No. 02-0182

In The
Supreme Court of the United States

THE STATE OF GEORGIA,

Appellant,

v.

JOHN ASHCROFT, et al.,

Appellees,

and

PATRICK L. JONES, et al.,

Intervenor-Appellees.

On Appeal From The United States District Court For The District Of Columbia

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM SUMMARILY

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LIST OF PARTIES

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Ralph F. Boyd, Jr., in his official capacity as Assistant Attorney General of the United States, Defendant-Appellee

The United States of America, Defendant-Appellee

Patrick L. Jones, Defendant Intervenor-Appellee

Roielle L. Tyra, Defendant Intervenor-Appellee

Georgia W. Benton, Defendant Intervenor-Appellee

Della Steele, Defendant Intervenor-Appellee

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PURPOSE OF MOTION

Appellees Patrick Jones, Roielle Tyra, Georgia Benton and Della Steele, all intervenors in the case below ("the Jones Appellees"), move the Court to dismiss the appeal or, in the alternative, to affirm summarily. On April 5, 2002, a three-judge panel of the United States District Court for the District of Columbia ("the trial court" or "the district court") applied clearly defined legal standards pursuant to Section 5 of the Voting Rights Act of 1965 and declined to issue a declaratory judgment preclearing the 2001 Georgia State Senate redistricting plan ("the first Senate plan").[1] Appellant State of Georgia ("Appellant") now asks the Court to revisit the trial court's factual findings and apply Section 2 rather than Section 5 law to the case. The Jones Appellees respectfully suggest that, except in extreme circumstance, the appeals process should avoid revisiting factual determinations based on significant testimony and trial presentations. Furthermore, there is no authority to support displacing Section 5 law in favor of an analogy to Section 2 law. The only authentic legal issue presented is the Appellant's challenge to the trial court's decision allowing the Jones Appellees intervention in the proceedings. That decision involves neither a new nor complex issue. Minority citizens affected by changes in voting laws have long been allowed to intervene in Section 5 preclearance actions. On this ground as well, the appeal should be dismissed. In the alternative, the decision should be summarily affirmed.

INTRODUCTION

In Georgia, the legislative and executive branches are controlled by the Democratic Party and have been since

[1] A revised Senate plan ("the second Senate plan") was subsequently precleared and is being used in the current elections.

1865. When Appellant entered the redistricting process this decade, it was clear that Appellant could either (1) preserve minority voting strength and sacrifice the political strength of the Democratic Party or (2) sacrifice minority voting strength and preserve the political power of the Democratic Party. Appellant chose the latter.

However, because Georgia redistricting is subject to Section 5 preclearance, Appellant was required to prove there had not been any "retrogression" or worsening of minority voters' opportunities to exercise their voting rights.[2] Using the traditional retrogression analysis methods of the Department of Justice and voting rights experts, Appellant could not succeed. Therefore, Appellant rejected the administrative preclearance process and sought a declaratory judgment in the United States District Court for the District of Columbia.[3] The hallmark

[2] Section 5 of the Voting Rights Act requires any covered jurisdiction to seek a declaratory judgment from the District Court for the District of Columbia or obtain administrative preclearance from the Department of Justice ("DOJ") before the jurisdiction can enforce any change to "any voting qualification or prerequisite to voting, or any standard, practice, or procedure." 42 U.S.C. § 1973c (2002). The court or the DOJ must declare in its judgment 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 in contravention of the guarantees set forth in section 1973b(f)(2) [language minorities]." *Id.* The burden of proof before both the DOJ and the district court is on the jurisdiction seeking preclearance to show that the change has neither such a purpose nor such an effect. *See City of Richmond v. United States*, 422 U.S. 358, 362 (1975); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997).

[3] Appellant states that it did not seek administrative preclearance from the DOJ, purportedly because it wanted to speed up the process. This was clearly not Appellant's motivation, however. The current guidelines of the DOJ require that "if a retrogressive redistricting plan is submitted, the jurisdiction seeking preclearance of such a plan bears the burden of demonstrating that a less-retrogressive plan cannot reasonably be drawn." Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5412

(Continued on following page)

of Appellant's argument before the trial court was that the first Senate plan was not retrogressive because a "point of equal opportunity" had been reached. In the point of equal opportunity analysis proposed by Appellant, the focus is not upon whether the minority community's opportunity to elect candidates of their choice is diminished in a districting plan, but upon whether the minority community has an opportunity "equal" to the non-minority community to elect candidates of their choice in a particular district. Such an analysis has never been relied upon by any court in making a retrogression determination.

In addition to a single expert's testimony on the point of equal opportunity, Appellant also sought to meet its burden by offering the testimony of several incumbent minority legislators that, in their opinions, the redistricting plans did not result in retrogression. Finally, in defense of its plans, Appellant argued that the dispersal of minority voters was required in order for Appellant to comply with the principle of one person, one vote.

With regard to the first Senate plan, the trial court correctly found that Appellant failed to meet its burden under Section 5. The trial court rejected Appellant's expert's "point of equal opportunity" analysis as being irrelevant to a Section 5 inquiry. Instead, applying the well-settled retrogression analysis taken straight from 42 U.S.C. § 1973c, the trial court correctly decided that

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(Jan. 18, 2001). In general, "[a] proposed redistricting plan . . . will occasion an objection by the DOJ if the plan reduces minority voting strength relative to that contained in the benchmark plan and a fairly-drawn alternative plan could ameliorate or prevent that retrogression." *Id.* Appellant realized that, pursuant to these rules, its plans would not be precleared by the DOJ as alternative plans had been introduced in the legislature which did not reduce the number of majority-minority districts. Accordingly, Appellant sought preclearance in the district court in an attempt to circumvent the traditional legal standards embodied in the DOJ's rules.

Appellant had failed to prove that, when judged from the benchmark, the first Senate plan would not have the effect of denying or abridging voting rights on the basis of race. The trial court concluded that the evidence produced by Appellant simply did not allow for a "competent comparison of the benchmark Senate plan and the proposed plan and their consequences for the voting strength of Georgia's African-American population." (J.S. 142a-143a).[4] The trial court's rejection of Appellant's alternate theory, the court's application of the standard retrogression test and its finding that Appellant failed to produce evidence sufficient to meet that test are all correct. Lastly, the trial court correctly concluded that "the State . . . was not forced to choose between complying with the Equal Protections Clause and the Voting Rights Act." (J.S. 125a). Therefore, the trial court's decision to deny a declaratory judgment preclearing the first Senate plan is correct.

Likewise, the law supports the trial court's decision to allow the intervention of the Jones Appellees. Appellant cites no applicable authority for its incredulous contention that minority voters have no place in a Section 5 case, the entire focus of which is the rights of those voters. To the contrary, intervention by minority voters in Section 5 cases is permitted in accordance with the trial court's discretion. In *City of Richmond v. United States*, 422 U.S. 358 (1975), the trial court allowed intervention in a Section 5 case; when the case reached this Court, it was remanded specifically for a trial on the intervenors' objections. Certainly, if the intervenors lacked standing, they would not have been entitled to such a remand.

Furthermore, when a redistricting plan is submitted to the Department of Justice for preclearance, any interested citizens or organizations may file comments and

[4] All citations to "J.S." refer to the Jurisdictional Statement submitted by Appellant.

make their positions known to the ultimate decisionmaker, the Department of Justice. Appellant's suggestion that citizens are prohibited from participating in a declaratory judgment action for preclearance would result in an anomaly. Covered jurisdictions could shut interested parties completely out of the process simply by electing to seek preclearance in the District Court.

Finally, Appellant's argument that citizens should be kept out of a Section 5 declaratory judgment action because they may delay settlement of the case is misguided. As a practical matter, there could not have been any "settlement" of this redistricting case. The plans were enacted by the General Assembly and could only be changed by majority vote of that body followed by the Governor's approval. Only a lawfully enacted plan can be precleared. Furthermore, as a legal matter, when a covered jurisdiction seeks a declaratory judgment that its redistricting plans comply with Section 5, the trial court must determine, as it did here, that the burden of proof has been met by the submitting jurisdiction. The parties cannot "settle" that the burden has been met; the court must enter its judgment that the burden has been met.

Appellant contends that even if minority citizens are allowed to participate in Section 5 cases, they may do so only if they are residents of particular districts. Appellant cites no authority for that position but instead attempts to support its argument by analogy. Specifically, Appellant relies upon cases decided under Section 2 of the Voting Rights Act and under the Equal Protection Clause but, in so doing, ignores the key difference between those cases and a Section 5 case. In redistricting claims based on Section 2 and the Equal Protection Clause, a citizen's rights as a resident of a particular district are at issue, and it is thus logical that parties must live in the affected district to have standing. However, as recognized by the trial court, this Section 5 case involves statewide plans:

> [W]e reject the State's argument that this Court's review is limited only to those districts challenged

> by the United States, and should not encompass the redistricting plans in their entirety. In a declaratory judgment action brought pursuant to Section 5, the court's review necessarily extends to the entire proposed plan. Refusing to preclear only the specific districts to which defendants object would nevertheless require the State to rework its entire Senate plan. Moreover, Georgia has presented no legal authority that would limit the Section 5 inquiry to those districts challenged by the Attorney General as retrogressive.

(J.S. 105a-106a).

In summary, there is no prohibition against intervention by citizens in Section 5 cases, as shown by this Court's decision in *City of Richmond v. United States*, 422 U.S. 358 (1975). The trial court's decision to allow the intervention of the Jones Appellees was a matter within its discretion, and Appellant's appeal should be summarily dismissed. In the alternative, the decision appealed should be affirmed summarily.

STATEMENT OF FACTS

In October 2001, for the first time since the passage of the Voting Rights Act, the State of Georgia decided to seek preclearance of its newly-passed statewide redistricting plans for state Senate, state House of Representatives and federal Congressional districts through an action for declaratory judgment rather than administratively. The trial court then "set a demanding briefing schedule, while permitting the parties to engage in extensive discovery up until the commencement of trial." (J.S. 27a). Discovery was conducted until the literal eve of trial, with the parties taking the depositions of over thirty-five lay witnesses and four expert witnesses and exchanging thousands of pages of documents. At Appellant's suggestion, much of the evidence was submitted in written form to the district court prior to trial. (J.S. 29a). During the four-day trial, three experts testified and were cross-examined at length, the sworn

statements and/or depositions of over thirty witnesses were submitted, and thousands of pages of exhibits were tendered. The district court's Order, numbering over two hundred pages, shows a comprehensive consideration of the voluminous record, particularly the evidence submitted in connection with the first Senate plan.

The district court's subsequent conclusion that Appellant had failed to meet its burden of proof as to the first Senate plan was simply unavoidable. The reduction in the minority voting power in the plan was drastic. While the benchmark plan had thirteen districts with minority population ("BPOP") above 50%, the first Senate plan contained only twelve such districts. The decrease in the black voting age population ("BVAP") in the Senate plan was even more significant. In the benchmark, twelve districts had a BVAP of more than 54%; the first Senate plan contained only *seven* such districts. Of the remaining six, all had less than a 52% BVAP. In eight of the twelve districts, the BVAP decreased by more than 10%. (Pl. Ex. 1A; DI Ex. 2; DI Ex. 32).

Although the benchmark Senate plan contained thirteen districts in which the minority voter registration ("BREG") was 52% or above, the first Senate plan contained only seven such districts; of the remaining six districts, the BREG in five of the districts (Districts 2, 12, 22, 26 and 34) decreased to less than 50%, and in the sixth (District 15) the BREG was barely 50%. (Pl. Ex. 1A; DI Ex. 2; DI Ex. 32). Although Appellant claimed, and claims still, that many of the reductions in minority population were required in order to comply with the constitutional mandate of one person, one vote, that justification was rejected by the trial court because it was simply not borne out by the facts. (J.S. 123a). With the exception of Senate District 43, *every one* of the majority-minority districts in the benchmark Senate plan was *already* underpopulated. (Pl. Ex. 1A). Even so, minority population was removed from these districts and put into other districts. For example, Appellees Benton and Steele, who were in underpopulated

Senate District 2 in the benchmark plan, were moved to the overpopulated Senate District 4 in the first Senate plan. Overall, the BVAP in this already underpopulated district was reduced by more than 10%. (Pl. Ex. 1A; DI Ex. 2; DI Ex. 32).

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

Because the entire State of Georgia is a covered jurisdiction under Section 5, the new redistricting plans could not be implemented until the State received preclearance either by declaratory judgment from the District Court for the District of Columbia or by administrative determination of the Department of Justice that the proposed changes had neither the purpose nor effect of denying or abridging minority citizens' voting rights. 42 U.S.C. § 1973c; 28 C.F.R. § 51. Appellant elected the very unusual route of pursuing Section 5 preclearance of all three plans by filing a declaratory judgment action in the district court.

Shortly after Appellant filed its complaint, the Jones Appellees, all African-American voters in the State of Georgia, moved to intervene as Defendants, contending that the proposed Congressional, state House and state Senate plans "retrogressed" or worsened minority voters' opportunities to elect candidates of choice. The trial court initially denied the motion to intervene without prejudice, pending Appellee United States' announcement of its

position on the plans and a resulting determination of whether Appellee United States would adequately represent the interests of the Jones Appellees. The trial court, however, invited the Jones Appellees to renew their Motion after the position of the United States became known.

Subsequently, Appellee United States announced that it did contend that the proposed Senate plan violated the Voting Rights Act; that it did not contend that the proposed Congressional plan violated the Voting Rights Act; and that it was not prepared to state its final position on whether the proposed House plan violated the Voting Rights Act. Based on Appellee United States' position, the Jones Appellees renewed their motion to intervene. On January 10, 2002, the trial court partially vacated its previous Order denying intervention and allowed the Jones Appellees to intervene as to the state legislative plans. (J.S. 216a-219a). After Appellee United States announced that it did not oppose preclearance of the state House plan, Appellant moved the trial court to reconsider and vacate its January 10, 2002 Order allowing partial intervention. The trial court took further briefs, heard oral argument, took still more briefs and concluded, in a January 29, 2002 Order, that intervention would be allowed not only on the state legislative plans but on the Congressional plan as well. (J.S. 214a). The trial court made it clear, however, that the intervention of the Jones Appellees would not be permitted to cause a delay in the litigation (J.S. 219a). Therefore, Appellant's contention that the Jones Appellees' intervention somehow caused a delay is factually incorrect; all pretrial proceedings and the trial took place as scheduled unless all parties consented to a schedule change and the trial court approved the same.

The court conducted a four-day trial, hearing live testimony from three experts,[5] Dr. David Epstein, Dr.

[5] The fourth expert, Dr. Roderick Harrison, did not testify at trial.

Richard Engstrom and Dr. Jonathan Katz, all political scientists. The remaining evidence was submitted in writing, in the form of sworn statements, designated deposition testimony and exhibits. (J.S. 29a). In attempting to meet its burden of proving that the new plans did not result in retrogression, Appellant relied primarily upon the testimony of its expert, Dr. Epstein. Dr. Epstein relied on a single methodology, the probit analysis. While Appellant describes the probit analysis as "a standard probability methodology," it was undisputed that the probit methodology is not a standard methodology used in assessing retrogression.[6] (J.S. 90a). Appellant's suggestion that the Jones Appellees' expert, Dr. Katz, previously used the probit analysis in the same manner as Dr. Epstein is a mischaracterization of Dr. Katz's testimony. Dr. Epstein used the probit analysis as the sole basis for his retrogression analysis; Dr. Katz clearly testified that he had utilized the methodology only in conjunction with other analyses. (2/17/02 Tr., pp. 99-100, 107).

Other than Dr. Epstein's testimony, the only other evidence offered by Appellant to meet its burden was the testimony of several minority legislators and Appellant's cross-examination of Appellees' expert and lay witnesses. With the testimony of minority legislators, Appellant attempted to show that the plans did not reduce minority voting rights because the majority of minority legislators voted for the plans. Through the cross-examination of Appellees' witnesses, Appellant attempted to prove that because some of the citizen witnesses acknowledged a possibility that a minority community's candidate of choice could still win in a district with a reduced BVAP or BREG, such testimony constituted evidence that no retrogression would occur.

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[6] The "probit" methodology is not found in a single reported Voting Rights Act decision.

After receiving post-trial briefs, findings of fact and conclusions of law, and hearing closing argument, the trial court entered an Order on April 5, 2002. In that Order, the trial court granted preclearance to Appellant's state House and Congressional plans but denied the same for the first Senate plan. The court concluded that Appellant had simply failed to meet its burden of proof. The trial court found that Appellant's expert "made no attempt to address the central issue before the court: whether the State's proposal is retrogressive," and later in the opinion deemed the expert's testimony on this point "woefully inadequate." (J.S. 121a, 143a). In fact, the trial court held that Dr. Epstein's testimony was relevant only "insofar as it suggests that decreases in BVAP within the ranges proposed in the contested Senate districts may have a significant (if inadequately quantified) negative impact on the likelihood that African American voters will be able to elect their candidates of their choice." (J.S. 123a). Of course, such would tend to disprove Appellant's contentions completely.

In rejecting Dr. Epstein's analysis, the trial court noted six major flaws. First, the court found that Dr. Epstein's analysis, while perhaps having some relevance to a Section 2 case, was not "in any way dispositive of a Section 5 inquiry." (J.S. 119a-120a). While a Section 2 case might involve the concept of an equal opportunity, Section 5 focuses upon maintenance of the status quo, which the point of equal opportunity fails to address.

Second, the trial court determined that Dr. Epstein's application of his retrogression analysis "rendered his analysis all but irrelevant." (J.S. 121a). By simply comparing the number of majority-minority districts, using the "point of equal opportunity number" (> 44.3% BVAP) and identifying the number of majority-minority districts using that figure, Dr. Epstein failed to establish any fact relevant to retrogression.

Third, Dr. Epstein neither identified the decreases in BVAP under the proposed plan nor the corresponding

reductions in the ability of minority voters to elect candidates of choice. (J.S. 121a).

Fourth, although the proposed plan contained six districts (of 13) in which the BVAP was 50.3-51.5%, Dr. Epstein did not consider the effect of reducing BVAPs to these bare majorities. (J.S. 97a).

Fifth, while the trial court found that the record showed that "African American candidates of choice running for State Senate seats are unlikely to receive the same levels of white crossover voting as may occur in statewide elections," Dr. Epstein's analysis of white crossover voting was based *entirely* on data from three statewide general elections. (J.S. 91a, 144a). In fact, Dr. Epstein testified that "the whole point of my analysis is not to look at polarization per se" and that "the great advantage of the probit analysis" is that he did not have to consider, among other things, crossover voting. (J.S. 127a & n.39).

In a similar vein, the sixth and final flaw was that the lack of information in Dr. Epstein's report rendered it useless in assessing "the expected change in African American voting strength statewide that will be brought by the proposed Senate plan." (J.S. 121a).

With respect to the legislators' testimony offered by Appellant, the trial court concluded that while that evidence might have been probative of a discriminatory purpose, the court did not find a discriminatory purpose. The court concluded that the legislators' testimony, offered to show support of the plan, was not relevant to a consideration of a discriminatory effect. (J.S. 134a-135a).

Finally, the trial court concluded that although lay witnesses acknowledged a *possibility* that a minority community's candidate of choice might still win in a district with reduced BVAP or BREG, that testimony did not constitute evidence that the plan would not result in retrogression. (J.S. 139a). The trial court rejected this argument for one of the same reasons it rejected Dr. Epstein's analysis: the inquiry in a Section 5 action is not

whether there is a fair chance for minority voters to elect candidates of choice, but whether there is a lesser chance. (J.S. 139a).

Perhaps the trial court best summarized its opinion when expressing its concern that although the benchmark Senate plan included four districts with BVAPs of 55.43% to 62.45%, the first Senate plan proposed by Appellant reduced these BVAPs to "bare majorities." (J.S. 97a, 113a-114a). The court was particularly troubled when that fact was combined with the fact that in five districts the BREG ranged from 52.48% to 64.07% in the benchmark plan but was reduced to 47.46% to 49.44% in the first Senate plan.[7] The court noted that Appellant produced no evidence, by way of expert testimony or otherwise, to show that these decreases in BVAP and BREG would be counteracted by white crossover voting or an increase in minority voting strength in other districts. Because such evidence was not produced, the trial court concluded that Appellant failed to show that the first Senate plan did not have the effect of denying or abridging minority citizens' voting power. Therefore, Appellant was not entitled to preclearance of the Senate plan.

With respect to the intervention of the Jones Appellees, the record establishes that the district court considered the issue thoroughly on several different occasions.

Curiously, Appellant's argument on appeal that intervention is never proper in a Section 5 action completely contradicts Appellant's argument before the district court that Federal Rule of Civil Procedure 24 was applicable but precluded intervention because the Attorney General could adequately represent intervenors' interests.

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[7] The trial court apparently did not consider District 34 in the range, believing it was a newly created district. However, District 34 is not a newly created majority-minority district. It is simply the former District 44 by another name. (DI Ex. 32).

In any event, the district court correctly permitted intervention because intervenors established each of the requirements of Rule 24(a)(2): (1) timely filing before counsel for defendant had entered an appearance, discovery commenced, or a three-judge panel appointed; (2) an interest in the subject matter of the litigation as minority citizens of Georgia; (3) interests which would have been impaired had intervenors not been able to present those interests; and (4) the minimal showing required to demonstrate that their interests would not be adequately represented by the Attorney General.

I. THE DISTRICT COURT'S RULING DID NOT REQUIRE APPELLANT TO DRAW "SAFE" MAJORITY-MINORITY DISTRICTS WITH "SUPERMAJORITY" MINORITY POPULATIONS

In its first argument, Appellant completely mischaracterizes the trial court's ruling as requiring Appellant to draw "safe" majority-minority districts with "supermajority" minority populations. It is clear, both from the trial court's April 5, 2002 Order and June 3, 2002 Order ultimately approving a revised Senate plan, that the district court imposed no such requirement upon Appellant. (J.S. 1a-150a). Instead, the district court merely insisted, as it was bound to do under Section 5, that Appellant prove the first Senate plan had neither the purpose nor effect of reducing the ability of minority voters to elect candidates of choice.

Appellant proposes a novel legal theory that is contrary to 30 years of practice and precedence as well as the policy considerations underlying the Section 5 preclearance requirement. Under Appellant's theory, the state could recraft representational districts that presently, without fail, elect the choice of the minority community. Under Appellant's analysis, a new district plan could reduce the majority-minority voting age population in these districts to an "equal opportunity" level, a level where Appellant's expert witness projects the minority

preferred candidate has a 50-50 chance of being elected. Pursuant to this analysis, such a new plan is not "retrogressive" of minority voting rights and should be precleared because it affords "minorities equal opportunities at success."

While the Jones Appellees agree that the test for retrogression involves an "equal opportunity" analysis, the "equal opportunity" must be for minority voters in the new plan as compared to the benchmark plan. Equal opportunities to elect between minority and non-minority voters in particular districts is not the test.

As Appellant recognizes, Section 5 was designed to "insure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques." (J.S. 18). Yet, in espousing a theory that Section 5 requires that minority communities have only an "equal" opportunity to elect candidates of choice, Appellant engages in the exact destruction of minority gains that Section 5 was intended to prohibit.

The purpose of Section 5 cannot be disputed. It is to guard against backsliding with respect to minority voting power. *See Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 478 (1991); *Miller v. Johnson*, 515 U.S. 900, 926 (1995). Appellant drew the first Senate plan in a manner that clearly resulted in a loss of minority voting power, and therefore, Appellant was unable to meet the well-established burden of proof for establishing that no backsliding has occurred, *i.e.*, that the change does not have the purpose and will not have the effect of reducing the ability of minority voters to elect candidates of their choice. 42 U.S.C. § 1973c.

Appellant simply failed to meet this burden of proof. The district court described the record as voluminous but went on to identify the problem: the record did not contain evidence sufficient for Appellant to meet its burden. (J.S. 143a-145a). Rather than argue that the evidence it offered was sufficient to meet the statutory burden, Appellant

chose, and continues to choose, instead to argue for a change in the burden. (J.S. 19). Appellant's argument, that the Section 5 burden should be akin to that in a Section 2 vote dilution case, fails. The burdens are not interchangeable. The Section 5 burden is a statutory obligation, placed squarely (and only) upon jurisdictions with a history of discriminatory voting practices, to prove that a change *does not reduce* minority voting power. 42 U.S.C. § 1973c. Furthermore, the burden of proof must be met before the new practice or procedure can be used, as Section 5 is a prophylactic, rather than a remedial, measure.

By contrast, the Section 2 burden, established in *Thornburg v. Gingles*, 578 U.S. 30 (1986), requires the challenger, not a jurisdiction, to prove that a change *does* reduce minority voting strength. Because both the purposes of, and remedies for violations of, Sections 2 and 5 are distinct, so too are the burdens and the identity of the parties required to meet those burdens. Appellant cites no authority for its argument that the statutory burden of Section 5 can or should be abandoned in favor of the Section 2 burden.

The district court, in fact, considered and rejected this attempt by Appellant: "Georgia thus asks us to apply a Section 2 test to the proposed plan. . . . The State's implicit argument is that retrogression cannot exist where its proposed plan satisfies Section 2. We disagree." (J.S. 112a). In a related footnote, the district court succinctly summarized Appellant's request: "Effectively, then, the State would have us adopt the converse of the argument rejected by the Supreme Court in the *Bossier Parish* cases. There, the Court rebuffed the claim that preclearance must be *denied* where a proposed plan *violates* Section 2." (J.S. 112a n.35 (citations omitted)).

The trial court correctly declined Appellant's invitation to ignore the statutory burden of proof in Section 5 in favor of the new burden proposed by Appellant analogizing to Section 2. Despite Appellant's contention that "[t]his Court's jurisprudence, the statute itself and all of the

underlying congressional history make it clear that it is equal opportunity – not safe seats or guarantees – that is the object of the law," (J.S. 20), Appellant cites no Section 5 jurisprudence, statute or congressional history supporting the assertion.

Appellant's citations to the *City of Richmond* and *United States v. Mississippi* do not support its argument. Those cases do stand for the proposition that over-representation cannot be required, but a comparison of the Senate benchmark plan, the first Senate plan rejected by the district court, and the revised Senate plan precleared by the district court shows that there was no requirement of minority "overrepresentation."

Moreover, *City of Richmond* and *United States v. Mississippi* are factually distinguishable from the instant case. In *City of Richmond*, changes in the City's boundaries increased the percentage of white residents in the City, resulting in a proportional decrease in the percentage of black residents in the city. 422 U.S. 358, 368 (1975). However, unlike the *City of Richmond*, Georgia did not attempt to justify the decrease in minority voting power under the first Senate plan on geographic or demographic changes. Neither the trial court nor the Jones Appellees contend that the number or make-up of majority-minority districts may not change with demographic or geographic changes.

Similarly distinguishable on its facts, *United States v. Mississippi* involved the decrease in BVAP in three districts in which, even under the benchmark plan, black voters could not elect a candidate of choice. 490 F. Supp. 569, 580 & n.5 (D.D.C. 1979). In this case, Appellant took districts in which the minority community could elect candidates of choice and made them districts in which they could not so do.

Appellant's last-ditch effort to convince this Court that Section 2 standards should be used in this Section 5 case is in the form of an "opening the floodgates" argument. Appellant reasons that unless the Section 2 and Section 5 burdens are exactly the same, Appellant will be subjected

to Section 2 claims for "packing," and that such claims "would hardly be frivolous." (J.S. 23).

While the Jones Appellees are surprised that Appellant seems to invite a claim for Section 2 litigation, Appellant's position is not legally sound. The Senate Districts at issue, Districts 2, 12, 15, 22 and 26, at BVAPS of 50.31%, 50.66%, 50.87%, 51.51% and 50.80% respectively, can hardly be described as "packed" or "supermajority." Furthermore, the suggestion that such districts were drawn "over the *ardent* opposition of the overwhelming majority of Georgia's African-American legislators" is both factually incorrect and legally irrelevant. (J.S. 23) (emphasis added). There is no evidence in the record that minority legislators ardently opposed districts with BVAPs at the levels stated above; in fact, the record establishes that many minority legislators had grave concerns about the decreased BVAPs.[8] (J.S. 134a). As the trial court correctly pointed out, the opinion of minority legislators might be relevant to whether there was a discriminatory purpose, but those opinions were not relevant with respect to a discriminatory effect. (J.S. 135a).

In the end, Appellant simply did not produce evidence that allowed the district court to find, using the parameters of Section 5, that the first Senate plan had neither the purpose nor effect of abridging or denying the right to vote based on race. Perhaps knowing that it could not meet that burden, Appellant tried to convince the lower court that a different burden – that of Section 2 – should be

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

used. The district court properly rejected that argument, and the Jones Appellees request this Court to do so as well.

II. THE DISTRICT COURT'S RULING, WHICH CORRECTLY APPLIED SECTION 5, DID NOT OFFEND THE CONSTITUTION AND DID NOT REQUIRE THE DRAWING OF "SUPERMAJORITY" LEGISLATIVE DISTRICTS AND "SAFE" SEATS

Appellant's second argument appears to be the same argument as the first – that Section 2 standards should be applied to a Section 5 preclearance case instead of Section 5 standards – but with the twist that the failure to use Section 2 in this case amounts to a constitutional violation. Appellant cites absolutely no authority for that proposition but instead argues that because Section 5 originally focused upon intent, the examination of the first Senate plan should have been limited to an "intent" examination under Section 5 and an "effects" examination under a Section 2 standard of "equal opportunity." (J.S. 23-24).

There are several flaws in this argument. First, as noted above, none of the districts at issue, indeed, none of Georgia's new legislative or congressional districts, can accurately be described as "supermajority" districts. Second, as Appellant correctly recognizes, Section 5 contains, as it has for the last twenty years, an equally important requirement that proposed changes not have the effect of reducing minority voting rights. (J.S. 23-24). Appellant concedes that the effect prong has been deemed constitutionally valid. (J.S. 24).

It was Appellant's failure to meet the effect prong that led to the rejection of the first Senate plan. (J.S. 144a). Contrary to Appellant's assertions, the district court never required that Appellant prove its case by demonstrating that all majority-minority seats were "safe," nor did the district court require "supermajority" districts. Appellant

argues that the trial court's opinion requires that the same or greater number of districts must be maintained as safe minority seats, and that the trial court's ruling dictates "an inexorable 'ratcheting up' process whereby Georgia loses its authority to make reasonable redistricting choices." (J.S. 25) This is simply not true. If minority population grows in a district, a district which was not a majority-minority district might become a majority-minority district, or an influence majority-minority district might become a true majority-minority district over the decade. Likewise, if the non-minority population grows in a district, as is happening in many coastal areas of Georgia as well as in some urban areas, the benchmark minority voting strength may decrease. The result is totally dependent upon the natural growth patterns that occur in that individual location. The purpose of analyzing the benchmark plan using the current census data is to prevent a jurisdiction from using redistricting as a way to suffocate a growing minority population in a discrete geographic area which has become, or is becoming, the majority population in a district. A district which was originally an influence majority-minority district, but which has grown into a majority-minority district over the decade, should not have a racial quota applied to it which requires the district to be restructured in a geographically bizarre fashion in order to retrogress its minority voting strength to a marginal level. The Senate Committee on the Judiciary recognized this when it stated in its 1982 report (recommending extending Section 5 for 25 years) that " . . . the departure from past practices as minority voting strength reaches new levels . . . serves to underline the continuing need for Section 5." S.Rep.No. 97-417, at 10.

The district court did not require the Senate districts to be "ratcheted up," (J.S. 25), but instead required those districts not to be weakened to the point that minority voting rights were reduced. It is clear from the Senate plan that was ultimately approved that the district court never imposed a requirement that the BVAPs in those

districts not be reduced. The revised Senate plan, approved by the trial court's June 3, 2002 Order, allowed preclearance of a Senate plan in which almost every majority-minority district saw a decrease in BVAP. Thus, Appellant's fear that the trial court's decision will lead to covered jurisdictions having "only supermajority, safe districts" is unfounded. The trial court did not rule that minority population could never be reduced in a district; it simply ruled, in accordance with Section 5, that minority population could not be reduced to the point at which, considering all relevant factors, minority voting power was reduced. It was Appellant's burden to prove that there was no such reduction. *See City of Richmond v. United States*, 422 U.S. 358, 362 (1975); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997). When Appellant failed to do so, the trial court properly denied declaratory judgment.

Appellant argues that the district court's ruling "would strip covered states like Georgia of their political choices." (J.S. 25). To the contrary, the district court made clear that it would not interfere with political choices, (J.S. 148-149a), unless those choices interfered with the Voting Rights Act, as they did here: "Whatever political success the Georgia Democratic Party may enjoy as a result of the Senate redistricting plan does not and cannot immunize the plan's racially retrogressive effects from a Section 5 attack. The Voting Rights Act was not enacted to safeguard the electoral fortunes of any particular political party." (J.S. 142a).

That ruling is in no way a constitutional violation. In fact, the only constitutional violation in the first Senate plan is entirely of Appellant's making and directly acknowledged by Appellant. Appellant made the point many times that the intent of its plans was to maximize Democratic political performance. Now, Appellant acknowledges that its own goal was constitutionally infirm: "Guaranteeing a particular political result is not a constitutionally legitimate goal." (J.S. 25).

III. THE DISTRICT COURT CORRECTLY PERMITTED INTERVENTION BY AFFECTED GEORGIA CITIZENS

A. The Court has recognized intervention by private parties in Section 5 declaratory judgment actions, and nothing in the statute or caselaw precludes intervention.

Nearly thirty years ago, the Court recognized that Federal Rule of Civil Procedure 24 permits intervention in declaratory judgment actions brought pursuant to the Voting Rights Act. *See NAACP v. New York*, 413 U.S. 345, 365 (1973). *See also Bossier Parish Sch. Bd. v. Reno*, 157 F.R.D. 133, 134 (D.D.C. 1994) (applying Rule 24 to permit intervention in Section 5 preclearance action). Since that time, the Court has noted the presence of private party intervenors in multiple Section 5 cases. *See City of Richmond v. United States*, 422 U.S. 358, 366 (1975) (noting that district court referred Section 5 action to a special master for hearings when intervenors opposed a consent judgment entered into by the City and Attorney General); *City of Lockhart v. United States*, 460 U.S. 125, 129 (1983) (noting the intervention of private party in Section 5 declaratory judgment action); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 476 (1997) (noting the intervention of private parties in Section 5 declaratory judgment action); *United States v. Mississippi*, 444 U.S. 1050 (1980) (summarily affirming Section 5 decision in which intervention by private parties was allowed). In all of these cases the Court clearly recognized that intervention had been allowed; in none of these cases did the Court indicate that intervention was improper.

Appellant's assertion that the Court and other courts have indicated their "opposition to intervention" in Section 5 declaratory judgment actions does not stand up to examination. The first case cited by Appellant for this proposition, *Morris v. Gressette*, 432 U.S. 491 (1977), is

completely inapposite to the issue. In *Morris*, the Court was asked to determine whether a district court could review action by the Attorney General when a state elects to pursue preclearance *administratively*, rather than in a declaratory judgment action. *Id*. at 501. After specifically distinguishing between the two avenues of preclearance provided by Section 5, the Court concluded that because administrative preclearance was intended to be an "expeditious alternative to declaratory judgment actions," judicial review of the Attorney General's actions is not allowed. *Id*. at 504. This ruling provides no support for Appellant's argument that private parties cannot intervene in Section 5 *declaratory judgment* actions.

Next, Appellant contends that in *Brooks v. Georgia*, 516 U.S. 1021 (1995), the Court summarily affirmed the district court's denial of intervention. The district court decision that the court summarily affirmed, *Georgia v. Reno*, 881 F. Supp. 7 (D.D.C. 1995), however, contains absolutely no discussion of intervention. In fact, there is no indication that the Court was even aware that private persons had sought to intervene in the case below. Thus, the Court's affirmance cannot be read to indicate that the Court has reversed its long-held position permitting intervention in Section 5 cases.[9]

Appellant's contention that the Court "upheld denial of intervention in a § 4 action" in *NAACP v. New York*, 413 U.S. 345 (1973), is also misleading. In that case, the Court specifically recognized that intervention was permissible under Federal Rule of Civil Procedure 24, but determined that the district court did not abuse its discretion in finding the motion to intervene untimely – the first prong

[9] Moreover, the Court recognized the presence of intervenors in a Section 5 case decided after *Brooks* without suggesting that intervention was improper. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997).

of a Rule 24 analysis. *Id.* at 367-69. As Appellant notes, *NAACP v. New York* cited *Apache County v. United States*, 256 F. Supp. 903 (D.D.C. 1966) with approval. Contrary to Appellant's representations, however, *Apache County* did not deem "intervention inappropriate because of the Attorney General's unique statutory role." (J.S. 27). Rather, *Apache County* explicitly rejected the argument made now by Appellant that "the spirit of the 1965 Act excludes intervention by private parties under any circumstances." *Apache County*, 256 F. Supp. at 907. Recognizing the affirmative role that courts are given in declaratory judgment actions bought under the Voting Rights Act, the *Apache County* court stated:

> We are being asked to enter a judgment declaring the existence of a state of facts. . . . We see no basis for supposing that Congress meant to strip the court of its customary authority to permit intervention deemed helpful by the court. In our view the court has discretionary authority to permit intervention by applicants offering to provide evidence or argument concerning the facts the court must determine in arriving at its declaratory judgment.

Id. at 908.

Finally, Appellant's argument that intervention should be precluded in Section 5 declaratory judgment actions because private parties prolong the length of trial fails for three reasons. First, had Appellant truly been concerned about possible delay and its effect on candidates and the public, Appellant could have sought administrative preclearance instead of instituting this declaratory judgment action. As the Court recognized in *Morris*, the legislative history of Section 5 indicates that the administrative preclearance option was specifically added to the Act to address timing concerns by providing a "speedy alternative method of compliance." *Morris*, 432 U.S. at 503.

Second, Appellant had the option of passing redistricting plans and initiating the preclearance process much earlier than it did. Although the census numbers were released in March 2001, Georgia's Governor did not sign the redistricting bill – and Appellant did not file the declaratory judgment action – until October 2001. (J.S. 27a).

Third, the presence of intervenors in this action did not prolong the length of the declaratory judgment proceedings. The intervenors were subject to the same schedules as the other parties.[10] And contrary to Appellant's assertion, the district court could not have entered a consent decree had the Attorney General and Appellant reached a settlement as to a particular plan. The submitting jurisdiction bears the burden of proving that a proposed change in a voting law does not have the purpose and will not have the effect of abridging or denying the right to vote on the basis of race or color. 42 U.S.C. § 1973c. *See also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. at 480. If the change is submitted to the Department of Justice for preclearance, the submitting jurisdiction must prove its case to the satisfaction of the Department of Justice. However, when the case is submitted to the district court, the submitting jurisdiction must prove its case to the satisfaction of the court. There is simply no authority that the district court could have entered a declaratory judgment for Appellant, based solely on the Department of Justice's acquiescence in the proposed plan, before Appellant had proven entitlement to that judgment.

[10] The Attorney General agreed that intervention would neither delay nor disrupt the proceeding: "The United States does not believe that intervention by the movants at this time would unduly delay or disrupt this action, so long as the movants are required to meet the same schedules as the Plaintiff and the United States." United States' Response to Motion of Patrick L. Jones and Roielle L. Tyra to Intervene as Defendants, Appendix at 8a.

Rather, the applicable law is found in *City of Richmond v. United States*, 422 U.S. 358 (1975). In that case, the City of Richmond sought preclearance of an annexation. After permissive intervention was granted to a group of minority citizens, a proposed consent decree between the City of Richmond and the United States was presented to the court. *Id*. at 366. The intervenors objected, and the trial court set the case for a hearing on the merits before a special master. *Id*. Despite the United States' willingness to enter into a consent decree, the special master's recommendation was that the trial court find that the City of Richmond had not met its burden of proof. *Id.* The trial court followed the recommendation, and the annexation plan was rejected. *Id*. The City appealed. While the Court remanded the case for additional factual findings, *id*. at 378, the case makes clear that even upon the offering of a consent decree, a submitting jurisdiction is not relieved of its burden to make the requisite showing under Section 5.

B. Intervenors had standing because they reside in districts subject to preclearance.

Pursuant to Section 5, Appellant had the burden of proving that its proposed changes in voting laws – that is, the new plans in their entirety, not particular districts – had neither the purpose nor effect of denying or abridging minority citizens' voting rights. Although Appellant attempted to make this a case about particular districts, the issue in a Section 5 case is whether an overall plan reduces minority voting strength.[11] The Jones Appellees

[11] The United States supported this view in its opposition to Appellant's motion to vacate the district court's initial order permitting intervention: "Although the Court's factual inquiry necessarily will focus upon particular areas, Section 5 preclearance must be granted or denied based upon whether the plan has a net retrogressive effect across the State. Thus, residence in any particular area or district should not be a criterion by which the Court determines standing in

(Continued on following page)

did not challenge particular districts but the plans as a whole. Indeed, the declaratory relief obtained by a party opposing Section 5 preclearance is the denial of preclearance for an entire plan, not a single district. The cases cited by Appellant, none of which are Section 5 cases, are distinguishable on this basis.

The case of *United States v. Hays*, 515 U.S. 737 (1995), involving a single district alleged to be racially-gerrymandered, does not defeat the Jones Appellees' standing in this case. The *Hays* plaintiffs' claims, in which intervenors sought to join, differed from the claims here in two important respects: the claims (1) were brought after preclearance and (2) were based on the Louisiana and federal Constitutions and Section 2 of the Voting Rights Act, not Section 5. At issue in the case at hand, in contrast, is not the harm presented by a single gerrymandered district after preclearance, but instead, the harm of an entire plan for which preclearance is sought. In short, by the time a case like *Hays* is filed, the plan has been precleared and the issue is whether the new district being attacked results in representational harms based on racial classifications. On the other hand, the harm to be avoided in a Section 5 preclearance case is the implementation of a retrogressive plan – whether the plan fails because only a particular district or the plan as a whole dilutes minority voting strength.[12]

Cases that interpret *Hays* are clear that its holding with respect to standing is particularly tailored to racial gerrymandering cases. *See Shaw v. Hunt*, 517 U.S. 899, 904 (1996) (citing *Hays* for the proposition that one who

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actions of this type." United States' Opposition to Plaintiff's Motion to Vacate Order Permitting Intervention on the Senate Plan, Appendix at 13a.

[12] The one person, one vote cases cited by appellant are distinguishable on the same grounds.

resides in a racially-gerrymandered district has standing to challenge the district, while one who does not reside in the district lacks standing unless he or she has been personally subjected to racial classification); *Dillard v. Baldwin County Comm'rs*, 225 F.3d 1271, 1279 (11th Cir. 2000) (finding that *Hays* "set forth a bright-line standing rule for *a particular class of cases* alleging illegal gerrymandering with respect to voting districts") (emphasis added). In *Wilson v. Minor*, 220 F.3d 1297 (11th Cir. 2000), the Eleventh Circuit Court of Appeals, considering an attack on a county commission election scheme, explained the difference between *Hays* and cases, such as the one at hand, in which an *entire* election scheme is at issue:

> *Hays* lays down a bright-line standing rule for a particular class of cases alleging illegal racial gerrymandering with respect to voting districts: if the plaintiff lives in the racially gerrymandered district, she has standing; if she does not, she must produce specific evidence of harm other than the fact that the composition of her district might have been different were it not for the gerrymandering of the other district. There is no suggestion in *Hays* – or any subsequent decision that we are aware of – that the district-by-district analysis adopted in that decision applies to a case . . . which does not have anything to do with gerrymandering and relates instead to an allegedly illegal electoral scheme covering an *entire* election area.

220 F.3d at 1303-04, n.11 (emphasis in original).

The trial court correctly distinguished the Jones Appellees' Section 5 challenge in this action from the racial gerrymander challenge in *Hays*, holding that because intervenors challenged the redistricting plans as applied

to the state as a whole, intervenors had standing by virtue of residing in Georgia.[13] (J.S. 30a). Any other conclusion would have resulted in two inconsistencies. First, although the Jones Appellees would have been allowed to make any comment and present any evidence they wished if the proposed plans were submitted to the Department of Justice for administrative preclearance (without regard to whether the comments concerned their particular home districts), Appellant would have been able to curtail sharply the comments and evidence that the Jones Appellees could submit by seeking declaratory judgment in the district court. Second, in order to have had standing to put Appellant to its burden of proving that the proposed plans in their entirety are not retrogressive, the Jones Appellees would have needed a group of 249 individuals in order to cover the entire Senate plan (56 districts), the entire House plan (180 districts) and the entire Congressional plan (13 districts). Neither *Hays* nor any other case that the Jones Appellees have found requires that enormous burden.

In summary, Appellant has not and cannot cite any applicable authority that supports a ban on intervention in a Section 5 declaratory judgment action. On numerous occasions, the trial court considered all of Appellant's arguments on the issue and correctly rejected them. In its argument to this Court, Appellant contends that intervention should be prohibited because "[M]ore often than not, intervenors have purely political reasons for opposing

[13] As the trial court also noted, even if individualized harm was a requirement for standing in a Section 5 action, intervenors would satisfy the requirement by virtue of the fact that the proposed plans remove them from majority-minority districts: "[T]he removal of intervenors from a majority-minority district is sufficient to provide intervenors with standing to challenge the proposed district." (J.S. 30a).

a voting change . . . ." (J.S. 28). Whether Appellant's prediction is true remains to be seen,[14] but it cannot be disputed that an attempt to silence all dissent, especially that of members of the affected group, always has a purely political motivation. A ruling that citizens, particularly minority citizens, have no right to participate in a Section 5 proceeding if the submitting jurisdiction elects to file a declaratory judgment action in lieu of an administrative proceeding would effectively silence any opposition.

CONCLUSION

For the foregoing reasons, the Jones Appellees respectfully request that the Court summarily dismiss the appeal in this case.

Respectfully submitted,

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[14] Certainly, Appellant's contention was not true in this case, as the Jones Appellees were two Republicans and two Democrats.