

IN THE  
**Supreme Court of the United States**

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THE STATE OF GEORGIA,  
*Appellant,*

v.

JOHN ASHCROFT, *et al.*,  
*Appellees,*

and

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

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

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**JURISDICTIONAL STATEMENT**

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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**

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 State of America

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

### STATEMENT OF THE CASE

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; and 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.<sup>1</sup> (P.Exs. 1D, 2C, 8D, 9C, 11D, 12C). The high percentages of African Americans in the majority BPOP/BVAP districts were generally lower under the new plans, however, as discussed below.

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<sup>1</sup> 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," 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. In light of the extensive experience of Georgia and its subdivisions with protracted administrative proceedings under § 5 and the need for a definitive decision at the earliest practicable date, Georgia exercised its statutory right to proceed directly to the District of Columbia District Court.

By order of 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 did oppose 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: “[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). Intervention as to the Senate plan was allowed 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 29, 2002, the court reversed its position and allowed intervention as to all plans, regardless of the DOJ’s position. (J.S. 214a). Intervenors thus had the plenary right to contest all aspects of all three plans at trial, but they failed to overcome the State’s proof on any issue.

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 RULING: In a 2-1 decision on April 4, 2002, the court precleared Georgia's congressional and House plans, but rejected the Senate plan based on the DOJ's criticisms of the three districts objected to. (J.S.142a-47a). 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 the State 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 non-discriminatory 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-49a).

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 consternation 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 super-majorities 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 super-majority to the

point that they turn away from the political process. The Voting Right 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. This plan included all of the black majority areas that were contiguous to the three districts, and excluded white areas the DOJ had objected to. (J.S.6a, 17a-18a, 20a). The BVAPs and BPOPs in the revised plan were thus increased substantially (J.S.5a):

S.D.	BPOP%		BVAP%	
	<u>2001 Plan</u>	<u>Rev'd Plan</u>	<u>2001 Plan</u>	<u>Rev'd Plan</u>
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. (Ga. Laws of 2002, 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. The case is in no way mooted by the fact that a temporary plan was enacted.

GEORGIA'S RECENT REAPPORTIONMENT HISTORY: Georgia's current legislative redistricting can only be understood by looking at the preceding redistricting of 1991-1992, which was dominated by the DOJ's policy of requiring racially gerrymandered, "max-black" districts. What occurred in Georgia is 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 1991-1992 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 pre-clearance, that State House and Senate districts be drawn to include "available" minority populations in the area, just as had been demanded in congressional redistricting. 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 (black population and voting age population, respectively) 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 gerrymander of 1991-1992, but by no means all. In spite of the *Miller* decision, the DOJ still denied preclearance to the modified House and Senate plans in 1996 and then sued the State in an effort to compel use of the old, patently illegal plans. *Id.* 1541. The district court in *Johnson III* enjoined use of the 1991-1992 House and Senate lines and imposed an interim remedy for the 1996 elections. Commenting 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 factor in drawing the sixteen districts we have determined to be unconstitutional." *Id.* at 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 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 thus left with much of the redistricting residue of the DOJ's maximization strategy from 1991-1992 as it approached redistricting in 2001. The re-drawn House and Senate plans

were very similar to those originally passed by the General Assembly in 1991-92; only the clearly unconstitutional parts were modified.

One consequence of this redistricting history is that Georgia's House and Senate districts throughout the 1990's consisted almost entirely of districts either with (1) very high BVAPs, or (2) much lower BVAPs. Midrange districts were rare.

REAPPORTIONMENT IN 2001: Maintaining Georgia's majority minority districts in the 2001 reapportionment was very challenging, as problems of population growth left most minority districts far short of one-person, one-vote requirements. Thirty-two of the 37 majority BVAP House districts ranged from 7% to 32% short of population. (P.Exs. 11C, 12C). Seven of the 10 majority BVAP Senate districts were from 14% to 27% short of population, according to the 2000 census. (P.Ex. 1D and 1E). Because of changing housing patterns, the majority-minority districts also had become much blacker since the 1990 census. Many House and Senate districts had BVAPs of 60% and above. (P.Exs. 1D, 11D).

African Americans had a full voice in Georgia's 2001 redistricting. There were 34 African American representatives in the House out of 180 members, and 11 out of 56 Senators. (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. (*Id.*; Tr.23, P.Ex.22). Among black legislators, the nearly universal consensus was "to maintain [their] districts, but not . . . waste their votes." (Tr. 20-21, P.Ex. 22). Because the "high black percentages" were a "waste of their votes," minority legislators supported substantial BVAP reductions in the existing supermajority

districts. *Id.* 21. It is undisputed that redistricting plans could not have passed the General Assembly without substantial minority support.<sup>2</sup> 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 other positions that

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<sup>2</sup> In the Senate, only one African American Senator (S.D. 2) voted against the Senate plan (J.S. 56a), and she did so simply 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 a rarity in any political endeavor.

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 Senate majority leader, Charles Walker, is 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 around 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.” On deposition cross-examination, these witnesses almost entirely contradicted their affidavits. For example, Clifton Jones acknowledged that “blacks still have a fair opportunity to elect the candidate of their choice” in the proposed S.D. 2. (C.Jones Dep.63). Charles Sherrod admitted that a number of black candidates had won with substantial white vote. Sherrod ascribed whites voting for blacks to “a phenomenon 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.” (Sherrod Dep.97). DOJ witness Albert Abrams had, himself, won election in one of the most populous Georgia counties where the BVAP was 43%. (Abrams Dep. 22-23). William Barnes admitted that a black candidate had a reasonable chance of winning in a 50% BVAP district. (Barnes Dep.59). Several witnesses acknowledged that any number of African American candidates could win the proposed 50% BVAP districts. (*E.g.*, Hart Dep. 44-45; Abrams Dep.34-35,45,61).

The pervasive admissions by the DOJ’s witnesses on cross-examination that contradicted their conclusory affidavits are set forth 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 plainly demonstrates that the high BVAPs required by the district court create unnecessarily safe districts. Minority candidate success in Georgia the past decade has been compelling. Georgia's statewide BVAP is 26.6%, and eight of the State's 32 offices that are elected statewide are held by African Americans.<sup>3</sup> (P.Ex.25,p.3).

The undisputed evidence at trial included a database that contained *all* 1,258 legislative elections (State House, Senate, and Congress) that occurred from 1991 through 2001. This comprehensive data includes 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, Att.2). This uncontradicted data revealed that African American incumbents have an effective guarantee of re-election in districts with BVAP levels far below 50%. There were exactly 200 such legislative elections since 1991, and the black incumbents won 199. (J.S. 225a) The only exception occurred where the incumbent was under a federal 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 past 11 years. (J.S. 238a) 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

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

elections between 50% BVAP and 53.5% BVAP where the candidate of choice could be determined, and African Americans won two out of those four.

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 that no present incumbent African American Senator was elected in an open seat election with a BVAP of less than 53.5%. That contention is totally disingenuous. It ignores the fact that—because of the DOJ orchestrated reapportionment of 1991-92—there were virtually no Senate seats between 40-50% BVAP throughout the entire decade. As a result of the DOJ's actions, there were only three Senate districts that ever had a BVAP level between 40% and 49%, at any time, during the 1990's and up through 2001. The absence of black candidates winning more frequently in this range is not a reflection of their inability to do so, but the paucity of such districts resulting from the DOJ's action under § 5. (J.S. 242a)

Furthermore, the experience in the three Senate districts that did fall in the 40-49% range utterly 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% (S.D. 25, in 1994). *Id.* The BVAP was then lowered in 1996, after the *Miller* decision, to 36.66%. The black incumbent won re-election. Neither he nor any other minority candidate ran for re-election or election in that district thereafter. *Id.*

The 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%. S.D. 44 was a rapidly transitional district. Its BVAP changed from 40.39% to 49% between 1996 to 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 past gerrymandering of Georgia's lines.* (J.S. 238a; 242a).

THE PARTIES' EXPERT TESTIMONY: Expert opinion testimony was presented by all parties. Dr. David Epstein of Columbia University performed a probit analysis (a standard probability methodology) on all of Georgia's legislative elections from 1991 through 2001. He determined from that comprehensive data that African American candidates of choice had an equal chance of winning an open-seat election where the BVAP was 45%, and an increasingly higher likelihood with greater BVAPs.<sup>4</sup> 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). The DOJ's expert, Dr. Richard Engstrom, made no assessment at all as to 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 or was not retrogression under any of the plans, at issue. *Id.* 70. Dr. Engstrom did, however, explain that he looked at "reaggregated" election returns in proposed S.D. 2, 12, and 26 using elections in which African American candidates had run. He admitted that this was the only method that he has used over the years to assess the "viability" of a district for a minority candidate. *Id.* Based

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<sup>4</sup> Dr. Epstein's analysis used more conservative assumptions regarding race and politics than is permitted by this Court's decisions. He did not count a winner of an election as 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).



on that reaggregation analysis in this case, Dr. Engstrom admitted that Georgia's proposed S.D. 2, 12, and 26 afforded minority candidates a "very good chance" to win. *Id.* 88-89.

Dr. Engstrom performed certain "racially polarized voting" calculations on various elections, very few of which were coextensive with the legislative districts at issue. *Id.* 19, 85, 93-98. Based on the idea 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 found "polarization" in the local elections the DOJ attorneys had provided him to analyze. *Id.* 25. But Dr. Engstrom's analysis completely ignored the impact of the degree of polarization he found on the ability of minority preferred candidates to actually win. Incredibly, while Dr. Engstrom testified that there was racial polarization in most elections he reviewed, the fact is that African Americans 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 state-wide election he examined, yet each of those elections, except one, was won by the African American candidate with a state-wide BVAP of only 26.6%. (*Id.* 85-86; P.Ex.25, pp.3-4). *Dr. Engstrom admitted that whether the minority candidate won or lost was irrelevant to him.* (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 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).

## SUBSTANTIALITY OF THE QUESTIONS PRESENTED

### I. SECTION 5 OF THE VOTING RIGHTS ACT DOES NOT REQUIRE THE DRAWING OF SAFE MINORITY DISTRICTS WITH SUPER- MAJORITY MINORITY POPULATIONS.

As this Court has noted on several occasions, § 5 represents a serious invasion of the most fundamental prerogatives of the states. It was originally enacted to complement the principal provision of the 1965 Voting Rights Act, which was 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 the voter registration gains achieved by the literacy test ban. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). The Act was initially passed in 1965 as a “temporary” measure to last five years. It has been extended three times, the last time in 1982 for another 25 years.

Because § 5 is such a procedural intrusion into the normal 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 Board*, 520 U.S. 471, 478 (1997). 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 preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose.” *Reno v. Bossier Parrish School Board*, 528 U.S. 320, 341 (2000).

In contrast to the limited *substantive* role of § 5, the later-enacted § 2 of the Voting Rights Act prohibits certain conduct, 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.* at 1020.

This Court's jurisprudence, the statute 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. 38, 49 (1986). This § 2 requirement would be stood on its head under the district court's logic. The majority would convert the statutory proof requirement that minorities be “usually defeated,” into a mandate that states enact districts where minorities will win with near certainty.

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 in that fashion 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 II, supra*, at 477 (emphasis added). Conversely, *non-discriminatory* 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 the 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 overrepresentation" 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. 01-3581-10 (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. This Court has expressed its concern over this 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 kind of supermajority districts demanded by the majority below—*over the ardent opposition of the overwhelming majority of Georgia's African American legislators*—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 SUPER-MAJORITY 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). The Act was amended

in 1982 to prohibit electoral systems that “resulted” in discrimination, regardless of purpose. *Thornburg v. Gingles, supra*. Section 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 justification for Congress to mandate the creation of safe seats with guaranteed political outcomes. The very purpose and aim of such a statute would be illegitimate.

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 for the purpose of creating safe



seats, and § 2 cannot be constitutionally construed to mandate 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 political choices. Georgia's majority BVAP districts had relatively high black majorities throughout the 1990's. Demographic changes that arose from the 2000 Census raised those BVAPs even further in the existing majority minority districts, which in most cases were far short of population equality. (P.Exs.1D,11D).

According to the district court, the same or a greater number of districts must be maintained as *safe* minority seats. The district court's ruling dictates an inexorable "ratcheting up" process whereby Georgia loses the authority to make reasonable redistricting choices. That is true notwithstanding the fact that its choices are admittedly nondiscriminatory and provide minorities with equal electoral opportunities. Judge Edwards' concurrence recognized 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 have only 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.**

#### **A. Private parties should not be permitted to intervene in a Section 5 case because the statute establishes a unique role for the Attorney General as the defendant in preclearance actions.**

The district court first ruled that intervention would not be permitted to allow private parties to challenge a redistricting plan if the DOJ did not oppose the plan. (J.S. 216a). Several days before trial, however, the court reversed itself and permitted the intervenors to contest anything, 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 upends traditional principles of federalism. *Bossier Parrish I, supra* at 479. Expanding § 5 proceedings to give private citizens the *same power and authority* as the Attorney General would exacerbate 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 Act hints that private citizens should be allowed to intervene and arrogate to themselves the enormous responsibilities and power of the Attorney General.

In *Morris*, the Court recognized that § 5 preclearance determinations have no place for participation by third parties. The Attorney General's failure to object under Section 5 was therefore 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, *Morris* 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 challenging the precleared voting practice;<sup>5</sup> 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), 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)). The court reasoned that "the right enforced by [the statute] is a public right, appertaining not to

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<sup>5</sup> 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. Section 5 is a purely procedural statute.

individual 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.

States should not be subjected to the whims of intervenors acting like private attorneys general. Expeditious decisions are critical in § 5 actions; they must be rendered prior to the next election. 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).

More often than not, intervenors have purely political reasons for opposing a voting change, which is just one more reason why intervention is inappropriate in these unique proceedings. Delay alone sometimes wins the day in politics.

**B. Even if intervention were ever appropriate, these intervenors had no standing to complain about districts they did not live in.**

In *United States v. Hays*, 515 U.S. 737, 744-745 (1995), and *Shaw v. Hunt*, 517 U.S. 899, 904 (1996), the Court held that a plaintiff who resides in a district predominately drawn

based on race has standing to challenge the legislation which created that district, but that a plaintiff in an adjacent district lacks standing. Similarly, in a one person/one vote case, voters have standing to sue when they reside in districts where their votes are arbitrarily “disfavored” and their votes are “less influential” by virtue of the population differences between counties. *Baker v. Carr*, 369 U.S. 186, 206-208 (1962). Voters who do not reside in overpopulated districts do not have standing to challenge an alleged malapportionment because they suffer no harm. *Fairley v. Patterson*, 493 F.2d 598, 603-604 (5th Cir. 1974); *Roxbury Taxpayers Alliance v. Delaware County Board of Supervisors*, 80 F.3d 42, 46-47 (2d Cir.), *cert denied*, 519 U.S. 872 (1996).

The four intervenors in this case challenged Georgia senate districts 2, 12, 15, 22, 26; Georgia house districts 51, 95, 97, 100, 113, 148 and 149; and congressional district 5, all as retrogressive. But none of the intervenors resided in any of the House districts they challenged, and an intervenor resided in only two of the five challenged Senate districts. Nonetheless, the trial court held that, “whether intervenors reside in the proposed or benchmark districts at issue in this matter does not affect their standing for purposes of challenging the redistricting plans as retrogressive. The plans are statewide and the drawing of one district’s boundaries necessarily affects neighboring districts.” (J.S.30a). The court’s ruling is incorrect both factually and legally. Factually, the redrawing of one district will affect one adjoining district (although which one is speculative *a priori*), but it may or may not affect any more than that. There is certainly no basis to assume that changing a single district would have “statewide” impact. The ruling is legally incorrect because it directly contradicts this Court’s holding in *Hays*, 515 U.S. at 746.

**CONCLUSION**

For the foregoing reasons, the State of Georgia respectfully requests that the Court note probable jurisdiction in this matter, set the case for full briefing and argument, and reverse the April 5, 2002, judgment of the district court.

Respectfully submitted,

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