Nos. 24-109, 24-110

In the
Supreme Court of the United States

STATE OF LOUISIANA

Appellant,

v.

PHILLIP CALLAIS, *et al.*,

Appellees.

PRESS ROBINSON, *et al.*,

Appellants,

v.

PHILLIP CALLAIS, *et al.*,

Appellees.

On Appeals from the United States District Court for the Western District of Louisiana

BRIEF FOR PROFESSOR TRAVIS CRUM AS *AMICUS CURIAE* IN SUPPORT OF THE *ROBINSON* APPELLANTS

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INTEREST OF AMICUS CURIAE[1]

Professor Travis Crum is a 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 Riddle of Race-Based Redistricting*, 124 Colum. L. Rev. 1823 (2024); Travis Crum, *The Unabridged Fifteenth Amendment*, 133 Yale L.J. 1039 (2024); 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).

SUMMARY OF ARGUMENT

In *Shaw v. Reno*, 509 U.S. 630 (1993), this Court recognized racial gerrymandering claims under the Equal Protection Clause. *Id.* at 652. This Court's reargument order—which asks whether the "intentional creation of a second majority-minority congressional district violates the Fourteenth or Fifteenth Amendments," 8/1/25 Docket Entry—calls for a thorough reassessment of *Shaw*'s textual and historical support.

By grounding *Shaw* in the Equal Protection Clause, this Court applied Fourteenth Amendment

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[1] No counsel for any 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.

principles to what should be a Fifteenth Amendment issue. In *amicus*'s view, "the Fifteenth Amendment has independent meaning and force," *Rice v. Cayetano*, 528 U.S. 495, 522 (2000), and yet this Court has rendered the Fifteenth Amendment superfluous.

As originally understood, the Equal Protection Clause did not apply to political rights. Indeed, following the Fourteenth Amendment's ratification, half the States continued to disenfranchise Black men. The Fifteenth Amendment enfranchised Black men nationwide. Contrary to the *Shaw* Court's concerns about "racial stereotypes," 509 U.S. at 647, the Reconstruction Framers recognized that Black men and White men had divergent political interests, and they adopted the Fifteenth Amendment to ensure that Black men could vote as a bloc to protect their civil rights. Once the right to vote free of racial discrimination is properly grounded in the Fifteenth Amendment's original public understanding, it becomes clear that *Shaw* rests on constitutional quicksand.

Shaw should be overruled. *Shaw*'s approach to race-based redistricting sharply diverges from the worldview of the Reconstruction Framers. Indeed, *Shaw* has all the hallmarks of a precedent ripe for overturning: the racial gerrymandering claim has no textual or historical support; the predominant factor standard is unworkable; it diverges from equal protection doctrine; it is in tension with statutory and constitutional precedent as well as Congress's considered judgment on the subject; and it has been undermined by legal and factual developments since the 1990s. *See Ramos v. Louisiana*, 590 U.S. 83, 121 (2020) (Kavanaugh, J., concurring in part) (listing factors for overturning precedent).

Even if this Court retains *Shaw*, reversal is still appropriate because Section 2 is a rational exercise of Congress's Fifteenth Amendment enforcement authority. Congress could have reasonably believed that the packing and cracking of minority voters is a denial or abridgment of the right to vote free of racial discrimination. And as applied to redistricting, Section 2 has a de facto sunset clause, assuming one is even necessary.

ARGUMENT

Today, the Equal Protection Clause prohibits racial discrimination in voting. *See Hunter v. Underwood*, 471 U.S. 222, 233 (1985). Yet that was not so during Reconstruction. Hence the necessity of the Fifteenth Amendment. *See Oregon* v. *Mitchell*, 400 U.S. 112, 166 (1970) (Harlan, J., concurring in part and dissenting in part) (observing that the Fifteenth Amendment's existence "is evidence that [Congress] did not understand the Fourteenth Amendment" "to have extend[ed] the suffrage").

Proposed 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* 15 Stat. 346 (1869); 16 Stat. 1131 (1870). In guaranteeing that "[t]he right of citizens . . . 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," U.S. Const. amend. XV, § 1, the Fifteenth—*not* the Fourteenth—Amendment 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). And by empowering "Congress . . . to enforce [its provisions] by appropriate legislation," U.S. Const. amend. XV, § 2. the Fifteenth Amendment guaranteed that Congress had broad authority to respond if States—especially the re-admitted Southern States—sought to restrict the right to vote free of racial discrimination. *See Foner*, *Second Founding*, *supra*, at 109.

I. The Fifteenth Amendment Banned Racial Discrimination In Voting And Granted Congress Novel Enforcement Authority.

At the outset, two historical points deserve emphasis. First, the Fourteenth and Fifteenth Amendments were not bipartisan affairs. They were the political platform of the Republican Party—which had commanding majorities in Congress and state legislatures—and almost uniformly opposed by Democrats. *See* Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* 397–400 (2012). Moreover, the principal debate was *within* the Republican Party between moderates and Radicals. *See infra* Section I.A–D. Thus, in ascertaining the original public understanding of these Amendments, it is the views of Republicans that are most illuminating.

Second, the Reconstruction Framers conceptualized civil rights and political rights as occupying distinct spheres. Civil rights were inherent in citizenship; political rights were not. *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 1016 (1995). The Fourteenth and Fifteenth Amendments reflect this distinction.

A. As Originally Understood, The Fourteenth Amendment Did Not Mandate Enfranchisement.

The Reconstruction Framers drafted Section One of the Fourteenth Amendment to exclude protections for political rights.[3] This omission was purposeful. "Moderate 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). Indeed, Radical Republicans openly complained that the Fourteenth Amendment lacked protections for political rights and vowed to continue the fight in the future. *See* Crum, *Superfluous*, *supra*, at 1585–86.

The Fourteenth Amendment's text bears this out. The Privileges or Immunities Clause was borrowed from Article IV's Privileges and Immunities Clause, and the right to vote was not considered a privilege or immunity of citizenship. The Equal Protection Clause applies to "person[s]," U.S. Const. amend. XIV, § 1. meaning that if it had encompassed the right to vote, it would have enfranchised not only Black men but also women, children, and non-citizens. *See* Amar, *Biography*, *supra*, at 391–92. As for Section Two's

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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 [White or Black men] 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").

Apportionment Clause, it provided merely an incentive for Southern States to enfranchise Black men or lose seats in the House after the 1870 Census. *See* Crum, *Unabridged*, *supra*, at 1056–57.

Thus, the Fourteenth Amendment did not enfranchise *any* Black voters when it was ratified in July 1868. *See* Crum, *Superfluous*, *supra*, at 1602.

B. Prior To The Fifteenth Amendment, Black Men Were Enfranchised In Some States And In Federal Domains.

When the lame-duck Fortieth Congress began debating the Fifteenth Amendment in January 1869, the Nation was evenly divided: 17 States permitted Black suffrage, and 17 did not.[4] Racially discriminatory suffrage laws remained on the books in the Border States, the Mid-Atlantic, the West, and parts of the Midwest. *See* Crum, *Superfluous*, *supra*, at 1602–03.

By contrast, Black men had the right to vote in New England, parts of the Midwest, and the former Confederacy. Five States in New England had enfranchised Black men by the end of the Civil War. *See id.* at 1593. During Reconstruction, Wisconsin adopted Black male 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 Black men in 1867 following the State's re-admission to the Union,

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[4] In addition, Black men were enfranchised in the three yet-to-be-re-admitted Southern States: Mississippi, Texas, and Virginia. *See* Crum, *Superfluous*, *supra*, at 1602 n.363.

becoming the only ex-Confederate State to do so voluntarily. See W.E.B. DuBois, *Black Reconstruction in America* 575 (2d ed. 1962).

Meanwhile, Congress played a pivotal role in expanding the voting rights of Black men. In early 1867, the Thirty-Ninth Congress mandated Black male suffrage in the District of Columbia and the federal territories. *See* An Act to Regulate the Elective Franchise in the District of Columbia, ch. 6, 14 Stat. 375 (1867); An Act to Regulate the Elective Franchise in the Territories of the United States, ch. 15, 14 Stat. 379 (1867). Congress also required Nebraska to abolish its racially discriminatory suffrage laws as a fundamental 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). 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. Congress, in seeking to reconstruct the South, believed that Black men would vote *en masse* to protect their political interests.

C. The Reconstruction Framers Were Aware Of And Encouraged Racial Bloc Voting By Black Men.

In enfranchising Black men, the Reconstruction Framers' motives were varied. 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 Reconstruction Framers 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 943–44. 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.

But it was clear by early 1869 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 starker. The Republican Party had won the Civil War and successfully advanced an abolitionist and civil rights agenda. The Democrats backed the de facto re-establishment of slavery. *See* Foner, *Reconstruction*, *supra*, at 293–94.

In the Reconstructed 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 popular vote victory in 1868 and helped him win every re-admitted ex-Confederate State except Georgia and Louisiana, where violence suppressed the Black vote. *See* Ron Chernow, *Grant*, at 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. In four Southern States, not a *single* Black man cast a ballot against the constitutional conventions. *See* Crum, *Reconstructing*, *supra*, at 303. By contrast, White voters roundly rejected the constitutional conventions. *See id.* at 304 n.272 (showing support ranging from 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.").

The Reconstruction Framers openly discussed these racial disparities. Indeed, both the House and Senate commissioned reports with detailed racial data on the Southern constitutional convention elections. *See* Crum, *Reconstructing*, *supra*, at 305; *see also Doe v. Reed*, 561 U.S. 186, 224 (2010) (Scalia, J., concurring in the judgment) ("Voting was public until 1888 when the States began to adopt the Australian secret ballot."). 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 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, *Biography*, *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 thousand fellow-citizens ready at the call of Congress

to take their place at the ballot box."); *id.* at 561 (statement of Rep. Boutwell) (similar).

D. The Reconstruction Framers Purposefully Chose A Constitutional Amendment Rather Than A Suffrage Statute.

Following a closer-than-expected 1868 presidential election, Republicans coalesced behind nationwide Black male suffrage. *See* Crum, *Unabridged*, *supra*, at 1074. But how to accomplish that goal remained unclear.

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). Backtracking from their prior position, *see supra* Section I.A, 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 *McCulloch* standard 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"). Notably absent from this debate was the Equal Protection Clause.

Moderate Republicans objected to the suffrage statute on constitutional and political grounds. They 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 51–52 (discussing the constitutional objections of the Ohio House Republican delegation). On the political front, moderate Republicans worried that a suffrage statute would backfire, derailing the Fifteenth Amendment's ratification and risking the statute's repeal. *See id.* at 51–52.

In response, Boutwell pulled his bill, citing "general agreement that some amendment to the Constitution should be proposed." Cong. Globe, 40th Cong., 3d Sess. 686 (1869). Thereafter, the debate focused on adopting a constitutional amendment rather than a

statute.[5] In concluding that it could not pass ordinary legislation to prohibit racial discrimination in voting by States under its Fourteenth Amendment enforcement authority, the Reconstruction Congress adhered to the longstanding distinction between civil and political rights.

E. The Fifteenth Amendment's Drafting And Ratification Debates Were Silent About Race-Based Redistricting.

The drafting and ratification debates over the Fifteenth Amendment focused on two issues: voting qualifications and officeholding requirements. The qualifications debate principally concerned whether to expand the Fifteenth Amendment's protections to prohibit discrimination on account of education, nativity, property, and religious belief. *See* Crum, *Unabridged*, *supra*, at 1127–36. As for officeholding, there was heated disagreement within the Republican Party over whether the right to hold office should be explicitly protected, and, if not included in the Amendment's text, whether it would nevertheless be implicitly covered. *See id.* at 1138–42.

By contrast, there was virtually no discussion of redistricting. There were only scattered mentions of malapportionment and the choice between at-large and single-member district elections. *See* Cong. Globe, 40th Cong., 3d Sess. 543 (1869) (statement of Sen. Dixon) (discussing "rotten boroughs"); *see also* Crum, *Riddle*, *supra*, at 1869–71 (collecting examples). These passing references show no concern that the Fifteenth

[5] Two weeks later, Sumner moved to substitute his bill—complete with jurisdictional provisions and criminal sanctions—under the guise of a constitutional amendment. His proposal was defeated 9-47. *See* Cong. Globe, 40th Cong., 3d Sess. 1041 (1869).

Amendment *on its own force* would prohibit race-based redistricting.[6]

F. Post-Ratification History Reveals Race-Based Redistricting During Reconstruction.

This Court frequently looks to post-ratification practice to shed light on ambiguous constitutional provisions. *See, e.g.*, *Moore v. Harper*, 600 U.S. 1, 32–34 (2023); *Chiafalo v. Washington*, 591 U.S. 578, 592–97 (2020).

Following the Fourteenth and Fifteenth Amendments' ratifications, the Reconstruction-era Congress adopted four enforcement acts. *See* Enforcement Act of 1870, ch. 114, 16 Stat. 140; Enforcement Act of 1871, ch. 99, 16 Stat. 433; Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871); Civil Rights Act of 1875, ch. 114, 18 Stat. 335. None of these enforcement acts addressed race-based redistricting.

To be sure, one should not presume that the Reconstruction-era Congress "maximally exercised [its] power to regulate" under the Fourteenth and Fifteenth Amendments, as that risks "adopting a 'use it or lose it' view of legislative authority." *United States*

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[6] In originalist parlance, this silence indicates that the Reconstruction Framers did not intend for—and did not expect—the Fifteenth Amendment to apply to redistricting. Of course, this is only a useful proxy. It does not answer the separate question of the text's original public meaning. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 28 (2022) ("Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated."). Nor does it answer what Congress may achieve through enforcement legislation. *See infra* Part III.

v. Rahimi, 602 U.S. 680, 740 (2024) (Barrett, J., concurring). But here, given the Reconstruction Framers' views on the political salience of Black men's votes, it is unsurprising that enforcement legislation did *not* prohibit race-based redistricting.

Moving beyond Congress, Republican-controlled Southern States engaged in race-based redistricting. Given the high levels of racially polarized voting in the Reconstructed South, "a partisan gerrymander amounted to a racial gerrymander." J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction*, at 29 (1999). Furthermore, Reconstruction-era racial demographics meant that majority-Black districts were common across the South. In some States, these districts were majority-majority because the State had a Black majority statewide whereas in other States a majority-Black district was majority-minority. *See* Crum, *Riddle*, *supra*, at 1886.

Consider Mississippi's congressional redistricting. After the 1870 apportionment, Mississippi had six congressional districts, and its Republican state legislature adopted a new map that cut across the heavily Black Mississippi Delta in an east-west direction. The result: five majority-Black districts, ranging from 56.4% to 60.6% Black in a State that was only 53.7% Black at the time. *See id.* at 1893–95.

After Democrats seized power during the violent 1875 state elections, they engaged in mid-decade redistricting. As historian Eric Foner has observed, "Mississippi Redeemers concentrated the bulk of the black population in a 'shoestring' Congressional district running the length of the Mississippi River." Foner, *Reconstruction*, *supra*, at 590. Predictably,

Democrats fared far better under this new map. *See* Crum, *Riddle*, *supra*, at 1896.

The Mississippi example is instructive because it reveals a Republican state legislature engaging in race-based redistricting and a Democratic state legislature packing Black voters.

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The Fifteenth Amendment did not clarify the Fourteenth Amendment. It enfranchised Black men nationwide, imposed novel obligations on the States, and created a new source of federal authority. The Fifteenth Amendment is *the* constitutional provision governing racial discrimination in voting, and it was not originally understood to prevent race-based redistricting.

II. *Shaw* Should Be Overruled.

Although "[a]dherence to precedent is the norm." *Ramos*, 590 U.S. at 120 (Kavanaugh, J., concurring in part), *stare decisis* is not an "inexorable command." *Payne v. Tennessee*, 501 U.S. 801, 828 (1991). Indeed, *stare decisis* is "at its weakest" in constitutional cases because this Court's "interpretation can be altered only by constitutional amendment or by overruling [its] prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

In its "precedent on precedent," *Barr v. Am. Ass'n of Political Consultants*, 591 U.S. 610, 621 n.5 (2020), this Court has weighed several factors in deciding whether to overrule a prior decision, including the quality of the precedent's reasoning, its workability, its consistency with prior and subsequent decisions, and the presence of changed law and facts. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215,

267–68 (2022); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Ramos*, 590 U.S. at 121 (Kavanaugh, J., concurring in part). Each of these factors points to overruling *Shaw*, as modified by *Miller v. Johnson*, 515 U.S. 900 (1995). Collectively, they provide the "special justification" needed to "depart[] from the doctrine of stare decisis." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).[7]

A. *Shaw* Was Egregiously Wrong.

Shaw is grounded in the Fourteenth Amendment's Equal Protection Clause. *See* 509 U.S. at 649; *Cooper v. Harris*, 581 U.S. 287, 291 (2017). But as originally understood, the Equal Protection Clause did *not* apply to voting rights. *Shaw* did not engage with the Fifteenth Amendment's text or history. *Shaw* referenced the Fifteenth Amendment in a rhetorical flourish. *See* 509 U.S. at 657 (stating that "a goal that the Fourteenth and Fifteenth Amendments embody" was a "political system in which race no longer matters"). *Shaw* did not engage with the Fifteenth Amendment's text or history. As written, *Shaw* cannot be defended as a matter of original understanding.

Nor can the Fifteenth Amendment save *Shaw*. Race-based redistricting is not a "deni[al] or abridg[ment]" of the "right . . . to vote." U.S. Const. amend. XV, § 1. It is plainly not a "denial." As for "abridgment," the historical context reveals a wide divergence between *Shaw*'s logic and the Reconstruction Framers' worldview.

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[7] This Court also looks to whether there are "reliance interests" at stake. *Payne*, 501 U.S. at 827–28. There is scant guidance on reliance interests in the redistricting context. Given the weight of the other factors, any reliance interests cannot salvage *Shaw*.

Shaw condemned as "impermissible racial stereotypes" the belief that racial groups "think alike, share the same political interests, and will prefer the same candidates at the polls." 509 U.S. at 647. But the Reconstruction Framers openly and frankly discussed the stark political reality of racial bloc voting in the Reconstructed South. Indeed, their "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); *supra* Section I.D. The Fifteenth Amendment was passed "'because of,' not merely 'in spite of,'" racial bloc voting. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Rather than being a constitutional taboo, racial bloc voting was instrumental in the Fifteenth Amendment's adoption.

After the Fifteenth Amendment's ratification, the Reconstruction-era Congress did not prohibit race-based redistricting. Meanwhile, Republican-controlled state legislatures engaged in race-based redistricting by creating majority-Black districts to advance the political power of Black men and elect Republicans to office. *See supra* Section I.F. In short, *Shaw*'s underlying logic is ahistorical when viewed through the lens of the Fifteenth Amendment.

B. *Shaw* Is Unworkable.

Shaw—on its own terms and as modified by *Miller*—is an unworkable standard that has mired judges in difficult line-drawing exercises.

In recognizing a racial gerrymandering cause of action, *Shaw* emphasized the district's "bizarre" and "highly irregular" shape. 509 U.S. at 646. In so doing, this Court analogized racial gerrymanders to racial

classifications. *See id.* at 657 ("Racial classifications with respect to voting carry particular dangers."). *Shaw* thus required districts to survive strict scrutiny, which is used for "all racial classifications . . . because without it, a court cannot determine whether or not the discrimination truly is benign." *Id.* at 653 (internal quotation marks omitted).

But the Court quickly abandoned this approach in its next *Shaw* case. *See Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 188 (2017) ("*Bethune-Hill I*") (acknowledging this point); *see also* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv. L. Rev. 1663, 1692–93 (2001) (explaining that only Justice O'Connor appeared ever to endorse an "expressive harm" theory). In *Miller*, this Court adopted the "predominant factor" test. 515 U.S. at 916. Although a district's shape is still relevant evidence, *see id.* at 916–17, *Shaw* plaintiffs must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.* In other words, they must establish that the mapmaker "subordinated traditional race-neutral districting principles . . . to racial considerations." *Id.*; *see also Bethune Hill I*, 580 U.S. at 187 (clarifying that "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement").

Miller's revisionism is an implicit acknowledgement that *Shaw*, as written, was misguided. But over four redistricting cycles, the predominant factor test has also proved unworkable.

In half of the post-*Miller* cases that addressed predominance, this Court has overturned the lower

court's determination. *See Hunt v. Cromartie*, 526 U.S. 541, 553–54 (1999); *Easley v. Cromartie*, 532 U.S. 234, 243, 258 (2001); *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 271–75 (2015); *Bethune-Hill I*, 580 U.S. at 192–93; *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 18 (2024).[8] Because a district court's factual findings "as to whether racial considerations predominated in drawing district lines . . . are subject to review only for clear error," *Cooper*, 581 U.S. at 293, this reversal rate is remarkable.

Because many *Shaw* claims are brought against statewide maps and this Court has mandatory jurisdiction over those appeals, 28 U.S.C. § 2284(a), these decisions represent a large proportion of all *Shaw* claims, *see* Crum, *Deregulated*, *supra*, at 397 n.254 (identifying only a handful of *Shaw* challenges to local maps in the 2010s). And although this Court traditionally looks to circuit splits as evidence of unworkability, *see Dobbs*, 597 U.S. at 284–86, that is not an

[8] By contrast, this Court affirmed predominance findings in five out of ten of the post-*Miller* racial gerrymandering cases. *See Bush v. Vera*, 517 U.S. 952, 972, 976 (1996) (plurality opinion); *Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 902–03, 905–07 (1996); *Cooper*, 581 U.S. at 301, 309; *North Carolina v. Covington*, 581 U.S. 1015 (2017) (summary affirmance); *North Carolina v. Covington*, 585 U.S. 969, 976–77 (2018). Meanwhile, this Court has resolved *Shaw* challenges on other grounds. *See, e.g.*, *Wittman v. Personhuballah*, 578 U.S. 539, 541 (2016) (dismissing appeal on standing grounds). And *Shaw*-esque arguments appear in other redistricting cases, albeit not technically racial gerrymandering challenges. *See, e.g.*, *Wisc. Legislature v. Wisc. Elections Comm'n*, 595 U.S. 398, 403 (2022) (noting that it was "not clear whether the court viewed the Governor or itself as the state mapmaker who must satisfy strict scrutiny").

appropriate metric here. Because circuit courts rarely hear *Shaw* claims, circuit splits are unlikely to arise.[9]

C. *Shaw* Is Inconsistent With Precedent.

Racial gerrymandering claims are also problematic because "precedents before and after [*Shaw* and *Miller*'s] issuance contradict [their] central holding[s]." *Lawrence*, 539 U.S. at 577.

The predominant factor test is inconsistent with broader equal protection jurisprudence. Although awareness of race is not a constitutional violation,[10] being motivated by race ordinarily raises red flags. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977). By contrast, *Miller* greenlights racial motives because strict scrutiny is triggered only when race predominates over traditional redistricting principles. *See Alexander*, 602 U.S. at 56–58 (Thomas, J., concurring in part).

In adopting a motive-based inquiry, *Miller* failed to tweak the second part of *Shaw*'s test—namely, strict scrutiny. Once race is found to predominate, this Court does not, as it would under *Arlington Heights*'s "motivating factor" approach, "shift[] to the [government] the burden of establishing that the same

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[9] The Court has also vacillated as to whether plaintiffs must produce an alternative map. *Compare Cooper*, 581 U.S. at 319 (holding that alternative maps are "merely an evidentiary tool" and not a requirement), with *Alexander*, 602 U.S. at 34 ("[T]he District Court also critically erred by failing to draw an adverse inference against the Challengers for not providing a substitute map.").

[10] *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 230 (2023); *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 545 (2015).

decision would have resulted even had the impermissible purpose had not been considered." 429 U.S. at 270 & n.21. Instead, it asks whether the use of race is in furtherance of a compelling governmental interest and is narrowly tailored. *See Cooper*, 581 U.S. at 292. In pairing a heightened-motive factual inquiry with the test for facial classifications, the *Shaw-Miller* two-step is a unicorn of equal protection jurisprudence.

Nor does *Shaw* itself convincingly rely on precedent. It relied heavily on *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), a *Fifteenth* Amendment decision about the State of Alabama re-drawing the City of Tuskegee's boundaries to exclude virtually every Black voter, *id.* at 341. Justice Whittaker's concurrence relied on the Fourteenth Amendment, but the *Gomillion* majority declined to endorse that theory. *See id.* at 349 (Whittaker, J., concurring). Nevertheless, *Shaw* retconned *Gomillion* as an equal protection case, highlighting "the correctness of Justice Whittaker's view." *Shaw*, 509 U.S. at 645.

Most starkly, *Shaw* is also in tension with decisions recognizing constitutional racial vote-dilution claims, which pre-date *Shaw* by two decades. *See White v. Regester*, 412 U.S. 755, 765–69 (1973); *Rogers v. Lodge*, 458 U.S. 613, 627 (1982). And this Court has repeatedly expressed concern that *Shaw* and Section 2 of the VRA impose "'competing hazards of liability.'" *Abbott v. Perez*, 585 U.S. 579, 587 (2018) (quoting *Vera*, 517 U.S. at 977 (plurality opinion)). In *amicus*'s opinion, *Shaw* generated this doctrinal uncertainty and should give way to Congress's considered judgment. *See Allen v. Milligan*, 599 U.S. 1, 41 (2023) (rejecting Alabama's argument that the "[Fifteenth] Amendment does not authorize race-based redistricting as a remedy for § 2 violations"); *infra* Part III.

D. *Shaw* Has Been Undermined By Subsequent Legal And Factual Developments.

Since *Shaw* was decided in 1993, two inter-related developments have *undermined* its logic and exacerbated its harms.

First, in *Rucho v. Common Cause*, 588 U.S. 684, 718 (2019), this Court held that partisan gerrymandering presents a non-justiciable political question. Mapmakers can now freely raise a "party not race" defense without fear of liability under the federal Constitution.

Second, computer-based redistricting has advanced exponentially. Computer-based redistricting existed in the 1990s. *See Vera*, 517 U.S. at 962 (plurality opinion) (explaining that REDAPPL, a new software program, "enabled districters to make more intricate refinements on the basis of race than on the basis of other demographic information"). But as Justice Kagan explained during the 2010 redistricting cycle, "[w]hile bygone mapmakers may have drafted three or four alternative districting plans, today's mapmakers can generate thousands of possibilities at the touch of a key." *Rucho*, 588 U.S. at 729 (Kagan, J., dissenting). Even that relatively recent description is outdated. Technological advances utilized during the 2020 redistricting cycle empowered "mapmakers [to] generate *millions* of possible districting maps for a given State." *Milligan*, 599 U.S. at 23 (emphasis added).

Given the "good faith" afforded to state legislatures, *Alexander*, 602 U.S. at 6, these two developments will make it even harder to disentangle race

from politics. This compounds the predominant factor test's unworkability. *See supra* Section II.B.

* * *

For the foregoing reasons, *Shaw* should be overturned. *Amicus* shares Justice Thomas's skepticism of *Shaw* claims, but not on the ground that such claims are non-justiciable political questions. Justice Thomas argues that redistricting "is a task for politicians, not federal judges" and that there are "no judicially manageable standards for resolving claims about districting." *Alexander*, 602 U.S. at 40 (Thomas, J., concurring). In *amicus*'s view, racial gerrymandering does not violate the Equal Protection Clause or the Fifteenth Amendment at all.

III. Section 2 Is Constitutional.

This Court should resolve this case by overturning *Shaw* and holding that appellees have failed to state a claim. If this Court declines that invitation, then it may have to decide whether compliance with Section 2 is a compelling governmental interest. In *amicus*'s opinion, this inquiry essentially asks whether Section 2 is rational legislation to enforce the Fifteenth Amendment. It is.

A. Congress May Pass Rational Legislation Pursuant To Its Fifteenth Amendment Enforcement Power.

In adjudicating Section 2's constitutionality as applied to redistricting, the threshold question is the relevant standard of review. Here, there are three potential options: *Katzenbach*'s rationality standard, *Boerne*'s congruence and proportionality test, and *Shelby County*'s equal sovereignty principle. *See South Carolina v. Katzenbach*, 383 U.S. 301, 324

(1966); *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997); *Shelby County v. Holder*, 570 U.S. 529, 556 (2013). Text, history, and precedent demonstrate that "Congress may use any *rational* means to effectuate the constitutional prohibition of racial discrimination in voting" embodied in the Fifteenth Amendment. *Katzenbach*, 383 U.S. at 324 (emphasis added).

1. The Reconstruction Congress Conferred On Itself Broad Enforcement Authority.

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 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 borrowing 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*").

2. This Court's Precedent Confirms That *Katzenbach* Is The Governing Standard For The Fifteenth Amendment.

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 held 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. This Court subsequently upheld the VRA's coverage formula and preclearance provisions under *Katzenbach*, including after *Boerne*. *See Lopez v. Monterey County*, 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).

And just two years ago, this Court in *Milligan* rebuffed "Alabama's attempt to remake . . . § 2 jurisprudence anew" and "reject[ed] Alabama's argument that § 2 as applied to redistricting is unconstitutional under the Fifteenth Amendment." 599 U.S. at 23 & 41. In so doing, this Court relied exclusively on the *Katzenbach* line of cases. *See id.* at 41. By contrast, the principal dissent treated *Katzenbach*, *Boerne*, and *Shelby County* as interchangeable. *See id.* at 79–89 (Thomas, J., dissenting).

3. Neither *Boerne* Nor *Shelby County* Apply To A Nationwide Statute Enacted Pursuant To The Fifteenth Amendment.

Boerne established a new congruence and proportionality test for adjudicating Congress's *Fourteenth*

Amendment enforcement authority. *See* 521 U.S. at 520. Despite "virtually identical" enforcement clauses, *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8 (2001), *Boerne* should remain cabined to the Fourteenth Amendment.

First and foremost, *Boerne* misconstrued the original public understanding of the Reconstruction Amendments. *See supra* Section III.A.1. As Justice Scalia explained two decades ago, *Boerne* "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). An erroneous interpretation of one amendment need not bleed over to an interpretation of another.

Second, this Court has applied *Boerne* only in Fourteenth Amendment cases. *See Allen v. Cooper*, 589 U.S. 248, 260–61 (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); *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 733–35 (2003) (FMLA's family-care provision); *Garrett*, 531 U.S. at 374 (Title I of the ADA); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (ADEA); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (VAWA's civil-remedies provision); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank*, 527 U.S. 627, 647 (1999) (Patent and Plant Variety Protection Act); *see also Trump v. Anderson*, 601 U.S. 100, 115 (2024) (observing that *Boerne* would apply to any statute enforcing the Disqualification Clause). Almost all these cases implicated Congress's power to abrogate state

sovereign immunity. None involved racial discrimination in voting or the Fifteenth Amendment.[11]

Third, the *Katzenbach* standard accords with judicial minimalism and respect for the separation of powers. 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 sidestepped questions about the underlying constitutional right by deferring to Congress's considered judgment. *See 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)); *Milligan*, 599 U.S. at 41 (re-affirming this point).

Fourth, *Shelby County* did not hold that *Boerne* applies to the Fifteenth Amendment. It did not 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 did it cite to any of the *Boerne* line of cases. The words "congruent" and "proportional" do not appear either. By contrast, *Shelby County* at least gestured toward *Katzenbach*'s rationality standard. *See* 570 U.S. at 556 (characterizing Congress's reauthorization of the coverage formula as "irrational"); *id.* at 550 (noting that the original

[11] Although this brief's focus is 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).

coverage formula was "'rational in both practice and theory'" (quoting *Katzenbach*, 383 U.S. at 330)).

Finally, *Shelby County*'s "current-conditions" requirement is inapplicable because Section 2 does not "*divide the States*." *Id.* at 553 (emphasis added). Put differently, the current-conditions requirement applies only to coverage formulas. *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."); *id.* at 557 (clarifying that its holding applied "only [to] the coverage formula," not to "§ 5 itself"). But Section 2 is a "*nationwide* ban on racial discrimination in voting." *Id.* at 557 (emphasis added). Thus, Section 2 does not infringe the States' "equal sovereignty." *Id.* at 534.[12]

B. Section 2 Is Rational Fifteenth Amendment Enforcement Legislation.

In revising Section 2 in 1982, Congress exercised its Fifteenth Amendment enforcement authority to prohibit racial vote dilution even absent a finding of discriminatory intent. *See Brnovich v. Democratic Nat'l Comm'n*, 594 U.S. 647, 656–60 (2021).[13] In so

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[12] In *Allen v. Cooper*, 589 U.S. 248 (2020), this Court held that Congress unconstitutionally abrogated state sovereign immunity in the Copyright Remedy Clarification Act of 1990, a nationwide statute. Tellingly, *Allen* 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. *See id.* at 263–65.

[13] Although this Court has found that racial vote dilution violates the Equal Protection Clause, *see Regester*, 412 U.S. at 766, it "has not decided whether the Fifteenth Amendment applies to vote-

doing, 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.

Under *Katzenbach*, 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. Moreover, *Katzenbach* gives Congress some leeway in interpreting ambiguous constitutional provisions. Thus, this Court need not determine whether vote dilution is barred by Section One of the Fifteenth Amendment. Rather, the inquiry is whether Congress could reasonably conclude that it may prohibit vote dilution under its enforcement power.

As an initial matter, the terms "abridge" and "dilute" are close cousins. Reconstruction-era and modern dictionaries use both words to mean "to diminish." Crum, *Riddle*, *supra*, at 1907–08. And "[b]y providing that the right to vote cannot be discriminatorily 'denied *or* abridged,'" the Fifteenth Amendment "assuredly strikes down the diminution as well as the outright denial of the exercise of the franchise." *Bolden*, 446 U.S. at 126 (Marshall, J., dissenting).

Here, the "textual and historical link" between Section Two of the Fourteenth Amendment and Section One of the Fifteenth Amendment is illuminating. Franita Tolson, *The Constitutional Structure of Voting*

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dilution claims." *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993). This Court also 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).

Rights Enforcement, 89 Wash. L. Rev. 379, 414 (2014).[14] The Apportionment Clause strips States of House seats if they "den[y]" or "in any way abridge[]" the "right to vote" of adult male citizens. U.S. Const. amend. XIV, § 2. The Reconstruction Framers employed "abridge" when linking the concepts of enfranchisement and representation.

The post-ratification redistricting by Democratic state legislatures were also classic examples of vote dilution. *See supra* Section II.F. This was the dawn of the Southern Redeemers' "unremitting and ingenious defiance of the Constitution." *Katzenbach*, 383 U.S. at 309. Although one could view this post-ratification practice as evidence that the Fifteenth Amendment permits vote dilution, Congress in 1982 could have reasonably concluded that Southern Redeemers' racist and bad-faith actions should not be repeated.

Finally, given the lengthy record that Congress compiled of jurisdictions unconstitutionally erecting so-called second-generation barriers in response to Black enfranchisement, *see, e.g.*, S. Rep. No. 97-417 (1982), Congress's judgment is assuredly rational.

In response, appellees—and now, Louisiana—assert that Section 2 is unconstitutional because it lacks a sunset clause. Appellees Br. 37; Louisiana Supp. Br. 30–31. This claim is flawed for three reasons.

First, the Reconstruction Framers did not think that there was any temporal limit to their Fifteenth Amendment authority. Quite the contrary. The Reconstruction Framers designed the Fifteenth Amendment

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[14] With regard to voting rights, the phrase "deny or abridge" was not commonly used in Reconstruction-era state or federal legislation, making the Apportionment Clause particularly on point. *See* Crum, *Unabridged*, *supra*, at 1058–72.

as an *amendment* to avoid the possibility that a suffrage statute could be repealed, *see supra* Section I.C, and to empower Congress to protect voting rights in the *re-admitted* Southern States, *see* Amar, *Biography*, *supra*, at 397. It would be perverse and anachronistic to impose sunset dates on Congress's Fifteenth Amendment enforcement authority.

Second, despite language in *Boerne* praising sunset dates, *see* 521 U.S. at 532, Congress can enact permanent statutes under its Reconstruction Amendment enforcement authority. Even under *Boerne*'s congruence and proportionality test—which does not apply here, *supra* Section III.A—this Court has upheld permanent statutes. *See Hibbs*, 538 U.S. at 733–35; *Lane*, 541 U.S. at 533–34. By contrast, this Court has *never* applied *Boerne* to a statute *with* a sunset date, reinforcing that such provisions are rare.

Third, unlike the affirmative-action programs invalidated in *SFFA*, 600 U.S. at 225, Section 2 is a federal statute that has a de facto sunset provision. The *Gingles* factors are context-specific and calibrated to current conditions. *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986). As *Milligan* explained, the recent decline in residential segregation has made it harder for plaintiffs to satisfy the first *Gingles* prong. *See* 599 U.S. at 28–29. In addition, *Gingles*'s racial polarization requirement is not satisfied in many portions of the country. *See Robinson* Appellants Supp. Br. 19–20; Shiro Kuriwaki, et al., *The Geography of Racially Polarized Voting: Calibrating Surveys at the District Level*, 118 Am. Pol. S. Rev. 922, 929–31 (2024).

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As originally understood, Congress has broad Fifteenth Amendment enforcement authority to pass

rational legislation combatting racial discrimination in voting. Section 2 of the VRA falls well within Congress's discretion to define the "deni[al] or abridg[ment]" of the "right . . . to vote." U.S. Const. amend. XV, § 1.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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