No. 99-1203

# In the Supreme Court of the United States

DENNIS THERIOT, ET AL., PETITIONERS

*v.*

PARISH OF JEFFERSON, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
*Solicitor General*
*Counsel of Record*

BILL LANN LEE
*Acting Assistant Attorney General*

MARK L. GROSS
REBECCA K. TROTH
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTIONS PRESENTED

1. Whether the court of appeals correctly upheld as not clearly erroneous the district court's finding that incumbency and other nonracial considerations, rather than race, predominated in the drawing of District 3 of the Parish Council of Jefferson Parish, Louisiana, and therefore correctly concluded that District 3 is not subject to strict scrutiny.

2. Whether the court of appeals correctly held that the appropriate benchmark for determining whether a proposed redistricting in Jefferson Parish would satisfy the nonretrogression principle of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, was the most recent redistricting plan that the Parish had adopted and the Attorney General had precleared under Section 5, including the current black percentage of the voting age population of the Parish districts in that plan.

3. Whether the configuration of District 3 is narrowly tailored to meet the compelling state interest of compliance with the Voting Rights Act.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 185 F.3d 477. The opinion of the district court (Pet. App. A37-A69) is reported at 966 F. Supp. 1435.

## JURISDICTION

The judgment of the court of appeals was entered on August 17, 1999. The petition for a writ of certiorari was filed on November 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. The Parish of Jefferson is a political subdivision of the State of Louisiana and is governed by a Parish President and a seven-member Council. In 1980, the Parish had a population of 454,592. At that time, blacks in the Parish made up 13.86% of the total population and 11.78% of the voting age population (VAP). Pet. App. A2 & n.1.

Before 1987, members of the Council were elected under what was known as the "4-2-1 plan." Under that plan, the Parish was divided into four Council districts, each of which elected one member. In addition, a floterial district, or super-district, comprising Districts 1 and 2, elected a fifth member, a floterial district comprising Districts 3 and 4 elected a sixth member, and a seventh member (the Council Chairman) was elected from the entire Parish at-large. In 1986, several Parish voters brought suit against the Parish, alleging that the Council districts were malapportioned in violation of the one-person, one-vote requirement of the Equal Protection Clause. The plaintiffs prevailed in that suit, and in 1987 the district court entered a consent decree that redrew the four base councilmanic districts, but otherwise maintained the 4-2-1 structure of the Council. No district in the 1987 consent decree plan had a black population exceeding 24%. Pet. App. A2-A3 & n.1.

2. Two Jefferson Parish civic associations and six black voters brought suit alleging that the 4-2-1 plan violated Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, and the Fourteenth and Fifteenth Amendments to the Constitution. After a bench trial, the district court ruled in 1988 that the Parish's districting plan violated Section 2. See Pet. App. A3-A4. The district court approved, as a remedy for the Section 2

violation, a plan proposed by the Parish in March 1990,[1] which abandoned the 4-2-1 structure and instead established one at-large district and six single-member districts, one of which, District 3, had a black majority population and voting age population. The Attorney General precleared the March 1990 plan under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.[2] Pet. App. A4-A5; Pet. 2 (stating that District 3 had 50.12% black VAP as reflected in 1980 census figures).

The Parish appealed the district court's finding of liability under Section 2. The court of appeals affirmed, and remanded the case for implementation of the new districting plan. Pet. App. A5.

3. On remand, the district court recognized that the March 1990 plan would have to be adjusted to accommodate population shifts reflected in the newly

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[1] In reciting the history of this case, the court of appeals initially referred to this plan incorrectly as the February 1990 plan, Pet. App. A4-A5, but later correctly referred to it as the March 1990 plan (*id.* at A25 n.24). See *id.* at A45-A46 (district court's findings of fact).

[2] Because Louisiana and all of its political subdivisions are jurisdictions covered under Section 5 of the Voting Rights Act, Jefferson Parish may not enact or seek to administer any new voting procedure unless it first obtains "preclearance" of the new procedure from either the United States District Court for the District of Columbia or the Attorney General. A voting change may not be precleared if it will cause, or has the purpose to cause, a "retrogression" in minority voting strength, that is, if the change will adversely affect, or is designed to affect adversely, the ability of minority voters to participate in the political process. See *Reno* v. *Bossier Parish Sch. Bd.*, 120 S. Ct. 866, 868-869 (2000). That retrogression standard generally requires a comparison of the proposed voting change to a "benchmark," which is "the last legally enforceable practice or procedure used by the jurisdiction." 28 C.F.R. 51.54(b)(1).

released 1990 census figures. According to the 1990 census, the total population of the Parish had declined by about 1.4%, to 448,306, of which 74% was white and 17.5% (78,263) was black. Pet. App. A5 n.8. The black percentage of the total population of the Parish grew by 3.6 percentage points between the 1980 census and the 1990 census. *Ibid.* The Department of Justice informed Jefferson Parish that the March 1990 districting plan was the appropriate benchmark for determining whether a new districting plan would cause retrogression under Section 5 of the Voting Rights Act. The 1990 census showed that District 3 in the March 1990 plan had a 52.3% black VAP. *Ibid.*

Councilman James Lawson, the incumbent in District 2 in the invalidated 4-2-1 plan, proposed a new plan using the new census figures that protected his incumbency interests as well as the interests of the majority of the other incumbents. On May 8, 1991, the Parish Council adopted the plan Lawson had proposed, altered slightly to reflect the concerns of an extremely vocal constituent.[3] In the Lawson Plan, District 3 has a black VAP of 57.4%. Pet. App. A6-A7.

Although the parties presented the Lawson Plan to the district court as a joint stipulation, the district court rejected it on the ground that the parties had improperly allowed "politics" to influence the redistricting process. The district court appointed a special master to assist in adjusting the March 1990 plan to reflect the census figures. The special master drew a plan based largely on the lines in the March 1990 plan, which con-

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[3] See Pet. App. A53 (district court refers to that constituent as raising "political Cain" because she wanted to be in District 1); *id.* at A58 (that "uproar" caused the Council to divide precinct between two districts).

tained a District 3 with a 49% black VAP. The district court ordered implementation of the special master's plan. Pet. App. A7.

4. The court of appeals reversed the district court's rejection of the Lawson Plan. The court of appeals ruled that the district court had intruded on the Council's legislative responsibility in redistricting by ordering implementation of the special master's plan, and that the special master's plan unacceptably failed to include a black-majority district necessary to remedy the Parish's violation of Section 2. The remand order instructed the trial court to issue an injunction requiring the Parish to submit the Lawson Plan to the Department of Justice for expedited review under Section 5. The district court did so, and on August 27, 1991, the Attorney General precleared the Lawson Plan. Pet. App. A7-A8.[4]

5. In 1995, petitioners brought this suit in district court, challenging the Lawson Plan (particularly District 3) as an unconstitutional racial gerrymander in violation of the Fourteenth and Fifteenth Amendments to the Constitution and the Voting Rights Act of 1965. The district court allowed the United States and local officials to intervene to defend the Lawson Plan. Pet. App. A8-A9.

After a bench trial, the district court entered judgment for respondents. Pet. App. A36-A68. The court's extensive findings of fact stressed that incumbency played the predominant role in the Council's decision to adopt the Lawson Plan. In particular, the district court found that, while race "was a factor, it is clear that

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[4] Elections were held in the fall of 1991 using the Lawson Plan, and for the first time in the history of Jefferson Parish, voters elected a black Council member. Pet. App. A8 & n.1.

political incumbency drove the pencil in designing these districts." *Id.* at A48.[5] Other factors at work, the court found, were the one-person, one-vote rule, considerations of contiguity and compactness in light of the Parish's particularly dispersed population, and other traditional districting principles, including uniting communities of interest. *Ibid.*; see *id.* at A53-A57. The district court also found that splitting districts and even precincts for political reasons was not uncommon in the Parish (*id.* at A55), that the increase in the black VAP of District 3 to 52.3% as reflected in the 1990 census justified the use of that figure for the purpose of measuring retrogression under Section 5 of the Voting Rights Act (*id.* at A58-A59), and that vestiges of discrimination remain in Jefferson Parish (*id.* at A59-A60).

After reiterating the factors that had predominated in determining the shape of the districts in the Lawson Plan, the district court held that District 3 should not be subjected to strict scrutiny because petitioners had failed to prove that race predominated in the drawing of that District. Pet. App. A62. The court further concluded that the shapes of the districts in the Lawson

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[5] With respect to incumbency, the district court observed that the Council had understood that the first elections after the 1990 census would almost certainly pit incumbents against each other, as the Parish had abandoned the floterial districts in the old 4-2-1 plan. Recognizing that necessity, Lawson set out to ensure that his own district, District 2, included his strongest political constituencies, while likely supporters of his anticipated opponent for District 2, Lloyd Giardina, were placed in the neighboring District 3. For that reason, several areas were placed in District 3 even though those areas, if placed in District 2, would have made District 2 more compact. Some of those divisions, moreover, could not be explained on racial grounds, for several areas with larger black populations were placed in District 2 rather than the majority-black District 3. See Pet. App. A49-A51.

Plan were not so "bizarre" as to require strict scrutiny on the ground that the district lines could not be explained on a ground other than race. *Id.* at A63. Although the court therefore did not examine in detail whether District 3 satisfies strict scrutiny, it did state generally that "this plan has been narrowly tailored to meet a compelling state interest." *Id.* at A68.

6. The court of appeals affirmed. Pet. App. A1-A29. Noting that petitioners "bear the burden of proving an impermissible racial classification," *id.* at A11, it sustained the district court's finding that racial considerations did not predominate in the drawing of District 3: "The record reveals no clear error inasmuch as incumbency protection, maintaining communities of interest, addressing one-person, one-vote concerns and natural geographic conditions predominated in drawing District 3." *Id.* at A12.

The court stressed that much of the discussion surrounding the adoption of the Lawson Plan turned on political considerations, including the likelihood that Lawson and another incumbent (Lloyd Giardina) would each campaign for the same District 2 Council seat. "Although the Lawson Plan resulted in a race between Lawson and Giardina in District 2, it garnered the most support because it met the political and incumbency concerns of the majority of the existing councilpersons." Pet. App. A13.[6] The court of appeals also held that the

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[6] The court rejected petitioners' contention that the Department of Justice had pressured the Parish "to adopt a plan with maximum benefits to minority voters." Pet. App. A17 n.18; *id.* at A25 n.24. The court concluded that, notwithstanding petitioners' efforts to "exaggerate and misconstrue the nature of the communications between the DOJ and the Parish Council," *id.* at A25, "there was no proverbial big brother manipulating the process of drawing the districts," *id.* at A17 n.18. Rather, "DOJ properly

district court did not clearly err in finding that District 3 unites communities of interest among low-income residents, and in particular, it sustained the district court's finding that District 3's low-income residents share "common social and economic needs." *Id.* at A18.[7] It further sustained the district court's finding of the "paramount" importance to the Parish of meeting the Constitution's one-person, one-vote requirement in a V-shaped jurisdiction that is "very irregular" geographically and topographically. *Id.* at A19-A20. The court did not find the shape of District 3 to be "bizarre on its face," but in any event, it determined that "any irregularity associated with the shape of District 3 is derivative of politics, joining communities of interest, one-person, one-vote concerns, and the geography and population distribution in the Parish." *Id.* at A20-A21.

Because the court of appeals determined that race did not predominate in the drawing of District 3, it concluded that strict scrutiny was not appropriate, and it did not address whether the Lawson Plan would survive strict scrutiny. Pet. App. A32. The court did,

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advised the Parish of a benchmark under Section 5 of the Voting Rights Act." *Ibid.*

[7] In reaching that conclusion, the court of appeals cited the evidence in the record of the "plethora" of civic and community organizations whose members live in District 3 and have been active in addressing the issues of housing, education, and poverty in the community. Pet. App. A18 n.20. It also rejected petitioners' argument that that evidence of communities of interest was not properly considered by the district court because that evidence had been developed after the district lines were drawn. The court noted that, when the Lawson Plan was drawn in 1991, members of the Parish Council were already "well aware" of the socioeconomic conditions of Parish residents and were familiar with the evidence of those conditions compiled during the earlier Section 2 litigation. *Id.* at A19.

however, consider and reject petitioners' argument that the Lawson Plan could not be justified to avoid retrogression under Section 5 of the Voting Rights Act because (petitioners argued) only the last plan under which elections actually have been held provides the proper benchmark for determining retrogression. Pet. App. A24-A25. Rather, the court held, the appropriate benchmark for determining retrogression is the last plan that was legally in force or effect, not the last plan under which elections were actually held. A contrary rule, the court observed, would often "sentence minorities complaining of vote-dilution to a fate similar to Sisyphus," since a plaintiff that proved a Section 2 violation could not then use a plan entered as a remedy for that violation as the appropriate benchmark for Section 5 purposes (unless elections had actually been held under the remedial plan). See *id.* at A25-A26. In effect, the court observed, petitioners "would have us turn the [plaintiffs] away and have them prove a Section 2 violation all over again. We decline to impose such a requirement." *Id.* at A26.

**ARGUMENT**

The court of appeals correctly sustained the district court's finding that race did not predominate in the drawing of the lines of District 3 of the Jefferson Parish Council. That determination reflects a factbound application of this Court's now settled principles setting forth the requirements for establishing a racial gerrymander in violation of the Equal Protection Clause. The court of appeals also correctly concluded that conditions under the March 1990 plan at the time redistricting to reflect the 1990 census was proposed (including the black voting age population of the Parish Council's districts as reflected in the 1990 census figures)

provided the appropriate benchmark for determining whether a redistricting plan to account for 1990 census would cause retrogression in violation of Section 5 of the Voting Rights Act. That conclusion does not conflict with any decision of this Court or any court of appeals. Further, since the court of appeals concluded that race did not predominate in the drawing of District 3 in the Lawson Plan, it did not reach the question whether District 3 satisfies strict scrutiny. Accordingly, this case does not present an appropriate vehicle for review of any broad questions concerning whether and when compliance with the Voting Rights Act justifies a districting plan dictated primarily by racial considerations.

1. Petitioners contend that District 3, a black-majority district in Jefferson Parish, is an unconstitutional racial gerrymander. To establish a racial gerrymander, petitioners must first prove that race was the "predominant factor" motivating the jurisdiction's redistricting decision; that is, that the jurisdiction "subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995); see also *Shaw* v. *Hunt*, 517 U.S. 899, 905 (1996) ("The constitutional wrong occurs when race becomes the dominant and controlling consideration.") (internal quotation marks omitted). Because this "threshold standard" is a "demanding one," see *Miller*, 515 U.S. at 928 (O'Connor, J., concurring), strict scrutiny is not triggered by evidence that race was only one of several factors animating the drawing of a district's boundaries. See *Bush* v. *Vera*, 517 U.S. 952, 958-959 (1996) (opinion of O'Connor, J., joined by Rehnquist, C.J., and Kennedy,

J.) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. * * * Nor does it apply to all cases of intentional creation of majority-minority districts."); see also *id.* at 993 (separate opinion of O'Connor, J., concurring) ("Only if traditional criteria are neglected *and* that neglect is predominantly due to the misuse of race does strict scrutiny apply."); *Hunt* v. *Cromartie*, 526 U.S. 541, 546 (1999).

The courts below faithfully followed this Court's decisions and examined the factors considered by the Parish in drawing and adopting the Lawson Plan (including the lines of District 3). Based on that examination, the lower courts correctly concluded that incumbency, not race, was the predominant factor in the fashioning of District 3. With regard to the influence of incumbency concerns, the courts below found that Councilmember James Lawson was the driving force behind the plan that the Parish ultimately adopted and the court of appeals ordered into effect in August 1991. Pet. App. A6-A8. Because Lawson wanted his areas of political strength in District 2, areas were added and deleted for political reasons, and racial matters were secondary in the minds of those drawing the plan. *Id.* at A13-A14. Indeed, with regard to the specific geographical areas on which petitioners focus, the district court found either that there was no racial motivation present in placing those areas in District 3, or that political motivations predominated. *Id.* at A49-A54. The court of appeals agreed, concluding that "the issue of race was plainly subordinate to the majority of the councilpersons' preoccupation with protecting incumbency and maintaining other political advantages." *Id.* at A13-A14. The district court also exhaustively addressed the other factors that motivated the drawing

of the plan, and after reviewing that evidence in detail, the court of appeals confirmed that "[t]he record presents bountiful evidence supporting the district court's finding that political incumbency, communities of interest, one-person, one-vote, and geography dwarf issues pertaining to race." *Id.* at A21. Petitioners provide no basis for this Court to disturb those factual conclusions in which two lower courts have concurred. See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 662 (1987).

Petitioners note that the Parish was aware of the need to comply with the Voting Rights Act in redistricting. It has never been disputed that the Parish considered as a factor in the 1991 redistricting process the need to create a majority-black district in order to comply with that statute. The Parish could not have acted otherwise in light of the adjudicated Section 2 violation. But evidence that the Parish undertook to comply with the Voting Rights Act is not proof that race *predominated* in the drawing of the specific lines of the majority-black district. Here, the courts below considered the evidence of the Parish's awareness of the need to devise a remedy for the Section 2 violation and to comply with Section 5 and concluded that neither those concerns nor other racial considerations predominated over traditional districting concerns, and indeed, that those considerations were accommodated within traditional districting principles. Thus, the court of appeals concluded that "[i]ssues of race were relevant, inasmuch as the Parish Council was directed to remedy a Section 2 violation, yet did not predominate." Pet. App. A22.

The courts below also agreed there was no evidence that District 3 reflected any policy of "maximization" of minority voting strength without regard to traditional

redistricting principles. Cf. *Miller* v. *Johnson*, 515 U.S. at 926. The district court found (Pet. App. A24) that petitioners "had not demonstrated that the [Department of Justice] coerced the Parish into designing a district that maximizes District 3's black population," and the court of appeals agreed: "Stated simply, there was no proverbial big brother manipulating the process of drawing the districts." *Id.* at A17 n.18. Because the plan the Parish drew generally respected traditional redistricting principles, and because (as the courts found) the relatively minor deviations from compactness in District 3 are explained by politics, not race, the fact that the Parish was also aware of the need to comply with the Voting Rights Act does not trigger strict scrutiny or suggest a constitutional violation.

2. Petitioners contend (Pet. 10-11) that the adoption of District 3 cannot be justified on the ground of avoiding retrogression of minority voting strength in violation of Section 5 because, they contend, the appropriate benchmark under Section 5 is minority voting strength in the last plan under which elections were actually held, not the last valid plan that was in force and effect. In this case, the last Council elections before the adoption of the Lawson Plan were held under the 4-2-1 plan, in which no district had more than a 24% black VAP. That plan, as we have explained (pp. 2-3, *supra*), was found to violate Section 2. The Parish subsequently adopted, and the Attorney General precleared, a March 1990 plan that created one black-majority district, but no elections were held under that plan because the census and the requirement of redistricting intervened.

Petitioners' argument is not properly presented in this case. At bottom, petitioner's contention amounts to an argument that District 3 of the Lawson Plan does

not satisfy strict scrutiny because, even if it was adopted to avoid retrogression, it is not narrowly tailored to accomplish that end since (they maintain) Section 5 precluded retrogression only from the 24% black VAP under the 4-2-1 plan, not the 52.3% black VAP in the March 1990 plan (as reflected in the 1990 census figures). But the question whether the Lawson Plan satisfies strict scrutiny would arise only if racial considerations had predominated in the adoption of that Plan. As we have explained, racial considerations did not so predominate, and so there is no occasion to reach the question whether the Lawson Plan is narrowly tailored to avoid a Section 5 violation. That question could arise only if the Lawson Plan required strict scrutiny.

In any event, petitioners' argument is without merit. Section 5 plainly bases nonretrogression on the most recent plan validly in force and effect, not on the earlier plan under which elections were most recently held. Otherwise, as the court of appeals observed (Pet. App. A25-A26), in many cases Section 2 litigation would be a pointless exercise. Here, for example, black voters in Jefferson Parish established in litigation that Jefferson Parish's 4-2-1 plan (with no majority-black district) violated Section 2, and that finding of liability was affirmed by the court of appeals. The parties then agreed upon, and the district court eventually adopted, a remedial (March 1990) plan in which one majority-black district was created. By the time that plan was finally adopted, however, the census had intervened, and so the Parish had to adopt a new plan to reflect population shifts. If petitioners' view of Section 5 were adopted, however, then Jefferson Parish could not have been justified even in adopting the very same remedial (March 1990) plan, because the proper benchmark for

retrogression would have been the previous 4-2-1 plan, with a maximum 24% black VAP in any district. Thus, to obtain a majority-black district after the 1990 census, the plaintiffs would have been required to establish a Section 2 violation over again (and perhaps again and again, if the vagaries of timing were such that elections were not held under a remedial plan before a new census). The Voting Rights Act does not relegate minority voters "to a fate similar to Sisyphus." *Id.* at A25-A26.

The Attorney General's Section 5 Guidelines explain that the retrogression standard generally requires a comparison of the proposed voting change to a "benchmark," which is "the last legally enforceable practice or procedure used by the jurisdiction," to determine whether there is any reduction in minority electoral opportunity. 28 C.F.R. 51.54(b)(1). Retrogression is determined by using the racial composition of the population in districts as reflected in the most recent census (or more accurate and recent figures) as a starting point. See *City of Rome* v. *United States*, 446 U.S. 156, 186 (1980) (the "effect of the 13 annexations must be examined from the perspective of the most current available population data"); 28 C.F.R. 51.54(b)(2). The use of the most recent census (or other highly reliable) figures is necessary because they are most likely to present an accurate depiction of minority voting strength at the time the Section 5 preclearance submission is made. If there have been population shifts in districts since the previous census, old census figures may present a misleading picture of minority voting strength. See *Ketchum* v. *Byrne*, 740 F.2d 1398, 1402, 1414 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); *Burton* v.

*Sheheen*, 793 F. Supp. 1329, 1347 (D.S.C. 1992), vacated on other grounds, 508 U.S. 968 (1993).[8]

Petitioners have sought to rely on *Young* v. *Fordice*, 520 U.S. 273 (1997), and *Abrams* v. *Johnson*, 521 U.S. 74 (1997), but those decisions confirm that the proper benchmark for retrogression is the current level of black voting strength in the last valid plan that was in effect in the jurisdiction. In *Abrams*, the Court rejected the contention that the proper benchmark for retrogression in that case was minority voting strength in a plan that was an unconstitutional racial gerrymander when it was drawn (as distinguished from a plan that became malapportioned over time because of population shifts), and held that the proper benchmark was the last plan that was constitutional when drawn and was legally in effect in the district before the unconstitutional plan was drawn. *Id.* at 97. That decision, however, establishes only that the plan that provides the benchmark must have been constitutional when it was drawn, not that elections must have been held under the plan. In *Fordice*, the Court rejected the claim that a provisional voter registration plan that was never actually adopted by the State was "in force or effect" for purposes of determining the benchmark. 520 U.S. at 282.

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[8] To the extent that petitioners fault the practice of measuring minority voting strength using current census figures, it should be noted that petitioners' assumption (Pet. 4-5) that reliance on current figures will result in racial gerrymandering is unfounded factually as well as legally. There is no bias in that practice, as current census figures may show either increases or decreases in minority VAP from the previous census. If the 1990 census had shown that the minority VAP of District 3 had decreased over the previous decade, those 1990 census figures would still have provided the appropriate measure for determining retrogression.

In this case, it is not disputed that the March 1990 plan was valid and in effect when the 1990 census figures were released, and petitioners never challenged the constitutionality of that plan. The March 1990 plan was the plan the Council adopted, the district court approved, and the Attorney General precleared. It was the plan that would have been used had a Council election been held at that time to fill a vacancy or for any other reason. Cf. *Perkins* v. *Matthews*, 400 U.S. 379, 394-395 (1971). The court of appeals therefore correctly concluded that the March 1990 plan, including the 52.3% black VAP of existing District 3 under 1990 census data, provided the proper benchmark for Section 5 review of any plan that would be adopted after the 1990 census.[9]

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[9] Petitioners note (Pet. 8) that, although District 3 in the March 1990 plan, with a black VAP of 50.12% as reflected in the 1980 census figures, satisfied the compactness requirement of a single-member majority-minority district established as a remedy for a Section 2 violation, no court has expressly decided whether a majority-minority district with a greater percentage of black voters than 50.12% also satisfies the compactness requirement under Section 2. Nevertheless, it remains true that the 52.3% black VAP in District 3 provided the appropriate figure for avoiding a violation of the nonretrogression principle of Section 5, which has a separate application from that of Section 2. This Court has frequently emphasized that Section 2 and Section 5 "combat different evils and * * * impose very different duties upon the States." *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997). Section 2 "was designed as a means of eradicating voting practices that minimize or cancel out the voting strength and political effectiveness of minority groups." *Id.* at 479 (internal quotation marks omitted). Section 5, however, was designed "to insure that the gains thus far achieved in minority political participation shall not be destroyed," *Beer* v. *United States*, 425 U.S. 130, 141 (1976) (brackets omitted), and thus "freez[es] election procedures in the covered areas unless the changes can be shown to be" nonretro-

3. Petitioners argue more generally (Pet. 26-30) that the Lawson Plan does not satisfy strict scrutiny because that Plan was not necessary to avoid a violation of the Voting Rights Act. As we have explained (pp. 13-14, *supra*), that contention is not properly presented here, because both lower courts determined that race did not predominate in the drawing of District 3. In addition, the court of appeals did not address whether the Lawson Plan satisfies strict scrutiny, and so this Court should not decide that issue in the first instance. Cf. *Shaw* v. *Reno*, 509 U.S. 630, 658 (1993).

In any event, petitioners err in arguing that the court of appeals' August 1991 decision ordering the Parish to create a majority-minority district to remedy the adjudicated Section 2 violation did not establish a compelling interest in creating a majority-minority district when the Parish's district lines were adjusted to reflect the 1990 census. Although the Court has not explicitly decided the question, a majority of the Court has stated that compliance with Section 2 is a compelling state interest, see *Vera*, 517 U.S. at 990 (separate opinion of O'Connor, J., concurring); *id.* at 1033 (Stevens, J, dissenting); *id.* at 1065 (Souter, J., dissenting). Petitioners do not argue to the contrary here. See Pet. 26-30.

Rather, petitioners contend (Pet. 28) that compliance with Section 2 could not have been a compelling interest in this case because there was no evidence in this case that there "presently existed impediments to the Parish's minority citizens' ability to fully participate in the electoral process." In other words, petitioners argue that, when the Parish drew its majority-minority district in the Lawson Plan, the Parish was required *at*

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gressive, *id.* at 140 (internal quotation marks and brackets omitted).

*that time* to establish that the absence of such a district would contravene Section 2. But petitioners fail to acknowledge that the court of appeals had *already* determined, only a year earlier, that the Parish's previous 4-2-1 election scheme violated Section 2, and had ordered the Parish to implement a plan with a majority-minority district as a remedy for that violation. Thus, petitioners appear to contend that the Parish and the courts below were required to reconsider those Section 2 findings after the 1990 census results became available and reconfirm that the preconditions for finding a Section 2 violation under *Thornburg* v. *Gingles*, 478 U.S. 30, 50 (1986), were met under new census data. Petitioners cite no authority (and there is none) for the proposition that a court must revisit a finding of a Section 2 violation whenever more recent census figures become available. The court of appeals properly rejected petitioners' invitation to revisit the merits of the protracted Section 2 litigation absent affirmative proof that population densities and concentrations had changed such that the *Gingles* preconditions could no longer be met. Pet. App. A26.

Petitioners also suggest (Pet. 9) that the Attorney General, in exercising her preclearance authority under Section 5, required the Parish to draw a district that is unconstitutional in order to avoid retrogression. That argument is flawed for several reasons. First, both the district court and the court of appeals specifically found (in addition to their findings that racial considerations did not predominate in the drawing of District 3) that the shape of the District 3 under the Lawson Plan was not "bizarre" (especially given the highly dispersed population of the Parish) and did not contravene *Shaw* v. *Reno*. See Pet. App. A20, A63. Therefore, this case presents no occasion for the Court to consider what

limits the Equal Protection Clause, including the principles of *Shaw* v. *Reno*, may place on the nonretrogression principle of Section 5.

Second, the Attorney General considers constitutional principles against racial gerrymandering in applying the nonretrogression principle of Section 5 in the administrative preclearance process. The Attorney General's Section 5 guidelines make clear that the Attorney General considers a variety of factors in determining whether preclearance should be granted, including the protections of the Equal Protection Clause:

> In making a determination the Attorney General will consider whether the change is free of * * * retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution, 42 U.S.C. 1971(a) and (b) * * * and other constitutional and statutory provisions designed to safeguard the right to vote from denial or abridgment on account of race, color, or membership in a language minority group.

28 C.F.R. 51.55. The benchmark provides a guide, not an absolute limit below which minority voting strength may not fall. For example, Section 5 does not require jurisdictions to draw plans that violate the one-person, one-vote principle of the Equal Protection Clause, or are otherwise unconstitutional. Similarly, Section 5 does not require a jurisdiction to engage in unconstitutional racial gerrymandering to achieve preclearance, and the Attorney General administers Section 5 in light of that understanding.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
*Solicitor General*
BILL LANN LEE
*Acting Assistant Attorney General*
MARK L. GROSS
REBECCA K. TROTH
*Attorneys*

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