Nos. 21-1086 and 21-1087

IN THE

Supreme Court of the United States

JOHN H. MERRILL, Alabama Secretary of State, *et al.*,

Appellants,

v.

EVAN MILLIGAN, *et al.*,

Appellees.

JOHN H. MERRILL, Alabama Secretary of State, *et al.*,

Petitioners,

v.

MARCUS CASTER, *et al.*,

Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA AND ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* PROFESSOR TRAVIS CRUM IN SUPPORT OF APPELLEES/RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Professor Travis Crum is an Associate Professor of Law at Washington University in St. Louis,[2] where he teaches and writes about voting rights and constitutional law. His scholarship focuses on the Fifteenth Amendment and the Voting Rights Act of 1965 (VRA). *See* Travis Crum, *The Lawfulness of the Fifteenth Amendment*, 97 Notre Dame L. Rev. 1543 (2022); Travis Crum, *Deregulated Redistricting*, 107 Cornell L. Rev. 359 (2022); Travis Crum, *Reconstructing Racially Polarized Voting*, 70 Duke L.J. 261 (2020); Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 Nw. U. L. Rev. 1549 (2020); Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L.J. 1992 (2010).

SUMMARY OF THE ARGUMENT

Alabama makes two peculiar and unprecedented arguments about Section 2 of the Voting Rights Act and Congress's enforcement authority under the Reconstruction Amendments. Alabama's central claim is that the only "workable, text-based benchmark" for Section 2 is "race neutrality." Appellants' Br. 69-70. According to Alabama, "constitutional guardrails" prohibit the consideration of race in the redistricting process. Appellants' Br. 37. Drawing on the *Shaw* line of cases, *see Shaw* v. *Reno*, 509 U.S. 630 (1993) and

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[1] All parties have filed blanket consents to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no person other than *amicus*'s counsel made a monetary contribution to fund the preparation or submission of this brief.

[2] Professor Crum's institution is noted for identification purposes only. The views expressed in this brief are entirely his own.

Miller v. *Johnson*, 515 U.S. 900 (1995), Alabama operationalizes this standard by requiring race-neutral maps for purposes of *Gingles*'s first prong, *see Thornburg* v. *Gingles*, 478 U.S. 30, 50 (1986). That is, when determining whether "a minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district," *id.*, the proposed map should be drawn without regard to race.

Alternatively, Alabama contends that Section 2 is unconstitutional as applied to single-member redistricting schemes. Appellants' Br. 71-72. Here, Alabama claims that Section 2 of the VRA exceeds Congress's enforcement authority under Section Two of the Fifteenth Amendment.

Alabama's arguments are misguided for, at least, two reasons. First, the primary source of constitutional authority for the VRA is the Fifteenth Amendment, as that Amendment—rather than the Fourteenth Amendment—was expressly designed to prohibit racial discrimination in voting. Moreover, racially polarized voting was a recognized phenomenon and openly discussed during Reconstruction. The Reconstruction Framers were explicit in their belief that the Fifteenth Amendment was necessary to help Black men vote as a bloc to protect their interests. Alabama's "constitutional guardrails" would have come as a surprise to the Reconstruction Framers.

Second, the best reading of text, history, structure, and precedent is that Congress's authority to enforce the rights guaranteed by the Fifteenth Amendment is broad and governed by the rationality standard from *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). Contrary to Alabama's apparent position, *see* Appellants' Br. 72-74, the proper standard is not some amalgum of the rationality standard announced in

Katzenbach, the congruence and proportionality test articulated in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and the equal sovereignty principle from *Shelby County* v. *Holder*, 570 U.S. 529 (2013). Looking to the proper standard, Congress has the authority under the Fifteenth Amendment to require States to consider race in drawing single-member districts to the limited extent required by Section 2 of the VRA.

ARGUMENT

Passed by the Fortieth Congress in 1869 and ratified by the States in 1870, the Fifteenth Amendment was the final act in the trilogy of Reconstruction Amendments. *See* 16 Stat. 1131 (1870). Its broad prohibition of racial discrimination in voting and its clause empowering "Congress … to enforce [its provisions] by appropriate legislation," U.S. Const. amend. XV, § 2, represent the crowning achievement of Reconstruction. In less than a decade, the United States fought a bloody Civil War to preserve the Union and transformed itself from a slaveholding nation to the world's first multi-racial democracy.

"The Fifteenth Amendment has independent meaning and force." *Rice* v. *Cayetano*, 528 U.S. 495, 522 (2000). The Fifteenth Amendment was *not* a mere clarification of the Fourteenth Amendment, which is now construed to also prohibit racial discrimination in voting. *See Hunter* v. *Underwood*, 471 U.S. 222, 233 (1985). Rather, the Fifteenth Amendment was the first constitutional provison prohibiting racial discrimination in voting and bestowed authority on Congress to enforce that mandate. An approach centered on the Fifteenth Amendment reveals that Alabama's proposals lack historical and doctrinal support.

I. The Fifteenth Amendment Enfranchised Men Nationwide Regardless Of Race Or Color and Is An Independent Source of Congressional Authority.

A. Prior to the Fifteenth Amendment, Congress Never Imposed Suffrage Qualifications On The States.

The Fourteenth and Fifteenth Amendments were ratified with distinct scopes. The Framers of the Reconstruction Amendments understood civil rights and political rights as occupying distinct spheres. Civil rights were inherent in citizenship; political rights were not. Thus, they drafted Section One of the Fourteenth Amendment to exclude protections for political rights—meaning that the Fourteenth Amendment did not enfranchise any Black voters when it was ratified in July 1868. *See* Crum, *Superfluous*, *supra*, at 1602.[3] This exclusion was purposeful, as "[m]oderate Republicans feared they could not sell the equal-suffrage idea in the North, where white bigotry remained a stubborn fact of life." Akhil Reed Amar, *America's Constitution: A Biography* 392-93 (2005).

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[3] *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard) ("[T]he first section of the proposed amendment does not give to either of these classes [Whites or Blacks] the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution."); *id.* at 2542 (statement of Rep. Bingham) ("[T]he exercise of the elective franchise … is exclusively under the control of the States."); *id.* at 1159 (statement of Rep. Windom) (commenting that the Fourteenth Amendment "does not … confer the privilege of voting, for that is a political right"); Michael W. McConnell, *Originalism and the Desegregation Decision*, 81 Va. L. Rev. 947, 1016 (1995) (discussing the Reconstruction-era distinctions between civil and political rights).

When the lame-duck Fortieth Congress started debating the Fifteenth Amendment in January 1869, the Nation was evenly divided: 17 States permitted Black suffrage, and 17 did not. Racially discriminatory suffrage laws remained on the books in the Border States, the Mid-Atlantic, the West, and parts of the Midwest.[4]

By contrast, Black men had the right to vote in New England, parts of the Midwest, and the former Confederacy.[5] Five States in New England had enfranchised Black men by the end of the Civil War. *See* Crum, *Superfluous, supra*, at 1593. During Reconstruction, Wisconsin adopted Black suffrage via a judicial decision interpreting the state constitution, *see Gillespie* v. *Palmer*, 20 Wis. 544 (1866), and voters in Iowa and Minnesota passed referenda enfranchising Black men, *see* William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* 26 (1965). The Tennessee legislature enfranchised

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[4] To be specific, these States barred Blacks from voting: California, Connecticut, Delaware, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Missouri, Nevada, New Jersey, Ohio, Oregon, Pennsylvania, and West Virginia. *See* Crum, *Superfluous*, *supra*, at 1602-03 n.362. In addition, New York technically permitted Black men to vote, but racially discriminatory property and residency qualifications disenfranchised virtually all Blacks. *See id.* at 1593.

[5] The right to vote free of racial discrimination existed in these States: Alabama, Arkansas, Florida, Georgia, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, New Hampshire, North Carolina, South Carolina, Tennessee, Rhode Island, Vermont, and Wisconsin. *See* Crum, *Superfluous*, *supra*, at 1602 n.363. Furthermore, Black men could vote in Mississippi, Texas, and Virginia, but those States had not yet been re-admitted to the Union. *See id.* at 1603; *see also* Crum, *Lawfulness*, *supra*, at 1580-89 (discussing Georgia's unique position as only partially re-admitted to Congress).

Black men in 1867 following the State's re-admission to the Union, becoming the only ex-Confederate State to do so voluntarily. *See* W.E.B. DuBois, *Black Reconstruction in America* 575 (2d. ed. 1962).

At the same time, Congress played a pivotal role in expanding the voting rights of Black men. In January 1867, Congress overcame President Andrew Johnson's veto and mandated Black male suffrage in the District of Columbia. *See* An Act to Regulate the Elective Franchise in the District of Columbia, ch. 6, 14 Stat. 375 (1867). That same month, Congress enfranchised Black men in the federal territories. *See* An Act to Regulate the Elective Franchise in the Territories of the United States, ch. 15, 14 Stat. 379 (1867). Congress also overrode President Johnson's veto when it required Nebraska to abolish its racially discriminatory suffrage laws as a condition of statehood. *See* An Act for the Admission of the State and Nebraska into the Union, ch. 36, § 3, 14 Stat. 391, 392 (1867).

Most importantly, Congress passed the First Reconstruction Act of 1867, which mandated Black male suffrage in 10 of the 11 ex-Confederate States. *See* First Reconstruction Act, ch. 153, § 5, 14 Stat. 428, 429 (1867). The political significance of the First Reconstruction Act in transforming the South cannot be overstated. The Act enfranchised nearly 80 percent of Black men nationwide. *See* Richard M. Valelly, *The Two Reconstructions: The Struggle For Black Enfranchisement* 24 (2004). With enfranchisement, Black voters constituted effective majorities in five Southern States—Alabama, Florida, Louisiana, Mississippi, and South Carolina. *See* Crum, *Reconstructing*, *supra*, at 302-03. As unpacked below, *see infra* Section I.C, Congress, in seeking to reconstruct the South, believed that Black men would vote en masse to protect their political interests.

B. The Reconstruction Framers Deliberately Chose a Constitutional Amendment Over a Statutory Solution.

Following the 1868 election, Republicans coalesced behind nationwide Black male suffrage. *See infra* Section I.C. However, the choice of means to secure it was still undecided.

When the Thirty-Ninth Congress mandated Black male suffrage in 1867, it did so in areas of federal control. As its fonts of authority, Congress relied on the Guarantee Clause in the Reconstructed South and on the District of Columbia's and the territories' statuses as federal domains. *See* Crum, *Superfluous*, *supra*, at 1596. The question whether Congress had the independent authority to mandate Black suffrage in *States* was contested within the Republican Party. *See* Earl M. Maltz, *Civil Rights, The Constitution, and Congress, 1863-1869*, at 131-36 (1990). The salience of Congress's authority over suffrage qualifications was further heightened by the re-admission of Southern States and the prescient concern that those States would backslide and seek to disenfranchise Black men. *See* Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 29 (2004).

When the lame-duck Fortieth Congress convened in early 1869, Radical Republicans backed a "double-barreled approach" to nationwide Black suffrage. Gillette, *supra*, at 51. In the House, Representative George Boutwell introduced *both* a statute and a constitutional amendment, the latter of which was nearly identical to what would become the Fifteenth Amendment. *See* Cong. Globe, 40th Cong., 3d Sess. 285 (1869); H.R. 1667, 40th Cong. (1869). Senator Charles Sumner introduced a similar suffrage statute in the

Senate. *See* Cong. Globe, 40th Cong., 3d Sess. 5 (1868); S. 650, 40th Cong. (1868).

In support of their suffrage statute, the Radicals advanced numerous theories concerning federal authority over suffrage qualifications in the States. *See* Crum, *Superfluous*, *supra*, at 1604-17 (canvassing these debates). Of particular importance here, the Radicals invoked the recently ratified Fourteenth Amendment as a novel source of authority. Boutwell, for example, claimed that voting was covered by the Privileges or Immunities Clause, *see* Cong. Globe, 40th Cong., 3d Sess. 559 (1869) (statement of Rep. Boutwell), and that the Apportionment Clause was a "political penalty for doing that which in the first section it is declared the State has no right to do," *id.* (discussing U.S. Const. amend. XIV, § 2); *see also id.* at 903 (statement of Sen. Sumner) (arguing that voting is protected under the Privileges or Immunities Clause); Crum, *Superfluous*, *supra*, at 1610 n.411 & 1616 n.464 (collecting additional statements). The Radicals also relied on Congress's enforcement authority under Section Five, gesturing to the standard articulated in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), for support. *See* Cong. Globe, 40th Cong., 3d Sess. 903 (1869) (statement of Sen. Sumner) (discussing the "familiar rule of interpretation, expounded by Chief Justice Marshall in his most masterly judgment").

Unsurprisingly, Democrats opposed the Radicals' suffrage statute. In a lengthy debate with Boutwell, Representatives Charles Eldredge and Michael Kerr provided detailed critiques of the Radicals' arguments. *See id.* at 642-45 (statement of Rep. Eldredge);

id. at 653-62 (statement of Rep. Kerr).[6] Critically, although the Democrats disagreed with the Radicals on whether the Fourteenth Amendment protected the right to vote, neither Eldredge nor Kerr contested that *McCulloch* provided the proper standard for Congress's enforcement authority. *See id.* at 654 ("The language of the fourteenth amendment seems to have been intended to give Congress the power to enforce [its] provisions."). But as Democrats were outnumbered three-to-one, they could not stop the Radicals' suffrage statute. *See* Crum, *Superfluous*, *supra*, at 1613.

Rather, moderate Republicans objected to the suffrage statute on constitutional and political grounds. Moderate Republicans disagreed with the Radicals' position that the Fourteenth Amendment protected the right to vote. *See* Cong. Globe, 40th Cong., 3d Sess. 727 (1869) (statement of Rep. Bingham) (arguing that a constitutional amendment was necessary to accomplish "impartial suffrage"); Crum, *Superfluous*, *supra*, at 1613 (discussing the views of President Grant and Republican newspapers); Gillette, *supra*, at 51 (discussing the constitutional objections of the Ohio House Republican delegation). On the political front, moderate Republicans worried that a suffrage statute would backfire, potentially derailing the Fifteenth Amendment's ratification and leaving open the possibility of the statute's subsequent repeal. *See id.* at 51-52.

In light of these objections, Boutwell pulled his bill, citing the "general agreement that some amendment to the Constitution should be proposed." Cong.

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[6] The Congressional Globe misspells Eldredge's name as "Eldridge." David P. Currie, *The Reconstruction Congress*, 75 U. Chi. L. Rev. 383, 453 & n.403 (2008).

Globe, 40th Cong., 3d Sess. 686 (1869). Following Boutwell's capitulation in the House, the debate in the Senate largely shifted to adopting a constitutional amendment, rather than passing a statute.[7] In concluding that it could not pass ordinary legislation to prohibit racial discrimination in voting by States under its Fourteenth Amendment enforcement power, the Reconstruction Congress adhered to the long-standing distinction between civil and political rights.

C. The Reconstruction Framers Openly Discussed Racially Polarized Voting during the Fifteenth Amendment's Drafting and Ratification.

The motives of Republicans in supporting Black male enfranchisement were complex. For many veterans of the abolitionist movement, Black suffrage was a moral imperative and a "triumphant conclusion to four decades of agitation." Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 448 (1988). Other Republicans were moved by Black soldiers' sacrifices on behalf of the Union during the Civil War. *See* Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 Stan. L. Rev. 915, 933 (1998). Still others acted out of partisan self-interest, predicting that Black voters would reliably back Republicans. *See id.* at 943. The Republican Party's 1868 platform—which advocated Black suffrage in the South but not the North—had also proven politically problematic given its explicit double standard. *See* Crum, *Superfluous*, *supra*, at 1600.

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[7] About two weeks later, Sumner belatedly attempted to advance his own bill—complete with jurisdictional provisions and criminal sanctions—under the guise of a constitutional amendment. Sumner's proposal was defeated 9-47. *See* Cong. Globe, 40th Cong., 3d Sess. 1041 (1869).

But what was crystal clear by early 1869 was that Black voters overwhelmingly backed the Republican Party and would vote as a bloc to protect their political interests. The underlying policy differences between the parties could not have been more stark. After all, the Republican Party had won the Civil War and successfully advanced an abolitionist and civil rights agenda. The Democrats aligned themselves with unabashed racists and had passed the notorious Black Codes in the South, which sought to re-establish slavery through strict labor and vagrancy laws. *See* Foner, *Reconstruction*, *supra*, at 293. Moreover, one does not need modern statistical tools to uncover racial bloc voting during Reconstruction. That is because "[v]oting was public until 1888 when the States began to adopt the Australian secret ballot." *Doe* v. *Reed*, 561 U.S. 186, 224 (2010) (Scalia, J., concurring in the judgment).

In the Reconstruted South, Black men helped ratify the Fourteenth Amendment and elected the first Black politicians to office. *See* Crum, *Reconstructing*, *supra* at 303-04; *see also* Crum, *Lawfulness*, *supra*, at 1606-07 (discussing Black voters' role in ratifying the Fifteenth Amendment). Black voters were also crucial to President Ulysses S. Grant's victory in the popular vote in 1868 and helped him win every re-admitted ex-Confederate State, except Georgia and Louisiana, where Klan-related violence suppressed the Black vote. *See* Ron Chernow, *Grant* 623 (2017).

Voting was also racially polarized. Consider the constitutional conventions mandated by the First Reconstruction Act. Across the South, Black voters accounted for between 66% and 97% of the supporters of those conventions. Indeed, in four Southern States, not a *single* Black man cast a ballot against the con-

stitutional conventions. *See* Crum, *Reconstructing*, *supra*, at 303. By contrast, White voters rejected the constitutional conventions by large margins. *See id.* at 304 n.272 (showing support ranging from only 8.5% to 33.6%); *see also* Foner, *Reconstruction*, *supra*, at 297 ("In no Southern State did Republicans attract a majority of the white vote.").[8]

These racial disparities were openly discussed by the Reconstruction Framers. Indeed, both the House and the Senate commissioned reports with detailed racial data on the Southern constitutional convention elections. *See* Crum, *Reconstructing*, *supra*, at 305. Moreover, Republicans in Congress acknowledged that Southern Black voters were "pretty much the only people in those States who were loyal" and that the ballot would allow them to "protect themselves." Cong. Globe, 40th Cong., 3d Sess. 1008 (1869) (statement of Sen. Corbett); *see also* Amar & Brownstein, *supra*, at 939-56 (collecting additional examples). Looking to the Border States that would be impacted by the Fifteenth Amendment, Republicans believed that the "infusion of new voters might give [them] extra electoral security in the coming years." Amar, *supra*, at 397; *see also* Cong. Globe, 40th Cong., 3d Sess. 724 (1869) (statement of Sen. Sumner) ("You need votes in Connecticut, do you not? There are three housand fellow-citizens ready at the call of Congress to take their place at the ballot box."); *id.* at 561 (statement of Rep. Boutwell) (similar).

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[8] Although party preferences have switched, the level of racial polarization *today* in Alabama is strikingly—and disturbingly—similar to the levels during Reconstruction. *See* SJA120 (expert report finding that, on average, "Black voters supported their candidates of choice with 92.3% of the vote" and "White voters supported Black-preferrred candidates with 15.4% of the vote").

To sum up, the Fifteenth Amendment imposed novel obligations on the States and created a new font of federal authority. It was the Fifteenth—not the Fourteenth—Amendment that eradicated "white" from suffrage laws and "expanded the right to vote to include tens of thousands of previously disenfranchised black men" "in the North or along the sectional border." Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* 108-09 (2019). The Fifteenth Amendment also guaranteed that Congress could take appropriate action if and when Southern States sought to restrict the right to vote. *See id.* at 109. Finally, in debating the Fifteenth Amendment, the Reconstruction Framers were not only aware of but openly embraced the reality of racially polarized voting as a *raison d'etre* for extending the franchise. Put simply, the starting point for racially polarized voting was the 1860s, not the 1960s.

II. Congress May Pass Rational Legislation Pursuant To Its Fifteenth Amendment Enforcement Authority.

Text, history, structure, and precedent dictate that the rationality standard announced in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), governs Congress's enforcement authority under the Fifteenth Amendment. By contrast, the congruence and proportionality test articulated in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), "has no demonstrable basis in the text of the Constitution," and is a "standing invitation to judicial arbitrariness and policy-driven decisionmaking." *Tennessee* v. *Lane*, 541 U.S. 509, 558 (2004) (Scalia, J., dissenting). In addition, *Shelby County* v. *Holder*, 570 U.S. 529 (2013), has no application to a nationwide statute like Section 2.

A. The Reconstruction Congress Conferred Itself Broad Enforcement Authority Under the Reconstruction Amendments, Supporting the *Katzenbach* Standard.

Section Two of the Fifteenth Amendment provides that "Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XV, § 2. The key term here is "appropriate," which the Reconstruction Framers first included in the Thirteenth Amendment's enforcement clause and used again in the Fourteenth and Fifteenth Amendments' enforcement clauses.

During Reconstruction, the term "appropriate" was understood to embody *McCulloch*'s deferential approach to congressional authority . It is well established that the Reconstruction Framers' selection of the term "appropriate" was a deliberate adoption of *McCulloch*'s broad conception of congressional authority. *See, e.g.*, *Katzenbach* v. *Morgan*, 384 U.S. 641, 650 (1966) ("By including § 5 the draftsmen sought to grant Congress … the same broad powers expressed in the Necessary and Proper Clause."); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153, 188 (1997) (observing that the term "appropriate" "has its origins in the latitudinarian construction of congressional power in *McCulloch*"). The Reconstruction Framers' borrowing of *McCulloch*'s standard may be the most significant example of Justice Frankfurter's adage that "if a word is obviously transplanted from another legal source … it brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947).

Nearly a century after the Fifteenth Amendment was ratified, Congress passed the Voting Rights Act of

1965. In upholding Section 5's preclearance provisions, this Court concluded that Congress's use of the term "appropriate" in Section Two of the Fifteenth Amendment was a clear adoption of the *McCulloch* standard. *Katzenbach*, 383 U.S. at 325-26.

Under the *Katzenbach* standard, "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Id.* at 324. Section 2 of the VRA is just such a rational means.

B. *Boerne*'s Congruence and Proportionality Test Should Not Be Extended to the Fifteenth Amendment.

In *Boerne*, this Court established a new standard for adjudicating Congress's *Fourteenth* Amendment enforcement authority. Under *Boerne*'s three-pronged congruence and proportionality test, this Court begins by "identify[ing] with some precision the scope of the constitutional right at issue." *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356, 365 (2001). This Court then "examine[s] whether Congress identified a history and pattern of unconstitutional [conduct] by the States." *Id.* at 368. This Court concludes by determining whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520. *Boerne* was wrongly decided, but this case does not require the Court to apply *Boerne*. That is because this Court has never held that *Boerne* governs Congress's *Fifteenth* Amendment enforcement authority.

Since *Boerne*, this Court has continued applying the congruence and proportionality test. *See Allen* v. *Cooper*, 140 S. Ct. 994, 1004-05 (2020) (Copyright Remedy Clarification Act of 1990); *Coleman v. Court*

of Appeals of Md., 566 U.S. 30, 43-44 (2012) (plurality opinion) (FMLA's self-care provision); *Lane*, 541 U.S. at 533-34 (Title II of the ADA's application to state courts); *Nevada Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721, 733-35 (2003) (FMLA's family-care provision); *Garrett*, 531 U.S. at 374 (2001) (Title I of the ADA); *Kimel* v. *Florida Board of Regents*, 528 U.S. 62, 91 (2000) (ADEA); *United States* v. *Morrison*, 529 U.S. 598, 627 (2000) (VAWA's civil-remedies provision); *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627, 647 (1999) (Patent and Plant Variety Protection Act). With the exception of *Morrison*, all of these cases implicated Congress's power to abrogate state sovereign immunity. None involved race, voting, or the Fifteenth Amendment.[9]

Despite "virtually identical" enforcement clauses, *Garrett*, 531 U.S. at 373 n.8, there are several reasons to not extend *Boerne* to the Fifteenth Amendment. First and foremost, *Boerne* misconstrues the original public understanding of the Reconstruction Amendments. *See supra* Section II.A. Moreover, the most on-point precedent for Congress's Fifteenth Amendment enforcement authority remains *Katzenbach*. Indeed, this Court repeatedly upheld the VRA's coverage formula and preclearance provisions under *Katzenbach*, including after *Boerne*. *See Lopez* v. *Monterey County*,

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[9] Although the focus of this *amicus* brief is on Congress's Fifteenth Amendment enforcement authority, this Court could follow Justice Scalia's suggestion and decline to apply *Boerne* to "congressional measures designed to remedy racial discrimination by the States." *Lane*, 541 U.S. at 564 (Scalia, J., dissenting); *see also id.* ("I shall leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under § 5 to prevent or remedy racial discrimination by the States.").

525 U.S. 266, 283-85 (1999) (upholding, after *Boerne*, the 1982 reauthorization); *City of Rome* v. *United States*, 446 U.S. 156, 182-83 (1980) (upholding the 1975 reauthorization); *Georgia* v. *United States*, 411 U.S. 526, 535 (1973) (upholding the 1970 reauthorization). There is no warrant to extend *Boerne*'s unduly constrained view of congressional authority to another amendment.

Second, the *Katzenbach* standard accords with principles of judicial minimalism and respect for the separation of powers. Recall that at *Boerne*'s first step, courts must "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. By contrast, in cases applying *Katzenbach*'s rationality standard, this Court has repeatedly dodged questions about the underlying constitutional right by deferring to Congress's considered judgment. *See Morgan*, 384 U.S. at 648 ("A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the [Fourteenth] Amendment … would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment."); *City of Rome*, 446 U.S. at 173 ("We hold that, *even if* § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect." (emphasis added)).

Third, *Boerne* creates unnecessary "conflict with a coequal branch of Government." *Lane*, 541 U.S. at 558 (Scalia, J., dissenting). *Boerne*'s second and third prongs require, in effect, that courts "regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional." *Id.* This practice

improperly treats Congress "as if it were an administrative agency." *Garrett*, 531 U.S. at 376 (Breyer, J., dissenting).

Finally, the Fourteenth and Fifteenth Amendments' substantive scopes—and thus their enforcement clauses—implicate different separation-of-powers and federalism concerns. The Fourteenth Amendment's broad language encompasses a panoply of rights and protected classes. *See Lane*, 541 U.S. at 562-63 (Scalia, J., dissenting) (collecting examples). By contrast, the Fifteenth Amendment prohibits racial discrimination in voting—an assuredly critical but nevertheless narrow right. Given the Fifteenth Amendment's targeted language, it is unlikely that Congress could invoke it to exercise "virtually plenary police power." Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 Stan. L. Rev. 1127, 1191 (2001).[10]

C. Neither *Northwest Austin* nor *Shelby County* Extended *Boerne* to the Fifteenth Amendment.

Shelby County also does not circumscribe Congress's Fifteenth Amendment enforcement authority. The Court in *Shelby County* did not even mention *Boerne*, much less hold that its congruence and proportionality test governs Congress's Fifteenth Amendment enforcement authority. Furthermore, *Shelby*

[10] That is especially true in cases involving congressional—rather than state legislative or municipal—redistricting. Under the Elections Clause, Congress has broad authority to preempt state laws over such matters. *See* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 13-15 (2013); Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, 99 B.U. L. Rev. 317, 367-68 (2019).

County's equal sovereignty principle and current-burdens requirement are inapt for a nationwide statute like Section 2 of the VRA.

1. *Shelby County*'s Equal Sovereignty Principle Is Distinct From *Boerne*'s Congruence and Proportionality Test.

In striking down the VRA's coverage formula, the *Shelby County* Court looked to two "basic principles" from *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009), for guidance. *Shelby County*, 570 U.S. at 542. The first principle was *Northwest Austin*'s statement that the VRA's "'current burdens … must be justified by current needs.'" *Id.* (quoting *Northwest Austin*, 557 U.S. at 203). The second principle was *Northwest Austin*'s "conclusion that 'a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.'" *Id.* (quoting *Northwest Austin*, 557 U.S. at 203). In a key passage, the Court melded these two principles into one standard: "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions." *Id.* at 553. Thus, the Court determined that the current-conditions requirement is contingent on disparate treatment of the States. *See id.* at 550 ("The provisions of § 5 apply only to those jurisdictions singled out by § 4. We *now* consider whether that coverage formula is constitutional in light of current conditions." (emphasis added)).

The Court's opinion in *Shelby County* does not even cite *Boerne*—not for the standard of review, not for its application, and not for its praise of previous versions of the coverage formula. Nor does it cite to any of the *Boerne* line of cases. The words "congruent"

and "proportional" do not appear either. Thus, on its face, *Shelby County* does not hold that *Boerne* applies to the Fifteenth Amendment.[11]

To be sure, the *Shelby County* Court stated in a footnote that "[b]oth the Fourteenth and Fifteenth Amendments were at issue in *Northwest Austin*" and that decision "guides our review *under both Amendments* in this case." *Shelby County*, 570 U.S. at 542 n.1 (emphasis added). This language, however, does not mandate that *Boerne* applies to the Fifteenth Amendment. In *Northwest Austin*, the parties disputed whether *Boerne* or *Katzenbach* supplied the governing constitutional standard, but the Court concluded that it "need not resolve" that dispute as the VRA's "preclearance requirements and its coverage formula raise serious constitutional questions under either test." *Northwest Austin*, 557 U.S. at 204.

Rather than being a restriction on Congress's Reconstruction Amendment enforcement authority, the equal sovereignty principle is best conceptualized as a freestanding federalism norm. *See* Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 Duke L.J. 1087, 1132-33 (2016); *see also* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 Harv. L. Rev. 2003, 2005 (2009) (defining "freestanding federalism" as a structural argument that does not "purport to [be] ground[ed] … in any particular provision of the constitutional text"). Indeed, the Court focused on the

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[11] By contrast, the *Shelby County* Court gestured toward *Katzenbach*'s rationality standard. *See Shelby County*, 570 U.S. at 556 (characterizing Congress's reauthorization of the coverage formula as "irrational"); *id.* at 550 (noting that the original coverage formula was "'rational in both practice and theory'" (quoting *Katzenbach*, 383 U.S. at 330)).

coverage formula's differentiation between the States, i.e., the issue "in th[e] case." *Shelby County*, 570 U.S. at 542 n.1. If the equal sovereignty principle reflected a structural protection, then it would apply to statutes enacted under "both Amendments," *id.*, just as it would apply to statutes enacted under any other constitutional provision, such as the Commerce Clause.

This Court's explicit limits on its holding elucidate this point. This Court made clear that its holding applied "only [to] the coverage formula," not to "§ 5 itself." *Id.* at 557. This Court further stated that its "decision in *no way affects the permanent, nationwide* ban on racial discrimination in voting found in § 2." *Id.* (emphasis added). Given these statements, *Shelby County* cannot have changed the standard of review for all statutes enacted under Congress's Reconstruction Amendment enforcement authority. After all, applying a more stringent constitutional standard for Congress's enforcement authority would obviously "affect" a neighboring statutory provision. *Id.* And this Court's emphasis on Section 2's nationwide application reinforces the point that *Shelby County* applies only to coverage formulas that "divide the States." *Id.* at 553.

2. *Shelby County*'s Equal Sovereignty Principle Does Not Apply to Nationwide Statutes.

A recent post-*Shelby County* decision clarifies that the equal sovereignty principle is distinct from the congruence and proportionality test applied in *Boerne*. In *Allen* v. *Cooper*, the Court held that Congress unconstitutionally abrogated state sovereign immunity in the Copyright Remedy Clarification Act of 1990. 140 S. Ct. 994 (2020. In applying *Boerne*'s test, the *Allen* Court observed that a prior decision invalidating a

"basically identical statute" "all but prewrote [its] decision." *Id.* at 998, 1004-05, 1007 (discussing *Florida Prepaid*, 527 U.S. at 627). Of course, if *Shelby County* had changed the standard of review for Congress's Fourteenth Amendment enforcement authority, this pre-*Shelby County* precedent would have been inapt.

Moreover, the *Allen* Court declined to cite *Shelby County* or its current-burdens requirement. Rather than examine extra-record evidence of copyright infringement from the past three decades, this Court confined its analysis to the "legislative record" compiled by Congress *in 1990*. *Allen*, 140 S. Ct. at 1005-06. This Court then put the ball back in Congress's court, observing that it was free to pass a new law with an updated "legislative record to back up th[e] connection" between abrogating state sovereign immunity and "the redress or prevention of unconstitutional injuries." *Id.* at 1007. Thus, *Allen* makes clear that *Shelby County*'s current-burdens requirement is triggered by coverage formulas—not a nationwide statute like Section 2.[12]

III. States May Consider Race in the Redistricting Process Consistent with the Fifteenth Amendment.

Keeping in mind the Fifteenth Amendment's historical context and Congress's enforcement authority, let us turn to Alabama's arguments. Alabama's central complaint concerns the "Goldilocks test" that States cannot consider race too much or too little in the redistricting prrocess. Appellants' Br. 69. And to

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[12] In *Brnovich v. DNC*, 141 S.Ct. 2321 (2021), this Court adopted a new multi-factor test for vote-denial claims brought under Section 2. *See id.* at 2338-40. In so doing, this Court did not question Section 2's constitutionality and declined to address the relevant standard of review.

be sure, there is some truth to that concern. The VRA requires States to consider race to protect against vote dilution, but, under *Shaw*, if race predominates during the redistricting process, then those maps must survive strict scrutiny. However, Alabama's proferred solutions—imposing race neutrality at *Gingles*'s first prong and invalidating Section 2 as applied to single-member redistricting schemes—ignore history and precedent.

Properly understood, Congress may require States to consider race in the redistricting process pursuant to its Fifteenth Amendment enforcement authority.

A. The Reconstruction Amendments Do Not Prohibit the Consideration of Race During Redistricting.

Alabama's application of colorblind principles to a voting rights case reveals modern normative preferences rather than fidelity of the original understanding of the Reconstruction Amendments.

In advancing its novel interpretation of Section 2, Alabama draws heavily from the *Shaw* cause of action and its skepticism about the role of race in the redistricting process. *See, e.g.*, Appellants' Br. 37 ("[R]ace cannot predominate in redistricting, *no matter what the reason*." (emphasis added)); *id.* at 76. (arguing that Section 2 must work "in concert" with *Shaw*). Rather than focus on whether race *predominates* in the redistricting process, *see Miller*, 515 U.S. at 916, Alabama contends that *Shaw* dictates that mapmakers purposefully blind themselves to race at *Gingles*'s first prong. Such an approach is not required under the Equal Protection Clause in general and certainly not in the redistricting context where a higher threshold of knowledge is necessary to trigger strict scrutiny.

See id. ("Redistricting legislatures will . . . almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process.").[13]

But there is a more fundamental error. *Shaw* is grounded in the Fourteenth Amendment's Equal Protection Clause. *See Shaw*, 509 U.S. at 649 (describing the claim as brought "under the Equal Protection Clause"); *Cooper* v. *Harris*, 137 S. Ct. 1455, 1463 (2017) ("The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans."). But as originally understood, the Equal Protection Clause did *not* apply to voting rights. Hence the need for the Fifteenth Amendment. *See Oregon* v. *Mitchell*, 400 U.S. 112, 166 (1972) (Harlan, J., concurring in part and dissenting in part) (observing that the Fifteenth Amendment's existence "is evidence that [Congress] did not under-

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[13] Just as States can take race into account to some extent in education, employment, and housing decisions, so too can States look at racial data at *Gingles*'s first prong. *See Tex. Dep't of Hous. & Cmty. Affs.* v. *Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 545 (2015) ("[M]ere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor."); *Ricci* v. *DeStefano*, 557 U.S. 557, 585 (2009) (declining to "question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the [promotion] process"); *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in judgment) ("School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; [and] drawing attendance zones with general recognition of the demographics of neighborhoods.").

stand the Fourteenth Amendment" "to have extend[ed] the suffrage"); *supra* Section I.A. The *Shaw* doctrine, therefore, is difficult to defend as a matter of original intent or public understanding. But as this is not a *Shaw* case—Alabama merely imports its predominance standard—there is no need for the Court here to reassess whether that cause of action is properly grounded in the Constitution.

Once one turns to the Fifteenth Amendment, it becomes clear that Alabama's concerns are misplaced. Recall that the Reconstruction Framers recognized that a South with an all-White electorate was a South with the Black Codes. *See supra* Section I.C. The Reconstruction Framers' "arguments in favor of extending the franchise" were "grounded on the perceived need for and anticipated benefits of blacks voting *as a coherent force*." Amar & Brownstein, *supra*, at 929 (emphasis added). The Reconstruction Framers frankly discussed the humanitarian and partisan salience of Black male suffrage. Moreover, racial bloc voting was instrumental in the Fifteenth Amendment's adoption. It would be ironic if those same concerns could no longer be acknowledged under enforcement legislation passed pursuant to that Amendment.

B. Section 2 of the VRA is Appropriate Fifteenth Amendment Enforcement Legislation.

Alabama's claim that Section 2 of the VRA is unconstitutional as applied to single-member redistricting schemes runs counter to decades of this Court's precedent and invokes the wrong standard of review for Congress's Fifteenth Amendment enforcement authority. *See* Appellants' Br. 71-73.

In 1982, Congress exercised its Fifteenth Amendment enforcement authority to prohibit racial vote dilution without a finding of discriminatory intent. *See Chisom* v. *Roemer*, 501 U.S. 380, 383-84 (1991).[14] Although Alabama invokes both *Boerne*'s congruence and proportionality test and *Shelby County*'s equal sovereignty principle, as discussed in Part II *supra*, *Katzenbach*'s rationality standard controls. Under *Katzenbach*, "Congress may use any *rational* means to effectuate the constitutional prohibition of racial discrimination in voting." 383 U.S. at 324 (emphasis added). Moreover, Congress can go beyond that which "is forbidden by the [Constitution] itself" because otherwise it would "confine the legislative power . . . to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional." *Morgan*, 384 U.S. at 648-49.

In Section 2, Congress determined that racial vote dilution "denie[s] or abridge[s]" the "right . . . to vote . . . on account of race," U.S. Const. amend. XV, § 1, after compiling a lengthy record of unconstitutional

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[14] Here, it is important to flag some doctrinal nuances. First, although this Court has found that racial vote dilution can violate the Equal Protection Clause, *see White* v. *Regester*, 412 U.S. 755, 766 (1973), it "has not decided whether the Fifteenth Amendment applies to vote-dilution claims." *Voinovich* v. *Quilter*, 507 U.S. 146, 159 (1993). Second, this Court has never held that intentional discrimination is a necessary ingredient of a Fifteenth Amendment claim. In *City of Mobile* v. *Bolden*, a mere plurality reached that conclusion. 446 U.S. 55, 62 (1980). Finally, unlike racial vote dilution doctrine, *Shaw*'s racial gerrymandering cause of action has never been endorsed by Congress. Indeed, Congress based Section 2's language and standard on this Court's racial vote dilution decisions under the Equal Protection Clause. *See Brnovich*, 141 S. Ct. at 2331-33 (discussing *White*).

conduct that jurisdictions were erecting so-called second-generation barriers in response to Black enfranchisement, *see, e.g.*, S. Rep. No. 97-417 (1982). On that record, it was assuredly rational for Congress to conclude that additional prophylactic protection against racial vote dilution—regardless of whether it occurred through an at-large, a multi-member, or a single-member redistricting plan—was necessary. *See Brnovich*, 141 S. Ct. at 2333 (observing that there were "many examples of what the [Senate Judiciary] Committee took to be unconstitutional vote dilution").

To exclude single-member districts from Section 2's coverage despite broad text, abundant legislative history, congressional acquiescence, and decades of precedent would be an unwarranted and extraordinary restriction on congressional power. Alabama's *Shaw*-based arguments rely entirely on obfuscation as to the proper standard of review and on Equal Protection principles that should yield to a Fifteenth Amendment framework. *See, e.g.*, Appellants' Br. 74 (citing *Boerne* rather than *Katzenbach*); *id.* 75 (arguing that Section 2 must survive "Fourteenth Amendment scrutiny"). In short, Alabama's arguments lack grounding in both history and precedent, and therefore cannot justify excluding single-member redistricting schemes from Section 2's scope.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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