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Subcommittee on the Constitution

A Remedy for Georgia v. Ashcroft

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Chairman Chabot, Ranking member Nadler and Members of the Constitution Subcommittee:

I am pleased to appear before you today and appreciate the opportunity to share my views on the need for Congress to restore the protection of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, eroded by the decision in Georgia v. Ashcroft, 539 U.S. 461 (2003).

As you know, Section 5 of the Voting Rights Act requires certain jurisdictions with a history of racial discrimination in voting to obtain preclearance from the U.S. Department of Justice or the U.S. District Court in D.C. before they can implement any changes to their voting practices or procedures. To obtain preclearance, jurisdictions must prove that the proposed voting change is not retrogressive, i.e. does not have a discriminatory purpose and will not have the effect of denying or abridging a person's right to vote because of their race or color or membership in a language minority group.[1]

Prior to the decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the Supreme Court in *Beer v. United States*, 425 U.S. 130 (1976) held that the failure to preserve the ability of minority voters to elect candidates of their choice is retrogressive and that such voting changes are objectionable under §5 of the Voting Rights Act. This standard was also ratified when Congress extended Section 5 in 1982.

The Georgia v. Ashcroft decision, however, represents a significant departure from the retrogression standards applied in *Beer* and other voting rights cases. The Court created a new standard for retrogression and allows states to relegate minority voters into second-class voters, who can "influence"

1 42 U.S.C. §1973c.

the election of white candidates, but who cannot amass the political power necessary to elect a candidate of their choice who they believe will represent their interests.

The Decision of the District Court

Georgia v. Ashcroft was an action instituted by the State of Georgia in the District Court for the District of Columbia seeking preclearance under Section 5 of its congressional, senate, and house redistricting plans based on the 2000 census. The district court precleared the congressional and house plans, but objected to three of the districts in the senate plan because "the State has failed to demonstrate by a preponderance of the evidence that the reapportionment plan . . . will not have a retrogressive effect." Georgia v. Ashcroft, 195 F. Supp. 2d 25, 94 (D.D.C. 2002). Although blacks were a majority of the voting age population (VAP) in all three senate districts, the district court concluded that the state failed to carry its burden of proof that the reductions in BVAP from the benchmark plan would not "decrease minority voters' opportunities to elect candidates of choice." Id. at 89. The standard for retrogression applied by the district court was the one articulated by the Court in Beer v. United States, 425 U.S. 130, 141 (1976). In Beer, quoting the legislative history of the 1975 extension of the Voting Rights Act, the Court held that the standard under Section 5 is "whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting." 425 U.S. at 141 (emphasis in original). The state enacted a remedial senate plan, which was precleared by the district court, and appealed the decision on the merits to the Supreme Court.

The State's Brief in the Supreme Court

The brief filed by the state of Georgia in Georgia v. Ashcroft **provides a dramatic, present day example of the continued willingness of one of the states covered by Section 5 to manipulate the laws to diminish the protections afforded racial minorities.**The state's brief resorted to the kind of rhetoric that it had used countless times in the past to denounce the Voting Rights Act.

In April 1965, Carl Sanders, the governor of Georgia, wrote to president Lyndon Johnson urging defeat of the pending voting

rights bill. He argued that states had exclusive power to prescribe voter qualifications, and that the abolition of literacy tests in the southern states and the federal registrar system was "an extreme measure . . . not even attempted during the vengeful days of the Reconstruction Period." LBJ Library, LE/HU 2-7, Box 70, p. 2.

In 1970, in testimony before the U.S. Senate, Georgia's governor Lester Maddox railed against the Voting Rights Act as an "outrageous piece of legislation," that was "illegal, unconstitutional and ungodly and un-American and wrong against the good people in this country." Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, Ninety-first Congress, First and Second Sessions, on S. 818, S. 24556, S. 2507, and Title IV of S. 2029, Bills to Amend the Voting Rights Act of 1965, July 9, 10, 11, and 30, 1969, February 18, 19, 24, 25, and 26, 1970, p. 342.

The state essentially boycotted the 1975 congressional hearings on extension of the Voting Rights Act, but Georgia Attorney General Arthur Bolton advised Senator John Tunney in a terse letter that "in a number of litigated cases my position with respect to the law in this matter is well established, and I do not at this time have anything further to add in this matter." Extension of the Voting Rights Act, Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, Ninety-fourth Congress, First Session, on S. 407, S. 903, S. 1297, S. 1409, and S. 1443, April 8, 9, 10, 22, 29, 30, and May 1, 1975, Arthur Bolton to Sen. John Tunney. In one of the cases referred to by Bolton, the state argued that the Voting Rights Act was unconstitutional. See Georgia v. United States, 411 U.S. 526, 530 (1973).

When Congress considered extension of the Voting Rights Act in 1981-1982, one of those who testified in opposition was Freeman Leverett, a former state assistant attorney general. He proudly recalled that he had argued on behalf of Georgia in South Carolina v. Katzenbach, 383 U.S. 301 (1966), that the Voting Rights Act was unconstitutional and renewed his attack on the act. Disparaging the civil rights movement, he said the Voting Rights Act had been passed in 1965 "to appease the surging mob in the street," and that Section 5 should be repealed because "there is no longer any justification for it at all." Voting Rights Act, Hearings before the Subcommittee on

the Constitution of the Committee on the Judiciary, United States Senate, Ninety-seventh Congress, Second Session, on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112, Bills to Amend the Voting Rights Act of 1965, January 27, 28, February 1, 2, 4, 11, 12, 25, and March 1, 1982, pp. 942, 950.

In its brief in Georgia v. Ashcroft, the state continued its tradition of bashing the Voting Rights Act. It argued that Section 5 "is an extraordinary transgression of the normal prerogatives of the states." State legislatures were "stripped of their authority to change electoral laws in any regard until they first obtain federal sanction." The statute was "extraordinarily harsh," and "intrudes upon basic principles of federalism." As construed by the three-judge court, the state said, the statute was "unconstitutional." Brief of Appellant State of Georgia, pp. 28, 31, 40-1. But the arguments the state advanced on the merits were far more hostile to minority voting rights even than its anti-Voting Rights Act rhetoric.

One of the state's principle arguments was that the retrogression standard of Section 5 should be abolished in favor of a coin toss, or an "equal opportunity" to elect, standard based on Section 2 of the Voting Rights, 42 U.S.C. § 1973, which it defined as "a 50-50 chance of electing a candidate of choice." Georgia v. Ashcroft, 195 F.Supp.2d at 66.[2] The state also made the extraordinary argument, and in contrast to well established law, that minorities, the very group for whose protection Section 5 was enacted, should never be allowed to participate in the preclearance process.

Had the state's proposed coin toss standard been adopted, it would have had a severe negative impact upon minority voting strength. A 50-50 chance to win is also a 50-50 chance to lose. If the state were allowed under Section 5 to adopt a plan providing minority voters with only a 50-50 chance of electing candidates of their choice in the existing majority black

[2]Section 2 is a permanent, nationwide prohibition on the use of any voting practice "which results in a denial or abridgment of the right to vote on account of race or color [or membership in a language minority]."

districts, the number of blacks elected to the Georgia legislature would by definition be cut essentially in half, or reduced even further.

The Decision of the Supreme Court

The majority opinion of the Supreme Court in Georgia v. Ashcroft is the proverbial mixed bag. As an initial matter, the Court rejected two of the anti-Voting Rights Act arguments made by the state, i.e., that private parties should never be allowed to intervene in preclearance actions, and that the retrogression standard of Section 5 should be replaced with the "equal opportunity" standard of Section 2. According to the majority: "Private parties may intervene in Section5 actions assuming they meet the requirements of Rule 24, and the District Court did not abuse its discretion in granting the motion to intervene in this case." 539 U.S. at 477. The Court further held that: "Instead of showing that the Senate plan is nondilutive under Section 2, Georgia must prove that its plan is nonretrogressive under Section 5." Id. at 479.

The Court, however, vacated the decision of the three-judge court denying preclearance to the three senate districts because, in its view, the district court "did not engage in the correct retrogression analysis because it focused too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts." 539 U.S. at 490. The Court held that while this factor "is an important one in the Section 5 retrogression inquiry," and "remains an integral feature in any Section 5 analysis," it "cannot be dispositive or exclusive." Id. at 480, 484, 486. The Court held that other factors which in its view the three-judge court should have considered included: "whether a new plan adds or subtracts 'influence districts'-where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process;" and whether a plan achieves "greater overall representation of a minority group by increasing the number of representatives sympathetic to the interest of minority voters." Id. at 482-83.

The Court held "that Georgia likely met its burden of showing nonretrogression," but concluded that: "We leave it for the District Court to determine whether Georgia has indeed met its burden of proof." 539 U.S. at 487, 489. But before the district court could reconsider and decide the case on remand, a local three-judge court invalidated the senate plan on one

person, one vote grounds, Larios v. Cox, 300 F.Supp.2d 1320 (N.D.Ga. 2004), aff'd 124 S. Ct. 2806 (2004), and implemented a court ordered plan. Larios v. Cox, 314 F.Supp.2d 1357 (N.D.Ga. 2004). As a consequence, the preclearance of the three senate districts at issue in Georgia v. Ashcroft was rendered moot.

The Dissent

The dissent in Georgia v. Ashcroft, relying upon Beer, argued that Section 5 means "that changes must not leave minority voters with less chance to be effective in electing preferred candidates than they were before the change." 539 U.S. at 494. The dissenters also argued that the majority's "new understanding" of Section 5 failed "to identify or measure the degree of influence necessary to avoid the retrogression the Court nominally retains as the Section 5 touchstone." Id. at 495.

Problems with the Majority Decision

The opinion of the majority introduced new, vague and difficult to apply, and contradictory standards. According to the Court, the ability to elect is "important" and "integral," but a court must now also consider the ability to "influence" and elect "sympathetic" representatives. The Court took a standard that focused on the ability to elect candidates of choice, that was understood and applied, and turned it into something subjective, abstract, and impressionistic. The danger of the Court's opinion is that it may allow states to turn black and other minority voters into second class voters, who can "influence" the election of white candidates but who cannot elect their preferred candidates, including candidates of their own race. That is a result Section5 was enacted to avoid. As the Court held in Beer, "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 425 U.S. at 141.

The inability of blacks to exercise the franchise effectively in so-called influence districts is apparent from the lack of electoral success of black candidates in majority white districts. As of 2002, of the ten blacks elected to the state senate in Georgia, all were elected from majority black districts (54% to 66% black population). Of the 37 blacks elected to the state house, 34 were elected from majority

black districts. Of the three who were elected from majority white districts, two were incumbents. The third was elected from a three-seat district. 2003 House of Representatives, Lost & Found Directory.

The Expert Testimony in Georgia v. Ashcroft

Despite the lack of success of black candidates in majority white districts, critics of the extension of Section 5 have argued, erroneously, that the evidence in Georgia v. Ashcroft - specifically the testimony of the state's expert Dr. David Epstein - showed that black voters have an equal opportunity to elect candidates of their choice in districts with a black voting age population as low as 44%. To the contrary, the three-judge court concluded that Dr. Epstein's analysis was "entirely inadequate" to assess the impact of the state's plan on the ability of minorities to elect candidates of their choice and was "all but irrelevant." Georgia v. Ashcroft, 195 F.Supp.2d at 81.

Among the defects found by the court in Dr. Epstein's analysis were (a) his erroneous reliance solely on statewide, as opposed to region or district specific, data, (b) his failure to acknowledge the range of statistical variation in his estimates of the black percent needed to provide an equal opportunity to elect, (c) his use of analyses that were marred by errors in "coding" that affected his conclusion, and (d) his use of a method of analysis (probit analysis) that failed to account for variations in levels of racial polarization. 195 F.Supp.2d at 66, 81, 88.

Dr. Epstein also failed to take into account the "chilling" effect upon black political participation, and the "warming" effect upon white political participation, caused by the transformation of a majority black district into a majority white district. Once a district is perceived as no longer being majority black, black candidacies and black turnout are diminished, or "chilled," while white candidacies and white turnout are enhanced, or "warmed." See Colleton County v. McConnell, 201 F.Supp.2d 618 (D.S.C. 2002), Supplemental Report of Prof. James W. Loewen, p. 2 ("[s]ocial scientists call the political impact of believing that one's racial or ethnic group has little hope to elect the candidate of its choice the 'chilling effect'"). A formerly majority black district, particularly one without a black incumbent, would not be

expected to "perform" in the same way after being transformed into a majority white district.

Dr. Epstein presented a similar "equal opportunity" analysis in Colleton County v. McConnell, and it was also rejected by the three-judge court. Citing the pervasive racially polarized voting that existed throughout South Carolina, the court concluded that "in order to give minority voters an equal opportunity to elect a minority candidate of choice . . . a majority-minority or very near majority-minority black voting age population in each district remains a minimum requirement." 201 F.Supp.2d at 643.

The three-judge court in Georgia v. Ashcroft further found that the United States "produced credible evidence that suggests the existence of highly racially polarized voting in the proposed districts." Id. at 88. That evidence included the analysis of Dr. Richard Engstrom which, unlike the analysis of Dr. Epstein, "clearly described racially polarized voting patterns" in the three senate districts in question. 195 F.Supp.2d. at 69. The Supreme Court did not disturb these findings of the lower court on appeal.

Minority Influence As a Pretext for Vote Dilution

Minority influence theory, moreover, is frequently nothing more than a guise for diluting minority voting strength. White members of the Georgia legislature, for example, opposed the creation of a majority black congressional district in 1981 on the grounds that black political influence would be diminished by "resegregation," "white flight," and the disruption of the "harmonious working relationship between the races." Busbee v. Smith, 549 F. Supp. 494, 507 (D.D.C. 1982). The three-judge court, in denying Section 5 preclearance of the state's congressional plan, found that these reasons were pretextual and that the legislature's insistence on fragmenting the minority population in the Atlanta metropolitan area was "the product of purposeful racial discrimination." Id. at 517.

Julian Bond, a state senator at that time, introduced a bill at the beginning of the legislative session creating a fifth district that was 69% black. The Bond plan had the support of two white members of the senate, Thomas Allgood, the Democratic majority leader from Augusta, and Republican Paul Coverdell. Busbee v. Smith, Deposition of Thomas Allgood, p. 15-6. In

large measure as a result of their endorsement, the final plan adopted by the senate contained a 69% black fifth district.

The house, however, rejected the senate plan. The speaker of the house, Tom Murphy, was opposed as a matter of principle to creating a majority black congressional district. "I was concerned," he said, "that . . . we were gerrymandering a district to create a black district where a black would certainly be elected." Busbee v. Smith, 549 F. Supp. at 520. According to the District of Columbia court, Murphy "refused to appoint black persons to the conference committee [to resolve the dispute between the house and senate] solely because they might support a plan which would allow black voters, in one district, an opportunity to elect a candidate of their choice." Id. at 510, 520. Joe Mack Wilson, the chair of the house reapportionment committee, and the person who dominated the redistricting process in the lower chamber, was of a similar mind and advised his colleagues on numerous occasions that "I don't want to draw nigger districts." Id. at 501.

After the defeat of the Bond plan in the house, the fragile coalition in the senate in support of the plan broke down. Several senators approached Allgood and said, "I don't want to have to go home and explain why I was the leader in getting a black elected to the United States Congress." Allgood acknowledged that it would put a senator in a "controversial position in many areas of [Georgia]" to be perceived as having supported a black congressional district. He finally told his colleagues to vote "the way they wanted to, without any obligations to me or to my position," and "I knew at that point the House plan would pass." Busbee v. Smith, Deposition of Thomas Allgood, pp. 42-5.

Based upon the racial statements of members of the legislature, as well as the absence of a legitimate, nonracial reason for adoption of the plan, the conscious minimizing of black voting strength, and historical discrimination, the District of Columbia court concluded that the state's submission had a discriminatory purpose and violated Section 5. The court also held that the legislature had applied different standards depending on whether a community was black or white. Noting the inconsistent treatment of the predominantly white North Georgia mountain counties and metropolitan Atlanta, the court found that "the divergent utilization of the 'community of interest' standard is indicative of racially discriminatory intent." 549 F. Supp. at 517.

As for Joe Mack Wilson, the court made an express finding that "Representative Joe Mack Wilson is a racist." 549 F. Supp. at 500. The Supreme Court affirmed the decision on appeal. Busbee v. Smith, 549 U.S. 1166 (1983).

Forced yet again by the Voting Rights Act to construct a racially fair plan, the general assembly in a special session enacted an apportionment for the fifth district with a black population exceeding 65%. The plan was approved by the court. John Lewis, one of the leaders of the Civil Rights Movement, was elected from the fifth district in 1986 and has served in Congress ever since.

The Shaw/Miller Decisions

The fallacy of the notion that influence can be a substitute for the ability to elect is apparent from the Shaw /Miller cases, which were brought by whites who were redistricted into majority black districts. Rather than relishing the fact that they could "play a substantial, if not decisive, role in the electoral process," and perhaps could achieve "greater overall representation . . . by increasing the number of representatives sympathetic to the[ir] interest," they argued that placing them in white "influence," i.e., majority black, districts was unconstitutional, and the Supreme Court agreed. See, e.g., Miller v. Johnson, 515 U.S. 900, 919-20 (1995). In addition, if "influence" were all that it is said to be, whites would be clamoring to be a minority in as many districts as possible. Most white voters would reject such a notion.

Clarifying Georgia v. Ashcroft

Because the decision in Georgia v. Ashcroft runs counter to the intent of the Voting Rights Act, it is important that members of Congress utilize the reauthorization process as an opportunity to restore the protection of Section 5 and clarify the retrogression standards as articulated in Georgia v. Ashcroft. Any efforts to address this issue should provide that any diminution of the ability of a minority group to elect a candidate of its choice would constitute retrogression under Section 5.

Thank you very much.