IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, Defendant. ERIC KENNIE, *et al.*, Defendant-Intervenors, TEXAS STATE CONFERENCE OF NAACP BRANCHES, *et al.*, Defendant-Intervenors, TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND, *et al.*, Defendant-Intervenors. TEXAS LEGISLATIVE BLACK CAUCUS, *et al.*, Defendant-Intervenors, VICTORIA RODRIGUEZ, *et al.*, Defendant-Intervenors.	CASE NO. 1:12-CV-00128 (RMC-DST-RLW) Three-Judge Court

CONSOLIDATED REPLY MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Texas requests (Pl. Reply 1, 11[1]) that this Court strike down Congress's 2006 reauthorization of Section 5 or, at a minimum, either "discard" Section 5's prohibition on voting changes that will have a retrogressive effect on the position of racial minorities with respect to their effective exercise of the electoral franchise or bar its application to voting qualifications. Yet Texas fails to carry its heavy burden. Its facial challenge to the 2006 reauthorization is foreclosed by the D.C. Circuit's decision in *Shelby County* v. *Holder*. And its facial challenge to the non-retrogression requirement should be rejected as contrary to well-established Supreme Court precedent that (a) has interpreted the effects prong as prohibiting those voting changes that have a retrogressive effect, and (b) has upheld that standard as constitutional. Because Section 5 is appropriate legislation to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments and does not violate equal protection or due process principles, it is constitutional.

I

TEXAS'S FACIAL CHALLENGE FAILS BECAUSE SECTION 5 IS A CONGRUENT AND PROPORTIONAL RESPONSE TO PERSISTENT VOTING DISCRIMINATION IN THE COVERED JURISDICTIONS

The D.C. Circuit's decision in *Shelby County* v. *Holder*, 679 F.3d 848 (D.C. Cir. 2012), cert. granted, No. 12-96 (Nov. 9, 2012), governs Texas's facial challenge to the

[1] "Pl. Reply" refers to Texas's reply brief in support of its motion and in response to the Attorney General and defendant-intervenors' motions. Doc. 351. "Pl. Mem." refers to Texas's memorandum in support of its motion. Doc. 347. "Def. Mem." refers to the Attorney General's memorandum opposing Texas's motion and supporting his motion. Doc. 350.

2006 reauthorization of Section 5 of the Voting Rights Act (VRA), 42 U.S.C. 1973c, and should be treated as a binding decision by this Court. Although the weight of authority is against the State's position, Texas persists in arguing (Pl. Reply 2-7) that this Court is not bound to follow *Shelby County*. As already explained by the Attorney General in his opening brief (Def. Mem. 12-14), a challenge to the constitutionality of Section 5 would normally be heard by a single judge of this Court. See *LaRoque* v. *Holder*, No. 10cv561, 2010 WL 3719928, at *1-3 (D.D.C. May 12, 2010). This three-judge Court was properly convened by statute to render a preclearance determination. See 42 U.S.C. 1973c(a). Thus, a three-judge court that hears a challenge to Section 5's constitutionality does so only by exercising pendent jurisdiction. See Def. Mem. 13.

Because a one-judge court otherwise deciding a constitutional question under Section 5 of the VRA would be bound to follow relevant D.C. Circuit precedent, to the extent any exists, this Court must similarly follow D.C. Circuit precedent that governs Texas's facial challenge. In response, Texas argues (Pl. Reply 2-3) only that *Shelby County* cannot be controlling because the D.C. Circuit has no way of enforcing its decision on this Court. Texas's argument assumes that a three-judge court will faithfully apply relevant circuit precedent only under a threat of reversal. But federal district courts exercising supplemental jurisdiction regularly follow the decisions of appellate courts that have no power to ensure the district court acts in accordance with those decisions. For example, when a district court exercising federal-question jurisdiction reaches a supplemental state-law claim, it follows state law despite the inability of the state appellate courts to review its decision. See 19 Charles A. Wright & Arthur R. Miller,

Federal Practice and Procedure § 4520 (2d ed. 2012). Treating *Shelby County* as binding authority therefore is consistent not only with the VRA's statutory framework, but also with traditional principles governing the exercise of pendent jurisdiction and the duty of the courts to faithfully follow controlling precedent even when they are not subject to direct review by that tribunal. Failing to accord *Shelby County* controlling weight in this case constitutes a compelling reason for this Court not to exercise pendent jurisdiction over the State's constitutional claims even though considerations of judicial economy and convenience would normally favor hearing those claims. See 28 U.S.C. 1367(c)(4). Moreover, Texas is not prejudiced by according *Shelby County* controlling weight (Pl. Reply 6 n.4) where the State can take a direct appeal to the Supreme Court. Thus, if this Court reaches Texas's constitutional claim, it must follow *Shelby County* and reject the State's facial challenge to the 2006 reauthorization of Section 5.

Regardless, even if this Court exercises pendent jurisdiction to reach the constitutional question and declines to accord *Shelby County* controlling weight, this Court should still follow *Shelby County* based on its persuasive value as well as the value of having consistency in the law in lower courts of the same circuit. Texas argues that its facial challenge raises new arguments not considered in *Shelby County* (Pl. Reply 9), but the State argues only that the most recent congressional record evinces neither a pattern of intentional discrimination nor any specific constitutional violations that cannot be remedied through traditional litigation (Pl. Reply 7-9). Yet this same argument was rejected by the D.C. Circuit in *Shelby County*, which explained (1) that the evidence Congress considered was probative of an ongoing pattern of intentional (and therefore

unconstitutional) voting discrimination, 679 F.3d at 864-873, and (2) that Congress could reasonably conclude that Section 5 remains necessary in the covered jurisdictions where the "magnitude and extent of constitutional violations" is "so serious and widespread that case-by-case litigation is inadequate," *id.* at 863-864.

Texas ignores *Shelby County* and misunderstands Congress's broad enforcement authority and the continued basis for Section 5 in repeatedly arguing that, for Section 5 to be valid, Congress must show specific constitutional violations that cannot be remedied by Section 2. Cf. Pl. Reply 8; Pl. Mem. 41-42. As the majority in *Shelby County* explained, it is the "magnitude and extent of [ongoing] constitutional violations" in the covered jurisdictions that allowed Congress to reasonably conclude that requiring plaintiffs to repeatedly bring complex, costly, and time-consuming litigation is an ineffective means of combating the "uniquely harmful" problem of racial discrimination in voting. See *Shelby Cnty.*, 679 F.3d at 861, 863-864, 872-873; cf. *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 735 (2003) ("[T]he States' record of unconstitutional [conduct] * * * is weighty enough to justify the enactment of prophylactic [ ] legislation."); *id.* at 745 (Kennedy, J., dissenting) ("The relevant question * * * is whether, notwithstanding the passage of [remedial legislation], the States continued to engage in widespread discrimination."). Indeed, the Supreme Court in *South Carolina* v. *Katzenbach* recognized that, where a jurisdiction consistently engages in unconstitutional voting discrimination, "Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims." 383 U.S. 301, 328 (1966). Not surprisingly, Texas fails to engage with the sizable legislative

record from 2006, the testimony regarding the inadequacy of Section 2 as a stand-alone and after-the-fact remedy, and the evidence of covered jurisdictions evading remedial measures ordered in traditional litigation. Compare Pl. Reply 7-9, with Def. Mem. 15-20 & nn.6-8.

Finally, this Court should reject Texas's arguments that Section 5 no longer remains necessary because "[segregationist] judges have retired or died, [and] federal judges throughout the South can be trusted to faithfully enforce the Fifteenth Amendment and federal voting-rights laws." Pl. Reply 10. Although Texas characterizes Section 5 as a response to a racist federal judiciary, the statute was enacted because of pervasive state-sponsored racial discrimination in the covered jurisdictions that persisted in the face of increasing federal voting-rights protections and ongoing court-ordered relief. See *Shelby Cnty.*, 679 F.3d at 853-855; *South Carolina*, 383 U.S. at 308-316. Regardless, the 2006 legislative record independently establishes that Section 5 remains necessary in the covered jurisdictions because of widespread and enduring racial discrimination in voting that cannot be remedied by Section 2 alone. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577-581; H.R. Rep. No. 478, 109th Cong., 2d Sess. (2006); see also *Shelby Cnty.*, 679 F.3d at 862-874. Texas has not refuted the Attorney General's arguments (Def. Mem. 21-26) that *Shelby County* properly analyzed Section 4(b) and that that provision is constitutional.

II

SECTION 5'S PROHIBITION ON VOTING CHANGES WITH A RETROGRESSIVE EFFECT IS CONSTITUTIONAL

Because Texas failed to show the absence of a retrogressive effect under the facts of this case, see *Texas* v. *Holder*, No. 12cv128, 2012 WL 3743676, at *1 (D.D.C. Aug. 30, 2012), and cannot prevail in its facial challenge to the 2006 reauthorization of Section 5, Texas challenges the constitutionality of the non-retrogression requirement, *i.e.*, Section 5's effects prong. But Texas disregards established Supreme Court precedent and fails to carry its heavy burden of demonstrating that the statute is not a congruent and proportional response to an ongoing pattern of racial discrimination in voting in the covered jurisdictions. Nor has Texas demonstrated that Section 5's prohibition on voting changes with a retrogressive effect violates equal protection or is unconstitutionally vague. Accordingly, this Court should reject Texas's remaining challenges and uphold the constitutionality of the non-retrogression requirement.

A. The Supreme Court Has Interpreted Section 5's Effects Prong To Prohibit Those Voting Changes That Have A Racially Discriminatory Effect

In response to the Attorney General's argument that the effects prong is facially valid (Def. Mem. 26-50), Texas requests that this Court "discard" the non-retrogression requirement and rule that preclearance may be denied only when a law has the purpose or will have the effect of violating the Fifteenth Amendment (Pl. Reply 11). Texas asserts that (Pl. Reply 12), even if this Court declares the non-retrogression requirement unconstitutional, the effects prong remains in place in order to ensure that "benign"

voting changes are not selectively administered in a racially biased way in violation of the Fifteenth Amendment.

The State's interpretation of Section 5 contradicts well-established Supreme Court precedent and renders the effects prong superfluous. Decades ago, the Supreme Court interpreted Section 5's statutory prohibition against changes that have the "effect of denying or abridging the right to vote on account of race or color," 42 U.S.C. 1973c(a), as barring the implementation of those voting changes that have a retrogressive effect on the position of racial minorities with respect to their effective exercise of the electoral franchise, regardless of discriminatory intent. See *Beer* v. *United States*, 425 U.S. 130, 139-141 (1976). Congress has twice reauthorized Section 5, in 1982 and 2006, with the knowledge that the statute would be interpreted consistently with *Beer*, see H.R. Rep. No. 478, 109th Cong., 2d Sess. 69 (2006), and the Supreme Court has twice upheld the constitutionality of Section 5's preclearance requirement under the interpretation set forth in *Beer*. See *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282-285 (1999); *City of Rome* v. *United States*, 446 U.S. 156, 172-178 (1980). And the Supreme Court has elsewhere reiterated the well-settled meaning of a prohibited "effect" under Section 5. See, *e.g.*, *Riley* v. *Kennedy*, 553 U.S. 406, 412 (2008); *Reno* v. *Bossier Parish Sch. Bd. (Bossier II)*, 528 U.S. 320, 328-329 (2000); *Reno* v. *Bossier Parish Sch. Bd. (Bossier I)*, 520 U.S. 471, 478 (1997). Thus, "to hold, as Texas urges, that section 5 applies only to voting changes that themselves violate the Fifteenth Amendment would require [this Court] to ignore section 5's purpose and structure, as well as decades of Supreme Court decisions interpreting its language." *Texas*, 2012 WL 3743676, at *32. As another three-judge

panel of this Court aptly stated, "the text and Supreme Court precedent establish that the effects test of Section 5 is stringent and that a voting law change that disproportionately and materially burdens voters is unlawful. Any argument to narrow Section 5 * * * must be directed to Congress or to the Supreme Court." *South Carolina* v. *Holder*, No. 12cv203, 2012 WL 4814094, at *19 n.13 (D.D.C. Oct. 10, 2012) (three-judge court). By asking this Court to "discard" the non-retrogression requirement, Texas seeks to have this Court overrule the Supreme Court's interpretation of the effects language as imposing a non-retrogression standard.

Moreover, facially neutral voting changes that a State intends to be administered in a racially biased manner are prohibited as intentionally discriminatory voting changes under Section 5's purpose prong. See 42 U.S.C. 1973c(a) and (c). If this Court "discard[s]" the non-retrogression requirement, as Texas urges, a covered jurisdiction would satisfy its Section 5 burden solely by demonstrating that its proposed voting change does not have a discriminatory purpose, *e.g.*, it is not intended to be selectively administered or intended to have a racially discriminatory effect. Under that interpretation, if that voting change either will have a retrogressive effect or is selectively administered on the basis of race (even though the State anticipated no such selective administration), Section 5 offers no recourse. Rather, plaintiffs will have to challenge the practice's discriminatory effect or selective administration under Section 2 of the VRA, see 42 U.S.C. 1973, or the Constitution, thereby undermining Section 5's purpose to rid the covered jurisdictions of racial discrimination by "shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims," *South Carolina* v. *Katzenbach*,

383 U.S. 301, 328 (1966). Texas's theory of Section 5 plainly renders the effects prong superfluous. Regardless of whether Texas limits its requested relief to "discard[ing] the 'nonretrogression' doctrine" (Pl. Reply 11), because the State's interpretation of Section 5 is contrary to established precedent and does not prohibit any conduct not already prohibited under the purpose prong, Texas asks this Court to declare the effects prong facially invalid.[2]

B. The Non-Retrogression Requirement Is Valid Prophylactic Legislation

As already explained (Def. Mem. 26-38), Section 5's effects prong, *i.e.*, the non-retrogression requirement, is valid prophylactic legislation designed to deter and remedy ongoing constitutional violations in the covered jurisdictions and does not exceed Congress's authority to enforce the voting guarantees embodied in the Fourteenth and Fifteenth Amendments.[3] In response (Pl. Reply 2, 16-21), Texas primarily argues that the non-retrogression requirement does not comport with *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and that *City of Rome* and *Lopez* are largely irrelevant to the State's constitutional challenge. Texas, however, yet again conflates the various steps of the

[2] This Court has already rejected, as rendering the effects prong superfluous, the State's statutory argument that the effects prong does not extend to laws that have a racially discriminatory effect because of something other than race. See *Texas*, 2012 WL 3743676, at *30-32; see also *Florida* v. *United States*, No. 11cv1428, 2012 WL 3538298, at *12 (D.D.C. Aug. 16, 2012) (three-judge court) (similarly rejecting that argument).

[3] Consistent with the D.C. Circuit's decision in *Shelby County*, see 679 F.3d at 859, the Attorney General applies congruence and proportionality analysis for the purposes of this motion. The Attorney General adheres to his view, however, that rational basis review is the proper standard for examining legislation to remedy racial discrimination in voting. Def. Mem. 11 n.4.

congruence and proportionality standard (Def. Mem. 29-30) and thus concludes that the non-retrogression requirement is not a prophylactic remedial measure but instead "an extra-constitutional substantive requirement" (Pl. Reply 13). Compare Pl. Reply 13-15, with Def. Mem. 26-38. This Court should reject Texas's disregard for established precedent and hold that the State has failed to carry its heavy burden of challenging Congress's appropriate exercise of its constitutional enforcement authority. See, *e.g.*, *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 205 (2009) (noting Congress's primary authority to enforce the Fifteenth Amendment); *Katzenbach* v. *Morgan*, 384 U.S. 641, 648-653, 657-658 (1966) (same for the Fourteenth Amendment).

Texas persists in arguing (Pl. Reply 12-15) that the non-retrogression requirement could not have been designed to prevent Fifteenth Amendment violations because the State must already demonstrate that its voting change is constitutional. According to Texas (Pl. Reply 15), "[a] law that merely imposes a disparate impact on racial minorities has *no* likelihood of being unconstitutional once DOJ or a federal [court] concludes that the law was not enacted with a racially discriminatory purpose and will not be implemented in a racially biased manner." But as the Attorney General has explained (Def. Mem. 28-30, 34-36), once Congress demonstrates that there is a pattern of intentional voting discrimination in the covered jurisdictions, thereby satisfying the second step of *Boerne*, it may then use "strong *remedial* and *preventive* measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination," *Boerne*, 521 U.S. at 526 (emphasis added). Yet Texas ignores the remedial and deterrent purposes of Section 5's prohibition

on voting changes with a retrogressive effect. See Def. Mem. 31-38. It also disregards Congress's broad discretion under the third step of *Boerne* to decide on an appropriate measure to both remedy and deter a widespread pattern of unconstitutional state action, which may include proscribing practices that have a racially discriminatory effect, even if they are not discriminatory in intent. See *Tennessee* v. *Lane*, 541 U.S. 509, 520 (2004); *Hibbs*, 538 U.S. at 727-728; *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 81 (2000); *Boerne*, 521 U.S. at 518.[4]

Texas also argues (Pl. Reply 15-21) that *City of Rome* and *Lopez* neither addressed the specific challenge Texas raises in this case, applied congruence-and-proportionality review, nor confronted an expanded non-retrogression requirement that prohibits "laws

[4] Texas's statement that adopting the Attorney General's position would require overruling *Boerne* (Pl. Reply 14) further shows that the State conflates the second and third steps of congruence-and-proportionality review. The portion of *Boerne* that Texas cites concerns the plaintiffs' assertions in that case that, given the alleged difficulty of proving that a law intentionally targets religious beliefs and practices, Congress did not have to identify a pattern of unconstitutional action (*i.e.*, satisfy *Boerne*'s second step) before enacting prophylactic legislation. See 521 U.S. at 517-532. Here, the 2006 legislative record shows a pattern of ongoing constitutional violations in the covered jurisdictions. See *Shelby Cnty.*, 679 F.3d at 873. In our brief, the Attorney General merely argued (Def. Mem. 35 n.12), contrary to Texas's assertion (Pl. Mem. 16), that a purpose-only inquiry might not block all intentionally discriminatory changes, *e.g.*, a scant public record and broad assertions of privilege might prevent the Attorney General and intervenors from accessing direct or circumstantial evidence of discriminatory purpose that rebuts the State's *prima facie* showing of non-discriminatory purpose. Thus, even where the State has established a non-discriminatory purpose by a preponderance of the evidence, the effects prong still has value in identifying those voting changes for which a Fifteenth Amendment violation may still actually exist. That argument concerns the third step of *Boerne*, *i.e.*, the choice of a remedial measure, not the second step of congruence-and-proportionality review.

that impose a disparate impact on groups that are disproportionately composed of minorities, or laws that prevent minorities who voted in previous elections from voting in future elections" (Pl. Reply 21). But contrary to Texas's assertions (Pl. Reply 15-16, 19-20), this Court's denial of preclearance based on Texas's failure to show that Senate Bill 14 (SB 14) will not have a retrogressive effect is consistent with the Supreme Court's interpretation of the effects prong under *Beer*. Moreover, this Court may not disregard well-established Supreme Court precedent concerning the meaning of Section 5's effects prong or upholding the statute's constitutionality simply because Texas disregards that precedent. See *Lopez*, 525 U.S. at 283; *City of Rome*, 446 U.S. at 175, 178; *Georgia* v. *United States*, 411 U.S. 526, 534 (1973); *South Carolina*, 383 U.S. at 315-316. Regardless of this Court's application of congruence-and-proportionality review, Texas cannot seriously contest that both *City of Rome* and *Lopez* are directly relevant to the State's assertion that Section 5 cannot be constitutionally applied to prohibit those voting changes that will lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.

Texas also argues (Pl. Reply 1, 34-37) that even if a covered jurisdiction can be required to demonstrate non-retrogression in order to secure preclearance as to some voting changes, it cannot, under *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), be required to show that electoral changes setting voting qualifications for state and local elections will not have a retrogressive effect. Yet one of the primary reasons for enacting Section 5 was to review discriminatory voter registration practices and voting qualifications in the covered jurisdictions. See *Shelby Cnty.*, 679 F.3d at 853-855; see also *Northwest Austin*,

557 U.S. at 198 ("We have interpreted the requirements of § 5 to apply * * * to the ballot-access rights guaranteed by § 4."). Moreover, because Section 5's prohibition on electoral changes that will have a retrogressive effect on the voting rights of racial minorities is appropriate legislation to deter and remedy an identified pattern of ongoing constitutional violations in the covered jurisdictions, it does not intrude impermissibly into areas of legislation traditionally reserved to the States. See Def. Mem. 38.

As stated in *South Carolina*, the power to enforce the Constitution's voting guarantees can displace state authority to freely enact changes to voting qualifications:

> States have broad powers to determine the conditions under which the right of suffrage may be exercised. The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power. When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

383 U.S. at 325 (citation and internal quotation marks omitted); see also *Mitchell*, 400 U.S. at 125-127 (Black, J.) (noting that state power to establish voting qualifications in state and local elections is limited by the Fourteenth, Fifteenth, Nineteenth, and Twenty-Fourth Amendments). Almost a hundred years prior to *South Carolina*, the Supreme Court had explained in *Ex parte Virginia* that the prohibitions of the Civil War Amendments are "directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action[.] * * * Such enforcement is no invasion of State sovereignty." 100 U.S. 339, 346 (1879). See also *id.* at 345 (noting those amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of

Congres[s]"). Relying on *Ex parte Virginia*, the Supreme Court further explained in *South Carolina* that "Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting," 383 U.S. at 326, and that Congress is not constrained in the exercise of its enforcement authority to forbidding only constitutional violations, see *id.* at 327.

The Supreme Court reiterated in *City of Rome* that "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.' * * * Congress ha[s] the authority to regulate state and local voting through the provisions of the [VRA]." 446 U.S. at 179-180; see also *Lopez*, 525 U.S. at 282 ("[T]he [Civil War] Amendments by their nature contemplate some intrusion into areas traditionally reserved to the States."). The Supreme Court has reaffirmed this principle in its more recent constitutional-authority cases: "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." *Boerne*, 521 U.S. at 518 (citation and internal quotation marks omitted); see also *Lane*, 541 U.S. at 555 (Scalia, J.) (where there is a record of constitutional violations, Congress may "proscribe[ ] facially constitutional conduct * * * when [it] determines such proscription is desirable to make the amendments fully effective" (citation and internal quotation marks omitted)). Accordingly, this Court should reject Texas's unprecedented attempt to discard—or extract voting qualifications from—Section 5's prohibition on those voting

changes that will have a retrogressive effect on the position of racial minorities with respect to their effective exercise of the electoral franchise.[5]

C. The Non-Retrogression Requirement Complies With Equal Protection

As already explained (Def. Mem. 38-44), Section 5's prohibition on voting changes that have "the effect of denying or abridging the right to vote on account of race or color," 42 U.S.C. 1973c(a), rests on the "limited substantive goal" of protecting against "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Bush* v. *Vera*, 517 U.S. 952, 982-983 (1996) (quoting *Beer*, 425 U.S. at 141), and complies with equal protection principles. In response, Texas argues only that the non-retrogression requirement is not narrowly tailored to "advance the government's compelling interest in enforcing the Fifteenth Amendment" (Pl. Reply 21), bypasses the race-neutral alternative of requiring jurisdictions only to show

[5] Texas states (Pl. Reply 34 & n.9) that the Supreme Court struck down Congress's attempt to lower the voting age in state and local elections "even though members of racial and language minorities are disproportionately represented among those disenfranchised by laws establishing a minimum age for voting." The Court made no such finding in *Oregon* v. *Mitchell*, however, and the opinion of Justice Black shows that, unlike the nationwide prohibition on literacy tests or imposition of Section 5 preclearance in the covered jurisdictions, Congress did not justify lowering the minimum voting age in state and local elections on the basis of race discrimination. See 400 U.S. at 117, 126-130; see also *id.* at 212-213, 216-217 (Harlan, J.); *id.* at 239-240 (Brennan, J.); *id.* at 283-284, 293-294 (Stewart, J.). Thus, despite Texas's attempt to equate Congress's impermissible attempt to lower the minimum voting age in state and local elections with its imposition of the non-retrogression requirement in covered jurisdictions, the need for prophylactic legislation in the covered jurisdictions is based on those jurisdictions' demonstrated history and ongoing pattern of intentional racial discrimination in voting and thus squarely falls within Congress's authority to override state legislative authority.

compliance with the Fifteenth Amendment (Pl. Reply 24), and forces jurisdictions to engage in race-conscious decision-making (Pl. Reply 25).[6]

In an attempt to show the non-retrogression requirement is not narrowly tailored, Texas misstates the government's compelling interest in "remedying the effects of identified state-sponsored intentional discrimination for which a strong basis in evidence exists that remedial action is necessary" (Def. Mem. 39) as an interest in "preventing violations of the Fifteenth Amendment" (Pl. Reply 22). In misidentifying the compelling interest, however, Texas skews the narrow tailoring analysis and incorrectly asserts that a race-neutral preclearance requirement suffices to protect minority voters from intentional discrimination. While that is certainly one of Section 5's purposes, Texas ignores the

[6] Texas incorrectly asserts (Pl. Reply 21) that the Attorney General has conceded that the non-retrogression requirement can survive only if it satisfies strict scrutiny. The Attorney General makes no such concession. No court has ever held that strict scrutiny applies to the non-retrogression principle. The Attorney General's statement that Section 5 complies with strict scrutiny (assuming, as in *LaRoque*, that it applies) merely demonstrates that Section 5 also would satisfy less searching review. Compare *LaRoque* v. *Holder*, 831 F. Supp. 2d 183, 231-232 (D.D.C. 2011) (for purposes of equal protection challenge, assuming that strict scrutiny applies), vacated as moot, 679 F.3d 905 (D.C. Cir. 2012), cert. denied, No. 12-81 (Nov. 13, 2012), with *Florida*, 2012 WL 3538298, at *15 ("We do not discern constitutional difficulties with the interpretation" of Section 5 where "[n]othing in the effect test as we have construed it for * * * ballot access cases requires covered jurisdictions to maximize voting opportunities for their minority citizens alone.") and Def. Mem. 41 n.15. Cf. *LULAC* v. *Perry*, 548 U.S. 399, 519 (2006) (Scalia, J., concurring and dissenting) ("[A] covered jurisdiction may have a compelling interest in complying with § 5."); see also *id.* at 475 n.12 (Stevens, J. concurring and dissenting) ("compliance with § 5 of the [VRA] is * * * a compelling state interest"); *id.* at 485 n.2 (Souter, J., concurring and dissenting) ("compliance with § 5 is a compelling state interest"); *Shaw* v. *Hunt*, 517 U.S. 899, 909 (1996) ("A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions."); *LaRoque*, 831 F. Supp. 2d at 233 ("the government * * * has a compelling interest in remedying discrimination in voting").

critical function of the non-retrogression requirement in remedying the effects of past intentional discrimination in voting, and in ensuring that any gains that racial minorities have achieved are not undone. See Def. Mem. 38-41; see also *Miller* v. *Johnson*, 515 U.S. 900, 925-926 (1995); *Beer*, 425 U.S. at 139-141; *South Carolina*, 2012 WL 4814094, at *21 (Bates, J., concurring) ("[O]ne cannot doubt the vital function that Section 5 of the [VRA] * * * played here. Without the review process under the [VRA], South Carolina's voter photo ID law certainly would have been more restrictive."). Nor is the application of Section 5 "limitless" (Pl. Reply 22); rather, the statutory prohibition on voting changes with a retrogressive effect bars only those changes that will worsen the position of racial minorities relative to the status quo by disproportionately burdening their voting rights. See *Bush* v. *Vera*, 517 U.S. at 982-983; *Beer*, 425 U.S. at 141; *LULAC*, 548 U.S. at 519 (Scalia, J.); *Texas*, 2012 WL 3743676, at *10, *13; *Florida*, 2012 WL 3538298, at *9, *15, *32.

Nor does Section 5 compel jurisdictions to violate constitutional requirements. Although Texas asserts (Pl. Reply 25) that the Attorney General never denied that Section 5 forces jurisdictions to violate equal protection principles, Texas misstates the Attorney General's argument. Before explicitly denying that Section 5 compels jurisdictions to violate the Constitution (Def. Mem. 42-43), the Attorney General emphasized the heavy burden Texas carries in seeking to invalidate Section 5's effects prong, *i.e.*, the non-retrogression requirement (Def. Mem. 41-42). Texas attempts to distance its challenge from the heavy burden of a facial challenge by stating it merely requests that this Court "excise" the non-retrogression requirement from the preclearance

standard (Pl. Reply 25). But because the Supreme Court has interpreted the effects prong to prohibit non-retrogression, and because Texas's challenge to the non-retrogression requirement is not limited to the particular circumstances of this case, Texas asserts a facial challenge. See *John Doe No. 1* v. *Reed*, 130 S. Ct. 2811, 2817 (2010).

Texas also misunderstands (Pl. Reply 23) the import of a flexible retrogression standard to the equal protection analysis. Because the retrogression standard does not "require the reflexive imposition of objections in total disregard of the circumstances involved or the legitimate justifications in support of changes that incidentally may be less favorable to minority voters" (Def. Mem. 43), the standard does not compel covered jurisdictions to elevate race over other considerations, in violation of the Constitution. Nor does the non-retrogression requirement compel jurisdictions to maximize voting opportunities for minority citizens; rather, it merely ensures that a voting change does not worsen the position of minority voters relative to the status quo. Cf. *Miller*, 515 U.S. at 921 ("[C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws."); *Florida*, 2012 WL 3538298, at *15 ("[C]overed jurisdictions must simply ensure that their ballot access changes do not have *retrogressive* effects on minority voting rights."). Thus, contrary to Texas's assertion (Pl. Reply 25-26), non-retrogression requires only that covered jurisdictions, because of their identified pattern of intentional racial discrimination in voting, gauge the racial impact of their voting changes and, to the extent consistent with the Constitution, take ameliorative steps to counteract any anticipated retrogressive effect. Accordingly,

the non-retrogression requirement complies with equal protection principles and is constitutional.

D. The Non-Retrogression Requirement Is Not Unconstitutionally Vague

As already explained (Def. Mem. 44-49), Section 5 provides fair notice to jurisdictions of what is required of them in order to obtain preclearance and is not unconstitutionally vague. In response, Texas concedes (Pl. Reply 30-31) that jurisdictions have long been able to satisfy the non-retrogression standard and that Section 5 is not unconstitutionally vague simply because a jurisdiction will not always know whether each of its voting changes will satisfy the preclearance standard. The State also concedes (Pl. Reply 26-27) that the Supreme Court has interpreted Section 5's effects prong to prohibit those voting changes that would worsen the position of racial minorities with respect to their "effective exercise of the electoral franchise," *Beer*, 425 U.S. at 141, and that the Attorney General has adopted regulations that are consistent with *Beer* and that govern his administration of Section 5. See generally 28 C.F.R. Pt. 51, Subpt. F. Although Texas states it is left to wonder under this Court's opinion whether preclearance will be denied if a voting change imposes *any* burden on racial minorities (Pl. Reply 28), this Court has plainly stated that Section 5's effects prong bars those changes that disproportionately and materially burden racial minorities. See *Texas*, 2012 WL 3743676, at *10, *13; see also *South Carolina*, 2012 WL 4814094, at *7; *Florida*, 2012 WL 3538298, at *9, *15, *32.

Yet Texas argues (Pl. Reply 27) that the retrogression inquiry is unconstitutionally vague because it depends on a number of fact-based considerations that allow "the

Attorney General (and federal courts) discretion to deny or withhold preclearance at whim." The Supreme Court, however, has held that the Attorney General's issuance of regulations has cabined his discretion by providing notice to jurisdictions of the factors the Attorney General considers in deciding to interpose an objection or oppose a voting change. See *Georgia*, 411 U.S. at 536. Moreover, regardless of both Texas's failure to show any arbitrary decision-making by the Attorney General and its inability to challenge an administrative preclearance determination, see *Morris* v. *Gressette*, 432 U.S. 491 (1977), where the Attorney General interposes an objection to a voting change, a covered jurisdiction may seek *de novo* review in the federal district court and take a direct appeal to the Supreme Court from an adverse ruling. See 42 U.S.C. 1973c(a). This hardly equates to "discretion to deny or withhold preclearance at whim" (Pl. Reply 27).

Because the regulations and cases applying Section 5 provide adequate notice to covered jurisdictions of what is required of them, Texas attempts (Pl. Reply 28-31) to show vagueness by mischaracterizing this Court's preclearance determination, taking the Attorney General's statements out of context, and equating SB 14 to Georgia's photo ID requirement. But Texas's attempts fail. First, this Court's opinion is clear that its retrogression finding rests on the disproportionate and material burdens that SB 14 places on minority voters in Texas. See, *e.g.*, *Texas*, 2012 WL 3743676, at *10 ("[C]overed jurisdictions must show that any change in voting procedures will not 'worsen the position of minority voters' compared to the general populace." (quoting *Bossier II*, 528 U.S. at 324)); *id.* ("[I]f, as Texas argues, SB 14 imposes only a 'minor inconvenience' on voters, * * * it could easily be precleared because it would not undermine minorities'

'effective exercise of the electoral franchise.'" (quoting *Beer*, 425 U.S. at 141)); *id.* at *13 ("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.").

Second, the Attorney General's statements, when read in context, show in the analysis of voting changes affecting ballot access, a finding of prohibited retrogression is based on the existence of a disproportionate racial effect that imposes a significant burden on minority voters. Cf. Pl. Reply 30. This Court's question to the Department of Justice at closing argument assumed that the data showed that "there's a *disproportionately high number of minorities* who lack the necessary documents," and the Department's answer spoke to a "*sufficient burden* on the effective exercise of [the] electoral franchise to * * * cause [minority] voting strength to retrogress." Pl. Reply 28-29 (emphasis added). See also Letter from Thomas E. Perez, Ass't Atty. Gen., U.S. Dep't of Justice, to Keith Ingram, Dir. of Elec., Office of the Texas Sec'y of State (Mar. 12, 2012) (interposing an objection to SB 14 and emphasizing that Hispanics are (1) *disproportionately* likely to lack a form of acceptable state ID and (2) that the racial impact of SB 14 is not mitigated where there are *significant* costs, travel times, and accessibility issues associated with obtaining a free election ID certificate). Moreover, this Court and the Supreme Court have consistently held—and the Attorney General's regulations have consistently described—that the determination of whether a voting change will have a retrogressive effect is a fact-specific inquiry. See Tr. 7/3/2012 at 92

("The determination turns on [the] particular circumstances in each case," *i.e.*, "[t]he nature of the ID law, the allowable forms of ID, [and] the demographic circumstances in * * * the varying states."); *id.* at 92-93 ("The difference [between previous Texas law and SB 14] is that [SB 14] by contracting the allowable forms of ID only to those with photo, only to a small subset, only to a small subset far narrower and more restrictive than any other state in the country that that is what has the retrogressive effect. And that relates to the point * * * about ameliorative amendments."); see also, *e.g.*, *Florida*, 2012 WL 3538298, at *9 ("Th[e] [retrogression] inquiry is a fact-intensive one, and requires us to carefully scrutinize the context in which the proposed voting changes will occur." (citation and internal quotation marks omitted)).

Finally, SB 14 is more stringent than Georgia's photo ID requirement and will be applied in a State with considerably different demographics. Indeed, this Court has noted the differences between Georgia and Texas law:

> Georgia's voter ID law was precleared by the Attorney General—and probably for good reason. Unlike SB 14, the Georgia law requires each county to provide free election IDs, and further allows voters to present a wide range of documents to obtain those IDs. Ga. Code Ann. § 21-2-417.1(a); Ga. Elec. Code 183-1-20-.01. The contrast with Senate Bill 14 could hardly be more stark.

Texas, 2012 WL 3743676, at *32; see also *id.* at *26-30 (summarizing this Court's factual findings regarding the burdens imposed by SB 14); *South Carolina*, 2012 WL 4814094, at *15-16 (contrasting Georgia and Texas's photo ID laws to South Carolina's recently enacted law). Thus, contrary to Texas's assertion (Pl. Reply 29), the Attorney General's differing positions on the Georgia and Texas enactments do not show that the

retrogression standard is so vague that it may be applied arbitrarily by the Attorney General or lower courts to deny preclearance. Rather, it simply shows that analyzing retrogression is a fact-specific inquiry. Cf. *Florida*, 2012 WL 3538298, at *25 n.39 (noting that although the Attorney General opposed preclearance for Florida's early voting changes despite having precleared decisions by some other jurisdictions to shorten their early voting periods, those cases differed on the facts).

The mere fact that the analytical structure under Section 5 relies on a case-specific weighing of the available facts (Pl. Reply 26) does not render the preclearance standard void for vagueness. Instead, it simply shows that neither this Court nor the Attorney General applies the retrogression standard in a mechanical way to deny preclearance simply because the State lacks the necessary data to determine whether its voting change will not have the prohibited effect. See Def. Mem. 46-48; see also *Texas*, 2012 WL 3743676, at *13 ("The upshot of all of this is 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."); Letter from Thomas E. Perez, Ass't Atty. Gen., U.S. Dep't of Justice, to Keith Ingram, Dir. of Elec., Office of the Texas Sec'y of State 3 (Mar. 12, 2012) ("In view of the statistical evidence illustrating the impact of S.B. 14 on Hispanic registered voters, we turn to those steps that the state has identified it will take to mitigate that effect."). Here, Texas's failure to obtain preclearance had nothing to do with an unconstitutionally vague standard and everything to do with its failure to put forth sufficient evidence that demonstrated SB 14 would not have a retrogressive effect, either because it does not disproportionately burden racial minorities or, even if it did, does not

constitute a material burden on their effective exercise of the electoral franchise. See, *e.g.*, *Texas*, 2012 WL 3743676, at *13; see also *South Carolina*, 2012 WL 4814094, at *16. Accordingly, Section 5's requirement that changes not have a retrogressive effect on racial minorities' effective exercise of their voting rights complies with due process principles and is constitutional.

CONCLUSION

This Court should grant the Attorney General's motion for summary judgment and deny Texas's motion. We note that the Supreme Court has granted certiorari in *Shelby County* v. *Holder*, which the Attorney General relies on in support of his arguments.

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Respectfully submitted,

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