OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JANET RENO, ATTORNEY GENERAL, Appellant, v. BOSSIER PARISH SCHOOL BOARD; and GEORGE PRICE, ET AL., Appellants, v. BOSSIER PARISH SCHOOL BOARD

CASE NO: 98-405 & 98-406 0-2

PLACE: Washington, D.C.

DATE: Wednesday, October 6, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

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JANET RENO, ATTORNEY GENERAL, :

Appellant, :

v. : No. 98-405

BOSSIER PARISH SCHOOL BOARD; :

and :

GEORGE PRICE, ET AL., :

Appellants, :

v. : No. 98-406

BOSSIER PARISH SCHOOL BOARD :

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Washington, D.C.

Wednesday, October 6, 1999

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

PAUL R. Q. WOLFSON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Appellant Reno.

PATRICIA A. BRANNAN, ESQ., Washington, D.C.; on behalf of Appellants Price, et al.

MICHAEL A. CARVIN, ESQ., Washington, D.C.; on behalf of the Appellees.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 98-405, Janet Reno v. Bossier Parish School Board and George Price versus the same.

Mr. Wolfson.

ORAL ARGUMENT OF PAUL R. Q. WOLFSON

ON BEHALF OF APPELLANT RENO

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

Section 5 of the Voting Rights Act of 1965 prevents a covered jurisdiction from implementing any new voting practice that has the purpose to discriminate against racial minorities even if that purpose is not retrogressive. Section 5's purpose prong is not limited to an intent to make matters worse for minorities, and section 5 also places the burden of proof on the covered jurisdiction to show that its new voting practice does not have the purpose to discriminate.

The text and the Court's decisions and the background of section 5 also support those points.

QUESTION: Well now, of course, if you relied on section 2 instead, and the Government brought some challenge or some private citizen, it would be -- the burden of proof would be on the plaintiff, I suppose, to

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prove a discriminatory purpose.

MR. WOLFSON: That's correct, but I think it's important to understand section 5 does not render section 2 -- does not -- useless. I mean, this is an issue that's come --

QUESTION: Well, it would for all practical purposes in a section 5 jurisdiction.

MR. WOLFSON: I don't agree with that --

QUESTION: I don't see that you ever resort to it, probably.

MR. WOLFSON: I must disagree with that, Justice O'Connor. First of all, after all, section 5 has been applied by the Attorney General and by the preclearance courts this way for 30 years, not limited to a retrogressive purpose, and yet there are many section 2 cases brought in the covered jurisdictions. This Court has had several. Mobile v. Bolden was a section 2 case. Rogers v. Lodge was a section 2 case. Thornburgh v. Gingles was a section 2 case, even though parts of North Carolina are covered.

There are at least two very important areas where section 2 remains vital. First, of course, is where the challenged practice predates the Voting Rights Act, and in many covered jurisdictions in that area there are at-large voting practices and multimember voting practices

and what-have-you that predate 1965.

Section 2 also remains very important for fact patterns like Beer and like Thornburgh v. Gingles, that is, where there was not a retrogressive effect, and the evidence does not indicate anything to show that the jurisdiction had a discriminatory purpose but nonetheless the plan has a very serious, relatively adverse impact on minorities.

There are many reported section 2 cases in covered jurisdictions on the books, and I think it, given the history -- this is not a new interpretation of section 5 that we are advancing here. It's the one that has been applied, and it's consistent with Arlington Heights. Ever since this Court decided Arlington Heights in 1976, almost -- just after it decided Beer, the Attorney General has followed the Arlington Heights factors to determine whether an enactment has a retro -- has a discriminatory purpose.

The preclearance court in the District of Columbia, as far as we know, other than this case, has never limited its search to a retrogressive purpose. In addition, there are at least two cases in this Court where we submit, where the Court has rendered decisions that are fundamentally irreconcilable with the construction of section 5 that the board advances today.

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QUESTION: Mr. Wolfson, before you go on with that, I just wanted to make sure that I understood you correctly to say that section 2 often works when there is a dilutive effect, even though you can't prove any malevolent purpose.

MR. WOLFSON: Correct. Correct.

QUESTION: And under the section 5 interpretation that you're urging, a dilutive effect would not suffice.

MR. WOLFSON: That's --

QUESTION: You would have to have this malevolent purpose, so that would leave a great office for section 2 in dilutive effect cases.

MR. WOLFSON: That's exactly the point I was trying to make.

In addition, the Court's precedents really foreclose the proposition that is relied on today. City of Pleasant Grove in particular is irreconcilable with the submission that section 5 is limited to a retrogressive purpose, as opposed to a discriminatory purpose more broadly conceived.

That case involved an all-white town that annexed an all-white enclave and a -- an all-white parcel, rather, and a vacant parcel, and refused to annex a parcel in which black residents were living, and the argument

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that was made by the City of Pleasant Grove in this case was exactly the one that is made today, which is, we know there is no retrogressive effect, so the effect is not bad under section 5.

We know that there could not have been a retrogressive effect because the city officials were not aware of any black residents of the town at the time, so how can it possibly be said that there is a discriminatory purpose.

QUESTION: Well, Mr. Wolfson, how far can Congress go in this area --

MR. WOLFSON: Well, Congress can --

QUESTION: -- pursuant to the Constitution?

MR. WOLFSON: Well, first of all, Mr. Chief Justice, let me say the question about how far the Congress can go beyond the Fourteenth and Fifteenth Amendment really is not implicated in this case, because this case involves a core discriminatory purpose, or at least that is what is in contention.

Now, whatever -- however far Congress can go, the question about whether -- the issue about a core discriminatory purpose against racial minorities is fundamentally what the Fourteenth and Fifteenth Amendment is about, so we're not talking about going --

QUESTION: But how far can the Congress go in

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directing the Attorney General to supervise those States which are under the Voting Rights Act, under preclearance orders? I -- the Chief Justice can explain his own question, but I was -- it seems to me that if you depart from retrogression as the baseline that the Attorney General must follow, then the Attorney General has vastly greater discretion and vastly greater responsibilities in preclearance procedures, and that may put the constitutionality of the intervention in State Voting Rights Acts in an entirely new light.

MR. WOLFSON: Well, there's certainly no question that section 5 is an un unusual statute, and it has, without doubt, federalism costs, as the Court has said. However, the Court has three times examined the constitutionality of section 5 and has upheld it.

Many of these arguments were the arguments that were raised in South Carolina v. Katzenbach. The question was raised, how is that the Congress can require the States to come to Washington to prove that the -- that their enactments do not have a discriminatory purpose, and the Court said, it is unusual, but, given the sensitivity of the interest which is at stake, which is the right to vote, and given the importance of protecting that right against discrimination on the basis of race, that this is an acceptable cost, and it is within Congress' power to

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enact.

Now, in South Carolina v. Katzenbach, there was certainly no suggestion that the kind of purpose that was at issue there was limited to a retrogressive purpose, and each time Congress has looked at this act again, and it's reenacted it three times, it has considered these constitutional questions very carefully -- they are serious ones -- and it has said, the interests at stake are serious enough that the preclearance remedy is still necessary.

QUESTION: That --

QUESTION: If it meant what you say it means. If it meant what you say it means. If it doesn't say what you say it means, Congress didn't make that judgment, and in coming to that decision, I was going to ask you when you said this case involves core purposeful discrimination, well, that may well be true, but in deciding what the statute means, what it means as applied to all situations, we have to take into account the fact that it would apply to noncore purpose discrimination as well, so I don't think you can just dismiss these problems on the ground, well, after all, this is a particularly bad case. It may well be --

MR. WOLFSON: Well, the --

QUESTION: -- but we're talking about, you know,

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how should you reasonably interpret the statute.

MR. WOLFSON: Understood, and section 5 has been understood to have two independent prongs or protections. The purpose prong addresses those enactments that violate the Constitution itself, and the effect prong does go beyond it, and it inhibits the enforcement of those enactments which, although not animated by a discriminatory purpose, nonetheless present the risk of eroding those gains that have been made, and that was the issue before the Court in City of Rome.

In City of Rome, the court said, section 5 has two functions. One is to ameliorate discrimination, and the other is to prevent against further erosion. Many of these arguments, many of these serious concerns about section 5 have been aired in City of Rome and in Katzenbach, and there's no doubt, as I've said, that section 5 is unusual, but -- but the question about whether it reaches what the Constitution itself prohibits is not a question -- it does not implicate the concerns about whether the outer reaches of section 5 might present some constitutional difficulties.

What Congress intended above all was to enforce what it called the explicit commands of the fifteenth Amendment, and to make sure that new enactments did not violate the Constitution, and that's what this is about.

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QUESTION: Well, you know, you're talking now quite properly in response to questions about the substantive extent of section -- but the preclearance requirement and that sort of thing are quite different. I mean, those are procedural things that are highly unusual, regardless of the substantive extent.

MR. WOLFSON: They are unusual, and they're unusual in a number of ways, one of which is that the burden of proof is placed on the covered jurisdiction, as we've argued, to show that the enactment does not have a discriminatory purpose, but the procedural requirements are not -- they're not -- it's important not to exaggerate their onerousness. The evidence is put in, and the trier of fact in the preclearance court in this case makes a judgment as to whether -- as to where the risk of nonpersuasion should lie.

QUESTION: But it's awfully hard to prove the absence of an intent. I mean, that is a very difficult thing for anybody to do, and what's the practical effect of your interpretation?

Does it mean that any proposed change by a covered jurisdiction of any kind is going to require that jurisdiction to come in and show the negative somehow, this isn't what we intended, we didn't intend to discriminate, or have a purpose to do so, and it is not

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retrogressive?

MR. WOLFSON: Right.

QUESTION: I guess that would become the requirement in every section 5 application.

MR. WOLFSON: Well, the preclearance, the district court in this case --

QUESTION: Is that right?

MR. WOLFSON: Not exactly, which is to say that --

QUESTION: Why?

MR. WOLFSON: Which is to say, really what the jurisdiction does is, it says, here is our intent. Here is what we -- here is why we enacted this particular legislation. For example, it could be that as in Lopez last term, that there's a State policy of court consolidation because it's inefficient to have all of these various courts, and so we're doing this for efficiency purposes.

And that may, as the preclearance court said in this case, establish its prima facie reason, a legitimate nondiscriminatory reason, and then it's up to the Attorney General to show that there's some evidence that cast doubt on that reasoning, or some evidence that rebuts it.

QUESTION: But I would think under your view that wouldn't be necessary, that the trial court could

just discount the covered jurisdiction's proof. If they have the burden of proof, it's very -- as Justice O'Connor says, it's very, very difficult to prove a negative.

MR. WOLFSON: Well, unless the covered jurisdiction's reason, proffered reason is totally implausible on its face, Mr. Chief Justice, it would seem to me that if they come forward with what seems to be a facially credible reason, and it's supported by some evidence, then -- and the Attorney General simply stands mute, then perhaps the preclearance court would enter judgment.

I mean, after all, under the Court's decisions like St. Mary's Honor Center v. Hicks, it's recognized that the other side generally doesn't stand mute in response to what the suggested reason is, and the general rules of summary judgment do apply to preclearance cases, just as they do to other civil litigation, so --

QUESTION: How do we know how this statute has been applied as a practical matter by the Attorney General in the past? I don't -- it isn't clear to me that the Attorney General has done more in the past than look at retrogression --

MR. WOLFSON: Well --

QUESTION: -- in most instances.

MR. WOLFSON: Right. Of course, the one thing I

can point to is, the Attorney General's published regulations on the matter don't -- certainly don't refer to retrogression as a purpose. They say, discriminatory purpose and retrogressive effect, and it's difficult to point to anything that's published.

But the Attorney General has reviewed many, many cases, over 300,000 submissions in the entire history of the Voting Rights Act. About -- fewer than 1 percent of -- in 1 percent of the admissions has an objection been lodged. The --

QUESTION: Is that the statistic, in all the years that it's been in effect, that the Attorney General has objected in only 1 percent of the cases?

MR. WOLFSON: 3,071 times, and a majority of those are purpose cases, and as far as we are able to tell from reviewing, they certainly do not distinguish between discriminatory purpose and retrogressive purpose, and we have cases like City of Pleasant Grove, where one can easily look to it and say well, there's no -- it couldn't have been a retrogressive purpose, and Busbee v. Smith is another example.

An objection was lodged there by the Attorney General. It went to the preclearance court, there was no retrogression in that case, but the process of redistricting in the Georgia delegation to the House of

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Representatives was filled with racial epithets being hurled, you know, in meetings and so forth, and the preclearance court said, it's a discriminatory intent.

QUESTION: Mr. Wolfson, I certainly agree with you that the Attorney General's regulations couldn't be clearer, when they say discriminatory purpose or retrogressive effect. That is absolutely clear.

Unfortunately, that is not what the statute says. The statue says, whether 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, and we have clearly held, and you do not contest that the effect of denying or abridging the right to vote on account of race or color means the effect of being retrogressive.

I just find it impossible to know how you can use the English language to say that it will not have this purpose or effect, or the purpose or effect of burning the house down. Burning the house down means one thing with regard to purpose, and something else with regard to effect.

That is just not -- that language just cannot be used -- in your brief, your only response to that is that it is not at all unusual in our laws for a purpose to be treated more harshly and to be subjected to greater

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sanctions than an effect. That's certainly true, but we're not talking about what's possible for the law to do. We're talking about just the plain language. I don't see how you can say that it will not have this purpose or effect, and this means one thing for purpose and another for effect. It --

MR. WOLFSON: Well, certainly if one were to look at the language for the first time and see that it prohibits a purpose of denying or abridging the right to vote on account of race, one would not find any language in there that would suggest retrogression. I understand what -- I understand your point, but --

QUESTION: And the same for effect.

MR. WOLFSON: But --

QUESTION: But we've held that, and you don't contest that holding.

MR. WOLFSON: But the concept of effect was construed by the Court in Beer in light of the particular constitutional considerations similar to the ones that were discussed earlier, which is -- and concern, uncertainty about how far Congress intended to go beyond the core requirements of the Fourteenth and Fifteenth Amendment.

Those considerations do not apply to the purpose prong. I mean, to the contrary, the purpose prong

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essentially restates the Constitution --

QUESTION: That's certainly true, and therefore Congress should have perhaps written it differently.

MR. WOLFSON: Well --

QUESTION: It should have written it the way your Attorney General wrote the regulations.

MR. WOLFSON: Well, those regulations --

QUESTION: Shall not have a discriminatory purpose or a retrogressive effect. I don't deny that makes a whole lot of sense, but that happens not to be what the statute says.

MR. WOLFSON: Well, the statute has been construed, of course, not just in Beer but in City of Richmond and in City of Pleasant Grove, and in City of Richmond the effect was held good, but nonetheless the court remanded for a question of the purpose and the court said, it may be asked, how is it that the purpose to accomplish a certain result may be bad if that result if not bad under the effect prong, and the answer is that under our Constitution and the statute -- and the statute -- that a purpose to discriminate has no legitimacy at all.

I'd like to reserve the remainder of my time for rebuttal.

QUESTION: I would like to ask you, though, the

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Attorney General can proceed under section 2 and achieve exactly what could be achieved by your interpretation of section 5, presumably.

MR. WOLFSON: A section 2 suit could be brought, but one of the principal advantages that Congress saw in section 5, and one of the reasons why it enacted it, was to prevent the necessity of the Attorney General going forward like that. That's why, as the Court said in Katzenbach, the burden of time and inertia was placed on the covered jurisdictions, and that was -- it is unquestionably an unusual statute, but that is -- and one of the chief functions of section 5, and Congress has reexamined that three times, and each time ratified that rationale.

Thank you.

QUESTION: Thank you, Mr. Wolfson.

Ms. Brannan, we'll hear from you.

ORAL ARGUMENT OF PATRICIA A. BRANNAN

ON BEHALF OF APPELLANTS PRICE, ET AL.

MS. BRANNAN: Thank you. Mr. Chief Justice, and may it please the Court:

If the goal of the Voting Rights Act to eliminate discrimination in voting is to be fulfilled, the purpose clause of section 5 should not be restricted to a meaning more narrow than the basic fundamental

constitutional framework for assessing discriminatory intent.

If I might begin on the point Justice Scalia asked toward the end of Mr. Wolfson's argument with respect to the plain language of section 5, there's an important countervailing principle of statutory interpretation that would be violated by reading effect in the statute to mean only retrogression and purpose to mean only retrogression, and that is that the purpose prong would become virtually meaningless in practical impact. The only voting changes that would be reached by section 5 and could be touched by section 5, no matter how outrageously flagrant the racism that underlie them, would be retrogressive ones.

QUESTION: No, but there are two situations, number 1 where you -- where in fact the jurisdiction has a retrogressive purpose, but the plan it adopts in fact doesn't achieve that. That may be fluky enough, but the other situation, it seems to me, is quite substantial.

It would not be necessary for the Attorney General to show a retrogressive effect so long as the Attorney General shows that the purpose -- in fact, rather the jurisdiction has to show that the purpose wasn't retrogressive, and if the jurisdiction cannot show that the purpose was not retrogressive, the game's over.

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The Attorney General doesn't have to go into the further difficulty, or the D.C. Circuit -- the District of Columbia court doesn't have to go through the further difficulty of figuring out whether in fact the functioning of the matter is retrogressive. I think that's a great advantage.

MS. BRANNAN: Justice Scalia, with respect to that first category, we think the incompetent retrogressive category will indeed be so small --

QUESTION: It's pretty small. I agree with that.

MS. BRANNAN: -- that it really doesn't underlie the congressional purpose in a meaningful way, and with respect to the second, and a jurisdiction like Bossier Parish is a perfect example, it has never had a majority black election district, so when they come in with any redistricting plan that still doesn't have a majority black election district, it by definition is not going to be retrogressive, and for the Attorney General or a court to be looking for a purpose to do something other than what they've done we would submit is not a meaningful --

QUESTION: But that doesn't meet my point. That just shows that it does not go as far as you would like it to go, but my point is that there is a great advantage to having retrogressive purpose in the statute, and that

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advantage is, once you show a bad purpose, you don't have to go into the calculation of the effect.

MS. BRANNAN: Your Honor, I -- we think that once there is a discriminatory purpose in some kinds of voting changes it's very useful to not go into the effect, because some voting changes, unlike redistricting, the effect analysis is probably not very telling.

There are some voting changes clearly covered by section 5 that don't lend themselves to numerical analysis like districting plans do, but they also don't lend themselves, we would submit, to retrogression analysis. For example, the Court has said that when a covered jurisdiction changes its leave policies for employees to campaign for candidates for election, that must be precleared.

It really defies understanding to see how that could be retrogressive, but we could certainly imagine how that could be flagrantly discriminatory if a jurisdiction always let employees off taking leave time to campaign, but the first black candidate appeared on the scene and suddenly the leave policy was cancelled, and people said you'll never go out and campaign for that guy. I don't know how we would analyze it as retrogressive, but certainly we could analyze it as discriminatory under the Arlington Heights test.

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In essence, the point we're making is that the school board's test simply goes too far toward making the first prong of the Arlington Heights analysis the only prong that will be analyzed in reasonable common sense cases that we can imagine. Effect clearly is one important indicia of what the purpose of an act or a governmental actor is.

But in Bossier I, by commending the Arlington Heights to the District court that does this analysis, we think that the court was saying that obviously the history, the contemporary statements, the course of events in adopting the change are all highly relevant and telling. They're highly relevant and telling on these facts. We think these facts are not only not unique, but that there will be many voting changes and have been many voting changes considered over the years by the courts that have a comparable situation.

If I might turn to Justice O'Connor's question about whether the proof of the negative, especially in a situation where there isn't objective evidence that this is getting worse, is really an unfair burden on the jurisdiction. I would comment to the Court Judge Silberman's two-page discussion of this in the first panel opinion in this case. It appears at pages 104 and 105 of the appendix to the jurisdictional statement.

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He undertook to explain in a very straightforward way how this works in the court that is an expert, after all, in applying this in an evidentiary context. Judge Kessler, the assenting judge, agreed. Her agreement with this is on page 116 of the appendix to the jurisdictional statement.

And what he really did was, he harmonized it with the Court's cases in the City of Richmond. What the jurisdiction must do is stand up and give a verifiable nonracial reason for what it did. After all, it knows why it did what it did.

QUESTION: What do you mean by verifiable, Ms. Brannan.

MS. BRANNAN: Your Honor, if the jurisdiction, for example, here got up and said, we were trying not to split precincts, and here we have precinct splits, we were trying to get preclearance. We did not file a motion for judgment, neither did the United States at the close of their evidence. We recognized that there were contested facts, and that that --

QUESTION: But --

MS. BRANNAN: -- was something that should be judged on the facts.

QUESTION: But you haven't told me why that's verifiable, in your words, and something else perhaps is

not.

MS. BRANNAN: Your Honor, it's simply the Arlington Heights test, whether the facts and circumstances -- whether it's standing up and saying something that makes sense.

It said one thing that didn't make sense, and we know what the other side of the coin looks like. It said the --

QUESTION: You've never -- were you finished? Sorry. I want you to finish what --

MS. BRANNAN: Yes. I just wanted to give the one further example that's actually present in this case. The jurisdiction stood up in the D.C. District Court and said, we were trying to comply with Shaw. Well, Shaw hadn't been decided by this Court at the time that the school board acted. We know that that isn't a good reason. If that's all they had ever said, frankly we probably would have moved for judgment at the close of their evidence.

But what I want to be very clear about is, we do not think the covered jurisdiction has to stand up and negate the Arlington Heights factors. That is a burden of doing forward that the defendant has, and that's what Judge Silberman said, and we think that makes sense.

The proof of racial intent has to come from the

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defendants either in cross-examining the plaintiff's case, or in their case-in-chief, and if it never comes, the jurisdiction is entitled to preclear.

QUESTION: Well, wait, you say they have the burden -- just the burden of production, or do they have the burden of persuasion as well?

MS. BRANNAN: The burden of production, and we think the risk of nonpersuasion never leaves the covered jurisdiction --

QUESTION: But the burden --

MS. BRANNAN: -- in accordance with this Court's decision in --

QUESTION: Is it the case that your -- the words here is, if the evidence is equally convincing.

MS. BRANNAN: Yes.

QUESTION: All right.

MS. BRANNAN: Yes.

QUESTION: In other words, all this rigmarole that often accompanies words like burden of proof doesn't exist here. All you're talking about is, if the evidence is equally convincing --

MS. BRANNAN: Yes.

QUESTION: -- a matter which I have never found as a judge in 15 years in any case.

(Laughter.)

MS. BRANNAN: Yes.

QUESTION: But if it were to happen --

MS. BRANNAN: Yes.

QUESTION: -- then, all it means is, if it's equally convincing, then the board loses as opposed to winning.

MS. BRANNAN: Yes. Yes, and we think this --

QUESTION: I guess the burden of proof is not very important at all, is it?

MS. BRANNAN: Well --

QUESTION: All these years I thought --

QUESTION: Often it's not.

QUESTION: I thought it made a big difference.

(Laughter.)

QUESTION: Often not.

MS. BRANNAN: Well, Your Honor, we think the Court has made very clear in McCain v. Lybrand and Georgia v. United States that the burden is there.

Congress rejected efforts to shift the burden of proof from the covered jurisdiction.

QUESTION: Well, but why --

QUESTION: But would the burden of production shift?

MS. BRANNAN: Yes.

QUESTION: Would the burden shift to the

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Government --

MS. BRANNAN: Yes.

QUESTION: -- once the jurisdiction said, look, we didn't want to split precincts.

MS. BRANNAN: Yes.

QUESTION: At that point, the burden of production moves to the Government and say, that was pretext.

MS. BRANNAN: That's right.

QUESTION: That was the reason why they did it.

MS. BRANNAN: That's exactly right.

QUESTION: So they don't -- the burden of persuasion may remain constant, but the burden of production would shift once they come up with a good reason for why they did what they did.

MS. BRANNAN: Yes.

QUESTION: So you have some statements by some members of the city council that are clearly racist, and clearly indicate that these members at least were going to do it for that reason. On the other hand, there are other members whose statements indicate the opposite. Who knows what the majority was on the city council, whether the reason -- in that kind of uncertitude, where you really don't know what the answer is, the jurisdiction loses.

MS. BRANNAN: Your Honor, yes is the answer, but

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the Court wrestled and Justice Powell's opinion in Arlington Heights wrestled with exactly this issue, how do you get at the intent of a multimember governmental body, and what the Court said is, yes, they'll tell you what they said, but you look at what they did.

You look at what information they had in front of them when they made the decisions that they made, whether the public was participating and what they said to the public at the time. That's what these cases are made of. That's what this trial was about.

QUESTION: And if you have to throw up your hand at the end, which frankly in most of these cases I have to do -- I can't really tell what the intent of the body was. If you have to throw up your hands, the jurisdiction loses.

MS. BRANNAN: It does, Your Honor, but again in Arlington Heights we think the Court made the decision that, rather than effect alone, that was the exercise fact-finders should go through.

QUESTION: Thank you, Ms. Brannan. Mr. Carvin, we'll hear from you.

ORAL ARGUMENT OF MICHAEL A. CARVIN

ON BEHALF OF THE APPELLEES

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

To answer the statutory question of when a voting change has a purpose to abridge voting rights, you need to answer the question, abridge compared to what? Abridged is a relative term. You don't know what an abridged vote is unless you know what an unabridged vote is and, as Justice Scalia pointed out, this Court has answered that question repeatedly.

In a voting rights case under section 5, you compare the change to the status quo ante, and if the change is no worse than the old status quo, then it hasn't abridged the right to vote.

QUESTION: It hasn't had the effect of abridging the right.

MR. CARVIN: Abridging, but the relevant point, I would submit, Justice Stevens, is that they've interpreted the term, abridging, and all of those cases say, if you maintain the status quo, you do not abridge, you do not commit the --

QUESTION: You do have the effect of abridging.

MR. CARVIN: Right.

QUESTION: That's what they all say, you don't have the effect of abridging.

MR. CARVIN: Precisely.

QUESTION: The New York --

QUESTION: Is it not possible that you would not

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have the effect of abridging, but you would nevertheless have the intent to abridge?

MR. CARVIN: Only in circumstances where you intended to make the status quo worse. It's stipulated here that they intended to maintain the status quo, and maintaining the status quo, as we have agreed, does not have the effect of abridging, so if you intend to maintain the status quo, you do not intend to abridge. You do not intend to commit the injury that is prohibited by section 5.

QUESTION: So if a county in Mississippi in 1966 had never had one black voter, never one in their history, and they come up with a great plan under pressure from the Department and 87 lawsuits, they say, I have an idea, we'll change it so now one black person votes, one. Why are you doing it? Well, don't you see, if we don't do that -- by the way, we have a very complicated plan. One votes. If we don't do that, we'll be forced to allow thousands to vote. And in your opinion, that evidence, right on the record, there would be no violation of this statute.

MR. CARVIN: No, I'd have to disagree with that hypothetical for two reasons. First of all, if you're talking about litigation, of course, you're not talking about section 5 preclearance.

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QUESTION: No, I'm talking about --

MR. CARVIN: The court -- okay.

QUESTION: I wasn't clear, then.

MR. CARVIN: Okay, Your Honor.

QUESTION: What I meant was, Mississippi has never allowed a person to vote. They now have a new plan so one black person can vote.

MR. CARVIN: Right.

QUESTION: And on the record, it's clear the reason they adopted it is, they were afraid that if they didn't they would soon have to allow thousands to vote.

MR. CARVIN: Right, but if they had a law that said no one could vote, that would violate the Voting Rights Act because it would be a test or device, wholly apart from section 5. It would also violate section 5, because it denied the right to vote, regardless of whether abridge means retrogression or not.

But let's play out your hypothetical. A Mississippi jurisdiction has a law that says no one can vote. All section 5 said under South Carolina v. Katzenbach was, look, don't make your other voting procedures worse to replace the law we have just gotten rid of.

If those procedures stay the same, if the registration hours and all of the registration

qualification stayed the same, and after all, they were designed for an all-white electorate, then you haven't filled the discriminatory gap that's left when the Voting Rights Act itself eliminates the law that says blacks can't vote, so that's a perfect example of what I'm talking about.

You've got a law that says, blacks can't vote. Then the jurisdiction comes along and says, look, we're going to increase filing fees for candidates, because now blacks can vote, we want to make sure they don't get to run for office.

Now, let's assume they reduce the filing fee, so it was retrogressive, from $100 to $75, but the NAACP says, you should have reduced it to $50, and you find that the failure to reduce the filing fee to $50 was motivated by a discriminatory purpose, what would you do under section 5? You would deny the reduction of the filing fee to $75. You would put back in place the filing fee of $100, the fee that was worse for black candidates.

And Congress understood that since the remedy under section 5 is to deny the change and restore the status quo, you only want to deny the change when it's worse than the status quo. You never want to deny the change when it's better than the status quo, i.e., nonretrogressive, because then you'd go back to the

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discriminatory status quo.

QUESTION: Is that how the Justice Department has administered this statute in those hundreds of cases?

MR. CARVIN: The Justice Department has misinterpreted the retrogression standard both in Bossier I and in Beer and in this case as well, and this Court has not given deference to the Justice Department's misinterpretation of the retrogression standard in any of those cases, nor should it in this one as well, and that's because it does raise the very substantial federalism concerns that were addressed in the prior argument.

QUESTION: Let me just suggest -- that's a great hypothetical. It really was clever.

MR. CARVIN: Thank you, Your Honor.

(Laughter.)

QUESTION: But isn't the response to that, if the evidence was all that clear they'd bring a section 2 case?

MR. CARVIN: Exactly. That was the whole point. No one expected section 5 to undo the discriminatory status quo in the South. They knew they were dealing with recalcitrant southern jurisdictions. Section 5 is only triggered if they change. Well, the last thing they're going to do is change a discriminatory system and subject themselves to Federal review.

Section 2 was the answer. This is how it worked. The literacy test --

QUESTION: Yes, but there's nothing in the statute that section 2 is the only answer.

MR. CARVIN: Well, but the only way you can get at a discriminatory status quo. That's the essential point. See, if the status quo is discriminatory, section 5 can't get at it, because section 5 is triggered only when there's a change to the status quo, and this remedy again is to restore the status quo, so if you have a discriminatory status quo, section 5 is powerless to change that, and that's what Congress realized.

QUESTION: Well, you say it's powerless. That depends on whether one reads the retrogressive modifier to apply to the effect in the statute or to apply to the word abridge, as you do.

MR. CARVIN: No, I must respectfully disagree, Justice Stevens. The only question in this case is whether abridge means the same thing in the same sentence. Abridge modifies both purpose and effect, and abridge means retrogress, so if you don't have a purpose to retrogress, you do not have a purpose to abridge. That is the essential thrust of our statutory argument. If you are intending to maintain the status quo, you are not intending to abridge.

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Now, the appellants argue that that renders the purpose prong relatively meaningless. Well, it does have some meaning in the Richmond annexation context, as Mr. Wolfson pointed out, but I think the additional point, purpose prong of section 2 and title 7 don't carry much independent baggage.

Section 2 prohibits purposefully discriminatory voting changes, but you rarely even get to that in section 2 litigation because it's got a broader prohibition, which is a prohibition on result, and obviously strict liability statutes are broader than one that requires some kind of bad intent. It is the appellants who are making the extraordinarily anomalous argument that --

QUESTION: Of course, here the strict liability only attaches if the effect is obvious because it's retrogressive, but if you don't have a retrogressive effect, then you have to look further. That's all that means. Your strict liability attaches when there is a retrogressive effect.

MR. CARVIN: Right, but what do you look at? Do you look at whether or not they intended to cause the injury, to go back to Justice Scalia's analogy.

If you have -- for example, under the law, if you defame somebody negligently, you cannot be held liable, but if you intentionally defame them, you can be

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held liable, because we agree that intentionally inflicting an injury is worse than negligently doing so, but in both instances you must defame the other person. There must be a defamatory statement.

And in this case, there must be retrogression to come within the legally cognizable injury addressed by section 5. Otherwise, you open up the very narrow section 5 proceeding to encompass all sorts of the free-floating purpose inquiry that was referenced before and dramatically increase the burden on the covered jurisdiction in three ways.

First of all, you subject the covered jurisdiction to duplicative litigation and inconsistent judgments. Under appellants' theory of section 5, the small Louisiana parish comes up to the district court in D.C., proves itself innocent of any potential constitutional violation, and it means nothing, because the next day they can be sued in Louisiana District Court under section 2 and the Fifteenth Amendment, and section 5 strips them of any res judicata defense.

Well, obviously, when section 5 says you can have a follow-on proceeding in the local district court, it was not intended that you have precisely the same trial in the District of Columbia one day and in Louisiana the next. It intended that the section 5 court would deal

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with section 5 issues, and it intended that the district court would deal with the constitutional issues, the Fourteenth and Fifteenth Amendment violations that they address every day.

The second problem for the covered jurisdictions is, you create an insoluble dilemma for them, as this Court noted in Miller and Shaw. If the covered jurisdiction fails to subordinate traditional districting principles to create a majority-minority district, the Justice Department will find that they have a "discriminatory purpose," as they did in this case because the parish refused to violate State law.

On the other hand, if they do subordinate traditional districting principles to create majority-minority districts, then they will have violated the Fourteenth Amendment under Shaw and the gerrymandering cases, and this Court has noted that the jurisdictions need some breathing space to reconcile the competing interests under those two laws. They need to have some ability not to violate the Voting Rights Act and to comply with the Constitution. I submit that that breathing space will be gone under this regime.

QUESTION: Counsel, as I understand, part of your argument is that, as a matter of textual analysis and as a matter simply of common sense analysis, there would

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be something very strange in saying that abridgement with respect to its effects can refer only as this Court has said, to retrogression, whereas a purpose to abridge might be broader to include, among other things, dilution.

It seems to me that in part of your argument this morning you've given a response to that, and I want to know whether I've understood you. You pointed out that one of the difficulties with the concept of dilution is that there really isn't any benchmark ready-made. We know what the benchmark is on retrogression simply by definition. It's the status quo you start from, and you do have your benchmark.

When you're talking about dilution, you don't have a ready-made bench mark. You have to, in effect, choose one somewhere, and it seems to me that -- I mean, I think there's a lot of force in your point there, but that also seems to lead to this, that if we don't know whether a non -- or if it's very difficult, conceptually, to decide how to determine whether a nonretrogressive change is diluted or not, the way we do it is to look to purpose. Was the purpose in effect to dilute, to in effect to mean that the vote will be less effective than the vote of the majority.

And simply because purpose is so important in determining dilution, whereas effect may not, in fact, be

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a basis for finding dilution at all, or at least it may be conceptually difficult, it seems to me that it makes perfect sense to say that a statute would want to proscribe an abridgement effect limited only to retrogression, but would want to proscribe an intent that includes both retrogressive and diluting.

Have I misunderstood your point, and if I haven't, is that suggestion unsound?

MR. CARVIN: Well, I would agree with half of what you said. The --

QUESTION: Well, that's a good start.

MR. CARVIN: You've -- where I agree with you, Justice Souter, is that you've precisely identified the dilemma that would be confronting us if we injected these purpose, unconstitutional dilution issues into the section 5 proceeding. Even at the benchmark level, it's tough to figure out what is dilutive.

As the Court pointed out in Johnson v. De Grandy and the Voinivich case, it's hard to even know whether or not a black majority district is less or more dilutive than a 45-percent, so you have to litigate all of those issues. You have to introduce all of the section 2 evidence that -- into the section 5 proceeding to figure that out.

Then you would have to get into the question of

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whether this multimember body believed that it was dilutive, and if they did believe it, that they have a -- I think the phrase is, verifiable reason for not doing so. You've turned --

QUESTION: Of course, that would be easy in this case. It would be easy in this case, because the witnesses on behalf of the board, as I recall, testified that they understood that the police jury plan was dilutive, so that would not be a difficult hurdle in this case.

MR. CARVIN: Well, remember, in Bossier I we said that the district court simply assumed dilutive impact, but this Court found that that was not at all clear, so if -- now in future cases to eliminate the question of whether or not a black minority district does have a dilutive impact, to avoid the ambiguity that led to the first remand, you do have to litigate that, and --

QUESTION: But in this case -- in this case, it would be easy.

MR. CARVIN: In this case, there is no question but that white majority districts are not dilutive. They have elected 3 blacks out of 12 on the school board under white majority districts. I --

QUESTION: You're going beyond the record, as I understand it.

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MR. CARVIN: Well, unfortunately the record closed before the 1998 election.

QUESTION: Yes. Yes.

MR. CARVIN: -- so the Court has --

QUESTION: There is testimony on the record, as I understand it, that the police jury plan is dilutive, and that the board knew that.

MR. CARVIN: No. There is the allegation that it's dilutive, and the board didn't want to bring in their own voting rights expert to disagree with that, because they said, we'll stipulate that it's dilutive, because we've got a superb reason for not taking the nondilutive plan, which is it violates --

QUESTION: Well, the stipulation that it's dilutive --

MR. CARVIN: Well --

QUESTION: -- is pretty good evidence, actually.

MR. CARVIN: -- actually --

(Laughter.)

QUESTION: -- I was using stipulated in the sense that it assumed it arguendo. They didn't contest it.

But my point is that we are, I think, structuring a rule for future section 5 litigation, and every section 5 jurisdiction, in light of what happened in

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Bossier I, is going to litigate that. They are going to introduce precisely the same evidence that you would have had to produce if you injected section 2 into section 5, so all of the federalism concerns that animated the Court to reject the injection of section 2 evidence into the section 5 proceeding apply with equal force here.

Indeed, Congress was quite clear in 1982 in saying that they thought constitutional purpose inquiries were more invasive of State sovereignty than the result test under section 2, so you don't avoid any of these federalism problems.

QUESTION: What is your opinion -- and you're free to sound them. What is your opinion on something I don't really have the answer to. I haven't sat as a trial judge, but my impression is when a trial judge sits on deciding a question of fact, it's pretty unusual that the trial judge thinks the evidence is really equally convincing.

Normally, he thinks, well, you know, if I'm forced to choose, I think the evidence is a little more one way, or a little more the other way, and I raise that because I want to know what, in your opinion, that would make as a practical difference on factual questions heard by a trial judge if you said, the board has the burden of proving it, or the other side has the burden?

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MR. CARVIN: I have to answer that on three levels, Justice Breyer.

First of all, I agree with you that the real problem here is not who has the burden of persuasion. The real problem is injecting us into this amorphous constitutional purpose inquiry in the narrow section 5 proceeding.

I think that generally the cases in the 2000 redistricting cycle are going to be close cases, with very difficult, if you go too far, do you violate Shaw, so maybe the burden of persuasion will be outcome-determinative in those cases more typically than they would in other kinds of circumstances, because we all recognize that in redistricting you are considering race at some level of abstraction.

Whether that's a discriminatory consideration or not is a question that's bedeviled this Court in the gerrymandering cases, and I think would bedevil the lower courts as well.

My third point is, if they are close cases, of course, that is the kind of burden that you particularly don't want to put on the covered jurisdiction, because if it's a close case where a trial judge could go one way or another, the Justice Department and the minority plaintiffs have all the more incentives to bring the

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follow-on case in Louisiana that I described earlier.

Because they say, look, it was a coin toss, we might as well get a free second bite at the apple, leading to even more litigation than you have typically involved in redistricting and, of course, the follow-on lawsuit by the nonminorities in the jurisdiction we said that remedy that the Justice Department tried to force on you violate our rights.

So we're contemplating literally four different proceedings every time we want to get a voting change precleared.

QUESTION: May I --

QUESTION: Mr. Carvin, you have said in answer to Justice Breyer, and I think you said earlier, that we don't want to put such a difficult burden, particularly in close cases, on the covered jurisdiction, and I don't know why we should assume that. I would have assumed just the opposite.

The reason section 5 was enacted was that there was a game going on in the south in which every time there was an adjudication there was an immediate change in the law which in effect put the jurisdiction one step ahead of the courts, and the litigation had to start all over again, and I would have supposed that the very point of section 5, whether the issue might be close in litigation

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or not close in litigation, was to put the burden precisely on the covered districts, and I don't know why it is sound for you to stand here and argue that, in fact, this is somehow an offense against federalism. It seems to me that it was precisely what was intended, and there was a justification for it.

MR. CARVIN: Again, the presumption that I'm talking about comes from this Court's precedent in Will and Gregory v. Ashcroft, that if you are going to redefine the traditional balance between the Federal Government and the States, you need to do so on the basis of unmistakably clear statutory language Here, we're not only --

QUESTION: And we're talking about a voting context in which, in fact, the political and the constitutional context is fundamentally different from that of any other category of case, isn't that true?

MR. CARVIN: Well, but of course, that was true in Bossier I and the reasoning in Bossier I was, we're not going to add to the federalism burdens inherent in the covered jurisdiction. We're not going to inject section 2 into the section 5 proceeding either.

QUESTION: But that begs the question here.

MR. CARVIN: But --

QUESTION: Whether we are adding or not is, in fact, the issue before us.

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MR. CARVIN: Oh, I don't --

QUESTION: Your argument is, well, you don't want to come out to the -- with a ruling that a nonretrogressive intent is covered, because these can be very close cases, and that somehow would be offensive to federalism, but if you look at the broader context in which section 5 was enacted, it seems to me that is probably precisely what Congress intended.

MR. CARVIN: But if we're talking about the 1960's, again, we did not -- Congress did not anticipate that the southern jurisdictions would be submitting these redistricting plans because obviously section 5 in 1965 was only supposed to exist for 5 years. That's why they had to renew it in 1970, so they didn't --

QUESTION: But it has been renewed, and if there's supposed to be a fundamental conceptual difference, I think it's Congress that ought to make it.

MR. CARVIN: Well, true enough, but in 1982 when it was renewed the Court had just ruled that the Fifteenth Amendment doesn't apply to redistricting cases, so the last thing Congress wanted to do in 1982 was embrace the Fifteenth Amendment standard that appellants were arguing for, because that would create the very real possibility that section 5 wouldn't even reach redistricting.

On the more realistic level --

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QUESTION: You say we'd ruled that section -- the Fifteenth Amendment doesn't apply to redistricting. Are you talking about Rogers v. Lodge?

MR. CARVIN: Actually, the Mobile plurality opinion.

QUESTION: Mobile, or the Mobile --

MR. CARVIN: Yes, which it ruled that the Fifteenth Amendment only deals with the --

QUESTION: It had an intent element, yes.

MR. CARVIN: No, I'm sorry, the right to vote, the right -- that it only reached the right to cast an individual ballot, that vote dilution mechanisms were not within the scope of the Fifteenth Amendment.

QUESTION: Right.

MR. CARVIN: Those need to be dealt with under the Fourteenth Amendment.

QUESTION: And the 1982 amendment was a response to that decision.

MR. CARVIN: Yes.

QUESTION: Okay.

MR. CARVIN: And obviously they didn't change the language of section 5 to in any way undo that problem, but again, we're talking about 2000, and I think that's the important point to understand.

Unlike the hypotheticals that they keep bringing

up from the 1960's, the status quo is no longer discriminatory in 1999. We know that for three reasons. They have precleared these redistricting plans three times.

QUESTION: But we don't know it in this case. There's a record indication in this case that the so-called police jury is dilutive. You're -- it seems to me you're asking us to start with an assumption which is contrary to the record in this case.

MR. CARVIN: No, no, I think that the covered jurisdiction has the burden to disprove retrogression, but I don't think if we're talking about the reality confronting covered jurisdictions --

QUESTION: No, but you said a moment ago, as a premise for your argument, that this is 1999 or 2000, and we're not dealing with discrimination in the jurisdictions. In this case, we are.

MR. CARVIN: Well, actually, no, the court found that we're not, that they didn't have a discriminatory purpose.

QUESTION: We are dealing with a police jury system as to which there is evidence in the record that it was dilutive.

MR. CARVIN: Oh, there may be nonpersuasive evidence. I don't dispute that. My only point is that

the school board's plan was precleared in the 1980's as free of any discriminatory purpose and effect. That was the --

QUESTION: Wasn't the Department of Justice at that time ignorant that there had a plan, that there had been the very real possibility of creating at least one, perhaps more, majority-minority districts?

MR. CARVIN: As I understand it, all of the evidence produced by the black community was communicated to the Justice Department when they precleared the police jury plan in 1991, that they were not in any way misled, or and a mistake made, and I think the best evidence of that, Your Honor, is nobody's ever sued the 1991 police jury plan. If it was such an obvious violation of the discriminatory purpose standard, presumably somebody would have brought a case against the identical police jury plan, but nobody's done that.

QUESTION: Maybe it didn't matter as much for the police jury as it did for the school districts, and then ycu have a plan that has districts with no schools in them, two districts where incumbents are paired against each other. Sounds passing strange that one would want to arrange a school district that way.

MR. CARVIN: Only if the people in those pairs were going to run against each other, and the undisputed

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evidence is that they were not, and --

QUESTION: But that decision was made later.

MR. CARVIN: No, actually, the evidence in the record is that they knew at the time that these people in the pairs were not going to run against each other, but indeed the school board was in a worse position than the police jury, because the school board was prohibited by law from splitting precincts, whereas --

QUESTION: Yes, but they could get permission to do that, and there had been permission given in the past.

MR. CARVIN: Only in response to a Justice Department objection, or where you did joint redistricting with the police jury and the school board. The school board tried to do that in this case and was unsuccessful in doing so. There was no ambiguity under State law that says, the precincts that were created in 1991 must be the building blocks for the school board's district.

They have tried to obfuscate that issue, but it is a very straightforward violation of State law, which gives particular point to the point I was trying to make earlier, which is, here, they failed to subordinate State law. They failed to do something that was admittedly irrational because it was more costly and created voter confusion, which was splitting precincts, and they think this is a very clear case of discriminatory purpose.

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That will give you an idea of the dilemma that covered jurisdictions will face in 2000 when they have to create yet another minority-majority district or the Justice Department will say, you didn't have a compelling Government interest for not doing so, ergo you've got to do it, which will lead to a Shaw lawsuit in the wake of that.

If this is a close case, or if this is a clear case of discriminatory purpose, then no covered jurisdiction can get through the Justice Department without committing a Shaw violation.

QUESTION: May I ask you one sort of basic question? Do you agree with Justice Scalia's comment that the intent, that the meaning of the Department of Justice regulations that distinguish between effect and purpose have been perfectly clear ever since the beginning?

MR. CARVIN: I think it's been their practice. I think -- these are not regulations. These are guidelines on how they will enforce the law, and --

QUESTION: So we're really deciding whether or not the practice that they've been following for 35 years may continue or not.

MR. CARVIN: And I think you should give that the same deference that was given to it in Bossier I and Presley, which is none, because, as in Bossier I, their

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practice is contrary to both the Beer retrogression principle and to the statutory language.

I would also point out that, if you adopt the Justice Department position, you will be overturning the learned opinion of the section 5 district court in the District of Columbia, and they were the ones, as this Court made clear in City of Port Arthur, who were given primary responsibility for interpreting a violation of section 5, so if there's a choice between deferring to the section 5 court and the Justice Department, I think any Chevron deference could be given to the section 5 court in those circumstances.

Unless there are further questions, I have nothing else.

QUESTION: Thank you, Mr. Carvin.

Mr. Wolfson, you have a minute remaining.

REBUTTAL ARGUMENT OF PAUL R. Q. WOLFSON

ON BEHALF OF APPELLANT RENO

MR. WOLFSON: Thank you, Mr. Chief Justice.

I want to address a few points. First, the filing fees hypothetical, which has come up in various guises. It does portray a somewhat inaccurate way of how election laws operate and how they are changed. I mean, jurisdictions don't change election laws for fun. They usually do it in response to some change in circumstance,

or some change in policy that requires it.

Redistricting presents the most obvious example. Every 10 years, most jurisdictions that have single-member districts are under a constitutional obligation to reapportion. Section 5 says essentially you can respond to that constitutional obligation in a discriminatory way, or you can respond to it in a nondiscriminatory way. Section 5 forces you to chose the nondiscriminatory way.

Lopez last term was another example. The State voters changed the State constitution to say, we want consolidated courts. There are many ways that could have been carried out. The effect of section 5 is to say, it must be carried out without discrimination, without discrimination on the basis of race.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wolfson. The case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)

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CASE NO: 98-405 & 98-406

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)