No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, *et. al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR *AMICI CURIAE* SECTION 5 LITIGATION INTERVENORS

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INTERESTS OF THE AMICI

Amici curiae[1] were intervenors in the four cases decided in the last year under Section 5 of the Voting Rights Act of 1965 ("VRA"). These cases demonstrate that Section 5 is still necessary to achieve the constitutional goal of an election system free of the taint of racial and ethnic discrimination.

The Texas State Conference of NAACP Branches ("Texas NAACP"), the Mexican American Legislative Caucus, the Texas League of Young Voters Education Fund, and the Reverend Peter Johnson intervened as defendants in a lawsuit brought by the State of Texas under Section 5, concerning Texas's voter photo identification ("ID") law. *Amici* successfully helped to prevent preclearance for that retrogressive law.

The League of United Latin American Citizens as well as the Texas NAACP intervened in Section 5 litigation decided in 2012 concerning the redistricting plans drawn by Texas based on the 2010 Census. That case determined that Texas's plans were discriminatory in purpose and effect, further demonstrating the continued need for Section 5.

The South Carolina State Conference of the NAACP, The Family Unit, Inc., Dr. Brenda Williams, and Kenyda Bailey were all intervenors in Section 5 litigation concerning South Carolina's photo ID law, which was found to have a potentially retrogressive effect, but was saved by a mitigating con-

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[1] This *amicus curiae* brief is submitted pursuant to the parties' consents on file with the Court. No counsel for a party authored this brief in whole or in part, and no party or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

struction of the law taken by South Carolina officials as a direct result of the Section 5 case.

The Florida State Conference of the NAACP, Sharon Carter, Howard Harris, and Dianne Hart intervened in the preclearance litigation regarding Florida's early voting procedures. This litigation enabled Florida to implement changes to its voting procedures in a nondiscriminatory manner.

As individuals and organizations representing minority voting groups that are expressly protected by the VRA, *Amici* have a substantial interest in this matter. Should Section 5 of the VRA be held unconstitutional, they would stand to lose a crucial safeguard against measures that disproportionately burden racial and language minorities' right to vote.

SUMMARY OF ARGUMENT

The enactment of the VRA represented a monumental turning point in "the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote." *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009). As Congress recognized in overwhelmingly reauthorizing the VRA in 2006, the law is largely responsible for the effective transformation of America into a broadly inclusive democracy. *See generally* H.R. Rep. No. 109-478, at 12-18 (2006). To be sure, "[t]hings have changed in the South." *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009). "[M]any of the first generation barriers to minority voter registration and voter turnout that were in place prior to the [VRA] have been eliminated." H.R. Rep. No. 109-478, at 12.

But not all things have changed. Rather, "voting discrimination in covered jurisdictions" remains

a "21st century problem." *Shelby Cnty., Ala. v. Holder*, 679 F.3d 848, 857 (D.C. Cir. 2012) (quoting *Shelby Cnty., Ala. v. Holder*, 811 F. Supp. 2d 424, 428 (D.D.C. 2011)).

Petitioner and various *amici* assert that jurisdictions covered under Section 5 no longer engage in "pervasive voting discrimination and electoral gamesmanship." Pet'r Br. 28. While it is true that progress has been made and that the specific methods of voting discrimination in place in 1965—such as poll taxes, literacy tests, and grandfather clauses—are no more, that is not the whole story. Indeed, Congress determined in 2006, that while "[d]iscrimination [in voting] today is more subtle than the visible methods used in 1965 . . . the effects and results are the same." H.R. Rep. No. 109-478, at 6.

Petitioner's claims to the contrary are utterly belied by the four cases decided under Section 5 in 2012 (the "2012 cases"). These cases confirm that, while the particular methods of discrimination have taken new and more subtle forms, they persist; and therefore Section 5 remains "justified by current needs." *Nw. Austin*, 557 U.S. at 203.

Two of the 2012 cases involved the State of Texas, a covered jurisdiction with a long and sad history of discrimination in voting. In 2012, a unanimous three-judge panel found that Texas's three redistricting plans were either discriminatory in purpose or effect *or both*. Just two days later, another three-judge court unanimously determined that Texas's photo ID law would have a retrogressive effect on Black and Latino voters. In these two cases, Section 5 prevented Texas from turning back the clock on minority voting rights.

The other two 2012 cases concerned South Carolina's photo ID law and Florida's change in early voting hours. In those cases, Section 5 litigation resulted in covered jurisdictions being allowed to implement otherwise retrogressive laws in non-retrogressive ways. In the South Carolina case, the litigation process pushed the State to interpret the law in such a way that would allow individuals unable to obtain photo ID to vote. In the Florida case, the court found that contemplated changes to Florida's early voting hours could potentially have a discriminatory impact on minority voters. Rather than just striking down these provisions entirely, the court offered guidance on how the Florida law could be implemented in a non-retrogressive manner. These two cases demonstrate the flexibility of Section 5 and show that Section 5 litigation can play a vital role in ameliorating the impacts of otherwise retrogressive laws, while allowing states and localities to pursue legitimate policy objectives.

The 2012 cases also demonstrate that the "current burdens" imposed by Section 5 litigation, as discussed by Petitioner and various *amici*, can be significantly minimized by diligent federal judges tightly managing the process. Indeed, these courts were able to achieve highly expedited results—despite repeated instances where the covered jurisdictions' recalcitrance in meeting court orders could have led to significant delays.

The VRA is more than adequately justified by current needs, and Congress acted properly in reauthorizing it in order to enforce constitutional guarantees that remain all too threatened. Accordingly, this Court should affirm the decision of the Court of Appeals.

ARGUMENT

I. RECENT PRECLEARANCE LITIGATION SHOWS THAT SECTION 5 IS "JUSTIFIED BY CURRENT NEEDS"

A. This Court May Consider Post-Enactment Evidence In Deciding Whether Congress Correctly Determined That Section 5 Remains Necessary

The 2012 cases are relevant in assessing the validity of Section 5 and may be considered even though they occurred after the reauthorization of the VRA in 2006. This approach is consistent with precedent. In *Tennessee v. Lane*, 541 U.S. 509 (2004), this Court considered cases decided after the enactment of the Americans with Disabilities Act of 1990 ("ADA") to determine whether Title II of the ADA was valid. *Id.* at 524-25 nn.7, 11, 13 & 14. Likewise, in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Court reviewed legislation in effect after the enactment of the Family and Medical Leave Act of 1993 to assess whether the family-care provision of that statute was congruent and proportional under Section 5 of the Fourteenth Amendment. *Id.* at 733-34 & nn.6-9.

One *amicus* argues that *Lane* did not examine post-enactment cases with regard to the specific constitutional right that was at issue there—access to the courts. *See* Br. for Reason Foundation as *Amicus Curiae* in Supp. of Pet'r 22 ("Reason Foundation Br."). That is flatly incorrect. *See Lane*, 541 U.S. at 525 & n.14 (citing *Layton v. Elder*, 143 F.3d 469, 470-72 (8th Cir. 1998) (mobility-impaired individual

excluded from a quorum court session held on an inaccessible floor of a courthouse), and *Matthews v. Jefferson*, 29 F. Supp. 2d 525, 528, 533-34 (W.D. Ark. 1998) (mobility-impaired individual called to court for full-day hearings but unable to use the restroom or leave the floor to obtain a meal during noon recess)).

Moreover, "[i]n reviewing the constitutionality of a statute, 'courts must accord substantial deference to the predictive judgments of Congress.'" *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (plurality opinion)). In applying such deference to the review of Congress's prediction in 2006 that Section 5 would still be necessary in the years to come, it would be absurd to require the Court to ignore that Congress's prediction turned out to be right.[2]

B. The Two Cases Involving Texas Show That Section 5 Remains Necessary

1. The Texas Redistricting Case

Two of the 2012 cases involved the State of Texas, and Texas lost in both. *See Texas v. United States*, ___ F. Supp. 2d ___, No. 11-1303, 2012 WL

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[2] Petitioner itself pointed to the Texas and South Carolina photo ID cases and the Florida early voting case in its Petition for a Writ of Certiorari. *See* Pet. for a Writ of Cert. 19-20. Many *amici* supporting Petitioner likewise point to these cases in their analysis of the constitutionality of Section 5. *See, e.g.,* Br. of Arizona et al. as *Amici Curiae* in Supp. of Pet'r ("Arizona Br.") 22-23 (South Carolina photo ID case); Br. of Former Government Officials as *Amici Curiae* in Supp. of Pet'r ("Former Officials Br.") 19-22 (South Carolina and Texas photo ID cases; Florida early voting case); Br. of State of Texas as *Amicus Curiae* in Supp. of Pet'r ("Texas Br.") 3-25 (Texas photo ID case).

3671924, at *37 (D.D.C. Aug. 28, 2012) ("*Texas Redistricting*"), *appeal docketed*, No. 12-496 (U.S. Oct. 19, 2012); *see also Texas v. Holder*, ___ F. Supp. 2d ___, No. 12-128, 2012 WL 3743676, at *1 (D.D.C. Aug. 30, 2012) ("*Texas ID*"), *notice of appeal filed* (D.D.C. Dec. 19, 2012). In its *amicus* brief, Texas focuses almost entirely on the 2012 photo ID case, *see* Texas Br. 3-25, but never even mentions that, just two days before that case was decided, another three-judge panel rejected Texas's redistricting plans, finding that the State's Congressional and State Senate plans were intentionally discriminatory and that the State's Congressional and State House plans would have a retrogressive effect. *See Texas Redistricting*, 2012 WL 3671924, at *37. The court also expressed grave doubts about Texas's commitment to protecting the rights of non-Anglo voters. *See id.* Indeed, as that court noted, "[i]n the last four decades, Texas has found itself in court every redistricting cycle, and each time it has lost." *Id.* at *20.[3] Thus, the most recent Texas redistricting case demonstrates why Section 5 remains amply "justified by current needs." *Nw. Austin*, 557 U.S. at 203.

In August 2012, following a 10-day trial, a three-judge panel declined to preclear Texas's redistricting plans. *Texas Redistricting*, 2012 WL 3671924, at *2. The court unanimously found that Texas's Congressional redistricting plan was enacted with a discriminatory intent. *Id.* at *21. The court noted that the Texas legislature had engaged in

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[3] *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Bush v. Vera*, 517 U.S. 952 (1996); *Upham v. Seamon*, 456 U.S. 37 (1982); *White v. Weiser*, 412 U.S. 783 (1973); *White v. Regester*, 412 U.S. 755 (1973); *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex.1992), *aff'd sub nom., Richards v. Terrazas*, 505 U.S. 1214 (1992).

"substantial surgery" in order to remove key economic generators, such as hospitals, universities, sports centers, and even Congressional district offices, from the districts of Black and Latino members of Congress. *Id.* at *19. In contrast, "[n]o such surgery was performed on the districts of Anglo incumbents." *Id.* at *20.

Texas offered two explanations for this pattern, neither of which the court found remotely plausible. *Id.* First, the State argued that the removal of economic engines and district offices from the districts of Black and Latino lawmakers was a mere "coincidence." *Id.* But as the court found, "[i]t is difficult to believe that pure chance would lead to such results." *Id.* Texas also asked the court to believe that "the mapdrawers did not know where [Congressional] district offices were located." *Id.* But the court saw this explanation as the mere smoke screen that it was. *See id.* ("We are confident that the mapdrawers can not only draw maps but read them, and the locations of these district offices were not secret.").

The court found that these actions "alone" could support a finding of discriminatory intent as they were "unexplainable on grounds other than race." *Id.* (quoting *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). In determining the legislature's intent, however, the court also looked to Texas's record of defying the VRA in redistricting, and the fact that Black and Latino members of Congress "were excluded completely from the process of drafting new maps, while the preferences of Anglo members were frequently solicited and honored." *Id.* at *20, 21. "[T]he totality of th[is] evidence" demonstrated that the Congressional

plan had been "enacted with discriminatory intent." *Id.* at *21.

In addition to finding discriminatory purpose, the court determined that Texas's Congressional redistricting plan would have a retrogressive effect. *Id.* at *17-18. The court noted that under the status quo, there already existed a "representation gap" between the number of minority Congressional districts in Texas and the number of minority districts that would exist if districts were allocated proportionally to the population. *Id.* at *18. In turn, the court determined that the enacted plan would increase this "representation gap" by one Congressional district. *Id.* at *17-18. The court emphasized that a state may not "undo[] or defeat[] the rights recently won by minorities by increasing the degree of discrimination." *Id.* at *18 (internal citation and quotation marks omitted). Texas's enacted plan would have done just that. *Id.*

One of the most egregious aspects of Texas's Congressional plan involved Congressional District 23. *See id.* at *15-16. In *LULAC v. Perry*, 548 U.S. 399 (2006), a case decided shortly before Congress reauthorized the VRA, this Court specifically rejected Texas's attempt to dilute the Latino vote in that district. *Id.* at 442. In a strongly worded decision, this Court observed that "District 23's Latino voters were poised to elect their candidate of choice," and that Texas was trying to "t[ake] away [that] opportunity because Latinos were about to exercise it." *Id.* at 438, 440. In view of "the long history of discrimination against Latinos and Blacks in Texas," this Court found that Texas's actions "b[ore] the mark of intentional discrimination" and could not be sustained. *Id.* at 439, 440 (citation and internal quotation marks omitted).

Sadly, following this Court's decision, Texas tried once again to undermine the political participation of Latino voters in Congressional District 23. The district court in the 2012 Section 5 case found that Texas "consciously replaced many of the district's active Hispanic voters with low-turnout Hispanic voters." *Texas Redistricting*, 2012 WL at 3671924, at *16. In other words, the State tried to "maintain the semblance of Hispanic voting power in the district while decreasing its effectiveness." *Id.* Just as this Court did in 2006, the district court rejected Texas's attempt "to create the facade of a Latino district," *LULAC*, 548 U.S. at 441, finding that it was a thinly veiled attempt "to reduce Hispanic voters' ability to elect." *See Texas Redistricting*, 2012 WL 3671924, at *16.

With respect to the State Senate plan, specifically Senate District 10, the court also found credible evidence showing that the Texas legislature intentionally sought to weaken the Black and Latino vote. *Id.* at *26. Among other things, the court found that "the legislature deviated from typical procedures and excluded minority voices from the process even as minority senators protested that section 5 was being run roughshod." *Id.* Texas "made no real attempt" to refute defendants' claims of intentional discrimination. *Id.* As a result, the court was compelled to "conclude that the Senate Plan was enacted with discriminatory purpose as to [Senate District] 10." *Id.*

Finally, the court denied preclearance to the State House plan because of its retrogressive effect, finding that Texas's enacted plan would have the effect of abridging minority voting rights in four "ability districts," without creating any new ability districts to offset this loss. *Id.* In contrast to its find-

ings with respect to Texas's Congressional and State Senate plans, the court stopped just short of formally finding that Texas's State House plan was motivated by discriminatory intent. *Id.* at *36. Nevertheless, the court observed that, "at minimum, the full record strongly suggests that the retrogressive effect [of the State House plan] may not have been accidental." *Id.* at *37. The court noted that the legislature had adopted "a deliberate, race-conscious method to manipulate . . . the Hispanic vote," and found evidence "suggest[ing] that Texas had something to hide in the way it used racial data to draw district lines." *Id.* (emphasis omitted).

2. The Texas Photo ID Case

Repeatedly, Petitioner and its supporting *amici* also point to Texas's attempt to implement the most restrictive voter ID law in the country as an example of Section 5 fostering an improper intrusion on federalism. *See* Pet. for Writ of Cert. 19-20; Former Officials Br. 19-21; Texas Br. 3-25. To the contrary, the Texas photo ID case demonstrates precisely why the protections of Section 5 are still needed.

Because of Section 5, Texas was stopped from implementing a statute that "will likely have a retrogressive effect" on minorities' right to vote. *Texas ID*, 2012 WL 3743676, at *1. This finding of retrogression was based on the uniquely restrictive nature of Texas's law, "the most stringent [voter ID law] in the country," *id.* at *33, and the undisputed record evidence specific to Texas's circumstances. *See id.* at *14.

In this context, although Petitioner and supporting *amici* repeatedly claim that Section 5 stopped Texas from implementing a law that non-covered states may implement, *see, e.g.*, Former Of-

ficials Br. 19-21, that is simply not the case. Texas's proposed photo ID law, SB 14, is significantly more restrictive than that of any other State, including the Indiana statute adjudicated in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), a case decided without a well-developed record as to how many voters (or which ones) would be affected by the ID law, *see id.* at 200, and the Georgia statute precleared by the Attorney General.[4] *See Texas ID*, 2012 WL 3743676, at *26, 33. Other covered states, including Arizona, Louisiana, Michigan, New Hampshire, and Virginia, have also successfully adopted voter ID requirements less restrictive than Texas's without any objection by the Attorney General. Federal Resp't Br. 44.

As the court indicated, had Texas simply adopted some of the very provisions found in the laws of other states, its request for preclearance might have been granted.[5] *See Texas ID*, 2012 WL

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[4] While Indiana's law permits the use of *any* federal or Indiana ID with an individual's name, photograph, and an expiration date after the most recent general election, *see* Ind. Code Ann. § 3-5-2-40.5(a), Texas's law would have permitted the use of only the following photo IDs: a driver's license, election ID certificate, personal ID card, license to carry a concealed handgun issued by the Texas Department of Public Safety, a United States passport, or United States military ID card, all of which must be current or not expired earlier than 60 days before the election, or a United States citizenship certificate. Tex. Elec. Code § 63.0101. Similarly, Texas's law would have permitted fewer forms of ID than Georgia's, which allows the use of photo ID issued by *any* state or federal entity authorized to issue ID, as well as a tribal ID. Ga. Code Ann. § 21-2-417(a). Also unlike Texas's law, Georgia's permits the use of expired drivers' licenses. *Id.*

3743676, at *32-33. Instead, Texas pushed the envelope by proposing a retrogressive law that the court condemned as "almost certain" to disproportionately affect racial minorities by "impos[ing] strict, unforgiving burdens on the poor." *Id.* at *33.

The purported discrepancy between the result in *Crawford* and that in *Texas* does not raise the specter of federalism concerns suggested by Petitioner and its supporting *amici*. First, there is a fundamental difference between Texas and Indiana. Texas has a well-documented history of flagrant voting discrimination; Indiana does not. Second, there is no inconsistency in the result between *Crawford* and *Texas* because the ultimate issue determined in *Texas* was not decided in *Crawford*, which involved a facial challenge to the constitutionality of a voter ID law without reference to its potentially discriminatory effect. *See id.* at *12-13. Finally, to the extent that *Crawford* instructed on two issues involved in *Texas*, the district court in *Texas* followed *Crawford*'s guidance. *Id.* at *12. The court adhered to *Crawford*'s ruling that the purpose of curtailing in-person voter fraud was a legitimate state interest even without any evidence of in-person voter fraud. *Id.* The district court also followed *Crawford*'s ruling that the inconvenience of making a trip to a motor vehicle facility, in and of itself, does not qualify as a substantial burden on the right to vote. *Id.* at *13.

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[5] Specifically, the Texas legislature tabled or defeated amendments that would have waived all fees for indigent persons who needed the underlying documents to obtain an election ID certificate (as does Georgia), expanded the range of acceptable ID by allowing voters to present Medicare ID cards at the polls (as do Georgia and Indiana), and allowed indigent persons to cast provisional ballots without photo ID (as does Georgia). *See Texas ID*, 2012 WL 3743676, at *33.

But Petitioner and its supporting *amici* would have *Crawford* stand for the much broader proposition that *any* type of voter ID law is immune from challenge, no matter what its terms, no matter if it has an *illegitimate* purpose as well as a *legitimate* purpose, and no matter what the actual proof is of its potential discriminatory impact. *See, e.g.*, Former Officials Br. 19-21. Nothing in *Crawford* suggests that result, and, as explained by the court in the Texas ID case, *Crawford*'s discussion as to the insubstantiality of the burden of the Indiana law on "most" voters cannot be expanded into a finding as to "all" voters, and *Crawford* specifically did not address whether the burdens fell disproportionately on minorities. *Texas ID*, 2012 WL 3743676, at *13.

In *Texas ID*, the court found that the burdens of obtaining the required ID would weigh most heavily on poor Texans, who are disproportionately racial minorities. *Id.* at *26.[6] These burdens were sufficiently significant to convince three federal judges to find that, in 2011, a covered jurisdiction had enacted a law, which, if implemented, would have discriminated against minorities in the exercise of their voting rights. *Id.* In this regard, the court did not merely rely on Texas's failure to shoulder its burden of proof under Section 5 to show a lack of discrimina-

[6] Specifically, the court found that these burdens include traveling to motor vehicle facilities over 200 miles away roundtrip (one-third of Texas counties do not have such facilities, and many facilities have limited hours); and paying significant sums to obtain documents such as a birth certificate necessary to get a driver's license or the election ID certificate supposedly provided for "free" under the proposed law. *Texas ID*, 2012 WL 3743676, at *15-16. In Georgia, by contrast, the required ID can be obtained in every county. Ga. Code Ann. § 21-2-417.1(a). Moreover, the documents necessary to obtain the free Georgia voter ID include those that are costless. *See id.* § 21-2-417.1(e).

tory effect. *See id.* ("[T]his case does not hinge merely on Texas's failure to prove a negative." (citation and internal quotation marks omitted)). Rather the court expressly found that "in fact, record evidence demonstrates that, if implemented, SB 14 will likely have a retrogressive effect" on Latino and Black voters. *Id.* at *1.[7]

C. Section 5 Ameliorated The Potentially Discriminatory Effects Of Laws In South Carolina And Florida

While the two Texas 2012 cases demonstrate the necessity of the preclearance process to address laws that are discriminatory in purpose or effect, the other two 2012 cases show that Section 5 is flexible and may enable otherwise retrogressive laws to be ameliorated such that they can be implemented in a non-retrogressive manner.

1. The South Carolina Voter ID Case

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[7] Because it found discriminatory effect, the court did not reach the issue of discriminatory purpose, *Texas ID*, 2012 WL 3743676, at *32, of which there was substantial evidence, including (1) the implementation of extraordinary legislative procedures to pass the law, such as the abandonment of the established two-thirds rule in the Texas Senate, (2) the increasingly restrictive evolution of the law, despite express knowledge of its potential discriminatory impact; (3) the summary rejection of dozens of amendments which would have ameliorated that impact; (4) the anti-immigrant rhetoric associated with the bill; and (5) the use of pretextual arguments, most notably that the law would have prevented prior instances of alleged voter fraud. *See* Attorney General's Proposed Findings of Fact and Conclusions of Law at 24-48, 63-71, *Texas v. Holder*, No. 12-128 (D.D.C. June 25, 2012), ECF No. 223; Defendant-Intervenors' Proposed Supplemental Non-Duplicative Findings of Fact and Conclusions of Law at 23-40, *Texas v. Holder*, No. 12-128 (D.D.C. June 27, 2012), ECF No. 241.

The South Carolina case concerned Act R54, that State's newly enacted photo ID law. *South Carolina v. United States*, ___ F. Supp. 2d ___, No. 12-203, 2012 WL 4814094, at *1 (D.D.C. Oct. 10, 2012). With regard to the 178,000 voters in South Carolina that would be affected by R54,[8] the three-judge panel determined that the law could have a retrogressive effect because far fewer Blacks in South Carolina possessed acceptable forms of ID than whites. *Id.* at *8. The court determined "[t]hat racial disparity, combined with the burdens of time and cost of transportation inherent in obtaining a new photo ID card, might have posed a problem for South Carolina's law under the strict effects test of Section 5 . . . ." *Id.*

The law was saved, however, when, at trial, State officials offered a broad reinterpretation of R54's "reasonable impediment" provision. *Id.* at *4-5. Under this interpretation, "all citizens may still vote with [a] non-photo voter registration card, so long as they state the reason for not having obtained a photo ID." *Id.* at *9; *see also id.* at *11 ("So long as the reasonable impediment affidavit is properly completed and actually lists a reason for not obtaining a photo ID, the affidavit generally 'will be deemed to speak for itself' and the ballot must be counted." (quoting Op. S.C. Att'y Gen., Aug. 16, 2011, 2011 WL 3918168, at *4)). Any alteration of this interpretation by the state would again require preclearance. *Id.* at *19-20.

Thus, as Judge Bates wrote in his concurrence (joined by Judge Kollar-Kotelly), R54 (as precleared by the court) was not the same law passed by the South Carolina legislature. *Id.* at *21 (Bates, J.,

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[8] *See South Carolina v. United States*, No. 12-203 (D.D.C. Apr. 26, 2012) (Bates, J., concurring), ECF No. 64.

concurring). The Section 5 process enabled South Carolina to implement a photo ID law that otherwise would have disproportionately disenfranchised minority voters in a way that ensured that it would not have such an effect. *See id.* As Judge Bates put it:

> [O]ne cannot doubt the vital function that Section 5 of the Voting Rights Act has played here. Without the review process under the Voting Rights Act, South Carolina's voter photo ID law certainly would have been more restrictive.

Id.

In addition, *South Carolina* demonstrates the powerful deterrent effect of Section 5. At trial, certain South Carolina legislators testified that the "reasonable impediment" provision and the overall structure of the law were meant to help ensure preclearance. *See id.* at *4 (opinion of the court). Accordingly, "the history of Act R54 demonstrates the continuing utility of Section 5 . . . in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws." *Id.* at *22 (Bates, J., concurring). Indeed, Congress took this deterrent effect into account in reauthorizing the VRA, finding that "the deterrent effect of Section 5 is substantial." *See* H.R. Rep. No. 109-478, at 24; *see also Shelby Cnty.*, 679 F.3d at 870-72 (summarizing Congressional findings as to Section 5's deterrent effect).

2. The Florida Early Voting Case

The fourth 2012 case concerned Florida's early voting statute, which a three-judge panel determined could not be precleared because of its potentially dis-

criminatory impact on Black voters. *Florida v. United States*, ___ F. Supp. 2d ___, No. 11-1428, 2012 WL 3538298, at *2 (D.D.C. Aug. 16, 2012).

The new law reduced the total number of days available for early voting and gave county election officials broad discretion to determine the number of early voting hours for each day, within a statutory range. *Id.* at *16. As a result, the new statute allowed the number of early voting hours to be cut by as much as half from that which was available under the prior law. *Id.*

The court found that offering the minimum number of early voting hours under the new law would have a retrogressive effect. *Id.* at *17. Indeed, because the rate at which Blacks used early voting could be as high as twice that of whites—54% of Black Floridians voted early in 2008—the new statute undoubtedly had significant *potential* for a discriminatory effect. *Id.* at *17–18. The court was also concerned that a reduction in early voting days could lead to "substantially increased lines, overcrowding, and confusion at the polls," which would further disproportionately discourage Blacks from voting. *Id.* at *24. Florida failed to submit any evidence to show that "given a menu of possible hours, its covered counties will choose nonretrogressive ones." *Id.* at *22. As a result, the court found that the statute could have a discriminatory effect and denied preclearance. *Id.* at *17.

As in *South Carolina*, however, the Section 5 process led to a result in which an otherwise retrogressive law ultimately could be implemented in a nondiscriminatory manner. Specifically, the court offered guidance to Florida, holding that "if Florida and the covered counties were to submit a preclear-

ance plan that offered early voting for 12 hours per day, from 7 a.m. to 7 p.m. over an 8-day early voting period, including one previously-unavailable Sunday, they would likely satisfy the burden of proving that the overall effect of the early voting changes would be nonretrogressive . . . ." *Id.* at *30.

In response, Florida submitted a revised early voting plan that took into account the court's guidance, and the Attorney General promptly precleared the State's plan. *See* United States' Notice to the Court, *Florida v. United States*, No. 11-142 (D.D.C. Sept. 19, 2012), ECF No. 161.

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Whether in cases involving blatant discrimination (such as the Texas cases) or cases concerning potentially retrogressive laws that required judicial intervention in order to achieve a balanced, mitigated result (such as the Florida and South Carolina cases), the 2012 cases rebut Petitioner's claim that Section 5 is no longer justified by current needs. Rather, as determined by four unanimous three-judge panels in 2012, minority voters in Texas, South Carolina, and Florida recently faced the very real possibility of moving backwards in their hard-won progress as a result of decisions made by state legislators. Section 5 prevented that result.

II. THE 2012 CASES SHOW THAT POTENTIAL BURDENS OF SECTION 5 LITIGATION CAN BE SIGNIFICANTLY MINIMIZED

Various *amici* supporting Petitioner, especially the State of Texas, discuss the "heavy burdens" they claim are associated with litigation under Section 5; Texas argues that such litigation is unduly time-consuming, subjects legislators to inappropriate

discovery, allows too much leeway to intervenor parties, and imposes on covered jurisdictions an "impossible burden." *See* Texas Br. 18; *see also* Arizona Br. 24-31; Former Officials Br. 24-27. But the 2012 cases refute those claims and demonstrate that courts manage Section 5 litigation in a manner consistent with the federalism concerns described in *Northwest Austin*.

A. The 2012 Cases Were Highly Expedited

Texas argues that the delay it faced in seeking adjudication of its photo ID law demonstrates that "the burdens that section 5 imposes on covered jurisdictions are severe and extraordinary." Texas Br. 24.

The record paints a different picture. Ever mindful of both efficiency and federalism concerns, the three-judge panel adjudicated the photo ID law with dispatch, and with great deference to the sovereign rights of Texas. Throughout the litigation, the court acted with "obvious urgency," so as to permit "Texas's only chance of implementing SB 14 before the November 2012 elections." *Texas ID*, 2012 WL 3743676, at *5. Even before the United States had filed an answer to Texas's amended complaint, the court granted Texas's request for an expedited schedule. *Texas v. Holder*, No. 12-128 (D.D.C. Mar. 27, 2012) (scheduling order), ECF No. 43. The court rejected the defendants' position that a summer trial was infeasible, and set an accelerated case schedule, with 90 days of discovery, a five-day trial beginning July 9, and the promise of a decision by Texas's requested date of August 31. *Id.* Each of these dates was met—despite ample reasons to modify the schedule occasioned by Texas's own delays. As the court said:

> It should be no surprise to Texas that this Court has been troubled by Texas'[s] dilatory conduct. The specific instances of delay detailed in Defendants' briefs—much of which is not specifically rebutted or contested by Texas—and revealed or confirmed at the May 3, 2012 hearing, has troubled this Court even more. . . . Based upon the record to date, this Court would be well within its discretion to continue the July 9 trial date, to impose monetary sanctions against Texas, or to keep the July 9 trial date and impose evidentiary sanctions such as an adverse inference upon Texas.

Texas v. Holder, No. 12-128 (D.D.C. May 7, 2012) (order clarifying trial schedule), ECF No. 107.

Nevertheless, the court stuck to its schedule. As it explained, "[t]he questions under the Voting Rights Act presented here are too important to let even Texas'[s] missed discovery . . . force a change to the July 9 trial date." *Texas v. Holder*, No. 12-128 (D.D.C. May 22, 2012) (order denying motion to clarify trial date), ECF No. 137 at ¶ 2.

The expedited schedule adopted by the court was no anomaly: each of the courts that oversaw the 2012 cases took steps to expedite the litigation.[9] It is

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[9] The *South Carolina* court "set an extremely aggressive trial schedule," *South Carolina*, 2012 WL 4814094, at *19; *South Carolina v. United States*, No. 12-203 (D.D.C. May 11, 2012) (revised scheduling order), ECF No. 67, despite the fact that the state engaged in "inexplicably dilatory conduct" prior to and during the litigation. *South Carolina v. United States*, No. 12-203 (D.D.C. Apr. 26, 2012) (Bates, J., concurring), ECF No. 64. The court ultimately issued its final decision in October

noteworthy that, as a result, all of these cases reached final adjudication within 8 to 13 months of the filing of the complaint, well short of the median time for civil cases generally, despite the complexity of voting rights cases. *See* Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts* 156 (2011) (median time interval in fiscal 2011 from filing to post-trial judgment in civil cases was 23.4 months).

2012, only eight months after the commencement of the litigation. *See South Carolina*, 2012 WL 4814094, at *1. The court in the Texas redistricting case also sought to accommodate Texas's desire to implement its redistricting plans for the November 2012 elections. Texas sought a final decision before November 12, 2011, the first date on which the candidates could register to run for election. Plaintiff's Motion to Expedite, *Texas v. United States*, No. 11-1303 (D.D.C. Aug. 8, 2011), ECF No. 10. Hewing to that request, the court issued a scheduling order that contemplated the possibility of a resolution of the case by that date. *See Texas v. United States*, No. 11-1303 (D.D.C. Sept. 22, 2011) (scheduling order), ECF No. 51. After denying Texas's summary judgment motion on November 8, 2011, the court set trial for January 2012 and ultimately rendered its final decision in August 2012, about thirteen months after the case began. *Texas Redistricting*, 2012 WL 3671924, at *1-2. Florida asked the court that oversaw the early voting litigation to expedite the matter—specifically, to decide the case by early January 2012, in advance of the State's preferential presidential primary. *See Florida v. United States*, 820 F. Supp. 2d 85, 88-89 (D.D.C. 2011). The court noted, however, that the languid pace with which Florida handled the litigation "belie[d] Florida's contention that expedition of this action is essential"—for example, Florida did not file a motion to expedite until two-and-a-half months after commencing the action. *Id.* at 91. Nonetheless, the court did adopt an expedited schedule for both discovery and briefing. *Florida*, 2012 WL 3538298, at *50. The court ultimately issued its preclearance decision about twelve months after the commencement of the litigation. *See id.* at *1, 49.

B. Section 5 Litigation Is Faster Than Litigation Under Section 2 While Preventing Discriminatory Laws From Taking Effect

While addressing the burdens associated with Section 5 litigation, Petitioner and various *amici* urge that Section 2 is the "appropriate" remedy to redress discriminatory voting laws. *See* Pet'r Br. 20; Arizona Br. 27; Br. of National Black Chamber of Commerce as *Amici Curiae* in Supp. of Pet'r ("National Black Chamber Br.") 13-23. But litigation under Section 2 is more time consuming than litigation under Section 5 and at the same time fails to ensure that discriminatory voting laws are not implemented prior to adjudication.

Congress had an adequate basis for finding that Section 2 litigation was an insufficient remedy, because Section 2 cases are more costly, complex, and time consuming—often taking more than several years to resolve[10]—than those brought under Section 5. *See Shelby Cnty.*, 679 F.3d at 872-73. In part, this is because, unlike Section 2, Section 5 provides for an expedited appeal directly to this Court. 42 U.S.C. § 1973c(a); *see also* 28 U.S.C. § 1253.

This delay under Section 2 is compounded by the fact that a discriminatory law may take effect

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[10] *See, e.g.*, *Levy v. Lexington Cnty., S.C.*, No. 03-3093, 2009 WL 440338, at *1 (D.S.C. Feb. 19, 2009), *vacated*, 589 F.3d 708 (4th Cir. 2009), *remanded to* 2012 WL 1229511 (D.S.C. April 12, 2012) (9 years); *Thompson v. Glades Cnty. Bd. of Cnty. Comm'rs*, 493 F.3d 1253, 1267, *vacated*, 508 F.3d 975 (11th Cir. 2007) (en banc) (7 years); *Vander Linden v. Hodges*, 193 F.3d 268, 272 (4th Cir. 1999) (8 years); *Johnson v. DeSoto Cnty. Bd. of Comm'rs*, 868 F. Supp. 1376, 1378 (M.D. Fla. 1994), *vacated*, 72 F.3d 1556 (11th Cir. 1996), *remanded to* 995 F. Supp. 1440 (M.D. Fla. 1998), *aff'd*, 204 F.3d 1335 (11th Cir. 2000) (10 years).

during the pendency of Section 2 litigation—one of the most critical drawbacks of Section 2 litigation that Congress considered in reauthorizing the VRA. *See Shelby Cnty.*, 679 F.3d at 872 (noting that, "during the time it takes to litigate a section 2 action . . . proponents of a discriminatory law may enjoy its benefits").

The suggestion that preliminary injunctions may remedy this problem, *see* National Black Chamber Br. 13-23, is not persuasive. It overlooks the fact that, by its nature, "a preliminary injunction is an *extraordinary and drastic* remedy." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis added) (citation and internal quotation marks omitted). A plaintiff must demonstrate entitlement to relief by a "*clear showing*" even before discovery has begun. *Id.* And this Court has long made it clear that a preliminary injunction is "never awarded as of right," *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008), "even though irreparable injury may otherwise result to the plaintiff," *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citation and internal quotation marks omitted).

United States v. Charleston County, 316 F. Supp. 2d 268 (D.S.C. 2003), illustrates this reality. There, the United States alleged in January 2001 that the at-large method of electing the members of the Charleston County Council violated Section 2 of the VRA. *Id.* at 270. In March 2002, the United States moved for a preliminary injunction to prevent the method from being used for the November 2002 elections, and the request was denied. *Id.* at 272-73. Following a trial on the merits, however, the court in 2003 found that "the at-large system of election for the Charleston County Council unlawfully denies African Americans equal access to the electoral

process" and enjoined its use in future elections.[11] *Id.* at 304. Unfortunately, by that time, the November 2002 elections had already occurred. *See id.* at 268; *see also Williams v. City of Dallas,* 734 F. Supp. 1317, 1317, 1367-68, 1415 (N.D. Tex. 1990) (finding after denial of preliminary injunction and trial that the electoral system for the Dallas City Council violated Section 2, and noting that an election had occurred since the time the injunction was denied).

C. The Scope Of Discovery In Section 5 Cases Can Be Limited So As To Prevent Intrusion Into Privileged Legislative Matters

Texas argues that its state legislators were subjected to inappropriate questioning about their motives in passing the photo ID legislation. Texas Br. 14-15. Texas's account ignores the great deference shown to such concerns by the court in that case even though Section 5 expressly requires an inquiry into legislative purpose.[12] Mindful of "federal

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[11] As a part of the Section 2 analysis, the court also described attempts by the South Carolina legislature to alter the method of electing the Charleston County School Board after the 2000 elections resulted in Blacks becoming a majority on the school board for the first time. *Charleston Cnty.*, 316 F. Supp. 2d at 290 n.23. If not for the Attorney General's objection under Section 5, South Carolina would have adopted "the exact same method" for the school board elections as the discriminatory one struck down for the County Council. *Voting Rights Act: Evidence of Continuing Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 80, 84-85 (2005). Whereas the Section 2 suit had lasted four years, Section 5 swiftly prevented South Carolina from engaging in discriminatory electoral gamesmanship. *Id.* at 80.

[12] Notably, both Fourteenth Amendment and Section 2 litigation also contemplate inquiries into legislative intent that can cause similar discovery disputes. *See City of Mobile v. Bolden*,

intrusion into sensitive areas of state and local policy making," *Nw. Austin*, 557 U.S. at 202, the *Texas* court prohibited all discovery relating to legislative acts or a legislator's motivations, other than what was in the public record; prohibited the discovery of certain communications between legislators and executive agencies; and shielded most evidence in possession of the Lieutenant Governor, even though the Lieutenant Governor operates as both a legislator and an executive. *Texas ID*, 2012 WL 3743676, at *5-6.

Similarly, "[d]uring the discovery phase of [the Florida] case, the intervenors moved to compel deposition testimony from four Florida legislators and two legislative staff members," but the motion was denied on the grounds of legislative privilege. *Florida*, 2012 WL 3538298, at *50; *see also id.* at *44 & n.65 (rejecting the United States' request that the court draw an adverse inference from Florida's refusal to allow its legislators to be deposed).

Clearly, courts can manage discovery in Section 5 cases while preventing intrusion into the "sensitive areas" outlined in *Northwest Austin*.

D. Intervenors Carefully Managed By The Courts Played An Important Role In The 2012 Cases

The 2012 cases also refute the suggestion that "rampant intervention by private parties in judicial preclearance cases has significantly increased" the costs of Section 5 litigation. Former Officials Br. 24; *see also* Texas Br. 13-14. Indeed, intervenors in the 2012 cases—many of whom became parties to the

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446 U.S. 55, 66 (1980); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 766 (9th Cir.1990).

cases without opposition from the covered jurisdictions[13]—played an important role in representing the interests of minority voters, even while operating under significant constraints imposed by the district courts.

For instance, in the Texas redistricting case, the United States did not object to the State Senate redistricting plan, but several intervenors did, arguing that the plan was enacted with discriminatory intent. *Texas Redistricting*, 2012 WL 3671924, at *21. Following trial, the court agreed with the intervenors and denied preclearance. *Id.* Similarly, the United States declined to take the position that one particular Congressional district was protected under the VRA, but several intervenors did, urging that, as a result, the redistricting plan would have an impermissibly retrogressive impact. *Id.* at *44 (majority opinion). The court also agreed with the intervenors in that respect. *Id.*

In the Texas photo ID case, intervenors contributed significantly to the district court's resolution of the preclearance issues. The court's rejection of Texas's expert on discriminatory effect was based substantially on the testimony of the intervenors' statistical expert. *Texas ID*, 2012 WL 3743676, at *23-25. In addition, the court expressly relied on the testimony of several other witnesses presented by

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[13] *See, e.g.*, *South Carolina v. United States*, No. 12-203 (D.D.C. Mar. 20, 2012) (noting that South Carolina did not file a response to the motion to intervene and granting the motion), ECF No. 10; *Florida v. United States*, No. 11-1428 (D.D.C. Oct. 19, 2011) (noting that Florida did not oppose permissive intervention and granting motions to intervene), ECF No. 42; *Texas v. United States*, No. 11-1303 (D.D.C. Aug. 16, 2011) (noting that Texas did not oppose permissive intervention and granting motion to intervene), ECF No. 11.

intervenors on the issue of the disproportionate burden that the law would have on minorities. *Id.* at *27-29. Similarly, in *Florida*, the court relied primarily on the testimony of the intervenors' expert witness to find that the proposed changes would disproportionately affect minorities. *See, e.g.*, *Florida*, 2012 WL 3538298, at *17, 25, 26.

Moreover, in each of these cases, the intervenors operated under significant constraints imposed by the court. For instance, the courts ordered the United States and intevenors to confer with each other throughout the litigation to determine whether their position on any given issue could be set forth in a consolidated fashion,[14] required intervenors to work collectively and to act through a single representative,[15] and carefully managed the intervenors' involvement.[16]

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[14] *See, e.g.*, *South Carolina v. United States*, No. 12-203 (D.D.C. Mar. 30, 2012) (order granting motion to intervene and requiring intervenors to confer with the United States prior to any filings to determine whether their positions can be set forth in a consolidated fashion), ECF No. 10; *Florida v. United States*, No. 11-1428 (D.D.C. Oct. 19, 2011) (same), ECF No. 42; *see also Texas v. United States*, No. 11-1303 (D.D.C. Sept. 30, 2011) (paperless minute order precluding those intervenors who agreed with the United States on Texas's compliance from filing a separate brief).

[15] *See, e.g.*, *Texas v. United States*, No. 11-1303, ECF No. 51, at ¶7 (order requiring the intervenors to designate one representative to address scheduling and non-merits issues, including all discovery disputes).

[16] *See, e.g.*, *South Carolina v. United States*, No. 12-203 (D.D.C. Aug. 7, 2012) (order limiting intervenors as a group to five hours of live testimony at trial, in comparison to fourteen for the state and nine for the United States), ECF No. 155; *Texas v. Holder*, No. 12-128 (D.D.C. June 13, 2012) (order limit-

Indeed, it is telling that although Petitioner and its supporting *amici* reference the relatively large number of intervenors in these cases, they ignore that in each case, all intervenors operated as a single unit.[17]

E. Covered Jurisdictions Do Not Face An "Impossible Burden" Under Section 5

Texas also argues that covered jurisdictions face an "impossible burden" under Section 5 because a court hearing a Section 5 case can demand "that the State produce evidence that is impossible to obtain" or else invoke "new theories of 'retrogression' and requir[e] the State to rebut them." Texas Br. 15, 18. Other *amici* complain that Section 5 is burdensome because it requires the covered jurisdiction to "prove a negative" by establishing the absence of discriminatory purpose. *See* Former Officials Br. 14; Br. of Cato Institute as *Amicus Curiae* in Supp. of Pet'r 5. However, the 2012 cases rebut these claims.

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ing intervenors as a group to five hours of live testimony, in comparison to ten each for Texas and for the United States), ECF No. 183; *South Carolina v. United States*, No. 12-203 (D.D.C. Apr. 26, 2012) (order limiting intervenors as a group to fewer depositions, interrogatories, and requests for admission than those allowed for the original parties), ECF No. 64.

[17] Moreover, if the restrictions imposed by the courts on intervenors in the 2012 cases were somehow deemed insufficient, any burden created by the involvement of such intervenors does not provide a justification for striking down Section 5 as unconstitutional. Under the Federal Rules of Civil Procedure, courts have ample authority to control the conduct of intervenors, such as by limiting their number and the extent of their involvement. *See* Fed. R. Civ. P. 24(b); *see also* Fed. R. Civ. P. 24 advisory committee's note; 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1913 (3d ed. 2012).

Contrary to the claims of various *amici*, these courts did not invent the governing retrogression standard from whole cloth. Rather, they applied the decades-old retrogression standard first established by this Court in *Beer v. United States*: "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 425 U.S. 130, 141 (1976); *see also Texas ID*, 2012 WL 3743676, at *32 ("For decades, courts have applied the Supreme Court's longstanding interpretation of section 5's effect element . . . ."). South Carolina and Florida could meet that standard. Texas could not. [18]

In *South Carolina*, the court concluded that given its "expansive reasonable impediment provision" the State's photo ID law would "not have a discriminatory retrogressive effect on racial minorities . . . ." 2012 WL 4814094, at *12. In fact, the court specifically noted that South Carolina's showing with respect to the mitigating impact of that provision distinguished the case from the Texas ID case. *See id.* at *16. Likewise, in *Florida*, the court determined that adoption of an ameliorative early voting plan within the "menu" of options devised by the State would not be retrogressive. 2012 WL 3538298, at *30. These cases demonstrate that it is not impossible for a covered jurisdiction to establish a lack of retrogression.

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[18] Indeed, following the 2010 census, Texas was the *only* state whose statewide redistricting plans were denied preclearance by the Attorney General. U.S. Comm'n on Civil Rights, *Redistricting and the 2010 Census: Enforcing Section 5 of the Voting Rights Act* 28 (2012).

While Texas argues that there exists no precise measure of retrogression and that Section 5 is thus subject to the interpretive whims of the Attorney General and federal judges, that argument is unpersuasive. With regard to the photo ID litigation, the State asks "how exactly is Texas (or any other State) supposed to 'prove' the absence of a disparity in photo-identification possession?" Texas Br. 18. But this argument ignores what actually happened in that case, which did "not hinge merely on Texas's failure to prove a negative." *Texas ID*, 2012 WL 3743676, at *26 (citation and internal quotation marks omitted). Indeed, the *Texas ID* court pointed to substantial record evidence affirmatively demonstrating that the photo ID law would have a disproportionate and retrogressive effect on Latino and Black voters. *Id.* at *1, 26-30.

To be sure, close cases—unlike those decided in 2012—could raise questions about the degree of harm required to establish retrogression. But Petitioner has brought a *facial* challenge and thus "can only succeed . . . by establishing that *no* set of circumstances exists under which the [VRA] would be valid, i.e., that the law is unconstitutional in all of its applications" or that the statute lacks any "plainly legitimate sweep." *Wash. State Grange v. Wash. State Rep. Party*, 552 U.S. 442, 449 (2008) (citations and internal quotation marks omitted). Given the success of covered jurisdictions in showing non-retrogression, Texas's theoretical concerns about its ability to meet the retrogression standard do not justify striking down Section 5.

Additionally, both the South Carolina and Florida cases demonstrate that a jurisdiction can show the absence of discriminatory purpose under the *Arlington Heights* factors. *See South Carolina*,

2012 WL 4814094, at *12 (citing *Arlington Heights*); *Florida*, 2012 WL 3538298, at *39 (same). In *South Carolina*, the court found that the State acted without a discriminatory purpose insofar as R54 was facially neutral; the statute was designed to achieve the legitimate State interests of preventing fraud and increasing voters' confidence in the legitimacy of elections; and the legislature made ultimately fruitful attempts to ameliorate the law's discriminatory effect. *See* 2012 WL 4814094, at *12-15. Similarly, in *Florida*, the court found that a change relating to the casting of ballots by inter-county movers was enacted without a discriminatory purpose, noting that the State had a legitimate interest in preventing fraud even in the absence of evidence demonstrating that such fraud existed. *See* 2012 WL 3538298, at *42-46.

CONCLUSION

For the reasons set forth above, *Amici* urge the Court to affirm the judgment of the Court of Appeals.

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