

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: GEORGIA,  
Petitioner

v.

JOHN ASHCROFT, ATTORNEY  
GENERAL, ET AL.

CASE NO: 02-182

WASHINGTON, D.C.

DATE: TUESDAY, APRIL 29, 2003

PAGES: 1-56

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IN THE SUPREME COURT OF THE UNITED STATES

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GEORGIA, :

Petitioner :

v. : No. 02-182

JOHN ASHCROFT, ATTORNEY :

GENERAL, ET AL. :

- - - - -X

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.

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1 P R O C E E D I N G S

2 (10:16 a.m.)

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

5 Mr. Walbert.

6 ORAL ARGUMENT OF DAVID F. WALBERT

7 ON BEHALF OF THE PETITIONER

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

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

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

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

3               Congress followed behind this Court, started  
4    adopting some of the early Civil Rights Act in the early  
5    1950s, the more moderate ones, if you will, under -- under  
6    President Eisenhower's administration, and of course, the  
7    great Civil Rights Act of 1964 was enacted. 1965, Voting  
8    Rights was enacted; and the 1968 Open Housing Act.

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

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

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

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

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

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

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

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

21 MR. WALBERT: Yes, Your Honor.

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

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

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

3 QUESTION: Yes.

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

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

10 MR. WALBERT: The finding was that safe seats --  
11 the rule of law was that safe seats must be maintained.  
12 To get a safe seat here, one had to raise these 4 to  
13 5 percent.

14 QUESTION: Is --

15 QUESTION: So that's the --

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

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

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

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

18 QUESTION: Mr. Walbert, I didn't get that  
19 impression from Judge Edwards' opinion or Judge  
20 Sullivan's. They both say we are dealing with a narrow  
21 section 5. It has a concept, retrogression, backsliding.  
22 And I assume that they would say if you start out, you  
23 start with the status quo. Everyone agrees with that. If  
24 you start out with, say, 30 percent and you end up with  
25 30 percent, it's okay. You don't have to have a safe

1 district because the starting point may not be safe.

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

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

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

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

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

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

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

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

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

1 MR. WALBERT: That --

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

6 MR. WALBERT: Yes, sir.

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

16 MR. WALBERT: Well --

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

20 MR. WALBERT: I --

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

1 what it's about.

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

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

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

1 MR. WALBERT: No, you do not.

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

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

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

18 MR. WALBERT: Well --

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

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

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

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

6 MR. WALBERT: Yes, sir.

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

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

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

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

1 MR. WALBERT: Well, safe is --

2 QUESTION: Did Judge Edwards --

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

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

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

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

12 MR. WALBERT: No, it doesn't in this case, Your  
13 Honor, because when you get to the levels they're talking  
14 about, there is still a possibility for sure, whether it's  
15 20 percent or whatever, but that's a real possibility.

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

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

1 the evidence, believe that we should say?

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

4 QUESTION: And what is that difference?

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

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

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

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

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

1 quote, a fair opportunity to elect candidates, unquote.

2 QUESTION: That sounds very much like section 2  
3 language.

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

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

14 MR. WALBERT: Well --

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

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

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

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

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

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

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

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

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

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

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

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

4 QUESTION: It doesn't contain --

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

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

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

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

11 MR. WALBERT: It's abridge --

12 QUESTION: -- interpreting to mean backsliding?

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

15 QUESTION: Abridge or deny the right to vote.

16 MR. WALBERT: Yes, sir.

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

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

22 QUESTION: And you --

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

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

7 MR. WALBERT: Section 5?

8 QUESTION: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13          QUESTION: It is not --

14          MR. WALBERT: Excuse me.

15          QUESTION: -- illegitimate.

16          MR. WALBERT: Correct.

17          QUESTION: It -- it is proper.

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

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

23          MR. WALBERT: You know --

24          QUESTION: It's not using an illegitimate  
25 factor.

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

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

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

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

25           Section 5 is there, in effect, to say you

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

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

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

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

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

1 because of that history.

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

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

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

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

4 QUESTION: Well, we've --

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

9 QUESTION: Maybe -- maybe it would be --

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

12 MR. WALBERT: But it is always --

13 QUESTION: This is an automatic expiration --

14 MR. WALBERT: Well --

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

17 MR. WALBERT: It's a de facto extension as a  
18 practical matter. There is no real likelihood that  
19 section 5 will not be extended as a practical matter.  
20 That's been true in '70, '75, '82. Whether it will be for  
21 25 years, 20 or 50 or become permanent this time, I don't  
22 know.

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

25 (Laughter.)

1 QUESTION: Maybe worse is better from your  
2 standpoint.

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

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

13 If what Your Honor just said, Justice Souter, if  
14 it happened that there was a mistake and, oh, my gosh, it  
15 really -- the world changed in Georgia and 55 percent or  
16 50 percent wasn't equal and it turned -- and 40 percent  
17 wasn't and it had to go back up to 60 -- let's take an  
18 unimaginably bad situation -- section 2 is still there.  
19 Section 5 could be applied.

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

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

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

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

8 QUESTION: Very well, Mr. Walbert.

9 Mr. Stewart, we'll hear from you.

10 ORAL ARGUMENT OF MALCOLM L. STEWART

11 ON BEHALF OF THE FEDERAL RESPONDENT

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

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

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

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

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

4 MR. STEWART: The Justice Department --

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

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

10 QUESTION: You do look at it as a whole.

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

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

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

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

1 instance, if --

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

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

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

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

11 (Laughter.)

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

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

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

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

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

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

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

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

14 MR. STEWART: Well, I -- I think one -- one  
15 thing the Court should focus on is that when we're talking  
16 about the Senate districts at issue here, we are talking  
17 about districts that are among the strongest for blacks in  
18 the State of Georgia; that is, under the benchmark plan,  
19 13 out of 56 districts with -- Senate districts within the  
20 State had majority black voting age populations. That's  
21 in a State that's approximately 27 percent black in terms  
22 of voting age population. So to say that the districts in  
23 which blacks are strongest have been reduced to a point  
24 where blacks have an equal opportunity to elect candidates  
25 is not equivalent to saying that in the State as a whole

1 blacks have equal electoral opportunities.

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

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

7 QUESTION: Yes.

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

12 QUESTION: Well, there was another district,  
13 Senate District 15, where the percentage dropped from  
14 62 percent to 50.8 percent, and the Government didn't  
15 challenge that.

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

17 QUESTION: Why?

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

23 QUESTION: Does the --

24 QUESTION: What about section 15?

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

1 we didn't object to -- to Senate District 15. I do know  
2 as to Senate District 2, for instance, that even though  
3 the BVAP under the benchmark plan was over 60 percent, in  
4 a 1999 runoff election, the black candidate of choice had  
5 won the -- the primary by only 70 votes, and the reason  
6 was that the black candidate received approximately  
7 78 percent of the black vote but only 9 percent of the  
8 white vote, and then --

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

17 MR. STEWART: No.

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

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

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

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

7 MR. STEWART: I --

8 QUESTION: -- in an additional district?

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

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

17 QUESTION: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 QUESTION: It isn't just percents --

11 MR. STEWART: And --

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

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

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

18 MR. STEWART: We introduced --

19 QUESTION: It has to mean a lot.

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

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

7 And the second thing that the district court  
8 said --

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

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

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

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

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

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

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

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

1 that basis.

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

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

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

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

1 was really the thrust of the plan.

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

15           If the Court has nothing further.

16           QUESTION: Thank you, Mr. Stewart.

17           Mr. Braden.

18           ORAL ARGUMENT OF E. MARSHALL BRADEN

19           ON BEHALF OF THE PRIVATE INTERVENORS

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

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

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

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

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

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

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

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

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

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

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

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

8 MR. BRADEN: We did not ask this --

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

11 QUESTION: I thought intervention was granted.

12 MR. BRADEN: Intervention was granted.

13 QUESTION: So how could you appeal from a  
14 victory?

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

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

20 MR. BRADEN: That is correct.

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

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

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

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

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

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

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

1 Scalia.

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

4 MR. BRADEN: One in --

5 QUESTION: A woman. I forget her name.

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

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

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

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

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

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

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

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

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

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

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

1 55 or 60? Doesn't that fit precisely under what Justice  
2 Scalia described?

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

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

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

1 And that's what's happening. Undeniable.

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

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

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

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

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

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

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

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

22 There is no tension whatsoever --

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

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

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

13 MR. BRADEN: Absolutely correct.

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

15 Mr. Walbert, you have 3 minutes left.

16 REBUTTAL ARGUMENT OF DAVID F. WALBERT

17 ON BEHALF OF THE PETITIONER

18 MR. WALBERT: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

6                   QUESTION: Okay.

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

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

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

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

25                   Integration's working in Georgia. We have the

1 most politically integrated political system probably in  
2 the United States.

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

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

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

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

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

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

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

8 QUESTION: Thank you, Mr. Walbert.

9 MR. WALBERT: Thank you, Your Honor.

10 CHIEF JUSTICE REHNQUIST: The case is submitted.

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

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