No. 01-1437

In the Supreme Court of the United States

BEATRICE BRANCH, ET AL., APPELLANTS

v.

JOHN ROBERT SMITH, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the Attorney General is required under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to review a voting change subject to a federal court injunction that the jurisdiction involved has not appealed.

2. Whether the districting plan imposed by the state court in this case was precleared under Section 5 of the Voting Rights Act when the Attorney General requested additional information from the State rather than issuing an objection within 60 days of the initial submission.

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INTEREST OF THE UNITED STATES

The appeal in this case involves a challenge to the Attorney General's implementation of regulations governing Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. The United States has a substantial interest in a workable and efficient preclearance mechanism under Section 5 that is not subject to unauthorized judicial review.

STATEMENT

1. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides that whenever a covered jurisdiction, such as Mississippi, see 30 Fed. Reg. 9897 (1965), "shall enact or seek to administer" a change in "any voting qualification or prerequisite to voting, or standard, practice or procedure," the State must obtain preclearance from the District Court for the District of Columbia or the Attorney General before the change may be enforced. 42 U.S.C. 1973c. Section 5 specifies that, where the preclearance submission is made to the Attorney General, the voting change may be enforced if "the Attorney General has not interposed an objection within sixty days after such submission, or * * * the Attorney General has affirmatively indicated that such objection will not be made." *Ibid.*

Under the regulations interpreting Section 5 and governing the administrative preclearance process, the covered jurisdiction has the burden of producing sufficient information to enable the Attorney General to determine that the change does not have a retrogressive purpose and will not have a retrogressive effect. See 28 C.F.R. 51.52. The regulations describe the required contents of a Section 5 submission, see 28 C.F.R. 51.26-51.28, and further provide that:

> [i]f a submission does not satisfy the requirements of § 51.27, the Attorney General may request from the submitting authority any omitted information considered necessary for the evaluation of the submission. * * * The Attorney General shall notify the submitting authority that a new 60-day period in which the Attorney General may interpose an objection shall commence upon the receipt of a response from the submitting authority that provides the information requested or states that the information is unavailable. The Attorney General can request further information within the new 60-day period, but such a further request shall not suspend the running of the 60-day period.

28 C.F.R. 51.37(a) and (c). If a jurisdiction fails to provide a complete submission, or fails to sustain its burden of proof based on the information it has submitted, the Attorney General may issue an objection. 28 C.F.R. 51.40, 51.52. A covered jurisdiction that has received an objection from the Attorney General may still implement the change if it obtains judicial preclearance from the District Court for the District of Columbia. See 42 U.S.C. 1973c; 28 C.F.R. 51.44(c).

2. a. After the 2000 census, Mississippi lost one congressional seat. The State Legislature, however, failed to pass a redistricting plan. In October, 2001, appellant Beatrice Branch and others (the Branch plaintiffs) filed suit in state chancery court and asked the court to issue a districting plan

for the upcoming 2002 congressional elections. In November, 2001, appellee John Smith and others (the Smith plaintiffs) filed a similar action before a federal three-judge district court. The Smith plaintiffs argued that any plan developed by the state court would require Section 5 preclearance, which could not be completed in time for the March 1, 2002, deadline for candidate qualification. They therefore asked the federal court to draw up its own districting plan or order at-large elections pursuant to 2 U.S.C. 2a(c)(5).

The State moved to dismiss the federal case as premature. In an order filed on December 5, 2001, the federal district court denied that motion, J.S. App. 108a, but the court nonetheless stayed its hand to permit the state court to develop an enforceable plan. *Id.* at 107a-109a. In the same order, the federal district court granted the motion of the Branch plaintiffs to intervene in the federal case. *Id.* at 108a.

On December 13, 2001, the State Supreme Court denied a petition for mandamus filed by a group of intervenors in the state-court action. In a two-page ruling, the court stated that the chancery court had jurisdiction to issue a redistricting plan. J.S. App. 110a-112a. The Smith plaintiffs then amended their complaint in federal court, claiming that the State Supreme Court's decision on the chancery court's jurisdiction also required Section 5 preclearance and that any plan issued by the state court would violate Article I, Section 4 of the United States Constitution.

On December 21, 2001, the state court adopted the Branch plaintiffs' proposed districting plan. J.S. App. 117a-160a. On December 26, 2001, the State Attorney General submitted three matters to the Department of Justice for preclearance: (1) the State Supreme Court's mandamus decision to the extent it changed the process for drawing congressional districts by authorizing the Chancery Court to create a districting plan; (2) the resulting state-court plan; and (3) a change in the legislative process for developing districting legislation, which has subsequently been precleared by the

Department of Justice and is not at issue in this litigation. *Id.* at 227a-229a. Under Section 5 and its implementing regulations, preclearance is granted by operation of law if the Attorney General makes no objection within 60 days of receiving a complete submission. See 42 U.S.C. 1973c; 28 C.F.R. 51.42. Sixty days from the State's initial submission was February 25, 2002.

On January 15, 2002, the federal three-judge court expressed "serious doubts whether the Mississippi Supreme Court's Order and the plan adopted by the Chancery Court pursuant to that order will be precleared prior to the March 1 candidate qualification deadline." J.S. App. 98a. With respect to the State Supreme Court's decision authorizing the Chancery Court to impose a redistricting plan, the court believed that "it is not at all clear that this change is not retrogressive with respect to minority voting rights" and, "[c]onsequently, it appears to us that, at the very least, the Attorney General of the United States will consider those implications very carefully, and might perhaps request more information from State authorities to clarify what is embodied in the change and the consequences thereof." *Id.* at 100a. The court thus began work on its own redistricting plan.

On February 14, 2002, the Department of Justice sent a letter to the State Attorney General regarding the Section 5 submission. The letter began by noting that two of the matters for which preclearance was requested—the State Supreme Court's decision and the resulting state-court plan—were "directly related" so that "it would be inappropriate for the Attorney General to make a determination concerning the congressional redistricting plan adopted by the Chancery Court" until preclearance could also be given to the process by which that plan was developed. J.S. App. 192a; see 28 C.F.R. 51.22(b), 51.35. With respect to the State Supreme Court's decision, the letter informed the State that

> [o]ur analysis indicates that the information sent to date regarding this change in voting procedure is insufficient to enable us to determine that all or parts of the change 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, as required under Section 5.

J.S. App. 193a. The Department requested additional information, *id.* at 193a-195a, and notified the State that the "sixty-day review period will begin when we receive the information specified above," *id.* at 196a. See 28 C.F.R. 51.37.

The State Attorney General provided additional information on February 19 and 20, 2002. Assuming the response was complete, that made any Section 5 objection due by April 22, 60 days later. J.S. App. 200a-214a. The State Attorney General's submission noted that "[t]he case is still in litigation by an appeal to the Mississippi Supreme Court, which will at some juncture issue * * * [a] judgment * * *, presumably including a final determination on the merits of the Chancery Court jurisdiction." *Id.* at 204a.

b. The Branch intervenors argued in federal court that the Department's request for additional information did not extend the 60-day preclearance period. See J.S. App. 33a-34a n.3. The federal district court rejected that argument, *ibid.*, and declared that it would order the State to use the federal-court plan unless the Department precleared the state-court plan by February 25, 2002. See *id.* at 60a-61a. The Department did not preclear the plan by that date.

On February 26, 2002, the federal court enjoined the State from using the state-court plan and ordered the State instead to use the plan the federal court had developed. J.S. App. 1a-3a. At the same time, the court ruled that Article I, Section 4 of the United States Constitution prohibited the state chancery court from issuing a districting plan for congressional elections. *Id.* at 4a-24a. The court-stated that its

constitutional holding "is this court's alternative holding, in the event that on appeal it is determined that we erred in our February 19 ruling" that the plan had not been precleared. *Id.* at 5a. The court therefore framed its injunction to run "until the State of Mississippi produces a constitutional congressional redistricting plan that is precleared in accordance with the procedures in Section 5 of the Voting Rights Act of 1965." *Id.* at 2a.

The Branch plaintiffs filed a notice of appeal on February 26, 2002. J.S. App. 239a. The State did not file a notice of appeal.

c. On April 1, 2002, the Department of Justice in a letter informed the State that "it would be inappropriate for the Attorney General to make a determination concerning [the State's] submission now." J.A. 29. The letter explained that "[w]here voting changes submitted by the State have been enjoined by a federal court, they are not presently capable of administration, and are not ripe for review by the Attorney General." *Ibid.*

On April 23, 2002, the Branch plaintiffs filed a motion with the federal district court, J.A. 30, requesting vacation of the Section 5 ruling and a declaration that the state-court plan is precleared. J.A. 31. They argued that the Attorney General had no authority to decline to consider the enjoined voting change and that, as a result, the submission was precleared when no objection was interposed by April 22, 2002. J.A. 31-36. The district court summarily denied that motion on June 3, 2002. J.A. 37. No notice of appeal from that order was filed.

SUMMARY OF ARGUMENT

The district court properly enjoined implementation of the state-court plan because it required, but had not received, Section 5 preclearance. Contrary to appellants' assertion, the district court's ruling on that point has not been mooted by subsequent preclearance of the state court plan, because

no such preclearance has taken place. A prerequisite to preclearance under Section 5 is that a jurisdiction "enact or seek to administer" a voting change. The state-court plan was not "enact[ed]" by the State legislature, but imposed by the state court. Moreover, after the federal court enjoined the State from using the plan, the State's failure to appeal the injunction precludes a finding that the State was "seek[ing] to administer" the plan. Accordingly, the state-court plan was not precleared by passage of time while the injunction remained in force. Indeed, although this Court need not reach the issue, the injunction itself—even if the State had appealed it—precluded the State from "seek[ing] to administer" the plan and therefore precluded its preclearance by operation of law in any event.

Appellants likewise err in contending that the State's submission was precleared under Section 5 by operation of law 60 days after the State made its *initial* submission. Before the expiration of that period, the Attorney General determined that the State's initial submission failed to carry the State's burden under Section 5 and that additional information was necessary. Under regulations whose validity was upheld by this Court in *Georgia* v. *United States*, 411 U.S. 526 (1973), such a determination extends the time within which a preclearance decision may be made. As cases subsequent to *Georgia* have made clear, the Attorney General's determination that a State has failed to carry its burden under Section 5—and therefore the relevant determination in this case—is not subject to judicial review. The State's remedy, if it believes the Attorney General's determination to be erroneous, is to file a declaratory judgment action in the District Court for the District of Columbia—the only court authorized by Section 5 to make the substantive determination whether a plan satisfies Section 5's standards. If appellants' argument were accepted, local district courts would obtain precisely the jurisdiction over the merits of Section 5 determinations that Congress denied them.

Moreover, the intrusive judicial review that appellants seek would undermine the preclearance process. Such review would subject the Attorney General to the risk that a court would later invalidate a request for more information and thereby declare a plan precleared by the mere passage of time without any substantive Section 5 determination at all by the Attorney General or the District Court for the District of Columbia. To avoid that result, and to protect the Section 5 process, the Attorney General would be forced simply to file objections rather than seek more information in doubtful cases—a result that would inevitably make the preclearance process more cumbersome for covered jurisdictions.

In this case, the Attorney General had a reasonable basis for seeking more information that would more than suffice to satisfy any applicable standard of judicial review. The Attorney General reasonably declined to pass on the Section 5 validity of the state-court plan until he could also determine the Section 5 validity of the process—the vesting of jurisdiction to draw districts in the State Chancery Court—that produced the plan. And, especially in light of the district court's finding that the process did require preclearance under Section 5, the Attorney General reasonably sought more information on that matter as well. The Attorney General's reasonable approach was nowhere near the type of abuse of the Section 5 process that could warrant holding a potentially discriminatory plan precleared without any findings on its actual discriminatory purpose or effect.

ARGUMENT

The jurisdiction of a local federal court faced with a Section 5 coverage issue is limited to determining "(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate." *City of Lockhart* v. *United States*, 460 U.S.

125, 129 n.3 (1983). Appellants do not dispute that, at the very least, the state-court plan here was "covered by § 5" and therefore required preclearance before it could be enforced. Appellants also do not dispute that that the Attorney General has not expressly precleared it. They do contend, however, that "§ 5's approval requirements were satisfied" by the mere passage of time because at least one of two 60-day periods for the Attorney General to act—either the initial period beginning on December 26 and ending on February 25, or a revised period triggered by the State's submission of new material on February 20 and ending on April 22—passed without any action by the Attorney General. That contention is mistaken.

I. THE STATE-COURT PLAN HAS NOT BEEN PRECLEARED BY THE PASSAGE OF TIME DURING THE PENDENCY OF THIS APPEAL

Appellants argue (Br. 29-32) that the state-court plan was precleared by operation of law under Section 5 no later than April 22, 2002, 60 days after the State, on February 20, 2002, supplied the additional information sought by the Department of Justice.[1] On the facts of this case, that contention is wrong, because the State's failure to appeal the federal district court's injunction made clear that the State was no longer "seek[ing] to administer" the state-court plan, thus

[1] Appellants filed a motion with the district court asking it to declare that the submission was precleared on April 22 (see J.A. 30), but they did not appeal the denial of that motion. If the State's submission, however, has been precleared during this appeal, appellants' challenge to the district court's ruling that the plan was not precleared earlier (though not their challenge to that court's constitutional ruling) has become moot. See, *e.g.*, *United States Dep't of the Treasury* v. *Galioto*, 477 U.S. 556, 559-560 (1986) (holding equal protection challenge to statute moot when later statute eliminated the discrimination). Mootness issues may be raised at any time. *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 116 (1920). Accordingly, the question whether the state-court plan was precleared on April 22 appears to be properly before this Court, despite appellants' failure to appeal the district court's denial of their motion.

eliminating a critical prerequisite to preclearance by operation of law under Section 5. Moreover, as the Department's April 1 letter informed the State, even if the State had appealed the injunction, that would mean only that the State was seeking to appeal a decision that was an obstacle to the State's "seek[ing] to administer" the plan, not that the State was "seek[ing] to administer" the plan itself. Accordingly, the plan was not precleared on April 22.

A. The State Ceased "Seek[ing] To Administer" The State-Court Plan When It Failed To File A Notice Of Appeal

1. Section 5 provides that "[w]henever a [covered jurisdiction] shall *enact or seek to administer*" a voting change, "such [change] may be enforced * * * if [it] has been submitted * * * to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission." 42 U.S.C. 1973c (emphasis added). If a covered jurisdiction does not "enact or seek to administer" a voting change, then a submission by the State and a consequent failure to act by the Attorney General has no legal effect.

2. The state-court plan at issue here was not "enacted" by the State of Mississippi. See *Black's Law Dictionary* 546 (7th ed. 1999) (defining "enact" as "[t]o make into law by authoritative act; to pass"); *id.* at 910 (defining "legislate" as "[t]o make or enact laws"). To the contrary, the tangled litigation in the state and federal courts resulted from the legislature's failure to enact a plan. Accordingly, the Attorney General was required to act on the preclearance of the plan within the statutory 60-day period only if the State was "seek[ing] to administer" it.

When the Attorney General of Mississippi, acting on behalf of the State of Mississippi, made his initial submission to the Department of Justice on December 26, 2001 (J.S. App. 221a-238a), when he provided the supplemental infor-

mation regarding that plan on February 20, 2002 (see J.A. 28), and until the federal district court's injunction on February 26, 2002, the State was clearly "seek[ing] to administer" the changes for which preclearance was sought. Accordingly, if before the federal-court injunction a relevant 60-day period had elapsed without action by the Attorney General, the submitted voting changes would have been precleared by operation of law.

On February 26, 2002, however, the federal district court "enjoined [the State] from implementing the congressional redistricting plan adopted by the [state court]." J.S. App. 2a. The State never appealed the district court's injunction. Accordingly, the State was no longer "seek[ing] to administer" the state-court plan and the 60-day time period was no longer running. Under those circumstances, the passing of 60 days from the date of the State's February 20 submission had no legal significance.[2]

3. Appellants argue (Br. 30) that, because Mississippi's "courts have ordered implementation of the state court plan," the State "clearly has 'enact[ed] or seek[s] to administer' that plan." As noted above, the State never "enact[ed]" the state-court plan, because its legislature never approved it. Moreover, the "seeks to administer" language appears designed to identify relevant action by a state executive, not by the state judiciary. And even if the state-court injunction supported the claim that the State at one time "s[ought] to administer" the state-court plan, the State was not seeking to do so at any time after February 26, 2002, the date the federal court enjoined the State from implementing the state-court plan and thereby removed any legal requirement

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[2] The Section 5 prerequisite is not limited to whether the State was "seek[ing] to administer" the plan at the time it was submitted; the State must be doing so as well throughout the 60-day period. Otherwise, a State could repeal a law or withdraw a submitted plan and nonetheless force the Attorney General to act on it to preclude an argument that the submission was precleared by the passage of time.

that the State put it into effect. Because the State thus was not "seek[ing] to administer" the plan on April 22, it could not have been precleared by operation of law on that date.

That conclusion is particularly appropriate on the facts of this case. The State's posture vis-a-vis the state-court plan in the federal-court litigation was ambivalent at best. Although the State moved to dismiss the federal court case as premature, it did so in light of the possibility that the state legislature would act. The State never took the position that the state-court plan had been precleared or was constitutional under Article I, Section 4. In light of that ambivalent posture toward the state-court plan, it would be particularly anomalous to find that the State was nonetheless "seek[ing] to administer" that plan notwithstanding its failure to file a notice of appeal.

Appellants' argument, if accepted, would not only contravene the express terms of Section 5, but it would force the Attorney General to review wholly hypothetical voting changes that have been enjoined by a court judgment—state or federal—and that remain unappealed by *any* party. To be sure, the private intervenors here appealed the district court's injunction one day after it was issued. But the jurisdictional time period for filing an appeal would have allowed the private intervenors to file an appeal after the 60-day preclearance clock had expired and then claim that preclearance had occurred through the passage of time. See 28 U.S.C. 2101. The only way to preclude that scenario would be to have the Attorney General evaluate enjoined plans, even when no party may ever seek an appeal.

More broadly, in light of Section 5's requirement that the State "seek to administer" the plan, the private parties' filing of a notice of appeal should have no effect on the Attorney General's obligations to act on a preclearance submission. The terms of Section 5 make clear that the Attorney General's obligations are triggered only if and when a *State* "enact[s] or seek[s] to administer" a voting change. The

actions of a private party are not the actions of a State, and the actions of a private party therefore cannot themselves satisfy the prerequisite to Section 5 preclearance.

B. The Attorney General Need Not Act On A Submission That Has Been Enjoined On Grounds Other Than A Failure To Obtain Preclearance Under Section 5

For the reasons given above, the Attorney General's failure to interpose an objection to the state-court plan by April 22 was of no legal significance. The Court therefore need not reach any other issue regarding the effect of an injunction on the Attorney General's obligations to evaluate a Section 5 submission. Nonetheless, as the Department's April 1 letter explained, the federal-court's injunction made it impossible for the State to "seek to administer" the voting changes at issue, and it therefore precluded preclearance of the plan on April 22 by operation of law under Section 5. See J.A. 28-29.

1. A voting change that has not yet been precleared under Section 5 is rarely enjoined for reasons apart from Section 5. This Court has repeatedly instructed that a "new reapportionment plan enacted by a State * * * will not be considered 'effective as law' until it has been submitted and has received clearance under § 5. Neither, in those circumstances, until clearance has been obtained, should a court address the constitutionality of the new measure." *Wise* v. *Lipscomb*, 437 U.S. 535, 542 (1978) (citations omitted).[3] Accord *United States* v. *Board of Supervisors*, 429 U.S. 642, 646-647 (1977); *Connor* v. *Finch*, 431 U.S. 407, 412 (1977); *Connor* v. *Waller*, 421 U.S. 656 (1975). Under those instruc-

[3] Appellants are correct (Br. 31) that "this Court recognized that federal courts might enjoin voting changes on constitutional grounds independent of any Section 5 review." But such adjudication must wait until the preclearance process is finished. See *Morris* v. *Gressette*, 432 U.S. 491, 504 (1977) (noting there is "no bar to *subsequent* constitutional challenges" to precleared submissions) (emphasis added); 42 U.S.C. 1973c (Section 5 process shall not "bar a *subsequent* action to enjoin enforcement" of a voting change) (emphasis added).

tions, the district court may have erred in ruling, after it had determined that the voting changes at issue required preclearance and had not received it, that those changes also violated Article I, Section 4 of the Constitution. That error presumably will not recur frequently, and the issue of the effect of a non-Section 5 injunction on the Attorney General's obligations to act on submission of a voting change should therefore arise only in cases in which the voting change is enjoined by state courts on state-law grounds, or perhaps where exigencies require a court to reach all issues in a case at one time.

2. When the question does arise, however, the Attorney General appropriately may refuse to act on submission of a voting change that has been enjoined on non-Section 5 grounds.[4] The governing regulations interpret the statutory "enact or seek to administer" requirement as excluding a "premature submission," 28 C.F.R. 51.35, such as a legislative enactment or administrative decision that is not yet final, 28 C.F.R. 51.22(a). Until the covered jurisdiction's process has passed that threshold and the voting change is capable of implementation, a jurisdiction cannot "seek to administer" the change.

More broadly, the statutory scheme envisions that preclearance will generally occur only when there is no other present and known obstacle to a plan's taking effect.[5] Sec-

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[4] Obviously, if the voting change has been enjoined on Section 5 grounds because it should have been, but was not, precleared, then the injunction has no effect on the Attorney General's responsibilities. In such a case, the goal of the injunction is precisely "to ensure that the covered jurisdiction submits its election plan to the appropriate federal authorities for preclearance as expeditiously as possible." *Lopez* v. *Monterey County*, 519 U.S. 9, 24 (1996).

[5] Under 28 C.F.R. 51.22, where approval of a submitted change by referendum or state or federal court or federal agency is necessary, the Attorney General deems the submission sufficiently ripe "if the change is not subject to alteration in the final approving action and if all other action necessary for approval has been taken." That usually occurs when a

tion 5 provides that a plan "may be enforced" once preclearance occurs either by affirmative approval or by expiration of the 60-day period. It makes little sense to interpret the statute to provide that a plan "may be enforced" by expiration of a 60-day period when, in fact, it is a certainty that it will *not* be enforced because of a pending injunction on grounds unrelated to Section 5.

In addition, the rule that enjoined voting changes do not require action by the Attorney General provides the kind of bright-line, easily administrable rule that is necessary for the Section 5 process to function. The contrary rule would either require the Attorney General to act on enjoined changes that have not yet been appealed (and that may never be appealed) or to hinge action on speculation about whether appeal will follow in each case. Requiring the Attorney General to act on enjoined voting changes would also complicate the benchmark analysis; if an enjoined change is precleared while a court-ordered change takes effect, it can be unclear whether the precleared change or the court-ordered change would be the benchmark for retrogression analysis of any *future* change—especially if the injunction has been lifted by the time the future change is submitted. Finally, appeal of an enjoined change may frequently (though not in this case) result in modifications to the injunction or the enjoined change itself. See note 5,

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jurisdiction is seeking Section 5 preclearance to conduct a referendum on a proposed change in its method of election or form of governance. An appeal of an injunction, however, does not seek *approval* of the underlying voting change, but *disapproval* of the court's action imposing the injunction. Moreover, depending on the legal issues involved, appeal of an injunction frequently results not merely in an up-or-down decision on the injunction, but in a decision modifying the terms of the injunction or the voting change itself. See, e.g., *Upham* v. *Seamon*, 456 U.S. 37 (1982); *White* v. *Weiser*, 412 U.S. 783 (1973); *Hickel* v. *Southeast Conference*, 846 P.2d 38, 44 (Alaska 1993); *United States* v. *Dallas County Comm'n*, 850 F.2d 1430, 1432, on reh'g, 858 F.2d 746 (11th Cir. 1988), cert. denied, 490 U.S. 1030 (1989).

supra. The best solution is to await the completion of judicial action on an enjoined plan, so that the Attorney General may examine the plan the State ultimately will enforce, rather than some other more-or-less hypothetical possibility.

II. THE DISTRICT COURT PROPERLY HELD THE STATE-COURT PLAN WAS NOT PRECLEARED 60 DAYS AFTER ITS INITIAL SUBMISSION

Appellants also argue (Br. 32-44) that the state-court plan was precleared on February 26, 2002—60 days after the State's *initial* submission to the Department of Justice under Section 5. Because the Department, however, asked for additional information before it could determine whether to preclear the plan as initially submitted, the 60-day period for preclearance did not begin to run until the State supplied that information, on February 20, 2002. Accordingly, the plan was not precleared by operation of law on February 26, 2002.

A. Incomplete State Submissions Do Not Trigger The Section 5 Administrative Preclearance Scheme

Under Section 5, a jurisdiction seeking administrative preclearance must prove that the change is nondiscriminatory, *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320, 328 (2000), and must provide the Attorney General with information sufficient to sustain that burden of proof, *Georgia* v. *United States*, 411 U.S. 526, 538-539 (1973). A jurisdiction's failure to provide sufficient information to sustain that burden may require the Attorney General to interpose an objection to the voting change at issue. See *ibid.*; 28 C.F.R. 51.52(c).

In some cases, despite its initial failure to provide sufficient information to sustain its burden, a jurisdiction may be able to supply additional information that will enable the Attorney General to preclear the change. To that end, the Section 5 regulations authorize the Department to request additional information from a jurisdiction that has initially "omitted information considered necessary for the evalua-

tion of the submission." 28 C.F.R. 51.37(a). If the jurisdiction declines to provide the additional information, the Attorney General may interpose an objection based on the jurisdiction's failure to sustain its burden of proof. See 28 C.F.R. 51.40. But if the jurisdiction supplies the additional information, the Attorney General will consider that information and make a Section 5 determination within 60 days of receiving the complete response.[6] 28 C.F.R. 51.37(c). The regulations allow for only a single extension of the 60-day period. See 28 C.F.R. 51.37(c).[7]

This Court has upheld the validity of the regulations permitting a request for additional information, concluding in *Georgia* v. *United States*, 411 U.S. 526 (1973), that the regulations are within the Attorney General's authority and "wholly reasonable and consistent with the Act." *Id.* at 541. Accord *Morris* v. *Gressette*, 432 U.S. at 504 n.19. The Court reasoned that "if the Attorney General were denied the power to suspend the 60-day period until a complete submission were tendered, his only plausible response to an inadequate or incomplete submission would be simply to object to it," a "result [that] would only add acrimony to the administration of § 5." 411 U.S. at 540-541. In response to Georgia's suggestion that the regulation "open[s] the way to frivolous and repeated delays by the Justice Department," *id.* at 541 n.3, the Court noted that no such allegations were present in that case, but that "a submission to the Attorney General is not the exclusive mode of preclearance under § 5.

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[6] The response must be complete or state that the requested information is unavailable in order to commence the running of the new 60-day period. See 28 C.F.R. 51.37(d). If the jurisdiction fails to provide the requested information within 60 days of the request, the Attorney General may interpose an objection. 28 C.F.R. 51.40.

[7] The regulation permitting only a single extension was enacted after *Garcia* v. *Uvalde County*, 455 F. Supp. 101 (W.D. Tex. 1978), aff'd, 439 U.S. 1059 (1979), held that the prior version of the regulations permitted only a single extension of the 60-day period. See 52 Fed. Reg. 486 (1987).

If a State finds the Attorney General's delays unreasonable * * * the State 'may still enforce the legislation upon securing a declaratory judgment in the District Court for the District of Columbia.'" *Ibid.*

B. The Attorney General's Determination That A Submission Is Incomplete And More Information Is Needed Is Not Subject To Judicial Review

The Court in *Georgia* noted that it was not presented with a claim that the Attorney General had engaged in "frivolous and repeated delays" in the case before it when requesting more information, and the Court therefore simply stated that "we most assuredly do not prejudge any case in which such unwarranted administrative conduct may be shown." 411 U.S. at 541 n.13. The Court is now presented with a case in which appellants characterize (Br. 40) the Attorney General's request for more information as "frivolous" and "unwarranted," and argue that the Attorney General's request should be held on that basis not to have extended the 60-day period. Appellants' contention is mistaken, because later cases have made clear that the Attorney General's determinations on the merits of a Section 5 submission, let alone interim determinations that more information is needed, are not subject to judicial review.

1. Since *Georgia* v. *United States*, it has become firmly established that the Attorney General's determination on the merits of a Section 5 submission is not subject to judicial review. As this Court explained in *Morris* v. *Gressette*, the "nature of the § 5 remedy * * * strongly suggests that Congress did not intend the Attorney General's actions under that provision to be subject to judicial review." 432 U.S. at 501 (citations omitted). Because the administrative process was intended to provide "an expeditious alternative to declaratory judgment actions," and because "judicial review of the Attorney General's actions would unavoidably extend this period, it is necessarily precluded." *Id.* at 504-505.

That does not mean that a covered jurisdiction has no recourse against an unfavorable preclearance decision by the Attorney General. Congress specifically provided that even if the Attorney General objected to a proposed change, the jurisdiction could still seek judicial preclearance in a de novo action for a declaratory judgment in the District Court for the District of Columbia. See *Morris* v. *Gressette*, 432 U.S. at 504-505 & n.20.[8] The availability of that alternative de novo judicial action—a statutory second bite at the apple—obviates the need for judicial review of the Attorney General's Section 5 determination.

Under *Morris*, a court may not review the Attorney General's determination that a jurisdiction has failed to carry its burden of proving that the submitted change satisfies Section 5. It follows *a fortiori* that a court also may not review the Attorney General's legally indistinguishable determination that a jurisdiction has failed to carry its burden under Section 5 but that the jurisdiction should have more time to complete its submission and perhaps obtain preclearance.[9] Indeed, judicial review of a request for additional information would necessarily require the court to do what *Morris*

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[8] The Court also noted that third parties could still challenge a precleared change under the Constitution or Section 2 of the Voting Rights Act, 42 U.S.C. 1973. *Morris*, 432 U.S. at 504-505 & n.20.

[9] Because the request for information ordinarily will—and in this case did—state that the jurisdiction had failed to carry its burden of proof in its initial submission, a mistaken request for more information would in any event be a conditional objection, not an unintentional preclearance. Neither the statute nor the regulation prescribe the words by which the Attorney General must interpose an objection. "[T]he purpose of [Section] 5 is to establish procedures in which voting changes can be scrutinized by a federal instrumentality before they become effective." *United States* v. *Board of Comm'rs*, 435 U.S. 110, 136 (1978). Although "inaction by the Attorney General may, under certain circumstances, constitute federal preclearance of a change, the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." *Ibid.*

forbids: to determine whether the jurisdiction's initial submission provided information sufficient to carry its burden of proof that the submitted change did not have a discriminatory purpose or effect. Although the Attorney General may err in determining that a submission is incomplete, the jurisdiction's remedy is the one identified in *Morris*: to invoke the "basic mechanism for preclearance" under the statute—"a declaratory judgment proceeding in the District Court for the District of Columbia." *United States* v. *Board of Comm'rs*, 435 U.S. 110, 136 (1978).

2. The facts of this case illustrate the point. The Department of Justice informed the State that it was requesting further information because "the information sent to date regarding this change in voting procedure is insufficient to enable us to determine that all or parts of the change do not have the purpose, and will not have the effect, of denying or abridging the right to vote." J.S. App. 193a. There is little difference between that determination and the unreviewable decision whether to issue an objection. In either case, the jurisdiction could have sought judicial preclearance as an alternative to providing the Attorney General with additional information. But in neither case does Section 5 permit, as an alternative remedy, judicial review of the Attorney General's decision.

Indeed, appellants seek to upset Section 5's carefully developed scheme by allowing review at the insistence of third-party intervenors. Congress explicitly placed control over initiation of the preclearance process in the hands of the covered jurisdiction, to the exclusion of third parties. Only a covered jurisdiction may seek administrative preclearance of a voting change. See 42 U.S.C. 1973c (administrative preclearance may be sought only by "the chief legal officer or other appropriate official of such State or subdivision"). Only a covered jurisdiction may seek judicial relief from an administrative Section 5 objection through a declaratory judgment action before the District Court for the District of

Columbia. See *ibid.* ("[S]uch State or subdivision may institute an action" seeking judicial preclearance.). The statute thus precludes a private party from initiating preclearance of a voting change. It would be particularly anomalous to permit a private party to obtain such preclearance through the mechanism of a review of the Attorney General's determination that the covered jurisdiction has failed to submit sufficient information to warrant preclearance.

3. Permitting judicial review, as appellants urge, would have serious consequences for the enforcement of Section 5.

a. First, judicial review would inevitably extend and add acrimony to the administrative process. That is most clearly seen in a case in which the Attorney General requests additional information and then issues an objection. Under appellants' theory, any party that stood to benefit under the original submission could argue that despite the Attorney General's objection to the change, it was precleared by operation of law 60 days after the initial submission because the request for additional information was erroneous. Such lawsuits would completely frustrate the limits on judicial review of Attorney General determinations. Such lawsuits also could place a cloud over the finality of the Attorney General's determination and the legal status of the original plan. They could also pose the risk of competing federal lawsuits over the same plan, with the jurisdiction seeking judicial preclearance from the District Court of the District of Columbia—while private parties litigated a collateral attack on the Attorney General's request for additional information in a local court.[10]

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[10] Such a situation could arise, as in this case, where a party seeks a Section 5 injunction in light of the Attorney General's objection and a party to that case argues that the injunction is moot, because the plan was actually precleared because the objection was preceded by an improper request for information. A plaintiff might also file a state law mandamus action to require State officials to enforce the voting change, arguing that officials had a duty to administer the change under state law and that

b. Second, appellants' theory permits any local three-judge court to consider whether the initial request was sufficient to warrant preclearance, despite the "congressional choice in favor of specialized review" of substantive Section 5 issues by the District Court for the District of Columbia, a choice that "necessarily constrains the role of the [local] three-judge district court." *Lopez* v. *Monterey County*, 519 U.S. 9, 23 (1996); see *Perkins* v. *Matthews*, 400 U.S. 379, 385 (1971).

c. Third, to avoid the risk of preclearing discriminatory plans through a faulty request for further information, the Attorney General would be forced to stop making such requests and simply enter an objection whenever a jurisdiction has failed to provide sufficient information to sustain its burden of proof. See *Georgia*, 411 U.S. at 540. In other words, the Attorney General would be forced to abandon a practice this Court found to have substantial practical value for covered jurisdictions. *Id.* at 540-541. That would lead to many unnecessary objections to plans that could otherwise have ultimately obtained preclearance. In short, back-door judicial review of the Attorney General's decision on the merits of a Section 5 submission is impermissible under this Court's post-*Georgia* precedents and could needlessly tangle the Section 5 process in litigation that would make the entire scheme less workable and more onerous for covered jurisdictions.

C. The Attorney General Properly Delayed Preclearance Of The State-Court Plan While Awaiting Further Information Regarding The Change In The Redistricting Process

Even if it is assumed that a local district court could engage in judicial review of a request by the Attorney General for more information necessary to determine the Section 5

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federal law did not prohibit administration of the change because the change had been precleared.

status of a voting change at the behest of an intervenor, such review must be highly deferential, limited to the question whether the request is "frivolous" or "irrelevant to § 5 evaluation." *Georgia* v. *United States*, 411 U.S. at 540, 541 n. 13. The request for more information in this case, however, was reasonable at the time it was made, regardless of whether the process about which the information was sought is ultimately determined to be a voting change that required preclearance under Section 5 or not. Accordingly, the Attorney General's request for more information extended the beginning of the 60-day period for action under Section 5 until that information was supplied on February 20, and the districting plan was not precleared when the 60-day period from the State's initial submission passed on February 26.

1. If judicial review of the Attorney General's request for more information—and consequent extension of the 60-day administrative preclearance period under Section 5—is permissible at all, it must be conducted very deferentially. In *Georgia*, the Court upheld the regulation permitting the Attorney General to extend the time by a request for more information, and it reserved only the question whether the preclearance time would be extended by a case that presented "frivolous and repeated delays by the Justice Department"—a possibility eliminated by the post-*Georgia* regulation permitting only one extension of time, see p. 2, *supra*—or "unwarranted administrative conduct."

The Court's implicit determination in *Georgia* that more searching judicial review would be improper was correct. The core purpose of Section 5 is to ensure that voting changes in covered jurisdictions are scrutinized, either administratively or judicially, before being permitted to take effect. *Board of Comm'rs*, 435 U.S. at 136. If the Attorney General's ability to request more information and thereby extend the preclearance period were subject to intrusive judicial review, a request for more information would become a highly risky venture. Every time the Attorney

General requested more information and then waited beyond the sixtieth day to make a final ruling, he would be taking the chance that a reviewing court would later find the request mistaken, with the result that the voting change was precleared by operation of law with no substantive determination made at all. That regime would undermine the core purpose of Section 5. Accordingly, any review of the Attorney General's determination that additional information is needed must be sharply limited to uncovering requests for more information that are entirely without foundation.

2. The Attorney General's request for more information in this case was reasonable, and it therefore was more than adequate to extend the 60-day preclearance period under any applicable standard of judicial review. See J.S. App. 33a-34a n.3 ("[T]he Department of Justice's decision to investigate the change in state law that authorized the Chancery Court to adopt a redistricting plan, before considering the plan itself, does not constitute 'unwarranted administrative conduct.'"). First, the Attorney General's determination not to pass on the preclearance of the state-court districting plan itself until he could pass on the process by which that plan was imposed was reasonable. Second, the Attorney General's determination that more information was necessary to pass on the process was also reasonable.

a. Initially, the Attorney General acted appropriately in extending the time to pass on the Section 5 validity of the state-court plan until he could also determine whether Section 5 would preclude the asserted change in process vesting the Chancery Court with jurisdiction. Regulations adopted to implement Section 5 make clear that the Attorney General may not preclear a districting plan if that plan was developed through a process that itself violated Section 5. See 28 C.F.R. 51.15, 51.22(b). This Court has reached the same conclusion. In *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636, 638-639 n.6 (1976), the Court noted that a local covered jurisdiction had not

purported to reapportion itself in accordance with state enabling legislation. The Court explained that, because the State's "enabling legislation [that would permit the local jurisdiction to reapportion itself] was opposed by the Attorney General * * * under § 5 of the Voting Rights Act, the [local jurisdiction] did not have the authority to reapportion itself." *Ibid.*

Similarly here, if the authorization for the state court to impose a districting plan lacked required preclearance, then the state court had no authority to order a plan into effect, and preclearance of the resulting plan would be inappropriate. In those circumstances, especially in light of the federal district court's determination that the process did require preclearance, see J.S. App. 97a-98a, the Attorney General reasonably determined that he could not pass on the districting plan itself without at least obtaining more information about process.

Appellants argue (Br. 34) that, if the process leading up to the plan did not constitute a voting change subject to Section 5, "the additional information requested [by the Department of Justice] does not relate to any voting changes, and the voting change that did occur—the redrawing of the lines—was precleared when the sixtieth day expired on February 25 without objection."

Appellants' argument is mistaken, because the validity of the extension of time does not turn on what a court, in hindsight, ultimately determines to be the correct view of whether the State's initial submission was in fact complete; it turns instead, at most, on whether the Attorney General had any possible foundation for seeking more information and extending the time. The Attorney General, acting pursuant to rules declared valid by this Court in *Georgia* v. *United States*, extended the preclearance period for both the vesting of jurisdiction in the state chancery court and the drawing of the district lines. If judicial review of the Attorney General's determination is permissible at all, it extends

only to reviewing whether he acted without foundation in extending the time. Even if a court ultimately determines that the vesting of jurisdiction in the chancery court was not subject to preclearance—and that further information on that subject was, in hindsight, irrelevant under Section 5—that would not retroactively invalidate the Attorney General's determination that he needed more information and the time should be extended.

b. Not only did the Attorney General act reasonably in considering the predicate process before acting on the redistricting plan, but his specific request for more information about that process was also reasonable.[11] Determining whether a submission is a covered change is part of the administrative preclearance decision. See 28 C.F.R. 51.35 (the Attorney General "will make no response on the merits with respect to an inappropriate submission," including "submission of standards, practices, or procedures that have not been changed [and] submission of changes that affect voting but are not subject to the requirement of Section 5"). The submission in this case presented the Attorney General with the novel question of whether the assumption of jurisdiction to issue a remedial redistricting order was the sort of change "with respect to voting" covered by Section 5.[12] The State

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[11] Because the propriety of the Attorney General's action does not turn on whether the change in process was in fact subject to preclearance, the Court need not determine in this case whether this type of change is subject to Section 5.

[12] This was the first time that any jurisdiction submitted a court's assumption of jurisdiction for preclearance and the first time any court has suggested that such a change might be covered by Section 5. While the State of North Carolina did recently submit the State Supreme Court decision in *Stephenson* v. *Bartlett*, 562 S.E.2d 377 (N.C. 2002), for preclearance, it did so in order to obtain review of the substantive standards for redistricting set forth in that opinion and to request that the Attorney General withdraw a prior objection to certain districting practices that were modified by the new decision. See J.S. App. 1a-3a. North Carolina did not seek preclearance of the State Supreme Court's conclusion that the

specifically requested preclearance of the change (J.S. App. 227a-228a), and the federal district court stated its view (*id.* at 97a-98a) that assumption of jurisdiction "clearly appears to be a change in Mississippi's election procedures that must be precleared by federal authorities." While the district court's holding was not strictly binding on the Attorney General, see *Hathorn* v. *Lovorn*, 457 U.S. 255, 268 n.22 (1982), it was entitled to substantial deference, see 28 C.F.R. 51.56, and a disagreement with the court on that issue would have had serious practical consequences. Had the Department refused to provide a response on the merits of the State's submission of the Chancery Court's assumption of jurisdiction, the district court may well have continued to enjoin the plan until precleared by the District Court of the District of Columbia.

The Attorney General's response to this unusual situation was to take seriously the question of coverage while investigating possible means of resolving the submission on other grounds. Thus, the Attorney General properly considered whether the assumption of jurisdiction represented a change in voting practice, rather than the invocation of a power that predated the Voting Rights Act, asking the State to clarify the basis for the State Supreme Court's determination that the Chancery Court had jurisdiction to develop a new plan (Question 2(A), J.S. App. 193a), and "whether Chancery Courts historically have had jurisdiction to preside over proceedings involving state-wide redistricting plans and then themselves adopt and implement such plans" (Question 2(G), J.S. App. 195a).[13]

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state courts had authority to issue redistricting orders to remedy violations of the state constitution.

[13] The district court (J.S. App. 98a) and the State Attorney General (J.S. App. 228a-229a) further indicated that the state-court process represented a change because it departed from the at-large election requirements of Miss. Code Ann. § 23-15-1039 (1999). The Attorney General also

The Attorney General also requested information concerning the discriminatory potential of such a change, because the possibility remained that he could determine that it satisfied Section 5's substantive standards without deciding whether it was subject to those standards. Cf. 28 C.F.R. 51.37(c) (permitting only a single extension of time to request further information). A change has 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). A change has a discriminatory purpose if its purpose is to achieve that effect. *Bossier Parish*, 528 U.S. at 341. This Court has explained that "assessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a 'sensitive inquiry into such circumstantial and direct evidence as may be available.'" *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 488 (1997). "[C]onsiderations relevant to the purpose inquiry include, among other things, the historical background of the jurisdiction's decision; the specific sequence of events leading up to the challenged decision; [and] departures from the normal procedural sequence." *Id.* at 489 (citations and internal punctuation omitted).

The district court suggested a number of questions that might be relevant to this determination, see J.S. App. 100a, 194a, and the Department reasonably followed many of those suggestions. For example, the Department asked a series of questions to determine whether turning the districting process over to a chancery court could be manipulated for discriminatory purposes or to achieve discriminatory results.

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requested information to evaluate that question. See Question 2(B), J.S. App. 194a.

As the district court observed, there is a risk of retrogression where "redistricting decisions will depend on the individual views of an individual judge, elected by a small percentage of the State's voters," *ibid.*, particularly if a plaintiff can effectively select that individual judge through forum shopping. The chances of discriminatory results in such a process could be substantially greater than if districting were conducted by the state legislature through the collective action of representatives elected throughout the State. The Department, therefore, asked questions about the chancery court system (Questions 2(C)-(D), J.S. App. 194a) and the ease with which a plaintiff intent on achieving retrogressive results could select a favorably-disposed judge (Questions 2(E)-(H), J.S. App. 194a-195a). The letter also sought information regarding the historical background leading to the state court's assertion of authority to redistrict. See Question 2(G), J.S. App. 195a. And the Department asked questions to determine whether districting by the state chancery court was consistent with, or a departure from, "the normal procedural sequence." See Questions 2(A)-(B), (G), J.S. App. 193a, 195a.

That the effect of the change in process on voting would be indirect, and that any discriminatory effect might later be remedied by subsequent Section 5 review of the resulting plan, are not sufficient reasons to conclude the change was nondiscriminatory. "The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations" with discriminatory effects. *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 565 (1969). The regulations require preclearance of "[a]ny change *affecting* voting, even though it appears to be minor or *indirect*." 28 C.F.R. 51.12 (emphasis added). Thus, the regulations require preclearance of changes in the "procedure for instituting a change affecting voting" or authorizing legislation, as well as the resulting substantive changes under that changed procedure. 28 C.F.R. 51.15-51.16. That is true even though the change in process has only an in-

direct effect on voting and even though the changes resulting from the new process would themselves be subject to preclearance. See, *e.g.*, *East Carroll Parish Sch. Bd.*, 424 U.S. at 638-639 n.6 (requiring preclearance of statute authorizing county to apportion itself, as well as resulting apportionment); *Board of Comm'rs*, 435 U.S. 110 (1978) (requiring preclearance both of decision to hold referendum on changing form of county government, and the resulting change).[14]

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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[14] Appellants note (Br. 42) that the questions asked of Mississippi in this case were not asked regarding a subsequent submission regarding redistricting in North Carolina. The cases are quite different, however. No party or court had suggested that the North Carolina courts' assumption of jurisdiction to order redistricting required preclearance under Section 5. Although the Attorney General attempts to identify changes requiring preclearance even when they are not brought to his attention by the covered jurisdiction, the volume of submissions reviewed annually necessarily focuses the Department's attention on those features of voting changes identified by the parties to the preclearance process. Moreover, in the North Carolina case there was no suggestion that the assumption of jurisdiction represented a *change* in the authority of the State courts. See *Stephenson*, 562 S.E.2d at 392, 393. In contrast, both the Mississippi Attorney General (see J.S. App. 228a) and the federal district court (*id.* at 97a-98a) in this case asserted that the chancery court's assumption of jurisdiction departed from traditional practices under state law.

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