No. 02-182

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF GEORGIA,

Appellant,

vs.

JOHN ASHCROFT, Attorney General, et al.,

Appellees,

and

PATRICK L. JONES, et al.,

Intervenors.

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

---

Brief Amicus Curiae of Georgia Coalition For The Peoples' Agenda in Support of Appellees

---

LAUGHLIN MCDONALD
Counsel of Record
NEIL BRADLEY
BRYAN SELLS
MEREDITH E.B. BELL
American Civil Liberties Union Foundation.
2725 Harris Tower
233 Peachtree Street
Atlanta, GA 30303
(404) 523-2721

BARBARA R. ARNWINE
THOMAS J. HENDERSON
ANITA HODGKISS
Lawyers' Committee for Civil Rights Under Law
1401 New York Ave., N.W.
Suite 400
Washington, DC 20005

(202) 662-8600
(continued on back of page)

ELAINE R. JONES
Director-Counsel

NORMAN J. CHACHKIN
DEBO P. ADEGBILE
NAACP Legal Defense
and Educational Fund, Inc.
99 Hudson Street, Suite 1600
New York, New York 10013
(212) 219-1900

TODD A. COX
NAACP Legal Defense
and Educational Fund, Inc.
1444 Eye Street, N.W.
10th Floor
Washington, D.C. 20005
(202) 682-1300

Counsel for Amicus Curiae
Georgia Coalition For The
Peoples' Agenda

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES Page

STATUTES

RULES

CONGRESSIONAL REPORTS

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

No. 02-182

STATE OF GEORGIA,

Appellant,

vs.

JOHN ASHCROFT, Attorney General, et al.,

Appellees,

and

PATRICK L. JONES, et al.,

Intervenors.

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

---

Brief Amicus Curiae of Georgia Coalition For The Peoples' Agenda in Support of Appellees

---

INTEREST OF AMICUS CURIAE[1]

[1]No counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been submitted to the clerk pursuant to Supreme Court Rule 37.3(a).

The Georgia Coalition For The Peoples' Agenda (GCPA) is an organized group of representatives from all of the major civil rights/human rights/peace & justice organizations and concerned citizens of the state of Georgia. Dr. Joseph E. Lowery is the Convenor of this coalition, whose members include: AFLCIO; Atlanta Millennium Section NCNW; Concerned Black Clergy; Ebenezer Baptist Church; Georgia Association of Black Elected Officials; Georgia Coalition of Black Women; Georgia NAACP; Juvenile Justice Task Force; Lindsay Street Baptist Church; Progressive Baptist Convention; Providence Baptist Church; RAINBOW/PUSH; Southern Christian Leadership Conference; and Trinity House. The mission of the coalition is (1) to improve the quality of governance in Georgia, (2) to help create a more informed and active electorate, and (3) to have responsive and accountable elected officials. Among its projects, GCPA has launched a massive statewide voter registration and mobilization crusade with a goal of registering 100,000 new voters. Central to the fulfillment of its mission is the adoption and maintenance of redistricting systems that do not lead to retrogression in minority voting strength and provide all voters of the state the equal opportunity to participate in the political process and elect candidates of their choice.

SUMMARY OF ARGUMENT

The State of Georgia's proposed "equal opportunity," or 50-50 chance of winning, standard for Section 5 preclearance would, if adopted, have a devastating impact on minority office holding and voting rights. A 50-50 chance of winning is also a 50-50 chance of losing. If the state were allowed under Section 5 to adopt a plan providing minority voters with only a 50-50 chance of electing candidates of their choice, the number of blacks elected to the legislature would likely be cut in half. The state proposes, moreover, that "the point of equal opportunity is 44.3% BVAP." The adoption of such a standard would allow the state to abolish many, if not most, of the majority black districts in the state.

Given past and continuing patterns of racial bloc voting, blacks have been elected to office in Georgia and throughout the South primarily in majority black districts. Experience has

shown that white candidates are all but prohibitive favorites to win in majority white districts. The state's 50-50 chance of losing standard would cause a significant reduction in the number of black office holders and should be objectionable under the retrogression standard of Section 5 articulated by this Court.

The state's claim that the Department of Justice (DOJ) and the three-judge court applied a "black maximization" standard is completely belied by the record. Although the state's proposed senate plan reduced the black population in 12 of the 13 majority black districts, DOJ contested, and the three-judge court denied preclearance to, only three of the districts. The absence of "black maximization" is further evident from the fact that the state's house plan was precleared, even though it reduced the black population in a number of districts compared to the benchmark plan. Similarly, DOJ did not contest, and the three-judge court precleared, the state's remedial plan despite the fact that the black population was still lower, by an average of 4.51%, in all three senate district compared to the benchmark plan. If there is a "ratcheting" process at work in the court's opinion, as the state contends, it is one that "ratchets" black majorities down.

The state failed to carry its burden of proof that the reductions in black population in the three senate districts would not a cause a "worsening" of the electoral opportunities of minority voters. The expert testimony presented by the state was deeply flawed and, as found by the three-judge court, "was woefully inadequate" to support a contrary holding.

The three-judge court correctly found that the state failed to present "any" evidence that a decrease in black voting power in the three senate districts at issue would be offset by gains in other districts. The black population was dispersed, not to enhance minority "influence," but to enhance the electoral opportunities of Democrats, particularly white Democrats.

The fact that some black members of the legislature voted for the state's plan is irrelevant to the issue of retrogression. Section 5 was enacted to protect minority voters from a "worsening" of their voting strength, and not to protect

incumbents or promote the electoral fortunes of any particular political party.

This Court has rejected the application of Section 2 "results" analysis to Section 5 preclearance. The adoption of the state's "equal opportunity" approach would require each submitting jurisdiction to show that its proposed change in voting did not have discriminatory results, and would burden the Section 5 preclearance process.

Georgia's statewide redistricting plans have been a constant subject of Section 5 objections and litigation. At the local level, from 1974-1990 some 57 counties and 40 cities in the state were sued over their use of discriminatory at-large elections, and in nearly every case some form of district elections was the result. This entire history of discrimination should be taken into account in determining the retrogressive effect of the state's senate plan.

Congress has provided a dual mechanism, including a private right of action, for enforcing the provisions of the Voting Rights Act. In recognition of that fact, the courts have routinely allowed intervention in Section 5 preclearance actions. Private intervenors can bring an informed, local perspective on current and historical facts at issue. Experience has shown that DOJ and private litigants have often disagreed over the standards to be applied under the Voting Rights Act. Public policy of enforcing the act and ensuring minority access to the political process support a right of private intervention in Section 5 proceedings.

ARGUMENT

I. The State's "Equal Opportunity" Standard Would Have a Devastating Impact on Minority Voting Rights

The state of Georgia proposes that a new "equal opportunity" to elect standard, which it defines as "a 50-50 chance of electing a candidate of choice," *Georgia v. Ashcroft*, 195 F.Supp.2d 25, 66 (D.D.C. 2002), should be adopted to replace the well established "retrogression," or "diminished" opportunity, standard consistently applied by this Court in

determining preclearance of proposed changes in voting under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *See, e.g., Beer v. United States*, 425 U.S. 130, 141 (1976) (a reapportionment plan may not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"); *Bush v. Vera*, 517 U.S. 952, 983 (1996) (the electoral opportunities of minorities may "not be diminished, directly or indirectly, by the State's actions"); *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 335 (2000) (a proposed voting change may be "no more dilutive" that the preexisting practice). The state's proposed new "equal opportunity" standard, if adopted, would be plainly retrogressive and have a devastating impact upon minority voting strength.

A 50-50 chance to win is also a 50-50 chance to lose. If the state were allowed under Section 5 to adopt a plan providing minority voters with only a 50-50 chance of electing candidates of their choice in the existing majority black districts, the number of blacks elected to the Georgia legislature would likely be cut in half. Section 5, whose basic purpose is to maintain the status quo and prevent covered jurisdictions from enacting new voting practices that diminish minority voting rights, *South Carolina v. Katzenbach*, 383 U.S. 301, 334-35 (1966), cannot be construed to countenance such a retrograde result.

The 50-50 chance standard promoted by the state is actually far more retrograde even than it appears in the factual context of this case, for if it were adopted it would permit the state to abolish *all* of the majority black districts in the state. The state, and its expert, Professor David Epstein, contend that "the point of equal opportunity is 44.3% BVAP, which means that 'there's a 50-50 chance of electing a candidate of choice' in a district with an open seat and with 44.3% BVAP." *Georgia v. Ashcroft*, 195 F.Supp.2d at 66. *See also* Brief of Appellant, p. 16 (blacks have "an equal chance of winning an open-seat

election where the BVAP was 44%").[2] The adoption of the state's equal opportunity standard would permit the abolition of many, if not most, of the majority black districts in the state, would eviscerate the concept of retrogression under Section 5 in redistricting, and, for the reasons set out more fully below, would roll back the gains in minority office holding since passage of the Voting Rights Act. It would also allow the state to do precisely what Section 5 was designed to circumvent, to stay "one step ahead of the federal courts" by adopting new discriminatory voting procedures. *Beer v. United States*, 425 U.S. at 140.

A. **Majority Minority Districts Have Been Key to Minority Electoral Success**

On the eve of passage of the Voting Rights Act, there were fewer than a hundred black elected officials in the entire eleven states of the old Confederacy. U.S. Commission on Civil Rights, *Political Participation* 15 (Washington, D.C.: U.S. Government Printing Office, 1968). By January 1993, the number had grown to 4,924. Joint Center for Political and Economic Studies, *Black Elected Officials: A National Roster* xxiii (Lanham, MD: University Press of America, 1993). The key to the increase in effective minority political participation and black officeholding has been the creation of majority-minority districts. Indeed, it is only the creation of such districts under the Voting Rights Act that has succeeded in blunting the effects of systematic white bloc voting.

Throughout the 1970s and 1980s, only about 1% of majority white districts in the South elected a black to a state legislature. Blacks who were elected were overwhelmingly from majority black districts. Lisa Handley & Bernard

---

[2]Prof. Epstein gave similar testimony in *Colleton County Council v. McConnell*, 201 F.Supp.2d 618, 643 (D.S.C. 2002), a case involving court ordered redistricting in South Carolina. In rejecting Prof. Epstein's analysis that a black VAP as low as 45.58% was the "point of equal opportunity," the three-judge court concluded that "a majority-minority or very near majority-minority voting age population in each district remains a minimum requirement" in order the satisfy the requirements of the Voting Rights Act. *Id.*

Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations," in *Quiet Revolution in the South* 336-37, edited by C. Davidson & B. Grofman (Princeton: Princeton University Press, 1994). As late as 1988, no black had been elected from a majority white district in Alabama, Arkansas, Louisiana, Mississippi, or South Carolina. *Id.* at 346. The number of blacks elected to state legislatures increased after the 1990 redistricting, but again the gain resulted from an increase in the number of majority black districts. David A. Bositis, *Redistricting and Representation: The Creation of Majority-Minority Districts and the Evolving Party System in the South* 46 (Washington, DC: Joint Center for Political and Economic Studies, 1995). The most comprehensive and systematic study to date of the impact of the Voting Rights Act from 1965 to 1990, *Quiet Revolution in the South*, concluded that "the increase in the number of black elected officials is a product of the increase in the number of majority-black districts and not of blacks winning in majority-white districts." Handley and Grofman, "The Impact of the Voting Rights Act on Minority Representation," 335.

The pattern of blacks winning almost exclusively from majority black legislative districts is particularly evident in Georgia. Of the six black state senators and twenty-two representatives elected in 1974, only one--Michael Thurmond, whose district included the university town of Athens--was elected from a majority white (57%) district. The remaining black members were elected from districts that ranged from 56% to 99% black. Laughlin McDonald, Michael Binford & Ken Johnson, "Georgia," in *Quiet Revolution in the South* 87. The plan adopted in Georgia in 1982 increased the number of majority black senate districts from two to eight, and the number of majority black house districts from twenty-four to thirty, setting the stage for increased black representation in both houses of the general assembly. Ga. Laws 1982, pp. 444, 452; Georgia Legislative Information Services, Georgia State Senate Districts as Reflected in SB 388, statistical sheet, Updated April 1984, and Georgia State House Districts, Updated March 1986.

Under the 1992 legislative plan, as in the past, black

electoral success in Georgia was confined almost exclusively to the majority black districts. Of the forty blacks elected to the house and senate under the 1992 plan, all but one was elected from a majority black district. The lone exception was Keith Heard from House District 89 (42% black) in Clarke County, the home of the University of Georgia. Whites, on the other hand, not only won all but one of the majority white districts, but also won fourteen (26%) of the majority black districts. *Members of the Georgia General Assembly, Senate and House of Representatives, Second Session of 1993-94 Term (1994); Johnson v. Miller*, Civ. No. 194-008 (S.D.Ga.), trial transcript, Vol. 4, p. 237, Stipulations Nos. 61-63, Joint Ex. 11. Not surprisingly, the three-judge court in *Johnson v. Miller*, 922 F. Supp. 1552, 1568, 1570-1571 (S.D. Ga. 1995), concluded that because of racial bloc voting, a district maintaining the percentage of black registered voters as close to 55% as possible was necessary to avoid dilution of minority voting strength in the state's Fifth Congressional District.

The same pattern of polarized voting has continued under the 2002 plan. Of the ten blacks elected to the state senate, all were elected from majority black districts (54% to 66% black population). Of the thirty-seven blacks elected to the state house, thirty-four were elected from majority black districts. Of the three who were elected from majority white districts, two (Keith Heard and Carl Von Epps) were incumbents. The third black, Alisha Thomas, was elected from a three-seat district (HD 33). *2003 House of Representatives, Lost & Found Directory*.

The pattern of minority office holding principally from majority black districts exists at the city and county levels in Georgia as well. Based upon a survey conducted in 1989-90 of cities and counties in Georgia, *Quiet Revolution in the South* concluded that:

> The increase in black officeholding can in large measure be traced directly to the gradual demise of at-large elections and the implementation of single-member districts containing effective black voting majorities. These changes were neither self-executing nor voluntary, but were

> coerced through a combination of congressional legislation, favorable judicial decisions, the enforcement of the preclearance requirement, favorable judicial decisions, and litigation efforts of the civil rights and minority communities.

McDonald, Binford & Johnson, "Georgia," 90.

The most notable exception to the pattern of blacks losing in majority white districts, and upon which the state places special reliance, Brief of Appellant, p. 13, have been judicial elections. Judicial elections, however, are unique in that they are subject to considerable control by the bar and the political leadership of the state. Candidates are essentially preselected through appointment by the governor to vacant positions upon the recommendation of a judicial nominating committee dominated by the bar. The chosen candidate then runs in the ensuing election with all the advantages of incumbency. Judicial elections are low key, low interest contests in which voters tend to defer to the choices that have previously been made. Robert Benham, elected to the court of appeals in 1984 and the state supreme court in 1990, and Clarence Cooper, elected to the court of appeals in 1990, were preselected in this manner. McDonald, Binford & Johnson, "Georgia," 85. The ability of preselected blacks to win low key judicial elections does not, however, translate into the ability of blacks to elect candidates of their choices in majority white state house and senate districts.

Given the continuing levels of white block voting identified by the three-judge court in this case, 195 F.Supp.2d at 69, white candidates are all but prohibitive favorites to win in majority white legislative districts in Georgia, not to mention the rest of the South. To provide black voters an opportunity to elect candidates of their choice only in selected districts, and with reduced black populations that provide a 50-50 chance of losing, would cause a significant reduction in the number of black office holders and should be objectionable under the retrogression standard articulated by this Court.

II. **The State's "Maximization" Charge Is Belied by the Record**

The state's claim that the Department of Justice (DOJ) has a policy of insisting on "high concentration," "super majority" black districts, Brief of Appellant, p. 30, is completely belied by the record in this case. As appears from the table below, the plan proposed by the state for the senate contained 13 districts with a majority black population and/or voting age population (VAP).[3] Despite the fact that there was an absolute retrogression in black voting strength in 12 of the districts compared to the preexisting benchmark plan, DOJ argued that only three districts violated Section 5, *i.e.*, SDs 2, 12, and 26. *Georgia v. Ashcroft*, 195 F. Supp. 2d at 37.

MAJORITY BLACK DISTRICTS IN BENCHMARK AND PROPOSED SENATE PLAN

BLACK DISTRICTS	EXISTING PLAN	PROPOSED PLAN
*2 (Savannah)	64.76%	54.99%
	60.58%BVAP	50.31%BVAP
10 (Ellenwood)	73.5%	64.87%
	70.66%BVAP	64.14%BVAP
*12 (Albany)	59.31%	53.51%
	55.43%BVAP	50.66%BVAP
15 (Columbus)	64.32%	53.74%
	62.05%BVAP	50.87%BVAP
22 (Augusta)	66.84%	54.71%
	63.51%BVAP	51.51%BVAP
*26 (Macon)	66.62%	54.88%
	62.45%BVAP	50.8%BVAP
**34 (Morrow)	36.4%	52.94%
	33.96%BVAP	50.54%BVAP
35 (Atlanta)	77.68%	62.71%
	76.02%BVAP	60.69%BVAP
36 (Atlanta)	65.3%	61.9%

[3]The United States, based upon its census calculations, concluded that only 11 proposed districts contained majority black VAPs. The state contends that the number is 13. *Georgia v. Ashcroft*, 195 F.Supp.2d 56. Without attempting to resolve this dispute, the figures set out in the table are those of the state, since no matter which figures are used the proposed plan reduced the black population in 12 districts.

	60.36%BVAP	56.94%BVAP
38 (Atlanta)	78.06%	63.59%
	76.61%BVAP	60.29%BVAP
39 (Atlanta)	58.65%	60.01%
	54.73%BVAP	56.54%BVAP
43 (Decatur)	89.63%	64.88%
	88.91%BVAP	62.63%BVAP
44 (Jonesboro)	52.8%	38.23%
	49.62%	34.71%
55 (Clarkston)	73.73%	61.85%
	72.4%BVAP	60.64%BVAP

* Districts challenged by DOJ and denied preclearance.
** New district created in proposed plan.

That DOJ did not apply a black "maximization" standard, as the state insists, Brief of Appellant, p. 39, is further evident from the fact that DOJ did not pose an objection to the state's house plan, despite the fact that it reduced the black population in a number of house districts compared to the benchmark plan. *Georgia v. Ashcroft*, 195 F.Supp.2d at 95.

DOJ did not in any event deny preclearance to the state's senate plan. That was done by the three-judge court in a carefully reasoned, narrowly tailored opinion applying the standards for retrogression under Section 5 consistently articulated by this Court. *See Georgia v. Ashcroft*, 195 F.Supp.2d at 31, 74 (applying the "diminished" opportunity standard of *Beer v. United States*, 425 U.S. at 141, and the "no more dilutive" standard of *Reno v. Bossier Parish School Bd.*, 528 U.S. at 335). In preclearing the house plan, the court held that:

> While some of the existing House districts would experience decreases in BVAP under the proposed plan, there is no evidence before the court of racially polarized voting in any House Districts that might suggest that these decreases will have a retrogressive effect.

Id. at 95. No amount of distortion by the state can transform this straightforward application of the retrogression standard of

Section 5 into a mandate for "supermajority" black districts. That the court did not apply such a mandate is further evident from its explicit acknowledgment that:

> the Voting Rights Act allows states to adopt plans that move minorities out of districts in which they formerly constituted a majority of the voting population, provided that racial divisions have healed to the point that numerical reductions will not necessarily translate into reductions in electoral power.

Id. at 78.

In 12 of the proposed senate districts, the reduction in black VAP ranged from -3.42% to -26.28%. In nine of the districts the reduction in black VAP was greater than 10%. *Georgia v. Ashcroft*, 195 F.Supp.2d at 82. Preclearance was denied, however, to only three districts. Clearly, there is no merit whatever to the state's overheated charge that the "district court's ruling imposes a one-way march towards maximization . . . . [and] dictates an inexorable 'ratcheting up' process, with Georgia losing its authority to make reasonable redistricting choices along the way." Brief of Appellant, p. 39. If there is a "ratcheting" process at work in the court's opinion, it is one that "ratchets" black majorities down.

Yet further evidence that the mere reduction in black population was not viewed as a basis for a Section 5 objection is apparent from the fact that DOJ did not object to, and the three-judge court approved, the 2002 remedial plan proposed by the state (Georgia Act No. 444). *Georgia v. Ashcroft*, 204 F.Supp.2d 4, 9, 16 (D.D.C. 2002). While the black population was increased compared to the objected to plan, it was still lower, by an average of -4.51%, in all three districts compared to the benchmark plan. *Id.* at 7. Moreover, one of the three senate seats (District 12) was held by a white incumbent, Senator Michael Meyer von Bremen. He was reelected under the 2002 remedial plan, an event that disproves the state's claim that DOJ and the court applied a standard that "mandate[s] the creation of safe seats with guaranteed political outcomes."

Brief of Appellant, p. 38.[4]

The lower court properly considered the factors that inform a Section 5 retrogression analysis, including the extent and degree of racially polarized voting. Thus, reductions in minority population that might be tolerable in one area, even though relatively small, might have a retrogressive effect in another. The area specific analysis applied by the three-judge court is entirely consistent with the purposes of Section 5 and its interpretation by this Court.

The state also errs in claiming that a "residue" or "legacy" of maximization remains from the 1990s redistricting described in *Miller v. Johnson*, 515 U.S. 900 (1995). Brief of Appellant, pp. 9-10. The legislative plan adopted in 1997 was the result of court-ordered mediation, *Johnson v. Miller*, No. 196-040 (S.D.Ga.), and was precleared by DOJ. There is no factual or legal basis for contending that the plan has a "residue" of discrimination. This Court has repeatedly held that the last legally enforceable plan used by a jurisdiction is to serve as the baseline for comparison in a Section 5 retrogression analysis. *Abrams v. Johnson*, 521 U.S. 74, 96-7 (1997); *Holder v. Hall*, 512 U.S. 874, 883-84 (1994). Accordingly, as long as the preexisting plan has not been declared unconstitutional as a "residue" of discrimination, it must serve as the benchmark under Section 5. Furthermore, the preexisting plan was admittedly unconstitutional under one person, one vote. An inquiry into whether the plan is also the "legacy" of a *Miller* type violation would therefore embroil a court in an extensive trial over the moot issue of whether the plan is unconstitutional for other reasons as well.

III. **The State Failed to Carry Its Burden of Proof**

The three-judge court denied preclearance to Georgia's senate plan for the unexceptional reason that "the state has not met its burden of proof" of showing that the reduction in black population in SDs 2, 12, and 26 "does not have the effect of

---

[4]Whites were also elected in two other majority black senate districts, SDs 22 and 36.

worseningminority voters' opportunities to effectively exercise their voting rights." *Georgia v. Ashcroft*, 195 F. Supp. at 93. The expert testimony the state presented "was woefully inadequate" and did not support a contrary holding. *Id.*

Among the defects in the "equal opportunity" analysis performed by the state's expert, Prof. Epstein, were (a) his erroneous reliance solely on statewide, as opposed to region or district specific, data,[5] (b) his failure to acknowledge the range of statistical variation in his estimate of the black percent needed to provide an equal opportunity to elect,[6] (c) his use of analyses that were marred by errors in "coding" that affected his conclusion,[7] and (d) his use of a method of analysis (probit analysis) that failed to account for variations in levels of racial polarization.[8] The court concluded that Epstein's analysis was "all but irrelevant." *Georgia v. Ashcroft*, 195 F.Supp.2d at 81.

Prof. Epstein also failed to take into account the "chilling" effect upon black political participation, and the "warming" effect upon white political participation, caused by the transformation of a majority black district into a majority white district. Once a district is perceived as no longer being

---

[5]Prof. Epstein calculated one "equal opportunity number" and insisted that "there was no need to perform regional analysis." 195 F.Supp.2d at 65. But as the three-judge court held, "despite the importance of such information to the Section 5 inquiry, plaintiff has provided the court with no competent, comprehensive information regarding white crossover voting or levels of polarization in individual districts." *Id.* at 88.

[6]Despite the fact that the white crossover voting calculated by Prof. Epstein ranged from 24.73% to 57.39%, he did not consider this range to be "statistically significant." 195 F.Supp.2d at 66.

[7] Prof. Epstein, for example, "coded" incumbent Representative Cynthia McKinney as a non-incumbent running for an open seat, and failed to code white incumbent Senator Meyer von Bremen as an incumbent. 195 F. Supp. 2d at 81.

[8]195 F.Supp.2d at 88. The three-judge court in *Colleton County v. McConnell*, 201 F.Supp.2d at 643, similarly rejected Prof. Epstein's "equal opportunity" probit analysis, which it described as "a new technique . . . which he professes to have pioneered."

majority black, black candidacies and black turnout are diminished, or "chilled," while white candidacies and white turnout are enhanced, or "warmed." *See Colleton County v. McConnell*, Supplemental Report of Prof. James W. Loewen, p. 2 ("[s]ocial scientists call the political impact of believing that one's racial or ethnic group has little hope to elect the candidate of its choice the 'chilling effect'"). A formerly majority black district, particularly one without a black incumbent, would not be expected to "perform" in the same way after being transformed into a majority white district.

The statistical analysis performed by Professor Richard Engstrom, the expert witnesses for DOJ, in contrast to that presented by Prof. Epstein, "clearly described racially polarized voting patterns in Senate Districts 2, 12 and 26." *Georgia v. Ashcroft*, 195 F.Supp.2d at 69. The court further found that the levels of polarized voting in the redrawn districts would be "high," and that the state "has presented no evidence to suggest otherwise." *Id.* at 86.

Aside from the statistical analysis presented by Prof. Engstrom, including the evidence of racially polarized voting, and the degree of white crossover voting, the three-judge court relied upon the lay testimony proffered by the parties of the effect of the proposed plans on the ability of minority voters to exercise their electoral franchise. *Georgia v. Ashcroft*, 195 F.Supp.2d at 80, 88-91. After "a searching review of the record," the court properly concluded that "the State has not met its burden of proof." *Id.* at 93. There is no basis for conflating, as the state attempts to do, the court's careful, reasoned opinion with "ratcheting" or a standard of black maximization. The state simply failed to carry its burden of proof that proposed SDs 2, 12, and 26 were not retrogressive.

IV. **The Red Herring Of Minority Influence**

The state argues that "the supermajority districts demanded" by the three-judge court "necessarily diminish African American voter influence in other districts." Brief of Appellants, p. 36. The court did not, of course, demand the creation of supermajority districts but instead approved the construction of districts that significantly reduced the

preexisting black VAP. More important, aside from raising a theoretical objection, the court held that the state "has failed to present any such evidence" that the decrease in black voting power in SDs 2, 12, and 26 would be offset by gains in other districts. 195 F.Supp.2d at 88. The state's minority influence theory fails as a matter of proof.

In addition, the Section 2 standard which the state argues (erroneously) should be applicable in this case by its express language protects the equal right of minorities "to elect" candidates of their choice, 42 U.S.C. § 1973(b), and not simply the right to influence the outcome of elections. In light of the plain language of the statute, this Court has consistently held that Section 2 guarantees the right "of a protected class to elect its candidates of choice on an equal basis with other voters." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993). *See also Thornburg v. Gingles*, 478 U.S. 30, 88 (1986) ("minority voting strength is to be assessed solely in terms of the minority group's ability to elect candidates it prefers") (O'Connor J., concurring). Thus, the very standard which the state argues should be applied to this case refutes its claim that influence is a substitute for the ability of minorities to elect candidates of their choice.

Minority influence theory, moreover, is frequently nothing more than a guise for diluting minority voting strength. Members of the Georgia legislature, for example, opposed the creation of a majority black congressional district in 1981 on the grounds that black political influence would be diminished by "resegregation," "white flight," and the disruption of the "harmonious working relationship between the races." *Busbee v. Smith*, 549 F. Supp. 494, 507 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983). The three-judge court, in denying Section 5 preclearance of the state's congressional plan, found that these reasons were pretextual and that the legislature's insistence on fragmenting or disbursing the minority population in the Atlanta metropolitan area was "the product of purposeful racial discrimination." *Id.* at 517.

Here, the state seeks once again to disperse the black population, this time in the Albany, Macon, and Savannah areas. The pretext for doing so, according to the state's argument in this Court, was to enhance minority "influence."

Brief of Appellant, p. 36. But it is unrefuted in the record that the real reason for fragmenting the black vote was to enhance the opportunities of Democrats, particularly white Democrats. 195 F.Supp.2d at 91-2. Senator Robert Brown, the black incumbent from SD 26, for example, consented to the reduction in black population in his district "in order to assist neighboring white Democratic incumbents." *Id.* at 92.

Linda Meggers, the state's chief demographer, testified that the redistricting process was driven by partisanship. To enable it to draw Democrat-friendly districts, the Democratic controlled legislature developed sophisticated "political performance data" that allowed it to determine how a proposed district might vote in future elections based upon its performance in prior elections. 195 F.Supp.2d at 41. The goals of the Democrats were to protect incumbents and "increase the number of Democratic seats" by reducing, or not "wasting," the black votes in existing majority black districts. *Id.* The intensely partisan nature of the redistricting is further evident from the fact that not a single Republican in either the house or senate voted in favor of the enacted plans. 195 F.Supp.2d at 41.

Partisan rancor is also evident from the fact that Governor Sonny Perdue, a Republican, is now openly feuding with Attorney General Thurbert Baker, a Democrat, over whether to withdraw the instant appeal pending in this Court. In a lawsuit recently filed in state court, the governor has sued the attorney general arguing that the governor has the authority to withdraw the appeal and demanding that the appeal be dismissed. According to the governor, "further prosecution of the pending appeal is *not* in the best interest of the people of the State of Georgia and . . . the pending appeal should be dismissed." *State of Georgia v. Thurbert E. Baker*, No. 2003 CV 66239 (Sup. Ct. Fulton Cty., Ga. Feb 28, 2002), Verified Complaint, p. 19. If the governor prevails in his law suit, this appeal would presumably be dismissed. But in any case, the partisan nature of the redistricting refutes the state's claim that its goal was merely to increase minority influence.

A. **Black Legislative Support Cannot Excuse**

Retrogression

The state's demographer, Ms. Meggers, said that most of the black senators went along with the Democrats' plan because if the Democrats failed to control the house and senate, "all existing African American chairs of committees would be lost." 195 F.Supp.2d at 42. Black legislative support of the Democrats' plans was not unanimous, however. Two black caucus members voted against the house and senate plans, Senator Regina Thomas and Representative Dorothy Pelote, both of whom were from the Savannah area. *Id.* at 41, 55.

The three-judge court concluded that the support of the state's plan by black incumbents could not justify a retrogression in minority voting strength. As the court held:

> A vote for legislation is almost always a compromise of some sort, motivated by a complex intersection of self-interest and external pressure. A court that tries to unpack these forces, and assign probative weight to them, treads a treacherous path. Accordingly, we are loath to rely on testimony regarding the nature of legislative trade-offs, or on post-hoc expressions of doubt on the part of legislators who nevertheless voted for the contested plan. Certainly, as it relates to the plan's possible retrogressive effect, this is dubious evidence indeed.

195 F.Supp.2d at 89. *See also, id.* at 101 ("that Georgia's African American politicians sought to make their state safer for Democratic candidates does not establish (or even imply) that in so doing they did not make it worse for African American voters") (Edwards, Circuit Judge, concurring)).

Section 5 of the Voting Rights Act was enacted, as the court correctly concluded, to protect minority voters from a retrogression of their voting strength, and not to protect incumbents or "to safeguard the electoral fortunes of any particular political party." 195 F.Supp.2d at 93. In addition, for a court to grant preclearance to a voting change for the reason

that it protected particular incumbents or advanced the interests of a particular political party, would violate the court's obligation to act "circumspectly, and in a manner 'free from any taint of arbitrariness or discrimination.'" *Connor v. Finch*, 431 U.S. 407, 415 (1977) (*quoting Roman v. Sincock*, 377 U.S. 695, 710 (1964)). While a court may acknowledge or follow traditional state districting principles, it does not possess the power to reconcile conflicting state policies on the electorate's behalf or advance a particular political agenda. *Id.* The support of black legislators for a partisan plan that diminishes black voting strength cannot shield the plan from an objection under Section 5.

V. The State's Section 2 Approach Has Been Rejected by this Court

In *Reno v. Bossier Parish School Bd.*, 520 U.S. 471 (1997), the Court specifically rejected the contention made by the state here, that Section 2 results analysis should be imported into Section 5. Brief of Appellant, p. 34 (arguing that "Section 5 cannot . . . be applied to require results . . . beyond what § 2 permits"). The Court noted that Sections 2 and 5 "impose very different duties upon the States," and to apply Section 2 results analysis to Section 5 "would contradict our longstanding interpretation of these two sections of the Act." 520 U.S. at 477. The Court further held that "the burden on judicial resources might actually increase if appellants' position prevailed because § 2 litigation would effectively be incorporated into *every* § 5 proceeding." *Id.* at 485.

Between 15,000 to 24,000 administrative Section 5 submissions are made each year, not counting declaratory judgment actions filed in federal court. U.S. Department of Justice, Civil Rights Division, *Voting Section, Section 5 Changes by Type and Year, 1965-2002.* Were each of the submissions required to be analyzed under a full Section 2 equal opportunity, or discriminatory results, analysis the work of the Department of Justice and the courts would be significantly increased.

Under the state's Section 2 approach, each submitting jurisdiction would presumably be required to prove that its

proposed change, no matter how seemingly minor or routine, did not result in discrimination by showing the absence of the various factors identified in *Thornburg v. Gingles*, 478 U.S. 30, 44-5 (1986), as probative of minority vote dilution, *e.g.*, racial campaign appeals, the extent of minority office holding, the existence of racial bloc voting, depressed socio-economic, status, etc. Each submission would presumably have to be resolved under the "totality of circumstances" approach required in Section 2 cases. *Johnson v. De Grandy*, 512 US. 997 (1994). Abandoning the retrogression standard of Section 5, which in the vast majority of submissions involves a relatively simple comparison of a proposal with a benchmark, in favor of the state's Section 2 "totality of circumstances" approach, would burden the Section 5 process. As in *Reno v. Bossier Parish School Bd.*, the state's Section 2 approach should be rejected here.

VI. The State's View of Georgia's Reapportionment History Is Selective and Truncated

The state acknowledges in its brief the importance of "Georgia's reapportionment history" in resolving the issues presented in this case, Brief of Appellant, p. 7, but in its constricted view that history did not begin until 1991. According to the state, "Georgia's current legislative redistricting can only be understood by looking at the preceding redistricting of 1991-92." *Id.* To the contrary, legislative redistricting and the operation of Section 5 can only be understood by looking at the entire history of discrimination, backsliding, and racially polarized voting that have characterized the political process in Georgia. *See City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973) (denying preclearance and reciting the history of racial segregation, bloc voting, and discrimination); *Busbee v. Smith*, 549 F. Supp. at 517(same).

The history of discrimination in voting in Georgia was succinctly summarized by Justice Ginsburg in her dissenting opinion in *Miller v. Johnson*, 515 U.S. 900, 936-38 (1995), and need not be repeated here. Amicus would simply add that the amount of litigation required to enforce minority voting rights in Georgia has, by any estimate, been extraordinary.

The state's statewide redistricting plans have been a constant subject of Section 5 objections and litigation. The Attorney General objected to the state's 1972 house redistricting plan because it contained a variety of practices that had the clear potential for diluting black voting strength. *Georgia v. United States*, 411 U.S. 526, 530 (1973). The Attorney General objected to the state's senate plan because of the potentially discriminatory way in which districts had been drawn in Fulton and Richmond Counties. *United States v. Georgia*, 351 F. Supp. 444, 445 (N.D.Ga. 1972). The state's congressional plan was denied preclearance because it fragmented the black population in the Atlanta area and excluded from the fifth district the residences of blacks who were known to be potential candidates (Andrew Young and Maynard Jackson). *Bacote v. Carter*, 343 F. Supp. 330, 331 (N.D.Ga. 1972); *Busbee v. Smith*, 549 F. Supp. at 500.

The court denied preclearance to Georgia's 1980 congressional plan after finding evidence "of racially discriminatory intent," and made the express finding that the chair of the house reapportionment committee "is a racist." *Busbee v. Smith*, 549 F. Supp. at 500, 517. The Attorney General also objected to the state's house and senate plans because they fragmented concentrations of black population in several areas of the state--DeKalb, Richmond, and Dougherty Counties. William Bradford Reynolds to Michael Bowers, Feb. 11, 1982.

At the local level, from 1974-1990 some 57 counties and 40 cities in Georgia were sued over their use of at-large elections, and in nearly every case some form of district elections was the result. McDonald, Binford & Johnson, "Georgia," p. 79. Most of the cases were settled, but in those that went to trial the courts made extensive findings of the factors showing minority vote dilution and the need for creating effective majority-minority districts.

In *Paige v. Gray*, 437 F. Supp. 137, 153-58 (M.D.Ga. 1977), for example, a successful challenge to at-large elections in Albany, the court found that: the city functioned "in every respect . . . as a racially segregated community;" schools, voting, the library, the city auditorium, tennis courts, swimming

pools, public housing, juries, municipal employment, taxicabs, theaters, and city busses were segregated; the Democratic party was "in the hands of an all-white committee;" the black community "has just never had the opportunity or been permitted to enter into the political process of electing city commissioners;" the at-large system was "winner take all" and was unconstitutional. The other counties and cities in Georgia shared a common history of discrimination. For a fuller discussion of this history and voting rights litigation in Georgia, *see* Laughlin McDonald, *A Voting Rights Odyssey; Black Enfranchisement in Georgia* (Cambridge: Cambridge U. Press, 2003).

The *entire* history of discrimination in Georgia, and not just the 1990s redistricting, needs to be taken into account in determining the retrogressive effect of the state's senate plan.

VII. **Private Parties Should Be Allowed to Intervene in Section 5 Preclearance Actions**

The state's claim that "[n]ot 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," Brief of Appellants, p. 41, reflects an ignorance of the dual enforcement mechanism of the act established by Congress. In *Allen v. State Board of Elections*, 393 U.S. 544, 554-55 (1969), the Court acknowledged a private cause of action to enforce the very provision of the act at issue here, Section 5. Speaking of the original 1965 act, the Court noted that "[t]he Voting rights Act does not explicitly grant or deny private parties authorization to seek a declaratory judgment that a State has failed to comply with the provisions of the Act." Despite that, the Court held that such a cause of action was "implied" because the act was "passed to protect a class of citizens." *Id.* at 557. The Court concluded that "[t]he achievement of the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." Id. at 556. The Court found in addition that because the "Attorney General has a limited staff . . . . [i]t is consistent with the broad purpose of the Act to allow individual citizens standing to insure that his city or county government complies

with the § 5 approval requirements." *Id.* at 556-57.

Following the decision in *Allen*, Congress amended and extended the Voting Rights in 1970, 1975, and 1982 and made it clear that a private cause of action to enforce the act was not simply implied but is expressly sanctioned. The House report that accompanied the 1970 extension cited *Allen* with approval, noted "the need for private policing," and concluded that "private persons have authority to challenge the enforcement of changed voting practices and procedures." H.R. Rep. No. 397, 91st Cong., 2d Sess. 8 (1970), reprinted in 1970 U.S. Code Cong. & Adm. News 3277, 3284.

When it amended and extended the Voting Rights Act in 1975, Congress once again expressly provided for private enforcement. Section 3 of the act as originally enacted in 1965 provided for the appointment of federal examiners and other special procedures in actions brought "under any statute to enforce the guarantees of the fifteenth amendment" by the Attorney General. *See* 79 Stat. 437. The 1975 amendments authorized the bringing of such enforcement actions by "the Attorney General *or an aggrieved person*." 42 U.S.C. § 1973a (emphasis added). Congress made it clear that the purpose of the amendment was to provide dual enforcement of the act by both the Attorney General and private parties. According to the Senate report:

> In enacting remedial legislation, Congress has regularly established a dual enforcement mechanism. It has, on the one hand, given enforcement responsibility to a governmental agency, and on the other, has also provided remedies to private persons acting as a class or on their own behalf. The Committee concludes that it is sound policy to authorize private remedies to assist the process of enforcing voting rights.

S.Rep.No. 94-295, 94th Cong., 1st Sess. 40 (1975), reprinted in 1975 U.S. Code Cong. & Adm. News 807.

The legislative history of the 1975 amendments is filled

with references to the importance of private enforcement and the need to afford private parties the same remedies the act affords to the Attorney General. *See*, *e.g.*, 121 Cong. Rec. 16268 (statement of Rep. Drinan) (noting the necessity to "provide a dual enforcement mechanism in the voting field"); *id.* at 16915 (statement of Rep. Rangel) (stressing the importance of private enforcement of the act). When President Ford signed the 1975 amendments into law, he highlighted the importance of private rights of action:

> [T]his bill will permit private citizens, as well as the Attorney General, to initiate suits to protect the voting rights of citizens in any State where discrimination occurs. There must be no question whatsoever about the rights of each eligible American, each eligible citizen to participate in our elective process. The extension of this act will help ensure that right.

President's Remarks Upon Signing the Voting Rights Act Extension Into Law, 11 Weekly Comp. Pres. Doc. 837 (Aug. 6, 1975).

Congress amended and extended the act again in 1982 to provide, among other things, a discriminatory "results" standard for suits under Section 2. *See Thornburg v. Gingles*, 478 U.S. at 35. In doing so, the Senate report that accompanied the 1982 amendments, citing *Allen* with approval, "reiterates the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965." S.Rep. No. 417, 97th Cong., 2d Sess. 30 (1982), reprinted in 1982 U.S. Code Cong. & Adm. News 208(1982). The House report is to the same effect. It provides that "citizens have a private cause of action to enforce their rights under Section 2." H.R.Rep. No. 97-227, 97th Cong., 1st Sess. 32 (1981).

In *Morse v. Republican Party of Virginia*, 517U.S. 186, 239 n. 40 (1996), this Court acknowledged a private right of action to enforce § 10 of the act, 42 U.S.C. § 1973h, which authorizes "the Attorney General" to institute action in the name of the United States to enjoin enforcement of any requirement of the payment of a poll tax as a precondition for

voting. The Court discussed in detail the legislative history of various amendments of the act and concluded that their "purpose . . . was to provide *the same* remedies to private parties as had formerly been available to the Attorney General alone." 517 U.S. at 233 (emphasis added).

Thus, whenever private enforcement has been an issue, whether in enforcing Section 2, Section 3, Section 5, or Section 10, the right of a private cause of action, and private participation, has been recognized. The state's complaint that it "should not be subjected to the political strategems of intervenors wearing the mantle of private attorneys general," Appellant's Brief, p. 42, is unavailing. Congress intentionally established a dual enforcement mechanism for Section 5 to provide minorities an opportunity to participate in the preclearance process.

A. **Intervention Should Be Encouraged and Is Routinely Granted**

Given the broad purpose of the Voting Rights Act to secure equal political participation, and the importance of reliable decisionmaking, intervention should be encouraged in Section 5 preclearance actions. Intervenors, unlike the United States, include residents and voters of a submitting jurisdiction and are therefore in a special position to provide the trial court with a local appraisal of the facts and circumstances involved in the litigation. In *County Council of Sumter County v. United States*, 555 F.Supp. 694, 697 (D.D.C. 1983), for example, the court allowed black citizens to intervene in a voting rights suit in part specifically because of their "local perspective on the current and historical facts at issue." Indeed, it is no doubt because intervention brings a "local perspective" to the litigation that the state in this case seeks so adamantly to exclude it.

Intervention in voting cases is appropriate for the further reason that while the interests of the United States and private parties may often be congruent, they are frequently divergent. In *City of Lockhart v. United States*, 460 U.S. 125, 130 (1983), for example, the minority intervenors presented the sole argument in the Supreme Court on behalf of the appellees; no argument was presented on behalf of the United States. In

Blanding v. DuBose, 454 U.S. 393, 398-399 (1982), minority plaintiffs, but not the United States, appealed and prevailed in the Supreme Court in a voting rights case involving the method of electing a county government in South Carolina. And in *County Council of Sumter County*, 555 F.Supp. at 696, the United States and minority intervenors took opposite positions regarding the application of Section 2 to Section 5 preclearance.

Intervention in Section 5 cases is governed by the same standards as in any other case. In *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10 (1972), the Court held that when a party to an existing suit is obligated to serve two distinct interests, which, although related, are not identical, another with one of those interests should be entitled to intervene. The test for determining the propriety of intervention is whether each of the dual interests "always dictate precisely the same approach to the conduct of the litigation." *Id.* at 539. The interests of intervenors in litigation such as this are sufficiently different from those of the United States to justify intervention. The United States must represent the interests of its citizenry generally, including the interests of state defendants. Given the divergence of intervenors' interests from those of the United States, and the examples from other voting cases in which the United States has failed to represent---or even opposed--the interests of minority voters, intervention should be liberally allowed.

For this and other reasons, timely intervention in Section 5 preclearance and Section 4(a) bailout actions in the District of Columbia court has been routinely granted. *See, e.g., Busbee v. Smith*, 549 F.Supp. at 518; *City of Lockhart v. United States*, 460 U.S. at 129; *City of Port Arthur, Texas v. United States*, 517 F.Supp. 987, 991 n.2 (D.D.C. 1981), *aff'd*, 459 U.S. 159 (1982); *City of Richmond, Virginia v. United States*, 376 F.Supp. 1344, 1349 n.23 (D.D.C. 1974) *vacated and remanded on other grounds*, 422 U.S. 358 (1975); *Beer v. United States*, 374 F.Supp. 363, 367 n.5 (D.D.C. 1974), *vacated and remanded on other grounds*, 425 U.S. 130 (1976); *Commonwealth of Virginia v. United States*, 386 F.Supp. 1319, 1321 (D.D.C. 1974), *aff'd*, 420 U.S. 901 (1975); *City of Petersburg, Virginia v. United States*,

354 F.Supp. 1021, 1024 (D.D.C. 1972) , *aff'd*, 410 U.S. 962 (1973), and *aff'd sub nom. Diamond v. United States*, 412 U.S. 901 (1973); *Commissioners Court of Medina County, Tex. v. United States*, 683 F.2d 435, 438 (D.D.C. 1981); *Bossier Parish School Bd. v. Reno*, 7 F. Supp.2d. 29, 31 (D.D.C. 1995) , *aff'd*, 528 U.S. 320 (2000); *State of Texas v. United States*, 802 F. Supp. 481, 486 (D.D.C. 1992); *State of Texas v. United States*, 866 F. Supp. 20, 21 (D.D.C. 1994).

B. **The State's Legal Analysis Is Seriously Flawed**

The state not only ignores the dual enforcement scheme for enforcing the Voting Rights Act, but it distorts the cases it relies upon beyond recognition. It erroneously claims that *Apache County v. United States*, 256 F. Supp. 903 (D.D.C. 1966), a Section 4(a) bailout action, stands for the proposition that "intervention [is] inappropriate because of the Attorney General's unique statutory role." Brief of Appellant, p. 41. While the court denied intervention based on the particular facts involved, it held that "the court has discretionary authority to permit intervention by applicants offering to provide evidence or argument concerning the facts the court must determine in arriving at its declaratory judgment." *Id.* at 908. The state similarly misstates the holding in *Morris v. Gressette*, 432 U.S. 491 (1977), *i.e.*, that "§ 5 preclearance determinations have no place for participation by third parties." Brief of Appellant, p. 41. The Court made no such statement and held only that there was no judicial review of the Attorney General's failure to object to a proposed voting change. *Id.* at 504-05.

The state's reliance upon *Georgia v. Reno*, 881 F. Supp. 7 (D.D.C. 1995), *aff'd sub nom. Brooks v. Georgia*, 516 U.S. 1021 (1995), is also misplaced. There is not a single word in the trial court's opinion dealing with intervention. This Court's summary affirmance of a decision which makes no mention of intervention can hardly be construed as "agree[ment] with appellant's opposition to intervention." Brief of Appellants, p. 41. Similarly, in *NAACP v. New York*, 413 U.S. 345, 369 (1973), the Court upheld the denial of intervention on the ground that "the motion to intervene was untimely." But there is no suggestion or hint in the opinion that intervention was inherently inappropriate. Indeed, the Court expressly held that

the applicants for intervention "were free to renew their motion to intervene" at a future date. *Id.* at 368. The applicants did in fact renew their motion for intervention and it was granted by the district court, *New York State v. United States*, 65 F.R.D. 10, 12 (D.D.C. 1974), a fact which the state conveniently fails to bring to the attention of the Court.

C. **Intervenors Have a Preeminent Interest in Preclearance**

The state makes the truly extraordinary claim that minority intervenors have no "interest" in the Section 5 preclearance process. Brief of Appellant, p. 42. To the contrary, as members of the very group for whose protection Section 5 was enacted, no one could have a greater "interest" in preclearance than intervenors.

The state also errs in arguing that no right of intervenors is "impeded" because they can always challenge a precleared voting change under Section 2. Brief of Appellants, pp. 41 n.11, 43. The state fails to note that the ability to challenge a voting practice on retrogression grounds does not exist under Section 2. In addition, the burden of proof is on the submitting jurisdiction under Section 5, but is upon minority plaintiffs in a Section 2 "results" case. Once a voting change is precleared, a presumption of legality attaches and minority rights and interests are by definition impeded.

Diamond v. Charles, 476 U.S. 54 (1986), upon which the state relies for its argument that intervenors have no interest or "claim" is completely inapposite. In *Diamond*, the Court merely held that "a private party whose own conduct is neither implicated nor threatened by a criminal statute has no judicially cognizable interest in the statute's defense." *Id.* at 56. As Justice O'Connor elaborated in her concurrence, the intervenor had no claim or defense because "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.* at 77. Here, of course, intervenors, as members of a group protected by the Voting Rights Act, *do* have an interest that would permit them to sue the State of Georgia in

an action challenging its senate plan sharing common questions of law or fact with those at issue in this litigation. *Diamond* in fact indicates the propriety of intervention here. The state, although unwittingly, concedes as much by noting that intervenors could challenge a precleared plan in a separate action under Section 2. Intervenors have both an interest and a claim sufficient to support intervention.

CONCLUSION

For the foregoing reasons, amicus respectfully suggests that the judgment of the three-judge court be affirmed.

Respectfully submitted,

LAUGHLIN MCDONALD
Counsel of Record
NEIL BRADLEY
BRYAN SELLS
MEREDITH E. B. BELL
American Civil Liberties
Union Foundation
2725 Harris Tower
233 Peachtree Street
Atlanta, GA 30303
(404) 523-2721

ELAINE R. JONES
Director-Counsel

NORMAN J. CHACHKIN
DEBO P. ADEGBILE
NAACP Legal Defense
and Educational Fund, Inc.
99 Hudson Street, Suite 1600
New York, New York 10013
(212) 219-1900

BARBARA R. ARNWINE
THOMAS J. HENDERSON
ANITA HODGKISS
Lawyers' Committee for
Civil Rights Under Law
1401 New York Ave., N.W.
Suite 400
Washington, DC 20005
(202) 662-8600

TODD A. COX
NAACP Legal Defense
and Educational Fund, Inc
1444 Eye Street, N.W.
10th Floor
Washington, D.C. 20005
(202) 682-1300

Counsel for Amicus Curiae Georgia Coalition For The Peoples' Agenda