MODIFICATION OF THE CONSENT DECREE IS FAIR, REASONABLE, AND ADEQUATE.

Because all parties to this action agree to the proposed modification of the consent decree, the standards this court must employ to determine whether the modification should be approved are governed by Fed.R.Civ.P. 23(e). *Reynolds v. Alabama Dept. of Transportation,* 261 F.Supp.2d 1331, 1345-51 (M.D. Ala.), *vacated on other grounds,* 265 F.Supp.2d 1289 (M.D. Ala. 2001). Thus, the issue here is whether the proposed modification is "fair, reasonable, and adequate." Fed.R.Civ.P. 23(e)(2). This court has previously set out the factors it will examine in deciding whether a settlement is fair, adequate, and reasonable. Those factors are as follows:

> "(1) the views of the class members; (2) the views of class counsel; (3) the substance and amount of opposition to the settlement; (4) the possible existence of collusion behind the settlement; (5) the state of the proceedings; (6) the likelihood of success at trial; (7) the complexity, expense and likely duration of

> the lawsuit; and (8) the range of possible recovery."

Allen v. Alabama State Bd. of Education, 190 F.R.D. 602, 607 (M.D. Ala. 2000) (citations omitted). All of the relevant factors are satisfied here. However, in approving the amendment to the consent decree, the court must "undertake an analysis of the facts and the law relevant to the proposed compromise" and "support [its] conclusions by memorandum opinion or otherwise in the record." *Cotton v. Hinton,* 559 F.2d 1326, 1330 (5th Cir. 1977).*

No objections were submitted to the court by members of the plaintiff class. Commissioner Bobby L. Agee, who is black, and other class members attended the fairness hearing and represented to the court that they favored striking the race-specific proviso from the consent decree.

The Supreme Court has provided guidance about the appropriateness of race-specific relief in a remedial decree:

> "In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the

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* In *Bonner v. Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

> impact of the relief on the rights of third parties."

United States v. Paradise, 480 U.S. 149, 171, 107 S. Ct. 1053, 94 L. Ed. 2d 203 (1987) (plurality opinion). Although the Supreme Court in *Paradise* was addressing remedies in an employment context, the general principles it enunciated are applicable here as well. Commissioner Agee and defendant Chilton County Commission presented evidence that the proviso had never been invoked and was not necessary. To the extent it appeared to be necessary when the consent decree was approved in 1988, 20 years is a sufficient duration for such a temporary race-specific proviso. The evidence now before the court shows that striking the proviso should have no adverse impact on the class of black voters.

Counsel for the plaintiff class, experienced voting rights lawyers, have stated their view that removing the proviso was in the best interests of the class. The consent decree has been in effect for 20 years, and striking the race-specific proviso will facilitate the final dismissal of this action. The public interest will be served by eliminating an unnecessary racial classification from the consent decree.

An appropriate judgment will be entered.

DONE, this the 3rd day of April, 2008.

/s/ Myron H. Thompson

UNITED STATES DISTRICT JUDGE

[December 10, 2007, Order of the District Court]

IN THE DISTRICT COURT OF THE UNITED STATES OF THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JOHN DILLARD, et al.,	)	
	)	
Plaintiffs,	)	
	)	
ROBERT R. BINION and JOHN WRIGHT,	)	
	)	
Plaintiff-Intervenors,	)	
	)	CIVIL ACTION NO.
v.	)	2:87-cv1179-MHT
	)	(WO)
CHILTON COUNTY COMMISSION, et al.,	)	
	)	
Defendants.	)	

ORDER

Upon consideration of the opinion of the United States Court of Appeals for the Eleventh Circuit entered on August 20, 2007, *Dillard v. Chilton County Com'n,* 495 F.3d 1324 (11th Cir. 2007), wherein the orders and opinions of this court made and entered herein on August 14 and September 6 and 21, 2006 (Doc. Nos. 170, 171, 182, 194, & 195), *Dillard v. Chilton County Com'n,* 447 F. Supp. 2d 1273 (M.D. Ala. 2006), 447 F. Supp. 2d 1280 (M.D. Ala. 2006), 452 F. Supp. 2d 1193 (M.D. Ala. 2006), were vacated; and the mandate for the United States

Court of Appeals for the Eleventh Circuit issued on December 6, 2007, and received in the office of the clerk of this court on December 6, 2007 (Doc. No. 206), it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) The orders and opinions entered on August 14 and September 6 and 21, 2006 (Doc. Nos. 170, 171, 182, 194 & 195), *Dillard v. Chilton County Com'n,* 447 F. Supp. 2d 1273 (M.D. Ala. 2006), 447 F.Supp. 2d 1280 (M.D. Ala. 2006), 452 F. Supp. 2d 1193 (M.D. Ala. 2006), are vacated.

(2) The claims set forth in the complaint-in-intervention (Doc. No. 64) filed by intervenors Gilbert Green and Calvin Jones, Jr. are dismissed without prejudice for lack of standing.

(3) The previously vacated remedial orders and judgments, including the orders and consent decree entered on June 23, 1988 (Doc. Nos. 46 & 47), that restructured the Chilton County Commission, including establishing a 'cumulative voting scheme' for the commission, *Dillard v. Chilton County Bd. of Educ,* 699 F. Supp. 870 (M.D. Ala. 1988), *aff'd, Dillard v. Chilton Cty. Comm'n,* 868 F.2d 1274 (11th Cir. 1989) (table), are reinstated.

DONE, this 10th day of December, 2007

/s/ Myron H. Thompson

UNITED STATES DISTRICT JUDGE