No. 12-1028

In the Supreme Court of the United States

STATE OF TEXAS, APPELLANT

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether Texas demonstrated that the voter-identification law it adopted in 2011 did not have the purpose and would not have the effect of discriminating on the basis of race, as required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

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OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1-70) is reported at 888 F. Supp. 2d 113.

JURISDICTION

The judgment of the three-judge district court was entered on December 17, 2012 (J.S. App. 71-73). A notice of appeal was filed on December 19, 2012 (J.S. App. 74), and the jurisdictional statement was filed on February 19, 2013. 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 qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first obtaining preclearance from either the United States At-

torney General or a three-judge court in the United States District Court for the District of Columbia. 42 U.S.C. 1973c(a). Under either procedure, the jurisdiction must demonstrate that the proposed voting change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" or membership in a racial group statutorily defined as a "language minority group." *Ibid.*; 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 practice. *Beer* v. *United States*, 425 U.S. 130, 141 (1976); see *Riley* v. *Kennedy*, 553 U.S. 406, 412 (2008). Section 5's "purpose" prong precludes preclearance of voting changes motivated by "any discriminatory purpose." 42 U.S.C. 1973c(c).

2. Texas has been required to comply with Section 5 since 1975, see 28 C.F.R. Pt. 51, App., and therefore must obtain preclearance for any changes to its voting practices, including changes to voter-identification requirements. "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*) (quoting *Vera* v. *Richards*, 861 F. Supp. 1304, 1317 (S.D. Tex. 1994), aff'd, 517 U.S. 952 (1996)). That history of intentional racial discrimination in voting "stretch[es] back to Reconstruction." *Id.* at 440 (quoting *Vera*, 861 F. Supp. at 1317). This Court has also recognized that "the political, social, and economic

legacy of past discrimination for Latinos in Texas may well hinder their ability to participate effectively in the political process." *Ibid.* (internal citations and quotation marks omitted).

3. a. This case concerns Texas Senate Bill 14, S. 14, 2013 Leg., 83d Sess. (Tex. 2013) (S.B. 14), which Governor Perry signed on May 27, 2011. S.B. 14 requires in-person voters in Texas to present one of several specified forms of government-issued photo identification in order to cast a regular ballot. J.S. App. 3, 6. Under existing law (*i.e.*, the law in place at the time S.B. 14 was enacted), Texas does not require in-person voters to present photo identification in order to cast a regular ballot. *Id.* at 2-3. Any Texan wishing to register to vote must file an application with the county elections registrar, including by providing his name, date of birth, and a sworn affirmation of United States citizenship. *Id.* at 2. If the registrar approves the application, the registrar provides to the applicant (either in person or by mail) a voter registration certificate that includes the voter's name, date of birth, gender, and a unique voter identification number, but does not include a photograph. *Ibid.* A voter who presents his registration certificate at a polling place is entitled to cast a regular ballot. *Ibid.*

Under current law, a voter who does not present a registration certificate at the polls may nevertheless cast a regular ballot if he executes an affidavit stating that he does not have his certificate and presents an alternative form of identification specified by law. J.S. App. 2. Acceptable alternative forms of identification include birth certificates, current or expired drivers' licenses, United States passports or other proof of United States citizenship, utility bills, other government docu-

ments or official mail showing the voter's name and address, and other forms of identification that include a photograph and establish the voter's identity. *Id.* at 2-3.

b. Under S.B. 14, in-person voters[1] would be required to present one of the following five types of photo identification: (1) a driver's license, election identification certificate (EIC), or personal-identification card issued to the person by the Texas Department of Public Safety (DPS); (2) a United States military identification card; (3) a United States citizenship certificate; (4) a United States passport; or (5) a DPS-issued license to carry a concealed handgun. J.S. App. 3. A voter would not be permitted to use one of the specified forms of photo identification if it had expired more than 60 days earlier. *Ibid.* If a voter were to present an acceptable form of photo identification, an election officer would be required to determine whether the name listed on that identification is on the precinct list of registered voters; if the name provided were "substantially similar to" but did not exactly match the name on the precinct list, the voter would be required to submit an affidavit stating that he or she is the person on the registered-voter list. See *id.* at 46 (emphasis omitted) (quoting Tex. Elec. Code Ann. § 63.001 (West 2010 & Supp. 2012)).

Prior to an election, a prospective voter who does not have one of the approved forms of photo identification would be able to obtain a photographic EIC free of charge from DPS by traveling to a DPS office and presenting either (1) a specified form of "primary identification," (2) two specified forms of "secondary identification," or (3) a "secondary identification" and two speci-

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[1] Certain voters with disabilities could obtain an exemption from S.B. 14's photo-identification requirements for in-person voting, but only after effectively having to re-register. See J.S. App. 6.

fied forms of "supporting identification." J.S. App. 4. Acceptable forms of primary identification would include an expired Texas driver's license or a personal-identification card that has been expired for between 60 days and two years. *Ibid.* Acceptable forms of secondary identification include an original or certified copy of a birth certificate, an original or certified copy of a court order indicating an official change of name and/or gender, or United States citizenship or naturalization papers that do not include an identifiable photograph. *Id.* at 4-5. Acceptable forms of supporting identification include school records, out-of-state drivers' licenses, Social Security cards, and other documents. *Id.* at 5. In order to obtain at least one of the required documents, a potential voter would have to spend between $22 and $354. *Id.* at 5-6.

S.B. 14 would permit an eligible voter who fails to present an acceptable form of photo identification at the polls to cast a provisional ballot, provided that the voter's eligibility has not been challenged. S.B. 14 §§ 9(g), 17. Texas would be required to count such a provisional ballot only if the voter either presented the required photo identification to the voter registrar within six days after the election or executed an affidavit attesting that the voter (a) has a religious objection to being photographed and has consistently refused to be photographed for any governmental purpose from the time the voter has held this belief, or (b) has lost his photo identification in a natural disaster declared by the President of the United States or the Governor of Texas that occurred within 45 days of the election. S.B. 14 §§ 17, 18.

c. On July 25, 2011, Texas submitted S.B. 14 to the United States Attorney General for administrative re-

view under Section 5. J.S. App. 7. Because Texas's initial submission did not include sufficient information for the Attorney General to determine whether the State had met its Section 5 burden, the Attorney General requested additional information. *Ibid.* On January 12, 2012, Texas submitted the requested information to the Attorney General. *Ibid.* On March 12, 2012, the Attorney General interposed an objection. *Id.* at 8-9.

The Attorney General determined that Texas failed to demonstrate that S.B. 14 would not have a prohibited retrogressive effect. J.S. App. 8-9. The Attorney General noted that the data Texas submitted demonstrated that Hispanic registered voters are more than twice as likely as non-Hispanic registered voters to lack a DPS-issued photo identification. *Id.* at 8. The Attorney General further noted that the availability of the "free" EIC would not mitigate that disproportionate effect because prospective voters who lack the necessary documents to obtain an EIC would have to pay a minimum of $22 to obtain those documents. *Ibid.* In addition, the Attorney General noted that voters in need of an EIC would have to travel to a DPS office to obtain one. No such office exists, however, in 81 of Texas's 254 counties, and the offices that do exist often have limited hours. *Ibid.* In addition, Texas made no provision for assisting individuals who would have limited access to a DPS office even though some voters live a significant distance from a DPS office, lack a valid driver's license, have limited access to transportation, and may not be able to travel to an open DPS office during its hours of operation. *Id.* at 8-9. Because Texas failed to show that S.B. 14 would not have a prohibited effect under Section 5, the Attor-

ney General did not reach a determination as to discriminatory purpose. *Id.* at 9.[2]

4. a. On January 24, 2012—while its administrative submission was pending—Texas also sought judicial preclearance for S.B. 14 by filing an expedited complaint for declaratory judgment. J.S. App. 10. Texas later amended its complaint to add an alternative claim seeking a declaratory judgment that Section 5 is unconstitutional on its face. *Ibid.* The court permitted four groups of organizations and individuals to intervene on the condition that the defendant-intervenors consolidate their briefing and argument in order "to reduce the litigation burden on Texas." *Ibid.*

After the Attorney General interposed an objection to S.B. 14, the district court granted Texas's motion to expedite consideration of its preclearance request, including by scheduling a trial on the preclearance issue to begin on July 9, 2012, so that the court could render a decision by August 31, the date by which the court determined Texas needed a decision in order to be able to implement S.B. 14 for the November 2012 election. J.S. App. 11. The court deferred consideration of Texas's constitutional challenge to Section 5, noting that the court would not consider it unless or until the court denied preclearance. *Id.* at 12.

Attempting to expedite the litigation and to reduce the federalism costs Section 5 imposed on Texas, the district court resolved most discovery disputes in Texas's favor. J.S. App. 12-13. The court's "efforts to accelerate th[e] litigation, however, were often under-

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[2] The Attorney General did not object to those sections of S.B. 14 that increased state-law penalties for illegal voting and attempted illegal voting. See 12-cv-128, Docket entry No. 25, Exh. 3, at 1 (Mar. 15, 2012).

mined by Texas's failure to act with diligence or a proper sense of urgency," including by "repeatedly ignor-[ing] or violat[ing] directives and orders of th[e] Court that were designed to expedite discovery." *Id.* at 13. Although Texas's delays "seriously hindered" other parties' ability to prepare for trial, the court denied motions to postpone the trial. *Ibid.* Meanwhile, Texas's "dilatory approach to discovery" prevented it from obtaining important evidence, *viz.* data regarding Texas voters' possession of acceptable forms of federal photo identification. *Id.* at 14. Texas opted to proceed to trial without that data rather than postpone the start of the trial. *Id.* at 14-15. At trial, the district court heard live testimony from 20 witnesses and received thousands of pages of deposition testimony, expert reports, and other written evidence on whether S.B. 14 had the purpose or effect of discriminating on the basis of race. *Id.* at 15.

b. On August 30, 2012, the three-judge court unanimously denied Texas's request for preclearance, concluding that S.B. 14 would have a prohibited retrogressive effect on minority voters. J.S. App. 1-70. Because the court held that S.B. 14 failed Section 5's effects prong, it did not decide whether S.B. 14 was enacted with a discriminatory purpose. *Id.* at 2, 68.

i. Initially, the district court rejected Texas's argument that Section 5's retrogression prong could not apply to voter-identification laws because such laws "can never 'deny[] or abridg[e] the right to vote.'" J.S. App. 21 (brackets in original) (quoting 42 U.S.C. 1973c(a)). As the court explained, Texas's "argument completely misses the point of section 5," which is to ensure that no voting change worsens the position of minority voters in covered jurisdictions. *Id.* at 21-22. The court noted that if, as Texas contended, S.B. 14 imposed only a "minor

inconvenience" on voters, "it could easily be precleared because it would not undermine minorities' 'effective exercise of the electoral franchise.'" *Id.* at 22 (quoting *Beer*, 425 at 141).

The court also rejected Texas's argument that this Court's decision upholding an Indiana voter-identification law against a facial constitutional challenge in *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008), "control[led] this case" and required the district court to preclear S.B. 14. J.S. App. 23-28. Although the district court agreed with Texas that States have a legitimate interest in protecting the integrity of their electoral systems even in the absence of proof of actual voter fraud, the court cautioned that the inquiry required under Section 5 differs from that employed in *Crawford*. *Id.* at 24-28. The court explained that, "if [material] burdens fall disproportionately on racial or language minorities, they would have [a] retrogressive effect 'with respect to [those minorities'] effective exercise of the electoral franchise,'" in violation of Section 5. *Id.* at 28 (quoting *Beer*, 425 U.S. at 141). But the court emphasized that:

> Texas can prove that SB 14 lacks retrogressive effect even if a disproportionate number of minority voters in the state currently lack photo ID. But to do so, Texas must prove that these would-be voters could easily obtain SB 14-qualifying ID without cost or major inconvenience.

Ibid.

ii. Turning to the evidence presented at trial, the district court rejected Texas's primary reliance on social-science literature and other evidence analyzing the effects of other photo-identification laws and nationwide surveys of voters' attitudes about photo-identification

laws. J.S. App. 29-36. The court declined to rely on evidence of the effects of photo-identification laws in Georgia and Indiana, noting that the circumstances in those States "are significantly different from those in Texas." *Id.* at 32. The court concluded that S.B. 14 "will be far more burdensome than either Indiana's or Georgia's voter ID laws," *id.* at 33, and turned to an examination of the evidence of the effect that S.B. 14 would have on Texas voters.

The court considered the parties' competing evidence analyzing whether minority voters in Texas disproportionately lack the forms of photo identification required to comply with S.B. 14. J.S. App. 36-55. Although the court ultimately concluded that none of the studies submitted by the parties was reliable, *id.* at 55, the court concluded that "record evidence suggests that SB 14, if implemented, would in fact have a retrogressive effect on Hispanic and African American voters," *id.* at 56. In particular, the court noted that Texas had conceded that "there is a subset of Texas voters who lack SB 14-approved ID * * * and that, *at minimum*, racial minorities are proportionately represented within this subgroup." *Id.* at 57. "Equally uncontested," the court noted, was evidence that those voters without an acceptable form of photo identification would have to obtain an EIC in order to vote and that some of those voters would have to pay at least $22 to obtain the documents necessary to obtain an EIC. *Ibid.* In order to obtain an EIC, moreover, voters would have to submit an application at a DPS office; but nearly one-third of Texas's counties do not contain a DPS office. *Id.* at 57-58. Thus, individuals without drivers' licenses who wish to obtain an EIC would have to travel long distances to do so, some needing to travel up to 250 miles round-trip.

Id. at 57. The court further noted that many DPS offices are not accessible by public transportation, even in major cities, leaving voters without access to a car (and licensed driver) without means to visit such an office. *Id.* at 61.

The court concluded that S.B. 14 would impose "substantial burden[s]" on some Texas voters and that such burdens would fall most heavily on the poor—and in particular the working poor who might have to choose between their wages and the ability to obtain an EIC by traveling to a DPS office during business hours. J.S. App. 58-59. Cognizant of the fact that the finding of a retrogressive effect under Section 5 "cannot turn on wealth alone," the court relied on United States Census data indicating both that poor populations in Texas are disproportionately minority and that between two and three times as many African-Americans and Hispanics in Texas live in households with no access to a motor vehicle, as compared with Anglo Texans. *Id.* at 60-61. The court concluded that "it is virtually certain that" the burdens S.B. 14 would impose "will disproportionately affect racial minorities." *Id.* at 61.

The court also rejected as "entirely unpersuasive" Texas's unprecedented argument that, "if SB 14 denies or abridges the right to vote at all, it does so 'on account of' factors like poverty or lack of vehicular access," not race. J.S. App. 64-65. The court explained that Congress passed the VRA "precisely to prohibit [discriminatory] election devices proximately based on something other than race" such as wealth, literacy, and property ownership that would have a discriminatory effect on minority voters. *Id.* at 65-66.

In denying Texas's request for declaratory relief, the district court emphasized that it was not passing judg-

ment on photo-identification laws generally, and noted that the Attorney General had precleared Georgia's photo-identification law under Section 5. J.S. App. 68. Rather, the court's denial of preclearance was based on the evidence in the record about the particular photo-identification law at issue—"the most stringent in the country"—and its effect in the particular State before the court. *Id.* at 68-69. The court noted that, in enacting S.B. 14, "the Texas legislature defeated several amendments that could have made this a far closer case," including amendments that would have waived fees for indigent persons who needed to obtain the documents required to obtain an EIC; reimbursed EIC-related travel costs; expanded the range of acceptable identification forms; lengthened DPS hours; and counted the provisional ballots of indigent persons without photo identification. *Id.* at 69-70.

c. After declining to preclear S.B. 14, the district court ordered the parties to brief Texas's constitutional challenge to Section 5. On November 9, 2012—before that briefing was complete—this Court granted a petition for a writ of certiorari in *Shelby County* v. *Holder*, No. 12-96 (argued Feb. 27, 2013), which also raises a facial challenge to the constitutionality of Section 5. Over Texas's objection, the district court stayed Texas's constitutional challenge pending this Court's decision in *Shelby County*. The district court then entered final judgment in favor of the Attorney General on Texas's preclearance claim to enable Texas to file this appeal immediately. J.S. App. 71-73.

ARGUMENT

Texas seeks review of the three-judge court's denial of preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, of Texas's 2011 law requiring in-

person voters to present particular forms of photo identification. Texas asks (J.S. 2-3, 10-11) this Court to hold the case until the Court issues a decision in *Shelby County* v. *Holder*, *supra* (No. 12-96), in which the question presented is whether Congress acted within its constitutional authority when it reauthorized Sections 4(b) and 5 of the Voting Rights Act in 2006. That is an appropriate course of action. If the Court upholds the constitutionality of Sections 4(b) and 5 in *Shelby County*, it should summarily affirm the three-judge court's decision in this case for the reasons expressed below. If the Court holds that Sections 4(b) and 5 are unconstitutional in whole or in part, it should note probable jurisdiction, vacate the district court's decision, and remand this case for further proceedings consistent with the decision in *Shelby County*.

1. Texas first argues (J.S. 12-13) that the three-judge court erred in denying preclearance because other photo-identification laws in other States have been either precleared under Section 5 (in the case of Georgia) or upheld by this Court against a facial constitutional challenge (in the case of Indiana, see *Crawford* v. *Marion Cnty. Election Bd.*, 553 U.S. 181 (2008)). Texas suggests that such differential treatment of distinct laws displays a "flagrant disregard for 'our historic tradition that all the States enjoy "equal sovereignty."'" J.S. 12 (quoting *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 203 (2009)). Texas is incorrect. The features of the Georgia and Indiana voter-identification laws that were, respectively, precleared and upheld were materially different from the features of the Texas law at issue in this case. The populations in Georgia and Indiana are also materially different from the population in Texas. And the basis for the legal

challenge in *Crawford* was not the same as the legal standard the Attorney General and district court apply in Section 5 actions. It is therefore unremarkable that the results in the Georgia and Indiana matters differed from the result here. Application of the same legal standard to different facts (to say nothing of application of a different legal standard to different facts) often leads to different results.

There is no merit to Texas's suggestion (see J.S. 12) that States covered by Section 5 are prohibited from enacting photo-identification requirements while non-covered States are not. See J.S. App. 68 ("Nothing in this opinion remotely suggests that Section 5 bars all covered jurisdictions from implementing photo ID laws."). Texas is the only covered State that has been prevented by Section 5 from implementing a voter-identification law.[3] Indeed, the Attorney General has recently precleared voter-identification requirements adopted by several other fully or partially covered States (*e.g.*, Arizona, Georgia, Louisiana, Michigan, New Hampshire, and Virginia)—based on fact-specific determinations that those laws were not adopted with a discriminatory purpose and would not have the effect of infringing the right to vote on the basis of race. And all States in the Union are subject to Section 2 of the Voting Rights Act, which prohibits voter-identification

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[3] The Attorney General recently objected under Section 5 to a voter-identification law enacted by South Carolina. South Carolina obtained preclearance of its voter-identification law for elections taking place in 2013 and subsequent years after amending its interpretation and application of the law's requirements during the course of the preclearance litigation. See *South Carolina* v. *United States*, No. 12-203, 2012 WL 4814094, at *4 (D.D.C. Oct. 10, 2012) (three-judge court); *id.* at *21 (Bates, J., concurring).

requirements (and other voter qualifications) that have the purpose or effect of discriminating on the basis of race.

Texas further errs in contending that its law "closely resembles" the Georgia law that was precleared by the Attorney General and the Indiana law that was upheld in *Crawford*. J.S. 12. Although Texas asserts (J.S. 1-2, 11) that S.B. 14 was "based on" the Georgia and Indiana laws, it makes no effort to demonstrate any material similarity among the laws. And, indeed, the three-judge court concluded that Texas's law is much more burdensome than either Georgia's or Indiana's. As the district court determined, S.B. 14 "is the most stringent" voter-identification provision "in the country." J.S. App. 69; *id.* at 32 ("SB 14 is far stricter than either Indiana's or Georgia's voter ID laws.").

For example, the court explained that "[t]he contrast" between the precleared Georgia voter-identification law and S.B. 14 "could hardly be more stark." J.S. App. 69. First, Georgia law requires every county to provide "free election IDs" and "allows voters to present a wide range of documents to obtain those IDs." *Ibid.*; see *id.* at 32. S.B. 14, by contrast, would require voters to spend money to obtain the documents needed to obtain the purportedly "free" voter-identification card. *Id.* at 32-33. Second, S.B. 14 would impose greater burdens on voters who would need to travel long distances to a DPS office to obtain an EIC: whereas "Georgia law requires each county to 'provide at least one place in the county at which it shall accept applications for and issue [free] Georgia voter identification cards,'" approximately one-third of the counties in Texas contain no DPS office and therefore no place to obtain an EIC. *Id.* at 33 (quoting Ga. Code Ann. § 21-2-

417.1(a) (2008)) (alteration in original). The court similarly concluded that Indiana's voter-identification law is less burdensome than S.B. 14 would be because the forms of voter identification required in Indiana are both less expensive and more readily available than would be the case under S.B. 14. *Id.* at 32-33.

In light of the differences between S.B. 14 on one hand, and the Georgia and Indiana laws on the other, the district court "ha[d] little trouble finding that SB 14 will be far more burdensome than either Indiana's or Georgia's voter ID laws." J.S. App. 33. And given the different features of each law, the Attorney General's preclearance of Georgia's law is not inconsistent with the district court's refusal to preclear Texas's law. This Court's decision in *Crawford* provides even less support for petitioner's assertion of unequal treatment of the States. *Crawford* did not present the question whether Indiana's voter-identification law had the purpose or effect of discriminating on the basis of race and the Court found no evidence that it imposed disparate burdens on minority voters.

2. Texas also errs in suggesting (J.S. 13-14) that photo-identification requirements can never "'deny or abridge' *anyone's* right to vote" under Section 5 because they impose the same types of burdens that laws governing registration and polling places already place on voters. One of the primary reasons Congress enacted the Voting Rights Act was to combat facially neutral laws that had the effect of discriminating against minority voters in registration and ballot-casting. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 310-315 (1966); see *Perkins* v. *Matthews*, 400 U.S. 379, 387-388 (1971). It defies reason to suggest that a voter-identification re-

quirement could never have the type of discriminatory effect that Congress intended Section 5 to prevent.

As the district court noted—and as the Attorney General has recognized in implementing Section 5—some changes in voter-identification requirements are permissible under Section 5 because they do not have the purpose or effect of discriminating on the basis of race. See J.S. App. 22 (noting that, if Texas were correct that S.B. 14 would impose "only a 'minor inconvenience' on voters, the consequence of that argument is not that SB 14 would be exempt from section 5, but rather that it could easily be precleared because it would not undermine minorities' 'effective exercise of the electoral franchise'") (quoting *Beer* v. *United States*, 425 U.S. 130, 141 (1976)). But S.B. 14 is not such a law. With any particular Section 5 submission, the Attorney General or district court must conduct the required fact-specific analysis to determine whether the law at issue will have a discriminatory effect or was enacted for a discriminatory purpose. As discussed, the district court undertook that contextual analysis in this case and determined that the voting changes in S.B. 14, if applied to the particular demographics of the State of Texas, would have the effect of discriminating against minority voters.

Texas also errs in arguing that any voter who was eligible to vote before S.B. 14 but would be ineligible to vote under S.B. 14 would be denied the ability to vote only by virtue of that voter's own choice not to take advantage of S.B. 14's mitigation measures. Such an argument could justify a jurisdiction's closing all of the polling places in minority neighborhoods (for a purportedly race-neutral reason) and requiring minority voters to travel long distances to vote at polling places in Anglo neighborhoods. Texas could argue that any minority

voter who did not cast a ballot in such circumstances simply chose not to make the trip. But the imposition of such an unequal burden on the exercise of the franchise is exactly the type of behavior that Congress intended Section 5 to prevent. Section 5 courts have routinely rejected similar arguments that laws "are immune from section 5 so long as they can be tied to 'voter choice.'" J.S. App. 22; *Florida* v. *United States*, 885 F. Supp. 2d 299, 317-318 (D.D.C. 2012) (three-judge court); *Texas* v. *United States*, 831 F. Supp. 2d 244, 262-265 (D.D.C. 2011) (three-judge court), appeal pending, No. 12-496 (docketed Oct. 23, 2012). Like this Court, those courts have recognized that "the political, social, and economic legacy of past discrimination for" minority voters in covered jurisdictions "may well hinder their ability to participate effectively in the political process." *LULAC* v. *Perry*, 548 U.S. 399, 440 (2006) (internal quotation marks and citations omitted); see *Florida*, 885 F. Supp. 2d at 328-337; *Texas*, 831 F. Supp. 2d at 264.

Determining whether a voting change is retrogressive therefore requires a careful look at the circumstances of minority voters and of the practical effects the proposed change will have. The three-judge court in this case undertook that careful analysis and determined that the mitigation measures Texas relies on would not meaningfully alleviate the burdens S.B. 14 would impose on minority voters. For example, Texas argues (J.S. 14) that anyone without an acceptable form of photo identification may obtain one for "free" from the State. The district court correctly concluded, however, that the burdens associated with obtaining the so-called free EIC would be prohibitive for some voters, particularly for poor voters who are disproportionately minority. J.S. App. 32-34, 56-61. In particular, the documents a

voter is required to present in order to obtain an EIC are not free. *Id.* at 32-33, 56-57. The process of obtaining an EIC would impose additional costs as well because nearly one-third of Texas counties do not have a DPS office where voters can obtain an EIC at all, many other counties do not have such an office that is open more than two days per week, and no county has an office that is open during weekends or after 6 p.m. on weekdays. *Id.* at 33, 57-58. Poor voters who work during those hours would have to shoulder a heavy burden to take time off of work, find a means to travel up to 250 miles to visit a DPS office, and wait in line for up to several hours to obtain an EIC. *Id.* at 59. As the district court explained, "[a] law that forces poorer citizens to choose between their wages and their franchise unquestionably denies or abridges their right to vote." *Ibid.*

Texas's reliance (J.S. 14) on the option of casting a provisional ballot is also unavailing as S.B. 14 imposes additional burdens on voters who would cast such ballots. Unlike Indiana, which allows indigent voters without photo identification to cast a provisional ballot that will be counted if they execute an affidavit within ten days, see *Crawford*, 553 U.S. at 186, Texas counts only the provisional ballots of those voters who, within six days of the election, either show the required identification to the voter registrar or execute an affidavit stating that they have a religious objection to being photographed or recently lost their photo identification in a natural disaster, see S.B. 14 §§ 17-18.

3. Finally, Texas errs in arguing (J.S. 15) that the district court applied "an unprecedented theory of retrogression" that equated discrimination on account of poverty with discrimination on account of race.

It is well established that a covered jurisdiction bears the burden under Section 5 of establishing that a proposed voting change does not have the purpose and will not have the effect of discriminating on the basis of race. 42 U.S.C. 1973c(a). Applying a traditional Section 5 analysis, the three-judge court correctly concluded, based on evidence that Texas did not then and does not now dispute, that Texas failed to meet its burden. As discussed, the district court concluded that S.B. 14 would impose significant burdens on poor voters who do not already possess an acceptable form of photo identification. J.S. App. 56-61. But that was not the end of the analysis. The court relied on the undisputed evidence that Hispanics and African-Americans in Texas are nearly three times as likely as Anglos to live in poverty. *Id.* at 60. In addition, minorities in Texas are two to three times more likely than Anglos to live in a household with no access to a motor vehicle—a significant factor given the long distances some voters would have to travel to obtain an EIC. *Ibid.* Given the undisputed evidence, there is no basis to set aside the district court's determination that the new burdens that S.B. 14 would impose on Texas voters would be material and would fall disproportionately on minority voters. That is the essence of retrogression.

Texas raises a red herring in emphasizing (J.S. 15) that the district court rejected the Attorney General's and intervenors' evidence measuring the degree to which minority voters lack the forms of photo identification that S.B. 14 would require, as compared to Anglo voters. See J.S. App. 39-46, 53-55. Texas bears the burden of establishing a lack of retrogression and the district court rejected all of Texas's evidence about the expected effect of S.B. 14. See *id.* at 29-39, 46-53. But

the district court found that "everything Texas * * * submitted as affirmative evidence is unpersuasive, invalid, or both." *Id.* at 68. The court instead relied on the undisputed evidence discussed above, and correctly concluded that S.B. 14 would materially burden the right to vote of many poor Texans, who are disproportionately minority citizens. See *id.* at 56-64, 68-70. Indeed, as the district court noted, Texas's own legislators were aware that S.B. 14 "would disenfranchise minorities and the poor." *Id.* at 69. They nevertheless defeated numerous amendments that would have alleviated the burdens S.B. 14 would impose on Texas voters and on poor Texas voters in particular. *Id.* at 70.

Texas also misunderstands the decision below in arguing that the "district court's interpretation of Section 5 would result in a denial of preclearance even if there were *undisputed proof* that the racial makeup of voters without photo identification precisely mirrored the racial composition of the State's electorate." J.S. 15. S.B. 14's retrogressive effect does not spring only from the fact that it would reduce the range of acceptable forms of voter identification, thereby leaving some voters who are able to cast a ballot now unable to do so. If minority voters were disproportionately represented in that population, S.B. 14 could be retrogressive. But even if minority voters are not disproportionately represented in the group of voters who have acceptable forms of voter identification now but would not under S.B. 14, the law can be retrogressive if minority voters within that group would be disproportionately burdened in their ability to obtain an acceptable form of voter identification. That is the burden on which the district court relied in correctly concluding that S.B. 14 would have a retrogressive effect. J.S. App. 28; see also *South Carolina* v. *United*

States, No. 12-203, 2012 WL 4814094, at *7 (D.D.C. Oct. 10, 2012).

Finally, Texas errs in suggesting (J.S. 15) that an election law cannot discriminate "on account of race," for purposes of Section 5, 42 U.S.C. 1973c(a), if the law's burdens are proximately based on something other than race, such as socioeconomic status. As the district court explained in rejecting that argument, the VRA was enacted precisely to target "notorious" election devices such as poll taxes, grandfather devices, literacy tests, and property qualifications that were all proximately based on something other than race. But all of those devices were both intended to discriminate and had the effect of discriminating "on account of race." See J.S. App. 64-67.

* * * * *

If this Court upholds Sections 4(b) and 5 against the constitutional challenge asserted in *Shelby County*, it should summarily affirm the three-judge court's denial of preclearance for S.B. 14 because that court correctly concluded that S.B. 14 will have a retrogressive effect on the ability of minority voters in Texas to cast their votes. If the Court instead grants plenary review and ultimately disagrees with the district court's conclusion on retrogression, however, the proper course would be to remand the case to the three-judge court for further proceedings. Because that court determined that S.B. 14 violated Section 5's retrogression prong, it did not consider whether Texas had established that S.B. 14 was not enacted with a discriminatory purpose. J.S. App. 68. Such a finding would be necessary before Texas could implement S.B. 14.

CONCLUSION

The Court should hold this case pending resolution of *Shelby County* v. *Holder*, No. 12-96 (argued Feb. 27, 2013). If the Court upholds the constitutionality of Sections 4(b) and 5 in *Shelby County*, it should summarily affirm the district court's denial of preclearance. If the Court holds that Sections 4(b) and 5 are unconstitutional in whole or in part, it should note probable jurisdiction, vacate the district court's decision, and remand this case for further proceedings consistent with the decision in *Shelby County*.

Respectfully submitted.

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