No. 12-496

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

APPELLEE-INTERVENORS' MOTION TO AFFIRM

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, none of the Appellee-Intervenors filing the instant Motion to Affirm has a parent corporation or issues any stock. The Texas State Conference of NAACP Branches is an affiliate of the national NAACP.

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Appellee-Intervenors, comprising five of the seven groups of organizations and individuals granted intervention below, respectfully submit this Motion to Affirm in response to the Jurisdictional Statement filed by the State of Texas.[1] A sixth group of Appellee-Intervenors also joins in the arguments set forth herein.[2]

REASONS FOR GRANTING THE MOTION TO AFFIRM

The district court, after giving due consideration to the "full record in this case [which] runs many thousands of pages, including over a thousand exhibits," App. 6 n.4, denied preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to redistricting plans enacted by the State of Texas for Congress and the state legislature. The three-judge district court unanimously determined that two of the three plans, for Congress and the state Senate, were motivated by a discriminatory purpose, and that there was substantial evidence

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[1] The Appellee-Intervenors filing this motion include: 1) the Mexican American Legislative Caucus of the Texas House of Representatives; 2) the Texas State Conference of NAACP Branches, Juanita Wallace, Rev. Bill Lawson, Howard Jefferson, Ericka Cain, Nelson Linder, and Reginald Lillie; 3) the Texas Legislative Black Caucus; 4) Greg Gonzales, Lisa Aguilar, Daniel Lucio, Victor Garza, Blanca Garcia, Josephine Martinez, Katrina Torres, and Nina Jo Baker; and 5) the League of United Latin American Citizens.

[2] Appellee-Intervenors Wendy Davis, Marc Veasey, John Jenkins, Vicki Bargas, and Romeo Munoz join in the arguments in this motion but are filing a separate motion to affirm specifically focusing on the state Senate plan.

that the state House plan also had a discriminatory purpose. In addition, all three judges agreed that the Congressional and House plans would retrogress minority electoral opportunity, and thus violated the Section 5 "effect" standard as well. These determinations are fully supported by the record below, and were based on established principles for applying Section 5 to redistricting plans.

Texas's arguments for plenary review by this Court are insubstantial. As to discriminatory purpose, Texas fails to contest the abundance of evidence on which the district court relied in making its purpose findings. Instead, Texas centers its argument on its concession that the legislature also engaged in political gerrymandering, and from this it concludes that no racial purpose was present. However, the district court fully considered and rejected the State's argument that the legislature was solely motivated by partisan politics, and, contrary to what Texas suggests, racial and partisan motivations are not, as a matter of law, mutually exclusive. Texas also challenges the constitutionality of that part of Congress' 2006 reauthorization of Section 5 which bars voting changes adopted with "any discriminatory purpose," 42 U.S.C. § 1973c(c), listing as one of the questions presented "whether the 2006 reauthorization . . . is constitutional." J.S. Questions Presented. But "[t]he constitutionality of section 5 was neither briefed nor argued" to the district court and, accordingly the court "express[ed] no opinion on this significant point." App. 23-24 n.11. Since "the question presented was not pressed or passed upon below,"

United States v. Williams, 504 U.S. 36, 41 (1992), Texas may not introduce it on appeal.

Texas's criticisms of the district court's retrogression determinations also are quite limited. Texas faults the district court for relying on the standard methodology for assessing minority voters' electoral opportunity, and wrongly attempts to elevate factual disagreements into legal disputes. Moreover, the district court's "racial purpose" finding as to the Congressional plan provides a separate and independent basis for affirming that preclearance denial and, notably, one of the minority ability districts eliminated by the new plan was the very district whose redrawing in 2003 led this Court, in *LULAC v. Perry*, 548 U.S. 399 (2006), to conclude that that Texas Congressional redistricting plan violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. As to the state House plan, Texas identifies just one district where the district court allegedly erred in its retrogression ruling, although the court's determination in that regard was based on the legislature's elimination of multiple districts in which minority voters had an ability to elect their preferred candidates.

Finally, Texas attempts to bypass the facts of this case by criticizing the district court's grant of permissive intervention to minority voters and organizations. The district court, however, simply adhered to this Court's longstanding decisions regarding intervention in Section 5 litigation.

In sum, the district court applied Section 5 in the manner that Congress designed the statute to operate, and unanimously determined, in accordance with this Court's well-established precedent and a real-world analysis of the submitted plans, that Texas had engaged in intentional discrimination and had retrogressed minority electoral opportunity. These findings provide strong evidence of the continuing need for the preclearance remedy. The district court's judgment, accordingly, does not merit plenary review and should be affirmed.

STATEMENT OF THE CASE

1. Minority voters in Texas face substantial hurdles in their ongoing struggle to participate equally in the political process. In the four redistricting cycles preceding the 2010 Census, "Texas has found itself in court every redistricting cycle, and each time it has lost." App. 55-56. Indeed, the Attorney General has interposed a Section 5 objection to at least one of Texas's statewide plans in each of the past four redistricting cycles.[3] Now, once again, Texas has adopted statewide plans that discriminate against minority voters.

2. The 2010 Census showed a "dramatic increase" in Texas's population, as the State, now majority-minority, added more than four million

[3] http://www.justice.gov/crt/about/vot/sec_5/tx_obj2.php (listing Section 5 objections for Texas) (last visited December 5, 2012).

residents. App. 3. The increase was due almost entirely to growth in the State's minority population: minorities comprised 89 percent of the growth in total population, and 80 percent of the voting-age population growth. App. 45 & n.23. The State's Latino population, in particular, expanded substantially, accounting for two-thirds of the population increase. *Id.* Black population also grew significantly. *Id*. As a result, according to the 2010 Census, Latinos make up 26 percent of the State's citizen voting-age population ("CVAP") and African Americans make up 13 percent. App. 49 n.27.

3. Following the 2010 Census, Texas gained four seats in Congress, for a total of 36. Despite dramatic minority population growth, the legislature chose not to draw any additional Congressional districts in which minority voters would be able (in the context of racially polarized voting) to elect their preferred candidates. App. 37-45, 162-80, 186-92.

The district court applied the familiar "intent" factors of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977), to the Congressional plan, and found strong evidence of discriminatory purpose. In particular, the district court concluded that the legislature employed a race-based dual standard in drawing districts, disadvantaging the districts where minority voters had elected representatives, and that this was the product of a redistricting process that excluded minority congresspersons while catering to the desires of their Anglo counterparts. App. 51-57, 192-209.

The district court also found that the Congressional plan had a discriminatory effect under Section 5. Judge Griffith, joined by Judge Howell, concluded that the lack of any increase in the number of Latino ability districts was retrogressive in the context of the large increase in the size of the Congressional delegation and the dramatic growth in the Latino population. App. 45-51. Judge Howell, joined by Judge Collyer, further concluded that the new plan actually decreased, by one, the number of minority ability districts. App. 99-125, 180-85.[4]

4. The district court held that the state House plan was retrogressive because it eliminated four minority ability districts, and did not include any offset districts. App. 69.[5] The district court reached that conclusion after carefully evaluating the electoral circumstances present in each district contested by the parties. App. 68-95, 240-81. The court did not make a "purpose" determination, but nonetheless observed that "the full record strongly suggests that the retrogressive effect we have found may not have been accidental." App. 97. In this regard, the court observed: the legislature employed

[4] All three judges agreed that, at a minimum, there was no net increase in the number of minority ability districts. The state legislature eliminated two ability districts, Congressional District ("CD") 27 in southeastern Texas, App. 39, and CD 23, in west Texas, App. 43-45, while drawing two other offset districts. Judges Howell and Collyer further concluded that a third ability district (CD 25) was eliminated, App. 99, while Judge Griffith disagreed. App. 126.

[5] The House has 150 members elected from single-member districts. App. 307.

"a deliberate, race-conscious method to manipulate . . . the Hispanic vote" in the House plan, App. 96 (emphasis omitted); the redistricting process paid little heed to Voting Rights Act compliance, App. 95; and the plan (like the Congressional plan) disregarded the State's "dramatic" Hispanic population growth. App. 95.

5. The district court denied preclearance to the state Senate plan based on its finding that the legislature, for racially discriminatory reasons, fragmented a substantial African American and Latino population that had exercised a decisive role in a Tarrant County district.[6] App. 61-68. Because the trial court found this district had not yet become a minority ability district, this did not violate the non-retrogression standard. App. 58-61. However, the re-drawn district had "a disparate impact on minority voters," and (like the Congressional and state House plans) was the product of a process that "deviated from typical redistricting procedures and excluded minority voices . . . even as minority senators protested that section 5 was being run roughshod." App. 68. *See also* App. 209-25.

[6] The Senate has 31 members elected from single-member districts. App. 309.

ARGUMENT

I. THE DISTRICT COURT PROPERLY RELIED UPON THE WELL-ESTABLISHED SECTION 5 ANALYTIC FRAMEWORK IN DENYING PRECLEARANCE

The district court correctly grounded its decision upon the settled criteria for assessing discriminatory purpose and effect under Section 5. These criteria are set forth in decisions by this Court and in Congress' 2006 amendments to Section 5. Texas does not claim that the district court misconstrued this Court's decisions or the amendments. Nor does the State claim that this Court's prior decisions regarding the Section 5 standards should be overruled, and its claim regarding the constitutionality of the 2006 reauthorization is not properly before this Court. Accordingly, no issue is presented for this Court's plenary review regarding the analytic framework for applying the purpose and effect standards.

1. *Discriminatory purpose.* The district court concluded that, under the 2006 amendments, Texas was required to demonstrate that its redistricting plans did not have "any discriminatory purpose." 42 U.S.C. § 1973c(c). Thus, preclearance could not be granted if the plans were motivated by a purpose to retrogress or otherwise dilute minority voting strength. App. 33-34.

Texas concedes that the district court properly understood Congress' prohibition on voting changes

that have "any discriminatory purpose." J.S. 32. This provision superseded the holding in *Reno v. Bossier Parish Sch. Bd*, 528 U.S. 320, 328 (2000) (*Bossier Parish II*), that Section 5 only proscribed retrogressive purpose. Texas avers that the amendment is unconstitutional, J.S. 33, but the State is precluded from advancing that claim for the first time on appeal. *United States v. Williams*, *supra*. In any event, the amendment merely bars preclearance of voting changes that would violate the Fourteenth and Fifteenth Amendments, and thus is constitutionally appropriate. *See United States v. Georgia*, 546 U.S. 151, 158 (2006).

The district court relied on the factors identified by this Court in *Arlington Heights* to evaluate Texas's redistricting plans for discriminatory purpose. That was in accord both with this Court's precedent, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488 (1997) (*Bossier Parish I*), and Congress' intent. H.R. Rep. No. 109-478, at 68 (2006).

The nub of Texas's dispute with the district court's purpose findings is its claim that the evidence "is more consistent with a partisan, rather than racial, motivation." J.S. 30. Thus, according to Texas, the district court was required to choose between racial and partisan intent as to which provided a better explanation for the plans. But the Constitution, and thus Section 5, prohibits state action motivated even in part by a racially discriminatory purpose, and there is no requirement that courts ascertain whether the official "decision

[was] motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Arlington Heights*, 429 U.S. at 265. Texas's partisan-primacy claim largely repeats the argument this Court rejected in *LULAC v. Perry*, where the Court held that Texas's "troubling blend of politics and race – and the resulting vote dilution . . . – cannot be sustained" under Section 2 of the Voting Rights Act, 548 U.S. at 442, and further bore "the mark of intentional discrimination." *Id.* at 440.

2. *Retrogressive effect*. The district court concluded that, under the 2006 amendments, the focal point of the retrogression analysis was whether Texas's redistricting plans would lessen minority voters' ability to elect their preferred candidates. *See* 42 U.S.C. § 1973c(b) (a voting change has a prohibited effect if it would "diminish[] the ability of any citizens of the United States on account of race or color, or [membership in a language minority group], to elect their preferred candidates of choice"); 42 U.S.C. § 1973c(d) ("The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice."). App. at 7-8.

Texas agrees, as a matter of statutory construction, that "ability to elect" is the proper yardstick for measuring retrogression. J.S. 18, 23. Texas also does not dispute the constitutionality of Congress' decision in 2006 to adopt this standard, thus superseding the holding in *Georgia v. Ashcroft*, 539 U.S. 461, 482-84 (2003), that the creation of new minority "influence" districts could, in some

circumstances, offset the loss of minority ability districts. Although Texas avers in passing, in its Statement of the Case, that Congress' action "would likely violate the Equal Protection Clause," J.S. 6, the State does not contend in the body of its argument that Congress erred in adopting the "ability to elect" standard. J.S. 23-27. Moreover, as indicated, any such claim has been waived by Texas.

The district court also properly held that minority voters' "ability to elect" must be measured by conducting a real-world "functional analysis" of the electoral process, involving consideration of a variety of electoral factors. App. 8, 318-24. Texas asserts that, instead, the district court should have employed a simplistic "bright-line test" (J.S. 23) where only one statistic would be determinative: "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." J.S. 25 (emphasis omitted).[7]

The district court's reliance on a functional analysis was dictated by the prior decisions of this Court. In *Lockhart v. United States*, 460 U.S. 125, 133 (1983), the Court emphasized that the Section 5 "effect" standard is "intended to halt actual retrogression in minority voting strength," and thus retrogression assessments should be fact-based and

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[7] Texas has changed its position in this regard from what it argued in the district court. There, it contended that African Americans have an "ability to elect" in any district that is more than 40% African American, and said that the 50% figure only applies to Latino voters. App. 297.

not founded on abstractions such as "the legality under state law of the practices already in effect." *Id*. In the same vein, the Court explained in *Georgia v. Ashcroft* that: "any assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the relevant circumstances," 539 U.S. at 479; "[n]o single statistic provides courts with a shortcut to determine whether a voting change retrogresses from the benchmark," *id.* at 480 (internal quotation marks omitted); "[t]he ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine," *id.*; and "evidence of racial polarization is one of many factors relevant in assessing whether a minority group is able to elect a candidate of choice." *Id.* at 485. As the district court observed, the importance of examining all relevant electoral factors was particularly evident in this case, given the extent to which the legislature sought to use sophisticated devices to intentionally manipulate district lines to minimize minority electoral opportunity. App. 8 n.5.

Texas ignores *Lockhart* and *Georgia v. Ashcroft*, and cites to no Section 5 precedent in support of its novel position. Instead, the State relies on decisions of this Court applying the separate and distinct "results" standard of Section 2 of the Voting Rights Act, asserting that "'equality of [electoral] opportunity'" is the essential guidepost under Section 5. J.S. 25. But this merely repeats the analytic error this Court has cautioned against, that "a § 2 vote dilution inquiry [cannot be equated] with the § 5 retrogression standard" because,

"[w]hile some parts of the § 2 analysis may overlap with the § 5 inquiry, the two sections differ in structure, purpose, and application." *Georgia v. Ashcroft*, 539 U.S. at 478 (internal quotation marks omitted); *see also Bartlett v. Strickland*, 556 U.S. 1, 24-25 (2009) (plurality opinion); *Bossier Parish I*, 520 U.S. at 477.[8]

Texas otherwise asserts that its test is "need[ed]" because it is "easily administrable" and because a functional analysis allegedly does not provide "clear guidance to covered jurisdictions." J.S. 24. But, as discussed, Texas would substitute simplicity for a real-world assessment of the electoral facts. Moreover, simplicity is not a prerequisite for clarity, and contrary to what Texas implies, the "functional analysis" employed by the district court is not new but rather has undergirded retrogression reviews for decades.[9]

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[8] Texas also disparages the district court's efforts to identify minority voters' preferred candidates and to evaluate voter registration and turnout patterns. J.S. 25-26. Yet, these are standard inquiries in conducting a Section 5 retrogression analysis of a redistricting plan. *Georgia v. Ashcroft*, 539 U.S. at 473 n.1 (considering "black registration numbers"); *id.* at 479-80 (discussing the importance of examining the ability of minority voters to elect their preferred candidates)*; see also LULAC*, 548 U.S. at 427-28 (scrutinizing Latinos' candidates of choice, the impact of increasing Latino registration and turnout, and the impact of Texas's history of discrimination on minority citizens' electoral participation).

[9] Dep't of Justice Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471-72 (Feb. 9, 2011); Dep't of Justice Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting

Accordingly, the district court applied the proper analytic framework in making its retrogression determinations.

II. THE DISTRICT COURT'S DENIAL OF PRECLEARANCE TO THE CONGRESSIONAL REDISTRICTING PLAN SHOULD BE AFFIRMED

A. The District Court's Finding of Discriminatory Purpose Is Fully Supported by the Factual Record and Provides Complete Grounds for Affirmance

The district court unanimously concluded that the Texas legislature enacted the Congressional plan with a discriminatory purpose. App. 51. The district court's scrupulous application of the *Arlington Heights* factors, bolstered by extensive findings of fact and a thorough evaluation of the credibility of the evidence and witnesses before it, was not clearly erroneous, and presents no issue for plenary review. App. 52-57, 192-209.

In *Arlington Heights*, this Court concluded that, in the absence of "rare" direct evidence of discriminatory purpose, racial intent may be inferred by looking at: (1) a law's discriminatory impact on minority groups; (2) the law's historical background; (3) the sequence of events leading up to

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Rights Act, 66 Fed. Reg. 5412, 5413 (Jan. 18, 2001); Comments to Revision of Procedures for the Administration of Section 5 of the Voting Rights Act, 52 Fed. Reg. 486, 487-88 (Jan. 6, 1987).

the law's passage; (4) procedural or substantive deviations from the typical or historical decisionmaking process; and (5) legislative or administrative history, including contemporaneous viewpoints expressed by lawmakers. *Arlington Heights*, 429 U.S. at 265, 266-68.[10]

Under the first *Arlington Heights* factor, the district court was troubled by the treatment of the three districts electing African Americans to Congress. App. 52-54. Each district was close to the new ideal population size and thus needed only minor adjustments to achieve equal-population compliance. App. 192-95. Nonetheless, each was subjected to substantial surgery, with historic black communities, economic generators, and the congresspersons' district offices moved to other districts. This also occurred to CD 20, a Latino ability district. On the other hand, no district represented by an Anglo congressperson was treated in this manner and, indeed, these congresspersons were granted special favors. App. 52-54, 192-98. The district court observed that the "improbability of these events alone could well qualify as a 'clear pattern, unexplainable on grounds other than race,' *Arlington Heights*, 429 U.S. at 266." App. 55.

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[10] The district court was clear that it did not consider Texas's burden in proving the absence of discriminatory intent to be "insurmountable." App. 35. The court relied upon the same burden-shifting scheme employed in prior Section 5 cases, *e.g.*, *Bossier I*, 907 F. Supp. 434, 446 (D.D.C. 1995), *vacated on other grounds*, 520 U.S. 471 (1997), whereby Texas only needed to make out a prima facie case for nondiscrimination in order to shift the burden of production to the parties opposing preclearance. App. 35 n.19.

However, the Court went on to examine the other *Arlington Heights* factors, and found Texas's explanations even less credible.

The district court recognized that Texas has a long history of enacting discriminatory statewide redistricting plans, which is an important circumstantial factor under *Arlington Heights*. App. 55-56. Furthermore, there was substantial, uncontroverted evidence that the Congressional redistricting process excluded minority lawmakers and proceeded at unprecedented speed. App. 56, 143-55. For example, even experts retained by the Senate Redistricting Committee warned that the lack of opportunity for public review of draft congressional plans was a distinct departure from previous redistricting processes and raised significant concerns under the Voting Rights Act. App. 150-51.

The district court also carefully assessed the credibility of the witnesses who supported and opposed preclearance. In particular, the court highlighted a number of flatly inaccurate or incredible claims made by mapdrawers and legislative leaders, which undermined the credibility of Texas's witnesses and defenses. App. 55, 57, 160; 164-65; 200-01.

Because "[t]he parties . . . provided more evidence of discriminatory intent than [the district court] ha[d] space, or need, to address," App. 57 n.32, the district court omitted from its opinion a full discussion of other evidence of discriminatory intent.

However, in its Findings of Fact, the court recounted how the mapdrawers, in crafting CD 23, consciously and carefully sought to ensure that there would be "actual retrogression" in the ability of Latino voters to elect their preferred candidate, while nominally maintaining the district's Latino population and registration levels and deliberately creating the false appearance of no retrogression. App.177-80. This was the same district the legislature redrew in 2003 to "divide[] the cohesive Latino community in Webb County" to take "away the Latinos' [electoral] opportunity because Latinos were about to exercise it." *LULAC*, 548 U.S. at 440. That violated Section 2 of the Voting Rights Act, *id.* at 442, and bore "the mark of intentional discrimination." *Id.* at 440.

The district court's Findings of Fact also detailed the bizarre manner in which the Dallas-Fort Worth districts were drawn, and the unavoidable conclusion that race motivated the drawing of districts in that region. App. 198-209. In the benchmark plan, nine congressional districts converged in the metroplex area, with only one of those districts being a minority ability district. The 2010 Census indicated that growth in the area warranted the addition of another district in the region. Despite the fact that non-Anglos accounted for all of the growth in Dallas County, and nearly all of the growth in neighboring Tarrant County (Fort Worth), the area again was drawn with only one minority ability district, now out of ten. App. 198-99. Anglo-dominated districts were bizarrely drawn to fragment minority population concentrations. App. 203-08 (describing the "lightning bolt"

extension of a Denton County-based district into Tarrant County to pull in a Latino community, thus preventing it from being included in the same district with a neighboring African American community). This is precisely the kind of racially-motivated state action that Section 5 is intended to prevent.

Accordingly, the district court's finding of discriminatory purpose was amply supported by the record, and should be affirmed.

B. The District Court's Finding of Retrogressive Effect Provides a Further Ground for Affirmance

The district court correctly held that the Congressional plan was retrogressive. In making that determination, the court properly conducted a functional analysis to compare minority voters' ability to elect their preferred candidates under the new and old plans. Rather than dispute the district court's factual determinations, Texas again centers its appeal on an effort to create new legal exceptions to the settled analytic framework for conducting retrogression analyses. This attempt to rewrite Section 5 does not merit plenary review.

1. In order to satisfy the non-retrogression requirement, a redistricting plan must be "no more dilutive than what it replaces." *Bossier Parish II*, 528 U.S. at 335. The district court correctly applied this standard in holding that the legislature's decision to not make any net increase in the number of Latino ability districts constituted, in the

particular circumstances presented here, "a retrogression in the position of [Latino voters] with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976).

The district court examined "all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan," *Georgia v. Ashcroft*, 539 U.S. at 479, as well as the substantial increase in the State's minority population and in the State's total number of Congressional districts. App. 37-45, 49-51. Under the benchmark plan, Latinos were able to elect their preferred candidates in seven of the 32 Congressional districts (22%), but under the new plan, at best, they would be able to elect in seven of 36 districts (19%). App. 49 n.27. By drawing one additional Latino district, which the State easily could have done, the State would have avoided this retrogression: eight Latino districts out of 36 would have maintained Latino voters at electing 22 percent of the delegation. Or, as the district court expressed it, the State's new plan consigned Latino voters to being a full district further away from proportional representation than was true under the old plan. App. 46-51.[11]

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[11] Judges Griffith and Howell joined this ruling. Judge Collyer neither agreed nor disagreed, believing that this retrogression issue did not need to be reached because of the court's alternative ruling that CD 25 had been eliminated as a minority ability district (see *infra*). App. 45 n.22.

Texas argues it is irrelevant that the new plan placed minority voters in a relatively worse position than before because a redistricting plan can never be "retrogressive as long as the total number of . . . minority [ability] districts does not decrease compared to the benchmark plan." J.S. 15. In other words, as the district court observed, Texas's position would mean that it would be "no more dilutive" for a jurisdiction to double the size of its governing body while limiting minority voters to having the ability to elect the same number of representatives as before. J.S. 47 n.25.[12]

Texas's argument is nonsensical. Vote dilution always has required an assessment of the legal significance of minority voters' opportunity to elect a particular number of officials as a share of the total number of officials at issue. *See*, *e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 1012-14 (1994) (Section 2); *City of Port Arthur v. United States*, 459 U.S. 159, 167 (1982) (Section 5); *White v. Regester*, 412 U.S. 755, 765-66 (1973) (Fourteenth Amendment). Texas claims that that there can be no potential for "actual retrogression" in this opportunity, *Lockhart*, 460 U.S. at 133, when the

[12] This example, while written for illustrative purposes, is not unlike the situation presented with regard to Texas's Congressional delegation, which has grown by 133% in the past three reapportionments. *See Bush v. Vera*, 517 U.S. 952, 956-57 (1996) (Texas had 27 congresspersons before the 1990 Census). According to Texas, the non-retrogression standard would have allowed the State to limit minorities to electing the same number of representatives under the 2011 36-district plan as they elected in the pre-1990 27-district plan.

denominator increases (regardless of the size of the increase), and that retrogression only may occur when the numerator is diminished.

Texas wrongly asserts that this artificial limitation on measuring retrogression is mandated by this Court's decision in *Abrams v. Johnson*, 521 U.S. 74 (1997). J.S. 14-15. In *Abrams*, the retrogression question concerned the fact that minority voters in Georgia, under that State's new Congressional plan, would be able to elect one of eleven congresspersons, whereas before they could elect one of ten. The Court found there was no retrogression, but did not base its conclusion on the fact that the absolute number of minority ability districts was unchanged. Instead, the Court determined that, on the facts of that case, the small mathematical decrease in minority voters' electoral proportion was not substantively significant. *Id.* at 97.[13] Thus, *Abrams* only stands for the proposition that it is not always retrogressive, as a matter of law, for a jurisdiction to expand the number of elected positions while leaving the number of minority ability districts unchanged.[14] The district

[13] Under the benchmark plan in *Abrams*, minority voters elected 10 percent of the delegation and under the new plan they would elect nine percent. 521 U.S. at 97. Adding one minority district would not have maintained the existing minority electoral position, as is the case here, but rather would have substantially augmented it (two minority districts out of 11 would have created an 18 percent opportunity).

[14]The flip-side also is true: a jurisdiction that decreases the number of elected positions is not automatically precluded

court agreed, and accordingly limited its retrogression finding to the particular facts of this case. App. 46-47.[15]

Furthermore the district court's holding does not raise any constitutional concern, contrary to what the State theorizes. J.S. 16-18. As the district court found, "minority population growth was largely concentrated in three areas in Texas," App. 50 n.28, and the Texas legislature therefore could have drawn an additional minority ability district while also complying with other constitutional and statutory requirements. *Id.* Thus, the retrogression holding raises no concern under this Court's decision in *Miller v. Johnson*, 515 U.S. 900 (1995).

2. The district court also properly held that the Congressional plan was retrogressive because, by

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by the non-retrogression principle from adopting a concomitant decrease in the total number of minority ability districts.

[15] Texas claims that the district court's analysis "is little more than an assessment of proportionality." J.S. 13. But the district court merely used the increase in minority voters' distance from proportionality as one factor in assessing whether "actual retrogression" had occurred; the court did not mandate proportionality or mandate that Texas draw a plan that was closer to proportionality than the old plan. Texas also claims that the "clear effect of the court's analysis" is to require jurisdictions to "add new majority-minority districts whenever they experience sufficient population growth." J.S. 13-14 (emphasis omitted). But, as indicated, the growth in the State's minority population was just one of several factors the district court considered, and nowhere did the district court require that the State "disprove a Section 2 vote dilution claim." J.S. 16.

substantially redrawing CD 25, the legislature reduced by one the number of minority ability districts. App. 99-125. The district court found – and Texas does not disagree – that the intent and effect of the new plan was to eviscerate the coalition in existing CD 25 (centered in the Travis County/Austin area), "composed of almost all the district's Black and Hispanic voters, and up to half, but as little as 37%, of Anglo crossover voters," App. 101. That district had consistently elected minority voters' preferred candidates to Congress, although the district was majority Anglo in CVAP. App. 100. The legislature accomplished its goal by drastically altering the geographic orientation of this "crossover" district, unnecessarily relocating nearly three-quarters of CD 25's voters to other districts. App. 184-85.

The district court relied on a deep evidentiary record establishing that Latinos and African Americans in CD 25 consistently were able to elect their preferred candidate with the support of crossover Anglo voters. App. 106-11. Indeed, Texas's own expert witness fully agreed with that assessment. App. 103. The district court found that minority voters "regularly prevail[ed] in the coalition's selection of candidates," and there was "equal power-sharing among the members of the coalition rather than domination by Anglo voters." App. 110.[16]

[16] For example, an analysis of 43 Travis County primary elections for other offices showed that minority-preferred candidates won 12 without Anglo support while an Anglo-preferred candidate won only once without minority

All three judges below agreed that, as a legal matter, retrogression may occur when a State voluntarily chooses to draw a crossover district as part of its "method of complying with the Voting Rights Act," *Bartlett v. Strickland,* 556 U.S. at 23, and then dismantles that district in a subsequent plan. App. 24-29. In so holding, the district court was careful to adhere to the important distinction between the non-retrogression requirement, on the one hand, and the Section 2"results" test on the other, since the latter does not require the creation of crossover districts in the first instance. *Bartlett*, 556 U.S. at 14.[17]

Judge Griffith dissented only with regard to the application of this principle to CD 25. Although he agreed that, in redrawing this district, the legislature had eliminated the opportunity of a minority-Anglo coalition to elect its preferred candidate, App. 126, 130, he believed that, in this

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support. In addition, Latino voters supported the winner in 32 primaries, African Americans supported the winner in 31 primaries, and Anglo voters backed the winner in 31 primaries. App. 108-09. In 2010, the minority-preferred candidate was elected to Congress despite the fact that nearly two-thirds of Anglo voters supported his opponent. App. 110.

[17] The district court's recognition that the loss of a crossover district, in appropriate circumstances, may be retrogressive is fully consonant with Congress' intent in 2006 in adopting the "ability to elect" standard. H.R. Rep. No. 109-478, at 71 (2006) ("Voting changes that leave a minority group less able to elect a preferred candidate of choice, either directly or when coalesced with other voters, cannot be precleared under Section 5.").

instance, the evidence fell short of demonstrating retrogression because minority voters did not "lead the coalition." App.141. Texas, in particular, cites to Judge Griffith's analysis of voter turnout in the district. J.S. 21. However, the State's turnout data "contain[ed] enormous error rates," App. 119, and Judge Griffith's effort to make his "own calculations of turnout data [also were] defective." App. 121. The majority emphasized the narrow scope of its holding, and that if the facts had shown that the legislature had only eliminated a minority "influence" district, that would not have been retrogressive. App. 101-02 n.2.

Texas argues that "[a]t a minimum, . . . a . . . crossover district is not protected by Section 5 [*i.e.*, by the non-retrogression principle] unless the groups that comprise the 'coalition' vote cohesively in primary elections." J.S. 22. It asserts that, under the "plain text of the VRA," the determinative question is whether "the coalition voted cohesively for the same candidate in the primary election." J.S. 19.

Texas's novel interpretation of the Voting Rights Act, based on an erroneous view as to the role of primary elections in our political system, is not supported by the language of Section 5, logic, or precedent. The retrogression analysis turns on minority voters' ability to "elect," 42 U.S.C. § 1973c(b) & (d), *i.e.*, their electoral ability in general elections. Differences that inevitably can arise at the primary stage never have been thought to preclude a minority group from demonstrating

cohesiveness, and Texas cites no decisions that have so held. Indeed, under Texas's sweeping revision of the Section 5 analysis, if African Americans (or Latinos) in a district with an African American (or Latino) majority did not "vote[] cohesively for the same candidate in the primary election," J.S. 19, then re-drawing the district with an Anglo majority not be retrogressive. That is plainly incorrect. *See* App. 89 ("We refuse to penalize minority voters for acting like other groups . . . who do not coalesce around a candidate until the race is on for the general election.").[18]

Texas also seeks to cast doubt generally on whether, as a matter of law, the elimination of a crossover district could ever support a retrogression finding. J.S. 19-22. Texas cites to the plurality opinion in *Bartlett*. However, as the district court unanimously held, "the *Bartlett* Court only concluded that section 2 does not compel states to draw new crossover districts . . ., not that states can disregard the existence of established crossover and coalition districts in a section 5 inquiry." App. 27-28 (emphasis omitted). Moreover, *Bartlett* expressly recognized that a State's intentional elimination of an existing crossover district "would raise serious questions under both the Fourteenth and Fifteenth

[18] Of course, this does not mean that what occurs in a primary is irrelevant. As Judges Howell and Collyer indicated, if the nominees in a putative crossover district were regularly determined by Anglo voters, it would be unlikely that any redrawing of that district would lead to a finding of retrogression.

Amendments," 556 U.S. at 24, which is what occurred here.[19]

III. THE DISTRICT COURT'S DENIAL OF PRECLEARANCE TO THE HOUSE REDISTRICTING PLAN SHOULD BE AFFIRMED.

The district court also unanimously held, correctly, that Texas's plan for its state House of Representatives was retrogressive. In making that determination, the court again conducted a functional analysis to compare minority voters' ability to elect their preferred candidates under the new and old plans, and its factual determinations in this regard are fully supported by the record below.

Texas disputes the preclearance denial as to the House plan only in two limited respects. First, as discussed above, Texas asserts that the district

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[19] Texas further cites to this Court's recent decision in *Perry v. Perez*, 132 S. Ct. 934 (2012), but "*Perez* held only that the district court [in Texas] had no basis to draw a new coalition district under section 2, without addressing the separate question before [the district court below]: whether preexisting coalition or crossover districts merit protection under section 5." App. 29 (emphasis omitted). Moreover, Texas's constitutional theorizing with regard to the application of the non-retrogression principle to existing crossover districts is again misplaced. The district court simply applied the well-established tools of "functional analysis" to the electoral circumstances present in CD 25, and Texas provides no factual basis for its claim that the district court required Texas to have done anything more than design its new Congressional plan to avoid retrogression.

court should have reviewed the plan using its simplistic 50-percent "bright-line" test, rather than a functional analysis. Second, and beyond that general claim, Texas only disputes the district court's retrogression determination with regard to one of the four districts whose redrawn boundaries were the basis for the court's retrogression holding, House District ("HD") 149.

1. The district court found that Texas eliminated four minority ability districts included in the benchmark plan and did not replace them with any new ability districts in the enacted plan. App. 69. The district court carefully reviewed the eight districts the Attorney General and Intervenors asserted were minority ability districts in the benchmark plan but not in the enacted plan. The court agreed with regard to four of these districts, HD 33, 35, 117, and 149. App. 69-90, 240-60, 270-81. The court also reviewed the districts that Texas claimed were new (offset) ability districts, and rejected Texas's contentions. App. 90-95, 261-70.

2. HD 149 in the benchmark plan was a majority-minority "coalition" district in Harris County (Houston area), with a combined African American, Latino, and Asian American CVAP of 61 percent. App. 84. The State eliminated this district entirely. App. 89. The district court conducted a meticulous analysis of the voting patterns in this district, and determined that African American, Latino, and Asian American voters were politically cohesive. App. 83-87. These voters had a long "track record of success," App. 86, electing their preferred

candidate to the House (Hubert Vo, the only Vietnamese American in the House), App. 83, 270, and also coalescing to elect candidates of their choice to other positions, including members of the local school board and the Houston City Council. App. 86.

Texas's only objection to the district court's specific findings as to HD 149 is its claim that, as with "crossover" districts, the elimination of an existing "coalition" district can only occasion "actual retrogression" in limited circumstances. However, as discussed above, the district court properly rejected Texas's theory that minority voters must unite behind the same candidate in primary elections in order for there to be "actual retrogression" when a plan eliminates a district in which minority voters are electing their preferred candidate in general elections. App. 87-89.[20] Moreover, this Court previously has recognized that "'[t]here are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice.'" *Ashcroft*, 539 U.S. at 481-82 (quoting *Johnson v. De Grandy*, 512 U.S. at 1020). By "dismantl[ing] [HD 149] without offsetting the loss elsewhere," App. 89, Texas's plan was retrogressive. Accordingly, the district court's

[20] Texas also does not explain why HD 149 did not qualify as a protected coalition district even under the State's highly restrictive test, since Representative Vo did not face any primary opposition after his initial election in 2004. App. 88. It is undisputed that HD 149's minority residents voted cohesively in general elections. App. 84-85.

determination as to HD 149 presents no issue for plenary review.

3. The district court concluded that it did not need to reach the question of whether the House plan was racially motivated given the court's unanimous retrogression holding. App. 95. Nonetheless, the court expressed "concern" about this issue as well, *id.*, and determined that the evidence "strongly suggest[ed]" that the House plan had been drawn with a retrogressive intent. App. 97.

The evidence of discriminatory purpose summarized by the district court is strikingly similar to the evidence upon which the court relied in finding that both the Congressional plan (*supra*) and the Senate plan (*infra*) were racially motivated. This included:

- "the process for drawing the House Plan showed little attention to, training on, or concern for the VRA," J.S App. 95;

- the legislature's failure to draw any new minority ability districts despite the fact that House districts are "relatively small" and the fact that the dramatic Latino growth "was concentrated primarily in three geographic areas," J. S. App. 95;

- the use of "a deliberate, race-conscious method to manipulate not simply the Democratic vote but, more specifically the Hispanic vote" in HD 117, App. 96 (emphasis omitted); and

- the fact that the legislature's primary House mapdrawer "incredibl[y]" and "implausib[ly]" "professed ignorance" at trial of certain functions in the redistricting software that provided racial data for redistricting, which "suggest[ed] that Texas had something to hide in the way it used racial data to draw district lines." App. 96-97.

For all these reasons, the district court's judgment denying preclearance to the House plan does not merit plenary review and should be affirmed.

IV. THE DISTRICT COURT'S DENIAL OF PRECLEARANCE TO THE SENATE REDISTRICTING PLAN SHOULD BE AFFIRMED

The district court unanimously concluded that the Senate plan was motivated by a discriminatory purpose. App. 61-68. Because that determination is fully supported by the record and is not clearly erroneous, there is no issue for plenary review and the district court's judgment should be affirmed.

The district court's intent finding turned on the legislature's dismantling of the increasingly effective minority electoral opportunity in Senate District ("SD") 10, located in Tarrant County (Fort Worth area). When the State drew this district in 2001, it "predicted that SD 10 could become a district where the minority community would grow to be able to elect a candidate of its choice." App. 225; *see also* App. 58-59. Indeed, the district changed from

being 57 percent Anglo in total population according to the 2000 Census to being slightly majority-minority in population according to the 2010 Census; and in 2008 the district narrowly elected a candidate who received near unanimous support from minority voters and about a quarter of the Anglo vote. App. 58-60. In response, the state legislature fragmented SD 10's minority population concentrations into "districts that share few, if any, common interests with the existing District's minority coalition." App. 62 (internal quotation marks omitted). In other words, in redrawing SD 10, the State followed the well-trod path described in *LULAC*: intentional fragmentation of a minority population to take "away the [minority's electoral] opportunity because [minorities] were about to exercise it." *LULAC*, 548 U.S. at 440.

The district court again based its intent finding on the *Arlington Heights* framework. App. 61. Significantly, with regard to the "important starting point" for that analysis, *Arlington Heights*, 429 U.S. at 266 – whether the plan bore "more heavily on one race than another," *id.* (internal quotation marks omitted) – Texas did not dispute that its fragmentation of the minority population in SD 10 negatively affected minority voters. App. 62. This was acknowledged by Texas's own expert. App. 61. Texas nonetheless claimed "that the legislature's motivations were wholly partisan, untainted by considerations of race." App. 67. The district court rejected this argument after carefully analyzing it in light of the other *Arlington Heights* factors. App. 68.

In particular, the district court determined that a close examination of the sequence of events leading up to the adoption of the Senate plan did not support the State's "partisan-only" explanation. For example, over the objections of an African American state representative, the one hearing held in Tarrant County was conducted at a location that lacked public transit service, making it inaccessible to many low-income minority voters, App. 210-11, and, unlike previous redistricting cycles, the Senate held no public hearings after the Census data were released or after the proposed plans were made public. App. 66. It also was "clear that senators who represented minority districts were left out of the process." App. 64. Emails between legislative staffers further cemented the district court's concern about a discriminatory intent. Staffers discussed "'pre-cook[ing]' the committee report, *i.e.*, writing the report before the [committee] hearing had been held," App. 65, and ultimately decided against doing that after being advised there would be a "'paper trail'" that this had occurred, which would not be "'a good idea for preclearance.'" App. 65.

As with the Congressional plan, the district court properly applied Section 5 to block implementation of a plan that sought to intentionally discriminate against African American and Latino voters. Accordingly, the district court's judgment denying preclearance to the Senate plan also should be affirmed.

V. THE DISTRICT COURT'S INTERVENTION RULINGS SHOULD BE AFFIRMED.

The district court granted permissive intervention to minority voters, and organizations of minority voters, constituted in seven intervenor groups. Because the district court did not abuse its discretion in granting intervention, these rulings should be affirmed.

This Court unequivocally held in *Georgia v. Ashcroft*, 539 U.S. at 477, that "[p]rivate parties may intervene in § 5 actions assuming they meet the requirements of Rule 24 [of the Federal Rules of Civil Procedure]." That ruling flowed directly from the proposition that "Section 5 does not limit in any way the application of the Federal Rules of Civil Procedure to this type of lawsuit, and the statute by its terms does not bar private parties from intervening." *Id.* at 476. In *Ashcroft*, private parties intervened to oppose preclearance of redistricting plans adopted by the State of Georgia, and this Court upheld the district court's intervention ruling because there was no abuse of discretion. *Id.* at 477.

Texas urges this Court to now overrule *Georgia v. Ashcroft* and hold that minority voters never may intervene in Section 5 declaratory judgment actions. J.S. 37 n.16. The basis for such a ruling, according to Texas, is that intervention in Section 5 cases poses a constitutional concern. J.S. 37. Alternatively, the State avers that at least permissive intervention should never be allowed in a

Section 5 redistricting case on the ground that minority voters, in that instance, lack a "claim" under Rule 24(b)(1)(B). J.S. 35. The State further avers that, if the Court continues to allow intervention in Section 5 cases, minority voters should not be permitted to contest the preclearance of a voting change not also opposed by the Attorney General in the litigation. J.S. 34.

Texas's contentions are astonishing in their reach. Not only does the State ask this Court to take the strong action of overruling precedent that is only nine years old, it would have the Court overturn decades of decisions by this Court specifically recognizing the permissible – and independent – role that minority voters play as intervenors in Section 5 actions. In *Lockhart v. United States*, *supra*, the Court undertook an assessment of the scope of the non-retrogression standard only in response to an intervenor's defense of the district court's ruling that the city's changes were retrogressive. On appeal, the Attorney General agreed with the city that the district court's retrogression holding was wrong. 460 U.S. at 130.

Likewise, in *City of Richmond v. United States*, 422 U.S. 358 (1975), the Court addressed the purpose and effect of an annexation by the City of Richmond only at the behest of intervenors, who opposed a consent order submitted by the Attorney General and the city that would have granted preclearance. *Id.* at 366-67. The Court not only addressed the merits of intervenors' objections to preclearance, but remanded the case to the district

court for additional findings concerning intervenors' contention that the annexation had a discriminatory purpose. *Id.* at 378.[21]

These decisions fully dispose of Texas's contentions here, and there is no basis for plenary review of the intervention question. Moreover, Texas's arguments rest on two flawed premises. First, the State pins its constitutional assertion on its claim that intervention in Section 5 cases is "[u]nchecked." J.S. 37. But just as in any other lawsuit in federal court, "[p]rivate parties may intervene in § 5 actions [only if] they meet the requirements of Rule 24," *Ashcroft*, 539 U.S. at 477, and even if intervention is granted, the district court retains full authority to oversee intervenors' participation in the litigation to ensure fairness and guard against undue prejudice to the jurisdiction seeking preclearance. *See, e.g.,* Advisory Committee Notes to the 1966 Amendments to the FRCP*; see also* 7C Wright, Miller & Kane, Federal Practice and Procedure § 1913, at 391-92*; Stringfellow v. Concerned Neighbors in Action,* 480 U.S. 370, 377-78 (1987).

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[21] The District of Columbia District Court also has for decades permitted intervention in appropriate Section 5 actions. *E.g.*, *Bossier Parish School Board v. Reno*, 157 F.R.D. 133, 135 (D.D.C. 1994); *Texas v. United States*, 802 F. Supp. 481, 482 n. 1 (D.D.C. 1992); *County Council of Sumter County v. United States*, 555 F. Supp. 694, 697 (D.D.C. 1983); *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982); *City of Port Arthur v. United States*, 517 F. Supp. 987, 991 n.2 (D.D.C. 1981); *Beer v. United States*, 374 F. Supp. 363, 367 n.5 (D.D.C. 1974).

Texas also misfires in asserting that private parties may not permissively intervene as defendants in a Section 5 redistricting action based on the absence of a "claim" against the plan. Private parties, such as the Intervenors here, are granted permissive intervention in Section 5 actions because, under Rule 24(b)(1)(B), they assert a "defense that shares with the main action a common question of law or fact," and not because of any "claim" since no claim is alleged.[22]

In the district court, Intervenors presented evidence and legal arguments representing the specific interests of minority voters in Texas. That is what this Court's decisions long have sanctioned, and the district court did not err in following that precedent. The district court's intervention rulings, therefore, should be summarily affirmed.

CONCLUSION

The district court's thoughtful, well-supported application of Section 5 to the facts of this case prevented the implementation of three discriminatory statewide redistricting plans, and raises no issues appropriate for plenary review by this Court. The only burden that Section 5 places on

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[22] In addition, Texas's broad assertion that individuals lack standing to contest redistrictings under Section 5, J.S. 34-35, would necessarily mean that individuals likewise lack standing under Section 2 to challenge redistricting plans. This is yet another new legal rule asserted by Texas that is plainly at odds with this Court's precedent. *Cf. Growe v. Emison*, 507 U.S. 25, 40-41 (1993) (applying Section 2 to redistrictings, at the behest of individual plaintiffs).

Texas is a necessary and proper burden—a prohibition against enacting redistricting plans that have the purpose or effect of discriminating on the basis of race. For these reasons, the Court should affirm the district court's judgment.

Respectfully submitted,

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