Nos. 98-405 & 98-406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

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**

BRIEF OF APPELLANTS GEORGE PRICE, *ET AL.*

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QUESTION PRESENTED

Whether a redistricting plan submitted to the United States District Court for the District of Columbia under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, for a declaration that the plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," should be precleared even if infected with an unconstitutional, racially discriminatory purpose that is not retrogressive?

PARTIES TO THE PROCEEDINGS

The Defendant-Intervenors below, Appellants George Price, *et al.*, who are not listed in the caption are:

Leroy Harry
Thelma Harry
Clifford Doss
Odis Easter
Jerry Hawkins
Barbara Stevens King
Hurie Jones
Grover Cleveland Jaggers
Floyd Marshall
Rubie Fowler

All other parties are named in the caption.

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OPINIONS BELOW

The decision of the United States District Court for the District of Columbia ("D.C. District Court") that is the subject of these appeals is reported at 7 F. Supp. 2d 29

(D.D.C. 1998) and is reprinted at App. 1a-28a.[1] An earlier decision of the D.C. District Court in this case is reported at 907 F. Supp. 434 (D.D.C. 1995) (App. 78a-144a); this Court's decision vacating and remanding that earlier decision is reported at 117 S. Ct. 1491 (1997) (App. 29a-77a).

JURISDICTION

The D.C. District Court had jurisdiction pursuant to 42 U.S.C. § 1973c. It entered the judgment at issue on May 4, 1998. George Price, *et al.,* and Janet Reno filed timely notices of appeal on July 6, 1998 and filed timely jurisdictional statements on September 4, 1998. This Court noted probable jurisdiction on January 22, 1999. This Court's jurisdiction is based on 42 U.S.C. § 1973c.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Section 1 of the Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, is reprinted at App. 244a-246a.

STATEMENT

Because the Bossier Parish School Board ("Board") is a jurisdiction subject to the preclearance requirements of §5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, it is required to obtain the approval either of the Attorney General of the United States or of the D.C. District Court before implementing any changes to a "voting qualification or

1 Citations to "App." refer to the separately bound appendix to the Jurisdictional Statement filed on behalf of Janet Reno in No. 98-405. Citations to "J.A." refer to the Joint Appendix filed on March 5, 1999.

prerequisite to voting, or standard, practice, or procedure." App. 244a. Because the 1990 census revealed wide population disparities among its election districts, the Board proceeded to redraw its election districts to meet the mandate of this Court's one-person -- one-vote decisions. *Id.* at 30a. The Board seeks in this declaratory judgment action a determination that its redistricting plan adopted following the 1990 census "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (App. 245a).

This is the second time that the Court has noted probable jurisdiction in this case. In 1997, this Court vacated and remanded the first judgment of the D.C. District Court preclearing the Board's proposed redistricting plan. Although the D.C. District Court found on remand "powerful support for the proposition that the Bossier Parish School Board in fact resisted adopting a redistricting plan that would have created majority black districts" and a "tenacious determination to maintain the status quo," in which all election districts were majority white, App. 7a, it once again precleared the 12-of-12 majority white election district plan.

A. This Court's Decision Vacating and Remanding the First Declaratory Judgment.

This Court decided two questions in its review of the D.C. District Court's first judgment granting preclearance of the Board's proposed redistricting plan:

> (i) whether preclearance must be denied under § 5 whenever a covered jurisdiction's new voting "standard, practice, or procedure" violates § 2 [of the Voting Rights Act]; and
>
> (ii) whether evidence that a new "standard, practice, or procedure" has a dilutive impact is always irrelevant to the inquiry whether the covered jurisdiction acted with "the purpose . . . of denying or abridging the right to vote on account of race or color" under § 5.

App. 29a-30a.

The Court first reviewed the Board's process of redistricting following the 1990 census:

> [The Board] considered, and initially rejected, the redistricting plan that had been recently adopted by the Bossier Parish Police Jury, the parish's primary governing body (the Jury plan), to govern its own elections. Just months before, the Attorney General had precleared the Jury plan, which also contained 12 districts. ... (Stipulations, ¶ 68). None of the 12 districts in the Board's existing plan or in the Jury plan contained a majority of black residents. ... (Stipulations, ¶ 82) (under 1990 population statistics in the Board's existing districts, the three districts with highest black concentrations contain 46.63%, 43.79%, and 30.13% black residents, respectively);. ... (Stipulations, ¶ 59) (population statistics for Jury plan, with none of the plan's 12 districts containing a black majority). Because the Board's adoption of the Jury plan would have maintained the status quo regarding the number of black-majority districts, the parties stipulated that the Jury plan was not "retrogressive."... (Stipulations, ¶ 252). ... Appellant George Price, president of the local chapter of the NAACP, presented the Board with a second option — a plan that created two districts each containing not only a majority of black residents, but a majority of voting-age black residents. ... (Stipulations, ¶ 98). Over vocal opposition from local residents, black and white alike, the Board voted to adopt the Jury plan as its own. ....

App. 30a-31a (citations omitted).

The Court recounted that the Attorney General rejected the Board's proposed redistricting plan when it was submitted for preclearance, on grounds that it would violate § 2 of the Voting Rights Act, 42 U.S.C. § 1973, "because it 'unnecessarily limit[ed] the opportunity for minority voters to elect their candidates of choice.'" App. 32a. The Attorney General had concluded that black residents are sufficiently numerous and geographically compact to form a majority in two of the 12 election districts. *Id.* at 31a-32a.

While the Court concluded that a voting change should not automatically be denied preclearance under § 5 of the Voting Rights Act, because the change would violate § 2 of the Act, App. 33a-45a, it held that evidence of minority vote dilution should not be excluded in a § 5 preclearance proceeding. A remand was necessary because it was not clear whether the District Court considered proffered evidence that would be relevant to a § 2 claim in order to determine whether the redistricting plan has the "purpose ... of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (App. 45a-51a).

The Court commended to the D.C. District Court on remand the factors relevant to determining discriminatory intent for purposes of Fourteenth Amendment analysis, outlined in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977):

> The "important starting point" for assessing discriminatory intent under *Arlington Heights* is "the impact of the official action whether it 'bears more heavily on one race than another.'" 429 U.S., at 266 (citing *Washington* v. *Davis*, 426 U.S. 229, 242 (1976)). In a § 5 case, "impact" might include a plan's retrogressive effect and, for the reasons discussed above, its dilutive impact. Other considerations relevant to the purpose inquiry include, among other things, "the historical background of the [jurisdiction's] decision"; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[t]he legislative or administrative history, especially ... [any] contemporary statements by members of the decisionmaking body." *Id.*, at 268.

App. 49a.

The Court concluded:

> Because we are not satisfied that the District Court considered evidence of the dilutive impact of the Board's

redistricting plan, we vacate this aspect of the District Court's opinion. The District Court will have the opportunity to apply the *Arlington Heights* test on remand as well as to address appellants' additional arguments that it erred in refusing to consider evidence that the Board was in violation of an ongoing injunction "to 'remedy any remaining vestiges of [a] dual [school] system'," 907 F. Supp., at 449, n. 18.

App. 50a-51a.

The Court noted that it was leaving "open for another day the question whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent. . . . Reserving this question is particularly appropriate when, as in this case, it was not squarely addressed by the decision below or in the parties' briefs on appeal. . . . The existence of such a [non-retrogressive but nevertheless discriminatory] purpose, and its relevance to § 5, are issues to be decided on remand." App. 45a-46a (citations omitted).

B. The District Court's Analysis on Remand.

Soon after this Court issued its mandate, the three-judge D.C. District Court called for short memoranda from the parties setting forth their views of what further proceedings should be required. [2] The court required the parties to state "whether the record needs to be re-opened" and whether additional briefs were required.[3] The record was not re-opened on remand to receive the results of the School Board elections held in March and April 1996 under the Jury plan, because the parties agreed "that there is no need to reopen the

2 Order filed Aug. 13, 1997, Civ. No. 94-1495. On remand, United States District Judge James Robertson was assigned to fill the vacancy on the panel left by the death of Judge Charles Richey. The panel on remand accordingly consisted of Judge Robertson, District Judge Gladys Kessler, and Circuit Judge Laurence H. Silberman.

3 *Id.*

evidentiary record."[4] In fact, this Court had denied a Board motion to supplement the record on the first appeal with the 1996 election results. *Reno* v. *Bossier Parish Sch. Bd.*, 517 U.S. 1154 (1996). The court set a schedule for further briefing on the application of the *Arlington Heights* criteria to the largely stipulated record previously developed and "on the relevance to Section 5 of a non-retrogressive, but nevertheless discriminatory, 'purpose[.]'"[5]

The D.C. District Court received the parties' briefs on those issues, but ostensibly "decline[d]" to address whether §5's purpose prong encompasses a search for discriminatory intent beyond retrogressive intent. App. 3a. The court searched the record, however, only for retrogressive intent: "The question we will answer . . . is whether the record disproves Bossier Parish's *retrogressive intent* in adopting the Jury plan." *Id.* at 4a (emphasis added). The court applied the *Arlington Heights* factors to this limited question:

1. Effect of the Plan. The D.C. District Court pointed out that "[t]he first *Arlington Heights* factor is 'the impact of the official action -- whether it bears more heavily on one race than another.'" App. 5a, quoting *Arlington Heights,* 429 U.S. at 266. The court noted the argument of Mr. Price and the other intervening defendants that the redistricting worsened the position of black voters by diminishing slightly the percentage of black voting age population in two of the 12 election districts, but concluded that the parties had "stipulated the point away" by agreeing that these reductions are "*de minimis*." App. 6a. The court next addressed "other allegedly dilutive impacts of the Jury plan": "that some of the new districts have no schools, that the plan ignores attendance boundaries, that it does not respect communities of interest, that there is one outlandishly large district, that several of them are not compact, that there is a lack of contiguity, and that the population deviations resulting from

4 Order filed Sept. 9, 1997, Civ. No. 94-1495.

5 *Id.*, quoting *Reno* v. *Bossier Parish Sch. Bd.,* 520 U.S. 471, 486 (1997) (App. 46a).

the jury plan are greater than the limits (± 5%) imposed by Louisiana law." *Id.* The court conceded that "[t]wo of those points -- failure to respect communities of interest and cutting across attendance boundaries -- might support a finding of *retrogressive intent*," *id.* (emphasis added), but thought the point "too theoretical, and too attenuated, to be probative." *Id.*

2. Historical Background of the Adoption of the Plan. The D.C. District Court characterized its previous findings on the historical background of the Jury plan as "provid[ing] powerful support for the proposition that the Bossier Parish School Board in fact resisted adopting a redistricting plan that would have created majority black districts." *Id.* at 7a. In this context, the panel majority addressed for the first time the history of "the school board's resistance to court-ordered desegregation, and particularly its failure to comply with the order of the United States District Court in *Lemon* v. *Bossier Parish School Board,* 240 F. Supp. 709 (W.D. La. 1965), *aff'd,* 370 F.2d 847 (5th Cir. 1967), *cert. denied,* 388 U.S. 911 (1967), that it maintain a bi-racial committee to 'recommend to the School Board ways to attain and maintain a unitary system and to improve education in the parish.'" App. 7a, quoting Stipulation ¶ 111. The court found that the intent proved by that history "is a tenacious determination to maintain the status quo." *Id.* This, however, the court found "is not enough to rebut the School Board's *prima facie* showing that it did not intend *retrogression*." *Id.* (emphasis added).

The D.C. District Court conducted only a summary review of the other *Arlington Heights* factors. The pattern on each is the same: The court found fact after fact that supports the conclusion that the Jury plan was adopted with racial animus, but minimized that evidence because the Jury plan did not set back even further the voting position of the black citizens of Bossier Parish.

3. Specific Sequence of Events Leading to the Decision to Adopt the Jury Plan. The D.C. District Court found that the sequence of events "does tend to demonstrate the school board's resistance to the NAACP plan; it does not demonstrate *retrogressive intent*." *Id.* (emphasis added).

4. Board Departures from Normal Practice. The court referenced its earlier review of evidence "tending to establish that the board departed from its normal practices," and found that it "establishes rather clearly that the board did not welcome improvement in the position of racial minorities with respect to their effective exercise of the electoral franchise," but concluded that such "is not evidence of *retrogressive intent*." *Id.* (emphasis added).

5. Contemporary Statements of Participants. The D.C. District Court referred back to its earlier findings concerning such statements, and concluded that "[t]hey do not establish *retrogressive intent*." *Id.* at 8a (emphasis added).

Judge Gladys Kessler once again dissented, because she remained convinced that the Board's decision to adopt the Jury plan was motivated by discriminatory purpose. *Id.* at 12a. Judge Kessler pointed out that her "colleagues have limited their § 5 purpose inquiry to a search for intent to retrogress and have declined to consider whether the § 5 inquiry ever extends beyond that search for retrogressive intent." *Id.* at 13a. That analysis, in Judge Kessler's view, "avoid[ed] carrying out the Supreme Court's directive to (1) inquire into the existence of 'some nonretrogressive, but nevertheless discriminatory, purpose'; and (2) determine the relevance of such a purpose (should one exist) to [the] § 5 inquiry." *Id.* (internal quotation omitted).

Since the parties agreed that the Board's proposed redistricting plan would not have a retrogressive effect, Judge Kessler first addressed whether a nonretrogressive but nonetheless discriminatory purpose to deny or abridge the right to vote on account of race or color warrants denial of preclearance under § 5. She reasoned that if the court "were to deny preclearance under § 5 only to those new plans enacted specifically with a retrogressive purpose, . . . [it] would commit [itself] to granting § 5 preclearance to a 'resistant' jurisdiction's nonretrogressive plan even if the record demonstrated an intent by that jurisdiction to perpetuate an historically discriminatory status quo by diluting minority voting strength." *Id.* at 17a. Because "a construction of § 5 that limits its purpose inquiry to a search for retrogressive intent could require us to preclear nonretrogressive but *nevertheless unconstitutional* voting plans," *id.* (emphasis in original), Judge Kessler concluded that the purpose inquiry does extend beyond a search for retrogressive intent.

That conclusion prompted Judge Kessler to review again the full range of the evidence demonstrating the real reasons why the Board adopted the Jury plan. She cited the Board's admission in a stipulation that it is "'obvious that a reasonably compact black-majority district could be drawn in Bossier City.'" *Id.* at 19a, quoting Stipulation ¶ 36. Stipulations also demonstrate that the Parish is racially polarized, *id.* at 19a, citing Stipulations ¶¶181-96, and "that no black person ha[d] been elected to the Bossier Parish School Board despite the fact that 20.1% of the population is black." *Id.* (footnote omitted), citing Stipulations ¶¶153, 5. Bossier Parish has a history, recounted by Judge Kessler, of official and voting-related discrimination including implementation by the State of Louisiana of procedures since the adoption of the Voting Rights Act that dilute minority voting strength. *Id.* at 20a-21a. Reviewing her previous assessment of the *Arlington Heights* factors on these facts, Judge Kessler reached the same conclusion:

> [T]he only conclusion that can be drawn from the evidence is that the Bossier School Board acted with discriminatory purpose. The adopted plan has a substantial negative impact on the black citizens of Bossier Parish. The sequence of events leading up to the decision show conclusively how the School Board excluded the black community from the redistricting process and rushed to adopt the Police Jury plan only when faced with an alternative plan that provided for black representation. The plan itself ignores and overrides a number of the School Board's normal paramount interests. And the statements of some School Board members certainly lend strength to the other evidence. . . . We cannot blind ourselves to the reality of the situation and the record before us.

App. 23a (citation omitted).

These appeals followed.

SUMMARY OF THE ARGUMENT

Section 5 of the Voting Rights Act calls for a declaratory judgment by the D.C. District Court preclearing a voting change where the covered jurisdiction can establish that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Section 5 echoes the words of the Fifteenth Amendment to the Constitution, which is the authority for Congress' enactment of the Voting Rights Act: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

This Court's cases reviewing the D.C. District Court's § 5 decisions establish core principles supporting the conclusion that the discriminatory "purpose" that bars preclearance of a voting change under § 5 is as broad as the discrimination prohibited by the Constitution:

- The "purpose" and "effect" inquiries both must be conducted in order to determine whether a proposed voting change passes muster under § 5.
- Even if the effect of a voting change is not retrogressive, the proposed change will not be precleared if it was motivated by a discriminatory, unconstitutional purpose.
- The test for determining whether a voting change was motivated by a discriminatory purpose is set forth in *Arlington Heights*.

Consistent with these principles, on remand the D.C. District Court should have applied the *Arlington Heights* factors to determine whether any racially discriminatory purpose to deny or abridge the right to vote motivated the redistricting plan submitted by the Bossier Parish School Board, without restricting its analysis to a search for "retrogressive intent." The D.C. District Court applied the *Arlington Heights* factors, but in its analysis of each *Arlington Heights* element it addressed only whether the evidence demonstrated "retrogressive intent." *See* App. 5a-8a. That limitation should not be read into the "purpose" analysis under § 5 because it has no foundation in the language or history of the statute, or in the § 5 decisions of this Court. Indeed, the Court has decided "purpose" cases that would have had a different result if its analysis had been limited to a search for purpose to retrogress. Moreover, limiting "purpose" to "retrogressive intent" would require the Attorney General and the D.C. District Court to preclear voting changes that violate the Constitution.

The D.C. District Court found that the Board's adoption of the Jury plan violated traditional districting principles and reflected a strong resolve to maintain 12-of-12 majority-white election districts. The Board sought through its redistricting to maintain a status quo characterized by non-compliance with its unsatisfied desegregation obligations. Under a proper application of the *Arlington Heights* analysis, these conclusions warrant reversal of the judgment below and denial of preclearance of Bossier's redistricting plan.

ARGUMENT

I. THE WORDS OF § 5, AND DECISIONS OF THIS COURT APPLYING THEM, MAKE CLEAR THAT THE "PURPOSE . . . OF DENYING OR ABRIDGING THE RIGHT TO VOTE ON ACCOUNT OF RACE OR COLOR" IS ANY UNCONSTITUTIONAL, RACIALLY DISCRIMINATORY PURPOSE.

The critical error of the D.C. District Court on remand was in its failure to recognize the many cases holding that

consideration of purpose is not limited to a search for retrogression. The analysis of "purpose" and "effect" are not the same, and both must be conducted in a declaratory judgment action seeking preclearance of a voting change: "By describing the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent." *City of Rome* v. *United States*, 446 U.S. 156, 172 (1980) (emphasis in original); *accord Lopez* v. *Monterey County*, 119 S. Ct. 693, 703 (1999) ("once a jurisdiction has been designated, [§ 5 of] the Act may guard against both discriminatory animus and the potentially harmful *effect* of neutral laws in that jurisdiction") (emphasis in original). Giving meaning to both "purpose" and "effect" implements the common-sense principle of statutory construction that sections of a statute generally should be read to give effect, if possible, to every clause. *Heckler* v. *Chaney*, 470 U.S. 821, 829 (1985) (finding distinct applications for two provisions of Administrative Procedure Act).[6]

This Court's cases applying the "purpose" prong of § 5 confirm that the purpose analysis is not the same as the effect test, and is not limited to retrogressive intent. The D.C. District Court's limitation of purpose to retrogressive intent would require preclearance of voting changes adopted with an unconstitutional discriminatory purpose.

6 *See also United States* v. *Albertini*, 472 U.S. 675, 682-83 (1985) (declining to read statute in way that renders one paragraph superfluous); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1883) and refusing to "emasculate an entire section" of Immigration and Nationality Act because it is the Court's "duty 'to give effect, if possible, to every clause and word of a statute'").

A. In Cases Evaluating Whether a Voting Change Satisfies § 5, This Court Has Examined the Full Scope of Discriminatory Purpose that Could Violate the Constitution.

This Court's § 5 decisions are based on the principle that "[t]he Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting." *South Carolina* v. *Katzenbach,* 383 U.S. 301, 315 (1966) (footnote omitted). In *Katzenbach*, the Court upheld the constitutionality of challenged sections of the Voting Rights Act, including § 5, as a valid exercise of Congress' authority under the Fifteenth Amendment. *Id.* at 327. Section 5 is an appropriate exercise of congressional power because a judicial determination to preclear a voting change "is a judicial determination that continued suspension of the new rule is unnecessary to vindicate rights guaranteed by the Fifteenth Amendment." *Id.* at 335. An analysis of whether a proposed voting change reflects a discriminatory purpose that would offend the Constitution is the touchstone for preclearance, since "[t]he Act suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment." *Id.* at 334.

A determination whether a proposed voting change "will not have the effect of denying or abridging the right to vote on account of race or color" calls for some prediction, as Congress' use of the future tense suggests, of how a voting change will operate in practice. Where redistricting is at issue, "a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5." *Beer* v. *United States*, 425 U.S. 130, 141 (1976). The Court accordingly concluded in *Beer* that a new apportionment plan for the New Orleans City Council did not have the "effect" of denying or abridging the right to vote on account of race or color, since the old apportionment plan had five councilmanic districts, in one of which blacks were a majority of the population and about

half of the registered voters. *Id.* at 135. Under the new post-1970-census plan, two districts had black population majorities and one district had a black voter majority. *Id.* at 135-36.

The key to the Court's analysis in *Beer* is the selection of the baseline for comparison with the new plan to determine whether the new plan will have the "effect" of denying or abridging the right to vote on account of race or color. The Court rejected the proposition that comparison of the "mathematical potential" of black majority districts and "predicted reality" under the new plan was appropriate. *Id.* at 137. Instead, the Court held that the "effect" prong is properly measured in the redistricting context by comparing the old and proposed new plans. Where the new plan is an "ameliorative new legislative apportionment," it does not have the "effect" of denying or abridging the right to vote. *Id.* at 141.

The Court carefully explained in its *Beer* holding that the analysis of "effect" did not change the principle that voting changes in violation of the Constitution should be denied preclearance under the "purpose" prong of § 5: "We conclude, therefore, that such an ameliorative new legislative apportionment cannot violate § 5 *unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.*" *Id.* at 141 (emphasis added). The Court explained why even a voting change with no retrogressive effect should be rejected if it manifests a discriminatory purpose: "It is possible that a legislative reapportionment could be a substantial improvement over its predecessor in terms of lessening racial discrimination, and yet nonetheless continue so to discriminate on the basis of race or color as to be unconstitutional." *Id.* at 142 n.14. Because facts demonstrating discriminatory purpose were not present in *Beer*, and the effect of the redistricting plan was not retrogressive, preclearance was granted.

Beer built on the Court's holding in *City of Richmond* v. *United States* 422 U.S. 358 (1975), in which the D.C. District Court had refused to preclear annexation of an area of

Chesterfield County to the City of Richmond, Virginia, on grounds that it was discriminatory both in its purpose and effect. *City of Richmond* v. *United States,* 376 F. Supp. 1344 (D.D.C. 1974), *vacated,* 422 U.S. 358 (1975). The D.C. District Court relied on evidence that the City initially proceeded without seeking the preclearance mandated by § 5, that no legitimate purpose for annexation had been shown, and that a proposed post-election ward system had not minimized to the extent possible the dilution of black voting strength that would be caused by annexing an area with a more substantial proportion of white voters than were present in the City before annexation. *City of Richmond,* 422 U.S. at 367.

This Court held in *City of Richmond* that an annexation has the effect of denying or abridging the right to vote on account of race or color only if the resulting election system fails to fairly reflect the voting strength of the black community as it exists after the annexation; the Court rejected the notion that an annexation should be rejected for preclearance because the black community will lose relative influence in the City. *Id.* at 370-72. Although the Court concluded that the effect of the annexation did not violate § 5, it went on to weigh whether it had a racially discriminatory purpose. *Id.* at 372. The Court remanded for further proceedings to consider possible legitimate, non-discriminatory reasons for the annexation, a remand that would have been meaningless if the absence of retrogression were dispositive. The Court made very clear in *City of Richmond* why the inquiry into purpose is required, even if a voting change is not retrogressive:

> We have held that an annexation reducing the relative political strength of the minority race in the enlarged city as compared with what it was before the annexation is not a statutory violation as long as the post-annexation electoral system fairly recognizes the minority's political potential. If this is so, it may be asked how it could be forbidden by § 5 to have the purpose and intent of achieving only what is a perfectly legal result under that section and why we need remand for further proceedings with respect to purpose alone. The answer is plain, and we need not labor it. An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. Section 5 forbids voting changes taken with the purpose of denying the vote on the grounds of race or color. Congress surely has the power to prevent such gross racial slurs, the only point of which is "to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights." *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347 (1960). Annexations animated by such a purpose have no credentials whatsoever; for "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end. . . ." *Western Union Telegraph Co.* v. *Foster,* 247 U.S. 105, 114 (1918); *Gomillion* v. *Lightfoot, supra,* at 347. An annexation proved to be of this kind and not proved to have a justifiable basis is forbidden by § 5, whatever its actual effect may have been or may be.

City of Richmond, 422 U.S. at 378-79. *Accord Miller* v. *Johnson*, 515 U.S. 900, 924 (1995) ("[a]meliorative changes, even if they fall short of what might be accomplished in terms of increasing minority representation, cannot be found to violate section 5 unless they so discriminate on the basis of race or color as to violate the Constitution") (citation omitted); *City of Port Arthur* v. *United States*, 459 U.S. 159, 168 (1982) (even an electoral scheme that "might otherwise be said to reflect the political strength of the minority community . . . would nevertheless be invalid if adopted for racially discriminatory purposes, *i.e.,* if [a] majority-vote requirement . . . had been imposed for the purpose of excluding blacks from any realistic opportunity to represent those districts or to exercise any influence on Council members elected to those positions. *City of Richmond* v. *United States*, 422 U.S., at 378-379").

This Court's affirmances after *Beer* and *City of Richmond* in *City of Pleasant Grove* v. *United States*, 479 U.S. 462 (1987) and *Busbee* v. *Smith*, 459 U.S. 1166 (1983), further establish that the discriminatory "purpose" prohibited by § 5 is not limited to retrogressive intent. The voting changes at issue in those cases were not retrogressive, but were nonetheless rejected because they were infected with discriminatory purpose.

Pleasant Grove, like *Richmond*, was an annexation case. The City of Pleasant Grove, Alabama, was "an all-white enclave in an otherwise racially mixed area of Alabama." *City of Pleasant Grove*, 479 U.S. at 465 (citation omitted). Pleasant Grove annexed two parcels of land, one of which was uninhabited and one of which was home to an extended white family. *Id.* at 465-66. While these annexations were in process, Pleasant Grove rejected the annexation of an adjacent black neighborhood and attempted to cut off that area's fire protection and paramedic services. *Id.* at 466. The D.C. District Court found no prohibited effect under § 5, because it could not be said that annexation of a white area that did not alter the racial composition of the voting population had a retrogressive "effect" as described in *Beer*. *City of Pleasant Grove* v. *United States*, 568 F. Supp. 1455, 1458-59 (D.D.C. 1983). The court found, however, that summary judgment preclearing the annexation could not be granted because of evidence of discriminatory purpose under the *Arlington Heights* analysis. The City's history of discriminatory policies and practices included ordinances "to restrict colored property," opposition to a "colored housing project," refusal to annex black residential areas, and maintenance of a segregated school system. *Id.* at 1456-57. After trial on the merits, the D.C. District Court denied preclearance based on the purpose prong alone. *City of Pleasant Grove* v. *United States*, 623 F. Supp. 782 (D.D.C. 1985), *aff'd*, 479 U.S. 462 (1987).

This Court affirmed, holding that the trial court's findings were not clearly erroneous that Pleasant Grove's economic justifications for treating adjacent white and black areas

differently were flawed pretexts developed after the fact. *Pleasant Grove*, 479 U.S. at 470. The Court specifically rejected Pleasant Grove's argument that "since the annexation could not possibly have caused an impermissible effect on black voting, it makes no sense to say that appellant had a discriminatory purpose." *Id.* at 471. A covered jurisdiction cannot "short-circuit a purpose inquiry under § 5 by arguing that the intended result was not impermissible under an objective effects inquiry." *Id.* at 471 n.11, citing *City of Richmond*, 422 U.S. at 378-79. Section 5 prohibits voting changes with discriminatory purposes beyond the dilution of existing minority voting strength, the Court concluded, because:

> One means of thwarting this process [of racial integration] is to provide for the growth of a monolithic white voting block, thereby effectively diluting the black vote in advance. This is just as impermissible a purpose as the dilution of present black voting strength. Cf. *City of Richmond, supra,* at 378. To hold otherwise would make appellant's extraordinary success in resisting integration thus far a shield for further resistance. Nothing could be further from the purposes of the Voting Rights Act.

City of Pleasant Grove, 479 U.S. at 472.

In *Busbee* v. *Smith*, 459 U.S. 1166, this Court summarily affirmed the D.C. District Court's conclusion that the Georgia congressional redistricting following the 1980 census could not be precleared under § 5 because it was tainted with discriminatory purpose, although "the voting plan does not have a discriminatory effect, as that term has been construed under the Voting Rights Act." *Busbee* v. *Smith*, 549 F. Supp. 494, 516 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983) (relying on *Beer*, 425 U.S. at 141). The D.C. District Court found no retrogressive effect, because there was one majority black congressional district in the Atlanta area in both the previous and proposed plans; that district gained a few percentage points in black population under the proposed plan. *Busbee*, 549 F. Supp. at 498, 516. The court's findings of discriminatory purpose, as in *Pleasant Grove*, were based on application of the *Arlington Heights* factors. *Id.* at 517. The court found overt racial statements (such as statements by the Chairman of the House Permanent Standing Committee on Legislative and Congressional Reapportionment opposing drawing of a "nigger district," 549 F. Supp. at 512); the conscious minimization of black voting strength in the Atlanta area (especially as contrasted with efforts to consolidate communities with consistent interests in other parts of the state, such as the mountains of North Georgia); a history of invidious discrimination; and the absence of legitimate non-racial reasons for the plan. *Id.* The process was questionable as well. By excluding black legislators "solely because of their race . . . from the final-decision making process," -- a legislative conference committee -- and entrusting those decisions to "whites who, for racially discriminatory reasons, opposed the creation of a district which might allow black voters an opportunity to elect a candidate of their choice," the process failed to function in a nondiscriminatory manner. *Id.* at 518.

The D.C. District Court stressed that it expressed no view as to what congressional redistricting plan the Georgia legislature should adopt, and that its "decision does not require the State of Georgia to maximize minority voting strength in the Atlanta area." *Id.* at 518. The court concluded: "The State is free to draw the districts pursuant to whatever criteria it deems appropriate so long as the effect is not racially discriminatory and so long as racially discriminatory purpose is absent from the process." *Id.*

On appeal, the State of Georgia appellants specifically sought this Court's review of whether a voting plan that lacks the effect of diminishing black voting strength can be held to have a discriminatory purpose.[7] This Court summarily affirmed. *Busbee*, 459 U.S. 1166.

B. Until This Case, the D.C. District Court Had Not Limited the Analysis of "Purpose" Under § 5 to Intent to Retrogress.

The D.C. District Court in numerous § 5 cases since *Beer*-- in addition to *Busbee* and *City of Pleasant Grove*-- has evaluated whether a proposed voting change has a retrogressive effect; regardless of that result, the court also has considered whether the proposed change is the product of a discriminatory purpose, with *Arlington Heights* and *Washington* v. *Davis* setting the framework for the analysis. For example, where a voting change -- the creation of new judgeships -- was found not to have a retrogressive effect, the D.C. District Court has granted summary judgment to a covered jurisdiction on the effect prong of the analysis, but has permitted the United States to conduct discovery into purpose in order to develop evidence regarding the *Arlington Heights* factors. *Arizona* v. *Reno*, 887 F. Supp. 318 (D.D.C. 1995), *appeal dismissed,* 516 U.S. 1155 (1996). *Accord Georgia* v. *Reno*, 881 F. Supp. 7, 11, 14 (D.D.C.), *aff'd sub. nom. Brooks* v. *Georgia*, 516 U.S. 1021 (1995) (finding neither effect nor purpose in creation of new judgeships); *Texas* v. *United States*, 866 F. Supp. 20, 27-28 (D.D.C. 1994) (summary judgment denied on both purpose and effect prongs because of disputed facts concerning change from elected to appointed governing board).[8]

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[7] The questions presented in *Busbee* were:

A. Whether a Congressional reapportionment plan that has no discriminatory effect, that enhances black voting strength, and that provides blacks with equal access to the political process can be deemed to violate Section 5 of the Voting Rights Act.

B. Whether a Congressional reapportionment plan that does not have the purpose of diminishing the existing level of black voting strength can be deemed to have the purpose of denying or abridging the right to vote on account of race within the meaning of Section 5 of the Voting Rights Act.

Jurisdictional Statement at i, *Busbee* v. *Smith,* 459 U.S. 1166.

[8] *Accord County Council of Sumter County* v. *United States*, 596 F. Supp. 35 (D.D.C. 1984) (change to at-large election system for county council had both the purpose and effect of denying or

Since *Beer*, the D.C. District Court has measured the effect prong by analyzing retrogression, but, until the decision below, the D.C. District Court had never, so far as we are able to discover, restricted a § 5 "purpose" analysis to a search for retrogressive intent. *See New York* v. *United States*, 874 F. Supp. 394, 399-400 (D.D.C. 1994) (creation of new judgeships precleared; "preclearance under section 5 represents nothing more than an official determination that a proposed voting change will not diminish the position of minority voters and that it was not undertaken for a discriminatory purpose"); *Texas* v. *United States*, 785 F. Supp. 201, 203-04 (D.D.C. 1992) ("Plaintiff's burden in a suit for declaratory judgment under section 5 is twofold: First, it must demonstrate that the redistricting plan does not lead to a retrogression in the position of racial minorities; second, the State must demonstrate that the plan is free of a discriminatory purpose. Even if a change is 'ameliorative,' it may violate Section 5 if it 'so discriminates on the basis of race or color as to violate the Constitution'" (quoting *Beer*, 425 U.S. at 141)).

C. The "Retrogression" Limitation on the "Purpose" Analysis Imposed by the Court Below Is Inconsistent with the Intent of Congress.

The court below ruled that "[t]he language of *Beer* [defining retrogression in terms of a comparison of an old election plan to the proposed plan] is just as applicable to the 'purpose' inquiry as to the 'effect' inquiry." App. 4a. To be sure, this Court explained in *Beer* 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 with respect to their effective exercise of the electoral franchise." *Beer,* 425 U.S. at 141; *see City of Lockhart* v. *United States,* 460 U.S. 125, 133

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abridging right to vote based on race); *Hale County* v. *United States*, 496 F. Supp. 1206, 1218 (D.D.C. 1980) (change to at-large elections for the Hale County, Alabama county commission had both the purpose and effect of denying or abridging the right to vote on account of race; *Arlington Heights* factors applied).

(1983) ("Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect"; voting change evaluated only for retrogressive effect, since purpose inquiry had been bifurcated by D.C. District Court) (footnote omitted). *Beer* and *Lockhart* both addressed only the "effect" prong of § 5, so these broad statements can most reasonably be understood to describe the particular analysis required to determine whether a voting change has the prohibited "effect."

More fundamentally, the Court's statement in *Beer* could not fairly be read to suggest that in adopting § 5 Congress intended only to halt new stratagems that would actually diminish meaningful participation in elections by black voters as compared to some earlier level. Voter registration and election participation by black voters in some parts of this country in 1965 was almost non-existent. This Court in *Katzenbach* summarized the evidence that was before the Congress when it first enacted the Voting Rights Act:

> According to estimates by the Attorney General during hearings on the Act, registration of voting-age Negroes in Alabama rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964. In each instance, registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration.

Katzenbach, 383 U.S. at 313.

Congress made clear through its adoption of multiple means of combating discrimination in voting that it knew the job would be massive. Congress authorized new kinds of litigation to secure voting rights, 42 U.S.C. §§ 1973, 1973a; suspended the use of tests and devices in determining eligibility to vote in certain states and political subdivisions where voter registration and participation were very low, 42

U.S.C. § 1973b; and imposed the preclearance requirement in § 5 for new voting qualifications or prerequisites.

There is no evidence that Congress thought that the enactment of these tools through passage of the Voting Rights Act would create such a level baseline of nondiscriminatory voting opportunity that Congress intended in § 5 only to bar deterioration in the opportunity of blacks to vote. The perpetuation of discrimination through new devices with the purpose of keeping black citizens from participating as voters, even if the new devices were merely as effective as the old ones, would insure that the promise of the Fifteenth Amendment could not become a reality. It is in this context that this Court, in its voting rights decision closest to the date of the passage of the Act, observed that numerous discriminatory requirements and stratagems to bar black citizens from voting had been outlawed by federal courts, but "some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests *designed to prolong the existing disparity* between white and Negro registration." *Katzenbach,* 383 U.S. at 314 (footnote omitted) (emphasis added). *Accord Rogers* v. *Lodge*, 458 U.S. 613, 625 (1982) (affirming denial of § 5 preclearance of voting change due to purposeful discrimination evident in part through "practices which, though neutral on their face, serve to maintain the status quo"). The Voting Rights Act was designed to combat a discriminatory status quo as well as to avoid future retrogression.

Congress has not limited the overall reach of § 5 to retrogressive voting changes as the circumstances of black and other minority voters have improved. In the reauthorization of the Voting Rights Act in 1982, the Committee on the Judiciary of the House of Representatives found "that there has been much progress in increasing registration and voting rates for minorities since the passage of the Voting Rights Act of 1965," but that "these gains are fragile. The registration figures for minorities remain substantially lower than those for white voters." H.R. Rep.

No. 97-227 at 7 (1981). In light of that evidence, and evidence of continued discrimination in registration and voting through a variety of mechanisms, the Judiciary Committee recommended and the Congress approved the extension of § 5, the "speedy review mechanism to correct existing Fifteenth Amendment violations and to prevent future voting discrimination," with no change in the language of § 5 that would limit "purpose" to purpose to retrogress. *Id.* at 13.

D. Limiting the Purpose Inquiry Under § 5 to Retrogressive Intent Would Require Preclearance of Voting Changes that Violate the Constitution.

This Court and the Congress have linked § 5 preclearance to the goal of barring voting changes that discriminate on the basis of race or color. It takes no imagination to identify voting changes that should be denied preclearance under § 5 because of their discriminatory purpose, but that would not be halted if the search for purpose is limited to "purpose to retrogress." This Court has held that certain voting practices or requirements violate the Fourteenth or Fifteenth Amendment although they do not present "retrogression" in anything like the numerical sense addressed in *Beer.* For example, if a covered jurisdiction were to seek a declaratory judgment preclearing a rule requiring candidates to be identified by race on the ballot, that change should be denied preclearance. Such a requirement violates the equal protection clause of the Fourteenth Amendment. *See Anderson* v. *Martin*, 375 U.S. 399, 402 (1964). Yet that type of voting change is not readily analyzed under a retrogression test. Fact issues could be extensive in litigation over whether listing of race on the ballot would have an impact on voting patterns. Regardless of whether such a requirement would gain or lose votes for candidates by race, it should be denied preclearance because it represents government's endorsement of consideration of race in the casting of ballots. *Id.*

If a covered jurisdiction proposed preclearance of a rule requiring the disenfranchisement of misdemeanants convicted of crimes involving moral turpitude, for example, preclearance should be denied if the jurisdiction does not demonstrate the absence of a racially invidious intent to limit the eligibility of black voters. *See Hunter* v. *Underwood,* 471 U.S. 222 (1985). Fact and opinion witnesses no doubt would clash in their predictions of whether such a change would diminish voter participation by race. Whether or not it is possible to prove that such a device actually would diminish the practical ability of black citizens to elect candidates of their choice, such a rule should be denied preclearance if it is intended to disqualify black voters.

If a covered jurisdiction relocated polling places from centers that are familiar and readily accessible to black voters to areas inconvenient and perceived as hostile to the black community, that voting change is subject to the preclearance requirement of § 5. *See Perkins* v. *Matthews,* 400 U.S. 379, 387-88 (1971). If the jurisdiction brought the change in polling places to the D.C. District Court for preclearance, it should be denied regardless of factual conflicts about whether black voters would actually be deterred. If white leaders testified that they changed the polling places just out of hatred, to force black voters to come to them in order to participate, it should matter not at all whether a single black voter would refrain from voting at the new polling place. Such discrimination should not be dignified with preclearance since it is unsupported by any rational, nondiscriminatory basis.

Denial of preclearance to a redistricting plan infected with a discriminatory purpose that is not retrogressive is important in jurisdictions like Bossier Parish, in which the existing plan against which retrogression is measured has no majority black election districts and only white candidates had ever been elected to the School Board at the time of the adoption of the proposed plan. In such jurisdictions, voting changes imposing any conceivable means of limiting black voter participation could pass muster under the "effect" prong of § 5, as long as they merely hold even the white dominance of the electoral system. If the "purpose" analysis also is limited to "intent to retrogress," the D.C. District Court would have

to preclear even the most flagrantly racist efforts to hold down a low baseline of meaningful black voter participation.

In short, a covered jurisdiction's "extraordinary success in resisting integration" should not become a "shield for further resistance," *City of Pleasant Grove,* 479 U.S. at 472, that requires preclearance of voting changes that seek only to maintain the status quo for the racially invidious reason that the status quo is very favorable to white voters. In redistricting cases, such a jurisdiction could pass a plan designed to maintain the status quo, accompanied even with the most overt and outlandishly racist statements, and still gain preclearance of its plan.

Congress sought in the Voting Rights Act to break the status quo, which was characterized by discrimination that kept meaningful black voting participation at very low levels. Racially motivated efforts to maintain that status quo are as invidious and violative of the Constitution as are efforts to retrogress.

II. APPLYING THE *ARLINGTON HEIGHTS* STANDARD TO THE UNCONTESTED FACTS BELOW, THIS COURT SHOULD REVERSE BECAUSE THE BOARD'S PROPOSED DISTRICTING PLAN WAS MOTIVATED BY A PURPOSE TO DISCRIMINATE ON THE BASIS OF RACE.

The facts in this case, to a remarkable degree, have been stipulated by the parties. App. 145a-232a. The summary of the facts herein relies principally on the stipulations and on the findings of the majority below, and applies the *Arlington Heights* factors, as the D.C. District Court was directed to do on remand. *Id.* at 49a.

Because the Board was starting from a baseline of no majority black election districts, retrogression is not the salient factor in the inquiry. The Board's adoption of the Jury plan was surrounded with racial tension, marked by irregular procedures and deviations from traditional districting principles, and what the D.C. District Court found to be a "tenacious determination to maintain the status quo."

Id. at 7a. The evidence establishes that preclearance of the plan should be denied because the Board has not carried its burden of demonstrating the absence of a purpose to deny or abridge the right to vote on account of race or color.

A. Effect of the Plan.

In 1992, in response to the need to redistrict for one-person-one-vote purposes following the 1990 census, the Board adopted a 12 single-member-district reapportionment plan with 12 majority-white districts. The Board's plan during the 1980s also had no majority black districts. By 1990, however, Bossier Parish, Louisiana had a population that was 20.1% black, *id.* at 145a-146a (¶ 5), and a voting age population that was 17.6% black. *Id.* at 146a (¶ 6). Black students also comprise 29% of the enrollment in the Parish's public schools. *Id.* at 81a n.2; *id.* at 191a (¶ 142). No black candidate, however, had ever been elected to the 12-member School Board when the plan was adopted in 1992. *Id.* at 145a (¶ 4).

As the parties stipulated below, voting patterns in Bossier Parish are affected by racial preferences. *Id.* at 201a-207a (¶¶ 181-196). The foreseeable impact of the Board's adoption of a redistricting plan with all majority-white districts, therefore, was to ensure that when black voters and white voters prefer different candidates, white voters' preferences will prevail, *see id.* at 118a-120a, perpetuating the status quo.

The record furthermore showed that the creation of 12 majority-white election districts was not dictated by adherence to traditional redistricting principles. The parties stipulated and the court below found that the black population of the Parish is concentrated in two areas. More than 50% of the black residents live in Bossier City, App. 79a; *id.* at 146a-147a (¶ 10); another significant percentage of black residents is concentrated in communities in the northern rural portion of the Parish. *Id.* The School Board stipulated that it was "obvious that a reasonably compact black-majority district could be drawn within Bossier City," *id.* at 154a-155a (¶ 36), and that the outlines of a second such

district in the northern part of the parish were "readily discernible." *Id.* at 194a (¶ 148). By fragmenting or "fracturing" predominantly black residential areas, however, the Board avoided drawing any majority-black districts. *See id.* at 190a-192a (¶¶ 137-138, 142). On remand, Bossier conceded that "[t]he impact of [its] plan does fall more heavily on blacks than on whites," and, more specifically, that its election plan "did dilute black voting strength." Brief In Behalf of Plaintiff on Remand at 12, 21.

The Board's plan not only has a harsh impact on black voters; it departs substantively from its earlier districting plans and ignores factors that it had previously considered paramount. App. 128a-129a. For example, the Police Jury plan pitted School Board incumbents against one another in two districts. *Id.* at 85a. Likewise, as the court below recognized, the Police Jury plan distributed schools unevenly, with some election districts containing no schools and other districts containing several. *Id.* at 85a; *see also id.* at 151a, 191a (¶¶ 24, 141).

The plan also contained one district that included "almost half of the geographic area in the Parish," *id.* at 129a, several others that were not compact according to the Board's own cartographer, *id.* at 191a (¶ 139), and one district that was not contiguous. *Id.* at 6a; J.A. 221-238 (Cooper). The plan also violated a state law requirement that no election district deviate from the one-person, one-vote ideal by more than 5%. *Id.* ¶ 31; La. R.S. 17:71.3 E(2)(a) and E(3)(a) (J.A. 374-379).

The Board stipulated to facts showing that its plan does "not respect communities of interest in Bossier Parish." App. 129a (citing Stipulations ¶¶ 135-37). What the plan did accomplish was splitting black communities and retaining all white-majority election districts. The panel majority below found that those departures from the Board's traditional districting criteria "establish[ ] rather clearly that the board did not welcome improvement in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at 7a.

B. Historical Background of the Adoption of the Plan.

The adverse effects of racially polarized voting on the ability of black voters to elect candidates of their choice are exacerbated in Bossier Parish by the effects of past discrimination. App. 210a-218a (¶¶ 213-243). It was undisputed below that the depressed socioeconomic and educational levels of black citizens of Bossier Parish make it hard for them "to obtain necessary electoral information, organize, raise funds, campaign, register, and turn out to vote; [these factors] in turn cause a depressed level of political participation." *Id.* at 207a-210a (¶¶ 197-202, 206-213).

The dark history of voting discrimination in Bossier Parish was undisputed below. *Id.* at 210a-216a (¶¶ 214-232). The parties stipulated that "vestiges of discrimination persist which affect the rights of black persons to register, to vote or otherwise participate in the democratic process." *Id.* at 210a (¶ 214). After the passage of the Thirteenth Amendment, significant numbers of black Louisianans registered to vote. *Id.* at 210 (¶ 215). Beginning in 1896, however, Louisiana enacted laws intended to reduce black voting; black registration decreased by 90% within a few years. App. 121a; *id.* at 210a-211a (¶ 215-219). In 1921, an amendment to the State Constitution required persons seeking to register to vote to "'give a reasonable interpretation'" of a constitutional provision. *Id.* at 122a, 211a-212a (¶ 221). That amendment, which disenfranchised most black citizens, was not invalidated until 1965. *Louisiana* v. *United States*, 380 U.S. 145 (1965). After an all-white Louisiana Democratic primary was invalidated, the party then adopted an anti-single-shot rule and a majority-rule requirement for party office. App. 122a; *id.* at 212a (¶ 222); *Major* v. *Treen*, 574 F. Supp. 325, 340-41 (E.D. La. 1983).

The School Board's history of discrimination in education against black citizens demonstrates its motive for wanting to continue 12 majority-white districts. The schools in Bossier Parish are segregated by race. App. 123a-124a (four elementary schools have predominantly black enrollments); *id.* at 217a-218a (¶¶ 240-242). While the District's total school enrollment is only 29% black, Bossier and Butler Elementary Schools, whose attendance areas are adjacent to one another in Bossier City, were 77% and 74% black in 1994. U.S. Exh. 84YY; U.S. Exh. 84KK. Likewise, both schools in Board Member Thomas Myrick's district in the northern portion of the Parish have become more than 75% black, J.A. 247-248, a telling contrast to the Board's claim periodically in this litigation that black residential population is not sufficiently concentrated to permit it to draw majority-black voting districts. So long as black voters had no voice, and their children are largely isolated in predominantly black schools, the Board could safely ignore their concerns. For decades this has been the case.

The Board maintained *de jure* segregation in its schools long after *Brown* v. *Board of Education*, 347 U.S. 483 (1954). App. 122a; *id.* at 216a (¶ 235). While the Board has been a defendant for more than 30 years in the school desegregation case of *Lemon* v. *Bossier Parish School Board*, C.A. No. 10,687 (W.D. La.), it still has not fulfilled its constitutional obligations to remedy segregation and establish a unitary school district. App. 122a-124a. *See Lemon* v. *Bossier Parish Sch. Bd.*, 240 F. Supp. 709 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967).

The parties stipulated that the "Board for years sought to limit or evade its desegregation obligations." App. 216a (¶ 237). The Board used techniques such as assigning "black children of Barksdale Air Force Base personnel to black schools without a right, to transfer to white schools [on grounds] that they were 'federal children' and not within the 'jurisdiction' of the school district." *Id.* at 216a-217a (¶ 237). Judge Wisdom rejected the Board's "new and bizarre excuse for rationalizing [its] denial of the constitutional right of Negro school children to equal educational opportunities as white children." App. 217a (¶ 237) quoting *Bossier Parish School Bd.* v. *Lemon*, 370 F.2d 847, 849 (5th Cir. 1967). The federal courts rejected the Board's "freedom of choice" and other student assignment plans, including one that proposed to assign students to schools in Plain Dealing on the basis of their scores on the California Achievement Test. App. 217a (¶ 238). *See Hall* v. *St. Helena Parish Sch. Bd.*, 417 F.2d 801 (5th Cir. 1969); *Lemon* v. *Bossier Parish Sch. Bd.*, 421 F.2d 121 (5th Cir. 1970); *Lemon* v. *Bossier Parish Sch. Bd.*, 444 F.2d 1400 (5th Cir. 1971).

While the school desegregation consent decree requires the Board to follow *Singleton* standards and assign teachers to schools by race in approximately their proportion in the District as a whole, the Board has assigned black teachers disproportionately to predominantly black schools, such as Bossier and Butler Elementary Schools, contributing to their increasing racial identifiability. *See Singleton* v. *Jackson Mun. Separate Sch. Dist.*, 419 F.2d 1211, 1218 (5th Cir. 1969), *cert. denied sub nom. West Feliciana Parish Sch. Bd.* v. *Carter*, 396 U.S. 1032 (1970); App. 217a-218a (¶¶ 239-240); J.A. 281-287 (Lewis) (admitting *deliberate* assignment of more than 70% black faculty to predominantly-black Butler Elementary School, despite the fact that district-wide black faculty had declined to less than 10%).

As the court below recognized when it examined this evidence on remand, "the intent [this history] proves . . . is a tenacious determination to maintain the status quo." App. 7a. Black citizens have tried without success to alter these policies and practices. Bossier is required by federal court order to maintain a biracial committee to "recommend to the School Board ways to attain and maintain a unitary system and to improve education in the parish." *Id.* at 182a (¶ 111). The Board admitted that, for decades, it simply ignored this requirement altogether. *Id.* at 182a-183a (¶ 112). In 1993, the Board established a committee; but when black members made policy suggestions, the Board unilaterally disbanded the committee. App. 184a (¶ 116); *id.* at 124a. As Board members admitted, they did not want this committee getting into "policy" questions. *Id.* Even in the face of a federal court mandate to listen to the concerns of the black community, Bossier refused to do so. As a result, the black

citizens of Bossier Parish are effectively cut off from any opportunity to have a voice in the operation of their public schools. Adopting a redistricting plan with 12 majority-white districts continued this pattern of exclusion. This history, as the majority found on remand, "provides powerful support for the proposition that . . . Bossier . . . resisted adopting a redistricting plan that would have created majority black districts." *Id.* at 7a.

C. Specific Sequence of Events Leading to the Decision to Adopt the Jury Plan.

The redistricting process began in May 1991, when the Board decided to develop its own plan rather than adopt the one previously accepted by the Police Jury in response to its own need to redistrict following the 1990 census. Throughout the 1980s the Jury and the Board had different election districts, but both had 12 single-member districts that were majority white. *Id.* at 79a-81a; 151a, 171a (¶¶ 22, 80-81).

Given the fact that the next School Board election was not scheduled until November 1994, there was no need for hasty Board action. *Id.* at 81a-82a. The Board hired Gary Joiner, the cartographer who had drawn the Jury plan. *Id.* He was hired to perform 200-250 hours of work, far more time than would be needed simply to recreate the Jury plan. *Id.* at 173a (¶¶ 86-87).

On July 29, 1991, the Police Jury plan was precleared by the Justice Department. *Id.* at 80a. The parties stipulated, however, that members of the Police Jury were "specifically aware that a contiguous black-majority district could be drawn both in northern Bossier Parish and in Bossier City." *Id.* at 154a, 160a-161a, 162a (¶¶ 36, 52-53, 57); the parties stipulated that it was "obvious that a reasonably compact black-majority district could be drawn within Bossier City." *Id.* at 154a-155a (¶ 36). Alternate configurations for a contiguous majority-black district in the northern part of the Parish also could be created. *Id.* at 194a (¶ 148). However, the Police Jury deliberately misled the public, *id.* at 161a-162a (¶ 54), the only black police juror, *id.* at 159a (¶ 47), and the Attorney General, *id.* at 165a-166a (¶¶ 65-66), by claiming that drawing any majority-black district was impossible. Despite these misrepresentations, some black community groups opposed the plan and specifically asked that their letter expressing concerns about it be included in the Police Jury's § 5 submission. *Id.* at 147a, 165a-166a (¶¶ 11, 65-66). The letter was not submitted.

School Board member Thomas Myrick participated in private meetings with Mr. Joiner and white police jurors during this time. App. 82a; *id.* at 159a-160a, 172a-173a (¶¶ 48, 85).[9] After these meetings, Mr. Myrick, who lives in an area that the parties stipulated "would likely be included in any majority-black district to be drawn in the northern part of Bossier Parish," *id.* at 160a (¶ 48), recommended that the Board adopt the Police Jury plan. *Id.* at 174a (¶ 90). "On September 5, 1991, however, the Board decided *not* to adopt the Jury plan, largely because it would pit incumbents against each other." *Id.* at 125a (emphasis added). "Over the course of the next year, Board members considered a number of redistricting options." *Id.* "Mr. Joiner met privately with Board members and demonstrated different possibilities to them on his computer." *Id.* at 125a; 176a (¶ 96). These meetings were not open to the public, nor were there any recorded minutes or published notices of the meetings. *Id.* at 126a; 176a (¶ 96).

While the School Board was meeting and planning in private, the black community was trying, unsuccessfully, to participate in public. *Id.* at 126a. In March of 1992, George Price, on behalf of a coalition of black community groups, wrote to the Board asking to participate in its redistricting process. App. 82a; *id.* at 175a (¶ 93). Neither the Board nor the Superintendent responded to this request. *Id.* In August of 1992, Mr. Price sent another letter asking specifically to be involved in every aspect of the redistricting process. *Id.* (¶ 94).

Frustrated by the Board's unresponsiveness, Mr. Price contacted the NAACP Redistricting Project in Baltimore, Maryland. *Id.* at 177a (¶ 98). The Project was able to develop a partial plan for Mr. Price to discuss with the School Board. That illustrative plan consisted of two majority-black districts. *Id.* The plan did not show the other 10 districts that would make up the Parish. *Id.* When Mr. Price gave this information to a school district official, he was told that it would not even be considered because it only showed two districts. *Id.* (¶ 99). Mr. Price went back to the NAACP, and a complete 12-district illustrative plan was drawn up. *Id.* The parties stipulated that this plan demonstrated that "two contiguous districts with a black voting age population majority can be drawn within Bossier Parish for the Bossier Parish School Board." *Id.* at 192a (¶ 143).

On September 3, 1992, when Mr. Price appeared on behalf of the black community at a Board meeting and presented a new plan showing all 12 districts, including 10 majority-white and two majority-black districts, the Board dismissed it summarily, claiming incorrectly that it could not even consider any plan that split precinct lines. *Id.* at 177a-179a (¶¶ 100-102). Until that time, however, the School Board had been actively considering alternatives to the Police Jury plan, almost all of which would have split precincts. *See* App. 107a; *id.* at 151a, 174a (¶¶ 23, 89).

At the Board's next meeting, on September 17, 1992, Mr. Price again presented the NAACP's illustrative plan. *Id.* at 179a-180a (¶ 106). Instead of discussing the plan with Mr. Joiner, or asking him to further analyze the possibility of drawing black-majority districts without splitting precincts (the Board's purported reason for rejecting the plan, *but see id.* at 151a (¶ 23)), the Board responded by immediately passing a motion of intent to adopt the Jury plan. *Id.* at 127a.

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9 Despite the Board's stipulations about Mr. Myrick's meetings with Mr. Joiner and the Police Jurors, App. 159a-160a, 172a-173a (¶¶ 48, 85), and Mr. Joiner's live testimony about such meetings, J.A. 260-266 (Joiner), Mr. Myrick denied on the witness stand that any of them took place. J.A. 247-258 (Myrick). The D.C. District Court rejected Mr. Myrick's testimony. App. 82a.

Around this time, a narrow majority of the Board appointed Jerome Blunt as the first black person ever to serve on the Board. *Id.* at. 84a. Mr. Blunt was appointed to a six-month term representing an 11% black district. *Id.* at 84a-85a. He was sworn in at the September 17, 1992, meeting but was defeated by a white candidate in the special election six months later. *Id.* at 85a. As Judge Kessler observed:

> Certainly, Board members knew that adopting the Police Jury plan would ignite controversy in the black community. And on the very night of that decision, the School Board appointed a black to fill a seat that they knew he would be unable to hold, hoping to quell the political furor over adoption of the Police Jury plan. [*Id.* at 133a-134a n.9.]

On September 24, 1992, an overflow crowd attended the state-mandated public hearing on the redistricting plan. *Id.* at 85a. Fifteen people spoke against the Board's proposed plan, most of whom objected because it would dilute minority voting strength. App. 85a; *id.* at 180a-181a (¶ 108). Not a single person spoke in favor of the plan. *Id.* At this hearing, Mr. Price also presented the Board with a petition signed by more than 500 Bossier Parish residents, asking the Board to consider an alternative redistricting plan. *Id.* at 85a. This was the largest petition presented to the Board on any subject in years. *Id.* at 180a (¶ 108).

Despite the one-sided input from Bossier citizens, and despite the fact that elections still were more than two years away, the Board voted, at its very next meeting on October 1, 1992, to adopt the Jury plan. While Jerome Blunt encouraged the other Board members to explore the issues being raised by the black community, the Board refused. J.A. 125-130 (Blunt); *id.* at 80-83 (U.S. Exh. 36). Mr. Blunt abstained from the vote in protest, *id*; but the white majority present voted unanimously for the Jury plan. App. 85a. Neither at this hearing nor at its other meetings did the Board members explain on the record their reasons for their support of the Police Jury plan. *See* J.A. 60-69, 72-83 (U.S. Exhs. 23-36). Thomas Myrick, in the one verbatim statement concerning redistricting recorded in two years of Board minutes, told Mr. Blunt that this was not a question of "black and white" but of "majority rule." J.A. 80-83 (U.S. Exh. 36 at 67). The Board's minutes reflect an unexplained retreat to the Police Jury plan that it had rejected a year earlier. J.A. 72-77, 80-83 (U.S. Exhs. 32, 34, 36). Thus, no perceived strengths of the Police Jury plan are discussed or documented anywhere on the public record of the Board's action. As with the meetings of September 3 and September 17, 1992, the minutes of this meeting reflect virtually no substantive consideration of the Police Jury plan.

The D.C. District Court concluded that "[w]hen . . . the redistricting process began to cause agitation within the black community, . . . the Police Jury plan became, as Board member Myrick described it, 'expedient.'" App. 106a. The Jury plan only became "expedient" when the Board was publicly confronted with an illustration that alternatives to 12 white-majority districts were possible. Faced with the growing frustration of the black community at being excluded from educational policy decisions and from the electoral process, the only way for the Board to ensure a plan with all majority-white districts was to adopt the Jury plan quickly, despite its other drawbacks. App. 128a; *id.* at 85a, 106a.

D. Board Departures from Normal Practice.

The sequence of events described in section C. above illustrates numerous departures from normal practice in the Board's consideration and adoption of the Jury plan. Procedurally, the Board rushed to a decision, with no upcoming election, upon being confronted with a demonstration that majority black election districts could be drawn. The Board departed from the conduct expected of elected officials when it adopted the Jury plan in defiance of the contrary views of every speaker at the public hearing and in the face of the largest petition it had received in recent years on any issue. The Board hid its real deliberations from the public, made no official record of its reasoning, and ignored the efforts of leaders in the black community to be included.

On the substance of the plan as well, the Board reached a result contrary to its own districting goals and traditional principles that would be expected to govern the development of an election plan for a school board. *See* page 29, *supra.* The D.C. District Court majority below evaluated these departures from traditional districting practice as part of its analysis of the "effect" of the plan. App. 6a. The D.C. District Court summarized its earlier findings as "tending to establish that the board departed from its normal practices," and found that this "establishes rather clearly that the board did not welcome improvement in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at. 7a.

E. Contemporary Statements of Participants.

The motivation that School Board member Thomas Myrick described on the stand as "expediency," he and other Board members spoke about more candidly in private. Mr. Myrick, who lives in one of the areas that could accommodate a black-majority district and that contains two schools -- both of which have student enrollments that are more than 75% black -- told black leaders that he would not "let [them] take his seat away from him." *Id.* at 83a n.4. School Board member Henry Burns told a black acquaintance that "while he personally favors having black representation on the board, other school board members oppose the idea." *Id.* at 83a n.4. The School Board offered no evidence denying or explaining this statement. School Board member Barry Musgrove told a prominent black leader that "while he sympathized with the concerns of the black community, there was nothing more he could do . . . on this issue because the Board was 'hostile' toward the idea of a black-majority district." *Id.*

In subsequent efforts to justify the unexplained reversal of its initial decision and its refusal to consider alternatives from the black community, the Board later offered the Attorney

General and the District Court a series of pretextual explanations, including several which the majority itself found "clearly were not real reasons." *Id.* at 106a n.15. For example, the Board argued that it adopted the Police Jury plan (on October 1, 1992) to comply with *Shaw* v. *Reno,* 509 U.S. 630 (1993) (decided June 28, 1993) even though *Shaw* was decided nine months after the Board adopted its plan. *Id.*

The Board also reiterated its claim that it could not adopt a plan with fewer than 12 majority-white districts because any such plan would require precinct-splitting, which it erroneously claimed violates state law. App. 135a. The majority found, however, that when "the School Board began the redistricting process, it likely anticipated the necessity of splitting some precincts." *Id.* at 108a. Indeed, the majority found and the parties stipulated that the Board was aware when it entered the redistricting process that if it did not adopt the same plan as the Police Jury, it would need to have new precincts established. App. 108a, *id.* at 174a (¶ 89). Yet the Board hired Gary Joiner to perform 200 to 250 hours of work, far more than would be necessary simply to recreate the Jury Plan. *Id.* at 173a (¶¶ 86-87).

But it was only *after* the black community presented its alternative plan that the School Board proffered the "no precinct-splitting" rationale. Furthermore, while the Board itself may not split precincts, police juries have the authority to establish and modify precinct lines, and many do so when requested by a school board. *Id.* at 148-152a, 164a (¶¶ 13-25, 60-61). Here, as the majority found, the Board never made such a request. *Id.* at 84a.

Bossier's final later-proffered justification for adopting the Police Jury plan was that it guaranteed preclearance; that is, the Attorney General would approve the Board's plan because it was identical to the Jury plan which already had been precleared. *Id.* at 137a. However, "guaranteed preclearance" was not the Board's objective; if it had been, the Board would not have waited until October 1, 1992 -- almost 14 months after the Jury plan was precleared -- to adopt it. *Id.* Moreover, adopting a plan with one or more majority-black districts certainly would not have made preclearance *less* likely. To the contrary, given the Board's history and the Attorney General's position, the Board could not reasonably have believed that a plan that would both honor traditional districting principles and improve the opportunity of black citizens to participate in the political process would have had *less* chance of preclearance than the Police Jury plan.

CONCLUSION

For all of these reasons, this Court should reverse the judgment below.

Respectfully submitted,

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