IN THE SUPREME COURT OF THE UNITED STATES

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GEORGIA, :

Petitioner :

v. : No. 02-182

JOHN ASHCROFT, ATTORNEY :

GENERAL, ET AL. :

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Washington, D.C.

Tuesday, April 29, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:16 a.m.

APPEARANCES:

DAVID F. WALBERT, ESQ., Atlanta, Georgia; on behalf of the Petitioner.

MALCOLM L. STEWART, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Federal Repondent.

E. MARSHALL BRADEN, ESQ., Washington, D.C.; on behalf of the Private Intervenors.

C O N T E N T S

P R O C E E D I N G S

(10:16 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 02-182, Georgia versus John Ashcroft.

Mr. Walbert.

ORAL ARGUMENT OF DAVID F. WALBERT

ON BEHALF OF THE PETITIONER

MR. WALBERT: Mr. Chief Justice, and may it please the Court:

For some 6 decades now, the policy of the United States has been to embrace integration, reject segregation and separation of people. We stand -- really, the Nation of the United States of America stands pretty much as the beacon in the world to the notion that balkanization is not the way to go. Particularly in public affairs and in public life, integration, working together, not separating people on the basis of race is our goal.

This Court started that trend, that great trend, in the early -- in the 1940s with the original decisions of Smith versus Allright, putting aside segregation, the past history of that in this country, the ICC, Interstate Commerce Commission desegregation decisions, Brown versus Board of Education, voting rights cases, jury cases, and so on. And the policy of the United States, as this Court was the leader on that at all times, has always

been -- has been for integration, for treating people the same independent of their color.

Congress followed behind this Court, started adopting some of the early Civil Rights Act in the early 1950s, the more moderate ones, if you will, under -- under President Eisenhower's administration, and of course, the great Civil Rights Act of 1964 was enacted. 1965, Voting Rights was enacted; and the 1968 Open Housing Act.

Throughout that entire time, the policy of integration has been the policy that this Nation has embraced and espoused and advocated. And I would submit to Your Honors respectfully that the State of Georgia -- the position the State of Georgia puts before this Court in this case today stands four square in the center of that tradition.

Georgia comes here to this Court today advocating that politics should be open and integrated. Politics should not have allocations unnecessarily, in particular, of seats based on race. I would submit to this Court that what we say is totally consistent with everything this Court has said that touches upon this matter and in this particular regard.

QUESTION: Could we bring it down to what we have to decide here, which is whether there was retrogression or not?

MR. WALBERT: Yes, Justice O'Connor, and I was going -- excuse me.

QUESTION: And on that, do we look at the whole State and what would happen overall, or do we just focus on individual legislative senatorial districts?

MR. WALBERT: Well, I think you look at both, and when you look at the whole plan of redistricting, then you go down to look at the district. You can't do one without the other. One looks at, first of all, the whole plan and sees if opportunities are the same in terms of majority and minority seats, for example, or opportunities where minorities have a real opportunity get election, and sees whether that, under the whole plan, is the same and whether that's been maintained.

And to do that, though, one has to look --

QUESTION: Well, what -- what ended up deciding this case apparently was the fact that in three of the districts that were drawn for the Senate, the number of black voters decreased under the new plan from what it had been, and they had been very safe districts --

MR. WALBERT: Yes, Your Honor.

QUESTION: -- assured of electing black officials before, and it was reduced to around 50 percent. Is that right?

MR. WALBERT: That's correct. The -- the

likelihood of winning -- the -- the black voter age population was reduced to about 50 percent --

QUESTION: Yes.

MR. WALBERT: -- which according to the evidence, would give about a 75 percent chance of a minority candidate of choice winning in that particular district.

QUESTION: And was that the finding of the court below?

MR. WALBERT: The finding was that safe seats -- the rule of law was that safe seats must be maintained. To get a safe seat here, one had to raise these 4 to 5 percent.

QUESTION: Is --

QUESTION: So that's the --

QUESTION: Is -- is that one of the ways, at least, that you think we ought to view this case? As I understand it, no one on the other side is claiming that the percentage of safety has got to be maintained in order to avoid retrogression.

But one difference between you and them, at least as I am reading what you're saying, is you, I think, are saying they maintain the same opportunity to elect. Minorities maintain the same opportunity to elect if they use their best efforts and their good politicians in doing

it. Whereas, the other side seems to be saying, there's got to be more of a margin of safety for maintaining -- or avoiding retrogression than merely best efforts. There should be some margin of safety, even if it's not as great as it used to be under the old districts. Is that a fair way of looking at the disagreement?

MR. WALBERT: I -- I think it understates it a little bit, in all due respect, Justice Souter, because I think the district court came squarely down. If you look at the majority opinions -- and both Judge Sullivan and Judge Edwards wrote ones that were concurred in about each other -- and Judge Oberdorfer's decision, the line is safe seats. One must maintain safe seats. And I think the only way that those can be looked at in this case is that all of the evidence is -- when you get to that level, no one has ever -- on an open seat in Georgia, no one's ever lost a 54 percent BVAP seat.

QUESTION: Mr. Walbert, I didn't get that impression from Judge Edwards' opinion or Judge Sullivan's. They both say we are dealing with a narrow section 5. It has a concept, retrogression, backsliding. And I assume that they would say if you start out, you start with the status quo. Everyone agrees with that. If you start out with, say, 30 percent and you end up with 30 percent, it's okay. You don't have to have a safe

district because the starting point may not be safe.

MR. WALBERT: I -- I agree entirely with that, Your Honor. I didn't mean to suggest that they are requiring more than that. The fact is that these districts that evolved demographically from the 1990 Census, when two more districts under the old districting plan became majority minority, became high BVAP -- let's take Senate District 26, for example.

QUESTION: Well, is it -- are you saying that when you get up over a certain number of black voters, say, 50 percent, then retrogression or backsliding is really out of the picture because it's good enough?

MR. WALBERT: Well, I would say this. Where you have a real equal opportunity at winning the seat, that is enough.

QUESTION: Yes, but that's the -- that's the conclusion, and we're -- we're looking for some kind of indication at this point of whether that is true. And the only indication that at least I have and I think that Justice Ginsburg is -- is looking at right now are -- are the percentage figures, the BVAP percentage figures.

MR. WALBERT: Well, I think this, Your Honor. I mean, the -- the court accepted Dr. Epstein's probability curve all over -- any number of times. I think it was on page 36 the first time. Dr. Epstein's evidence is -- his

study is reliable and relevant is what the court says in that regard. And I guess the critical thing is that was the only evidence in this case, plus the legislators who testified, and -- and Congressman Lewis who testified about the likelihood of winning at a 50 percent BVAP level.

QUESTION: Let -- let me ask you this because some of what you say might be explained as just a difference of -- of -- a conclusion of facts, which we have to accept. Were there legal premises that the majority opinions adopted below that were wrong? Was it wrong to talk about robust campaigning? Was it wrong to consider polarized voting? Were there -- did the controlling opinions make reference to any impermissible legal standards?

MR. WALBERT: Well, I think the bottom line standard of safe seat is the problem that we have. I'm not sure that -- they didn't speak of robust campaigning, with all due respect, Justice Kennedy. It was robust districts, meaning -- they equated that with safe. And the -- the point -- that is the legal issue. That is the fundamental legal flaw in the opinion of the majority below that we take issue with, the fact that one must maintain safe seats and --

QUESTION: What's -- what's the legal issue?

MR. WALBERT: That --

QUESTION: That is, I -- I thought there's a statute, and the statute here says that you cannot have a new plan which will have the effect of abridging the right to vote on account of race.

MR. WALBERT: Yes, sir.

QUESTION: And Judge Edwards says that that statute has been interpreted to mean you cannot backslide, and he adds that if you go from a safe seat to a seat where there's only a fair opportunity, that is clearly backsliding unless it's made up for in other districts. Let's call it frontsliding. And here there is no evidence of frontsliding, and here there are two experts who disagree as to the backsliding. One is Epstein who thinks there isn't, and the other is Engstrom --

MR. WALBERT: Well --

QUESTION: -- who thinks there is. And two judges below agreed with Engstrom and one judge below agreed with Epstein.

MR. WALBERT: I --

QUESTION: Now, are we supposed to do -- to go back and redo the work of those three judges and say, well, we happen to think Epstein was better or the other one thinks Engstrom was better? Is that this -- what this case is about? And if it isn't about this, I don't know

what it's about.

MR. WALBERT: Well, first, that's not what happened in the record. Professor Engstrom gave no testimony. There was no testimony but from our side of the case about the likelihood of winning. Professor Engstrom came in and said there is racially polarized voting, and he criticized that and the Department criticized it, and it was relied upon. But the African American candidates were winning in election after election after election in which he said there is a problematic racially polarized voting.

QUESTION: I -- I'm overstating what I say for purposes of clarity, because you're giving a view of Engstrom, and I'm sure the other side will give a somewhat different view, but nonetheless, I want to know what it is I'm supposed to do as a judge in this Court.

After reading it, I thought what you're asking me to do is to go back, look at what Judge Edwards and the other majority judge cite as convincing, factual, detailed statistical evidence, look at the evidence of the political figures who are very distinguished whom Judge Oberdorfer cites the other way, and remake that evaluation that three judges of -- of a three-judge district court did. Now, my question is, is that right? Have it got it right what you think we should do in this case?

MR. WALBERT: No, you do not.

QUESTION: All right. Good. Then what is it I'm supposed to do?

MR. WALBERT: The rule of law that was established here by the majority of having to maintain -- having to maintain a safe seat. There's no question they're not saying you have to create one if there wasn't one, but the question is, do you have to maintain a seat that's safe?

QUESTION: All right. Why -- if that's the issue, assuming that the safe seat, going down to only a probable seat, is nowhere made up for by countervailing factors elsewhere in the State, assuming that, why isn't going from a safe seat to a fair probability seat -- why is that not backsliding, retrogression, other things being equal, an abridgement, a -- the effect of abridging the right to vote because of race?

MR. WALBERT: Well --

QUESTION: Why isn't it? It if that's the issue, why isn't it?

MR. WALBERT: There's two reasons. And -- and first of all, no one disagrees that lowering the percentage and the likelihood down -- the -- we're not -- no one in this case, including the district court, says you can't lower the probabilities. So what Your

Honor is saying is a position more extreme than what the majority says below.

QUESTION: I'm reading -- I'll say it again because I'm reading from Judge Edwards. Going from a safe district --

MR. WALBERT: Yes, sir.

QUESTION: -- into one where there is only a fair opportunity, that -- that, he says, other things being equal in the State, will constitute retrogression in effect, not necessarily in purpose, but in effect. And now, why isn't that so?

MR. WALBERT: And -- and my point is that he is conceding that dropping down from a certain seat to a safe seat is okay. Now, how does that -- how can that possibly square to the notion of retrogression? Everybody agrees in this courtroom, including the majority below, that there can be decreases in the likelihood of success. The only question in this Court -- in this case is where do you draw the line? Safe or equal seats?

Safe is just out of the air. Never before in the history of this Court has anyone ever said safe is the -- is the Plimsoll line or the water line beyond which you cannot drop.

QUESTION: You're drawing a distinction between safe and certain. Now, did --

MR. WALBERT: Well, safe is --

QUESTION: Did Judge Edwards --

MR. WALBERT: And that's what the -- and the court is acknowledging that there is a drop for sure. The court said --

QUESTION: A drop that makes no difference. That's -- that's how I understood their opinion.

MR. WALBERT: I don't think that could be, because --

QUESTION: A safe seat is a safe seat. It means a certain seat.

MR. WALBERT: No, it doesn't in this case, Your Honor, because when you get to the levels they're talking about, there is still a possibility for sure, whether it's 20 percent or whatever, but that's a real possibility.

QUESTION: But I didn't think we're dealing with safe versus certain in this case. I thought what we're dealing in this case is two judges decided that dropping from safe to whatever you want to characterize this level -- Edwards characterizes it as fair probability, but characterize it as you wish -- dropping from safe to this level, however you want to characterize this, is a retrogression. And one judge thought it wasn't given the circumstances.

So what is it that you, aside from re-evaluating

the evidence, believe that we should say?

MR. WALBERT: They used different legal standards, with all due respect, Justice Breyer.

QUESTION: And what is that difference?

MR. WALBERT: Safe versus equal. That is the difference in the legal standards between the majority and -- and the decision below.

QUESTION: Or why is Edwards' standard in your opinion wrong?

MR. WALBERT: Because I think it's inconsistent with what this Court has said on section 5 before. And if I might read several of the -- just a sentence. And I'm going to start with Justice Marshall, who was the most aggressive interpreter and advocate of what section 5 would mean. And in his dissent, in the case of United States versus Mississippi in 1980, he three times addressed what section 5 requires in a retrogression context.

And he said in the first thing, it requires a reasonable opportunity to elect a candidate of their choice. That is what a district had to be maintained like under Justice Marshall's interpretation of section 5. That's on page 1055 of that decision.

Again, on the next -- on page 1057, Justice Marshall says, the numbers must be sufficient to provide,

quote, a fair opportunity to elect candidates, unquote.

QUESTION: That sounds very much like section 2 language.

MR. WALBERT: And -- and that's in section 5 under Justice Marshall is all I'm saying, Your Honor, because this issue that is in this case today has never been squarely put before this Court. But all the prior language of the Court interpreting, where does section 5 kick in when there is still fair, equal districts.

QUESTION: I thought that the Bossier, the two cases, clarified the difference between section 2 and section 5, and what you just read from Justice Marshall sounds to me like the section 2 standard.

MR. WALBERT: Well --

QUESTION: Section 5 standard is you start with what you have, you look to see if there's backsliding.

MR. WALBERT: I think the problem, though, Judge -- and -- and certainly you start with backsliding and retrogression, but the question is, where does inquiry stop? Truly, you could say at a 100 percent district goes down to 80 percent, the chances clearly change on electoral success, without a doubt. That is inevitable. Goes from 100 to 60, 100 to 55. That is a real and palpable change. That is okay, according to the district court, because at least we stopped at safe.

That's our problem. We don't think safe is where you arbitrarily draw the line to stop. No decision of this Court ever has suggested that before. So is --

QUESTION: Well, you start with, say, 55. Where does backsliding start in your view of section 5?

MR. WALBERT: In our view of section 5, so long as -- if you have a district that is -- that it has at least an equal opportunity, it must be maintained in that fashion. If you have a -- a district where minorities have an equal opportunity or better, to prevail and to control.

QUESTION: Well, then how do you fit backsliding, retrogression --

MR. WALBERT: If you go -- excuse me.

QUESTION: If -- if you go, say, from 55 to what? 44? That's okay because you -- you would have a fair opportunity?

MR. WALBERT: If the evidence in a particular case would show that, that -- you know, we never went below 50 on anything, so that's not here in this case.

QUESTION: Although it would seem an unusual definition of backslide.

MR. WALBERT: Well, I think the problem is this, though, Your Honor. Where -- what would be the policy reason where a section of the Voting Rights Act,

section 5, could be construed to mandate a State to maintain something more than what Federal law could possibly compel it to under section 2?

QUESTION: It doesn't contain --

QUESTION: So -- so what you're saying is --

QUESTION: It doesn't contain the word backsliding, does it? What -- what's --

MR. WALBERT: Section 5 does not, Your Honor.

QUESTION: What's the text that -- that we're interpreting and -- and --

MR. WALBERT: It's abridge --

QUESTION: -- interpreting to mean backsliding?

MR. WALBERT: It's abridge or deny the right to vote --

QUESTION: Abridge or deny the right to vote.

MR. WALBERT: Yes, sir.

QUESTION: And -- and that has been interpreted by some of our opinions to mean that once a certain level is reached, you're abridging or denying the right to vote if it goes below that level of -- of safety. Is that it?

MR. WALBERT: That's correct, Your Honor.

QUESTION: And you --

QUESTION: And the reason for that is because, I gather, historically there were quite a few instances where, indeed, in the South, you could elect -- a black

representative was elected by a black community in, let's say, one district. And then, lo and behold, what happens is that the district boundaries are changed so that there happened to be a lot fewer black representatives elected out of districts that were predominantly black. I take it that's why Congress passed this statute.

MR. WALBERT: Section 5?

QUESTION: Yes.

MR. WALBERT: No. Congress passed the statute -- section 5 in 1965 because they were concerned about voter registration laws changing after --

QUESTION: And backsliding so that you had fewer people who were --

MR. WALBERT: It was -- it was passed to dovetail with the literacy test. That's why it was passed.

QUESTION: So it doesn't really have to do with retrogression in your view?

MR. WALBERT: Sure, it does, as been interpreted by this Court since then, but the original reason why it was passed was to fit in with the literacy test.

QUESTION: So what it -- what it comes down to is not a -- is -- is that the State is entitled to take a safe district and make it a district where there's just a -- an even chance.

MR. WALBERT: Equal opportunity, yes, Your Honor. And -- and our reasoning on that is -- is a simple thing. If one looks at it from the other side, and -- and we're not saying section 2 is incorporated in section 5.

QUESTION: And -- and this cannot be within the definition of retrogression.

MR. WALBERT: That's correct, Your Honor. That cannot be the abridgement of the right to vote.

QUESTION: May I ask a sort of a general question? In any of the analysis, do the -- the judges take into account the likelihood of winning primaries as opposed to the likelihood of winning the election itself?

MR. WALBERT: It's -- it's implicit in what we did because we looked at the whole election scheme. Everything that Dr. Epstein did was the whole election. Dr. Engstrom made no distinction between nonpartisan elections, generals, and primaries. He lumped them all together and treated them in one ball of wax. We certainly did, and our evidence always looked at winning/winning, winning the seat. If you won the primary and lost the seat, you're a loser because we're talking about winning the election. That's all we looked at. If you didn't win it, we didn't count it.

But the thing that is the most troubling, I guess, in this regard that is -- and the reason I looked

to section 2 is not that section 2 is incorporated in here, but if you assume that section 2 was proved -- that a plaintiff came in and proved a section 2 violation in Georgia, what would be the high water mark relief that they would get? They would get under Justice Souter's opinion for the Court in Johnson versus DeGrandy a district with an equal opportunity to prevail. That --

QUESTION: But we really haven't equated section 2 challenges with section 5 challenges.

MR. WALBERT: That's correct, Your Honor.

QUESTION: I know that's what you're arguing, but we have not done that. And we have said that section 5 prevents retrogression. So I think this case boils down to what amounts to retrogression.

MR. WALBERT: And I think, Your Honor, with all due respect here, I believe that the problem with interpreting it to be an absolutist at the safe seat level, you've got to -- in our opinion -- and we raised the issue, of course -- is a grave constitutional question. What is the legitimate ends? What is the legitimate ends into -- I think the Court's discussion in City of Boerne versus Florida is the most detailed discussion recently about section 5 enforcement power under the 14th and section 2 under the 15th -- and everybody on the Court agreed with the formulation there.

The ends of Congress must be legitimate and the ends must be related proportionately and with congruence, the -- the remedies that are chosen by Congress. And I would have to say what is -- other than just preserving what happens to be there -- the only reason we're talking about keeping safe seats is they happen to be there. This is not because they're ever put in because of a remedy.

QUESTION: Is it illegitimate for the State to decide to keep the safe seat if it wants?

MR. WALBERT: That's a different question surely, but no, I would say it's not, Your Honor. I think as long as it's not --

QUESTION: It is not --

MR. WALBERT: Excuse me.

QUESTION: -- illegitimate.

MR. WALBERT: Correct.

QUESTION: It -- it is proper.

MR. WALBERT: I think that is within the State's prerogative so long as --

QUESTION: Well, then is it proper for the Justice Department to consider that in its discretion in deciding whether or not to preclear?

MR. WALBERT: You know --

QUESTION: It's not using an illegitimate factor.

MR. WALBERT: I'm going to add on the last part of that. So long as it's not the predominant reason for the way the lines are drawn is how I was going to try and answer the -- the rest of the last question. So the State can do it.

And -- and it is illegitimate in this sense, Your Honor, because you're getting back to the question about why didn't the State do it, which is almost like Bossier II. What's the purpose and so on behind it? So long as we maintain a system that satisfies the -- what I would call the high water liability remedy level of section 2, that has got to be enough.

QUESTION: All right. What is your answer to this -- this counter-argument? I don't know whether the other side is going to make it, but let -- let me -- let me try it here.

The reason that section 5 is in there is that efforts simply to achieve your Plimsoll line, the -- the equal opportunity, historically failed over and over and over and over again because every time a decree came down saying equal opportunity is required, there would be another voting change that, in fact, would inject a -- a new fact pattern. And the new fact pattern, just about every time, resulted in something less than equality.

Section 5 is there, in effect, to say you

can't -- you can't make a move without advance approval, and the only way, in effect -- this Court has said in Beer, the only way to -- or the -- the best way at least, to keep from moving that line in a way which is going to result in less than an equal opportunity is to insist that at least the status quo, as best you can determine it, is, in fact, not going to be modified by the change. And if the status quo is some measure of safety, then the theory of section 5 is preserve the measure of safety because if you don't do that, we know what's going to happen, and what's going to happen is you're not going to get to the line of equality.

That's the argument. It's essentially an historical argument. And what do you say to that?

MR. WALBERT: Several things. First of all, the history Your Honor cites, which is correct in some regards, has nothing to do with redistricting history as a matter of fact in Georgia at least. We have eight --

QUESTION: That's what we -- that's what you get for general laws. We -- we've got a general law, and that's the theory behind it.

MR. WALBERT: Well, I think insofar as you're trying to apply that in interpreting section 5 in this context, with all due respect, Justice Souter, I don't think that that is a realistic way of interpreting it here

because of that history.

If the mere fact that there was segregation and so on before 1965, a horrible history before 1965, that that was enough to justify in the year 2003 where African Americans are demonstrably having success that no one would have dreamed of in 1965 in the State of Georgia -- in a 26 percent black State, one-quarter of the statewide elected officials are African American today in the State of Georgia. And to say that it is necessary is so divorced from the factual reality that it wouldn't be a fair factual predicate to apply that constitutionally to the State of Georgia at this time in history.

QUESTION: Why wouldn't it be -- why wouldn't it be fair for us to say, number one, we're going to maintain the Beer theory? And we're going to accept the position taken by Judge Edwards that if there was a margin of safety before, there's got to be some margin of safety now in order to comply with Beer and ultimately with section 5, and we're going to leave the law alone to that extent because the statute is up for renewal in a few years, and that will be an appropriate time for Congress to decide whether it wants to modify the standard or, indeed, to continue to have any section 5 standard at all. That's a timing argument. What's your response to that?

MR. WALBERT: I would say that's punting the

Court's constitutional and statutory interpretation duty to a coincidence of time like that, with all due respect, Your Honor. We have this case today.

QUESTION: Well, we've --

MR. WALBERT: And what Georgia can do today is the questions before this Court. And the fact that Congress may or may not -- any law that ever comes before this Court may be repealed the next week.

QUESTION: Maybe -- maybe it would be --

QUESTION: No. But this isn't repealed. This is --

MR. WALBERT: But it is always --

QUESTION: This is an automatic expiration --

MR. WALBERT: Well --

QUESTION: -- on which Congress will have to act.

MR. WALBERT: It's a de facto extension as a practical matter. There is no real likelihood that section 5 will not be extended as a practical matter. That's been true in '70, '75, '82. Whether it will be for 25 years, 20 or 50 or become permanent this time, I don't know.

QUESTION: Maybe if we make it bad enough, they'll think about repealing it.

(Laughter.)

QUESTION: Maybe worse is better from your standpoint.

MR. WALBERT: I don't know about that, Judge. We don't have a problem with section 5. It's the way it would be applied if the district court were affirmed in this case.

And the difficulty is that just the whole notion of making section 5 compel more than the substance of section 2 in a redistricting context, there's a grave illogic about that given the narrow purpose of section 5 which is always the freeze and the backslide, the emergencies. Don't -- don't let anything bad happen.

If what Your Honor just said, Justice Souter, if it happened that there was a mistake and, oh, my gosh, it really -- the world changed in Georgia and 55 percent or 50 percent wasn't equal and it turned -- and 40 percent wasn't and it had to go back up to 60 -- let's take an unimaginably bad situation -- section 2 is still there. Section 5 could be applied.

Section 5 is a stopgap, extraordinarily harsh statute that is unique. It is unique in our Federal system.

And the answer, I truly believe, to Your Honor's question is section 2 is always there if any of those kind of parade of horribles, if you will -- if the expectation

of equality disappeared. But we're dealing with the facts of today, and the facts of today at the time of this trial showed equality was absolutely established at the level that we were talking about. And that is the problem with this case that is before this Court today.

If I may reserve the remainder of my time for rebuttal, Your Honor.

QUESTION: Very well, Mr. Walbert.

Mr. Stewart, we'll hear from you.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE FEDERAL RESPONDENT

MR. STEWART: Mr. Chief Justice, and may it please the Court:

In a section 5 preclearance action, the appropriate comparison is between a covered jurisdiction's proposed voting change and the jurisdiction's existing practice.

In the present case, the district court found that Georgia's proposed Senate districting plan was likely to cause a significant diminution of black voters' ability to elect their candidates of choice.

QUESTION: In -- in preclearing, does the Government look at the effect as a whole? What if, under the plan, it's true that the districts reduced the black voter population somewhat from the prior districting, but

in so doing, they picked up enough black voters in another district that gave them an additional elected official of the minority race --

MR. STEWART: The Justice Department --

QUESTION: -- and -- and as a whole might be better off?

MR. STEWART: The Justice Department's view is that the analysis should focus on the plan as a whole, and our guidance is --

QUESTION: You do look at it as a whole.

MR. STEWART: We do look at the plan as a whole.

QUESTION: And you didn't think that this plan resulted in a gain as a whole?

MR. STEWART: No, because our -- our feeling was that there were three Senate districts that we focused on specifically because we felt, for a variety of reasons, that the diminution in black population was likely to have a significant impact on black voters' ability to elect candidates of choice in those three districts. And we -- we also looked to where those black voters were going. Were they being redistributed to other districts in which they would increase the ability to elect candidates of choice?

The -- the focus of the inquiry has always been on the ability to elect candidates of choice. So, for

instance, if --

QUESTION: Well, with certainty or -- or ability? I'm -- I'm really concerned about how far we are getting from the text of the statute. The statute says nothing about retrogression. Indeed, it says nothing about redistricting. It -- it's -- it -- it says that if one of the States who were covered by section 5 seeks to administer any voting qualification or prerequisite to voting, or standard practice or procedure with respect to voting, which I would have thought meant, you know, whether you vote on a -- on a working day or on a non-working day, whether the polls are open for a certain amount of time or not. Anyway, we've expanded that to cover districting.

Then it goes on and it says, any change cannot have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. And we have said that that means you're denying or abridging the right -- the right to vote if you backslide. If -- if a -- even though all of the black or minority citizens can vote just the way they did before, if the percentage of -- of minority voters in a -- in a certain district goes down, we have denied or abridged their right to vote.

I -- I find that -- maybe that is a plausible

interpretation of the statute when you are going from a good chance to elect a minority candidate to no chance of electing a minority candidate. Maybe you can stretch it that far, but to say that you're abridging or denying the right to vote when you go from a certainty or safe seat for electing a minority candidate to a mere probability of -- of electing a minority candidate -- to say that that constitutes a denying or abridging of the right to vote seems to me to -- you know, in violation of the -- of the legal principle that fun's fun but you can't die laughing.

(Laughter.)

QUESTION: I mean, that is such a -- such a stretch of the statutory language that the -- that the Government is asking us to accept that I -- I find it implausible.

MR. STEWART: Several points. The -- the Court- in the second Bossier Parish case discussed the retrogression standard and grounded it in the word abridge and explained that the -- the word abridge necessarily implies a comparison to some baseline. And in the section 2 context, the baseline is a hypothetical reasonable world. But because section 5 is targeted specifically at voting changes, the appropriate baseline is the jurisdiction's existing practice.

QUESTION: Well, you -- you wouldn't say that a

reduction from 90 percent minority to 85 percent minority abridges, would you?

MR. STEWART: No, because I think the likelihood of --

QUESTION: So that proposition that mere reduction is enough is -- is simply not valid.

MR. STEWART: I mean, I think -- I think the --

QUESTION: So why isn't it reasonable to say that the reduction that counts is the reduction below the point where the minority has a probability of winning the election? Why does it have to be below the point where the minority has a certainty of -- of winning the election?

MR. STEWART: Well, I -- I think one -- one thing the Court should focus on is that when we're talking about the Senate districts at issue here, we are talking about districts that are among the strongest for blacks in the State of Georgia; that is, under the benchmark plan, 13 out of 56 districts with -- Senate districts within the State had majority black voting age populations. That's in a State that's approximately 27 percent black in terms of voting age population. So to say that the districts in which blacks are strongest have been reduced to a point where blacks have an equal opportunity to elect candidates is not equivalent to saying that in the State as a whole

blacks have equal electoral opportunities.

QUESTION: Well, how about if it's reduced to a probably will elect? More likely than not.

MR. STEWART: I mean, I think if we're going from the 90 percent certainty to the 51 percent likelihood --

QUESTION: Yes.

MR. STEWART: -- we would still say that's retrogression. We -- we do have a sort of substantiality inquiry in Department of Justice preclearance practice where --

QUESTION: Well, there was another district, Senate District 15, where the percentage dropped from 62 percent to 50.8 percent, and the Government didn't challenge that.

MR. STEWART: I -- I think part of the reason --

QUESTION: Why?

MR. STEWART: Part of the reason that the Government challenged these three districts had to do with the magnitude of the increase, but part of it also had to do with electoral history and evidence of racially polarized voting. And I -- I don't --

QUESTION: Does the --

QUESTION: What about section 15?

MR. STEWART: I -- I don't know the reason that

we didn't object to -- to Senate District 15. I do know as to Senate District 2, for instance, that even though the BVAP under the benchmark plan was over 60 percent, in a 1999 runoff election, the black candidate of choice had won the -- the primary by only 70 votes, and the reason was that the black candidate received approximately 78 percent of the black vote but only 9 percent of the white vote, and then --

QUESTION: Does the State have any latitude insofar as your interpretation of the statute is concerned and insofar as your Department policy is concerned to experiment to see if it can't expand the black franchise in other districts? Nothing in life is certain, and your position is -- is that the State is simply frozen in these supermajority districts and it can't attempt to increase minority representation in other districts.

MR. STEWART: No.

QUESTION: Doesn't it have -- doesn't the State have some latitude to try that?

MR. STEWART: We certainly think that they do, and -- and nothing that we've said in this case and nothing that the district court said is to the contrary. That is, if the State had sought to prove that the likelihood of electing black voters' candidates of choice in these three districts would be somewhat reduced, but

that that was likely to be offset by corresponding increases in the ability to elect -- to elect candidates of choice in other districts --

QUESTION: Well, was that -- where did I get the notion that there was very likely going to be, under their plan, another minority official elected --

MR. STEWART: I --

QUESTION: -- in an additional district?

MR. STEWART: I don't -- there was -- there was a pair of Senate Districts, not 2, 12, and 26, one of which was reduced sharply in black population --

QUESTION: I have the same -- I have the same problem with Justice O'Connor. I -- I thought the case was before us on -- on the assumption that there is a likelihood that there will be another black representative from another district --

QUESTION: Yes.

QUESTION: -- and that that was the testimony of the State and the State said that this is the reason why we're doing this.

MR. STEWART: No. That -- that's not the case at all. I think the -- the nature of the State's plan was to reduce the high majorities of black voters in some districts, and those voters would be redistributed to other districts, but not districts in which there would be

a high enough black population to create a plausible likelihood of electing black candidates of choice.

QUESTION: Why -- why is that the only change that's relevant? Why is it insignificant that you -- you change a district that was previously lily-white into a district that has, let's say, 30 percent black voters whose wishes and whose desires have to be taken into account by whoever is elected from that district, whether he's white or black? Why is that an insignificant benefit to -- to the black voters in that district so they won't get some -- some redneck discriminatory representative, but rather somebody who will take into account their needs, even if he's not a black man?

MR. STEWART: As -- as an original matter, I think an argument could be made that black voters throughout the State of Georgia would be better off if every district were 27 percent black on the theory that even though they couldn't elect any candidates of choice, they could influence all legislators. But although an argument could be made along those lines, the Court has consistently, in its vote dilution cases, framed the inquiry in terms of the ability to elect -- to elect candidates of choice.

QUESTION: We've never had a case before that -- that amounts to a reduction not below the level where they

can elect, but -- but just to the level where it's merely probable as opposed to certain that -- that they can elect. I -- I don't know that we're foreclosed from taking that reality into account.

MR. STEWART: I -- I agree that the -- the precise question hasn't come before this Court.

The two things I'd say are that, first, we are talking about the strongest districts for blacks. So to say that those districts have been reduced to an even shot, a toss-up, is not to say that blacks have equal electoral power statewide.

The second point I'd make is this is not different in principle from what goes on all the time in other preclearance settings. That is, it is often the case that a covered jurisdiction will seek preclearance of a voting change, and the change will consist of getting rid of something that the jurisdiction had no obligation to create in the first instance. But the inquiry has always focused on retrogression, on whether the State has made black voters worse off than they were --

QUESTION: Now, worse off, I thought -- and I'm still at my same problem of what am I supposed to do in this case. But I thought worse off means their right to vote is abridged because of race. Abridged is the word. And that it isn't so much a question, though it's partly a

question, of percentage of black voters in the district. It is really a question of what a reduction in that percentage means in terms of a -- a race, black people, being able, across the State, to have a better or worse chance of electing public officials that they want. And that's a function of polarization because if there isn't a lot of polarization, there is no such person as the official they want. But there might be where there is polarization. And it's also a function of how much of a reduction you get in a particular district in terms of what that means.

Now, if I'm thinking that way, A, is that the right way to think about it? B, if it is, do I have any alternative in this case but to go through the statistical testimony about polarization? The testimony, if there is any, which I'm not sure that there is or not -- I thought the majority held there wasn't -- that somehow other districts will be benefitted, and then sort of second guess the district court. What is it I'm supposed to do? Do I have it right? And if I have it right, is that what I'm supposed to do?

MR. STEWART: I -- I think you're looking at it correctly. And when the Justice Department approached this case, there were other Senate districts in which the absolute drop in black voting age population was much

greater than in these three districts. The reason we found these districts problematic was partly the -- the magnitude of the reduction, partly the fact that it had occurred along a point in the spectrum where a 10 percent reduction was especially likely to have a concrete impact. That is, it stands to reason that reducing black population from 60 percent to 50 percent will more likely affect concrete results than reducing it from 80 percent to 70 percent or from 20 percent to 10 percent.

QUESTION: It isn't just percents --

MR. STEWART: And --

QUESTION: -- it's a question of what a percent means in the context of the particular district.

MR. STEWART: That's correct. And we -- we introduced --

QUESTION: And it's not just a little. It has to be a lot.

MR. STEWART: We introduced --

QUESTION: It has to mean a lot.

MR. STEWART: We introduced substantial district-specific evidence of racial polarization in these three specific Senate districts. We -- both statistical and anecdotal evidence to the effect that there was a high degree of correlation between the race of the voter and the candidate of choice and evidence that racial appeals

had been made in prior elections within those districts. So the first step was to say, based on all that evidence, there is a -- this change is likely to have a significant impact on black voters' ability to elect candidates of choice in these districts. And the district court found to that effect.

And the second thing that the district court said --

QUESTION: I think the -- the district court found that -- I thought there was a heavy concentration on crossover in this record. Wasn't that the whole controversy about Engstrom? Didn't he say that there would be minimal white crossover in these districts?

MR. STEWART: That's correct. His -- his analysis of the statistical evidence of prior elections within the districts was that there would be minimal white crossover voting. There was substantial racial polarization within these three districts specifically. And so the district court found that the likelihood of black candidates -- of black voters' ability being able to elect candidates of choice in these three districts --

QUESTION: Do the findings tell us whether there's been any change in the last few years in the amount of white crossover voting? It seems to me there's some anecdotal evidence to that effect.

MR. STEWART: I -- I don't believe that there were findings to that effect. The -- the findings were basically surveying the last --

QUESTION: Were they based on evidence during the last few years, or back in the '80s and '90s?

MR. STEWART: During the last few years. Basically the experience under the benchmark district.

But the second thing that the district court said and -- and emphasized -- and I believe it's on pages 133 and 134a of the appendix to the jurisdictional statement. The district court said at the very bottom of the page, once again we note that it may well be the case that any decrease in African American electoral power in Senate Districts 2, 12, and 26 will be offset by gains in other districts, but plaintiff, namely the State, has failed to present any such evidence.

So the district court acknowledged in principle that even though black voters' ability to elect candidates of choice in these three districts had been substantially decreased, the State might, nevertheless, be able to prove non-retrogression for the plan as a whole if it presented evidence that there would be offsetting gains in other districts. And the court faulted the State for a failure of proof not for any -- not -- it didn't suggest that there was a -- an analytical barrier to proceeding along

that basis.

So I think the district court regarded this as a relatively easy case precisely because there were meaningful losses in identified districts and no attempt to prove offsetting gains in others. And again, the retrogression standard has always focused on whether the change renders minority voters worse off.

And again, the -- the preclearance inquiry would substantially -- be substantially complicated if the analysis were otherwise. That is the Court has held, for instance, that relocation of polling places is one type of change that has to be precleared before it can --

QUESTION: Well, if they were not offsetting gains, what was the gravamen of the testimony of the black State officials who testified in favor of this plan?

MR. STEWART: The -- the gravamen of the -- the testimony was not that there would be offsetting gains in black voters' ability to elect candidates of choice. Really, the thrust of the plan was black voters would be taken out of majority black districts and placed in districts that were predominantly white. The black percentages would be too low for the black electorate to elect candidates of choice, but it might be high enough that the black vote could swing the balance between a white Republican and a white Democratic candidate. That

was really the thrust of the plan.

And because -- again, whatever might have been said in the first instance, the Court's analysis has focused on ability to elect candidates of choice. Congress has amended section 2 to facilitate vote dilution claims along those lines. Congress has continued to reenact section 5 against the backdrop of the Court's decision. So even though the argument could have been made that it's more important for blacks to be the balance of power in a lot of districts than to be able to elect candidates of choice in a few, the Court has rejected that proposition and Congress appears to have endorsed the Court's holdings by continuing to reenact these provisions without change.

If the Court has nothing further.

QUESTION: Thank you, Mr. Stewart.

Mr. Braden.

ORAL ARGUMENT OF E. MARSHALL BRADEN

ON BEHALF OF THE PRIVATE INTERVENORS

MR. BRADEN: Mr. Chief Justice, and may it please this Court:

I assume that the threshold question for the intervenors in this case raised by the State is whether or not the two intervenors of the four intervenors, two African American Republican voters and two African

American Democrat voters, are properly in this case. Is intervention permitted in a section 5 case?

If precedent or experience provides any guidance to this Court, the answer clearly is yes. In more than 70 percent of the section 5 litigation in district court here in the District of Columbia, more than 70 percent of those cases have involved intervenors. There is not a single case -- not a single case -- cited by the State of Georgia where the Court has rejected the concept of intervention in section 5 litigation.

QUESTION: Well, in -- this type of case is governed by the Federal Rules of Civil Procedure, is it not, which provide for intervention under given circumstances?

MR. BRADEN: Absolutely correct, Mr. Chief Justice, and --

QUESTION: Mr. Braden, I -- I think even if you're correct that intervention was appropriate, did the intervenors join in the appeal here?

MR. BRADEN: Intervenors did not join in the appeal.

QUESTION: So why isn't it moot as to your issue?

MR. BRADEN: As to our issue, it's not moot because this Court might fashion a remedy to send it back

to the district court for additional findings, in which we would have presumably a position to argue it in that case.

QUESTION: Well, then you should have appealed. I mean, that -- if that was a real possibility, you should have appealed, but not to appeal and then ask us to decide whether you're proper intervenors because this might affect you, it seems to me --

MR. BRADEN: We did not ask this --

QUESTION: You can't walk both sides of the street.

QUESTION: I thought intervention was granted.

MR. BRADEN: Intervention was granted.

QUESTION: So how could you appeal from a victory?

MR. BRADEN: I do not know, Justice. It appears to me that --

QUESTION: Well, intervention was granted, but you didn't join the appeal from -- from the decision below or file a cross appeal. Right?

MR. BRADEN: That is correct.

But we are before this Court now and that -- in that issue I think we are properly before this Court as decided by the lower court.

Now, the real issue I think below -- before this Court is the question of whether or not you can accept

Georgia's invitation to throw out 27 years of your jurisprudence because the reality of the Georgia position is the rejection of retrogression. It's not this bugaboo about safe seats.

Every redistricting plan, by its very nature, creates safe seats. The plan that wasn't precleared created safe seats. It simply created safe seats solely for white members of the legislature. Their proposal would permit the State to decide that there's only one class of Georgia's citizens entitled to safe electoral seats, and that would be white voters in Georgia.

The reality of what happened in the Georgia redistricting process is clear from the record in this case. To maintain the political majority in the State legislature in Georgia, the individuals involved in the process looked at it and decided, well, these existing black districts, these existing represented communities have to be divided up. Black precincts have to be pulled out of those districts and put in adjoining white districts so we may be able to maintain the Democrat level of vote in those districts so white Democrats can win.

QUESTION: Didn't -- didn't almost all of the black legislature -- legislators in the Georgia assembly favor this -- this plan?

MR. BRADEN: That is, in fact, correct, Justice

Scalia.

QUESTION: How -- how many opposed it? Was it just one?

MR. BRADEN: One in --

QUESTION: A woman. I forget her name.

MR. BRADEN: Actually, I believe there were two, but one in the Senate. Actually the senator representing District 2 which was one of the districts that was rejected in this case.

But I might make the observation that the view from aboard the ship of state and on the dock is quite different. If you're on board the ship, if you're already in the legislature, the gangplank doesn't look very steep going up, but if you're there trying to get aboard the ship of state, if you're not an incumbent -- incumbents have a different view and when an incumbent needs to be elected, it's totally different than a challenger candidate.

QUESTION: Well, that may be, but I -- I find it hard to believe that they didn't have the -- the -- or a majority of them at least didn't have the best interests of their -- of their race in -- in mind.

And -- and of course, you know that one of the problems has been in the southern States packing minorities into one district. I mean, it's been the -- in

the interest of particular parties on occasion to put all the black voters in one district so that all the other districts can be -- can go to the other party. And, you know, maybe the black voters who supported this plan did so because they thought it was a good thing to disperse some of the black voters who weren't needed to -- to produce a high probability of success for a black candidate into other districts. I mean, that's -- that's a very plausible explanation --

MR. BRADEN: That -- that -- Justice Scalia, that is a very plausible explanation in a hypothetical State. It simply isn't a plausible explanation in the case of Georgia.

One, no one alleged that these districts were packed. That simply -- argument was never made.

Second, we're not talking about incumbents looking at the notion of whether or not we will maintain, quote/unquote, our racial position. We're talking about incumbents looking about --

QUESTION: Yes, but don't the figures --

MR. BRADEN: -- whether or not they'll be elected.

QUESTION: Don't the figures show that some of the districts were way up there before, were -- were packed and they reduced them something like 80 percent to

55 or 60? Doesn't that fit precisely under what Justice Scalia described?

MR. BRADEN: Absolutely correct. And in fact, to be candid with you, it's our view as the intervenors -- we believe the court actually probably went too low, that they took the numbers down, and frankly, the election results from the last election showed that our argument was vindicated by the failure to elect in certain district candidates of choice.

The process -- the district court took a very conservative view on the issue of retrogression. They permitted the State to decrease the number of black voting age populations in many districts, and the reason for that was not to unpack. Look at the record. I ask the Court to look at the record. Look at the testimony of the person who drew the plan. Look at the dissenting opinion of the judge. Clearly what was happening here was a desire to divide up an existing community, to move black precincts into other districts to help elect Democrat candidates.

Now, politically that's understandable and political gerrymandering -- it would appear to me, that it's possibly constitutional to do that, but not in a retrogression situation where we would reduce the black community's ability to elect its candidates of choice.

And that's what's happening. Undeniable.

And you're talking about two different classes of candidates. We have white safe seats but not black.

QUESTION: The black -- the black community's candidates of choice has overwhelmingly been Democrats and to -- to increase the probability of getting a Democrat elected by moving black voters into another district is precisely to give black voters a -- a better choice, to -- to -- it may not be a black candidate, but it will be the candidate the black voters want.

MR. BRADEN: And I think that's a misinterpretation of this Court's position and a misunderstanding of what the voting rights is meant to protect. This is not a max Democrat plan. Our jurisprudence doesn't point -- we've got to create as many Democrat seats as possible. We're talking about maintaining the existing level of the choice of the minority community which might be Democrat or might be Republican.

But we're not -- it's hard to imagine the Congress in 1982 renewed this act and thought it would be interpreted of -- of not looking at how many black or minority candidates would be chosen, but how many Democrats would be elected to a legislature. One can't possibly believe that they would think that your

jurisprudence would metamorphose to something like that. That cannot be what we're looking at.

QUESTION: No. But -- but I -- it's an implausible argument that you are -- you are contravening the choice of black voters by increasing the probability of a Democrat's getting elected.

MR. BRADEN: In -- Justice Scalia, the fallacy I believe of that argument, in all due respect, is that there's one type of Democrat candidate, and the reality to that is there isn't one type.

And the political science on this is abundantly clear and the record in this case is abundantly clear that there's racial polarization and bloc voting. No one denies that. It exists in Georgia. And this is simply a continuation of Georgia's sad history of 100 years of not just blocking minority voting rights, but enacting statutes and working very hard to do this. And this is, in fact, another statute that was created to -- again to divide up existing representative districts, move out black precincts to elect Democrats. That's the process here.

There is no tension whatsoever --

QUESTION: Move out -- move out black voters to elect Democrats in the district they are moved to or in the district they're moved from?

MR. BRADEN: In the district that they're moved to. This is just a carefully calculated scheme to move the numbers down to make adjoining districts to those existing black districts more likely to elect Democrat candidates. And what happens is those districts the black precincts are moved from become less likely to choose the candidate of choice in more --

QUESTION: Whether they're Democrats or Republicans or whatever they are in these other districts, I take it in your view if evidence had been put on the stand that the black voter was better off, then you might lose your side of the case.

MR. BRADEN: Absolutely correct.

QUESTION: Thank you. Thank you, Mr. Braden.

Mr. Walbert, you have 3 minutes left.

REBUTTAL ARGUMENT OF DAVID F. WALBERT

ON BEHALF OF THE PETITIONER

MR. WALBERT: Thank you, Your Honor.

I would ask the Court to think of one question here, and it is this question. Is it remotely realistic in the real world that 43 out of 45 African American legislators who are the most sophisticated, knowledgeable African Americans about politics and winning and political power and electoral power would have voted for this if it did all these bad things, if this wasn't the best way they

could see of enhancing the power? Is that conceivable? It's not conceivable. That's -- that's fanciful. One can't possibly say that's possible. And --

QUESTION: Well, it's conceivable if all they're interested in -- is, is in race and you want us to presume that. They might also wanted to have kept their jobs.

MR. WALBERT: Well, Your Honor, I don't think that there's -- that's realistic to think that the delegation would vote themselves out of office, which is what we're talking about. Are they making their districts so weak they're voting themselves out of office? No.

Their testimony is unequivocal that this enhances black voting strength because -- and the Solicitor General was wrong when he says there's no testimony that the other districts would be enhanced. There is no testimony that any other districts would become safe seats, but from a black point of view, absolutely. When you're shifting the black votes into those other districts, the potential is enhancing, the potential of getting someone the Democrats prefer who happens to be white.

QUESTION: And the evidence is where? What am I supposed to read?

MR. WALBERT: That's in the testimony of every one of the legislators, said that's why we get --

QUESTION: So what -- what do I read and what pages do I read?

MR. WALBERT: It would be in the -- it's in the -- the testimony of the legislators. It would be in the proposed --

QUESTION: Okay.

MR. WALBERT: It's -- I'm sorry. It's the testimony of the legislators. Some little bit of it is quoted in our brief. It's in the proposed findings of fact in great detail, but it's the testimony of the legislators.

QUESTION: The district court didn't consider that relevant testimony because it was not testimony about safe seats elsewhere.

MR. WALBERT: I would think that's a fair characterization, Your Honor.

As a practical matter, it would be a tragedy. And we're well aware of the history. We're not up here apologizing that we are disowning the history of race in Georgia. We know what it is. The Attorney General knows what it is. But it would be a tragedy on the facts of this case to utilize that history to penalize what African Americans are trying to do -- tried to do in this reapportionment under this evidence.

Integration's working in Georgia. We have the

most politically integrated political system probably in the United States.

QUESTION: That's what we're supposed to, go into which political party is better for which particular group of people?

MR. WALBERT: No. We look at the success of what the record unequivocally and without contradiction demonstrates in terms of African American success in the State of Georgia, and it's a compelling record, Your Honor.

It shows again that we have 4 congressmen out of 13 who are African American, 52 percent district, 50 percent district, 41 percent district, and 38 percent district. Last one just elected 13 -- Congressional District 13 just created -- this reapportionment got two new districts. 13 was open, 38 percent, African American elected. African American elected in the last election in a 28 percent multi-member house district. It's working.

QUESTION: May I ask before -- before you conclude your argument, what is the status of the litigation that's pending in the State court to resolve the dispute between the Attorney General and the Governor?

MR. WALBERT: Yes. There's oral argument next week on that, Your Honor, and we expect that to be decided very quickly. There is, of course, your favorable

decision from our position from the superior court. That's on direct appeal to the supreme court, oral argument next week and that will in all likelihood be decided very, very promptly. So --

And I think that -- what is the reason -- putting all these facts aside, which are compelling, if this Court were to hold that section 5 --

QUESTION: Thank you, Mr. Walbert.

MR. WALBERT: Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:14 a.m., the case in the above-entitled matter was submitted.)