BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS

STATEMENT OF ANNE W. LEWIS
IN CONNECTION WITH
FEBRUARY 3, 2012 COMMISSION BRIEFING
ON SECTION 5 ISSUES

February 3, 2012

Introduction

I appreciate the invitation and opportunity to participate in the Commission's briefing on Section 5 of the Voting Rights Act. In particular, you asked me to address Georgia's experiences in the current redistricting cycle, including the state's interactions with the Department of Justice. As one of only nine wholly-covered jurisdictions, with four statewide redistricting plans and 159 counties (almost all of which must redistrict their county commissions and school boards following the Census), Georgia is likely one of the Department of Justice's biggest customers when it comes to preclearance of redistricting plans.

In providing these comments today, I am relying primarily on my experiences in the preclearance process during this cycle, in which I served as a Special Assistant Attorney General (or SAAG) to Georgia Attorney General Sam Olens to obtain Section 5 preclearance of Georgia's Congressional, State House and State Senate plans which resulted from the August 2011 Special Session of the General Assembly. In addition to Attorney General Olens, I was fortunate to work

with Senior Deputy Attorney General Dennis Dunn and two attorneys in our law firm who also served as SAAGs, Frank Strickland and Bryan Tyson.

However, my comments may also include prior preclearance experience, which was from the perspective of an objector to preclearance. In the 2000 cycle, Mr. Strickland and I represented intervenors who opposed preclearance of Georgia's statewide redistricting plans in the Section 5 preclearance litigation, *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002) (Three-Judge Court). After the District Court for the District of Columbia precleared the plans, we brought a constitutional challenge in Georgia in *Larios v. Perdue*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (Three-Judge Court). We ultimately prevailed with respect to the state legislative plans but not the Congressional plan. When the General Assembly could not agree on remedial plans for the state House and Senate, the *Larios* court drew remedial plans for use in the 2004 elections, and we participated in that process, which included consideration of compliance with Section 5. Those plans did not have to be precleared and were used without significant change for the remainder of the decade. In 2005, the General Assembly redrew the Congressional plan, and we participated in the preclearance process as supporters of the new plan.

In the 1990 cycle, our firm participated in the preclearance process, filing written comments objecting to the plans and meeting with the Department of Justice about those objections. Later that decade, we represented Speaker Newt

Gingrich, Rep. John Lewis and all but one of the members of the Georgia Congressional delegation, filing an *amicus* brief and a suggested remedial plan in the last of the *Johnson* cases, a series of Section 2 challenges to the Congressional plan that had been precleared earlier in the decade. *Abrams v. Johnson*, 521 U.S. 74 (1997).

During this briefing, I will also rely on the State of Georgia's January 13, 2012 responses to the Commission's request for information. Those responses include a great deal of information related to Georgia's experiences with respect to preclearance of the 2011 Congressional and state legislative redistricting plans, as well as a wealth of historical information regarding preclearance of Georgia's statewide redistricting plans in prior decades.

In this Statement, I address five topics related to Georgia's experiences in the current redistricting cycle:

- Georgia's preparation for the Section 5 preclearance process;
- The major points of contention regarding Section 5 that arose during the Georgia General Assembly's 2011 debates of the proposed redistricting plans;
- Georgia's decision to submit its statewide redistricting plans to both the United States District Court for the District of Columbia and the DOJ for preclearance;
- Georgia's interactions with the DOJ during the preclearance process; and
- Georgia's continued challenges to the constitutionality of the renewal of Section 5.

GEORGIA'S PREPARATION FOR THE 2011 PRECLEARANCE PROCESS

In all states, the body responsible for redistricting after the census must take certain steps to be ready for that process. On the technical side, demographic data must be gathered and processed so that it is suitable for use by the people who will physically draw the maps and those who will provide guidance in that process. On the legislative side, decisions must be made to ensure that new plans are in place in time to be used for the next elections. With respect to performing those general tasks, Georgia is no different from other states.

However, only in Georgia and eight other states (and parts of 7 more) must the redistricting process also meet the requirements of Section 5, a "temporary" remedial measure now over forty years old. In these "covered" states, the redistricting process isn't simply a rebalancing of population while considering constitutional and statutory law and ever-present political goals. Instead, the covered states must also prove a negative: that the plans do not have the purpose and will not have the effect of denying the right to vote on account of race or color or, for some jurisdictions, membership in a language minority.

In the past several years, state officials in Georgia have both challenged the renewal of Section 5 with respect to Georgia and supported challenges filed by other jurisdictions. However, going into the 2011 redistricting process, the state understood that Section 5 was in effect and that Georgia would be expected to

comply with it in drawing redistricting plans. The state's commitment to complying with Section 5 was not just based on the philosophy that we follow the law but also based on pragmatism: not complying with Section 5 and therefore not receiving preclearance throws a covered state's election process into disarray. While that problem isn't one that most states have to worry about, passing plans and achieving preclearance at the earliest possible date is of paramount importance to covered states so that elections can take place as scheduled. In Georgia, the 2012 electoral schedule includes candidate qualifying at the end of May, primaries and nonpartisan elections at the end of July and the general election in November. With the special redistricting session of the General Assembly set to begin in mid-August 2011, there was no room for trouble with preclearance if we wanted to conduct elections on time.

In Georgia, the General Assembly began preparing for redistricting and preclearance in 2010. That year, the General Assembly reorganized and increased the staff in the redistricting office and hired our firm to provide legal advice on the general topic of redistricting. In 2011, the redistricting committees in the House and Senate adopted rules, set a schedule for public hearings, conducted 12 public hearings around the state, adopted guidelines for drawing plans and ultimately, considered the legislation that contained the new plans. The chairmen of the respective committees met with every single one of the 236 legislators who chose

to accept the invitation to meet and discuss the districts they represented. The special redistricting session of the General Assembly began August 15, 2011 and ended on August 31, 2011.

I cannot describe the particular tasks that we performed without revealing attorney-client privileged information regarding our services to the General Assembly leadership. However, I can say that in providing legal advice and interpreting Section 5 as renewed in the "Fannie Lou Hamer, Rosa Parks, Coretta Scott King , César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006," Pub. L. 109-246, 120 Stat. 577 (VRARA), we reviewed and applied:

- the text and commentary to the VRARA;
- the DOJ's February 2011 guidance document;
- the DOJ's final rule published April 15, 2011 revising the Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. Part 51; and
- relevant Section 5 caselaw, including cases decided since the renewal and caselaw relied upon by the DOJ in its 2011 guidance and final rule.

Of course, absent Section 5, the legislative leadership would not have needed outside assistance to interpret these provisions and apply them to the proposed plans.

As noted on page 13 of Georgia's responses to the Commission's information requests, the amount of real guidance that the state was able to draw from the two

DOJ publications was limited. The guidelines lacked any sort of clear directives that a covered jurisdiction might use to ensure compliance. Although it is certainly understandable that the DOJ cannot provide specific direction on specific districts or even plans, it does seem that more detailed standards could be issued. For example, after Texas sought preclearance from the District Court for its plans, the DOJ argued for a standard to be applied to those plans that is not set forth in either the guidance or final rules. Section 5 is an extreme intrusion into the affairs of a covered jurisdiction and the standards for compliance surely must be more settled than one announced in litigation after the fact.

MAJOR POINTS OF CONTENTION REGARDING SECTION 5 DURING THE 2011 GEORGIA REDISTRICTING PROCESS

As noted above, after adopting redistricting plans, the state would be put to the test of proving that its proposed plans did not have the effect or purpose of denying or abridging the right to vote on account of race or color. The intrastate fight about entitlement to preclearance began before the maps were drawn and continued long after they were signed into law.

From the minority party's perspective, the renewal changed the retrogression analysis by expanding the types of districts covered to include majority-minority districts and coalition/crossover districts (*i.e.*, districts in which African-American voters - although not in the majority - could "coalesce" with other racial minorities and white voters to elect the African-American voters' candidate of choice). In

other words, Section 5 required covered jurisdictions to create coalition/crossover districts to achieve preclearance.

From the majority party's perspective, the VRARA did not change Section 5 to require that the benchmark used to judge retrogression include both districts where the African-American voters could elect a candidate of choice and districts where the African-American voters could elect a candidate of choice as long as those voters could persuade other voters (of any race) to vote for the African-American voters' preferred candidate. Instead, the majority party looked to the authority listed above, including authorities cited within those, such as *Reno v. Bossier Parish School Bd.* 528 U.S. 320 (2000) *and Beer v. United States,* 425 U.S. 130 (1976) to determine if the plans it drew would result in retrogression. In short, were the number of benchmark districts reduced? They were not:

> • Under the benchmark plan for the state House, there are 49 majority-minority districts based on population, 45 districts based on voting age population, and 43 districts based on voter registration. Under the 2011 state House plan, there are 49 majority-minority districts based on population, 47 districts based on voting age population, and 49 districts based on voter registration.
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> • Under the benchmark plan for the state Senate, there are 14 majority-minority districts based on population, 13 districts based on voting age population, and 12 districts based on voter registration. Under the 2011 state Senate plan, there are 15 majority-minority districts based on population, 15 districts based on voting age population, and 15 districts based on voter registration.

> • Under the benchmark plan for the U.S. Congress, there are three majority-minority districts based on population, two districts based on voting age population, and two districts based on voter registration. Under the 2011 Congressional plan, there are four majority-minority districts based on population, three districts based on voting age population, and four districts based on voter registration.

The debate on the plans included a discussion of a "discriminatory purpose" in adopting the plan. Opponents of the plans urged that the absence of coalition/crossover districts proved a discriminatory purpose.

Proponents of the plan looked to the DOJ's guidance, which provided some assistance. The DOJ's guidance emphasized the importance of the public statements of those who played a role in the process along with the underlying motivation of those involved using the list of factors in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977). Those include: (1) the impact of the decision; (2) the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; (3) the sequence of events leading up to the decision; (4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and (5) contemporaneous statements and viewpoints held by the decision makers. *Id.* at 266-68.

In its submission, the state addressed these factors to demonstrate that there was no discriminatory purpose. The first factor is somewhat curious, as it implies that "purpose" is determined by "impact," seemingly another word for "effect." In any event, the effect was not retrogressive, as outlined above. Second, there was no "historical background" that would indicate a discriminatory intent. Third, the sequence of events leading up to the decision involved a public process, extensive consultation with all willing members and final plans that incorporated many suggestions of minority members of the legislature. Fourth, the passage of the 2011 redistricting plans did not depart from the normal practices of the Georgia General Assembly in redistricting sessions. Finally, the contemporaneous statements made by decision makers did not indicate any discriminatory purpose.

GEORGIA'S DECISION TO SUBMIT ITS STATEWIDE REDISTRICTING PLANS TO BOTH THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AND THE DOJ FOR PRECLEARANCE

Georgia's decision to seek preclearance simultaneously from both the DOJ and the District Court was based on a number of considerations. The primary consideration was one of timing. As discussed above, the 2012 election schedule in Georgia is very tight. The General Assembly historically does not return for a special session until late in the summer, and so the special session schedule is predictable. With a special session beginning in August and perhaps not ending until sometime in September, the time allowed for preclearance is very short, in

light of the subsequent work to be done to make the elections happen: notifying voters of new districts, qualifying candidates and holding the elections on schedule.

Based on past experience, Georgia predicted that an administrative submission would likely result in more than 4 months elapsing between the submission and a decision from the DOJ. First, there would be a number of requests for more information from the DOJ, which, in turn, would result in a delay. The DOJ was not likely to issue a determination within the first 60 days but would likely take another 60 days, as is its right under the statute. A period estimated to be more than 120 days from when the state could reasonably expect to make a submission, i.e., October 1, was unworkable from an election schedule perspective. Furthermore, if the DOJ rejected the plans after the legislature had ended its 2012 session, it would have to come back into a 2012 special session to redraw the plans.

In addition, Georgia had recently had a preclearance experience in which, during a period of eighteen months, the DOJ had denied preclearance to a voter verification process, the state had submitted a new process and the DOJ was still seeking additional information. Finally giving up on ever obtaining administrative preclearance, the state filed for preclearance in the District Court in Washington. Subsequently, the DOJ and the state agreed to two minor changes to the process,

the state submitted the process for administrative preclearance, the DOJ granted the preclearance that same week and the state dismissed the litigation. Not long after, the state sought preclearance in the District Court for a voting change requiring proof of United States citizenship to register to vote. The DOJ notified the State that it would not object, the State sought administrative preclearance and once it was granted, dismissed the lawsuit.

Finally, if the DOJ indicated that it would object to preclearance, although that decision would not be appealable, the State could still seek preclearance from the District Court. By filing the suit simultaneously with the administrative submission, the time for the DOJ to answer was already running. If administrative preclearance could not be obtained, the state could pursue the already-pending litigation and still hope to meet the stringent timeline necessary to hold elections on time.

In summary, the state had no time to waste. Proceeding along both tracks made sense.

GEORGIA'S INTERACTIONS WITH THE DEPARTMENT OF JUSTICE DURING THE 2011 PRECLEARANCE PROCESS

When the state filed suit in the District Court, the state notified the DOJ that day and sent a courtesy copy of the pleadings to the DOJ. Following submission of the request for administrative preclearance, Georgia's interactions with the DOJ

were almost daily. As set forth in the state's response to the Commission's information requests, the DOJ made over 40 requests for additional information. In addition, the DOJ conducted more than 60 interviews. The state had regular telephone conferences with the DOJ to answer questions related to the submission, as well as to assist the DOJ in handling the data. As noted in our earlier responses, the DOJ's use of an in-house software product rather than a commercial product like Maptitude made it necessary for us to explain and/or convert data so that the DOJ could use it.

The attorney in charge of Georgia's submission, Abel Gomez, was very professional and managed a large amount of work in the short timeframe given him. The other attorneys and the analysts assigned to the submission were also professional but, at least in the interviews of witnesses, often seemed to be looking for reasons not to preclear the plans. Many times the interviewers seemed to be attempting to lead the witnesses to the answer the DOJ preferred, rather than to the one that the witness would give. In fact, in many of the early interviews, the interviewers would sometimes ask the same question 2 or 3 times. The ones that come to mind are any number of variations of the question: "Do you think the motivation for the plans was politics or race?" Even after a witness would immediately say, "Politics," the question would be asked again (and sometimes again).

Mr. Dunn, Mr. Tyson and I met with Mr. Gomez and all the DOJ attorneys and analysts assigned to the Georgia submission in December, several weeks before preclearance. Over the course of several hours, we had a very frank and courteous discussion about the plans. We attempted to answer remaining questions, believed the meeting was productive and were appreciative of the DOJ's willingness to provide us time when they were under the gun.

GEORGIA'S CHALLENGES TO THE CONSTITUTIONALITY OF SECTION 5

Since the renewal of Section 5, Georgia has argued against the renewal in various forums. Our former Governor, Sonny Perdue, filed an amicus brief in *Northwest Austin Municipal Utility District No. 1 v. Holder*, 129 S. Ct. 2504 (2009). Our firm prepared that brief. In the preclearance litigation referenced earlier, relating to the voter verification process and the requirement for proof of citizenship in order to register to vote in Georgia, we included alternative claims challenging the constitutionality of the renewal. The state included that same claim in the litigation we filed for preclearance of the 2011 redistricting plans.

Georgia's point is a simple one: the renewal of Section 5 in 2006 without any change in the coverage formula is indefensible. Present-day Georgia bears no resemblance to Georgia in 1965. When the current renewal expires, Section 5, the temporary emergency remedial temporary measure will have been in effect 67 years.

Bailout is no saving grace for the flawed statute. In Georgia, there are over 900 subjurisdictions that must seek and receive preclearance before changing an election process or law. For Georgia to be able to bail out, it must be able to show that all of these subjurisdictions have complied with Section 5 by seeking and obtaining preclearance when necessary and that there have been no denials of preclearance for 10 years. That is a test that cannot be met, which makes the bailout provision meaningless for Georgia.

Supporters of the renewal point to the fact that Sandy Springs, Georgia, a city that did not even exist until 2005, was able to bail out. That example does not help the cause of Section 5 supporters. First, the fact that it did not exist until 2005 begs the question of why it even was covered. The answer: because it is in Georgia. Second, the fact that a city did not exist until 2005, forty years after Section 5 was enacted, and has not violated Section 5 should be a given. Finally, unlike the state of Georgia, Sandy Springs' bail out was not dependent on the behavior of any jurisdiction other than Sandy Springs.

Likewise, the ability of Northwest Austin Municipal Utility District No. 1 to obtain a bail out was the product of the Supreme Court's creation of that remedy to the District (which isn't qualified to receive it) and the DOJ's recognition that no objection to that bail out did not cause any harm and avoided a constitutional showdown on the renewal.

CONCLUSION

For as long as Section 5 exists and Georgia is covered by it, the state must comply with the law. Like all covered states, Georgia faces the burden of complying with Section 5 and the DOJ's interpretations of it, announced or unannounced, and the burden of attempting to obtain preclearance from an agency that, to some extent, seems to lean toward not granting it.

Because of the strict time constraints that exist for elections held after redistricting, in covered states, the option of double-tracking preclearance efforts may be the only way to ensure that those states, like the non-covered states, are able to achieve a timely answer and hold elections on time.

As for the constitutional issue, Georgia looks forward to the resolution of it, which appears imminent. The changes that have occurred in Georgia over the last 45 years cannot be ignored, and Georgia awaits the day when it will be treated like the place that it is today.