IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-201

CITY OF RICHMOND, VIRGINIA, *Appellant,*

v.

UNITED STATES OF AMERICA and
EDWARD H. LEVI, ATTORNEY GENERAL, and
CURTIS HOLT, SR. *et al.* and
CRUSADE FOR VOTERS OF RICHMOND, *et. al.,*
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLEE CRUSADE FOR VOTERS

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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QUESTION PRESENTED

Was the district court correct in holding that the City of Richmond was not entitled to a declaratory judgment under section 5 of the Voting Rights Act where the City annexed a white suburban area with the purpose and effect of denying and abridging the right to vote on account of race, and where the City (when it modified its proposed change by adopting a ward plan for city council elections) still failed to prove both that it had an objectively verifiable, legitimate purpose for the annexation and that its ward plan "neutralize[d] to the extent possible any adverse ef-

fect [of the annexation] upon the political participation of black voters"?

STATEMENT OF THE CASE

This is the third case involving the application of section 5 of the Voting Rights Act to a municipal annexation to come before this Court;[1] it is one of nearly a thousand such annexations which have been submitted for review under that Act.[2] It differs from all those annexations by the glaring fact that the purpose of the annexation here at issue was to discriminate on account of race; that is, the purpose of the City of Richmond in annexing the territory here was to maintain white supremacy in the City Council and in the general governance of Richmond, Virginia.

The issues in this case center on the consequences of that fact.

The annexation in question took place in 1969, at a time when black voters were approaching parity or a majority in the City of Richmond. The pre-annexation population of Richmond was 202,359, 52 percent black and 48 percent white. The annexation added 47,000 people, 45,000 of them white. After annexation, the population of the City of Richmond was 58 percent white and 42 percent black.[3]

In the early 1960's, officials of the City of Richmond began exploring the possibilities of acquiring vacant land by seeking to annex territory from neighboring Chesterfield or Henrico Counties. The City initially

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[1] *Perkins* v. *Matthews*, 400 U.S. 379 (1971), *City of Petersburg* v. *United States*, 410 U.S. 962 (1973).

[2] Brief for the Federal Parties, p. 18, n. 5.

[3] *Holt* v. *City of Richmond*, 334 F.Supp. 228, 240 (E.D.Va. 1971).

pursued that objective cautiously, and in 1965 rejected an annexation court award which would have given it sixteen square miles of Henrico County territory in return for payments totalling $55 million.

Thereafter the City focused on annexing a portion of Chesterfield County, but that case too proceeded fitfully for several years, with the City and County far apart on the boundary line, compensation and other issues. By this time, the growing number of black voters had begun to be an object of concern to Richmond officials, and as early as 1965 the City's negotiations with Chesterfield County focused on the need for "at least 44,000 leadership-type affluent white people."[4] In subsequent years, numerous City officials expressed increasing fears—many of them in the crudest of terms —that black voters might gain controlling influence in Richmond elections.[5]

In 1969, the proceedings took on a new sense of urgency from the City's point of view. In the previous year's elections, black voters in Richmond had played a dominant role in electing three of the nine Councilmen, and there was a common feeling that the growing black vote might result in a black voting majority by the time of the 1970 elections.[6]

In the Spring of 1969, negotiations began in earnest between the Mayor of Richmond and the Chairman of the Chesterfield County Board of Supervisors. These negotiations were steadily reported to six members of the Richmond City Council, but were concealed from the three members who had been elected with black

[4] App. 320-21.

[5] App. 293-352.

[6] App. 345-50.

voters' support.[7] During the negotiations, the City negotiators expressed two major concerns, both of which were markedly different from the City's professed aim of acquiring vacant land at a satisfactory level of compensation. Instead, the City focused only on (1) the number of white people who would be brought in by the annexation, and (2) hurrying the annexation to completion by December 31, 1969, so that the new residents would be eligible under Virginia law to vote in the 1970 Richmond City Council elections.[8]

In May the negotiators finally drew a line (which became known as the Horner-Bagley line) around an area which they knew contained about 45,000 white people, and agreed that the City would be given this area in return for payments of $27 million, and that the County would not appeal. Because the City's Boundary Expansion Coordinator, who had been employed for seven years to provide technical information,[9] was kept out of the negotiations, the area was selected without any knowledge of the amount of vacant land, the assessed value, or even the number of prospective schoolchildren—and it was later found, with embarrassment, that there were not enough schools for all the students who lived in the annexed area.[10]

The settlement agreement was presented to the annexation court in a semi-secret meeting between the members of the annexation court and the counsel for

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[7] App. 357-62.

[8] App. 323-32.

[9] App. 352-54.

[10] *Holt* v. *City of Richmond*, 459 F.2d 1093, 1106 (4th Cir. 1972) (Butzner, J. dissenting).

City and County. The meeting did not include counsel for intervening county residents who were opposed to the annexation, and indeed much of the discussion in the meeting concerned how to deal with the intervenors.[11]

Three days later, the settlement agreement was presented, as planned, in open court, and ten days after that, on July 1, 1969, the annexation court adopted the agreement verbatim. In its opinion, that court observed that it had not felt bound by the agreement, which it termed unprecedented. The court nonetheless pointed out that the settlement agreement eliminated the need for it to evaluate the sharply conflicting evidence presented by City and County witnesses as to boundary line and compensation. Instead of balancing the equities, as the court noted it would have had to do in an ordinary annexation case, the court gave the settlement agreement great weight, and held that:

> "In sum, we believe that the boundary line set forth in the agreement should be the annexation line and that all terms and conditions specified should constitute the conditions of annexation verbatim, and we so adjudge." [12]

The intervenors took appeals which were quickly disposed of, and the annexation did go into effect on December 31, 1969.

The Proceedings Below

The proceedings below began in early 1971, when, after this Court's decision in *Perkins* v. *Matthews,* 400 U.S. 379 (1971), the City submitted its annexation for review under section 5 of the Voting Rights Act. Dur-

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[11] App. 48-53. See also *Holt* v. *City of Richmond,* 459 F.2d at 1110-11 (Winter, J. dissenting).

[12] App. 40-48.

ing the Attorney General's consideration of the submission, both sets of intervenors here, the Crusade for Voters and Curtis Holt, presented arguments showing why the annexation was discriminatory. On May 7, 1971, the Attorney General objected to the annexation but suggested that a shift to single-member district elections for City Councilmen might be enough to avoid the diluting effect of the annexation, and might therefore lead to section 5 approval. (There is nothing in the record to suggest that at that time the Attorney General was fully aware of the facts described above showing the discriminatory purpose of the annexation.[13])

The City took no action to comply with the Attorney General's objection for over a year. During that period, Curtis Holt, one of the intervenors here, filed a suit to enforce the objection, obtained an order from this Court enjoining the 1972 City Council elections, and then sought a summary judgment detaching the annexed area from a three-judge court in the Eastern District of Virginia. *Holt* v. *City of Richmond,* 406 U.S. 303 (1972) [commonly known as *Holt II.*] [14]

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[13] App. 166-167.

[14] After the City submitted its annexation for section 5 review, Holt first filed a fifteenth amendment suit (commonly known as *Holt I*), which was tried after the Attorney General had entered his section 5 objection. The district court found a fifteenth amendment violation based upon findings that the purpose of the annexation had been to discriminate against black voters. The Fourth Circuit (en banc, with Judges Butzner and Winter dissenting) reversed the judgment of the district court without quite reversing the findings. The Fourth Circuit's grounds for reversal instead seemed to rest on the view that discriminatory purpose is not an appropriate inquiry in fifteenth amendment cases. This Court denied certiorari. *Holt* v. *City of Richmond,* 335 F. Supp. 228 (E.D. Va. 1971), *rev'd* 459 F.2d 1093 (4th Cir. 1972), *cert. denied,* 408 U.S. 931 (1973).

Five days before the scheduled hearing on the motion for summary judgment, the City of Richmond filed this suit in the United States District Court for the District of Columbia. The original defendants were the United States and the Attorney General, but the Crusade for Voters and Curtis Holt each promptly moved, and were allowed, to intervene, and the case proceeded with three sets of defendants.

The City's initial complaint sought a section 5 declaratory judgment that its annexation, even in the context of at-large city elections, had no discriminatory purpose and would have no discriminatory effect. After this Court upheld a denial of a similar declaratory judgment in *City of Petersburg* v. *United States,* 410 U.S. 962 (1973), in March 1973, Richmond adopted a single-member district plan for its councilmanic elections, and thereafter sought a declaratory judgment that its annexation, as modified by the adoption of district elections, lacked the prohibited discriminatory purpose and effect.

At this point, appellees do not understand Richmond to argue that it is entitled to have its annexation and keep its at-large elections too; rather, the issue in the case is limited to whether the City's district plan is adequate to justify section 5 clearance of the annexation.

Presentation of Single-Member Plans

As early as the Fall of 1971, the City began devising and filing single-member district plans.[15] Some time after the *Petersburg* decision, when this case had been in discovery for six months, the City (without consulting defendant-intervenors) presented four single-mem-

[15] App. 200.

ber district plans for discussion with the representatives of the Attorney General. The Attorney General suggested that one of those plans, with some modifications, would probably pass muster. The City made the requested changes, and then presented this plan to the defendants and defendant-intervenors for their signature on a consent decree. The Attorney General did consent, but both intervenors refused.

Shortly thereafter, the Crusade presented several alternate plans which it believed would better ameliorate the dilution caused by the annexation, if anything could.[16] The record is plain that the City never analyzed any of the Crusade's plans to see whether they were more effective in minimizing dilution, or whether they were superior by any other standard.[17] Instead, the City, having adopted its plan, thereafter would not consider any changes.[18]

After the City's failure to secure acceptance of its proposed consent agreement, the District Court for the District of Columbia referred the case to a Special Master, who held three days of trial in October 1973, and reported his findings and conclusions back to the court. The Special Master found that the annexation, even as modified by the single-member districts, did not comply with section 5, because of the discriminatory purpose and because the City's district plan (es-

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[16] The Crusade presented three plans (N, O and P) at a pre-trial hearing held on July 23, 1973, marked for identification at the Special Master's trial as Crusade exhibits 17-19. The Crusade filed two additional plans in September (Q and R) which were introduced at the Special Master's trial as Crusade exhibits 20 and 21 and are reproduced at App. 164-65.

[17] Special Master's trial transcript 711-27.

[18] App. 200, 209-12.

pecially as compared to the Crusade's plans) did not minimize dilution to the extent possible.[19]

Various parties filed objections to the report of the Special Master, but these objections were principally to the legal conclusions. The objections were heard by the district court, which held that the declaratory judgment must be denied because, even as to the annexation as modified by the ward plan, the City had failed to meet its burden of proof as to *both* purpose *and* effect:

> (1) "Richmond has failed to present substantial evidence that its original discriminatory purpose did not survive adoption of the ward plan." (J.S. App.-20b)
>
> (2) "The annexation also had a discriminatory effect under the *Petersburg* standard since the ward plan was not 'calculated to neutralize to the extent possible any adverse effect upon the political participation of black voters.'" (J.S. App.-28b)

The District Court for the District of Columbia carefully distinguished *City of Petersburg* v. *United States,* 354 F. Supp. 1021 (D.D.C. 1972), *aff'd,* 410 U.S. 962 (1973), where the annexation had not been discriminatory and where the single-member plan adopted by the City was agreed by all parties to minimize dilution to the extent possible.[20]

This appeal by the City of Richmond followed.

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[19] J.S. App. 1c-16c.

[20] The reported *Petersburg* decision involved only the definition of the standard of minimizing dilution; the actual approval of a plan came on remand, *City of Petersburg* v. *United States,* C.A. No. 509-72 (Order of April 13, 1973)

SUMMARY OF ARGUMENT

Section 5 of the Voting Rights Act requires that any covered jurisdiction bear the burden of proving that any voting changes are nondiscriminatory both in purpose and effect. In this case, Richmond abandoned its initial claim that its annexation, without modification, can meet that burden. Instead, Richmond has modified its annexation by shifting from an at-large system to single-member districts for its City Council elections in an attempt to meet its burden.

Both sets of intervenors and the federal parties (i.e., all parties except the City of Richmond) agree that the district court posed the correct questions in asking whether Richmond's modification had dispelled the discriminatory purpose and affect of the annexation. Those questions, both of which Richmond must answer in the affirmative, are (1) whether there was an objectively verifiable, legitimate purpose for the annexation, apart from the impermissible racial purpose; and (2) if so, whether the City's districting plan is calculated to eliminate the diluting effects of the annexation to the extent possible.

We differ from the federal parties not in the questions but in the answers. Unlike the federal parties we do not believe the City has made any showing that this annexation is one which the City would have made if not for its intense desire to bring in massive numbers of white people. And, in light of Richmond's rejection of an earlier annexation award and in light of the Commonwealth's current moratorium on annexations, it is far from clear that Richmond would have chosen to complete any other annexation by this time, if motivated solely by legitimate considerations.

Again, unlike the federal parties, we do not believe that Richmond's ward plan for electing City Councilmen is sincerely or effectively calculated to neutralize the diluting effect of the annexation. Rather, Richmond has adopted a plan which guarantees continued white control, and has steadfastly refused even to look at alternatives proposed to it; the City appears to take the view that its willingness to adopt a ward plan at all satisfies the "effect" test of the *City of Petersburg* case.

For these reasons, the declaratory judgment sought by the City of Richmond was correctly denied. Following the new elections which must be held within the pre-annexation borders of the City, Richmond will be free to seek annexation anew, if it still wishes to do so. The passage of time and the political changes which will undoubtedly be reflected in the new elections will create new perspectives which will affect Richmond's ability to take those actions nondiscriminatorily. This annexation, however, violates the Voting Rights Act.

ARGUMENT

The tortuous history of this case tends to obscure the fact that the issues are simply novel variations on themes which this Court has confronted several times in recent years. Beginning with the Tuskegee case of fifteen years ago, this Court has often dealt with racially motivated impairments of the right to vote which have been "cloaked in the garb of the realignment of political subdivision." *Gomillion* v. *Lightfoot,* 364 U.S. 339, 345 (1960).

In *Gomillion,* the Alabama legislature had fenced out virtually all of Tuskegee's black residents by reshaping the City's boundaries from a square into an uncouth

twenty-eight-sided figure. This Court struck that change down as a violation of the fifteenth amendment, which "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson,* 307 U.S. 268, 275 (1939).

After passage of the Voting Rights Act of 1965, which outlawed many of the more obvious forms of discrimination, "gerrymandering and boundary changes [became] prime weapons for discriminating against Negro voters." *Perkins* v. *Matthews,* 400 U.S. 379, 389 (1971). This Court then made it clear that section 5 of that Act covers such boundary changes because "section 5 was designed to cover changes having a potential for discrimination in voting, and such potential inheres in a change in the composition of the electorate affected by an annexation." *Ibid. See also Georgia* v. *United States,* 411 U.S. 526, 534 (1973).

Every party in this case but the City of Richmond agrees with the finding of the Special Master and of the District Court for the District of Columbia that the annexation in question had both a discriminatory purpose and a discriminatory effect. *See, e.g.,* Brief for the Federal Parties, at 16. Such an annexation is barred by section 5 of the Voting Rights Act, which provides that no covered jurisdiction may enact or seek to administer a voting change unless it can prove that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c.

As originally filed, this action asked for a declaratory judgment simply approving the addition of the annexed area voters. While this case was pending, however, this Court affirmed *City of Petersburg* v. *United*

States, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd,* 410 U.S. 962 (1973). In that case, the district court held that, although a particular annexation had no discriminatory purpose, it did have a discriminatory *effect.* The court found that that effect could be overcome if the City changed from at-large City Council elections to a ward system "calculated to neutralize to the extent possible any adverse effect upon the political participation of black voters." *City of Petersburg* v. *United States,* 354 F. Supp. 1021, 1031 (D.D.C. 1972).

Petersburg appealed, claiming that it was entitled to the annexation without having to abandon at-large elections. When this Court affirmed *Petersburg,* Richmond changed course in this case, and soon presented a ward plan to the district court, urging that its annexation, as modified by the ward plan, should be approved under the *Petersburg* rule.

From that point to this, Richmond has steadfastly ignored the major distinction between this case and *Petersburg*: the discriminatory purpose of the Richmond annexation. Indeed, the approach of the City throughout this case has been disingenuously to cloak its purposely discriminatory annexation in the garb of a legitimate boundary change. The City's repeated references to "incidental voting changes," *e.g.,* Brief of the Appellant, p. 33, bring to mind this Court's statement in *Gomillion*:

> ". . . [T]he Alabama Legislature has not merely redrawn the Tuskegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries." 364 U.S. at 347.

Both Richmond and the federal parties take the position that the ward plan adopted by the City cleanses the annexation of both its racially discriminatory purpose and its racially discriminatory effect. The Crusade for Voters, however, agrees with the district court that, in view of Richmond's failure to prove that *this* annexation has an objectively verifiable, legitimate purpose besides race and in view of Richmond's further failure to prove that its ward plan neutralized the annexation's diluting effect to the extent possible, Richmond did not meet the burden of proof imposed upon it by the Voting Rights Act and its request for declaratory judgment could not be granted.

I. The City Of Richmond Has Not Met Its Burden Of Proof That The Annexation, As Modified By The Ward Plan, Does Not Have The Purpose Of Discriminating On Account Of Race.

Judge Butzner was correct in saying that "Virginia's annexation laws, though fair on their face, were deliberately used to debase the votes of the black citizens of Richmond." *Holt* v. *City of Richmond,* 459 F.2d at 1100. Richmond does not appear directly to rebut the massive evidence of racial purpose, but rather relies on two circumstantial arguments: (1) the need for central city expansion generally; and (2) the ratification of the annexation here by two courts, the state annexation court and the fourth circuit. As is shown below, neither of these circumstances is sufficient to dispel the clear showing of the City's racial purpose in its annexation.

A. There is no objectively verifiable, legitimate purpose for annexation

The City relies heavily on general statements that central cities need to expand and that Richmond's need

for expansion made some annexation inevitable. *E.g.*, Brief for the Appellant, pp. 53-59. The United States supports this view. Brief for the Federal Parties, pp. 30-33.

But a close look at the discussion shows that there is virtually nothing to support a claim that *this* annexation is economically beneficial, or that it would have been undertaken if not for the impermissible purpose of diluting black votes. The area finally annexed had substantially less vacant land and commercial or industrial land than was initially sought in the Chesterfield suit or was sought and rejected in the Henrico suit. City Manager Kiepper testified that the need for annexation had been brought home to him when he could not find a 350-acre site in the old City for a warehouse. *Holt* tr., pp. 536-37. But the figures cited by Judge Butzner suggest that the City would not find such a site in the annexed area either:

> "Although the City professed that it was seeking vacant land for business and industry, it settled for only 475 acres (.74 of a square mile) of potential industrial land, and 729 acres (1.1 square mile) of potential commercial land. Developed industrial and commercial land amounted to even less—312 acres, industrial; and 351, commercial." *Holt* v. *City of Richmond,* 459 F.2d 1093, 1105-06 (4th Cir. 1972) (Butzner, J., dissenting).

The City's Brief also relies heavily on "facts" which are thought to be obvious, but for which no proof is cited:

> "The high class suburban area comprising most of the annexation area needs far fewer services than the central city.
>
> * * * *

> "It needs no citation of authority to support the proposition that the higher the level of income the less the requirement for municipal services. More affluent citizens need less welfare, less police, less recreation, on and on throughout the list of normal municipal services required by the old central City." Brief for the Appellant, pp. 57-58.

It may be that affluent suburbanites do not *need* as much of some expensive services, but it is at least as likely, *a priori,* that they will be able to demand and—because of their political influence—be able to obtain other expensive services which poorer people may not want, need, or get.[21] To accept the City's supposition requires us to believe that our city governments habitually spend more money in poor neighborhoods than in rich ones—a belief that not many people would cling to without proof. See *Hawkins* v. *Town of Shaw,* 461 F.2d 1171 (5th Cir. 1972) (*en banc*) *aff'g* 437 F.2d 1286 (1971).

The United States claims that the testimony of Chesterfield County Administrator Burnett is not conclusive proof that the annexation produces an economic loss, but the burden was on the City to prove, not the defendants to disprove, a nondiscriminatory ground for the annexation. The United States' conclusion that the evidence "amply supports" the City's contention that *this* annexation is economically beneficial, Brief for the Federal Parties, p. 33, is based on nothing more than

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[21] See *e.g.* Thomas Muller, *Fiscal Issues of Local Growth,* PUBLIC MANAGEMENT, May 1974, at 5:

> For example, recent studies show that when a suburban area is developed, "[u]nless local revenues from these new households are substantially above the community average, new residents will pay less than the incremental costs of public services they consume, causing a fiscal deficit."

a citation to pages of the City's Brief, and those pages only confirm the district court's finding that no "objectively verifiable, legitimate purpose for annexation" had been shown.

Especially in these times, when scholars and public officials are beginning to question the wisdom of large annexation, and when Virginia itself has enacted a five-year moratorium on annexations,[22] *Holt, supra,* at 1105n.11, it cannot be assumed that Richmond would unquestionably have proceeded with an annexation had it not been for the urgent need for "44,000 leadership-type affluent white people."

B. Neither prior court decision insulates Richmond's annexation from a finding of bad purpose.

Richmond's Brief refers several times to the state court's annexation decree, suggesting that this decree immunizes the annexation. This theme was echoed by the fourth circuit in *Holt,* when it found that "no violation of any Fifteenth Amendment right was worked by the annexation, effected, as it was, by the decree of the state court." 495 F.2d at 1100.

But section 5 is clear in making it irrelevant that a state court plays a role in bringing about a voting change. The language of the statute itself provides that a covered jurisdiction may not "enact or seek to administer" a covered voting change without going through section 5 review procedures. Moreover, a state chancery court had entered the Canton, Mississippi, annexations which were held to be reviewable in *Perkins* v. *Matthews, supra.* Finally, in this case, the annexa-

[22] Judge Mehrige's belief in *Holt* that some annexation was inevitable was formed before the enactment of Virginia's moratorium.

tion decree was in fact the work of the City and County rather than the annexation court. Even without the evidence that the annexation court "was badly used," as Judge Winter put it 459 F.2d at 1110, that court's role in this case would not affect the section 5 question.

The City places even stronger reliance on the decision of the fourth circuit in *Holt* v. *City of Richmond, supra,* which it claims is fully conclusive of the purpose question under the doctrines of *res judicata* or collateral estoppel. Brief for the Appellant, pp. 28-32.

The United States has ably pointed out why the City is wrong on this point, in view of the difference in parties between this case and *Holt,* in view of the fourth circuit's disclaimer of any intention or jurisdiction to reach questions under section 5 of the Voting Rights Act, and in view of the difference in the burden of proof. *See* Brief for the Federal Parties, pp. 16-17 n.4.

In *Holt,* the burden of proving a violation was placed upon the plaintiff challenging the annexation, whereas in a section 5 case the burden is shifted to the governmental body seeking to justify the voting change. *Georgia* v. *United States,* 411 U.S. 526, 538 (1973). That difference is enough to preclude application of the doctrines of collateral estoppel or *res judicata. One Lot Emerald Cut Stones* v. *United States,* 409 U.S. 232 (1972).

Moreover, in *Holt* the fourth circuit largely declined to consider the claim of unconstitutional purpose, holding that a court could strike a legislative action only in the exceptional case "when its sole or clearly dominant purpose was both obvious and constitutionally impermissible." *Holt, supra,* at 1097-99, citing, *inter alia,*

United States v. *O'Brien,* 391 U.S. 361 (1968); *Palmer* v. *Thompson,* 403 U.S. 17 (1971).

Section 5, on the other hand, explicitly requires courts to look into the question of unconstitutional motivation:

> ". . . [T]he burden of proof is placed upon the jurisdiction to show that the new voting law procedure does not have the purpose or effect of discrimination. Those who know the law of procedure best and what motivated its passage must come forward and explain it. Because section 5 strips away the presumption of the legality that so often cloaked imaginative and clever schemes, and because section 5 requires the jurisdiction to explain, the existence of section 5 serves to prevent multiplication of such schemes." [*Hearings on H.R. 4249, H.R. 5538, and Similar Proposals, Before Subcomm. 5 of the House Comm. on the Judiciary,* 91st Cong., 1st Sess., ser. 3, at 270 (1969) (remarks of Rep. McCulloch).]

In a section 5 case, the inhibition on examining legislative purpose is removed by Congressional direction, thus providing another significant distinction between the question raised in this case and that involved in *Holt. See United States* v. *O'Brien,* 391 U.S. at 383n. 30. *See also Gomillion* v. *Lightfoot,* 364 U.S. at 347.[23]

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[23] The *Holt* court also failed to examine the effect of the annexation on black votes, an examination which the district court here was of course required to and did make. Compare *Wright* v. *Council of the City of Emporia,* 407 U.S. 451, 460-62 (1972); *United States* v. *Scotland Neck City Board of Education,* 407 U.S. 484 (1972).

II. The City's Adoption Of A Ward Plan Did Not Minimize The Dilution To The Extent Possible.

The City's Brief takes the position that its decision to adopt a ward plan, without more, minimized dilution to the extent possible and therefore eliminated any invalid effect flowing from the annexation. Brief for the Appellant, pp. 46-47. The City attempts to bolster its argument by setting out figures which purport to show that black voters under its plan will exercise electoral influence proportional to their number, and to the black percentage of the pre-annexation voting-age population. The City argues that alternate plans presented by the Crusade intervenors produce racial gerrymandering, Brief for the Appellant, pp. 39-40; or as the United States puts it, "substantially disproportionate majority representation." Brief for the Federal Parties, pp. 27-29.

But there is no evidence in the record to support the supposition that the Crusade's plans produced this effect. The Crusade has in fact tendered five plans at various times, in which the percentage of black citizens residing in Ward H ranged from 44 to 59 percent, compared to the City's plan. The Crusade never claimed that any of its plans was mandatory but simply that they showed more effective alternatives available. The City erred in refusing even to consider the Crusade's plans, which not only arguably minimized dilution to a greater extent, but also were closer to meeting standards of population equality, and which met other criteria well.

The record shows that once the City adopted its plan, which provides for five certain white seats, it refused ever to consider any alternate plans. See notes 17 and 18, *supra*. The only reason ever given by the City for re-

fusing even to consider or analyze alternative plans was a desire not to have any wards that included territory lying on both sides of the James River. Compare App. 213 with App. 487-96. But it was clear that the City's preoccupation with the river was a new development, since every one of the plans drawn during the two years before the adoption of the final plan had had at least one ward which crossed the water. It was also clear that insistence on maintaining the river as an inviolate boundary would automatically limit the degree to which dilution could be minimized. J.A. 209-15, 221. See *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973); *Davis* v. *Board of School Commissioners,* 402 U.S. 33 (1971); *Medley* v. *School Board of Danville,* 482 F.2d 1061 (4th Cir. 1973), *cert. denied,* 414 U.S. 1172 (1974).

The Special Master found specifically that the City had not proved that its interest in avoiding wards that crossed the river was enough to justify dilution of black citizens' votes, and both he and the District Court for the District of Columbia held that the existence of the Crusade's plans, and the City's refusal to consider them, made it impossible for the City to meet its burden of proof.[24] In the context of an annexation undertaken to maintain white control of the City Council, adoption of a plan which guaranteed that five of the nine City Council districts would be unquestionably white could be seen as an extension of the City's purpose in annexing the territory initially. J.S. App. 25b-27b.[25]

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[24] *Kirkpatrick* v. *Preisler,* 394 U.S. 526, 529 (1969).

[25] *Wright* v. *Council of City of Emporia,* 407 U.S. 451, 461 (1972).

Finally, even if it were determined that the Crusade's plans were benign districting,[26] and unconstitutional for that reason, the City's plan might still be inadequate; while it might minimize dilution to the extent possible, that might still fall short of compensating for the degree of discrimination brought about by the annexation. The *Petersburg* case does not hold that every discriminatory annexation can be neutralized by shifting to single-member districts, and it may be that Richmond's is one that cannot. Richmond's annexation added the equivalent of one and one-half wards of white residents and the City is being disingenuous when it claims that simply carving up the enlarged city is bound to neutralize the diluting effect of the expansion. All these reasons support the district court's view that Richmond's unexplained refusal even to consider the Crusade's alternate plans contributed to the City's failure to meet its burden of proof.

III. The District Court's Disposition Was Appropriate

The district court's discussion of de-annexation obscures the fact that the only order it entered was one denying a declaratory judgment. To be sure, the effect of this order is to restrain Richmond from allowing residents of the annexed area to vote in its elections. While this leaves de-annexation as a virtually inevitable consequence, it is a de-annexation which would be ordered by either the District Court for the Eastern District of Virginia or a state court.

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[26] Quaere whether "benign districting" may sometimes be appropriate to "overcome the residual effects of past state dilution of Negro voting strength." *Taylor* v. *McKeithen*, 407 U.S. 191, 193 (1972).

The United States argues that the case should be remanded for further testimony to allow the City to meet its burden of proving an objectively verifiable basis for the annexation, but this case has gone on too long for that. Eight years have passed since the last valid City Council election in Richmond, the City has had repeated opportunities which it has foregone, and there is no reason for delay now.

This does not mean, despite the City's fears, that cities are prevented from expanding with the times, nor even that Richmond is necessarily locked into its borders. Nothing prevents Richmond from seeking another annexation upon completion of this case. And if a new annexation is sought, the intervening passage of time and one or more nondiscriminatory elections should allow Richmod to go forward, if it still wishes to, with a legitimate rather than a racist annexation.

CONCLUSION

For the reasons set forth herein, the judgment below should be affirmed.

Respectfully submitted,

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