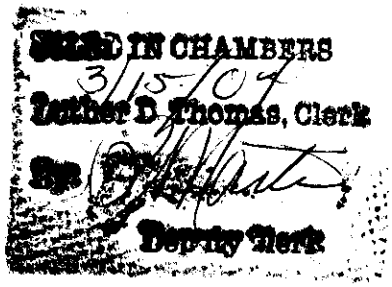

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SARA LARIOS, et al., Plaintiffs, versus CATHY COX, Defendant.	CIVIL ACTION NO. 1:03-CV-693-CAP

REPORT AND RECOMMENDATION OF THE SPECIAL MASTER

On March 1, 2004, the three-judge court consisting of Judge Stanley Marcus, United States Circuit Judge of the Eleventh Circuit Court of Appeals, Judge Charles A. Pannell, Jr., United States District Judge of the Northern District of Georgia, and Judge William C. O'Kelley, Senior United States District Judge of the Northern District of Georgia (the "Court"), issued an order appointing a Special Master in this action pursuant to Federal Rule of Civil Procedure 53. The order directed the Special Master to prepare and submit to the Court a Report and Recommendation, including proposed redistricting plans for the House and the Senate of the state of Georgia.

The following is the Report and Recommendation of the Special Master. Appendix Tabs 1 through 4 show the plans for the Georgia Senate and House, with Tabs 1 and 3 showing the statewide plans and Tabs 2 and 4 showing enlargements of certain metropolitan areas. Full-size originals of the statewide maps and the Atlanta metropolitan area have been filed with the Clerk of Court.

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as the "Enjoined House Plan" and the redistricting plan enacted in 2002 for the Senate is referred to as the "Enjoined Senate Plan."[1] The Enjoined House Plan, with enlargements of certain metropolitan areas, is attached at Appendix Tab 5; the Enjoined Senate Plan, also with enlargements of certain metropolitan areas, is attached at Appendix Tab 6.

On March 13, 2003, a group of Georgia voters filed a complaint against four Georgia state officers in their official capacities—the Governor, the Speaker of the House, the President Pro Tem of the Senate and the Secretary of State and Chair of the State Election Board—challenging the "current state redistricting plans" as violative of the United States Constitution and 42 U.S.C. § 1983. *See* Complaint [Doc. # 1] at ¶¶ 1-41.[2] Concurrently with the Complaint, the plaintiffs filed a request for a three-judge court, pursuant to 28 U.S.C. § 2284(a). [Doc. #2]. With the exception of the President Pro Tem of the Senate, the defendants moved to dismiss the Complaint and opposed the request for a three-judge court.

On June 19, 2003, the district court ruled that a three-judge court was necessary to adjudicate the plaintiffs' claims and deferred all remaining substantive issues to the

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[1]The appellation "enjoined" reflects the fact that these are the plans the Court has enjoined Georgia from using and distinguishes these plans from previously-enacted plans, as well as the Special Master's Plans, all of which are discussed below.

[2]The phrase "current state redistricting plans" covered the three redistricting plans enacted in 2001 as well as the Senate plan enacted in 2002 as a consequence of the D.C. District Court's denial of preclearance of the Senate plan enacted in 2001.

three-judge court. [Doc.# 38]. The following day, the Chief Judge of the Eleventh Circuit Court of Appeals designated the members of the panel. [Doc.# 39].

On August 6, 2003, the plaintiffs served an amended complaint, reiterating their claims in further detail and adding the claims that race was the predominant factor in the creation of the Enjoined Senate Plan and that the Congressional plan violated Article I, § 2 of the U.S. Constitution. [Doc. # 54]. Again with the exception of the President Pro Tem of the Senate, the defendants moved to dismiss.

On August 29, 2003, the Court ruled on the pending issues—*i.e.*, all issues other than the new claims in the amended complaint—and realigned the President Pro Tem of the Senate as a plaintiff. The Court dismissed certain of the plaintiffs' claims and ordered that the case proceed on the plaintiffs' claims against the Congressional Plan and the Enjoined House Plan on "one person, one vote" and partisan gerrymandering grounds. [Doc.# 60]. The Court stayed consideration of the challenge to the 2002Senate plan because the Enjoined Senate Plan had been enacted in 2002 with the caveat that it was only to be effective unless and until the D.C. District Court granted preclearance to the 2001 Senate plan; as the D.C. District Court continued to address preclearance issues with respect to the 2001 Senate plan, the Court determined that a stay was warranted. *See id.* at 21-23.

Upon the parties' agreement, the Court dismissed the Governor and the Speaker of the House as defendants, leaving the Secretary of State and Chair of the

State Election Board (defendant Cox) as the sole defendant. [Doc.# 64]. On October 15, 2003, the Court denied the motion to dismiss directed to the new claims in the amended complaint. [Doc. # 79].

On November 7, 2003, defendant and the plaintiffs filed motions for summary judgment. Defendant's motion was as to the entirety of the plaintiffs' claims; the plaintiffs' motion only sought summary judgment on their "one person, one vote" claims. *See* Defendant's Motion for Summary Judgment [Doc. # 83]; Plaintiffs' Joint Motion for Summary Judgment [Doc.# 85]. On December 9, 2003, the Court denied the plaintiffs' motion and granted the defendant's motion as to the plaintiffs' partisan gerrymandering claim, the plaintiffs' First Amendment freedom of speech and association claim and the plaintiffs' claim that Georgia exceeded its constitutional authority under Article I, § 2, to regulate congressional elections. *See* Order [Doc.# 118] at 1-2.[3]

As a result of these rulings, the only claim remaining for trial was the plaintiffs' "one person, one vote" challenge to the redistricting plans for Georgia's

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[3]The Court's order reflects that the prior stay with respect to the plaintiffs' challenge to the 2002 Senate Plan—*i.e.*, the Enjoined Senate Plan—had been lifted: "Because it is unclear whether or not the 2001 plan will ultimately be precleared and reinstated, this court considers the plaintiffs' claims only with respect to the 2002 state Senate plan now in effect, as well as with respect to the congressional and state House plans enacted during the 2001 special sessions." *Id.* at 3.

Congressional, Senate and House districts.[4] The trial of this remaining claim began on January 6, 2004, and concluded on January 9, 2004.

On February 10, 2004, the Court issued a per curiam opinion ("Opinion") upholding the Congressional Plan and finding the Enjoined Senate and House Plans unconstitutional because they "plainly violate the one person, one vote principle embodied in the Equal Protection Clause because each deviates from population equality by a total of 9.98% of the ideal district population and there are no legitimate, consistently applied state policies which justify these population deviations." Opinion [Doc.# 170] at 3. A copy of the Opinion is attached as Appendix Tab 7. The Court enjoined any further use of the plans in future elections and set a deadline of March 1, 2004, for the General Assembly to submit new (constitutional) plans to the Court. *Id.* at 86-87.

Concurrently with the Opinion, the Court issued its Judgment [Doc.# 171] striking the Enjoined Senate and House Plans; in addition, the Court stayed consideration of the plaintiffs' challenge to the 2001 Senate plan, pending the D.C. District Court's decision on that plan. *Id.* at 2. On February 20, 2004, the D.C. District Court dismissed the Section 5 action, without prejudice, in part due to

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[4]In addition to the "one person, one vote" claim, plaintiff's racial gerrymandering challenge survived summary judgment; however, the Court stayed adjudication of that claim "pending further development of the preclearance proceedings in the [D.C. District Court]." *Id.* at 2.

the ruling of the Court in this action as well as the parties' concession that in no event would preclearance of the 2001 Senate plan be sought for purposes of use in the November 2004 election. *See* Order, Civil Action No. 01-2111 (D.DC. Feb. 20, 2004), at 1-2 (attached at Appendix Tab 8). Therefore, for purposes of this Report and Recommendation, the 2001 Senate plan is a nullity, as it was neither precleared nor considered in this action.

As of the March 1, 2004, deadline, the General Assembly had not passed new plans for either the Senate or the House. As a result, and given the indisputable requirement that constitutional plans be drawn in time for orderly conduct of the November 2004 elections, the Court issued the order appointing the Special Master. [Doc.# 189]. A copy of the order is attached at Appendix Tab 9. The Court directed the Special Master to draw constitutional plans and submit to the Court a report and recommendation with the plans on or before March 15, 2004. *Id.* at 2.

Throughout these proceedings, the Court has repeatedly reiterated its desire that the General Assembly formulate its own constitutional plans. *See, e.g., id.* at 3. The General Assembly has not passed any new plans.

B. Applicable Legal Principles

1. General Principles

A federal court faced with the "'unwelcome obligation'" of drafting a remedial reapportionment plan, *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (quoting *Connor v. Finch,* 431 U.S. 407, 415 (1977)), is required to act "circumspectly, and in a manner 'free from any taint of arbitrariness or discrimination,'" *Connor v. Finch,* 431 U.S. at 415 (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)). To ensure that a court-drafted remedial plan appropriately reflects this role, federal courts have followed five general principles in drafting reapportionment plans.

First, a court-drawn plan should be limited to those changes "necessary to cure any constitutional or statutory defect." *Upham v. Seamon*, 456 U.S. 37, 43 (1982). Here, however, the constitutional violation permeated the Enjoined Senate and House Plans; therefore, this first principle applies with less force than if the violation had been limited to a distinct region. The "constitutional violation here affects [the entirety] of the state; any remedy of necessity must affect almost every district." *Abrams*, 521 U.S. at 86. Therefore, the comprehensive violation of the "one person, one vote" requirement required wholesale adjustment of district boundaries.

Second, "[a] court-ordered plan should 'ordinarily achieve the goal of population equality with little more than *de minimis* variation.'" *Abrams v. Johnson*, 521 U.S. 74, 98 (1997) (quoting *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975)). Of

course, given that the core constitutional violation in this action was the failure to comply with the "one person, one vote" requirement, this principle becomes particularly important.

Third, the federal court should "defer to legislative judgments on reapportionment as much as possible," but only to the extent that such legislative judgments are unrelated to the constitutional violation the Court found. *Upham*, 456 U.S. at 39, 42-43; *see also Abrams*, 521 U.S. at 85 ("*Upham* called on courts to correct—not follow—constitutional defects in districting plans."). This principle, too, weighs less heavily in this case, as the Court found that

> there are no legitimate, consistently applied state policies which justify the[] population deviations. Instead, the plans arbitrarily and discriminatorily dilute and debase the weight of certain citizens' votes by intentionally and systematically underpopulating districts in rural south Georgia and inner-city Atlanta, correspondingly overpopulating the districts in suburban areas surrounding Atlanta, and by underpopulating the districts held by incumbent Democrats.

Opinion at 3. Moreover, the Court specifically found that Georgia's traditional redistricting criteria were not followed in drafting the plans: "Incumbent protection" was selectively applied to benefit Democratic incumbents, *id.* at 19-24, and "[t]he other policies were not causes of the population deviations . . . ; nor indeed, were they priorities at all in drafting the plans," *id.* at 25. Accordingly, little in the way of valid "legislative judgments" exists to provide guidance in drafting new redistricting plans.

Fourth, even though not strictly applicable to the federal courts, a court-drawn plan should strive to ensure compliance with Section 2 and Section 5 of the Voting Rights Act. "On its face, § 2 does not apply to a court-ordered remedial redistricting plan, but we will assume courts should comply with the section when exercising their equitable powers to redistrict." *Abrams*, 521 U.S. at 90. Similarly, § 5 "is a reasonable standard, at the very least as an equitable factor to take into account, if not as a statutory mandate." *Id.* at 96.

Finally, once the constitutional and statutory requirements are met, the federal court should consider traditional state redistricting principles, while avoiding any "purely political considerations." *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981).

2. Single- vs. Multi-Member Districts

Because the Enjoined House Plan chose to use multi-member districts, additional guidance must be gleaned from the Supreme Court decisions addressing the propriety of such districts in court-drawn plans. "[W]hen district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter." *Connor v. Johnson*, 402 U.S. 690, 692 (1971). Significantly, in *Connor*, the Supreme Court instructed the District Court, "absent insurmountable difficulties, to devise and put into effect a single-member district plan . . . ." *Id.*

Although most of the cases addressing this question involve—as does this case—violations of the "one person, one vote" requirement, "the same considerations . . . compel a similar rule with regard to court-imposed reapportionments designed to cure the dilution of the voting strength of racial minorities resulting from unconstitutional racial discrimination." *Wise*, 437 U.S. at 541 n.5. Therefore, any choice to use multi-member districts requires identification of"special circumstances" that outweigh the general preference for single-member districts. *East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636, 639 (1976).

C. *Georgia v. Ashcroft*

In addition, the Supreme Court's decision in *Georgia v. Ashcroft* provides guidance in this particular action, as the plan reviewed in that § 5 proceeding was the 2001 Senate plan. *Id.*, 123 S.Ct. at 2506-07. The Enjoined Senate Plan struck down in this action resulted from modifications to the 2001 Senate plan deemed necessary for compliance with § 5. Opinion at 8. Furthermore, as the Supreme Court noted in *Ashcroft*, the plan enacted in 2002—the Enjoined Senate Plan—gained preclearance and no party challenged the propriety of that preclearance. *Id.* at 2509 (citing *Georgia v. Ashcroft*, 204 F. Supp 2d. 4 (D.D.C. 2002)).

As the Supreme Court noted, "a plan that merely preserves 'current minority voting strength' is entitled to § 5 preclearance." *Id.* at 2510 (quoting *City of Lockhart v. United States*, 460 U.S. 125, 134 n.10 (1983)). The key parameters for the analysis

are that "the inquiry must encompass the entire statewide plan as a whole" and that "any assessment of the retrogression of a minority groups' effective exercise of the electoral franchise depends on an examination of all the relevant circumstances . . . ." *Id.* at 2511. Significantly, "'[n]o single statistic provides courts with a shortcut to determine whether' a voting change retrogresses from the benchmark." *Id.* (quoting *Johnson v. DeGrandy*, 512 U.S. 997, 1020-21 (1994)).

D. Court Guidelines

On February 26, 2004, the Court ordered the parties to file briefs suggesting guidelines to be used in the event the Court had to draw redistricting plans. [Doc.# 186]. On March 2, 2004, the Court issued guidelines "to which the Special Master shall adhere in preparing reapportionment maps for the House of Representatives and the Senate of the General Assembly of Georgia." March 2, 2004, order [Doc.# 193] at 2. A copy of this order (the "Guidelines") is attached as Appendix Tab 10.

The Guidelines underscore the legal principles identified above, providing focus and context with respect to the particular redistricting tasks at hand. The Guidelines establish "three principal criteria" for drafting new Senate and House plans: "the Constitution, the Voting Rights Act, and the neutral principles of redistricting." *Id.* at 4. Of the three, the first two are predominant because, "[p]lainly,

the requirements of the Constitution and the Voting Rights Act take precedence over any traditional redistricting principles." *Id.*

Moreover, "[b]ecause the constitutional wrong to be remedied in this case is a violation of the Fourteen Amendment's one person, one vote principle, equality of population is a paramount concern in redrawing the maps." *Id.* With respect to the Voting Rights Act, the Guidelines require "full compliance" with its provisions, both "the racial-fairness mandates of § 2 of the Act, as well as the purpose-or-effect standards of § 5 of the Act." *Id.* at 5.

The third set of criteria is "secondary to ensuring compliance with the Constitution and the Voting Rights Act." *Id.* at 6 (emphasis in original). In the area of neutral redistricting principles, the Court "direct[ed] the Special Master to apply Georgia's traditional redistricting principles of compactness, contiguity, minimizing the splits of counties, municipalities, and precincts, and recognizing communities of interest." *Id.* (emphasis omitted). In addition, the Court instructed the Special Master that "'many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts.'" *Id.* at 7 (quoting *Wyche*, 769 F.2d at 268) (emphasis added).

Finally, the Court addressed in detail the appropriateness of single-member districts versus multi-member districts. The baseline principle is that court-drawn redistricting plans—and, therefore, the Special Master's plans—"'should prefer single

member districts over multimember districts, absent persuasive justification to the contrary.'" *Id.* at 7 (quoting *Wise*, 437 U.S. at 540). In addition, "the Georgia Constitution prohibits the use of multi-member districts in the state Senate. Art III, § II, ¶ I(a)." *Id.* at 8. As for the House, while recognizing that the Enjoined House Plan contained multi-member districts, the Court noted that although "a court should defer to a state legislature's judgment that multimember districts are appropriate, in this instance, there is no clear indication that the use of such districts is an established state policy." *Id.* (citations omitted). Furthermore, "the existing multi-member districts substantially contributed to the constitutional infirmity embodied in the House plan." *Id.* Accordingly, the Court concluded:

> [W]e direct the Special Master to adhere generally to the redistricting principle, traditionally followed by the Georgia General Assembly, of creating only single-member districts. While the existence of multi-member districts in the original [House] plan might constitute a justification for maintaining such districts, the Special Master may only do so where the multi-member districts are not tainted by the factors which rendered the previous plans unconstitutional, and only so long as their inclusion does not undermine the other guidelines we have already enumerated.

Id. at 9 (citation omitted).

The above, therefore, are the principles and guidelines that guided the Special Master in this task. As will be seen, reconciling these various requirements proved exceedingly complicated.

II. DEVELOPMENT OF THE NEW SENATE AND HOUSE PLANS

A. Personnel Assisting the Special Master

Given the speed the Court's schedule required, the Special Master determined that experts and assistants familiar with the process of redistricting would need to be retained immediately. With the Court's guidance, the Special Master retained Dr. Nathaniel Persily, a nationally-recognized expert in developing redistricting maps. Dr. Persily was ably assisted by Patrick J. Egan. Their *curricula vitae* are attached at Appendix Tabs 11 and 12, respectively. The Special Master and Dr. Persily also consulted with Dr. Bernard Grofman, a nationally-recognized expert on voting rights issues, whose *curriculum vitae* is attached at Appendix Tab 13.

To assist the Special Master in his overall task, the Special Master retained Christopher S. Carver, Esq., known to the Special Master as being well versed in redistricting matters. In addition to Mr. Carver, Richard A. Perez, Esq., aided the Special Master.[5]

B. Record of the Proceedings and Factual Background

In developing the redistricting plans for the Senate and the House, the Special Master and his assistants had available to them the record of the proceedings in this

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[5]The Special Master and all persons assisting in this task, including experts, have been subject to a March 2, 2004, order [Doc.# (pending)] "requiring the strictest confidentiality with respect to the issues and information being considered by the Special Master . . . ." *Id.* at 1.

litigation. While the parties' characterization of the "facts" and the "law" were not relied upon, the record was useful in identifying the central legal issues and providing the necessary factual background, which was gleaned from either the Court's findings or from the Parties' Stipulation of Facts [Doc.# 116] and the Parties' Refined Stipulation of Facts [Doc.# 128].

In addition, Georgia has been party to many cases addressing redistricting and related issues, including *Ashcroft* and *Abrams* (both cited above), as well as *Miller v. Johnson*, 515 U.S. 900 (1995), *Holder v. Hall*, 512 U.S. 874 (1994), *Johnson v. Hamrick*, 296 F.3d 1065 (11th Cir. 2002), *Clark v. Putnam County*, 293 F.3d 1261 (11th Cir. 2002), *DeJulio v. Georgia*, 290 F.3d 1291 (11th Cir.), *cert. denied*, 537 U.S. 948 (2002), and *Johnson v. Hamrick*, 196 F.3d 1216 (11th Cir. 1999). These appellate cases were often preceded and succeeded by several district court cases, including *Smith v. Cobb County Bd. of Elections and Registrations*, 230 F. Supp 2d. 1313 (N.D. Ga. 2002), *Johnson v. Hamrick*, 155 F. Supp 2d. 1355 (N.D. Ga. 2001), *aff'd*, 296 F.3d 1065 (11th Cir. 2002), *Johnson v. Hamrick*, 1998 WL 476186 (N.D. Ga. June 10, 1998), *rev'd*, 196 F.3d 1216 (11th Cir. 1999), *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), *aff'd*, 515 U.S. 900 (1995), *Johnson v. Miller*, 922 F. Supp. 1552 (S.D. Ga. 1995), *aff'd sub nom. Abrams v. Johnson*, 517 US. 1207 (1996), and *Johnson v. Miller*, 922 F. Supp. 1556 (S.D. Ga. 1995), *aff'd sub nom. Abrams v. Johnson*, 517 US. 1207 (1996). To the extent those opinions contained

factual determinations and background information, they provided additional source material.

Finally, in an order dated March 2, 2004, the parties were directed to file jointly the record in the *Georgia v. Ashcroft* proceedings in the D.C. District Court. [Doc.# 194]. On March 8, 2004, the parties jointly submitted to the Court the materials they deemed appropriate and offered to provide additional information.

C. Political Data and Information

In performing the duties of the Special Master, the Court strictly prohibited the Special Master and his experts and assistants from reviewing or analyzing political data and information, including, but not limited to, prior districts' voting performance, incumbent residency, political party registration and past election results. Accordingly, such factors were not considered. In addition, where such information appeared in materials otherwise reviewed or provided to the Special Master, it was not considered.

D. Georgia Legislative Reapportionment Office

The Special Master and his experts received substantial assistance from personnel at the Georgia Legislative Reapportionment Office. The order appointing the Special Master respectfully directed that office

> to provide to the Special Master immediate and unrestricted access to its computer facilities and programs for use in developing the plans and to cooperate with the Special Master and his staff by providing them

> access, support, and staffing on a confidential basis, together with any additional assistance that will facilitate and expedite the work of the Special Master.

March 1, 2004, order at 3 (emphasis omitted). The staff of the Legislative Reapportionment Office fulfilled both the letter and the spirit of this command and the Special Master greatly appreciates their assistance.

The new Senate and House Plans were developed through the computers at the Legislative Redistricting Office. The primary computer program used in generating the plans was "Maptitude for Redistricting" ("Maptitude"). Maptitude is widely used for legislative redistricting throughout the country and is the program currently employed for redistricting purposes by the General Assembly.

III. OVERVIEW OF THE SPECIAL MASTER'S PLANS

A. Plan Principles

The redistricting plans the Special Master developed for the Senate (the "Special Master's Senate Plan") and for the House (the "Special Master's House Plan") represent the Special Master's resolution of the multiple—and sometimes contradictory—demands associated with developing redistricting plans. While each plan is explained in detail in the Affidavit of Nathaniel Persily, J.D., Ph.D. (Appendix Tab 16),[6] the overall governing principles may be summarized as follows.

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[6]Given the volume of Dr. Persily's affidavit with its attachments, it is presented as a separate volume of the Appendix. Therefore, it is numbered out of sequence.

1. "One Person, One Vote"

The core violation the Court found was the failure of the Enjoined Senate and House Plans to adhere to the "one person, one vote" requirement of the Equal Protection Clause. The Special Master's Senate Plan and the Special Master's House Plan substantially resolve the deviations from the ideal size for districts based on the 2000 Census. The ideal size for a Senate district is 146,187 persons. Opinion at 13. The ideal size for a House district is 45,480. *Id.* at 11.

The Special Master's Senate Plan has a total population deviation range of 1.91% and an average deviation of 0.55%. The Special Master's Senate districts deviate from the ideal equal population by a range of +0.96% to -0.95%, with the largest district having 147,589 persons and the smallest district having 144,802 persons. In contrast, the Enjoined Senate Plan contained "a total population deviation range of 9.98% and an average deviation of 3.78%. The Senate districts deviate from ideal equal population by a range of +4.99% to -4.99%, with the largest district having 153,489 persons and the smallest district having 138,894 persons." *Id.* at 14.

The Special Master's House Plan has a total population deviation range of 1.95% and an average deviation of 0.46%. The Special Master's House districts deviate from the ideal equal population by a range of +0.970% to -0.985%, with the largest district having 45,921 persons and the smallest district having 45,032 persons. In contrast, the Enjoined House Plan contained "a total population deviation range of

9.98% and an average deviation of 3.47%. The House districts deviate from ideal equal population by a range of +4.99% to -4.99%, with the largest district having 176,939 persons (in a four-member district) and the smallest district having 43,209 persons." *Id.* at 12.

Significantly, whereas in the Enjoined Senate and House Plans, "the most underpopulated areas are located almost exclusively in rural south Georgia and inner-city Atlanta, and the most over populated areas are located almost exclusively in the areas of north Georgia that encircle Atlanta," *id.* at 19, the +/–1% deviations in the Special Master's Senate and House Plans are randomly scattered across Georgia.

In *Smith v. Cobb County Bd. of Elections and Registrations*, 230 F. Supp 2d. 1313 (N.D. Ga. 2002), the district court adopted a remedial plan for Cobb County Commission districts in which the deviations ranged from +1.64% to –1.26% from the ideal population. *Id.* at 1328. However, the court concluded,

> [t]o the extent that there are small deviations in each plan from the ideal population figure, these deviations have been necessary to comply with other principles applicable to the drafting of a remedial plan. The Court concludes that any deviations are *de minimis* and justified by the need to comply with the other dictates applicable to this endeavor.

Id. at 1315. Similarly, the Special Master has determined that the lesser deviations exhibited by the Special Master's Senate and House Plans are "justified by the need to comply with the other dictates applicable to this endeavor."

2. Satisfaction of the Mandates of the Voting Rights Act

The Special Master's Senate and House Plans fulfil the mandates of the Voting Rights Act. As the Enjoined Senate and House Plans were found unconstitutional, they could not serve as "benchmark" plans. *See, e.g., Abrams*, 521 U.S. at 97 ("Nor can the 1992 plan, constitutional defects and all, be the benchmark. Section 5 cannot be used to freeze in place the very aspects of a plan found unconstitutional."). The violation the Court found was "intentional[] and systematic[]," Opinion at 3; therefore, "[u]sing the[se Plans] would validate the very maneuvers that were a major cause of the unconstitutional redistricting." *Abrams*, 521 U.S. at 86.

Accordingly, the last valid plans in effect and used for the 2000 elections (the "Senate Benchmark Plan" and "House Benchmark Plan") were used as the benchmark plans for purposes of analysis under the Voting Rights Act.[7] Copies of these two plans, with enlargements of metropolitan areas, are attached at Appendix Tabs 12 and 13, respectively.

As compared to the Benchmark Plans and the Enjoined Senate and House Plans, the Special Master's Senate and House Plans meet or exceed the requirements of § 2 and of § 5 of the Voting Rights Act. Although neither dilution (§ 2's focus) nor retrogression (§ 5's focus) are properly measured from an unconstitutional plan, it is

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[7]The House Benchmark Plan was in effect in 1998; the Senate Benchmark Plan was in effect in 2000. Therefore, the maps shown in Appendix reflect those dates.

notable that the Special Master's Senate and House Plans compare favorably on all accounts with both the Enjoined Senate Plan and the Enjoined House Plan, as well as with the Benchmark Plans.

The following chart shows the comparison of the Special Master's Senate Plan with the Enjoined Senate Plan and the Senate Benchmark Plan:

Percentage of African-American Registered Voters	Number of Districts		
	Special Master's Senate Plan	Enjoined Senate Plan	Senate Benchmark Plan
70% or more	0	0	5
50% to 69%	13	13	8
30% to 49%	10	11	8
Less than 30%	33	32	35

Similarly, the following chart shows the comparison of the Special Master's House Plan with the Enjoined House Plan and the House Benchmark Plan:

Percentage of African-American Registered Voters	Number of Districts		
	Special Master's House Plan	Enjoined House Plan[8]	House Benchmark Plan
70% or more	3	5	25
50% to 69%	41	33	14
30% to 49%	22	35	26
Less than 30%	114	107	115

Measured by 2000 voting age population, African-Americans comprise 26.72% of Georgia's population; measured by 2000 registered voters, African-Americans

[8]Multi-member district calculations are weighted by number of members per district.

comprise 25.62% of Georgia's population.[9] In the Special Master's Senate Plan, 23.20% of the districts are majority-minority; in the Special Master's House Plan, 24.44% of the districts are majority-minority. Accordingly, "no violation of § 2 can be found here, where . . . minority voters form effective voting majorities in a number of districts roughly proportional to the minority voter's respective shares in the voting-age population." *Johnson v. DeGrandy*, 512 U.S. 997, 1000 (1994).

As for Section 5, the Special Master's Senate and House plans substantially exceed the number of minority-majority districts created in the Benchmark Plans, and, in addition, equal or exceed the number of minority-majority districts created in the Enjoined Plans. Thus, no retrogression exists from either the Benchmark Plans or the Enjoined Senate and House Plans. Although the Special Master's House Plan has fewer minority population districts in the 25-49% range than reflected in the Enjoined House Plan, "regardless of any potential retrogression in some districts, § 5 permits Georgia to offset the decline in those districts with an increase in the black voting age population in other districts." *Ashcroft*, 123 S.Ct. at 2515-16. Moreover, the House Benchmark Plan has only seventy-six such districts. Therefore, the Special Master's House Plan comports with the requirements of § 5.

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[9]There are a number of sources for these percentages, including U.S.Ex. 115, "Voting Age Population According to 2000 Census, and November 2000 Voter Registration Statistics as Provided by the State of Georgia for Georgia Counties," filed in the *Ashcroft* litigation.

3. Traditional Redistricting Principles

Within the constraints arising from resolving the "one person, one vote" flaw of the Enjoined Senate and House Plans and from the Voting Rights Act, the Special Master's Senate and House Plans adhere to the traditional redistricting criteria of compactness and contiguity. The Special Master also sought to follow the traditions of recognizing communities of interest and minimizing county and municipality splits.

a. Avoidance of County Splits

The Special Master's Senate and House Plans attempt to keep counties contained in single districts wherever possible. "Georgia has an unusually high number of counties: 159, the greatest number of any State in the Union apart from the much larger Texas. These small counties represent communities of interest to a much greater degree than is common . . . ." *Abrams*, 521 U.S. at 100. In addition, avoiding county splits is also important because

> [e]ach county, municipality, or other jurisdiction has a local delegation and any legislator whose district encompasses territory within a specific city or county is a member of the local delegation for that entity. The local delegations make recommendations to the House and Senate standing committees, which then recommend local legislation to the entire body. A local bill must receive the requisite majority from the local delegation to be reported favorably out of the standing committees with a "do pass" recommendation.

DeJulio, 290 F.3d at 1293 (footnote omitted). Furthermore, "[i]f local legislation has received the requisite number of signatures of representatives or senators whose

districts lie partially or wholly within the locality which the legislation affects, it is ordinarily passed on an uncontested basis as a matter of local courtesy." *Id.* at 1293-94. Thus, having a district intrude across county (or municipality) lines gives a legislator whose district predominately lies outside that county (or municipality) a vote on issues that may well not directly affect the majority of the legislator's constituents.

The Special Master's Senate Plan keeps 119 counties entirely within a single district and splits forty counties into 100 parts, thirty-four of which are only divided between two districts.[10] This provides a sharp contrast with the Enjoined Senate Plan: "in the 2002 Senate Plan, eighty-one counties are split into 219 parts." Opinion at 29.

Although lower ideal population size for a House district as compared to the ideal population size of a Senate district necessarily results in a greater number of county splits, the Special Master's House Plan substantially reduces the number of county splits. In contrast to the Enjoined House Plan, which "actually splits eighty of the state's 159 counties into 266 parts," Opinion at 28, the Special Master's House Plan keeps eighty-two counties entirely within a district and splits seventy-seven counties into 278 parts, of which fifty-nine are split either between two districts or

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[10]Of the remainder, two counties are each divided among three districts, one county is divided among five districts and three counties are each divided among seven districts. The majority of such divisions are an inevitable result of the population concentration in the Atlanta metropolitan area.

among three districts.[11] The comparative numbers, however, do not tell the full story. The difference is much greater than it appears because the Special Master's House Plan—because it uses no multi-member districts—has thirty-three more districts than the Enjoined House Plan and fifty-six smaller districts, as a result of dividing larger multi-member districts into smaller single-member districts.[12]

Moreover, the lower number of county splits in both Special Master's Plans was achieved under the primary constraint of population equality. Relaxing that constraint would inevitably have reduced the number of splits. Accordingly, given that the Special Master's districts achieve population deviations of below +/–1%—whereas the Enjoined Plans' deviations were approximately +/–5%—the reduction of county splits Special Master's Plans is even more significant.

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[11]Of the remainder, seven counties are each divided among four districts, four counties are each divided among five districts, two counties are each divided among six districts and the remaining five counties are divided among seven or more districts. As with the county splits in the Special Master's Senate Plan, the majority of such divisions are an inevitable result of the population concentration in the Atlanta metropolitan area.

[12]The Enjoined House Plan had 147 districts, with 124 districts containing a single member, fifteen two-member districts, six three-member districts and two four-member districts. Parties' Refined Stipulation of Facts No. 67.

b. Avoidance of Municipality Splits

A second key traditional redistricting criterion reflected in the Special Master's Senate and House Plans is attempting to keep municipalities contained within districts. This proved particularly difficult, as many municipalities cross county lines; for example, Braselton (on the border of Gwinnett and Barrow counties), Maysville (on the border of Banks and Jackson counties), Waycross (on the border of Ware and Pierce counties) and Villa Rica (on the border of Carroll and Douglas counties) cross county boundaries. Even more complicating was the fact that the annexation patterns of a number of municipalities have resulted in non-contiguous municipalities; for example, Byron, Calhoun, Cartersville, LaGrange and Warner Robins have non-contiguous portions.

As a general rule, where the principles of avoiding county splits and avoiding municipality splits conflicted, the choice was often made to avoid municipality splits. Accordingly, for example, the Floyd County splits are a result of keeping Rome together in Special Master House district 13A.

c. Compactness and Contiguity

By striving to preserve county and municipality lines, the Special Master's Senate and House Plans generally satisfy compactness and contiguity criteria because both are facilitated by using counties and municipalities as district building blocks.

Compactness: Use of county and municipalities as building blocks where possible naturally enhances compactness. In addition, compactness was one of the several goals in developing the Special Master's Senate and House Plans, although subservient to the primary goal of population equality. The data bear out the success of the efforts in this area, particularly in comparison with the prior plans. Compared with both the Enjoined Plans and the Benchmark Plans, the Special Master's Plans equal or exceed the prior plans' performance, whether using smallest-circle or perimeter-to-area compactness measures.[13]

Under the smallest-circle measure, the Special Master's Senate Plan's .43 level exceeds the .42 level attained by the Senate Benchmark Plan and the .35 level of the Enjoined Senate Plan. Under the perimeter-to-area measure, the Special Master's Senate Plan's .28 level matches the level attained in the Senate Benchmark Plan and substantially exceeds the .16 level of the Enjoined Senate Plan.

Comparing the House plans under the smallest-circle measure, the Special Master's House Plan's .41 level matches the level attained in the House Benchmark Plan and exceeds the .38 level of the Enjoined House Plan. Under the perimeter-to-

[13]The "smallest-circle" measure compares a district's area to that of the smallest circle that could encompass the entire district; the "perimeter-to-area" measure is the ratio of the district's area to the area of a circle with the same perimeter. Under both measures, the figure for the "perfect" district would be 1.00.

area measure, the Special Master's House Plan's .30 level exceeds the .29 level attained in the House Benchmark Plan and the .24 level of the Enjoined House Plan.

In addition, the Special Master's Plans achieved these compactness scores along with population deviations below +/–1%, in distinct contrast to the substantially higher population deviations of the four comparison plans.

Contiguity: Similarly, the degree of contiguity reflected in the Special Master's Senate and House Plans sharply contrasts with the Enjoined Senate and House Plans. The Court found that

> district contiguity was not a real concern among plan drafters and legislators. . . . While all of the districts are technically contiguous (as required by state law), many districts achieve that designation through the use of water contiguity, which is predicated on the assumption of line-of-sight across a lake or other body of water, or touch-point contiguity, which is predicated on facing corners in a checker-board like fashion.

Opinion at 27 (emphasis omitted). Unlike the Enjoined Senate and House Plans, the districts in the Special Master's Senate and House Plans are fully contiguous, except where contiguity is impossible.[14] Moreover, none of the districts in the Special

[14]For example, the districts encompassing the coastal counties of Eastern Chatham, Bryan, Liberty, McIntosh, Glynn and Camden cannot be fully contiguous because portions of those districts are islands.

Master's Senate and House Plans exhibit touch-point contiguity, except where such contiguity is an existing feature of a county.[15]

d. Communities of Interest and Preservation of Cores of Prior Districts

The "one person, one vote" violation the Court found reflected "intentionally and systematically underpopulating districts in rural south Georgia and inner-city Atlanta, corresponding overpopulating the districts in suburban areas surrounding Atlanta . . . ." Opinion at 3. Moreover, "[t]o the extent that the cores of prior districts were preserved at all, it was done in a thoroughly disparate and partisan manner . . . . Quite simply, the population deviations in the House Plan and the 2002 Senate Plan did not result from a neutral, consistently applied concern for retaining incumbent cores." Opinion at 72.

Because the Enjoined Senate and House Plans do not demonstrate an intent to preserve the cores of prior districts, the question arises of what "cores" exist to be preserved. To the extent possible within the constraints of the Guidelines, however, the Special Master's Senate and House Plans were drawn with recognition of the cores of districts shown in either the Enjoined Senate and House Plans or the

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[15]For example, portions of Lee, Peach and Rockdale counties are touch-point contiguous with the main bodies of those counties; therefore, the districts encompassing those counties similarly may reflect touch-point contiguity.

Benchmark Plans, under the theory that the prior districts should reflect communities of interest.

B. Single-Member Districts in the Special Master's House Plan

Much of the Special Master's and his experts' focus was on the issue of single-member versus multi-member districts in the Special Master's House Plan. The Guidelines were quite clear that single-member districts were preferable; the Special Master was only to draw multi-member districts "where the multi-member districts are not tainted by the factors which rendered the previous plans unconstitutional, and only so long as their inclusion does not undermine the other guidelines we have already enumerated." Guidelines at 9.

The Guidelines, of course, follow the Supreme Court's instructions on this matter. Thus, "absent insurmountable difficulties," *Connor v. Johnson*, 402 U.S. at 692, a court-drawn plan should not make use of multi-member districts. The Special Master recognizes that "in the absence of any finding of a constitutional or statutory violation with respect to those districts, a court must defer to the legislative judgments the plans reflect," *Upham*, 456 U.S. at 40-41; however, "the existing multi-member districts substantially contributed to the constitutional infirmity embodied in the House plan." Guidelines at 8. In addition, the Court found that the use of multi-member districts did not exhibit "an established state policy." *Id.* Accordingly,

> [t]he instant action presents a quite different situation from *Upham*, and for several reasons. In the first place, the precleared plan is not owed *Upham* deference to the extent that the plan subordinated traditional districting principles . . . . *Upham* called on courts to correct–not follow–constitutional defects in districting plans . . . . Second, the constitutional violation here affects a large geographic area of the State; any remedy of necessity must affect almost every district.

Abrams, 521 U.S. 85-86 (citations omitted). Therefore, the fact that the Special Master's House Plan does not use multi-member districts is in accord with the Supreme Court's rulings on this issue.

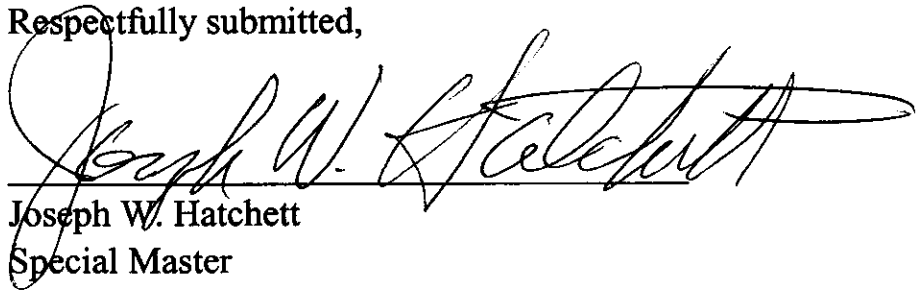
As a consequence of removing the multi-member districts, the Special Master's House Plan contains an additional thirty-three districts. Because the Special Master's House Plan breaks up the multi-member districts in the Enjoined House Plan into single-member districts, the issue of district numbering arises. For ease of comparison between the two plans, the Special Master's House Plan designates districts formerly part of multi-member districts by alphabetic suffixes, so that, for example, the approximate area of former House district 13, a two-member district, is now designated as Special Master's House Districts 13-A and 13-B.

IV. CONCLUSION

The Special Master's Senate and House Plans satisfy the applicable principles of the United States Constitution, the Georgia Constitution, the Voting Rights Act and the Guidelines the Court established. Based on the foregoing, the Special Master respectfully recommends that the Court adopt the Special Master's Senate Plan and Special Master's House Plan for use in the November 2004 election and, thereafter, until the Georgia Assembly issues new plans that comply with the above principles.

Date: March 15, 2004

Respectfully submitted,



Joseph W. Hatchett
Special Master

Copies provided to:

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