Nos. 11-713, 11-714, 11-715

In the Supreme Court of the United States

RICK PERRY, GOVERNOR OF TEXAS, ET AL.,
Appellants,

v.

SHANNON PEREZ, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

1. Has the modern application of the Voting Rights Act resulted in an exercise of extra-constitutional authority by the federal government that conflicts with the Act's very purpose?

2. Can Voting Rights Act Sections 2 and 5 coexist?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Constitutional Provisions

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The interest of *amicus* here arises from its mission to protect the rights the Constitution guarantees to all citizens, particularly in their capacities as political candidates, voters, and citizens of the several states.

Established in 1977, the Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case concerns Cato because it implicates a constitutional overreach too long suffered in jurisdictions where the federal government found, nearly half a century ago, that African-American voters had been disenfranchised. The goal of preventing voter disenfranchisement is unquestionably just (and constitutional), but it is no longer served by Sections 2 and 5 of the Voting Rights Act. These provisions now only perpetuate the very race-based districting decisions the Act was intended to stop.

Cato has no direct interest in the outcome of this case. Its sole interest is to ensure that elections are administered in as race-neutral a manner as possible.

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[1] Pursuant to this Court's Rule 37.2(a), a letter from Appellants' counsel consenting to the filing of this brief has been submitted to the Clerk, while Appellees' counsel have lodged blanket consents. Pursuant to Rule 37.6, *amicus* states that no part of this brief was authored by any party's counsel, and that no person or entity other than *amicus* funded its preparation or submission.

STATEMENT OF THE CASE

Amicus incorporates by reference the description of facts and procedural history outlined in the Appellants' brief, but takes no position on any factual disputes between the parties.

SUMMARY OF ARGUMENT

"The historic accomplishments of the Voting Rights Act are undeniable." *Nw. Austin Mun. Util. Dist. No. One v. Holder, ("NAMUDNO"),* 129 S. Ct. 2504, 2511 (2009). Its modern application, however, is problematic to say the least. Sections 2 and 5 conflict with each other, with the Fourteenth and Fifteenth Amendments, and with the orderly implementation of free and fair elections. These problems and tensions—constitutional, statutory, and practical—undermine the VRA's great legacy of vindicating the voting rights of all citizens.

This case exemplifies all that is wrong with the Voting Rights Act as it now exists. Particularly in jurisdictions covered by Section 5, the decennial redistricting process produces utterly predictable litigation, the outcome of which is often dependent on various judges' views (and this Court's incremental clarifications) of how to satisfy both the VRA's race-conscious mandates and the Fifteenth Amendment's command to treat people of all races equally under law. When added to state legislators' partisan interests, this navigation between the VRA's Scylla and the Constitution's Charybdis inevitably crashes the redistricting vessel onto judicial shoals.

Such is the case here. If the San Antonio district court's interim maps satisfy Section 5, would that re-

solve this case? If they avoid Section 2 violations, would that do the trick? If they technically violate the VRA but still guarantee that no voter is disenfranchised and no racial minority group's political power is diminished?

What if the lower court gave insufficient deference to the Texas legislature's maps but those maps themselves violate Sections 2 or 5? Or if the D.C. district court—the one with jurisdiction over the Section 5 issues—would have drawn (and still may draw) substantially different maps but the San Antonio court gave sufficient deference? Or if the dissenting judge's (more deferential) state house and congressional maps satisfy the VRA, but the majority's do too?

What if the lower court considered only and correctly ruled on the Section 2 claims before it, acknowledging that the D.C. court had sole jurisdiction over the Section 5 issues? Or if it consciously resolved the Section 5 issues on an interim basis but implicitly deferred to the D.C. court's ultimate ruling? If the interim maps satisfy the VRA *and are the exact maps this Court would draw* but the San Antonio court applied the wrong standards to get there?

Because the jurisprudence is muddled and fact-bound, it's impossible to give a definitive positive answer to any of these questions. Given this uncertainty, neither state legislatures nor courts can do their work properly—which indicates a fundamental flaw in the system we use to draw and approve political districts. This systemic breakdown that the 2011-12 Texas redistricting process has revealed should give this Court pause as it considers what guidance to give states going forward.

Amicus supports no party here because it takes no position on whether the San Antonio district court's interim maps satisfy the VRA or give sufficient deference to the Texas legislature's maps. Instead, this brief highlights the conflict between the VRA and the Constitution and the practical difficulties that conflict engenders for election administration. After a general discussion to that effect, the brief explores one specific context in which the conflict is particularly manifest: the incongruity between Sections 2 and 5. District courts struggle mightily to extrapolate objective, enforceable standards from a confusing case law under which "considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5." *Georgia v. Ashcroft*, 539 U.S. 461, 491-92 (2003) (Kennedy, J., concurring).

The Voting Rights Act has exceeded expectations in making this nation "a more perfect union." Barack Obama, A More Perfect Union, Address at the National Constitution Center (Mar. 18, 2008) (transcript available at http://www.americanrhetoric.com/speeches/barackobamaperfectunion.htm). While celebrating its achievements, we must recognize that the VRA's success has obviated its constitutional legitimacy. Moreover, as many redistricting cycles have demonstrated, the VRA's growing incongruities present the prototypical situation of legal problems that are (more than) capable of repetition, yet evading (definitive) review. *See*, *e.g.*, *Roe v. Wade*, 410 U.S. 113, 125 (1973) (internal citations omitted). *Amicus* respectfully urges this Court to set this case for reargument regarding the continuing viability of this historic piece of legislation.

ARGUMENT

I. THIS COURT MUST RECONSIDER THE CONTINUING VIABLITY OF THE VOTING RIGHTS ACT BECAUSE THIS HISTORIC LEGISLATION NO LONGER SERVES ITS ORIGINAL PURPOSE

Assume *arguendo* that the San Antonio district court's redistricting maps are legally correct. That assumption may seem to decide the entirety of the case before this Court. No such luck, however, given the complex (and disputed) meaning of "legally correct" in this context. The San Antonio court tried to apply the plain meaning of a statute, Section 5, which states that a state map is presumed illegal—and to reconcile a jurisprudence forbidding enforcement of illegal maps, *Branch v. Smith*, 538 U.S. 254, 265 (2003), even while judges must defer to the districting decisions of state political actors, *Upham v. Seamon*, 456 U.S. 37, 40-42 (1982).

That is, even a map identical to one approved by the Justice Department or the federal court during the redistricting process 10 years earlier would be presumed unenforceable—because of the "one man, one vote" principle and the need to account for population changes since the previous census (even if no net population changes warrant district redrawing). *See*, *e.g.*, *Branch*, 538 U.S. 254; *Lopez v. Monterey County*, 525 U.S. 266 (1999). At the same time, even if its maps "neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race or color," thus facially satisfying the language of Section 5, the district court may have violated the law by substituting its judgment for that of the state legislature. *Upham*, 456 U.S. at 41-42.

The problem, then, isn't so much with any court's application of Section 5 to the map-drawing process (on which reasonable judges of good faith can disagree) or even state legislators' partisan gerrymandering—which is subject to strict judicial scrutiny when race is the "overriding, predominant force" in the redistricting process, *Miller v. Johnson*, 515 U.S. 900, 909 (1995) (interpreting *Shaw v. Reno*, 509 U.S. 630 (1993))—but with a statute that presumes that *anything* a state does in this area is illegal unless proven otherwise.

If anything the state does *ab initio* is illegal, then why should a court give *any* deference to it? Because neither the text nor purpose of the VRA suggest that federal judges should draw redistricting maps. While courts do so under certain circumstances, "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than that of a federal court…absent evidence that these state branches will fail to timely perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Branch,* 538 U.S. at 261-62 (internal citations omitted). Indeed, the federal law provision permitting at-large congressional elections when state districts are not timely drawn, 2 U.S.C. § 2a(c) (1996), is further evidence that judges are not meant to draw districting maps, even in jurisdictions subject to Section 5, except under exceptional circumstances.

That logical conundrum—which likely motivated this Court to note probable jurisdiction—raises the question of why the San Antonio court was drawing maps in the first place. After all, the D.C. court is

handling the Section 5 preclearance case while the San Antonio court entertains a smattering of Section 2 claims. The San Antonio court dutifully held evidentiary hearings relating to these latter issues but, at the parties' request, continued trial indefinitely pending the resolution of the preclearance process. It is only because the D.C. court refused to expedite its case—scheduling trial for the end of January, with little hope of a final decision in time to hold primaries that don't jeopardize the entire 2012 elections—that the San Antonio court felt obligated to draw interim maps. This unusual procedure was bound to end up before this Court regardless of how the San Antonio court dealt with its unenviable predicament.

And still, even if this Court summarily affirms the San Antonio court's maps, its work will have mostly been for naught; the D.C. court will either approve the Texas legislature's maps or, in rejecting them, provide for a remedial map-drawing process unlikely to match the San Antonio court's. The San Antonio court has thus been forced to deliver a premature (even stillborn) baby, or took it upon itself to do so because the alternative was to let the mother—the 2012 elections—die. Regardless, this process demonstrates that Section 5 jurisdictions are ill-advised to seek preclearance from the D.C. court, at least if they hope to receive it in time to actually hold their elections.

That's an unfortunate lesson—because Congress intended for covered states to go through the D.C. district court; the option of obtaining DOJ preclearance was an eleventh-hour addition to the statute. Appellants have been criticized for going the "slow" route, but they are in fact using the method Congress intended in 1965. "The original voting rights bill did

not contain this alternative preclearance method," but "the [legislative] history which does exist . . . indicate[s] that Congress in no way intended that the substantive protections of § 5 be sacrificed in the name of expediency." *McCain v. Lybrand*, 465 U.S. 236, 246 (1984) (internal citations omitted).

Moreover, the current episode involves an all-too-foreseeable misuse of judicial resources. The resource-intensive case below forced the district judges in San Antonio to transfer dozens of matters from their dockets—typically pressing local criminal and habeas cases—to less-taxed Mississippi district courts. For all this sacrifice, the San Antonio court couldn't even rule on the merits of *either* the Section 2 or Section 5 issues. With no guidance from existing law as to what to do under the circumstances, the San Antonio court wasted time and resources drawing interim maps based on its own sense of good public policy and due deference. Again, taking no position as to the merits of the lower court's judgment, *amicus* contends that there must be a better way.

Finally, the Section 5 preclearance system is an anachronism that, regardless of the geography of this particular case, can no longer be justified as a matter of constitutional law or policy. As this Court found two terms ago,

> The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions. For example, the racial gap in voter registration and turnout is lower in

> the States originally covered by § 5 than it is nationwide.

NAMUDNO, 129 S Ct. at 2512 (citing Edward Blum & Lauren Campbell, Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act 3-6 (American Enterprise Institute, 2006)).

Indeed, the list of Section 5 jurisdictions is bizarre: six of the eleven states of the Old Confederacy (and certain counties in Florida, North Carolina, and Virginia), plus Alaska, Arizona, and some counties or townships in five other states as diverse as New Hampshire and South Dakota. Curiously, (only) three New York counties are covered, all boroughs in New York City. What is going on in the Bronx, Brooklyn, and Manhattan that is not in Queens or Staten Island? Four members of this Court famously hail from Gotham, each from a different borough; perhaps they know something the rest of us don't.

And all of this mess stems from the presumption that redistricting actions in particular places, including all of Texas, are illegal until proven otherwise. Even if the Justice Department raises no objection to a state-approved map within the 60-day statutory period, litigation can and will occur later. Why this unusual presumption? Because of events from the Jim Crow era. Three generations of federal intrusion on state prerogatives have proven to be more than sufficient to kill Jim Crow. This Court needs to address the fundamental constitutional defects that have arisen in administering the modern VRA.

A. The VRA, Once Justified by Jim Crow, Is Now "an Eye Glazing Mess"[2]

1. Basic History

The Voting Rights Act has become "one of the most ambitious legislative efforts in the world to define the appropriate balance between the political representation of majorities and minorities in the design of democratic institutions." Richard Pildes, *Introduction* to DAVID EPSTEIN, THE FUTURE OF THE VOTING RIGHTS ACT xiv (2006).

Defining that appropriate balance was not the VRA's original aim, however. Its original purpose was simply to enfranchise southern blacks who, a century after the Civil War, were still being denied their voting rights. Indeed, "[t]he statute has become such an eye glazing mess that it's easy to forget that in 1965 it was beautifully designed and absolutely essential." Abigail Thernstrom, *The Messy, Murky*

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[2] This section is based largely on the work of Abigail Thernstrom, legal historian and vice-chairman of the U.S. Commission on Civil Rights, particularly her book VOTING RIGHTS—AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS (2009) and her series of blogposts about the book at the Volokh Conspiracy blog. *See The Messy, Murky Voting Rights Act: A Primer*, THE VOLOKH CONSPIRACY (Aug. 17, 2009, 3:15 AM), http://volokh.com/2009/08/17/the-messy-murky-voting-rights-act-a-primer; *Race-Conscious Districting: Needed and Costly*, THE VOLOKH CONSPIRACY (Aug. 18, 2009, 3:16 AM), http://volokh.com/2009/08/18/race-conscious-districting-needed-and-costly; *DOJ: A Law Office Working for Minority Plaintiffs*, THE VOLOKH CONSPIRACY (Aug. 19, 2009, 3:16 AM), http://volokh.com/2009/08/19/doj-a-law-office-working-for-minority-plaintiffs; *A Period Piece*, THE VOLOKH CONSPIRACY (Aug. 20, 2009, 3:15 AM) http://volokh.com/2009/08/20/a-period-piece; *Looking Forward*, THE VOLOKH CONSPIRACY (Aug. 21, 2009, 3:16 AM), http://volokh.com/2009/08/21/looking-forward.

Voting Rights Act: A Primer, THE VOLOKH CONSPIRACY (Aug. 17, 2009, 3:15 AM), http://volokh.com/2009/08/17/the-messy-murky-voting-rights-act-a-primer.

When Congress enacted the VRA, Jim Crow was not going quietly into the historical night. Black ballots were the levers of change that white supremacists most feared, so southern blacks were kept from the polls by fraudulent literacy tests, intimidation, violence, and myriad other devices. Enforcing the Fifteenth Amendment thus required an overwhelming exercise of federal power—radical legislation that involved an unprecedented intrusion of federal authority into state and local elections. *See Lopez*, 525 U.S. at 282 (noting that Section 5, "which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial 'federalism costs'" (quoting *Miller v. Johnson*, 515 U.S. at 926)).

The VRA effectively put southern states under federal electoral receivership. It suspended literacy tests, provided for the use of federal registrars, and demanded that racially suspect jurisdictions obtain preclearance of all proposed electoral changes. A reverse-engineered statistical trigger identified the "covered" jurisdictions; the VRA's framers knew which states they wanted covered and determined the formula to pull those places into Section 5's purview.

The burden to prove that changes in voting procedure were free of racial animus lay on the Section 5 jurisdictions. A school district that wanted to enlarge its board, for example, had to demonstrate the absence of discriminatory purpose or effect. Under this paradigm, even suspected discrimination was sufficient to invalidate a proposed change.

Justice Black worried that the provision compelled states to "beg federal authorities to approve their policies," so distorting our constitutional structure as to nearly eradicate the distinction between federal and state power. *South Carolina v. Katzenbach*, 383 U.S. 301, 358 (1966) (Black, J., concurring in part and dissenting in part). It was a constitutionally serious point, and although the Court upheld the VRA against that initial challenge in the midst of deeply troubling discriminatory practices, Justice Black's words should not have been forgotten.

At the time, however, all other attempts to secure Fifteenth Amendment rights had failed. The VRA succeeded in its original aim: Southern black voter registration skyrocketed. Ensuring electoral equality proved more difficult than originally understood, however, as political subdivisions structured elections to minimize the number of blacks likely to win.

To combat these white-supremacist maneuvers, this Court in 1969 expanded its definition of discriminatory voting practices to include devices that diluted the impact of the black vote. *See Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). It thus brought at-large voting, districting lines, and other election devices that had been used to deprive blacks of expected electoral wins within the scope of Section 5. But in so doing the Court put VRA enforcement on a slippery slope toward reserving offices for minorities, even in places with no history of racist exclusion. From there, racial and ethnic representation became the only logical standard by which to measure true electoral opportunity; anything less than proportional office-holding suggested a "diluted" minority vote.

Civil rights advocates saw proportional outcomes as the proper measure of opportunity—in employment, education, and contracting, too—and those who wrote, interpreted, and enforced the law consistently took their cues from these advocates. Thus, when DOJ rejected a districting map, the jurisdiction was obligated to go back to the drawing board—with the understanding that it had to create the maximum number of safe black legislative seats possible. Indeed, this Court was forced to put a stop to such pressure from the DOJ when it held that there is not, in fact, a requirement that districting plans contain the maximum number of majority black districts. *Abrams v. Johnson*, 521 U.S. 74, 86 (1997).

Section 5 was an emergency provision with an expected life of five years that instead has been repeatedly renewed. Every renewal became an occasion for expanding the Act; never did Congress consider whether the law's unprecedented reach should instead be reduced in recognition of its success. Thus, even as black political participation increased, federal power over local electoral affairs grew.

In the 1970s, the government placed still more groups and places into Section 5's clutches. An arbitrary, careless change in the statistical trigger, for example, made those three New York boroughs subject to preclearance, even though black New Yorkers had been freely voting since the enactment of the Fifteenth Amendment in 1870, and had held municipal offices for decades. Hispanics, Asian Americans, American Indians, and Alaskan Natives became eligible for federal protection, even though their experience with exclusion from the polls was not remotely comparable to that of southern blacks. It was during

this time that preclearance was also extended to Texas and other previously exempt locales.

In 1982, Congress rewrote what had been an innocuous preamble, Section 2, morphing it into a powerful tool to attack election practices anywhere in the nation that had the "result" of denying the right to vote on account of race. Indeed, this Court had already read Section 5 to provide a remedy for vote dilution that squared with the structure of the Voting Rights Act, and delegated to distant DOJ attorneys a limited task: stopping the institution of new electoral arrangements that undermined the 1965 VRA. *Beer v. United States*, 425 U.S. 130, 141 (1976).

But Section 2 as rewritten guaranteed electoral equality in some absolute sense—undefined and indefinable. The obvious inquiry, one of proportionality, rests on profound misunderstandings about the "natural" distribution of various groups across the sociopolitical landscape. Racist exclusion, not statistical imbalance, should instead have been the concern.

2. Moving in the Wrong Direction

The VRA thus moved in an unanticipated direction over time—a change that had both benefits and costs. Its original vision was one all decent Americans share: equality of access to the political process, with blacks free to form political coalitions and choose candidates in the same manner as everyone else. But in certain places, it soon became clear, equality could not be achieved simply by giving blacks the vote. Ballot access was insufficient after centuries of slavery, another century of segregation, ongoing racism, and persistent resistance to black political power. More aggressive measures were needed.

Consequently, blacks came to be treated as politically different; entitled to a unique political privilege. The VRA was interpreted (and later amended) to mandate the drawing of legislative districts effectively reserved for African-American candidates. The power of federal authorities to force jurisdictions to adopt "racially fair" maps conflicted starkly with the Constitution's federalism guarantees, while the entitlement of designated racial groups to legislative seats was similarly discordant with traditional notions of democratic competition.

A century of Fifteenth Amendment violations, however, demanded what might be called "federal wartime powers." As on other occasions when wartime powers were invoked, the consequence was a serious distortion of constitutional order. Abigail Thernstrom, *Race-Conscious Districting: Needed and Costly*, THE VOLOKH CONSPIRACY (Aug. 18, 2009, 3:16 AM), http://volokh.com/2009/08/18/race-conscious-districting-needed-and-costly. Such a temporary distortion was justified in 1965, but it is not today.

The history of whites-only legislatures in the South made the presence of blacks both symbolically and substantively important. Racially integrated governments work to change racial attitudes. Most southern whites had little or no experience working with blacks as equals, so their views rapidly changed when blacks became colleagues.

Most Americans reject policies that distribute benefits and burdens on the basis of race or ethnicity. While it's relatively easy to take an uncompromising stance against such classifications in, say, higher education, it's harder to do so when the issue is districting designed to increase black office-holding.

Context matters. The University of Michigan's racial preferences, for example, were not dismantling a dual system. The contrast with the realm of politics is marked. There are no objective qualifications for political office—the equivalent of a college or professional degree, a minimum SAT score or grade-point average, or relevant work experience. And race-based districts also work precisely as intended, electing blacks and Hispanics to legislative seats. Such descriptive representation has demonstrably had an importance in Texas far greater than increasing the number of black and Hispanic students at UT-Austin.

Even if race-conscious maps were once temporarily justified to overcome systemic racism, however, that experience does not in turn justify *today's* racially gerrymandered districts. Serious costs have accompanied race-driven districting of the brand Texas alleges here—costs that have increased as racism has waned. Nearly 20 years ago, this Court described race-driven maps as "an effort to 'segregate . . . voters' on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (O'Connor, J.) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)). Such maps thus threaten "to stigmatize individuals by reason of their membership in a racial group." *Id.* at 631.

Racially gerrymandered districts keep "RACE, RACE, RACE," at the forefront of our minds, voting rights scholars T. Alexander Aleinikoff and Samual Issarcharoff wrote in *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno, 92 MICH. L. REV. 588, 610 (1993). Such racial sorting creates advantaged and disadvantaged groups; some that are privileged and some that are subordinate. The majority-minority districts which the DOJ demanded

have become safe for minority candidates but have also turned white voters into what these scholars call "filler people." *Id.* at 601. Whites are irrelevant to the outcome of elections in racially drawn districts except in black-on-black contests.

In short, America has experienced an amazing transformation since 1965. The costs of race-conscious districting now far outweigh their benefits—and they represent an obstacle to political equality. Black political progress would likely be greater if race-conscious districting were viewed as a temporary remedy for unmistakably racist electoral practices (the lesser of various evils) rather than a tool for "racially proportionate" representation (which cannot be constitutionally justified).

3. The Justice Department's Complicity in Perverting Section 5

Regardless of Congress's intent, jurisdictions seeking Section 5 preclearance quickly began filing most requests with the Justice Department rather than the D.C. district court. DOJ was expected to function as a surrogate court, using legal standards from court opinions in a process akin to administrative decisionmaking. The reality has been quite different, as *Miller v. Johnson*, 515 U.S. 900, demonstrates.

Miller tells the remarkable story of a lawless Republican DOJ that forced Georgia to accept a districting plan drawn by the ACLU in its capacity as advocate for black state legislators. The ACLU's "max-black" plan served GOP interests by "bleaching" districts of black (and presumably Democratic) voters.

Georgia's redistricting committees increased the number of majority black congressional districts from

one to two—even though the state had no obligation give minorities more "safe" districts. After all, the point of preclearance was to prevent states from depriving blacks of the gains that basic enfranchisement promised, not to ensure a "fair" number of seats. *Beer*, 425 U.S. at 140. Georgia plainly met the law's demands, but DOJ still rejected its maps, informing the state that it had not adequately explained its failure to create a third majority-minority district. This "third district," however, would have connected neighborhoods in metropolitan Atlanta to black residents on the coast, 260 miles away and "worlds apart in culture." *Miller v. Johnson*, 515 U.S. at 908. "In short," this Court continued, "the social, political and economic makeup of the Eleventh District [told] a tale of disparity, not community." *Id.*

The preclearance process was not supposed to work as it did in Georgia and countless other jurisdictions, large and small, during the Reagan-Bush years. By 1991, when the Justice Department reviewed Georgia's plan, the vision of DOJ as a more "accessible" court had completely broken down. The Civil Rights Division's Voting Rights Section was operating as "a law office for minority plaintiffs, working as partners with civil rights advocacy groups." Abigail Thernstrom, *DOJ: A Law Office Working for Minority Plaintiffs*, THE VOLOKH CONSPIRACY (Aug. 19, 2009, 3:16 AM), http://volokh.com/2009/08/19/doj-a-law-office-working-for-minority-plaintiffs.

As UCLA law professor Daniel Lowenstein wrote,

> Much is at stake for politicians and the interests they represent in a districting plan, and enacting a plan is typically a difficult and contentious process. Once they strike a deal, they

> want it to stay struck, and therefore they tend to be risk-averse with respect to possible legal vulnerabilities in a plan.

Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate Racial Gerrymandering Cases*, 50 STAN. L. REV. 779, 794 (1998).

A risk-averse plan was one that accepted racial quotas, which DOJ believed in as a matter of principle throughout the 1980s and 1990s: district segregation in just the right numbers to ensure the election of blacks roughly in proportion to their population. Appellants may have thought—rightly or wrongly—that this commitment to proportionality had returned under the current administration, which is probably why they pursued preclearance in the D.C. court.

4. Congress Exacerbates the Mire

In 2006, Congress nearly unanimously renewed the VRA, including Section 5, for another 25 years (Section 2 was made permanent in 1982). It had been persuaded that at least until 2031 minority voters in covered jurisdictions (according to a formula last updated in 1975) would remain unable to participate in political life without electoral set-asides—and that those jurisdictions could not be trusted to set election rules without federal oversight. Such pessimism is not benign; it distorts public discourse and the formulation of policies involving race.

The VRA is disconnected from the reality of modern American life. By every measure, U.S. politics has been transformed since the 1960s. Blacks hold office at all levels of government—not least the presidency—and have reached the pinnacles of every field of private endeavor. Yet a sustained campaign by

civil rights groups persuaded Congress that race relations remain frozen in the past and that America is still plagued by persistent disfranchisement. Activists were determined to garner such overwhelming support for renewal that nobody would dare consider whether Section 5 was still appropriate in the 21st century. As this case shows, they succeeded.

Congress thus ratified the conventional wisdom in the civil rights community and the media. "Discrimination [in voting] today is more subtle than the visible methods used in 1965. However, the effects and results are the same," the House Judiciary Committee reported. H.R. Rep. No. 109-478, at 6 (2006). "Vestiges of discrimination continue to exist . . . [preventing] minority voters from fully participating in the electoral process," the amended statute itself read. Pub. L. No. 109-246 § 2(b)(1)(2) (2006).

No evidence supported such an extraordinary claim. The skepticism of those who cannot forget Jim Crow's brutality is understandable, but the South they remember is gone (and the discrimination that existed there never did in Alaska, Arizona, Manhattan, etc.). Today, southern states have some of the highest black voter-registration rates in the nation; over 900 blacks hold public office in Mississippi alone. Abigail Thernstrom, VOTING RIGHTS—AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS 11 (2009). Massive disfranchisement is ancient history, as unlikely to return as segregated water fountains. America is no longer a land where whites hold the levers of power and minority representation depends on extraordinary federal intervention, consistent with the Constitution only as an emergency measure.

By the 2008 presidential election, a stunning 69.7 percent of the black population was registered to vote. Thom File & Sarah Crissey, U.S. CENSUS BUREAU POPULATION REPORTS: VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2008 4 (2010) *available at* http://www.census.gov/prod/2010pubs/p20-562.pdf. Black turnout rates, as well, have been impressive. *Id.* By 2008, there were 41 members of the Congressional Black Caucus; almost 600 African-Americans held seats in state legislatures, and another 8,800 were mayors, sheriffs, school board members, and the like. Forty-seven percent of these black public officials lived in the seven Section 5 states, even though those states contained only 30 percent of the nation's black population. Thernstrom, VOTING RIGHTS—AND WRONGS 203. The bottom line is indisputable: *Section 5 states elect black candidates at higher rates than the rest of the country*.

"Voting rights advocates" argue that elections remain racially polarized based on the questionable premise that whites and blacks prefer different candidates in the abstract. If this were true, however, racial polarization would exist wherever black candidates run campaigns unlikely to attract white majorities. By that definition, all districts where whites are more conservative than blacks are racially polarized.

Without the threat of federal interference, would southern state legislatures feel free to engage in disfranchising mischief? It seems wildly improbable, even in the Deep South. Indeed, the most recent VRA remedial order in Mississippi involved the black Democratic Party chairman of Noxubee County conspiring to discriminate against white voters. *See*, *e.g.*, *Appeals Court Upholds Noxubee Voting Rights*

Ruling, PICAYUNE ITEM, (Mar. 3, 2009), http://picayuneitem.com/statenews/x2079285859/Appeals-court-upholds-Noxubee-voting-rights-ruling.

In the same vein, a 2008 Clarksdale, Mississippi, newspaper editorial noted, "[t]here's probably less chance today of election discrimination against minorities occurring in Mississippi—given the high number of African-Americans in elected office, including as county election commissioners—than in many parts of the country not covered by the Voting Rights Act." (As quoted in Abigail Thernstrom, *A Period Piece*, THE VOLOKH CONSPIRACY (Aug. 20, 2009, 3:15 AM), http://volokh.com/2009/08/20/a-period-piece.) Yet, Section 5 still "presumes that minorities are powerless to protect their own election interests in places where they actually have the most clout." *Id.*

Racial progress has rapidly outpaced the law, and the voting rights challenges of greatest concern today—hanging chads, provisional ballots, electronic voting glitches, and Black Panther intimidation—bear no relation to those that plagued the South in 1965. Nevertheless, the VRA's most radical provisions survive, addressing yesterday's problems.

Seventeen years ago, one of the more liberal members of this Court described blacks and Hispanics as members of normal political interest groups. "Minority voters," Justice David Souter said, "are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics." *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994).

America has changed, the South has changed, and it's time for this Court to change constitutional understandings regarding the VRA as well.

5. Escaping the "Serbonian Bog"

At its inception, the VRA stood on firm constitutional ground; it was pure antidiscrimination legislation designed to enforce basic Fifteenth Amendment rights. A clear principle justified its original enactment: skin color should be irrelevant when states determine voting eligibility.

Unfortunately, that clarity has been lost. More than four decades later, the law has become what Judge Bruce Selya has described as a "Serbonian bog." *Uno v. Holyoke*, 72 F.3d 973, 977 (1995). The legal landscape looks solid but is really a quagmire into which "plaintiffs and defendants, pundits and policymakers, judges and justices," have sunk. *Id.*

Indeed, the VRA is arguably an obstacle to greater racial integration. Race-based districts have kept most black legislators from the political mainstream—precisely the opposite of what the law's framers intended. Majority-minority districts reward politicians who make the sort of racial appeals that are the staple of invidious identity politics. Cass Sunstein has identified this mechanism as being part of a larger phenomenon: People across the political spectrum end up with more extreme views than they would otherwise hold when they talk only to those who are similarly-minded. *See generally* Cass Sunstein, REPUBLIC.COM (2001).

Districts drawn to maximize the voting power of a racial group encourage voters to talk only to the similarly minded. Black elected officials are disinclined

to run and unprepared to win races in majority-white constituencies. In safe seats, meanwhile, politicians are under no pressure to run as centrists. Their ideology, along with a reluctance to risk campaigns in unfamiliar settings, perhaps explain why so few members of the Congressional Black Caucus have run for statewide office. As of 2006, all CBC members were more liberal than the average white Democrat, limiting their appeal to white voters, particularly in the South. Abigail Thernstrom, *Looking Forward*, THE VOLOKH CONSPIRACY (Aug. 21, 2009, 3:16 AM), http://volokh.com/2009/08/21/looking-forward.

Non-mainstream actors can play an important role in shaping legislation, of course, but when a historically excluded group subsequently chooses the political periphery, it risks perpetuating its outsider status. The marginalization that the VRA aims to eradicate instead becomes entrenched.

Not all black politicians have been trapped in safe minority districts, of course. Barack Obama, to use a glaring example, lost a congressional race in a majority-black district but went on to win a statewide Senate election. Journalist Gwen Ifill described a number of other such candidates whose political ingenuity transcended racial lines in her recent book, THE BREAKTHROUGH: POLITICS AND RACE IN THE AGE OF OBAMA (2009). For example, in 1999, Mike Coleman became the first black mayor of Columbus, Ohio, using the strategy: "Woo the white voters first . . . then come home to the base later." *Id.* at 227. Nevertheless, such candidates remain the exception. The VRA was meant to level the playing field but has been used to maximize safe black districts. The ugly implication is that black politicians need such help to win.

More broadly, the firm constitutional ground the VRA initially stood upon has disintegrated.

B. The VRA Conflicts with the Constitution[3]

Section 1 of the Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Section 2 provides: "The Congress shall have power to enforce this article by appropriate legislation." It's hard to fault either provision. Of course nobody should be kept from voting because of skin color and, given the historical context, the national legislature should have the authority to pass laws making that guarantee a reality.

The trouble is that, as we have seen, *supra*, the principal statutes that Congress passed in the Fifteenth Amendment's name go far beyond enforcing that guarantee and, perversely, encourage segregation through racial gerrymandering. The problem's genesis may be in the contrast between the prolixity of the VRA and brevity of the Fifteenth Amendment; compare the quotations in the previous paragraph with Section 2's 200-plus words and Section 5's 650.

What's going on here? One could understand how the constitutional provision "to provide and maintain a Navy" might necessitate an enacting statute of more than a few words, but why does a prohibition on race-based voter discrimination require all this verbiage? There is a different answer for each provision.

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[3] This section is largely based on the work of Roger Clegg, president of the Center for Equal Opportunity and former DOJ official, particularly *The Future of the Voting Rights Act after* Bartlett *and* NAMUDNO, 2008-2009 CATO SUP. CT. REV. 35 (2009).

With regard to Section 2, note that the original 1965 version was much shorter: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." The longer version was enacted in 1982 to override *Mobile v. Bolden*, 446 U.S. 55 (1980), which held that the original provision was coextensive with the Constitution, prohibiting only racially disparate *treatment*—but not voting practices and procedures a judge or bureaucrat determined had a racially disparate *result*. Put differently, Congress used its Fifteenth Amendment enforcement power to make illegal actions that aren't unconstitutional.

With regard to Section 5, there is a more sympathetic answer. Certain jurisdictions in the South had played a cat-and-mouse game with voting-rights enforcement, so Congress decided to require them to get permission from the DOJ or D.C. court—not the local federal court that the court below is here—before making any electoral changes. Fair enough, but it is problematic that Congress has again outlawed both actions with a racially disparate "purpose" and those with a racially disparate "effect"—so again that which the Constitution permits is illegal under a law supposedly passed to enforce the Constitution.

Whenever the government bans actions (public or private) that merely have racially disparate *impacts*, two bad outcomes are encouraged that would not be if the government only policed actual racial discriminationce. First, actions that are perfectly legitimate are abandoned. Second, if the action is valuable enough,

surreptitious racial quotas will be adopted so that the action no longer produces a racially disparate impact.

In staffing, for example, an employer who has required each of his employees to have a high school diploma, and who does not want to be sued for the racially disparate impact this criterion creates, has two choices: abandon the requirement (and hire employees he believes to be less productive) or keep the requirement but implement racial hiring quotas (thus, perversely, engaging in the very discrimination that the statute supposedly bans). This latter tension—between the anti-racism mandate of prohibiting disparate treatment and the race-conscious mandate of prohibiting disparate impact—was at the forefront of another civil rights case that this Court decided three terms ago. *See* Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008-2009 CATO SUP. CT. REV. 53 (2009). Justice Scalia's concurrence there noted that, indeed, the tension is so strong that disparate impact statutes may violate the Constitution's equal protection guarantee. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009).

We see the same phenomenon in the VRA context. Some legitimate voting practices—*e.g.*, making sure that voters can identify themselves as U.S. citizens—will be challenged if they have a racially disparate impact. More relevant to this case, jurisdictions will be pressed to use racial gerrymandering—racially segregated districting—to ensure proportionate election results and thus engage in the very discrimination that is at odds with the underlying law's ideals!

To emphasize: *The principal use of Sections 2 and 5 today is to coerce state and local jurisdictions into*

drawing districts with an eye on race, to ensure that minorities will elect representatives of the right color.

The VRA quite literally denies the equal protection of the laws by providing legal guarantees to some racial groups that it denies others. A minority group may be entitled to a racially gerrymandered district—or be protected against racial gerrymandering that favors others—while other groups are not so entitled and indeed may lack protection against districting that hurts them. *This is nothing if not treating people differently based on race.* Under the Constitution, no racial group should be assured "safe" districts or districts where it has "influence" unless all other groups are given the same guarantee—a guarantee that is impossible to give even if it were a good idea.

The racial balkinization Sections 2 and 5 foster is so pernicious that this Court has repeatedly warned about its unconstitutionality. *See, e.g.*, *NAMUDNO*, 129 S. Ct. 2504; *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Branch*, 538 U.S. 254; *Abrams*, 521 U.S. 74. The segregated districts that racial gerrymandering creates have led to uncompetitive elections, increased polarization (racial and ideological), and the insulation of Republican candidates and incumbents from minority voters—as well as the insulation of minority candidates and incumbents from white voters (contributing to these politicians' difficulties in running for statewide office). As Chief Justice Roberts wrote, it is, indeed, "a sordid business, this divvying us up by race." *LULAC v. Perry*, 548 U.S. 399, 511 (2006).

II. SECTIONS 2 AND 5 ARE AT A "BLOODY CROSSROADS" THAT CREATES BAD LAW

The VRA's outdated provisions no longer advance the Fifteenth Amendment's simple bar on race-based disenfranchisement. *See NAMUDNO*, 129 S. Ct. at 2516. Worse yet, racial equality is hindered by the complex judicial web surrounding VRA implementation. Courts face significant challenges in trying to avoid racial discrimination while administering the inherently race-conscious VRA—particularly in states like Texas that are subject not only to Section 2's demands but also Section 5's onerous requirements.

The tension between Sections 2 and 5 is perhaps the biggest problem with the VRA that this case brings to the fore. Regardless of one's political ideology or partisan affinities, one can sympathize with the dilemma the San Antonio court faced. That is, the court confronted a "bloody crossroads" at the intersection of Sections 2 and 5. While we know from *Reno v. Bossier Parish School Bd.*, 520 U.S. 471 (1997), that each section requires a distinct inquiry, the court below faced Section 2 claims while also having to draw maps that, because they came from a Section 5 jurisdiction, at least facially had to comply with Section 5. While neither DOJ nor the D.C. court is supposed to deny Section 5 preclearance on Section 2 grounds, *Georgia v. Ashcroft*, 539 U.S. at 478, the San Antonio court was effectively forced to wear both hats. Its apparent inability to do so—at least four members of this Court saw a need for review—is not surprising given the lack of applicable standards.

The San Antonio court is one of many that have labored to satisfy the VRA in the context of a cacophony of precedent—some that invokes only Section 5,

some that invokes only Section 2, and some that invokes both sections. What's more, certain elements of the Section 2 and Section 5 inquiries overlap, but this and other courts have consistently maintained that—at least in some measure—they are distinct. *See, e.g.*, *Bartlett v. Strickland,* 556 U.S. 1; *Georgia v. Ashcroft*, 539 U.S. 461; *Metts v. Murphy*, 347 F.3d 346 (1st Cir. 2003); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, (D.S.C., 2002).

In evaluating a map under Section 5, a court conducts a "retrogression" analysis to ensure the proposed map does not reduce the ability of minorities to elect their preferred candidates. 42 U.S.C. § 1973c (2006); *Beer v. United States*, 425 U.S. 130 (1976). There is no standardized, justiciable definition, however, of what constitutes the "ability to elect."

Ignoring for the moment the "ability to elect" ambiguity, if a court concludes that retrogression would result under a proposed map, "court-ordered reapportionment plans are subject in some respects to stricter standards than are plans developed by a state legislature. This stricter standard applies, however, only to remedies required by the nature and scope of the violation." *Upham*, 456 U.S. at 42 (internal citations omitted). Okay, but in what respects these standards are "stricter," what constitutes "remedies," and which remedies are "required" (and under what circumstances) is far from clear.

If that weren't cryptic enough, Congress's 2006 prohibition on plans promulgated with "any discriminatory purpose," regardless of effect, further muddies the waters. Without legislative guidance as to what constitutes a "discriminatory purpose," lower courts like the one here are left only to "hope that . . . the

Supreme Court will provide appropriate and immediate guidance." Interim House Order (Doc. 528) at 29 (Smith, J., dissenting), *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. Nov. 23, 2011).

But even if this Court's Section 5 guidance were easily applicable in a given case, that does not end the dispute. After a map has been precleared by the DOJ or approved by a court of relevant jurisdiction, Section 2 further complicates matters. Its language sounds similar to Section 5's—it invalidates laws that create inequality among races in electing their preferred representatives, 42 U.S.C. § 1973(b)—but don't be fooled, say the courts. This Court has "consistently understood" Section 2 to "combat different evils and, accordingly, to impose very different duties upon the States." *Georgia v. Ashcroft,* 539 U.S. at 477-78 (citing *Reno* v. *Bossier Parish,* 520 U.S. at 477). *See also Holder v. Hall*, 512 U.S. 874, 883 (1994) (noting that, while some parts of the § 2 analysis may overlap with the § 5 inquiry, the two sections "differ in structure, purpose, and application.") The distinction *Bossier Parish* draws, however, is merely that Section 5 "by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan." *Id.* at 478. Is that a meaningful difference?

Indeed, even if it is relatively clear that courts intend the analysis under the two sections to be different; how those analyses should differ remains ambiguous. "In contrast to Section 5's retrogression standard, the 'essence' of a Section 2 vote dilution claim is that 'a certain electoral law, practice, or structure…cause[s] an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.'" *Georgia v. Ashcroft*, 539 U.S.

at 478 (citing *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)). This Section 2 process seems hardly different, however, from the very "retrogression" standard it distinguishes—a judicial assurance that a map "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (2006).

The result is untenable: Some states and counties are subject to Section 5's prolonged preclearance process—requiring them to maintain certain minority-majority districts under complex standards—while there has not yet been any judicial, legislative, or otherwise meaningful articulation of any *substantive* difference between that selectively applied Section 5 analysis and the Section 2 review all states must satisfy. Further, Section 5 is no longer justified by "the proven existence of intentional discrimination so extensive that elimination of it through case-by-case enforcement would be impossible." *NAMUDNO*, 129 S. Ct. at 2524 (Thomas, J., dissenting).

This confusing precedent leaves little hope for the evenhanded administration of justice across the nation—and the turmoil is needless. Indeed, Sections 2 and 5 stem from the same constitutional provision, the Fifteenth Amendment. Section 2 meant to ensure that the Amendment was enforced nationwide, while Section 5 kept a closer eye on states that were most apt to violate it in the 1960s. But the contradictory precedent that has emerged creates a near-impossible task for courts administering the VRA. The lack of clarity regarding the interplay of Sections 2 and 5 also means that constitutionally permitted districting is prohibited (in some states) by a statute passed to enforce the same constitutional guarantees.

CONCLUSION

The Voting Rights Act has served its purpose but is now outmoded and unworkable. Section 2 requires race-based districting, even as Section 5, along with the Fourteenth and Fifteenth Amendments, seem to prohibit it. For its part, Section 5 arbitrarily prevents common national redistricting standards.

Moreover, these tensions cannot but produce chaotic proceedings like those here, which seem to be replicated every redistricting cycle. This state of affairs only serves to frustrate state legislatures, the judicial branch, and the voting public.

Accordingly, *amicus* respectfully suggests that the Court schedule this case for reargument on the serious issues raised regarding the constitutional viability of the VRA as presently conceived. At the very least, any remand should provide guidance beyond even Appellants' detailed fallback position. Such instructions should specify how states can simultaneously satisfy Section 2, Section 5, and the Constitution, and the standards courts are to use when evaluating such attempts or drawing maps themselves.

Respectfully submitted,

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