No. 08-_____

In The
Supreme Court of the United States

GILBERT GREEN and CALVIN JONES, Jr.

Petitioners,

v.

JOHN DILLARD,

v.

CHILTON COUNTY COMMISSION,
ROBERT M. MARTIN, PROBATE JUDGE

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Eleventh Circuit mistakenly apply the doctrine of standing and wrongly reverse the vacation of a Voting Rights injunction requiring a local government (i) to institute a racial classification for the chair position; (ii) to require an appointment to the chair position in place of the voters electing him; and (iii) to illegally increase the number of elected positions of the Commission?

2. Was the Eleventh Circuit wrong to reinstate such an injunction where neither its beneficiary nor the affected government sought to vacate it?

PARTIES TO THE PROCEEDING

Petitioners are Gilbert Green and Calvin Jones, Jr., intervenors in the district court. They were appellees before the Court of Appeals for the Eleventh Circuit in No. 06-14950.

Respondents are John Dillard, the original plaintiff and Robert R. Binion and John Wright, plaintiff-intervenors. They are collectively referred to as "Dillard." Dillard was the appellant in No. 06-14950.

Respondents also include the Chilton County, Alabama Commission, a defendant in Dillard's original action, and Chilton County's probate judge, Robert M. Martin, who was added as a defendant in 2003.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Green and Jones (collectively "Petitioners") respectfully petition this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at *Green v. Chilton County Commission*, 495 F.3d 1324 (11th Cir. 2007), and is reprinted in the Appendix at App.1a-33a. The decision of the United States District Court for the Middle District of Alabama vacating the decree is reported at *Dillard v. Chilton County Commission*, 447 F.Supp.2d 1273 (M.D. Ala. 2006), and is reprinted in the Appendix at App. 34a-50a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its decision on August 20, 2007. App. 1a. On November 28, 2007, the Court of Appeals denied the Petitioners' timely request for rehearing and rehearing *en banc*. App. 101a-104a. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves interpretation of the following:

United States Constitution, Article III, sec. 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have

been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, sec. 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1973(a)

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.

Fed. R. Civ. P., Rule 60(b)(5)

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable.

STATEMENT OF THE CASE

This Petition presents issues of critical importance. The first is whether the Eleventh Circuit properly denied redress to Petitioners in their attempt to vacate a District Court's 1988 injunction that constituted the manner of choosing the governing officials for Chilton County, Alabama by ordering a racial quota, replacing an elected official with an appointed one, and creating three new elected positions in the local government without a finding or evidence of intentional discrimination in the creation or maintenance of the existing form of local government.

The second, equally critical issue directly affects the implementation of the Voting Rights Act: whether a court's equitable authority should include appointment of local officials required to be elected. Indeed, a variation on the same problem is now pending before this Court in *Riley v. Kennedy,* No. 07-77. Here though, the issue is the scope of the federal courts' authority and whether its equitable power requires a motion from a party to vacate such an illegal injunction.

I. The 1988 Decree

In 1985, Respondents filed suit challenging the election processes of nine Alabama counties alleging violations of section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments of the United States Constitution. In response to a United States District Court opinion finding these election

systems "to be the product of, or tainted by, racially inspired enactments of the Alabama legislature," *Dillard v. Crenshaw County,* 640 F. Supp. 1347, 1357-1360 (M.D. Ala. 1986), Respondents amended their complaint to certify the Talladega Board of Education and the City of Childersburg as designated representatives of a proposed defendant class consisting of all political subdivisions of the state. *Dillard v. Chilton County Comm'n,* 447 F. Supp. 2d 1273, 1274 (M.D. Ala. 2006) (*citing Dillard v. Baldwin County Bd. of Educ.,* 686 F.Supp. 1459 (M.D. Ala. 1988).

In July 1987, the United States District Court for the Middle District of Alabama approved an Interim Consent Decree in order to avoid the burden and expense of further contested litigation and to promote speedy enforcement of the Voting Rights Act. *See Dillard v. Baldwin County Bd. of Educ.,* 686 F.Supp. at 1461. The Interim Consent Decree also designated the Talladega County Board of Education and the City of Childersburg as representatives of the defendant class and gave 183 defendant political subdivisions in the state the opportunity to select one of three options for resolving the case against it. *See Dillard v. Chilton County Comm'n,* 447 F.Supp.2d at 1274. The Chilton County Commission ("the Commission"), a member of the defendant class, selected Option B. *Id.*

Chilton County is located in central Alabama. In 1988, blacks comprised just 11.86% of the general population and lived throughout the county. From 1931 to 1988, a five-member

commission governed Chilton County in accordance with the election system enacted by the Alabama legislature. *Id.* Under this system, the elected probate judge of the county served as chair and the remaining four members were elected first county-wide, then by numbered posts wherein each voter was allowed to vote for only one candidate in each place. In order to run as the nominee of a political party in the general election, a candidate had to receive a majority of the votes in the primary election.

On March 9, 1988, Respondents and the Commission filed a joint motion for approval of a Consent Decree negotiated in response to the lawsuit.[1] The District Court granted said motion over the objection of several members of the plaintiff class on June 1, 1988. *Dillard,* 447 F.Supp.2d at 1274. The approved consent decree ("the 1988 Decree") expanded the number of seats on the Commission from four to seven, required that commissioners be elected at-large using cumulative voting rules, and removed the probate judge as chairman of the commission. In addition, the 1988 Decree established a new procedure for determining the chairman of the Commission. The 1988 Decree required that the Commission:

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[1]In accordance with the terms of Option B, the Commission did not contest the alleged violation of section 2 of the Voting Rights Act and proceeded immediately to the remedial phase of the litigation.

> "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 than [sic] six months duration during each four year terms of office. If more than one black citizen [was] elected to the commission, the proviso herein shall only require that one six month term as chair be guaranteed."

App. at 98a at ¶ 4.

II. The Proceedings Below

On February 21, 2003, Petitioners filed a Complaint-in-Intervention[2] alleging violations of both their constitutional and statutory rights. Specifically, Petitioners claimed that this Court's holding in *Holder v. Hall*, 512 U.S. 874 (1994), prohibited federal courts from mandating that a political subdivision alter the size of its elected bodies as a remedy under section 2 of the Voting Rights Act. App. at 79a-96a. Petitioners further claimed that the 1988 Consent Decree violated the Fifth and Fourteenth Amendments to the United States Constitution "to the extent it provides for commissioners to be offered the chair of [the]

[2]Petitioners added the Probate Judge as a defendant. App. at 80a. The probate judge is responsible for the administration of local elections. App. at 82a.

Commission . . . on the basis of the race of the commissioner thereby imposing a racial quota on the governing body." App. at 91a at ¶ 28. Finally, Petitioners alleged that the decrees' change of the office of chairman from an elected position to an appointed one violated the Voting Rights Act. App. at 88a-89a at ¶ 19. To remedy these alleged violations, Petitioners requested the court vacate the 1988 Decree to the extent it altered the size of the Commission and imposed an unlawful racial quota.

The Commission and probate judge answered Petitioners' complaint-in-intervention jointly, admitting that the 1988 Decree should be vacated "because it exceeds the remedial authority set forth in the Voting Rights Act." App. at 75a at ¶ 16. The Commission also admitted that the 1988 Decree should be vacated on the grounds that it violated the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment. App. at 76a at ¶ 28.

Respondents did not answer Petitioners' complaint-in-intervention. Nevertheless, Respondents did attend the pretrial hearing to argue that Petitioners failed to state claims upon which relief could be granted under both the Voting Rights Act and Fourteenth Amendments, app. at 55a at ¶ 4 (a) (6), to challenge Petitioners' standing, app. at 54a at ¶ 4 (a) (14), and to allege that Petitioners' intervention was motivated by racial discrimination, app. at 56a at ¶ 4 (a) (11).

In its pretrial hearing submission, the Commission and probate judge focused solely on the proposed remedy, requesting that it provide that the Commission be composed of four members from

single-member districts, with the Probate Judge serving as fifth member and chairman. *Id*. at ¶ 4 (c) (2). The Commission denied Respondents claim that it acted, or failed to act, for racially motivated reasons. App. at 67a at ¶ 4 (c) (4).

On August 14, 2006, the District Court sustained Petitioners' challenge and vacated the 1988 Decree on the grounds that the remedy contained in the decree was not authorized by section 2 of the Voting Rights Act. Indeed, the District Court noted that similar decrees had been vacated as "illegal election scheme[s] that [were] plainly created because of or on account of race." *See Dillard*, 447 F. Supp. 2d at 1278 (*citing Dillard v. Baldwin County Commissioners*, 225 F.3d at 1281). Presumably because it found adequate grounds upon which to grant Petitioners requested relief, the District Court did not address whether the 1988 Decree, to the extent it imposed a racial quota on the office of the chairman, violated the Equal Protection clause of the Fourteenth Amendment or whether the removal of the Probate Judge from the office of chairman was itself a violation of section 2 of the Voting Rights Act and/or the Fourteenth Amendment. It did, however, note that "there is no evidence to support the conclusion" that the pre-1988 Chilton County Commission election scheme was used for racially discriminatory reasons. *Dillard,* 447 F.Supp.2d at 1278.

Respondent Dillard appealed the decision of the District Court to the Court of Appeals for the Eleventh Circuit. The Court of Appeals took briefs

and heard arguments on the matter pursuant to its jurisdiction under 28 U.S.C. 1291(a)(1).

On August 20, 2007, the Court of Appeals reversed the District Court's decision, holding that Petitioners lacked independent standing under *Lance v. Coffman*, 127 S. Ct. 1194 (2007), to assert their claims under the Voting Rights Act and the Fifth, Tenth, and Eleventh Amendments. The Court of Appeals did not address Petitioners' allegation that the removal of the Probate Judge as chairman violated section 2 of the Voting Rights Act and ruled they lacked standing to assert their alleged equal protection violations.

Petitioners timely filed a petition for rehearing *en banc* pursuant to Fed. R. App. P. 35 on September 7, 2007. On November 28, 2007, the Court of Appeals for the Eleventh Circuit denied the petition for rehearing *en banc*. App. at 101-104.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit should not have reversed the District Court's decision to vacate the 1988 injunction. Its grounds for the decision, that Petitioners did not have standing to contest the constitutional validity of the injunction, are not supported by this Court's precedent. Moreover, the decision reinstates an illegal racial quota for a position in local government, reinstates an appointed position in place of an elected position, and reinstates three judicially created positions in local government not provided by state law.

I. Petitioners Have Article III Standing to End the District Court's Decree Barring Their Right to Vote for Chair of the Local Government.

The issue presented in this petition deals with the "he" in the "he suffered" component of standing; i.e., whether the act complained of goes beyond a general grievance. Petitioners' injury is like that found in *Shaw v. Reno*, 509 U.S. 630, 641 (1993), and *Shaw v. Hunt*, 517 U.S. 899, 904 (1996), where citizens are treated as racial units, or in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), where they are systematically excluded from voting by gerrymander, or *Bunton v. Patterson,* 393 U.S. 544 (1969), where the office is changed from elected to appointive. Though this injury can be said to be suffered by a large number of persons, it is no less an injury cognizable under Article III. Thus, the injury is not a harm suffered "in common with people generally." *Lance v. Coffman,* 127 S.Ct. 1194, 1196 (2007) (*citing Daimler Chrysler Corp. v. Cuno,* 126 S.Ct. 1854, 1862 (2006)).

In finding to the contrary, the Eleventh Circuit did not fully consider the pleadings, and positions taken by Petitioners in the district court. For instance, the district court stated that Petitioners "argued that they individually suffered an actual injury as a result of the illegal election schemes plainly created because of, or on account of race." *See Dillard*, 447 F.Supp.2d at 1278. That claim of injury entitles Petitioners to be heard in an Article III court.

Petitioners complaint in intervention alleges the following injuries:

> "Petitioners are adversely affected by the increase in the number of members of the Commission, by the change of the method of electing county commissioners from the method established by the Alabama legislature to the cumulative voting system currently utilized under the Order of this Court entered in this case June 23, 1988, by the removal of the Probate Judge of Chilton County, Alabama from his position as chairman *ex officio* of the Commission, and by the imposition of a racial quota in the selection of the chairman of the Commission."

App. 81a at ¶ 6. In *addition*, Petitioners asserted a "federally protected interest in maintaining the democratically-established form of his county government." *Id.* These are precisely the types of claims this Court distinguished as cognizable in *Lance* because they are concrete and personalized injuries in the form of denials of equal treatment. *Dillard,* 495 F.3d at 1333 (*citing Lance,* 127 S.Ct. at 1198).

Count II of the Complaint-in-Intervention alleges that the 1988 Decree violates the Voting Rights Act because it reserves the office of chairman for a black member. App. at 88a at ¶ 19. In order secure an office to fulfill its racial quota, the 1988

Decree took from the voters of Chilton County the right to elect the chairman of the Commission and provided for the selection of the chairman by the Commissioners among their members *on the condition that they selected a black commissioner if one was available*. In still another count, Count V, Petitioners allege a violation of the Fourteenth Amendment based on the 1988 Decree's requirement that the Commission select a black commissioner to chair the commission if one is available. App. at 91a at ¶ 28. The District Court did not address these claims, presumably because it decided to vacate the injunction on other grounds. The Court of Appeals addressed whether Petitioners had standing to bring the claims in a footnote. *Dillard,* 495 F.3d at 1334-1335 n.8.

A. Petitioners Do Not Seek Relief From a Mere Generalized Grievance.

In determining that Petitioners did not have standing to assert their claims, the Eleventh Circuit relied entirely on this Court's holding in *Lance v. Coffman*, 127 S.Ct. 1194 (2007). This reliance was misplaced. Petitioners claims are distinguishable from *Lance* for two reasons: first, Petitioners claimed specific, personal injuries caused by a failure to follow the law, and; second, this Court has previously held that a plaintiff has standing to allege a violation of his constitutional rights where he is subject to a classification based solely on race. Additionally, Petitioners presented claims that the 1988 Decree

was contrary to other precedent not related to Equal Protection. Regardless of whether the Eleventh Circuit properly refused relief on those claims, it was not justified in overlooking the race-based defects in the 1988 Decree.

In *Lance*, private citizens alleged that the Colorado Constitution violated the United States Constitution because it deprived the Colorado legislature of its responsibility to draw congressional districts. *Lance,* 127 S.Ct. at 1196. This Court dismissed the complaint for want of standing upon its finding that the only alleged injury, "that the law—specifically the Elections Clause—was not followed," constituted an "undifferentiated, generalized grievance." *Id.* In articulating its holding, this Court expressly distinguished the claim at issue where the "plaintiff sought to assert 'only the right possessed by every citizen, to require that the Government be administered according to law . . . ,'" *id*. at 1197 (*citing Fairchild v. Hughes*, 258 U.S. 126, 129 (1922), from cognizable claims brought by individual qualified voters subjected to an election process that deprives them of equal protection of the laws in violation of the Fourteenth Amendment. *Lance,* 127 S.Ct. at 1198.

The Eleventh Circuit described the *Lance* plaintiffs' interest as "citizen voters in the district that they allege should have been legislatively, rather than judicially drawn." *Dillard,* 495 F.3d at 1332 (emphasis in original). It then similarly characterized Petitioners' complaint, stating that "the [Petitioners] assert only the generalized incompatibility of the consent decree

with the rights of all citizens in the county to be free of judicial interference," a form of injury that constituted "an undifferentiated harm suffered in common by all citizens of the county." *Id.* at 1333. While it is true that such claims are present, this statement overlooks alternative grounds on which the District Court's vacation of its 1988 Decree should have been affirmed and thereby fails to consider the full scope of the pleadings, and the separate counts of the Complaint-in-Intervention. Thus, the Eleventh Circuit mischaracterizes Petitioners' claims, disregards the facts of the case as plead in the complaint-in-intervention which is a crucial oversight because "although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and the source of the claim asserted." *Warth v. Seldin,* 422 U.S. 490, 500 (1975) (internal citations omitted).

In only two paragraphs of dicta, the Elevnth Circuit dismissed Petitioners' equal protection and Voting Rights Act claims, stating that the claim "merely raises the same allegations as elsewhere that the district court, by imposing unauthorized injunctive relief, exceeded its authority and violated legal rights held by the Commission members."[3]

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[3]While the Court of Appeals is correct that the Complaint alleges that the effect of the 1988 Decree is that it causes the Commission members to engage in conduct that violates the Equal Protection Clause, *see* App. at 91a at ¶ 28, the Court of Appeals is incorrect in its assumption that the conduct described in that paragraph is the only conduct which

Dillard, 495 F.3d at 1334 n.8 (emphasis in original). This interpretation is not supported by the record. Importantly, the Court of Appeals' statement that Petitioners lack standing to claim an equal protection violation because the invidious racial classification is a "generalized grievance shared by all voters in Chilton County," *id.,* is not supported by the law.

B. Petitioners Have Standing Because They Have Been Denied the Right to Vote for an Office on Account of Race.

In matters of equal protection, the right possessed by every citizen to be free of governmentally imposed racial classifications can be defended by a private citizen where that citizen is uniquely situated so as to be directly affected by that classification. The fact that Petitioners allege an injury that other voters in their district share does not alter this analysis. A plaintiff who alleges a distinct and palpable injury to himself may invoke the general public interest in support of his claim. *Warth,* 422 U.S. at 502 (internal citations omitted).

Petitioners in the instant case have standing to assert their Equal Protection claims because they are directly affected by the racial quota system. Petitioners are all registered voters in Chilton County. Through the exercise of their voting rights

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Petitioners allege violated the Equal Protection Clause. (See App. 81a-82a at ¶ 6 (alleging that Petitioners were adversely affected by, among others things, the imposition of a racial quota system).

before 1988, Petitioners selected the chair of the Commission by casting a vote for the probate judge candidate of their choice. The 1988 Decree deprives Petitioner of their right to vote for chairman of the Commission and replaces that procedure with a scheme that utilizes an illegal racial quota system. These direct, concrete personal injuries are sufficient grounds upon which to base Petitioners' standing.

Moreover, the effect of these personal injuries so egregiously harms the general public that Petitioners are entitled to raise the question of whether the consent decree is legal. *See Shaw v. Reno,* 509 U.S. at 641. Like the districts in *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964), the principles of equality are at war with the notion that the Commission must be chaired by a black commissioner if one is available. 376 U.S. at 66-67 (Douglas, J. dissenting). The benchmark for eligibility to sit as the chairman of the Commission should not rest with race because race has no bearing on an individual's qualification. As this Court stated in *Shaw*:

> Classifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility. Even in the pursuit of remedial objectives, an explicit policy of assignment by race

> may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs.

Shaw, 509 U.S. at 643 (internal citations omitted). *See also*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, *No. 1*, 127 S. Ct. 2738, 2767 (2007). To allow such a benchmark to persist would undermine decades of this Court's jurisprudence highlighting and defending the most basic principle of humanity: it is the individual that is important, not his race.

II. The Eleventh Circuit's Equitable Authority Did Not Include The Power to Reinstate the 1988 Decree Merely Because the Local Government It Created Was Not Opposed.

The Eleventh Circuit decision to reinstate of the 1988 Decree leaves in place an injunction which is due to be set aside. Doing so under the banner of Article III standing doctrine is especially troublesome. 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. It should not have left in place the illegal racial classification utilized to select the chair, or the provision for three additional persons to be elected. This Court has never sanctioned the use of a federal court's remedial power in equity to include the

alteration of the total number of officials elected or racial classifications. The accepted remedy for vote dilution caused by the use of multi-member forms of governance is to provide for single member election districts. *See Chapman v. Meier*, 420 U.S. 1 (1975). Indeed, this Court decided previously that the authority of a federal court to fashion a remedy for vote dilution of racial groups does not include increasing the number of persons elected. *See Holder v. Hall*, 512 U.S. 874 (1994). Given that "an exercise of judicial power" is improper to change the number of persons elected, a court order doing exactly that even resembles an unauthorized commandeering of the local election process. *See*, *e.g.*, *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

Petitioners were allowed to intervene in 2003 without objection of the parties, except that Dillard denied that Petitioners had standing. Petitioners contended that the 1988 Decree was due to be vacated in light of *Holder v. Hall*, *supra*, and its Eleventh Circuit progeny: *White v. Alabama*, 74 F. 3d 1058 (11th Cir. 1996); *Wilson v. Minor*, 220 F. 3d 1297 (11th Cir. 2000); *Dillard v. Baldwin County Commissioners*, 225 F. 3d 1271 (11th Cir. 2000). Petitioners noted as well that the 1988 injunction restructuring local government was premised in part on Alabama's generally poor history of racial equality, and contended that history of intentional racial discrimination did not apply to Chilton County, *see Dillard v. Baldwin County Commission*, 222 F. Supp.2d 1283, 1287-88 (M.D. Ala. 2002)(noting

erroneous 1988 finding of racially-inspired manipulation of local government structure of Baldwin County, Alabama).

A. The Ruling Below Conflicts With Seventh Circuit Precedent.

The Eleventh Circuit decision conflicts with *Assoc. of Community Organizations for Reform Now* ("ACORN") v. *Edgar*, 56 F.3d 791 (7th Cir. 1995). In that case, an injunction was issued to remedy non-compliance by the State of Illinois with the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg *et seq*., popularly known as the "motor voter" law. *Id*. Among its provisions was an order for "the defendants to designate a chief election official to be responsible for coordinating the state's responsibilities under the 'motor' voter law. . . ." *Id.* at 797. The State asserted on appeal that the motor voter law itself – not the remedy – improperly required it to change its laws to conduct registration for federal elections. *ACORN,* 56 F.3d at 793 (noting reliance on *New York v. United States*, 505 U.S. 144 (1992)).

Notwithstanding the State's failure to appeal the remedy, and despite this waiver, the Seventh Circuit held itself authorized to vacate that provision of the injunction because "the ground relates to the propriety or scope of an injunction." The State's indifference was not controlling. *Id.* at 797 (citing cases). Despite the absence of a controversy between the parties as to issue of relief, or, indeed the State's failure to assert this ground on appeal, the Seventh

Circuit vacated this portion of the injunction. As Judge Posner stated:

> "The value of decentralized government is recognized more clearly today than it has been for decades. This recognition, born of experience, enables us (and not only us) to see that federal judicial decrees that bristle with interpretive difficulties and invite protracted federal judicial supervision of functions that the Constitution assigns to state and local government are to be reserved for extreme cases of demonstrated noncompliance with milder measures."

ACORN, 56 F. 3d at 798. Clearly, the Eleventh Circuit forgot these principles when it reinstated the 1988 Decree.

In deciding that the district court order must be reversed and the injunction reinstated, the Eleventh Circuit wrongly required more adverseness *between Dillard and the Defendants*. Because they did not present conflicting positions on appeal, the Eleventh Circuit reasoned there to be no case or controversy between them. *See Dillard,* 495 F.3d at 1339. Such reasoning is what the Seventh Circuit found not controlling. Certain injunctions must be set aside, even though those directly affected find them acceptable. So the Eleventh Circuit should have ruled here.

B. There Is a Split in the Circuits on the Power of a Federal Court to Vacate its Injunction, Without Regard for a Proper Motion from a Party.

There is a well-acknowledged split in the circuits on whether a court may set aside injunctive relief pursuant on its own motion. Other courts have faced the question whether they may set aside a public injunction without regard for whether the proper parties have requested it. The First and Sixth Circuits hold that a court may not grant Rule 60(b) relief from the operation of an injunction *sua sponte*. *See United States v. Pauley,* 321 F. 3d 578, 581 (6th Cir. 2003); *Dr. Jose S. Belaval, Inc. v. Perez-Perdomo*, 465 F. 3d 33, 37 (1st Cir. 2006). The Second, Fourth, Fifth, and Ninth Circuits have held that "nothing forbids the court to grant such [Rule 60(b)] relief *sua sponte*." *Fort Knox Music, Inc. v. Baptiste*, 257 F. 3d 108, 111 (2d Cir. 2001); *United States v. Jacobs*, 298 F. 2d 469, 472 (4th Cir. 1961)*; Alberti v. Klevenhagen,* 46 F.3d 1347, 1365-68 (5th Cir. 1995) (*sua* sponte power exists "regardless of parties silence or inertia"); *Kingsvision Pay-Per-View, Ltd. v. Lake Alice Bar*, 168 F. 3d 347, 351-52 (9th Cir. 1999).

CONCLUSION

Based on the foregoing, Petitioners respectfully request that this Court issue a writ of certiorari to the Court of Appeals for the Eleventh Circuit to

determine whether a private voter has standing to claim violations of the Voting Rights Act and Equal Protection Clause even where other citizens of the district in which he lives suffer similarly. In addition, the Court should grant the writ to determine whether the Eleventh Circuit misused its equitable power by reinstating the 1988 injunction.

Respectfully Submitted,

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