ORIGINAL

In the

Supreme Court of the United States

CITY OF ROME, et al.,
Appellants,
v.
UNITED STATES, et al.,
Appellees.

No. 78-1840

Washington, D. C.
October 10, 1979

Pages 1 thru 39

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v.	:	No. 78-1840
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Washington, D. C.,

Wednesday, October 10, 1979

The above-entitled matter came on for argument at 1:07 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROBERT M. BRINSON, ESQ., City Attorney of Rome, Georgia, Brinson, Askew & Berry, 200 North Fifth Avenue, Rome, Georgia 30161; on behalf of the Appellants.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Appellees.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in City of Rome against the United States.

Mr. Brinson, I think you may proceed when you're ready.

ORAL ARGUMENT OF ROBERT M. BRINSON, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. BRINSON: Mr. Chief Justice, and may it please the Court:

I represent the City of Rome and two of its citizens in a Section 5 matter, which is somewhat broader than a Section 5, Voting Rights Act of 1965 matter.

The City of Rome is a city of some 30,000 persons. It lies 65 miles or so northwest of Atlanta, Georgia.

I am on my 23rd visit to the City of Washington in an effort to get preclearance of my city's growth and government under Section 5, the preclearance provision of the Voting Rights Act, a provision which we here challenge.

The City of Rome is governed by a Council-Manager form of government, which has been elected at large since 1918. In 1966, during a time when, or soon after this Court's reapportionment cases, and during those reapportionment cases the City Attorney, upon request from the then governing council, recommended to the City Council that certain changes needed to be made, as he understood the reapportionment cases,

as they existed at that time.

The reason for his recommendation was the City of Rome was divided into nine wards of very disparate size, and even though the City Council was el-cted at large there was a residency requirement.

At that time there was a case pending under the title of Dusch v. Davis in the lower court, where that system of government had been challenged. And that ultimately made this Court and it was reversed. But at that time the law was in question.

The City Attorney recommended that certain provisions of the charter of the City of Rome be changed at that time. Among which were the wards situation, should be changed from nine to three; and, at the same time, some housecleaning matters in the government should be also changed.

As of that time, in 1964 the Georgia election code required a majority vote; and although that code did not specifically apply to municipalities in Georgia, it did serve as an unofficial guide for local charter.

He recommended that majority vote be instituted. And noting that there was a tendency from time to time for both the county government and the city government to be swept completely out of office, he recommended, in order to assure some continuity of government, that staggered terms be instituted. And the staggered terms, the best way to set them

up would be to provide for numbered posts.

He also, to make consistent the charter with respect to the City Commission and the Board of Education, recommended that residency requirements be instituted for the Board of Education, as they were required for the City Commission.

So that these electoral changes which were made in 1966 by the Georgia Legislature were: the majority vote; numbered posts; staggered terms; and residency requirement for the Board of Education.

QUESTION: And reduction of nine wards to three.

MR. BRINSON: And reduction of nine wards to three.

QUESTION: With the Commission or Council now still elected at large and still the same number of members, but requirement that they reside, some of them reside in each of the three wards; is that it?

MR. BRINSON: That is correct.

These changes took place -- and it is important to note that at the same time these changes took place, on the State front, on the general State law front, the Georgia Municipal Election Code in 1968, which also contained majority vote provision and a numbered post provision, for Statewide application, was submitted to the Attorney General and pre-cleared.

It is also important to note that when the changes of the City of Rome were made, it was prior to this Court's

decision in Allen vs. Board of Elections, and Perkins vs. Matthews. And quite a while prior to, in fact five years prior to the time that the Attorney General even had regulations governing the manner in which submissions under Section 5 were to be made.

The City of Rome in 1974 had an annexation of a rather large -- at least for the City of Rome -- section over its objection; that is, over the City Government's objection. It was imposed upon them by the State Legislature because of a great need of sewer services within this island in the City of Rome. It was an island, the City of Rome surrounded an unincorporated area.

So that the -- over the actual objection of the Rome City Commission, the State of Georgia, the local legislative delegation imposed the annexation of that area on the city. It was a State law by which that annexation took place, although annexation can also take place by ordinance.

In 1974 that annexation was submitted tothe Attorney General by the then City Attorney. The Attorney General wrote back and said that he could not preclear it until he learned about the City Government and what it was like.

Whereupon, the city provided additional information as to what the city, how the city was structured, and that included the 1966 electoral changes.

The Attorney General then refused to preclear both

that annexation and the electoral changes. And, in addition, he had inquired about the number of annexations which had occurred since 1964. There were a total of 60 annexations, which had taken place during a ten-year period.

QUESTION: And these annexations had been by way of an ordinance or by way of legislation in the State Legislature?

MR. BRINSON: Four of them had been State Legislature, and the balance were by ordinance.

QUESTION: By ordinance.

MR. BRINSON: That's correct.

So that after the exchange between the City Attorney and the Attorney General of the United States, there remained the unprecleared electoral changes and 13 of the annexations.

In the meantime, the City of Rome had conducted some five or six elections under the changes which they had made in 1966, including the staggered terms provision. So that there were members right in the middle of their term.

It was determined, as of the objection time, that no further elections were feasible under the then existing interplay of federal and State law. So that no election has been held in Rome since 1974.

QUESTION: What is it, except for this situation, is it a biennial or election every two years?

MR. BRINSON: Yes. No, I believe it's every four

years.

QUESTION: Every four years.

MR. BRINSON: Yes.

QUESTION: And the terms at first, I guess, were of differing lengths, to introduce the staggered terms, but thereafter --

MR. BRINSON: That's right, to initiate the staggered terms.

QUESTION: Thereafter they were four-year terms?

MR. BRINSON: That's correct.

Whereupon the City of Rome filed suit in the only jurisdiction in which it can file suit, the District Court of the District of Columbia, to seek not only a review of the Attorney General's action or the constitutionality of the Attorney General's action, but bail-out. And at which time it also challenged the constitutionality of Section 5, and also asked that it be permitted to bail out under Section 4 of the Voting Rights Act.

The District Court of the District of Columbia made many findings of fact, to which I commend this Court for its careful reading, which we have itemized in the brief and have shown that there have been some 18 particular findings which are characterized according to the Zimmer standards, under Zimmer vs. McKeithen. The City of Rome took the position that in order to carry its burden approving no purpose and no effect,

that the Zimmer standards were applicable, at least were a guide by which they could prove the lack of discriminatory effect in the changes and annexations.

The Court below found that there was not, had not been used in the City of Rome any literacy test for the 17-year period required by the Act. The Court also found no past discrimination. The Court also found a total access to the political process, and, to quote the Court, it said that the city officials of Rome were quite responsive to the needs of the minorities.

And, most remarkably, with respect to the political power of minorities in the City of Rome, I quote the specific findings of the Court below: Blacks often hold the balance of power in Rome elections.

And in Rome politics, the black community, if it chooses to vote as a group, can probably determine the outcome of many, if not most, contests.

The many others, detailing and generalizing the findings as to the representations provided by the City of Rome for the minorities are set out on pages 5 through 7 of the brief. Quite frankly, I think they are remarkable, and I'm proud of my city for having conducted its own affirmative action plan; that's about what it amounts to.

QUESTION: Mr. Brinson, it's been a while since I read the briefs in this case, do I recollect correctly that

the population makeup of your city is about three-quarters white and one-quarter Negro?

MR. BRINSON: That is correct, almost exactly. It's about 76 to 23.4 percent.

QUESTION: You've read us that finding, have there been Negro office holders in the city?

MR. BRINSON: There have been no elected black officials in the City of Rome. However, there's been only one black citizen who ran for office after the change times, and only one significant candidate who ran before the electoral changes were made.

QUESTION: But neither one was elected?

MR. BRINSON: Neither one was elected.

There is one appointed on the Board of Education, which is a six-member board.

QUESTION: And the election was at large both before and after 1966?

MR. BRINSON: That's correct.

The city takes the position that, among its basic positions that it did take from the very beginning, at the first instance, was the unconstitutionality of the Act, and that is the power of Congress to enact a provision, that is Section 5, which permits the Attorney General or the Court to deny pre-clearance merely on effect. Because the lower court found the City of Rome completely innocent of any purposeful discrimina-

tion in any of its electoral changes or annexations. That was a specific finding by the lower court.

Thus the question is squarely presented to this Court whether or not Congress indeed has the power to prescribe those changes which may have arguable discriminatory effect alone.

QUESTION: You say, then, that Section 5 of the Fifteenth Amendment permits Congress to provide for implementation of the proscriptions of the amendment itself, but it does not permit it to enlarge the rights created by the Fifteenth Amendment?

MR. BRINSON: That is correct. We do that. We do argue that point. That is Section 2 of the Fifteenth Amendment. The enforcement clause.

QUESTION: I'm sorry, I was confusing Section 5 with respect to those things, too.

MR. BRINSON: We say that the substitute provision, Section 4 of the Fifteenth Amendment, controls just what they can enforce, that Congress can only enforce the substantive provisions of the Fifteenth Amendment.

QUESTION: Of course the Court has held otherwise with respect to the Fourteenth Amendment. Hasn't it?

MR. BRINSON: I don't agree that it has, I --

QUESTION: Well, I thought it did; I didn't agree with the Court when it did so, but --

MR. BRINSON: We have analyzed the Katzenbach vs. Morgan case --

QUESTION: That's the case I'm talking about.

MR. BRINSON: And Oregon vs. Mitchell as well. And we found that, nevertheless, it is based on some rational fact-finding, that in that case what the Court did was analyze what Congress had done and Congress had specifically, with its fact-finding powers, had determined that the abolition of the literacy test would -- that the existence of a literacy test denied services to non-English speaking people, and that also it denied the voting rights, and that a specific way to counter that would be to prohibit the literacy test. But that was based on a fact-finding with specific reference to the literacy test itself. The literacy test, the national application of the prohibition of literacy test was also subject to that fact-finding in Oregon vs. Mitchell.

QUESTION: But then it wouldn't have been a sufficient answer in those cases for the State or city to have come back and said the literacy test, although they may have had discriminatory effect, were not discriminatory in purpose.

MR. BRINSON: The point that we make is that, as was noted in Oregon v. Mitchell, that there are three -- as Justice Black noted in Oregon v. Mitchell, the three things that Congress can do are to enforce the substantive provisions of the Constitution and cannot strip the States of their power

-- I'm going to get into that -- but with reference to States, it cannot strip the States of their power, and can only enact appropriate legislation, appropriate with respect to the State power reserved to it.

We contend that, first of all, and the question that I've not yet reached, that the Fifteenth Amendment does prohibit only purposeful discrimination, a question which we say -- and I'm not sure that it has been decided, I know that it is before the Court now in another case -- it is also before the Court in this case. But such a holding would be consistent with the Court's treatment of the Fourteenth Amendment, as reflected in the Washington v. Davis, and more recently in the Finney case.

But it is also consistent with Gomillion vs. Lightfoot, and the Wright case, as well as Nevett vs. Sides, a case from the Fifth Circuit.

But the question becomes whether or not Congress does have the power to expand the substantive provision of the Fifteenth Amendment of Section 1. If Section 1 does not proscribe innocent electoral changes, then we contend that Congress cannot proscribe innocent electoral changes, because to do so would be to expand that provision.

And the appropriateness of such legislation with respect to the States, which is the test as established in --

QUESTION: As I get it, the only way for that

would be for the Legislature to say: We are doing this for the express purpose of discriminating against the minorities.

Now, if they don't say that, that's it. Is that your position?

MR. BRINSON: No, Mr. Justice Marshall, --

QUESTION: Thank you.

MR. BRINSON: -- it is not.

Because the other way that has been justified is that there is some nexus or some prior discrimination. In every other voting rights case there has been some indication of discrimination otherwise. Some prior discrimination which has a present nexus to the existing effect.

And that does not exist in Rome. That was found to be excluded with respect to past discrimination. It was found that the present -- it was an actual finding, it was not just a lack thereof. The City of Rome proved that there was no purpose to the satisfaction of the District Court of the District of Columbia.

QUESTION: And the Civil Rights Act of 1954 and specifically Title VII thereof was enacted under the commerce clause power, I suppose?

MR. BRINSON: I understand that it has been held to be also enacted under the Fourteenth Amendment.

QUESTION: Well, the amendments maybe.

MR. BRINSON: Right.

QUESTION: But they would be, I suppose, under the commerce power, at least arguably.

MR. BRINSON: Yes, sir.

Now, however, it is my understanding that this Court has never addressed the question of whether or not Title VII can be applicable to cities or States, because of the reserve power of the States, and that there is an additional consideration. Because of States qua States, as we're reminded in the National League of Cities case.

I realize that that was a commerce clause case, nevertheless, it revivified the existence of the Tenth Amendment and federalism principle.

I think that Fitzpatrick v. Bitzer, which was an Eleventh Amendment case, is not inconsistent with that holding. And that where there's application to State action or to States as States, that an additional consideration is there, and that is the federalism principle of the Tenth Amendment and of the fourth section --

QUESTION: That's Article IV, Section 4.

MR. BRINSON: The guaranty clause.

QUESTION: For the republican form of government.

MR. BRINSON: That's correct.

One of the considerations, I think, that has been discussed in these cases is that, well, Congress considered the federalism principle when it enacted the statute in question.

And that may be true, but I remind the Court in this case that Section 5 of the Voting Rights Act is an entirely different animal from such remedies as Title VII. It is an entirely different kind, and one that has been observed to be a vast departure from our ordinary concepts of federalism.

And I would remind the Court also that it has application only to a few States. Therefore, when Congress passed Section 5, it could not have been considered to uphold the federalism principle because it was applicable to only a few States.

This has been particularly noted, I think, by Mr. Justice Powell, who, in his various dissents with respect to the Voting Rights Act, has noted that it is made more noxious by its applicability to a few States.

The National League of Cities decision -- again, although a decision involving commerce power -- points out that federalism principles prevent Congress from enacting a law that interferes with the State's separate and independent existence. We have attempted to show in our brief just how this interference has occurred.

It has been a criticism for quite some time, and it was indeed a criticism on theoretical basis in the Katzenbach case. And we're not asking this Court to rehear the Katzenbach case, we have attempted to make that clear, that Katzenbach is clear -- many times from the language of Katzenbach, that

the Court was then addressing and that Congress was addressing purposeful discrimination.

The very terms that are used throughout the Katzenbach case refer to the evil of purposeful discrimination. The contrivances of discrimination.

Moreover, it was also important in South Carolina vs. Katzenbach, and they noted, and based their justification of Section 5 on the temporary nature of the Act; that is, the intent of the Congress at the time was that it would last five years.

QUESTION: So you submit that the effect language in the section is unsupported, is unsupportable under the Constitution?

MR. BRINSON: We do not, Your Honor; we have suggested to the Court a construction of the statute which would be within our argument about the constitutionality. So that Congress could not be considered to have expanded the limitations on Section 1, or limitations provided by Section 1 of the Fifteenth Amendment.

That construction is that in determining whether or not --

QUESTION: Well, you do argue that Congress has no power.--

MR. BRINSON: We do.

QUESTION: -- to prohibit electoral changes that have

no discriminatory purpose?

MR. BRINSON: We do indeed argue that, Your Honor, except that we argue --

QUESTION: Why do you argue that at all?

MR. BRINSON: Because we feel that the Congress -- unless the statute is interpreted the way we suggested, that it has expanded those limitations of Section 1.

QUESTION: So you do argue, then, that Congress had -- that the effect language in Section 5 as it permits -- if it forbinds changes without discriminatory purposes, unconstitutional?

MR. BRINSON: No, sir, we argue --

QUESTION: Well, if the effect language bans changes that took place without discriminatory purpose, you say that the effect language is unconstitutional.

MR. BRINSON: That's correct. To the extent that Congress so intended. Or to the extent that it's been applied by the District Court of the District of Columbia.

QUESTION: And you say we have never held otherwise?

MR. BRINSON: I don't believe this Court has. I believe that wherever this Court has had a voting rights case, it has involved purposeful discrimination.

QUESTION: What about Beer?

MR. BRINSON: In Beer there was -- it was at least noted in the dissent that there was purposeful discrimination,

that it was involved.

QUESTION: Well, that's nice, talking about the dissent. That was me.

[Laughter.]

QUESTION: What about the majority?

MR. BRINSON: Well, in that case, Your Honor, I think the fact that there had been discrimination in the city, there had been a history of discrimination, but in looking to effect, the issue was not before the Court at the time, but in looking at the effect, there was the cognizance that the city had had a history of racial discrimination.

QUESTION: We wouldn't reach a constitutional claim, I take it, if there was some nonconstitutional basis upon which we could decide the case?

MR. BRINSON: I believe that would be correct.

QUESTION: And we reviewed a three-judge court's findings on a clearly erroneous basis?

MR. BRINSON: The findings in this case would support our proposition, because they are exactly and specifically that we have no discriminatory purpose.

QUESTION: Well, except that that necessarily includes your constitutional premise. Supposing you were to show that not only was the District Court correct in finding there was no intent, but that it was wrong in showing there was no effect, that the annexations, for example, were de minimis?

MR. BRINSON: Well, we do very well, that is still another argument that we made, that there is no effect under the Act.

QUESTION: Well, that would not require any constitutional holding on our part.

MR. BRINSON: That's correct.

QUESTION: But that would require us to overturn the finding of the District Court?

MR. BRINSON: Yes, it would.

QUESTION: And therefore, at least we would be obliged to find that that finding was clearly erroneous, I suppose?

MR. BRINSON: That's correct.

And we do argue that principle. We argue, first of all, that it's unconstitutional, as being expansion of substantive provisions of the Fifteenth Amendment. We argue that if you can construe the Act to provide that where there's purpose, then there should be no preclearance. If there is the, also, on effect. If it's not clear whether there's purpose, then you look at the effect that exists and see if you can infer purpose.

And then if there is effect alone, that -- without purpose, or if there can be no inference of purpose, then the provision should be precleared.

QUESTION: Is it -- more fundamentally, Mr. Brinson,

do you contend that this particular constitutional issue was not decided in Katzenbach, in South Carolina against Katzenbach? Or are you conceding that it was decided and asking us to revisit, reconsider that decision?

MR. BRINSON: It was not decided, we contend, Your Honor, because the question, first of all, was not before the Court, and it is clear from the Court's decision that it was considering purposeful discrimination; that those were the evils to which it was directing -- to which Congress was directing the Act, and the reasons for justifying the Act were the unique circumstances existing at the time.

And we contend that those unique circumstances don't exist now, and did not exist at the time that the Section 5 of the Voting Rights Act was re-enacted in 1975.

We contend that the fact that there were unique circumstances was the way that the Court justified the intrusiveness or the uniqueness of the Section 5 other remedy.

QUESTION: In South Carolina against Katzenbach?

MR. BRINSON: Correct.

QUESTION: And you're telling us now they have changed circumstances, which would imply that you're conceding that this issue was decided in Katzenbach.

MR. BRINSON: No, sir.

QUESTION: That's what confuses me.

MR. BRINSON: Well, we do not concede that issue,

but we say that --

QUESTION: Well, even if the conditions have not been changed, you're telling us that in any event this is a new question before this Court.

MR. BRINSON: I am saying in any event.

QUESTION: Yes.

MR. BRINSON: I am saying that. Because we have several alternative approaches to this, and the fact, first of all they were looking at purposeful discrimination, that was the evil to which the Court and Congress were directing in 1965 and '66.

But that in any event, in looking at it today, there's a different set of circumstances, and in the re-enactment in 1975 there was a different set of circumstances.

QUESTION: That wasn't true in Morgan v. Katzenbach, though. The claim there wasn't purposeful discrimination.

MR. BRINSON: No, Mr. Justice Rehnquist, but the claim there was that non-English speaking people had been intentionally discriminated against with respect to city services, or, rather, services, governmental services. And that there had been an intentional discrimination of the right to vote previously.

But that the particular change, the particular literacy requirements had been utilized intentionally, and therefore it was promiscuous under the congressional fact-

finding to outlaw.

Here, to show the Court our effect argument, the fact that whether or not Congress can outlaw non-purposeful discriminatory changes, there is no effect here.

MR. CHIEF JUSTICE BURGER: Your time has expired now, Mr. Brinson.

MR. BRINSON: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE APPELLEES

MR. WALLACE: Mr. Chief Justice, and may it please the Court:

In our view, very little, if anything, is involved in this case, other than faithful application by the District Court to the facts before it of the principles established by this Court's pertinent decisions.

QUESTION: Do you think we made a mistake in noting probable jurisdiction then?

MR. WALLACE: Well, that is not for me to say, Mr. Justice. Probable jurisdiction was noted before the time for filing. Our response to the jurisdictional statement had expired. Otherwise the case would have been put over the summer when the Court made that decision. And I'm not here to question the Court's determination of that question. I'm here to state our contentions about what's involved in

the case.

The rule of retrogression, established in Beer v. United States -- and we've set out the pertinent quotation in our brief at page 33 -- was largely determinative of the outcome here, as the District Court analyzed the case. And I might point out that that rule was developed by this Court in the context of a question about the effect of the changes that were involved in Beer, the question of discriminatory purpose had not been reached by the District Court in Beer, and therefore was not before this Court. It was something to be considered on remand in Beer, after this Court's decision.

So the rule of retrogression was adopted by this Court in Beer, entirely in the context of the effect test under Section 5. That was the rule applied quite properly here, in our view, by the District Court. The kinds of changes at issue here, particularly annexations of predominantly white areas, and the imposition of majority vote requirements where previously there had been election by plurality, and the run-off elections that went along with that, and the imposition of staggered terms were all devices specifically mentioned in the Committee Report accompanying the 1975 extension of the Voting Rights Act, as devices threatening diminution of black voting strength.

QUESTION: Mr. Wallace, one of your statements was annexation of predominantly white areas. As I understand it,

if one took the population of the area when it was annexed, frequently it was virtually unpopulated.

MR. WALLACE: In those, in 47 of the 60 annexations, the Attorney General precleared them after that became apparent. And his objections were interposed as to only 13 of the 60 annexations that had taken place. With respect to those, there was an addition of, I believe it was, 2,000-and-some white voters. We have the figures in the brief.

But --

QUESTION: Does that change the percentage very much?

MR. WALLACE: Not very much, but measurably, Your Honor.

QUESTION: Less than one percent?

MR. WALLACE: It was a total of two percent; it was a one percent increase in white registered voters, and a one percent decrease in the percentage of black registered voters for a difference of two percent.

We have that set forth in a lengthy footnote in our brief, in which we analyse the statistical evidence -- it's on pages 38 and 39 -- a little bit differently from the way the District Court did.

QUESTION: You think that ties in with the holding in Richmond?

MR. WALLACE: It does tie in with the holding in

Richmond, Mr. Justice, but it ties in even more closely with the holding in the City of Petersburg.

And in just a moment I would like to speak further about the annexations. I just wanted to say with respect to the other changes, as we pointed out in our brief, unlike the typical Section 5 case, in this case the District Court did not have to predict whether there would be a retrogressive effect as a result of the other changes because elections had taken place for eight years under those changes, without their having been precleared, and in the 1970 election, in which Reverend Hill, a black candidate to whom counsel for the petitioner referred, ran for office. He would have been elected under the old procedure, indeed, arguably, he was elected since the run-off election and the majority vote requirement had not been precleared and were a nullity. But there has been a subsequent election, so that issue is, for practical purposes, moot. But, arguably, he was elected because he received a plurality in the initial vote, and then was defeated in the run-off, in which a majority vote was required as a result of the change.

So there was no speculation required about whether a retrogressive effect was involved in the changes at issue here.

Now, with respect to the annexations, this case, in our submission, differs only in degree and not in any way in

principle from the Petersburg case, which was decided summarily by this Court in Volume 410 U.S., and was referred to extensively in the Court's subsequent opinion in City of Richmond.

In affirming that judgment, this Court necessarily rejected petitioner's basic statutory argument here, and implicitly rejected his constitutional argument as well. And for the convenience of the Court, in order to clarify this, I have asked the Clerk to circulate a Xerox copy of the motion to affirm that was filed by the United States in City of Petersburg, and that was granted by seven Justices of this Court, all of whom are present here.

QUESTION: Isn't it fairly well settled that when we affirm a judgment in the District Court we don't affirm the reasoning, we simply affirm the holding?

MR. WALLACE: That the Court does not necessarily affirm the reasoning, and that is why I thought it wise to take a look and see whether there's some other conceivable basis for the affirmance, and why I'd like, if the Court please, to turn now to pages 6 and 7 of that motion to affirm, because I think that the government there fairly laid bare exactly what was at issue in this appeal, based on the findings that had been made by the District Court in the holding there.

And with the Court's leave, I'd like to just read a

short passage here.

Appellant argues that because the court below found nothing in the annexation which indicated that it had a racial purpose, judicial inquiry in a suit of this nature, into the effect on the Negro voter of an extension of the city limits into white suburbia is foreclosed. The plain language of Section 5, however, refutes this argument.

And there we quote that the burden is to show that the change does not have the purpose and will not have the effect of denying or abridging the right to vote.

Then we say, the District Court therefore properly did not end its inquiry upon finding that the Petersburg annexation was, quote, "a necessary measure to allow the city to expand its tax base and its potential for growth and development." It looked further to ascertain whether, as this Court stated in a related context, designedly or otherwise, the extension of the city limits under the circumstances of this particular case would operate to minimize or cancel out the voting strength of racial elements of the voting population.

QUESTION: Well, is it your position that although we do not adopt the opinion of the District Court when we summarily affirm we adopt the statement of the government's motion to affirm?

MR. WALLACE: Not necessarily, Your Honor. But I believe that by looking at this the Court's recollection will

be refreshed as to precisely what was before the Court and whether there was some other basis on which affirmance was granted.

As a matter of fact, to a large extent, the reasoning of the District Court was subsequently endorsed in the City of Richmond's opinion. The reason why this decision happens to be more closely on point is because here the District Court denied preclearance to the annexation, whereas, after appropriate adjustments were made in voting procedures, this Court upheld the annexation, and the City of Richmond applying what to all appearances are precisely the same standards on which this denial is based and was affirmed by this Court.

QUESTION: Mr. Wallace, it's sort of hard to refresh my recollection, because I wasn't here; but on page 8 of your motion you point out that in that case the majority white Council had been generally unresponsive to the expressed needs and desires of the black community, and we have a precisely opposite finding in this case, don't we?

MR. WALLACE: Well, I'm aware of that difference between the two cases.

QUESTION: That difference could have been critical, couldn't it?

MR. WALLACE: There was a different finding here, which, arguably, could make a difference either in the relief

that would be appropriate or in the finding of whether there was a retrogressive effect. But it doesn't make any difference in the basic statutory constitutional question, whether, having found nondiscriminatory purpose, indeed a purpose that is referred to in one quotation we have from the opinion, in a footnote on page 11, there's a compelling need for the annexation.

The District Court nevertheless was correct in striking it down, because the city did not meet the burden of showing that it nonetheless did not have an effect, in the absence of ameliorative changes in other voting procedures, in effect proscribed by the Act.

It seems to me that is the basic statutory and constitutional contention that is being made on the other side of this case, which would require the rejection of this affirmance. And I would just point out that again on pages 10 and 11 we laid bare that that was what was at issue in City of Petersburg.

Here the diminution in the black voting strength resulting from the annexation, although measurable, was obviously less in degree, which is why I say the case differs in degree but not in principle from the City of Richmond case. And the District Court took proper account of this difference in degree in devising the remedy, or, that is, in stating what remedy would be appropriate in order for preclearance to be

granted.

The pertinent portion of the District Court's opinion begins at page 54b in the Appendix to the Jurisdictional Statement, and there the District Court looks very properly to the standards spelled out by this Court in the City of Richmond case.

There was a two-step analysis. The first was that the Court found the impact,because we find the impact on black voting strength to be significant, a measurable retrogressive impact. And we have spelled out the magnitude in that lengthy footnote in our brief.

We must inquire further, we must proceed to the second step, whether the black community, after the annexation, has a fair opportunity to obtain representation reasonably commensurate with its post-annexation numerical strength, which is a paraphrase of the standard adopted by this Court in City of Richmond.

And while in both City of Richmond and Petersburg, a change to single-member districting was required under the facts of those cases, in order to ameliorate the retrogressive effect that the annexations would have, here because the effect was less extreme the Court refused to say that that was the only possible way of ameliorating those adverse effects. And, as we pointed out in our brief, there are several alternatives that are open to the city to ameliorate those

effects. The other changes in voting procedures, particularly the change to majority voting requirement having been eliminated. As a matter of fact, the Attorney General no longer interposes an objection with respect to the Board of Education elections, no longer interposes an objection to the annexations for that purpose, but only because ameliorative changes of one kind or another should be made with respect to the City Commissioner election.

And we have spelled out on pages 40 to 42 of our brief the three possibilities that are open to the city to provide an appropriate amelioration under the standards of City of Richmond.

QUESTION: Why does it treat the Board of Education different from the City Commissioners with respect to annexation?

MR. WALLACE: Well, the difference is because of a residency requirement for City Commission elections, which did not exist under the old procedure for the Board of Education election. The residency requirement, in the context here, was we have explained in some detail on page 41, serves the function of a numbered post requirement, and results in head-to-head contests that, in effect, results in majority vote requirements.

As a practical matter, that's been the effect of it. And the residency requirement could either be dropped or

adjusted to a requirement based on the three wards that were later adopted rather than the nine wards, as we suggest; so as to ameliorate the adverse effect of adding this large number of additional white voters we have on the pre-existing numerical opportunity that black voters had to elect a candidate of their choice, which was demonstrated in the 1970 election, when Reverend Hill did win a plurality on the first vote.

Now, the statutory standard, as we say, was, in our view, settled in Petersburg and Richmond, and certainly is described similarly in Beer and in other decisions, and has been endorsed by Congress in the Committee Reports with respect to the re-enactments. And the constitutional power of Congress to adopt those statutory standards was implicitly upheld in all of those decisions. Starting with South Carolina v. Katzenbach itself.

There really have been four decisions under the Voting Rights Act which show that Congress is not restrictive in adopting legislative measures to taking actaion against only what could be proven to be violations of Section 1 of the Fifteenth Amendment. South Carolina v. Katzenbach is itself such a decision, and has in common with two others, Gaston County v. North Carolina and Oregon v. Mitchell, the fact that the Court upheld a congressional ban on the use of literacy tests, in Oregon v. Mitchell a wider ban; in Gaston County an

application of the ban to particular circumstances -- upheld that ban despite the fact that this Court had held in Lassiter v. North Carolina that the use of literacy test was not a violation of Section 1 of the Fifteenth Amendment, or at least had not been proven to be a violation of Section 1 of the Fifteenth Amendment, such that the Court could strike it down.

QUESTION: In that case; in that case.

MR. WALLACE: In that case.

But the congressional province was not really [illegible] to overrule the Court's holding in Lassiter, nor did the Court itself find it necessary to re-examine Lassiter; instead, I think what the Court did in all of these cases is very well described, if I may say so, in a paragraph of Mr. Justice Stewart's opinion in Oregon v. Mitchell, and I would like to quote this opinion, which was joined by the Chief Justice and Mr. Justice Blackmun, and this is on page 284 of 400 U.S.

"Because of the justification for extending the ban on literacy test to the entire nation,"-- the claim here was being made by Arizona, that the ban on literacy test should not be extended to it -- "need not, because of the justification for extending the ban on literacy test to the entire nation, need not turn on whether literacy tests unfairly discriminate against Negroes in every State in the Union; Congress was not required to make State-by-State findings concerning either the equality of educational opportunity or actual impact of

literacy requirements on the Negro citizens' access to the ballot box. In the interest of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records, compare Lassiter v. Northampton Election Board."

The findings that Congress made when it enacted the Voting Rights Act of 1965 would have supported a nationwide ban on literacy test.

Instead, at that time, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary, quoting South Carolina v. Katzenbach. Experience gained under the 1965 Act has now led Congress to conclude that it should go the whole distance.

This approach to the problem is a rational one, consequently, it is within the constitutional power of Congress, under Section 2 of the Fifteenth Amendment.

And the eight Justices who reached this question under the Fifteenth Amendment -- Mr. Justice Douglas upheld it under the Fourteenth Amendment -- the eight essentially agreed on this point, the disagreements were on other points. Mr. Justice Black's opinion, Mr. Justice Harlan's opinion, and the joint opinion of Justices Brennan, White and Marshall were not in disagreement on this basic point about legislative power. That there need be a rational nexus to the kind of discrimina-

tion that would be a violation of the Fifteenth Amendment, but, as Mr. Justice Stewart said, that Congress can paint with a much broader brush.

And as we show in our brief, there are really two ways in which this legislation has a rational nexus. One is the fact that it applies in areas where there is reason to presume that in many, perhaps most, of the areas to which it applies, there has been purposeful voting discrimination, the effect of which can be perpetuated by changes without this prophylactic device of preclearance provided for in Section 5.

And the other is that in light of the findings of racial bloc voting that were made by the District Court in this case, changes can lend themselves to the facilitation and promotion of private purposeful discrimination, and therefore are connected with the principle of Terry v. Adams and other decisions of this Court under Section 1 of the Fifteenth Amendment.

So there are two ways in which there is a wholly adequate legislative nexus here, a rational nexus with purposeful discrimination. And the case therefore falls well within the principles this Court has previously settled.

On the remaining point, we'll rely principally on our brief. It is clear in our view that the change at issue here were not precleared in 1968 at the time of the Attorney

General preclearing the State law which didn't make any specific reference to Rome.

As this Court pointed out in the Sheffield case, which we think is controlling on this point, it bears re-emphasizing at the outset that the purpose of Section 5 is to establish procedures in which voting changes can be scrutinized by a federal instrumentality before they become effective. And unless the Attorney General's attention is called to them, the purpose of the Act will not be served; there will be no scrutiny. There was no scrutiny of what changes would occur in the City of Rome.

And, for reasons expressed in our brief, we believe the Attorney General properly interpreted his regulations with respect to the request for reconsideration that had been submitted to him, and acted in a timely manner under those regulations. And even if he had not, he nonetheless had interposed an objection within the time specified by the statute. And we don't see why the protections of the statute would be abrogated by tardiness under the regulations in consideration of the request for reconsideration.

QUESTION: Mr. Wallace, may I interrupt? Will you refresh my recollection on how a State may be relieved from the obligation to comply with Section 5? You take the position that a city may not bail out under any circumstances; how does a State get out?

MR. WALLACE: Well, there is a provision in the Act for the bringing of a declaratory judgment action to exempt itself from the coverage --

QUESTION: I understand that. What must it show?

MR. WALLACE: The provision is set out on page 43 of our brief, Mr. Justice. It must show that no test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color within the entire covered jurisdiction.

QUESTION: Does that mean if one county failed to comply with that, that the rest of the State would remain under the Act?

MR. WALLACE: That question has not been decided by a court, but so far as I'm aware that would be the meaning of it, because there is no provision for piecemeal bail-outs which would be for the reasons we stated a very impractical way to proceed.

QUESTION: So that the smallest unit in a State can keep the entire State under the Act indefinitely?

MR. WALLACE: Well, the Act, of course, is a temporary one.

QUESTION: The Act is temporary?

MR. WALLACE: Well, it extended --

QUESTION: That's what Katzenbach said.

MR. WALLACE: It was extended by Congress in 1975 to seven additional years, so it presently expires in 1982. Many of the advocates of the extension at that time had been advocating a ten-year extension. The Attorney General had advocated a five-year extension. Congress, after lengthy hearings, determined that seven years would be the appropriate extension, and I'm sure the question will come up again in 1982.

QUESTION: Mr. Wallace, if you're correct that the city can't bring an action to bail out, and we agree with you, is the case over? Do we reach any other issue?

MR. WALLACE: Well, the city is saying that the District Court erred in refusing to preclear its changes. It brought an ordinary preclearance suit in the District Court. So that that question is also before this Court. Those are separate counts of the complaint, and the District Court reached them and decided them against the city.

QUESTION: So that we must reach the other issue?

MR. WALLACE: Yes. Yes, Mr. Justice.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:05 p.m., the case in the above-entitled matter was submitted.]

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