REL: June 30, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180152

William G. Veitch

v.

Sherri C. Friday, Acting Chief Election Official of Jefferson County

Appeal from Jefferson Circuit Court
(CV-18-901519)

MITCHELL, Justice.

William G. Veitch was a Republican candidate in 2018 for District Attorney of the 10th Judicial Circuit ("Jefferson County D.A.") and a resident of the area of Jefferson County

known as the Bessemer Cutoff. When he went to cast his vote in the Republican primary, he was not able to vote for the very office for which he was running. In fact, none of his neighbors in the Bessemer Cutoff were. Because of a local law enacted in 1953, residents of the Bessemer Cutoff do not participate in primary elections for Jefferson County D.A. Veitch challenged that law before the 2018 primary, and he continues to maintain that it violates the United States Constitution. The trial court entered a judgment against him. We reverse that judgment.

Facts and Procedural History

Jefferson County constitutes the 10th Judicial Circuit, which consists of two divisions -- the Birmingham Division, anchored by the civil and criminal courthouses in Birmingham, and the Bessemer Division, anchored by the courthouse in Bessemer. The portion of Jefferson County covered by the jurisdiction of the Bessemer Division is often referred to as the Bessemer Cutoff. Each division has its own set of officers, including district attorneys. So in addition to the Jefferson County D.A., who sits in the Birmingham Division, there is an elected Deputy District Attorney of the Tenth

Judicial Circuit, Bessemer Division ("Bessemer Division D.A."). The Bessemer Division D.A. is variously referred to in the Alabama Code as a "Deputy District Attorney," § 45-37-82, Ala. Code 1975, or an "elected assistant district attorney," § 45-37-82.01, Ala. Code 1975.

Voters in the Bessemer Cutoff vote for both the Bessemer Division D.A. and the Jefferson County D.A. in the general election. But, as provided by a local law enacted in 1953, those voters are not permitted to vote for the Jefferson County D.A. (referred to in 1953 as the "circuit solicitor") in the primary election:

> "Section 1: That candidates in primary elections for nomination for Circuit Solicitor of the Tenth Judicial Circuit of Alabama shall be placed upon the ballots in such primary elections only in those precincts over which the Circuit Court holding at Birmingham, Alabama, has jurisdiction; that is to say, candidates for nomination in such primary elections for Circuit Solicitor of the Tenth Judicial Circuit of Alabama shall run and shall be placed upon the ballots used in such primaries only in those precincts which are within the jurisdiction of said Circuit Court holding at Birmingham, Alabama."

Act No. 138, Ala. Acts 1953 ("Act No. 138").

In 2018, Veitch ran for Jefferson County D.A. as a Republican. He was a resident of the Bessemer Cutoff, and he

had previously served as the Bessemer Division D.A. Because of Act No. 138, voters in the Bessemer Cutoff, including Veitch's former constituents and Veitch himself, could not vote for him (or anyone else running for Jefferson County D.A.) in the 2018 primary election.

On April 13, 2018, Veitch filed a petition in the Jefferson Circuit Court asking for a judgment declaring Act No. 138 unconstitutional and for a writ of mandamus directing the Jefferson County probate judge to include the candidates for Jefferson County D.A. on primary ballots in the Bessemer Cutoff.[1] On April 20, 2018, the trial court dismissed Veitch's action for lack of subject-matter jurisdiction and,

[1]Veitch's petition named Jefferson County Probate Judge Alan King, who was the Chief of the Jefferson County Election Commission, as the defendant. Because Judge King was running for reelection, retired Circuit Judge Scott Vowell was subsequently appointed as the acting Chief of the Jefferson County Election Commission. Vowell was substituted as the defendant in accordance with Rule 25(d), Ala. R. Civ. P. Following the election, Judge King reassumed his position as Chief of the Jefferson County Election Commission until his retirement effective June 1, 2020. The Jefferson County Attorney, who represents the appellee, has certified that Jefferson County Probate Judge Sherri C. Friday is currently "acting Chief Election Official of Jefferson County," and the Court has substituted her as the appellee pursuant to Rule 43(b), Ala. R. App. P. Because Judge Vowell, not Judge Friday, filed the appellee's brief and various appellate motions, we refer to the appellee as "the election official" in this opinion.

alternatively, based on the doctrine of laches. On June 1, 2018, four days before the primary, this Court reversed the trial court's judgment and remanded the case for further proceedings. Veitch v. Vowell, 266 So. 3d 678 (Ala. 2018).

On June 5, 2018, Mike Anderton defeated Veitch in the Republican primary for Jefferson County D.A. No voters in the Bessemer Cutoff were permitted to cast ballots in that race.

On remand, which took place after the primary, the trial court considered Veitch's arguments on the merits and, on September 28, 2018, once again dismissed the case. It concluded that Act No. 138 was not unconstitutional because it was rationally related to the division of power between the Birmingham Division and the Bessemer Division of Jefferson County, which the trial court considered to be a legitimate legislative goal. Veitch appealed.

Following Veitch's appeal and the conclusion of the general election, in which no Republican candidate for any county-wide office in Jefferson County was elected, the election official, on December 5, 2018, filed with this Court a motion to dismiss the appeal as moot.

Standard of Review

Veitch argues that Act No. 138 is unconstitutional. We review constitutional challenges to legislative enactments de novo. State ex rel. King v. Morton, 955 So. 2d 1012, 1017 (Ala. 2006) (citing Richards v. Izzi, 819 So. 2d 25, 29 n.3 (Ala. 2001)).

Analysis

As a preliminary matter, and in light of the election official's pending motion to dismiss this appeal, we first consider the election official's argument that Veitch's appeal has been mooted by the conclusion of the 2018 primary and general elections. After concluding that the appeal is not moot, we consider the merits, which requires us to answer two questions: Does the Jefferson County D.A. have power in the Bessemer Cutoff, and, if so, does Act No. 138 pass constitutional muster?

A. Veitch's Appeal Is Not Moot

Mootness is a jurisdictional issue -- this Court cannot consider a moot case. Swindle v. Remington, 291 So. 3d 439, 453 (Ala. 2019). "'A moot case or question is a case or question in or on which there is no real controversy; a case

which seeks to determine an abstract question which does not rest on existing facts or rights, or involve conflicting rights so far as plaintiff is concerned.'" Case v. Alabama State Bar, 939 So. 2d 881, 884 (Ala. 2006) (quoting American Fed'n of State, Cty. & Mun. Emps. v. Dawkins, 268 Ala. 13, 18, 104 So. 2d 827, 830-31 (1958)). Under general principles of mootness, we might be compelled to dismiss Veitch's appeal; but different principles apply in cases involving elections.

Alabama law recognizes an exception to the mootness doctrine for questions capable of repetition but evading review:

> "The capable-of-repetition-but-evading-review exception has been applied in contexts that generally involve a significant issue that cannot be addressed by a reviewing court because of some intervening factual circumstance, most often that the issue will be resolved by the passage of a relatively brief period of time. See, e.g., ... Moore v. Ogilvie, 394 U.S. 814, 89 S. Ct. 1493, 23 L.Ed.2d 1 (1969) (involving challenges to election procedures after the completion of the election); and [State ex rel.] Kernells [v. Ezell, 291 Ala. 440, 282 So. 2d 266 (1973)] (same)."

McCoo v. State, 921 So. 2d 450, 458 (Ala. 2005). As the citations in McCoo illustrate, an election-law challenge is a classic example of a question capable of repetition but evading review.

This Court has applied the capable-of-repetition-but-evading-review exception to consider challenges to laws that will impact future elections. See Griggs v. Bennett, 710 So. 2d 411, 412 n.4 (Ala. 1998) ("We note that under the principles enunciated in Moore v. Ogilvie, 394 U.S. 814, 816, 89 S. Ct. 1493, 1494-95, 23 L. Ed. 1 (1969), the interpretation of § 6.14 of Amendment 328 [now § 153, Ala. Const. 1901 (Off. Recomp.)] for this case is not moot, because the interpretation could impact future elections."). Because Act No. 138 will operate the same way in future primary elections for the office of Jefferson County D.A., the capable-of-repetition-but-evading-review exception to the mootness doctrine permits us to consider the merits of Veitch's appeal.

B. Addressing Veitch's Challenge to Act No. 138 on the Merits

1. The Jefferson County D.A. Has Authority in the Bessemer Cutoff

We now consider Veitch's challenge to Act No. 138 on the merits. We begin by examining the Jefferson County D.A.'s statutory power within the Bessemer Cutoff. Veitch's claim that Act No. 138 unconstitutionally disenfranchises voters in

the Bessemer Cutoff proceeds from the premise that those voters have a protected interest in voting for Jefferson County D.A. Veitch argues that, because the Jefferson County D.A. exercises power over residents of the Bessemer Cutoff, those residents must be allowed to vote for that office in both the primary and the general elections. The election official counters that the Bessemer Cutoff is within the exclusive jurisdiction of the Bessemer Division D.A., that the Jefferson County D.A. has no power in the Bessemer Cutoff, and that voters in the Bessemer Cutoff therefore have no constitutional interest in voting for Jefferson County D.A.

The position that was the forerunner to the modern Bessemer Division D.A., called the "deputy solicitor," was created in 1915. See Act No. 490, Ala. Acts 1915; Act No. 720, Ala. Acts 1915. The legislature made it clear in 1915 that the new deputy solicitor would not exercise power within the Bessemer Cutoff to the exclusion of the circuit solicitor (now the Jefferson County D.A.):

> "[The deputy solicitor] shall, in the absence of the circuit solicitor, discharge the same duties and exercise the same authority within the territory from which he is elected as if he were solicitor; ... and [he] shall be under the supervision of the circuit solicitor of such circuit ...."

Act No. 720, § 1 (emphasis added). The position and powers of the deputy solicitor were eventually codified as follows:

> "[T]here shall be elected by the qualified voters of the Bessemer division of Jefferson county, a deputy circuit solicitor of the tenth judicial circuit ... who shall in the absence of the circuit solicitor discharge the same duties and exercise the same authority within the territory from which he is elected as if he were solicitor...."

Tit. 13, § 252, Ala. Code 1940 (emphasis added). The same provision was included in the 1958 recompilation of the Alabama Code. See Tit. 13, § 252, Ala. Code 1940 (Recomp. 1958). Although the codified language did not include the language from Act No. 720 about the deputy solicitor being "under the supervision of the circuit solicitor," it nonetheless makes clear that the deputy solicitor's authority is based upon "the absence of the circuit solicitor" in the Bessemer Cutoff. This Court concluded as much when it considered the relationship between the circuit solicitor and deputy solicitor in State ex rel. Gallion v. Hammonds, 281 Ala. 701, 703, 208 So. 2d 81, 83 (1968): "Thus, we have an officer, elected by the people, who is clothed with all the powers of the circuit solicitor but all of those powers are nullified whenever the circuit solicitor of Jefferson County

is present." Unless that arrangement was altered by subsequent legislation, it persists today.

Nothing in the 1975 Alabama Code altered the statutory arrangement considered by this Court in Gallion. Rather, the 1975 Code, which is in effect today, ratified the arrangement set out in the 1958 recompilation of the 1940 Alabama Code:

> "All general laws applicable within certain judicial circuits, general laws of local application and local laws providing for deputy or assistant district attorneys or circuit solicitors and the manner of election or appointment, compensation, duties, etc., of such officers, which said laws were in effect on the effective date of this code, shall continue in effect until amended or repealed by statute; provided, that all such officers shall be known as 'assistant district attorneys.'"

§ 12-17-198(b), Ala. Code 1975. Likewise, the current local laws for Jefferson County do not change the 1958 status quo. They provide, with respect to the Bessemer Division D.A., only that "the elected Deputy District Attorney of the Tenth Judicial Circuit, Bessemer Division, shall serve a term of office of six years," § 45-37-82, and that the Bessemer Division D.A. shall have the power to appoint deputies, § 45-37-82.01.

The election official argues that two provisions of the general laws alter the relationship between the Jefferson

County D.A. and the Bessemer Division D.A. as that relationship was understood in Gallion. First, the election official cites § 12-17-222, Ala. Code 1975: "The elected deputy district attorney of the tenth judicial circuit (the Bessemer cutoff) shall be, for the purpose of this division, considered a district attorney." But the election official misapprehends that provision. Section 12-17-222 makes the two district attorneys equal only for the limited purposes of "this division," i.e., Title 12, Chapter 17, Article 6, Division 3: "Assistants, Investigators, and Other Personnel; Budget Procedures." The fact that the Bessemer Division D.A. is empowered to hire support staff, § 12-17-220, Ala. Code 1975, and is required to prepare a separate budget report, § 12-17-221, Ala. Code 1975, does not mean that the Bessemer Division D.A. is "considered a district attorney," § 12-17-222, for purposes of analyzing her relationship with the Jefferson County D.A.

Second, the election official cites § 12-17-184, Ala. Code 1975, as evidence indicating that the Jefferson County D.A. and the Bessemer Division D.A. are wholly independent of one another:

> "It is the duty of every district attorney and assistant district attorney, within the circuit, county, or other territory for which he or she is elected or appointed:
>
> "(1) To attend on the grand juries, advise them in relation to matters of law, and examine and swear witnesses before them.
>
> "(2) To draw up all indictments and to prosecute all indictable offenses.
>
> "(3) To prosecute and defend any civil action in the circuit court in the prosecution or defense of which the state is interested.
>
> "...."

§ 12-17-184. But the fact that the Bessemer Division D.A. has clearly defined statutory duties does not foreclose the possibility that the Jefferson County D.A. can displace the Bessemer Division D.A. and assume those same duties. In addition, a substantially identical provision was on the books at the time of Gallion. See Ala. Code 1940 (Recomp. 1958), T. 13, § 229. The Gallion Court was aware of the Bessemer Division D.A.'s statutory duties and yet concluded that the Jefferson County D.A. and the Bessemer Division D.A. are not equal in authority. Section 12-17-184 does not bolster the election official's argument either.

The relationship between the Jefferson County D.A. and the Bessemer Division D.A. is the same as it was when this Court decided Gallion in 1968. The Bessemer Division D.A. is an officer "elected by the people, who is clothed with all the powers of the [district attorney] but all of those powers are nullified whenever the ... Jefferson County [D.A.] is present." 281 Ala. at 703, 208 So. 2d at 83. Because the Jefferson County D.A. has the ultimate power to displace the Bessemer Division D.A. and to prosecute residents of the Bessemer Cutoff, voters residing in the Bessemer Cutoff have an interest in voting for the Jefferson County D.A. We turn now to whether Act No. 138 unconstitutionally prevents them from doing so.

2. Act No. 138 Unconstitutionally Disenfranchises Voters in the Bessemer Cutoff

a. Act No. 138 Severely Restricts the Right to Vote and Is Therefore Subject to Strict Scrutiny

Veitch argues that Act No. 138 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution: "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The general rule is that

legislation will be upheld in the face of an equal-protection challenge "if the classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). But rational-basis review is not appropriate "when the challenged statute places burdens upon 'suspect classes' of persons or on a constitutional right that is deemed to be 'fundamental.'" Clements v. Fashing, 457 U.S. 957, 963 (1982) (quoting San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, 17 (1973)). When a fundamental right is involved, courts typically apply "strict scrutiny" and sustain a challenged statute only if it is narrowly tailored to serve a compelling state interest. City of Cleburne, 473 U.S. at 440.

The United States Supreme Court has, at times, referred to the right to vote as "fundamental." See, e.g., Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."); Smiley v. Holm, 285 U.S. 355, 366 (1932) ("[Election regulations] are necessary in order to enforce the fundamental right involved."); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("[The political franchise of voting] is

regarded as a fundamental political right, because preservative of all rights."). Accordingly, the United States Supreme Court has occasionally applied strict scrutiny to statutes burdening the right to vote. See, e.g., Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966).

But the United States Supreme Court has also cautioned that "to subject every voting regulation to strict scrutiny ... would tie the hands of States seeking to assure that elections are operated equitably and efficiently." Burdick v. Takushi, 504 U.S. 428, 433 (1992). Because of this concern, it has occasionally applied a relaxed level of scrutiny in voting-rights cases. See Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) ("[A] court must resolve [constitutional challenges to specific provisions of a state's election laws] by an analytical process that parallels its work in ordinary litigation. ... Only after weighing [the rights and interests of the plaintiffs and the state] is the reviewing court in a position to decide whether the challenged provision is unconstitutional.").

To determine the appropriate level of scrutiny in this case, we must determine which of those two lines of United

States Supreme Court cases applies. Concurring in the judgment in Crawford v. Marion County Election Board, 553 U.S. 181 (2008), Justice Antonin Scalia attempted to harmonize the coexistence of conflicting analytical approaches to voting-rights cases by characterizing the precedent as creating a two-track framework:

> "To evaluate a law respecting the right to vote -- whether it governs voter qualifications, candidate selection, or the voting process -- we use the approach set out in Burdick v. Takushi, 504 U.S. 428 (1992). This calls for application of a deferential 'important regulatory interests' standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote."

Crawford, 553 U.S. at 204 (Scalia, J., concurring in the judgment). We adopt that framework here to determine the applicable level of scrutiny.

A survey of leading voting-rights cases in which the United States Supreme Court has applied less than strict scrutiny illustrates what Justice Scalia meant by "nonsevere, nondiscriminatory restrictions." In Crawford, the United States Supreme Court considered a facial challenge to a voter-ID law that, "[f]or most voters[,] ... [did] not qualify as a substantial burden on the right to vote, or even represent a

significant increase over the usual burdens of voting." 553 U.S. at 198. In Burdick, it considered Hawaii's prohibition on write-in voting and concluded the prohibition created only a slight burden for a small number of voters. 504 U.S. at 436–37. And, in Anderson, the United States Supreme Court concluded that Ohio's early filing deadline for Presidential candidates should not be subject to strict scrutiny, although it ultimately invalidated the law because the burdens imposed by the law outweighed the state's "minimal interest." 460 U.S. at 789, 806.

Act No. 138 imposes a far more severe restriction than any of the restrictions considered in the cases above. In all of those cases, a law incidentally burdened the right to vote by making voter registration and ballot access more difficult. Act No. 138, by contrast, completely deprives voters in a significant portion of Jefferson County of the right to vote for an officer who has statutory authority over them. That severe restriction falls within the second category identified by Justice Scalia in his special writing in Crawford and is therefore subject to strict scrutiny.

The election official argues that, unlike the right to vote in a general election, the right to vote in a primary election is not fundamental and therefore cannot trigger the application of strict scrutiny. We disagree. In United States v. Classic, 313 U.S. 299, 309-10 (1941), the United States Supreme Court considered the indictment of five Louisiana officials for election fraud under the predecessors to 18 U.S.C. §§ 241-42, which criminalized "any conspiracy to injure a citizen in the exercise 'of any right or privilege secured to him by the Constitution or laws of the United States,'" and provided penalties for "anyone who, 'acting under color of any law' 'willfully subjects, or causes to be subjected, any inhabitant of any State ... to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States.'" One of the questions presented in Classic was whether the right to vote in a primary election was a right secured by the United States Constitution. The United States Supreme Court rejected the argument that the right to vote in a primary election was less constitutionally protected than the right to vote in a general election, saying:

> "The right to participate in the choice of representatives for Congress includes, as we have said, the right to cast a ballot and to have it counted at the general election whether for the successful candidate or not. Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, § 2."

313 U.S. at 318. The United States Supreme Court noted that constitutional equivalence between primary and general elections was particularly important given that in Louisiana at the time (as has recently been the case in Jefferson County) the winner of a particular party's primary was virtually assured victory in the general election. 313 U.S. at 319 ("[T]he right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative."). In many states, the primary is the whole shooting match -- a right to vote in the general election would be hollow without a complementary right to vote in the critical primary election. Thus, as a general matter, the right to vote in a

primary election is no less fundamental than the right to vote in a general election.

The cases cited by the election official to suggest that the right to vote in a primary election is not as strong as the right to vote in a general election simply illustrate that primary elections involve constitutional considerations that are not at play in general elections -- most importantly, the First Amendment right to associate in political parties. See California Democratic Party v. Jones, 530 U.S. 567, 574 (2000) ("[T]he First Amendment protects 'the freedom to join together in furtherance of common political beliefs,' which 'necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.' That is to say, a corollary of the right to associate is the right not to associate." (internal citations omitted)). The fact that a countervailing constitutional right is involved makes the right to vote in a primary election more susceptible to regulation than the right to vote in a general election. But this is so because of the importance of the First Amendment rights of members of political parties, not because of the unimportance of voting

in primary elections. When the United States Supreme Court dismissed the possibility of a "fundamental right" to vote in a blanket primary election, i.e., a primary election in which voters could vote for any candidate regardless of the voter's or candidate's party affiliation, California Democratic Party, 530 U.S. at 573 n.5, it did so not because voting in primaries is less protected under the Constitution, but because California's blanket primary unconstitutionally subjugated the associational rights of members of political parties to the voting rights of nonmembers. We see no reason why laws burdening the right to vote in primary elections should be categorically exempted from strict scrutiny.

b. Act No. 138 Is Not Narrowly Tailored to Serve a Compelling State Interest

Act No. 138 is constitutional only if it is narrowly tailored to serve a compelling state interest. City of Cleburne, 473 U.S. at 440. The only state interest identified in the record and briefs in this appeal is the interest in "proportionately divid[ing] influence in the court system between the two court divisions in [Jefferson County]" mentioned by the trial court in its order. Counsel for the election official echoed this theme at oral argument before

this Court when he identified principles of "representative democracy" as providing the State's interest. For the purposes of this opinion, we assume that this interest is compelling. Cf. Evans v. Cornman, 398 U.S. 419, 422 (1970) ("The sole interest or purpose asserted by appellants to justify the limitation on the vote in the present case is essentially to insure that only those citizens who are primarily or substantially interested in or affected by electoral decisions have a voice in making them. Without deciding the question, we have assumed that such an interest could be sufficiently compelling to justify limitations on the suffrage, at least with regard to some elections." (citing Kramer v. Union Sch. Dist., 395 U.S. 621, 632 (1969), and Cipriano v. City of Houma, 395 U.S. 701, 704 (1969))).

But even if the interest in proportionately dividing political influence between the two divisions in Jefferson County is compelling, Act No. 138 is not narrowly tailored to that interest. In fact, Act No. 138 directly undermines representative democracy. It reinforces Birmingham voters' interest in self-government only by disregarding the same interest of Bessemer voters and subjecting Bessemer voters to

the possibility of prosecution without representation. A law that gives the voters in one locality the exclusive right to select an officer who will exercise power over the voters in another locality is not narrowly tailored to an interest in promoting representative local government. Therefore, Act No. 138 violates the Fourteenth Amendment to the United States Constitution.

Conclusion

The Jefferson County D.A. has the statutory authority to displace the Bessemer Division D.A. and exercise his powers in the Bessemer Cutoff. Because residents of the Bessemer Cutoff are subject to the prosecutorial power of the Jefferson County D.A., they have an equal interest with other Jefferson County residents in who occupies that office. Despite that equal interest, Act No. 138 denies voters in the Bessemer Cutoff the right to participate in the primary election for Jefferson County D.A. That discrimination violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and renders Act No. 138 unconstitutional.

REVERSED AND REMANDED.

Parker, C.J., and Wise, Bryan, and Stewart, JJ., concur.

Shaw,[2] Sellers, and Mendheim, JJ., concur in the result.

Bolin, J., recuses himself.

[2]Although Justice Shaw did not sit for oral argument of this case, he has reviewed a recording of that oral argument.