

No. __

In the
Supreme Court of the United States

STATE OF TEXAS,

Appellant,

v.

ERIC H. HOLDER, JR.,

Appellee.

**On Appeal from the United States District Court
for the District of Columbia**

APPELLANT'S JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

The State of Texas enacted a voter-identification law modeled after the Indiana law this Court upheld in *Crawford v. Marion County*, 553 U.S. 181 (2008). Because Texas is a “covered jurisdiction” under section 5 of the Voting Rights Act, Texas cannot implement this law unless it secures “preclearance” from the Department of Justice or a federal court. The district court refused to preclear Texas’ voter-identification law because it concluded that the law would impose disproportionate burdens on persons living in poverty, a group that is disproportionately made up of racial and language minorities.

The question presented is whether Texas is entitled to have its duly enacted voter-identification law take effect.

LIST OF PARTIES TO THE PROCEEDING

Appellant is the State of Texas. Appellee is Attorney General Eric H. Holder, Jr., in his official capacity.

Intervenor-defendant-appellees are the Texas State Conference of NAACP Branches, the Mexican American Legislative Caucus of the Texas House of Representatives, the Texas League of Young Voters Education Fund, Imani Clark, Kiessence Culbreath, Demariano Hill, Felicia Johnson, Dominique Monday, Brianna Williams, Eric Kennie, Anna Burns, Michael Montez, Penny Pope, Marc Veasey, Jane Hamilton, David De La Fuente, Lorraine Birabil, Daniel Clayton, Sergio Deleon, the Texas Legislative Black Caucus, the League of Women Voters of Texas, the Justice Seekers, Peter Johnson, Ronald Wright, Donald Wright, Southwest Workers Union, La Union Del Pueblo Entero, Victoria Rodriguez, Nicole Rodriguez, Southwest Voter Registration Education Project, and Mi Familia Vota Education Fund.

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JURISDICTIONAL STATEMENT

Appellant State of Texas respectfully submits this jurisdictional statement regarding its appeal of a decision from a three-judge panel of the United States District Court for the District of Columbia.

OPINION BELOW

The district court's opinion denying preclearance under Section 5 of the Voting Rights Act ("VRA") is reproduced at App.1-70.

JURISDICTION

This is an appeal from the decision of a three-judge district court withholding preclearance from Texas Senate Bill 14, which requires persons voting at the polls to present photographic identification. The district court entered judgment under Rule 54(b) on December 17, 2012, and Texas filed a timely notice of appeal on December 19, 2012. App.71-74. This Court has jurisdiction under 42 U.S.C. § 1973c(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth and Fifteenth Amendments and Section 5 of the VRA, 42 U.S.C. § 1973c, are reproduced in the appendix to this brief at App.76-81.

INTRODUCTION

In May 2011, the Texas Legislature enacted a statute (Senate Bill 14) that requires all voters who vote in person at the polling place to present photo identification. SB 14 was modeled on an Indiana law that this Court found to be facially constitutional, *see*

Crawford v. Marion County, 553 U.S. 181 (2008), as well as a Georgia law that received preclearance from the Department of Justice in 2005. In a State not subject to Section 5, such a law would have taken effect in May 2011, and the burden would be on private parties to demonstrate a basis for enjoining that duly enacted law—a heavy burden, indeed, in light of *Crawford*. But because Texas is subject to Section 5, it had the burden of seeking preclearance before its law could take effect.

Texas first sought administrative preclearance shortly after SB 14 was enacted; after eight months DOJ denied preclearance. In the meantime, Texas also sought judicial preclearance, which a three-judge district court denied in August 2012. That court’s holding was *not* based on the Justice Department’s theory that minority voters disproportionately lack photo identification. Instead, the court relied on the unprecedented theory of retrogression that SB 14 would disproportionately burden *indigent* voters, who, in turn, are disproportionately racial minorities.

This case raises several important issues about the scope of Section 5’s “effects” test and—like Texas’ pending appeal in its redistricting case, *see Texas v. United States*, No. 12-496—amply demonstrates the constitutional problems with the practical application of Section 5. But this Court is already considering the facial constitutionality of the 2006 reauthorization of Section 5 in *Shelby County v. Holder*, No. 12-96 (cert. granted Nov. 9, 2012). The Court should accordingly hold this case pending its decision in *Shelby County*, as the Court appears to be doing with Texas’ redistricting appeal. If the Court

finds Section 5 to be unconstitutional, it should enter judgment for Texas.

If the Court upholds Section 5 in *Shelby County*, then—after supplemental briefing about how the Court’s decision affects this case—it should note probable jurisdiction and schedule this case for plenary review. This case implicates a number of important issues regarding the scope of Section 5, including but not limited to: (1) whether Section 5 is unconstitutional when it is used to block legislation in a covered jurisdiction that closely resembles facially valid legislation in a non-covered jurisdiction; (2) whether photo-identification laws such as SB 14—which impose minimal burdens no different from the burdens of advance registration or in-person voting—“deny” or “abridge” the right to vote; and (3) whether a court can deny preclearance based on a novel theory of retrogression that rests on *socioeconomic* disparate-impact analysis, even when there is no evidence of an actual *racial* disparity.

* * *

Texas strongly encourages the Court to hold in *Shelby County* that the 2006 reauthorization of Section 5 is unconstitutional. See Br. of Texas as *Amicus Curiae* in Support of Petitioner, *Shelby County v. Holder*, No. 12-96 (filed Jan. 2, 2013). But if the Court rejects that position, it is critical to schedule this case for plenary consideration to ensure that Section 5 is interpreted in a properly restrained manner that will alleviate, rather than exacerbate, its inherent constitutional flaws going forward.

STATEMENT OF THE CASE

A. Background on SB 14

On May 27, 2011, Texas enacted Senate Bill 14 (SB 14), which requires persons voting at the polls to present one of the following forms of photographic identification: (1) a driver's license, election identification certificate, or personal identification card issued by the State; (2) a U.S. military identification card that contains the person's photograph; (3) a U.S. citizenship certificate that contains the person's photograph; (4) a U.S. passport; or (5) a Texas license to carry a concealed handgun. Acts 2011, 82nd Leg., R.S., Ch. 123 § 14.1.¹ The identification must be either unexpired or have expired no earlier than 60 days before the date of presentation. SB 14 provides that election identification certificates will be issued free of charge to persons who lack other forms of photo identification.

Voters who fail to present proper photo identification at the polls may cast a provisional ballot. That ballot will be counted if the voter presents photo identification to the voter registrar within six days after the election, or if the voter

¹ The preexisting (or "benchmark") Texas law provided that an in-person voter may cast a regular ballot upon presentation of a voter-registration certificate, TEX. ELEC. CODE § 63.001(b), or upon execution of an affidavit and presentation of another form of identification, TEX. ELEC. CODE § 63.008(a), such as a birth certificate, official government mail, or a utility bill. See TEX. ELEC. CODE § 63.0101.

executes an affidavit stating that the voter has a religious objection to being photographed or that he has lost his photo identification in a natural disaster that occurred within 45 days of the election. *See id.* §§ 17-18. SB 14 preserves existing laws allowing disabled voters or voters over the age of 65 to vote by mail without showing identification. *See* TEX. ELEC. CODE §§ 82.002-.003.

Because Texas is a “covered jurisdiction” under Section 5 of the VRA, it cannot implement SB 14 until it receives “preclearance” from the Department of Justice (“DOJ”) or a three-judge federal district court in Washington, D.C. *See* 42 U.S.C. § 1973c(a). Section 5 provides that Texas is entitled to preclearance if SB 14 “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color” or “because” of membership in “a language minority group.” *See id.*; 42 U.S.C. § 1973b(f)(2).

B. Procedural History

Texas submitted SB 14 to DOJ for administrative preclearance on July 11, 2011. Although the VRA requires the Attorney General to rule on a preclearance request within 60 days of submission,² DOJ did not issue a decision on Texas’

² *See* 42 U.S.C. § 1973c(a) (“Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such [preclearance] proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within

request until March 12, 2012. When DOJ finally issued its decision, it refused to preclear the law because it claimed that registered voters in Texas with Spanish surnames were less likely than white voters to have exact-name matches in the State's driver's license and state-identification databases. *See* United States' Notice of Filing Preclearance Determination (DN 11) Exh. 1 at 5. And although it never requested such information, DOJ added that the State's submission "did not include evidence of significant in-person voter impersonation not already addressed by the state's existing laws." *Id.* at 2. DOJ declined to make any determination regarding discriminatory purpose. *See id.* at 5.

By that time, having waited nearly six months without a decision from DOJ, the State had already filed a complaint in the U.S. District Court for the District of Columbia seeking judicial preclearance. *See* Expedited Complaint (DN 1). The district court allowed ten organizations—including two official caucuses of the Texas Legislature—and twenty-one individuals to intervene as defendants. The court conducted a trial from July 9 to July 13, 2012.

At trial, Texas presented extensive evidence showing that SB 14 would not have the effect of denying or abridging any citizen's right to vote on account of race or color. The State presented

sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made.”).

unrebutted evidence showing that voter-identification laws in Georgia and Indiana—on which Texas’ law was based—have not reduced voter turnout among either minority voters or the general population. Those findings were confirmed by the social-science literature, which has consistently found that photo-identification requirements have no measurable effect on voter turnout.

Texas also introduced expert-administered surveys of individuals on DOJ’s so-called “no-match” list.³ Those surveys showed no disparity in photo identification possession among black, Hispanic, and non-Hispanic white voters. Moreover, many individuals who appeared on DOJ’s “no-match” list (and supposedly lacked photo identification) claimed when surveyed that they *did* possess photo identification.

C. The District Court’s Decision

The district court nonetheless rejected Texas’ evidence regarding the likely impact of SB 14 and found in an opinion issued on August 30, 2012, that

³ The no-match list consisted of entries in Texas’ voter-registration database that could not be linked to an exact-name match in the State’s driver’s license and state-identification databases. DOJ did not check the voter-registration database against *federal* databases for other forms of identification that are acceptable under SB 14, such as passports, citizenship certificates, or military identification cards.

Texas failed to carry its burden under the “effects” prong of Section 5.⁴

First, the court refused to credit the unrebutted social-science literature introduced by the State regarding the effects of voter-identification requirements on turnout. Citing a single study that predicted a slight decrease in turnout—but did *not* predict a racial disparity in the impact on turnout—the court concluded that “the effect of voter ID laws on turnout remains a matter of dispute among social scientists.” App.30.

The court next rejected Texas’ evidence regarding the Indiana and Georgia photo-identification statutes, concluding that “the circumstances in Georgia and Indiana are significantly different from those in Texas.” App.31-32. Specifically, the court found that SB 14 is “far stricter” than the laws in Indiana and Georgia, because a Texas birth certificate costs \$22 (compared to \$3 to \$12 in Indiana) and because roughly one-third of Texas’ 254 counties do not have a Department of Public Safety office. App.32-33.

The district court also rejected DOJ’s evidence on SB 14’s effects, concluding that DOJ and the intervenors had failed to introduce any credible evidence that minority voters in Texas disproportionately lack photo identification.

⁴ The court did not determine whether SB 14 was enacted for an impermissible purpose, App.68, even though both sides presented evidence on this issue at trial.

See App.55 (“[N]o party has submitted reliable evidence as to the number of Texas voters who lack photo ID, much less the rate of ID possession among different racial groups.”). Yet the court found DOJ’s failure of proof insufficient to grant preclearance because “Texas bears the burden of proving that nothing in SB 14 ‘would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.’” *Id.* (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)).

The court further held, based on a unique retrogression standard which focused on socioeconomic disparate-impact analysis of poverty and race, that preclearance should be denied because “record evidence suggests that SB 14, if implemented, would in fact have a retrogressive effect on Hispanic and African American voters.” App.56. As the court explained:

(1) a substantial subgroup of Texas voters, many of whom are African American or Hispanic, lack photo ID; (2) the burdens associated with obtaining ID will weigh most heavily on the poor; and (3) racial minorities in Texas are disproportionately likely to live in poverty. Accordingly, SB 14 will likely “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”

App.56 (quoting *Beer*, 425 U.S. at 141).

The district court also backed up this socioeconomic analysis with a particularly extreme

test for retrogression, suggesting that a law will violate Section 5 if it causes *any* member of a racial or language minority who voted in a previous election to be “unable to vote in the next election”—regardless of whether the law’s overall impact imposes a disparate burden on minority groups. *See* App.61 (“Simply put, many Hispanics and African Americans who voted in the last election will, because of the burdens imposed by SB 14, likely be unable to vote in the next election. This is retrogression.”).

The district court entered a partial final judgment under Rule 54(b) on December 17, 2012, App.71, and Texas filed a timely notice of appeal two days later, App.74.

**THE QUESTIONS PRESENTED ARE
SUBSTANTIAL**

**I. THE COURT SHOULD HOLD THIS CASE PENDING
ITS DECISION IN *SHELBY COUNTY***

In *Shelby County*, this Court will address whether the 2006 reauthorization of Section 5 is facially constitutional. That issue is squarely implicated here, and Texas has fully preserved a constitutional challenge to Section 5. *See* Amended Complaint at 26 (DN 25) (“The State of Texas is entitled to a declaratory judgment authorizing the immediate implementation of Senate Bill 14 because section 5 of the Voting Rights Act violates the Constitution.”). If the Court finds Section 5 unconstitutional, then Texas would be entitled to all of the relief it seeks in this case—namely, the ability for its duly enacted statute, passed nearly two years ago, to take effect.

As with Texas' pending appeal in its redistricting case, *see Texas v. United States*, No. 12-496, this case amply demonstrates the constitutional difficulties with the practical operation of Section 5. To take just two examples: No fewer than ten organizations and twenty-one individuals have been allowed to intervene and slow down proceedings that must be streamlined to have any chance of passing constitutional muster. And when the Justice Department failed to marshal evidence to support its theory for denying preclearance, the reversed burden of proof was invoked to deny Texas relief. App.55.

This Court appears to be holding Texas' appeal in the redistricting case pending its decision in *Shelby County*. The Court should follow the same course with this appeal. If the Court finds that the reauthorization of Section 5 was unconstitutional, then it should enter judgment for Texas.

II. TEXAS IS ENTITLED TO PRECLEARANCE EVEN IF THE COURT UPHOLDS SECTION 5 IN *SHELBY COUNTY*

If the Court finds the 2006 reauthorization of Section 5 to be facially constitutional, it should note probable jurisdiction and set this case for plenary consideration to address the scope of Section 5 going forward and its application to a voter identification law that was based on the Indiana law this Court upheld in *Crawford*. This Court has repeatedly emphasized the importance of construing Section 5 to alleviate its constitutional difficulties, *see Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 201-06 (2009), and that rule will continue to apply with full force even if the facial challenge

advanced in *Shelby County* is rejected. Covered jurisdictions would also need guidance from this Court regarding the viability of as-applied constitutional challenges to Section 5. *See, e.g., Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410, 411-12 (2006) (*per curiam*) (rejection of facial challenge does not “purport to resolve future as-applied challenges”).

If the Court rejects the facial challenge to Section 5 in *Shelby County*, supplemental briefing would likely be necessary to sharpen the issues and address how this case should proceed in light of the Court’s decision. Depending on what the Court says in its *Shelby County* decision, the issues before the Court would likely include, but not necessarily be limited to, the following:

A. The Court should note probable jurisdiction to determine whether Section 5 is unconstitutional when it is applied to block a covered jurisdiction from implementing a statute that closely resembles facially valid legislation in non-covered jurisdictions. SB 14 is quite similar to photo identification statutes enacted by Indiana and Georgia. The former was upheld by this Court in *Crawford* and the latter received administrative preclearance from DOJ in 2005. Yet the district court denied preclearance of Texas’ photo-identification law.

It is difficult to imagine a more flagrant disregard for “our historic tradition that all the States enjoy ‘equal sovereignty.’” *Northwest Austin*, 557 U.S. at 203 (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)). Even if Section 5’s coverage formula and preclearance remedy are constitutional

in the abstract, the Court should set this case for plenary review to consider whether the statute may be used to block legislation that would have been perfectly permissible if adopted by a non-covered State.

B. The Court should note probable jurisdiction to address whether photo-identification laws “deny or abridge” the right to vote under Section 5.

By necessity, jurisdictions throughout the United States regulate the voting process in ways that impose minor inconveniences on voters. *See Burdick v. Takushi*, 504 U.S. 428, 433-434 (1992) (“[E]lection laws will invariably impose some burden upon individual voters.”). The very act of in-person voting requires a trip to the polling place, taking time away from family, work, or leisure. And a large majority of States require voters to register in advance of election day, which requires the completion of paperwork and possibly a visit to a government office. Yet registration laws (and in-person voting) have never been held to “deny” or “abridge” the right to vote, even though *some* voters inevitably decide that the benefits of voting are simply not worth the burdens.⁵

Photo-identification laws are no different. As Justice Stevens explained for a plurality of the Court in *Crawford*, “[t]he inconvenience of making a trip to

⁵ *See generally* William H. Riker and Peter O. Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25 (1968).

the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.” *Crawford*, 553 U.S. at 198; *see id.* at 209 (Scalia, J., concurring in the judgment) (same).

SB 14 thus does not “deny or abridge” *anyone’s* right to vote. For an overwhelming majority of voters—*i.e.*, those who already possess an approved photo identification—there will be no burden whatsoever. And for the remaining voters who currently lack photo identification, SB 14 mitigates any inconvenience by offering election identification certificates free of charge. It also allows voters to cast provisional ballots if they appear at the polls without photo identification. *See Crawford*, 553 U.S. at 199 (“The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted.”). That some voters may *choose* not to take advantage of these mitigation measures hardly means that their right to vote has been “denied” or “abridged.”

In short, any burdens imposed by SB 14 are minimal and justified, and the statute does not deny or abridge *anyone’s* right to vote. The district court’s decision to the contrary is likely to have far-reaching implications for similar legislation in other covered jurisdictions, and the Court should note probable jurisdiction to provide clear guidance about the legality of such legislation under Section 5.

C. The district court rejected *all* of the evidence proffered by the United States and thirty-one intervenors purporting to show that minority citizens are less likely than white citizens to possess approved photo identification. App.39-46, 53-55. That should have been more than sufficient to grant preclearance of SB 14. But instead of stopping there, the district court denied preclearance based on an unprecedented theory of retrogression that relied on *socioeconomic* disparate-impact analysis. The court reasoned that: (1) certain voters in Texas lack photo identification; (2) those voters are more likely than others to be poor; and (3) racial minorities are more likely than others to be poor. App.56-61.

That novel theory is untethered from both the Constitution and the text of Section 5. Section 5 says nothing about socioeconomic status—it is targeted to discrimination “on account of race or color” or language minority status. 42 U.S.C. § 1973c(a); *see also* U.S. CONST. AMEND. XV (prohibiting purposeful discrimination “on account of race”). And this Court has long held that the Constitution does not equate discrimination on account of poverty with discrimination on account of race. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

Indeed, the district court’s interpretation of Section 5 would result in a denial of preclearance even if there were *undisputed proof* that the racial makeup of voters without photo identification precisely mirrored the racial composition of the State’s electorate. *See* App.56 (“[T]his case does not hinge merely on Texas’ failure to ‘prove a negative.’”);

App.57 (finding that “*at minimum*, racial minorities are proportionately represented” within the subgroup of registered voters who lack photo identification).

But even assuming, implausibly, that financial status can play some role in the Section 5 inquiry, the district court’s analysis was incomplete. Most obviously, the court made no attempt to analyze whether poor minority citizens were *more likely than poor white citizens* to lack photo identification. Instead, the court simply assumed that SB 14 would have a disproportionate impact on poor minority voters, then shifted the burden to Texas to disprove this theory. That was an impossible task, given that there is no reliable data linking income, race, and photo-identification-possession for Texas citizens.

In all events, if this Court were to reject the facial challenge to Section 5’s constitutionality in *Shelby County*, it would certainly need to consider how Section 5 can be applied to minimize its inherent burdens on state sovereignty and to eliminate Section 5’s problematic tendency for jurisdictions to take race into account—precisely what Section 2 of the VRA, and the Fourteenth and Fifteenth Amendments forbid—in order to avoid a Section 5 violation. The decision below and its novel retrogression analysis exacerbate the inherent constitutional difficulties with Section 5. If this Court does not invalidate Section 5 in *Shelby County*, the need for plenary review of this case will be imperative.

CONCLUSION

The Court should hold this case pending its decision in *Shelby County*. If the Court finds Section 5 facially unconstitutional, it should enter judgment for Texas. If the Court upholds Section 5, then—after supplemental briefing on how the Court’s decision applies to this case—it should note probable jurisdiction and schedule this case for plenary review to address the scope of Section 5 going forward.

Respectfully submitted,

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