SUPREME COURT OF THE UNITED STATES

Nos. 98–405 and 98–406

JANET RENO, ATTORNEY GENERAL, APPELLANT
98–405 *v.*
BOSSIER PARISH SCHOOL BOARD

GEORGE PRICE, ET AL., APPELLANTS
98–406 *v.*
BOSSIER PARISH SCHOOL BOARD

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

[January 24, 2000]

JUSTICE BREYER, dissenting.

I agree with JUSTICE SOUTER, with one qualification. I would not reconsider the correctness of the Court's decision in *Beer* v. *United States*, 425 U. S. 130 (1976)– an "effects" case– because, regardless, §5 of the Voting Rights Act prohibits preclearance of a voting change that has the purpose of unconstitutionally depriving minorities of the right to vote.

As JUSTICE SOUTER points out, *ante*, at 21–22, Congress enacted §5 in 1965 in part to prevent certain jurisdictions from limiting the number of black voters through "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 335 (1966). This "stratagem" created a moving target with a consequent risk of judicial runaround. See, *e.g.*, *Perkins* v. *Matthews*, 400 U. S. 379, 395–396 (1971). And this "stratagem" could prove similarly effective where the State's "new rules"

were intended to retrogress and where they were not. Indeed, since at the time, in certain places, historical discrimination had left the number of black voters at close to zero, retrogression would have proved virtually impossible where §5 was needed most.

An example drawn from history makes the point clear. In Forrest County, Mississippi, as of 1962, precisely three-tenths of 1% of the voting age black population was registered to vote. *United States* v. *Mississippi*, 229 F. Supp. 925, 994, n. 86 (SD Miss. 1964) (dissenting opinion), rev'd, 380 U. S. 128 (1965). This number was due in large part to the county registrar's discriminatory application of the State's voter registration requirements. Prior to 1961, the registrar had simply refused to accept voter registration forms from black citizens. See *United States* v. *Lynd*, 301 F. 2d 818, 821 (CA5 1962). After 1961, those blacks who were allowed to apply to register had been subjected to a more difficult test than whites, while whites had been offered assistance with their less taxing applications. And the registrar, upon denying the applications of black citizens, had refused to supply them with an explanation. *Id.*, at 822. The Government attacked these practices, and the Fifth Circuit enjoined the registrar from "[f]ailing to process applications for registrations submitted by Negro applicants on the same basis as applications submitted by white applicants." *Id.*, at 823.

Mississippi's "immediate response" to this injunction was to impose a "good moral character requirement," *Mississippi*, *supra*, at 997, a standard this Court has characterized as "an open invitation to abuse at the hands of voting officials," *Katzenbach*, *supra*, at 313. One federal judge believed that this change was designed to avoid the Fifth Circuit's injunction by "defy[ing] a Federal Appellate Court determination that particular applicants were qualified [to vote]." *Mississippi*, *supra*, at 997. Such defiance would result in *maintaining*— though *not*, in light

of the absence of blacks from the Forrest County voting rolls, in *increasing*— white political supremacy.

This is precisely the kind of activity for which §5 was designed, and the purpose of §5 would have demanded its application in such a case. See, *e.g., Perkins, supra,* at 395–396 (Congress knew that the "Department of Justice d[id] not have the resources to police effectively all the States . . . covered by the Act," and §5 was intended to ensure that States not institute "new laws with respect to voting that might have a racially discriminatory purpose"); *Katzenbach, supra,* at 314 (Prior to 1965, "[e]ven when favorable decisions ha[d] finally been obtained, some of the States affected ha[d] merely switched to discriminatory devices not covered by the federal decrees").

And nothing in the Act's language or its history suggests the contrary. See, *e.g.,* H. R. Rep. No. 439, 89th Cong., 1st Sess., 10 (1965) ("Barring one contrivance too often has caused no change in result, only in methods"); S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, p. 12 (1965) (joint views of 12 members of Senate Judiciary Committee, describing *United States* v. *Parker,* 236 F. Supp. 511, 517 (MD Ala. 1964), in which a jurisdiction responded to an injunction by instituting various means for "the rejection of qualified Negro applicants"); Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., 5 (1965) (testimony of Attorney General Katzenbach) (discussing those jurisdictions that are "able, even after apparent defeat in the courts, to devise whole new methods of discrimination"); Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pt. 1, p. 11 (1965) (testimony of Attorney General Katzenbach) (similar).

It seems obvious, then, that if Mississippi had enacted its "moral character" requirement in 1966 (after enactment of the Voting Rights Act), a court applying §5 would have found "the purpose . . . of denying or abridging the

right to vote on account of race," even if Mississippi had intended to permit, say, 0.4%, rather than 0.3%, of the black voting age population of Forrest County to register. And if so, then irrespective of the complexity surrounding the administration of an "effects" test, the answer to today's *purpose* question is "yes."