No. 02-182

# In the Supreme Court of the United States

STATE OF GEORGIA, APPELLANT

*v.*

JOHN ASHCROFT, ET AL.

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

## BRIEF FOR THE FEDERAL APPELLEES

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## QUESTIONS PRESENTED

1. Whether the district court erred in denying appellant's request for judicial preclearance of its proposed state senate redistricting plan under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

2. Whether Section 5, as applied by the district court to the facts of this case, is a permissible exercise of congressional power under the Fifteenth Amendment.

3. Whether private parties may intervene in a declaratory judgment action filed under Section 5.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued: Page



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page



Constitution, statutes, regulations and rules:

Miscellaneous: Page

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### OPINIONS BELOW

The opinion of the three-judge district court denying preclearance of appellant's state senate redistricting plan, and granting preclearance of appellant's congressional and state house redistricting plans (J.S. App. 23a-213a), is reported at 195 F. Supp. 2d 25. The opinion of the district court granting preclearance of appellant's revised state senate redistricting plan (J.S. App. 1a-22a) is reported at 204 F. Supp. 2d 4.

### JURISDICTION

The three-judge district court entered its initial judgment on April 5, 2002. The court entered its judgment granting preclearance of the revised state senate redistricting plan on June 3, 2002. Appellant filed a notice of appeal from both judgments on June 4, 2002, and filed a jurisdictional statement on July 31, 2002.

See 28 U.S.C. 2101(b). This Court noted probable jurisdiction on January 17, 2003. The jurisdiction of this Court rests on 42 U.S.C. 1973c and 28 U.S.C. 1253.

**STATEMENT**

Appellant, the State of Georgia, instituted this action in the United States District Court for the District of Columbia, requesting a declaratory judgment that its 2001 redistricting plans for seats in the United States Congress, Georgia Senate, and Georgia House of Representatives "do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" in violation of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. J.S. App. 23a. The United States opposed that request with respect to the state senate plan, while four African-American citizens of Georgia were permitted to intervene to challenge the legality of all three plans. *Id.* at 214a-219a. The district court granted appellant's request for a declaratory judgment with respect to the congressional and state house plans, but denied its request for a declaratory judgment with respect to the state senate plan. *Id.* at 28a-29a, 149a-150a.

Appellant subsequently adopted a revised state senate plan and submitted it to the district court. Based on a stipulated record, the court held that the revised plan did not violate Section 5, and it granted appellant's request for a declaratory judgment with respect to that plan. J.S. App. 1a-22a. Appellant has appealed from the district court's initial decision denying a declaratory judgment with respect to the State's original state senate plan.

1. The State of Georgia is a covered jurisdiction subject to Section 5. See 28 C.F.R. Pt. 51, App. Under Section 5, a covered jurisdiction may not implement

changes in any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," unless the jurisdiction (1) has obtained judicial preclearance by means of a declaratory judgment from the United States District Court for the District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or (2) has submitted the proposed change to the Attorney General for administrative preclearance and the Attorney General has not interposed an objection. 42 U.S.C. 1973c. An action for declaratory judgment under Section 5 is heard and determined by a three-judge district court. *Ibid.*; 28 U.S.C. 2284(a). The court may preclear a proposed voting change only if the covered jurisdiction proves that the change will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) (*Bossier I*) (quoting *Beer* v. *United States*, 425 U.S. 130, 141 (1976)). The jurisdiction's last existing legally enforceable plan is the benchmark against which a proposed voting change will be measured in determining whether the change will have a prohibited retrogressive effect. *Ibid*[1]

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[1] Appellant's redistricting following the 1990 census resulted in several years of litigation. This Court found that, in exercising its Section 5 authority at that time, the United States had unlawfully pressured appellant to adopt a districting plan that maximized the number of majority-black districts. See *Miller* v. *Johnson*, 515 U.S. 900 (1995). That case was subsequently resolved when a court-drawn remedial plan was adopted for the congressional district lines, and the parties reached a mediated agreement with respect to the state legislative district lines. Those plans were implemented in 1997 and served as the benchmark in this pre-

2. The United States House of Representatives and the Georgia State Senate and House of Representatives are reapportioned in light of population changes after each decennial census. J.S. App. 37a, 47a. Because appellant is a covered jurisdiction, it must comply with Section 5 before redefining its congressional and state legislative district lines. *Georgia* v. *United States*, 411 U.S. 526, 528 n.1, 534-535 (1973). The 2000 census revealed substantial population growth within the State of Georgia, as well as shifts in the relative populations of different areas within the State. J.S. App. 40a, 55a. As a result, appellant was apportioned two additional seats in the United States House of Representatives, *id.* at 47a, and most of the existing state senate and house districts were malapportioned, *id.* at 55a. In particular, most of the districts in which the black voting age population (BVAP) comprised a majority under the benchmark plans were substantially underpopulated in comparison to the ideal district size. *Id.* at 55a, 72a.

In response to those census results, appellant adopted new congressional and state legislative districting plans. J.S. App. 42a-46a. In formulating those districting plans, Georgia legislative officials avowedly sought to increase the number of seats held by the Democratic Party in the state house and senate. See *id.* at 46a, 113a, 139a. As the district court explained, "Georgia's State House and State Senate reapportionment plans were drafted to bolster support for the Democratic Party, in part by 'unpacking' predominantly African American districts," *id.* at 113a, apparently in

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clearance action. See J.S. App. 37a-38a; see also *Abrams* v. *Johnson*, 521 U.S. 74 (1997); *Johnson* v. *Miller*, 929 F. Supp. 1529 (S.D. Ga. 1996).

the belief that dispersion of black voters among a broader range of electoral districts would result in the election of a greater number of Democratic candidates.

Implementation of the three proposed districting plans would have resulted in a reduction of BVAP in a total of 46 districts (one congressional district, 11 state senate districts, and 34 state house districts) that, under the benchmark plans, had majority BVAPs. See Attachment A. In many of those districts, the proposed reduction of BVAP was substantial. For example, the BVAP in proposed state house District 97 was reduced from 74.04% to 53.24%, a difference of 20.80%. J.S. App. 63a. In some districts, the BVAPs were reduced to less than a majority. Proposed state house District 125, for example, was drawn to contain a BVAP of 45.46%, even though the benchmark district had a BVAP of 52.09%. *Id.* at 71a. Finally, in other districts, BVAPs that were significantly more than 50% were reduced to bare majorities. For example, the BVAP in proposed state senate District 15 was reduced from 62.05% to 50.87%. *Id.* at 74a.[2]

The proposed state senate plan in particular would have redrawn "four districts with existing BVAPs of 55.43% to 62.45% such that they would have bare majorities of BVAP, ranging from 50.31% to 50.87%." J.S. App. 113a. Overall, the proposed senate plan reduced the number of BVAP majority districts from 12 to 11, and the number of districts with majority black registered voter populations (BRVPs) from 13 to 8. *Id.* at 73a-74a. Moreover, the BVAPs in Districts 2, 12, and 26 were reduced to bare majorities, and the

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[2] The percentages in the text were derived using appellant's method of calculating black population. See note 3, *infra* (describing parties' differing calculation methods).

BRVPs to less than 50%. A comparison of the percentages of BVAP and BRVP in those districts under the benchmark and proposed plans is reflected in the table below:

| District | Benchmark BVAP | Proposed BVAP | Benchmark BRVP | Proposed BRVP |
|---|---|---|---|---|
| 2 | 59.98% | 49.81% | 62.38% | 48.42% |
| 12 | 54.94% | 50.22% | 52.48% | 47.46% |
| 26 | 61.93% | 50.39% | 62.79% | 48.27% |

*Id.* at 74a.[3]

[3] The calculations of BVAP set forth in the text are based on the Department of Justice's *Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c*, 66 Fed. Reg. 5412 (2001), which counts as black all non-Hispanic individuals who, in the 2000 census, identified themselves only as black, or as black and white, but not persons who identified themselves as black and another minority race. Appellant, however, calculated BVAP by counting all black multi-racial Hispanic and non-Hispanic individuals as black. In determining whether the plan would have an impermissible retrogressive effect, the district court followed the United States' recommendation that it refrain from choosing one measurement over the other. The court instead "consider[ed] *all* the record information, including total black population, black registration numbers and both BVAP numbers." J.S. App. 117a. In any event, the reduction in BVAP in senate Districts 2, 12, and 26 was slightly greater under appellant's method of calculation:

| Dist. | Benchmark BVAP (Ga.) | Proposed BVAP (Ga.) | Reduct. (Ga.) | Benchmark BVAP (U.S.) | Proposed BVAP (U.S.) | Reduct. (U.S.) |
|---|---|---|---|---|---|---|
| 2 | 60.58% | 50.31% | 10.27% | 59.98% | 49.81% | 10.17% |
| 12 | 55.43% | 50.66% | 4.77% | 54.94% | 50.22% | 4.72% |
| 26 | 62.45% | 50.80% | 11.65% | 61.93% | 50.39% | 11.54% |

*Id.* at 74a, 122a.

The reduction of BVAP and BRVP in Districts 2, 12, and 26 was caused in part by the removal of majority black precincts. J.S. App. 124a-125a. Because those districts were underpopulated in comparison to the ideal district size after the 2000 census, the removal of such precincts was unnecessary in order to comply with constitutional one person-one vote requirements. *Ibid.* The following table shows each proposed district's deviation in population from the ideal district size, as well as a comparison between the percentage of BRVP removed from each district and the percentage of BRVP that was added:

| District | Deviation From Ideal District Size | BRVP of Removed Precincts | BRVP of Added Precincts |
|---|---|---|---|
| 2 | -24.37% | 20.39% | 14.97% |
| 12 | -17.77% | 46.64% | 30.28% |
| 26 | -28.65% | 41.80% | 20.20% |

*Id.* at 124a-125a n.38. Thus, because the precincts added to proposed Districts 2, 12, and 26 contained significantly lower numbers of black residents than did the precincts that were removed, the overall effect of the plan was to reduce the percentages of BRVP in those districts. *Id.* at 125a.

The government's evidence in this case also indicated that senate Districts 2, 12, and 26 were marked by racially polarized voting. The government's expert prepared a report that analyzed the extent to which black and non-black voters' preferences for specific candidates have differed in recent elections where voters were presented with a choice between black and white candidates. J.S. App. 99a-101a. The statistical evidence, which indicated that white crossover voting was low or minimal, was supported by the opinions of

various community activists who stated that they had observed highly polarized voting patterns and racially charged political campaigns in benchmark Districts 2 and 12. *Id.* at 136a-138a.

3. Appellant did not apply to the Attorney General for administrative preclearance of the new districting plans, but instead instituted an action for declaratory judgment in the district court. J.S. App. 27a. Although the proposed congressional and state house plans effected a reduction of the BVAPs of a total of 35 districts that had majority BVAPs under the benchmark plan (see p. 5, *supra*), the United States did not oppose preclearance of those plans because it concluded that those reductions, in light of other factors, did not significantly reduce black voting strength. See *id.* at 103a. The United States opposed preclearance of the state senate plan, however, on the ground that the plan's changes to the boundaries of Districts 2, 12, and 26 (as compared to the benchmark districting scheme) unnecessarily reduced the ability of black voters to elect candidates of their choice. See *ibid.* Four African-American citizens of Georgia were granted leave to intervene to oppose all three of the districting plans. *Id.* at 28a-29a, 214a-219a.[4] The district court granted appellant's request for a declaratory judgment

[4] A fifth African-American Georgia resident, Michael King, was denied leave to intervene based on his failure to comply with applicable procedural requirements. See J.S. App. 28a-29a, 31a-35a. King appealed to this Court, challenging both the district court's denial of leave to intervene and the court's subsequent disposition of the case on the merits. This Court summarily affirmed. See *King* v. *Georgia*, 123 S. Ct. 868 (2003) (No. 02-425); *King* v. *Georgia*, 123 S. Ct. 962 (2003) (No. 02-125). The four individuals who were granted leave to intervene by the district court did not appeal any of the district court's rulings.

with respect to its congressional and state house plans, but denied appellant's request with respect to its state senate plan. *Id.* at 23a-213a.

a. The district court rejected appellant's contention that the United States' failure to object to the congressional and state house plans was a sufficient basis, in and of itself, for entry of a declaratory judgment with respect to those plans. J.S. App. 103a-106a. The court observed that "[t]he State of Georgia made the strategic decision to institute an action in this court for declaratory judgment and not to seek administrative preclearance from the Department of Justice." *Id.* at 103a. The court found that, notwithstanding the absence of any objection by the United States to Georgia's congressional and state house districting plans, appellant's request for a declaratory judgment "imposes on [the district] court an affirmative duty to inquire whether the plans have the effect or purpose of denying or abridging the right to vote on account of race or color. Furthermore, the State assumes the burden of demonstrating by a preponderance of the evidence that such a declaratory judgment is warranted." *Id.* at 104a. The court also observed that "Georgia has presented no legal authority that would limit the Section 5 inquiry to those districts challenged by the Attorney General as retrogressive." *Id.* at 105a-106a.

b. The district court discussed at length the expert reports and testimony submitted by the parties. The court reviewed the testimony of appellant's expert witness, Dr. David Epstein, who testified that the "point of equal opportunity" for black voters to elect their candidate of choice in a particular district was a BVAP of 44.3% in an open-seat election, and 56.5% if a white incumbent was in office. See J.S. App. 92a-93a.

The court found that Dr. Epstein had provided "no competent, comprehensive information regarding white crossover voting or levels of polarization in individual districts across the State." *Id.* at 133a. The court further found that Dr. Epstein's conclusions were based on a statistical technique that "no court has relied on * * * in reviewing a reapportionment plan," *id.* at 90a, and that Dr. Epstein's retrogression analysis consisted solely of comparing the number of districts under the benchmark and proposed plans that had BVAPs greater than 44.3%, *id.* at 96a-97a. The court observed that Dr. Epstein had "failed even to identify the decreases in BVAP that would occur under the proposed plan, and certainly did not identify corresponding reductions in the electability of African American candidates of choice." *Id.* at 121a.

Dr. Epstein testified that a decrease in a district's BVAP would diminish the likelihood of success for black voters' preferred candidates, and that the extent of such a decrease would vary depending on the level of BVAP under the benchmark. J.S. App. 122a. For example, Dr. Epstein projected that a decrease in BVAP from 50% to 44.3% would result in a 25% decline in the likelihood that black voters' candidate of choice would be elected. *Id.* at 122a-123a. Dr. Epstein's analysis indicated, however, that a similar decrease in BVAP would not have the same effect if the overall BVAPs were higher.[5] *Id.* at 123a. The district court found Dr. Epstein's testimony to be "relevant insofar as it sug-

[5] For example, Dr. Epstein testified that in senate District 10, to which the United States did not assert an objection, a decrease in BVAP from 69.72% to 63.42%—a difference of 6.52%—"would reduce only slightly the probability of electing an African American preferred candidate." J.S. App. 123a.

gests 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." *Ibid.*

The report prepared by the United States' expert, Dr. Richard Engstrom, "clearly describe[d] racially polarized voting patterns in Senate Districts 2, 12 and 26." J.S. App. 99a. Dr. Engstrom testified that evidence of white crossover voting to support black candidates in statewide elections did not disprove the likelihood of racially polarized voting in local elections, such as for state senate seats, because "the level of crossover voting tends to be considerably higher in these [statewide] elections than in the senate and other elections involving local candidates." *Id.* at 101a-102a; see *id.* at 128a-129a. The district court found that "Engstrom's report presents relevant information, and indicates that Senate elections in the redrawn districts will be marked by high levels of polarized voting. [Appellant] has presented no evidence to suggest otherwise." *Id.* at 130a.

The district court also evaluated the parties' lay testimony. The court found that the testimony of various African-American legislators supporting the proposed plan was "far more probative of a lack of retrogressive purpose than of an absence of retrogressive *effect*."[6]

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[6] The court also observed that the United States had "presented extensive evidence of African American Senators' misgivings about the Senate plan." J.S. App. 134a. The court noted that two black legislators had voted against the plan, and that other legislators had supported it partly out of concern "that, should the Democratic Party cease to be in the majority in the State House and State Senate, all existing African American chairs of committees would be lost." *Id.* at 46a.

J.S. App. 135a. The court explained that other community leaders, in testimony offered by the United States, had described racially polarized voting in the contested senate districts (particularly in Districts 2 and 12) and had expressed the fear that reductions in BVAP within those districts as contemplated by the State's proposed plan would diminish the opportunities for black voters to elect candidates of choice. *Id.* at 136a-138a.

The district court also considered evidence of demographic changes within the State of Georgia. The court found that appellant had failed to demonstrate that reduction of BVAP in senate Districts 2, 12, and 26 was necessary in order to ensure districts of essentially equal size as required by the Constitution. J.S. App. 124a-126a. The court observed, *inter alia*, that "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." *Id.* at 124a. The court further found that there were alternative, reasonable plans that would have satisfied the constitutional principle of one person-one vote while maintaining minority voting strength in the contested districts. *Id.* at 125a.

c. Based on its assessment of the record evidence, the district court concluded that appellant had failed to prove that its proposed state senate plan would not have the retrogressive effect prohibited by Section 5. The district court explained that, under this Court's precedents, "[p]reclearance must be denied if a proposed change abridges the right to vote relative to the status quo." J.S. App. 106a (internal quotation marks omitted). The court observed:

> Section 5 cases have focused almost exclusively on evaluating whether a proposed change would leave

> minority voters in a "worse" position than under the existing plan. The [Supreme] Court has clearly held that compliance with Section 5, and avoidance of retrogression, does not require jurisdictions to improve or strengthen the voting power of minorities. Nor does Section 5 require that redistricting plans ensure *victory* for minority preferred candidates. Rather, it is a mandate that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions.

*Id.* at 107a-108a (citations and internal quotation marks omitted).

The district court further explained that its "analysis —while limited to the question of retrogression—is fact-intensive and must carefully scrutinize the context in which the proposed voting changes will occur." J.S. App. 111a. "In particular, the level of racially polarized voting, or the degree to which there is a correlation between the race of a voter and the way in which the voter votes, sheds light on whether a decrease in districts' minority populations will produce an impermissibly retrogressive effect." *Ibid.* (citation and internal quotation marks omitted). Accordingly, "if racially polarized voting persists in an area and its electoral history demonstrates that minority voters' preferences diverge greatly from those of non-minority voters, a decrease in BVAP may translate into a lessening of minority voting strength." *Ibid.* The court found that the analysis offered by appellant's expert had "fail[ed] to account for variations in levels of racial polarization," and that appellant had "presented no other evidence to persuade us that voting in future Senate races in the

contested districts will not be racially polarized." *Id.* at 133a.

The district court rejected appellant's contention that "the retrogression inquiry is limited to determining whether reapportioned districts provide minority voters with an 'equal opportunity' to elect minority candidates." J.S. App. 111a-112a. The court explained:

> The Supreme Court has repeatedly held that, while a Section 2 suit compares the change in voting procedures to an ideal, fair benchmark, Section 5 actions must compare the proposed plan to the existing opportunities to elect candidates of choice. Thus, as already discussed, our analysis must focus, not on the level of BVAP that will ensure a "fair" or "equal" opportunity to elect preferred candidates, but on whether the proposed changes would decrease minority voters' opportunities to elect candidates of choice.

*Id.* at 119a-120a (citation omitted). Accordingly, the court concluded that appellant's expert testimony "was woefully inadequate" because it "was crafted to predict a 'point of equal opportunity' that has little relevance to the retrogression inquiry mandated by Section 5." *Id.* at 143a; see *id.* at 121a (appellant's expert "made no attempt to address the central issue before the court: whether the State's proposal is retrogressive").

Based on its application of the foregoing legal standards, and on "a searching review of the record," J.S. App. 142a, the district court concluded that "the State ha[d] failed to demonstrate by a preponderance of the evidence that the reapportionment plan for the State Senate will not have a retrogressive effect," *id.* at 144a. The court explained:

> The plan proposes to decrease the BVAPs in [senate Districts 2, 12, and 26] such that they would constitute only bare majorities, or slightly less than majorities. It was Georgia's burden to produce some evidence to prove that these changes would not be retrogressive.
>
> The State has produced no evidence to demonstrate that the demographics of the proposed Senate Districts counteract any reduction in BVAP. It has not attempted to show the number of white voters who cross over to vote for African American candidates of choice in the disputed districts and how that might affect the effective exercise of minority voters' franchise. Nor has the State presented evidence regarding potential gains in minority voting strength in Senate Districts other than Districts 2, 12 and 26.

*Id.* at 144a-145a. Emphasizing that it was "limited to reviewing the evidence presented by the parties," the district court was "unable to conclude that the Senate reapportionment plan will not have a retrogressive effect on the voting strength of Georgia's African American electorate." *Id.* at 145a.

The district court found, however, that appellant had carried its burden of proving that the State's congressional and state house districting plans (which were challenged only by the intervenors) would not have a retrogressive effect. J.S. App. 145a-147a. Although the congressional districting plan effected a 6.81% decrease (from 58.85% to 52.04%) in the majority-BVAP Fifth District (see Attachment A), the court was "not persuaded that the reduction in the African American population in the Fifth District necessarily constitutes retrogression." *Id.* at 146a. With respect to the state

house districting plan, the court explained that "[t]he proposed plan would have 38 or 39 seats in districts with majorities of BVAP. While some of the existing House districts would experience decreases in BVAP under the proposed plan, there is no evidence before the court of racially polarized voting in any House Districts that might suggest that these decreases will have a retrogressive effect." *Id.* at 147a.

d. Judge Oberdorfer filed an opinion concurring in part and dissenting in part. J.S. App. 161a-212a. Judge Oberdorfer "agree[d] that Georgia ha[d] met its burden of proving, by a preponderance of the evidence, that the proposed Congressional and state House redistricting plans have neither a retrogressive purpose nor effect." *Id.* at 161a. Judge Oberdorfer would have held, however, that appellant had also carried its burden with respect to the state senate plan. *Id.* at 165a-212a.

e. Six days after the district court ruled, appellant adopted a revised state senate plan. J.S. App. 2a. Although the revised plan also proposed to reduce the BVAPs in each of the contested districts from the levels in the benchmark plan, the United States advised the court that it would not object. The intervenors, however, opposed the revised plan. *Id.* at 2a-3a.[7]

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[7] A comparison of the benchmark, proposed, and revised plans is reflected in the following table, which uses appellant's method of calculating BVAP:

| Dist. | Benchmark BVAP | Proposed BVAP | Revised BVAP | Benchmark BRVP | Proposed BRVP | Revised BRVP |
|---|---|---|---|---|---|---|
| 2 | 60.58% | 50.31% | 54.50% | 62.38% | 48.50% | 55.80% |
| 12 | 55.43% | 50.66% | 55.04% | 52.48% | 47.76% | 51.58% |
| 26 | 62.51% | 50.80% | 55.45% | 62.93% | 48.68% | 54.70% |

J.S. App. 5a.

Based on a stipulated record, the district court granted appellant's request for a declaratory judgment with respect to its revised state senate plan. J.S. App. 4a, 21a. The court explained that "[t]he likelihood that retrogression will result from the [revised] plan is significantly less where the demographics of the districts with evidence of racially polarized voting are changed to include higher percentages of BVAP." *Id.* at 14a. Thus, although the district court was "faced with the same evidence of racially polarized voting that it considered in reviewing the 2001 Senate plan," *ibid.*, the court "f[ou]nd that it is more probable than not that the 2002 plan will not have a retrogressive effect on African American voting strength in the State of Georgia," *id.* at 20a.

## SUMMARY OF ARGUMENT

I. The district court's decision denying preclearance of the State's proposed senate districting plan rests on a straightforward application of established Section 5 principles. Unlike Section 2 of the Voting Rights Act, Section 5 applies only to jurisdictions with a particular history of racial discrimination in voting and only to *changes* in such a jurisdiction's electoral practices. The Section 5 inquiry focuses on the presence or absence of "retrogression"—*i.e.*, on whether a proposed voting change has the purpose or likely effect of rendering minority voters less able to elect candidates of choice than they are under the jurisdiction's pre-existing voting practices. A covered jurisdiction that seeks judicial preclearance of a change in its voting practices bears the burden of proving that the proposed change has neither an impermissible retrogressive purpose nor a retrogressive effect on minority electoral power.

In conducting its Section 5 inquiry, the district court correctly rejected appellant's contention that its proposed senate districting plan could be precleared simply upon a showing that it gave black voters a "fair" or "reasonable" opportunity to elect their candidates of choice. Because the retrogression inquiry under Section 5 turns solely on a comparison between a proposed voting practice and the jurisdiction's existing electoral scheme, proof that the proposed practice is sufficiently fair and reasonable to satisfy Section 2 in the abstract is not an adequate basis for preclearance under Section 5. This Court has specifically rejected efforts to equate the two standards.

Contrary to appellant's contention, the district court did not construe Section 5 as inflexibly requiring the maintenance of pre-existing black super-majority districts. The court expressly recognized that majority-black districts do not inherently increase or decrease black voting strength, and that assessing the effect of a proposed dispersal of black voters requires consideration of all the attendant facts and circumstances. In concluding that the State had failed to carry its burden of persuasion under Section 5, the district court considered the reductions of BVAP in proposed senate Districts 2, 12, and 26, in light of other pertinent factors. The court placed particular emphasis on evidence of racially polarized voting in those senate districts. The court specifically recognized that the State might have been able to obtain preclearance if it had proved that anticipated losses of black electoral power in Districts 2, 12, and 26 would likely be offset by commensurate gains in other senate districts. The district court's refusal to preclear the proposed senate districting plan was based on the State's failures of proof, not on the court's imposition of any categorical

barrier to the elimination or reduction of majority-black districts. The district court's other rulings in this case, which granted preclearance of appellant's congressional, state house, and revised senate districting plans, further refute the State's characterization of the court's decision.

II. As applied by the district court in this case, Section 5 is a permissible exercise of congressional power under the Fifteenth Amendment. Appellant's constitutional challenge rests largely on its erroneous view that the district court categorically required the use of majority-black districts. This Court has specifically sustained the constitutionality of Section 5, both on its face and as applied to voting changes that are adopted for non-discriminatory purposes but are likely to have discriminatory effects. Congress may properly act under the Fifteenth Amendment to prohibit jurisdictions with a history of racial discrimination in voting from adopting new voting practices that would further erode minority electoral strength.

III. The question whether the district court acted properly in allowing individual Georgia voters to intervene in the State's judicial preclearance action is moot, since the court's judgment would be unaffected even if that interlocutory intervention ruling were held to be erroneous. In any event, appellant's challenge to the district court's intervention ruling lacks merit. Actions for declaratory judgment filed in district court are governed by the Federal Rules of Civil Procedure, which include provisions specifically addressing intervention. Because neither the text nor the history of Section 5 suggests that Congress intended to depart from the usual rules governing intervention, the district court acted properly in granting the individual voters' intervention request.

## ARGUMENT

### I. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S REQUEST FOR JUDICIAL PRECLEARANCE OF ITS PROPOSED STATE SENATE REDISTRICTING PLAN UNDER SECTION 5 OF THE VOTING RIGHTS ACT OF 1965

The district court in this case broke no new ground, but simply engaged in a straightforward application of established Section 5 standards to a detailed factual record. The court correctly recognized that Section 5 analysis turns on a comparison between a covered jurisdiction's proposed voting change and the jurisdiction's existing practices. Under that approach, a voting change is impermissible if it reduces the ability of minority voters to elect their candidates of choice, whether or not the proposed new practice is otherwise unfair or unreasonable. And, contrary to appellant's contention, the district court imposed no categorical bar to the elimination or reduction of existing black supermajority districts. Rather, the court held, based on all the relevant circumstances, that proposed reductions in the BVAPs of three specific state senate districts were likely to diminish the ability of black voters within those districts to elect candidates of choice. The court further held that appellant had failed to produce evidence that the anticipated losses of black electoral power within those three districts would likely be offset by commensurate gains in other parts of the State. Appellant offers no cogent basis for rejecting the court's considered assessment of the evidentiary record.

### A. Section 5 Of The Voting Rights Act Imposes Duties Upon Covered Jurisdictions That Are Separate And Distinct From Those Imposed By Section 2

Congress enacted the Voting Rights Act of 1965 "to rid the country of racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315 (1966). Although Sections 2 and 5 of the Act are "[t]wo of the weapons in the Federal Government's formidable arsenal," this Court has "consistently understood these sections to combat different evils and, accordingly, to impose very different duties upon the States." *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997) (*Bossier I*). It is thus well settled that Sections 2 and 5 "differ in structure, purpose, and application." *Holder* v. *Hall*, 512 U.S. 874, 883 (1994).

Section 2 of the Voting Rights Act is not limited to particular jurisdictions, but rather bars *all* States and their political subdivisions from maintaining any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right * * * to vote on account of race or color." 42 U.S.C. 1973(a). The pertinent inquiry in a Section 2 case is "whether, as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Thornburg* v. *Gingles*, 478 U.S. 30, 44 (1986) (citations and internal quotation marks omitted). The plaintiff in a Section 2 case need not demonstrate that the challenged voting practice reflects a change in the relevant jurisdiction's practice, or that it deprives minority voters within the jurisdiction of electoral strength that they possessed at some prior time. Rather, in Section 2 proceedings "the comparison must be made with a hypothetical alternative: If the *status quo* results in an

abridgement of the right to vote or abridges the right to vote relative to what the right to vote *ought to be*, the status quo itself must be changed." *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) (*Bossier II*).

In contrast to Section 2, Section 5 does not apply nationwide but rather is "aimed at areas where voting discrimination has been most flagrant," *Katzenbach*, 383 U.S. at 315, and it is triggered only by *changes* in a covered jurisdiction's voting practices. The jurisdictions covered by Section 5, including the State of Georgia, were initially identified based on the presence of certain factors, such as the use of literacy tests and low electoral participation, evincing "widespread and persistent discrimination in voting." *Id.* at 331. As originally enacted, Section 5 provided for termination of a jurisdiction's coverage within five years after enactment if "the danger of substantial voting discrimination ha[d] not materialized." *Ibid.* After careful review of the subsequent conduct of covered jurisdictions, however, Congress has found it necessary to extend the temporal scope of Section 5 on three occasions, most recently in 1982. See S. Rep. No. 417, 97th Cong., 2d Sess. 7-10 (1982). The Senate Report accompanying the 1982 legislation explained that "the pre clearance remedy is still vital to protecting voting rights in the covered jurisdictions and that its enforcement should be strengthened." *Id.* at 14. That conclusion was supported in part by the fact that many jurisdictions, including the State of Georgia and its political subdivisions, had failed to comply with Section 5's substantive and procedural requirements, especially in redistricting. *Id.* at 12-14. Congress therefore extended the application of Section 5 for an additional 25 years, until June 29, 2007. See 42 U.S.C. 1973b(a)(8); 42 U.S.C. 1973b note.

"[T]he purpose of § 5 has always been 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* v. *United States*, 425 U.S. 130, 141 (1976). As the pertinent Justice Department regulation explains, "[a] change affecting voting is considered to have a discriminatory effect under section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively." 28 C.F.R. 51.54(a). The pertinent inquiry under Section 5 therefore is "whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change." H.R. Rep. No. 196, 94th Cong., 1st Sess. 60 (1975) (quoted in *Beer*, 425 U.S. at 141).

In enacting Section 5, Congress sought "to shift 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." *Beer*, 425 U.S. at 140 (internal quotation marks citations omitted); accord *Bush* v. *Vera*, 517 U.S. 952, 983 (1996) (Section 5 mandates that "the minority's *opportunity* to elect representatives of its choice not be diminished"). Whereas Section 2 requires that a challenged voting practice be compared "with a hypothetical alternative," *Bossier II*, 528 U.S. at 334, a preclearance action under Section 5 "requires a comparison of a jurisdiction's new voting plan with its existing plan," *Bossier I*, 520 U.S. at 478. Thus, "[i]n § 5 preclearance proceedings—which uniquely deal only

and specifically with *changes* in voting procedures—the baseline is the status quo that is proposed to be changed: If the change 'abridges the right to vote' relative to the status quo, preclearance is denied." *Bossier II*, 528 U.S. at 334; see *id.* at 335 ("[I]n vote-dilution cases § 5 prevents nothing but backsliding."); *Holder*, 512 U.S. at 883 (under Section 5, "the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change.").

In short, neither Section 2 nor Section 5 is a "lesser included" version of the other: each prohibits some voting practices that the other does not. Section 2 is not limited to identified jurisdictions with a history of racial discrimination in voting, and a Section 2 violation may be established without proof that the challenged practice represents a change in the law of the pertinent State or locality. Conversely, with respect to covered jurisdictions, "retrogression" has always been understood to constitute a violation of Section 5, whether or not the new practice would also "abridge" the right to vote within the meaning of Section 2. Cf. *Bossier II*, 528 U.S. at 334 ("[The Court's] reading of 'abridging' as referring only to retrogression in § 5, but to discrimination more generally in § 2 and the Fifteenth Amendment, is faithful to the differing contexts in which the term is used.").[8]

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[8] As the district court in this case explained,

> [e]vidence that a plan satisfies Section 2 by preserving reasonably good opportunities for African American voters to elect candidates of choice may bear on whether there has been impermissible retrogression under Section 5. Undoubtedly, a change that has this effect is less likely to be marked by retrogressive intent. Yet, if existing opportunities of minority voters to exercise their franchise are robust, a proposed plan

Section 2 and Section 5 differ in another significant respect as well. In a Section 2 case, the burden is on the plaintiff to prove unlawful discrimination. See *Bossier I*, 520 U.S. at 479-480. By contrast, a covered jurisdiction that seeks judicial preclearance of a change in its voting practices "bears the burden of proving" that the proposed change has neither an impermissible retrogressive purpose nor a retrogressive effect on minority electoral strength. *Id.* at 478; see *id.* at 480 (Section 5 "imposes upon a covered jurisdiction the difficult burden of proving the *absence* of discriminatory purpose and effect."); *Bossier II*, 528 U.S. at 332 ("In the specific context of § 5, * * * the covered jurisdiction has the burden of persuasion."); J.S. App. 26a ("[I]n a Section 5 case, * * * the burden is on the State to show that the redistricting plan will not adversely affect the opportunities of African American voters to effectively exercise their electoral franchise.").

### B. The District Court's Determination That Appellant Had Failed To Prove The Absence Of An Impermissible Retrogressive Effect In This Case Was Consistent With This Court's Precedents

#### *1. The District Court Properly Focused Its Inquiry On A Comparison Between The State's Proposed Senate Districting Plan And The Benchmark Plan*

a. Appellant contends (Br. 30-31) that it was entitled to preclearance of its original senate districting plan

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that leaves those voters with merely a "reasonable" or "fair" chance of electing a candidate of choice may constitute retrogression in overall minority voting strength.

J.S. App. 113a.

because each of the three districts contested by the United States "presented minority voters and candidates with at least an equal chance to win and a full, fair opportunity to participate in the political process." That claim lacks merit. The "retrogression" inquiry under Section 5 requires a comparison between the proposed voting practice for which preclearance is sought and the pre-existing voting regime or benchmark of the covered jurisdiction. And "the purpose of § 5 has always been 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. Evidence demonstrating that black voters within a proposed district would have a "fair" or "reasonable" opportunity to elect their candidate of choice, while potentially *relevant* to the Section 5 inquiry, does not by itself establish the absence of retrogression. As the district court correctly recognized, "if existing opportunities of minority voters to exercise their franchise are robust, a proposed plan that leaves those voters with merely a 'reasonable' or 'fair' chance of electing a candidate of choice may constitute retrogression in overall minority voting strength." J.S. App. 113a.

In both *Bossier I* and *Bossier II*, this Court specifically declined "to blur the distinction between § 2 and § 5 by shifting the focus of § 5 from nonretrogression to vote dilution, and changing the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan." *Bossier II*, 528 U.S. at 336 (brackets, ellipsis, and internal quotation marks omitted); see *Bossier I*, 520 U.S. at 480. In *Bossier I*, the United States argued that preclearance of a proposed redistricting plan could properly be denied on the ground that the proposed

plan violated Section 2 by unnecessarily limiting the opportunity of minority voters to elect their candidates of choice. See *id.* at 475-476. This Court rejected that contention, explaining that to

> recogniz[e] § 2 violations as a basis for denying § 5 preclearance would inevitably make compliance with § 5 contingent upon compliance with § 2. Doing so would, for all intents and purposes, replace the standards for § 5 with those for § 2. Because this would contradict our longstanding interpretation of these two sections of the Act, we reject [the United States'] position.

*Id.* at 477. In *Bossier II*, the Court similarly held that the Attorney General could not properly refuse to preclear "a voting change with a discriminatory but nonretrogressive purpose." 528 U.S. at 336; see *id.* at 328-341.

The Court's analysis in *Bossier I* and *Bossier II* compels rejection of appellant's argument that a covered jurisdiction's *compliance* with Section 2 suffices for preclearance under Section 5. To obtain judicial preclearance under Section 5, a covered jurisdiction must prove that a proposed voting change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c. As the Court in *Bossier II* recognized, the question whether a particular practice "abridges" the right to vote cannot cogently be addressed "without some baseline with which to compare the practice." 528 U.S. at 334. Because the "baseline" in a Section 5 case "is the status quo that is proposed to be changed," any change that materially reduces the electoral power of minority voters "abridges the right to vote" within the meaning of Section 5, regardless of any comparison that

might be made to some "hypothetical alternative." *Ibid.* To permit preclearance of such a change based on the general "fairness" or "reasonableness" of the proposed voting practice "would, for all intents and purposes, replace the standards for § 5 with those for § 2." *Bossier I*, 520 U.S. at 477. This Court's adoption of such an approach would "call into question more than 20 years of precedent interpreting § 5." *Id.* at 480.

b. Appellant's reliance (Br. 35) on *City of Richmond* v. *United States*, 422 U.S. 358 (1975), is misplaced. *City of Richmond* involved a request for preclearance of a proposed annexation that would have reduced the black population of the city from 52% to 42%. *Id.* at 363. This Court concluded that, although the annexation may have had the effect of creating a political unit with a lower percentage of blacks, it did not violate Section 5 so long as it fairly reflected the strength of the black community after annexation. *Id.* at 371. That holding, however, was "nothing more than an *ex necessitate* limitation upon the effect prong in the particular context of annexation—to avoid the invalidation of all annexations of areas with a lower proportion of minority voters than the annexing unit." *Bossier II*, 528 U.S. at 330-331. While the Court in *City of Richmond* "found it necessary to make an exception to normal retrogressive-*effect* principles" in the context of annexation, *id.* at 331, it in no way equated the Section 2 and Section 5 inquiries, nor did it eliminate the retrogressive-effect test in Section 5 cases generally. Because this case does not involve an annexation, *City of Richmond* is inapposite. See *id.* at 330 ("[*City of Richmond*'s] interpretation of the effect prong of § 5

was justified by the peculiar circumstances presented in annexation cases.").[9]

***2. The District Court Did Not Construe Section 5 As Inflexibly Requiring The Maintenance Of Pre-Existing Majority BVAP Districts***

Appellant characterizes the district court's opinion as imposing an inflexible rule that, once a jurisdiction covered by Section 5 has created a BVAP majority or super-majority district, the district's black population cannot under any circumstances be dispersed to adjoining districts. See Appellant Br. 39 ("According to the district court, once a seat thus becomes safe through demographic changes, it must be kept safe forever."). Appellant further contends that under the district court's analysis, "covered states like Georgia would ultimately be compelled to have the maximum possible number of supermajority, safe districts" (*ibid.*), notwithstanding "the unavoidable fact that super-majorities necessarily diminish African American voter

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[9] Appellant's reliance (Br. 35) on *United States* v. *Mississippi*, 444 U.S. 1050 (1980), is also misplaced. In that case, a three-judge district court found that slight differences in the number of districts with majority BVAPs in the benchmark and proposed plans were "insubstantial," and that the proposed plan therefore was "not retrogressive in overall black voting strength." *Mississippi* v. *United States*, 490 F. Supp. 569, 580 (D.D.C. 1979). The court cited *City of Richmond*, along with a number of other cases, for the limited proposition that "no racial group has a constitutional or statutory right to an apportionment structure designed to maximize its political strength." *Id.* at 582. But that proposition is a recognized principle under Section 5 and was properly applied to appellant's proposed state senate plan by the district court in this case. See J.S. App. 107a ("The [Supreme] Court has clearly held that compliance with Section 5, and avoidance of retrogression, does not require jurisdictions to improve or strengthen the voting power of minorities.").

influence in other districts" (*id.* at 36). Appellant's argument reflects a fundamental misunderstanding of the district court's opinion.

Contrary to the State's contention, the district court took pains to emphasize that it was *not* adopting a categorical prohibition on the alteration or elimination of existing BVAP majority districts. "In evaluating the evidence of the Senate redistricting plan's purpose and effect, the court consider[ed] a wide range of factors that contribute to minority voting strength." J.S. App. 118a. Although the district court attached substantial weight to the fact that the Senate districting plan "propose[d] to decrease the BVAPs in existing majority-minority districts such that they would constitute only bare majorities, or slightly less than majorities," *id.* at 145a, it did not suggest that such decreases, standing alone, were dispositive of appellant's preclearance request. Rather, the court observed that "[i]t was Georgia's burden to produce some evidence to prove that these changes would not be retrogressive," and it concluded (after exhaustive analysis of the pertinent record evidence) that "the State ha[d] not met its burden." *Ibid.* Appellant offers no cogent basis for rejecting the district court's assessment of the evidentiary record.

a. The district court observed at the outset of its retrogression analysis that "Section 5 is not an absolute mandate for maintenance of [majority-minority] districts." J.S. App. 108a. The court explained that

> majority-minority districts do not inherently increase or decrease minority voting strength, but rather can have either effect or neither. Breaking apart a majority-minority district and dispersing minority voters into neighboring districts can have

> different consequences in different contexts. On the one hand, it can diminish minority voters' power by fragmenting them among several districts where a bloc-voting majority can routinely outvote them. On the other hand, such dispersal can actually increase electoral opportunity if it eliminates "packing" whereby the minority voters are crammed into a small number of "safe" districts and deprived of an ability to influence a greater number of elections.

*Id.* at 109a (citations, brackets, and internal quotation marks omitted). For that reason, the court explained, its Section 5 "analysis—while limited to the question of retrogression—is fact-intensive and must carefully scrutinize the context in which the proposed voting changes will occur." *Id.* at 111a.[10]

b. In concluding that appellant had failed to carry its burden of persuasion under Section 5, the district court considered the reductions of BVAP in proposed senate Districts 2, 12, and 26, in light of other factors bearing on black voters' effective exercise of the franchise and their ability to elect candidates of choice. Consistent with this Court's decision in *Thornburg*, 478 U.S. at 55-57, and with applicable Department of Justice regulations and published guidance, see 28 C.F.R. 51.58(b)(3); *Guidance Concerning Redistricting and Retrogression*

[10] Consistent with that aspect of the district court's analysis, applicable Department of Justice regulations provide that, in determining whether a covered jurisdiction's proposed redistricting plan has a retrogressive purpose or effect, the Attorney General will consider both "[t]he extent to which minority concentrations are fragmented among different districts" and "[t]he extent to which minorities are overconcentrated in one or more districts." 28 C.F.R. 51.59(c) and (d); accord *Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c*, 66 Fed. Reg. 5412, 5413 (2001).

*Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c*, 66 Fed. Reg. 5412, 5413 (2001) (*DOJ Guidance*), the district court placed particular emphasis on evidence concerning the presence or absence of racially polarized voting in the senate districts contested by the United States. See, *e.g.*, J.S. App. 114a, 115a, 126a-127a. The court reviewed the record and concluded that "[t]he United States ha[d] produced credible evidence that suggests the existence of highly racially polarized voting in the proposed districts." *Id.* at 133a. The court further explained that the State had "provided the court with no competent, comprehensive information regarding white crossover voting or levels of polarization in individual districts across the State," and had "presented no other evidence to persuade [the court] that voting in future Senate races in the contested districts will not be racially polarized." *Ibid.*[11]

c. Based on the evidence described above, the district court found that appellant had failed to prove "by a preponderance of the evidence that the planned reductions in BVAP and in the number of African American registered voters in Senate Districts 2, 12 and 26 will not diminish African American voting strength in these districts." J.S. App. 133a. But the court did not hold that the likelihood of reduced black electoral power in those three districts was dispositive of the Section 5 inquiry. Rather, the court left open the

[11] In its subsequent opinion granting preclearance of Georgia's revised senate districting plan (see J.S. App. 1a-22a; pp. 16-17, *supra*), the district court summarized its earlier decision denying preclearance of the 2001 plan by stating: "The evidence of racially polarized voting in [Districts 2, 12, and 26], in conjunction with the bare majorities of BVAP in the proposed districts, led the court to conclude that the 2001 plan was more likely than not to have a retrogressive effect." *Id.* at 19a.

possibility that, even when the dispersion of minority residents can be expected to diminish the electoral power of minority voters within a particular district, a covered jurisdiction might still be able to prove that the proposed change is non-retrogressive because it will *increase* the ability of minority voters to elect candidates of choice in *other* districts within the jurisdiction. The district court found that appellant could not obtain preclearance of its original senate districting plan on that basis, however, because the State had failed to present evidence of likely gains in black electoral power in districts other than 2, 12, and 26. Thus, the court stated: "[I]t may well be the case that any decrease in African American electoral power in Senate Districts 2, 12 and 26 will be offset by gains in other districts, but [Georgia] has failed to present any such evidence." *Id.* at 133a-134a; see *id.* at 145a (noting that the State did not "present[] evidence regarding potential gains in minority voting strength in Senate Districts other than Districts 2, 12 and 26").

There is consequently no basis for appellant's assertion (Br. 36-37) that, under the district court's analysis, a covered jurisdiction must maintain pre-existing black super-majority districts even if overall black electoral power would be increased by dispersion of black voters. In fact, the district court expressly contemplated the possibility that a covered jurisdiction could obtain preclearance of a new districting plan by showing that anticipated losses of black electoral power in some districts would likely be offset by commensurate gains in others. See pp. 32-33, *supra*; cf. *DOJ Guidance*, 66 Fed. Reg. at 5413 (when Justice Department considers an administrative preclearance request for a proposed redistricting plan, all relevant "information is used to compare minority voting strength in the benchmark

plan as a whole with minority voting strength in the proposed plan as a whole."). The district court faulted appellant for a failure of proof, not a simple failure to maintain existing BVAP-majority districts. While recognizing that a new districting plan might sometimes increase overall black electoral strength even while reducing black voting power in particular areas, the court held that appellant, which bears the burden of proof in this Section 5 proceeding (see p. 25, *supra*), had failed to show a likelihood that its own proposed senate districting plan would have that effect.

For essentially the same reason, there is no merit to appellant's contention (Br. 36-37) that the district court under Section 5 has required conduct—*i.e.*, the continued use of black super-majority legislative districts—that is potentially violative of Section 2 under a "vote packing" theory. See *Johnson* v. *DeGrandy*, 512 U.S. 997, 1007 (1994) ("manipulation of district lines can dilute the voting strength of politically cohesive minority group members" by, *inter alia*, "packing them into one or a small number of districts to minimize their influence in the districts next door"); *Thornburg*, 478 U.S. at 46 n.11; pp. 30-31, *supra*. Vote dilution prohibited by Section 2 occurs only when a challenged districting plan "impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters," *Johnson*, 512 U.S. at 1007 (citation omitted); and a claim that black voting strength has been "impair[ed]" through "packing" necessarily requires proof that overall black electoral power would be *greater* if black voters were more evenly dispersed among different legislative districts. In situations where the elimination or reduction of existing majority-black districts could be expected to have that *ameliorative* effect, such a change would not be retro-

gressive, and Section 5 would impose no barrier to its adoption.

In the present case, the district court expressly contemplated the possibility that a covered jurisdiction's elimination or reduction of pre-existing majority-black districts could be held non-retrogressive based on proof that the dispersion of black voters would increase black electoral strength in other districts. See pp. 32-33, *supra*. If appellant had shown that the reduction of high BVAPs in some districts (and the consequent dispersion of black voters to other districts) would increase rather than diminish black electoral strength statewide, there is no reason to doubt that the district court would have granted preclearance of the original proposed senate districting plan. There is consequently no ground for concern that the district court's Section 5 analysis would prevent a covered jurisdiction from eliminating overconcentrations of black voters in any situation where that might be necessary to ensure compliance with Section 2.[12]

d. The district court's other rulings in this case further belie appellant's contention that the court's refusal to preclear the original senate districting plan was based on an inflexible requirement that the State maintain existing black majority and super-majority

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[12] There is, in particular, no basis for appellant's suggestion (Br. 36-37) that the changes made to the state senate districting plan in response to the district court's initial denial of preclearance have rendered Georgia vulnerable to a colorable "vote packing" claim under Section 2. Under the revised senate districting plan, the BVAPs of Districts 2, 12, and 26 were 54.5%, 55.04%, and 55.45%, respectively. J.S. App. 14a. Appellant cites no precedent, and we are aware of none, suggesting that majority-black districts of that comparatively small magnitude can give rise to a tenable vote packing claim.

districts. In its initial decision, the court granted the State's request for a declaratory judgment with respect to the proposed congressional and state house districting plans, see J.S. App. 145a-147a, notwithstanding the fact that the plans resulted in a reduction of BVAP in one congressional and 34 state house districts that had majority BVAPs under the benchmark plan, see p. 5, *supra*. The court's grant of declaratory relief with respect to the congressional and state house plans was consistent with the position of the United States, which did not oppose preclearance of those plans (though the private intervenors did oppose preclearance).[13] With respect to the congressional plan, the court was "not persuaded that the reduction in the African American population in the Fifth District necessarily constitutes retrogression." *Id.* at 146a. With respect to the state house plan, the court explained that "[w]hile some of the existing House districts would experience

[13] Appellant suggests (Br. 30) that the United States' approach in this case represents a continuation of the practice, declared unlawful by this Court in *Miller* v. *Johnson*, 515 U.S. 900, 927-928 (1995), of pressuring covered jurisdictions to maximize the number of majority-black districts. See note 1, *supra*. In this case, however, neither the United States nor the district court required appellant to create additional majority-black districts. Instead, the United States' position and the court's holding were properly premised upon the *Beer* retrogression standard. Thus, their focus was on preventing the diminution—not on achieving the maximization—of minority voting strength. See, *e.g.*, *Vera*, 517 U.S. at 983 ("Nonretrogression * * * mandates that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions."). And appellant does not contest the district court's conclusion (J.S. App. 37a-38a; see note 1, *supra*) that the prior court-ordered remedial districting plan furnished the appropriate benchmark for the court's retrogression analysis in this case.

decreases in BVAP under the proposed plan, there is no evidence before the court of racially polarized voting in any House Districts that might suggest that these decreases will have a retrogressive effect." *Id.* at 147a. In preclearing those plans, the court unequivocally rejected any mode of analysis that would categorically require the maintenance of all black majority and super-majority legislative districts.

The same is true of the district court's subsequent decision (see J.S. App. 1a-22a) that granted preclearance of the State's revised senate districting plan, notwithstanding reductions in the BVAPs of some BVAP-majority districts. Appellant submitted its revised plan in April 2002, six days after the district court denied preclearance of the original (2001) proposed senate plan. The United States did not oppose preclearance of the revised plan; the private intervenors opposed preclearance. See *id.* at 3a. The court observed, with respect to the revised plan, that "[w]hile there are thirteen districts with majority BVAP according to the State's calculations of BVAP, the BVAPs in eight of these proposed districts would decrease as compared with the benchmark plan." *Id.* at 13a. The court nevertheless found it "more probable than not that the 2002 plan will not have a retrogressive effect on African American voting strength in the State of Georgia," *id.* at 20a, and it accordingly granted appellant's request for a declaratory judgment preclearing the plan, *id.* at 21a.

In granting preclearance of the revised senate districting plan, the district court explained that "[t]he only evidence of racially polarized voting before the court is in Senate Districts 2, 12 and 26," and that "[u]nder the revised Senate redistricting plan, the BVAP in Senate District 12 would remain practically

the same" as under the benchmark plan. J.S. App. 14a. Although the BVAPs in Districts 2 and 26 were approximately 6% lower under the revised plan than under the benchmark plan, see *ibid.*, the court noted that "[t]he revised plan addresses district residents' concerns about particular precincts, the inclusion or exclusion of which the residents testified would negatively affect minority voting strength," *id.* at 20a. The revised plan also offered the possibility of offsetting gains in other districts that the court found absent in the original plan. Thus, the district court found it significant that "according to [appellant's] methodology of calculating BVAP, the 2002 plan has thirteen districts with majority BVAP, where the benchmark plan only has twelve." *Id.* at 19a. The district court's nuanced consideration of all the relevant evidence in preclearing the State's 2002 senate districting plan further refutes appellant's contention that the court's prior opinion categorically required the maintenance of existing black majority or super-majority districts.

## II. AS APPLIED BY THE DISTRICT COURT TO THE FACTS OF THIS CASE, SECTION 5 IS A PERMISSIBLE EXERCISE OF CONGRESSIONAL POWER UNDER THE FIFTEENTH AMENDMENT

Appellant contends (Br. 37-39) that Section 5, as applied by the district court to Georgia's preclearance request in this case, exceeds Congress's enforcement authority under the Fifteenth Amendment. That claim lacks merit.

A. Like its statutory challenge to the district court's ruling, appellant's constitutional argument is premised on a clear overreading of that court's decision. As explained above, the district court did not "require that states draw safe minority districts" (Appellant Br. 38)

or hold that "once a seat thus becomes safe through demographic changes, it must be kept safe forever" (*id.* at 39). Whatever the constitutional status of a hypothetical federal law that imposed such requirements, Section 5 as correctly applied by the district court here did not have those effects and so suffers no constitutional defect.

B. This Court has "specifically upheld the constitutionality of § 5 of the [Voting Rights] Act against a challenge that this provision usurps powers reserved to the States." *Lopez* v. *Monterey County*, 525 U.S. 266, 283 (1999); see *Katzenbach*, 383 U.S. at 334-335. In *City of Rome* v. *United States*, 446 U.S. 156 (1980), the Court sustained the application of Section 5 to voting changes that "had not been made for any discriminatory purpose, but did have a discriminatory effect." *Id.* at 172. The Court held that Congress possesses constitutional authority to "prohibit voting practices that have only a discriminatory effect," *id.* at 175, explaining that "Congress may, under the authority of § 2 of the Fifteenth Amendment, prohibit state action that, though in itself not violative of § 1, perpetuates the effects of past discrimination," *id.* at 176.

The fact that Section 5 measures discriminatory effect by reference to a covered jurisdiction's own prior voting practices, rather than by comparison "to what the right to vote *ought to be*" (*Bossier II*, 528 U.S. at 334), creates no constitutional concern. This Court has repeatedly applied Section 5's effects prong, and has distinguished the discriminatory effects prohibited by Section 5 from those proscribed by Section 2, without suggesting that Section 5's focus on "retrogression" renders it vulnerable to constitutional attack. Indeed, if Congress may "prohibit state action that * * * *perpetuates* the effects of past discrimination," *City of*

*Rome*, 446 U.S. at 176 (emphasis added), it may surely ban voting changes that would *exacerbate* the effects of past discrimination by *reducing* minority electoral strength in jurisdictions with a history of discriminatory conduct.

## III. THE QUESTION WHETHER PRIVATE PARTIES MAY INTERVENE IN JUDICIAL PRECLEARANCE SUITS UNDER SECTION 5 IS MOOT AND WAS CORRECTLY RESOLVED BY THE DISTRICT COURT

Appellant argues (Br. 40-44) that the district court erred in allowing four African-American Georgia voters to intervene in the State's declaratory judgment action in order to challenge the legality of plans and districts that the United States did not oppose.[14] See J.S. App. 214a-219a. Because a ruling favorable to appellant on that issue would not affect the district court's judgment, the question whether the district court appropriately allowed intervention is moot, and this Court should not address it. In any event, appellant's argument lacks merit.

### A. The Question Whether The District Court Properly Allowed Intervention In This Case Is Moot

The State does not contend that the district court's judgment would be in any way affected if this Court were to hold that Section 5 bars private intervention in a judicial preclearance action. Any such contention would be implausible. The district court granted

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[14] Appellant appears to have abandoned its prior contention (J.S. 28-30) that the intervenors in this case lacked Article III standing. For the reasons set forth by the district court (J.S. App. 30a-31a) and in the United States' Motion to Affirm (at 19-21), the intervenors had standing in this case.

appellant's request for a declaratory judgment with respect to its congressional and state house districting plans. See J.S. App. 145a-147a. With respect to appellant's original state senate plan, the district court based its decision denying preclearance on the likely retrogressive effects of the plan in the three districts (Districts 2, 12, and 26) identified by the United States as those in which retrogression appeared likely. Thus, even if the retrogression inquiry in a Section 5 judicial preclearance action is properly limited to those aspects of the proposed voting changes that are disputed by the parties—a proposition that the district court in this case squarely rejected, see *id.* at 103a-106a; p. 9, *supra*—there can be no colorable argument that the participation of the individual African-American voters as intervenors affected the district court's ruling on the merits of the case. Whether or not the district court acted correctly in granting leave to intervene, that interlocutory ruling has no continuing effect on the State's rights and obligations under Section 5. Appellant's objection to that interlocutory ruling is therefore moot, and this Court should not address it.[15]

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[15] The four African-American voters who were granted leave to intervene in the district court did not appeal the court's rulings on the merits. See note 4, *supra*. If those individuals had sought to appeal the portions of the district court's decision that were favorable to the State (*i.e.*, the court's grant of preclearance with respect to appellant's congressional, state house, and revised state senate districting plans), the question whether the voters were properly given party status in the district court would indeed be relevant to the proper disposition of their appeal. But the propriety of allowing those persons to intervene in the district court has no bearing on the correct resolution of the State's appeal from the district court's denial of preclearance of the original proposed senate plan.

Appellant contends (Br. 42) that the participation of the intervenors "expanded the scope of the case from three Senate districts to include the entire Georgia House and congressional plans," and rendered the proceedings in the district court more arduous and complex. It is far from clear that this is so. The district court found that the State's request for a declaratory judgment "impose[d] on th[e] court an affirmative duty to inquire whether the [districting] plans have the effect or purpose of denying or abridging the right to vote on account of race or color." J.S. App. 104a. In light of that conception of its duties, the district court would likely have considered itself obliged to inquire into the probable effects of the congressional and state house districting plans even if the private intervenors had not participated (or had participated solely as amici) in the declaratory judgment action. In any event, appellant identifies no means by which this Court could now redress any inconvenience or increased litigation burdens that the State may have suffered as a result of the district court's order granting the private parties leave to intervene.

### B. The District Court Acted Properly In Allowing Individual African-American Voters To Intervene In The State's Declaratory Judgment Action

Under Section 5, a covered jurisdiction that seeks to adopt a change in voting practices may either (1) sue for a declaratory judgment from a three-judge district court in the District of Columbia, or (2) request administrative preclearance from the Attorney General. 42 U.S.C. 1973c. Appellant asserts (Br. 40) that in a Section 5 declaratory judgment action, "the Attorney General maintains his unique role as the sole statutorily designated defendant." Nothing in the text of Section 5

provides that the Attorney General shall be the exclusive defendant in such a proceeding, however, nor does the statute by its terms bar private parties from intervening. See 42 U.S.C. 1973c.

Actions for declaratory judgment filed in district court are governed by the Federal Rules of Civil Procedure, which include provisions specifically addressing intervention. See Fed. R. Civ. P. 1, 24; see also *NAACP* v. *New York*, 413 U.S. 345, 365 (1973) (applying Rule 24 to an application for intervention in a declaratory judgment action under the Voting Rights Act). Rule 24 states that leave to intervene shall be granted "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." Fed. R. Civ. P. 24(a)(2). Because the United States in this case opposed only the state senate plan, the district court concluded that the intervenors' interest in opposing the other two plans was not adequately represented by the United States. Accordingly, the court granted the intervenors' application under Rule 24. See J.S. App. 214a-219a. In light of the absence of any indication in the text or history of Section 5 that Congress did not intend the usual rules governing intervention to apply to a judicial preclearance action, the district court acted properly in granting the individual voters' intervention request.[16]

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[16] In *City of Richmond*, the district court similarly permitted intervention when the City requested a declaratory judgment that a proposed annexation did not have a prohibited retrogressive

Appellant's reliance (Br. 41-42) on *Morris* v. *Gressette*, 432 U.S. 491 (1977), is misplaced. In *Morris*, this Court held that, in an administrative preclearance proceeding, the decision whether to interpose an objection to a proposed voting change is committed to the Attorney General's discretion and is therefore not judicially reviewable. *Id.* at 504-507. Because the Court's holding rested in part on the important *differences* between administrative and judicial preclearance procedures under Section 5, see *id.* at 502-503, *Morris* has little bearing on the proper disposition of the question presented here. The Court in *Morris* did not address the right of private parties to intervene in a declaratory judgment action, much less suggest that the pertinent provisions of the Federal Rules of Civil Procedure are inapplicable in this setting. The State here voluntarily chose to forgo submission of its plan to the Department of Justice, and it thereby opted for the rules applicable in a civil action, rather than the rule of *Morris*.

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purpose or effect. Although the Attorney General indicated approval of the plan, a group of residents who opposed it were permitted to intervene. See 422 U.S. at 366. As a result, the City and the intervenors continued in litigation, and the lower court eventually concluded that the City had failed to meet its burden of proof. *Id.* at 366-367. This Court noted probable jurisdiction, see *id.* at 367, and subsequently reversed on the merits, see *id.* at 367-379. Although this Court did not specifically address the propriety of the district court's decision to permit intervention, "neither did the Court question the district court's exercise of jurisdiction." J.S. App. 105a. Indeed, as the district court in the instant case correctly noted, this Court in *City of Richmond* "remanded the case to the district court for further proceedings" in light of the Court's opinion. *Ibid.*; see 422 U.S. at 378-379.

## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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## APPENDIX

### ATTACHMENT A

The following table summarizes the reductions of BVAP in the 46 districts that had majority BVAPs under the benchmark plans. The districts to which the United States interposed an objection are marked with an asterisk (*). The table is arranged in descending order, from the largest reduction in BVAP to the smallest. The table is based on appellant's method of calculating black population figures.

| District (Benchmark/ Proposed) | Benchmark BVAP | Proposed BVAP | Reduction |
|---|---|---|---|
| House 54/47 | 94.12% | 60.12% | 34.00% |
| House 73/60 | 93.38% | 59.51% | 33.87% |
| House 71/61 | 91.82% | 58.33% | 33.49% |
| House 53/48 | 92.49% | 61.13% | 31.36% |
| House 72/59 | 91.23% | 61.86% | 29.37% |
| Senate 43 | 88.91% | 62.63% | 26.28% |
| House 70/60 | 85.18% | 59.51% | 25.67% |
| House 117/97 | 74.04% | 53.24% | 20.80% |
| House 51/44 | 78.46% | 59.18% | 19.28% |
| House 52/45 | 82.43% | 64.55% | 17.88% |
| House 68/59 | 79.39% | 61.86% | 17.53% |
| Senate 38 | 76.61% | 60.29% | 16.32% |
| House 118/98 | 73.35% | 57.63% | 15.72% |
| Senate 35 | 76.02% | 60.69% | 15.33% |
| House 49/43 | 79.39% | 65.18% | 14.21% |
| House 148/124 | 67.97% | 54.14% | 13.83% |
| Senate 22 | 63.51% | 51.51% | 12.00% |
| House 136/111 | 67.92% | 56.16% | 11.76% |
| Senate 55 | 72.40% | 60.64% | 11.76% |
| Senate 26* | 62.45% | 50.80% | 11.65% |

| | | | |
|---|---|---|---|
| House 127/107 | 75.13% | 63.60% | 11.53% |
| House 124/105 | 70.08% | 58.71% | 11.37% |
| Senate 15 | 62.05% | 50.87% | 11.18% |
| House 50/43 | 75.50% | 65.18% | 10.32% |
| Senate 2* | 60.58% | 50.31% | 10.27% |
| House 55/48 | 71.00% | 61.13% | 9.87% |
| House 162/135 | 70.69% | 60.86% | 9.83% |
| House 65/55 | 71.76% | 62.30% | 9.46% |
| House 149/124 | 62.98% | 54.14% | 8.84% |
| House 58/48 | 69.37% | 61.13% | 8.24% |
| House 120/95 | 52.92% | 45.10% | 7.82% |
| Congress 5 | 58.85% | 52.04% | 6.81% |
| House 151/125 | 52.09% | 45.46% | 6.63% |
| Senate 10 | 70.66% | 64.14% | 6.52% |
| House 57/50 | 70.75% | 65.38% | 5.37% |
| House 140/114 | 58.21% | 53.07% | 5.14% |
| Senate 12* | 55.43% | 50.66% | 4.77% |
| House 121/103 | 51.58% | 47.79% | 3.79% |
| House 133/113 | 57.79% | 54.26% | 3.53% |
| Senate 36 | 60.36% | 56.94% | 3.42% |
| House 66/57 | 62.76% | 59.59% | 3.17% |
| House 64/61 | 61.60% | 58.33% | 3.27% |
| House 161/136 | 64.68% | 61.62% | 3.06% |
| House 116/100 | 52.81% | 50.05% | 2.76% |
| House 56/51 | 54.72% | 52.07% | 2.65% |
| House 93/81 | 75.76% | 75.17% | 0.59% |

See Pl. Exhs. 1E, 2D, 8E, 9D, 11E, 12D.