Nos. 98-405, 98-406

In The

Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES,

Appellant, and

GEORGE PRICE, *et al.*,

Appellants,

v.

BOSSIER PARISH SCHOOL BOARD,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

REPLY BRIEF ON REARGUMENT OF APPELLEE

MICHAEL E. ROSMAN
HANS F. BADER
CENTER FOR INDIVIDUAL RIGHTS
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 833-8400

MICHAEL A. CARVIN*
ANDREW G. MCBRIDE
DAVID H. THOMPSON
CRAIG S. LERNER
COOPER, CARVIN & ROSENTHAL, PLLC
1500 K Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 220-9600

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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1. Our initial briefs establish that under *Beer v. United States*, 425 U.S. 130 (1976), and its progeny, a voting change "abridg[es]" minority voting power under Section 5 only if it causes a retrogression in minority voting rights. Consequently, just as a change cannot have the "effect of . . . abridging the right to vote" unless it has a retrogressive effect, it cannot have the "purpose . . . of . . . abridging" unless it has a retrogressive purpose.

Apparently recognizing that every principle of English usage compels this conclusion, the United States now makes the astonishing assertion that "*Beer* . . . did not decide that the phrase 'deny or abridging the right to vote,' as used in Section 5, refers only to retrogression." U.S. Rearg. Br. at 5.[1] Incredibly, in support of this assertion, the United States quotes the very passage from *Beer* that most directly refutes this assertion, *i.e.*, a nonretrogressive change " 'can hardly have the "effect" of diluting or *abridging* the right to vote on account of race within the meaning of § 5.' " U.S. Rearg. Br. at 5 (quoting *Beer*, 425 U.S. at 141 (emphasis added)). *See also City of Lockhart v. United States*, 460 U.S. 125, 136 (1983) (emphasis added) (perpetuation of potentially discriminatory *status quo* did not "have the effect of denying or *abridging* the right to vote on account of race . . . "). Thus, *Beer* clearly states that a change has the effect of abridging Section 5 voting rights only if it reduces minority power from that which existed prior to the change.

Moreover, *Beer's* holding that Section 5 reaches only retrogressive effect is necessarily an interpretation of the statutory term, "abridging." *Beer's* holding that Section 5 prohibits only changes with the "effect" of retrogressing is necessarily a holding that,

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[1] In this brief, citations are to the Brief on Reargument for the Federal Appellant ("U.S. Rearg. Br."); Brief of Appellee ("Initial Br."); Brief of Appellee on Reargument ("App. Rearg. Br."); Supplemental Brief on Reargument of Appellants George Price, *et al.* ("A-I Rearg. Br."); and Brief for the Federal Appellant ("U.S. Initial Br.").

under Section 5, "abridging" is the same as "retrogressing." Otherwise, a nonretrogressive change could have the effect of "abridging," which all agree it cannot.

The United States nevertheless asserts that "abridge" under Section 5 must go beyond retrogression because "abridge" goes beyond retrogression under Section 2. If anything is clear, however, it is that the abridgment proscribed by Section 2 is entirely different than the abridgment prohibited by Section 5.[2] As the United States elsewhere concedes, a voting qualification may "result in . . . abridgement" under Section 2 only if it creates the dilutive effect found in *White v. Regester*, 412 U.S. 755 (1973), but has the effect of abridgment under Section 5 only if it is retrogressive. *See* U.S. Rearg. Br. at 4 n.3 (internal quotations omitted). Since it is undisputed and clear that the abridging effect prohibited by Section 5 is entirely different than the abridging result prohibited by Section 2, the normal presumption that the same language in different statutory sections has the same meaning plainly does not pertain here.

The United States also argues that "the purpose and effect prongs of Section 5 are not coterminous." U.S. Rearg. Br. at 8. It notes that otherwise permissible acts may

[2] The United States also notes, correctly, that the "abridge" language in Section 3(c) of the Act is patterned after and has the same meaning as the identical language in Section 5. 42 U.S.C. § 1973a(c). U.S. Rearg. Br. at 3. But it is plainly wrong in suggesting that Section 3(c) must reach nonretrogressive changes because, otherwise, the Justice Department would be forced to preclear voting changes which are indistinguishable from the voting procedure that the Court just struck down as unconstitutional. *Id.* As we explained in our initial brief, procedures which have been adjudicated by a court to be unconstitutional will never be submitted for preclearance. Rather, the court which found that a voting procedure violated the Constitution would directly remedy that adjudged violation, and plainly could not accept a proposed "remedy" with precisely the same discriminatory purpose and effect. Initial Br. at 40 n.30. The text of Section 3(c) itself makes this clear. The authorization for district courts to require preclearance of other voting changes in the future comes only "*in addition to* such relief as [the court] may grant" with respect to the adjudged constitutional violation. 42 U.S.C. § 1973a(c) (emphasis added).

" 'become unlawful when done to accomplish an unlawful end.' " *Id.* (quoting *City of Richmond v. United States*, 422 U.S. 358, 379 (1975)). This is, of course, entirely true and entirely irrelevant. Contrary to the straw man erected by the United States, we have never argued that "purpose and effect" are "coterminous."[3] We have contended, rather, that "abridge" and "abridge" are coterminous or, more accurately, that the same word must mean the same thing in the same statutory sentence. Since perpetuating a discriminatory *status quo* does not actually abridge any voting rights – *i.e.*, does not have the "effect" of "abridging" – an intent to perpetuate the *status quo* cannot be a "purpose" of "abridging." Since maintaining the *status quo* is not an "unlawful end" under Section 5, intending to maintain the *status quo* is not an intent to "accomplish an unlawful end."[4]

[3] As the United States correctly notes, the law often treats a deliberate effort to do X differently than an action which unintentionally results in X. "In the words of Justice Holmes, 'even a dog distinguishes between being stumbled over and being kicked.' " *C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 424 n.12 (1994) (Souter, J., dissenting) (citation omitted). But if actually killing a dog is not a "homicide" under state law, intentionally killing a dog cannot be an "intentional homicide." By the same token, since a nonretrogressive change does not "abridge" voting rights, a change intended to be nonretrogressive cannot purposefully abridge those rights.

[4] The United States again speculates that *Beer* narrowly interpreted Section 5 to reach only changes with a retrogressive effect because the Court was purportedly concerned that a broader effects test would "reach beyond the Constitution itself" – a concern that is not implicated by a purpose test that extends beyond retrogression. U.S. Rearg. Br. at 6-7. As we have shown, this is plainly untrue on every level: (1) there is absolutely no language in *Beer* or its progeny reflecting any concern about a statute which imposes an effects test that goes beyond retrogression or the Constitution; (2) a *retrogressive* effect test also "reach[es] beyond the Constitution itself," by attaching liability without any finding of an invidious purpose; (3) it was entirely unclear in *1976* whether a statute prohibiting an unintended dilutive result even went beyond the Constitution; and (4) even if the Constitution itself did not prohibit dilutive results, no Justice perceived any problem with *Congress* imposing such a test, as it ultimately did in 1982 for Section 2, particularly since the same Court, just prior to *Beer*, had decided *White v. Regester* and read an "effects

The United States next canvasses the same legislative history examined in *Beer* and cites various pronouncements suggesting that "Congress was concerned that covered jurisdictions would adopt new devices to freeze the *existing* disparity in voter registration between blacks and whites." U.S. Rearg. Br. at 9. This is quite true, but Congress intended to eliminate that registration disparity by "freezing election procedures" other than literacy tests and similar devices in order to prevent, as the United States elsewhere concedes, "covered jurisdictions [from] employ[ing] new voting practices to evade the effect of the suspension of discriminatory tests and devices in Section 4 of the Act, 42 U.S.C. 1973b." U.S. Rearg. Br. at 20. If poll taxes and literacy tests – "the principal method used to bar Negroes from the polls" – are eliminated, and other procedures remain the same, then the registration disparity existing prior to the Act would obviously not be perpetuated, but would be dramatically reduced. *South Carolina v. Katzenbach*, 383 U.S. 301, 310 (1966). The only way the registration disparity would be "perpetuated" is if procedures other than the banned tests and devices were made worse, so that they could fill the discriminatory "gap" caused by the banning of tests. Accordingly, forbidding retrogressive changes in *other* voting procedures – which were presumably neutral since they were designed for a white electorate – would clearly not result in perpetuating the existing registration disparity, but would plainly avoid such perpetuation.

For this reason, in the legislative history cited by the United States, the *only* examples of changes prohibited by Section 5 are those which are plainly retrogressive because they are worse than the *status quo, i.e., "adopting* at-large elections [over the less dilutive single-member schemes], *increasing* filing fees, *abolishing* elective offices, and *extending* the terms of white incumbents." U.S. Rearg. Br. at 12 (emphasis added). Thus, the examples helpfully catalogued by the United States plainly contradict appellants' position that Section 5 invalidates voting changes which, for example, *reduce* filing fees or white incumbents' terms, if the

test" into Title VII on the basis of far less compelling statutory language. *See Griggs v. Duke Power*, 401 U.S. 424 (1971). *See* Initial Br. at 24-25 & n.19, 34 n.25.

Justice Department finds that they would have been reduced even more absent racial considerations.

In short, the Solicitor General's legislative history argument is based on a fundamental distortion of the nonretrogression principle actually established by *Beer*. The United States maintains that a change cannot be retrogressive unless it reduces overall minority voter participation below the sorry levels that existed in 1965 and then contends that Congress could not have limited Section 5 to prevent even "further diminishment" of this abysmal state of affairs. U.S. Rearg. Br. at 11. But obviously a change in voting procedure is retrogressive even if it does not reduce overall minority registration or voting strength, so long as it makes access to the ballot or voting strength more difficult than the particular procedure being replaced. Since, as noted, that retrogression principle would prevent voting procedures other than tests and devices from accomplishing the disenfranchisement previously accomplished by literacy tests, that principle obviously would accomplish Congress' goal of preventing southern jurisdictions from "replac[ing]" the "old devices for disenfranchisement" with "new ones." U.S. Rearg. Br. at 12 (quoting S. Rep. No. 417, 97th Cong., 2d Sess., at 6 (1982)).[5]

[5] The Solicitor General disingenuously maintains that the following passage from the 1965 Senate Report somehow suggests that Section 5 incorporated the substantive standard of the Fifteenth Amendment concerning purposeful abridgement of minority voting rights: " '[S]o long as State laws or practices erecting voting qualifications do not run afoul [of] the 15th amendment or other provisions of the Constitution, they stand undisturbed.' " U.S. Rearg. Br. at 11 (quoting S. Rep. No. 162, 89th Cong., 1st Sess., Pt. 3, at 18 (1965)). This passage had absolutely nothing to do with Section 5, or its substantive standard. Rather, as the very heading of the section of the Senate Report makes clear, it was simply responding to the argument that the Act was unconstitutional because it interfered with "the right of the States to fix qualifications for voting," by pointing out that the States would unconstitutionally abuse this authority if their qualifications ran "afoul of the 15th amendment." S. Rep No. 162, Pt. 3, at 18. This truism does not suggest that Section 5 would, of its own force, invalidate any Fifteenth Amendment violation by a State, as the very next sentence makes even clearer: "But when State power is abused, it is subject

Indeed, *Beer* itself makes crystal clear that interpreting Section 5 to reach only retrogressive changes is fully consistent with Congress' goal of affirmatively increasing minority voter participation and preventing covered jurisdictions from perpetuating the prior discriminatory regime by replacing the invalidated discriminatory devices with new ones. *Beer* found that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities . . . ," *Beer*, 425 U.S. at 141, only *after* noting that Section 5 was intended to prevent covered jurisdictions from " 'staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down' " and to " ' "shift the advantage of time and inertia from the perpetrators of the evil to its victim." ' " *Beer*, 425 U.S. at 140 (quoting H.R. Rep. No. 94-196, at 57-58 (1975)) (citation omitted). The *Beer* Court understood that Congress intended to increase minority voting by "freezing election procedures" in order to prevent States from " 'undo[ing] or defeat[ing] the rights recently won' by Negroes" and to " 'insure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques.' " *Id.* at 140-41 (quoting H.R. Rep. No. 91-397, at 8 (1970) and S. Rep. No. 94-295, at 19 (1975)).[6]

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to Federal action by Congress as well as by the courts *under the 15th amendment*." *Id.* More generally, we fully agree that the Voting Rights Act, including Section 5, was obviously intended to secure and protect the Fifteenth Amendment's guarantee against racial discrimination in voting. *See* H.R. Rep. No. 439, 89th Cong., 1st Sess., at 26 (1965) (*quoted in* U.S. Rearg. Br. at 11). But Section 5 did not accomplish that goal by adopting the Fifteenth Amendment's abridgement standard. Section 5 could not do this, since, unlike the Fifteenth Amendment, it deals only with changes to the *status quo*. Of course, the United States does not really believe that Section 5 incorporated the Fifteenth Amendment's substantive standards because, if it did, there would be a serious, unresolved question concerning whether Section 5 even reaches vote *dilution* mechanisms such as redistricting plans. *See Voinovich v. Quilter*, 507 U.S. 146, 159 (1993).

[6] Contrary to the Solicitor General's assertion, by preventing such retrogression, Section 5 did indeed " 'play an important role' " in

2. Appellants devote the bulk of their briefs to arguing that the covered jurisdiction has the burden of persuasion with respect to the purpose prong of Section 5, just as it has the burden to show the absence of an impermissible effect. To be sure, just as the covered jurisdiction has the burden of showing that a voting change does not have the effect of reducing minority voting power, it must also show that the purpose of the change was not to reduce minority voting strength. The question here, however, is whether the covered jurisdiction must shoulder an *additional* burden with respect to "purpose" that it does not have with respect to "effect," by proving not only that the change has a nonretrogressive purpose but also that it is not motivated in any way by considerations of race.

Appellants seek to justify this additional showing for "purpose" not because the language of Section 5 draws any distinction between purpose and effect, but because Section 5's broader "goal" was purportedly to prohibit unconstitutional voting changes. Accordingly, it would be inequitable and unreasonable to shift the burden used in those constitutional cases simply because the covered jurisdiction was forced unwillingly to litigate this issue in the special District of Columbia Section 5 Court as a plaintiff, as the *Bossier I* dissenting opinion acknowledged with respect to Section 2. *See* App. Rearg. Br. at 23. Appellants cannot explain why a different rule should obtain with respect to the Constitution or why the covered jurisdiction has the constitutional burden when, even under their interpretation, *Beer* plainly placed the burden on the Attorney General to show a constitutional violation. App. Rearg. Br. at 22.[7]

" 'rid[ding] the country of racial discrimination in voting.' " *Beer*, 425 U.S. at 140 (quoting *South Carolina*, 383 U.S. at 315). So, contrary to the United States' contention, the legislative history lauding the valuable role of Section 5 is hardly "inconsistent" with interpreting it to reach retrogression.

[7] Appellant-intervenors do seem to suggest that covered jurisdictions should have the burden simply because they are nominal plaintiffs in the Section 5 declaratory judgment proceeding. But the standard rule is that "[i]t would seem rather anomalous that so important a matter [as the burden

Rather, appellants argue that placing the burden on covered jurisdictions is fair because they possess the information on the jurisdiction's intent and because Congress determined that these jurisdictions were generally racist in the 1960s, thus "establish[ing], in effect, a presumption that future voting practices enacted by covered jurisdictions would also have a discriminatory purpose. . . . " U.S. Rearg. Br. at 20. Both factors are also present in traditional constitutional voting rights challenges to jurisdictions covered by Section 5, where minority plaintiffs bear the burden of proof, thus demonstrating that these factors are plainly insufficient to shift the normal burden. Moreover, under other civil rights statutes, the alleged victim of discrimination bears the burden of persuasion to prove discriminatory purpose. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Here, as in those cases, it is the United States and minority parties who are contending that the covered jurisdiction will harm their civil rights,

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of proof] should depend on the chance of who first sues and the outstanding authority in the field argues against such a result." *Preferred Accident Ins. Co. v. Grasso*, 186 F.2d 987, 991 (2d Cir. 1951) (citing E. Borchard, *Declaratory Judgments*, at 404-09 (2d ed. 1941). *See also Fireman Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1176 & n.4 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977); *American Eagle Ins. Co. v. Thompson*, 85 F.3d 327 (8th Cir. 1996). This is particularly true where, as here and in patent cases, placing the burden on the plaintiff would require him to "prove a negative." 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 57.62[2][d] (1999); *see also* Borchard, *supra; Under Sea Indus. v. Dacor Corp.*, 833 F.2d 1551, 1557 (Fed. Cir. 1987). Moreover, those courts that have placed the burden on declaratory judgment plaintiffs have done so because it is "reasonable and fair that one who brings another into court," and thus may select the forum and enjoy the other "advantages" of a plaintiff, should have the burden that is normally borne by those seeking to have the court prevent another from taking some adverse action. *Liberty Mut. Ins. Co. v. Sweeney*, 216 F.2d 209, 210-11 (3d Cir. 1954). Here, of course, covered jurisdictions are not coercing the United States into court, but are forced by Section 5 to seek preclearance and cannot select the forum, but are forced to the distant, disadvantageous court in Washington, D.C.

and thus should bear the burden of proving this harm.[8] This is particularly true since minority voters have *not* suffered the only adverse effect concededly prohibited by Section 5 – *i.e.*, retrogression.

The covered jurisdictions' allegedly superior access to the relevant facts is a complete non-factor in an era where "liberal civil discovery rules give [minority proponents] broad access to" such information, and thus even the United States concedes that "[d]iscovery should give the government the opportunity to test [the covered jurisdiction's] assertions and to obtain any contrary or impeaching evidence." *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 657 (1989); U.S. Rearg. Br. at 22. *See* 2 J. STRONG, MCCORMICK ON EVIDENCE § 337, at 439 n.11 (4th ed. 1992). Regardless of who has the burden of ultimate persuasion, the covered jurisdiction will, "[a]s a practical matter . . . and in the real-life sequence of a trial" have to offer a nondiscriminatory explanation for the voting change because it "knows that its failure to introduce evidence of a nondiscriminatory reason will cause judgment to go against it. . . . " *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510 (1993).[9]

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[8] *See, e.g., Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 667 (1989) (Stevens, J., dissenting); *Wygant v. Jackson Bd. of Educ,*, 476 U.S. 267, 292 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

[9] In the redistricting context, where "the legislature always is *aware* of race," *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (emphasis in original), an apportionment plan violates the Constitution only if it "subordinate[s] traditional race-neutral districting principles" and "race was the *predominant* factor motivating the legislature's decision." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). The Constitution clearly does not prohibit redistricting plans where race was "*a* motivating factor," as appellants contend. U.S. Initial Br. at 46-47. (Even outside the redistricting context, where race was "a substantial or motivating factor," *Hunter v. Underwood* 471 U.S. 222, 225 (1985) (internal quotations omitted), a jurisdiction is not liable if it can show that it would have made the same decision absent the impermissible factor. *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 271 n.21 (1977)). Since there is no basis for concluding that Section 5's purpose prong goes *beyond* the Constitution

Moreover, even if it could be plausibly "presumed" that every voting change by every covered jurisdiction is motivated by a discriminatory purpose because of congressional findings from 34 (or 17) years ago, this is not an argument for shifting the burden of *persuasion* to the covered jurisdiction. Even where *specific* evidence " 'creates a presumption that the [particular party] unlawfully discriminated,' " it is a "fundamental principle of [Federal] Rule [of Evidence] 301 that a presumption does not shift the burden of proof," in the sense of the risk of nonpersuasion. *St. Mary's Honor Ctr.*, 509 U.S. at 506, 511 (quoting *Burdine*, 450 U.S. at 254). In any event, using the South's sorry history of discrimination as a basis for requiring jurisdictions to prove themselves innocent of a constitutional violation would be impermissible triple counting. That history is the reason they must bear the extraordinary Section 5 burden of disproving retrogression to Washington courts or bureaucrats *before* implementing their sovereign acts and is also a negative factor under the *Arlington Heights* analysis of discriminatory purpose. *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). To also use that history as a reason to impose an additional burden on the constitutional issue would plainly be unwarranted.

Respectfully submitted,

MICHAEL E. ROSMAN
HANS F. BADER
CENTER FOR INDIVIDUAL RIGHTS
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 833-8400

MICHAEL A. CARVIN*
ANDREW G. MCBRIDE
DAVID A. THOMPSON
CRAIG S. LERNER
COOPER, CARVIN & ROSENTHAL
1500 K Street, N.W., Suite 200
Washington, D.C. 20005
(202) 220-9600

**Counsel of Record*

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by prohibiting any consideration of race in redistricting, any remand order in this case should require the district court to determine whether defendants have proved that the Board's plan subordinated traditional districting principles and was predominantly motivated by racial *animus*.