No. 12-496

IN THE
Supreme Court of the United States

STATE OF TEXAS,

Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

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

MOTION TO AFFIRM OF APPELLEES WENDY DAVIS, MARC VEASEY, ET AL.

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INTRODUCTION

Appellees Wendy Davis, Marc Veasey, John Jenkins, Vicki Bargas, and Romeo Munoz (the "Davis-Veasey Appellees" or "Davis-Veasey Intervenors") request that this Court summarily affirm the three-judge panel's rulings in *Texas v. United States*, Case No. 11-1303 (TBG-RMC-BAH) (Aug. 28, 2012).[1] In particular, Appellees request that the Court affirm the panel's holding with respect to the denial of preclearance to the Senate Plan.[2] The State of Texas's appeal from the three-judge panel's well-reasoned denial of preclearance to the Senate Plan is simply an attempt to overturn this Court's longstanding precedent governing private party intervention and discriminatory intent in cases under Section 5 of the Voting Rights Act. As such, it should be summarily rejected.

As an initial matter, the three-judge panel followed well-settled precedent in granting private party intervention to represent the interests of minority voters and elected officials, which, as this Court has previously recognized, can provide a different perspective from that of the Department of

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[1] Unless otherwise indicated, all subsequent citations are to materials in the docket before the three-judge panel below.

[2] The Davis-Veasey Intervenors herein fully adopt and incorporate the arguments made by the other intervenors for affirmance of the panel's denial of preclearance to Texas's House and Congressional Plans. However, because the Senate Plan raises unique issues, the Davis-Veasey Intervenors are filing this separate brief arguing for affirmance of the ruling on the Senate Plan.

Justice. *See Georgia v. Ashcroft*, 539 U.S. 461, 476-77 (2003). The district court also correctly applied this Court's long-standing analysis of legislative intent to the extensive factual record in finding that the State of Texas acted with a discriminatory purpose in redrawing Senate District 10 by deliberately and systematically fracturing minority communities during a highly irregular and racially exclusionary legislative process, particularly in light of the State's lengthy history of suppression of minority voting rights. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). The panel's rulings with respect to the Senate Plan are not clearly erroneous and should be affirmed.

STATEMENT OF THE CASE

I. The Texas Legislature Purposely Fractured Minority Voting Strength in Senate District 10.

In its proposed State Senate Plan, the Texas Legislature deliberately dismantled the minority voter coalition that had recently emerged in Senate District 10. Only a decade ago, State leaders held up Senate District 10 in their preclearance filing as a district that would present minority voters with an opportunity to elect their candidate of choice by the end of the decade. J.S. App. 58-59. Texas's prediction proved correct. Yet as soon as minority voters succeeded in actually electing their preferred candidate in 2008, the State purposely eliminated Senate District 10 as a minority opportunity district, dramatically altering the district's demographic makeup and fracturing its minority population into

Anglo-dominated districts scattered across North Texas. *Id.* at 217-225.

Benchmark Senate District 10 combined growing African-American and Hispanic communities in the Fort Worth area in Tarrant County, Texas. *Id.* at 58, 214. When the state legislature drew the benchmark district in 2001, the population was 56.6% Anglo, 16.7% African-American, and 22.9% Hispanic. *Id.* at 58. Over the past ten years, the total Hispanic population in Dallas and Tarrant counties grew by more than 440,000 and the African-American population grew by more than 152,000. Complaint ¶ 33, *Davis v. Perry*, 2011 WL 6207134 (W.D. Tex. 2011) (No. 5:11-cv-788). Tarrant County now has the third largest African-American population in Texas and one of the State's largest and fastest growing urban Latino populations. Defs.' Ex. 130 (Letter from Tarrant County Commissioner Roy Brooks to Sen. Selinger (May 11, 2011)).[3] By contrast, over the same span of time, the Anglo population in this two-county area fell by more than 156,000. Complaint ¶ 33, *Davis v. Perry*, 2011 WL 6207134. Thus, by the time of the 2010 census, minorities constituted a majority of the total population in Senate District 10. *See id.*; *see also* J.S. App. 58-59. According to the

[3] Defs.' Ex. 130 appeared in the district court as Exhibit 17 to Davis Intervenors' Memorandum in Opposition to Plaintiff State of Texas's Motion for Summary Judgment [Dkt. 76-20]. The exhibit numbers provided herein are the official exhibit numbers assigned for the trial before the three-judge panel. For the Court's convenience, Davis-Veasey Intervenors have also provided the cross-reference to the location of these exhibits as they originally appeared in the docket.

2010 Census, benchmark Senate District 10 is now a majority-minority district at 19.2% African-American, 28.9% Hispanic, and only 47.6% Anglo. J.S. App. 59.

These demographic changes should have come as no surprise to the State of Texas, which had, in fact, predicted this trend in making Senate District 10 central to its case for preclearance in 2001. *Id.* In its 2001 submission to the Department of Justice seeking administrative preclearance of its Senate Plan pursuant to Section 5 of the Voting Rights Act, the State pointed to benchmark Senate District 10 as an emerging minority coalition district, urging the Department of Justice to recognize that "[t]he voting strength of these minority communities in the future will depend on the cohesion within and between African-American and Hispanic voters and the ability of such voters to form coalitions with other racial or ethnic groups in support of their preferred candidates." *Id.* (citing 2001 State of Texas Submission for State Senate Preclearance at 18 (Aug. 15, 2001)).

Over the course of the next decade, the minority communities of benchmark Senate District 10 bore out Texas's prediction, demonstrating that they could join together to elect their candidate of choice. *Id.* at 59-60. After the 2006 election for Tarrant County District Attorney, Appellee-Intervenor Mark Veasey – an African-American representative in the Texas State House of Representatives – took note of the district's rapidly growing minority population. *Id.* at 215. Representative Veasey recognized that if the

African-American and Hispanic communities "came together as a coalition to vote . . . they could win Senate District 10." *Id.* at 60 (quoting Trial Tr. 30:15-16, Jan. 18, 2012 PM). In the following election, a coalition of minority community leaders convinced Appellee-Intervenor Wendy Davis – then a member of the Fort Worth City Council – to run for the seat as the Democratic nominee. *Id.* at 215. Davis, an Anglo Democrat recruited because of her strong relationship with Senate District 10's minority community, spent much of her 2008 run campaigning in the district's African-American and Hispanic communities. *Id.* at 215-16. Relying on a coalition of the district's growing minority population, she ran unopposed in the Democratic primary and won a close victory in the general election, receiving 99.6% of the African-American vote, 85.3% of the Hispanic vote, and 25.8% of the Anglo vote. *Id.* at 60.[4]

Yet as soon as this minority coalition emerged to elect the candidate of its choice, Texas decided to dismantle Senate District 10. *See id.* at 60, 61-63. In drawing the Senate Plan based on the 2010 Census data, state legislative leaders knew that Senate District 10 had become majority-minority in population, acknowledged that Senator Davis was minority voters' candidate of choice in 2008, and were warned that dismantling Senate District 10 would harm minority voting rights. *See, e.g.*, Defs.' Ex. 128 (Letter from Sen. Davis to Sen. Selinger

[4] At trial, the State of Texas did not dispute these figures. *Id.* at 216-17.

(May 10, 2011))[5]; Defs.' Ex. 129 (Statement of Democratic Senators (May 17, 2011));[6] *see also* Defs.' Ex. 134 app. 8 ¶2 (Declaration of Sen. West)[7]; Defs.' Ex. 134 app. 7 ¶7 (Declaration of Sen. Zaffirini). But the State still knowingly and deliberately "cracked" apart these growing African-American and Hispanic communities and submerged them into three majority Anglo districts. J.S. App. 217-18; *see also* Jan. 24, 2012 AM Trial Tr. 56:10-57:6 (Sen. Seliger); Jan. 18, 2012 AM Trial Tr. 22:9-11 (Doug Davis).

First, the large African-American community in Southeast Fort Worth was extracted from Senate District 10 and moved into enacted Senate District 22, a 61.3% Anglo district that extends over 100 miles south into rural areas of Central Texas. J.S. App. 217-18, 222. At the same time, Texas fractured the Hispanic population in North Fort Worth into enacted Senate District 12, a largely suburban district with a 61% Anglo population. *Id.* at 217-218, 223. Only Fort Worth's remaining Southside Hispanic population was left in enacted Senate

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[5] Defs.' Ex. 128 appeared in the district court as Exhibit 14 to Davis Intervenors' Memorandum in Opposition to Plaintiff State of Texas's Motion for Summary Judgment [Dkt. 76-17].

[6] Defs.' Ex. 129 appeared in the district court as Exhibit 16 to Davis Intervenors' Memorandum in Opposition to Plaintiff State of Texas's Motion for Summary Judgment [Dkt. 76-19].

[7] Defs.' Ex. 134 appeared in the district court as Exhibit 7 to Davis Intervenors' Memorandum in Opposition to Plaintiff State of Texas's Motion for Summary Judgment [Dkt. 76-10].

District 10, which the State transformed into a 54.5% Anglo district. *Id.* at 225.

Splintered across and subsumed in Anglo-dominated districts that are unlikely to share its interests, Fort Worth's minority voter coalition in Senate District 10 would no longer have the ability to elect the candidate of its choice under the State's enacted Senate Plan. Indeed, the State's own expert admitted as much at trial, frankly conceding that the enacted Senate Plan "diminishes the voting strengths of Blacks and Latinos in [Senate District 10]." *Id.* at 61 (quoting Trial Tr. 39:14, Jan. 25, 2012 AM).

Worse yet, this fracturing of Fort Worth's minority communities was entirely unnecessary because benchmark Senate District 10 was well within the acceptable population deviation range for state legislative districts. *Id.* at 218. The State made an affirmative decision to dismantle the district and fracture the coalition of African-American and Hispanic voters that had come together in 2008 to elect its preferred candidate. Rather than maintain the very minority opportunity district for which it took credit over a decade ago, Texas sought to destroy it, deliberately dismantling an emerging minority coalition district.

II. The Texas Legislature Deliberately Dismantled Senate District 10 Through A Highly Discriminatory and Racially Exclusionary Legislative Process.

The State cracked Senate District 10 during a legislative process that completely shut out minority legislators and was infected with discriminatory intent. The State systematically excluded all twelve senators representing minority opportunity districts – including those serving on the Redistricting Committee – from any discussion of the Senate Plan. Indeed, Senator Zaffirini, who represents a minority district and served on the Redistricting Committee, testified that she "had never had less input into the drawing of any [redistricting] map, in over 30 years of redistricting experience." J.S. App. 66 (quoting Defs.' Ex. 370 at 1) (internal quotations omitted) (alterations original). Senators representing minority opportunity districts were not even shown the proposed configuration of their own districts until the plan was finalized, despite repeated requests. *See* J.S. App. 63-64.

In particular, State leaders denied Senator Davis' repeated requests to see the proposed plans for Senate District 10, even as another Senator told her that the proposed plan was "shredding" the district. J.S. App. 63. Yet State leaders not only provided Anglo senators who represented majority Anglo districts with maps of their proposed districts, but also provided these Anglo senators with "open and continued access to the redistricting process for weeks leading up to the formal consideration of the

map." *See* Defs.' Ex. 134 app. 7 ¶ 6 (Declaration of Sen. Zaffirini); *see also* Defs.' Ex. 134 app. 8 ¶ 3 (Declaration of Sen. West); Defs.' Ex. 190 at 8-11 (deposition testimony of Sen. Shapiro conceding the same).[8]

By the time the twelve senators representing minority opportunity districts were given notice of the proposed map for the first time – just 48 hours before the public hearing – the Senate map had been finalized in all but name. Indeed, the State staff members responsible for drawing the map even wanted to finalize the official committee report supporting the maps before the senators representing majority-minority districts or the public had any opportunity to provide input on the maps. The only reason they did not create the committee report before the hearing on that map was their fear that doing so would leave a "paper trail" that would cause problems with preclearance under Section 5 of the Voting Rights Act. *See* J.S. App. 65. In an email titled "pre-doing committee report," David Hanna, a lawyer for the Texas Legislative Council, warned those who had drawn the plan:

> No bueno. RedAppl [the redistricting software Texas used] time stamps everything when it assigns a plan. Doing [the Committee Report

[8] Defs.' Exhibit 190 includes excepts from the Deposition of Senator Shapiro, originally included as an exhibit in support of Davis Intervenors' Memorandum Regarding Plaintiff's Objections to Discovery Based on Privileges [Dkt. 119-8].

> on] Thursday [May 12] would create [a] paper trail that some amendments were not going to be considered at all. Don't think this is a good idea for preclearance. Best approach is to do it afterwards and we'll go as fast as possible.

Id. (quoting "No Bueno" email) (alterations original). At trial, even the Chairman of the Senate Redistricting Committee acknowledged the map was already a "*fait accompli*" by the time of the hearing, "such that no new proposals or amendments to the district map would be entertained at the markup." *See* J.S. App. 65-66 (citing testimony from Senator Ken Seliger, Chairman of the Redistricting Committee).

The end result was just the same as if the report had already been pre-written. All twelve senators representing minority opportunity districts objected to the redistricting process with respect to the Senate Plan and proposed alternatives – to no avail. *See* J.S. App. 66-67. The "uncontroverted" record evidence of the purposeful exclusion of the twelve Senators representing minority ability districts, *see* J.S. App. 63-64, makes clear that State leaders intentionally prevented them from having any meaningful input into the creation of the Senate Plan and preventing the destruction of Senate District 10.[9]

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[9] While many minority and Democratic senators ultimately voted for the Senate Plan, they did so under protest and only to prevent a legislative deadlock on the State Senate map that would have resulted in the map being drawn by an all-Anglo, highly partisan five-member body (the Legislative Redistricting

Contrary to previous procedure, State officials also effectively excluded the public from the redistricting process. The State failed to hold *any* field hearings after the Census was released or after the plans were drawn. *See* J.S. App. 66. Indeed, the State "did not refute testimony indicating that the hearings held prior to the start of the 2001 legislative session were 'perfunctory,' . . . and a 'sham,' with low attendance, low participation, and little invited testimony or prepared materials." J.S. App. 64 n.34 (internal citations omitted). The only public hearing covering the proposed Senate Plan was conducted less than 24 hours after the redistricting plan was publicly released, thereby preventing any meaningful opportunity to participate in the redistricting process. Jan. 20, 2012 AM Trial Tr. 44:6-16 (Sen. Davis).

III. The State Of Texas Affirmatively Chose Judicial Rather Than Administrative Preclearance.

After the plans were adopted, the State of Texas, as a covered jurisdiction under Section 5 of the Voting Rights Act, was required to seek preclearance for its proposed voting changes. When selecting which preclearance process to use, the State chose to

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Board) appointed under State law. *See* J.S. App. 209; Defs.' Ex. 134 app. 6 ¶¶4-5 (Declaration of Sen. Ellis). As African-American State Senator Rodney Ellis explained: "[m]any Senators feared, with justification, that this harshly partisan body of statewide elected officials would dismantle not only District 10 but other minority opportunity districts as well." Defs.' Ex. 134 app. 6 ¶5 (Declaration of Sen. Ellis).

forgo submitting its plan through the more "expeditious alternative" of administrative preclearance before the Department of Justice. *See Morris v. Gressette*, 432 U.S. 491, 504 (1977). Had it chosen to pursue administrative preclearance, Texas would have been subject to a review by the Department of Justice that would have required the Department to act on the State's preclearance submission within 60 days and would have provided for only very limited participation from outside groups or individuals. Instead, Texas decided to pursue a declaratory judgment action in the District Court for the District of Columbia, filing its Complaint on July 19, 2011 (more than six weeks after the Senate Plan was enacted by the Legislature).

Two days after Texas filed its Complaint, Wendy Davis, Marc Veasey, John Jenkins, Vicki Bargas, and Romeo Munoz filed a motion to intervene in the preclearance proceedings. *See* Mot. to Intervene & Mem. of Law [Dkt. 5] ("Mem. in Support of Mot. to Intervene" or "Mot. To Intervene"); *see also* Reply Br. [Dkt. 9] ("Reply to Mot. to Intervene"). Senator Davis offered a particularly valuable perspective both in her individual capacity as a voter in Senate District 10 and as the elected official chosen by the minority voters in Senate District 10 to represent their interests. Mot. to Intervene ¶ 4. Representative Marc Veasey intervened both in his individual capacity as an African-American voter in Senate District 10 and in his official capacity as a member of both the Texas State House of Representatives for the 95th District, which is a

minority ability-to-elect district, and the Texas House's Redistricting Committee. Mot. to Intervene ¶ 5; J.S. App. 145. Mr. Jenkins, an African-American voter, had the ability to elect his preferred candidate in benchmark Senate District 10 but was removed from the district and placed into a neighboring Anglo district under the State's new plan, where he would have lost his ability to elect his preferred candidate. Mot. to Intervene ¶ 6. Ms. Bargas, a Latina voter, had the ability to elect her preferred candidate in benchmark Senate District 10, but she would have lost this opportunity under the proposed plan because other minority voters were systematically removed from Senate District 10. *Id.* ¶ 10.

As detailed in the briefings before the three-judge panel, the Davis-Veasey Intervenors provided a "unique perspective with respect to the experience of minority voters in Texas," particularly Senator Davis and Representative Veasey, who experienced first-hand the highly exclusionary procedure implemented by the Texas Legislature in purposefully dismantling Senate District 10. Mem. in Support of Mot. to Intervene at 11; *see also generally id.* at 2-4, 5-8, 10-12; Mot. to Intervene ¶¶ 4-9, 12-14, 16, 21-24. While sharing an interest in the redistricting plan at issue, the Davis-Veasey Intervenors also represented interests divergent from those of the Department of Justice, which did not oppose permissive intervention by the Davis-Veasey Intervenors. *See* Mem. in Support of Mot. to Intervene at 10 (citing cases); Mot. to Intervene ¶ 23 (same). Recognizing this, the three-judge panel granted intervention to

the Davis-Veasey Intervenors "upon consideration of the motion, the parties' memoranda, and the entire record." *See* Order at 1 [Dkt. 11] ("Aug. 16, 2011 Order"). The court subsequently granted intervention to several other groups and individuals as well.

The intervenors' local perspective was particularly critical on the question of preclearance of the Senate Plan. On September 19, 2011, the Department of Justice filed its Answer in the district court stating that while the Department would oppose preclearance of the Congressional and State House plans, it would not oppose preclearance of the Senate Plan or State Board of Education plan. *See* Answer [Dkt. 45]. However, the Department's Answer was filed before any discovery was undertaken and thus before much of the evidence of discriminatory intent had come to light.[10] Nonetheless, because the Department had not opposed preclearance of the Senate Plan, it was left to the Davis-Veasey Intervenors, along with Intervenors LULAC, the Texas State NAACP, and the State Legislative Black Caucus, to demonstrate to the Court that the State could not carry its burden for preclearance of the Senate Plan.

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[10] Indeed, at closing arguments following the trial in this case, the Department of Justice stated that it had "learned a lot of new information in the Senate case regarding purpose" and opined that if the same evidence had been submitted to it prior to filing its Answer, the Department "would have to go back and take a look" at the Senate Plan. Trial Tr. 83:20-23, Jan. 31, 2012.

Approximately two months after initiating its preclearance proceeding in the district court, the State of Texas moved for summary judgment, asserting that it was entitled to preclearance as to all of its redistricting plans. Following extensive briefing, the district court denied summary judgment as to the Senate Plan (as well as the House and Congressional Plans), finding that "Texas has not disputed many of the Intervenors' specific allegations of discriminatory intent." J.S. App. 340. The district court noted that the Davis-Veasey Intervenors, along with Intervenors LULAC, the Texas State NAACP, and the State Legislative Black Caucus, had raised serious questions of fact as to whether the State had violated Section 5 by intentionally dismantling Senate District 10 through a discriminatory process. J.S. App. 312-18. The case then proceeded to trial.

Over the course of the two-week trial, the three-judge panel heard from fourteen expert witnesses and more than twenty fact witnesses, examined more than one thousand exhibits, and analyzed voluminous trial briefing, *see* J.S. App. 6 & n.4, 10. Based on the extensive factual record presented at trial, the district court denied preclearance to Texas's proposed Senate Plan. Although the court found that Senate District 10 was not yet a proven minority ability-to-elect district because the minority voters had coalesced only very recently and thus had only prevailed in one election, the court did find – after carefully applying the *Arlington Heights* factors to the record before it – that Texas had acted with discriminatory intent in splintering the minority communities in Senate District 10.

Subsequent to the three-judge panel's decision, the 2012 election took place under the interim maps adopted by three-judge panel in the Western District of Texas pursuant to this Court's instructions in *Perry v. Perez*, 132 S. Ct. 934 (2012). That interim map returned Senate District 10 exactly to the configuration of Senate District 10 in the benchmark plan. Restored to their original district, minority voters coalesced again and re-elected Senator Davis as their candidate of choice in Senate District 10. *See* Elections: November 6, 2012, Joint General and Special Election Results – State Senator – District 10,TARRANT COUNTY, http://tcweb.tarrantcounty.com /evote/lib/evote/2012/Nov6/results/contest_21.pdf (last visited Nov. 26, 2012). Absent Section 5, that 2012 election would have taken place under the State of Texas's enacted intentionally discriminatory plan and minority voters would have lost the ability to elect their candidate of choice.

STANDARD OF REVIEW

A three-judge panel's denial of preclearance based on a finding of discriminatory purpose is reviewed under the clearly erroneous standard. *See City of Pleasant Grove v. United States*, 479 U.S. 462, 469 (1987). This Court must accept the district court's factual conclusions unless based "on the entire evidence," it is "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

The panel's decision to permit intervention is reviewed under the abuse of discretion standard. *See Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003). Under this standard, a "district court . . . abuse[s] its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). This Court has emphasized that "deference . . . is the hallmark of abuse-of-discretion review." *General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997).

REASONS FOR GRANTING THE MOTION

The State of Texas is no stranger to this Court when it comes to racial discrimination in its redistricting process. Indeed, just a few years ago, this Court noted the "long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process" in Texas. *LULAC v. Perry*, 548 U.S. 399, 439 (2006)

(internal quotation marks omitted). And this Court found that Texas had continued that discrimination by taking away a Latino opportunity district just as Latinos were about to exercise their political power to elect a candidate of choice. *See id.* at 440. The Court observed that such an action "bears the mark of intentional discrimination that could give rise to an equal protection violation." *Id.*

Here we are again. Apparently paying no heed to anything this Court said, Texas did exactly what this Court characterized as intentional discrimination in *LULAC* – it fractured a minority community just as that minority community had begun to exercise its political power by electing a candidate of choice. The State's Senate Plan deliberately and systematically broke apart the minority communities that made up Senate District 10, subsuming them into districts controlled by Anglos and effectively ending any hope they had of continuing to elect a candidate of choice.

Rather than submit its deeply flawed Senate Plan for administrative preclearance, Texas instead submitted it to a three-judge panel in the District Court for the District of Columbia. Based on evidence from fourteen expert witnesses, more than twenty fact witnesses, over one thousand exhibits, voluminous briefing, and a two-week trial, *see* J.S. App. 6 & n.4, 10, the three-judge panel applied the *Arlington Heights* factors and found that the Senate Plan violated Section 5 because Texas had intentionally discriminated against minority voters in Senate District 10, *id.* at 61-68.

Not happy with this outcome, the State of Texas now attempts to reopen settled jurisprudence providing for intervention by private parties as expressly affirmed by this Court in *Georgia v. Ashcroft*, and likewise seeks to jettison existing precedent regarding findings of discriminatory intent under *Arlington Heights*. Because the three-judge panel below faithfully applied this Court's settled precedent to the facts before it, its decision cannot be said to be clearly erroneous and must be affirmed.

ARGUMENT

I. The District Court's Ruling Granting Permissive Intervention Was Well Within Its Discretion Under this Court's Precedent And On This Record

1. The district court acted well within its discretion in granting permissive intervention under Federal Rule of Civil Procedure 24(b)(1) "upon consideration of the motion, the parties' memoranda, and the entire record." *See* Aug. 16, 2011 Order at 1. The State's arguments to the contrary, *see* J.S. 33-38, are squarely foreclosed by long-settled jurisprudence governing third-party intervention in Section 5 cases. Almost thirty years ago, this Court first recognized that under Section 5, "[i]ntervention in a federal court suit is governed by Fed. Rule Civ. Proc. 24." *NAACP v. New York*, 413 U.S. 345, 365 (1973). When faced with this question again in *Georgia v. Ashcroft*, 539 U.S. at 476, this Court affirmed that "Section 5 does not limit in any way the application of the Federal Rules of Civil Procedure to this type of lawsuit, and the statute by

its terms does not bar private parties from intervening."

Georgia v. Ashcroft is directly on point: this Court upheld the district court's ruling granting private party intervention and rejected Georgia's arguments that "States should not be subjected to the political stratagems of intervenors." *Id.* at 476-77. Texas's arguments here merely recycle those that this Court already rejected in *Georgia v. Ashcroft*.[11] *Compare* Georgia Br. at 40-44, *Georgia v. Ashcroft*, 539 U.S. 461 (2003) (No. 02-182), 2003 WL 554486; Georgia Reply Br. at 12-15, *Georgia v. Ashcroft*, 539 U.S. 461 (2003) (No. 02-182), 2003 WL 1945491 *with* J.S. 33-38. The State has presented no reason to depart from this Court's well-reasoned precedent permitting permissive intervention in Section 5 cases, both expressly as described above, as well as implicitly by addressing issues or evidence raised by intervenors. *See, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 323 (2000); *City of Lockhart v. United States*, 460 U.S. 125, 129-30 (1983); *Beer v. United States*,

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[11] Indeed, the State appears to concede that *Georgia v. Ashcroft* precludes its arguments. *See* J.S. 37 n.16. The State's attempt to summarily distinguish *Georgia v. Ashcroft* in a footnote does not adequately raise the issue. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 n.24 (2004). In any case, the State's rationale remains flatly wrong for the reasons adopted by *Georgia v. Ashcroft*. Nothing in the 2006 Reauthorization of the Voting Rights Act purported to remove Section 5 intervention from the commonly applied standards of the Federal Rules and it would be contrary to longstanding precedent to alter the statutory framework in the manner suggested by the State.

425 U.S. 130, 142 n.13 (1976); *City of Richmond v. United States*, 422 U.S. 358, 366-67 (1975).[12]

Moreover, the State has not come close to showing that the district court abused its discretion in granting permissive intervention in this case. The briefing submitted by the Davis-Veasey Intervenors, and adopted by incorporation into the district court's order, provided an ample basis on which to permit intervention. *See* Mot. to Intervene; Reply to Mot. to Intervene; Aug. 16, 2011 Order. The Davis-Veasey Intervenors represented both minority voters and elected representatives of minority communities who shared common questions of law and fact with the parties, but whose experiences presented unique and valuable perspective for the Court as those directly impacted by the discrimination here. *See* Mot. to Intervene ¶¶ 4-9, 12-14, 16, 21-24; Mem. in Support of Mot. to Intervene at 2-4, 5-8, 10-12. The three-judge panel appropriately evaluated the State's objections to permissive intervention, including its concession that the court has the general discretion to permit intervention, *see* Tex. Mem. of Points and Authorities in Opp. to Intervention at 1-2, 2-12,

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[12] Such a departure from precedent would also unsettle the countless cases in which the District Court for the District of Columbia has relied on this Court's guidance in granting intervention in preclearance cases. *See e.g., Georgia v. Holder*, 748 F. Supp. 2d 16, 18 (D.D.C. 2010); *Texas v. United States*, 802 F. Supp. 481, 482 n.1 (D.D.C. 1992); *North Carolina State Bd. of Elections v. United States*, 208 F. Supp. 2d 14, 16 (D.D.C. 2002); *Bossier Parish Sch. Bd. v. Reno,* 157 F.R.D. 133, 135 (D.D.C. 1994); *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).

[Dkt. No. 8], as well as the United States' position that it did not oppose permissive intervention, *see* Attorney Gen. Resp. to Mot. to Intervene at 1 [Dkt. No. 6]. Taking all of these arguments into consideration, the district court was well within its discretion to permit intervention here.

2. The State's argument that private party intervention is particularly problematic where the Department of Justice has declined to interpose an objection to a redistricting plan, *see* J.S. 33-37, is also foreclosed by *Georgia v. Ashcroft*.[13] In that case, this Court upheld the right of private parties to intervene as to two state senate districts for which the Department of Justice had not interposed any objection. *See Georgia*, 539 U.S. at 472-74. The Court did so despite express objections from the State of Georgia that private parties can have "no legal claim or defense in common with the main action" where they go farther than the claims or defenses raised by the "pleadings of plaintiff and the United States," Georgia Br. at 43, *Georgia v. Ashcroft*, 2003 WL 554486. As this Court recognized in affirming private party intervention in *Georgia v. Ashcroft*, private intervenors can "identif[y] interests that are not adequately represented by the existing parties" and it remains firmly within the district court's discretion to take such arguments into consideration in determining whether a plan merits

[13] The State's decision to press this claim in this Court is surprising, as Texas did not file any dispositive motion against the intervenors on the Senate Plan that was based solely on the Department of Justice's failure to object to the Senate Plan.

preclearance. *See Georgia*, 539 U.S. at 477 (internal quotation marks omitted); *see also City of Richmond,* 422 U.S. at 366-67 (allowing private party intervenors to oppose a consent judgment as improperly entered into by the City and the Attorney General in a Section 5 proceeding); *City of Lockhart*, 460 U.S. at 130 (hearing appeal in Section 5 proceeding where the private intervenor defended the opinion denying preclearance even though the United States no longer believed there to be any retrogression).

Had Texas wanted to ensure that the "decision to object belongs only to the Attorney General," it could have gone through the administrative preclearance process, rather than the judicial preclearance process. *See Georgia*, 539 U.S. at 476 (citing *Morris*, 432 U.S. at 403-07, as recognizing the difference between these two preclearance methods). Indeed, Texas could have simultaneously pursued both administrative and judicial preclearance. For whatever reason, the State chose not to do so, despite well-documented case law permitting intervention by private parties in judicial preclearance cases. Having affirmatively selected the judicial preclearance process and rejected the administrative preclearance process, the State has no basis to now complain of surprise or unfairness arising from the rules of the venue it deliberately chose.

II. The District Court Correctly Found That The Senate Plan Was Enacted With A Discriminatory Purpose On The Basis Of The Extensive Factual Record

1. In order to obtain judicial preclearance, a covered jurisdiction "bears the burden of proving that the [voting] change [at issue] does not have the purpose . . . of denying or abridging the right to vote on account of race or color." *Reno v. Bossier Parish Sch. Bd. (Bossier I)*, 520 U.S. 471, 478 (1997) (internal quotation marks omitted). This Court has made clear that, "assessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a 'sensitive inquiry into such circumstantial and direct evidence as may be available.'" *Bossier I*, 520 U.S. at 488 (quoting *Arlington Heights*, 429 U.S. at 266). To conduct this "sensitive inquiry" into purpose, a court must look to the factors laid out in *Arlington Heights* – "the longstanding yardstick for determining discriminatory intent," J.S. App. 36. *See Bossier I*, 520 U.S. at 488 ("In conducting [a section 5 purpose] inquiry, courts should look to our decision in *Arlington Heights* for guidance."); *City of Pleasant Grove*, 479 U.S. at 469-70. The district court correctly applied this Court's longstanding precedent to the facts before it in finding that Texas's Senate Plan was enacted with a discriminatory purpose and thus violated Section 5 of the Voting Rights Act. J.S. App. 61-68.

Appellant ignores decades of this Court's jurisprudence in claiming that the district court's

extensive analysis simply relies on a "hodgepodge of circumstantial evidence." J.S. 30. Astonishingly, Appellant fails to even cite *Arlington Heights*, the opinion central to the district court's finding of discriminatory purpose under Section 5. What appellant critiques as "an *ad hoc* assessment of the 'circumstances surrounding' the enactment of the plan[]," J.S. 28-29, is in fact the long-standing foundation of discriminatory purpose analysis. *See Bossier I*, 520 U.S. at 488.

In finding that Texas's Senate Plan was enacted with a discriminatory purpose, the district court closely followed the well-established *Arlington Heights* framework. J.S. App. 61-68. The district court carefully considered the factual evidence before it relating to each *Arlington Heights* factor: "(1) discriminatory impact, (2) historical background, (3) sequence of events leading up to the decision, (4) procedural or substantive deviations from the normal decisionmaking process, and (5) contemporaneous viewpoints expressed by the decisionmakers." J.S. App. 36 (citing *Arlington Heights*, 429 U.S. at 266-68). For each of the five factors, the district court found evidence in the record which, taken as a whole, strongly supported a finding of discriminatory purpose. J.S. App. 61-68.

First, the district court determined that there was "little question," that the effects of the Senate Plan "bear[] more heavily on one race than another." J.S. App. 61 (quoting *Arlington Heights*, 429 U.S. at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976))). Carefully considering the record before it,

the court determined that the Senate Plan, and in particular the decision to "crack" State Senate District 10, "eliminate[d] the ability of minority citizens to elect their preferred candidates by submerging their votes within neighboring and predominantly Anglo districts." *Id.* at 61-62. Indeed, *the State's own expert* admitted at trial that the enacted plan would "diminish[] the voting strengths of Blacks and Latinos" in State Senate District 10. J.S. App. 61 (internal citations omitted). In reaching its conclusion, the district court also relied on testimony from Senator Rodney Ellis and on the expert witness report of Dr. Allan J. Lichtman about the dilution of minority voting power in Senate District 10. *Id.* at 61-62. The lower court's analysis accords with this Court's instruction that such dilution provides strong evidence of discriminatory purpose, as "a jurisdiction that enacts a plan having a dilutive impact is more likely to have acted with a discriminatory intent . . . than a jurisdiction whose plan has no such impact." *Bossier I*, 520 U.S. at 487.

Second, the district court looked to Texas's long history of discrimination with respect to the franchise. J.S. App. 55-56, 63. As the district court noted, "[i]n the last four decades, Texas has found itself in court every redistricting cycle, and *each time* it has lost." J.S. App. 55-56 (emphasis added). *See LULAC*, 548 U.S. 399; *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). Looking more broadly to Texas's history of racial discrimination in voting, the string of troublesome results in this Court extends back

nearly a century. *See Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927); *see generally LULAC*, 548 U.S. at 439-40 (cataloguing Texas's history of discrimination before and after its designation as a covered jurisdiction under the Voting Rights Act). Following the clear command of *Arlington Heights*, the district court properly gave weight to these persistent violations of the Constitution and the Voting Rights Act in assessing the State's purpose in enacting its Senate Plan. J.S. App. 63.

Third, the district court found additional evidence of discriminatory purpose in the sequence of events leading up to the adoption of the Senate Plan. J.S. App. 63-66. After hearing extensive testimony, the district court found a "clear" "pattern" in which "senators who represented minority districts were left out of the [redistricting] process." *Id.* at 63-64. While Anglo members of the legislature representing majority-Anglo Senate districts were given the opportunity to preview their proposed districts, "none of the senators representing [minority] ability districts were shown their districts until forty-eight hours before the map was introduced in the Senate." *Id.* at 64. Making matters worse, as the chairman of the State's redistricting committee admitted at trial, the boundaries of the plan introduced in committee were a "*fait accompli*" and the "committee did not intend to consider any amendments to the plan." *Id.* at 65. Indeed, an e-mail presented at trial showed that the only thing stopping the State legislative staff from writing the committee report prior to

committee consideration was the concern that doing so would create a "paper trail that some amendments were not going to be considered at all," and they "d[idn't] think this [was] a good idea for preclearance." *Id.* at 64-65. Based on this unrebutted evidence submitted at trial, the district court concluded that the State consciously "excluded minority voices from the [redistricting] process." *Id.* at 68.

Fourth, the district court found the process for the adoption of the Senate Plan "markedly different from" the "redistricting process" in "previous years." *Id.* at 66. In a sharp break from previous redistricting cycles, "[t]he State held no field hearings after Census data was released and proposed plans were drawn." *Id.* The hearings conducted prior to the release of the Census data were no better, as "unchallenged" evidence and trial "testimony indicat[ed] that [these] field hearings . . . were 'perfunctory' and 'a sham,' with low attendance, low participation, and little invited testimony or prepared materials." *Id.* at 64 n.34 (internal citations omitted). In particular, the district court credited the testimony of a senator representing a minority community who had 30 years experience in the redistricting process and who characterized the process leading up to the adoption of the plan as the "least collaborative and most exclusive she had ever experienced." *Id.* at 66 (internal citations omitted).

The last *Arlington Heights* factor – the views expressed by legislators during the redistricting process – similarly supports a finding of

discriminatory purpose. *Id.* at 66-67. As the district court noted, all twelve Senators representing districts with substantial minority populations raised their concerns about racial discrimination during the redistricting process. *Id.* at 67. These Senators filed a strongly worded statement in the Senate Journal protesting the State's racially discriminatory and exclusionary redistricting process. *Id.* At the very least, such an overt protest shows that the State was clearly on notice of concerns regarding its discriminatory intent. *Id.* Yet in spite of the objections of these Senators, the State "chose not to address their concerns," and instead "excluded minority voices from the [redistricting] process . . ." *Id.* at 67, 68.

Finally, the district court properly rejected the State's claims that its actions could be explained entirely by partisan motivations. J.S. App. 67-68. This Court has recognized that certain partisan actions, such as incumbency protection, are unjustified if consciously taken at the expense of minority voters electing their preferred candidate of choice. *LULAC*, 548 U.S. at 440-41. In *LULAC*, this Court explained that in these instances, even assuming "the State's action was taken primarily for political, not racial reasons" such action can still "bear[] the mark of intentional discrimination." *Id.* This precedent supports the district court's analysis that "under the VRA and *Arlington Heights*, it is not enough for Texas to offer a plausible, nonracial explanation that is not grounded in the record." J.S. App. 68. Rather, "[i]t must, at a minimum, respond to evidence that shows racial and ethnic motivation,

which it has failed to do." *Id.* By raising this excuse again before this Court that it was politics and not race, Appellant ignores this Court's precedent and seeks only to relitigate the district court's carefully considered and amply supported findings of fact. J.S. 28-30.

2. Given the magnitude of the largely "uncontroverted" evidence of discriminatory purpose, J.S. App. 61-68, the district court's opinion raises none of the "constitutional difficulties" identified by appellant. J.S. 32. Here, the district court conducted the same test to ferret out discriminatory purpose that it would have applied to a claim under the Fourteenth Amendment – application of the *Arlington Heights* factors. *See, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999); *Miller v. Johnson*, 515 U.S. 900, 914 (1995); *Rogers v. Lodge*, 458 U.S. 613, 618 (1982) (quoting *Arlington Heights*, 429 U.S. at 266). That the initial burden of proof rested on the State under Section 5 but would not have rested on the State under the Fourteenth Amendment, *compare Bossier I*, 520 U.S. at 478 *and Miller*, 515 U.S. at 916, would have made little difference on this record. Intervenors and the United States effectively carried the burden of proving discriminatory purpose – producing sufficient evidence to affirmatively establish the State's discriminatory intent under the Equal Protection Clause. *See* J.S. App. 61-68. Thus, even if the burden of proof were formally reversed in this case, the result would remain the same.

Although the district court did not undertake an equal protection inquiry, its analysis surely would support a finding of discriminatory purpose under the Fourteenth Amendment. J.S. App. 61-68. As discussed, for all five *Arlington Heights* factors, the district court found considerable evidence that, taken together, demonstrates the State's discriminatory intent. *Id.* Although Texas technically bore the burden of disproving discriminatory purpose under Section 5, in practice, for each of these *Arlington Heights* factors, the opposing parties – the Intervenors and the United States – produced all of the relevant evidence. *Id.* That evidence was "uncontroverted" or, indeed, conceded by the State's own admissions. *See id.* at 67 (finding that "Intervenors provided credible circumstantial evidence of the type called for by the Supreme Court in *Arlington Heights*" and noting that Texas chose not to "directly rebut this evidence"); *see also, e.g.*, *id.* at 61, 63, 64 n.34, 66. In other words, the United States and Intervenors produced sufficient evidence to establish discriminatory intent not only under the Voting Rights Act, but also under Fourteenth Amendment Equal Protection analysis.[14] Because

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[14] This conclusion remains unchanged even if, as Texas has argued, Senate District 10 "is a crossover district," and not an ability-to-elect or coalition district. J.S. App. 311. As members of this Court have recognized, "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (plurality opinion).

the district court would have arrived at the same result under the Equal Protection Clause, this case does not present an appropriate vehicle to determine whether Section 5's burden-shifting requirement poses constitutional questions.[15]

In this case, Section 5 did exactly what it was intended to do. Because Section 5 froze the status quo, benchmark Senate District 10 was preserved in the 2012 primaries and general election, affording minority voters the continued opportunity to elect their candidate of choice – Senator Davis – while the three-judge court in the Western District of Texas continued to work through the extensive record regarding violations of Section 2 and the Fourteenth Amendment. In the absence of Section 5, these minority voters almost certainly would have lost their opportunity to elect their candidate of choice in the 2012 elections, even though they would have ultimately prevailed in their constitutional claims for the reasons stated above. Because of the extensive and unrebutted evidence of intentional

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[15] Despite the fact that it affirmatively disclaimed any constitutional challenge to Section 5 in the court below, Texas now lists as one of its questions presented "whether the 2006 reauthorization . . . is constitutional." J.S. i. That question is not properly before this Court. As the court below found, "[t]he constitutionality of section 5 was neither briefed nor argued" by the parties and accordingly the court "express[ed] no opinion on this significant point." J.S. App. 24 n.11. Texas may not now raise on appeal a question that was never "pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted).

discrimination found here, this case simply does not present the question whether it is generally permissible to shift the burden to the State to prove that it did not intentionally discriminate.

CONCLUSION

For the foregoing reasons, as well as those set forth in the briefs of the other Appellee-Intervenors, which are incorporated herein by reference, Appellee-Intervenors Wendy Davis and Marc Veasey, *et al.*, respectfully request that the Court summarily affirm the decision below.

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Respectfully submitted,

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