No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

JANET RENO, APPELLANT

v.

BOSSIER PARISH SCHOOL BOARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the district court erred in concluding that, because Bossier Parish School Board's 1992 redistricting plan was not enacted with a retrogressive purpose, it was not enacted with "the purpose * * * of denying or abridging the right to vote on account of race," within the meaning of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

PARTIES TO THE PROCEEDING

Bossier Parish School Board was the plaintiff in the district court and is the appellee in this Court. Janet Reno, the Attorney General of the United States, was the defendant in the district court and is the appellant in this Court. Defendant-intervenors George Price, *et al.*, have filed a separate notice of appeal from the judgment of the district court and are filing a separate jurisdictional statement.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court that is the subject of this appeal (App. 1a-28a)[1] is not yet published, but is available at 1998 WL 293272. An earlier opinion of the district court (App. 78a-144a) is reported at 907 F. Supp. 434. This Court's opinion on appeal from the district court's initial decision (App. 29a-77a) is reported at 117 S. Ct. 1491.

JURISDICTION

The judgment of the three-judge district court was entered on May 4, 1998.[2] A notice of appeal was filed on July

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[1] "App." refers to the separately bound appendix to this jurisdictional statement.

[2] Although notations on the district court's opinion and order indicate that they were "filed" on May 1, 1998 (App. 1a, 28a), the district court's docket shows that final judgment was actually entered on May 4, 1998. See App. 242a.

6, 1998 (the Monday following Friday, July 3, a federal holiday). App. 242a-243a. The jurisdiction of this Court is invoked under 42 U.S.C. 1973c.

STATUTE INVOLVED

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, is reproduced at App. 244a-246a.

STATEMENT

The State of Louisiana and all of its political subdivisions, including appellee Bossier Parish School Board (appellee or Board), are jurisdictions covered by the "preclearance" requirements of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. See 28 C.F.R. Pt. 51, App. Section 5 provides that a covered jurisdiction may not implement any change in election practices unless it has first submitted the proposed change to the Attorney General and the Attorney General has not interposed an objection to the change within 60 days, or unless it has obtained a declaratory judgment from the United States District Court for the District of Columbia that the proposed 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." App. 244a-245a.

The Board submitted its 1992 redistricting plan to the Attorney General, but the Attorney General objected to it. The Board then filed suit in the District Court for the District of Columbia, and that court precleared the plan in 1995, concluding that neither a prohibited purpose nor a prohibited effect was present. App. 78a-144a. On appeal, this Court held that a redistricting plan has a prohibited "effect" under Section 5 only if the proposed change would be retrogressive, *i.e.*, if it would weaken the position of racial minorities in the jurisdiction with respect to their effective exercise of the electoral franchise. App. 33a-45a. With respect to the prohibited "purpose" under Section 5, by

contrast, the Court reserved "the question whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent" and requires consideration whether the jurisdiction acted with the intent to discriminate against minorities, but not necessarily to make their position worse than before, and stated that "[t]he existence of such a purpose, and its relevance to § 5, are issues to be decided on remand." App. 45a-46a. On remand, the district court declined to consider any discriminatory purpose other than retrogression, App. 3a, and precleared appellee's election plan because no retrogressive purpose had been shown, App. 5a-8a. The question presented on this appeal is whether a covered jurisdiction's discriminatory, but not retrogressive, purpose in enacting an election plan—such as its purpose to maintain and entrench a system that unconstitutionally dilutes a racial minority's votes—bars preclearance under Section 5, and accordingly whether the district court erred as a matter of law in preclearing appellee's election plan based on the lack of evidence of retrogressive intent.

1. This case involves a redistricting plan adopted in 1992 by Bossier Parish School Board. Bossier Parish is located in northwestern Louisiana. The Parish's primary governing body, the Police Jury, and the Parish's School Board each consist of 12 members elected from single-member districts by majority vote to four-year terms. App. 145a. There is no legal requirement, however, that the 12 Police Jury districts and the 12 School Board districts be the same, and the districts for the two bodies were different throughout the 1980s. App. 150a-151a.

The School Board and the Parish each have a history of racial discrimination beginning before the Civil War and continuing to the present. App. 210a-220a. That discrimination has affected both the administration of the school system by the Board and the drawing of voting districts for elections to both the Board and the Police Jury.

As for the administration of the school system, *de jure* segregation prevailed in Louisiana's schools long after this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). App. 216a. In 1965, the Board was placed under a court order to eliminate the vestiges of racial discrimination in its school system. *Lemon* v. *Bossier Parish Sch. Bd.*, 240 F. Supp. 709, 715-716 (W.D. La. 1965), aff'd, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967). The Board repeatedly sought to evade its desegregation obligations through a variety of devices, and it remains subject to the *Lemon* court's desegregation decree, its 1979 request for termination having been denied. App. 216a-217a. The Board has also violated the court's order to maintain a biracial committee to recommend ways to attain and maintain a unitary school system. App. 182a-183a. The Board has continued to assign disproportionate numbers of black teachers to schools with predominantly black enrollment, and the schools in Bossier Parish have become increasingly segregated by race since the 1980s. App. 217a-218a.

As for the Parish's electoral systems, in 1990, black persons comprised 20.1% of the total population of Bossier Parish and 17.6% of the voting age population. App. 145a-146a. The black population of the Parish is concentrated in two areas: more than 50% of the black residents live in Bossier City, and the remaining black population is concentrated in four populated areas in the northern rural part of the Parish. App. 146a-147a. The parties have also stipulated to facts showing that voting in the Parish is racially polarized, and that both black and white voters prefer candidates of their own race. App. 201a-206a. (One Police Juror estimated that at least 80% of white and black voters vote for candidates of their own race. App. 201a.) The parties have also stipulated that it is feasible to draw two reasonably compact majority-black districts in the Parish using traditional districting features such as roads,

streams, and railroads. App. 154a-155a, 192a-194a. Nevertheless, the Police Jury has never had a districting plan that contained any majority-black districts, App. 79a, and black voters have historically been unable to elect candidates of their choice to political positions in the Parish, App. 195a-206a.[3]

2. After the 1990 census revealed that its districts were malapportioned, the Police Jury began the process of redistricting. "At the time of the 1990-1991 redistricting process, some Police Jurors were specifically aware that a contiguous black-majority district could be drawn both in

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[3] When the stipulated record was compiled in this case, no black person had ever been elected to the Board. App. 195a. Of the 14 elections in the Parish held between 1980 and 1990 in which a black candidate ran against a white candidate in a single-member district or for mayor, only two black candidates (one for Police Jury, one for Bossier City Council) won; those candidates both ran in districts that contained an Air Force base that increased the ability of black voters to elect representatives of their choice, in a manner particular to those districts. App. 206a-207a. (That advantage was diminished after redistricting in the 1990s. App. 80a, 200a.) The black incumbent Police Juror was reelected, unopposed, in 1991, under the new Police Jury plan. App. 198a. The black City Councilmember ran against a white opponent in 1993 and lost. App. 200a.

Before its earlier decision in this case, this Court denied the Board's motion to supplement the record with the results of elections that occurred after the Board's adoption of the 1992 redistricting plan at issue here. *Reno* v. *Bossier Parish Sch. Bd.*, 517 U.S. 1154 (1996). On remand, the parties agreed to rest on the largely stipulated record that they had compiled. App. 1a. The district court denied the Board's request that it take judicial notice of the results of elections held since its previous decision, in which two black Board members were elected, noting that the Board had agreed to rest on the stipulated record and had declined its invitation to reopen the record. The court observed that, were it "to consider the results at all, [it] would need more information about them." See App. 1a-2a n.1, 10a. The district court therefore decided this case on the parties' stipulation that no black person had ever been elected to the Board.

northern Bossier Parish and in Bossier City," and "it was obvious that a reasonably compact black-majority district could be drawn within Bossier City." App. 154a-155a. Nonetheless, during public meetings in April 1991, white Police Jurors and the Police Jury's cartographer told citizens that it was impossible to create such districts because the black population was too dispersed. App. 160a-162a. On April 30, 1991, the Police Jury adopted a redistricting plan that, like all of its predecessors, contained no majority-black districts. App. 163a-164a.

On May 28, 1991, the Police Jury submitted its redistricting plan to the Department of Justice for preclearance under Section 5. The Police Jury did not provide the Department with information then available to it showing that reasonably compact majority-black districts could be created. Nor did it provide a copy of a letter from the Concerned Citizens of Bossier Parish, a local organization, protesting the Police Jury's exclusion of black citizens from the redistricting process, despite the organization's express request that the letter be included in the Police Jury's submission. On July 29, 1991, based on the information submitted to it, the Department of Justice precleared the plan for Police Jury elections. App. 165a-167a.

3. The School Board initially proceeded without urgency on its own redistricting process, as its next elections were not scheduled to occur until October 1994. App. 172a. The Board hired Gary Joiner, the Police Jury's cartographer, to develop a redistricting plan. Joiner estimated that he would spend 200 to 250 hours on the project. App. 173a. On September 5, 1991, Joiner presented the already-precleared Police Jury plan to the Board, along with precinct maps (because, Joiner explained, the Board would have to work with the Police Jury if it wanted to alter precinct lines). App. 174a.

The Board did not at that time adopt the Police Jury plan, which reflected different priorities than those of the Board. First, police juries "are concerned with road maintenance, drainage, and in some cases garbage collection, and the level of demand for such services in each district is a concern. * * * [B]oard members, by contrast, are typically concerned with having a public school or schools in each district." App. 151a. The district lines in the Police Jury plan do not correspond with school attendance zones, and some of the Police Jury districts contain no schools. App. 191a. Second, the Police Jury plan did not correspond to the distribution of Board incumbents; if adopted by the Board, that plan would have created two districts that pitted Board incumbents against each other and two other districts that contained no Board incumbents. App. 181a.

Beginning in March 1992, representatives of local black community groups (including defendant-intervenor George Price, president of the local chapter of the NAACP) requested that representatives of the black community be included in the Board's redistricting process. The Board did not respond to those requests. App. 175a-176a. On August 20, 1992, at a time when no other plan had been publicly released, Price presented a partial plan, consisting of two majority-black districts, that had been developed by the NAACP. App. 177a, 192a. Price was told, however, that the Board would not consider a plan that did not also draw the other ten districts. App. 177a. Accordingly, at a Board meeting held on September 3, 1992, Price presented an NAACP plan that depicted all 12 districts and included two majority-black districts. *Ibid.*

The Board refused to consider Price's new plan, ostensibly because "the [NAACP] plan's district lines crossed existing precinct lines, and therefore violated state law." App. 177a-179a. The Board's cartographer and attorney knew at the time, however, that crossing existing precinct lines did not

legally preclude the Board from considering the plan. App. 179a. Although state law prohibits school boards themselves from splitting precincts, App. 149a, school boards may and do "request precinct changes from the Police Jury necessary to accomplish their redistricting plans." App. 151a. The Board had itself anticipated that it would be necessary to split precincts in fashioning a redistricting plan; Joiner had given the Board precinct maps at the start of the redistricting process, and had told the Board members that they "would have to work with the Police Jury to alter the precinct lines." App. 174a.

At the next Board meeting on September 17, 1992, only two weeks after Price had presented the NAACP plan, the Board passed a motion of intent to adopt the Police Jury plan that it had initially rejected. The Board's action to adopt the Police Jury plan precipitated overflow citizen attendance at a Board hearing on September 24, 1992, at which many citizens vocally opposed the plan. Price explained to the Board that, in light of the NAACP plan demonstrating the feasibility of drawing one or more reasonably compact majority-black districts, the Department of Justice's pre-clearance of the Police Jury plan did not guarantee its preclearance for Board elections. The Board nevertheless adopted the Police Jury plan at its next meeting on October 1, 1992. App. 180a-181a.

There was evidence that several Board members preferred the Police Jury plan because they did not want black representation on the Board. Board member Barry Musgrove said that "the Board was 'hostile' toward the idea of a black majority district." App. 83a n.4. Board member Henry Burns stated that, although he personally favored "having black representation on the board, other school board members oppose[d] that idea." *Ibid.* Thomas Myrick, a white Board member who represented a district containing portions of predominantly black communities, told Price that

he (Myrick) "had worked too hard to get [his] seat and that he would not stand by and 'let us take his seat away from him.'" *Ibid.*

The Board submitted the 1992 plan to the Attorney General for preclearance. On August 30, 1993, the Attorney General interposed an objection to the Board's plan, citing new information that had not been provided when the Police Jury submitted the same plan, such as community objections to the plan, the Board's refusal to engage in efforts to accommodate the concerns of the black community, and the feasibility of a majority-black district. App. 233a-237a.

4. On July 8, 1994, the Board filed a declaratory judgment action in the United States District Court for the District of Columbia, seeking preclearance of its 1992 election plan. The government opposed preclearance, arguing that the Board had not shown either that the plan lacked a discriminatory effect or that it lacked a discriminatory purpose. The government did not argue, however, that the 1992 plan had either the purpose or effect of making the position of blacks *worse* than before it was enacted.[4]

On November 2, 1995, a divided three-judge district court granted preclearance. App. 78a-144a. With respect to the government's argument that the Police Jury plan had a discriminatory effect, the court held that a voting change cannot be denied preclearance under the "effect" analysis of Section 5 solely on the ground that the change would "result[] in a denial or abridgment of the right * * * to vote on account of race or color," in violation of Section 2 of the

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[4] The parties stipulated that, because the reductions in the black share of the population in some districts were *de minimis*, the plan "is not retrogressive to minority voting strength compared to the existing benchmark plan and therefore will not have a discriminatory [*i.e.*, retrogressive] effect." App. 221a.

Voting Rights Act, 42 U.S.C. 1973. App. 89a-102a.[5] The court also ruled that the Board, in adopting the Police Jury plan, did not have a racially discriminatory purpose that would bar preclearance. App. 102a-114a. In reaching that conclusion, the court acknowledged that the Board had "offered several reasons for its adoption of the Police Jury plan that were clearly not [its] real reasons." App. 106a n.15. The court nonetheless found "legitimate, non-discriminatory motives" for the Board's adoption of the Police Jury plan: "The Police Jury offered the twin attractions of guaranteed preclearance and easy implementation (because no precinct lines would need redrawing)." App. 106a.

Judge Kessler concurred in part and dissented in part, and would have denied preclearance. App. 115a-144a. Although she agreed with the majority that evidence of a Section 2 violation does not *per se* prevent Section 5 preclearance, she dissented from the majority's conclusion that the Board acted with legitimate, nondiscriminatory motives. App. 115a. Taking into account evidence that, she maintained, was relevant to the intent analysis under *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977), she found that "the evidence demonstrates conclusively that [the Board] acted with discriminatory purpose." App. 117a, 118a.

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[5] Section 2(a) of the Voting Rights Act bars all States and their political subdivisions from maintaining any voting "standard, practice, or procedure" that "results in a denial or abridgment of the right * * * to vote on account of race or color." 42 U.S.C. 1973(a). Under Section 2(b) of the Act, a voting practice results in a denial or abridgment of the right to vote if, "based on the totality of [the] circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [racial minority groups] * * * in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b).

5. The government appealed to this Court, and argued that a voting change may not be precleared under Section 5 if the change would violate Section 2. This Court disagreed with the government on that point and held, in agreement with the district court, that a voting change may not be denied preclearance under Section 5 for having a discriminatory "effect" solely because the change would "result" in a violation of Section 2. App. 33a-45a. The Court explained that "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." App. 35a (internal quotation marks omitted).

The Court also held, however, that evidence that a voting change would violate Section 2 by diluting minority voting strength is relevant to whether that change has a discriminatory *purpose*, and whether it should be denied preclearance. App. 45a-51a. The Court stated that, even if the only discriminatory purpose that requires denial of preclearance under Section 5 is a retrogressive purpose, evidence of vote dilution is relevant to that analysis. App. 47a. The Court remanded the case to the district court for further consideration as to whether the Board had a discriminatory purpose in adopting the 1992 plan. App. 50a-51a. In remanding the case, the Court "[left] open for another day the question whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent," and stated that "[t]he existence of such a purpose, and its relevance to § 5, are issues to be decided on remand." App. 45a-46a.[6]

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[6] In separate opinions, Justice Breyer, joined by Justice Ginsburg, and Justice Stevens, joined by Justice Souter, concluded that the purpose inquiry under Section 5 extends beyond the search for retrogressive intent, and "includes the purpose of unconstitutionally diluting minority voting strength." App. 56a (Breyer, J., concurring in part and concurring the judgment); App. 76a (Stevens, J., dissenting in part and concurring in

6. On remand, the parties rested on the original record. App. 1a. The government argued that a redistricting plan may not be precleared if it was enacted with a discriminatory (albeit not necessarily retrogressive) purpose, and that the evidence showed that the Board had adopted the 1992 plan with the discriminatory purpose of blocking advances in minority voting strength and maintaining a discriminatory status quo, which diluted blacks' voting strength in Bossier Parish. The district court, again divided, again precleared the Board's plan. App. 1a-28a.

As to the central legal question left open by this Court and remitted to the district court on remand—namely, whether Section 5 requires denial of preclearance of a plan enacted with a discriminatory but nonretrogressive purpose—the court stated, "We are not certain whether or not we have been invited to answer the question the Court left for another day, but we decline to do so in this case." App. 3a. The majority also remarked that the record in this case "will not support a conclusion that extends beyond the presence or absence of retrogressive intent." *Ibid.* Although the majority stated that it could "imagine a set of facts that would establish a 'non-retrogressive, but nevertheless discriminatory purpose,'" it believed that "those imagined facts are not present." App. 3a-4a. Thus, the majority addressed only whether the Board had enacted the

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part) (agreeing with Justice Breyer on that point). Justice Breyer observed that "to read § 5's 'purpose' language to require approval of [a discriminatory, but nonretrogressive plan], even though the jurisdiction cannot provide a neutral explanation for what it has done, would be both to read § 5 contrary to its plain language and also to believe that Congress would have wanted a § 5 court (or the Attorney General) to approve an unconstitutional plan adopted with an unconstitutional purpose." App. 59a. Justice Stevens found it "inconceivable that Congress intended to authorize preclearance of changes adopted for the sole purpose of perpetuating an existing pattern of discrimination." App. 76a.

plan with the intent to retrogress. It did not address whether the evidence demonstrated that the School Board had enacted the plan with the purpose of maintaining an electoral system that unconstitutionally dilutes the votes of blacks in the Parish, nor did it apply the *Arlington Heights* framework to analyze evidence of such a purpose to dilute blacks' votes.

The court adhered to its previous view that the Board's adoption of the Police Jury plan was supported by two "legitimate, non-discriminatory motives": the Board's belief that the plan would be easily precleared (because it had already been precleared by the Attorney General for use in Police Jury elections) and its "focus on the fact that the Jury plan would not require precinct splitting, while the NAACP plan would." App. 5a. Those two motives, the court concluded, were sufficient to establish a "prima facie case for preclearance." *Ibid.*

The majority then considered, under the rubric of *Arlington Heights*, *supra*, factors that might be relevant to establish the Board's retrogressive intent. First, it considered whether there was evidence that the plan "bears more heavily on one race than another." App. 5a. It found that factor inconclusive, because, having limited its analysis to evidence of retrogressive intent, it could not find evidence that "the Jury plan bears more heavily on blacks *than the pre-existing plan*," *ibid.* (emphasis added); even if the 1992 plan was dilutive of black voting strength, it was no *more* dilutive than the previous plan, App. 5a-6a. As for the historical background to the Board's adoption of the 1992 plan, the court acknowledged that this history, including the Board's history of resistance to school desegregation, provided "powerful support for the proposition that [appellee] in fact resisted adopting a redistricting plan that would have created majority black districts." App. 6a-7a. But, the court stressed, all that history proved only "a tenacious determina-

tion to maintain the status quo. It is not enough to rebut the School Board's prima facie showing that it did not intend retrogression." App. 7a. Similarly, the sequence of events leading up to the adoption of the plan "does tend to demonstrate the school board's resistance to the [NAACP plan]," and evidence of the Board's deviation from its normal practices "establishes rather clearly that the board did not welcome improvement in the position of racial minorities with respect to their effective exercise of the electoral franchise," but neither established retrogressive intent. App. 7a.

Judge Kessler again dissented. App. 12a-27a. She "remain[ed] convinced that the School Board's decision to adopt the Police Jury redistricting plan was motivated by discriminatory purpose," App. 12a (internal quotation marks omitted), and that the Board's "proffered reasons for acceptance of the Police Jury plan are clearly pretextual," App. 15a. She agreed with the government that evidence of a discriminatory, albeit nonretrogressive, purpose requires denial of preclearance under Section 5; otherwise, "we would commit ourselves to granting § 5 preclearance to a resistant jurisdiction's nonretrogressive plan even if the record demonstrated an intent by that jurisdiction to perpetuate an historically discriminatory status quo by diluting minority voting strength." App. 17a (internal quotation marks omitted). After reviewing evidence of vote dilution in Bossier Parish, Judge Kessler concluded that "[i]t would be impossible to ignore the weight and the relevance of this § 2 evidence to the School Board's intent to dilute the voting strength of blacks in Bossier Parish." App. 22a-23a. And she reiterated her previous conclusion, based on application of the *Arlington Heights* framework to the facts of this case, that "the only conclusion that can be drawn from the evidence is that [appellee] acted with discriminatory purpose." App. 23a (brackets omitted).

THE QUESTION PRESENTED IS SUBSTANTIAL

In the face of evidence that Bossier Parish School Board enacted its 1992 election plan in order to entrench a status quo that denies black citizens of the Parish an equal opportunity to elect representatives of their choice and to hinder improvement in the political position of blacks in the Parish, the district court precleared the plan because the record did not demonstrate that the Board intended to make the position of blacks worse than before. Thus, the district court effectively concluded that a voting change should be precleared even if the enacting covered jurisdiction adopted the change with the purpose of perpetuating an election system that unconstitutionally dilutes racial minorities' votes. Because the district court's ruling rests on a fundamental misconception about the scope of Section 5 of the Voting Rights Act and threatens seriously to impair enforcement of the Act, this Court should note probable jurisdiction.

1. Section 5 of the Voting Rights Act of 1965 prohibits a covered jurisdiction from implementing a new voting plan unless it first obtains a declaratory judgment from the District Court for the District of Columbia, or an administrative determination from the Attorney General, that the new procedure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c. When it is only the effect of a voting plan, and not its purpose, that may bar preclearance, this Court has held that, for preclearance to be denied, the plan must do more than continue a pre-existing abridgment of the right to vote on account of race; it must make things worse—it must have a retrogressive effect. App. 33a-45a. But when a voting plan has the *purpose* of "denying or abridging the right to vote" on account of race, and in fact accomplishes that purpose by perpetuating an electoral system that unconstitutionally dilutes the votes of

racial minorities, the plain language of the statute precludes enforcement of the plan.

This Court has consistently ruled, in accordance with that statutory language, that a voting plan is not entitled to preclearance if it was enacted with the intent to discriminate against racial minorities, and that the prohibited discriminatory purpose preventing preclearance is not limited to an intent to make the position of racial minorities *worse*. Most recently, in *City of Pleasant Grove* v. *United States*, 479 U.S. 462 (1987), the Court denied preclearance to the annexation, by a city with an all-white population, of two parcels of land, one vacant and one inhabited only by a few whites. The Court affirmed the district court's ruling that the City of Pleasant Grove had failed to show that its annexations were untainted by a discriminatory purpose, *id.* at 469, even though it was agreed that the change could not possibly have been retrogressive of the position of black voters in the City at the time of the annexation, since there were no such black voters there, *id.* at 470-471. The Court squarely rejected the contention that "an impermissible purpose under § 5 can relate only to present circumstances," *id.* at 471, and affirmed the denial of preclearance on the basis of the City's "impermissible purpose of minimizing *future* black voting strength," *id.* at 471-472 (emphasis added). "One means of thwarting this process [of black political empowerment]," the Court held, "is to provide for the growth of a monolithic white voting block, thereby effectively diluting the black vote *in advance*. This is just as impermissible a purpose as the dilution of *present* black voting strength." *Id.* at 472 (emphasis added).[7]

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[7] In reaching that conclusion, the Court rejected the argument, advanced in dissent, that, "for a city to have a discriminatory purpose within the meaning of the Voting Rights Act, it must intend its action to have a retrogressive effect on the voting rights of blacks." *City of Pleasant*

Similarly, in *City of Richmond* v. *United States*, 422 U.S. 358 (1975), the Court concluded that, if an annexation plan was motivated by a discriminatory purpose, it must be denied preclearance, even if the plan does not have a prohibited effect on minorities' franchise. Although the Court concluded in that case that the annexation plan did not have a discriminatory effect on the position of minorities, it ruled that the inquiry could not stop at that point, because the district court had found that the annexation plan "was infected by the impermissible purpose of denying the right to vote based on race through perpetuating white majority power to exclude Negroes from office through at-large elections." *Id.* at 373. The Court remanded for further proceedings on the issue of the City of Richmond's intent, and it stressed that, even though the effect of the annexation might have been permissible, nonetheless "[a]n official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. Section 5 forbids voting changes taken with the purpose of denying the vote on the grounds of race or color." *Id.* at 378.

This Court's summary affirmance of the district court's denial of preclearance in *Busbee* v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983), also establishes that a voting change must be denied preclearance if it was enacted with a discriminatory purpose, even if that purpose was not necessarily retrogressive, *i.e.*, intended to make the position of minorities worse. The redistricting plan at issue in *Busbee* was concededly not retrogressive in effect; indeed, it increased black voting strength. 549 F. Supp. at 516. The district court, however, relying upon evidence of Georgia's

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Grove, 479 U.S. at 474 (Powell, J., dissenting); see *id.* at 471 n.11 (opinion of the Court, rejecting dissent's position).

intent to avoid the creation of a majority-black district in the Atlanta area, denied Section 5 preclearance. *Id.* at 516-518. The court explained that the redistricting plan was "being denied Section 5 preclearance because State officials successfully implemented a scheme designed to minimize black voting strength to the extent possible, [and] the plan drawing was not free of racially discriminatory purpose." *Id.* at 518. It therefore denied preclearance based squarely on its finding that Georgia had acted with a discriminatory, but not retrogressive, intent.

On its appeal from the district court's judgment, the State included the following question in its jurisdictional statement: "Whether a Congressional reapportionment plan that does not have the purpose of diminishing the existing level of black voting strength can be deemed to have the purpose of denying or abridging the right to vote on account of race within the meaning of Section 5 of the Voting Rights Act." 82-857 Juris. Stmt. I. The State also argued that, "[a]bsent a purpose to diminish the existing level of black voting strength or to despoil theretofore enjoyed voting rights, [a voting change] cannot have a discriminatory purpose within the meaning of Section 5." *Id.* at 22. In response, the government noted that "[t]he core of [the State's] argument is that the only discriminatory purpose that violates Section 5 is a purpose to * * * cause retrogression," and argued that this reading of Section 5 was foreclosed by *City of Richmond, supra.* 82-857 Mot. to Aff. 5-6 & n.6. Thus, this Court's summary affirmance in *Busbee* necessarily rejected the contention that a voting plan enacted with a nonretrogressive, yet discriminatory, purpose may be precleared and "prevent[s] lower courts from coming to opposite conclusions on [that issue]." *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977).

In addition, in *Beer* v. *United States*, 425 U.S. 130, 141 (1976), the Court stated that even an ameliorative election

plan can violate Section 5 if it "so discriminates on the basis of race or color as to violate the Constitution." That part of the Court's decision in *Beer* was expressly noted with approval in the definitive Senate Report accompanying Congress's 1982 extension of Section 5 without change. See S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982).[8] Congress's reenactment of Section 5 "without changing its applicable standard," App. 42a, amounts to a codification of the Court's reading of Section 5 in *Beer*. See also *City of Port Arthur* v. *United States*, 459 U.S. 159, 168 (1982) (even if electoral scheme might reflect political strength of a minority group, "the plan would nevertheless be invalid [under Section 5] if adopted for racially discriminatory purposes").

The Court's decisions in these cases are fully consistent with Congress's overarching purpose in enacting and extending Section 5, which was to give effective protection to the constitutional right against purposeful racial discrimination in voting, secured by the Fifteenth Amendment. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 325-326 (1966); *City of Rome* v. *United States*, 446 U.S. 156, 173-178 (1980). Congress required certain jurisdictions to obtain preclearance of their voting changes precisely because those jurisdictions had a "demonstrable history of intentional racial discrimination in voting" in violation of the Fifteenth Amendment, and because their voting changes carried a "risk of purposeful discrimination." *Id.* at 177. Thus, although there has been disagreement over "*how far beyond*

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[8] There was no conference report on the 1982 extension of the Voting Rights Act; the House of Representatives adopted the version of the legislation passed by the Senate. See 128 Cong. Rec. 14,933-14,940 (1982). The Court has described the Senate Report as the "authoritative source" of the legislative history for the 1982 extension of the Act. *Thornburg* v. *Gingles*, 478 U.S. 30, 43 n.7 (1986).

the Constitution's requirements Congress intended [Section 5] to reach," this Court has never expressed doubt that Congress intended Section 5's preclusion of discriminatory voting changes "to reach *as far as* the Constitution itself." App. 57a (Breyer, J.) To hold otherwise would be to conclude that Section 5–-one of the federal government's principal weapons in its arsenal against unconstitutional racial discrimination in voting, enacted by Congress under its authority to enforce the Fifteenth Amendment because previous methods of protecting voting rights had proven ineffective (*City of Rome*, 446 U.S. at 174)–-does not in fact reach long-entrenched racial discrimination in voting that violates that Amendment.

It is particularly implausible that Congress would have intended that the Attorney General give preclearance to voting changes enacted with a racially discriminatory purpose. Congress enacted Section 5 because case-by-case litigation by the Justice Department against unconstitutional discrimination in voting had proven insufficient; jurisdictions affected by judgments outlawing a particular device had simply switched to other discriminatory mechanisms not covered by the decree. *South Carolina* v. *Katzenbach*, 383 U.S. at 309, 313-315; see also S. Rep. No. 417, *supra*, at 5. In Section 5, Congress gave the Attorney General the means to ensure that one discriminatory election system does not follow another. In 30 years of enforcement of the Voting Rights Act, the Department of Justice has *always* read Section 5 to require covered jurisdictions to show that their voting changes were enacted without an unconstitutionally discriminatory purpose, and it has *never* limited its purpose analysis on preclearance review to a search for "retrogressive intent." The Attorney General's published procedures for Section 5 submissions do not even recognize the concept of "retrogressive intent," but rather make clear that "the Attorney General will consider whether the change is free of

discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution." 28 C.F.R. 51.55(a). That longstanding and consistent construction of Section 5 by the Attorney General is entitled to "particular deference" in light of her "central role" in administering Section 5, see *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32, 39 (1978), and a holding to the contrary of that construction would effect a fundamental change in the operation of the Act.

2. Under the principles outlined above, the district court's preclearance of the Police Jury plan was legally erroneous. Despite this Court's instruction that "[t]he existence of such a [non-retrogressive, but nonetheless discriminatory] purpose, and its relevance to § 5, are issues to be decided on remand," App. 46a, the district court declined to decide whether the Board had acted with such a purpose, and instead limited its inquiry to "whether the record disproves [appellee's] retrogressive intent in adopting the Jury plan," App. 4a, a claim the government had never made. The district court's erroneous truncation of its legal analysis led it improperly to preclear the 1992 plan, notwithstanding its own factual findings and the underlying stipulated record, which plainly support, if they do not compel, a conclusion that the Board acted with discriminatory intent in adopting that plan.

First, the district court's own evaluation of the Board's motivation for adopting the Police Jury plan leads to the conclusion that the Board acted with a discriminatory purpose. The district court readily acknowledged that the Board was motivated by "a tenacious determination to maintain the status quo." App. 7a. It also accepted that the record "establishes rather clearly that the board did not welcome improvement in the position of racial minorities with respect to their effective exercise of the electoral

franchise." *Ibid.* The district court's previous decision in this case also recognized that the Board had initially disliked the Police Jury plan, for valid reasons, and that it turned to that plan only after the redistricting process "began to cause agitation within the black community." App. 106a. Thus, while the district court characterized the 1992 plan as a "close port" available in a "storm," *ibid.*, the "storm" was merely the Board's realization that the black community was seeking improvement in its political position, something the Board was determined to oppose.

Second, the record amply supports a conclusion that the Board adopted the Police Jury plan in order to prevent any advance in the political position of blacks—as the district court would surely have found, had it engaged in the proper analysis of the Board's intent under the well-settled framework of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-267 (1977).[9] Under the *Arlington Heights* framework for evaluating intent, the "important starting point" is whether the impact of the official action "bears more heavily on one race than another." *Id.* at 266. As this Court noted in its prior opinion in this case, a "jurisdiction that enacts a plan having a dilutive impact [on blacks' votes] is more likely to have acted with a discriminatory intent." App. 47a. On remand, it was undisputed that the Police Jury plan had a dilutive impact on blacks' exercise of the franchise; the Board conceded in its brief on remand that "the School Plan did dilute black voting strength." Board Br. 21 (filed Oct. 23, 1997). See also App. 201a-206a (stipulations establishing that white majority in

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[9] As this Court explained in its prior opinion in this case, *Arlington Heights* has served as the framework for examining discriminatory purpose in equal protection cases and "has also been used, at least in part, to evaluate purpose in [the Court's] Section 5 cases." App. 48a-49a (citing *City of Pleasant Grove*, and *Busbee*, *supra*).

Parish usually votes sufficiently as a bloc to defeat black minority's preferred candidate).

Arlington Heights also instructs that the historical background of a decision is particularly relevant "if it reveals a series of official actions taken for invidious purposes." 429 U.S. at 267; see also *Rogers* v. *Lodge*, 458 U.S. 613, 625 (1982). The district court did not doubt that the Board's history included a litany of actions taken for a discriminatory purpose, most notably "the school board's resistance to court-ordered desegregation" and its "failure to * * * maintain a bi-racial committee to recommend to the School Board ways to attain and maintain a unitary system and to improve education in the parish." App. 7a (internal quotation marks and citation omitted). It found that history irrelevant, however, because it proved at most "a tenacious determination to maintain the status quo," rather than retrogression, *ibid.*—even though that status quo was the vestige of *de jure* segregation in the Parish's public schools, and the denial of an equal opportunity for black voters to elect representatives of their choice.

Arlington Heights holds further that substantive changes in a decisionmaker's position are relevant "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." 429 U.S. at 267. The district court indeed found "[e]vidence in the record tending to establish that the board departed from its normal practices" in adopting the 1992 plan. App. 7a. Under "normal practices," the Board surely would not have rushed to adopt a redistricting plan with two districts that pitted incumbents against each other, and two other districts that contained no incumbent. See App. 178a. It is therefore unsurprising that the Board initially found the Police Jury plan unsuitable for its purposes and adopted it only upon realizing that it provided the only readily available plan to

prevent improvement in the political position of blacks in the Parish.[10]

The district court's cursory statement that "[it] can imagine a set of facts that would establish a 'non-retrogressive, but nevertheless discriminatory, purpose,' but those imagined facts are not present here" (App. 3a-4a) is unsupported—and unsupportable—by any analysis of the *Arlington Heights* factors. As Judge Kessler correctly pointed out, the majority "examine[d] each of the *Arlington Heights* factors * * * only for the purpose of finding evidence of retrogressive intent." App. 24a. Thus, the majority followed most of its findings establishing that the Board did not want blacks in the Parish to improve their voting strength with a statement that such evidence did not show the intent to retrogress. See pp. 13-14, *supra*. The lower court's failure to apply the *Arlington Heights* framework to the broader question of discriminatory intent was error.

3. The district court's decision to preclear the 1992 plan cannot be sustained by its determination that two of the Board's proffered explanations for adopting that plan—"guaranteed preclearance" by the Attorney General and "easy implementation (because no precinct lines would

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[10] As for the *Arlington Heights* factor of contemporaneous statements by decisionmakers (429 U.S. at 267), the district court noted evidence that some Board members were hostile to black representation on the Board, but it reaffirmed its earlier conclusion that those statements did not establish discriminatory intent. App. 7a-8a, 109a-111a. The government did not contend that those statements, standing alone, sufficed to prove discriminatory intent; rather, we argued, as Judge Kessler wrote in her initial dissent, that, when "considered in the context of the School Board's discriminatory past," "th[ose] statements add further proof of improper motive," and "it seems fair to conclude that at least some School Board Members were openly 'hostile' to black representation on the school board." App. 133a.

need redrawing)"—were legitimate and nondiscriminatory reasons. See App. 5a, 106a. First, the record clearly demonstrates that these reasons were pretextual. As Judge Kessler pointed out, proper application of the *Arlington Heights* framework to the facts of this case "leads to one conclusion: the Board adopted the Police Jury plan * * * to ensure that no majority-black districts would be created." App. 15a.

But even if the district court were correct that the Board's proffered reasons for its adoption of the 1992 plan were not pretextual, the court's decision to preclear the plan would still be erroneous as a matter of law, because the record clearly demonstrates that the Board *also* acted with a discriminatory intent in adopting the 1992 plan. A jurisdiction seeking preclearance has the burden to prove "the *absence* of discriminatory purpose" on its part. *City of Rome*, 446 U.S. at 172 (emphasis added); *City of Pleasant Grove*, 479 U.S. at 469. Because the presence of a discriminatory purpose requires denial of preclearance, a jurisdiction's election plan is not entitled to preclearance if a discriminatory purpose significantly contributed to the adoption of the plan, even if nondiscriminatory reasons also played a part in motivating the jurisdiction. The fact that the jurisdiction may have had some legitimate reason for enacting the plan does not permit the court to ignore its discriminatory motivation in doing so.

The Board's hope for "guaranteed preclearance" of the 1992 plan does not disprove a discriminatory purpose on its part. First, the hope for guaranteed preclearance might have been equivalent to a discriminatory purpose. Given the Board's history of racial discrimination, it would be reasonable to conclude that the Board turned to the Police Jury plan in part because it expected that the plan's "guaranteed preclearance" would enable it to continue in place a discriminatory status quo without detection or

objection by the Attorney General. Second, the record shows that, even if guaranteed preclearance was an important and race-neutral reason motivating the Board, it was not the only significant factor that induced the Board to adopt the Police Jury plan. Since that plan had been precleared for Police Jury elections on July 29, 1991, the School Board could have adopted it at its September 5, 1991, meeting, yet it continued to consider adopting another plan for more than a year. See pp. 6-7, *supra*. In fact, the Board turned to the Police Jury plan only after the position of the black community had become apparent. See pp. 7-8, *supra*. There must, therefore, have been another motivating factor behind the Board's decision, which can only be explained as the Board's desire to prevent blacks from making effective use of their voting strength.

Similarly, concerns over splitting precincts did not persuade the Board to adopt the Police Jury plan either initially or during its efforts to draw a plan that satisfied its interests regarding incumbencies and school locations. Instead, the Board abruptly abandoned that search, more than two years before the next election, only when the NAACP plan demonstrated the possibility of drawing majority-black districts in the Parish. The Board also made no attempt to examine measures that would have reduced the number of precinct splits in a plan that would have provided for some black electoral opportunity. See App. 180a. Thus, even if one favorable feature about the Police Jury plan was that it did not require precinct splitting, that does not mean that the Board acted without a discriminatory purpose in adopting it.

4. For the reasons we have explained, the district court's evaluation of the Board's adoption of its redistricting plan was legally flawed. Because of the importance of those legal errors for the administration of Section 5, plenary review by this Court is warranted. The district court's decision to pre-

clear an election plan without deciding whether it was infected by an unconstitutional, racially discriminatory motive (and in the face of evidence that it was) is a significant turn in Section 5 jurisprudence. Future three-judge panels of the District Court for the District of Columbia hearing preclearance cases under Section 5 are likely to follow the analysis of the lower court in this case. See App. 97a-98a n.9 (district court noting that prior decisions of three-judge preclearance panels are particularly persuasive because, "in this curious corner of the law," only this Court and three-judge panels of the District Court for the District of Columbia may consider these questions). Because preclearance cases may be brought only in the District Court for the District of Columbia, there is no opportunity for further percolation of these issues in other federal courts, and because appeals from such cases lie only to this Court, only this Court can correct the legal errors of the district court in this case.

Moreover, because the existence of a discriminatory purpose is potentially an issue in *every* preclearance submission, the question whether that prohibited purpose is limited to retrogressive intent is of central importance to the Attorney General's administration of Section 5. The existence *vel non* of a discriminatory purpose is particularly important in the Attorney General's evaluation of redistricting plans, and will undoubtedly be a major focus of submissions requesting preclearance of reapportionment plans following the upcoming decennial census. The significance of the question presented for the administration of Section 5 therefore warrants this Court's plenary consideration.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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SEPTEMBER 1998