

filed 8/11/86

No. 85-1244

In the Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF PLEASANT GROVE, APPELLANT

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

WALTER W. BARNETT
WILLIAM R. YEOMANS
Attorneys

*Department of Justice
Washington, D.C. 20530
(202) 633-2217*

QUESTIONS PRESENTED

1. Whether, in a declaratory judgment action pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, the district court properly refused to authorize an all-white municipality to annex a vacant area zoned for residential development and an area exclusively inhabited by whites, upon a finding that these annexations were part of a racially biased annexation policy whose purpose was to include whites while excluding blacks from becoming voting residents of the city.

2. Whether the district court's finding that the annexations at issue were motivated by racially discriminatory purposes is clearly erroneous.

A. The statute and the decisions of this Court establish that a discriminatory purpose to include white voters and exclude black voters suffices to invalidate an annexation 17

B. The absence of any black voters from Pleasant Grove does not suggest that the City lacked a discriminatory purpose with respect to voting 22

The C. Western Addition annexation cannot be justified on the ground that the area is uninhabited 23

D. The decision below is consistent with the longstanding interpretation of the Attorney General in implementing Section 5 26

II. The district court's finding that the City failed to prove the absence of discriminatory purpose from its annexation decisions is not clearly erroneous 27

A. Pleasant Grove's annexation and other policies demonstrate a pervasive discriminatory purpose over a long period 28

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
A. Factual background	2
B. District court proceedings	6
Summary of argument	14
Argument:	
I. The district court correctly refused to authorize annexations undertaken with a racially discriminatory purpose	17
A. The statute and the decisions of this Court establish that a discriminatory purpose to include white voters and exclude black voters suffices to invalidate an annexation	17
B. The absence of any black voters from Pleasant Grove does not suggest that the City lacked a discriminatory purpose with respect to voting	22
C. ^{The} Western Addition annexation cannot be justified on the ground that the area is uninhabited	24
D. The decision below is consistent with the longstanding interpretation of the Attorney General in implementing Section 5	26
II. The district court's finding that the City failed to prove the absence of discriminatory purpose from its annexation decisions is not clearly erroneous	28
A. Pleasant Grove's annexation and other policies demonstrate a pervasive discriminatory purpose over a long period	21

Argument—Continued:	Page
B. The district court correctly found that the city's economic justification for annexing the Western Addition was insubstantial and pretextual	31
Conclusion	36

TABLE OF AUTHORITIES

Cases:

<i>Allen v. State Board of Elections</i> , 393 U.S. 544	17, 25
<i>Anderson v. City of Bessemer</i> , No. 83-1623 (Mar. 19, 1985)	29
<i>Arlington Heights v. Metropolitan Housing Development Corp.</i> , 429 U.S. 252	30
<i>Beer v. United States</i> , 425 U.S. 130	18, 20, 23
<i>Blanding v. DeBose</i> , 454 U.S. 393	26
<i>Busbee v. Smith</i> , 459 U.S. 1166, aff'g 549 F. Supp. 494	19
<i>City of Petersburg v. United States</i> , 410 U.S. 962, aff'g F. Supp. 1021	18
<i>City of Port Arthur v. United States</i> , 459 U.S. 159..	18
<i>City of Richmond v. United States</i> , 422 U.S. 358....	17-18, 19, 20
<i>City of Rome v. United States</i> , 446 U.S. 156, aff'g 472 F. Supp. 221	14, 15, 16, 17, 18, 20, 25
<i>Dayton Board of Education v. Brinkman</i> , 443 U.S. 526	29
<i>DeMarco v. United States</i> , 415 U.S. 449	29
<i>Dougherty County Board of Education v. White</i> , 439 U.S. 32	26
<i>Georgia v. United States</i> , 411 U.S. 526	18, 20
<i>Gomillion v. Lightfoot</i> , 364 U.S. 339	
<i>Inwood Laboratories v. Ives Laboratories</i> , 456 U.S. 844	29
<i>Maine v. Taylor</i> , No. 85-61 (June 23, 1985)	29
<i>NAACP v. Hampton County Electory Comm'n</i> , No. 83-1015 (Feb. 27, 1985)	2
<i>Perkins v. Matthews</i> , 400 U.S. 379	14, 18, 24
<i>Pullman-Standard v. Swint</i> , 456 U.S. 273	29
<i>Reynolds v. Sims</i> , 377 U.S. 533	18

Cases—Continued:	Page
<i>Rogers v. Lodge</i> , 458 U.S. 613	29, 30
<i>South Carolina v. Katzenbach</i> , 383 U.S. 301	20, 23
<i>Stout v. Jefferson County Board of Education</i> , 466 F.2d 1213, cert. denied, 411 U.S. 930	4-5
<i>United States v. United States Gypsum Co.</i> , 333 U.S. 364	29
<i>United States v. Board of Commissioners of Sheffield</i> , 435 U.S. 110	28

Constitution, statute, regulation and rule:

U.S. Const. Amend. XV	23
Voting Rights Act § 5, 42 U.S.C. 1973c.....	9, 10, 13, 14, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

28 C.F.R.:

Section 51.12(e)	18
------------------------	----

Miscellaneous:

128 Cong. Rec. S7100 (daily ed. June 18, 1982)....	27
<i>Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary</i> , 97th Cong., 1st Sess. (1981)	27, 28
<i>Extension of the Voting Rights Act of 1965: Hearings on S. 407, et al., Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary</i> , 94th Cong., 1st Sess. (1975)	27
30 Fed. Reg. 9897 (1965)	17
H.R. 94-196, 94th Cong., 1st Sess. (1975)	23
S. Rep. 94-295, 94th Cong., 1st Sess. (1975).....	18
S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982)....	27, 28
U.S. Commission on Civil Rights, <i>The Voting Rights Act: Unfulfilled Goals</i> (1981)	27

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1244

CITY OF PLEASANT GROVE, APPELLANT

v.

UNITED STATES OF AMERICA

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court issued October 25, 1985, denying appellant's claim for declaratory relief (J.S. App. 1a-26a), is reported at 623 F. Supp. 782. The opinion of the district court issued August 3, 1983, denying appellant's motion for summary judgment (J.S. App. 1b-17b), is reported at 568 F. Supp. 1455.

JURISDICTION

The three-judge district court entered its judgment on October 25, 1985 (J.S. App. 1a-26a). Appellant filed its notice of appeal on December 19, 1985 (J.S.

App. 1d). The jurisdictional statement was filed on January 23, 1986. This Court noted probable jurisdiction on May 19, 1986. The jurisdiction of this Court rests on 42 U.S.C. 1973c.

STATEMENT

A. Factual background

1. Since its incorporation in the 1930's the City of Pleasant Grove, a suburb of Birmingham, has been an "all-white enclave in an otherwise racially mixed area of Alabama" (J.S. App. 2b). Pleasant Grove has no city ordinances prohibiting racial discrimination in housing, employment, public accommodations or voting (D. 17, at 7-8).¹ The city's population of approximately 7,000 is all white except for approximately 32 black residents who live in nursing homes and are not registered to vote and a single black family that moved into the city after this action was filed (J.S. App. 2b n.3). The all-white character of Pleasant Grove stands in contrast to its environs. Jefferson County, in which the city is situated, had a population (in 1980) of 671,197, one-third of which is black (*id.* at 2b).² The city also abuts several unincorporated black communities (*ibid.*).

¹ Because the district court record is not paginated, but the docket sheet assigns a number to each document, citations, to the extent possible, will refer to document (D.), exhibit (Exh.), and page numbers.

² Other municipalities in west-central Jefferson County include Bessemer (31,729 persons, 51.28 percent black), Birmingham (284,413 persons, 55.63 percent black), Hueytown (13,309 persons, 9.66 percent black), and Fairfield (13,040 persons, 52.87 percent black) (J.S. App. 2b n.4; Def't Exh. 11, at 15-17; Def't Exh. 1).

2. Pleasant Grove has considered a total of ten annexation requests during its history. Four of these requests resulted in annexations. None of them brought any black residents into the city (J.S. App. 3a), and Pleasant Grove retained its racial homogeneity as its population grew from 1,066 in 1940 to 7,102 in 1980 (Def't Exh. 10).

In 1945, the city acted favorably on the petition of white property owners living to the southeast of the city (J.S. App. 3). In 1967, land to the north, west, and south of the city was annexed (*ibid.*). With the exception of an all-white community known as Early Town and two then all-white nursing homes, this annexation involved primarily undeveloped land (D. 17, at 3; 12/17/81 Cain Dep. 14, 15).³ In 1969, the city refused to annex the Kohler parcel. The record in the district court indicates that this refusal was based on fear that this annexation would produce a "mush-room effect" that would put pressure on the city to annex the adjacent black areas (4/2/81 Patrick Dep. 55-56, 103-104).

On the same day that a federal district court ordered the desegregation of the Jefferson County School System, the Pleasant Grove City Council voted to establish a separate all-white system in the city (J.S. App. 4b-5b). The next two annexation requests came from white residents of outlying areas who wanted their children to attend Pleasant Grove's all-white schools. Some two weeks after the creation of the city's separate school system, the all-white non-contiguous communities of Sylvan Springs and West Grove petitioned for consolidation and annexation

³ Today, much of that land is developed and, with the exception of 32 persons institutionalized at the nursing homes, all of the residents are white (D. 17, at 3).

respectively (*id.* at 3a n.2). The city facilitated the active pursuit of these requests, and it was only the failure to consent by intervening landowner United States Steel Corporation that prevented the annexation (*ibid.*).

In 1971, the city acted favorably on the request of members of a white family, the Glasgows, that the city annex the 40 acres of property on which they lived. This property, lying to the northwest of the city, was accessible only by traveling several miles outside the city past a black neighborhood that was not annexed (J.S. App. 4b). Because of the tract's topography, the Glasgow property offered no opportunity for further residential development (12/17/81 Patrick Dep. 48). According to one council member, the city annexed the Glasgow Addition because the residents were " 'fine people' " whom the city " 'would be proud to have as [residents]' " (J.S. App. 7a n.13 (citation omitted)). The mayor stated that it was done to allow the Glasgow children to attend the newly formed, all-white Pleasant Grove school system, rather than the recently desegregated Jefferson County system (4/2/81 Patrick Dep. 63-65; 12/17/81 Patrick Dep. 6-7).⁴ Shortly after the Glasgow annexation, the city refused to annex the area including the historically all-black Woodward School, according to the court below, in order to avoid the school desegregation order (J.S. App. 3a n.3; D. 23, at 4-5).⁵

⁴ In the course of this litigation, the city has referred to the Glasgow annexation as "a decision taken in the heat of a busing controversy" (D. 28, at 2 n.1).

⁵ Eventually, the United States Court of Appeals for the Fifth Circuit ordered the City's school system abolished and transferred control of the schools back to the county (J.S. App. 5b n.12). *Stout v. Jefferson County Board of Education*,

In 1978, the all-white Westminster area was denied annexation. The district court found, once again, that this decision was motivated by fear that the "mushroom effect" would create pressure to annex several adjacent black areas (J.S. App. 4a).

In 1979, the city undertook to annex the Western Addition, a parcel of 450 acres of uninhabited land to the west of the city. The tract was zoned for residential development and the city projected that 700 residences would be built. The city council voted on February 5, 1979 to annex the land, and Mayor Patrick then asked State Senator Parsons to introduce a bill in the Alabama State legislature to complete the annexation. The bill passed and was signed into law by the governor on July 17, 1979 (J.A. 16).

While the Western Addition annexation proceedings were pending in the state legislature, the city council voted to withdraw fire and paramedic services Pleasant Grove had previously provided to two areas adjacent to the city—the all-black Pleasant Grove Highlands (the Highlands) area and the largely black Dolomite area (J.A. 18-19). The quality of homes in the Highlands is comparable to all but the newest subdivisions in Pleasant Grove (Capps Dep. 12; 4/3/81 Cooper Dep. 14; Morrison Dep. 79; Medlock Dep. 9-11; 4/2/81 Patrick Dep. 91-92; Harris Dep. 14). On April 18, 1979, residents of the Highlands and a few residents of an area known as Five-Acre Road presented a petition for annexation to Mayor Patrick (J.A. 16). Soon thereafter, on May 7, 1979, representatives of the group petitioning for annexation met with members of the city council, expressing concern about the loss of fire and paramedic service

466 F.2d 1213 (5th Cir. 1972), cert. denied, 411 U.S. 930 (1973).

and voicing a general desire to become part of the city to have a say in future decisions affecting municipal services (4/2/81 Patrick Dep. 16-22; Mason Dep. 7-8, 24-25). On June 18, 1979, the city council voted to restore fire protection to the Highlands, noting that only one call for assistance had come from that area in all of 1978 (J.A. 16, 19). Since commencement of this action, the city has restored paramedic service to the Highlands (J.S. App. 7a), and it has continued as always to respond to calls for police coverage from the Highlands (*ibid.*). The city has never acted on the Highlands' petition for annexation.

While the Highlands petition was pending, residents of the Dolomite area also requested annexation, which request was rejected (J.S. App. 3a-4a, 4b).

In no instance of actual or proposed annexation did Pleasant Grove conduct a study to determine economic consequences to the city likely to result (J.S. App. 5a).

3. Because the Western Addition was projected for residential development and would thus change the boundary lines in city elections, Pleasant Grove was required to and did seek preclearance of the Western annexation from the Department of Justice, pursuant to Section 5 of the Voting Rights Act. By letter dated February 1, 1980, the Department denied preclearance on the ground that the city had failed to satisfy its burden of establishing that the land was not being annexed, at least in part, for the purpose of denying or abridging the right to vote on account of race (D. 24, Exh. F at 1-2).

B. District court proceedings

1. The city then filed this action on October 9, 1980, seeking a declaratory judgment (D. 1). During

discovery, the city revealed that it had never sought preclearance of the 1971 annexation of the Glasgow Addition, in 1971. On October 16, 1982, the court therefore ordered the city to seek preclearance of that annexation as part of the present action so that the annexations could be considered cumulatively (J.S. App. 1b n.1).

While this action was pending, the city represented to the court that it had established a committee in March 1981 to study the proposed annexation of the Highlands, which has never been acted upon (J.S. App. 5a). Two committee members, James Mosley and Clyde Morgan, testified, however, that they were not notified of their appointments until more than a year later, shortly before they received a May 24, 1982, letter from Mayor Morrison (*id.* at 6a n.10).⁶ A third committee member, Joe Cooper, had no recollection of his appointment or his service on the committee (*ibid.*).

If the committee met, it did so only once and never made any independent inquiry into the factual basis for the city's opposition to annexation of the Highlands (J.S. App. 6a). Of the committee members, only Mosley stated that he had reached a conclusion regarding the annexation: that the city should not act because the matter was in litigation (*id.* at 6a n.12). The committee never made a recommendation or issued a report (*ibid.*).

2. In a memorandum order filed August 3, 1983, the three-judge court denied the city's motion for summary judgment (J.S. App. 1b-17b). In so doing it rejected the city's arguments (1) that there was no

⁶ The letter contained data gathered by various city department heads and the mayor's opinion that the annexation would prove economically disadvantageous to the city (J.S. App. 6a).

evidence that its annexations had the purpose of abridging the rights of blacks to vote or had such an effect, and (2) that, regardless, a discriminatory purpose would not alone bar preclearance of the annexations.

The court found "an astounding pattern of racial exclusion and discrimination in all phases of Pleasant Grove life" (J.S. App. 3b). The court noted that in the 1940's the city council blocked construction of a "colored housing project" in the city and ordered the city attorney to draft a zoning ordinance designed to "restrict colored property" (*ibid.*). The court concluded that the city has maintained a segregated housing market since that time by directing marketing and advertising exclusively to white buyers (*ibid.* (citation omitted)).

The court commented further on the city's history of racial discrimination in education and employment. Prior to 1969, Pleasant Grove's schools, as part of the Jefferson County system, were segregated by race. On August 4, 1969, the very day that a federal court ordered Jefferson County to desegregate its schools, the Pleasant Grove City Council voted to secede from the county system and to establish its own school system (J.S. App. 4b-5b). The court also found it significant that although Jefferson County was one-third black, Pleasant Grove had never hired a black employee even though the city employs people who live as distant as 50 miles out of town (*id.* at 5b).

The court found that Pleasant Grove's annexation policy similarly followed a racially exclusionary pattern. Specifically, the court noted that the city annexed the all-white Glasgow Addition, which can only be reached by traveling past an unannexed black neighborhood, and that it refused to annex the Kohler and Westminster parcels because adjacent areas oc-

cupied by blacks might then seek annexation. Finally, the court stated that while the annexation of the Western Addition was underway, the city rejected or refused to act on the petitions of the Highlands and Dolomite, two black areas (J.S. App. 3b-4b). If un rebutted by the city, the court concluded, this record would warrant a finding that Pleasant Grove had pursued its annexations with the purpose of denying or abridging the right to vote on account of race (*id.* at 5b).

The court next rejected Pleasant Grove's arguments (1) that proof of discriminatory purpose, absent proof of effect, is insufficient to establish a violation of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, and (2) that the absence of black voters in Pleasant Grove precluded a finding of discriminatory effect. The court held that a jurisdiction covered by Section 5 has the burden of proving the absence of *both* discriminatory purpose and effect (J.S. App. 6b-7b). Moreover, as the court noted (*id.* at 8b-9b), "[i]t would be incongruous if the City of Pleasant Grove, having succeeded in keeping all blacks out, could now successfully defend on the ground that there are no blacks in the city whose right to vote would be diluted by the annexation of white, but not black, subdivisions." While Pleasant Grove could not be required to annex contiguous areas merely because they contained black voters, it "may not annex adjacent white areas while applying a wholly different standard to black areas and failing to annex them based on that discriminatory standard" (*id.* at 10b-11b).

Judge MacKinnon dissented on the ground that the two annexations under consideration did not change the existing voting rights of any member of a minority group since the city did not contain any black

voters (J.S. App. 11b). Judge MacKinnon agreed with the majority's conclusion that the record supported a finding that Pleasant Grove's purpose was to "discriminate against blacks with respect to voting" (*id.* at 15b). He concluded, however, that a purpose to discriminate was insufficient to violate Section 5 absent any effect on minority voting strength within the city.

3. On October 25, 1985, the court decided the case on the merits, holding that Pleasant Grove had failed to carry its burden of proving that its annexation did not have a racially discriminatory purpose (J.S. App. 1a-26a).

Initially, the court found that the location of the Western Addition and the city's plans for its development would likely produce an all-white residential area (J.S. App. 4a n.5). The court then rejected the city's contention that its decision to annex the Glasgow and Western Additions, but not the black Highlands area, was economically motivated and not based on race. The court concluded that neither in connection with the Highlands petition nor the Western, Glasgow or other annexations, had the city studied in advance the economic advantages and disadvantages that would ensue (*id.* at 5a). As to the substance of the city's economic justification, the court found it to be "no more than a transparent attempt to put a valid gloss on decisions which plainly had a racial purpose" (*id.* at 10a).

The court cited several examples of arguments offered by the city to justify the different treatment of the annexation proposals, which, on analysis, proved to be plainly invalid. These arguments, concerning fire protection, streets and sanitation, and

police protection all relied on different premises and assumptions being invoked to assess costs associated with the annexation of black as opposed to white areas.⁷

⁷ For example, the city argued that annexation of the Highlands would have required three additional firefighter/paramedics and one additional rescue vehicle. The court responded that since Pleasant Grove already provided fire and paramedic services to the Highlands, no increased expenditures would be required. It also noted that the fire chief's estimated cost of serving the 79 homes in the Highlands was greater than his estimated cost of serving the 700 homes projected to be built in the Western Addition, even though the former is more accessible than the latter (J.S. App. 7a).

Similarly, the court found that the city had applied different methods for calculating the cost of providing street and sanitation services to the Highlands and the Western Addition. As a result, the city inflated the projected cost of providing such services to the Highlands. But, as the court found, if the same method of calculation is applied to both proposed annexations then the cost of providing services to the Highlands is less than to the Western Addition. This was true regardless of which method was employed, so long as the same method was used in both cases. Under one method, the result would be \$20,000 for the Western Addition and zero for the Highlands and under the other they would be \$81,900 for the Western Addition and \$6,917.24 for the Highlands. The court also noted that the Highlands residents had offered to continue their private garbage collection after annexation, whereas the city estimated that two new sanitation workers would have to be hired to service the Western Addition (J.S. App. 7a-8a).

The court next rejected the city's argument that providing police protection for the Highlands would prove costly, pointing out that because the Pleasant Grove police department already responds to calls in the Highlands, there should be no additional expense. The court also rejected the testimony of Pleasant Grove's police chief that the black residents of the Highlands are more "crime prone," noting that statistics

Finally, the court turned to Pleasant Grove's contentions about the relative development fees that would result from each of the annexations. As to the claim that the city would lose \$45,820 by annexing the 79 existing homes in the Highlands rather than building 79 new homes in the city, the court found a failure to include in the calculations the immediate tax revenues brought in by existing Highlands homes. It also found a failure to account for the fact that the Highlands contained enough undeveloped land for construction of 80 new homes.

As to the city's estimate of the sum that development fees in the Western Addition would generate, the court found the projected range of \$768,250 to \$1,424,500⁸ to be highly inflated (J.S. App. 9a). The court found even the lower of these figures to be unrealistic, in part because the city's projected tax revenues from the Western Addition exceeded those from the city's most expensive neighborhoods (*ibid.*). Moreover, the city failed to include in its calculations of the cost of annexing the Western Addition the need to construct a new fire station, a major traffic artery, and a new park (*id.* at 10a n.21). Overall, the court concluded that annexation of the Western Addition

did not bear out his characterization. It also rejected the city's projection of no new police costs for the proposed 700-home Western Addition (since the police chief testified that increased resources would be required) (J.S. App. 8a-9a).

⁸ In August 1980 counsel for the city had informed the United States that these fees would amount to \$768,250 over a four-year period. In a letter to the city council dated July 14, 1980, however, the mayor had estimated that fees over the same period would total \$1,014,600, but only a month earlier the mayor had estimated that annexation of the Western Addition would produce \$1,424,500 in development fees (J.S. App. 9a n.20).

would prove more costly to the city than annexation of the Highlands.

With regard to the Glasgow Addition, the court concluded that this annexation was economically disadvantageous to the city because of the area's inaccessibility to city fire and police services (J.S. App. 7a n.13).

In summation, the court stated (J.S. App. 12a):

The mass of evidence of a specific racially-based annexation policy, supported by what must be, for this day and age, an astonishing hostility to the presence and rights of black Americans, far overshadows and outweighs the City's feeble effort to portray its annexation policy as economically motivated.

Accordingly, it held that the city had failed to carry its burden of establishing that its annexation policy did not have the purpose of denying or abridging the right to vote on account of race or color.⁹

⁹ Judge MacKinnon again dissented. He disagreed with the majority's finding that the uninhabited Western Addition would be occupied exclusively by whites (J.S. App. 15a-17a). He then stated that only a purpose to achieve an impermissible effect related to voting could violate Section 5 and since the city did not contain any black voters, no such effect could result from annexation of the Western Addition (J.S. App. 18a-20a).

Judge MacKinnon acknowledged that the Glasgow area was inhabited exclusively by 14 members of a single white family at the time of annexation, but concluded that the city had annexed the area as a favor to the family, rather than for racial reasons. He stated that, regardless of the status of the Glasgow Addition, the annexation of the Western Addition should be approved since it involved completely uninhabited land (J.S. App. 17a-18a n.5).

Finally, Judge MacKinnon saw merit in the city's economic justification for its annexation policy. He stated that much

SUMMARY OF ARGUMENT

1. Section 5 of the Voting Rights Act requires a covered jurisdiction to submit for preclearance by the Attorney General or by declaratory judgment action in the District Court for the District of Columbia any change in a "qualification or prerequisite to voting, or standard, practice, or procedure, with respect to voting." In an action in the district court, whether brought initially or after preclearance has been denied by the Attorney General, the municipality has the burden of proving that the proposed voting 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" (42 U.S.C. 1973c).

2. This case arises from Pleasant Grove's efforts to annex two parcels of land. It is well settled that an annexation requires preclearance under Section 5 because it "constitutes a change in a 'standard, practice, or procedure with respect to voting' under the Act" (*City of Rome v. United States*, 446 U.S. 156 (1980); *Perkins v. Matthews*, 400 U.S. 379, 388-389 (1971)). When Pleasant Grove submitted the Western Addition for Section 5 review, the Attorney General objected, in accordance with his longstanding in-

of the city's revenue came from the distribution of water and gas to the surrounding area and that by annexing a developed area the city would be subsidizing the area by sharing with it the profits from this distribution. By contrast, an undeveloped area could be expected to pay for services by generating development fees. Although conceding that Pleasant Grove had not studied the economic consequences of its annexation decisions prior to making them, Judge MacKinnon stated that officials in a small town such as Pleasant Grove could be expected to understand these benefits without formal studies (J.S. App. 22a-26a).

terpretation of the statute, because the annexation was undertaken with a discriminatory purpose to include white voters while excluding black voters. The district court, also finding that the city failed to sustain its burden of proving the absence of discriminatory intent, refused to approve the proposed changes in the city's boundaries.

3. It is clear from the statutory language and well established in the case law (*City of Rome*, 446 U.S. at 172), that a jurisdiction's failure to prove an absence of discriminatory purpose, even where no immediate discriminatory consequences are apparent, fully justifies disapproval of a voting change. The city's arguments takes issue with this basic proposition.

Specifically, the city contends that because it presently has no black voters it is not possible for the annexations to have an effect on the voting rights of blacks. That argument is irrelevant, since the district court's judgment was based on discriminatory purpose, not effect. Even if the all-white composition of the city's population had not been the product of pervasive discrimination, as the district court found, this argument would fail because it reads the purpose element out of the statute. As the district court stated, however, the city's present racial homogeneity resulted from extraordinary efforts to perpetuate segregation. The city can scarcely rely on the absolute success of its exclusion of blacks to justify further annexations designed to bring in additional whites while excluding all blacks.

There is also no merit to the city's contention that it is entitled to judicial approval because the Western Addition is presently uninhabited. It has long been recognized that incorporation of undeveloped property

is a common method of municipal expansion and, especially when intended for residential development, that such annexations may well affect voting. Thus, since 1972, it has been the consistent practice of the Attorney General to require preclearance of annexations with any foreseeable effect on voting, even where the land involved is presently vacant, and this policy is reflected in this Court's decision in *City of Rome v. United States*, *supra* (nine of 13 annexations rejected by the Court were of tracts unpopulated when taken over by the city). This interpretation was made known to Congress on two occasions when extensions of the Voting Rights Act were under consideration. Congress twice reenacted the statute with no change in this regard.

4. The city also argues that the district court's factual findings should be brushed aside. Those findings of fact are not clearly erroneous, indeed they are amply supported by the record. The district court recounted Pleasant Grove's recurring official acts of discrimination in annexation, zoning, housing, and education. Based on a record that fully supported its finding of discriminatory purpose, the district court properly refused to order preclearance of the proposed annexations (J.S. App. 12a). That determination should be affirmed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY REFUSED TO AUTHORIZE ANNEXATIONS UNDERTAKEN WITH A RACIALLY DISCRIMINATORY PURPOSE

A. The statute and the decisions of this Court establish that a discriminatory purpose to include white voters and exclude black voters suffices to invalidate an annexation

Under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, a covered jurisdiction¹⁰ that enacts or seeks to administer any change in "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," must seek preclearance either from the Attorney General or by the entry of a declaratory judgment by the United States District Court for the District of Columbia that "such qualification, prerequisite, standard, practice, or procedure 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 * * *." It has long been well settled that Congress intended these preclearance provisions of the Act to be given "the broadest possible scope," and to reach "any state enactment which altered the election of a covered state in even a minor way." *Allen v. State Board of Elections*, 393 U.S. 544, 566 (1969).

As appellant concedes (Br. 19), it is well settled that the requirements of Section 5 of the Voting Rights Act must be satisfied when a political subdivision, such as the City of Pleasant Grove, expands its territorial boundaries. *City of Rome v. United States*, 446 U.S. 156, 187 (1980); *City of Richmond*

¹⁰ The State of Alabama is a covered jurisdiction for purposes of Section 5 (30 Fed. Reg. 9897 (1965)).

v. *United States*, 442 U.S. 358, 367-368 (1975); *City of Petersburg v. United States*, 410 U.S. 962 (1973), aff'g 354 F. Supp. 1021 (D.D.C. 1972); *Perkins v. Matthews*, 400 U.S. 379, 390-391 (1971); see S. Rep. 94-295, 94th Cong., 1st Sess. 16 (1975); 28 C.F.R. 51.12(e). Application of the extraordinary requirements of Section 5 to annexations is justified because "an annexation constitutes a change in a 'standard, practice, or procedure with respect to voting'" (*City of Rome*, 446 U.S. at 156) and acquisition of surrounding property can deny the right of suffrage " 'just as effectively as by wholly prohibiting the free exercise of the franchise' " (*Perkins*, 400 U.S. at 388, quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). As this Court recognized in *Perkins*, 400 U.S. at 388, the redrawing of boundary lines, as a general matter, affects voting because "by including certain voters within the city and leaving others outside, it determines who may vote in the municipal election and who may not."

Based on the statute's use of the conjunctive, "does not have the purpose and will not have the effect," this Court has held that "Congress plainly intended that a voting practice not be precleared unless both discriminatory purpose and effect are absent" (*City of Rome*, 446 U.S. at 172 (emphasis omitted)). See *City of Port Arthur v. United States*, 459 U.S. 159, 168 (1982); *City of Richmond v. United States*, 422 U.S. at 372; *Georgia v. United States*, 411 U.S. 526, 538 (1973); *Perkins*, 400 U.S. at 387, 388.

In *City of Richmond v. United States*, *supra*, this Court concluded that Richmond's annexation of additional territory did not have a discriminatory effect under Section 5, but it remanded the case for con-

sideration whether the annexation was motivated by a discriminatory purpose. The Court explained why an annexation that had been found not to have discriminatory effect had to be remanded to the district court for inquiry into its purpose (422 U.S. at 378 (emphasis added) (citations omitted)):

The answer is plain, and we need not labor it. An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. Section 5 forbids voting changes taken with the purpose of denying the vote on the grounds of race or color. Congress surely has the power to prevent such gross racial slurs, the only point of which is "to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights." *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960). Annexations animated by such a purpose have no credentials whatsoever; for "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end. . . ." * * * An annexation proved to be of this kind and not proved to have a justifiable basis is forbidden by § 5, *whatever its actual effect may have been or may be*.

To this end, the Court has refused to approve annexations that *increased* the black population in a district because the purpose of the change (to keep the black population from being even larger) was discriminatory. *Busbee v. Smith*, 459 U.S. 1166 (1983), aff'g 549 F. Supp. 494 (D.D.C. 1982). Similarly, in *Beer*, 425 U.S. at 141, the Court stated that even an *ameliorative* reapportionment scheme would violate Section 5 if "the new apportionment itself so

discriminates on the basis of race or color as to violate the Constitution" (see 425 U.S. at 142 n.14).

This Court's decisions also firmly establish that the annexing municipality has the burden of proving that its proposed expansion is undertaken without a discriminatory intent and that it will not have the effect of abridging the right to vote for minorities. *City of Rome*, 446 U.S. at 183 n.18; *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966); *Georgia v. United States*, 411 U.S. at 538. If the municipality fails to sustain its burden on either intent or effect, it is not entitled to judicial approval.

On the record in this case, the district court correctly withheld its approval of the Glasgow and Western annexations because they were part of the city's discriminatory policy. The annexations had a racially discriminatory purpose—to include areas occupied or likely to be occupied by whites, while excluding areas occupied by blacks—and were not entitled to judicial endorsement under Section 5. See *City of Richmond*, 422 U.S. at 378.

Of the two parcels of land involved, Glasgow was inhabited exclusively by whites and Western was intended for residential development of a type that has uniformly produced all-white neighborhoods in Pleasant Grove.¹¹ Contemporaneously with its decision to

¹¹ The city does not contest the court's finding that it was likely that the residential development would serve white citizens. The Western Addition is not adjacent to a black neighborhood, it was planned for single family residences such as prior annexations that resulted in all-white sections, and, when asked whether the planned residences would be populated mostly by white people, the mayor of Pleasant

annex the Western Addition, the city chose not to annex the all-black Highlands, even though the city concedes (Br. 7) that the housing stock in that neighborhood was of high quality.¹² Combined with the city's history of annexing only white or undeveloped areas (later populated by whites only) and refusing to annex any black areas, these decisions demonstrate that the city actively pursued a policy of redrawing its boundary lines to take in potential and actual white voters and to exclude black voters.¹³

Grove testified "I would think they would" (4/2/81 Patrick Dep. 83).

Because the area was zoned for residential development, it was apparent that Section 5 preclearance was indicated. Certain annexations, such as those of vacant land designated for use as a public park, do not require Section 5 review. Because Section 5 is concerned only with voting practices and procedures, the Attorney General does not require submission for preclearance of annexations of uninhabited land before such annexations take place. Rather, the Attorney General requires covered jurisdictions to submit such annexations for preclearance before inhabitants of the annexed area may vote in the annexing jurisdiction. Pleasant Grove voluntarily submitted its annexation of the Western Addition for preclearance before the area was inhabited and, therefore, any specific individuals sought to vote.

¹² The United States does not, nor has it ever, contended that the city's failure to annex surrounding black areas itself violated Section 5. Rather, the failure to annex these areas, while the city was simultaneously annexing non-black areas, is highly significant in demonstrating that the city's annexations here were purposefully designed to perpetuate Pleasant Grove as an enlarged enclave of white voters.

¹³ There is no merit to the city's contention (echoed by its supporting amicus) that the district court has required the annexation of the Highlands. All the court held was that the Glasgow and Western Additions did not satisfy Section 5; it

B. The absence of any black voters from Pleasant Grove does not suggest that the City lacked a discriminatory purpose with respect to voting

Pleasant Grove contends (Br. 18-21) that because it contains no black voters, its annexation of currently vacant land and land inhabited exclusively by whites cannot violate Section 5. In effect, the city seeks to rely on its unbroken history of racial exclusion (J.S. App. 3b) to argue that since it has no black voters it is impossible to abridge, restrict or "dilute" the votes of any blacks.

was those *changes* in the boundaries defining who could vote in city elections that brought Section 5 into play. Had the challenged annexations not occurred, the city's rejection of the Highlands' petition would not have occasioned Section 5 scrutiny. Of course, once the city sought preclearance of the Western Addition, its contemporaneous refusal to annex black areas was relevant to the inquiry into the purpose underlying the Western annexation.

Nor is there merit to the city's argument (Br. 23-24) that its refusal to annex the Highlands placed the black residents of that community in a better voting position than would have resulted from annexation. The city's anomalous argument that annexation of the Highlands would actually result in dilution of the voting strength of residents of the Highlands is supported by neither fact nor logic. Appellant contends that the black voters of the Highlands now are part of a significant minority in Jefferson County, but, if annexed, would constitute only an insignificant minority in Pleasant Grove. Nowhere, however, does the record suggest that residents of the Highlands would no longer participate in Jefferson County elections if they were annexed by Pleasant Grove. Quite the contrary. The record shows that voting "[r]egistration in Pleasant Grove is under the authority of the Jefferson County Board of Registrars" (J.A. 21). The net result of a Highlands annexation, therefore, would be that the Highlands residents would retain their voting strength in Jefferson County and would gain some voting strength in Pleasant Grove.

This argument rests on the erroneous premise (Br. 19) that annexation runs afoul of Section 5 only if it has a significant effect on present minority voting. The city's argument thus reads the purpose requirement out of the statute. Instead of imposing on an annexing jurisdiction the burden of satisfying two standards under Section 5, the city would diminish the burden so it need prove only the absence of an imminent discriminatory effect.¹⁴

More fundamentally, Pleasant Grove's argument distorts Congress's purpose in enacting Section 5. As this Court has observed (*Beer*, 425 U.S. at 140, quoting H.R. Rep. 94-196, 94th Cong., 1st Sess. 57-58 (1975) (footnote omitted)):

"Section 5 was a response to the common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law too, was discriminatory. . . . Congress therefore decided, as the Supreme Court

¹⁴ If appellant is correct that its all-white character precludes the possibility that any change in voting procedures would have an effect on blacks, the same defense could be made for an ordinance providing that no blacks may vote. While such a provision bluntly violates the Fifteenth Amendment it would appear to qualify for Section 5 preclearance under the city's theory. Similarly, based on its theory, Pleasant Grove could progressively annex every all-white community in the county and claim an entitlement to preclearance because there had been no "dilution" of black votes within the city. As is clear, the city's contention would drain Section 5 of vitality.

declared it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victims' by freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.' "

To head off such "adaptiveness" and to interdict changes having a "potential for racial discrimination" (*Perkins*, 400 U.S. at 388-389), Congress established the Section 5 preclearance mechanism, requiring that an act be discriminatory neither in purpose nor effect. As the district court found, Pleasant Grove's all-white character was not the result of benign happenstance. Certainly acts of selective annexation are no less objectionable under this statute on account of their complete success and the resulting fact that there are presently no black voters in the city.

C. The Western Addition annexation can not be justified on the ground that the area is uninhabited

The city also seeks to justify the Western Addition annexation (though not the Glasgow Addition) on the ground that the property is not yet developed, so that the annexation will not immediately alter the city's population, or have an immediate effect on voting. It is no less true, however, that this annexation of land likely to be developed as a white residential area,¹⁵ was plainly motivated by a discrimina-

¹⁵ Although appellant does not challenge the district court's finding that the annexed area was likely to be populated by whites, the dissenting judge in the lower court criticized that finding as "speculative" (J.S. App. 15a-16a). Such criticism is misplaced in the context of a statute, such as Section 5, that imposes a preclearance requirement. In discharging Section 5 responsibilities the Attorney General and the courts

tory purpose to increase the white but not the black political constituency of the city.

The practical consequence of Pleasant Grove's argument would be to exempt from Section 5 annexations of presently uninhabited property projected for residential development. In *City of Rome*, however, this Court affirmed the district court's refusal to approve 13 annexations, nine of which were of uninhabited land at the time of annexation. See 446 U.S. at 194, 196 (Powell, J., dissenting); *City of Rome v. United States*, 472 F. Supp. 221, 246 (D.D.C. 1979). The district court observed in that case that "cities frequently annex relatively unpopulated areas for purposes of future growth and development" (*id.* at 246-247). It would be anomalous to remove from the coverage of Section 5 so common a method of municipal expansion. See *Allen v. State Board of Elections*, 393 U.S. at 566.

frequently must project the anticipated consequences of municipal action. Thus, courts regularly assess the likely consequences of boundary changes in light of bloc voting patterns, historic levels of voter registration and similar factors.

On a broader level, the dissenting opinion suggests that based on the current facts, the effect of the annexations on any future black voters is speculative. The existence of future black voters in Pleasant Grove is not hypothetical however. During the pendency of this lawsuit, a black family moved into the city (Br. 20). Moreover, the city's two nursing homes house 32 black citizens. Although none of these residents is currently registered to vote, there is no reason to assume that they, or any future black residents, would not someday register and vote in the city. In any event, to say that the impact of the city's action is speculative is tantamount to saying that the city has failed to satisfy its burden of proving that the annexations "will not have" an effect on voting. Thus, even on the view of the facts espoused by the dissenting opinion, the judgment below should be affirmed.

D. The decision below is consistent with the long-standing interpretation of the Attorney General in implementing Section 5

The Attorney General's longstanding interpretation of Section 5 fully supports the district court.¹⁶ Since at least 1972, the Attorney General has consistently objected to selective annexations both of white and vacant areas that were motivated by racially discriminatory purposes, regardless of whether the annexation diluted the votes of minority voters remaining in the annexing jurisdiction.¹⁷ There is

¹⁶ Recognizing "the central role of the Attorney General in formulating and implementing [Section] 5," this Court has accorded considerable deference to his interpretation of its scope. *Dougherty County Board of Education v. White*, 439 U.S. 32, 39 (1978). See also *Blanding v. DuBose*, 454 U.S. 393, 401 (1982); *NAACP v. Hampton County Election Comm'n*, No. 83-1015 (Feb. 27, 1985), slip op. 11 n.29.

¹⁷ The United States submitted to the district court a list of objections interposed by the Attorney General to annexations on the ground that they reflected racially selective annexation policies (D. 50). This list included objections to annexations by: Lake Providence, Louisiana (December 1, 1972); McComb, Mississippi (May 30, 1973, withdrawn October 21, 1974); McClellanville, South Carolina (May 6, 1974); Grenada, Mississippi (February 5, 1975); Lumberton City School District, Lumberton, North Carolina (June 2, 1975); Bessemer, Alabama (September 12, 1975); Statesboro, Georgia (December 10, 1979); and Pleasant Grove, Alabama (February 1, 1980).

Between 1965 and 1981, the Attorney General objected to only 245 of the 8,786 annexations submitted for Section 5 preclearance (D. 50, at 2 n.1). It has been the Attorney General's policy to object only if an annexation will dilute the votes of minority residents remaining in the submitting jurisdiction or, as in this case, the annexation will lead to voting changes and is motivated by a racially discriminatory purpose.

specific evidence in the legislative history of the 1975 and 1982 reenactments of Voting Rights Act reflecting the Attorney General's policy of requiring that certain annexations of vacant land be submitted for Section 5 preclearance and his policy of objecting to annexations when they have a racially discriminatory purpose. See U.S. Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* 65 (1981) ("The Department of Justice most often objected to the annexations of predominantly white residential areas or to undeveloped areas zoned for middle-income housing"); S. Rep. No. 97-417, 97th Cong., 2d Sess. 10 n.21 (1982).

In both 1975 and 1982, complaints were made to Congress about the requirement of preclearance "where [the] area annexed does not include a single additional resident" (*Extension of the Voting Rights Act of 1965: Hearings on S. 407, et al., Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 189 (1975) (statement of A. F. Summer, attorney general of Mississippi)). See 128 Cong. Rec. S7100 (daily ed. June 18, 1982) (remarks of Sen. Helms) (noting that the Department of Justice had objected to the "annexation of an undeveloped subdivision"). Indeed, in 1982, the Department of Justice apprised Congress of the very case now before this Court. *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 2567 (1981) (*Hearings*) ("The Attorney General interposed a Section 5 objection to the annexation to Pleasant Grove of certain vacant land projected for

all-white residential development * * *.”);¹⁸ see *id.* at 194-195 (1975); S. Rep. No. 97-417, *supra*, at 13.¹⁹ The statute was reenacted without change in this regard in both 1975 and 1982. See *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 131-135 (1978).

II. THE DISTRICT COURT'S FINDING THAT THE CITY FAILED TO PROVE THE ABSENCE OF DISCRIMINATORY PURPOSE FROM ITS ANNEXATION DECISIONS IS NOT CLEARLY ERRONEOUS

A. Pleasant Grove's annexation and other policies demonstrate a pervasive discriminatory purpose over a long period

The district court's finding that Pleasant Grove acted with a racially discriminatory purpose in annexing the Western and Glasgow Additions is a

¹⁸ See *Hearings 1845* (attachment to testimony of E. Williams) (“the Department of Justice objected to an annexation plan submitted by Pleasant Grove, Alabama. The city population was 6,500 and exclusively white. The areas proposed for annexation were expected to be inhabited exclusively by whites. Several identifiably black areas had petitioned for annexation so as to derive the benefits of inclusion in the city, but the city had taken no action to annex these areas. Finally, the objection letter noted reports of ‘activities’ indicating the presence of considerable antagonism toward black persons in the vicinity of Pleasant Grove”).

¹⁹ Insofar as we have determined, it is true, as the city contends (Br. 24), that the Attorney General has never objected to another annexation where neither the annexing jurisdiction nor the annexed area contained black voters. However, this fact is explained by the rarity of a jurisdiction that does not contain any black voters, rather than by any government policy. As we have explained (pages 22-24, *supra*), the city's all-white population is scarcely a mitigating fact or warranting diminished Section 5 scrutiny.

factual finding that is subject to review under Fed. R. Civ. P. 52(a). *Anderson v. City of Bessemer City*, No. 83-1623 (Mar. 19, 1985), slip op. 8-9. See *Rogers v. Lodge*, 458 U.S. 613, 622-623 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273, 285-290 (1982); *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 534-537 (1979).

Since factfinding “is the basic responsibility of district courts, rather than appellate courts” (*Pullman-Standard v. Swint*, 456 U.S. at 291 (quoting *DeMarco v. United States*, 415 U.S. 449, 450 n.* (1974))), this Court may reverse the trial court's findings only if they are clearly erroneous, *i.e.*, only if the evidence leaves this Court with the “‘definite and firm conviction that a mistake has been committed.’” *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 (1982) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1984)). “This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.” *Anderson v. City of Bessemer City*, slip op. 8. See *Maine v. Taylor*, No. 85-62 (June 23, 1985), slip op. 13-14.

The evidence establishes not only that the city failed to carry its burden of proving the absence of a discriminatory purpose, but that Pleasant Grove's annexations were in fact motivated by a racially discriminatory purpose. The city's annexation policy itself manifests a desire to exclude all blacks from the city while taking in substantial numbers of white voters. As the district court found, Pleasant Grove has annexed several white or vacant areas while never approving an annexation that would bring a single black resident into the city. Indeed, the district court found that the city was so committed to remain-

ing all white that it refused to annex two white areas—the Kohler and Westminster areas—because they feared a “mushroom effect” that would create pressure for the city to annex black areas adjacent to these white areas (see pages 3, 5, 8-9, *supra*). The city’s refusal to annex the black Highlands area, while nearly simultaneously annexing the Western Addition, which it projected would be inhabited by whites, demonstrates the central role that race occupied in the city’s annexation decisions, which is not contradicted by its efforts at statistical justification (see pages 31-36, *infra*).

Were there ambiguity about the purposes of the annexation policy viewed in isolation, the city’s extraordinary history of racially hostile acts, as chronicled by the district court, is virtually undisputed. In nearly every aspect of its public life, including housing, zoning, education, employment, and annexations, Pleasant Grove has evinced overt racial animus toward black citizens. It has never hired a black employee, although it has hired white employees from as far as fifty miles away. It seceded from the Jefferson County school system rather than submit to a court order to desegregate its schools. Its independent school system was subsequently abolished by court order.

The district court correctly held this history of discrimination to be probative in determining the purpose behind the city’s annexation decisions. See *Rogers v. Lodge*, 458 U.S. at 624-626; *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977). While a finding of racially discriminatory purpose in other areas of the city’s life is not a substitute for a finding of dis-

crimatory purpose in its annexations, the city’s pervasive history of discrimination in its public acts, which manifests an overriding objective to exclude blacks from the city, is highly relevant in evaluating the evidence bearing on the purpose behind the annexations under review.

B. The district court correctly found that the city’s economic justification for annexing the Western Addition was insubstantial and pretextual

Contrary to the city’s contention (Br. 25-26), the evidence fully supports the district court’s rejection of Pleasant Grove’s supposed economic justification for annexing the Western Addition but not the Highlands (J.S. App. 10a).

Indeed, Pleasant Grove does not challenge most of the district court’s findings regarding its purported economic defense. Those findings demonstrate that the economic justifications both for refusing to annex the Highlands and for annexing the Western Addition were developed after the decisions had already been made and were, thus, not factors in those decisions. Pleasant Grove asserts that it relied on its annexation committee in refusing to annex the Highlands. However, appointments to the committee, if they were made at all, were made a year after the city asserted they had been made. The committee met at most once and conducted no independent inquiry into the economic consequences of annexing the Highlands. It generated no documents and made no report regarding the proposed annexation. Similarly, no advance study was conducted of the economic consequences of annexing any other area (J.S. App. 5a).

Moreover, the district court found that the substance of the justifications lacked merit and demon-

strated that the city had applied entirely different standards in deciding whether to annex the Highlands and the Western Addition.²⁰ The city's submission rested on inflated figures for the cost of annexing the Highlands and on deflated cost figures for the Western Addition. Thus, the court rejected the city's estimate that three additional firefighters and paramedics would be necessary to serve the Highlands as "entirely without factual basis" in view of the city's repeated assertion that it was already providing fire and paramedic protection to the Highlands (J.S. App. 7a). It also found that the city's projected cost of providing these services to the 79 homes in the Highlands exceeded its estimated cost of providing the same services to the 700 homes planned for the Western Addition, even though the Highlands is more accessible to existing facilities than the Western Addition (*ibid.*). Similarly, the city applied different methods in calculating the cost of providing street and sanitation services to the two areas, which resulted in an inflated figure for the Highlands and an artificially low figure for the Western Addition. The court calculated that, in reality, under either method, the cost of providing these services to the Western Addition would far exceed the cost of providing the same services to the Highlands (J.S. App. 8a; see note 7, *supra*). Moreover, the city's calculations failed to take into

²⁰ In its motion for summary judgment (D. 25, at 5), the city offered this encapsulation of the pertinent facts that shows the dual tracks on which annexation decisions were made: the city council promptly approved the Western Addition, which was regarded as involving no "racial issue," whereas the Highlands petition "did confront the Council with a racial issue."

account the offer of the Highlands to continue to provide its own sanitation service.

The district court correctly found that the city's estimated high cost of providing police protection to the Highlands was based on the inaccurate characterization by Pleasant Grove's police chief of the black residents of the Highlands as "'crime prone'" (J.S. App. 8a). Actual crime statistics did not support that characterization and the court found that, in fact, the Highlands annexation would generate no new costs, since Pleasant Grove police already responded to calls in that community (*id.* at 8a-9a). By contrast, the city projected no increased costs as a result of providing police protection for the 700 new homes in the more remote Western Addition (*id.* at 9a).

The district court also found that Pleasant Grove had inflated its estimate of the revenue to be derived from the Western Addition and seriously underestimated the revenue that could be expected from the Highlands. Within the course of two months, the city's estimate of the amount of development fees it would receive from the Western Addition (over a four-year period) declined by half from \$1,424,500 to \$768,250. The district court found even this latter figure to be inflated (J.S. App. 9a).

In contrast, the city underestimated the revenue it would derive from annexation of the Highlands. The city first argued that it would lose some \$45,000 in development fees by annexing the existing 79 homes in the Highlands rather than having the same number of new homes built in the city. Significantly, the city failed to acknowledge that the Highlands contains a substantial tract of undeveloped land that

the court estimated could accommodate 80 new homes and would bring in substantial development fees, presumably slightly more than \$45,000. The city has not challenged any of the above findings.

Nor does the city challenge the district court's finding that annexation of the Highlands would produce immediate benefits for the city in the form of ad valorem tax revenues from developed property. The city argues, however (Br. 25), that ad valorem taxes would provide only between 14% and 28% of the additional expenses it would incur by annexing the Highlands. The record does not support this contention. The city bases its statement on affidavits submitted by Sarah A. Mays, Pleasant Grove's Secretary-Treasurer, in connection with her deposition in this case (J.A. 21). Ms. Mays examined the city's sources of revenue and identified those ad valorem items that could be expected to increase in proportion to the increase in population if Pleasant Grove annexed the Highlands. These items amounted to \$255,404 for the fiscal year ending September 30, 1980. She then calculated that the city's *total expenditures* for that same period amounted to \$1,790,951, noting that the former figure was 14% of the latter.²¹

While Ms. Mays estimated certain *revenues* that would increase as a result of annexing the Highlands,²² she made no effort to quantify the additional

²¹ Ms. Mays conceded on cross-examination that the city's expenditures for FY 1980 were distorted by a once-in-a-decade expenditure of approximately \$500,000 to resurface all of the city's roads. She calculated that without that expenditure the revenues that would be expected to increase in proportion to the population of the Highlands amounted to 24.6% of the city's total expenditures (Mays Dep. 43; J.A. 21-24).

²² Ms. Mays did not purport to measure all additional revenues the Highlands would generate. For example, the affi-

costs of that proposed annexation. Nor do Ms. Mays' calculations address whether the city would incur *any* additional costs by annexing the Highlands. Thus, contrary to the city's contention, the Mays affidavit does not show that the Highlands would generate only 14%, or 28%, of the *additional* expenses the city would incur by annexing that area.²³

The city's comparative economic justification for annexing the Western Addition and refusing to annex the Highlands consists of an after-the-fact totaling of the revenues to be derived from annexation of the Western Addition, without regard to the costs, and a corresponding calculation of the costs associated with annexation of the Highlands, without regard to the revenues. The method employed in this post hoc rationalization itself refutes the city's contention that economic considerations alone fueled its annexation decisions. Thus, while the failure to annex the Highlands area is not a change subject to Section 5 review, it lends further support to the district court's conclusion that the voting changes in-

davit does not include the significant fees that Pleasant Grove would receive if the vacant land in the Highlands were developed and 80 new homes erected. Thus, as is plain on its face, the Mays affidavit's discussion of revenues is limited to ad valorem taxes.

²³ The district court rejected all of the city's estimates of increased expenditures that would accrue from annexation of the Highlands. It found that no new expenditures would be required to provide fire, police or paramedic protection and discounted the city's estimated cost of providing street and sanitation service. The city has simply failed to identify any other specific expenditures that would increase as a result of annexation of the Highlands.

volved in the annexations that are under review were motivated by a discriminatory purpose.²⁴

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

WALTER W. BARNETT
WILLIAM R. YEOMANS
Attorneys

AUGUST 1986

²⁴ The city did not attempt to offer an economic justification for its annexation of the Glasgow Addition, nor has it challenged the district court's finding that this annexation imposed an economic burden on the city.