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

REPLY BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITES

Cases

Other Authority

APPELLANT'S REPLY BRIEF

The United States concedes that multiple aspects of the district court's analysis were flawed and has not raised any objection of its own to preclearance of the Texas Senate plan. Nonetheless, Texas' decision to adopt electoral maps through the democratic process remains on hold. This case well illustrates the staggering federalism costs of Section 5 generally and of allowing permissive intervention in judicial preclearance proceedings in particular.

On November 9, 2012, this Court granted certiorari in *Shelby County v. Holder*, No. 12-96, to address whether the 2006 reauthorization of Section 5 is constitutional. The Davis Intervenors and MALC Intervenors—who do not so much as cite *Shelby County*—encourage the Court to summarily affirm. That contention should be rejected out of hand; at an absolute minimum, the Court should hold this case pending its decision in *Shelby County* on Section 5's facial constitutionality.

But this case so amply demonstrates the constitutional difficulties of Section 5 in practical application that the better course would be to note probable jurisdiction and schedule this case for plenary consideration as an as-applied accompaniment to *Shelby County*. The United States largely concedes that these issues warrant plenary review. Plenary review is thus appropriate in its own right, and would also inform the Court's analysis of whether the inherent constitutional defects of Section 5 are beyond repair.

I. THE DISTRICT COURT'S ERRONEOUS INTERPRETATION OF SECTION 5'S EFFECTS PRONG WARRANTS PLENARY REVIEW

A. Proportional Representation

The district court's unprecedented "representation gap" analysis was central to its finding that the congressional plan had a retrogressive effect. App.45-51. As Texas explained, that analysis is contrary to the VRA's text and puts consideration of race ahead of traditional redistricting principles. J.S. 12-18.

The United States and intervenors cannot deny that the district court's analysis embraces concepts of proportional representation. *See* U.S. Br. 15 (plan was retrogressive because it did not adequately keep up with the "increasing proportion of the Hispanic population"); MALC Br. 19 (assessing plan's departure from "proportional representation"). But in *Abrams v. Johnson*, 521 U.S. 74, 97-98 (1997), this Court squarely held that States are *not* required to earmark newly apportioned congressional seats for minority groups based solely on "population growth." The United States and MALC Intervenors seek to distinguish *Abrams* on the ground that it dealt with one newly apportioned district (not four). But the Court's decision contains no such limitation, and *Abrams*'s textually based rejection of proportional

representation is hardly limited to situations in which a State has gained a single congressional seat.[1]

The United States is likewise wrong to suggest (at 15) that the district court's "representation gap" analysis is limited to situations in which a covered State receives additional congressional seats *because of* minority population growth. The district court's analysis did not turn on the rate of growth among minority groups, but rather on a proportional comparison of racial population statistics and majority-minority districts in the benchmark and enacted plans. Under the district court's logic, Texas would have been required to draw an additional majority-minority district to close the "representation gap" even if the population growth were primarily attributable to Anglos.

The MALC Intervenors assert (at 19, 22 n.15) that departures from proportionality were merely "one factor" in the district court's retrogression analysis. It is true that the court applied its amorphous "functional" analysis to determine *how many* "ability" districts were included in the enacted and benchmark plans. But once the court tallied up those districts, Judges Griffith and Howell found retrogression in the congressional plan based on the

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[1] In *Abrams*, 10% of the districts in the benchmark and 9% of the districts in the new plan were majority-minority, yet this Court found no retrogression. The percentages in this case were 22% and 19%. *See* MALC Br. 19. It is highly unlikely that an additional gap of two percentage points would have resulted in a different outcome in *Abrams*.

simple arithmetic of the "representation gap." App.49-50.

It is this mechanical nature of the district court's analysis that gives rise to its significant constitutional infirmities. Neither the United States nor the intervenors dispute that, under the representation gap analysis, a jurisdiction *must* add new race-based districts whenever the "gap" crosses a numerical threshold, without regard to race-neutral districting factors. J.S. 17-18. But any such automatic use of race violates the Equal Protection Clause and flouts this Court's holdings in *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900, 916 (1995).[2]

B. Coalition and Crossover Districts

This Court should also grant plenary review to determine whether (and to what extent) "coalition" and "crossover" districts must be maintained in order to avoid retrogression under Section 5. Such districts are *not* protected under Section 2 of the Act, *see Bartlett v. Strickland*, 556 U.S. 1 (2009), and there is

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[2] The "representation gap" analysis also conflates Section 5 and Section 2 of the VRA. J.S. 15-16. The district court suggested that its proportionality inquiry "would likely be subject to the caveat" that the demands of Section 2 could be met, App.50, n.28, but the court never conducted the rigorous analysis that Section 2 demands. Texas offered extensive evidence in the parallel proceeding in the Western District of Texas showing that Section 2 does *not* require the State to draw an additional majority-minority congressional district.

no reason for a different result under Section 5. J.S. 18-23.

This issue was directly relevant to both the congressional plan and the state house plan. In the congressional plan, Judges Collyer and Howell found retrogression—a finding that DOJ disagrees with, U.S. Br. 19—based on their conclusion that District 25 was a "protected crossover district" that was eliminated and not replaced. App.99-125. The district court also found the Texas House plan to be retrogressive because HD 149 was a "coalition district protected under section 5" that was eliminated and not replaced elsewhere. App.89; *see* U.S. Br. 23 (conceding that Texas' "general argument that coalition ability districts are not cognizable would apply to the court's treatment of HD 149").

Whether coalition and crossover districts are protected by Section 5 is thus a discrete question of law that is squarely presented in this case. And this issue goes to the heart of Section 5's constitutional difficulties. Indeed, the United States and intervenors barely respond to Texas' argument that protection of such districts would significantly increase the extent to which race becomes a mandatory part of the redistricting process, thus raising serious constitutional concerns under the Equal Protection Clause. J.S. 21-22.

C. "Functional" Analysis

For the same reasons, the Court should grant plenary review to consider whether the district court's "functional" methodology for assessing retrogression is appropriate. J.S. 23-27. The district

court admitted that its free-form analysis will provide no practical guidance to covered jurisdictions. App.340. The United States, for its part, concedes the lack of guidance but, not surprisingly, suggests the answer is for covered jurisdictions to seek clarity from DOJ in the administrative preclearance process. U.S. Br. 14.

Texas' bright-line rule of protecting only districts in which minorities represent at least 50% of the citizen-voting-age population would give clear guidance to covered jurisdictions and minimize the extent to which redistricting decisions are driven by race. This rule "has its foundation in principles of democratic governance," *Bartlett*, 556 U.S. at 19, the very principles that animate Section 5's protection of the "ability to elect" (as opposed to the *demonstrated* ability).

The United States and intervenors provide no convincing reason to adopt the district court's convoluted analysis over the State's straightforward, bright-line rule. The United States (at 13) suggests that turnout and registration figures must be considered in the retrogression analysis. But such figures fail to provide clear guidance to covered jurisdictions and unnecessarily increase the focus on race in redistricting. Those burdens are not justified. African-American citizens in Texas registered at *higher* rates than white citizens for every election from 1994 through 2004 and turned out at rates nearly equal those of white citizens. *See* H.R. Rep. No. 109-478 at 12 (May 22, 2006) ("[I]n Texas, 68.4 percent of African-Americans were registered to vote in 2004 compared to 61.5 percent of white citizens.

Moreover, 55.8 percent of African-Americans turned out to vote in 2004 compared to 50.6 percent of white voters."). And Texas' Hispanic citizens have consistently registered and turned out to vote at higher rates than Hispanic citizens in non-covered jurisdictions. *Id.* at 14.

Even if this Court disagrees with Texas' bright-line rule, it should note probable jurisdiction to consider whether the district court should have accepted Texas' statewide functional analysis. Texas' approach is preferable to the binary methodology offered by the United States and adopted by the district court because it captures a more complete picture of minority voting strength throughout the State and eliminates the need to identify the inherently indeterminate point at which a district changes from "performing" to "non-performing," and vice-versa. J.S. 10-11 & n.1.

* * *

In determining whether Texas' congressional plan had a retrogressive effect, the district court was unable to agree on a single rationale: Judge Griffith would have decided the case based solely on the "representation gap"; Judge Collyer would have relied on the purported loss of District 25 as a "protected crossover district"; and Judge Howell accepted both theories. Similarly, the United States and intervenors *still* do not agree on why the congressional plan purportedly has a retrogressive effect.

This pervasive uncertainty is constitutionally intolerable, especially in an area of law in which the

two-year election cycle is shorter than the time it takes for a State to receive a final answer about whether its redistricting plan complies with Section 5. And the problem is exacerbated in States like Texas whose legislature meets for only 100 days every two years. If Section 5 is to survive, it is critical for this Court to establish workable standards going forward for assessing whether a challenged plan has a retrogressive effect. And if the district court's functional analysis is what the statute really requires, then Section 5's unconstitutionality is manifest.

II. THE DISTRICT COURT'S ERRONEOUS INTERPRETATION OF SECTION 5'S PURPOSE PRONG WARRANTS PLENARY REVIEW

The district court's finding of a discriminatory purpose in each of the three plans was not supported by the record and was based on the new "any discriminatory purpose" standard from the 2006 reauthorization, which raises serious constitutional concerns by overruling *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000). *See* J.S. 27-33.

The MALC Intervenors (at 2, 8-9) and the United States (at 22) suggest that Texas waived any constitutional challenge to the new substantive standard for assessing discriminatory purpose. To the contrary, Texas fully preserved its arguments that Section 5 must be *interpreted to avoid* constitutional violations or serious constitutional problems. Texas explicitly argued before the district court that "[f]orcing Texas to bear the burden of disproving discriminatory purpose would exceed Congress' enforcement authority under the Fifteenth

Amendment and violate the Tenth Amendment," and that "[t]o avoid an unconstitutional construction of § 5, Defendants must bear the burden of proving that Texas acted with discriminatory purpose." DN 201 (Post-trial brief) at 17-18.

Texas does not have space in this reply brief to respond comprehensively to the United States' and intervenors' specific allegations of discriminatory purpose in the congressional and Texas House plans. *See* U.S. Br. 20-22; MALC Br. 14-18, 30-31; Davis Br. 24-33; Task Force Br. 24-30.[3] But this circumstantial evidence—such as the allegation that opponents of the bill were not intimately involved in the drafting process and were unable to secure passage of amendments—is far more consistent with partisan political realities than racial motivations. The district court found no direct evidence of discriminatory purpose, and this circumstantial evidence would not come close to establishing a discriminatory purpose in a Section 2 or equal protection case with the burden of proof on the challenger. *See, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999). Furthermore, the United States and intervenors entirely ignore the many other

[3] One of the many costs imposed by rampant intervention in Section 5 cases is that it often forces covered jurisdictions to respond to multiple briefs (with differing and, in this case, contradictory, theories of the case) that far exceed the word limit that would apply to a single party. Here, Texas' Jurisdictional Statement was only 39 pages long, yet Texas must respond to nearly 150 pages of combined briefs from DOJ and three sets of intervenors.

considerations that influence every redistricting decision, including accommodating new districts, avoiding population variance, and balancing these competing concerns with the desire to preserve existing districts (especially majority-minority districts).

Contrary to the United States' suggestion (at 21), Texas did not in any way concede the argument that its plans were motivated by a partisan purpose. *See* DN 201 at 19 (defending all three plans as politically motivated, not racially motivated); *id.* at 26 ("Texas adopted the Congressional Plan with the lawful aim of protecting incumbents."); *id.* at 29 ("At worst, the evidence shows that Texas was guilty of blithe indifference to the wants of certain [Democratic] Congressmen.").

As to the senate plan, the United States concedes (at 26-30) that the district court's finding of a discriminatory purpose was not just wrong but *clear error*. The United States nonetheless asserts (at 30-31) that this Court should remand to give the Davis Intervenors another shot at refuting Texas' race-neutral motivation for its plan. But doing so would accomplish nothing other than further delay. Intervenors have already had months of discovery and a two-week-long trial to prove their case. If—as DOJ concedes—intervenors were unable to refute Texas' express, race-neutral purposes for enacting the senate redistricting plan, then the answer is not to give them a second bite at preventing a duly enacted state law to which DOJ does not object from going into effect. Such an opportunity would push Section 5 over the constitutional edge.

III. THE DISTRICT COURT'S ERRONEOUS DECISION TO ALLOW PRIVATE INTERVENORS TO RAISE DISTINCT CHALLENGES TO TEXAS' PLANS WARRANTS PLENARY REVIEW

As Texas explained, the legislatively enacted map for the state senate should have been precleared because DOJ conceded before the district court that this plan was not retrogressive in either purpose or effect. J.S. 33-38. Yet the United States and intervenors assert that private individuals and interest groups should be allowed to advance claims in a judicial preclearance case that DOJ has not deemed worth pursuing. U.S. Br. 31-32; Davis Br. 22-23.

Those arguments would effectively eliminate judicial preclearance as a viable option for covered jurisdictions. Under the United States' and intervenors' view of Section 5, a covered jurisdiction must either: (1) go "hat in hand to Justice Department officialdom to seek approval of any and all proposed voting changes," *Shelby County v. Holder*, 679 F.3d 848, 885 (D.C. Cir. 2012) (Williams, J., dissenting); or (2) seek judicial preclearance through a process in which dozens of interest groups and private parties can flip the burden to the State to justify its duly enacted laws.

If DOJ and intervenors are correct, then Section 5 is unconstitutional. A meaningful judicial preclearance option that is not significantly more onerous than administrative preclearance is a critical prerequisite to Section 5's validity. If Congress had enacted Section 5 without a judicial preclearance option, thus requiring States to obtain permission

from federal executive branch officials before their laws could go into effect, then Section 5's unconstitutionality would have been manifest long ago.

It is true that this Court has allowed private intervention in earlier Section 5 cases, *see Georgia v. Ashcroft*, 539 U.S. 461, 476 (2003), but those decisions pre-date the 2006 amendments to Section 5, which brazenly abrogated prior decisions of this Court and enlarged considerably Section 5's substantive reach. It is a staggering affront to the "integrity, dignity, and residual sovereignty of the States," *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011), to allow private parties to shift the burden to a State to prove the *absence* of *any* discriminatory intent in its duly enacted laws. Section 5's reversal of the normal burden of proof is unique and unprecedented in federal law, and requires much closer scrutiny of private intervention if the statute is to be applied consistent with the Tenth Amendment and Equal Protection Clause.

The costs of private intervention are manifest in considering how this case will proceed if the Court grants plenary review. DOJ *agrees* with Texas that the state senate plan is entitled to preclearance and that CD 25 in the congressional plan is not a protected "coalition" district. U.S. Br. 19-20, 26-30. Thus, DOJ is essentially taking a middle position, while intervenors seek to prevent implementation of aspects of Texas' plans to which DOJ has never objected. The fact that the district court prevented Texas' law from taking effect based on a flawed analysis that was opposed by *both* Texas and DOJ

underscores why private intervention is incompatible with a streamlined judicial preclearance process that operates as a meaningful alternative to administrative preclearance. The participation of dozens of intervenors who raise unique arguments about why preclearance should be denied turns the judicial preclearance process into little more than a punishment for jurisdictions that have the temerity not to seek approval directly from DOJ.

CONCLUSION

No aspect of the district court's decision should be summarily affirmed. At a minimum, the Court should hold this case pending its disposition of *Shelby County*. But the better course would be to note probable jurisdiction and set the case for oral argument this Term. The United States acknowledges that the decision below was wrong in several key respects, and largely concedes that this case warrants plenary review.

Respectfully submitted,

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December 13, 2012