No. 12-96

In the

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
Attorney General, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AND PROJECT 21 IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress's decision in 2006 to reauthorize Section 5 of the Voting Rights Act exceeded its authority under the Fifteenth Amendment to the United States Constitution.

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INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), the Center for Equal Opportunity (CEO), and Project 21 respectfully submit this brief amicus curiae in support of Petitioner Shelby County.[1] For the reasons set forth in this brief, PLF, CEO, and Project 21 also support the Petitioner and the grant of certiorari in the companion case, *LaRoque v. Holder*, 679 F.3d 905 (D.C. Cir. 2012), *petition for cert. filed, sub nom., Nix v. Holder* (U.S. July 20, 2012) (No. 12-81).

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF participated as amicus curiae in this Court in numerous cases relevant to this case. PLF submits this brief because it believes its public policy perspective and litigation experience in the area of voting rights will provide an additional viewpoint with respect to the issues presented. PLF participated as amicus curiae in past Voting Rights Act cases such as *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Chisom v. Roemer*, 501

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991); and *City of Rome v. United States*, 446 U.S. 156 (1980).

CEO is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. CEO supports color blind public policies and seeks to block the expansion of racial preferences and to prevent their use in, for instance, employment, education, and voting. CEO has participated as amicus curiae in past Voting Rights Act cases, such as *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193; *Bartlett v. Strickland*, 556 U.S. 1; and *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). In addition, officials from CEO testified before Congress several times during the 2006 reauthorization of the Voting Rights Act.

Project 21, the National Leadership Network of Black Conservatives, is an initiative of The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil rights establishment. Project 21 participated as amicus curiae in *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, and *Bartlett v. Strickland*, 556 U.S. 1. Project 21 participants seek to make America a better place for African-Americans, and all Americans, to live and work.

Amici Curiae have a substantial interest in preventing the racial segregation and gerrymandering of voting districts that is the result of Section 5's intrusiveness into traditional state functions. Amici

will show that the 2006 enactment extending the preclearance requirements of Section 5 of the Voting Rights Act should be reviewed by this Court.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

It is undeniable that America has come a long way since 1964 when "the majority of blacks remained unable to cast a ballot in almost every southern state." Abigail Thernstrom, *Voting Rights and Wrongs: The Quest for Racially Fair Elections* 4 (2009). It is equally undeniable that the strides America has made in eradicating the rampant discrimination in southern voting is, in part, attributable to the historic Voting Rights Act of 1965. *Nw. Austin*, 557 U.S. at 201. Today, for many Americans, it is difficult to imagine that forty-seven years ago, state and local governments deliberately disenfranchised blacks in the Deep South, and that the federal government enacted "the most aggressive assertion of federal power over voting issues since the Civil War and Reconstruction"—the Voting Rights Act of 1965 (Act)—to end it. Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 How. L.J. 741, 745 (2006).

The Act, as originally enacted, allowed the Attorney General to deploy federal examiners to the South to take over state and local voter-registration functions. Adopted as an extreme temporary measure, Section 5 of the Act required every political subdivision targeted by the Act to obtain permission from the federal government before any change to election procedures, no matter how minor, could take place. Today, Section 5 continues to place only certain state and local governments under a form of federal

receivership, often without rhyme or reason. However, the "insidious and pervasive evil" of racism in the Deep South, which once justified Section 5's uniquely burdensome remedy, has greatly diminished. *See South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (describing the "insidious and pervasive evil" in parts of the South); *Nw. Austin*, 557 U.S. at 202 (noting that conditions have "unquestionably improved").

"Past success alone, however, is not adequate justification to retain [Section 5]." *Nw. Austin*, 557 U.S. at 202. In *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997), this Court explained that for Congress's remedial authority under the Fourteenth and Fifteenth Amendments there must be a congruence and proportionality between the injury to be prevented and the means adopted to that end. Section 5's "current burdens" must be adapted to its "current needs." *Nw. Austin*, 557 U.S. at 203. But Section 5, which was designed as a *temporary* measure to combat the extensive intentional voting discrimination pervasive throughout the Deep South, can no longer be seen as a congruent or proportional means to alleviate that now largely eradicated discrimination.

This Court should grant certiorari because the lower court "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Section 5 dramatically changes the way states and local jurisdictions relate to the federal government. It imposes real and substantial costs on "state sovereignty" thereby raising significant "federalism concerns." *Nw. Austin*, 557 U.S. at 203. Its coverage formula lacks rhyme or reason placing municipalities and states at odds with

local laws and state constitutions. Further, Section 5's focus on the "effects" of a particular voting change, raises potential conflicts with the Fourteenth Amendment's guarantee of equal protection. Section 5, which is not set to expire until 2031, should be reviewed by this Court.

ARGUMENT

I

THE COURT SHOULD GRANT CERTIORARI BECAUSE SECTION 5 IMPOSES SIGNIFICANT BURDENS ON FEDERALISM AND STATE SOVEREIGNTY THAT MUST BE JUSTIFIED BY CONTEMPORARY DISCRIMINATION

There is no doubt that the Voting Rights Act, and Section 5 in particular, represented a dramatic upheaval to the relationship between the federal government and the states. *Nw. Austin*, 557 U.S. at 202-03. Amici urge this Court to grant certiorari here and in the companion case, *LaRoque v. Holder*, 679 F.3d 905 (D.C. Cir. 2012), *petition for cert. filed, sub nom.*, *Nix v. Holder* (U.S. July 20, 2012) (No. 12-81), because the circumstances that led this Court to validate the Act may no longer be present. The immense costs to federalism imposed by Section 5 should undergo rigorous review by this Court. Failure to review Section 5 would make these dramatic changes *de facto* permanent.

A. Conditions in the South No Longer Justify Blanket Section 5 Coverage

Today, political and social conditions are far different from those of forty years ago when certain state legislatures and county officials did whatever was necessary to ensure the continued disenfranchisement of black voters. Government action approaching such blatantly racist conduct could not even exist today given this country's growing shift to a color-blind society that just recently saw the election of our nation's first black President, the increasing intolerance for racism among most Americans, and the ever present scrutiny of news media. *See* Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now, a Murky Mess*, 5 Geo. J.L. & Pub. Pol'y 41, 74 (2007) (describing decline of white racism).

Section 5 is a federally intrusive law that injects the federal government directly into the policy-making process at the state and local levels. In extending Section 5, Congress simply assumed that covered jurisdictions remain mired in a discriminatory past. The measures provided by Section 5 were necessary in 1965, "because case-by-case adjudication of voting rights lawsuits proved incapable of reining in crafty Dixiecrat legislatures determined to deprive African Americans of their right to vote, regardless of what a federal court might order." Samuel Issacharoff, *et al.*, *The Law of Democracy: Legal Structure of the Political Process* 546-47 (2d ed. 2002); *see* H.R. Rep. No. 89-439, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2440-41 (describing repeated delays in the judicial process).

Originally, Section 5's coverage was limited mainly to jurisdictions of the Deep South. The experience federal officials gained from enforcing the

early voting rights statutes prior to 1965 allowed the framers of the Act to precisely identify which states and counties continuously and deliberately committed Fifteenth Amendment violations. In the context of this "unremitting and ingenious defiance of the Constitution," it was possible to infer that any change in voting procedures that occurred in certain southern jurisdictions was for a discriminatory purpose. *See Katzenbach*, 383 U.S. at 309 (describing the "insidious and pervasive evil" in parts of the South). Those jurisdictions were all of Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and most counties in North Carolina. Hearings on H.R. 4249, Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 1st Sess. 92-93 (1969). Armed with this knowledge, the framers of the Act carefully crafted a triggering formula to make Section 5 apply to those states and jurisdictions. Thernstrom, *Section 5*, *supra*, at 46, 49.

As a result, Section 5 of the Act "remains alone in American history in its intrusiveness on values of federalism and the unique and complicated procedures it requires of states and localities that want to change their laws." Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, 49 How. L.J. 717, 718 (2006).

Today, however, the unconscionable and deliberate vote suppression tactics that were implemented by governments in the Deep South in 1965, and which were the sole justification for the temporary intrusiveness of Section 5, have been eradicated. The Jim Crow inspired barriers to voting, such as intentionally discriminatory literacy tests and poll taxes, are no longer in use, and the numbers of

minority officeholders are at historically high levels, as are levels of minority electoral participation. Persily, *supra*, 49 How. L.J. at 719. Almost thirty years ago, there were few black elected officials; the Democratic Party was the only political party in much of the South; voting was extremely polarized along racial lines; and the major voting issues of the day concerned multimember and at-large election structures that hindered black political representation. Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 Yale L.J. Pocket Part 148 (2007). Today there is robust two-party competition in the South; a significant number of black officials serve at all levels in states with large minority populations, with black elected state legislators making up 31 to 45% of all Democrat state legislators in the Deep South states of Alabama, Florida, Georgia, Louisiana, Mississippi, and South Carolina; multiethnic jurisdictions abound, rather than the old biracial districts of the South thirty years ago; and there has been a decline in polarized racial voting. *Id.* at 149.

Section 5's intrusiveness deprives "local jurisdictions a customary range of political decisions—including districting, terms of office, and electoral systems—that were ordinarily subject to what Justice Souter would term the pulling and hauling of everyday politics." Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 Colum. L. Rev. 1710, 1711 (2004) (citing *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)). In extending Section 5 without altering its coverage of states in the Deep South, Congress failed to address difficult policy issues created by the changed social landscape, and locked Section 5 in place until the year 2031 in the hopes those issues will go away. Pildes, *supra*, 117 Yale L.J.

Pocket Part at 148. Congress made no concessions to the post 1982 *City of Boerne* doctrines, nor to the social, political, and institutional changes since 1982. *Id.* at 153. It is true that Congress held hearings prior to the 2006 reauthorization, but strangely those hearings had no effect on the content of the law. *Id.* at 151.

B. Section 5's Coverage Formula Places Great Strain on States and Municipalities and Raises Significant Tenth Amendment Concerns

The 2006 reauthorization of Section 5 fails to reflect *any* of the changes that have occurred in the South or the other scattered jurisdictions that are subject to Section 5's coverage formula. Pildes, *supra*, 117 Yale L.J. Pocket Part at 149-50. As a result, Section 5's coverage has become even more overinclusive and underinclusive since its last reauthorization in 1982. Persily, *supra*, 49 How. L.J. at 723. "Those jurisdictions that were selected for coverage based upon voting statistics from 1975 or earlier are no longer the worst or most notorious offenders of minority voting rights. *Id.* at 723-24 (citing The National Commission on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work 1982-2005* (Feb. 2006)).[2] Thus, subjecting these jurisdictions to the continued coverage of Section 5 cannot logically be supported. *See id.* at 724 (discussing how renewal of Section 5's old coverage would leave the Act "incongruent" and "disproportionate"). For instance, Section 5 covers

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[2] *Available at* http://www.lawyerscommittee.org/admin/voting_rights/documents/files/0023.pdf (last visited Aug. 21, 2012).

counties in New Hampshire and Michigan which have experienced few claims of discrimination, but not the counties which experienced recent well-known voting problems in Ohio and Florida. *Id.* at 723; *see also* U.S. Dep't of Justice, Civil Rights Div., Voting Section Home Page, *Section 5 Covered Jurisdictions*.[3]

This outdated coverage scheme has real consequences to the jurisdictions that are forced to live under Section 5's heavy hand. In *Lopez v. Monterey County*, 519 U.S. 9, 12-14 (1996), changes to statewide California law led Monterey County, a covered county, to reorganize its court system. The resultant voting changes were thus a product of statewide law meant to make the judicial system more efficient and practical. Even though California is not a covered jurisdiction, Monterey County's actions—done in accordance with state law—led to a lawsuit alleging that Monterey County failed to seek preclearance. *Id.* at 15. When the case returned to this Court a second time, the Court held that noncovered states must preclear any statewide voting change where it will have an effect in a covered county. *Lopez v. Monterey County*, 525 U.S. 266, 269 (1999). Thus, California cannot enact any statewide voting change without first getting prior consent from the federal government, even though California is *not covered* and has no history of discrimination that justifies Section 5 coverage.

The result of the *Monterey County* cases is all the more absurd when one considers the primary reason underlying Monterey County's inclusion as a covered jurisdiction. Monterey County became subject to

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[3] *Available at* http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Aug. 21, 2012).

Section 5 coverage in 1970 after the Census Bureau determined that fewer than 50% of the voting age residents in the county had voted in the November, 1968, presidential election. *See* 42 U.S.C. § 1973b(b); 35 C.F.R. Part 51 (Appendix); 35 Fed. Reg. 12354 (July 24, 1980); 36 Fed. Reg. 5809 (Mar. 27, 1971). In 1968, Monterey County had within its borders a large and active military base, Fort Ord Army Base, most of whose residents would not be expected to vote within Monterey County. *See Carrington v. Rash*, 380 U.S. 89, 91 n.3 (1965). Monterey County also housed the Naval Post-Graduate School. Moreover, Soledad State Prison was and is located in Monterey County. Under California law, the thousands of inmates could not vote. Cal. Const. art. II, § 4. The combined populations of the military outposts and the prison accounted for almost one-sixth of the County's total population. Appellee State's Brief on the Merits in *Lopez v. Monterey County*, 519 U.S. 9 (1996) (No. 95-1201), at 1-2. With a large proportion of this population not voting, the turnout for the 1968 elections fell below 50%, thus triggering the coverage provisions of the Voting Rights Act. Rampant discrimination is noticeably absent from the reasons Monterey County is included as a covered jurisdiction.

California, a sovereign state, should be able to determine the qualifications of its own officers and the structure of its own government, yet Section 5 prevents that. California should be able to impose state restrictions on subordinate political entities in furtherance of its decisions regarding the best qualifications and structure, but again, Section 5 prevents that. The federal government has never found that California's state election laws discriminate against minorities, even when those laws are directed

toward particular counties. No county, a mere political subdivision of the state, should be able to declare itself exempt from these nondiscriminatory provisions. Given the fundamental principles of federalism, micromanagement by the federal government in the absence of discriminatory conduct by the state raises significant Tenth Amendment state sovereignty questions.

Prior to 2006 reauthorization, legal scholars warned that if Congress left Section 5 unchanged, it would become increasingly difficult to account for the differences between jurisdictions covered and not covered in terms of addressing new specific areas of systematic minority voting-rights problems. Pildes, *supra*, 49 How. L.J. at 754; *see* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 183 n.32 (2007) (describing testimony of Professors Richard Hasen, Samuel Issacharoff, Nathaniel Persily, and Richard Pildes in the Senate hearings prior to reauthorization). Congress's failure to change Section 5's coverage area thus raises serious questions about Section 5's constitutionality. The reauthorization of Section 5's invasive scheme on the same jurisdictions for another 25 years is an act of political abdication, not responsibility. Pildes, *supra*, 117 Yale L.J. Pocket Part at 148. As this Court noted, "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." *Nw. Austin*, 557 U.S. at 203.

The Section 5 burden placed on states and jurisdictions severely strains the bounds of federalism by requiring sovereign states to amend their own laws

and constitutions to accommodate the federal government's view of the preferred method of conducting elections. While the intrusiveness of Section 5 is suspect as an initial matter, it is significantly more so when the states and jurisdictions subjected to its burdens cannot be reconciled by contemporary voting or discrimination statistics. Review is required to ensure that the constitutional guarantee of dual sovereignty is only infringed where necessary to enforce the Fifteenth Amendment.

II

THE COURT SHOULD GRANT CERTIORARI BECAUSE THE "EFFECTS TEST" OF SECTION 5 RAISES SERIOUS EQUAL PROTECTION CONCERNS THAT SHOULD BE ADDRESSED BY THIS COURT

In the court below, Judge Williams recognized "the troubling tension" between Section 5's "encouragement of racial gerrymandering and the ideals embodied in the [Constitution]." *Shelby County, Alabama v. Holder*, 679 F.3d 848, 902-03 (D.C. Cir. 2012) (Williams, J., dissenting). This "tension" is well-known to this Court. "[C]onsiderations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5." *Nw. Austin*, 557 U.S. at 203 (citation omitted). Section 5 is currently used as sword by the "*minority group's majority*"—ignoring the "minority group's *own minority*"—to gerrymander voting districts according to racial stereotypes. *Shelby County*, 679 F.3d at 903 (Williams, J., dissenting). There is little doubt that the "principal use of . . . Section[] 5 . . . is to coerce state and local jurisdictions into drawing districts with an

eye on race." Roger Clegg, *The Future of the Voting Rights Act after* Bartlett *and* NAMUDNO, 2008-09 Cato Sup. Ct. Rev. 35, 40 (2009) (emphasis omitted).

Section 5's primary use to create race-based districts[4] brings it into direct conflict with the Equal Protection Clause. The Equal Protection Clause mandates that, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Decisions of this Court have made clear that distinctions between persons based solely upon their ancestry "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). The core purpose of the Equal Protection Clause is to eliminate governmentally sanctioned racial distinctions. *City of Richmond v. J. A. Croson* Co., 488 U.S. 469, 495 (1989). Where the government proposes to ensure participation of "some specified percentage of a particular group merely because of its race," such a preferential purpose must be rejected as facially invalid. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (plurality opinion). Accordingly, all racial classifications by government are "inherently suspect," *Adarand*, 515 U.S. at 223 (citation omitted), and "presumptively invalid." *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993). "A racial

[4] The abuse of the effects test—using it not to combat true disparate treatment, but to advance a more partisan agenda—is starkly presented in the companion case. *See* Petition for Writ of Certiorari, *LaRoque v. Holder*, 679 F.3d 905 (D.C. Cir. 2012), *petition for cert. filed, sub nom., Nix v. Holder* (U.S. July 20, 2012) (No. 12-81), at 6-16. These facts help make *Nix* a good candidate for review by this Court.

classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

"[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 227. Before resorting to a race-conscious measure, the government must "identify [the] discrimination [to be remedied], public or private, with some specificity," and must have a "strong basis in evidence" upon which to "conclu[de] that remedial action [is] necessary." *Croson*, 488 U.S. at 504, 500 (citation omitted).

This Court has long held that the Fourteenth Amendment bans only disparate treatment—*i.e.* intentional discrimination—on the basis of race, not disparate impact. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (citation omitted) ("official action will not be held unconstitutional solely because it results in a racially disproportionate impact."); *Washington v. Davis*, 426 U.S. 229, 238-46 (1976) (finding no violation solely based on racially disparate impact). Similarly, this Court has also held that the Fifteenth Amendment only reaches intentional discrimination. *Rodgers v. Lodge*, 458 U.S. 613, 617 (1982); *City of Mobile, Alabama v. Bolden*, 446 U.S. 55, 62-65 (1980) (plurality op.) (citation omitted) ("[The Fifteenth] Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote 'on

account of race, color, or previous condition of servitude.'").

While both the Fourteenth and Fifteenth Amendments only reach intentional discrimination on the basis of race, Section 5 specifically targets racially disparate impacts. Under Section 5, a voting change will be precleared only where it "does not have the purpose and will not have the *effect* of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a) (emphasis added). Indeed, this Court recognized that Section 5 "goes beyond the prohibition of the Fifteenth Amendment." *Nw. Austin*, 557 U.S. at 202. Because disparate impact alone cannot justify a government's race-based action, it is this effects test that has caused Section 5 to run up against the Fourteenth Amendment's guarantee of equal protection. Section 5 requires the federal government to engage in race-based decision making where a disparate impact is found, and without more, there is no compelling governmental interest to constitutionalize the governmental act.

Congress may use its enforcement authority under the Fourteenth Amendment to rectify a disparate impact only where there is a "congruence and proportionality" to the Fourteenth Amendment's guarantee of equal protection. *See City of Boerne*, 521 U.S. at 520. That is, there must be some showing that the ban on disparate impact is intimately tied to the goal of ending disparate treatment. There should be little doubt that this requirement also applies to the Fifteenth Amendment. "[T]he two were ratified within nineteen months of each other, have nearly identical enforcement clauses, were both prompted by a desire to protect the rights of just-freed slaves, and indeed

have both been used to ensure our citizens' voting rights." Roger Clegg & Linda Chavez, *An Analysis of the Reauthorized Sections 5 and 203 of the Voting Rights Act of 1965: Bad Policy and Unconstitutional*, 5 Geo. J.L. & Pub. Pol'y 561, 570 (2007).

The 2006 reauthorization of the Voting Rights Act, however, fails to tie the disparate impact enforcement mechanism—the effects test—to the Fifteenth Amendment's requirement that legislation be designed to remedy *intentional* discrimination. *Id.* at 568-69 (discussing the nine "Findings" of the House bill and the lack of any relationship to eliminating intentional discrimination). "In sum, the record reads like an after the fact justification rather than a serious effort to provide constitutional justification for the reauthorization." *Id.*

Prior to engaging in race-conscious action, equal protection law requires the government to identify intentional discrimination with specificity and precision, *Croson*, 488 U.S. at 504, and demands a strong basis in evidence that race-based remedial action is necessary. *Hunt*, 517 U.S. at 909. Absent a prior determination of specific necessity, supported by convincing evidence, the government will be unable to narrowly tailor the remedy, and a reviewing court will be unable to determine whether the race-based action is justified. *Croson*, 488 U.S. at 510. Section 5, by requiring race-based action untethered to remedying intentional discrimination, fails to abide this Court's equal protection requirements. "It is a sordid business, this divvying us up by race." *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part and dissenting in part). Review by this Court is needed to ensure

individuals' right to equal protection of the law does not go abridged for another 20 years.

CONCLUSION

For the foregoing reasons, Amici Curiae Pacific Legal Foundation, the Center for Equal Opportunity, and Project 21 respectfully request that this Court grant the writ of certiorari here and in the companion case *LaRoque v. Holder*, 679 F.3d 905 (D.C. Cir. 2012), *petition for cert. filed, sub nom., Nix v. Holder* (U.S. July 20, 2012) (No. 12-81).

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