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 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 AMERICAN CIVIL RIGHTS FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

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INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), Center for Equal Opportunity (CEO), and American Civil Rights Foundation (ACRF) respectfully submit this brief amicus curiae in support of Petitioner Shelby County.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating matters affecting the public interest. PLF has participated as amicus curiae in this Court in numerous cases relevant to this case. *See, e.g., 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 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991); *City of Rome v. United States*, 446 U.S. 156 (1980). 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.

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-

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[1] Pursuant to this Court's Rule 37.3, all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm 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 Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

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 hearings on the 2006 reauthorization of the Voting Rights Act.

ACRF is a nonprofit public benefit corporation, with members nationwide, created to monitor and enforce laws that preclude the use of race, sex, or ethnicity in public contracting, public education, or public employment. ACRF has participated as amicus curiae in this Court in *Fisher v. Univ. of Texas*, No. 11-345 (U.S. 2012). ACRF has a keen interest in ensuring that state and local governments are not forced into race-conscious decisions by the Voting Rights Act.

This case raises the important issue of whether the 2006 reauthorization of the Voting Rights Act is a constitutional exercise of congressional power under the Fourteenth and Fifteenth Amendments. Amici believe that their public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

America is not the same country it was in 1964 when "the majority of blacks remained unable to cast

a ballot in almost every southern state." Abigail Thernstrom, *Voting Rights—and Wrongs: The Elusive Quest for Racially Fair Elections* 4 (2009). Thanks in large part to the Voting Rights Act of 1965 (Act), the intentionally discriminatory barriers to black enfranchisement "have been [largely] eliminated." *Bartlett*, 556 U.S. at 10. Today, for most 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 Act—"the most aggressive assertion of federal power over voting issues since the Civil War and Reconstruction"—was necessary 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). 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.

"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 when Congress invokes its remedial authority under the Fourteenth and Fifteenth Amendments, there must be a congruence and proportionality between the injury to be prevented and the means adapted to that end. Here, that indicates that Section 5's "current burdens" must be adapted to its "current needs." *Nw. Austin*, 557 U.S. at 203. Section 5, 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 enforcing Fifteenth Amendment rights.

The reasons for this conclusion have been well documented and extensively briefed in this case. The deplorable conditions that once justified Section 5's extraordinary measures are no longer present in the South (or the United States generally). *See* Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 Yale L.J. Pocket Part 148, 148-49 (2007) (comparing conditions in the South before the Act to contemporary conditions). Section 5's coverage formula bears little resemblance to current discriminatory voting practices and is becoming both more underinclusive and more overinclusive each day. *See* Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, 49 How. L.J. 717, 723-24 (2006) (detailing the constitutional problems with Section 5's "outdated" coverage formula). Section 5 also fails to address contemporary claims of discrimination in voting. *See* Pildes, *supra*, at 751-52 (explaining how Section 5 fails to address "barriers today to African American suffrage").

When these glaring problems are coupled with the significant federalism costs that accompany Section 5, it is clear that Section 5 is no longer a congruent and proportional means to enforce Fifteenth Amendment rights. *See, e.g.*, *Nw. Austin*, 557 U.S. at 203 (explaining how Section 5 encroaches on federalism); *Georgia v. Ashcroft*, 539 U.S. 461, 491-92 (2003) (Kennedy, J., concurring) (explaining how Section 5 requirements conflict with other anti-discrimination measures); *Miller v. Johnson*, 515 U.S. 900, 926 (1995) (detailing Section 5's federalism costs). Accordingly, this Court should hold that Section 5 is beyond Congress's power to enforce the Fifteenth Amendment. *See* U.S. Const. amend. XV, § 2.

Moreover, Section 5 suffers additional constitutional infirmity under the equal protection guarantees of the Fifth and Fourteenth Amendments. *See* U.S. Const. amend. V; U.S. Const. amend. XIV, § 1. On its face, Section 5 requires covered jurisdictions to embark on a race-first inquiry to ensure their voting practices do not "have *the effect* of denying or abridging the right to vote on account of race." 42 U.S.C. § 1973c(a) (2006) (emphasis added). This "effects test," along with the "preferred candidate of choice" guidance in subsection (b), force covered jurisdictions to make voting decisions *because of* the resultant racial outcomes.[2] Thus, the effects test must be subjected to strict scrutiny, and is only constitutional if narrowly tailored to further a compelling government interest. *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995).

This Court has long questioned the legality of racial preference in voting. "[T]he Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." *Gray v. Sanders*, 372 U.S. 368, 380 (1963). Only two years after *Gray*, Congress enacted the Voting Rights Act to enforce the Fifteenth Amendment's right to vote regardless of an individual's race. The Act opposed the principle that districts must be represented by individuals of specific racial groups. *Cf. Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J.,

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[2] In the court below, Judge Williams argued that the effects test was itself an overt racial classification. *Shelby County, Alabama v. Holder*, 679 F.3d 848, 903 (D.C. Cir. 2012) (Williams, J., dissenting) ("But the implied 'they' of § 5 is not a polity in itself; nor is it an association freely created by free citizens. Quite the reverse: It is a group constructed artificially by the mandate of Congress, entirely on the lines of race or ethnicity.").

dissenting). The whole concern of the Act was to ensure nondiscriminatory access to the ballot. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 582-94 (1969) (Harlan J., dissenting). But when the Act has been used for discriminatory purposes, this Court has not hesitated to declare those measures unconstitutional. *See Miller*, 515 U.S. 927-28 ("It takes a shortsighted and unauthorized view of the Voting Rights Act to . . . demand the very racial stereotyping the Fourteenth Amendment forbids.").

For decades,[3] the effects test—not purposeful discrimination—has been the Department of Justice's (DOJ) primary, nearly exclusive, Section 5 enforcement mechanism. Further, in the few instances where DOJ finds a discriminatory purpose, it requires little direct evidence of intentional discrimination. Instead, DOJ simply *infers* a discriminatory intent when a covered jurisdiction fails to adopt a "max-black" plan. Put simply, enforcement of Section 5 has morphed from ending racially discriminatory voting practices to forcing specific racial outcomes.

The effects test classifies people on the basis of race and requires covered jurisdictions to do the same. Thus, the effects test must be subjected to strict scrutiny. Because the government uses the effects test to create racially "safe" districts—and not to secure Fifteenth Amendment rights—the effects test is not narrowly tailored to any compelling governmental interest. Accordingly, this Court should hold that the effects test violates the guarantee of equal protection

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[3] DOJ has been using disproportionate racial impact as a basis to deny preclearance for years. It was this Court's rejection of DOJ's approach in *Ashcroft*, 539 U.S. at 490-91, that prompted Congress to expand the effects test in 2006.

of the laws embodied in the Fifth and Fourteenth Amendments.

ARGUMENT

I

THE EFFECTS TEST VIOLATES EQUAL PROTECTION

The Fifteenth Amendment to the Constitution guarantees that "[t]he 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." Congress passed the Voting Rights Act of 1965 to enforce this Amendment. In order to combat southern state legislatures that were bent on intentionally discriminating on the basis of race, Section 5 of the Act requires covered jurisdictions to preclear any voting change with the federal government. Over time, the DOJ's enforcement of Section 5 began to focus solely on the racial impact of proposed voting changes, and not on discriminatory intent. This Court subsequently clarified that intent must be at the heart of all preclearance decisions. *Ashcroft*, 539 U.S. at 490-91. In response, Congress amended Section 5 so that a proposed voting change would be precleared only if it "*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(a) (2006) (emphasis added). Explicitly addressing the Court's *Ashcroft* opinion, Congress added a second—more racially explicit—effects test that mandates preclearance denial to any voting practice which "will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to

elect their preferred candidates of choice." 42 U.S.C. § 1973c(b) (2006).

Section 5 enforcement is designed—and effective—at ending the intentionally discriminatory practices so prevalent throughout the 1960s Deep South. It is not aimed at racially balancing modern voting districts. By placing racial group rights over individual rights, the effects test violates the equal protection rights of all voters and constituents of every race. *See Miller*, 515 U.S. at 911-12. Further, it necessarily denies equal protection rights to individuals of all races.

A. The Effects Test Contravenes the Individual Right to Equal Protection

The effects test focuses on a racial group's ability to vote as a bloc and elect the "candidate of [its] choice." 42 U.S.C. § 1973c(b) (2006). In the court below, Judge Williams recognized that Section 5's group-rights concept is at odds with the individual right to vote "embodied in the 15th Amendment." *Shelby County*, 679 F.3d at 902-03 (Williams, J., dissenting).

Like the Fifteenth Amendment right to vote, equal protection guarantees in the Fifth and Fourteenth Amendments also protect individuals, "not groups." *Adarand*, 515 U.S. at 227. The intent of equal protection is to ensure that all persons are treated as individuals, not "as simply components of a racial . . . class," because "[r]ace-based assignments embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the

Constitution." *Miller*, 515 U.S. at 911-12 (citation and quotation marks omitted). By focusing on the effects a proposed voting change will have on a "racial group," Section 5 contravenes an *individual's* right to equal protection.

Instead of reinforcing the individual right to vote irrespective of one's race, the effects test eschews individual rights in favor of a perceived group right to elect a racial group's "candidate of [its] choice." There is little doubt that this language—which has been included in Section 2 of the Voting Rights Act since 1982—is designed to facilitate racial bloc voting. *See Shelby County*, 679 F.3d at 903-04 (Williams, J., dissenting). By transforming the right to vote from an individual right into a racial-group right, individuals only count insofar as they embody their racial group identity.[4] The effects test "bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

Not only is the racial-group right enforced by the effects test contrary to the very concept of individual rights, but it "literally denies the equal protection of

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[4] Of course, these broad categories are unjustifiable, insofar as there is nothing intrinsic in these categories that assures a commonality of experience. *See* Peter Wood, *Diversity: The Invention of a Concept* 25 (2003) (demonstrating how contemporary racial group classifications, *i.e.*, "black," "Asian," "Hispanic," etc., fail to identify any common factor inherent to individuals within those groups).

the laws by providing legal guarantees to some racial groups that it denies to others." Roger Clegg, *The Future of the Voting Rights Act after Bartlett and NAMUDNO*, 2008-09 Cato Sup. Ct. Rev. 35, 40. It also denies equal protection to many individuals within a "benefitted" racial group by forcing them to adopt candidates that are not "of their choice." In the court below, Judge Williams asked "what happened to the minority group's *own minority*—those who dissent from the preferences of the minority's majority?" *Shelby County*, 679 F.3d at 902-03 (Williams, J., dissenting). The answer—according to the effects test—is that those individuals are not entitled to Section 5 protections.

Accordingly, any notion that Section 5 is still designed to protect the individual's right to vote irrespective of race is belied by the text of the effects test. The effects test elevates group rights over individual rights. It denies equal protection to individuals in nonpreferred racial groups. And it even denies equal protection to individual minority voters—those individuals who comprise the "minority group's own minority."

B. Section 5's Effects Test Fails Strict Scrutiny

Adarand reinforced the truth that the right to equal protection is held by the individual, and rejected the idea that a group-right to equal protection could trump that individual right. 515 U.S. at 227. From this principle, the Court held that any law that elevates racial group rights over an individual's right to equal protection must "be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed."

Id. (emphasis added). Section 5, which is race-conscious on its face and is used principally to encourage race-based actions, directly conflicts with the constitutional guarantee of equal protection. This Court should subject the effects test to strict scrutiny.

The core purpose of equal protection is to eliminate governmentally sanctioned racial distinctions. The need for strict scrutiny is evident. Courts must inquire into the justification for race-based measures to determine which "classifications are in fact motivated by illegitimate notions of racial inferiority or . . . *racial politics*." *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (emphasis added). Thus, insofar as the effects test embodies an explicit racial classification, *Shelby County*, 679 F.3d at 903 (Williams, J., dissenting), it is inherently suspect and presumptively invalid. *See Adarand*, 515 U.S. at 223; *Shaw v. Reno*, 509 U.S. at 643-44. To survive strict scrutiny review, it must be necessary to further a compelling government interest.

While securing Fifteenth Amendment rights to all Americans may certainly be a compelling interest, Congress "had no evidence on which it could base a conclusion that the . . . 'effects' test" was necessary to securing those 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, 571 (2007). Not only did Congress lack any evidence linking the necessity of the effects test to practices that denied Fifteenth Amendment rights, but the evidence that it did have pointed in the opposite direction. *See* Edward Blum & Lauren Campbell, American Enterprise Institute, *Assessment of Voting Rights*

Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act (May 17, 2006).[5] Because the effects test is counter productive to securing Fifteenth Amendment rights, it necessarily cannot be needed—or "narrowly tailored"—to secure those rights. On its face the effects test is a racial classification; it fails strict scrutiny review, and this Court should find it unconstitutional. *See Johnson v. California*, 543 U.S. 499, 505 (2005).

Even if this Court rejects Judge Williams's reasons for finding the effects test facially discriminatory, it takes little digging to uncover its discriminatory purpose. This Court has long held that both the Fourteenth and Fifteenth Amendments only ban disparate treatment—*i.e.*, intentional discrimination—on the basis of race, not disparate impact. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Rodgers v. Lodge*, 458 U.S. 613, 617 (1982); *City of Mobile, Alabama v. Bolden*, 446 U.S. 55, 62-65 (1980) (plurality op.) ("[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. It therefore "goes beyond the prohibition of the Fifteenth Amendment." *Nw. Austin*, 557 U.S. at 202.

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[5] *Available at* http://www.aei.org/files/2006/05/15/20060515_BlumCampbellreport.pdf (last visited Dec. 20, 2012).

However, because disparate impact alone cannot justify a government's race-based action, the effects test is constitutionally suspect. It requires the federal government to engage in race-based decisionmaking where a disparate impact is found, and without more, there is no compelling government interest to make it constitutional. In this respect, the effects test is identical to the disparate impact provisions of Title VII. It "not only permits but affirmatively *requires*" race-conscious decisionmaking where an otherwise benign voting change will have a disproportionate *effect*. *See Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring).

The federal government cannot discriminate on the basis of race, nor can it enact laws requiring covered jurisdictions to do so. *See id.* (Scalia, J., concurring). But by forcing covered jurisdictions to avoid all racially disproportionate *effects*—even in the absence of past discriminatory behavior—that is precisely what the effects test requires. Like Title VII's disparate impact provisions, the danger of the effects test is that it "place[s] a racial thumb on the scales," requiring covered governments "to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes." *Id.*; *see also* Kenneth L. Marcus, *The War between Disparate Impact and Equal Protection*, 2008-09 Cato Sup. Ct. Rev. 53, 61-70 (discussing the conflict between equal protection and disparate impact); Richard Primus, *The Future of Disparate Impact*, 108 Mich. L. Rev. 1341, 1344-45 (2010) (same). Insofar as equal protection is concerned, there is little practical difference between a civil rights law that mandates race-conscious

decisions in employment, and a civil rights law that mandates race-conscious decisions in voting.[6]

Where the government proposes to ensure participation of "some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected . . . as facially invalid." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978). There is little doubt that the effects test is designed to produce districts that are "safe" along racial lines. Further, as demonstrated below, there is no doubt that DOJ's Section 5 enforcement—done primarily through the effects test—is racially discriminatory in fact. Even if the test is not suspect on its face, in its application it forces covered jurisdictions to make decisions because of race and, therefore, must also be subjected to strict scrutiny review. *Vill. of Arlington Heights*, 429 U.S. at 264-65. For the same reasons outlined above, the effects test cannot meet this demanding standard.

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[b] One difference between Title VII's disparate impact and the Section 5 effects test is worth highlighting. In a disparate impact challenge, the defendant can avoid liability if it demonstrates that the challenged practice is job related for the position in question and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i). The effects test contains no similar rebuttal stage, rendering it even more constitutionally suspect. For example, in 2007 the state of Michigan decided to close one of its Secretary of State branch offices. Letter from Grace Chung Becker, Assistant Attorney General, to Brian DeBano (Dec. 26, 2007), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_122607.pdf (last visited Dec. 21, 2012). DOJ refused to preclear the change because it would have a disproportionate effect on minority voters. *Id.* at 2-3. DOJ was clear that any change with a "retrogressive effect" will not survive Section 5 review. *Id.*

II

SECTION 5 IS NO LONGER USED TO ENFORCE RIGHTS GUARANTEED BY THE FIFTEENTH AMENDMENT

The battle for true civil rights based on moral equality was fought and won many years ago. Like any fundamental human achievement, these rights cannot be taken for granted and must be safeguarded. However, some permutations of civil rights have become divorced from the moorings of moral equality:

> [C]ivil rights are not protected or enhanced by the growing practice of calling every issue raised by "spokesmen" for minority, female, elderly, or other groups, "civil rights" issues. The right to vote is a civil right. The right to win is not. Equal treatment does not mean equal results. Everything desirable is not a civil right.

Thomas Sowell, *Civil Rights: Rhetoric or Reality?* 109 (William Morrow & Co., N.Y., 1984) (Rhetoric or Reality). Today, political and social conditions are far different from those forty years ago when certain jurisdictions 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, 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). Today, every voting change cannot be presumed to have a

discriminatory purpose. Nevertheless, that is how Section 5 continues to operate.

A. DOJ Enforces Section 5 to Produce "Safe Districts" Through Constitutionally Suspect Racial Gerrymandering

Section 5's pre-clearance requirements were adopted to address the pervasive problem of black disenfranchisement by government officials through literacy tests and other cleverly crafted rules designed to exclude blacks from the polls. *See South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966). That is why Section 5's coverage was originally limited to jurisdictions in the Deep South. 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).

Section 5, when it was used for its intended purpose—to eliminate deliberate racial discrimination by stubborn Southern governments—was an unquestionable success. It specifically targeted and eradicated the overt discriminatory voting practices of the South. *See Nw. Austin*, 557 U.S. at 226-29 (Thomas, J., dissenting). However, in the past twelve years, only three DOJ enforcement actions even allege exclusion of minorities from the polls.[7] Instead, DOJ

[7] These three objections all involved voter ID laws. Of course, this is not to say that voter ID laws are illegal, only that the charge—that they are designed to deny minorities the right to vote—is akin to the type of problem Section 5 was designed to

(continued...)

employs the extraordinary federal powers of Section 5 to enforce racial and political gerrymandering. *See* Clegg, *supra*, at 40. Of the 67 Section 5 objections pursued since 2000, 39 have centered on redistricting efforts.[8] The minutia upon which these preclearance decisions turn indicates a larger concern with racial politics, and maintaining "safe districts," than with protecting Fifteenth Amendment rights. *Id.*

For example, in 2002 DOJ rejected a proposed redistricting plan in Virginia that lowered the black population in one district from 55.7% to 55.2%. Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to Darvin Satterwhite, County Attorney (July 9, 2002).[9] DOJ conceded that population changes had altered the

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[7] (...continued)
remedy. Indeed, this Court has already ruled that voter ID laws are constitutional. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008). This, in turn, raises two legitimate concerns: (1) To what extent should Section 5's discouragement of legitimate voting practices counsel against its constitutionality as a congruent and proportional means of enforcing Fifteenth Amendment rights; and (2) How can Section 5 be congruent and proportional to secure Fifteenth Amendment rights if an identical law is legal in one state and illegal in another? Thus, in addition to encouraging race-based decisionmaking, an effects test also inevitably discourages legitimate criteria whenever they happen to have a disproportionate racial effect. *See Clegg*, *supra*, at 40.

[8] *See generally* United States Department of Justice, Section 5 Objection Determinations, *available at* http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php (last visited Dec. 21, 2012). This webpage catalogs all the "Section 5 objections interposed, continued or withdrawn by the Attorney General since 1965" on a state-by-state basis. *Id.*

[9] *Available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_070902.pdf (last visited Dec. 21, 2012).

racial makeup of the area, *id.* at 2, but nonetheless declared that the county had a duty to manipulate the district to prevent even a minor decrease in black voting strength to maintain the ability of the black population in that area to "elect their candidate of choice." *Id.* at 2-3.

An Arizona redistricting plan met a similar fate when, due to population growth, it split one majority-Hispanic district into two majority-Hispanic districts. Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to Lisa T. Hauser and José de Jesús Rivera (May 20, 2002).[10] Looking at the plan, DOJ concluded that the elimination of one district with a Hispanic population of 65% in favor of two districts with Hispanic populations of 51.2% and 50.6%, violated Section 5 because Hispanic voting populations at those levels were deemed insufficient to "elect their candidate of choice." *Id.* at 3.

Even redistricting plans that do not reduce minority voter strength at all have been (and are) denied preclearance under DOJ's understanding of Section 5. In 2001, DOJ rejected a proposed redistricting plan in Charleston, not because it reduced black voter strength at present, but because hypothetical population growth within the proposed district might reduce black voter strength in the future. Letter from R. Alex Acosta, Assistant Attorney

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[10] *Available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_052002.pdf (last visited Dec. 21, 2012).

General, to Francis I. Cantwell (Oct. 12, 2001).[11] DOJ acknowledged that redistricting was necessary due to population changes, and also that the proposed plan maintained the requisite number of majority-minority districts. *Id.* at 2. However, because hypothetical population changes could result in an increased number of white voters in one of the "black" districts, the plan was deemed retrogressive. *Id.* at 2-3.

Instead of guaranteeing individuals the right to vote irrespective of race, Section 5's primary function today is to create districts defined by race. In addition to the illegal and immoral purpose of racial gerrymandering, the unintended side effects of such racial gerrymandering are abundant.[12]

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[11] *Available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_101201.pdf (last visited Dec. 21, 2012).

[12] Many scholars have written at length about the effects of race-based gerrymandering. *See generally* Clegg & Chavez, *supra* (citing, *inter alia*, Christopher M. Burke, *The Appearance of Equality: Racial Gerrymandering, Redistricting, and the Supreme Court* 32-33 (1999); Katharine Inglis Butler, *Racial Fairness and Traditional Districting Standards: Observations on the Impact of the Voting Rights Act on Geographic Representation*, 57 S.C. L. Rev. 749, 780-81 (2006)). *See also* Jim Sleeper, *Liberal Racism* 43-66 (1997); Sheryll D. Cashin, *Democracy, Race, and Multiculturalism in the Twenty-First Century: Will the Voting Rights Act Ever Be Obsolete?*, 22 Wash. U. J.L. & Pol'y 71, 90 (2006); Roger Clegg & Joshua Thompson, *Overturn unconstitutional Voting Rights Act*, Wash. Times, Nov. 14, 2012; Abigail Thernstrom, *Racial Gerrymandering*, National Review, Apr. 29, 2011, *available at* http://www.nationalreview.com/articles/265956/racial-gerrymandering-abigail-thernstrom (last visited Dec. 21, 2012).

By destroying any need for voters or candidates to build bridges between racial groups or to form voting coalitions, segregating political districts by race only deepens racial divisions. Black candidates are easily elected in safe black districts while white candidates are elected in safe white districts. Neither whites nor blacks have any incentive to seek support from the other's constituency. *Holder v. Hall*, 512 U.S. 874, 906-09 (1994) (Thomas, J., concurring).

> We are bent upon polarizing political subdivisions by race. The arrangement we construct makes it unnecessary, and probably unwise, for an elected official from a white majority district to be responsive at all to the wishes of black citizens; similarly, it is politically unwise for a black official from a black majority district to be responsive at all to white citizens.

United States v. Dallas Cnty. Comm'n, 850 F.2d 1433, 1444 (11th Cir. 1988) (Hill, J., concurring specially).

As this Court recognized in *Shaw*, 509 U.S. at 648, "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." Justice Douglas also bluntly made this point:

> When racial . . . lines are drawn by the State, the multiracial . . . communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate

> to race . . . rather than to political issues are generated; communities seek not the best representative but the best racial . . . partisan. Since that system is at war with the democratic ideal, it should find no footing here.
>
> "Separate but equal" and "separate but better off" have no more place in voting districts than they have in schools, parks, railroad terminals, or any other facility serving the public.

Wright, 376 U.S. at 67 (Douglas, J., dissenting).

A state-imposed racial gerrymander also assumes that, given a choice, black voters would not exercise broader influence over a number of competitive districts. One of the obvious (if indirect and unintended) effects of creating and maintaining safe black seats is to isolate the black community, as well as to diminish electoral competition. Where black voters are confined to a single constituency, they might well be certain of electing *one* black candidate, but the elected representative might also be the only one—or a member of a small, heavily outnumbered and consequently ineffective band. Meanwhile, the black electorate suffers a diminished capacity to influence white representatives who might have taken their concerns into account if they themselves had needed to rely on black votes. J. R. Pole, *The Pursuit of Equality in American History* 449-50 (2d ed. revised, University of California Press, Berkeley, 1993) (Pursuit of Equality); D. Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* 96 (Basic Books, Inc. N.Y., 1987) (proportional representation would "worsen racial tensions because it distorts the political process

in order to create targeted entities less likely to engage in the coalition building that is the hallmark of American politics.").

Given the polarizing nature of a racial gerrymander, one might inquire just what is the minority representative supposed to contribute? It is inappropriate to treat people simply as bearers of some imagined racial or ethnic perspective—to treat them, in other words, as categories. True diversity is not achieved by looking to "personal qualities crude enough to be obvious to sense perception." Terry Eastland & William Bennett, *Counting By Race: Equality from the Founding Fathers to* Bakke *and* Weber 152 (1979) (Counting By Race) (citing Benjamin Martin, "*The Parable of the Talents*," 256 *Harper's* 18, 21 (Jan. 1978)).

Racial gerrymanders prescribe disharmony among the races. It draws attention to racial differences and, though not intending to do so, exacerbates them in some minds. The failures of the Great Society amply demonstrate that drawing attention to race cannot draw us closer to the realization of a color-blind society. Racial gerrymandering simply is not necessary for achieving moral equality in the voting rights context. The Voting Rights Act is designed to provide individual minorities, who may choose to form coalitions on any basis they choose, a real chance and a real opportunity to participate in the electoral process. Racial gerrymandering distorts the abilities of minority candidates and political organizations and also denigrates the real and substantial achievements they have recorded during the past decades, as well as their expected real and substantial achievements in the future. *See* Counting By Race at 157. *Cf.* Rhetoric

or Reality at 49-50 (demonstrating historical trend of increasing black representation in professional, technical, and other high-level occupations both prior and subsequent to the Civil Rights Act of 1964). The Fifteenth Amendment does not countenance such legislation, and equal protection forbids it.

B. Section 5 Is Rarely Used to Eliminate Intentional Discrimination

It is no longer tenable to argue that Section 5 is needed to remedy widespread intentional discrimination by covered jurisdictions. By 2009, African-Americans occupied 628 seats in state legislatures nationwide. National Conference of State Legislatures, *Legislators & Legislative Staff Information: Number of African American Legislators.*[13] In some states, like Mississippi, Alabama, and Georgia, nearly one-fourth of all state legislative seats were occupied by African-Americans. *Id.* That number is comparable to the percentage of African-Americans in those states. In other states, such as Ohio, Illinois, Nevada, and California, there is a larger percentage of African-Americans in the state legislature than there is in the population of the state as a whole. *Id.* In 2009, there was not a single state with a population of African-Americans greater than 3% that failed to elect an African-American to its state legislature. *Id.*

Given these numbers, it is unsurprising that in the past twelve years, only thirteen redistricting cases have involved arguments concerning purposeful discrimination by a covered jurisdiction—and even that

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[13] *Available at* http://www.ncsl.org/legislatures-elections/legisdata/african-american-legislators-2009.aspx (last visited Dec. 21, 2012).

number is overinflated. During the redistricting process, outside groups often submit proposed plans that maximize their political prospects. Of the thirteen cases purporting to involve intentional discrimination in the past twelve years, at least five inferred discrimination simply because the jurisdiction failed to adopt a plan proposed by the NAACP or some other interest group.[14]

In 2002, for example, DOJ claimed that a Virginia county failed to show that its redistricting plan was not motivated by a discriminatory purpose, primarily because it did not adopt proposed alternative plans favored by the "black community." Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to William D. Sleeper (Apr. 29, 2002) at 3. DOJ claimed that the county's reasons for rejecting the proposed

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[14] Letter from Thomas E. Perez, Assistant Attorney General, to Everett T. Sanders (Apr. 30, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_043012_ms.pdf (last visited Dec. 21, 2012) (rejection of NAACP plan was indicative of intent to discriminate); letter from Thomas E. Perez, Assistant Attorney General, to Tommie S. Cardin (Oct. 4, 2011), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_100411.pdf (last visited Dec. 21, 2012) (rejection of plan and anecdotal interviews sufficient to show discrimination); letter from Ralph F. Boyd, Jr., Assistant Attorney General, to Charles T. Edens (June 27, 2002), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_062702.pdf (last visited Dec. 21, 2012) (rejection of proposed plan and 3-3-1 district); letter from Ralph F. Boyd, Jr., Assistant Attorney General, to C. Havird Jones (Sept. 3, 2002), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_090302.pdf (last visited Dec. 21, 2012) (failure to adopt plan shows "intent to retrogress"); letter from Ralph F. Boyd, Jr., Assistant Attorney General, to William D. Sleeper (Apr. 29, 2002), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_042902.pdf (last visited Dec. 21, 2012) (failure to adopt the proposed plan).

plans were "pre-textual," but DOJ gave no evidence or explanation to support its belief. That same year, DOJ announced that "the state's failure to fully account for not considering these alternatives implies an intent to retrogress." Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to C. Havird Jones (Sept. 3, 2002) at 2. Notably, DOJ never explained what action—short of adopting the proposed alternative plans—would not be deemed an intent to retrogress.

Covered jurisdictions are under no duty to "establish minority districts wherever possible." *Miller*, 515 U.S. at 925 (Kennedy, J., concurring). In *Miller*, DOJ repeatedly refused to preclear a Georgia redistricting plan because it failed to mirror DOJ's proposed plans maximizing majority-black districts—*i.e.*, a "max-black plan." The state responded by adopting a plan which mirrored the "max-black plan" offered by DOJ. DOJ approved that modified plan, but the plan was later successfully challenged as violating equal protection because it was created with the purpose of drawing districts along racial lines. This Court agreed with the challengers, noting that DOJ's Section 5 enforcement strategy is precisely the type of action forbidden by equal protection. *Miller*, 515 U.S. at 927. Since *Miller*, DOJ has been less overt in asking states to adopt "max-black" plans, or other plans pushed by outside interest groups. Yet, the overarching purpose of DOJ enforcement remains the same—to force the adoption of racially gerrymandered districts. Clegg, *supra*, at 40. This Court should stop Section 5 from thwarting equal protection, by striking down the effects test as unconstitutional under equal protection.

CONCLUSION

The government asks this Court to uphold Congress's determination that Section 5 remains a necessary way to enforce the individual rights guaranteed by the Fifteenth Amendment. But requiring only selected jurisdictions to preclear a voting change by demonstrating that their neutral decision will not have a "racial effect," bears no resemblance to the Fifteenth Amendment's guarantee of an individual right to vote. Worse, the race-conscious effects test, and the race-based decisionmaking it requires, violate the Fifth and Fourteenth Amendments' guarantee of equal protection of the laws. As Congress has refused to bring Section 5 into compliance with the Constitution, Amici respectfully request this Court to declare it unconstitutional. It is long overdue.

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Respectfully submitted,

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