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No. 02-182

IN THE

Supreme Court of the United States

STATE OF GEORGIA,
Appellant,

v.

JOHN ASHCROFT, *et al.*
Appellees,

and

PATRICK L. JONES, *et al.*
Intervenors.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF APPELLANT STATE OF GEORGIA

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QUESTIONS PRESENTED

I. Whether Section 5 of the Voting Rights Act Requires the Drawing of Safe Majority-Minority Districts with Supermajority Minority Populations, Rather than Districts that Afford Minorities Equal Opportunities at Success?

II. Whether Section 5 can be Constitutionally Construed to Require the Drawing of Supermajority Minority Legislative Districts in Order to Create Safe Seats, Rather than Seats that Afford Minorities Equal Opportunities at Success?

III. Whether Private Parties Should be Allowed to Intervene in a Section 5 Preclearance Action and Assume the Role and Authority of the Attorney General?

PARTIES TO THE PROCEEDING

All parties to the proceeding below are:

State of Georgia
John Ashcroft, in his official capacity as Attorney General of the United States
Ralph F. Boyd, Jr., U.S. Assistant Attorney General, in his official capacity
United States of America
Della Steele
Georgia Benton
Patrick L. Jones
Roielle L. Tyra

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OPINIONS BELOW

The orders of the three-judge panel of the United States District Court for the District of Columbia are reported at 204 F.Supp.2d 4 (D.D.C. 2002) and 195 F.Supp.2d 25 (D.D.C. 2002), and are reproduced at J.S.1a and 23a.

JURISDICTION

This is an appeal from the order of a three-judge court denying a declaratory judgment to preclear Georgia's Senate redistricting plan under § 5 of the Voting Rights Act. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves §§ 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 and 1973c. The text of these statutes are set forth at J.S. 220a and 221a.

STATEMENT OF THE CASE

PROCEEDINGS BELOW

THE REDISTRICTING PLANS AT ISSUE: At two special sessions in 2001, the Georgia General Assembly redrew State House, Senate, and congressional districts in light of the 2000 census. All three plans either maintained or increased the number of majority black districts. For the House plan, the number of majority BPOP (black population) districts increased from 40 to 42; the number of majority BVAP (black voting age population) districts increased from 37 to 39. For the Senate plan, the number of majority BPOP districts remained at 13; the number of majority BVAP districts increased from 12 to 13. For Congress, the number of majority BPOP districts remained at 2; the number of majority BVAP districts increased from 1 to 2.[1] (P.Exs.1D, 2C, 8D, 9C, 11D, 12C).

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[1] The 2000 census is the first census that allowed multiple race responses. Consistent with the Census Bureau, Georgia counted as "black" all persons who responded either as "black only" or as black in combination with any other race. Inexplicably, the DOJ contended at one point that it might be appropriate to count, as "blacks," only those multiple-race responders who responded both black and white, but not persons who responded as black and any other race. (J.S.40a). In some instances, the minuscule change in BVAP under the DOJ's alternative method could change the count of the number of majority districts. The evidence is undisputed that Georgia's methodology is correct. To avoid any possible confusion over this issue, the State introduced the testimony of Dr. Roderick Harrison, the former Chief of the Racial Statistics Branch of the U.S. Census Bureau. His uncontradicted testimony established that the State's methodology is appropriate. (P.Ex. 26).

TRIAL COURT PROCEEDINGS: This action was filed on October 10, 2001, seeking § 5 preclearance for each of the new redistricting plans. On December 19, 2001, the court directed the Department of Justice (DOJ) to identify what plans and specific districts, if any, it challenged. The DOJ responded by taking no issue with the congressional plan and, after a requested extension of time, taking no issue with the House plan either. The DOJ opposed the Senate plan, complaining about Senate Districts (S.D.) 2, 12, and 26.

A motion to intervene was filed on behalf of several African American voters who were represented by the general counsel to the Georgia Republican Party. On January 10, 2002, the court denied intervention as to the congressional plan because the DOJ did not object to that plan. The court ruled: "[T]his court will not 'accommodate the intervenors' quest for a forum in which to test a voting plan' which the United States does not contend violates the Voting Rights Act." (J.S. 217a). The Court permitted intervention as to the Senate plan, however, because that plan was challenged by the DOJ. Intervention as to the House plan was left open, pending the DOJ's final position on that plan. (J.S. 218a, n.2). By order of January 30, 2002, however, the court reversed its position and allowed intervention as to all plans, regardless of the DOJ's position. (J.S. 214a).

The court required that direct testimony of all lay witnesses be presented in advance of trial through transcript or, as the DOJ did, by affidavits prepared by counsel. Cross-examination was done by pretrial deposition. Expert reports were introduced. The only live testimony at trial was expert cross-examination. Trial occurred February 4-7, 2002, before one judge, Hon. Emmet Sullivan. Closing argument occurred February 26, 2002, before all three judges.

THE COURT'S HOLDING: In a 2-1 decision on April 4, 2002, the court precleared Georgia's congressional and House plans, but rejected the Senate plan and adopted *in toto* the

DOJ's criticisms of the three districts objected to. (J.S.142a-147a). The disagreement between Judges Sullivan and Edwards in the majority and Judge Oberdorfer in dissent boiled down to a concise legal question: Does § 5 require the drawing of safe minority districts, or is the State allowed to draw districts where minorities have "merely" equal opportunities at success? The majority held that Georgia must maintain, as *safe*, any district that previously had a supermajority minority population, even if the district was greatly underpopulated and had to be expanded to comply with one-person/one-vote requirements. As Judge Sullivan wrote:

> [I]f existing opportunities of minority voters to exercise their franchise are robust, a proposed plan that leaves these voters with merely a "reasonable" or "fair" chance of electing a candidate of choice may constitute retrogression in overall minority voting strength. (J.S.113a).

Judge Sullivan's majority opinion rejected Georgia's contention that an otherwise nondiscriminatory plan should receive § 5 preclearance, even if a supermajority, safe seat is redrawn as a seat where minorities have an equal opportunity, but are not guaranteed to win.

> Georgia contends that because its plan preserves for black voters a reasonable—or equal—chance to elect candidates of choice in the three districts at issue, the State has satisfied § 5 . . . . The State's implicit argument is that retrogression cannot exist where its proposed plan satisfies § 2. We disagree. (J.S.112a).

In so holding, the court acknowledged that none of the plans were motivated by a discriminatory or "retrogressive" purpose. (J.S.147a-149a).

Judge Edwards, joined by Judge Sullivan, wrote in concurrence:

> Our dissenting colleague argues that § 5 is satisfied whenever a covered jurisdiction adopts a plan that

preserves an "equal or fair opportunity" for minorities to elect candidates of their choice. This is not an accurate statement of the law. (J.S.151a).

. . . .

When the idea of *retrogression* is taken seriously, as the dissent refuses to do, it is quite obvious that a proposed plan backslides from an existing plan if it *merely* affords the protected class an equal opportunity to elect a fixed number of candidates and the existing plan affords the protected group a significantly better than equal chance of electing that same slate of candidates. Accordingly, all other things being equal, a state that converts a safe district into one where African Americans have only a "fair opportunity" would be hard pressed to preclear its plan under the § 5 analysis described by the Supreme Court. (J.S.152a; emphasis partly added).

Judge Edwards further wrote that "neither the Supreme Court nor any other court, has held—or even hinted—that preclearance under § 5 must be granted to a plan that protects equal electoral opportunities for minority voters." *Id.* 153a. According to Judge Edwards, Judge Oberdorfer's contrary conclusion was a "legal error infect[ing] the whole of the dissent's analysis." *Id.* At closing argument, Judge Edwards expressed his disagreement with this Court's voting rights jurisprudence:

> The problem is, as you well know, the status quo analytically makes no sense when we have demographics that are changing, or you have one person one vote. It is a bogus—I mean unfortunately the [Supreme] court does not make it easy for us in some of these cases. To say, let's look at the status quo, is kind of dumb, when you cannot look to the status quo because by definition it is impermissible. (Tr. 128-29, 2/26/02).

Judge Oberdorfer dissented as follows:

> Neither the text of § 5 nor authoritative decisions interpreting it require the preservation of super or "robust"

majorities that would guarantee election of the minority candidate of choice; the statute and precedents "merely mandate that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." *Bush v. Vera*, 517 U.S. 952, 983 (1996). (J.S.187a; emphasis in original).

. . . .

It is my view that § 5 does not prevent a state from adopting a redistricting plan, with the blessing of African American legislators, that reduces "packed" concentrations of black voters so long as it preserves equal or fair opportunities for minorities to elect candidates of choice. It may well be that supermajorities of black voters under the benchmark plan create "robust" opportunities to elect a candidate of choice. But under the law of unintended consequences, they may also create conditions that are "unfair," "unreasonable," and "unequal," to both minority voters in those districts whose votes are "wasted," to the point that they may find it unnecessary to turn out and vote, and to non-minority voters in those districts whose voting interests might well be "submerged" by the supermajority to the point that they turn away from the political process. The Voting Rights Act does not countenance, let alone require, such a result.

The Constitution and the Voting Rights Act do not guarantee victory to minority candidates, but only equal opportunity. (J.S.206a-07a; citation omitted).

. . . .

There is "no vested right of a minority group to a majority of a particular magnitude unrelated to the provision of a reasonable opportunity to elect a representative." (J.S. 207a; citation omitted).

THE AMENDED SENATE PLAN AND SUBSEQUENT PROCEEDINGS: With the district court's ruling, Georgia was left with no enforceable plan for the 2002 elections. The district

court agreed to retain jurisdiction and allowed the State 20 days to enact and submit a revised Senate plan. (J.S. 2a). The General Assembly immediately passed a plan that raised the BVAPs in S.D. 2, 12 and 26 to levels that would satisfy the DOJ. The revised districts included all of the contiguous black majority areas desired by the DOJ and excluded all the white precincts to which the DOJ had objected. (J.S 6a, 17a-18a, 20a). The BVAPs and BPOPs in the revised plan were thereby increased substantially, as follows (J.S. 5a):

	BPOP%		BVAP%	
S.D.	2001 Plan	Rev'd Plan	2001 Plan	Rev'd Plan
2	55.60	59.47	50.31	54.50
12	54.01	58.66	50.66	55.04
26	55.36	60.32	50.80	55.45

The DOJ did not object to the amended plan, and the district court approved it over intervenors' continued objections.

The amended Senate plan is an interim remedy that, by the express terms of the statute, will lapse upon the original plan receiving § 5 preclearance. (2002 Ga. Laws 148, 149, Act No. 444, § 1(b); J.S. 223a). Thus, there remains an active case or controversy regarding the original Senate plan that the district court rejected. Indeed, because of the continuing "benchmark" issue, this case would not be moot even if the revised plan were a permanent plan. See DOJ Motion to Affirm, p. 12, n. 5.

STATEMENT OF FACTS

GEORGIA'S REAPPORTIONMENT HISTORY: Georgia's current legislative redistricting can only be understood by looking at the preceding redistricting of 1991-92, which was dominated by the DOJ's policy of requiring racially gerrymandered, "max-black" districts. Those events are detailed in the opinions of this Court and the lower courts. See *Miller v.*

Johnson, 515 U.S. 900 (1995); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Johnson v. Miller*, 929 F.Supp. 1529 (S.D. Ga. 1996) (*Johnson III*). Georgia's congressional redistricting was dictated by a "max-black" plan originally drafted by the ACLU. 515 U.S. at 907-08. Because that reapportionment was predominantly based on race and there was no compelling reason to justify the supermajority minority districts the DOJ required, the plan was unconstitutional. *Miller v. Johnson*, *supra*. A remedial plan was imposed by the trial court for future congressional elections. *Abrams*, *supra*.

The Georgia House and Senate redistricting in 1991-92 followed the exact same course in the General Assembly. Racially gerrymandered House districts had been building blocks for the Senate districts, all of which, in turn, were used as the building blocks for the congressional districts. *Johnson III*. The DOJ had required, as a condition of preclearance, that House and Senate districts be drawn to include "available" minority populations in the area. 929 F.Supp. at 1540. As a result, Georgia's House and Senate districts were almost exclusively of two kinds: Those with very high, supermajority black populations; and those with much lower minority populations (sometimes referred to as "bleached" districts). There were virtually no districts with BPOPs or BVAPs in the 40-50% range.

After this Court's *Miller* decision in 1995, the Georgia General Assembly held a special session and adopted new House and Senate plans. 929 F.Supp. at 1540. These plans unwound part of the DOJ-demanded racial gerrymanders of 1991-92, but by no means all of them. In spite of the *Miller* decision, the DOJ still denied preclearance to the modified House and Senate plans in 1996. Astonishingly, the DOJ then sued Georgia in an effort to compel use of the old, patently illegal plans. *Id.* 1541. The district court in *Johnson III* enjoined use of the 1991-92 House and Senate lines and imposed an interim remedy for the 1996 elections. Com-

menting on the particular districts challenged by the *Johnson III* plaintiffs, the district court found that "the record *is replete* with direct and circumstantial evidence that race was the predominant motivating factor in drawing the sixteen districts we have determined to be unconstitutional." *Id.* 1544.

> In attempting to maximize the number of majority black districts, the DOJ dictated the number and location of these districts in its objection letters. Because there were not enough existing concentrations of black voters to allow the creation of the desired number of black districts in a manner consistent with traditional districting principles, the DOJ used computer-generated maps to ascertain where black populations were concentrated. It then required the drawing of lines, using land bridges when necessary to commandeer the necessary number of blacks into a district. *Id.* 1544-45.

Under the direction of the court, the State and the DOJ reached a mediated agreement on plans for future House and Senate elections. Those plans were adopted by the General Assembly in 1997 and precleared by the DOJ pursuant to the settlement agreement. (Pl.Stip. ¶¶ 108-111). Georgia was left with much of the redistricting residue of the DOJ's maximization strategy from 1991-92 as it approached redistricting in 2001. The re-drawn House and Senate plans were very similar to those originally passed by the General Assembly, under DOJ direction; only the flagrantly unconstitutional parts were modified. Georgia's mediated Senate plan had 11 districts with a BPOP over 50% and ten with a BVAP over 50%, based on 1990 census figures. (P.Ex. 1C). Under the 2000 census, these numbers increased and the Senate plan then had 13 districts with a BPOP over 50% and 12 districts with a BVAP of over 50%. (P.Ex. 1D).

Even as amended, Georgia's House and Senate districts consisted almost entirely of districts with either (1) very high BVAPs or (2) very low BVAPs. (P.Ex. 1D, 11D). Midrange

districts continued to be rare because of the legacy of the DOJ's efforts to require that the State keep minority voters together wherever possible.

REAPPORTIONMENT IN 2001: Maintaining Georgia's majority minority districts in the 2001 reapportionment was very challenging because population growth had left most minority districts far short of one-person, one-vote requirements. Georgia's areas of population growth were primarily in the suburbs. Minority concentrations in mature urban areas were relatively static. Thirty-two of the 37 majority BVAP House districts were between 7% and 32% short of population equality under the 2000 census. (P.Exs. 11C, 12C). Seven of the 10 majority BVAP Senate districts were between 14% and 27% short of population under the 2000 census. (P.Ex. 1C, 1D). Many of the majority-minority House and Senate districts had BVAPs of 60% and above as of 2000, with BPOPs another 4-5% higher. (P.Exs. 1D, 11D).

African Americans had a full voice in Georgia's 2001 redistricting. Thirty-four of the 180 members of the House of Representatives were African Americans, and 11 of Georgia's 56 Senators were African Americans. (Stip. ¶ 11). Six of the 29 House Reapportionment Committee members were black, and six of the 24 Senate Reapportionment Committee members were black. (J.S.43a). The vice chairman of the Senate Committee, Robert Brown, was black, and he chaired the very subcommittee that developed the Senate plan at issue. (*Id*; Tr.23, P.Ex. 22). Among black legislators, the nearly unanimous objective was "to maintain [their] districts, but not . . . waste their votes." (Tr. 20-21, P.Ex. 22). Because minority legislators believed that the "high black percentages" were a "waste of their votes," they supported substantial BVAP reductions in the existing supermajority

districts. *Id.* 21. It is undisputed that a redistricting plan could not have passed the General Assembly without substantial minority support.[2] As Senator Brown testified:

> I think the [50%] BVAP levels in the [Senate] plan give good opportunities for African American candidates. And I can tell you this. The nearly unanimous consensus from the Black Caucus in the Senate that voted for the plan would never have been there had that not been a belief shared by those senators. (Tr.29-30, P.Ex.20).

The effort to preserve minority districts without squandering minority influence in safe, supermajority districts led to the enactment of a number of legislative districts with BVAPs of 50% or slightly above. It was the overwhelming opinion of minority legislators that such districts afforded African American candidates fair opportunities to win. Senator Brown testified that these districts afforded minority candidates a "very good chance of success":

> Q. [W]ould you share your opinions with the Court concerning the ability of African American candidates to get elected in these several districts which have a BVAP of just a bit over 50%, as they were finally passed in the Senate Plan last year?
>
> A. Sure. I feel comfortable that, with a good candidate, there is a very good chance that an African American would be elected. And I think today, much more than what was true not so many years ago, there is a good farm team, I've called it that before, of African American elected officials in

[2] In the Senate, only one African American Senator (S.D. 2) voted against the Senate plan (J.S. 56a), and she did so because of her personal desire for a district exactly as she wanted it -- which ignored the fact that 56 Senate districts had to be drawn with no one incumbent getting just what they wanted. One African American House member also voted against the House plan. (J.S. 56a, 134a). Such near unanimous support is rare in any political endeavor.

> other positions that could move up in the event of a vacancy. I think the incumbents in these districts at these BVAP levels are in very solid shape. But speaking specifically to the question of an open-seat, I think that an African American candidate would have a good chance of winning. He or she would have to have a good organization and work hard, but there's no reason why an African American can't win at a 50% BVAP. (Tr. 29-30, P.Ex. 20).

The then Senate majority leader was an African American. He testified to the same effect, that an African American candidate would have a "*fair or equal opportunity*" to win with a BVAP of "forty percent and above," and he was "comfortable at a 45% BVAP level." (P.Ex. 24, pp. 11-12). Georgia Congressman John Lewis also testified. He is as knowledgeable about electoral experiences in Georgia as anyone alive. Congressman Lewis testified as follows:

> I think a candidate, a good solid black candidate, would have more than a 50 percent chance of winning with a 50 percent BVAP in Georgia. Whether a black candidate wins or not in a district with that level of BVAP will depend more on the specifics of the particular candidate and his or her campaign. The kinds of things that are important in any campaign, like hard work, putting together a good organization, and so on, will make a difference. But a credible black candidate certainly has a good chance of winning a legislative seat anywhere in the State, I think, with a 50% BVAP.
>
> The state is not the same state it was. It's not the same state that it was in 1965 or in 1975, or even in 1980 or 1990. We have changed. We've come a great distance. (Tr. 17-18, P.Ex. 21).

In contrast to this compelling testimony, the DOJ offered the testimony of various people who lived in the vicinity of S.D. 2, 12, and 26. Their "direct testimony" consisted entirely

of affidavits drafted by the DOJ. Generally, these affidavits opined as to (1) the difficulty of an African American winning in new S.D. 2, 12, and 26 and (2) the existence of "racial vote polarization." When cross-examined, nearly every one of these witnesses materially contradicted their affidavits and admitted that "blacks still have a fair opportunity to elect the candidate of their choice" in the redrawn districts. See, e.g., C. Jones Depo. 63; Shetrod Depo. 97; Abrams Depo. 22-23; Barnes Depo. 59; Hart Depo. 44-45. The many admissions by the DOJ's witnesses that contradicted their conclusory affidavits are noted in Georgia's Proposed Post-Trial Findings of Fact. (*PPFF* pp. 108-15, 157-71, 178-92, 198-206). Judge Oberdorfer characterized the lay testimony as follows:

> I have also considered the testimony of the Department's lay witnesses, although I believe it pales in importance to the testimony of Lewis, Brown, and Walker and the expert witnesses. To the extent that discrepancies exist between declarations and depositions of the Department's lay witnesses, I accept the latter as more credible, because it represents the witnesses' own words, rather than the adoption of statements at least partially prepared by the counsel. The deposition testimony is also more comprehensive, and permits the witnesses to explain and elaborate on statements contained in the declarations. (*J.S. 210a*).

GEORGIA'S ELECTION EXPERIENCE 1991-2001: Georgia's election experience of the prior decade plainly showed that the high BVAPs required by the district court created unnecessarily safe districts. Minority candidate success in Georgia the past decade has been compelling. *For example, while Georgia's statewide BVAP is only 26.6%, eight of the State's 32 offices that are elected statewide are held by African Americans.*[3] (P.Ex. 25, p.3).

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[3] Five of those positions are elected judgeships; all five African American judges have won reelection. Of the other three statewide offices held by African Americans, two were initially appointed to

The undisputed evidence at trial included a database that contained all 1,258 legislative elections (Georgia House, Senate, and Congress) that occurred from 1991 through 2001. This comprehensive data included the BVAP of the district at the time of election; whether an African American candidate won; whether there was an incumbent in the race; etc. (P.Ex. 25, App. 2). This uncontradicted data revealed that African American incumbents face little chance of defeat by a white challenger in districts with BVAP levels far below 50%. There were exactly 200 such legislative elections since 1991, and the black incumbents won 199. The only exception occurred where the defeated incumbent suffered exceptionally high political "negatives;" he was under a federal corruption indictment. (P.Ex. 25, p. 16). In 18 of these elections, the BVAP ranged from 35% to 50%. *Id.*

Looking at open seat races, the African American candidate of choice won *every* election where the BVAP was 54% or higher. There were 30 such elections over the prior 11 years. (J.S. 238a-240a). There were six open seat legislative elections in the 11 year period where the BVAP ranged from 33% to 39.9%. *The African American candidate won two of those six elections. Id.* Because of the past gerrymanders, there was only one open seat election over the 11 years that fell in the 40% to 49% range. There were four open seat elections between 50% and 53.5% BVAP where the candidate of choice could be determined, and African Americans won two out of those four. *Id.*

The Senate election history over the last 11 years is equally consistent with the fact that a BVAP of 50% or more affords an excellent opportunity for an African American candidate of choice to prevail. Defendants argued at trial that no incumbent African American Senator had been elected in an

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vacancies (just as has occurred for whites) and then won reelection; the third won an open seat in 1998. (P.Ex. 25, p.3)

open seat election with a BVAP of less than 53.5%. That contention was totally disingenuous. It ignored the fact that the DOJ-orchestrated reapportionment of 1991-92 permitted virtually no Senate seats between 40 and 50% BVAP during the entire decade. As a result of the DOJ's directives, Georgia only had three Senate districts out of the total of 56 that had a BVAP level between 40% and 49%, in any year, up through 2001. (J.S. 242a). The absence of black candidates winning more frequently in this range is not a reflection of their inability to do so; it simply reflects the paucity of such districts, a direct result of the DOJ's past actions under § 5.

Furthermore, the experience in the three Senate districts that did fall in the 40-49% range belies the DOJ's contention. Of these three Senate districts, one was won and held by an African American candidate who beat a white incumbent when the BVAP was 41%. That occurred in S.D. 25 in 1994. *Id.* The BVAP in that district was lowered in 1996, after the *Miller* decision, to 36.66%. The black incumbent won re-election. Neither that incumbent nor any other minority candidate ran in that district thereafter. *Id.*

The only other two Senate districts that ever fell in the 40-49% range were S.D. 14 and S.D. 44. S.D. 14 had a white incumbent in each of the three elections when its BVAP exceeded 40%. *Id.* S.D. 44 was a rapidly transitional district. Its BVAP changed from 40.4% to 49% between 1996 and 2000. In each of those elections, the white incumbent ran and won. *Id.*

Defendants have made much of the fact that there were no open seat black winners in *Senate* districts in the 40-50% range from 1991-2001. Again, the contention is specious. *There were no open seat Senate elections in that BVAP range from 1991-2001 because of the DOJ's gerrymandering of Georgia's lines.* (J.S. 238a, 242a).

THE PARTIES' EXPERT TESTIMONY: Expert testimony was presented by all parties. Dr. David Epstein of Columbia University performed a probit analysis on all of Georgia's legislative elections from 1991 through 2001. (P. Ex. 25). Probit is a standard statistical methodology used by social scientists to determine the likelihood of a particular event, here, the likelihood of an African American candidate of choice winning a legislative election as a function of the district BVAP. (Tr. 21, 2/5/02, Morn. Sess; P.Ex. 25, pp. 9-10). Because probit focuses directly on the ultimate question of the likelihood of minority candidate success, it is especially useful in assessing voting strength. By comparison, evidence of "racially polarized voting" unfortunately says nothing about the ultimate issue of winning or losing. Dr. Epstein determined from the comprehensive election data that African American candidates of choice had an equal chance of winning an open-seat election where the BVAP was 44%, and an increasingly higher likelihood with greater BVAPs.[4] At a 50% BVAP, the likelihood of success in an open seat election was 75%. (P.Ex. 25, pp. 16-17).

The DOJ's expert, Dr. Richard Engstrom, made no assessment of the likelihood of minority-preferred candidates winning an election as a function of BVAP. (Tr. 10, 14, 2/5/02, Aft. Sess.). Neither did he offer any opinion as to whether there was retrogression under any of the plans at

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[4] Dr. Epstein's analysis used more conservative assumptions regarding race and politics than are permitted by this Court's decisions. He did not count a winner of an election a minority "candidate of choice" where the BVAP was below 50%, unless the candidate was African American. Using this very conservative approach, he was especially confident that his results did not overstate the ability of African American voters to elect candidates. (P.Ex. 25, pp. 10-13). Dr. Epstein determined at the outset that a unified probit analysis was appropriate for the State as a whole because the degree of variability in racial voting patterns permitted that approach. (Tr. 68-69, 2/4/02, Aft. Sess.).

issue. *Id.* 70. Dr. Engstrom did analyze "reaggregated" election returns in the redrawn S.D. 2, 12, and 26, a methodology that looked at the election returns from prior contests in which African American candidates had run against white candidates in the same areas encompassed by the new districts. This was the only method that he had ever used to assess minority electoral chances in a proposed new district that had no election history. *Id.* Dr. Engstrom's reaggregation results indicated that Georgia's proposed S.D. 2, 12, and 26 would afford minority candidates a "very good chance" to win. *Id.* 88-89.

Dr. Engstrom also performed "racially polarized voting" calculations on various elections, but few of those elections were coextensive with the legislative districts at issue. *Id.* 19, 85, 93-98. Using a catchall definition that there was "racial polarization" whenever 50.01% or more of minority voters preferred a different candidate than 50.01% or more of white voters, Dr. Engstrom not surprisingly found "polarization" in most of the local elections the DOJ attorneys provided him to analyze. *Id.* 25. Dr. Engstrom's definition, of course, effectively guaranteed that he would find "racial polarization." With black and white candidates opposing one another, a colorblind electorate that voted randomly would produce a 50% voter/candidate correlation.

Dr. Engstrom ignored the impact of this polarization on the ability of minority preferred candidates to actually win. Indeed, while Dr. Engstrom testified that there was racial polarization in most elections he reviewed, *the African American candidates won many of those elections, and won them in districts with much lower BVAPs than the proposed S.D. 2, 12, and 26.* *Id.* 80-82. For example, Dr. Engstrom testified there was "polarization" in every statewide election he examined, yet all but one of those elections was won by the African American candidate with a statewide BVAP of only 26.6%. (*Id.* 85-86; P.Ex. 25, pp.3-4). *Incredibly, Dr.*

Engstrom admitted that whether the minority candidate won or lost was irrelevant to his analysis and opinions. (Tr. 85-86, 2/5/02, Aft.Sess.)

Intervenors' expert, Dr. Jonathan Katz, gave no opinions on the evidence; his sole role was to criticize plaintiff's expert's use of probit analysis. On cross-examination, however, Dr. Katz admitted that he had used the same probit methodology himself in recent testimony he had given in another case where that analysis served his purpose. (Tr. 47-58, 61, 2/6/02, Aft.Sess; P.Ex. 107).

THE SENATE DISTRICTS AT ISSUE: The record is replete with additional district specific evidence, largely uncontradicted, that African Americans had *at least* an equal opportunity to participate in the political process and elect candidates of their choice in S.D. 2, 12 and 26. A brief synopsis of the district specific evidence follows; it is set forth in detail at PPFF ¶¶ 419-555.

Senate District 26.[5] When the incumbent African American Senator Robert Brown first ran for election in 1991, he did so in unusually difficult circumstances because he ran in a rare non-partisan special election held to fill a mid-term vacancy.[6] In a nonpartisan election, African American candidates do not benefit from the significant advantages they enjoy in partisan elections.[7] Nevertheless, Brown easily won

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[5] The three Senate districts challenged by the DOJ are treated out of order here because the incumbent in S.D. 26 was Robert Brown, Chair of the subcommittee that developed the Senate plan. Since the discussion of his testimony is pertinent to all of the districts, addressing his role and his district first is preferable.

[6] There were only 23 such non-partisan special elections, held to fill mid-term vacancies, out of the entire 1,258 legislative elections in Georgia over the preceding 11 years. (P. Ex. 25, App. 2).

[7] In a partisan election, the Democratic primary has a substantially greater percentage of black voters than the electorate as a whole; the Republican primary happens to consist almost entirely of white voters in

election to S.D. 26, which then had a BVAP of 52.8% and a total black voter registration of 47%. Indeed, Brown beat his popular white opponent in a landslide, 56.7% to 43.3%.[8] Subsequently, Senator Brown had no opposition from any candidate in the Democratic primary. He had opposition in the general election in 2000, winning overwhelmingly. See PPFF ¶ 535.

Under the 2000 census, old S.D. 26 was underpopulated by 28.7% from the ideal. (P.Ex. 7B). The district's BVAP under the 2000 census had also risen on account of demographic changes to 62.45%, far higher than when Robert Brown was first elected. *Id.* Senator Brown testified that S.D. 26 as redrawn would likely elect another African American, whether he ran or not; and he testified at length about the demographic trends in District 26, which were continuing to raise the minority percentage, just as had occurred from 1990 to 2000. (Tr. 17, 35, P.Ex. 20).

Georgia. Winning the Democratic primary then allows African American nominees a greater chance of election in a partisan general election because carrying the Democratic nomination brings additional white voters to his/her candidacy. Since more than "90% of black voters support Democrats, while over 60% of white voters cast their ballots for Republicans" (P. Ex. 25, p. 17, n. 14), the increased concentration of black voters in the Democratic primary is pronounced in a district with a BVAP of 40% or 50%. The DOJ's expert, Dr. Engstrom, testified that the percentage of African American voters in the Democratic primary in a 50% *BVAP district is approximately 69%. (Tr. 141-44, 2/6/02, Aft. Sess.).* Dr. Engstrom also admitted the undisputed fact that an African American nominee from the Democratic primary carries a nonracial advantage in the general election in that the party "cue" will draw votes independent of race. (Tr. 11, 2/6/02, Morn. Sess.). These partisan political facts are well-established in the record, and were admitted by all of the DOJ's witnesses who spoke to the issue. See, e.g., Abrams Depo. 30, 34-35; Wright Depo. 24, 27-28, 59; Williams Depo. 46-47.

[8] Brown's opponent, Robert Reichert, later won a Georgia House seat.

The undisputed evidence soundly confirms Senator Brown's decade-long election experience in S.D. 26 and his opinion that the district, as redrawn, provided a strong opportunity to elect an African American candidate. The only bi-racial election contests that encompassed all of redrawn S.D. 26 were the statewide elections in which black and white candidates faced one another. Taking the precincts from those elections that were encompassed by the new S.D. 26 revealed that black candidates, in the most recent elections of 1998 and 2000, took the overwhelming majority of the total vote—ranging from the high 60's to over 70%. (P. Exs. 2D, 7B). This is the "reaggregation" methodology preferred by the DOJ expert, Dr. Engstrom. (P.Ex. 110). While Dr. Engstrom sought to minimize the significance of these statewide reaggregated figures by opining that they were "more favorable" to minority candidates than other local elections he looked at, he performed no analysis at all of whether the substantial biracial support in the many statewide elections might, in fact, indicate what could be expected in future Senate elections.

While the statewide elections indicated higher levels of black candidate success than certain local elections Dr. Engstrom looked at, he admitted that he had made no effort to even compare what portions of the constituency encompassed by the redrawn Senate districts were included in those local elections; that he indiscriminately mixed very different nonpartisan and partisan elections; that he gave the same weight to small subdistrict elections as he did to elections that occurred in a much greater portion of the electorate; and that he made no effort at all as a political scientist to investigate whether the state elections were in fact *more* probative of elections to the state offices at issue. (Tr. 19, 93-100, 2/5/02 Aft. Sess.). Dr. Engstrom also acknowledged that, when one looked at the actual *differences* between the level of preference of black and white voters for the same minority candidates, those preference differences were very similar in

the local and statewide elections (particularly when considering the partisan elections that more closely parallel Georgia's legislative elections). (P.Exs. 104-06; Tr. 71-82, 2/6/02, Morn. Sess.).

Equally compelling is the testimony given by the DOJ's own witnesses. Defendants submitted affidavits of several witnesses asserting broad conclusions that they knew of "racially polarized voting" and that it would be difficult for a black candidate to prevail in the new S.D. 26. On cross-examination, however, they gave very different testimony. For example, DOJ witness Albert J. Abrams acknowledged that he won a county-wide seat on the Bibb County Board of Education in 1998 when the BVAP was 43% and fewer than 40% of the registered voters were black. (Abrams Depo. 13-14). Abrams beat a strong opponent, a "well respected white lawyer" who was appointed thereafter as the United States Attorney for the Middle District of Georgia. *Id.* 15-16.

While Bibb County is not coextensive with S.D. 26, it does include the majority of the population in redrawn S.D. 26, and it is much closer to the confines of the new Senate district than most of the elections Dr. Engstrom looked at. Mr. Abrams admitted he received a "substantial part of the white vote," and that any "good African American candidate . . . can get a substantial crossover vote in Bibb County." *Id.* 21. Mr. Abrams also named particular African Americans in the Macon area who would "have an excellent chance of winning" were they to run for S.D. 26 as redrawn in 2001. *Id.* 45, 61. DOJ witness William Barnes admitted that a black candidate could get elected in a Senate district in the Macon area with a 50% BVAP. (Barnes Depo. 59). DOJ witness Samuel Hart also admitted that good African American candidates could draw significant white votes in the area and that there were other formidable African American candidates in S.D. 26 as redrawn if Robert Brown declined to run for reelection. (Hart Depo. 46, 51).

Senate District 2. African American Senator Regina Thomas was the incumbent in S.D. 2. Her overriding redistricting objective was to keep her district as much like it was as possible, regardless of the impact on other districts. (Thomas Depo. 124-25, 147-47, 164-65). In fact, pre-existing S.D. 2 was far short of population equality at minus 24.4% deviation. The BVAP of old S.D. 2 under the 2000 census was 60.6%. (P.Ex. 3B). Because of population changes alone, the BVAP of District 2 had to decrease. S.D. 2 as redrawn by the General Assembly was 50.3% BVAP. All African American Senators except for Thomas voted for the entire plan, including S.D. 2.

Those other African American Senators—including the Chair of the subcommittee that drew the Senate Plan, Robert Brown—believed that S.D. 2 as redrawn gave a minority candidate a good opportunity to win. (Tr. 8-9, 29-30, P.Ex. 20). Senator Thomas did not quarrel with the judgment of the other African American Senators who believed that their 50% BVAP districts afforded African Americans good opportunities at election. But even if she believed that her district BVAP was equivalent to those of other incumbent black senators (which it was),[9] she still would have voted against it because she just did not like it. (Thomas Depo. 124-25, 146-47). While Thomas opined that an *under 50%* BVAP S.D. 2 would be unlikely to lead to the election of another African American after her, in the event of an open-seat, she admitted that a district of "50 percent or better BVAP" might have sufficed "from the point of view of that being enough black voters to be satisfactory." *Id.* 146-47.

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[9] Senator Thomas was apparently under the mistaken apprehension that the BVAP of her district was slightly less than 50%. Using correct census methodology, see note 1 *supra*, the BPOP and BVAP of S.D. 2 were both over 50.0% as the district was redrawn in 2001.

Senator Thomas was first elected in a run off election in January, 2000, when her predecessor, Diane Harvey Johnson, resigned upon conviction of a felony. The DOJ put great weight on the fact that the BVAP in S.D. 2 at that time was higher than in the redrawn district, and Ms. Thomas initially won by less than 100 votes in a run-off against a white attorney from Savannah. But defendants ignore the fact that, at the regular election in November, 2000, Thomas beat her white opponent overwhelmingly, taking approximately 80% of the vote. Defendants also ignore the fact that Thomas won the seat originally without the support of any of the African American political leadership in the district; they supported her white opponent. (Thomas Depo. 142). Notwithstanding that significant fact, Senator Thomas still won, and she did so in a nonpartisan special election.

Senator Thomas testified that she had never given any thought to the relative ease of an African American candidate winning a normal partisan election, rather than a nonpartisan special election. *Id.* 129-30. Not only did other African American Senators believe that the S.D. 2 BVAP level was more than adequate, there was undisputed evidence that a number of established African American elected officials in other offices—State Representative, the Mayor of Savannah, and the like—could "step up" and run a very effective campaign for S.D. 2 if the seat were vacant. (Tr. 40-42, P.Ex. 20).

Looking at the voting precincts contained within the redrawn S.D. 2 and comparing them to voting performance in past black/white elections for statewide offices, it is undisputed that African American candidates took the overwhelming majority of the total vote against their white opponents. Thurmond, an African American who ran for Labor Commissioner in 1998, won *78.9% of the total vote* against his white opponent in the primary run-off in those precincts encompassed by the redrawn S.D. 2. Thurmond

took 71.1% of the vote in the general election in those same precincts against another white candidate. Similarly, overwhelming majorities were run up by other African American candidates opposed by whites, including Thurbert Baker, who ran for Attorney General in 1998, receiving 71.8% of the vote against a white opponent. (P. Ex. 3B).

On cross-examination, the DOJ's lay witnesses also confirmed the ability of an African American candidate to win S.D. 2 as redrawn. Richard Shinhoster admitted that an African American could win election in a majority white jurisdiction; that they "still had that opportunity, certainly;" that an African American candidate had won a city-wide office in Savannah (the core of S.D. 2) when it was majority white; and the local black community was very active politically, registering 5,000 new voters in one local election alone. (Shinhoster Depo. 37-38, 42). He also testified that black turnout was sometimes poor and that, in his opinion, an elevated BVAP was necessary to "overcome voter apathy." *Id.* 26.

Mr. Shinhoster's disagreement with the redrawn S.D. 2 was the same as that of the DOJ, that a black candidate was not *guaranteed* a win where the BVAP was 50%. As he testified, in a district with a slight majority BVAP, the black community "cannot always be *assured* that a black can be elected when the majority—when the ratio is so close." *Id.* 16. Although Mr. Shinhoster's affidavit asserted that Regina Thomas was not likely to win in District 2, on deposition he admitted that she "probably [would] be elected." *Id.* 68. DOJ witness Prince Jackson admitted that he obtained significant white support when he ran for office years earlier, and that the degree of white support for black candidates depended on *who the person was, not just their race.* (Jackson Depo. 7, 10, 31, 58, 61, 62). Similar admissions were made by the DOJ's other witnesses. See, e.g., Goodman Depo. 29-30, 32, 41; Johnson Depo. 40-41; D. Jones Depo. 25, 31, 33, 63. Mr.

Jones admitted that under redrawn S.D. 2 "blacks still have a fair opportunity to elect the candidate of their choice." *Id.* 63.

Senate District 12. Under the 2000 census, old S.D. 12 had a BVAP of 55.4%. As redrawn in 2001, S.D. 12 had a BVAP of 50.7%. (P. Ex. 4B). Again, it was inevitable that there would be substantial changes in S.D. 12 because it was 17.8% short of the ideal population required for population equality, and the other districts in the same Southwest Georgia area were also short of population because the State's rapid population growth had largely occurred elsewhere. As each district took in additional population, it necessarily affected other districts in domino fashion.

The election results from statewide contests that encompassed the entire area of the new S.D. 12 again illustrated that black candidates could carry a strong majority of the total vote in those precincts. For example, African American Michael Thurmond carried 66% of the vote from the S.D. 12 precincts in his successful 1998 race against a white candidate; African American Thurbert Baker took 65% of the vote against his white opponent in 1998; and David Burgess took 66% of the vote in his 2000 election against a white opponent for Public Service Commissioner. (P. Ex. 4B). Dougherty County constituted a substantial part of S.D. 12 as redrawn. The DOJ's own witnesses admitted that African Americans had won recent county-wide races there when the electorate was majority white, with successful minority candidates securing "a great deal of white support." (Sherrod Depo. 45, 49-50).

In essence, the defendants' position regarding S.D. 12 boiled down to the past failures of one African American, John White, to win that seat. White had been elected as a state Representative from a part of Dougherty County. During his career in office, he had picked up an exceptional amount of "political baggage" and had very high, very visible negatives. Among other things, White created a company by

the name of Connections Unlimited, openly designed to capitalize financially on the fact that he was a public official. As Mr. White stated to the press, he felt he had been in public life long enough, and it was fine if he made some money from that. (White Depo. 32). Mr. White acknowledged that Connections Unlimited received substantial local and state wide news coverage, and that the media portrayed his "business" as simply selling the influence he had gained through his elected office in the Georgia General Assembly: "That's how they portrayed it, correct." (White Depo. 9).

In fact, an Atlanta Constitution article used White's own words to condemn him: "After 16 years in public office, I ought to know somebody. The reason I chose the name 'Connections Unlimited' is that I've got such connections everywhere. What's the use of doing it [public office] if you can't exercise your influence at some point?" *Id.* 32, Ex. 1. When asked about the political fallout from such an article, White testified that "I would agree it would hurt among white voters, coming from a white writer and a basically white newspaper, yes." *Id.* 29. Conversely, White testified that such appearances of corruption would not affect his ability to attract black voters. *Id.* 13.

John White ran in 1996 against incumbent Mark Taylor, who is white. In that election, Taylor carried a majority of the black vote in several of the counties and nearly secured a majority in S.D. 12 overall.[10] Moreover Taylor first won election to the Senate only because he received the endorsement of the African American community. (Taylor

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[10] As shown by the DOJ's expert report, White received just a shade more of the black vote than he would have gotten by random chance, i.e, just over 50%. U.S. Ex. 601, p. 14. One African American legislator bluntly testified that, "I don't think John [White] could have won the [S.D. 12] race if anybody was in it but himself." (Tr. 16-17, P.Ex. 24).

Depo. 20). That, of course, is significant confirmation of minority voting strength in S.D. 12 when the BVAP was substantially lower.

Notwithstanding John White's prominent negatives as a candidate, the DOJ relied on his election defeat in 1996 and again in 1998 as "proof" that the BVAP should be higher in S.D. 12. In so arguing, the DOJ effectively contends that the district must be drawn not to provide minority voters with equal political opportunity, but to guarantee the election of a particular African American, John White, regardless of his qualities, characteristics, history and pronounced inability to draw biracial support. The fallacy of that position is again demonstrated by the strong vote other African American candidates received in statewide races that encompass the very same precincts of the redrawn S.D. 12, as well as the success of other African American candidates in the area.

The DOJ again introduced the affidavits of several lay witnesses containing conclusions concerning how difficult it might be for an African American to win S.D. 12. But those same witnesses acknowledged, as they had to, that other African American candidates—such as Congressman Sanford Bishop—had won in the same area with lower BVAPs. Congressman Bishop has repeatedly won election (originally defeating a white incumbent) and re-election in District 2, which encompasses all of S.D. 12, at BVAPs ranging from 35% to 52%. (P. Ex. 25, App. 2). DOJ witness David Williams admitted that an African American candidate would have a "good probability of winning" in a district with a BVAP of 50%. (D. Williams Depo. 46-47). Charles Sherrod acknowledged that black candidates have won in majority white districts in the exact area encompassed by S.D. 12 by securing substantial white vote. As Mr. Sherrod testified, there is "a phenomena down here in south Georgia that we can't explain sometimes. It occurs when white people want to do their thing and they do it. Now I don't know why they

do it. They voted for Locket, they voted for Phipps under some circumstances, you know, which I do not understand." (Sherrod Depo. 97). "White people doing their thing," in Sherrod's words, are simply examples of the kind of white support for African American candidates that a John White does not receive.

SUMMARY OF THE ARGUMENT

The district court erred in holding that § 5 prohibited Georgia from adopting a Senate redistricting plan that included three districts with BVAPs of 50-51% and BPOPs of 54-55%, on the theory that these districts "only" afforded African Americans an equal, fair, or reasonable chance of victory. The majority below further erred in interpreting § 5 to require that Georgia draw supermajority, safe seats for minority candidates. This Court's decisions make it clear that the Voting Rights Act requires only that minorities have *equal* access to the political process and *equal* opportunities at electoral success. There is no requirement that states create or maintain *safe* minority seats which, among other things, actually dilute minority voting strength elsewhere by packing minority voters into certain districts. The sole purpose behind § 5 is to stop covered jurisdictions from enacting "new *discriminatory* voting laws." *Reno v. Bossier Parrish School Bd.*, 520 U.S. 471, 477 (1997). Section 5 provides no basis for rejecting Georgia's *nondiscriminatory* redistricting plan or requiring Georgia to pack minority voters into safe seats with virtually guaranteed results.

If § 5 were construed as the district court has done, the statute would be unconstitutional. The procedural restrictions of § 5 already stretch congressional authority to the outer limit. That limit would be transgressed if Georgia were now precluded from adopting nondiscriminatory redistricting plans because some other plan could be drawn that contained safe seats. In order to stand on constitutional underpinnings, § 5 must be construed so as to prohibit actual voting dis-

crimination. Those underpinnings would vanish if the statute were now expanded, in accord with the district court's interpretation, to require the enactment of safe minority seats in the place of the State's nondiscriminatory plan, a plan that enjoyed the overwhelming support of *African American* legislators. The district court's ruling would dictate an evolving "ratcheting up" process, whereby states such as Georgia would ultimately be required to have as many supermajority, safe districts as possible. That would deprive Georgia of its authority to select among other nondiscriminatory redistricting plans, and would do so without constitutional *justification*.

The district court erred in allowing several voters to intervene in this § 5 preclearance action. Private parties have no substantive rights under § 5. This special statutory proceeding is unique in our federal system, and the plaintiff jurisdiction and the Attorney General are the only proper parties. The district court here allowed intervenors to challenge and litigate Georgia's House and Congressional Plans —and other aspects of its Senate Plan—that the DOJ was satisfied with. Private parties should not be allowed to arrogate to themselves the role and authority of the Attorney General. Because § 5 preclearance is no bar to any private right or claim that may otherwise exist, denial of intervention to voters cannot prejudice their legitimate legal rights in any way.

ARGUMENT

I. BECAUSE SECTION 5 OF THE VOTING RIGHTS ACT DOES NOT REQUIRE THE DRAWING OF SAFE MINORITY DISTRICTS WITH SUPERMAJORITY MINORITY POPULATIONS, GEORGIA'S SENATE PLAN SHOULD HAVE BEEN PRECLEARED.

A. The Attorney General's and the District Court's Interpretation of Section 5.

The DOJ has long used § 5 to compel the enactment of districts with high minority populations, leaving other districts overwhelmingly white. Those efforts were condemned by this Court in the gerrymander litigation that resulted from redistricting after the 1990 census. See, e.g., *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993). The DOJ's commitment to high concentration, safe minority seats remains unabated, however, as shown by their position in the district court. The evidence in this case is overwhelming that minority voters would have substantial opportunities to elect candidates of their choice in each of the disputed Senate districts as they were redrawn in 2001. That evidence came from the extensive election history within the State over the prior decade; from the very African American legislators who participated in, supported, and virtually drew the Senate plan; from the defendants' own lay witnesses; and from expert testimony. That proof was not enough for the DOJ, however, which insisted that more minority population be included in S.D. 2, 12, and 26 in order to further increase the BPOPs and BVAPs to create safe minority seats.

The district court adopted the DOJ's position in full. There is no question that the three districts at issue, S.D. 2, 12, and 26, presented minority voters and candidates with at least an equal chance to win and a full, fair opportunity to participate

in the political process. Because Georgia failed to adopt even higher BVAP levels and create safe minority seats in these districts, however, the court denied preclearance of the Senate plan. (J.S. 113a). Judge Sullivan chose to speak of "robust" districts, rather than "safe seats." Accepting the DOJ's contention, Judge Sullivan wrote that, where the BVAP in a district is high enough that the minority's opportunity to win is "robust," the BVAP cannot be reduced in a way that would leave the chance of victory less than "robust." (J.S. 113a). As Judge Sullivan further wrote, a plan that "leaves these voters with merely a 'reasonable' or 'fair' chance of electing a candidate of choice" would be retrogressive. *Id.* Based on that interpretation of § 5, the district court denied Georgia's Senate plan preclearance. The court expressly rejected Georgia's contention that the three districts at issue were legal because they "preserved[d] for black voters a reasonable—or equal—chance to elect candidates of choice." *Id.* 112a. This was true, the court concluded, even though there was no evidence of any discriminatory or retrogressive purpose. *Id.* 147a-149a.

Judge Edwards joined Judge Sullivan's opinion and wrote a separate concurrence, which was joined by Judge Sullivan. Judge Edwards used the more traditional "safe district" terminology, writing that "a state that converts a *safe* district into one where African Americans have only a 'fair opportunity'" runs afoul of § 5. (J.S. 152a) (emphasis added). Judge Edwards further wrote that a state is not entitled to preclearance merely because it "adopts a plan that preserves an 'equal or fair opportunity' for minorities to elect candidates of their choice." *Id.* 151a.

B. The Substantive Limits of Section 5.

As this Court has often noted, § 5 is an extraordinary transgression of the normal prerogatives of the states. It was originally enacted to complement the principal provision of

the 1965 Voting Rights Act, the suspension of literacy tests. Congress included § 5 in the Act to ensure that no new changes in the laws of covered jurisdictions would be implemented that would undercut voter registration gains achieved by the literacy test ban. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Section 5 was initially enacted as a "temporary" measure to last five years precisely because it was so intrusive. It has been extended three times, most recently in 1982 for another 25 years.

Because § 5 is such a grave intrusion into the authority of the states, its substantive range is limited. The underlying purpose of § 5 was explained in *Beer v. United States*, 425 U.S. 130, 140-41 (1976):

> By prohibiting the enforcement of a voting-procedure change until it has been demonstrated to the United States Department of Justice or to a three-judge federal court that the change does not have a discriminatory effect, Congress desired to prevent States from "undo[ing] or "defeat[ing] the rights recently won" by Negroes. H.R. Rep. No. 91-397, p. 8. Section 5 was intended "to insure that [the gains thus far achieved in *minority political participation*] *shall not be destroyed through new* [discriminatory] procedures and techniques." S. Rep. No. 94-295, p. 19.

The limited role of § 5 was addressed again in the *Bossier Parrish* cases. In *Bossier Parrish I*, this Court held that a proposed voting change could have an impermissible "effect" only if it led to "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Reno v. Bossier Parrish School Bd.*, 520 U.S. 471, 478 (1997). The law was not an affirmative mandate that states adopt nondiscriminatory laws. *Id.* The DOJ's effort to minimize *Bossier Parrish I* by expansively interpreting the "purpose" term in § 5 was rejected in *Bossier Parrish II*, which held that § 5 "does not prohibit preclear-

ance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose." *Reno v. Bossier Parrish School Bd.*, 528 U.S. 320, 341 (2000).

In contrast to the limited *substantive* role of § 5, the later-enacted § 2 of the Voting Rights Act has a much broader substantive reach. It prohibits discriminatory redistrictings and other electoral practices, whether "retrogressive" or not. *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Holder v. Hall*, 512 U.S. 874(1994). Under § 2, however, this Court has unambiguously held that legislative districts that provide minorities with *equal opportunities* are sufficient. There is no right to a guaranteed, safe, or "robust" seat. *Johnson v. DeGrandy*, 512 U.S. 997 (1994). While the members of the Court have not been unanimous in their interpretations of § 2, see *Holder, supra*, there is unanimous agreement that § 2 *does not require maximization of minority voting strength.* As Justice Souter wrote for the Court in *Johnson*:

> [T]he ultimate right of § 2 is equality of opportunity, *not* a guarantee of electoral success for minority-preferred candidates of whatever race. 512 U.S. at 1014, n.11.

The Court went on in *Johnson* to say the following about supermajority districts and *equal* political opportunity:

> [M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics. *Id.* 1020.

This Court's jurisprudence, the Voting Rights Act itself, and all of the underlying congressional history make it clear that it is *equal* opportunity--not safe seats or guarantees—that is the object of the law. Section 2 districting claims require, as an essential element of proof, that the voting majority "must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular *minority*

group." *Thornburg v. Gingles*, 478 U.S. 30, 48-49 (1986). This § 2 requirement would be stood on its head under the district court's logic. The majority would convert the proof requirement that minorities be "usually defeated"—necessary for § 2 liability—into a § 5 mandate that states enact districts where minorities will win with near certainty. Section 5 cannot rationally be applied to require results far beyond what § 2 permits.

There can be no question that the majority's holding goes far beyond the requirements of § 2. Interpreting § 5 to mandate safe, supermajority districts is not only irreconcilable with the limited procedural purpose of § 5. Construing the law as the district court did flies in the face of everything this Court has ever said about § 5. The sole purpose and justification for § 5 is to stop covered jurisdictions from enacting "new *discriminatory* voting laws." *Bossier Parrish I, supra* at 477. Conversely, *nondiscriminatory laws must be approved under § 5. Id.*

The district court's holding that § 5 mandates the drawing of safe minority districts—which cannot arguably be required by § 2—ignores this critical distinction. The district court would permanently enjoin Georgia from using a redistricting scheme chosen by its legislators—black and white—*even though that districting scheme is not discriminatory.*

While this Court may not have unequivocally addressed the precise "safe district" issue presented here under § 5, every word the Court has written about § 5 is consistent with Georgia's position. In *Bush v. Vera*, 517 U.S. 952, 983 (1996), the Court held that § 5 "is not a license for the State to do whatever it deems necessary to ensure continued electoral *success*; it merely mandates that the minority's *opportunity* to elect representatives of its choice not be diminished . . . by the State's actions." (emphasis in

original). Because § 5 does not afford a "license" to States to create safe seats, *a fortiori* § 5 imposes no mandate upon the states to do so.

Nearly three decades ago, this Court first upheld the enactment of a nondiscriminatory election scheme under § 5 that substantially reduced the percentage of minority voters. *City of Richmond v. United States*, 422 U.S. 358 (1975). The Court there upheld an annexation that reduced the minority population of the city from a majority to 42% because the election system provided voters fair opportunities at election. As the Court held, § 5 does not require "permanent over-representation" as a price of avoiding retrogression. *Id.* 371.

The Court followed the logic of *City of Richmond* in *United States v. Mississippi*, 444 U.S. 105 (1980), which affirmed the district court's § 5 approval of a redistricting plan that reduced the percentages of blacks in various districts. See *Mississippi v. United States*, 490 F.Supp. 569 (D.D.C. 1979) (three-judge court). The district court in that case, citing *City of Richmond*, had held that "no racial group has a constitutional or statutory right to an apportionment structure designed to maximize its political strength." *Id.* 582.

Judge Oberdorfer's dissent sums up the majority's error in the present case as follows:

> There is no legal authority for the majority's proposition that § 5 requires that a plan preserve a *pre-existing* probability that a minority choice candidate prevail. To the contrary, the Supreme Court, albeit in the § 2 context, has consistently held that the Voting Rights Act aims to provide nothing more than a fair or equal opportunity, and does not guarantee "safe" seats or a "robust" chance of victory. Other lower courts have recognized, in the § 5 context, that a plan that preserves or increases the number of districts where minority voters have an equal or reasonable opportunity to elect

> their candidates of choice is not retrogressive. *See Colleton County Council v. McConnell*, 2002 U.S. Dist. LEXIS 10890 *110, No. 01-3584-10 (D.S.C. Mar. 20, 2002) (three-judge court) (examining the number of majority-minority districts maintained "at a level of equal opportunity"); *see also Ketchum v. Byrne*, 740 F.2d 1398, 1419 (7th Cir. 1984) (defining retrogression as a decrease in "the number of wards in which blacks have a reasonable opportunity to elect a candidate of choice."). This does not conflate a § 5 inquiry with a § 2 inquiry. Rather, it recognizes that a simple comparison of the number of majority-minority districts under the benchmark and proposed plans, although traditionally employed by the courts, is by itself insufficient because it fails to answer the question of whether the majorities are at a level that enables "*effective* exercise of the electoral franchise," *Beer*, 425 U.S. at 141 (emphasis in original; footnote omitted). (J.S.187a-88a).

Judge Oberdorfer's opinion also discusses the unavoidable fact that supermajorities necessarily diminish African American voter influence in other districts, which is an undesirable but inevitable byproduct of drawing safe seats. This Court has expressed its concern with this very issue before. See, e.g., *Johnson v. DeGrandy*, *supra* at 1020, 1029. Judge Oberdorfer discussed this problem as follows:

> Moreover, the continuation of supermajorities . . . diminishes [their] opportunity to influence election elsewhere and "threatens to carry us further from the goal of a political system in which race no longer matters." *DeGrandy*, 512 U.S. at 1029 (Kennedy, J., concurring). A proposed plan that provides a fair opportunity to elect the same or greater number of candidates of choice than the benchmark plan provides is entitled to § 5 preclearance. (J.S.207; some citations omitted).

Indeed, the supermajority districts demanded by the majority below—*over the ardent opposition of the overwhelming majority of Georgia's African American legisla-*

tors—raise an obvious question as to whether Georgia would now be liable under § 2 for a minority vote packing case. That possibility has been expressly recognized by previous decisions of this Court. See, e.g., *Quilter v. Voinovich*, 507 U.S. 146, 153-54 (1993). This issue was again discussed by Judge Oberdorfer:

> Indeed, if Georgia had maintained the heavy concentrations of African-American voters in certain of its Senate and House districts, particularly in the metropolitan Atlanta area, black voters in those districts may have had a cognizable § 2 claim based on dilution of their votes through packing. (J.S.206a, n.82).

With the near universal view of minority legislators that supermajorities unnecessarily *wasted* African American votes, and with the evidence establishing an undisputed ability of African American candidates to win in districts with 50% BVAP and lower, a charge of dilution by vote packing would hardly be frivolous.

II. SECTION 5 CANNOT CONSTITUTIONALLY REQUIRE THE DRAWING OF SUPERMAJORITY MINORITY LEGISLATIVE DISTRICTS IN ORDER TO CREATE SAFE SEATS, RATHER THAN SEATS THAT AFFORD MINORITIES EQUAL OPPORTUNITIES TO WIN.

The majority's interpretation of § 5 leads to plainly unconstitutional results. As originally enacted, the Voting Rights Act did not prohibit dilutive voting systems unless the system was itself unconstitutional and motivated by a purpose to discriminate. *Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Section 2 was amended in 1982 to prohibit electoral systems that "resulted" in discrimination, regardless of purpose. *Thornburg v. Gingles*, *supra*. Sections 2 and 5 are constitutional even though

they reach practices that have only a discriminatory impact, regardless of purpose. *Lopez v. Monterey County*, 525 U.S. 266, 282-84 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980).

> Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States. *Lopez, supra* at 282-83.

The constitutional foundation of both § 2 and § 5 is that they provide substantive protection for the legitimate rights of minority voters. By expanding § 5 beyond a ban against discriminatory practices to require that states draw safe minority districts, however, would leave this statute devoid of constitutional footing. Congress is empowered to prohibit the states from maintaining discriminatory voting laws, *Lopez*, but there is no constitutional basis for Congress to mandate the creation of safe seats with guaranteed political outcomes. That would not be legislation that eliminated discrimination.

In *Bush v. Vera, supra*, the Court addressed the constitutional power of the State to draw districts designed to do more than remedy the kind of vote dilution prohibited by § 2. The Court held in that case that it was unconstitutional for the Texas legislature to draw districts for racial purposes that were not required by § 2. Here, the district court's admitted purpose for increasing the BVAPs in Georgia's Senate was not to address voting discrimination—which was at least offered as a justification in the Texas case—but simply to create safe minority seats. Georgia could not constitutionally have drawn such districts on its own for the purpose of creating safe seats. That being the case, surely § 5 cannot be constitutionally construed to require the State to do so. Guaranteeing a particular political result is not a constitutionally legitimate goal.

The inevitable consequences of the district court's ruling point equally to its error. Under the court's holding, demographic changes from one census to another would strip covered states like Georgia of their rightful authority to make political choices. Georgia's majority BVAP districts had relatively high black majorities throughout the 1990s. Demographic changes reflected in the 2000 census increased the BVAPs even further in the existing majority minority districts. (P.Exs.1D,11D). According to the district court, once a seat thus becomes safe through demographic changes, it must be kept safe forever. Section 5 effectively imposes a one-way march towards maximization. The district court's ruling dictates an inexorable "ratcheting up" process, with Georgia losing its authority to make reasonable redistricting choices along the way. That is true even though its choices are nondiscriminatory and provide minorities with equal electoral opportunities. Judge Edwards acknowledged that this is exactly what would occur under the court's interpretation of § 5. He referred to the process approvingly as a "one-way ratchet imposed by § 5 [which] means that tangible gains made by African American voters need not be surrendered merely because the State has sought to undo those gains with a plan that is (perhaps) not independently unlawful under § 2." (J.S.152a).

If § 5 were so construed, covered states like Georgia would ultimately be compelled to have the maximum possible number of supermajority, safe districts. Section 5 would ultimately paint Georgia into a corner where its political choices would be ordained by the demographic happenstance of the past. Section 5 would have been applied to mandate what § 2 does not require, *Johnson v. DeGrandy, supra,* and § 5 would have been interpreted to mandate what this Court has repeatedly held to be unconstitutional under § 5, the purposeful creation of supermajority districts based predominantly on race. E.g., *Bush v. Vera, supra; Miller v. Johnson, supra.*

III. PRIVATE PARTIES SHOULD NOT BE ALLOWED TO INTERVENE IN A SECTION 5 PRECLEARANCE ACTION AND ASSUME THE ROLE AND AUTHORITY OF THE ATTORNEY GENERAL.

At the trial of this action, the United States did not contend that Georgia's House or congressional reapportionment plans violated § 5. As for Georgia's Senate plan, the United States contended that only three out of 56 districts were retrogressive. The district court at first denied intervention because to do so would "'accommodate the intervenor[s'] quest for a forum in which to test a voting plan' which the United States does not contend violates the Voting Rights Act." (J.S. 216a; citing *City of Dallas v. United States*, 482 F.Supp. 183 (D.D.C. 1980)). Several days before trial, however, the court reversed itself and permitted the intervenors to contest all three plans, including the congressional and House plans that were conceded by the DOJ not to be retrogressive. (J.S. 214a).

Section 5 preclearance proceedings are unique statutory creations. No other federal law so intrudes upon basic principles of federalism. *Bossier Parrish I, supra* at 479. Under § 5, state legislatures are stripped of their authority to change electoral laws in any regard until they first obtain federal sanction. The district court's expansion of § 5 proceedings to give private citizens the *same power and authority* as the Attorney General exacerbates a statutory anomaly that is already stretched to the constitutional limit.

In a § 5 administrative submission, the Attorney General alone possesses authority to object to a proposed redistricting plan. See *Morris v. Gressette*, 432 U.S. 491 (1977). In a civil action for preclearance, the Attorney General maintains his unique role as the sole statutorily designated defendant.

Not a word in the Voting Rights Act hints that private citizens possess a right to intervene and arrogate to themselves the enormous responsibilities and power of the Attorney General.

In *Morris*, *supra*, the Court recognized that § 5 preclearance determinations have no place for participation by third parties. The Attorney General's failure to object under § 5 is conclusive, immune from any subsequent review. The usual authority given private parties under the APA and other statutes to challenge agency decisions is inapplicable under § 5. In so holding, this Court emphasized the extraordinarily harsh nature of § 5; the need for expeditious treatment of preclearance claims; the fact that § 5 preclearance does not preclude anyone from otherwise challenging the precleared voting practice;[11] and the Attorney General's unique power and duty under § 5. *Id.* 501-07. The same considerations preclude intervention by "private attorneys general."

Other courts have agreed with appellant's opposition to intervention. In *State of Georgia v. Reno*, 881 F.Supp. 7 (D.D.C. 1995) (three-judge court), the district court denied intervention in a preclearance action, and that ruling was summarily affirmed by this Court. *Brooks v. Georgia*, 516 U.S. 1021 (1995). While four Justices indicated that they would have remanded the case for further consideration in light of the United States' withdrawal of its appeal, 516 U.S. at 1021, no Justice wrote that the denial of intervention was improper. In other cases under the Voting Rights Act, the district court has held intervention inappropriate because of the Attorney General's unique statutory role. E.g, *Apache County v. United States*, 256 F.Supp. 903 (D.D.C. 1966) (three-judge court) (bailout case under § 4(a)). In *Apache County*, the district court reasoned that "the right enforced by [the statute] is a public right, appertaining not to individual

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[11] Under the express terms of § 5, the grant of a declaratory judgment in a preclearance action does not prevent voters from pursuing any substantive claims they might have.

citizens, but to the United States itself." *Id.* 906. This Court cited *Apache County* with approval in *NAACP v. New York*, 413 U.S. 345, 369 (1973), which upheld denial of intervention in a § 4 action. The Court reasoned "that there were no unusual circumstances warranting intervention," including no alleged injury, no showing of inadequate representation by the Attorney General, and no impairment of any private right. *Id.* 368. In a § 5 case, private parties cannot assert any "impairment of a right" since they have neither substantive nor procedural "rights" under § 5.

States should not be subjected to the political stratagems of intervenors wearing the mantle of private attorneys general. Expeditious decisions are critical in § 5 actions, especially in redistricting. Final judgments must be rendered prior to the next election, which leaves little time in states like Georgia that have legislative elections every two years. The district court noted that it handled this case "with all possible speed" (J.S.27a), yet it still took eight months to final judgment. *Georgia v. Reno, supra,* went on for five years in the district court. The intervenors here expanded the scope of the case from three Senate districts to include the entire Georgia House and congressional plans. They prevented the court from entering a consent decree as to the House and congressional plans, which would otherwise have occurred months before judgment was ultimately entered. In addition to the much greater efficiency of pretrial proceedings that would have resulted from such a consent decree, prompt final judgments would have allowed voters and candidates to know much sooner what the districts would be. Any possibility of settlement discussions regarding the Senate plan were also precluded, as a practical matter, by the intervenors' much broader objections than those of the DOJ. (Tr.76-79, 2/8/02).

The inappropriateness of intervention in this case also follows from Fed. R. Civ. P. 24. There is clearly no "right" to intervene here under Rule 24(a). Section 5 provides no such right and intervenors have no legal "interest" that can be

either "impaired or impeded" by denial of intervention.[12] Neither does permissive intervention lie in a § 5 case because the claims and defenses in the case are defined by the pleadings of plaintiff and the United States. The intervenors' desire to object to all of Georgia's redistricting statutes did not endow them with a "claim or defense" in common with the "main action." That failure should be fatal to intervention under Rule 24, independent of the greater policy and statutory concerns inherent in the very structure of § 5.

The requirement that intervenors have a real "claim or defense" was addressed at length by the concurring opinion of Justice O'Connor in *Diamond v. Charles*, 476 U.S. 54, 74 (1986). In *Diamond*, the district court had permitted a pediatrician to intervene in an action filed by physicians attacking Illinois' abortion law. The State itself acquiesced in the permanent injunction that was affirmed by the Seventh Circuit, but the intervenor sought to appeal to this Court. In a unanimous opinion, this Court dismissed the appeal for want of jurisdiction because the intervenor did not have a sufficient legal interest to permit him to pursue issues acquiesced in by the State. Only the government itself had a sufficient, cognizable interest in defending its statutes. Justice O'Connor's concurrence addressed this issue and the "claim or defense" requirement of Rule 24 at some length:

> The words "claim or defense" manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit, as is confirmed by Rule 24(c)'s requirement that a person desiring to intervene serve a motion stating "the grounds therefor" and "accompanied by a pleading setting forth the claim or defense for which intervention is sought." Thus, although permissive intervention "plainly dispenses *with any* requirement that the intervenor shall have a direct personal or pecuniary interest in the subject

[12] See note 11 *supra*.

> of the litigation," *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 459 (1940), it plainly *does* require an interest sufficient to support a legal claim or defense which is "founded upon [that] interest" and which satisfies the Rule's commonality *requirement*. Dr. Diamond simply has no claim or defense in this sense; he asserts *no* actual, present interest that would permit *him* to sue or be sued by appellees, or the State of Illinois, or anyone else, in an action sharing common questions of law or fact with those at issue in this litigation. *Id.* 76-77 (O'Connor, J., concurring, joined by Burger, C.J., and Rehnquist, J.).

The same reasoning applies to the intervenors here. They have no legal claim or defense founded upon their political interest in this action. Indeed, the circumstances are far more compelling in a § 5 case than in *Diamond* because of the unique declaratory judgment procedure established by § 5.

CONCLUSION

For the foregoing reasons, the State of Georgia respectfully requests that the Court reverse the April 5, 2002, judgment of the district court and direct that court to enter judgment preclearing the 2001 Senate Plan at issue.

Respectfully submitted,

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