NO. __

In the

Supreme Court of the United States

STATE OF TEXAS,

Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Columbia

APPELLANT'S JURISDICTIONAL STATEMENT

GREG ABBOTT
Attorney General of Texas
DANIEL T. HODGE
First Assistant Attorney General
JONATHAN F. MITCHELL
Solicitor General of Texas
JAMES D. BLACKLOCK
J. REED CLAY, JR.
MATTHEW FREDERICK
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
MICHAEL H. MCGINLEY
BANCROFT PLLC
1919 M Street, N.W.
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Appellant

October 19, 2012 (Counsel continued on inside cover)

ADAM K. MORTARA
JOHN M. HUGHES
BARTLIT BECK HERMAN
PALENCHAR & SCOTT LLP
54 W. Hubbard Street, Suite 300
Chicago, IL 60654
(312) 494-4400

QUESTIONS PRESENTED

In the decision below, a three-judge district court refused to grant preclearance under Section 5 of the Voting Rights Act to Texas' legislatively enacted redistricting plans for the U.S. House, Texas House, and Texas Senate. The questions presented are:

1. Whether the district court erred and exacerbated the constitutional difficulties with Section 5 by requiring Texas to increase the number of majority-minority congressional districts in response to population growth, by treating "coalition" and "crossover" districts as protected under Section 5, and by applying a "functional" definition of retrogression that fails to give covered jurisdictions fair notice of the redistricting decisions that will be deemed to violate Section 5.

2. Whether the district court erred and exacerbated the constitutional difficulties with Section 5 by finding a discriminatory purpose under the new permissive standard adopted by Congress in the 2006 reauthorization in attempting to abrogate this Court's decision in *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000).

3. Whether the district court erred and exacerbated the constitutional difficulties with Section 5 by allowing private intervenors to challenge the Texas Senate map, even though DOJ conceded that this map was entitled to preclearance.

4. To the extent that the district court did not err in construing Section 5, whether the 2006 reauthorization of Section 5, as so construed, is constitutional.

LIST OF PARTIES TO THE PROCEEDING

Appellant is the State of Texas. Appellees are the United States and Attorney General Eric H. Holder, Jr., in his official capacity.

Intervenor-defendant-appellees are Wendy Davis, Marc Veasey, John Jenkins, Vicki Bargas, Romeo Munoz, Mexican American Legal Caucus of the Texas House of Representatives, Greg Gonzales, Lisa Aguilar, Daniel Lucio, Victor Garza, Blanca Garcia, Josephine Martinez, Katrina Torres, Nina Jo Baker, Texas Legislative Black Caucus, Texas Latino Redistricting Task Force, Texas State Conference of NAACP Branches, Juanita Wallace, Bill Lawson, Howard Jefferson, Ericka Cain, Nelson Linder, Reginald Lillie, and League of United Latin American Citizens. The Texas Democratic Party, Boyd Richie, and Michael Idrogo sought to intervene, but the district court denied their motions.

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JURISDICTIONAL STATEMENT

Appellant State of Texas respectfully submits this jurisdictional statement regarding its appeal of a decision from a three-judge panel of the U.S. District Court for the District of Columbia.

OPINIONS BELOW

The district court's opinion denying preclearance is reproduced at App.1–281, and the court's opinion denying Texas' motion for summary judgment is reproduced at App.282–341.

JURISDICTION

This is an appeal from the decision of a three-judge district court denying preclearance of Texas' legislatively enacted redistricting plans. The district court entered final judgment on August 28, 2012, and Texas filed a timely notice of appeal on August 31, 2012. App.342. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution and Section 5 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973c, are reproduced in the appendix to this brief at App.344-48.

INTRODUCTION

In the decision below, a three-judge district court in Washington, D.C., held that Texas' legislatively enacted redistricting plans for the U.S. House, Texas House, and Texas Senate were not entitled to preclearance under Section 5 of the Voting Rights

Act. The district court's opinion contains a number of serious structural errors that infect its analysis of both the "purpose" and "effect" prongs of Section 5 and push Section 5 past the constitutional breaking point.

First, the district court erred by faulting Texas for departing too much from proportional representation. The district court found the new congressional plan to be retrogressive because it increased the so-called "representation gap," which the court defined as the difference between the actual number of "minority" districts and the number of minority districts that racially proportional representation would yield. But the VRA explicitly disclaims any proportionality requirement, and this Court rejected such an analysis in *Abrams v. Johnson*, 521 U.S. 74, 97-98 (1997). The court's "representation gap" analysis also aggravates the constitutional difficulties with Section 5 by mandating that a covered jurisdiction elevate race above all other considerations once the "gap" crosses a certain numerical threshold. *See Miller v. Johnson*, 515 U.S. 900, 917 (1995).

Second, the district court concluded that the legislatively enacted plans for the U.S. House and Texas House had a retrogressive effect because they failed to preserve certain "coalition" or "crossover" districts. But Section 5 only protects districts in which a minority group has the "ability . . . to elect [its] preferred candidate[] of choice." 42 U.S.C. § 1973c(b), (d). In a coalition or crossover district, *no single group* has the ability to elect its favored candidate without assistance from other groups.

This Court has already held that a State's failure to create a crossover district does not violate Section 2, *see Bartlett v. Strickland*, 556 U.S. 1, 13-15 (2009), and there is no reason for a different result in the Section 5 context.

A holding that coalition and crossover districts are protected by Section 5 would deepen Section 5's constitutional problems by making race the primary focus of the redistricting process. States would not only have to divvy up voters on the basis of race, but would also have to make complicated judgments (both forward-looking and backward-looking) about the *interaction* between different racial groups. This sordid business has no proper place in a statute designed to promote "a political system in which race no longer matters." *Miller*, 515 U.S. at 912 .

Third, the district court erred by finding that the congressional and state senate plans were motivated by a discriminatory purpose, even though it found "no direct evidence" of such a purpose. App.51-52, 61. The district court demanded that Texas *prove the absence* of any discriminatory purpose, and relied on a hodgepodge of circumstantial evidence that reflected, at most, a focus on party, not race. Moreover, the court's impermissible purpose finding was based on Congress' 2006 reauthorization of Section 5, which sought to abrogate this Court's decision in *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000). The district court's decision amply illustrates and reintroduces the constitutional problems that this Court sought to avoid in *Bossier Parish II*.

Fourth, the district court allowed a number of individuals and interest groups to intervene—even allowing them to challenge the Texas Senate plan, which the Department of Justice ("DOJ") conceded complied with Section 5. Intervention multiplies the significant monetary and sovereignty costs exacted by the preclearance mechanism, by compounding the burdens of discovery, motions practice, expert testimony, and trial. It is also unnecessary in light of the remedies provided to private parties under Section 2 and the Constitution. Permitting private intervenors to displace DOJ as the enforcers of Section 5 drastically expands these federalism costs, by forcing States to disprove theories that DOJ has found to be meritless.

Fifth, this Court has recognized that Section 5 raises grave constitutional doubts, both by mandating the consideration of race and inverting the normal assumptions that state laws are presumptively constitutional and all States enjoy equal footing as sovereigns. The 2006 reauthorization of Section 5 raises additional constitutional concerns by renewing the statute for 25 years and overturning decisions of this Court designed to ameliorate Section 5's constitutional difficulties. The decision below exacerbates these constitutional difficulties at every turn by applying legal tests that maximize, rather than minimize, the interference with state sovereignty and the need for States to take race into account in order to obtain preclearance.

* * *

This Court has been asked several times in recent years to reconsider the facial constitutionality of Section 5. *See Northwest Austin Mun. Util. Dist. No. One v. Holder*, 129 S.Ct. 2504, 2509 (2009); *Shelby County v. Holder*, No. 12-96; *Nix v. Holder*, No. 12-81. Those cases raise critically important issues about Section 5, but they do not directly illustrate the burdens of the preclearance process. This case is different. It demonstrates the acute federalism costs when Section 5 is invoked to prevent a State from implementing changes to its electoral maps necessitated by population growth. The requirements of the Constitution and Section 2 ensure the absence of unconstitutional consideration of race. In contrast, the requirements of Section 5, especially as interpreted by the district court, virtually mandate an obsession with race and guarantee unprecedented intrusions into state sovereignty.

The decision below clearly merits this Court's review in its own right and would complement other Section 5 cases by showing the difficulties with the practical administration of the statute as reauthorized in 2006. The Court should note probable jurisdiction and set this case for oral argument this Term so that Texas can implement its legislatively enacted plans for the next electoral cycle.

STATEMENT OF THE CASE

A. The Voting Rights Act

Texas is a "covered" jurisdiction subject to Section 5 of the Voting Rights Act of 1965 ("VRA"), 42

U.S.C. § 1973c. For covered jurisdictions, Section 5 reverses the normal rule that a duly enacted law takes immediate effect by "suspending all changes in state election procedure" until they are "submitted to and approved by a three-judge Federal District Court in Washington, D.C., or the Attorney General." *Northwest Austin*, 129 S.Ct. at 2509. To obtain preclearance, a covered jurisdiction must show that the voting change neither "has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color," or because of one's membership in a "language minority group." 42 U.S.C. § 1973c(a).

Although Section 5 was originally conceived of as an emergency provision authorized only as a temporary measure for five or seven years, as Congress has gotten further removed in time from the events that initially precipitated Section 5, it has reauthorized the law for substantially longer periods. In 2006, Congress reauthorized Section 5 for an additional twenty-five years and purported to abrogate this Court's decisions in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) ("*Bossier Parish II*"), both of which relied on the canon of constitutional avoidance.

Georgia held that the retrogression inquiry is not "focus[ed] solely on the comparative ability of a minority group to elect a candidate of its choice." 539 U.S. at 480. Any other holding would likely violate the Equal Protection Clause by making racial considerations "the predominant factor in redistricting" by covered jurisdictions. *Id.* at 491-92

(Kennedy, J., concurring). Congress nevertheless sought to overrule *Georgia* by providing that Section 5 protects the "ability . . . to elect." 42 U.S.C. § 1973c(b); *see id.* § 1973c(d).

In *Bossier Parish II*, this Court held that Section 5's purpose prong prohibits only *retrogressive* purposes. 528 U.S. at 336. The Court warned that construing Section 5 to reach *any* discriminatory purpose, including those unrelated to retrogression, would "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about [Section] 5's constitutionality." *Id.* (citation omitted). Yet Congress overruled *Bossier Parish II* in the 2006 reauthorization by providing that Section 5's purpose prong "shall include *any* discriminatory purpose," regardless of whether that purpose is retrogressive. 42 U.S.C. § 1973c(c) (emphasis added).

B. Texas' Redistricting Process

Texas enjoyed remarkable population growth in the last decade. The 2010 census revealed that Texas' total population had grown by nearly 4.3 million people, to 25,145,561. Based on that increase, Texas was apportioned four additional seats in the U.S. House of Representatives, for a total of 36 seats.

The Legislature moved quickly to pass new redistricting plans. In the House, leadership and staff held several meetings with House members from both parties, and with groups that represent minority interests, such as the Mexican American Legal Defense and Education Fund and the Mexican

American Legislative Caucus. In the Texas Senate, the Redistricting Committee also conducted proactive outreach with interested parties, including outside groups. Both the House and Senate released their proposed plans to the public and held multiple hearings on those plans. The new maps for the Texas House and Senate were signed into law in June 2011, and the plan for the U.S. House was signed into law in July 2011.

C. Texas' Preclearance Suit

One day after the congressional plan was signed into law, Texas formally sought judicial preclearance from a three-judge district court in Washington, D.C. To facilitate the preclearance process, Texas voluntarily provided tens of thousands of pages of information to DOJ about its plans and coordinated numerous interviews of state officials. Two dozen individuals and interest groups also intervened in the Section 5 case (over Texas' objection) and sought extensive discovery of their own.

Texas moved for summary judgment on both the purpose and effect prongs of Section 5. The State proposed a retrogression test that would have allowed a clear and straightforward comparison of the districts in the benchmark plans and enacted plans. Prospectively, Texas' proposed standard would have given covered jurisdictions relatively clear guidance as to whether their plans raised Section 5 concerns. But the district court rejected Texas' proposed standard, denied summary judgment, and set the case for trial. App.312-18.

Between the district court's denial of summary judgment and the end of trial, this Court reviewed and vacated interim maps adopted by a different three-judge district court in the Western District of Texas. *See Perry v. Perez*, 132 S. Ct. 934 (2012). The Texas district court subsequently adopted new interim maps that will be used for the 2012 election cycle while the preclearance claims are being litigated.

D. The District Court's Decision

Following additional discovery, a two-week trial, and extensive briefing, the district court denied preclearance for all three of Texas's redistricting plans. The court's decision explicitly turned on Congress' 2006 changes to Section 5. It stressed that "[i]n the most recent reauthorization of the VRA, Congress further reinforced the meaning of the effect prong by stating that minority voters' 'ability to elect' their candidates of choice is the appropriate measure of whether a proposed change will be retrogressive." App.7. The court also emphasized that "[i]n direct response" to this Court's holding in *Bossier Parish II*, "the 2006 amendments to section 5 clarified that the term 'purpose' must be read more broadly and includes 'any discriminatory purpose.'" App.33-34.

Discriminatory Effect. Having rejected Texas' bright-line retrogression standard, the district court employed a "multi-factored, functional analysis" to judge retrogression. App.8. This analysis viewed districts with over 65% minority voting age population as presumptive "ability" districts, treated some (but not all) cross-over and coalition districts as ability districts, and relied on a host of "other factors"

including an open-ended list of endogenous and exogenous election results, App.10-29, and whether an enacted plan contains the same relative proportion of ability districts, App.45-51.

This "functional analysis" led the district court to conclude that Texas's congressional and state house plans retrogress. The court held that Texas' congressional plan retrogressed because it failed to create at least one additional minority congressional district in response to population growth. App.45-46. The court reasoned that Section 5 required the State to create an additional minority district to maintain the same proportion of minority districts as the benchmark plan. App.48-51. Under the district court's standard, a congressional plan that contains the *same number* of minority ability districts as the benchmark could violate Section 5 if it failed to earmark newly apportioned seats for racial minorities. *Id.*[1] Indeed, Texas' standard showed that the enacted plan actually *increased* the number of ability districts. App.303-04.

Turning to the Texas House, the court held that the State's enacted plan eliminated four minority

[1] The court found that CD 23 was a protected district even though it elected the Hispanic-preferred candidate less than half of the time, and found that it was not an ability district in the enacted plan even though its HCVAP *increased*. App.39-45. Two judges also held that CD 25 was a "protected ability district," App.99-100, based on a "tri-ethnic coalition" of Anglos, Blacks, and Hispanics who voted together in general elections to elect a white Democrat. Without these findings, the "representation gap" would not have increased.

districts. App.69. But two of those districts—HD 35 and HD 117—remained majority-Hispanic, and were deemed "lost" solely because they are now more likely to reelect the incumbent Republicans (who are both Latino). Another "lost" district is an "alleged coalition district composed of Asian-American, Black, and Hispanic voters" who do not vote cohesively in primaries. App.83, 87. The last district, HD 33, was an unavoidable loss because Texas complied with the county-line provision in its constitution. Tex. Const. art. III, § 26. And the district court refused to consider whether these purported "losses" were offset by three other districts whose minority voting strength was *increased* compared to the benchmark. App.90-95.

Discriminatory Purpose. Texas introduced direct evidence showing that the Legislature's plans were intended to adhere to traditional redistricting principles, comply with the VRA, and achieve political advantage within permitted legal limits. And the district court found no direct evidence to the contrary. App.51-52, 61. The court nevertheless held based on a smattering of circumstantial evidence that the congressional and state senate plans were enacted for discriminatory (but not retrogressive) purposes.

For the congressional plan, the court relied on evidence regarding the removal of "economic generators" from black Democrats' congressional districts, App.53-56, the State's history of redistricting litigation, App.55-56, allegations that legislative opponents were excluded from the redistricting process, App.56, and purported

differences from past decades' procedures, App.56-57. For the state senate plan, the court focused on the plan's disparate impact on minorities around SD 10; testimony alleging that the legislature "rebuffed" the concerns of Senator Wendy Davis, an Anglo Democrat and SD 10's incumbent; and complaints by Democratic senators that they were excluded from the process. App.61-68.[2]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THE DISTRICT COURT ERRED BY APPLYING ERRONEOUS LEGAL STANDARDS FOR RETROGRESSIVE "EFFECTS" THAT EXACERBATE SECTION 5'S CONSTITUTIONAL DIFFICULTIES

The district court's denial of preclearance was based on a series of unprecedented applications of Section 5's "effects" test, each of which finds no support in the text of the statute and would substantially exacerbate the already-serious constitutional difficulties with Section 5.

A. The District Court Erroneously Faulted Texas for Departures from Proportional Representation

1. The district court held that Texas' legislatively enacted congressional plan had a retrogressive effect because it departed too much

[2] The court found that the state senate plan did not have a retrogressive effect. App.58-61.

from proportional representation. App.45-51.[3] That holding was based on the district court's so-called "representation gap" analysis, which is little more than an assessment of proportionality. The court defined the "representation gap" as the difference "between the number of [minority] districts *proportional representation would yield* and the number of [minority] districts the legislature actually created." App.48 (emphasis added). The court then compared the representation gap in the benchmark congressional plan to the representation gap in the new plan, and deemed the new plan retrogressive because the "gap" had increased by a single majority-minority district. *Id.*[4]

This novel gloss on Section 5's "effects" test has no basis in the text or structure of the VRA. In fact, it is expressly prohibited by Section 2 of the VRA, which provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). Although the district court denied that it was applying a proportionality test, the clear *effect* of the court's

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[3] This holding was a reversal from the court's summary judgment opinion, in which it concluded that "Section 5 is limited to preventing 'states from undoing or defeating the rights recently won' by minorities . . . it does not require states to . . . create new minority districts in proportion to increases in the minority group's population." App.334.

[4] Only Judges Griffith and Howell joined this section of the court's opinion. App.45 n.22.

analysis is that States will be found to have retrogressed if they do not add new majority-minority districts whenever they experience sufficient population growth. *See* App.48 ("When the representation gap grows, the degree of discrimination grows.").[5]

This Court has expressly rejected previous attempts to incorporate proportionality into the Section 5 standard. In *Abrams v. Johnson*, 521 U.S. 74, 97-98 (1997), Georgia received one new congressional seat in the 1990 redistricting, and the appellants asserted that Section 5 required Georgia to draw that new district as a majority-minority seat. In particular, the appellants argued that Georgia's plan retrogressed because "under the 1982 plan 1 of the 10 districts (10%) was majority black, while under the [new] plan 1 of 11 districts (9%) is majority black, and therefore blacks do not have the same electoral opportunities under the [new] plan." *Id.* at 97. This Court squarely rejected that argument, noting that under the appellants' logic, "each time a State with a majority-minority district was allowed to add one new district because of population growth, it would have to be majority-minority." *Id.* at 97-98. "This the Voting Rights Act does not require." *Id.* at

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[5] Although the district court insinuated that its analysis was tied to *minority* population growth, a finding of retrogression under the "representation gap" theory is not dependent on minority population growth. *See* App.48-50. Rather, the court's analysis simply earmarks new majority-minority districts any time a State is apportioned *enough* new districts, regardless of minority population growth.

98; *see Johnson v. DeGrandy*, 512 U.S. 997, 1026 (1994) (O'Connor, J., concurring) (noting that "[l]ack of proportionality can never by itself prove dilution").

The district court attempted to distinguish *Abrams* on the ground that it involved only a *single* new district, and thus does not control in a situation where a State "gains multiple seats." App.46-47. That is a distinction without a difference. It is true that Georgia gained only one new seat after the 1990 census, but the Court did not in any way suggest that the outcome of *Abrams* would have been different if Georgia had gained two or three new seats instead of one. The core holding of *Abrams* is that a departure from proportional representation is not retrogressive as long as the *total number* of majority-minority districts does not decrease compared to the benchmark plan. *Abrams* flatly rejected any rule that would have required States to earmark newly apportioned congressional seats for minority groups based on nothing more than "population growth." 521 U.S. at 97-98.

The district court's decision is also contrary to the structure of the VRA. It is Section 2, not Section 5, that is used to determine whether *additional* majority-minority districts need to be drawn in response to demographic changes; Section 5 only protects against retrogression. *See LULAC v. Perry*, 548 U.S. 399, 436-42 (2006) (analyzing alleged vote dilution under Section 2); *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994). This Court has repeatedly emphasized that Section 2 and Section 5 "combat different evils" and "impose very different duties upon the States." *Reno v. Bossier Parish School Bd.*,

520 U.S. 471, 477 (1997) ("*Bossier Parish I*"). In *Bossier Parish I*, this Court rejected the argument that "a violation of § 2 is an independent reason to deny preclearance under § 5." 520 U.S. at 477. Any such rule "would inevitably make compliance with § 5 contingent upon compliance with § 2," and would effectively "replace the standards for § 5 with those for § 2." *Id.*

The district court clearly erred in conflating the Section 2 and Section 5 inquiries. The court expressly relied on Section 2 cases, *see* App.47-48, and noted that its analysis was "subject to the caveat that a State is only required to draw a new district if possible, *i.e.*, if it can draw a new ability district without violating . . . the demands of section 2," App.50 n.28. Put simply, the district court forced Texas to affirmatively disprove a Section 2 vote dilution claim in order to receive preclearance under Section 5, despite this Court's holding that preclearance is not "contingent upon compliance with § 2." *Bossier Parish I*, 520 U.S. at 477.[6]

2. The district court's "representation gap" analysis also raises serious constitutional concerns

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[6] Even though the district court limited its holding to situations in which a new district would be required under Section 2, it did not analyze whether Texas' new maps actually *violated* Section 2. The court merely asserted that Section 2 "will not be an issue here." App.50 n.28. And, although the district court's test purports to examine the "relationship between a minority group's share of CVAP statewide and the number of opportunity districts," App.47, it omits any consideration of Asian-Americans or other minority groups.

by forcing covered jurisdictions to set aside new congressional seats as majority-minority districts whenever the "gap" crosses a certain numerical threshold.

The Equal Protection Clause bars States from adopting redistricting plans in which "race was the predominant factor" motivating the drawing of certain districts because "[r]acial gerrymandering, even for remedial purposes . . . threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Miller*, 515 U.S. at 912 (citation omitted); *see Georgia*, 539 U.S. at 491 (Kennedy, J., concurring) (criticizing regime in which "considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5").

But that is exactly what the district court's analysis requires. The "representation gap" analysis mandates that once the "gap" becomes large enough, a jurisdiction *must* add new race-based districts, regardless of "traditional race-neutral districting principles," such as "compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests." *Miller*, 515 U.S. at 916. Any interpretation of Section 5 that forces States to elevate race above all other considerations once an arbitrary numerical threshold is crossed

cannot be squared with the Equal Protection Clause and should be rejected.[7]

B. The District Court Erred in Requiring the Protection of Coalition and Crossover Districts

The district court further erred by concluding that "coalition" and "crossover" districts are protected by Section 5, even though no single minority group has the ability to elect its candidate of choice in those districts. App.24-33. In a crossover district, a minority group must work together with white voters to elect the group's candidate of choice. In a coalition district, two or more minority groups must work together to elect the group's preferred candidate. Finding such districts to be protected by Section 5 disregards the VRA's text and this Court's jurisprudence, and would further exacerbate the constitutional defects of Section 5.

1. Section 5 protects the "ability . . . to elect." 42 U.S.C. § 1973c(b); *see id.* § 1973c(d) (purpose of Section 5 "is to protect the *ability* of [minority] citizens to elect their *preferred* candidates of choice" (emphasis added)). A coalition or crossover district is, by definition, a district in which a particular minority group lacks the "ability . . . to elect" its preferred candidate of choice without assistance from other voters. The candidate who ultimately prevails

[7] Had the court employed the bright-line test that Texas proposed, *see infra* Part I.C, it would have concluded that the "representation gap" actually *decreased* compared to the benchmark. *See* App.303-04.

is the preferred choice of the coalition as a whole. Unless the coalition voted cohesively for the same candidate in the primary election, it certainly cannot be said that each group is able to elect its *preferred* candidate of choice, as opposed to a compromise candidate. The plain text of the VRA thus makes clear that the statute does not protect coalition and crossover districts.

This Court has not specifically addressed coalition and crossover districts in the Section 5 context, but its decisions in Section 2 cases are illustrative and should have held sway before the district court. The Court has held that the VRA requires creation of a minority district only when, *inter alia*, the group claiming vote dilution is "sufficiently large and geographically compact to constitute *a majority in a single-member district*" that is "politically cohesive." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (emphasis added).

This Court has held that it would be "contrary to the mandate" of the VRA to recognize a vote dilution claim based on a State's failure to create a crossover district. *Bartlett v. Strickland*, 556 U.S. 1, 14 (2009). That is because the VRA simply does not "grant[] special protection to a minority group's right to form political coalitions." *Id.* at 15. In a crossover district, a minority group has the "opportunity to join other voters—including other racial minorities, or whites, or both—to reach a majority and elect their preferred candidate." *Id.* at 14. But the group cannot "elect

that candidate based on their own votes and without assistance from others." *Id.*[8]

This Court also held in *Perry v. Perez*, 132 S. Ct. 934, 944 (2012), that a district court lacks remedial authority to draw a race-based coalition district in response to *either* a Section 2 or Section 5 violation. It would make little sense to forbid courts from drawing coalition districts in response to a Section 5 violation but *require* States to draw such districts to avoid a Section 5 violation.

The driving force in a coalition or crossover district is *politics*, not race. Granting protected status to such districts thus poses a serious risk that "ephemeral political alliances having little or no necessary connection to discrimination will be confused with cohesive political units joined by a common disability of chronic bigotry." *LULAC v. Midland School Dist.*, 812 F.2d 1494, 1504 (5th Cir. 1987) (Higginbotham, J., dissenting); *see also Baird v. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) (VRA "is a balm for racial minorities, not political ones—even though the two often coincide . . ."). When a minority group does not comprise a majority of a single-member district, nothing in Section 5 immunizes that group "from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the

[8] *Bartlett* did not address coalition districts, 556 U.S. at 13-14, but the Court's reasoning is equally applicable to those districts.

waning of racism in American politics." *DeGrandy*, 512 U.S. at 1020.

The flaws of the district court's approach are best illustrated by its treatment of District 25 in the congressional plan. Judges Howell and Collyer concluded that District 25 was a protected crossover district, *see* App.99-100, even though minorities comprised only 36% of the citizen voting age population. Indeed, available data indicate that minority voters cast a mere 10% of the ballots in District 25 in the 2010 election, and 18% of ballots in 2008. App.137-38. Minority voters thus had no ability whatsoever to elect their "preferred candidate of choice." Instead, they simply voted as a bloc in the general election for the (white) Democrat who had represented that district for many years. But, as Judge Griffith explained, a district does not attain protected status merely because minority voters "provide[] the margin of victory in a competitive Democratic district." App.141.[9]

2. Interpreting Section 5 to protect coalition and crossover districts would exacerbate the constitutional difficulties of the statute by significantly increasing the extent to which redistricting decisions turn on racial considerations. As this Court explained, recognition of claims based on a State's refusal to create a crossover district "would place courts in the untenable position of

[9] The district court's erroneous holding that coalition and crossover districts were protected by Section 5 also infected its analysis of the Texas House map. App.83-89.

predicting many political variables and tying them to race-based assumptions." *Bartlett*, 556 U.S. at 17.

Such a holding would "demand the very racial stereotyping the Fourteenth Amendment forbids," *Miller*, 515 U.S. at 927-28, by forcing covered jurisdictions both to classify voters by race and to make predictions about how different racial groups will vote in the future. And, because there is no easily administrable standard for identifying coalition and crossover districts, map-drawers would have little guidance about how to avoid Section 5 violations, and preclearance cases would inevitably become bogged down in dueling expert testimony (as this case did).

* * *

For these reasons, the Court should hold that a covered jurisdiction's failure to maintain a coalition or crossover district does not violate Section 5. At a minimum, however, the Court should establish a bright-line rule that a coalition or crossover district is not protected by Section 5 unless the groups that comprise the "coalition" vote cohesively in primary elections. *Cf. Growe v. Emison*, 507 U.S. 25, 41 (1993) (holding that "proof of minority political cohesion is all the more essential" when the alleged vote dilution is based on "an agglomerated political bloc"). Merely requiring political cohesion in the general election is insufficient, because it does not distinguish between minority groups with overlapping political affiliations. If the groups comprising an alleged coalition do not vote cohesively in the primary, this should be conclusive evidence

that the "coalition" is actually based on politics rather than race, and is not protected by Section 5.[10]

C. The District Court Should Have Employed a Bright-Line Test for Retrogressive Effects Rather Than a Vague and Indeterminate "Functional Analysis"

Texas offered a bright-line test for analyzing retrogressive effect that looks solely to minority demographics in the benchmark plan and the new plan. Section 5 should be interpreted to protect only those districts where a single minority group constitutes 50% or more of the voting age population. For Latino-majority districts, it is appropriate to consider citizen voting age population ("CVAP") to ensure that only individuals who are eligible to vote are included in the analysis. *See LULAC*, 548 U.S. at 441 (relying on CVAP, rather than VAP, for Latino-majority districts).

Consistent with the text of Section 5, this test would accurately identify districts in which a minority group has the "ability" (*i.e.*, opportunity) to elect its preferred candidate, without assistance from other groups. 42 U.S.C. § 1973c(a). It would also

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[10] The evidence in the Section 2 trial unequivocally demonstrated that the groups comprising the purported coalitions in Texas do not vote cohesively in the primaries. *See* Trial Tr. at 265 (Latinos and African Americans are not cohesive in Democratic primaries); *id*. at 506-08 (plaintiffs' expert stating that African-Americans are the "least likely group to support Latinos in a Democratic primary").

provide an administrable standard that covered jurisdictions could apply to know—rather than guess—that a proposed plan was consistent with Section 5.

As this Court has explained, a majority-minority requirement "has its foundation in principles of democratic governance" because "it is a special wrong when a minority group *has 50 percent or more of the voting population* and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district." *Bartlett*, 556 U.S. at 19 (emphasis added). A bright-line 50% rule would also be a "workable standard" that "draws clear lines for courts and legislatures alike," *id.* at 17, thus minimizing the inherent constitutional burdens of Section 5 on covered jurisdictions. If Section 5 can continue to operate without imposing untenable sovereignty costs, the need for a bright-line rule that avoids obvious retrogression while leaving a role for Section 2 litigation is imperative.

The district court nonetheless rejected Texas' easily administrable rule in favor of a "multi-factored functional analysis." App.8.[11] The court admitted that its analysis provides no clear guidance to covered jurisdictions because it "does not lend itself

[11] After the court rejected Texas' objective standard, the State presented its own "statewide functional analysis" at trial. The court erred by not adopting that analysis for several reasons, but primarily because it—unlike the "functional analysis" adopted by the district court—does not turn on pinpointing the indeterminate point at which a district "performs" or ceases to "perform" electorally.

to a formalistic inquiry" and "can rarely be measured by a simple statistical yardstick." App.340.

The district court's analysis also erroneously focused on political *outcomes* rather than *ability*. Section 5 protects only a group's "ability" to elect its preferred candidate. 42 U.S.C. § 1973c(a). The district court departed from the text and changed the analysis in a subtle but critical way by assessing whether minority groups had a "*demonstrated* ability to elect" their candidate of choice. App.28, 39, 84 (emphasis added).

This change flips the VRA on its head. It is well-established that the VRA protects "equality of opportunity," and is "not a guarantee of electoral success for minority-preferred candidates of whatever race." *DeGrandy*, 512 U.S. at 1014 n.11. If a minority group comprises more than 50% of the voting age population of a district, then it unquestionably has the *ability* to elect its candidate of choice. Section 5 does not mandate that States also reverse-engineer those districts to guarantee a particular outcome.

The district court's analysis also requires covered jurisdictions and courts to engage in the patronizing and constitutionally dubious process of identifying a minority group's "preferred candidate of choice." That inquiry "perpetuate[s] stereotypical notions about members of the same racial group—that they think alike, share the same political interests, and prefer the same candidates," thus "exacerbat[ing] the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract." *Shaw v. Reno*, 509 U.S. 630, 631 (1993). It is also

empirically false. Indeed, several of the disputed districts are areas in which the Legislature sought to protect the seats of *Latino Republicans*. App.76 (Rep. Pena); App.82 (Rep. Garza). These changes have nothing to do with race and everything to do with politics.

In the same way, the district court's analysis also requires covered jurisdictions and courts to obsess over registration and turnout patterns, without ever justifying why such a burden is warranted. *See* App.320-21 ("[A] section 5 analysis must go beyond mere population data to include factors such as minority voter registration, [and] minority voter turnout."). That focus is particularly hard to justify in the wake of this Court's observations that "[v]oter turnout and registration rates now approach parity" and that "the racial gap in voter registration and turnout is lower in States originally covered by § 5 than it is nationwide." *Northwest Austin*, 557 U.S. at 203.

* * *

In sum, Texas offered an easily administrable retrogression standard that complies with the text and purpose of the VRA, provides clear guidance to map-drawers, and minimizes the inherent constitutional difficulties with Section 5. The district court, in contrast, insisted upon an amorphous totality-of-the-circumstances test that provides no meaningful guidance to covered jurisdictions, increases the role race will play in the redistricting process, and makes electoral *success*—not ability—for minority-preferred candidates the relevant

consideration. That test exacerbates the inherent burdens and constitutional difficulties with Section 5.

II. THE DISTRICT COURT ERRED BY CONCLUDING THAT THE PLANS WERE ENACTED WITH A DISCRIMINATORY PURPOSE

The district court erred by finding a discriminatory purpose based on a handful of factual allegations that do not remotely reflect intentional discrimination on the basis of race, let alone a specific intent to retrogress. At most, those facts demonstrate a *partisan* motivation, which is obviously not prohibited by the VRA.

Moreover, this case amply illustrates the constitutional difficulty with Congress' decision in the 2006 reauthorization to override decisions of this Court that were designed to ameliorate the constitutional difficulties with Section 5's purpose prong. In *Bossier Parish II*, this Court held that interpreting Section 5 to prohibit "discriminatory but nonretrogressive vote-dilutive purposes" would raise grave constitutional concerns by "exacerbat[ing] the substantial federalism costs that the preclearance procedure already exacts." 528 U.S. at 336. Yet the 2006 reauthorization purports to abrogate *Bossier Parish II* and reintroduces the exact constitutional flaws that this Court sought to avoid. The district court's finding of discriminatory purpose is based on that unlawful standard and cannot stand.

A. The District Court Erred by Finding a Discriminatory Purpose Despite the Absence of Any Direct Evidence of Discrimination

This Court has emphasized that "[c]aution is especially appropriate" before finding a discriminatory purpose when "the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). That is, "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be [minority] Democrats and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999); *see Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (discriminatory purpose requires an action to be taken "because of, not merely in spite of," racial considerations).

The Texas Legislature drew new redistricting plans to comply with the VRA, adhere to traditional redistricting principles, and achieve political advantage for the Republican Party. The State presented direct evidence confirming each of these purposes, *see* DN 201 at 20-29, and the district court found "no direct evidence" to the contrary, App.51-52, 61. The district court nonetheless disregarded Texas' stated and well-documented purposes based on an *ad*

hoc assessment of the "circumstances surrounding" the enactment of the plans. App.52.[12]

Such indirect evidence is plainly insufficient to support a finding of a discriminatory purpose (and would not suffice in a Section 2 suit with the burden on the challenger). Much of this evidence consists of self-serving testimony from legislators in the political minority who opposed the new plans, and the fact that the Legislature did not adopt amendments offered by those opponents. *See* App.53-56, 61-66. The court also relied on decades-old judicial decisions finding discrimination, *see* App.55-56, despite this Court's warning that "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful," *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980). And the district court relied on testimony from opponents of the State's plans who complained that the legislative process was insufficiently "collaborative." App.66.

All of this evidence is equally consistent—indeed, more so—with Texas' stated political motivations. Removing the "economic engines" from certain districts—thus reducing members' ability to raise campaign contributions and bring home the pork—is more obviously explained as a partisan maneuver

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[12] This evidence was scant, despite a costly and time-consuming discovery process, which resulted in severe "intrusion into sensitive areas of state and local policymaking," *Northwest Austin*, 557 U.S. at 202. Texas produced this information even though much of it likely would have been subject to the legislative or attorney-client privilege.

rather than a racial one, especially in light of the court's finding that these changes were "not retrogressive." App.53-56. Similarly, the fact that opponents of the new maps were not intimately involved in the drafting process and were unable to achieve passage of their proposed amendments reflects their minority status in politics, not race.

Most baffling of all is the district court's finding that certain changes to a *white Democrat's* district in the Texas Senate map—as well as the fact that this Senator's complaints about her district were "rebuffed"—were attributable to race rather than politics. App.61-68 (Sen. Wendy Davis).[13] Further confirming its political, yet race-neutral, motivations, the Legislature went out of its way to protect the districts of several minority incumbents from the Republican party. App. 76 (Rep. Pena); App. 82 (Rep. Garza).

In sum, the district court's finding of a discriminatory purpose based on a hodgepodge of circumstantial evidence—all of which is more consistent with a partisan, rather than racial, motivation—was both erroneous and illustrative of the problems with putting the burden of disproving a racial motivation on a sovereign State. The practical and constitutional difficulties with such a reversed burden with respect to discriminatory—as opposed to retrogressive—intent were recognized by this Court

[13] That holding was especially prejudicial, as it was the sole basis on which the district court denied preclearance of the Senate plan. App.58-61.

in *Bossier Parish II* and disregarded by Congress in the 2006 reauthorization. The district court's intent analysis is flawed even as an application of the 2006 reauthorization, but also underscores the wisdom of this Court's decision in *Bossier Parish II*.

B. The District Court's Decision Demonstrates the Constitutional Flaws with Congress' Decision to Override *Bossier Parish II* in the 2006 Reauthorization

In *Bossier Parish II*, this Court held that Section 5's purpose prong forbids only an intent to accomplish "retrogressive dilution." 528 U.S. at 328. As the Court explained, with respect to both the purpose and effects prongs, Section 5 "prevents nothing but backsliding, and preclearance under [Section] 5 affirms nothing but the absence of backsliding." *Id.* at 335.[14] The United States had argued that Section 5 prohibits *any* racially discriminatory purpose, not just the specific intent to accomplish retrogression. But the Court squarely rejected that position, noting that it would "blur the distinction between [Section] 2 and [Section] 5" and "chang[e] the [Section] 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan." *Id.* at 336 (citation omitted). The

[14] This limited prophylactic scope is not merely a narrow understanding of the Act's history. "To deny preclearance to a plan that is *not* retrogressive—*no matter how unconstitutional it may be*—would risk leaving in effect a status quo that is even worse." *Bossier Parish II*, 528 U.S. at 336.

Court also cautioned that reversing the burden of proof and requiring a covered jurisdiction to carry the burden of proving the absence of "any discriminatory purpose" would "exacerbate the substantial federalism costs that the preclearance process already exacts . . ., perhaps to the extent of raising concerns about [Section] 5's constitutionality." *Id.*; *see also Northwest Austin*, 129 S. Ct. at 2512.

Congress ignored those concerns, and the district court's decision demonstrates the wisdom of *Bossier Parish II*. In the 2006 reauthorization of Section 5, Congress purported to abrogate *Bossier Parish II* by redefining "purpose" to "include *any* discriminatory purpose." 42 U.S.C. § 1973c(c) (emphasis added). Congress purported to overturn this Court's statutory decisions as if it were operating under an ordinary legislative power, rather than pursuant to its extraordinary and sensitive responsibilities under Section 2 of the Fifteenth Amendment and Section 5 of the Fourteenth Amendment. *See, e.g.,* H.R. Rep. No. 109-478, at 93 (Congress "rejects the Supreme Court's holding in *Reno v. Bossier Parish*"). Congress thus reintroduced the very constitutional problems this Court sought to avoid. *See Shelby County v. Holder*, 679 F.3d 848, 888 (D.C. Cir. 2012) (Williams, J., dissenting).

The district court's decision amply demonstrates the constitutional difficulties with forcing covered jurisdictions not only to prove the absence of a retrogressive purpose, but to demonstrate the absence of any racially discriminatory purpose. First, the district court was explicit that the facts on which it relied in finding a discriminatory purpose

"*are not retrogressive*." App.53, 58 (emphasis added). But given the correlation between partisan voting patterns and race—which is less pronounced in parts of Texas than many other places, as demonstrated by the legislative efforts to protect minority Republicans—placing a burden on a sovereign State to prove the absence of any discriminatory motive takes Section 5's inherent intrusion into state sovereignty to another—and unconstitutional—level. It is "never easy to prove a negative," *Elkins v. United States*, 364 U.S. 206, 218 (1960), and it is particularly "unfair" to require a covered jurisdiction—especially one composed of two separate legislative bodies of over 181 individual members—to negate a subjective mental state, *see Patterson v. New York*, 432 U.S. 197, n.13 (1977).

To the extent the 2006 reauthorization mandates the very same legal standard that this Court rejected in *Bossier Parish II*, that standard is unconstitutional and cannot be used as the basis for denying preclearance.

III. THE TEXAS SENATE PLAN IS ENTITLED TO PRECLEARANCE BECAUSE DOJ HAS ADMITTED THAT IT COMPLIES WITH SECTION 5

DOJ conceded before the district court that Texas "is entitled to a declaratory judgment" granting preclearance of the redistricting plan for the Texas Senate. DN 45 at 1, 8; *see* App.58. That should have been the end of the matter. Instead, however, the district court allowed a number of intervenors to force Texas to litigate claims that DOJ did not deem worth pursuing. That holding was clear error.

This Court should hold that private parties have neither standing nor a right of action to intervene in a judicial preclearance case to oppose preclearance—especially when those intervenors seek to challenge a voting change that DOJ has found unobjectionable.

Maintaining judicial preclearance, as a meaningful alternative to administrative preclearance, is necessary to minimize Section 5's inherent imposition on state sovereignty. Requiring a State to bring a declaratory judgment action to allow its law to go into effect is a remarkable deviation from the normal principles of federalism and equal sovereignty. Forcing a State to obtain the prior approval of a federal executive branch official—with no judicial option—would be far more remarkable. For this reason, a covered jurisdiction cannot be penalized for seeking judicial preclearance by forcing them to litigate against both DOJ and dozens of private parties. This Court should clarify that private parties have neither standing nor a right of action to challenge a State's voting laws under Section 5—especially where DOJ finds that the law complies with Section 5.[15]

A. Section 5 does not give any *individual* voter or group of voters the right to reside in a particular district or elect their preferred candidates of choice. Rather, the Section 5 inquiry looks to the *overall*

[15] The district court also allowed intervenors to challenge the State's treatment of District 25 in the congressional plan, even though DOJ conceded that this district was not protected by Section 5. App.123.

effect of a redistricting plan. *See Georgia*, 539 U.S. at 479 ("[I]n examining whether the new plan is retrogressive, the inquiry must encompass the entire statewide plan as a whole."). Because Section 5 does not confer any individual rights, no private party has a "claim" under Section 5 that can provide the basis for intervention under Rule 24(b)(1)(B). It is DOJ's sole prerogative to determine whether to take the very serious step of interposing an objection to a sovereign State's duly enacted redistricting plan; as it should be given the unique federalism costs imposed by Section 5.

This Court has made clear that individual litigants have no role to play when DOJ does not object to a voting change and grants administrative preclearance. As the Court explained, "[t]he extraordinary remedy of postponing the implementation of validly enacted state legislation was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission." *Morris v. Gressette*, 432 U.S. 491, 504–05 (1977). Indeed, preserving judicial preclearance as a meaningful alternative to administrative preclearance demands as much. When administrative preclearance provides an expedient alternative to judicial preclearance, it ameliorates the constitutional burdens of Section 5. But if administrative preclearance were the only practical option for covered jurisdictions, that would exacerbate the constitutional difficulties inherent in Section 5. Allowing private parties to object to voting changes in court to which DOJ does not object effectively forecloses judicial preclearance as a viable

option and pushes Section 5 over the constitutional edge.

Indeed, if anything, DOJ's admission to a court that a plan is entitled to preclearance should carry even more weight than the Attorney General's failure to object to a change in the administrative preclearance process. Administrative preclearance is granted automatically if the Attorney General "has not interposed an objection within sixty days" of the submission. 42 U.S.C. § 1973c(a). In litigation, however, DOJ must "admit or deny" each allegation in the complaint. Fed. R. Civ. P. 8(b). Here, DOJ affirmatively represented to the district court that Texas "*is entitled to a declaratory judgment*" granting preclearance of the Texas Senate map. DN 45 at 1, 8 (emphasis added).

Even if they are not allowed to intervene in Section 5 cases, private parties will remain free to challenge voting changes under Section 2 or the Constitution. *See Morris*, 432 U.S. at 506–07 ("Where the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation."). In such cases, the burden is appropriately on the challengers to prove a violation, not (as interpreted here) on the State to preemptively disprove every allegation against it. The defendant-intervenors here were already pursuing such claims in the Texas district court when they moved to intervene in this case. And in all events, any interested private parties can easily convey their views to the Section 5 court by filing an

amicus brief, just as they may submit letters to DOJ during the administrative preclearance process.

B. This Court should grant review to consider the role of private-party intervention more broadly, even as to plans to which DOJ objects.[16] Allowing private parties to intervene in judicial preclearance cases vastly increases the federalism costs of the preclearance regime. Section 5 is at or beyond the outer limits of Congress' constitutional authority even when DOJ is responsible for determining whether preclearance should be granted or denied. But at least DOJ faces some institutional and political constraints on its exercise of that authority. The same cannot be said for private individuals and interest groups.

Unchecked intervention in Section 5 cases also imposes significant monetary and litigation costs on covered jurisdictions. Each additional intervenor compounds the burden of discovery, motions practice, expert testimony, briefing, and trial. In this case, six DOJ lawyers entered appearances before the district court, but *twenty-two* lawyers entered appearances on behalf of twenty-four different intervenors. Those intervenors then insisted on taking their own

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[16] To the extent the Court reached a different conclusion in *Georgia v. Ashcroft*, 539 U.S. at 476, that holding should be limited to its facts or overruled. The 2006 reauthorization of Section 5 raises grave constitutional concerns, and this Court should take all steps necessary to alleviate those concerns. Ending or sharply curtailing the abusive practice of *carte blanche* intervention would be a significant step in the right direction.

discovery, filing their own briefs and motions, tendering their own experts, and making their own presentations at trial—all of which Texas was forced to respond to separately.[17] Worse yet, D.C. Circuit precedent allows intervenors to collect attorneys' fees whenever a State unsuccessfully seeks judicial preclearance. *See Medina Cnty. v. United States*, 683 F.2d 435, 440 (D.C. Cir. 1982).

CONCLUSION

Each of the errors the district court committed exacerbated the inherent constitutional difficulties with Section 5. If Texas' position on these errors does not prevail, then Section 5 is not just constitutionally problematic, as this Court has repeatedly recognized, but the 2006 reauthorization of Section 5 would be clearly unconstitutional. While this Court may have other opportunities to consider the constitutionality of Section 5 in the abstract, this case demonstrates the constitutional difficulties with Section 5 in its practical application. This Court should grant plenary review to consider the multiple issues implicated by the decision below and the constitutional difficulties with the actual administration of the statute. Indeed, if this Court

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[17] This case is hardly an isolated example. In *South Carolina v. United States*, No. 12-cv-203 (D.D.C.), eighteen separate parties, represented by more than twenty-five attorneys, intervened in a case seeking judicial preclearance of a voter identification law. And in Texas' own voter ID preclearance trial, *Texas v. Holder*, No. 12-cv-128 (D.D.C.), the State faced over thirty intervenors, represented by thirty-five attorneys.

considers Section 5's constitutionality in another case, plenary review of this case—an as-applied challenge that amply demonstrates the practical problems with reversing burdens of proof, allowing multiple intervenors, and saddling covered jurisdictions with amorphous standards that compel the consideration of race—would materially enhance the Court's overall consideration of this incredibly important issue.

The Court should note probable jurisdiction and set this case for oral argument this Term to ensure that litigation against Texas' redistricting plans is resolved before the onset of the next election cycle.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas
DANIEL T. HODGE
First Assistant Attorney General
JONATHAN F. MITCHELL
Solicitor General of Texas
JAMES D. BLACKLOCK
J. REED CLAY, JR.
MATTHEW FREDERICK
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
MICHAEL H. MCGINLEY
BANCROFT PLLC
1919 M Street, N.W.
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

ADAM K. MORTARA
JOHN M. HUGHES
BARTLIT BECK HERMAN PALENCHAR & SCOTT LLP
54 W. Hubbard Street, Ste. 300
Chicago, IL 60654
(312) 494-4400

Counsel for Appellants

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