1985 WL 670010 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Susan J. DAVIS, et al., Appellants,
v.
Irwin C. BANDEMER, et al., Appellees.

No. 84-1244.
October Term, 1984.
March 15, 1985.

On Appeal from the United States District Court for the Southern District of Indiana

Appellees' Motion to Strike the Amicus Curiae Brief of the Members of the California Democratic Congressional Delegation

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CASES:

*1 INTRODUCTION

This motion is filed on behalf of the Bandemer plaintiffs-appellees. [1] Counsel for Bandemer plaintiffs received the Amicus Curiae Brief of the Members of the California Democratic Congressional Delegation ("the Delegation's amicus brief") on March 6, 1985.

Prior to filing their brief, counsel for the Delegation requested and received the consent of Bandemer plaintiffs to the filing of an amicus brief. At the time of that consent, however, Bandemer plaintiffs did not understand *2 that amici

would attempt to inject into this case issues not raised by appellants in their Jurisdictional Statement and in large part not raised by any party to this litigation below. Nor was it understood that amici would ask this Court for summary vacation and remand on grounds that in appellees' view are not appropriately asserted in this case, whatever their merit in other litigation to which amici are parties. For these reasons, and because the amicus brief seeks to inject these issues in a procedural posture that would give no opportunity for any response from appellees (whom the amicus brief opposes, not supports), appellees withdraw their consent and file this motion to strike. [2]

ARGUMENT

I. No Voting Rights Act Claim Was Presented In This Case Below; Moreover, Even A Victory For The NAACP Plaintiffs Would Not Moot The Bandemer Plaintiffs' Claims

The case before the Court on this appeal is an action filed by Bandemer plaintiffs in January of 1982 (before the 1982 Voting Rights Act Amendments) alleging that ***3** the Indiana Reapportionment Laws purposely and effectively discriminated against them as Democrats. No Voting Rights Act claim was asserted by the Bandemer plaintiffs. Indeed, four of the seven Bandemer plaintiffs are not members of any racial minority and could have no such claim. Approximately one month after the filing of the Bandemer case (and also before the 1982 Voting Rights Act Amendments), another case was filed in the Southern District of Indiana by the NAACP plaintiffs. That case did include claims of violations of the Voting Rights Act. The NAACP case is not on appeal here and the correctness of the district court's decision on that case is not before this Court. (*See* Jurisdictional Statement at 2 n.1.) Moreover, even if the NAACP plaintiffs had been successful on their Voting Rights Act claims, the district court would still have had to consider the Bandemer claims. [3] A complete remedy of the racially based Voting Rights Act violations alleged by NAACP plaintiffs would not redress the wrong of which Bandemer plaintiffs complained-that the Indiana reapportionment scheme was designed to and has the effect of minimizing or cancelling out the voting strength of the political minority to which they belong.

II. Abstention Was Properly Rejected By The District Court And Would Be Wholly Improper Now

Similarly without merit is amici's argument that this case should be summarily vacated and returned to the ***4** district court for consideration of state law claims under the *Pullman* doctrine of abstention. There is no uncertain state law issue to which anyone has pointed that would modify the laws in such a way as to render them constitutional. Abstention is simply not required, under these circumstances, "especially . . . where, as here, no state proceeding had been instituted or was pending when the District Court's jurisdiction was invoked." *Davis v. Mann,* 377 U.S. 678, 690-91 (1964). On this point, amici apparently confuse the situation presented by this case with the situation presented in another case before this Court in which amici are parties, *Badham v. The Secretary of State of the State of California,* No. 84-1226 (petition for cert. filed Jan. 30, 1985). *Badham* is a case involving federal and state law claims challenging congressional districting in California. Defendants in that federal litigation, however, promptly initiated parallel state court proceedings seeking to have state law claims adjudicated in state court. In that context, the district court abstained from deciding the federal constitutional issues pending resolution of the state law issues in that state court proceeding. The Ninth Circuit affirmed the district court's abstention. *Badham v. United States District Court for the Northern District of California,* 721 F.2d 1170 (9th Cir. 1983). Here, however, no state court proceedings are now or ever have been initiated for determination of those pendent state law claims included in the Bandemer plaintiffs' complaint. Defendants here, unlike their California counterparts, chose instead to drag out litigation in federal court for nearly three years during which time they never sought resolution of any issues in state court. No authority cited by amici requires or even suggests that abstention was or is now appropriate in these circumstances. *Davis v. Mann, supra,* is on point and controlling.

***5** Further, defendants raised abstention below only after losing a variety of other dilatory motions. [4] Even if abstention would have been proper at some early stage in the Bandemer litigation, it is clear that it is not proper now. This litigation has already continued without resolution through two (1982 and 1984) elections, thus depriving plaintiffs of participation in elections under a constitutional apportionment scheme for nearly half of the decade. This Court has long recognized that abstention should not operate to delay unduly ultimate adjudication on the merits where a fundamental right, like the right to vote, is at issue. *Harman v. Forssenius,* 380 U.S. 528, 537 (1965); *see also Zwickler v. Koota,* 389 U.S. 241 (1967); *Baggett v. Bullitt,* 377 U.S. 360 (1964). To reach the result urged by amici would turn the idea of abstention on its head, resulting in another three years of litigation and effectively denying plaintiffs any constitutional redress in this decade.

***6 CONCLUSION**

Amici's efforts to impose their own procedural morass on this litigation should be rejected. Moreover, amici seek to raise procedural arguments in a posture in which no response is possible, notwithstanding amici's admittedly "brief review" of this record. The Delegation's amicus brief should be stricken.

Respectfully submitted,

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Footnotes

* Counsel of Record

1 The parties are defined at p. 6 of appellees' Motion to Affirm filed March 1, 1985.

2 As received by counsel for Bandemer appellees on March 6, 1985, the Delegation's amicus brief was accompanied by a motion for leave to file. Accordingly, Bandemer appellees prepared and printed an opposition to the motion for leave raising the matters presented in this motion to strike. Upon attempting to file that opposition on March 13 however, counsel was informed by the Clerk that the Delegation had withdrawn its motion for leave to file and instead was filing the amicus brief without a motion for leave on the grounds that subsequent to the initial submission of the amicus brief, accompanied by a motion for leave to file, all parties had consented to its filing. The Clerk also informed counsel that the Bandemer appellees' opposition could not be received for filing because there was no longer a motion pending to which the opposition related. Bandemer appellees have never been informed by the Delegation of this change in procedure. Bandemer appellees have recast and reprinted the opposition in the form of this motion to strike upon the advice of the Clerk that this is the only procedure available for bringing their views before the Court.

3 Because the issues addressed by amici and here include Voting Rights Act claims brought in *Indiana NAACP State Conference Of Branches v. Orr,* Cause No. IP-82-164C (S.D. Ind. 1984) which was consolidated with the Bandemer case below, counsel for Bandemer appellees have informed counsel for the NAACP plaintiffs of the substance of this opposition and are authorized to inform the Court that counsel for the NAACP plaintiffs agrees that the Bandemer plaintiffs' claims would not have been mooted even if the district court had found a violation of the Voting Rights Act in the NAACP case.

4 Defendants' "Motion to Dismiss or, in the Alternative, To Abstain" was filed on May 12, 1982 after the district court's denial on May 3, 1982 of an earlier motion to dismiss that was itself preceded by a motion to "reconstitute" the three judge court. On November 9, 1982 the defendants' motion to dismiss or abstain was unanimously denied.

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