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SUBCOMMITTEE ON THE CONSTITUTION

OVERSIGHT HEARING ON
"THE VOTING RIGHTS ACT: SECTION 5 - PRECLEARANCE STANDARDS."

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Good afternoon Mr. Chairman and distinguished Committee members. My name is Mark Posner and I am an Adjunct Professor of Law at American University's Washington College of Law. From 1980 to 2003, I served as an attorney in the Civil Rights Division of the United States Department of Justice. From the mid-1980s to 1995, I was one of two attorneys principally responsible for supervising the Department's reviews of Section 5 preclearance submissions, and served with the title of Special Section 5 Counsel from 1992 to 1995. It is an honor to testify before you today regarding the reauthorization of Section 5 of the Voting Rights Act, one of the most important civil rights remedies enacted by Congress in our Nation's history.

The specific issue I will address in my testimony is whether Congress, as part of a reauthorization of Section 5 of the Voting Rights Act,[1] should legislatively reverse the Supreme Court's January 2000 decision in *Reno v. Bossier Parish School Board* (known as the "*Bossier Parish II*" decision).[2] In that case, the Supreme Court construed the scope of the Section 5 nondiscrimination standard, and by a vote of five-to-four held that Section 5 generally does not prohibit the implementation of voting changes enacted with a racially discriminatory purpose. This reversed over 34 years of law and practice, dating back to the 1965 enactment of the Voting Rights Act, under which voting changes with a racially discriminatory purpose had "no legitimacy at all . . . under the statute."[3]

It is my firm belief that Congress now should act to restore Section 5 to the nondiscrimination standard that existed prior to the *Bossier Parish II* decision. There are three reasons why Congress should do this. First, as a matter of actual practice, *Bossier Parish II* has had an enormous impact on Section 5. Before January 2000, the Section 5 nondiscrimination standard, as enforced by the Justice Department and the United States District Court for the District of Columbia, provided minority voters with broad and powerful protection against the enactment of discriminatory voting changes. After *Bossier Parish II*, the ability of the Justice Department and the district court to bar the implementation of discriminatory voting changes is highly circumscribed. Second, the intent of Congress, when it enacted Section 5 in 1965, was that Section 5 should prohibit the implementation of all racially motivated changes. Thus, as a matter of law, *Bossier Parish II* was incorrectly decided. Third, the pre-*Bossier Parish II* "purpose" test is fully capable of administration by the Justice Department and the district court, and does not raise any constitutional concerns.

Before expanding on these three points, I would like to place the legislative issue raised by *Bossier Parish II* in historical context, and also describe the legal context in which the decision was rendered and provide a more specific statement of the Court's holding.

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[1] 42 U.S.C. § 1973c.

[2] 528 U.S. 320 (2000).

[3] City of Richmond v. United States, 422 U.S. 358, 378 (1975).

Historically speaking, as Congress now embarks on its review of Section 5 of the Voting Rights Act, it finds itself in much the same situation presented in 1982, when Section 5 and the other time-limited provisions of the Voting Rights Act were last before Congress for reauthorization. Then, as is the case now, Congress was confronted with a recent Supreme Court decision that upended prior judicial rulings and severely limited the scope of the Act's nondiscrimination standards. In 1982, the Court decision was *Mobile v. Bolden*,[4] and the issue was whether the Court plurality in *Bolden* correctly interpreted the nondiscrimination standard contained in Section 2 of the Act, [5] as well as the constitutional vote dilution standard. Congress concluded that the Court got it wrong, and therefore amended Section 2 to restore the old standard.[6] Today, the Court decision is *Bossier Parish II*, and the issue is whether the five-Justice majority in *Bossier Parish II* correctly interpreted the nondiscrimination standard contained in Section 5.

Section 5 requires covered jurisdictions to satisfy a two-pronged test in order to obtain preclearance. Jurisdictions must demonstrate that their voting changes do not have a discriminatory purpose and that their changes will not have a discriminatory effect. In applying this test of discriminatory purpose and discriminatory effect, it is well established that the world of Section 5 voting changes is divided in two. In one sphere are those voting changes that are "retrogressive," i.e., changes that would worsen the opportunity of minority voters to effectively participate in the electoral process. In the other sphere are those voting changes that either are ameliorative or do not affect minority electoral opportunity one way or the other, i.e., non-retrogressive voting changes.

In 1976, the Supreme Court held in *Beer v. United States*[7] that discriminatory effect under Section 5 means retrogression. Because Section 5 prohibits the implementation of any and all changes that have a discriminatory effect, all retrogressive changes are per se unlawful under Section 5.

With regard to non-retrogressive changes, the Supreme Court, the District Court for the District of Columbia, and the Justice Department, prior to *Bossier Parish II*, all uniformly construed Section 5 as barring the implementation of such changes if and when they are adopted with a discriminatory purpose.[8] Under this approach, most non-

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[4] 446 U.S. 55 (1980).

[5] 42 U.S.C. § 1973.

[6] S. Rep. No. 97-227, at 15-27 (1982).

[7] 425 U.S. 130 (1976).

[8] Bossier Parish II, 528 U.S. at 368 (Souter, J., dissenting) & 373 (Stevens, J., dissenting); City of Pleasant Grove v. United States, 479 U.S. 462 (1987); City of Richmond v. United States, *supra*; Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983).

retrogressive changes were lawful under Section 5, but covered jurisdictions also were required to comply with the core teaching of the Fourteenth and Fifteenth Amendments, that government actions must be free of discriminatory purpose. Thus, discriminatory purpose under Section 5 simply meant any intent to abridge the right to vote of minority citizens.[9]

In *Bossier Parish II*, the Supreme Court held that discriminatory purpose under Section 5 no longer is co-extensive with the ordinary meaning of discriminatory purpose or with the meaning of discriminatory purpose under the Fourteenth and Fifteenth Amendments. Instead, Section 5 "purpose" now has been given a highly specialized and esoteric meaning, the intent to cause retrogression. As a result, the purpose test has effectively been read almost entirely out of Section 5. This is because the purpose standard now can almost never make a difference in whether or not a change is precleared. The only situation in which it can make a difference is where a jurisdiction intends to cause retrogression but then, somehow, messes up and enacts a voting change that will not actually cause retrogression to occur (the so-called "incompetent retrogresser"). In the nearly five years since *Bossier Parish II* was decided, the Justice Department has reviewed approximately 76,000 voting changes, and no such incompetent retrogresser has appeared.[10]

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[9] The Justice Department also implemented Section 5 so as to bar the implementation of non-retrogressive changes that violated some other provision of the Act, such as the Section 2 results test, the language minority requirements of Section 4(f)(4), 42 U.S.C. § 1973b(f)(4), and 203, 42 U.S.C. § 1973aa-1a, and the voter assistance requirement of Section 208, 42 U.S.C. § 1973aa-6. In 1997, in the *Bossier Parish I* decision, 520 U.S. 471, the Supreme Court held that preclearance may not be denied on this basis. This decision was important, but also had only a modest impact on Section 5 since the Justice Department had based relatively few preclearance denials solely on another Voting Rights Act provision prior to the decision in *Bossier Parish I*.

[10] Subsequent to *Bossier Parish II*, the Justice Department has denied preclearance on two occasions (to redistricting plans) where the Department, in its letters of explanation, seemingly advised that the denials were based solely on retrogressive intent. Letter from J. Michael Wiggins, Acting Assistant Attorney General, to Al Grieshaber Jr., City Attorney, September 23, 2002; Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to C. Havird Jones, Jr., Senior Assistant Attorney General, September 3, 2002. However, based on the information provided in the Department's letters, it appears that both plans actually were retrogressive in effect as well as being intentionally retrogressive (in one plan, the offending single-member district was reduced from fifty-one to thirty percent black in population, and in the other plan, the two offending districts dropped seven percentage points and four percentage points in black voting-age population).

The Department also advised in a third preclearance letter that its decision was based on discriminatory intent, although the Department did not contend that it was a retrogressive intent. Letter from R. Alexander Acosta, Assistant Attorney General, to Mayor H. Bruce Buckheister, September 16, 2003. That denial involved annexations that

1. *Bossier Parish II*'s Significant Impact on Section 5.

The Supreme Court's decision in *Bossier Parish II* has had an enormous impact on the ability of the Justice Department and the District Court for the District of Columbia to employ Section 5 to block the implementation of discriminatory changes. This impact is best demonstrated by examining the record of Justice Department preclearance denials (known as "objections") before and after the decision. Almost all Section 5 changes are reviewed by the Department and not by the district court.[11]

At the time that *Bossier Parish II* was decided, a majority of the Justice Department's objections were based on discriminatory, non-retrogressive purpose. Furthermore, the clear trend line, from the 1970s to the 1980s to the 1990s, was that discriminatory purpose increasingly was the basis on which Section 5 objections were being interposed.[12]

The purpose test was particularly important in the Justice Department's objections to redistricting plans. A substantial majority (about four-fifths) of the Department's objections to post-1990 redistricting plans were based on discriminatory purpose with no finding of retrogression, and about a third of the objections to the post-1980 plans were interposed on this basis.[13]

Not surprisingly, therefore, the Justice Department has interposed many fewer objections after the *Bossier Parish II* decision than in the corresponding time period in the 1990s. Again, the effect of the decision can best be seen by looking at the

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added two white persons of voting age to a town, and was based on the Department's finding that the town was implementing a racially selective annexation policy. Accordingly, it appears to be correct that this post-*Bossier Parish II* preclearance denial was based on discriminatory purpose, but it is difficult to see how the town's intent was to cause a retrogression in the electoral opportunity of the town's black citizens.

[11] Through October 4, 2005, jurisdictions covered by Section 5 have submitted approximately 435,000 voting changes to the Justice Department for Section 5 review, while filing only 68 preclearance lawsuits in the District Court for the District of Columbia.

[12] According to an analysis recently undertaken by voting rights researchers, fifty-five percent of the 1990s objections, twenty-seven percent of the 1980s objections, but just three percent of the pre-1980 objections were interposed to non-retrogressive, intentionally discriminatory voting changes. Peyton McCrary, Christopher Seaman, & Richard Valelly, The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act (Sept. 2005) (forthcoming).

[13] For purposes of this analysis, post-1990 plans are those that the Justice Department reviewed between April 1991 and June 1995, and post-1980 plans are those that were reviewed between April 1981 and June 1985.

preclearance statistics for redistrictings. Whereas the Department objected to about seven percent of the redistricting plans adopted following the 1980 Census and about eight percent of the post-1990 plans, the Department has objected to just one percent of the post-2000 redistricting plans. Interestingly, the number of redistricting plans submitted to the Department for preclearance was almost exactly the same after both the 1990 and 2000 Censuses, and the number of retrogression objections to post-1990 and post-2000 plans also remained the same. Accordingly, the sharp drop in the post-2000 objection percentage, and the corresponding sharp shop in the actual number of redistricting objections, occurred entirely because the purpose-based objections disappeared. While one cannot know for certain how many purpose-based objections to redistrictings would have been interposed if *Bossier Parish II* had not intervened (and it is possible that fewer purposefully discriminatory plans were adopted by covered jurisdictions after the 2000 Census), it seems clear that the change in the purpose standard occasioned by *Bossier Parish II* had a major impact. [14]

In considering the practical impact of *Bossier Parish II* on the enforcement of Section 5, it also is helpful to examine the specific types of circumstances in which non-retrogressive changes may have a discriminatory purpose and to briefly recount the history of the Justice Department's development, in the 1980s and 1990s, of the purpose basis for interposing objections.

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[14] Because the number of post-2000 redistricting objections has decreased substantially, the overall number of objections, involving all types of voting changes, also is much lower in recent years. However, it should be noted that the *Bossier Parish II* decision apparently is not the only reason for the overall decrease.

Since the mid-1990s, there have been many fewer retrogression objections to dilutive annexations, and to the use of a majority-vote requirement and/or anti-single-shot voting provisions in the context of at-large elections. This likely is due in large part to the fact that, by the mid-1990s, a great many covered jurisdictions had switched from at-large to district-based election systems, spurred by Congress' adoption of the Section 2 results test in 1982 (annexations that reduce a municipality's minority population percentage typically are not retrogressive when the municipality is employing a district-based election system; likewise, the adoption of a majority-vote requirement typically is not retrogressive in the context of a district-based system; and anti-single-shot voting provisions are inapplicable when elections are held using single-member districts since single-shot voting only can occur in the context of at-large or multi-member district elections).

In addition, there have been many fewer purpose objections since the mid-1990s to changes from at-large to mixed systems of districts and at-large seats. Initially, this decrease, at least in part, appears to have occurred because the wave of changes from at-large to district-based systems slowed in the mid-1990s. The *Bossier Parish II* decision in 2000 then eliminated the purpose basis for interposing these objections.

In the 1980s and 1990s, most purpose objections were interposed to redistrictings and election method changes. A purpose objection to a non-retrogressive redistricting could occur where, in the context of racially polarized voting, a jurisdiction adopted a new plan that fragmented or packed minority voters so as to purposefully avoid drawing additional majority-minority districts, or so as to minimize the opportunity of minority voters to elect a candidate of their choice in a majority-minority district included in the new plan. For example, in 1982, the State of Georgia enacted a congressional redistricting plan that increased the black population percentage in the Fifth Congressional District in Atlanta from fifty to fifty-seven percent, but the District Court for the District of Columbia denied preclearance because it found that the State had fragmented the black population in Atlanta to purposefully minimize black electoral opportunity.[15]

Election method objections were interposed on a number of occasions based on discriminatory purpose where a jurisdiction changed from an at-large to a mixed system of districts and at-large seats. Though this change was ameliorative in the context of racially polarized voting, purpose objections were interposed where the new election system included one or more features intentionally designed to significantly limit the extent of the new electoral opportunity provided to minority voters. For example, objections were interposed where the districting plan that was adopted with the new election system fragmented or packed minority voters to minimize their electoral opportunity. Objections also were interposed where the at-large seats in the new plan were to be elected with a majority-vote requirement or with a provision that prevented single-shot voting by minority voters.

The 1980s increase in the number of purpose objections to non-retrogressive changes began in the Reagan Administration under the leadership of then Assistant Attorney General William Bradford Reynolds. These objections first took full flower in the Department's reviews of post-1980 redistrictings by Mississippi counties. During Mr. Reynolds' tenure, the Department interposed about twenty-five objections to non-retrogressive Mississippi plans based on discriminatory purpose. Thereafter, Mr. Reynolds expanded the application of the purpose test to the review of covered jurisdictions' changes from an at-large method of election to a mixed system of districts and at-large seats. In the 1980s, many covered jurisdictions were abandoning their at-large systems in response to Congress' 1982 adoption of the Section 2 results test. While most of these jurisdictions adopted new election systems that provided minority voters with an equal opportunity to elect candidates of their choice, some jurisdictions inserted provisions in their new election systems so as to purposefully limit or minimize the increase in minority electoral power.

The modes of analysis forged under Mr. Reynolds then were applied by the Justice Department to the post-1990 redistrictings and to the continuing submission of election method changes. For example, about a fifth of the total number of 1990s purpose redistricting objections were again to plans enacted by Mississippi counties. The

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[15] Busbee v. Smith, *supra*.

other states in which a large number of purpose redistricting objections were interposed were Louisiana and Texas. The Texas objections were particularly notable as the Section 5 concern often was that jurisdictions were seeking to limit the growing political power of Hispanic voters.

In *Bossier Parish II*, the Supreme Court suggested that interposing purpose objections to non-retrogressive changes makes little or no practical sense. The Court correctly observed that a Section 5 preclearance denial, in and of itself, only means that the offending jurisdiction may return to the old voting practice or procedure and does not require the jurisdiction to adopt a substitute change that is both non-retrogressive and free of discriminatory purpose. The Court reasoned, therefore, that a refusal to preclear a non-retrogressive change "would risk leaving in effect a status quo that is even worse."[16] The flaw in the Court's reasoning, however, is that Justice Department often interposed purpose objections to non-retrogressive changes where the jurisdiction, for a non-Section 5 reason, could not return to the status quo. In the case of purpose objections to redistrictings, the status quo typically could not remain in effect because the existing plan violated the one-person, one-vote requirement. In the case of purpose objections to election method changes, the existing at-large system often could not remain in effect (for legal and/or practical reasons) because it was the subject of a Section 2 challenge, or because a Section 2 challenge was threatened and/or the local minority community was applying significant political pressure in favor of a change.

In sum, the Supreme Court's decision in *Bossier Parish II*, in very real terms, significantly shrank the remedial power of Section 5 by eliminating the most common basis on which the Justice Department was interposing objections.

2. *Bossier Parish II* Wrongly Interpreted Section 5.

The second issue is whether the Supreme Court in *Bossier Parish II* correctly construed congressional intent regarding the meaning of discriminatory purpose under Section 5. The answer, I believe, is emphatically "no." The separate dissenting opinions of Justices Stevens, Breyer, and Souter in *Bossier Parish II* provide excellent statements of the many reasons why the Court got it wrong, and I refer the Committee to those opinions (Justice Ginsburg dissented without writing an opinion).

What I would like to emphasize here are the two most basic flaws in the Court's analysis. First, the plain meaning of the word "purpose" in Section 5 encompasses any and all discriminatory purposes, not merely a purpose to cause retrogression. Second, it is implausible, if not unbelievable, that Congress in 1965 meant to adopt such a small bore definition of purpose when, as the Supreme Court noted in 1966, Congress had adopted Section 5 to respond to "exceptional conditions" by acting in a "decisive manner" through an "uncommon exercise of congressional power."[17]

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[16] 528 U.S. at 336.

[17] South Carolina v. Katzenbach, 383 U.S. 301, 334-335 (1966).

3. The Discriminatory Purpose Test is Administrable and Well-Established.

The third and final issue is whether the pre-*Bossier Parish II* purpose standard is administrable by the Justice Department and the District Court for the District of Columbia, and whether it raises any special concerns. This issue arises because of Supreme Court pronouncements indicating that the up-until-recent five-Justice majority of the Court did not trust the Justice Department to properly apply the pre-*Bossier Parish II* purpose standard. In 1995, this five-Justice majority severely criticized the manner in which the Justice Department purportedly was applying the Section 5 purpose test to redistrictings. The Court held that the Department was using the purpose test as a cover for the implementation of a near-unconstitutional policy of maximization (i.e., requiring that redistricting plans include the maximum number of possible majority-minority districts).[18] Then, in *Bossier Parish II*, the same five-Justice majority observed that use of the pre-existing purpose standard would "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts [citation omitted], perhaps to the extent of raising concerns about § 5's constitutionality."[19] Since purposeful discrimination is the core prohibition of the Fifteenth Amendment, this statement is perplexing. However, one explanation may be that the five Justices again were expressing their concern about the Justice Department's ability to properly enforce a purpose test. In short, the Supreme Court may well be asking, and Congress also then should consider, whether it is appropriate to give the purpose authority back to the Justice Department if the Department badly handled that authority in the past.

It is my conclusion that the Justice Department, in fact, did not apply the purpose standard in an unlawful or inappropriate manner to redistrictings (or any other type of voting change). Instead, the Department applied the Section 5 purpose test using the well-established framework for conducting discriminatory purpose analyses, a framework that continues to provide a fully workable basis on which to apply a restored purpose test in the future.

I previously have published a comprehensive and detailed analysis of the Justice Department's post-1990 redistricting objections.[20] As described in that essay, the Justice Department interposed its purpose objections to post-1990 plans by utilizing the analytic framework set out by the Supreme Court in its *Arlington Heights* decision.[21] The

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[18] Miller v. Johnson, 515 U.S. 900, 926 (1995).

[19] 528 U.S. at 336.

[20] "Post-1990 Redistrictings and the Preclearance Requirement of Section 5 of the Voting Rights Act," in *Race and Redistricting in the 1990s* (Bernard Grofman, ed., 1998).

[21] Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

Department also relied on the analytic factors set forth in the Department's Procedures for the Administration of Section 5.[22]

As specified in *Arlington Heights*, the Justice Department began each purpose analysis of a submitted redistricting plan by examining the impact of the plan on minority voters. That is, the Department considered whether the plan diluted or fairly reflected minority voting strength, in the context of the prevailing voting patterns in the jurisdiction and the location of the jurisdiction's minority population concentrations.[23] Had the Department's analyses also ended there, there might be reason for concern that the Department was implementing a maximization policy or perhaps an abbreviated version of the Section 2 results test. However, the Department's analyses did not end there. Instead, when the Department found that a plan diluted minority voting strength, it then proceeded to conduct a thorough review of the justifications proffered by the submitting jurisdiction for the plan. To determine whether these justifications were in fact the concerns that motivated the jurisdiction's selection of the new district lines, the Department analyzed whether the asserted redistricting criteria were applied consistently by the jurisdiction, whether the district lines in fact reflected the criteria, and the extent to which the criteria actually were discussed and used during the redistricting process. The Department also considered the extent to which efforts to protect white incumbents, elected by white voters in racially polarized elections, were indicative of a discriminatory purpose.[24]

Turning to the Supreme Court's interpretation of the Justice Department's purpose analyses, it appears that the evidence offered by the Court to support its "Justice Department as illegitimate maximizer" holding was extraordinarily weak. At the outset, the Court made no claim that the Justice Department had set forth its purported policy in any written document (in Section 5 objection letters or otherwise). No documentation was produced in support of the existence of any such policy and, as the Court acknowledged, the Solicitor General had advised the Court that no such policy existed.

Lacking direct evidence, the Court nonetheless concluded that it could infer the existence of a maximization policy. This was problematic on its face, since the Court was considering just two of the Department's post-1990 redistricting objections (to congressional redistricting plans enacted by the State of Georgia), which was a poor foundation on which to infer a general policy. Moreover, even with regard to these two objections, the Court's evidence consisted of a small assortment of less-than probative or unpersuasive facts. The most damning admission, according to the Court, was a

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[22] 28 C.F.R. § 51.59.

[23] *See* Johnson v. De Grandy, 512 U.S. 997 (1994); Thornburg v. Gingles, 478 U.S. 30 (1986); City of Richmond v. United States, *supra*.

[24] Garza v. County of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1992); Ketchum v. Byrne, 740 F.2d 1398, 1408-1409 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985).

statement by a Justice Department line attorney that he analyzed the objected-to redistricting plans in part by overlaying the adopted district lines on a map showing the location of black population concentrations to "'see how well those lines adequately reflected black voting strength.'"[25] Yet, this action was facially innocuous since it involved nothing more than an effort to gauge the impact of the plan on black voters, an assessment which, as noted above, is an essential part of any inquiry into discriminatory purpose. The Supreme Court perceived a more sinister motive for this action, but any such motivation would need to be demonstrated by some other extraneous evidence, and could not be gleaned merely from the line attorney's statement. However, the other inferential evidence pointed to by the Court, in a string citation to the district court's findings in the case, is equally unpersuasive.

In sum, the purpose analyses conducted by the Justice Department in reviewing the post-1990 redistricting plans were well-grounded in judicial precedent, and reflected a continuation of the modes of analysis begun by the Department in the 1980s. While the Department's purpose objections did involve a tough and assertive use of the Section 5 preclearance authority, they did not involve any abuse of that authority. Therefore, the pre-*Bossier Parish II* purpose test is fully capable of being properly administered by the Justice Department and the District of Columbia Court, and this standard does not raise any special problems.

Still, in light of the concern expressed by the Supreme Court, Congress should consider what actions it may take to provide further assurance that the Justice Department and the District Court for the District of Columbia will employ the purpose test in an appropriate manner if *Bossier Parish II* is legislatively reversed. Specifically, Congress should consider including statutory language and/or legislative history that would provide clear guidance to the Department and the district court with regard to the manner in which the Section 5 purpose test should be utilized. In so doing, Congress would be following the path it took in 1982 when it reversed the *Mobile v. Bolden* decision and established the Section 2 results test. The guidance regarding the implementation of the Section 5 purpose test could be drawn from the *Arlington Heights* decision, the Attorney General's Section 5 Procedures, and from other relevant court decisions (such as the *Garza* and *Ketchum* decisions cited above).

For these reasons, I believe that Congress should act to reverse the Supreme Court's decision in *Bossier Parish II* to restore the Section 5 purpose test to the meaning Congress intended when it enacted Section 5 in 1965. Discriminatory purpose under Section 5 should again mean discriminatory purpose.

Thank you.

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[25] 515 U.S. at 925.