No. 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

BRIEF OF APPELLEE

Filed April 2, 1999

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STATEMENT OF THE CASE

While appellants paint the disturbing picture of a monolithic white majority imposing a redistricting plan which permanently disenfranchises black voters, this picture bears little resemblance to the facts or the actual electoral results in Bossier Parish. In adopting the plan at issue here, the Bossier Parish School Board (the "Board") selected the only plan presented to it that conformed to state law, since private appellants' maximization plan (the "NAACP plan") concededly constituted a facial violation of state law, as well as numerous other neutral redistricting criteria. J.A. 376-77 (La. Rev. Stat. § 17:71.3(E)(1)).[1] The plan that was chosen had already been precleared by the Department of Justice just one year before. J.A. 86. In operation, the Board's plan has resulted in the election of *three* black members to the Board.

Bossier Parish is governed by a Police Jury, the 12 members of which are elected from single-member districts for consecutive four-year terms. Although no electoral district of the Police Jury has ever had a majority of black voters, Jerome Darby, a black resident of Bossier Parish, had been elected three times (the last time without opposition) by 1992 to represent a majority-white district as a member of the Police Jury. App. 79a. Another black representative preceded Mr. Darby in that district. J.A. 516-17.

On April 30, 1991, all members of the Police Jury, including Jerome Darby, its black member, approved a redistricting plan for the Police Jury containing two districts with substantial black populations, but no district with a black majority. Specifically, District Four was 45.2% black, and District Seven was 43.9% black. App. 164a ¶ 59. The plan was submitted to the Justice Department on May 28, 1991,

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[1] In this brief, citations are to the Appendix ("App.") filed with the jurisdictional statements in this appeal ("U.S. J.S."), ("A-I J.S."), to the Joint Appendix ("J.A."), to the United States and appellant-intervenors' briefs ("U.S. Br."), ("A-I Br.") and Oppositions to Motion to Dismiss ("U.S. Opp."), ("A-I Opp."), and to the trial transcript in the court below, No. CR 94-445 (D.D.C.) ("Tr.").

and on July 29, 1991, the Attorney General precleared it. Contrary to the misleading representations of appellants, the concerns of the black community were conveyed to the Justice Department prior to preclearance. *See* Hawkins Testimony at 6 ¶ 11.

Given that the Board and the Police Jury had shared the same district boundaries until 1980, the Board approached the Police Jury to formulate a common redistricting plan. App. 81a. The Police Jury rejected this overture. App. 107a. State law expressly prohibited the Board from changing, splitting, or consolidating the precincts established by the Police Jury for the Police Jury's 1991 redistricting plan. J.A. 376-77 ("The boundaries of any election district for a new apportionment plan from which members of a Board are elected shall contain whole precincts established by the parish governing authority under R.S. 18:532 or 532.1."). Thus, it would have been a facial violation of state law for the Board to adopt the NAACP plan or, for that matter, any plan that created a black majority district, because it is stipulated that: "It is impossible to draw, on a precinct level, a black-majority district in Bossier Parish without cutting or splitting existing precinct lines." App. 195a ¶ 152. The failure to abide by this mandatory state law requirement would have rendered the Board's plan "null and void." J.A. 377.

Appellants assert that the *Police Jury* could have split precinct lines so that the NAACP plan might be adopted. This is demonstrably false. Under state law, the Board was required to redistrict *prior to December 31, 1992*. J.A. 88-89; J.A. 406-07 (La. Rev. Stat. § 17:71.5) (state law required redistricting to be complete on December 31 of the second year following the year in which the President received the census report, which under 13 U.S.C. § 141(b), was 1990). And under state law, the Police Jury could only make changes to its existing precincts *after December 31, 1992*. J.A. 389 (La. Rev. Stat. § 18:532.1(H)(1)). Thus, it was *impossible* for *either* the Board *or* the Police Jury to sanction any precinct splits prior to the mandatory deadline for the Board to adopt a redistricting plan. This requirement under state law that Boards and Police Juries use the *same* precincts as "building blocks" for their districts is, of course, entirely rational.[2] Splitting precincts by divergent district lines engenders substantial costs and creates significant voter confusion. App. 107a; *see Bush v. Vera*, 517 U.S. 952, 974-75 (1996). Thus, even assuming (as the district court did to give appellants every benefit of the doubt) that the Police Jury somehow could have retroactively created 65 additional precincts to render the NAACP plan lawful, neither it nor the Board had any rational reason to do so.

Moreover, the conclusion that state law prohibited the adoption of any plan creating a black-majority district was uniformly acknowledged by the parties at the time the Board was considering which plan to adopt. Specifically, the Board was correctly advised both by its cartographer and the Parish's District Attorney during the September 3, 1992 meeting where the NAACP plan was presented that its massive number of precinct splits violated state law. App. 83a-84a; App. 179a ¶ 102. Likewise, the NAACP itself acknowledged this state law prohibition in 1992, and merely contended that the Supremacy Clause of the United States Constitution required the Board to ignore state law. J.A. 195-96.

The NAACP plan included two majority-black districts, the maximum possible number of such districts and roughly proportional (2/12) to the Parish's black voting age population of 17.6%. App. 83a. The plan was drawn by William Cooper for the exclusive purpose of "creat[ing] two majority black districts." J.A. 371. The NAACP plan subordinates traditional redistricting principles, because it is not compact,[3]

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[2] Although the Police Jury and Board used different *district* lines for the first time in the 1980s, they had *never* split precinct lines, and the unrebutted evidence is that none of the redistricting plans submitted for the Board's consideration by its cartographer created such splits. J.A. 250-51; Tr. (Myrick) at 118.

[3] A stipulation suggests that it was obvious, apparently to some unnamed members of the Police Jury in 1991, that one "reasonably compact" majority-black district could be established within Bossier City. App. 154a ¶ 36. This *subjective* assessment of some of the Police Jurors

splits all three town boundaries in the Parish and dramatically departs from the Police Jury districts. J.A. 458, 464, 509-10. In direct contravention of Louisiana law, the NAACP plan splits 46 precincts, 65 times. J.A. 471-96; App. 108a (some of the precincts suffering more than a single split; thus requiring that they become three or more new precincts). Of these, 17 precincts would have had less than 20 people in them. J.A. 471-96.

On September 3, 1992, the Board responded to NAACP concerns by granting its request that a black person, Jerome Blunt, be appointed to the vacant seat on the Board. This reflects "the Board's demonstrable willingness to *ensure* black representation on the Board. . . . " App. 112a (emphasis in original). At the same September 1992 meeting, the Board also passed a motion of intention to adopt the Police Jury's redistricting plan. The jury plan offered "the twin attractions of guaranteed preclearance and easy implementation (because no precinct lines would need [to be] redraw[n])." App. 106a. By maintaining the integrity of the Police Jury's precincts, the Board not only complied with Louisiana law, but also avoided the costs and disruptions that would have accompanied the NAACP plan. Furthermore, the Board understandably assumed that the Department of Justice would automatically preclear a plan that was *identical* to one the Department found to be entirely free of any discriminatory purpose or effect just one year before. With two districts well over 40% black, the plan also offered the substantial promise that black voters would be able to elect a candidate of their choice.

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has no reference to the *objective* feasibility of creating a "reasonably compact" majority-black district in Bossier City. Furthermore, the parties introduced substantial evidence, including a federal court finding, demonstrating it was not feasible to create a "reasonably compact" majority-black district in Bossier City, which is why it has never been drawn. *See, e.g.*, J.A. 471-96; J.A. 48-49, 51-52. Thus, any contrary stipulation should be disregarded. *PPX Enter., Inc. v. Audiofidelity, Inc.*, 746 F.2d 120, 123 (2d Cir. 1984); *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1369 (5th Cir. 1983).

On January 4, 1993, the Board submitted its plan to the Department of Justice for preclearance. Despite the identity between the Police Jury and Board plans, the Department denied preclearance citing "new information, particularly the 1991 [P]olice [J]ury elections held under the 1991 redistricting plan and the 1992 redistricting process for the [S]chool [B]oard." App. 235a. Yet, the only noteworthy event of the 1991 Police Jury elections was that Jerome Darby was once again re-elected, this time without opposition, to represent a majority-white district.

Two elections have been held under the redistricting plan adopted by the Board. In 1994, two black candidates were elected to the Board. Julian Darby was elected from district 10, which is only 26.7% black. J.A. 508. Vassie Richardson, who is also black, was elected from district 4, which is 45% black. J.A. 508. In the interim period between elections, the Board appointed Kenneth Wiggins, an African-American, to fill a vacancy in district 8 on the Board. In the 1998 elections, Mr. Wiggins was re-elected over a white opponent in a district that is only 21.1% black. J.A. 508; Official Elections Results attached to Motion to Dismiss or Affirm at A4. Also, both Julian Darby and Vassie Richardson were again elected, this time without opposition. *Id.* at A8.[4] As a result of these

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[4] It is well established that a court may take judicial notice of any fact that is not subject to reasonable dispute and is capable of accurate and ready determination. *See, e.g.*, Fed. R. Evid. 201; *De Castro v. Board of Comm'rs*, 322 U.S. 451, 463 (1944) (appellate court had "properly take[n] judicial notice" of election results); *Brown v. Piper*, 91 U.S. 37, 42 (1875) ("In this country, such [judicial] notice is taken of . . . the election and resignations of senators. . . . "). Accordingly, courts routinely take judicial notice of post-trial elections and changes in representation in voting rights and other cases. *See, e.g., Winpisinger v. Watson*, 628 F.2d 133, 138 n.28 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 827 & n.3 (9th Cir. 1986); *Southern Christian Leadership Conference v. Sessions*, 56 F.3d 1281, 1288 n.13 (11th Cir. 1995), *cert. denied*, 516 U.S. 1045 (1996); *Westwego Citizens for Better Gov't v. City of Westwego*, 906 F.2d 1042, 1045 (5th Cir. 1990). Finally, appellee did not have an opportunity to present the 1998 election results to

elections in which three blacks have been elected to the Board, blacks now enjoy extra-proportional representation of *25%* (3/12) on the Board in a parish with only *20.1%* black population and *17.6%* black voting age population. App. 79a. The election of three black members thus completely refutes appellants' repeated claim that the clearly "foreseeable effect" of the plan was to prevent any black candidates from being elected and that the white population will not vote for black candidates in Bossier Parish. *See, e.g.*, U.S. Br. 17; A-I Br. 28.[5]

The Board subsequently sought a declaratory judgment from the three-judge District of Columbia court preclearing its proposed redistricting plan. The district court has now concluded on two separate occasions that the plan is free of discriminatory purpose or effect.[6] *See Reno v. Bossier Parish School Board*, App. 29a-77a ("*Bossier I*").

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the district court as the election was held *after* the district court entered its decision on remand.

[5] *There is no competent evidence of racial bloc voting in any local Bossier Parish elections.* Specifically, the Justice Department's expert was concededly unable to find *any* racial bloc voting in *any* election for *any* Bossier Parish office, pursuant to either the "extreme case analysis [or] bivariate ecological regression analysis" endorsed by the *Gingles* plurality opinion. *Thornburg v. Gingles*, 478 U.S. 30, 52-53 (1986); J.A. 167-74. The *only* election where racial bloc voting was found was one "exogenous" *state judicial* race (held not just in Bossier Parish), which obviously reflects different voting patterns than those for *local representative* office. J.A. 165-67. *See, e.g., Magnolia Bar Ass'n v. Lee*, 994 F.2d 1143, 1149 (5th Cir.), *cert. denied*, 510 U.S. 994 (1993). Even in this single race, the "racial polarization" led to the black candidate receiving 35.7% of the vote in a parish with a 17.6% black voting age population. J.A. 518.

[6] The district court faithfully applied the *Arlington Heights* analysis in both its initial decision and on remand. *See, e.g.*, App. 5a-6a, 102a-105a (evidence pertaining to dilutive impact of plan); App. 6a-7a, 112a (history of discrimination); App. 7a, 108a, 111a-112a (sequence of events leading up to decision); App. 7a, 85a (substantive departures from factors usually considered important); App. 7a-8a, 83a, 109a-111a (alleged contemporaneous statements by Board members).

SUMMARY OF ARGUMENT

This appeal is nonjusticiable because no legally cognizable interest can be harmed by a redistricting plan that will not be used again. Further, the district court did not decide that § 5 reaches only voting changes adopted for a retrogressive purpose. Indeed, the court below unequivocally declined to resolve this issue because it found that the facts demonstrating a "nonretrogressive, but nonetheless discriminatory, purpose . . . are not present here." App. 3a-4a (internal quotations omitted).

In any event, Section 5's plain language demonstrates that the purpose inquiry under that statute relates exclusively to retrogressive intent. Section 5 requires a covered jurisdiction to demonstrate that any voting 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. . . . " Since a change has the "effect" of "denying or abridging the right to vote" only if it causes retrogresssion, it has the "purpose" of "abridging" only if it is intended to cause retrogression. No principle of statutory construction or common usage would suggest that a solitary phrase modifying two objects in the same sentence could have a different meaning as to each noun.

This does not mean, as appellants believe, that § 5 fails to proscribe a purpose to dilute minority voting strength. It simply means that dilution is measured by a different benchmark than in a constitutional challenge, *i.e.*, the existing redistricting system rather than a hypothetical alternative plan. Thus, just as in *Bossier I*, appellants impermissibly attempt to "shift the focus of § 5 from nonretrogression to vote dilution, and to change the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan." App. 37a-38a. The only difference here is that appellants seek to make the relevant § 5 question whether the *purpose* of a voting change is "vote dilution" relative to a "hypothetical, undiluted plan," rather than relative to the existing plan. Thus, in appellants' hands, § 5 is not a mechanism for protecting minority voters from stratagems designed to

weaken their electoral position, as Congress intended, but instead becomes a means for the Justice Department to impose its hypothetical minority "maximization" plan. Nor is there any basis for concluding that § 5 prohibits the "purpose" proscribed by the Constitution because there is no congruence between the Constitution and § 5, and because, even if the statute prohibits only retrogressive vote dilution, it still goes farther than the Fifteenth Amendment that it was intended to enforce.

Finally, there is also no basis for denying preclearance in a § 5 proceeding to a voting change that satisfies the non-retrogression purpose standard of *Section 5* on the grounds that it violates the *Constitution*. The *dicta* in *Beer v. United States*, 425 U.S. 130 (1976), particularly as subsequently construed, only confirms the obvious point that a reapportionment plan which satisfies § 5 may be enjoined in a *subsequent* constitutional challenge. This result is also the only one consistent with the express language of § 5. Alternatively, even if constitutional questions are within the province of § 5 courts, it is clear and conceded that the *United States* bears the burden of proving a constitutional violation.

ARGUMENT

I. THIS APPEAL IS NONJUSTICIABLE.

Appellants seek to have this Court opine on the legal validity of a redistricting plan that will never again be used in any election. Article III prevents such an advisory opinion as appellants lack standing and the case is now moot. It has long been recognized that the "case-or-controversy requirement [of Article III] subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Accordingly, "[t]he standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). Likewise, "Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case; it is not enough that

there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing." *Burke v. Barnes*, 479 U.S. 361, 363 (1987). Therefore, Article III requires a case to be dismissed as moot "if an event occurs [pending review] that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

There is no case or controversy here because, regardless of whether the Court affirms or remands the lower court's declaratory judgment preclearing the Board's 1992 redistricting plan, that plan will not be used again. One month after appellants filed their jurisdictional statements in this Court, the last scheduled election ever to be held under the Board's plan was conducted, and three black candidates were elected. The Board's plan will not be utilized again because, under Louisiana law, the next Board election will not take place until 2002. J.A. 373 (La. Rev. Stat. § 17:52). By that time, new federal decennial census data will be available, and thus the Board will be required under state law and this Court's one-person one-vote precedents to adopt a new apportionment plan. J.A. 406 (La. Rev. Stat. § 17:71.5). Accordingly, the current plan is already a dead letter, and if there is a remand, the Board will move to dismiss its complaint. In the terms of § 5, the voting "practice" at issue here will never again be "enforced" by any official in Bossier Parish. 42 U.S.C. § 1973c. *See Watkins v. Mabus*, 502 U.S. 954, 954-55 (1991); *Hall v. Beals*, 396 U.S. 45 (1969). Accordingly, as the parties "invoking federal jurisdiction," appellants have failed to carry their burden of establishing that they have a "legally protected interest." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). It is clear that appellants will not suffer "actual or imminent" injury under a plan that will never again be utilized, and thus they have no standing to invoke this Court's jurisdiction. *Id.* at 560 (internal quotations omitted).[7]

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[7] For the same reason, this case is now moot and there is no relief that the Court can grant which will redress appellants' purported injuries. *See,*

Consequently, just as it is now too late for appellants to challenge the Board's redistricting plan under § 2 in district court, it is too late for them to bring their appeal.

Appellants speculate that a Board member might die or resign in the next two and a half years, necessitating the use of the challenged plan to fill that vacancy. Appellants have offered *no* evidence that a vacancy on the Board is "certainly impending" or even likely. *Lujan*, 504 U.S. at 564 n.2 (internal quotations omitted). When a case involves uncertain or "contingent future events that may not occur as anticipated, or indeed may not occur at all," Article III's imminence requirement is not satisfied. *Lewis*, 494 U.S. at 480 (internal quotations omitted). Likewise, appellants' suggestion that the Board will violate its state law duty to engage in timely redistricting after the 2000 census is "unadorned speculation." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976). In any event, they are flatly wrong in suggesting that, if no new redistricting plan is developed, then the grossly malapportioned 1990s plan could, much less will, be used for the 2002 elections. U.S. Opp. 1; J.A. 406.

Unable to identify any legally cognizable interest in *this* "case or controversy," appellants claim that Article III is satisfied because a different court in a different case "*might*" grant different relief they might be "interested" in, *i.e.*, invalidating the 1998 elections and holding new elections under some unidentified "valid plan." U.S. Opp. 2; A-I Opp. 3. Appellants hypothesize a future lawsuit in a local Section 5 court which would somehow invalidate the 1998 elections. Although it is true that a local district court, as a corollary power, may sometimes order new elections where the voting procedure used in that election had *not been precleared*, *see, e.g., Berry v. Doles*, 438 U.S. 190, 192 (1978), it plainly has no power or jurisdiction to invalidate election results where,

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e.g., Burke, 479 U.S. at 363; *Oil, Chem. and Atomic Workers v. Missouri*, 361 U.S. 363, 371 (1960); *Northeastern Fla. Chapter of Associated Gen. Contractors v. Jacksonville*, 508 U.S. 656, 669-70 (1993) (O'Connor, J., dissenting).

as here, the new plan had been duly *precleared*. If appellants are suggesting that the local district court could invalidate elections held under an *erroneously* precleared plan, that is impossible as it would require the local district court to decide whether the plan was correctly or erroneously precleared, which it plainly may not do.[8]

Appellants finally argue that the 1990s redistricting plan somehow injures them because, absent reversal, it will serve as the retrogression "benchmark" for the 2000 redistricting plan. But appellants cannot rationally explain why this matters to them because, if the 1990s plan is somehow eliminated, then the *1980s plan* will be the benchmark.[9] *Abrams v. Johnson*, 521 U.S. 74, 95-97 (1997). All agree that there is no difference between the 1980s and 1990s Board plan since they contain materially the same racial percentages and neither has a black majority district; so appellants have no cognizable interest in substituting one retrogression benchmark for an *identical* one. App. 88a. In any event, the only legally cognizable interest appellants have in the 1990s plan is whether it injures any group's "right to *vote*." 42 U.S.C. § 1973c. Since the 1990s redistricting plan does not potentially injure *that* interest, the Court cannot engage in hypothetical adjudication of a non-controversy because the *collateral* consequences of that decision are of hypothetical interest in a *future* proceeding.[10] *Spencer v. Kemna*, 118 S. Ct. 978, 984-87 (1998).

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[8] This Court has repeatedly emphasized that local Section 5 district courts are "strictly limited" to addressing "[t]he only issue" over which they have jurisdiction, *i.e.*, "whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement." *Allen v. State Bd. of Elections*, 393 U.S. 544, 558-59 (1969); *accord Lopez v. Monterey County*, 519 U.S. 9, 21 (1996); *Perkins v. Matthews*, 400 U.S. 379, 383 (1971).

[9] There will be no new plan to serve as a benchmark because, as noted, neither the court below nor the local "*Allen*" court could order new elections or a new plan.

[10] If mootness is found, vacatur under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), is not appropriate in this unique context.

II. THE DISTRICT COURT DID NOT RULE THAT SECTION 5 REACHES ONLY RETROGRESSIVE INTENT.

In its first *Bossier* opinion, this Court expressly left "open for another day the question whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent." App. 45a. As appellants sometimes admit, the district court expressly "*declined*" to resolve this legal question. U.S. J.S. 12 (emphasis added). It did so because it was unnecessary to its decision since it had made the *factual* finding that there was no evidence " 'that the Board enacted the [redistricting] plan with some non-retrogressive, but nevertheless discriminatory, "purpose." ' " App. 3a n.2 (quoting *Bossier I*, App. 46a).

First, the lower court established that it was fully aware that the Court had "le[ft] for another day the question" whether § 5 prohibits actions taken with non-retrogressive

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Munsingwear provides that, in certain circumstances, the judgment in a moot case should be vacated when this "extraordinary remedy" is necessary to relieve the parties of the collateral consequences of the judgment below *and* the losing party was unable to obtain appellate review. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994). Because no collateral consequences will flow from the decision of the lower court, the basic rationale of the *Munsingwear* doctrine has no application here. In addition to the fact that the 1990s plan will never again be used, the lower court's judgment will have no preclusive effect in future cases. Collateral estoppel cannot be offensively employed against the United States, and the decision of the district court in this case is not binding precedent for other courts. *United States v. Mendoza*, 464 U.S. 154, 160-61 (1984); *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1176 (D.C. Cir. 1987), *aff'd sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989). Furthermore, appellants could have preserved the justiciability of the case by seeking a stay pending appeal, but failed to do so. *Cf. Lopez v. Monterey County*, 516 U.S. 1104 (1996). It is their "burden, as the party seeking relief . . . to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp*, 513 U.S. at 26. It is appellants' own fault that they are unable to obtain appellate review because they slept on their rights. *Id.* at 24-26.

discriminatory intent. App. 3a. It then "decline[d]" to "answer the question the Court left for another day" because "the *record will not support* a conclusion that extends beyond the presence or absence of retrogressive intent." App. 3a (emphasis added). While the court stated that it could "imagine a set of facts that would establish a 'non-retrogressive, but nevertheless discriminatory, purpose[,]' " it found that "those imagined facts are *not present here*." App. 3a-4a (emphasis added).

Thus, the district court plainly stated that resolution of the question whether § 5 prohibits a discriminatory, but non-retrogressive, purpose was unnecessary to decide this case because the facts supporting any such a discriminatory purpose were "not present here." It did not hold, as appellants maintain, that if such discriminatory purpose were "present here," the Board would nonetheless be entitled to pre-clearance under § 5 because that statute proscribes only "retrogressive" intent.

The rest of the court's analysis further confirms that it was analyzing the question of "non-retrogressive, but nevertheless discriminatory, 'purpose.' " First, the court plainly stated that, as it had already ruled in *Bossier I*, the Board had the "difficult[ ] . . . burden to prove the *absence* of *discriminatory* intent." App. 5a (first emphasis in original, second emphasis added). Next, the court analyzed the Board's reasons for adopting the Police Jury plan *in preference to the NAACP Plan*, not whether the Board had adopted the Police Jury plan for the purpose of putting minorities in a worse position than they enjoyed under the Board's 1980s redistricting plan. Thus, it squarely held that "the Board's resort to the pre-cleared Jury plan (which it mistakenly thought would easily be pre-cleared) and its focus on the fact that the Jury plan would not require precinct splitting, while the NAACP plan would, were 'legitimate, nondiscriminatory, motives.' " App. 5a. Again, then, the court was holding that the Board's "motives" for adopting the Jury plan in preference to the NAACP plan were "legitimate [and] non-discriminatory" because the Police Jury plan better furthered the race-neutral

policy of preserving precincts than the NAACP plan. Comparing the relative virtues of the Police Jury plan and the maximizing alternative proposed by the NAACP makes no sense if the court were analyzing only whether the Board's purpose was to cause retrogression compared to the *existing* plan. *See supra* pp. 7-8. Rather, this is classic "discriminatory purpose" analysis used in all *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), and employment cases – *i.e.*, whether the minority applicant (or integrative alternative) was rejected for racial reasons or for "legitimate, non-discriminatory reasons." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 n.8 (1978).

Similarly, when the court analyzed the impact of the proposed plan under *Arlington Heights* and this Court's remand, the district court did not look only at "whether the Jury plan bears more heavily on blacks than the pre-existing plan." App. 5a. Rather, after disposing of private appellants' argument that the Jury plan had such a retrogressive effect, the court analyzed the *other* "allegedly dilutive impacts of the Jury plan" that appellant had offered "in support of its *discriminatory* intent argument." App. 6a (emphasis added). Of course, as the district court was well aware, this Court in *Bossier I* had used the term "dilutive impact[ ]" to denote a situation where a jurisdiction chooses a plan that "dilut[es]" black votes as compared to a "reasonable alternative voting . . . benchmark" and in contradistinction to a plan which had a "retrogressive 'effect.' " App. 37a. *See also* App. 10a-11a (Silberman, J., concurring). Thus, as instructed by this Court on remand, the district court was analyzing whether the choice of the allegedly "dilutive" alternative reflected a "discriminatory intent."

In this regard, the court found that the Board's plan could have reflected an impermissible purpose if it had "deliberately attempted to break up voting blocks before they could be established or otherwise to divide and conquer the black vote" by, for example, "fail[ing] to respect communities of interest and cutting across attendance boundaries." App. 6a. In this case, however, it found "an absence of such evidence in this record" and thus the discriminatory purpose assertion

to be "too theoretical, and too attenuated, to be probative." App. 6a. Examining such evidence of "fragmentation" is standard analysis in determining whether a jurisdiction was acting with discriminatory purpose. *See Johnson v. De Grandy*, 512 U.S. 997, 1015 (1994). Finally, the district court's opinion clearly stated that it was adhering to the same "method of analysis" as its "earlier" decision. App. 5a. The earlier decision plainly focused exclusively on whether the NAACP plan was rejected for impermissible racial reasons, but did not focus on retrogressive intent. App. 105a-114a.[11]

To be sure, the majority opinion adverts on several occasions to the Board's "retrogressive intent." App. 6a-7a. In context, however, this should not be read as indicating that the district court somehow had made *sub silentio* the legal determination that *only* retrogressive intent violates the purpose prong of § 5. Rather, these statements must be read in conjunction with the district court's threshold decision that there was no *evidence* of "non-retrogressive, but nonetheless discriminatory, purpose," App. 3a, and its incorporation of its prior findings that the Board's "change was undertaken without a discriminatory purpose." App. 105a. Given the absence of such discriminatory purpose evidence, the court below quite naturally sometimes phrased its conclusions in terms of retrogressive intent. Since, in this opinion, the court had

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[11] The concurring opinion emphasized in this regard that the court was *again* analyzing whether " 'the Board has failed to provide an adequate reason explaining why it declined to act on a proposal featuring two majority-black districts.' " App. 9a (quoting App. 113a.). It noted that the court had both considered "dilutive impact" and applied the *Arlington Heights* framework in its first opinion – contrary to appellants' representation to this Court in the first *Bossier* appeal. App. 10a. The concurrence then affirmatively stated that it was engaging in such analysis again, while adding only that it was "now" dealing expressly with the Board's compliance with the outstanding school desegregation decree. App. 11a. Thus, the concurrence further confirms that the district court's opinion was simply fleshing out its first discriminatory purpose analysis, and was not substituting some new legal standard that focused exclusively on retrogressive intent.

already found that rejection of the NAACP plan was done pursuant to "legitimate, non-discriminatory motives," it did not need to reiterate that finding when it was dealing with each of the separate pieces of the *Arlington Heights* evidence. This is particularly true since, when considering each of the *Arlington Heights* factors, it incorporated by reference the court's earlier decision – in which it plainly did find that the plan was not motivated by discriminatory intent. *See* App. 6a-7a. Finally, as noted, the court often stated its conclusions in terms of "discriminatory" purpose, not "retrogressive" purpose. App. 5a; App. 6a (appellants had failed "to rebut the non-discriminatory reasons advanced by the Board" for adopting its plan).[12]

In short, even if the court had not expressly refused to resolve the legal question of § 5's scope, it is quite implausible that it would have resolved the legal issue that this Court made clear was important and unsettled without discussing in any way the reasons for adopting this position. In any event, if the district court did conclude that § 5 reaches only retrogressive intent, this is a correct interpretation of that statute.

III. SECTION 5 REACHES ONLY RETROGRESSIVE INTENT.

As in *Bossier I*, appellants advance an interpretation of § 5 that studiously and necessarily avoids the statute's plain language and this Court's consistent interpretation of that language, as well as the statute's unique structure and inherently "limited substantive goal." *Bush*, 517 U.S. at 982.

First, appellants' contention that § 5 prohibits a non-retrogressive purpose is irreconcilable with the statute's plain language. Section 5 provides in pertinent part that a covered jurisdiction is entitled to a declaratory judgment preclearing a proposed voting change where the practice at issue "does not

[12] Similarly, while the court did say that the Board's action reflected a "determination to maintain the status quo," it is unclear whether the *status quo* referred to was the previously enacted Police Jury plan or the Board's own 1980s redistricting plan. App. 7a.

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. Under the statute, then, preclearance will be denied if a proposed change has either (1) the "purpose . . . of denying or abridging the right to vote on account of race or color" or (2) "the effect of denying or abridging the right to vote on account of race or color." It is firmly established and undisputed that a proposed change has the "effect of denying or abridging the right to vote" only if it has retrogressive effect on minority voters.[13] Thus, a jurisdiction has the "purpose . . . of denying or abridging the right to vote" only if its purpose is to retrogress.

A contrary conclusion can only be reached if one assumes that the phrase "denying or abridging the right to vote on account of race or color" has a different meaning as it relates to "purpose" and "effect." Such an interpretation would be absurd, as no principle of common usage, grammar, or logic would suggest a solitary phrase modifying two objects in the same sentence could have a different meaning as to each noun. Not surprisingly, appellants have not cited a single case where this Court has endorsed such a counterintuitive and anomalous method of construing a statute. If the phrase "abridging or denying the right to vote" refers to retrogression as it relates to the term "effect," it inexorably follows that it must have the same meaning as applies to the term "purpose."[14]

[13] *See, e.g., Bossier I*, App. 46a ("[W]e have adhered to the view that the only 'effect' that violates § 5 is a retrogressive one."); *Beer*, 425 U.S. at 141; *City of Lockhart v. United States*, 460 U.S. 125, 134 (1983); *Shaw v. Reno*, 509 U.S. 630, 654 (1993) ("*Shaw I*"); *Holder v. Hall*, 512 U.S. 874, 883 (1994); *Miller v. Johnson*, 515 U.S. 900, 926 (1995) (" '[T]he 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. . . . ' ") (quoting *Beer*, 425 U.S. at 141); *Bush*, 517 U.S. at 982-83; *Abrams*, 521 U.S. at 97.

[14] *See, e.g., BankAmerica Corp. v. United States*, 462 U.S. 122, 129 (1983) ("[W]e reject as unreasonable the contention that Congress intended the phrase 'other than' to mean one thing when applied to 'banks' and

Appellants simply ignore this dispositive point and make no attempt to explain how "denying or abridging" could possibly dramatically shift meanings within the same sentence. In light of this implicit concession that there is no rational construction of § 5's actual language which reaches a purpose other than retrogression (at least absent reversal of the Court's precedent on retrogressive effect – which no one seeks), the Court's inquiry on this issue is complete. For, "[w]hen the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.' " *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Reuben v. United States*, 449 U.S. 424, 430 (1981)). *See also Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (internal quotations omitted).[15]

Thus, appellants are reduced to arguing that, in contexts *other than Section 5*, § 5's language could encompass a discriminatory, albeit nonretrogressive, purpose. Specifically, appellants' central theme is that under the Constitution and § 2, a jurisdiction may dilute minority voting strength without putting minorities in a worse position than they previously enjoyed and thus a jurisdiction may have a purpose to dilute minority voting strength without intending to place minorities in a worse position. U.S. Br. 22-23; A-I Br. 26. Therefore, the

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another thing as applied to 'common carriers,' where the phrase 'other than' modifies both words in the same clause."); *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

[15] While the Voting Rights Act's legislative history is irrelevant for this reason, we nevertheless note that there is nothing in that history suggesting the absurd English usage appellants desire. So far as we can discern or appellants argue, nothing in the 1982 legislative history suggests that the phrase, "denying or abridging" changes meaning when that phrase modifies "purpose" or otherwise indicates that there was some fundamental disconnect between "purpose" and "effect" in § 5. To the contrary, the legislative history treats purpose and effect interchangeably, in the sense that it uses the same adjective to describe their scope. *See, e.g.*, S. Rep. No. 417, 97th Cong., 2d Sess. 18 (1982).

argument goes, a jurisdiction may have the "purpose . . . of abridging the right to vote" under § 5 even if there is no intent to increase discrimination against minorities.

Even if this assertion were not contrary to the plain language of § 5, the attempt to analogize vote dilution under the Constitution to § 5 dilution ignores the fact that, as the Court has often noted, dilution is necessarily a *relative* concept.[16] Accordingly, the dilution concepts developed in the context of constitutional and § 2 lawsuits to beneficially *alter existing* electoral practices cannot be transferred to the inherently different context of § 5, which is intended to "freez[e] election procedures" against harmful *changes* to that system. *Miller v. Johnson*, 515 U.S. 900, 926 (1995) (internal quotations omitted). In the context of § 2 or constitutional challenges to alter existing systems, dilution necessarily requires a plaintiff to "postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice." *Bossier I*, App. 37a. *See also Holder v. Hall*, 512 U.S. 874, 881 (1994) (plurality); *id.* at 950-51 (Blackmun, J., dissenting). The argument is that the plan dilutes minority voting strength compared to the hypothesized alternative: a single-member districting plan compared to an at-large scheme or a potential single-member redistricting plan compared to the one adopted. *See Holder*, 512 U.S. at 880; *Thornburg v. Gingles*, 478 U.S. 30, 88 (1986); *Rogers v. Lodge*, 458 U.S. 613, 616 (1982). If the existing plan was deliberately conceived or maintained in order to achieve that dilutive result, it is unconstitutional, but may violate § 2 even if that dilutive harm is unintended. *City of Mobile v. Bolden*, 446 U.S. 55, 62-63 (1980); *Gingles*, 478 U.S. at 44.

The benchmark for measuring whether a minority group's voting strength is relatively diluted under § 5 is entirely

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[16] *See, e.g., Bossier I*, App. 37a. ("[T]he very concept of vote dilution implies – and, indeed, necessitates – the existence of an 'undiluted' practice against which the fact of dilution may be measured."); *Holder*, 512 U.S. at 880 (" 'The phrase vote dilution itself suggests a norm with respect to which the fact of dilution may be ascertained.' ") (quoting *Gingles*, 478 U.S. at 88) (O'Connor, J., concurring in judgment).

different, and necessarily so. Dilutive effect is not assessed by a comparison of the proposed change to a hypothetical "reasonable alternative," but by a comparison to the existing system now being changed in the manner that triggers § 5. Because § 5 deals only with *changes* to parts of an existing voting system, it is inherently not a weapon that can be used effectively to alter or *improve* an unchanged *status quo*. Deliberate maintenance of an at-large system for purely discriminatory reasons does not offend § 5 and cannot be remedied by that statute. *Beer*, 425 U.S. at 128. Moreover, the only § 5 *remedy* is to *deny* the proposed change and thus *restore* the *status quo ante*. Thus, § 5 is a purely *reactive* statute that is designed to "freez[e] election procedures" against *erosion*; *improvements* to the discriminatory *status quo* must occur through § 2 or constitutional challenges to that system. "Because § 5 focuses on 'free[zing] election procedures,' a plan has an impermissible 'effect' under § 5 only if it 'would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.' " *Bossier I*, App. 35a (quoting *Beer*, 425 U.S. at 141). Thus, 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." *Beer*, 425 U.S. at 141 (emphasis added). Rather, a voting change "deni[es] or abridg[es] the right to vote" under § 5 only if it dilutes minorities' group voting strength compared to their " 'theretofore enjoyed voting rights.' " *City of Richmond v. United States*, 422 U.S. 358, 378 (1975) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960)). This is an entirely different dilution inquiry than that required under § 2, even though the statutory language of the two sections is virtually identical. *See* 42 U.S.C. § 1973(a) (no voting procedure may "result in a denial or abridgement of the right . . . to vote on account of race or color. . . . "); *see* 128 Cong. Rec. 14292 (daily ed. June 18, 1982) (remarks of Sen. Kennedy).

In short, because of the "different evils" at which they are addressed, in asking whether a redistricting or at-large system has *actually* abridged or diluted minority voting strength, one gives an entirely different answer under § 5 than

would be given in a case involving a constitutional or § 2 challenge to such a system. *Bossier I*, App. 33a. Just as the standard for whether abridgment or dilution *exists* is different under § 5 than under the Constitution or § 2, so too is the standard for determining whether a local government *intended* for that abridgement or dilution to exist. A jurisdiction obviously cannot possess a purpose of diluting minority voting strength, as that concept is understood under § 5, unless it intends to dilute minority voting strength as that concept is understood under § 5. This does not mean, as appellants believe, that § 5 fails to proscribe a purpose to dilute minority voting strength. It simply means that dilution is measured by a different benchmark, *i.e.*, the existing system rather than any "reasonable alternative."

Appellants nevertheless assert that § 5 proscribes a purpose to deny or abridge the right to vote relative to another available alternative – such as the NAACP maximization plan here. While this is the test for abridgement and dilution under the Constitution and § 2, it is plainly not under § 5. Since the only harm proscribed by § 5 is less minority voting power than the *status quo ante*, a government cannot violate § 5 unless its purpose is to cause *that* harm. The fact that a jurisdiction's purpose is to cause the relative harm proscribed by the Constitution – less minority voting power than a reasonably available alternative – therefore affords no basis for finding a § 5 violation. Since § 5 is designed to insure against changes that make the *status quo* worse, the relevant question is not whether its purpose is to *improve* the *status quo ante* as much as a reasonably available alternative.

Thus, just as in *Bossier I*, appellants impermissibly attempt to "shift the focus of § 5 from nonretrogression to vote dilution, and to change the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan." App. 37a-38a. The only difference here is that appellants seek to make the relevant § 5 question whether the *purpose* of a voting change is "vote dilution" relative to the "hypothetical, undiluted plan," rather than "nonretrogression." But since "purpose" and "effect" modify the same language in § 5, attempting to transfer the § 5 purpose inquiry to a different

benchmark is just as contrary to the plain language and overall structure of that statute.

In short, in light of both its structure and language, it is quite impossible to interpret § 5 to prohibit a nonretrogressive purpose so long as the statute does not prohibit a nonretrogressive effect. Recognizing this, although appellants cannot directly argue that *stare decisis* permits overruling *Beer* and its numerous progeny, they nevertheless advance arguments that are necessarily premised on the notion that § 5 prohibits discriminatory, albeit nonretrogressive, *effects* and that *Beer* was wrongly decided.

In their most obvious assault on *Beer*, appellants' principal submission is that § 5's central purpose is to prevent the implementation of any new voting practice that "perpetuates" or "maintains" an existing discriminatory system. U.S. Br. 22-24; A-I Br. 24. This assertion, of course, cannot be reconciled with the established principle that § 5 reaches only retrogressive effect and, indeed, precisely echoes the *dissenting* opinions' arguments in both *Beer* and *Lockhart*, the two cases initially establishing that principle. *Beer*, 425 U.S. at 151 (Marshall, J., dissenting); *City of Lockhart v. United States*, 460 U.S. 125, 145 (1983) (Marshall, J., concurring in part and dissenting in part). The Court in *Lockhart* expressly acknowledged that the new electoral system "may . . . *remain*[ ] *discriminatory*," but was "entitled to § 5 preclearance" because it "did not increase the degree of discrimination against blacks." *Lockhart*, 460 U.S. at 134 (emphasis added). Appellants are therefore flatly wrong in arguing that § 5's goal was to prevent new electoral systems from "remaining discriminatory," even if they did not "increase the degree of discrimination against [minorities]." More generally, since the voting procedures which § 5 intended to "freeze" were often intentionally discriminatory in 1965, § 5 necessarily contemplated and tolerated changes which perpetuated and froze that discriminatory *status quo*, until they were undone by § 2 and the Constitution. *Bossier I*, App. 34a; *Miller*, 515 U.S. at 926; *Georgia v. United States*, 411 U.S. 526, 538 (1973). It was for this reason that the Court rejected Justice

Marshall's argument that maintenance of the *status quo* offended § 5 and held that § 5 reached only changes with a retrogressive effect.[17] *See Lockhart*, 460 U.S. at 145; *Beer*, 425 U.S. at 141.

The fact that construing § 5 to reach only a retrogressive purpose would also tolerate changes which maintain the *status quo* thus provides no basis for rejecting that construction of the statute. Since § 5 authorizes changes that actually maintain the *status quo*, the fact that a change was intended to

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[17] Although *stare decisis* principles demand fidelity to *Beer* and *Lockhart*, we nonetheless note that those cases were entirely correct in concluding that § 5 did not in any way prohibit maintenance of the *status quo*. To the contrary, Congress explicitly authorized changes under which minority voting power was " 'not affected.' " *Beer*, 425 U.S. at 141 (quoting H.R. Rep. No. 94-196, at 60). Similarly, Justice Brennan emphasized that the "fundamental objective of § 5 [is] . . . the protection of *present* levels of voting effectiveness for the black population." *Richmond*, 422 U.S. at 388 (Brennan, J., dissenting) (emphasis added). The very fact that § 5 applies only to *changes* to the *status quo* demonstrates that it could not have been intended to outlaw *maintenance* of the *status quo*. There is no better way to perpetuate a discriminatory system than not changing anything – a result necessarily contemplated by § 5. In *Beer*, for example, the submitting jurisdiction's attempt to maintain two at-large seats was not prohibited by § 5, even if this was deliberately done to "cancel out or minimize" minority voting strength compared to what they would enjoy under a single-member system. *White v. Regester*, 412 U.S. 755, 765 (1973). *See Beer*, 425 U.S. at 138-39. Finally, appellants note correctly that Congress in 1965 and 1982 was concerned with " 'extraordinary stratagem[s]' " to discriminate against minorities beyond the discriminatory "tests and devices" outlawed by the "Act itself." U.S. Br. 23-24 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966)). This self-evident point explains why § 5 presumptively suspends all voting procedures – in addition to the permanently suspended "tests and devices" outlawed "by the Act itself" – but it hardly says anything about the substantive standard that should be used to adjudicate whether those new voting practices violate § 5.

maintain the *status quo* cannot somehow suggest any illegality.[18]

Since the United States cannot reconcile its nonretrogressive purpose argument with *Beer's* holding on retrogressive effect, it argues instead that *Beer* was not actually engaging in an act of statutory *interpretation*. Rather, the *Beer* Court made a policy decision about the desirability of prohibiting discriminatory "effects" and substituted its policy judgment for that of Congress. Specifically, the United States argues that *Beer* artificially circumscribed the plain language of § 5's "effect" because it was concerned that voting rights laws which prohibited a "discriminatory effect" alone were quite troublesome, and could lead to proportional representation. U.S. Br. 29-31. It invites the Court to make a different policy decision than the *Beer* Court because all agree that a racially discriminatory *purpose* is always bad. But, of course, this Court is not free to use different methods of statutory construction depending on how desirable it believes congressional policy decisions to be. The Court cannot interpret "abridge" to mean one thing when modified by "purpose" because that creates an uncontroversial policy result, but to mean another thing when modified by "effect" because that creates a policy that the Court believes is disquieting. *Brogan v. United States,* 118 S. Ct. 805, 811-12 (1998) ("Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so. . . . "). Rather, the Court must

[18] Similarly, the United States' assertion that the "plain language" of § 5 reaches changes with a nonretrogressive purpose is a frontal assault on *Beer* and the consistent decisions following it. The United States asserts that a "purpose . . . of . . . abridging the right to vote on account of race" includes intentionally diluting minority voting power. U.S. Br. 18. But, under *Beer*, "abridg[e]" means retrogression or, stated another way, it means only a dilution of minority voting power as compared to the present system, but not dilution relative to a "hypothetical, undiluted alternative." Just as a nonretrogressive change cannot have the "effect of diluting or abridging the right to vote on account of race" unless it diminishes minorities' current voting power, it cannot have the purpose of doing so unless it intends to diminish that existing power.

interpret the law pursuant to its language and in a manner that renders the "statutory scheme . . . coherent and consistent." *Robinson*, 519 U.S. at 340. Nor, of course, is there any hint in *Beer* that the Court was in any way concerned with the policy implications of interpreting "effect" broadly, much less that the Court failed to faithfully interpret the congressional statute because of these concerns.[19] This is hardly surprising since the consequence of interpreting the § 5 "effect" prong "broadly" would have simply imposed on covered jurisdictions the "results test" of amended § 2. This is presumably not a policy which unduly troubled the *Beer* Court, since the same Court had decided *White v. Regester*, 412 U.S. 755 (1973), from which the § 2 "results" test was derived.

The United States' final argument is that § 5 tracks the language of the Fifteenth Amendment, which prohibits intentional discrimination, and, for this and other reasons, § 5 simply must go "*as far as* the Constitution." U.S. Br. 24 (quoting *Bossier I*, App. 57a (Breyer, J., concurring))

[19] Footnote 8 in *Beer*, to which the United States refers, simply reaffirms that there is no *constitutional right* to proportional representation and then notes, with seeming *approval*, that the redistricting plan gave black voters roughly proportional representation when compared to the *five* single-member seats which were properly the subject of § 5 scrutiny. *Beer*, 425 U.S. at 151 n.8; U.S. Br. 30. Moreover, contrary to the United States' assertion, the Court has never said that § 5 "imposes substantial 'federalism costs' " because a nonretrogressive "effect" test would invalidate constitutional practices. *Miller*, 515 U.S. at 926; U.S. Br. 31. Rather, those costs are created by requiring sovereign "conquered jurisdictions" to come to Washington, D.C. to disprove their presumed guilt – costs which exist regardless of how "effect" is interpreted and which have been noted by the Court *after* § 5 was interpreted to reach only *retrogressive* effect. *South Carolina v. Katzenbach*, 383 U.S. 301, 359 (1966) (Black, J., dissenting); *Miller*, 515 U.S. at 926. If troubling federalism costs were imposed by effects tests that prohibited constitutional actions, both § 2 and Title VII of the 1964 Civil Rights Act would impose such costs, but the Court has never suggested that those statutes impose the sort of federalism problems created by § 5, even though the latter reaches only *retrogressive* effect. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

(emphasis in original). This assertion is flatly wrong on a number of levels.

First, § 5's use of language similar to the Fifteenth Amendment clearly is not intended to incorporate the Fifteenth Amendment standard, for discriminatory purpose or otherwise. As reflected in the fact that *Section 2* also tracks the Fifteenth Amendment by prohibiting a "denial or abridgment of the right to vote on account of race," Congress did not intend by using that language to incorporate any sort of discriminatory purpose standard. *Cf.* U.S. Const., amend. XV. The legislative history goes out of its way to confirm this. "It is patently clearly [sic] that Congress has used the words 'on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination." S. Rep. No. 417, 97th Cong., 2d Sess. 28 n.109 (1982) ("S. Rep.").

More to the point, in 1982, it seemed quite probable – if not definitively settled – that the Fifteenth Amendment did not reach any form of vote *dilution*, intentional or otherwise. Yet the 1982 Congress plainly did want to render dilution mechanisms – such as redistricting plans – subject to § 5 review. *See* U.S. Br. 23. The plurality in *Mobile*, which was the object of extraordinary focus by the 1982 Congress, seemingly held that the Fifteenth Amendment reached only abridgments of the "right to *vote*" – *i.e.*, access to the ballot – rather than dilution of a group's voting power by redistricting schemes and the like.[20] Thus, Congress could not have intended to incorporate the Fifteenth Amendment standard by using similar language, otherwise it would run the serious risk of limiting Section 5's coverage to the denial or abridgement of the right to cast a vote, rather than to dilution of group

[20] *See Mobile*, 446 U.S. at 65 (plurality) ("Having found that Negroes in Mobile 'register and vote without hindrance,' " the Court concluded the Fifteenth Amendment had not been violated); *see id.* at 84 n.3 (Stevens, J., concurring in judgment); *Rogers*, 458 U.S. at 619 n.6 ("With respect to the Fifteenth Amendment, the [*Mobile*] plurality held that the Amendment prohibits only direct, purposefully discriminatory interference with the freedom of Negroes to vote.").

voting power. The Court has yet to resolve whether the Fifteenth Amendment does reach vote dilution. *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993).

For the same reason, even if § 5 prohibits only a retrogressive purpose, it still goes "as far as" – indeed, beyond – the Fifteenth Amendment as currently understood. A redistricting plan which intentionally fragments black concentrations may not violate the Fifteenth Amendment (and the 1982 Congress had grave doubts that it could), while such a plan would violate § 5 if the fragmentation was designed to cause retrogression. Thus, whatever meaning is assigned to "purpose" under § 5, *either* one goes "as far as" – indeed, farther – than the Fifteenth Amendment, especially as understood by the 1982 Congress.

Moreover, while appellants assume that a prohibition of retrogressive purpose is necessarily a more "narrow" requirement than the discriminatory purpose prohibited by the Fifteenth Amendment, this is not so. For example, if, in 2001, a covered jurisdiction, for purely race-neutral reasons, decides to eliminate a black-majority district created in 1990 through a maximization plan, this would not violate either the Fifteenth or Fourteenth Amendments, but would constitute a proscribed retrogressive purpose under § 5. In short, while the standards are *different*, it is not possible to say that one is consistently "broader" than the other.

Consequently, even if there were some basis for concluding that § 5 must go as far as the Fifteenth Amendment, this is not an argument for interpreting it contrary to its plain language since if § 5 prohibits retrogressive purpose, it still goes farther than the Amendment it seeks to enforce. More generally, however, there is no basis for concluding that the Constitution – the Fourteenth or Fifteenth Amendment – is somehow silently incorporated into § 5 because there is very little congruence between the Constitution and § 5. Section 5 goes farther than the Constitution because it prohibits state laws solely on the basis of their effect, while the Constitution requires an invidious purpose. Section 5 also goes farther because it enjoins the operation of state law until the jurisdiction proves its innocence. On the other hand, § 5 goes less far

than the Constitution because it reaches only changes to voting systems and covers only certain jurisdictions. Since § 5 is both broader and narrower than the Constitution, there is no basis for assuming it was intended to be coextensive with the Constitution and nothing in the 1982 legislative history indicates any such intent to incorporate the Constitution's "purpose" standard into § 5.[21]

1. Appellants' assertion that the Court has previously resolved the question of whether § 5 reaches beyond retrogressive intent is obviously belied by the fact that the *Bossier I* Court expressly reserved this unsettled question. App. 45a-46a. Nor did either of the concurring opinions maintain that the Court's precedent required such a rule. App. 61a, 70a, 76a. Although appellants maintain that *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987), somehow resolved this question, the Court's opinion never mentions the word "retrogression" or hints that there is any distinction between retrogressive and discriminatory purpose because that case simply did not present this issue. The question in *Pleasant Grove*,

[21] It is well established that § 5, as originally enacted in 1965 and subsequently amended in 1982, enforces the Fifteenth Amendment. *See, e.g., Lopez v. Monterey County*, 119 S. Ct. 693, 697 (1999); *Lockhart*, 460 U.S. at 136-37 (Marshall, J., dissenting); *Allen*, 393 U.S. at 588-89 (Harlan, J., concurring in part and dissenting in part); *South Carolina*, 383 U.S. at 335. Contrary to the United States' assertion, nothing in the legislative history indicates that § 5 reaches "racially motivated voting changes" that violate the Constitution. U.S. Br. 23 n.8. The legislative history upon which they rely merely contains a congressional finding that the extraordinary preclearance procedures of § 5 remain necessary to " 'preserve the "limited and fragile" achievements of the Act and to promote further amelioration of voting discrimination.' " S. Rep., at 10 n.19 (quoting *City of Rome v. United States*, 446 U.S. 156, 172, 182 (1980) (noting that "Congress passed the Act under the authority accorded it by the Fifteenth Amendment.")). The fact that Congress was relying on its power under the Fifteenth (or Fourteenth) Amendment to impose the extraordinary procedural burdens of § 5 does not suggest that § 5's substantive standard is coextensive with the Constitution, any more than § 2 incorporates the Fourteenth Amendment's standards.

rather, was whether the "purpose and effect" proscribed by § 5 reaches only current purposes and effects or also includes future purposes and effects.[22] The answer to that question is in no way dependent upon whether § 5 prohibits a retrogressive purpose (or effect), or something more. Appellants apparently believe that any intent to do a future harm somehow cannot be a purpose to cause retrogressive harm. This is plainly untrue. As the Court explained, just as an annexation of land *currently* populated by whites alone could make minority voters worse off than they were prior to the annexation (*i.e.*, retrogression), so too could annexing land that it was anticipated would be populated by whites. *Pleasant Grove*, 479 U.S. at 467.

Indeed, the Court's reasoning was that since "Section 5 looks not only to the present *effects* of changes, but to their future *effects* as well. . . . *Likewise*, an impermissible *purpose* under Section 5 may relate to anticipated as well as present circumstances." *Id.* at 471 (emphasis added). Thus, *because* the § 5 effects prong prohibits a certain (future) harm, it follows that the purpose prong encompasses an intent to do that (future) harm. Here, by the same logic, since the effect prong *permits* a nonretrogressive "harm," the purpose prong does not encompass an intent to do that harm.

In any event, the district court's opinion faithfully tracked *Pleasant Grove's* distinction between future and

[22] While it is true that the dissenting opinion, in passing, mentions that *Lockhart* required a showing of retrogressive intent, the dissent's repeated central complaint was that "discriminatory purpose within § 5 must relate to voting" and that "[w]here an annexation's effect on voting rights is purely hypothetical, an inference that the city acted with a motivation related to *voting* rights is insupportable." *Pleasant Grove*, 479 U.S. at 474, 476-77 (Powell, J., dissenting). The majority did not mention or disagree with the dissenting opinion's legal conclusion that § 5 reached only retrogressive intent, any more than it "rejected" the dissent's view that § 5 related only to *voting* discrimination or retrogressive *effect*. It simply disagreed that a future purpose or effect was inherently "hypothetical" or irrelevant to voting and thus beyond the scope of § 5.

present harm. Thus, the lower court found that § 5's purpose prong would have been violated if there had been any "corroborating evidence that the Board had deliberately attempted to break up voting blocks *before they could be established* or otherwise to divide and conquer the black vote." App. 6a (emphasis added). This almost precisely echoes *Pleasant Grove's* holding that the city had an "impermissible purpose of minimizing future black voting strength." *Pleasant Grove*, 479 U.S. at 471. Thus, whatever the rationale of *Pleasant Grove*, it is in no way inconsistent with the court below's reasoning or result.[23]

Likewise, the Court's decision in *City of Richmond* lends no support to appellants' interpretation of § 5. There, the Court *upheld* an annexation that severely "reduc[ed] the relative political strength of the minority race in the enlarged city as compared with what it was before the annexation" *notwithstanding* this undisputed *retrogressive* effect. 422 U.S. at 378.

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[23] The Court's summary affirmance in *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983), is also no help to appellants. That decision is entirely consistent with the opinion below since the primary flaw in *Busbee* was that the submitting jurisdiction had "split a cohesive black community in Districts 4 and 5," thus causing minor *retrogression* in District 4, albeit not in District 5. *Id.* at 498-99. Since a summary affirmance is precedent only for any ground upon which the case below can be decided, and one potential ground was that the redistricting plan had a retrogressive effect, *Busbee* is not precedent for the position that a nonretrogressive plan violates § 5 if it is motivated by an illicit, nonretrogressive purpose. *See, e.g., Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Moreover, the court below considered and rejected the notion that the Board had split or "fragmented" any cohesive black community as in *Busbee*. App. 6a. In *Miller v. Johnson*, 515 U.S. 900 (1995), the Court *overturned* the Justice Department's finding of discriminatory purpose as inconsistent with *any* understanding of that term and thus, as in *Bossier I*, resolution of the sort of purpose proscribed by § 5 was "not necessary [to the Court's] decision." App. 45a (internal quotations omitted). The *Miller* Court's implicit assumption that § 5 reaches beyond retrogressive purpose is no more dispositive of this point than *Bossier I's* explicit assumption that it does not.

The Court then remanded the case to insure that the motivation behind the annexation was not to cause such obvious *retrogression* in black voting strength, but was done for "verifiable, legitimate reasons." *Id.* at 375 (internal quotations omitted). In doing so, the Court again equated "changes taken with the purpose of denying the vote on the grounds of race or color" with "despoil[ing] colored citizens, and only colored citizens, of their *theretofore enjoyed voting rights*.' " *Id.* at 378-79 (quoting *Gomillion*, 364 U.S. at 347) (emphasis added). Thus, *Richmond* merely holds that an indisputably retrogressive change, which might otherwise survive § 5 review, will be struck down if the motive in undertaking the annexation was to cause such retrogression, rather than to accomplish some "legitimate" goal. It in no way suggests that a nonretrogressive change may be invalidated if motivated by a nonretrogressive purpose. *Beer* itself expressly noted this obvious, dispositive difference:

> The *City of Richmond* case thus decided when a change with an *adverse impact* on *previous* Negro voting power met the "effect" standard of § 5. The present case, by contrast, involves a change with no such adverse impact upon the former voting power of Negroes.

Beer, 425 U.S. at 139 n.11.

Thus, while *Pleasant Grove* and *Richmond* confirm that § 5 disjunctively prohibits either an unlawful purpose *or* unlawful effect, neither suggests that the § 5 "purpose" proscribes something other than the proscribed retrogressive "effect."

In sum, § 5 prohibits only changes with a retrogressive purpose.[24] There is also no basis, as we presently explain, for

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[24] No deference is due to the Attorney General's contrary interpretation because such deference is possible " 'only . . . if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable.' " *Bossier I*, App. 42a (quoting *Presley v. Etowah County Comm'n*, 502 U.S. 491, 508 (1992)). Here, the

denying preclearance in a § 5 proceeding to changes that *satisfy Section 5*, on the grounds that they violate the *Constitution*.

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statute's plain language directly resolves "the question" in a manner irreconcilable with the Attorney General's position, and the Court has declined to give deference in instances where the plain language was less definite than here. *See, e.g., Presley*, 502 U.S. at 508 (whether § 5 applies to changes in responsibilities of elected officials); *Holder*, 512 U.S. at 880 (plurality) (whether the phrase "standard, practice, or procedure" related to a change in the size of a governing authority). We further note that this Court has never adopted the Attorney General's reading of § 5 to override a contrary legal conclusion by the *Section 5 district court* – which is principally charged with administering the Act's preclearance mechanism – and there is no basis for doing so. This Court has made clear that it will not defer to an agency interpretation where the agency is "neither the sole nor the primary source of authority in such matters." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 202 (1991). Here, "the declaratory judgment proceeding is the basic mechanism for preclearance established by the Act, [while] the provision for submission to the Attorney General merely gives the covered State a rapid method of rendering a new state election law enforceable." *McCain v. Lybrand*, 465 U.S. 236, 247 (1984) (internal quotation and citation omitted); *accord, e.g., Clark v. Roemer*, 500 U.S. 646, 655 (1991); *Morris v. Gressette*, 432 U.S. 491, 503 (1977). Since Congress vested the three-judge court with primary responsibility for determining the meaning of "purpose and effect" under § 5, no intelligible principle of construction would reject the correct interpretation of that Article III court in deference to an *erroneous*, albeit "reasonable," construction by the Attorney General. *See Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment) (no deference for the Attorney General's interpretation of a criminal statute, because the statute "is not administered [by the Justice Department] but by the courts"). This Court does not give deference to the Attorney General's *factual* conclusions in a § 5 case, but defers to the three-judge court absent clear error. The same rule should obtain with respect to the court's legal conclusions, particularly since the Attorney General herself has acknowledged that she is controlled by those decisions. *See* 28 C.F.R. § 51.56; 28 C.F.R. § 51.52(a) (Attorney General "make[s] the same determination that would have been made by the court in an action for a declaratory judgment under section 5."). Finally, no Justice Department guideline or statement considers, much less explains, how § 5 could treat

IV. SECTION 5 PRECLEARANCE MAY NOT BE DENIED BECAUSE A CHANGE VIOLATES THE CONSTITUTION.

A distinct question, raised by *dicta* in *Beer*, is whether § 5 courts (and the Attorney General) may withhold preclearance of a voting change that satisfies the nonretrogression purpose standard of Section 5 on the grounds that it violates the Constitution. If the Court is to address this question, it should rule that constitutional issues are not properly within the province of Section 5 courts or, at a minimum, that the *United States*, as it has previously acknowledged, bears the burden in a § 5 proceeding of proving that a change violates the Constitution.

As the Court noted in *Bossier I*, *dicta* in *Beer* suggested that a constitutional violation "constituted grounds for denial of preclearance under *Beer*." App. 41a. *Beer* did not purport to interpret the meaning of § 5's "purpose," much less to suggest that it had a different meaning than the retrogression it held was the standard for determining an "effect of . . . abridging." Nor did it in any way explain or articulate what constitutional standard it was referencing. The most plausible understanding is that *Beer* believed that a single-member redistricting scheme violated the Constitution only if it caused retrogression by taking away a minority's "*theretofore enjoyed* voting rights." *Richmond*, 422 U.S. at 378 (quoting *Gomillion*, 364 U.S. at 347). *See Mobile*, 446 U.S. at 69 n.14 ("A districting statute otherwise acceptable, may be invalid because it fences out a racial group so as to deprive them of their *pre-existing municipal vote*. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).") (plurality) (emphasis added). It is doubtful that *Beer's* reference to the constitutional standard connoted a racial purpose to dilute since it was hotly contested whether this was the constitutional standard (particularly in a voting

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"purpose" differently than "effect"; the enforcement guidelines simply *assume* such a difference exists.

rights context) when *Beer* was decided,[25] and such a conclusion is irreconcilable with other assertions in the opinion.[26]

But regardless of what *Beer* intended by its reference to the *constitutional* standard, the relevant point is that the *dicta* was not construing *Section 5*, much less what "purpose"

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[25] *Beer* was pre-*Washington v. Davis*, 426 U.S. 229 (1976). *See Beer*, 425 U.S. at 149 n.4 (Marshall, J., dissenting); *Mobile*, 446 U.S. at 62, 66 (plurality); *id.* at 85-86, 88-90 (Stevens, J., concurring); *id.* at 120 (Brennan, J., dissenting); S. Rep., at 19-26.

[26] The *Beer* Court said that the United States had not, and could not "rationally," allege a constitutional violation. *Beer*, 425 U.S. at 142 n.14. But the government had contended in the *Beer* lower court that "the district boundaries established by Plan II have the purpose of discriminating against black voters." *Beer v. United States*, 374 F. Supp. 363, 386-87 (D.D.C. 1974). And, as the lower court and dissenting opinion made clear, there was ample evidence making an assertion of discriminatory purpose, at the very least, "rational." *Id.*; *Beer*, 425 U.S. at 160-61 (Marshall, J., dissenting); *cf. Rogers*, 458 U.S. at 623-27. Thus, it seems clear that the *Beer* Court perceived a difference between allegations of invidious purpose, at least in the single-member context, and allegations of a constitutional violation. At a minimum, the *Beer* Court would not have assumed that the Constitution was violated if the jurisdiction failed to create a *black-majority district* for racial purposes. Prior to *Shaw I*, many believed that a jurisdiction's conceded use of race as a basis for line-drawing would not form the basis for a viable constitutional challenge absent a showing of *dilutive effect* on a group's voting power. *Shaw I*, 509 U.S. at 658-60 (White, J., dissenting); *United Jewish Org. v. Carey*, 430 U.S. 144, 165-67 (1977) (plurality). As noted, *Beer* found that a nonretrogressive reapportionment did not have a dilutive *effect*, and it was quite an unsettled proposition in 1976 that deliberate creation of districts where blacks constituted a minority was necessarily dilutive of black voting power. *Allen*, 393 U.S. at 586 (Harlan, J., concurring in part and dissenting in part); *Bossier I*, App. 52a (Thomas, J., concurring). Thus, the reason that New Orleans' deliberate creation of white majority districts in *Beer* did not "remotely approach" a constitutional violation is because such districts are dilutive only when compared to a "hypothetical" plan creating more black-majority districts and only if one accepted the then-disputed premise that majority districts are "better" for minorities than "influence" districts. *Allen*, 393 U.S. at 586 (Harlan, J., concurring in part and dissenting in part).

meant under that statute. To the contrary, *Beer* was at pains to emphasize that its construction of § 5 was entirely distinct from its understanding of constitutional norms:

> In evaluating this claim, it is important to note at the outset that the question is not one of constitutional law, but of statutory construction. A determination of when a legislative reapportionment has "the effect of denying or abridging the right to vote on account of race or color," must depend, therefore, upon the intent of Congress in enacting the Voting Rights Act and specifically § 5.

Beer, 425 U.S. at 140-41 (footnote omitted).

The upshot of the *Beer dicta*, then, is the unexceptional proposition that a reapportionment which satisfies § 5 may nonetheless violate the Constitution. Read in isolation, it is true, *Beer* suggests the more troubling proposal that the *Section 5 court* itself may adjudicate constitutional issues and withhold preclearance on that basis. This Court has subsequently explained, however, that the *Beer dicta* was not intended to suggest that a constitutional violation affords a basis for a Section 5 court to deny preclearance. In *Shaw I*, this Court ruled that the *Beer dicta* simply "declined to reach [the] question" of whether a "nonretrogressive" redistricting plan was, "for that reason, . . . immune from constitutional challenge." *Shaw I*, 509 U.S. at 654 (citing *Beer*, 425 U.S. at 142 n.14). *Shaw I* noted that other cases had established that "a reapportionment plan that satisfies § 5 still may be enjoined as unconstitutional," citing the provision of § 5 allowing a "*subsequent* action to enjoin enforcement" after the declaratory judgment has issued and *Allen's* ruling that "*after preclearance*, 'private parties may enjoin the enforcement of the new enactment . . . in *traditional suits* attacking its constitutionality.' " *Id.* (quoting *Allen*, 393 U.S. at 549-50) (emphasis added).[27]

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[27] Moreover, *Beer's* suggestion that a nonretrogressive plan may be denied preclearance if it violates the Constitution is inconsistent with *Lockhart's* ruling that a nonretrogressive plan "is *entitled* to § 5

Thus, as construed in *Shaw I*, *Beer's dicta* at most confirms the obvious point that a reapportionment plan which satisfies § 5 may still violate the Constitution and, as § 5's language itself states, may be enjoined in a *subsequent* constitutional challenge. Moreover, this result is the only one at all consistent with the express language of § 5. There is no basis under that statute for denying preclearance to a voting change in a § 5 proceeding if the voting change satisfies the substantive requirements of *Section 5*, regardless of whether it violates another federal law. The authority and jurisdiction of the three-judge court in the District of Columbia is strictly limited to issuing a declaratory judgment on whether the voting change has a "purpose [or] effect" forbidden by § 5. If the three-judge court issues a declaratory judgment that the Board's proposed redistricting plan does not have the retrogressive "purpose and effect" prohibited by § 5, the preemptive constraints of § 5 have been lifted and no federal law trumps the Board's plan. "Once a covered jurisdiction has complied with these preclearance requirements, § 5 provides no further remedy." *Lopez v. Monterey County*, 519 U.S. 9, 23 (1996). If the three-judge court decides to also issue an advisory opinion on the Constitution, this can be of no legal consequence because nothing in the Voting Rights Act makes such a constitutional determination a prerequisite to implementing the jurisdiction's voting changes and the three-judge court has no subject matter jurisdiction to rule on any constitutional violation.

Amending § 5 to add the requirement that a change satisfy the Constitution would also make nonsense of the language in § 5 allowing a subsequent suit to enjoin a precleared change, and would be an invitation to relitigation and inconsistent judgments. If Congress intended for the Section 5 court to make a constitutional determination *before* preclearance, it is doubtful it would have

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preclearance," without referencing any possible exception for an unconstitutional nonretrogressive plan. *Lockhart*, 460 U.S. at 134 (emphasis added).

expressly authorized a subsequent constitutional challenge. This would simply create the potential for inconsistent judgments and duplicative litigation.

This further confirms that Congress intended to limit the extraordinary burdens imposed upon sovereign jurisdictions by using § 5 to resolve only the manageable substantive question of whether there is dilution compared to the cognizable benchmark of the *existing* practice. Requiring a covered jurisdiction to also, in essence, sue itself under the Constitution and disprove the validity of hypothetical alternatives limited only by the imagination of Justice Department lawyers (and then perhaps litigate those same issues *again* in a defensive lawsuit in district court) would increase the already "substantial federalism costs" imposed by § 5. *Lopez v. Monterey County*, 119 S. Ct. 693, 703 (1999) (internal quotations omitted).[28]

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[28] For the third time, appellants rely on footnote 31 in the 1982 Senate Report to argue that the 1982 Congress *thought Beer* authorized a denial of preclearance if a reapportionment plan violated the Constitution and thus § 5 must be so interpreted. U.S. Br. 29 (citing S. Rep., at 12 n.31). The authors of the same Senate Report footnote, however, also *thought* that "the rule laid down in *Beer* governed *ameliorative* changes," rather than nonretrogressive ones, and that *Beer* invalidated voting plans which violated the *White v. Regester* "results standard" later incorporated into § 2. *See* S. Rep., at 12 n.31; *Lockhart*, 460 U.S. at 145 (Marshall, J., concurring in part and dissenting in part) (emphasis in original); *Bossier I*, App. 43a; 73a. This Court nonetheless ruled precisely to the contrary in both *Lockhart* and *Bossier I* because the proposed interpretation offered in the Senate Report footnote was contrary to the language and structure of § 5. *Bossier I*, App. 43a. The United States suggests that this appeal is different because the issue here "involves Congress's *approval* of . . . *Beer*." U.S. Br. 29 n.10. But the Senate Report footnote also *approved Beer's* purported incorporation of *White v. Regester* "results" and *Beer's* purported limitation to only ameliorative changes. This does not change the fact that, yet again, the Senate Report's "interpretation" is contrary to both the plain language of the statute and, for that matter, this Court's subsequent interpretation of *Beer* in *Shaw I*. Thus, this footnote can be given "great weight" only if the Court abandons both its longstanding principle that legislative history cannot affect plain statutory language and the principle that "it is the

Appellants nonetheless conclusorily assert that Congress simply could not have intended that the Attorney General blind her eyes to unconstitutional voting discrimination. U.S. Br. 22. Congress concededly did, however, bar the Attorney General from objecting to even a "clear violation" of § 2. *Bossier I*, App. 45a; App. 62a (Stevens, J., dissenting). Presumably the 1982 Congress was as concerned about a clear § 2 violation as it was about an ambiguous constitutional violation. This is particularly true since it thought that the amended § 2 standard was the correct *constitutional* standard (and the established one prior to *Mobile*) and because it thought that "unintended" deprivations of minority voting rights were just as nefarious as actions taken with a discriminatory "intent." S. Rep., at 19-26, 30, 36-37.

As this reflects, there is nothing "implausible" about Congress determining that a violation of *other* voting rights guarantees affords no basis for objecting under § 5. U.S. Br. 20. The Attorney General's preclearance of changes is not tantamount to an "endorsement"; it is simply an acknowledgement of the "limited substantive" scope of § 5. *Bush*, 517 U.S. at 982. The fact that the Attorney General and this Court were forced to preclear the two at-large seats retained in the *Beer* reapportionment plan, even if they were retained for blatantly discriminatory reasons, hardly suggests that the Attorney General or this Court "tolerated" such an invidious motive. *Beer*, 425 U.S. at 138. The same is true of a single-member redistricting plan that, for whatever reason, simply retains the racial percentages contained in the prior redistricting plan. Granting preclearance simply recognizes the fact that practices which violate laws other than § 5 should be challenged under the laws which render them illegal.

At the same time, having local district courts, rather than the District of Columbia Section 5 court, adjudicate constitutional violations of proposed voting changes would not place

function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means." *Pierce v. Underwood*, 487 U.S. 552, 566 (1988); *see* U.S. Br. 29 n.10.

the United States or minority plaintiffs at any procedural disadvantage. For, as the United States itself acknowledged in *Bossier I*, if *Beer* is construed as injecting unconstitutional dilution claims into § 5 proceedings, the language of that opinion shows that "the burden to show dilution as a bar to preclearance remains with the *Attorney General*." U.S. Br. in *Bossier I* at 43 (emphasis added). Specifically, the United States brief pointed to the passage in *Beer* where "the Court stated that '[t]he *United States has made no claim* that [the disputed plan] suffers from any such [constitutional] disability, nor could it rationally do so.' " *Id.* (quoting 425 U.S. at 142 n.14) (emphasis added by U.S. Br.) (second bracket added).[29] The concession that it has the burden is well-taken because (in addition to the *Beer* language) the burden on submitting jurisdictions under § 5 is only to show that their change is "free of the purpose and effect" proscribed by *Section 5. South Carolina v. Katzenbach*, 383 U.S. 301, 355 (1966). There is no suggestion that the jurisdiction must also prove itself innocent of other potential violations.

Thus, if the Constitution is to be injected into § 5 litigation, this requires at most that the jurisdiction disprove a violation of § 5 – show the absence of a retrogressive purpose and effect – while the United States would have to demonstrate a constitutional violation. Under the Court's well-established precedent, this means, in redistricting cases where "the legislature always is *aware* of race," *Shaw I*, 509 U.S. at 646 (emphasis in original), that the United States' burden is to show "that race was the predominant factor motivating the legislature's decision." *Miller*, 515 U.S. at 916. Outside the redistricting context, it must show that race was a "motivating factor" unless the jurisdiction shows that it would have made the same decision without considering race. *Arlington*

[29] Since the United States in *Bossier I* attempted to show that *Beer* authorized § 2, as well as constitutional, challenges, it conceded that *Beer* also placed the burden on the Attorney General in § 2 challenges it thought could be brought in § 5 proceedings.

Heights, 429 U.S. at 270-71 n.21; *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

Since the United States concededly would have the burden to show a constitutional violation regardless of whether the litigation is in the District of Columbia Section 5 court or a traditional district court, this is an additional reason not to stretch § 5 beyond its language to expand the Section 5 court's jurisdiction. Indeed, this Court has frequently noted that local district courts are best situated to resolve constitutional voting rights challenges since analysis of that evidence requires an "intensely local appraisal." *White v. Regester*, 412 U.S. at 769-70. Thus, interpreting § 5 as not encompassing constitutional issues would have no cognizable effect on the judiciary's ability to resolve those constitutional claims or in any way allow any invidious purpose to go unremedied.[30]

Equally important, a nonretrogression standard in 1999, *standing alone*, is an extraordinarily muscular prophylactic barrier against any effort to improperly dilute minority voting strength. Each covered § 5 jurisdiction has already had at least two, and usually three, redistricting plans affirmatively found to be free of any discriminatory purpose or effect in the 1970s, 80s and 90s. *See* 42 U.S.C. § 1973c (some jurisdictions covered for practices in effect "on November 1, 1972"). In the 1990s, such preclearance was forthcoming from the

[30] The United States makes the puzzling assertion that, after a traditional district court has struck down an existing voting practice under the Fifteenth Amendment because of discriminatory purpose, the Attorney General would somehow be forced to preclear a new practice under § 5 that had precisely the same discriminatory purpose and effect. U.S. Br. 22. But, of course, a district court exercising its remedial jurisdiction could not possibly allow the offending jurisdiction to "cure" its adjudged violation by substituting precisely the same plan for precisely the same unconstitutional motive. *See, e.g., Connor v. Finch*, 431 U.S. 407, 414-15 (1977); *Abrams*, 521 U.S. at 84-86. Thus, no such discriminatory substitute plan would ever be eligible to be submitted for preclearance. *Id.* The question here, however, is simply whether § 5 contemplates that these Fifteenth Amendment questions will be decided in the first instance by these district courts or by the Justice Department. *See infra* pp. 41-42.

Justice Department only if it found compliance with § 2 and if it maximized minority districts to the extent arguably permitted (and often beyond what was permitted) by the constitutional guarantees for nonminority citizens. *See Bossier I*, App. 32a; *Shaw v. Hunt*, 517 U.S. 899, 902 (1996) ("*Shaw II*"); *Miller*, 515 U.S. at 917. Thus, in striking contrast to the 1970s, the retrogression benchmark in the 2000 redistricting cycle is set extraordinarily high. Simply maintaining that minority maximization *status quo* under a nonretrogression principle will not perpetuate any *discriminatory* redistricting plans. It will maintain, rather, a system which maximizes minority voting strength to the extent constitutionally permissible. It is extraordinarily implausible that a submitting jurisdiction, except in the rarest of cases, could avoid retrogressing from the race-conscious redistricting required in the 1990s and still unconstitutionally dilute minority voting strength. As noted, those rare cases can be swiftly adjudicated in local district courts pursuant to the same evidentiary standards as would be employed in the three-judge court.

On the other hand, injecting constitutional issues into § 5 adjudication would create an unworkable *administrative* system for § 5. First, there is simply no place in the traditional § 5 administrative scheme for the shifting burdens that all agree are necessary if the Constitution is to be part of § 5 analysis. The Justice Department itself has forthrightly acknowledged that it cannot reasonably administer a scheme where the Attorney General has the burden of proving a violation to *herself*: "Unlike court proceedings, administrative review under § 5 – which is by statute limited to 60 days upon receipt of all necessary information – does not include the kind of hearing procedures that provide for the full presentation of evidence and rebuttal evidence by contesting parties and others interested in the proceedings." Revision of Procedure for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 487 (Jan. 6, 1987).

Perhaps more troubling, in adjudicating this constitutional issue, the Justice Department takes the extraordinary view that it is perfectly appropriate to find that the submitting jurisdiction acted with a "discriminatory purpose" even if it

"did not take race into account in any way." App. 102a n.12. Thus, as the Department candidly argued to this Court in *Miller* and *Bossier I*, even if there is not a scintilla of evidence that a jurisdiction has departed from the traditional redistricting principles it would have used in a colorblind world, a discriminatory purpose finding can nonetheless be premised solely on the existence of racial bloc voting and a history of discrimination – phenomena that exist in many covered jurisdictions, which the submitting jurisdiction cannot change and which will exist regardless of which redistricting plan is chosen. U.S. Br. in *Bossier I* at 17-19; U.S. Br. in *Miller* at 32-33. Indeed, as the objection letter in this case makes clear, the Justice Department believes that a jurisdiction must maximize minority voting strength unless there is a compelling reason which *necessarily* forecloses the maximization alternative. *See* App. 235a (Board is "not free to adopt a plan that *unnecessarily* limits the opportunity for minority voters to elect the candidates of choice."). Thus, if granted authority over constitutional issues, the Justice Department will impermissibly exercise this unreviewable authority to find that the submitting jurisdiction acted with discriminatory purpose simply because, as here and in the *Shaw* gerrymander cases, it is prevented from maximizing by perfectly valid state laws and/or traditional districting principles. *Morris v. Gressette*, 342 U.S. 491 (1977). The necessary result of this empowerment is to again plunge this Court and covered jurisdictions into another decade-long cycle of litigation concerning whether the Justice Department's maximization policies have coerced jurisdictions to engage in an unconstitutional gerrymander against nonminorities. As this Court has previously noted, these Justice Department departures from neutral enforcement of accepted nondiscrimination principles raise serious constitutional concerns about § 5 itself. *Miller*, 515 U.S. at 926-27.

In sum, (1) § 5's retrogressive purpose standard, standing alone, is an extraordinary bulwark against unconstitutional

minority vote dilution; (2) judicial remedies are readily available to strike down any voting changes with a discriminatory purpose; and (3) there are compelling policy reasons not to transfer adjudication of this constitutional issue from neutral magistrates to an unreviewable bureaucracy which cannot administer a burden shift and which consistently applies erroneous (and unconstitutional) legal standards to adjudicate the Constitution. At most, even if appellants' reading of *Beer* is accepted, the question on remand should be whether the defendants have carried *their* burden of proving that the Board's redistricting plan violated the Constitution.

V. THE DISTRICT COURT'S DISCRIMINATORY PURPOSE FINDINGS ARE NOT PROPERLY BEFORE THIS COURT AND ARE NOT CLEARLY ERRONEOUS.

The only question presented by appellants to this Court is the purely legal issue of whether the district court misconstrued § 5 by concluding that it reached only retrogressive intent. *See* U.S. J.S. at I; A-I J.S. at i. Unlike the first appeal, neither appellant raised any question as to whether the district court improperly found no discriminatory purpose in this case by misapplying the *Arlington Heights* factors or making clearly erroneous factual findings. Thus, whether the Board had a discriminatory purpose is simply not before the Court, and the Court has no basis for reversing any findings the lower court made on that issue. *Yee v. City of Escondido*, 505 U.S. 519, 537 (1992); Sup. Ct. R. 14.1(a); Sup. Ct. R. 18.3. Rather, if the Court finds that the lower court erred by failing to examine the discriminatory purpose issue, it must remand so the lower court may apply the proper legal standard to the facts. Yet, without any explanation, both appellants devote roughly half their briefs to this nonexistent, fact-bound issue.

Although this issue is entirely irrelevant, we will nonetheless briefly explain why the district court's findings on discriminatory purpose are not "clearly erroneous" and therefore may not be set aside. *Pullman-Standard, Div. of Pullman,*

Inc. v. Swint, 456 U.S. 273, 287 (1982).[31] The Board was offered a choice between two alternative redistricting plans. As the undisputed facts establish, one plan had been precleared by the Justice Department the previous year, was supported by the black member of the Police Jury's Reapportionment Committee, kept intact every black population concentration, enhanced minority voting strength and clearly complied with state law and traditional districting principles, such as compactness and maintaining the integrity of municipal, district and precinct boundaries. J.A. 508; J.A. 504. The other alternative concededly constituted a facial violation of state law which rendered the plan "null and void," required more than doubling the number of existing precincts, split every municipal boundary in the Parish, grossly departed from the Police Jury districts and the "best" version was subsequently condemned by a federal court as "resembl[ing] an octopus, as it stretches out to the nooks and crannies of the parish in order to collect enough black voting age population. . . . " J.A. 509-10; J.A. 51. *See infra* pp. 46-47.

The short, and dispositive, explanation for why the district court found that the Board had a completely legitimate, nondiscriminatory reason for rejecting the proposed NAACP alternative is that this alternative (or even any variant

[31] Although appellants claim that "general" findings of fact are subject to heightened scrutiny, there is no finding more general than a determination of "discriminatory intent," and the Court has held that such a finding is subject to Sup. Ct. R. 52. *Pullman*, 456 U.S. at 287. Indeed, the Court has emphasized that factual findings " 'as to the design, motive and intent with which men act' [are] peculiarly factual issues for the trier of fact." *Id.* at 288 (quoting *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949)). *See also Pleasant Grove*, 479 U.S. at 469 (1987) (holding that under § 5, "findings, both as to the purpose [of adopting a voting change] and with respect to the weight of evidence regarding the purpose of the [changes] at issue, are findings of fact that we must accept unless clearly erroneous"); *Rogers*, 458 U.S. at 623.

thereof)[32] facially violated a state law that was impossible to evade. The Board was required to use the precincts created by the Police Jury (and used by the Police Jury for its districts) as the "building blocks" for the Board's districts. Louisiana law is quite unequivocal on this point: "The boundaries of any election district for a new apportionment plan from which members of a Board are elected shall contain whole precincts established by the parish governing authority [i.e., the Police Jury]. . . . " J.A. 376-77. Any failure to abide by this mandatory requirement would render the Board's plan "null and void."[33] J.A. 377. At the same time, the local NAACP claimed that the Voting Rights Act required the adoption of a plan with two black majority districts, even though this concededly violated state law because a black majority district could not be created without splitting numerous precincts. App. 195a; J.A. 195-96. Confronted with this allegedly insoluble conflict between state and federal law, the Board chose the one plan it knew complied with *both* sets of laws: the Police Jury plan which the Justice Department had precleared just the year before. Because this "guaranteed preclearance" solved the federal law problem, it rendered the Police Jury plan markedly superior to any other plan that complied with state law (since any plan that had a black majority district, and thus also had a chance at preclearance, violated state law by splitting precincts.)

Appellants contend that the Police Jury, as opposed to the Board, had the authority to split precincts and that such splits

[32] Two "Cooper" plans were formulated by intervenors after the Board had adopted its plan, and thus are clearly irrelevant. In any event, even the "best" of these plans splits all but one of the Parish's towns, results in *31 precinct splits*, and is not compact. J.A. 421-22, 440-54, 512.

[33] In an attempt to confuse this issue, appellants state that the Police Jury had modified the precincts used in the 1980s when it adopted its 1991 redistricting plan. No state law prohibits the Police Jury from changing its prior precincts to reflect population shifts and conform with its new districts, but once it has done so, the Board must use those precincts to build its districts. J.A. 389.

are both "legal and common." U.S. Br. 46; A-I Br. 39. This is extraordinarily disingenuous. For, *prior to December 31, 1992*, the Police Jury, just like the Board, was legally prohibited from altering a single precinct line. J.A. 389. But, under state law, the Board was required to redistrict *prior to December 31, 1992*. J.A. 88-89, 406-07. Thus, during the time that the Board was required to redistrict, lest the plan be "null and void," any splitting of precincts by it or the Police Jury would render the plan "null and void." It was therefore, *impossible* for *either* the Board *or* the Police Jury to sanction any precinct splits in the Board's redistricting plan during the period when the Board could lawfully redistrict.[34] This is hardly a coincidence, but was the manner in which state law ensured that all school boards used the Police Jury precincts as "building blocks" for their districts. Of course, *after* both the Board and the Police Jury had built their districts with the same precincts, there was no problem with the Police Jury *consolidating* those precincts *within* district lines to save money by having *fewer* precincts. J.A. 377. But, contrary to what the United States argued in *Bossier I*, this authority to consolidate precincts after they had been used to build the Board districts hardly authorized the Police Jury or Board to *split* the existing precincts, and thus create *more* precincts.[35]

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[34] Appellants' contention that such precinct splits are "common" is equally misleading. U.S. Br. 46. Appellants' own witness was able to cite only three examples of *other* Louisiana jurisdictions that had split a "few" precincts. J.A. 214. It appears that those three Boards used the *same* precincts as those used by the Police Jury, which is perfectly legal (*see supra* note 33) or were done to accommodate the Justice Department objections, as also permitted by state law. J.A. 377. These examples are thus irrelevant because they involve entirely dissimilar situations.

[35] The Board cartographer's reference to working with the Police Jury to "alter" precinct lines can only be understood as a reference to *consolidating* the precincts *after* the Board's plan was complete; not splitting precincts in the manner done by the NAACP plan. U.S. Br. 37 (citing App. 174a ¶ 102). It is stipulated that the cartographer discussed "*consolidat[ing]* some precincts" "*after* January 1, 1993" with members of the Board and Police Jury. App. 165a ¶ 61 (emphasis added). Conversely, the cartographer concededly knew and informed the Board that the Board's district lines could not split precinct lines under state law, and he never presented any of the Board members with a plan that split any precinct lines. J.A. 250-51; Tr. (Myrick) at 118.

Far from being a *post hoc* rationalization, the undisputed facts establish that the *contemporaneous* explanation for rejecting the NAACP alternative was that the district attorney and the Board's cartographer both correctly informed the Board that the NAACP's massive precinct splitting was a facial violation of state law. J.A. 177; App. 83a-84a; App. 179a ¶ 102; J.A. 180. Indeed, the NAACP *itself* recognized that its plan violated the state law prohibition against precinct splits, but merely maintained that the Voting Rights Act preempted this law. J.A. 195-96. The unrebutted facts also establish that prior Board plans had *never* split the Police Jury precincts and that the Board had never considered any plan that split precincts in the 1990 cycle. J.A. 250-51; Tr. (Myrick) at 118.

Even if state law did not render any plan with a black majority district facially void, every objective reason strongly counseled against more than doubling the existing number of precincts in this poor rural parish. This Court has already vividly described the "electoral nightmare" and "multiplied" costs caused by racially-motivated line drawings which required Harris County, Texas to almost double its existing precincts and "thrust" voters "into new and unfamiliar precinct alignments, a few with populations as low as 20 voters." *Bush*, 517 U.S. at 974 (quotations omitted).[36] In Bossier, the number of precincts would have increased *115%*, from 56 to 121, and 17 of those 65 new precincts would have had fewer than 20 people in them. J.A. 455-96. The cost of each new precinct was approximately $850 or, in the aggregate, $55,250, for *every* state, federal and local election. J.A. 275.

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[36] *See Shaw II*, 517 U.S. at 912 (criticizing precinct splits); *Johnson v. Miller*, 864 F. Supp. 1354, 1367, 1376 (S.D. Ga. 1994) (same).

Finally, "cutting across pre-existing precinct lines . . . is part of the constitutional problem insofar as it disrupts nonracial bases of political identity and thus intensifies the emphasis on race." *Bush*, 517 U.S. at 980.

Appellants allege that the Board's plan did not honor two "factors that it had previously considered 'paramount.' " A-I Br. 29. First, appellants make much of the fact that the Board's plan supposedly "pitted two pairs of Board incumbents against each other." U.S. Br. 38; A-I Br. 29. But pairing two incumbents is a problem only if *both* members of the pair will seek reelection, and the unrebutted testimony establishes that one member of each of these pairs had already decided *not* to run for reelection. *See* J.A. 54, 103, 108. (Incumbent Musgrove, paired with incumbent Jackson, had decided not to run again; incumbent Gray, paired with incumbent Harvey, had decided not to run again). Thus, unlike the NAACP Plan which greatly disfavored incumbents by radically redrawing every school district and pairing them, Tr. (Musgrove) at 46, the Police Jury plan was in no way inconsistent with the Board's interest in protecting incumbents. Second, appellants note that there was not a school in each district in the Board's plan. Yet, there is no evidence that appellants' newly-minted principle was a "factor[ ] that [the Board] had previously considered paramount," nor that the NAACP plan advanced this interest. A-I Br. 29. To the contrary, the Board *never* gave the cartographer school attendance maps or otherwise indicated this was a criterion. App. 174a ¶ 88. Since board members represent people, not buildings, there is no basis for believing that this is a traditional districting criterion, and appellants cannot cite a single case suggesting it is. Conversely, the Board's plan was superior to the NAACP plan for *all* recognized districting principles – compactness, preserving municipal and other boundaries, etc. – and the appellants cannot advance a *single* race-neutral reason for adopting the maximizing alternative. J.A. 504, 509; J.A. 455-96; Joiner Rebuttal Testimony at 7.

Appellants also maintain that the Board "rushed to a decision" in September and October 1992, when its elections were two years away. A-I Br. 36, 37; U.S. Br. 6. Again, the Board was required by state law to complete its redistricting procedures by *December 31, 1992*, J.A. 88, and thus the fact that its *elections* were two years off is utterly irrelevant.

Appellants also suggest that the Board has somehow violated its desegregation decree, even though the Justice Department has never so argued in the *school desegregation* case, or sought sanctions or modification of the decree. There is no evidence that the school's alleged racial imbalance is attributable to the Board's conduct, as opposed to demographic factors over which it has no control. *See Freeman v. Pitts*, 503 U.S. 467, 494 (1992). Moreover, contrary to appellants' suggestion, this Board's disbandment of a newly-constituted biracial committee in no way suggests noncompliance with any school desegregation decree or duty. In fact, the Board voluntarily established this committee in 1993, at the request of the NAACP. App. 183a ¶ 113.[37]

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[37] The committee was dismissed when it exceeded its desegregation advisory role and instead began to involve itself in educational policy matters that are "committed to the control of state and local authorities." *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 91 (1978). The initial biracial committee last met *twenty-three years ago* in 1976, when perhaps one current Board member was serving. App. 182a ¶ 112. This committee was established pursuant to a *consent* decree and was charged with "mak[ing] recommendations as to whether or not the present desegregation plan is to be reviewed." *Id.* (internal quotations omitted). This plainly implies that it was intended merely to make specific recommendations for a unitary system, not serve as a permanent governmental bureaucracy. It is thus entirely understandable that the interest of the volunteer citizens who served on the committee waned over time. There is nothing in the record suggesting that the Justice Department, the private plaintiffs or the black community ever complained about its dormancy. Indeed, the *lawyer* for the private desegregation plaintiffs since the 1970s testified that he was *unaware* of any biracial committee requirement until 1993. Davis Testimony at 12.

In sum, while it is theoretically conceivable that the Board made the right decision for the wrong reason, it is not possible that the district court's contrary conclusion is "clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.")[38]

CONCLUSION

The appeal should be dismissed for want of jurisdiction, or in the alternative, the judgment of the district court should be affirmed.

Respectfully submitted,

MICHAEL E. ROSMAN
HANS F. BADER
CENTER FOR
INDIVIDUAL RIGHTS
1233 20th Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 833-8400

MICHAEL A. CARVIN*
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*

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[38] The sum total of appellants' purpose case thus reduces to the complaint that the district court failed to sufficiently discount the Board's appointment of a black member for the only vacancy available and did not put the most nefarious possible spin on certain hearsay statements that Board members allegedly conveyed to the appellant-intervenor and another civil rights advocate. App. 108a-09a. This quibbling over the import (or existence) of, at worst, ambiguous acts and statements is of no consequence because "such questions of credibility are matters for the District Court," and this Court will not "second-guess the District Court's assessment of the witnesses' testimony." *Bush*, 517 U.S. at 970, 971. As even the dissent conceded, the Board members' alleged "statements are subject to different interpretations" and "standing alone would certainly be insufficient to show discriminatory purpose." App. 133a.