No. 02-182

IN THE
Supreme Court of the United States

STATE OF GEORGIA,

Appellant,

v.

JOHN ASHCROFT, Attorney General, *et al.*,

Appellees,

and

PATRICK L. JONES, *et al.*,

Appellee Intervenors.

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

BRIEF OF APPELLEE INTERVENORS PATRICK L. JONES, ROIELLE L. TYRA, GEORGIA W. BENTON, AND DELLA STEELE

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QUESTIONS PRESENTED

I. In denying preclearance of a redistricting plan under Section 5 of the Voting Rights Act, did the district court correctly refuse to substitute Appellant's Section 2-based "point of equal opportunity" analysis for the established Section 5 retrogression analysis?

II. Is the retrogression analysis established by this Court under Section 5 of the Voting Rights Act constitutional?

III. Does Section 5 of the Voting Rights Act preclude the district court from applying Federal Rule of Civil Procedure 24 to permit intervention by interested minority voters in a judicial preclearance action?

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STATUTORY PROVISIONS INVOLVED

This appeal involves Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. Pursuant to the theory articulated by Appellant State of Georgia ("Appellant"), this appeal also involves Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973.

STATEMENT OF FACTS

GEORGIA'S 2001 REAPPORTIONMENT: After the release of the 2000 decennial census figures in March 2001, Appellant, and most other states, began the process of redistricting its Congressional and state legislative districts. While all state redistricting plans must comport with the Constitutional principle of "one person, one vote" and the requirement of equal electoral opportunities under Section 2 of the Voting Rights Act, Congress imposed an additional requirement upon jurisdictions with egregious histories of discriminatory voting practices. Determining that it was necessary for such jurisdictions to prove, by way of a federal preclearance process, that changes in voting laws or practices were not simply new ways of discriminating or "backsliding" from previous gains in minority voting rights, Congress passed Section 5 of the Voting Rights Act.

Section 5 imposes upon covered jurisdictions the burden of proving that their proposed changes in voting laws or practices do not have the purpose, and will not have the effect, of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 42 U.S.C. § 1973c. In meeting this burden, Section 5 requires jurisdictions to demonstrate that their proposed changes do not "retrogress," or worsen, the ability of minorities to participate in the electoral process and to elect their candidates of choice. Section 5 applies to a number of individual cities and counties throughout the country, but it applies on a statewide basis to only nine states. Appellant is one of those states and therefore faces a hurdle that most

states do not in devising and implementing its statewide redistricting plans.

In violation of its Section 5 obligation,[1] the General Assembly and the then-Governor of Georgia ignored the demographic changes documented by the new census and gerrymandered minority voters in order to maximize the political power of the Democrat party. The General Assembly passed, and the Governor approved, three separate redistricting plans: one for Georgia's Congressional districts, one for the State House of Representatives, and one for the State Senate.[2] When compared to the last legally enacted and precleared plans in place, the so-called "benchmark plan," all three plans demonstrated a marked decrease in the percentage of black voting age population ("BVAP") and the percentage of black registered votes ("BREG") in majority-minority districts, even though the 2000 figures showed that BVAP and BREG increased in Georgia over the preceding decade. (Int. Exs. 1, 2, 8, 9, 18 and 19).[3]

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1. A visual review of Appellant's maps of the Congressional, House and Senate plans shows that Appellant also disregarded traditional redistricting criteria, such as geographic compactness and the preservation of political subdivisions and precinct boundaries, to achieve its partisan goals. Plainly, even a cursory examination of Appellant's maps shows that the uncouth and bizarre districts described by Justice Stevens in *Karcher v. Daggett*, 462 U.S. 725, 762 (1983), abound. (Int. Ex. 2, 9, 19).

2. The State Senate redistricting plan was approved by the Georgia Senate on August 10, 2001, and by the Georgia House of Representatives on August 17, 2001. The State House redistricting plan was passed by the Georgia House of Representatives on August 29, 2001 and by the Georgia Senate on September 6, 2001. The Congressional redistricting plan was passed by both houses of the Georgia General Assembly on September 28, 2001.

3. In this Brief, citations are to the Jurisdictional Statement of Appellant, State of Georgia, filed July 31, 2002 ("J.S."); to the transcripts from the trial and closing arguments before the United States District Court for the District of Columbia, held on February 4-8, 2002 and February 26, 2002, respectively ("Tr."); to the trial exhibits submitted by Appellant (Cont'd)

Nowhere were the decreases in BVAP and BREG in majority-minority districts more egregious than in the State Senate plan ("the first Senate plan"). While the benchmark plan had thirteen districts with black population ("BPOP") above 59%, the first Senate plan contained only seven such districts. The decrease in BVAP in the plan was even more significant. In the benchmark plan, 12 districts had a BVAP of more than 54%; the first Senate plan contained only seven such districts. Of the remaining six districts, all had a BVAP of less than 52%. In eight of the twelve districts, the BVAP decreased by more than 10%. (Pl. Ex. 1A; Int. Ex. 2; Int. Ex. 30; Int. Ex. 32). Indeed, as noted by the district court, the first Senate plan included four districts in which the BVAPs were reduced to "bare majorities," although the benchmark BVAPs for those districts ranged from 55.43% to 62.45%.[4] (J.S. 113a-114a).

Similarly, although the benchmark Senate plan contained 13 districts in which the BREG was 52% or higher, the first Senate plan contained only seven such districts. Of the remaining six districts, the BREG in five of the districts (Districts 2, 12, 22, 26 and 34) decreased to less than 50%, and in the sixth (District 15) the BREG was just 50.25%. (Pl. Ex. 1A; Int. Ex. 2; Int. Ex. 30; Int. Ex. 32).

(Cont'd)

("Pl. Ex."), by Appellee United States ("U.S. Ex.") and by Appellee Intervenors Jones, Tyra, Benton and Steele ("Int. Ex."); to the deposition testimony of witnesses ("Depo., page: lines"); to Appellee Intervenors' Motion to Dismiss Appeal or, in the Alternative, to Affirm Summarily ("Int. Motion to Dismiss"); and to the brief of Appellant to this Court ("App. Brief").

4. Similarly, unnecessary BVAP reductions in majority-minority district were made in the State House and Congressional plans. Because the General Assembly converted the House plan from 180 single-member districts to a plan containing both multi-member and single-member districts, it is difficult to assess the precise decrease in minority voting strength. However, it is clear that the House plan contains seven majority-minority districts in which BVAP was reduced. (J.S. 57a-71a). In the new Congressional plan, the BVAP in the majority-minority Fifth District was reduced from the benchmark by more than 5%. (J.S. 47a-54a).

APPELLANT'S DECLARATORY JUDGMENT ACTION FOR PRECLEARANCE: In an apparent effort to circumvent rejection by reducing the amount of expected negative public comment on the plans, Appellant took the unusual step of pursuing Section 5 preclearance through a declaratory judgment action in the United States District Court for the District of Columbia ("the district court"), rather than in an administrative proceeding before the Department of Justice ("DOJ") where public comment would have been invited. 28 C.F.R. § 51.29 (2002). Although Section 5 provides that covered jurisdictions may obtain preclearance by either route, the option of proceeding with a declaratory judgment action in the district court is rarely used because it is neither as expeditious nor as cost efficient as obtaining preclearance administratively through a DOJ proceeding. Indeed, in the 37 years since the passage of the Voting Rights Act, Appellant has *never* sought judicial preclearance of the numerous redistricting plans it has submitted, other than in one instance in which the DOJ had objected to its proposed plan. *See Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982). Despite this history, Appellant filed a declaratory judgment action in the district court on October 10, 2001, seeking preclearance of all three plans. Ironically, Appellant asserted that it was pursuing a litigation route in order to speed the process.

APPELLANT'S OBJECTIONS TO INTERVENTION: Shortly after Appellant filed its complaint, Appellee Intervenors, all African-American voters in the State of Georgia, moved to intervene as Defendants, contending that the proposed plans were not entitled to preclearance because they abridged the voting rights of minority citizens. Despite Appellant's repeated objections to intervention by Appellee Intervenors,[5] the district court ultimately

5. In total, Appellant attacked Appellee Intervenors' intervention on at least seven separate occasions. As a result, the parties briefed the intervention issue seven times, and the district court heard oral argument on the topic three times.

permitted intervention on all three plans.[6] (J.S. 214a). The district court made clear, however, that the intervention of Appellee Intervenors would not be permitted to cause a delay of the trial, scheduled to begin less than ten days after entry of the court's order. (J.S. 219a). All pretrial proceedings and the trial took place as scheduled, although the late date of the district court's order allowing full intervention limited Appellee Intervenors' ability to participate in discovery and to fully address the issue of retrogression in the three plans.

TRIAL IN THE DISTRICT COURT: On February 4, 2002, the district court began a four-day trial. Instead of presenting evidence demonstrating that the plans had neither the purpose nor the effect of reducing minority voting strength and therefore complied with Section 5, Appellant presented evidence on a different question. Because Appellant could not deny the reductions in minority voting strength evident on the face of the plans, particularly the first Senate plan, Appellant built its case around a purported Section 2, rather than Section 5, analysis. In short, Appellant's theory was, and remains, that the reductions in minority BVAP and BREG did not result in retrogression because, according to Appellant's expert and some lay witnesses, the plan provided minority voters an "equal opportunity," *i.e.*, a 50/50 chance, to elect candidates of their choice in majority-minority districts. Under Appellant's analysis, the benchmark from which to measure retrogression would not be the last legally enforceable plan, but a Section 2-based, hypothetical "point of equal opportunity" plan. To create that hypothetical plan and argue for its substitution in the retrogression analysis, Appellant relied upon: (1) a novel methodological analysis performed by its expert; (2) lay witness testimony that the minority community's candidates of choice might have

6. The district court initially denied intervention pending Appellee United States' announcement of its position on the plans. The court subsequently allowed intervention as to the state legislative plans and shortly thereafter, as to the congressional plan.

an equal opportunity of winning under the first Senate plan; and (3) the assertion that the plans had the strong support of minority legislators and, by implication, their constituents.

APPELLANT'S FAILURE TO PRESENT ADEQUATE EXPERT TESTIMONY: Appellant's expert, Dr. David Epstein, wholly failed to address the Section 5 inquiry. Rather than examining the reduction of voting strength in the new districts, Dr. Epstein focused on defining a point at which minority voters had an "equal" or "fair" opportunity to elect candidates of their choice. Not surprisingly, Dr. Epstein concluded that the first Senate plan allowed minority voters this "equal" opportunity. Dr. Epstein based his conclusion solely on what he called "probit analysis."[7] Probit analysis is not the standard methodology used in the scholarly literature or approved by any court in evaluating the retrogressive effect of redistricting plans.[8] (Int. Ex. 25a). In fact, probit analysis has never been cited by any court in any redistricting or voting rights case. The unpopularity of

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7. Probit analysis is a form of linear regression analysis that is generally applied to models in which the dependent variable is limited or categorized. It is commonly used to analyze binary dependent variables. For example, the independent variable could be the percentage of black voting age population, while the dependent variable could be limited to two options: (1) victory by the black candidate; or (2) loss by the black candidate. But because the dependent options are limited in number, the difference in values in the black population may not be as important in this type of analysis. Normal linear regression would use the variation in the independent variable (percentage of black voting age population) to provide an estimated value for the dependent variable (percentage of the vote). Probit analysis tends to minimize variations in the independent variable and does not use the known information to the fullest extent possible. Therefore, it is not a very robust method for analysis in most redistricting situations.

8. The accepted method of inferring voting behavior from aggregate information is known in the academic literature as "ecological inference." *Thornburg v. Gingles*, 478 U.S. 30, 52-53 (1986). Dr. Richard Engstrom, who testified for the Appellee United States, used this standard statistical analysis.

probit analysis in the redistricting context is well justified by the multiple problems inherent in applying it in this context. As explained by Appellee Intervenors' expert, Dr. Jonathan Katz, the probit method of analysis allows one to sweep "a lot of things under the rug that you don't see."[9] (2/6/02 Aft. sess. Tr., pp. 101-102). Primarily, probit analysis is a weak analytical tool in the redistricting context because it tends to minimize the differences in demographic and political factors between districts. Moreover, used in isolation, probit analysis is an unreliable means of assessing the probability of electing black candidates of choice. (2/6/02 Aft. sess.Tr., pp. 33-34). The analysis does not examine black turnout rate or black voting behavior at the district level, (2/6/02 Aft. sess.Tr., pp. 111-122), assumes that blacks only vote for black candidates, (2/6/02 Aft. sess. Tr. pp. 110-112), and does not account for the possibility that white crossover votes may account for a black candidate being elected.

Additionally, Dr. Epstein's analysis failed to identify the decreases in BVAP under the first Senate plan or the corresponding reductions in the ability of minority voters to elect candidates of choice. (J.S. 121a). Although the proposed plan contained six districts (of 13) in which the BVAP fell to between 50.3% and 51.5%, Dr. Epstein did not consider the effect of reducing BVAPs to these "bare majorities." (J.S. 97a). Instead, Dr. Epstein simply calculated a "point of equal opportunity" number (anything greater than 44.3% BVAP). Using that number, he identified the number of districts that he deemed majority-minority. As recognized by the district court, Dr. Epstein's application of the probit methodology in this manner "rendered his analysis all but irrelevant to the issue of retrogression."

9. Appellant's suggestion that Dr. Katz previously used probit analysis in the same manner as Dr. Epstein mischaracterizes Dr. Katz's testimony. While Dr. Epstein used probit analysis as the sole basis for his retrogression analysis, Dr. Katz testified that he had previously utilized the methodology only in conjunction with other analyses and that a probit analysis alone could not provide a basis for an opinion on retrogression. (2/17/02 Tr., pp. 99-100, 107).

(J.S. 121a). In particular, the district court criticized Dr. Epstein's failure to consider two important factors: (1) the decreases in BVAP under the first Senate plan and any corresponding reductions in the ability of minority voters to elect candidates of choice; and (2) the extent of racial polarization and white crossover voting. The district court concluded that Dr. Epstein's testimony was relevant only "insofar as it suggests that decreases in BVAP within the ranges proposed in the contested Senate districts may have a significant (if inadequately quantified) *negative* impact on the likelihood that African American voters will be able to elect their candidates of choice." (J.S. 123a) (emphasis added).

In addition to ignoring the BVAP decreases and the impact of such, Dr. Epstein conceded that he did not consider racial polarization: "the whole point of my analysis is not to look at polarization per se." (J.S. 127a). Dr. Epstein further believed that "the great advantage of using the probit analysis" is that he did not have to consider, among other things, white crossover voting. (J.S. 127a, n.39). To the extent that Dr. Epstein did consider white crossover voting, his analysis was based *entirely* on data from three statewide general elections, as opposed to data from district-wide elections. (J.S. 91a, 144a). Because the record showed that "African American candidates of choice running for State Senate seats are unlikely to receive the same levels of white crossover voting as may occur in statewide elections," the district court rejected Dr. Epstein's analysis on this issue. (J.S. 144a).

In its final analysis, the district court found that Dr. Epstein "made no attempt to address the central issue before the court: whether the State's proposal is retrogressive" and deemed his testimony "woefully inadequate." (J.S. 121a, 143a). According to the district court, the lack of information in Dr. Epstein's report rendered it useless in assessing "the expected change in African

American voting strength statewide that will be brought by the proposed Senate plan." (J.S. 121a).

Although relying heavily on Dr. Epstein's testimony during trial, counsel for Appellant conceded in his closing argument the worthless nature of Dr. Epstein's analysis: "I do not think Doctor Epstein truly, your Honor, is essential to any aspect of this case." (2/26/02 Tr., p. 60). On this point, the district court agreed, finding that Dr. Epstein's analysis, while perhaps having some relevance to a Section 2 case, was not "in any way dispositive of a Section 5 inquiry." (J.S. 119a-120a; J.S. 207a-210a).

APPELLANT'S FAILURE TO PRESENT ADEQUATE LAY WITNESS TESTIMONY: In addition to Dr. Epstein's testimony, Appellant relied upon cross-examination testimony of incumbent legislators that the electoral opportunities in the majority-minority districts, though reduced, were "equal." The testimony to that effect of incumbent Congressman Lewis, Senator Brown and then-Senator Walker contrasted sharply, however, with that of other lay witnesses. Every non-legislator citizen witness expressed grave concern that the first Senate plan would weaken minority electoral opportunities.

Many of the lay witnesses testified that the General Assembly "sacrificed" minority voters in an attempt to maintain and build a stronger Democratic majority. As examples, Appellee Intervenor Patrick Jones, who has had a long-standing interest and involvement in redistricting, testified that he saw the redistricting process as a "kind of preservation plan for white Democrats." (Jones Depo., 41:4-5). Edna Jackson, a Savannah City Council member, testified that black voters who could have been placed in Senate District 2 were sacrificed to allow more Democratic districts to be created elsewhere. (U.S. Ex. 502, ¶ 4). William Barnes, treasurer of the Bibb County Board of Education, testified that the Democrats sacrificed black voting strength to accomplish their goal of maximizing political strength.

(U.S. Ex. 516, ¶ 13). Burt Bivins, a member of the Bibb County Board of Commissioners, testified that with respect to Senate District 26, the desire to ensure Democratic strength took precedence over the need to preserve minority voter opportunity. (U.S. Ex. 517, ¶ 11). Finally, Dr. Prince Jackson, a member of the Executive Committee of the Savannah Branch of the NAACP (and now its President) testified: "Democrats in Atlanta have chosen to preserve their majority in the State Senate at the expense of African-American voters, who are getting nothing in return." (U.S. Ex. 503, ¶ 12). This testimony is consistent with the express goal of Appellant that the redistricting process be manipulated to maintain or increase Democrat membership in the Georgia Senate.

Multiple lay witnesses also testified about the difficulty that minority communities face in electing candidates of choice when the number of minority voters in a district is reduced. Appellee Intervenor Jones testified that "it is difficult, if not impossible, for most minority communities to elect candidates of choice when the district's minority voting age population . . . is less than 55%." (Int. Ex. 27, p. 2). LikeAppellee Intervenor Jones, Appellee Intervenor Steele testified that she did not believe that a minority community could elect a candidate of its choice with less than 55% BVAP. (Steele Depo., 29: 7-11). While Appellee Intervenor Steele's minority community was previously part of the majority-minority Senate District 2, the first Senate plan put her community into Senate District 4, which was not a majority-minority district. She believed that the change effectively disenfranchised her community:

> While I was once part of a majority-minority district [Senate District 2] where I could effectively use my vote to help the minority community elect a candidate of choice, my minority community and I are now part of the Fourth Senate District, where we cannot hope to elect a candidate of choice, unless that candidate happens to be the choice of the 70% white population as well.

(Int. Ex. 28, pp. 1-2). Appellee Intervenor Steele's belief that redistricting disenfranchised her led to her involvement in this case.[10] (Int. Ex. 28, p. 2). Appellee Intervenor Benton also was a resident of Senate District 2 who was placed in District 4 under the first Senate plan. She testified that "when you take us from a larger group of voting blacks, it diminishes us. You leave us paying taxes without any formal representation. You leave us paying taxation without representation. We will have none. We won't have any at all." (Benton Depo., 19:12-17).

In addition to Appellee Intervenors, other citizen witnesses throughout the state gave testimony about the discriminatory nature of the plans. In Savannah, witnesses testified to the detrimental effect of the plans, primarily in District 2 of the first Senate plan. For example, Helen Johnson, who has lived in Savannah for 43 years and is the Chief Executive Officer and Chairman of the Board of Directors of the Ralph Mark Gilbert Civil Rights Museum, testified that she wrote then-Governor Barnes and told him that Senate District 2 should not be changed "because if we lose that district, then we're going to lose some of our power or all of our power in that area." (H. Johnson Depo., 16:6-10). Richard Shinholster, who has lived in Savannah for all but two of his 60 years and who is active in the local NAACP, testified that the local chapter of the NAACP held a mass meeting regarding redistricting and determined that "the voting strength of African-Americans in Savannah, especially the second senatorial district, had been diluted." (Shinholster Depo., 9:1-8). Harris Odell and Joe Murray Rivers, both Chatham County Commissioners, and David Jones and Gwendolyn Goodman, both members of the Savannah City Council, also testified that adding predominately white areas to Senate District 2, as the first Senate plan did, would make it more difficult for African-Americans to elect candidates of their choice in that

10. Senator Regina Thomas, who represents District 2, also testified that voters such as Appellee Intervenor Steele would be disenfranchised by being moved out of the district. (Thomas Depo., 82:19-83:24).

district.[11] (U.S. Ex. 507, ¶ 6; U.S. Ex. 508, ¶ 8; U.S. Ex. 506, ¶ 5; U.S. Ex. 501, ¶ 8).

In Albany, where proposed Senate District 12 is located, lay witnesses testified that minority citizens would not be able to elect candidates of choice in the proposed district. Charles Sherrod, a leader in the Civil Rights movement in southwest Georgia and a member of the Dougherty County Commission for 14 years, testified that "black candidates [sic] will not have the opportunity to elect candidates of their choice under the proposed plan for Senate District 12. This is because the plan decreases the black voting age population figures when it was already difficult to elect a black candidate." (U.S. Ex. 510, ¶ 11). David Williams, an Albany City Commissioner for ten years and a lifelong resident of southwest Georgia, testified that the proposed Senate plan "is bad for black voters in Senate District 12 and doubly bad for black voters in Dougherty County." (U.S. Ex. 512, ¶ 4). Based on his review of voter registration information and his own experience as a candidate, Mr. Williams did not believe that a black candidate could be elected from proposed Senate District 12. (U.S. Ex. 512, ¶ 6). In addition, he believed that the plan was "doubly bad" for the black voters in Dougherty County because, under the benchmark plan, those voters were part of a majority-minority district and were represented by one senator, but under the first Senate plan some black voters would be shifted to Senate Districts 13 and 14, majority-white districts.[12] (U.S. Ex. 512, ¶ 7).

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11. Similar views were expressed by Savannah City Councilwoman Edna Jackson (U.S. Ex. 502, ¶ 10), and Dr. Prince Jackson, (U.S. Ex. 503, ¶ 19).

12. Such opinions also were expressed by Arthur Williams, (U.S. Ex. 511, ¶ 11); William Wright, a former President of the Dougherty County branch of the NAACP, (U.S. Ex. 514, ¶ 36); and John White, who served in the Georgia House of Representatives for 22 years, (U.S. Ex. 513, ¶¶ 2, 5, and 23).

In Macon, where proposed District 26 is located, the story was the same. William Barnes testified that a district with a BVAP of less than 50%, like District 26 is in the first Senate plan, "leaves black voters on a less than equal playing field." (U.S. Ex. 516, ¶ 9). Bert Bivins similarly testified that based on his personal knowledge and experience, "there is no question that proposed Senate District 26 makes it more difficult for minority voters to elect their candidates of choice." (U.S. Ex. 517, ¶ 10).

In summary, although some lay witnesses may have acknowledged a *possibility* that a minority community's candidate of choice might still win in a district with reduced BVAP or BREG, the overwhelming testimony of the lay witnesses was that the reductions in BVAP and BREG in the first Senate plan would reduce minority electoral opportunities, a result prohibited by Section 5.

APPELLANT'S ATTEMPT TO JUSTIFY RETROGRESSION: Appellant attempted to justify the obviously retrogressive first Senate plan in two ways. First, Appellant asserted that the district court should consider the allegedly overwhelming support of minority legislators for the redistricting plans as proof of non-retrogression. Second, Appellant argued that population equality among the districts required the plan to be drawn as it was.

In rejecting the first assertion, the district court found that the evidence did not show that the redistricting plans were resoundingly embraced by minority legislators.[13] (J.S. 134a-135a). Although Appellant's three minority legislator witnesses, Congressman John Lewis, then-Senate Majority Leader Charles Walker, and Chairman of the Senate reapportionment subcommittee, Robert Brown, professed satisfaction with the plans, rank and file members who represent majority-minority districts were much less

13. For reasons discussed in the Argument section, Appellee Intervenors dispute that the support of minority legislators is a relevant focus of the retrogression analysis.

enthusiastic, citing concerns from their constituents, as well as personal concerns.

Senator Horacena Tate testified that her district was the first majority-minority district in Georgia and that her constituents wanted the district "to have a certain amount of integrity and had strong feelings about how the district should look." (Tate Depo., 19:6-10). To address those concerns, she worked on a plan with the state reapportionment office, trying to devise a "map for the 38th District that I thought they would approve of." (Tate Depo., 19:14-17). However, the plan she drew, based on her understanding of her constituents' objectives, was not included in the first proposed Senate plan. (Tate Depo., 18:5-19:24 and 93:7-22). Senator Tate also noted that she did not agree with the final plan submitted by her delegation. (Tate Depo., 98:21-23). Most tellingly, when asked if she was promised anything in exchange for voting on the plan, she testified: "I was told that we would look at the — continue to watch the demographic changes in the district; and if need be, we might be able to go in and make some adjustments." (Tate Depo., 64:16 to 66:2).

Senator Vincent Fort, who represents the majority-minority Senate District 39, succinctly summarized his concerns about the first Senate plan when he addressed the Senate from the well, minutes before passage of the plan:

> I've looked at the data district by district regarding race and black voting districts. I know that ten out of thirteen of these majority black districts have lost black VAP. Eight out of thirteen have lost more than 10 percent of black VAP. And then even more importantly, there are four districts that are below 50 percent black voter registration. I don't know whether that's dilution or retrogression; that's going to be for others to decide who have more experience and learning on the issue. But the question is a valid question.

> If it's raised, one should not question the motives of those who raise it. But there is something going on here in the thirteen districts throughout the state.

(Int. Ex. 16, p. 3).[14]

After the first Senate plan passed, Senator Fort and several other minority legislators wrote to the Chairman of the Georgia Legislative Black Caucus ("GLBC") expressing their continued concerns about the plans that had passed and the lack of involvement of the GLBC in the redistricting process:

> We are concerned that the GLBC has not been involved in the redistricting process almost at all. This has resulted, among other things, in a legislative plan passing that has diluted majority-minority districts in both the House and the Senate. It is unfortunate that the organization with the expressed purpose of representing the interests of African-American Georgians has been almost silent as an organization on the redistricting process which is so important.

(Int. Ex. 17). The authors of the letter closed by demanding a GLBC meeting before the General Assembly considered the next redistricting plan, the Congressional plan. (Int. Ex. 17).

In the face of this testimony, the district court found that the evidence did not, as Appellant maintains, show overwhelming support by minority legislators for the plans. (J.S. 134a). Rather, the evidence showed only that minority legislators *voted* for the plans, not necessarily because they

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14. Senators Donzella James and Regina Thomas also noted the likely retrogressive effect of the first Senate Plan. (James Depo., 63:1-20; Thomas Depo., 82:19-83:24).

embraced them, but because they were convinced that their vote for the plans would be politically expedient. (J.S. 134-135a).

With respect to Appellant's second asserted justification for retrogression—the need to adjust for population loss in majority-minority districts—the district court found that Appellant asserted the population equality argument "without attempting to prove" it. (J.S. 124a). If Appellant's argument were true, then underpopulated majority-minority districts would have had none of their minority population removed; population would simply have been added to bring the district up to the ideal size. However, the evidence showed that minority voters were deliberately removed from underpopulated majority-minority districts and put into other districts in order to avoid, in Appellant's words, "wasting" a minority voter's vote. For example, Appellee Intervenors Benton and Steele were moved from the underpopulated majority-minority Senate District 2 to the overpopulated Senate District 4. The result was that the BVAP in already underpopulated District 2 was reduced by more than 10%. (Pl. Ex. 1A; Int. Ex. 2; Int. Ex. 32). The district court concluded that even if some BVAP reductions were inevitable,

> it certainly does not follow that Georgia was compelled to move minorities out of Districts 2, 12, and 26 to the extent that it did. Indeed, the State actually removed some majority African American precincts from each of these districts, a decision that at least casts doubt on its cries of inevitability.

(J.S. 124a). Finally, the district court noted the existence of alternative plans that it believed would have allowed compliance with the "one person, one vote" principle without moving so many African-Americans out of majority-minority districts. (J.S. 125a). The alternative plans

submitted to the Senate and to the district court prove beyond any doubt the accuracy of the court's observation.[15]

THE DISTRICT COURT'S DENIAL OF DECLARATORY JUDGMENT: None of the evidence presented by Appellant enabled the district court to find that the first Senate plan did not have the effect of denying or abridging minority citizens' right to vote. Rather, the district court recognized the first Senate plan for what it was — a gerrymander of minority voters which reduced their voting strength. Therefore, the district court denied declaratory judgment preclearing that plan.[16]

APPELLANT'S PASSAGE OF A REVISED SENATE PLAN: Following the denial of preclearance, Appellant requested that the district court retain jurisdiction and allow Appellant an opportunity to enact and submit a revised Senate plan. The district court agreed to do so, and the Georgia General Assembly promptly enacted a revised Senate plan. According to Appellant, "[t]he BVAPs and BPOPs in the revised plan were thereby increased substantially." (App. Brief, p. 7). Appellant fails to state, however, that the "substantial" increase was as judged against the rejected first Senate plan, not the benchmark plan. Judged against the benchmark plan, the BPOP and BVAP percentages in many districts are still markedly decreased.

While noting some remaining concern with the revised Senate plan, (J.S. 13a), on June 3, 2002, the district court granted declaratory judgment preclearing it. The following day, Appellant appealed the rejection of the first plan and the preclearance of the second plan.

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15. In fact, the 2003 Georgia State Senate recently passed a plan with a 2% overall population deviation that does not retrogress, that splits half the number of counties as the first Senate plan, and that follows traditional criteria.

16. The court granted preclearance of the State House and Congressional plans. (J.S. 150a).

SUMMARY OF ARGUMENT

Appellant asks this Court to do nothing less than reject more than 25 years of its Section 5 jurisprudence. A review of the Summary of Argument Section of Appellant's Brief crystallizes this point. While Appellant asks the Court to overturn a district court's decision in a declaratory judgment action brought under Section 5, the summary of Appellant's argument as to why that district court's decision is wrong fails to even use the word "retrogression." (App. Brief, pp. 28-29). In fact, Appellant's brief is virtually devoid of any reference to retrogression except when citing language from the district court's opinions which Appellant urges this Court to reject. Effectively, Appellant's brief asks the court to overturn and reject its analysis of the Section 5 retrogression standard first articulated in *Beer v. United States*, 425 U.S. 130 (1976) and consistently applied since then. Appellant argues that this Court was wrong in *Beer*, and calls into question whether Section 5 has been constitutionally interpreted for the last 27 years.

The district court carefully applied this Court's well-established retrogression standard in reaching its decision. It examined a substantial factual record, including the testimony of lay and expert witnesses, to determine whether a new election procedure—the first Senate plan—would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. After a four-day trial, the district court reached the conclusion that the state had failed to prove that the plan was not retrogressive. The court appropriately compared the existing benchmark Georgia Senate plan—which no party argued was constitutionally or legally invalid—to the first proposed Senate plan. From this comparison, the court determined that minority Georgia voters would have less opportunity to exercise their franchise effectively under the proposed plan. The first Senate plan was retrogressive because black Georgia voters, including Appellee Intervenors, would be less likely to elect

their candidates of choice in proposed Districts 2, 12 and 26, and there was no corresponding increase in black voters' opportunity to elect their candidates of choice in other Senate districts.

In denying preclearance of the first Senate plan, the district court did not require "supermajority, safe seats" in contravention of the Voting Rights Act or the Equal Protection Clause, as Appellant contends. (App. Brief, p. 28). Contrary to Appellant's characterization, the district court did not deny preclearance to the Senate plan because it "'only' afforded African Americans an equal, fair, or reasonable chance of victory." (App. Brief, p. 28). Instead, the district court, applying the clear language of Section 5 and this Court's decisions interpreting Section 5's requirements, denied preclearance because the plan was retrogressive. In refusing to substitute Appellant's purportedly Section 2-based "equal opportunity" analysis for the standard retrogression test of Section 5, the district court neither exceeded the purview of Section 5 nor caused a violation of the Equal Protection Clause.

Finally, Appellant's argument against intervention by the very citizens Section 5 was designed to protect is completely unsupported and contrary to the precedent of this Court. Having instituted litigation to obtain declaratory judgment, Appellant accepted the possibility of intervention by interested parties pursuant to Federal Rule of Civil Procedure 24. If a submitting jurisdiction chooses to bring a declaratory judgment action to obtain preclearance, as opposed to seeking administrative preclearance, the only way that interested minority citizens can participate is by intervention. Appellant's contention that "the grant of a declaratory judgment in a preclearance action does not prevent voters from pursuing any substantive claims they may have" is disingenuous. (App. Brief, p. 41 n.11). There is no alternative mechanism by which Appellee Intervenors might obtain the relief Section 5 provides, that is, the rejection of a retrogressive plan before it is implemented.

The only opportunity for a citizen to address retrogression is during the Section 5 preclearance process. Finally, Appellant's complaints that Appellee Intervenors delayed a decision, prevented the entry of consent decrees, and averted the possibility of "settlement" discussions are specious.

ARGUMENT

I. IN DENYING PRECLEARANCE OF THE FIRST STATE SENATE PLAN, THE DISTRICT COURT DID NOT REQUIRE APPELLANT TO DRAW "SAFE" MINORITY DISTRICTS, BUT INSTEAD PROPERLY INSISTED THAT APPELLANT MEET ITS BURDEN UNDER SECTION 5

In considering whether to grant declaratory judgment preclearing the first Senate plan, the district court simply applied this Court's long-established Section 5 precedent. It did not, as Appellant suggests, capitulate to the so-called "max black" DOJ policy of the 1990s, of which this Court arguably disapproved in the racial gerrymandering cases of that decade. (App. Brief, p.7). Appellant contends that the DOJ has a long history of improperly requiring high levels of minority population in majority-minority districts, that the DOJ persisted in that policy in this case, and that the district court acquiesced to that policy.[17] While this argument might have some relevance in the context of an appeal of the rejection of administrative preclearance by the DOJ (assuming such an appeal is permissible, *see Morris v.*

17. While the DOJ may have previously espoused such a policy, even a cursory review of the DOJ's position in the district court shows that such is no longer the case. In the proposed House and Congressional plans, the decrease in BVAP in many districts was severely reduced, but the DOJ raised no objections to those plans. Furthermore, although every majority-minority district in the Senate plan but one lost BVAP, the DOJ only objected to three districts. Perhaps most significantly, the DOJ approved of the revised Senate plan, even though the BVAPs in the "corrected" districts still fell far below BVAPs in the benchmark and did not exceed 56%.

Gressette, 432 U.S. 491 (1977)), it is of no relevance in this appeal from a three-judge district court decision on preclearance. Instead, this is a classic "straw man" argument.

The record does not support Appellant's contention that the district court extended the reach of Section 5 to require Appellant to draw "safe" majority-minority districts with "supermajority" minority populations. It is clear, from both the trial court's April 5, 2002 Order and June 3, 2002 Order ultimately approving a revised Senate plan, that the district court imposed no such requirement upon Appellant. (J.S. 1a-150a). Instead, the district court simply insisted that Appellant prove that the Senate plan had neither the purpose nor effect of reducing the minority community's ability to elect candidates of choice as compared to the benchmark plan.

A. The District Court's Opinion Faithfully Follows Established Section 5 Precedent

In determining whether a proposed change to a voting practice or procedure has the prohibited purpose or effect of denying or abridging the right to vote on account of race or color in contravention of Section 5, this Court has always focused exclusively on whether the proposed change has a retrogressive purpose or effect. Stated in its simplest terms, "retrogression" means a worsening in the voting rights of minority voters. *See*, *e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997) (*"Bossier Parish I"*); *Holder v. Hall*, 512 U.S. 874, 883 (1994); *City of Lockhart v. United States*, 460 U.S. 125, 135 (1983); *Beer*, 425 U.S. at 140 (1976); "Procedures for the Administration of Section 5 of the Voting Rights Act," 28 C.F.R. pt. 51 (2002); "Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c," 66 Fed. Reg. 5412 (Jan. 18, 2001). Preclearance is not warranted unless the covered jurisdiction proves that the proposed redistricting plans do not "lead to a retrogression in the position of racial

minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 140.

To determine whether minority voters are worse off under the proposed redistricting plan, a comparison is made to the benchmark plan—the plan currently in existence in the state. The district court properly compared the benchmark Senate plan to the proposed first Senate plan and came to the unavoidable conclusion that Appellant was not entitled to preclearance of the proposed plan because Appellant had failed to prove, by a preponderance of the evidence, that the plan would not have a retrogressive effect. Based upon the unrebutted credible expert testimony of the type recognized by this Court as persuasive and upon the testimony of numerous lay witnesses, the district court determined that the first Senate plan had three districts in which the likelihood of the minority candidate of choice being elected decreased.

This retrogression cannot reasonably be disputed and was not disputed before the trial court. The first Senate plan was designed to make it more likely that Democrat candidates would be elected. The political reason for this design was expressly articulated to the district court and even recognized in Judge Oberdorfer's dissent: "[t]he desire to strengthen the position of one political party relative to the other." (J.S. 210a). Appellant's method was to remove minority communities from present majority-minority districts and place them in adjoining districts, the result of which was to make it more likely that a white Democrat would be elected. While Appellant's goal is not politically illogical, its method and the result fly in the face of this Court's traditional Section 5 analysis, which focuses upon a minority community being able to elect candidates of their choice, rather than a minority citizen simply being a minority member of a coalition that elects Democrats. Appellant argued to the district court that Section 5 preclearance should be predicated not upon whether minority voters have the same ability to elect candidates of

choice in specific districts, but because most black voters are Democrats, upon the same or increased ability of Democrat candidates generally to be elected to the Georgia Senate. Appellant would have the preclearance analysis of Section 5 metamorphosed from an examination of retrogression of minority voting rights to an examination of retrogression of Democrat political power.[18] Because of racial polarization and bloc voting, the district court correctly concluded that black Georgia voters were less likely to be able to elect their candidates of choice in the first Senate plan than in the benchmark plan.

B. Section 5 Protects Important Rights, And The District Court Did Not Stretch Its Substantive Limits

The district court did not stretch the substantive limits of Section 5, as Appellant insists. Instead, the district court rejected Appellant's novel legal theory that is contrary to over 25 years of practice and precedent, as well as to the policy considerations underlying the Section 5 preclearance requirement.

Appellant states that Section 5 is an extraordinary transgression of the normal prerogatives of the state. (App. Brief, p. 31). This extraordinary restriction was passed in response to the extraordinary disregard that a few states, such as Georgia, had for the guarantees of the 14th and 15th Amendments to the United States Constitution. *See South Carolina v. Katzenbach*, 383 U.S. 301, 306 (1966). For roughly

18. It is difficult to conclude that this "max Democrat" approach was contemplated in the most recent renewal of the Voting Rights Act, which was sponsored in the Senate by then-Republican Majority Leader Senator Dole and signed by President Reagan, an action implicitly approving this Court's prior interpretations of Section 5. If this Court had any questions as to whether it had correctly interpreted Congressional intent in its prior Section 5 cases, those should have been answered by Congress's 1982 extension of the Voting Rights Act. *See NAACP v. Hampton County Election Comm.*, 470 U.S. 166, 176 (1985); *City of Pleasant Grove v. United States*, 479 U.S. 462, 468 (1987).

a century, these most fundamental rights were not just ignored in Georgia, they were actively blocked by the State. Georgia systematically frustrated its black citizens' voting rights with numerous state-constructed barriers. The Voting Rights Act was enacted to tear down those barriers, and Section 5 was designed to prevent their reconstruction. *See Bossier Parish I*, 520 U.S. at 478; *Miller v. Johnson*, 515 U.S. 900, 926 (1995).

As discussed above, Appellant drew the first Senate plan in a manner that clearly resulted in a loss of minority voting power and therefore was unable to meet the well-settled burden of proof for establishing that no "backsliding" would occur, *i.e.*, that the plan did not have the purpose and would not have the effect of reducing the ability of minority voters to elect candidates of their choice. 42 U.S.C. § 1973c. While the district court described the record as voluminous, it went on to identify the problem of Appellant's case: The record simply did not contain evidence sufficient for Appellant to meet its burden of proof. (J.S. 143a-145a). Rather than argue that the evidence it offered was sufficient to meet the Section 5 statutory burden, Appellant chose, and continues to choose, to argue for a change in that burden. (J.S. 19).

Because the district court followed this Court's well-established Section 5 jurisprudence, it did not stretch the substantive limits of Section 5. Indeed, it is the argument of Appellant that would expand the analysis required of the district court.

C. The District Court Was Neither Required Nor Permitted To Incorporate Appellant's Section 2 Based Analysis, As Section 5 And Section 2 Have Different Purposes And Standards

According to Appellant, a so-called Section 2 "equal opportunity" analysis should replace the traditional benchmark analysis of Section 5. Thus, if a plan arguably meets Section 2 requirements, it should be precleared.

Apparently, Appellant's argument is that the district court compared the first Senate plan to the wrong benchmark.[19]

The district court's use of the last legally enforceable plan as the benchmark plan is consistent with this Court's long-standing precedent and should be affirmed. The requirement that the existing redistricting plan serve as the benchmark originated with *Beer v. United States*, 425 U.S. 130 (1976), and has since been repeatedly recognized by this Court. *See Young v. Fordice*, 520 U.S. 273 (1997); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 327-29 (2000) ("*Bossier Parish II*"); *Holder*, 512 U.S. at 883 ("The proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change."). In *Bossier Parish II*, the Court made clear that the benchmark cannot be anything other than the last unchallenged legally enforceable plan: "Absent a successful subsequent challenge under Section 2, it [the existing redistricting plan], rather than the 1980 predecessor plan—which contains quite different voting districts—will serve as the baseline against which appellee's next voting plan will be evaluated for the purposes of preclearance." *Bossier Parish II*, 528 U.S. at 327-28 (addressing the issue of mootness). Pursuant to this Court's clear guidance, the District Court properly looked to the Georgia Senate plan used in the 2000 election as the benchmark in this case.

The district court discussed Appellant's argument for a replacement benchmark but rejected it: "Effectively, then, the State would have us adopt the converse of the argument rejected by the Supreme Court in the *Bossier Parish* cases. There, the Court rebuffed the claim that preclearance

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19. Appellant seems to suggest that because the DOJ played a role in the preclearance of the existing plan for the Georgia Senate (presumably by consenting to it, as Appellant did) it should not serve as the benchmark. Appellant, however, has never attempted to prove that the existing plan is unconstitutional. Indeed, the legality of the prior plan would not have been within the jurisdictional ambit of the district court, had Appellant made such an argument.

must be *denied* where a proposed plan *violates* Section 2."[20] (J.S. 112a n.35 (citations omitted) (emphasis in original)). In *Bossier Parish I*, the Court addressed whether Section 2 can be incorporated in the Section 5 preclearance process to prohibit practices which are not retrogressive but do abridge the voting rights of minorities by diluting their voting strength. 520 U.S. 471. In refusing to allow the incorporation, the Court recognized the different purposes and standards of the two sections. *Id.* at 477. The discernable standard of Section 5 allows the district court and the DOJ to do a rapid analysis in the shortened time frames that the preclearance process requires. Section 2 litigation (or for that matter, racial gerrymandering litigation), on the other hand, requires extensive expert testimony and historical evidence. Such analysis would be extremely difficult within the 60-day time frame allotted the DOJ for analyzing retrogression.

Appellant's suggestion that Section 2 should be incorporated to form a hypothetical benchmark for the measurement of retrogression is exactly what the appellants later surreptitiously attempted in *Bossier Parish II*. This Court responded: "Appellants ask us to do what we declined to do in *Bossier I*: to blur the distinction between Section 2 and Section 5 by shift[ing] the focus of § 5 from non-retrogression to vote dilution, and chang[ing] the Section 5 benchmark from that jurisdiction's existing plan to a hypothetical, undiluted plan." *Bossier Parish II*, 528 U.S. at 336.

The Section 2 and Section 5 inquiries cannot be interchanged. In *Holder*, this Court carefully explained the inapplicability of Section 5 retrogression analysis in Section 2 vote dilution cases and, conversely, the inapplicability of Section 2 vote dilution analysis in Section 5 retrogression cases. 512 U.S. at 884-85. The Court held that "[r]etrogression is not the inquiry in § 2 dilution cases," and gave a number

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20. Intervenor Appellees assert that an alteration of the standard is immaterial in this case because Appellants never put forward the type of proof necessary to prove that the plan would be an adequate remedy under Section 2.

of examples "to show that a voting practice is not necessarily subject to a dilution challenge under § 2 even when a change in that voting practice would be subject to the preclearance requirement of § 5." *Id.* (citing *Perkins v. Matthews*, 400 U.S. 379 (1971) and *McCain v. Lybrand*, 465 U.S. 236 (1984)). Under Appellant's argument for automatic preclearance of all changes that do not violate Section 2, a district court or the DOJ would be forced to perform a Section 2 analysis in every Section 5 case and be left in a conundrum when a Section 2 vote dilution analysis is not feasible. As Section 5 and Section 2 are not co-extensive in the circumstances they cover—indeed, there are numerous circumstances in which there are changes subject to Section 5 preclearance yet no reasonable or workable vote dilution analysis can be devised—the Court should not accept Appellant's invitation to interchange them.

Appellee Intervenors do not argue that a failure to meet the benchmark necessarily invalidates a plan. The benchmark simply establishes the burden and type of proof that must be provided by the jurisdiction. If a proposed change does not meet the benchmark, the jurisdiction can provide evidence to prove that voting strength less than the benchmark is not legally retrogressive. *See Bossier Parish II*, 528 U.S. at 331. As the DOJ noted in supplementary information accompanying the DOJ's procedures in Section 5 preclearance actions, 52 Fed. Reg. 487 (Jan. 6, 1987), "in the redistricting context a reduction in the number or percentage of minority voters in a particular district may have no impact on the opportunity for effective political participation." The DOJ procedure confirms that "any determination of retrogression will go beyond a simple numerical analysis to include the consideration of all factors that could be relevant to an understanding of impact of the change." 28 C.F.R. § 51.55(b)(1)(2) (2002). Appellant failed to prove that its reductions in minority voting strength did

not damage minority opportunities to elect candidates of their choice or were necessitated by other requirements.[21]

Appellant has attempted to reverse the burden of proof in a Section 5 declaratory judgment action by suggesting that if a jurisdiction asserts that its proposed plan complies with Section 2, then the defendants in the action must prove that the state's plan is not a viable Section 2 remedy. This is simply a "back door" method to attempt to replace the traditional Section 5 benchmark with a hypothetical Section 2 benchmark and thereby reverse the burden of proof. The district court correctly declined Appellant's invitation to ignore the standard established by Section 5 in favor of a new equal opportunity standard.

Appellant's citations to *City of Richmond v. United States*, 422 U.S. 358 (1975), and *United States v. Mississippi*, 444 U.S. 1050 (1980), do not support its argument for changing the Section 5 inquiry. While these cases stand for the proposition that overrepresentation of minority groups cannot be required, a comparison of the Senate benchmark plan, the first Senate plan, and the revised Senate plan precleared by the district court shows that the district court did not require "overrepresentation" of minority citizens. No party or witness even asserted that Georgia's minority voters were or would be "overrepresented" under any plan discussed in this case.[22]

Moreover, these two cases are factually distinguishable from the instant case. In *City of Richmond*, changes in the

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21. Other possible justifications, such as adherence to traditional redistricting criteria, *see* 28 C.F.R. pts. 51, 59 (2002), could not be claimed by Appellant. Alternative proposals that were before the legislature and the plan recently passed in the Senate show that Appellant could have met all traditional redistricting criteria and not retrogressed minority voting rights.

22. Following the 2000 election, the 56 member Georgia Senate contained only 11 minority senators. After the 2002 election under the revised Senate plan, the number of minority senators decreased to nine.

City's boundaries increased the percentage of white residents, resulting in a proportional decrease in the percentage of black residents in the City. 422 U.S. at 368. In this case, however, the percentage of white residents in Georgia has decreased since the 1990 Census, resulting in a proportional increase in the percentage of black residents in Georgia. Thus, unlike the City of Richmond, Appellant could not justify the first Senate plan's decrease in minority voting power on geographic or demographic changes. Neither the district court, Appellee United States, nor Appellee Intervenors dispute that the number or make-up of majority-minority districts could have legitimately been changed if there had been demographic or geographic changes which warranted the same.

Similarly distinguishable on its facts, *United States v. Mississippi* involved the decrease in BVAP in three districts in which, even under the benchmark plan, black voters could not elect a candidate of choice. 490 F. Supp. 569, 580 & n.5 (D.D.C. 1979). In contrast, Appellant took districts in which the minority community *could* elect candidates of their choice and made them districts in which, at best, it is *unclear* whether the communities can elect candidates of their choice.

Appellant's last ditch effort to convince this Court that Section 2 standards should be used in this Section 5 case is in the form of an "opening the floodgates" argument. Appellant reasons that unless the Section 2 and Section 5 burdens are exactly the same, Appellant will be subjected to Section 2 claims for "packing," and that such claims "would hardly be frivolous." (J.S. 23). While Appellee Intervenors are surprised that Appellant seems to invite a claim for Section 2 litigation, Appellant's position is not legally sound. First, the type of claim suggested by Appellant was rejected unanimously by this Court in *Voinovich v. Quilter*, 507 U.S. 146 (1993). In *Voinovich*, the Appellant argued that the creation of majority-minority districts at the expense of creating more influence districts

did not constitute "packing," and this Court agreed.[23] Second, the Senate Districts at issue, Districts 2, 12, 15, 22 and 26, at BVAPS of 50.31%, 50.66%, 50.87%, 51.51%, and 50.80%, respectively, can hardly be described as "packed" or "supermajority." Certainly, they could not be subdivided into additional majority-minority districts. Furthermore, the suggestion that such districts exist "over the ardent opposition of the overwhelming majority of Georgia's African-American legislators" is both factually incorrect and legally irrelevant. (App. Brief, p. 36). There is no evidence in the record that minority legislators ardently opposed districts with BVAPs at the levels stated above; in fact, as set forth above, the record establishes that many minority legislators had grave concerns about the decreased BVAPs.[24] (J.S. 134a).

Furthermore, as the district court correctly pointed out, the opinion of minority legislators might be relevant to whether a plan had discriminatory purpose, but those opinions are not relevant with respect to a plan's discriminatory effect. (J.S. 135a). The rights protected by Section 5 are those of voters, not elected officials, even if the elected officials are members of a protected minority. The redistricting process is not meant to guarantee individual legislators tenure in the legislature, and the Court

23. Furthermore no accusation has been made that the districts are geographically bizarre in order to maximize minority voting strength. In fact, they are geographically bizarre in order to minimize it.

24. The Appellee Intervenors' arguments were validated on September 10, 2002, in the Democratic run-off primary in Georgia State House District 44. The longtime African-American incumbent was defeated by a white opponent who received over 95% of the white vote. White voters made up a majority of the voters who turned out on election day. Had the district remained at its benchmark minority voting strength, the choice of a majority of the African-American community, the incumbent, would have won renomination.

Similarly, then-Senate Majority Leader, Charles Walker, who testified that the reduction in BVAP in his district, Senate District 22, would be inconsequential, was defeated by a white Republican on November 5, 2002 in a racially polarized election.

would be remiss to place too much importance on minority incumbent members' analysis of their ability to be reelected. Redistricting plans typically last for ten years.[25] The fact that a particular district might reelect a black incumbent does not answer the question of whether that district still would be able to elect a candidate of choice when the incumbent is no longer a candidate.

In the end, Appellant's case failed because Appellant simply did not produce evidence that allowed the district court to find, using the parameters of Section 5, that the first Senate plan had neither the purpose nor effect of abridging or denying the right to vote based on race. Perhaps knowing that it could not meet that standard, Appellant tried to convince the lower court that a different standard should be used. The district court properly rejected that argument.

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25. Appellant insists that no minority legislator should have a "safe seat," a position that begs the question: safe from whom? Numerous white senators have seats in which they are not "safe" from a white opponent, but, in Georgia's racially polarized environment, are certainly safe from a minority opponent. Appellant argues that for minorities to have similar "safe" seats, *i.e.*, safe from white Democrats, is unfair and unlawful. In effect, Appellant argues that majority-minority districts should never be robust. However, without robust districts, it is unlikely that minority representation would continue at even present levels. As recognized by redistricting scholar Bernard Grofman, "the gain in African-American representation cannot be attributed to an increase in the number of African-Americans being elected from non-majority black districts . . . in states with significant black populations. African-American representation increased only because the number and effectiveness of majority black districts increased." Lisa Handley, Bernard Grofman, & Wayne Arden, "Electing Minority-Preferred Candidates to Legislative Office: The Relationship Between Minority Percentages in Districts and the Election of Minority-Preferred Candidates," *Race and Redistricting in the 1990s* at 23 (Bernard Grofman, ed. 1998).

II. THE DISTRICT COURT PROPERLY APPLIED CONSTITUTIONALLY SOUND PRINCIPLES CONSISTENT WITH SUPREME COURT JURISPRUDENCE IN REJECTING APPELLANT'S REDISTRICTING PLAN

A. The District Court Appropriately Required Appellant To Draw Districts That Did Not Retrogress Minority Voting Power

Appellant's second argument is an extension of the first. Appellant asks this Court to find that the district court required the drawing of "supermajority," "safe minority" seats and that such a requirement is unconstitutional. Appellant cannot, and therefore does not, suggest that Section 5's ban against retrogression in a legislative redistricting plan is unconstitutional. *See Georgia v. United States*, 411 U.S. 526 (1973); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Instead, Appellant argues that Section 5 is only constitutional to the extent that it addresses voting discrimination. Appellant asserts that the district court's decision rejecting the first Senate plan went beyond Section 5's purview by requiring "safe seats," thereby giving minorities excessive voting rights. Appellant's constitutional argument is neither factually nor legally sound.

First, Appellant's argument is premised on the unsupported factual contention that the district court required Appellant to draw supermajority, safe seats that guarantee political outcomes. As articulated above, however, the district court did no such thing. Rather, the court examined the evidence presented by Appellant and determined that the state did not satisfy its burden of proving that there was no retrogression in the first Senate plan. Had the district court, as Appellant suggests,

mandated the drawing of supermajority minority districts, the court would undoubtedly have required Appellant to refrain from decreasing the BVAP in *any* of the benchmark majority-minority districts. To the contrary, the district court initially precleared nine districts that decreased BVAP below the benchmark and ultimately precleared a plan in which 12 districts had BVAP decreases. Moreover, the three districts which the court concluded Appellant had failed to prove to be non-retrogressive had BVAPs that were reduced to "bare majorities," although the benchmark BVAPs for those districts ranged from 55.43% to 62.45%. (J.S. 113a-114a). Two of these districts had BREGs of less than 49%, and the third district had a BREG of 51%. Moreover, the Senate districts enacted by Appellant in the revised Senate plan have BREG figures of 55.8%, 51.58% and 54.70%; they are clearly not "super-majority" districts or "packed" districts. Significantly, the district court precleared the revised Senate plan, although it had significantly decreased BVAP and BREG numbers and still caused the court concern, because the court could not "conclude that it is more probable than not that the 2002 plan will result in a reduction of African American voting strength." (J.S. 19a).[26]

In addition to not requiring "supermajority, safe seats," the district court did not, as Appellant asserts, "admit" that its "purpose for increasing the BVAPs in Georgia's Senate was not to address voting discrimination . . . but simply to create safe minority seats." (App. Brief, p. 38). As an initial matter, the district court did not "increase" BVAPs in the Senate districts. As noted above, the revised Senate plan drawn by Appellant actually had districts with BVAPs *lower* than those in the benchmark plan. Second, the district court's rejection of the first Senate plan *did* address voting discrimination—the voting discrimination that occurred

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26. Appellee Intervenors assert that the district court's task was to find that it was more probable than not that the revised plan would *not* result in reduced African-American voting strength. 42 U.S.C. § 1973c.

due to the retrogressive effect that the first Senate plan had on the effective franchise rights of minority voters.[27]

B. Application Of This Court's Section 5 Retrogression Standard Did Not "Impose A One-Way March Towards Maximization"

Appellant's argument that the district court's opinion results in a ratcheting up "whereby Georgia loses its authority to make reasonable redistricting choices" has no basis. (J.S. 25). The district court did not prohibit reasonable choices by Appellant, just retrogressive ones.

Section 5 plainly does not require the maintenance of any specific minority percentages in districts. Demographic changes might permit a state to change its reapportionment plan substantially, including reducing BVAP or BPOP levels in black majority districts, when evidence shows that the percentage of minority population in the state or a specific area has decreased. *See City of Richmond*, 422 U.S. at 372. This is not the case in Georgia, however, where the percentage of minority voting age population has increased since the last census.[28] Moreover, if political racial polarization and racial bloc voting were to disappear or decrease, a jurisdiction might be able to prove that a new plan with significantly diminished majority-minority districts would not retrogress the position of racial minorities with respect to the effective exercise of their

27. Appellee Intervenors note that Appellant intentionally engaged in this retrogression, constituting another basis for affirming the district court's decision. *See Garza v. Los Angeles County Bd. Sup.*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

28. In 1990, according to the United States Census Bureau, the black proportion of the total population was 27.0%; by 2000 this proportion had increased to 28.7%, a 6.3% gain. In 1990, the black proportion of the voting age population was 24.6%; by 2000 this proportion had increased to 26.6%, an 8.1% gain. *U.S. Census of Population and Housing, 2000: Redistricting Data Summary File, Tables PL1 and PL4: Georgia* (U.S.: Government Printing Office 2001).

electoral franchise.[29] Appellant, however, not only failed to carry its burden of proof on these issues in this case, it failed to make any significant evidentiary presentations on them.

Furthermore, Appellant's contention that the district court's opinions lead to a "once a majority-minority district, always one but always stronger" scenario does not play out. For example, if the minority population grows in a district which was not a majority-minority district under the benchmark, that district might become near majority-minority or a true majority-minority district under the next redistricting plan. Likewise, a near majority-minority district might become a true majority-minority district over a decade. Finally, if the nonminority population grows in a district, as is the case in many coastal areas as well as some urban areas of Georgia, the benchmark voting strength in the district may decrease. The demography of a state's districts is dependent upon normal growth patterns that occur in individual locations. The purpose of using the most recent census to create the benchmark is to stymie the habit of jurisdictions of continually fracturing minority communities so that those communities can never grow into majority-minority districts or become "safe seats."

The first Senate plan defied the natural growth patterns of the minority community. While the proportion of black voting age population had increased over the decade, Appellant attempted to minimize the effect of that growth by ignoring the benchmark numbers. The very purpose of analyzing the benchmark plan using the current census data is to prevent a covered jurisdiction from doing exactly what

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29. Additionally, if racial polarization in a jurisdiction diminishes sufficiently, Congress recognized that a state should have the ability to remove itself from Section 5's remedial provision. Congress enacted a specific provision, renewed in 1982, for jurisdictions to remove themselves from the preclearance requirement. 42 U.S.C. § 1973b(a)(1). In lieu of taking this "bail out" route, Appellant asks this Court to remove it from Section 5 compliance by judicially reversing its traditional interpretation of Section 5.

Appellant sought to do here—use redistricting as a way to suffocate a growing minority population in a discrete geographic area which has become, or is becoming, the majority voting age population in a district. A district which was originally a marginal majority-minority district but which has grown into a safe district over the decade should not have a "point of equal opportunity" racial quota applied to it that requires the district to be restructured in a geographically tortured fashion in order to retrogress minority voting strength to a marginal level.[30]

In summary, there can be no doubt that the retrogression test enunciated in *Beer* and applied by the district court is constitutional. There are no facts in this case that call the retrogression test into constitutional question. The district court's opinion correctly determined that when Appellant failed to establish the absence of a retrogressive effect, especially in the face of evidence that such an effect existed, Appellant was not entitled to preclearance of its first Senate plan. There is nothing unconstitutional in that conclusion.

The only constitutional violation in the first Senate plan, and in the revised Senate plan, is entirely of Appellant's making and, surprisingly, acknowledged by Appellant. Although Appellant announced many times that its intent was to maximize Democrat political performance, Appellant now acknowledges that its own goal may be constitutionally infirm: "Guaranteeing a particular political result is not a

30. The Senate Committee on the Judiciary recognized as much when, recommending a 25-year extension of Section 5, the Committee found that, "[t]he departure from past practices as minority voting strength reaches new levels . . . serves to underline the continuing need for Section 5." S. Rep. No. 97-412, 2d Sess. (1982). In short, as minority voting strength has increased to effective levels, it was even more important to Congress that Section 5 be honored. In Georgia, such strength has increased to effective levels in the benchmark majority-minority districts. Because that effectiveness interfered with Appellant's political goals, however, Appellant set about dismantling the districts. Such conduct on the part of a covered state is exactly what Congress intended to prevent in extending the life of Section 5.

constitutionally legitimate goal." (J.S. 25). Thus, while the plans may suffer constitutional infirmity because they were drawn to "guarantee" the success of the Democratic Party, in particular white Democrats, the plans are not constitutionally infirm because they were made to comply with Section 5.

III. SECTION 5 DID NOT PRECLUDE THE DISTRICT COURT FROM APPLYING FEDERAL RULE OF CIVIL PROCEDURE 24 TO PERMIT INTERVENTION BY INTERESTED MINORITY VOTERS

Private parties have routinely intervened in declaratory judgment actions brought pursuant to Section 5 since the infancy of the Voting Rights Act. In fact, as litigation under the Act has progressed, a strong tradition has emerged of private parties participating in, and bringing value to, Section 5 actions for declaratory judgment. Indeed, of the approximately 35 instances in which Section 5 preclearance was sought from the United States District Court for the District of Columbia (rather than administratively), private parties were allowed to intervene in approximately 30 cases. Despite this history and the obvious interests that individual minority voters have in maintaining their ability to elect candidates of their choice, Appellant makes the curious argument, completely unsupported by authority, that the Attorney General is the "sole statutorily designated defendant" in a Section 5 judicial action and that all private parties are prohibited from intervening in such actions. (App. Brief, p. 40). Appellant's arguments are specious.

A. Private Party Intervention In Section 5 Declaratory Judgment Actions Is Governed By Federal Rule Of Civil Procedure 24 And Recognized As Valuable In The Court's Jurisprudence

"Intervention in a federal court suit is governed by Fed. Rule Civ. Proc. 24." *NAACP v. New York*, 413 U.S. 345, 365 (1973). Not a word in the Voting Rights Act hints that Section

5 declaratory judgment actions are exempt from the Federal Rules of Civil Procedure. In one of the earliest cases examining whether private parties may intervene as defendants in declaratory judgment actions brought by states or political subdivisions for preclearance under the Act, the United States District Court for the District of Columbia recognized that nothing in the Act transmutes the purview of Rule 24:

> We are being asked to enter a judgment declaring the existence of a state of facts. . . . We see no basis for supposing that Congress meant to strip the court of its customary authority to permit intervention deemed helpful by the court. In our view 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.

Apache County v. United States, 256 F. Supp. 903, 908 (D.D.C. 1966) (Section 4 declaratory judgment action).[31] *See also Texas v. United States*, 802 F. Supp. 481, 482 n.1 (D.D.C. 1992) (applying Rule 24(b) to permit intervention of private parties in Section 5 declaratory judgment action).

Since that time, while not addressing the issue expressly,[32] this Court has implicitly recognized the role that interested private party intervenors are entitled to play in

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31. Contrary to Appellant's representation, *Apache County* did not deem "intervention inappropriate because of the Attorney General's unique statutory role." (App. Brief, p. 41). Rather, *Apache County* applied Rule 24 and explicitly rejected the argument made now by Appellant that "the spirit of the 1965 Act excludes intervention by private parties under any circumstances." *Apache County*, 256 F. Supp. at 907.

32. Presumably, the Court has never been asked to opine on the applicability of Rule 24 to Section 5 declaratory judgment actions because the applicability is self-evident.

Section 5 declaratory judgment actions. For example, in *City of Richmond*, private party intervenors were allowed to pursue a Section 5 preclearance action independently when they opposed a consent judgment improperly entered into by the City and the Attorney General. 422 U.S. at 366-67. A year later, in *Beer*, 425 U.S. at 142 n.13, Justice Stewart, writing for the Court, relied upon voter registration statistics provided by private party intervenors in analyzing the retrogressive effect of a proposed plan. Justice Marshall also extensively quoted the argument of private party intervenors in his dissenting opinion. *Id.* at 161 (Marshall, J., dissenting). This Court also has recognized the presence of intervenors in *United States v. Mississippi*, 444 U.S. at 1051 (Stevens, J., concurring); *City of Lockhart v. United States*, 460 U.S. 125, 129 (1983); and, in its most recent Section 5 action, *Bossier Parish II*, 528 U.S. at 323. In this tradition of allowing private party intervenors, the Court has implicitly acknowledged not only the applicability of Rule 24 to Section 5 cases, but also the significant value that intervenors bring to such actions.[33]

Appellant boldly, but incorrectly, asserts that Section 5 provides for the Attorney General "as the sole statutorily designated defendant" in a civil action for preclearance. (App. Brief, p. 40). To the contrary, Section 5 makes no mention of the appropriate defendants in such a declaratory judgment action. Nothing in the Voting Rights Act can be read to abrogate the discretionary authority possessed by the district court to permit intervention under Federal Rule of Civil Procedure 24 when a jurisdiction pursues judicial, rather than administrative, preclearance.

The cases cited by Appellant also fail to support the argument that private party intervention is impermissible in a Section 5 declaratory judgment action. The first case

33. As discussed below, minority voters possessing first-hand knowledge about the political implications of proposed plans and having distinct interests in seeing that their rights are not retrogressed bring a different perspective to declaratory judgment actions than does the Attorney General.

cited by Appellant for this proposition, *Morris v. Gressette*, 432 U.S. 491 (1977), is wholly inapposite. In *Morris*, South Carolina pursued preclearance *administratively*, rather than in a declaratory judgment action. *Id*. at 501. When the Attorney General failed to object to the plan, private individuals brought suit in federal district court, as plaintiffs, challenging the Attorney General's actions. On appeal, the issue before the Court was whether district courts have the authority to review action by the Attorney General in administrative preclearance cases. After discussing the two distinct Section 5 avenues of preclearance, the Court concluded that because administrative preclearance is intended to be an "expeditious alternative to declaratory judgment actions," judicial review of the Attorney General's administrative decisions is not allowed. *Id*. at 504. *Morris* did not address the issue of intervention rights of private parties in Section 5 declaratory judgment actions; instead, the Court simply held that neither the plaintiffs, nor anyone else, could file litigation to challenge administrative preclearance.

Next, Appellant contends that in *Brooks v. Georgia*, 516 U.S. 1021 (1995), the Court summarily affirmed the district court's denial of private party intervention. The district court decision that the Court summarily affirmed, *Georgia v. Reno*, 881 F. Supp. 7 (D.D.C. 1995), however, contains absolutely no mention of intervention, let alone a discussion of the reason that intervention was denied. As there is no indication that the Court was even aware that private persons had sought to intervene in the case below, the Court's summary affirmation cannot be read to indicate that the Court has reversed its long-held position permitting intervention in Section 5 cases.[34]

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34. Indeed, by Appellant's reasoning, the Court's summary affirmation of *City of Petersburg, Virginia v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *summ. aff'd*, 410 U.S. 962 (1973), and *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *summ. aff'd*, 459 U.S. 1166 (1983), both cases in which the district court permitted intervention in Section 5 preclearance actions, suggests that intervention of interested parties *is* permissible.

Appellant's contention that the Court "upheld denial of intervention in a § 4 action" in *NAACP v. New York*, 413 U.S. 345 (1973), is also misleading. (App. Brief, p. 42). In that case, the Court specifically recognized that private party intervention in Voting Rights Act declaratory judgment actions is permissible under Federal Rule of Civil Procedure 24. *NAACP*, 413 U.S. at 365. Reviewing the district court's denial of intervention for abuse of discretion, however, the Court determined that the district court did not abuse its discretion when the Rule 24 motion to intervene was untimely. *Id.* at 367-69. The Court noted that no unusual circumstances warranted an exception to Rule 24's time requirements because no appellant alleged an injury from the Voting Rights Act violations asserted therein. *Id.* at 368. In the present case, there is no dispute that Appellee Intervenors' Rule 24 application was timely[35] or that Appellee Intervenors will sustain injury if forced to vote in districts that retrogress their voting power.

Appellant's argument that private party intervention should further be precluded as a matter of course because the presence of private parties prolongs the length of declaratory judgment trials rings hollow. First, any state or political subdivision truly concerned about the possible delay that might arise from a declaratory judgment action has the option of pursuing preclearance administratively. As the Court recognized in *Morris*, the legislative history of Section 5 indicates that the administrative preclearance option was added to the Act specifically to address timing concerns by providing a "speedy alternative method of compliance." *Morris*, 432 U.S. at 503.[36] Second, any potential

35. Appellee Intervenors filed their motion to intervene on November 16, 2001, at a time when the only activities that had occurred in the case were purely procedural: the Attorney General's counsel had filed an entry of appearance and the court had requested the Chief Judge of the Circuit to appoint two other judges to the three-judge panel.

36. In this case, had Appellant truly been concerned about the delay that preclearance might have on the finalization of reapportioned voting

(Cont'd)

delay that might arise from the presence of additional parties in a declaratory judgment action can be curtailed by the district court's exercise of its inherent authority to control its docket. In this action, the presence of intervenors did not prolong the length of the declaratory judgment proceedings because the district court ordered the intervenors to comply, and the intervenors did comply, with the schedules set for the other parties.[37]

Finally, contrary to Appellant's assertion, the presence of intervenors here did not expand the scope of the litigation or prevent the district court from entering a consent decree had the Attorney General and Appellant reached an accord as to a particular plan. Rather, as discussed previously in a preclearance action, the submitting jurisdiction bears the burden of proving that each plan submitted for review does not have the purpose, and will not have the effect, of abridging or denying the right to vote on the basis of race or color. 42 U.S.C. § 1973c; *see also Bossier Parish I*, 520 U.S. at 480. When the plans are submitted to the DOJ for preclearance, the submitting jurisdiction must prove its case to the satisfaction of the DOJ. However, when the plans are submitted to the district court, the submitting jurisdiction must prove its case to the satisfaction of the court.

(Cont'd)
districts, Appellant would have passed redistricting plans and initiated the preclearance process much earlier than it did. Although the 2000 census numbers were released in March 2001, the General Assembly did not even meet to consider redistricting until August 2001 and did not enact the plans until mid August and late September 2001. (J.S. 45a). Appellant chose to wait for enactment of all three plans before filing the declaratory judgment action in October 2001. (J.S. 27a, 45a).

37. In supporting the intervention of minority citizens affected by the proposed changes in the voting laws, the Attorney General agreed that intervention would neither delay nor disrupt the proceeding: "The United States does not believe that intervention by the movants at this time would unduly delay or disrupt this action, so long as the movants are required to meet the same schedules as the Plaintiff and the United States." (Int. Motion to Dismiss, p. 11a).

The district court correctly concluded that it had no authority to enter declaratory judgment for Appellant based solely on the DOJ's acquiescence in the proposed House and Congressional plans before Appellant had proven entitlement to that judgment. Appellant has not directly challenged this holding on appeal, presumably because it recognizes that its argument is foreclosed by the Court's decision in *City of Richmond*. In that case, after permissive intervention was granted to a group of minority citizens, a proposed consent decree between the City and the United States was presented to the trial court. 422 U.S. at 366. The intervenors objected, and the trial court set the case for a hearing on the merits before a special master. *Id*. Despite the United States' willingness to enter into a consent decree, the special master recommended that the trial court find that the City had not met its burden of proof. *Id.* The trial court followed the recommendation, and the annexation plan was rejected. *Id*. The City appealed. While the Court remanded the case for additional factual findings, *id*. at 378, the case makes clear that even upon the offering of a consent decree, a submitting jurisdiction is not relieved of its burden to make the requisite showing under Section 5 to the district court.

B. The District Court Correctly Applied Federal Rule Of Civil Procedure 24 In Permitting Intervention By Minority Voters With An Interest In Protecting The Value Of Their Votes

Federal Rule of Civil Procedure 24(a)(2) provides that a person

> *shall* be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability

> to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(emphasis added).

Federal Rule of Civil Procedure 24(b)(2) provides that a person

> *may* be permitted to intervene in an action when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(emphasis added).

Appellant asserts that Appellee Intervenors neither had an "interest" that may have been impaired such that intervention was required under Rule 24(a)(2), nor a "claim or defense" in common with the main action such that intervention was permissible under Rule 24(b)(2).[38] As recognized by Justice O'Connor's concurring opinion in *Diamond v. Charles*, 476 U.S. 54, 75-77 (1986), the "interest" requirement of Rule 24(a)(2) and the "claim or defense" requirement of Rule 24(b)(2) are closely related concepts. The Rule 24(a)(2) "interest" requirement calls for "a direct and concrete interest that is accorded some degree of legal protection." *Id.* at 75. The Rule 24(b)(2) "claim or defense" requirement calls for an "actual, present interest" that is "sufficient to support a legal claim or defense." *Id.* at 77. The significant interest of Appellee Intervenors in the effective exercise of their voting rights satisfies both the "direct and concrete" standard for intervention as of right

38. The district court did not explain whether it granted intervention as of right under Rule 24(a)(2) or permissive intervention under Rule 24(b)(2).

under Rule 24(a)(2) and the "actual and present" standard for intervention by permission under Rule 24(b)(2).

The Voting Rights Act was enacted in 1965 to "attack the blight of voting discrimination across the Nation." *Bossier Parish I*, 520 U.S. at 476 (citing S. Rep. No. 97-417, 2d Sess. (1982) (internal quotation omitted)). To that end, Section 5 was promulgated "to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. Given its important but limited purpose, Section 5 was only made applicable to jurisdictions with a history of discriminatory voting practices, such as Georgia.

Appellee Intervenors are African-American registered voters of Georgia with a direct interest in the creation of nondiscriminatory redistricting plans. All pay taxes in Georgia, work in Georgia, drive on Georgia roads, and perform numerous other daily activities in Georgia that are influenced by Georgia elected officials. All have a direct, concrete interest in ensuring that their ability to elect candidates of their choice, candidates who will have an effect on their daily lives, is not diminished.[39] It is these voting rights of minority citizens, the "most basic of political rights," *Federal Election Commission v. Akins*, 524 U.S. 11, 24-25 (1998), that Section 5 was implemented to protect. Appellee Intervenors are directly affected by the preclearance of a retrogressive plan. They have a right to have their votes count, and this right is protected by Section

39. While the Attorney General has a general interest in enforcing the laws promulgated by Congress, he does not have the type of direct interest shared by the Appellee Intervenors in this case. He does not intimately know the interests of minority voters in Georgia. For this reason, minority voters in covered jurisdictions bring unique perspectives to preclearance actions. For example, minority citizens standing on the streets of Savannah will likely have a different view of the effect that changes in voting precincts have on the voting power of minority citizens in Georgia than will the Attorney General standing on the streets of Washington, D.C.

5. Appellant has cited no authority that such a monumental interest is insufficient to entitle Appellee Intervenors to have a presence in an action brought under the precise Act which protects that interest.

To hold otherwise would create a vast inconsistency in preclearance actions, dependent upon which of the two preclearance routes a jurisdiction pursues. When a jurisdiction pursues administrative preclearance, private citizens are permitted to make comments and present evidence on retrogression, and the decisionmaker (the DOJ) is entitled to rely on that information in deciding whether or not to preclear a proposed plan. When a jurisdiction pursues judicial preclearance, private citizens should similarly be permitted to make comments and present evidence on retrogression, and the decisionmaker (the district court) should be entitled to rely on that information in deciding whether or not to preclear a proposed plan. A ruling that citizens, particularly minority citizens, have no right to participate in a Section 5 proceeding if the submitting jurisdiction elects to file a declaratory judgment action in lieu of an administrative proceeding would effectively enable a jurisdiction to silence opposition to the proposed change.

Appellant also asserts that, even if Appellee Intervenors have a direct and concrete "interest," Rule 24(a)(2) does not support intervention because that interest would not be "impaired or impeded" by denial of intervention. Appellant appears to be arguing that Appellee Intervenors could protect their interests by bringing a Section 2 action following preclearance. This argument fails to recognize the distinct standards and remedies that distinguish Section 5 from Section 2. *See Bossier Parish I*, 520 U.S. at 477. "The two sections differ in structure, purpose and application." *Holder*, 512 U.S. at 883. Section 5 was enacted as "a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been

struck down." *Beer*, 425 U.S. at 140 (citing H.R. Rep. No. 94-196, pp. 57-58 (1970)). With Section 5, Congress shifted "the advantage of time and inertia from the perpetrators of the evil to its victim by freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory." *Id.* (internal quotation omitted). Section 5 thus focuses on "freezing election procedures" and imposes a burden on the covered jurisdiction to prove that the changed redistricting plan, as a whole, does not have the purpose or effect of retrogressing minority voting power. *Id.* at 141.

Section 2, on the other hand, does not include a retrogression inquiry. *Holder*, 512 U.S. at 884. Rather, it considers only whether a voting practice is discriminatory. In a Section 2 action, the burden is placed on the minority voter to establish that: (1) the minority group could constitute a majority in a single member district; (2) the minority group is politically cohesive; and (3) the white majority votes as a bloc to defeat the minority group's candidates of choice. *Id.* at 479. Thus, a Section 2 action, both in procedural respects (such as the shifted burden of proof) and in the interest that it is designed to protect, is not an appropriate substitute for Appellee Intervenors' right to participate as a party in a Section 5 action. Appellee Intervenors' ability to oppose the imposition of a plan that retrogresses their voting rights clearly would have been "impaired or impeded" had the district court denied intervention. Thus, Appellee Intervenors had a right to intervene in the declaratory judgment action pursuant to Rule 24(a)(2).

Finally, Appellant appears to argue that even if Appellee Intervenors had an "actual, present interest" such as to meet the requirement of a Rule 24(b)(2) "claim or defense," Rule 24(b)(2) would not permit intervention because Appellee Intervenors' claim or defense does not have a "question of law or fact in common" with the main action. This argument is completely untenable. The question in the

main action was whether Georgia's newly passed redistricting plans for the State House, State Senate, and Congress were retrogressive of minority voting strength. In their answer, Appellee Intervenors objected to Georgia's proposed plans because those plans result in a retrogression in minority voting strength. Because the weakening of minority voting strength was the issue in both the main action and the focus of Appellee Intervenors' answer, the two indisputably had a question in common. Thus, intervention was clearly appropriate under Rule 24(b)(2).

CONCLUSION

For the foregoing reasons, Appellee Intervenors respectfully request that the Court affirm the decision of the district court.

Respectfully submitted,

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