No. 12-496

# In the Supreme Court of the United States

STATE OF TEXAS, APPELLANT

*v.*

UNITED STATES OF AMERICA, ET AL.

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

**MOTION TO AFFIRM IN PART**

DONALD B. VERRILLI, JR.
*Solicitor General*
*Counsel of Record*
THOMAS E. PEREZ
*Assistant Attorney General*
JESSICA DUNSAY SILVER
ERIN H. FLYNN
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTIONS PRESENTED

1. Whether the district court erred in denying preclearance under Section 5 of the Voting Rights Act of 1965 (Section 5), 42 U.S.C. 1973c, to Texas's 2011 districting plan for the United States House of Representatives because Texas failed to demonstrate that the plan did not have the purpose and would not have the effect of discriminating on the basis of race.

2. Whether the district court erred in denying preclearance under Section 5 to Texas's 2011 districting plan for the State House of Representatives because Texas failed to demonstrate that the plan would not have the effect of discriminating on the basis of race.

3. Whether the district court erred in denying preclearance under Section 5 to Texas's 2011 districting plan for the State Senate because Texas failed to demonstrate that the plan did not have a discriminatory purpose.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page



Statutes, regulations and rule:

Miscellaneous: Page

# In the Supreme Court of the United States

No. 12-496

STATE OF TEXAS, APPELLANT

*v.*

UNITED STATES OF AMERICA, ET AL.

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

## MOTION TO AFFIRM IN PART

### OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1-281) is not yet reported in the *Federal Supplement* but is available at 2012 WL 3671924. The district court's decision denying Texas's motion for summary judgment (J.S. App. 282-341) is reported at 831 F. Supp. 2d 244.

### JURISDICTION

The judgment of the three-judge court was entered on August 28, 2012. A notice of appeal was filed on August 31, 2012 (J.S. App. 342-343), and the jurisdictional statement was filed on October 19, 2012. The jurisdiction of this Court is invoked under 42 U.S.C. 1973c(a).

### STATEMENT

1. Section 5 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973c, prohibits covered jurisdictions from adopting or implementing changes in "any voting quali-

fication or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first obtaining preclearance from either the United States Attorney General or a three-judge court in the United States District Court for the District of Columbia by demonstrating that the proposed 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 membership in a racial group statutorily defined as a "language minority group." 42 U.S.C. 1973c(a); see 42 U.S.C. 1973b(f)(2).

Section 5's "effect" prong precludes preclearance of voting changes that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," measured against the jurisdiction's existing (benchmark) practice. *Beer* v. *United States*, 425 U.S. 130, 141 (1976); see *Georgia* v. *Ashcroft*, 539 U.S. 461, 477 (2003). Sections 5(b) and (d) specify that the effect prong prohibits voting changes that will, because of race, color, or membership in a language minority group, "diminish[] the ability of any citizens * * * to elect their preferred candidates of choice." 42 U.S.C. 1973c(b). Section 5's "purpose" prong precludes preclearance of voting changes motivated by "any discriminatory purpose." 42 U.S.C. 1973c(c).

2. Because Texas is subject to Section 5, see 28 C.F.R. Pt. 51 App., it must preclear any voting change, including statewide redistricting. "Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process." *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 439 (2006) (*LULAC*) (quot-

ing *Vera* v. *Richards*, 861 F. Supp. 1304, 1317 (S.D. Tex. 1994), aff'd, 517 U.S. 952 (1996)). That unfortunate history "stretch[es] back to Reconstruction," *id.* at 440 (quoting *Vera*, 861 F. Supp. at 1317), and, as evidenced by the district court's decision in this matter, continues today. Since becoming covered in 1975, Texas has never engaged in statewide redistricting without either drawing a Section 5 objection to one or more plans, see J.S. App. 3-4, 55-56, or having this Court conclude that a plan violates Section 2 of the VRA, 42 U.S.C. 1973, see *LULAC*, 548 U.S. at 436-442.

According to the decennial Census, Texas's population increased by nearly 4.3 million people (approximately 20%) between 2000 and 2010. J.S. App. 142. Nearly all of that increase (89.2%) was attributable to the State's minority population. *Ibid.* Hispanics alone accounted for 65% of the growth, with African-Americans and Asian-Americans accounting for 13.4% and 10.1%, respectively. *Ibid.*; *id.* at 45. As a result of this growth, Texas was apportioned four additional congressional seats. *Id.* at 142. To account for these new seats and to comply with the Constitution's one-person-one-vote rule, Texas redrew its statewide districting plans for Congress, the State Senate, and the State House of Representatives. *Id.* at 142-143; see *id.* at 282-284.[1]

3. Between June 17 and July 18, 2011, Governor Perry signed the bills containing the redistricting plans. J.S. App. 154, 209, 241. Rather than submitting any of the plans to the Attorney General for administrative preclearance, Texas sought judicial preclearance of each

---

[1] Texas also enacted a new plan for the State Board of Education. No party objected to that plan and the district court precleared it. See J.S. App. 4 n.1.

plan by filing this action on July 19, 2012. *Id.* at 4. In its answer, the United States opposed preclearance of the State House and congressional plans on the basis that they both have the purpose and will have the effect of discriminating on the basis of race. *Id.* at 3. The United States did not oppose preclearance of the State Senate plan. See *ibid.* The court granted defendant-intervenor status to seven parties, some of whom opposed preclearance of the Senate plan.[2] *Id.* at 4 n.2.

Texas stated in its complaint that it "assum[ed] that Section 5 complies with the United States Constitution." 1:11-cv-01303 Docket entry No. (Docket No.) 1, at 1. During pretrial proceedings Texas specifically reiterated its intent not to amend its complaint to challenge Section 5's constitutionality. See J.S. App. 23 n.11; 12/7/11 Tr. 32-33; 12/12/11 Tr. 6.

On November 8, 2011, the district court denied Texas's motion for summary judgment. J.S. App. 5. The court explained in an opinion issued on December 22 that Texas had used improper methodology to assess whether its plans were retrogressive. *Id.* at 5, 282-336. The court also explained that genuine issues of material

---

[2] Several intervenors are also plaintiffs in actions in the District Court for the Western District of Texas, challenging the State House, State Senate, and congressional plans under Section 2 of the VRA and the Constitution. A three-judge court indicated it would not issue a decision on those claims while the Section 5 action was pending. The court enjoined Texas from implementing the enacted plans until the State secured Section 5 preclearance, and it adopted interim plans to govern elections in 2012. This Court vacated the interim plans and remanded. See *Perry* v. *Perez*, 132 S. Ct. 934, 944 (2012) (per curiam). On remand, the three-judge court entered new interim plans in accordance with the standards set forth in *Perry*. See J.S. App. 5-6.

fact remained on the question of discriminatory intent. *Id.* at 336-340.

4. After a two-week trial and extensive briefing, the district court denied Texas's request for preclearance of all three plans. J.S. App. 1-281.

a. The court denied preclearance of the new 36-seat congressional plan, concluding that Texas had not "carried its burden to prove the absence of discriminatory purpose and effect." J.S. App. 36-57. The court held that the plan was retrogressive with respect to Hispanic voters—although the judges did not all agree on the same rationale. *Id.* at 38-57, 99-141.

All three judges agreed that, in order to avoid retrogression, the new plan needs to contain at least 11 districts in which minority voters have the ability to elect their preferred candidate of choice (ability districts). J.S. App. 37-57. Judges Collyer and Howell agreed with some intervenors that the benchmark plan contained 11 ability districts because Congressional District 25 (CD25) was an ability district in the benchmark. *Id.* at 99-125. Judge Griffith, however, agreed with the United States that benchmark CD25 was not a protected ability district. *Id.* at 126-141.

Although Judge Griffith thus concluded that the benchmark plan contained ten rather than 11 ability districts, he agreed that the new plan is retrogressive because it does not contain 11 minority ability districts. J.S. App. 45-51. In a portion of the opinion joined by Judge Howell, Judge Griffith explained that, under the unusual facts at issue here, Texas was required to draw at least one of its four new congressional districts as a

Hispanic ability district.[3] *Ibid.* The court explained that Section 5 prohibits voting changes that "increase the degree of discrimination" against minority voters. *Id.* at 46 (quoting *City of Lockhart* v. *United States*, 460 U.S. 125, 134 (1983)). But the court "emphasize[d]" that Section 5 does not require covered jurisdictions to afford proportional representation to its minority populations. *Id.* at 50. The court concluded that, in the unique situation presented—*i.e.*, where a fully covered State with a sizable minority population gains four congressional seats—the court should measure retrogression with reference to the plan's "representation gap." *Id.* at 45-51. The representation gap is the difference between the number of ability districts that would be proportional to a minority group's share of citizen voting-age population (CVAP) and its actual number of ability districts. *Id.* at 48. In the benchmark plan, the gap was three districts for Texas's minority population as a whole (and 1.4 districts for Hispanics). *Id.* at 49 & n.27. In the new plan, the gap would be four districts (and 2.5 districts for Hispanics). *Id.* at 49-50 & n.27. Because the new plan increased the representation gap by one district, the court concluded that it is retrogressive. *Id.* at 50-51.

Although all three judges agreed that the new congressional plan cannot be precleared because it is retrogressive, they did not agree on a single rationale; they therefore considered whether Texas had met its burden on discriminatory purpose. J.S. App. 51-57. Employing the factors set forth in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the court held that Texas had not satisfied its

---

[3] Judge Collyer did not join that portion of the opinion because, given her views on CD25, she did not view it as necessary to a retrogression finding. J.S. App. 45 n.22.

burden. The court noted that Texas had removed the home offices and the major economic engines of several districts represented by minority legislators who were the candidates of choice in all three African-American ability districts and in one Hispanic ability district. J.S. App. 53-54. "No such surgery was performed on the districts of Anglo incumbents," the court explained, and Texas's only explanation ("coincidence") was unconvincing. *Id.* at 54-55 & n.31. The court also considered other *Arlington Heights* factors, including Texas's history of voting discriminating, the sequence of events leading to the enactment of the plan, and procedural and substantive departures from the normal decisionmaking process. *Id.* at 55-57. The court was "persuaded by the totality of the evidence that the plan was enacted with discriminatory intent." *Id.* at 57.

b. The court also concluded that Texas's new State House plan is retrogressive because it eliminates four ability districts without creating any new ones. J.S. App. 68-95. In reaching that conclusion, the court rejected Texas's preferred methods of gauging whether a district is an ability district, *i.e.*, using only statewide and national elections to the exclusion of local elections to assess past electoral success, and using a bright-line rule that would deem any district an ability district if at least 40% of the voting-age population (VAP) is African-American or 50% of the CVAP is Hispanic. *Id.* at 10-24, 70-82, 297-298, 318-326. Instead, the court employed a "multi-factored, functional analysis," *id.* at 8, to determine which districts in the benchmark and proposed plans qualified as ability districts. In one of the lost ability districts—House District 117 (HD117)—Texas removed high-turnout Hispanic voters and replaced them with low-turnout Hispanic voters. *Id.* at 80-82. In

so doing, Texas ensured that the district's CVAP would remain majority Hispanic while decreasing Hispanic voters' ability to elect their candidate of choice. *Id.* at 81-82. In another lost ability district (HD149), Texas dismantled what the court concluded was a coalition of African-American, Hispanic, and Asian-American voters who voted cohesively and had elected their candidates of choice in the benchmark plan. *Id.* at 83-89. Because the court unanimously agreed on the basis for finding the House plan retrogressive, it did not decide whether the plan was enacted with a discriminatory purpose. *Id.* at 95-97. The court noted, however, that there was ample evidence to support such a conclusion, including Texas's rampant splitting of existing voting precincts along racial lines and the "incredible" and "implausib[le]" testimony of the lead map-drawer, which "reinforce[d] evidence suggesting mapdrawers cracked [precincts] along racial lines to dilute minority voting power." *Id.* at 96.

c. Finally, the court concluded that, although the Senate plan is not retrogressive, Texas failed to demonstrate that it was not enacted with a discriminatory purpose. J.S. App. 58-68. The court focused on Senate District 10 (SD10), a majority-Anglo CVAP district that the court concluded was not a protected ability district in the benchmark plan. *Id.* at 58-61. The court noted, however, that Texas's redrawing of SD10 had a "disparate impact on racial minority groups" because it decreased the voting strength of African-Americans and Hispanics in the district. *Id.* at 61. Texas acknowledged that effect, but contended that "its decision to 'crack' SD 10 is best explained by partisan, not racial, goals." *Id.* at 62. The court rejected that explanation based on other factors, including Texas's history of voting discrimination. *Id.* at 63. The court also noted that Texas's map-

drawers had prevented both Senator Wendy Davis (who represented SD10) and "every senator who represented an ability district" from participating in the map-drawing process until 2 days before the map was introduced in the Senate. *Id.* at 63-64, 67. In addition, there was evidence that the map-drawers had no intention of considering amendments to the proposed plan during the mark-up process. *Id.* at 64-66.

**ARGUMENT**

Texas appeals the district court's refusal to preclear Texas's congressional, State House, and State Senate plans. For the reasons set forth below, this Court should note probable jurisdiction and then affirm the district court concerning the congressional plan, should summarily affirm concerning the State House plan, and should remand concerning the State Senate plan.

Although Texas includes a direct challenge to the constitutionality of Section 5 in its questions presented (J.S. i), it makes no such argument in the body of its Jurisdictional Statement, except in the form of constitutional avoidance. Section 5's constitutionality is not presented in this case as Texas affirmatively disclaimed such a direct challenge in the district court and may not raise it for the first time on appeal. This Court granted a petition for a writ of certiorari in *Shelby County* v. *Holder*, No. 12-96, to address the facial constitutionality of Section 5. For the reasons set forth herein, this Court should note probable jurisdiction here to address the application of Section 5 to the facts of this case.

### A. This Court Should Note Probable Jurisdiction And Affirm The District Court's Holding That Texas's Congressional Plan Is Discriminatory In Effect And Purpose

The district court correctly concluded that Texas's proposed congressional plan is retrogressive and was enacted with a racially discriminatory purpose. This Court should therefore affirm the district court's denial of preclearance. But because the court did not agree about why the congressional plan is retrogressive—and because the United States agrees with Texas that one of the two available rationales is flawed—this Court should affirm after noting probable jurisdiction (rather than summarily affirming) in order to clarify disputed questions about the application of Section 5 to the unusual facts of this case.

1. a. Texas argues (J.S. 23-27) that the district court erred in employing a "functional analysis" to determine which districts qualify as ability districts rather than using a bright-line test "to protect only those districts where a single minority group constitutes 50% or more of the voting age population." J.S. 23. The district court correctly rejected that interpretation of Section 5.[4]

---

[4] The district court also correctly rejected the State's contention that it should consider only exogenous election analysis (*i.e.*, analysis of how minority-preferred candidates perform in national or statewide elections), to the exclusion of endogenous election analysis (*i.e.*, analysis of election results for the relevant district). J.S. App. 11-15. Texas does not challenge that holding on appeal, instead taking a passing shot (J.S. 24 n.11) at the district court's rejection of the "statewide functional analysis" Texas proposed after the court rejected its bright-line test. J.S. App. 18-24. Under Texas's proposed approach, a court would consider "the *degree* of minority voting power across the entire plan" rather than the number of ability districts in the benchmark and proposed plans. *Id.* at 18. The district court

As this Court has long held, Section 5's effect prong prohibits covered jurisdictions from adopting or implementing a voting change that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1976). In applying that standard, the district court correctly focused on minority voters' "effective exercise of the electoral franchise," which includes not only "the 'ability of minority groups to participate in the political process,' but also the ability 'to elect their choices to office.'" J.S. App. 7 (quoting *Beer*, 425 U.S. at 141). The correctness of that approach is reflected in Section 5's text, see 42 U.S.C. 1973c(b) and (d) (focusing on minority voters' ability to elect their preferred candidates of choice), and in this Court's cases implementing Section 5. In *Beer* itself, this Court focused on the percentage of minority *registered voters* in the relevant districts, not just the proportion of minority VAP, in concluding that the redistricting plan at issue was not retrogressive. 425 U.S. at 134-142; see *LULAC* v. *Perry*, 548 U.S. 399, 428 (2006) ("[I]t may be possible for a citizen voting-age majority to lack real electoral opportunity.").

Although the district court agreed with Texas (and all other parties) that demographic statistics are an important starting point in assessing ability to elect, J.S. App. 319, the court explained that "[d]etermining that minorities have an ability to elect based solely on their numbers in the voting population of a district cannot account for the most fundamental concern of Section 5: the effect past discrimination has on current electoral power," *id.* at 321. This Court has repeatedly acknow-

---

correctly rejected that approach as "inconsistent with Section 5," particularly as amended in 2006. *Id.* at 18-22.

ledged Texas's long history of voting discrimination. See, *e.g.*, *LULAC*, 548 U.S. at 440. The district court correctly concluded that the lingering effect of such discrimination "requires a more complicated retrogression analysis than Texas want[ed] [the] Court to approve, but it is part and parcel of discerning whether minority citizen voters will be *effective* in their exercise of the electoral franchise." J.S. App. 322. The district court took account of "data that pertains to actual minority voting strength" rather than focusing exclusively on population statistics. *Ibid.* In particular, the court noted that, at least in districts with less than 65% minority CVAP, it would consider "minority voter registration, minority voter turnout, election history, and minority/majority voting behaviors." *Id.* at 319, 320-321.

Texas argues that the district court's approach improperly focuses on "political *outcomes* rather than *ability*." J.S. 25. It is true that a jurisdiction or reviewing court must consider past electoral outcomes and project probable future electoral outcomes to assess whether a districting change is retrogressive. But nothing in Section 5 requires a covered jurisdiction or court to guarantee minority voters' future electoral success. Section 5 does prohibit covered jurisdictions from adopting discriminatory voting changes that will diminish the ability of a sufficiently sizable, cohesive, and concentrated group of minority voters to elect their candidate of choice.

There is also no merit to Texas's assertion that focusing on actual electoral ability "requires covered jurisdictions and courts to engage in the patronizing and constitutionally dubious process of identifying a minority group's preferred candidate of choice," which it argues "perpetuates stereotypical notions about members of

the same racial group." J.S. 25 (internal quotation marks and brackets omitted). As the district court correctly explained, the "[i]dentification of the minority preferred candidate is a factual question." J.S. App. 328 n.29. Stereotypes have no place in that analysis—and "language minority status or race does not constitute a simple proxy for partisan preference in gauging the ability to elect." *Id.* at 318. Rather, identifying whether a candidate is a minority group's preferred candidate in a particular district requires an examination of political cohesion, racial-bloc voting, and past electoral outcomes. There is nothing "constitutionally dubious" about that factual inquiry. Indeed, in this case "there [was] generally no dispute about the identity of minority-preferred candidates in a given district." *Id.* at 11 n.7.[5] And while Texas attempts to argue that consideration of registration and turnout patterns is improper because such "rates now approach parity," J.S. 26 (quoting *Northwest Austin Mun. Util. Dist. No. 1* v. *Holder*, 557 U.S. 193, 203 (2009)), as Congress recognized when it reauthorized Section 5 in 2006, registration and turnout rates *in Texas* have not approached parity between Anglo and minority voters, H.R. Rep. No. 478, 109th Cong., 2d Sess. 29 (2006) (noting that in 2004 there was a 20-point gap in the percentage of registered Anglo and Latino citizens).

---

[5] Although Texas expresses concerns about the perpetuation of stereotypes, Texas repeatedly suggests that the universe of candidates who are themselves racial minorities and the universe of minority-preferred candidates are one and the same. See J.S. 11, 25-26. That is incorrect. The record in this case demonstrates, for example, that Latinos in Texas often vote cohesively for non-Latino candidates and that not all Latino elected officials are the candidates-of-choice of Latino voters. See, *e.g.*, J.S. App. 70-71, 165-167, 181, 248-250, 261-264, 272-273; see *LULAC*, 548 U.S. at 440-441.

Finally, Texas is incorrect in contending that the district court's multi-factored approach "provides no clear guidance to covered jurisdictions." J.S. 24. As the district court recognized, its approach closely parallels the approach that has been embodied for decades in the Attorney General's Section 5 guidance. J.S. App. 325-326 & n.26. Pursuant to that guidance, the Attorney General precleared all of the 49 post-2010 statewide redistricting plans that were submitted for administrative preclearance.[6] The only such plans that were not precleared are the plans at issue here. That is a strong indication that the retrogression analyses employed by the Attorney General and by the district court are not difficult to administer and do not increase Section 5's "sovereignty costs." J.S. 24; see J.S. App. 325-326.

b. Texas also argues (J.S. 12-18) that the district court erred in holding that, to avoid retrogression, Texas was required to draw one of its four new congressional districts as an ability district. Texas contends that the district court announced a "novel gloss on Section 5's 'effects' test" that is contrary to the statutory text and implicates constitutional concerns. *Ibid.* That is incorrect. The district court's holding is correct and carefully limited to the (so far) unique facts of this case.

Between the 2000 and 2010 Censuses, Texas's population grew dramatically, by approximately 20% (4.3 million people). J.S. App. 142. Nearly 90% of that increase was attributable to minority population growth, with 65% attributable to Hispanic residents alone. *Ibid.* As a result of this growth, Texas was apportioned four additional congressional seats, for a total of 36. *Id.* at

---

[6] Civil Rights Div., U.S. Dep't of Justice, *Status of Statewide Redistricting Plans* (last visited Dec. 7, 2012), http://www.justice.gov/crt/about/vot/sec_5/statewides.php.

142. The United States argued below that ten of the 32 benchmark districts were ability districts. The parties and the district court agreed that the benchmark and proposed plans each had three African-American ability districts. J.S. App. 37-38. The United States argued that seven benchmark districts (CDs 15, 16, 20, 23, 27, 28, and 29) were Hispanic ability districts, that proposed CDs 23 and 27 were no longer Hispanic ability districts, and that proposed CDs 34 and 35 qualified as new Hispanic ability districts. Docket No. 185, at 31-32. The district court agreed, J.S. App. 37-45, although two judges would also have held that CD25 was an ability district in the benchmark, but not in the proposed plan, *id.* at 99-141.

Although the benchmark and proposed plans each contained ten ability districts under the United States' analysis, the district court correctly held that the proposed plan is retrogressive because the unprecedented increase in the number of congressional seats, combined with the increasing proportion of the Hispanic population, has the effect of increasing the degree of underrepresentation of Hispanic voters by more than one congressional seat. J.S. App. 45-51. As a result, the district court correctly concluded, one of the four new congressional districts was required to be an ability district.

Texas errs in arguing (J.S. 15) that a State is *never* required to create an additional ability district to avoid retrogression, even if the State gains a substantial number of additional congressional districts because of dramatic growth in the minority population. That argument, the district court persuasively explained, cannot be correct: otherwise, "a state with a 100-member legislature and 30 ability districts in the benchmark map" could redraw its legislature to include 200 districts with-

out having to create *any* additional ability districts. J.S. App. 47 n.25. It is difficult to understand how such a plan would not be retrogressive.

In assessing whether Texas's proposed congressional plan is retrogressive, the district court implemented this Court's instructions that a reviewing court should consider whether the "'entire [enacted] statewide plan as a whole' * * * 'increase[d] the degree of discrimination against [minority voters].'" J.S. App. 46 (first and third sets of brackets in original) (quoting *Georgia* v. *Ashcroft*, 539 U.S. 461, 479 (2003), and *City of Lockhart* v. *United States*, 460 U.S. 125, 134 (1983)). The court measured the "degree of discrimination" by comparing the number of districts in which each minority group can elect its candidate of choice with the number of such districts that would exist if each minority group could elect its candidate of choice in proportion to its share of the population.

The court emphasized that nothing in Section 5 requires a jurisdiction to ensure proportional representation for minority voters. J.S. App. 50-51. Rather, it calculated the number of districts that would result from proportional representation only as a means of measuring the degree of minority underrepresentation that exists under both plans. The court noted that Hispanics comprise 26.4% of Texas's population—a proportion that would have translated to 8.4 ability districts in the 32-district benchmark plan and 9.5 ability districts in the 36-district proposed plan. *Id.* at 49 n.27. Then the court calculated the "representation gap"—*i.e.*, the difference between the number of actual ability districts and the number of ability districts that would exist if there were proportional representation—in order to assess whether the degree of underrepresentation, and therefore the

degree of discrimination, had increased. *Id.* at 48-50 & n.27. For Hispanics, the court concluded that the preexisting degree of discrimination increased under the proposed plan because the representation gap increased from 1.4 districts (the difference between the proportional share of 8.4 and the actual share of 7) to 2.5 districts (the difference between 9.5 and 7). *Id.* at 49 n.27. In order to avoid retrogression, the court concluded that Texas needed to draw 8 Hispanic ability districts, which would result in an increase in the representation gap of only 0.1 districts. See *id.* at 49-50.[7]

Contrary to Texas's argument (J.S. 14-16), nothing in the district court's approach conflicts with this Court's decision in *Abrams* v. *Johnson*, 521 U.S. 74 (1997). In *Abrams*, the Court rejected private intervenors' argument that Georgia's post-1990-Census congressional plan violated Section 5 because it did not draw a second ability district when the State obtained one additional congressional seat. *Id.* at 97-98. The Court explained that Section 5 does not require covered jurisdictions to draw every new congressional district as a minority ability district. *Ibid.* As the district court acknowledged, "when the number of districts remains the same or increases by one[,] there is no retrogression as long as the number of ability districts remains the same." J.S. App. 46. But *Abrams* did not address the situation presented here—*i.e.*, where the jurisdiction obtains a sufficient

---

[7] As the district court noted, the representation gap of African-Americans in Texas also increased, but by less than a full district. J.S. App. 49-50 & n.27. The court correctly concluded that Texas was therefore not required to draw an additional African-American ability district. *Ibid.* The court also correctly noted that the result is the same if one considers African-American and Hispanic voters in the aggregate. *Ibid.*

number of new seats to increase minority underrepresentation by one or more whole congressional districts. And *Abrams* "does not hold that a state's failure to draw new minority districts can never be retrogressive." *Ibid.*

Section 5's application to covered jurisdictions is predicated on the long and tenacious history of intentional voting discrimination against racial minorities in those jurisdictions. Section 5 is not intended to root out preexisting discrimination in covered jurisdictions—that is Section 2's job. Section 5 does, however, require a State to avoid further eroding the rights of minority voters by protecting the gains they have earned. See *Beer*, 425 U.S. at 141. The district court's application of Section 5 is faithful to that congressional purpose and does not (contrary to Texas's contention, see J.S. 16) conflate the roles of Sections 2 and 5.

As is plain from the district court's opinion, Section 5's effect prong will almost never require a covered State to draw a new minority ability district. Outside of either the facts presented here or the type of scenario posited by the court, see J.S. App. 47 n.25, it has never happened before and is unlikely to happen again. If, for example, the proportion of minority voters had dramatically increased in Texas, but the overall population had not increased enough to merit an additional congressional seat, Section 5's effect prong would not require Texas to draw an additional ability district. Because that prong addresses only the retrogressive effect of the proposed voting change (not of other factors), it requires a court to compare the operation of the benchmark plan at the time of preclearance with the operation of the proposed plan at that time. The proportion of minority voters is necessarily the same in both analyses; if the

proposed plan maintains the same number of ability districts, it is not retrogressive. But here, where nearly 90% of the State's increase in population is attributable to minority groups and that growth resulted in an unprecedented increase of four congressional seats, Texas must draw a new ability district to avoid increasing the degree of discrimination against minority voters.

c. The United States agrees with Texas that Judges Collyer and Howell incorrectly determined that benchmark CD25 was an ability district. See J.S. App. 99-125. As Judge Griffith explained in his dissent from the court's holding as to CD25, even if Section 5 protects some crossover districts (*i.e.*, majority-Anglo districts in which a minority group is able to elect its candidate of choice with the assistance of crossover Anglo voters), CD25 is not such a district. *Id.* at 126-141. Although African-Americans and Hispanics "vote cohesively" in CD25, *id.* at 126, Judge Griffith concluded that CD25 is not an ability district because there is no evidence that minority voters (who comprise only 35% of the district's CVAP) "lead" the choice of candidate rather than simply providing "the margin of victory" or having "an equal voice in a district's electoral decisions," *id.* at 129-130.

The United States does not view CD25 as a Section 5 ability district. CD25's coalition of minority voters has succeeded in electing its preferred candidate only because there is no racial-bloc voting among Anglo voters in that district. We therefore agree with Judge Griffith that the benchmark plan contained ten ability districts (three African-American and seven Hispanic). As explained, however, we also agree with the district court that the proposed congressional plan is retrogressive because it did not create a new ability Hispanic district. Thus, although the Court should affirm the district

court's holding that the congressional plan is retrogressive, we suggest that the Court note probable jurisdiction so that it may clarify the basis for such an affirmance in a written opinion.

2. Because the court did not agree on a rationale for finding Texas's congressional plan retrogressive, the court considered whether the plan was enacted with a discriminatory purpose. The court correctly held that it was.

a. Texas erroneously asserts (J.S. 28-30) that only direct evidence of intentional discrimination is relevant to a finding of discriminatory purpose. This Court has explained that "assessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a sensitive inquiry into such circumstantial and direct evidence as may be available," and has instructed that such an inquiry must consider the factors set forth in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 488-489 (1997) (internal quotation marks omitted). The district court did just that, considering the racial impact of the State's plan; the historical background of the decision; the sequence of events leading up to the plan's enactment; any procedural or substantive departures from the normal decision-making process; and any contemporaneous viewpoints expressed by decision-makers. J.S. App. 36, 51-57, 293-296.

b. In addition to the plan's retrogressive effect, the district court examined "the circumstances surrounding the drawing of the new maps." J.S. App. 52. In particular, the court noted that map-drawers made substantial changes to the three African-American ability districts in the benchmark plan "even though the 2010 Census

data shows the population in each was already close to the ideal size." *Id.* at 52-53. And the changes were not neutral: in each of the three districts, Texas carefully removed both important economic engines (*e.g.*, medical and convention centers, sports arenas, and universities) and the incumbents' home offices from the district. *Id.* at 53, 192-196. The map-drawers did the same in one Hispanic ability district. *Id.* at 54, 196-197. In contrast, "[n]o such surgery was performed on" any non-ability district, each of which retained the incumbent's home office. *Id.* at 54, 197-198. Although Texas now asserts (J.S. 29-30) that the surgery in question was motivated by partisanship, it "never argued" in the district court "that the removal of district offices and economic generators was the product of political animus." J.S. App. 55 n.31. The only explanation Texas offered was "coincidence." *Id.* at 55. The district court rejected that implausible explanation, concluding instead that "[t]he 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," that would "lead [it] to infer a discriminatory purpose." *Ibid.*

The district court found the suspicious line-drawing particularly concerning in light of Texas's history of discrimination. The court also emphasized the procedural and substantive deviations from normal processes that permeated the development and enactment of the plan. J.S. App. 56-57. Although the court noted that there was additional evidence of discriminatory purpose—including "the selective drawing of CD23 and [the] failure to include a Hispanic ability district in the Dallas-Fort Worth metroplex"—it found the evidence it set forth to be "sufficient * * * to conclude that the Con-

gressional Plan was motivated, at least in part, by discriminatory intent." *Id.* at 57 & n.32, 167-180, 198-209.[8]

c. Texas contends (J.S. 31-33) that requiring a State to disprove that it acted with a discriminatory purpose raises constitutional concerns. Although Texas includes a fourth question presented impugning the constitutionality of Section 5 (J.S. i), it expressly disclaimed any such challenge in the district court (other than in the form of constitutional avoidance), J.S. App. 23 n.11; 12/7/2011 Tr. at 32-33; 12/12/2011 Tr. at 6; Docket No. 201, at 17-18, and cannot raise such an argument for the first time on appeal, see, *e.g.*, *Nevada Comm'n on Ethics* v. *Carrigan*, 131 S. Ct. 2343, 2351 (2011); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38-39 (1989). Nor is constitutional avoidance appropriate in this case as there is no doubt that Congress intended preclearance to be denied when a jurisdiction fails to establish that its proposed change was not motivated by "any discriminatory purpose." 42 U.S.C. 1973c(a) and (c).

In any event, this is not a case in which the allocation of burdens made a difference in the holding as to discriminatory purpose. Although it would have been sufficient for the district court to conclude that Texas had failed to meet its burden of disproving discriminatory purpose, it went further, observing that the evidence was sufficient to prove that the congressional plan was enacted, at least in part, with a discriminatory purpose. J.S. App. 57.

---

[8] Texas dismantled Hispanic ability district CD23, which had been drawn by a district court as a remedy after this Court's holding in *LULAC* that Texas violated Section 2 of the VRA (with behavior that "bears the mark of intentional discrimination that could give rise to an equal protection violation") by removing Hispanic voters from that district in its mid-decade redistricting. 548 U.S. at 438-442.

### B. This Court Should Summarily Affirm The District Court's Holding That Texas's State House Plan Is Retrogressive

Texas challenges the district court's conclusion that its State House plan is retrogressive, arguing both that the court employed a flawed methodology in assessing which districts are ability districts, J.S. 23-27, and that the court improperly interpreted Section 5 to protect at least some "coalition" districts, J.S. 18-23. The first contention is incorrect and is addressed at pp. 10-14, *supra*. The second contention is incorrect as well.

Texas argues that Section 5 never protects a district in which no single minority group comprises more than 50% of a district, but a coalition of more than one minority group votes cohesively in the face of Anglo bloc-voting to elect its candidate of choice. But in concluding that the House plan is retrogressive, the district court correctly concluded that benchmark HD149 is a coalition ability district under Section 5. J.S. App. 83-89. Texas does not critique that specific conclusion in its Jurisdictional Statement, J.S. 18-23; but its general argument that coalition ability districts are not cognizable would apply to the court's treatment of HD149, J.S. 21 n.9.

Section 5 prevents covered jurisdictions from making voting-related changes that 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(b). Section 5's guarantee that a citizen's right to vote not be abridged on account of race is not limited to prohibiting practices that discriminate against one race only. Indeed, when Congress extended Section 5 in 1975 to include Texas, it noted that State's "long history of discriminating against members of both" African-

American and Hispanic groups "in ways similar to the myriad forms of discrimination practiced against blacks in the South." S. Rep. No. 295, 94th Cong., 1st Sess. 25 (1975).

Of course, as this Court has noted in the Section 2 context, "a State may not assum[e] from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls." *LULAC*, 548 U.S. at 433 (internal quotation marks omitted; brackets in original) (quoting *Miller* v. *Johnson*, 515 U.S. 900, 920 (1995)). That principle applies with particular force when considering a community of more than one racial group. Cf. *Growe* v. *Emison*, 507 U.S. 25, 41 (1993) (noting that, because "a court may not presume bloc voting within even a single minority group, it made no sense for" a district court to presume "bloc voting within an agglomeration of distinct minority groups") (citing *Thornburg* v. *Gingles*, 478 U.S. 30, 46 (1986)). But a community of non-Anglo citizens living in close proximity can collectively be subject to the type of discrimination expressly prohibited by Section 5.[9]

Thus, there is no reason to think that Congress would have declined to consider at least some coalition districts

---

[9] Texas errs in asserting that this Court "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." J.S. 20. The Court in *Perez* held that the district court in that case "had no basis" for intentionally drawing a particular coalition district "in which the court expected two different minority groups to band together to form an electoral majority." 132 S. Ct. at 944. But the Court did not hold that a coalition ability district in a benchmark plan—one for which there was a factual "basis" to conclude that more than one minority group voted cohesively in the face of Anglo bloc-voting to elect its candidates of choice—could never be protected under Section 5.

to be ability districts entitled to Section 5's protections. If a benchmark plan includes a district in which a coalition of distinct minority groups has the ability, voting cohesively, to elect their candidate of choice in the face of Anglo racial-bloc voting—and there is a showing that they actually do so—that district may qualify as a benchmark ability district. As reflected in the district court's opinion, see J.S. App. 83-89, that is a fact-intensive inquiry (not based on stereotypes and assumptions, contra J.S. 21-22) into the on-the-ground conditions in the relevant district—just as it is when determining whether a single minority group has the ability to elect its candidate of choice in a particular district, see *id.* at 29-32.

A majority (61.3%) of the CVAP population of benchmark HD149 is a non-Anglo group of Hispanics, African-Americans, and Asian-Americans. J.S. App. 83-84. Based on the evidence, the district court concluded that HD149's minority voters are a successful, politically cohesive coalition "across multiple election cycles." *Id.* at 83-87, 270-273.[10] Texas argues (J.S. 19, 22) that a minority group that does not coalesce behind the same candidate in a primary election cannot be said to have a preferred candidate of choice no matter how unanimously it supports a single candidate in the general election. But as the district court explained, this Court has never required evidence that a single minority group votes cohesively in primary elections in order to determine that it has a preferred candidate of choice within the meaning of Section 5. J.S. App. 87-88. There is no reason to ap-

[10] That the district court did not make assumptions about the electoral behavior of racial groups is reflected in its refusal to take up Texas's invitation to find that revised HDs 101 and 117 are coalition districts. J.S. App. 79 n.40, 95 n.47.

ply a different rule to a group that includes more than one racial minority. Primary elections serve a similar purpose for all voters, regardless of their race, in that they assist voters in developing their candidate preferences. See *id.* at 89. As the district court explained: "'Pull, haul, and trade' describes the task of minority and majority voters alike, and candidates may be minority 'candidates of choice' even if they do not 'represent perfection to every minority voter.'" *Ibid.* (quoting *Johnson* v. *De Grandy*, 512 U.S. 997, 1020 (1994)); see also *Georgia*, 539 U.S. at 481.

### C. This Court Should Remand For Further Consideration Of Whether Texas's Senate Plan Was Enacted With A Discriminatory Purpose

Texas also challenges the district court's conclusion that the Senate plan was enacted with a discriminatory purpose. In the view of the United States, the district court's conclusion was inadequately supported in its opinion. Regardless of the resolution of that question, the United States disagrees with Texas that the district court erred in permitting intervenors to challenge the Senate plan.

1. As an initial matter, the district court correctly determined that the Senate plan is not retrogressive because it contains the same number of ability districts as the benchmark plan. J.S. App. 58-61. The court denied preclearance, however, because it concluded that Texas had failed to rebut evidence that it was motivated at least in part by a racially discriminatory purpose when it dismantled SD10 in the new plan. *Id.* at 61-68. The evidence the district court identified in its opinion was insufficient to support a finding of intentional discrimination. However, because the record may contain additional evidence that would support such a conclusion,

this Court should remand that portion of the case for further consideration.

Texas bore the burden of establishing that it acted without a discriminatory purpose. As the district court acknowledged, Texas "may shift that burden to the defendants by making out a prima facie case for nondiscrimination." J.S. App. 35 n.19. In the view of the United States, Texas made out a prima facie case that it dismantled SD10 for partisan reasons. Indeed, the United States averred in its answer that Texas was entitled to preclearance on its Senate plan.[11] Although SD10 had traditionally elected Republican candidates, the Democratic candidate (intervenor Wendy Davis) won by a narrow margin in the 2008 election. *Id.* at 59-60. Texas proposed reconfiguring the district in the new plan and argued below that "[t]he goal of the Senate redistricting leadership was protection of Republican voting strength." Docket No. 186, at 49. And the redistricting in fact produced a more Republican district in SD10.

In response to Texas's partisan explanation, intervenors introduced evidence of the racial effect of the dismantling of SD10 and of the map-drawing process. As Texas conceded in the district court, the new Senate plan had a disparate impact on racial minorities residing

---

[11] In its answer to Texas's Complaint, the United States admitted that Texas was entitled to a declaratory judgment that the Senate plan complies with Section 5. Docket No. 46, at 7. Texas errs in contending that "[t]hat should have been the end of the matter." J.S. 33. As the United States further explained in its answer, because Texas elected to seek judicial rather than administrative preclearance, such that the district court rather than the Attorney General was the finder of fact, "the Court will have to make its own determination as to whether the proposed Senate plan complies with Section 5 of the Voting Rights Act before the plan may be implemented." Docket No. 46, at 7-8.

in benchmark SD10 because they were transferred to districts with a much larger majority of Anglo voters. J.S. App. 61-62. The district court also relied on intervenors' evidence that: in the months leading to the adoption of the new Senate plan, the map-drawers refused to share the draft map with Senator Davis and senators who represented ability districts; Senate Republicans decided before introducing the plan in committee that they would not accept any amendments to the plan; Texas held no field hearings after the new maps were drawn; and Democrats in general were more shut out of the map-drawing process than they ever had been before. *Id.* at 63-67. Viewed in light of Texas's history of discrimination, *id.* at 63-64, the court concluded that intervenors had "provided credible evidence of the type called for by the Supreme Court in *Arlington Heights*, which, as a whole, indicates that an improper motive may have played a role in the map-drawing process," *id.* at 67. The court further concluded that Texas had failed to rebut that evidence. *Ibid.*

The district court's factual finding concerning discriminatory purpose is reviewed for clear error. Although it is a close question, the district court's conclusion as to discriminatory purpose amounts to clear error based on the explanation provided by the district court. The evidence cited by the court does not alone sufficiently undercut Texas's explanation of partisan—rather than racial—motivation. It is true that senators from ability districts were excluded from the map-drawing process; but the court did not indicate whether any Democratic senator from a non-ability district was not similarly excluded. The district court also did not identify evidence that SD10's lines were reconfigured on the basis of race rather than partisanship.

The anomalies of the Senate map-drawing process stand in contrast to those of the congressional and State House map-drawing processes, as to which there was substantial unrebutted evidence of racially discriminatory motive. In redrawing those plans, Texas split hundreds of voting precincts (referred to as VTDs) throughout the State. See J.S. App. 96, 206-207, 236. As the district court noted, partisan voting data are not available at that census-block-by-census-block level within VTDs, although racial data are. *Id.* at 235-236. That line-drawing behavior was evidence that Texas moved certain areas into or out of particular districts because of the racial composition of the areas rather than because of their partisan affiliations. See *id.* at 96, 206-207, 236-238. Evidence of such a purpose was also evident in Texas's treatment of Hispanic ability district HD117, where map-drawers removed high turnout areas of Hispanic voters and replaced them with low turnout areas of Hispanic voters—rather than, *e.g.*, replacing Hispanic Democrats with Republicans. *Id.* at 78-82. As the district court pointed out, Texas's behavior "shows a deliberate, race-conscious method to manipulate not simply the Democratic vote but, more specifically, the *Hispanic* vote." *Id.* at 96.

In drawing the Senate plan, in contrast, Texas did not split any existing VTDs in SD10. Although there was evidence that map-drawers were aware that some of the areas they removed from SD10 contained large minority populations, *id.* at 224, the district court did not identify evidence demonstrating that they did so because of the race of those voters rather than because of their partisan voting history (which would be reflected at the VTD level). See *Hunt* v. *Cromartie*, 526 U.S. 541, 551 (1999) (noting that the Court's "prior decisions have made clear

that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact"); but cf. *LULAC*, 548 U.S. at 440-442 (concluding that the otherwise permissible districting goal of incumbency protection was "suspect when considered in light of evidence suggesting that the State intentionally drew [CD23] to have a nominal Latino voting-age majority (without a citizen voting-age majority) for political reasons").

The evidence identified by the district court is not sufficient to establish that Texas redrew the boundaries of SD10 with a racially discriminatory purpose. A remand on that question is appropriate, however, because the trial record may contain additional evidence that would support a finding of discriminatory purpose—but that the district court did not specifically identify because it viewed the evidence it did recite as sufficient to support its conclusion. See J.S. App. 57 n.32 (noting with respect to the congressional plan that the trial record contained "more evidence of discriminatory intent than we have space, or need, to address here"). If, for example, the evidence shows that Senator Watson—another Democrat who does not represent an ability district—was not excluded from the map-drawing process as were Senators from ability districts, that would undermine the State's assertion that its procedural irregularities were motivated by partisanship. In addition, if the evidence shows that Texas moved minority Democratic precincts, but not Anglo Democratic precincts, out of benchmark SD10, that would also tend to show that the State's motivation was not exclusively partisan. And, although the district court concluded that at least some of the witnesses who testified on behalf of Texas

about the House and congressional plans were not credible, see *id.* at 57, 96-97, 157, 198, 235-237, it made no credibility findings (one way or the other) about Texas's Senate-related testimony. Such findings alone could support the court's conclusion that Texas failed to satisfy its burden on discriminatory purpose. On the basis of such evidence, the district court might conclude, for instance, that Texas was attempting to dismantle a cohesive minority voting population *because* it was on the verge of having the ability to elect its preferred candidate of choice. See *LULAC*, 548 U.S. at 439-440; *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 471-472 (1987).

2. Although the United States agrees with Texas that the district court's purpose conclusion concerning the Senate plan was not sufficiently supported, Texas is incorrect in arguing (J.S. 33-38) that the district court erred by allowing intervenors to challenge the Senate plan.

If Texas had submitted the Senate plan to the Attorney General for administrative preclearance, private parties could not have intervened in that proceeding. See *Morris* v. *Gressette*, 432 U.S. 491, 504-505 (1977). States are certainly entitled instead to seek judicial preclearance—for any reason, including sovereignty concerns—but that choice carries consequences, including the possibility of confronting the claims of intervenors. Texas chose to defend its Senate plan in the judicial preclearance action with full knowledge that the only parties opposing preclearance of that plan were intervenors.

Texas urges (J.S. 37 n.16) this Court to overrule its holding in *Georgia* v. *Ashcroft*, *supra*, that "Section 5 does not limit in any way the application of the Federal

Rules of Civil Procedure to" a judicial preclearance action "and the statute by its terms does not bar private parties from intervening." 539 U.S. at 476. The district court complied with that directive by permitting private parties who satisfied the requirements of Rule 24 to intervene. Once those parties intervened, nothing in the statute or this Court's cases prevented them from raising arguments not raised by the Attorney General. Nor is this situation unprecedented. In *City of Richmond* v. *United States*, 422 U.S. 358 (1975), the jurisdiction sought a declaratory judgment that a proposed annexation did not have a prohibited retrogressive effect. Although the Attorney General indicated approval for the plan, a group of residents who opposed it were permitted to intervene and independently pursue the litigation. See *id.* at 366-367. This Court ultimately agreed with the Attorney General that the annexations did not have a retrogressive effect; but it never indicated that the district court erred by allowing the intervenors to pursue their argument to the contrary.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed in part and vacated and remanded in part.

Respectfully submitted.

DONALD B. VERRILLI, JR.
*Solicitor General*
THOMAS E. PEREZ
*Assistant Attorney General*
JESSICA DUNSAY SILVER
ERIN H. FLYNN
*Attorneys*

DECEMBER 2012