SUPREME COURT OF THE UNITED STATES

No. 02–182

GEORGIA, APPELLANT *v.* JOHN ASHCROFT, ATTORNEY GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[June 26, 2003]

JUSTICE KENNEDY, concurring.

As is evident from the Court's accurate description of the facts in this case, race was a predominant factor in drawing the lines of Georgia's State Senate redistricting map. If the Court's statement of facts had been written as the preface to consideration of a challenge brought under the Equal Protection Clause or under §2 of the Voting Rights Act of 1965, a reader of the opinion would have had sound reason to conclude that the challenge would succeed. Race cannot be the predominant factor in redistricting under our decision in *Miller* v. *Johnson,* 515 U. S. 900 (1995). Yet considerations of race that would doom a redistricting plan under the Fourteenth Amendment or §2 seem to be what save it under §5.

I agree that our decisions controlling the §5 analysis require the Court's ruling here. See, *e.g., Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471 (1997); *Reno* v. *Bossier Parish School Bd.*, 528 U. S. 320 (2000). The discord and inconsistency between §§2 and 5 should be noted, however; and in a case where that issue is raised, it should be confronted. There is a fundamental flaw, I should think, in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive. This serious issue has not been

raised here, and, as already observed, the Court is accurate both in its summary of the facts and its application of the controlling precedents. With these observations, I join the opinion of the Court.