The Burger Court Opinion Writing Database

Wise v. Lipscomb

437 U.S. 535 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 31, 1978

Re: 77-529 - Wise v. Lipscomb

Dear Lewis and Bill:

Please show me as joining each of your concurring opinions.

Regards,

WEB/ss

Mr. Justice Powell

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 3, 1978

WJB

I will be happy to [illegible]
dissent in

RE: No. 77-529 Wise v. Lipscomb
No. 77-369 Furnco Construction Corp. v. Waters

Dear Thurgood:

In whacking up dissents from the last list there are four I think I should try myself. You are not in dissent in two of the four and in the others, No.77-747 Fleck v. Spannaus, I have already covered the dissent in last Term's United States Trust Co. v. New Jersey, and in Pacifica I've written most for the Court in the area of obscenity and children. One of the others I have asked Lewis to take and another I have asked Byron to take. Would you care to take either or both of the above?

Sincerely,

Bill

Mr. Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 13, 1978

RE: No. 77-529 Wise v. Lipscomb

Dear Thurgood:

Please join me.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 24, 1978

No. 77-529, Wise v. Lipscomb

Dear Byron,

I am glad to join your opinion for the Court, although I do not disagree with Bill Rehnquist's suggestions.

Sincerely yours,

P.S.
/

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 1, 1978

Re: No. 77-529, Wise v. Lipscomb

Dear Bill,

I should appreciate your adding my name to your separate opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 5/23

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 77-529

Wes Wise, Mayor of the City of Dallas, et al., Petitioners, *v.* Albert L. Lipscomb et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1978]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case involves the recurring issue of distinguishing between legislatively enacted and judicially imposed reapportionments of state legislative bodies.

I

In 1971 respondents, Negro and Mexican-American residents of Dallas, Tex., filed suit in the United States District Court for the Northern District of Texas against petitioners, the Mayor and members of the City Council of Dallas, the city's legislative body, alleging that the at-large system of electing council members unconstitutionally diluted the vote of racial minorities. They sought a declaratory judgment to this effect and an injunction requiring the election of councilmen from single-member districts. The complaint was dismissed for failure to state a claim, but the Court of Appeals for the Fifth Circuit disagreed and remanded. *Lipscomb* v. *Jonsson*, 459 F. 2d 335 (1972).

On January 17, 1975, after certifying a plaintiff class consisting of all Negro citizens of the city of Dallas[1] and fol-

[1] Several plaintiffs, including all of the Mexican-American plaintiffs, were dismissed from the case for failure to respond to interrogatories. Two Mexican-Americans subsequently attempted to intervene. The District

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 25, 1978

Re: 77-529 - Wise v. Lipscomb

Dear Lewis and Bill,

Even if I agreed--and regretfully (because I need you) I do not--that Burns and East Carroll are in conflict, it seems to me that this is a quite inappropriate occasion to reject one or the other. If they are in conflict as to the treatment to be accorded a submission by a legislature (or its representatives) that has no authority under local law to reapportion itself, I fail to see why we should deal with the issue in a case where it is clear that the District Court not only considered the local legislative body to have the power under local law to submit the plan but also dealt with the plan as a valid legislative submission, where the Court of Appeals did not dispute the power of the City Council, and where the proposed disposition in the circulating draft agrees with the District Court. What should be done where there is a submission by a powerless legislative body is not in this case.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 5/26

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 5, 9

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-529

Wes Wise, Mayor of the City of Dallas, et al., Petitioners, *v.* Albert L. Lipscomb et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1978]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case involves the recurring issue of distinguishing between legislatively enacted and judicially imposed reapportionments of state legislative bodies.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 14, 1978

MEMORANDUM TO THE CONFERENCE

Re: 77-529 - Wise v. Lipscomb

I have sent to the printer the change indicated on the attached copy of page 1 of the May 26 circulation in this case.

BRW

Attachment

file

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 5/26

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 5, 9

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-529

Wes Wise, Mayor of the City of Dallas, et al., Petitioners, *v.* Albert L. Lipscomb et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1978]

MR. JUSTICE WHITE ~~delivered the opinion of the Court~~ announced the judgment of the Court and delivered an opinion in which Mr. Justice Stewart joined.

This case involves the recurring issue of distinguishing between legislatively enacted and judicially imposed reapportionments of state legislative bodies.

I

In 1971 respondents, Negro and Mexican-American residents of Dallas, Tex., filed suit in the United States District Court for the Northern District of Texas against petitioners, the Mayor and members of the City Council of Dallas, the city's legislative body, alleging that the at-large system of electing council members unconstitutionally diluted the vote of racial minorities. They sought a declaratory judgment to this effect and an injunction requiring the election of councilmen from single-member districts. The complaint was dismissed for failure to state a claim, but the Court of Appeals for the Fifth Circuit disagreed and remanded. *Lipscomb* v. *Jonsson*, 459 F. 2d 335 (1972).

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pp 1 & 11

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 6-15-78

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-529

Wes Wise, Mayor of the City of Dallas, et al., Petitioners, *v.* Albert L. Lipscomb et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1978]

MR. JUSTICE WHITE announced the judgment of the Court and delivered an opinion in which MR. JUSTICE STEWART joined.

This case involves the recurring issue of distinguishing between legislatively enacted and judicially imposed reapportionments of state legislative bodies.

I

In 1971 respondents, Negro and Mexican-American residents of Dallas, Tex., filed suit in the United States District Court for the Northern District of Texas against petitioners, the Mayor and members of the City Council of Dallas, the city's legislative body, alleging that the at-large system of electing council members unconstitutionally diluted the vote of racial minorities. They sought a declaratory judgment to this effect and an injunction requiring the election of councilmen from single-member districts. The complaint was dismissed for failure to state a claim, but the Court of Appeals for the Fifth Circuit disagreed and remanded. *Lipscomb* v. *Jonsson*, 459 F. 2d 335 (1972).

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[1] Several plaintiffs, including all of the Mexican-American plaintiffs, were dismissed from the case for failure to respond to interrogatories. Two Mexican-Americans subsequently attempted to intervene. The District

HAL

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 27, 1978

MEMORANDUM TO THE CONFERENCE

Case Held for No. 77-529, Wise v. Lipscomb

No. 77-1492, Rapides Parish Police Jury v. Parnell. In 1968, after a finding of gross numerical malapportionment in the make-up of the police jury in Rapides Parish, Louisian the District Court approved the LaBlanc plan submitted by the local government. The plan was a mixture of single- and mult member districts electing a total of 18 members. In 1973, af further litigation, the District Court found the LaBlanc plan be discriminatory against Negroes and absent submission of wh it deemed a satisfactory single-member district plan, the cou ordered into effect its own single-member plan electing 9, in stead of 18 jurors. The Court of Appeals reversed because of inadequate evidence of dilution. The LaBlanc plan remained i effect. The District Court held more hearings and again put into effect its 9-member plan, dilution again being found; Ea Carroll was also relied on to counsel against multi-member districts. The Court of Appeals this time affirmed on both grounds, also rejecting a claimed conflict with Minnesota Sta Senate v. Beens, 406 U.S. 187 (1973), which disapproved drast reductions in the size of legislative bodies when devising ne apportionment plans. Here, the Court of Appeals thought the size specified by the court was within the size range for poli juries approved by state law.

The issue of conflict with Beens, the only contention raised, has some substance, but not much. In any event, Wise little to do with this. I would deny.

Sincerely,

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 3, 1978

Re: No. 77-529 - Wise v. Lipscomb
No. 77-369 - Furnco Construction Corp. v. Waters

Dear Bill:

I will be happy to try my hand at dissents in both of the above.

Sincerely,

T.M.

Mr. Justice Brennan

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: 12 JUN 1978

Recirculated: _____

No. 77-529, Wise v. Lipscomb

MR. JUSTICE MARSHALL, dissenting:

I agree with the Court's decision not to reach the Voting Rights Act question, since it was not presented to either of the courts below. I also agree with the analysis of our past decisions found in Part II of the Court's opinion. I cannot agree, however, that the actions of the Dallas City Council are distinguishable from those of the local governing body in East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). I therefore conclude that the plan ordered by the District Court here must be evaluated in accordance with the federal

Stylistic changes throughout

15 JUN 1978

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–529

Wes Wise, Mayor of the City of Dallas, et al., Petitioners, *v.* Albert L. Lipscomb et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1978]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS join, dissenting.

I agree with the majority's decision not to reach the Voting Rights Act question, since it was not presented to either of the courts below. I also agree with the analysis of our past decisions found in Part II of MR. JUSTICE WHITE's opinion. I cannot agree, however, that the actions of the Dallas City Council are distinguishable from those of the local governing body in *East Carroll Parish School Board* v. *Marshall,* 424 U. S. 636 (1976). I therefore conclude that the plan ordered by the District Court here must be evaluated in accordance with the federal common law of remedies applicable to judicially devised reapportionment plans.

I

In *East Carroll Parish School Board* v. *Marshall, supra,* suit against the parish (county) was initially brought by a white resident who claimed that population disparities among the wards of the parish unconstitutionally denied him an equal vote in elections for members of the school board and the police jury, the governing body of the parish. Following a finding of unconstitutionality, the District Court adopted a plan submitted by the police jury, which called for at-large elections of both bodies. Two years later (after the 1970 census), in response to the court's direction, the at-large plan was resubmitted by the police jury. Respondent Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1978

Re: No. 77-529 - Wise v. Lipscomb

Dear Byron:

For now, I am about where Lewis is, as expressed in his letter of May 24 to you. I therefore shall await his writing, for I, too, would limit East Carroll to its facts.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1978

Re: No. 77-529 - Wise v. Lipscomb

Dear Lewis:

Please join me in your concurring opinion.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

Denied
9-0
re 11/2/77
Ltr Conference

November 1, 1977

No. A-396 (77-529) Wise v. Lipscomb, et al

MEMORANDUM TO THE CONFERENCE:

This is the case involving the validity of a provision of the Dallas City Charter with respect to the election of its 11-member council. CA5 invalidated the Dallas plan. On August 30, I issued a Chambers opinion (A-149) staying the judgment of CA5 and recalling its mandate pending disposition of the city's petition for certiorari.

One of the at-large council members in Dallas resigned, and an election to fill the vacancy is scheduled for November 8. Respondents in this case (Lipscomb, et al) filed an application with the DC seeking to enjoin the election. The DC declined to entertain jurisdiction to consider this application, and respondents have come directly to us for an injunction - bypassing CA5.

The cert petn requesting us to review CA5's decision on the merits was filed here on October 6.

I am referring the present application for an injunction to the Conference. I have asked the Clerk's Office to circulate with this memorandum copies of respondents' application for an injunction, Marc Richman's memorandum to me of November 1, and my Chambers opinion of August 30.

I will vote to deny the application.

L.F.P.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 20, 1978

No. 77-529 Wise v. Lipscomb

MEMORANDUM TO THE CONFERENCE:

On yesterday I received a motion for "allocation of time for oral argument" from the Mexican-Americans who have been in and out of this case.

At my request, Mike Rodak has circulated copies of the motion. I will bring it up at tomorrow's Conference. As it may save you a little time, I enclose a copy of my clerk's (Bob Comfort) memorandum summarizing the situation.

The Mexican Americans have filed a brief. The case is set for argument next Wednesday. I am inclined to deny the motion.

L.F.P.

L.F.P., Jr.

SS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 27, 1978

File copy

No. 77-529 Wise v. Lipscomb

MEMORANDUM TO THE CONFERENCE:

In view of the confusion as to the sequence of action with respect to the adoption of the "eight-three" plan in Dallas, I think you may be interested in the application for a stay that prompted my Chambers opinion last August. I invite your attention to the description of what happened on page 2 of that application. The response did not dispute these averments, and made no contribution to clarifying the history of the case. I read the opinion of the DC in light of the application and response.

In any event, my present understanding is as follows:

1. On January 17, 1975, the DC rendered an oral decision invalidating the existing provision for election of all council members at large.

2. At that time, it "gave the city of Dallas an opportunity to perform its duty to enact a constitutionally acceptable plan", retaining jurisdiction of the case.

3. The City Council promptly took advantange of this opportunity, and on January 24, 1975, adopted a resolution - not an ordinance - directing the City Attorney to inform the District Court of the Council's intent to pass an ordinance enabling the eight-three plan. Appendix 188. At a hearing on February 8, 1975, this plan and two others formulated by respondents were considered.

4. In an oral opinion, handed down at the close of testimony, the DC held that the Council's proposed plan was constitutionally acceptable.

5. Thereafter on February 10, 1975, the Council, as "a result of the decision of the District Court," enacted an appropriate ordinance embodying the plan. Appendix 189.

6. On March 25, 1975, the District Court issued its written opinion and filed its written order. In pertinent part, its opinion read:

> "The Court considered each of the three plans presented, with the spirit of the Supreme Court's mandate in Chapman v. Meier, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed. 2d 766 (1975) in mind. That is, that reapportionment is primarily the responsibility of state legislative bodies and not the federal courts. In the case at bar, an existing method of electing city council was found to be constitutionally defective. That plan was declared invalid and this Court then gave the City of Dallas an opportunity to perform its duty to enact a constitutionally acceptable plan. I find that it has met that duty in enacting the eight/three plan of electing council memberrs." Pet. B-16.

7. Dallas, a "home rule" city has the city manager form of government prescribed by a special charter pursuant to a special Act of the Texas legislature. Amendment of the charter required enactment of an ordinance by City Council and approval by the voters in a referendum. The eight-three plan was approved in a election held in April, 1976.

8. The Voting Rights Act of 1964 was not extended to include Texas until 1975. On August 6, 1975, the President signed the amendments into law, and in September the Attorney General certified Texas as falling within the reach of the Act. The preclearance provisions were retroactive to November 1, 1972.

9. Neither the DC nor CA5 considered, so far as their opinions go, either the relevance or effect of the Voting Rights Act on this case; nor was it mentioned in the petition for certiorari nor the opposition thereto.

* * *

As my Chambers opinion last August inaccurately (and incompletely) describes the situation, I circulate this memorandum hoping - at least - not to add further to the confusion.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 24, 1978

No. 77-529 Wise v. Lipscomb

Dear Byron:

I share the view expressed by Bill Rehnquist in paragraph (1) of his letter of this date.

We did not cite Burns in the East Carroll PC, and I now think the two cases - if East Carroll is viewed as broadly as your opinion suggests - cannot be reconciled. It seems to me that Burns reflects a sounder view.

I will certainly join your judgment and also agree that we need not explore questions concerning §5 of the Voting Rights Act. I hope you will feel disposed to reaffirm - as Bill suggests - the Burns doctrine and limit East Carroll to a ruling on its facts.

If you prefer not to do this, I will write two or three paragraphs concurring in part and concurring in the judgment.

Sincerely,

Lewis

Mr. Justice White

lfp/ss

cc: The Conference

May 30, 1978

No. 77-529 Wise v. Lipscomb

Dear Byron:

I appreciate your writing, but I am afraid we are too far apart at present for reconciliation.

It still seems to me that there is too much tension between Burns and East Carroll not to recognize it explicitly, and - in effect - make a choice. For the reasons stated in my concurring opinion I think East Carroll can be read as turning on its peculiar facts.

But apart from precedent, the substance of the situation - as I see it - is that the appropriate political body, the Dallas City Council, approved the plan here in question.

Sincerely,

Mr. Justice White

lfp/ss

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 30 MAY 1978

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 77-529

Wes Wise, Mayor of the City of Dallas, et al., Petitioners, *v.* Albert L. Lipscomb et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1978]

MR. JUSTICE POWELL, concurring in part and concurring in the judgment.

I agree with the Court's conclusion that the reapportionment plan adopted by the Dallas City Council was a "legislative plan" for purposes of review by a federal court. In my view, however, the Court's reasoning in reaching that conclusion casts grave doubt on *Burns* v. *Richardson*, 384 U. S. 73 (1966).

The Court reads *East Carroll Parish School Bd.* v. *Marshall*, 424 U. S. 636 (1976), as establishing the principle that a proposed reapportionment plan cannot be considered a legislative plan if the political body suggesting it lacks legal power to reapportion itself. *Ante*, at 9. Because the City Council ordinarily would have had no power to reapportion itself—a Charter amendment being necessary to that end—the Court is constrained to assume that the Council became imbued with such power after the District Court struck down the apportionment provisions of the City Charter. Aside from the fact that this aspect of Texas law was neither briefed nor argued, the Court's assumption seems unnecessary.

In *Burns* v. *Richardson*, *supra*, the Hawaiian Legislature was without power to reapportion itself, a constitutional amendment being required for that purpose. Nevertheless, this Court treated the plan that the legislature proposed to submit to the voters as a legislative plan. By parity of reasoning, the plan proposed by the Dallas City Council in this case must

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 31, 1978

No. 77-529 Wise v. Lipscomb

Dear Bill:

Please add my name to your concurring opinion.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

1, 2

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Powell

Circulated: _____

Recirculated: 31 MAY 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-529

Wes Wise, Mayor of the City of Dallas, et al., Petitioners, *v.* Albert L. Lipscomb et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1978]

The Chief Justice, Mr. Justice Blackmun, and

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, concurring in part and concurring in the judgment.

I agree with the Court's conclusion that the reapportionment plan adopted by the Dallas City Council was a "legislative plan" for purposes of review by a federal court. In my view, however, the Court's reasoning in reaching that conclusion casts grave doubt on *Burns* v. *Richardson*, 384 U. S. 73 (1966).

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1, 2

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

2nd DRAFT

Recirculated: 1 JUN 1978

SUPREME COURT OF THE UNITED STATES

No. 77-529

Wes Wise, Mayor of the City of Dallas, et al., Petitioners, *v.* Albert L. Lipscomb et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1978]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, concurring in part and concurring in the judgment.

I agree with the Court's conclusion that the reapportionment plan adopted by the Dallas City Council was a "legislative plan" for purposes of review by a federal court. In my view, however, the Court's reasoning in reaching that conclusion casts grave doubt on *Burns* v. *Richardson*, 384 U. S. 73 (1966).

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1-3

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 15 JUN 1978

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-529

Wes Wise, Mayor of the City of Dallas, et al., Petitioners, *v.* Albert L. Lipscomb et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1978]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, concurring in part and concurring in the judgment.

I agree with MR. JUSTICE WHITE's conclusion that the reapportionment plan adopted by the Dallas City Council was a "legislative plan" for purposes of review by a federal court. In my view, however, the Court's reasoning in reaching that conclusion casts grave doubt on *Burns* v. *Richardson*, 384 U. S. 73 (1966).

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In *Burns* v. *Richardson*, *supra*, the Hawaiian Legislature was without power to reapportion itself, a constitutional amendment being required for that purpose. Nevertheless, this Court treated the plan that the legislature proposed to submit to the voters as a legislative plan. By parity of reasoning,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 24, 1978

Re: No. 77-529 - Wise v. Lipscomb

Dear Byron:

I voted at Conference for the result reached in your draft opinion circulated yesterday, and hope I will be able to join it. As of now, I have two problems with it which may well be "negotiable":

(1) I have the feeling that there remains some conflict between Burns v. Richardson, 384 U.S. 73 (1966) and East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976), with respect to the extent to which the District Court is bound to accept a legislatively approved plan so long as it meets constitutional standards. I get the impression from Bill Brennan's opinion in Burns that the Hawaii legislature had no more authority to adopt a re-districting plan than did the police jury in East Carroll Parish, and yet we seem to have applied different rules in one case than we did in the other. Wouldn't this be a good opportunity to clarify this matter, and perhaps re-affirm the Burns doctrine?

(2) In footnote 5, you refer to "court-imposed reapportionments designed to cure

the dilution of the voting strength of racial minorities resulting from unconstitutional racial discrimination." I had thought that the "dilution" doctrine was a part of the federal law of remedies to be applied where a violation of the constitutional "one man, one vote" requirement was held to exist. To me, at any rate, the language in the footnote gives the impression that "dilution" "plano" is itself a form of constitutional violation independently of any violation of the "one man, one vote" principle. I realize that the footnote refers to dilution "resulting from unconstitutional racial discrimination", but would be happier if it were to cite cases applying that principle so that I could better understand what you meant by it.

Sincerely,

Mr. Justice White

Copies to the Conference

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: MAY 3 0 1978

Recirculated: _____

No. 77-529 Wise v. Lipscomb

MR. JUSTICE REHNQUIST, concurring.

I join my Brother Powell's opinion, concurring in part and concurring in the judgment. I write separately to emphasize that the Court today is not presented with the question of whether the District Court erred in concluding that the form of government of the City of Dallas unconstitutionally diluted the voting power of black citizens. While this Court has found that the use of multi-member districts in a state legislative apportionment plan may be invalid if "used invidiously to cancel out or minimize the voting strength of racial groups," White v. Regester, 412 U.S. 755, 765 (1973), we have never had occasion to consider whether an analogue of this highly amorphous theory may be applied to municipal governments. Since

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 30, 1978

Re: No. 77-529 - Wise v. Lipscomb

Dear Lewis:

Please join me in your concurring opinion in this case.

Sincerely,

Mr. Justice Powell

Copies to the Conference

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquis

Circulated: MAY 31 1978

Recirculated: _____

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-529

Wes Wise, Mayor of the City of Dallas, et al., Petitioners, *v.* Albert L. Lipscomb et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1978]

The Chief Justice and

Opinion of MR. JUSTICE REHNQUIST, with whom MR. JUSTICE POWELL joins.

I write separately to emphasize that the Court today is not presented with the question of whether the District Court erred in concluding that the form of government of the city of Dallas unconstitutionally diluted the voting power of black citizens. While this Court has found that the use of multi-member districts in a state legislative apportionment plan may be invalid if "used invidiously to cancel out or minimize the voting strength of racial groups," *White* v. *Regester*, 412 U. S. 755, 765 (1973), we have never had occasion to consider whether an analogue of this highly amorphous theory may be applied to municipal governments. Since petitioners did not preserve this issue on appeal, we need not today consider whether relevant constitutional distinctions may be drawn in this area between a state legislature and a municipal government. I write only to point out that the possibility of such distinctions has not been foreclosed by today's decision.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-529

Wes Wise, Mayor of the City of Dallas, et al., Petitioners, *v.* Albert L. Lipscomb et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1978]

Opinion of MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE POWELL join.

I write separately to emphasize that the Court today is not presented with the question of whether the District Court erred in concluding that the form of government of the city of Dallas unconstitutionally diluted the voting power of black citizens. While this Court has found that the use of multi-member districts in a state legislative apportionment plan may be invalid if "used invidiously to cancel out or minimize the voting strength of racial groups," *White* v. *Regester*, 412 U. S. 755, 765 (1973), we have never had occasion to consider whether an analogue of this highly amorphous theory may be applied to municipal governments. Since petitioners did not preserve this issue on appeal, we need not today consider whether relevant constitutional distinctions may be drawn in this area between a state legislature and a municipal government. I write only to point out that the possibility of such distinctions has not been foreclosed by today's decision.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 13, 1978

RE: No. 77-529 - Wise v. Lipscomb

Dear Thurgood:

Please join me in your dissenting opinion.

Respectfully,

John

Mr. Justice Marshall

Copies to the Conference