Nos. 21-1086, 21-1087

IN THE

Supreme Court of the United States

JOHN H. MERRILL, ET AL.,
Appellants,

v.

EVAN MILLIGAN, ET AL.,
Appellees.

JOHN H. MERRILL, ET AL.,
Petitioners,

v.

MARCUS CASTER, ET AL.,
Respondents.

On Appeal from and on Writ of Certiorari to the United States District Court for the Northern District of Alabama

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BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES AND RESPONDENTS

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July 18, 2022

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees. CAC accordingly has a strong interest in this case and the questions it raises about the scope of the Fifteenth Amendment's protections and Congress's power to enforce those protections.

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INTRODUCTION AND SUMMARY OF ARGUMENT

In 1875, seeking to flout the Fifteenth Amendment's promise of a multiracial democracy, the Alabama legislature packed five of the most populous Black counties into one congressional district, aiming to dilute the voting strength of the Black community just five years after the Fifteenth Amendment guaranteed the right to vote free from racial discrimination. *See* Sarah Woolfolk Wiggins, *The Scalawag in Alabama Politics, 1865-1881*, at 104 (1977). Now, more than a century later, Alabama has again drawn district lines in a way that dilutes the voting strength of

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

the Black community, packing much of the Black community in Alabama's Black Belt into Congressional District 7 and cracking the rest into Districts 1, 2, and 3 where members of the Black community will be consistently unable to elect representatives of their choice because of persistent racial bloc voting.

In a through and comprehensive opinion, the three-judge court below held that Alabama's redistricting map violated Section 2 of the Voting Rights Act, and that Alabama should have drawn a second Black-opportunity district to comply with that Act. In this appeal, Alabama claims that the results test contained in Section 2 of the Voting Rights Act, as construed by the court below, exceeds the scope of Congress's power to enforce the Fifteenth Amendment. Alabama claims that it cannot constitutionally be required to replace its map with a new map that contains a second congressional district in which Black voters can elect representatives of their choice. Appellants' Br. 71, 74.

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Alabama's claim cannot be squared with the text and history of the Fifteenth Amendment. As that text and history make clear, the Fifteenth Amendment gives Congress broad powers to prohibit states from denying or abridging the right to vote on account of race, including by adopting prophylactic rules to protect the right to vote, such as the results test contained in Section 2 of the Act.

Ratified in 1870, the Fifteenth Amendment gave Congress the "power of conferring upon the colored man the full enjoyment of his right" and "enable[d] Congress to take every step that might be necessary to secure the colored man in the enjoyment of these rights." Cong. Globe, 41st Cong., 2d Sess. 3670 (1870). Against the backdrop of a political system divided by race, the Framers of the Fifteenth Amendment recognized that "the black populations in the South would

be under siege" and that "political influence and voting power would be their sole means of defense." Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 Stan. L. Rev. 915, 939 (1998). They thus drafted the Fifteenth Amendment to give Congress broad power—no less sweeping than Congress's Article I powers—to stamp out every conceivable attempt by the states to deny or abridge the right to vote on account of race.

Congress thus has broad authority under the Fifteenth Amendment to set aside dilutive practices that exploit racially polarized voting to cancel out or minimize the voting strength of communities of color. And it also has broad authority to redress the tragic fact that "whites have ruthlessly, systematically, and pretty much without hindrance gerrymandered African-American voters in this country from Reconstruction to the modern era." Chandler Davidson, *White Gerrymandering of Black Voters: A Response to Professor Everett*, 79 N.C. L. Rev. 1333, 1334 (2001). This authority includes the power to protect the right to vote against all forms of racial discrimination—both heavy-handed and subtle—to ensure "the colored man the full enjoyment of his right," Cong. Globe, 41st Cong. 2d Sess. 3670 (1870), and to "prevent any state from discriminating against a voter on account of race," *id.* at 3663.

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A broad power to legislate prophylactically to safeguard the right to vote from state denials or abridgements was deemed "necessary to neutralize the deep-rooted prejudice of the white race there against the negro." *Id.* at app. 392. Given the intransigence of white-dominated state legislatures, the Framers of the Fifteenth Amendment understood that the "only means" for Black people "to secure his dearest privileges are to be found in national legislation." *Id.* Congress used

these express powers to enact Section 2 of the Voting Rights Act and then to amend it in 1982.

Alabama's insistence that the Fifteenth Amendment only permits purely color-blind districting ignores that race-consciousness is at the Amendment's core. The Framers wrote the Fifteenth Amendment to safeguard equal political opportunity for all because they recognized that the right to vote was an essential bulwark for liberty and equal citizenship that would empower members of the Black community to "protect themselves in the southern reconstructed States" from attacks on their rights. Cong. Globe, 40th Cong., 3d Sess. 1008 (1869). Moreover, given the persistence of racially polarized voting and the likelihood that white-dominated state legislatures would seek to curtail the power of Black votes, the Amendment's Framers recognized that Congress would need a broad enforcement power to empower Black people to participate in the political process as equals. The Fifteenth Amendment was thus premised on the idea that race matters, and in this respect, "[r]acially polarized voting was a feature—not a bug—in the passage and ratification of the Fifteenth Amendment," Travis Crum, *Reconstructing Racially Polarized Voting*, 70 Duke L.J. 261, 266 (2020).

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Alabama's arguments, if accepted, would give it and other states a constitutional license to undermine the multiracial democracy the Fifteenth Amendment promises and which it gives Congress the authority to help achieve. The judgment of the district court should be affirmed.

ARGUMENT

I. As Its Text and History Demonstrate, the Fifteenth Amendment Gives Congress Broad Enforcement Power to Prevent Impairment of the Right to Vote.

In language "as simple in command as it [is] comprehensive in reach," *Rice v. Cayetano*, 528 U.S. 495, 512 (2000), the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. "Fundamental in purpose and effect . . . , the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race." *Rice*, 528 U.S. at 512.

Recognizing that "[i]t is difficult by any language to provide against every imaginary wrong or evil which may arise in the administration of the law of suffrage in the several States," Cong. Globe, 40th Cong., 3d Sess. 725 (1869), the Framers of the Fifteenth Amendment chose sweeping language requiring "the equality of races at the most basic level of the democratic process, the exercise of the voting franchise," *Rice*, 528 U.S. at 512. The Fifteenth Amendment equally forbids laws that deny the right to vote outright on account of race, as well as those that abridge the right by diluting the voting strength of citizens of color and nullifying the effectiveness of their votes. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 333-34 (2000) (explaining that the "core meaning" of "'abridge'" is "'shorten'" (quoting Webster's New International Dictionary 7 (2d ed. 1950))); Steven G. Calabresi & Andrea Matthews, *Originalism and* Loving v. Virginia, 2012 B.Y.U. L. Rev. 1393, 1417-18 (2012) (demonstrating that "[t]he word 'abridge' in 1868 meant . . . [t]o lessen" or "to

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diminish" and that laws that gave "African Americans a lesser and diminished" set of freedoms unconstitutionally abridged their constitutional rights); Crum, *supra*, at 323 ("The Reconstruction Framers' use of the word 'abridged' militates in favor of broadly protecting the right to vote. At the time, dictionaries defined 'abridge' as 'to contract,' 'to diminish,' or '[t]o deprive of.' . . . And since the term 'denied' adequately captures the scenario where a voter is prevented from casting their ballot, the term 'abridge' presumably carries this broader meaning." (citation omitted)).

The Fifteenth Amendment's sweeping guarantee of equal political opportunity would empower Black citizens to participate in the political process as equal citizens, refusing to consign them to what Frederick Douglass called "emasculated citizenship." Frederick Douglass, *Reconstruction,* Atlantic Monthly (Nov. 1866), *in* 2 *The Reconstruction Amendments: Essential Documents* 296 (Kurt T. Lash ed., 2021). Without the right to participate in our democracy on equal terms, equal citizenship was illusory. As Douglass insisted, "to tell me that I am an equal American citizen, and, in the same breadth, tell me that my right to vote may be constitutionally taken from me by some other equal citizen or citizens, is to tell me that my citizenship is but an empty name." *See* James M. McPherson, *The Struggle for Equality: Abolitionists and the Negro in the Civil War and Reconstruction* 355 (1964) (quoting Douglass's writings). The Fifteenth Amendment rejected that form of second-class citizenship. Congressmen hailed that "[t]he negro race, downtrodden and long held in chattel slavery, has at last been placed by the Fifteenth Amendment on the same platform with other citizens." Cong. Globe, 41st Cong., 2d Sess. app. 393 (1870). Frederick Douglass celebrated that the Fifteenth Amendment "means that we are placed upon

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an equal footing with all other men" and that "liberty is to be the right of all." 4 *The Frederick Douglass Papers* 270-71 (J. Blassingame & J. McKivigan eds., 1991).

A constitutional prohibition on state denial and abridgement of the right to vote on account of race was necessary because "[t]he ballot is as much the bulwark of liberty to the black man as it is to the white," Cong. Globe, 40th Cong., 3d Sess. 983 (1869), and because "[n]o man is safe in his person or his property in a community where he has no voice in the protection of either," *id.* at 693; *id.* at 912 ("Suffrage is the only sure guarantee which the negro can have . . . in the enjoyment of his civil rights. Without it his freedom will be imperfect, if not in peril of total overthrow."); *id.* at 983 ("Without the ballot . . . [h]e is powerless to secure the redress of any grievance which society may put upon him."). The right to vote, the Framers of the Fifteenth Amendment understood, was "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."). In this respect, the Framers viewed the right to vote as "kindred to that which belongs under natural law to the right of self-defense." Cong. Globe, 39th Cong., 1st Sess. 174 (1866). The Fifteenth Amendment thus gave Black citizens a critical weapon to protect themselves from white-dominated legislatures seeking to roll back their rights.

To make the Fifteenth Amendment's guarantee a reality, the Framers explicitly invested Congress with a central role in protecting the right to vote against all forms of racial discrimination. They did so by providing that "[t]he Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XV, § 2. By adding this language, "the

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Framers indicated that Congress was to be chiefly responsible for implementing the rights created" by the Amendment and that Congress would have "full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1966). As the Framers of the Fifteenth Amendment recognized, "the remedy for the violation" of the Fifteenth Amendment, like the remedies for the violation of the other Reconstruction Amendments, "was expressly not left to the courts. The remedy was legislative, because . . . the amendment itself provided that it shall be enforced by legislation on the part of Congress." Cong. Globe, 42d Cong., 2d Sess. 525 (1872). The enforcement power "was born of the conviction that Congress—no less than the courts—has the duty and the authority to interpret the Constitution." Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153, 183 (1997). And Congress refused to leave the right to vote "to the unchecked discretion of the Supreme Court that decided *Dred Scott v. Sanford*." Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 743, 765 (1998).

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The Fifteenth Amendment's express grant of power to enact "appropriate legislation" gives Congress wide discretion to enact whatever measures it deems "appropriate" for achieving the Amendment's objective of ensuring that "[t]he right of citizens of the United States to vote shall not be denied or abridged . . . by any State on account of race." U.S. Const. amend. XV. By authorizing Congress to enact "appropriate legislation," the Framers granted Congress the sweeping authority of Article I's "necessary and proper" powers as interpreted by the Supreme Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316

(1819), a seminal case well known to the Reconstruction Framers. *See, e.g.*, John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States* 29-31 (2002); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801, 1810-15 (2010); Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 Harv. J.L. & Pub. Pol'y 991, 1002-03 (2008); McConnell, *supra*, at 188. As history shows, "Congress' authority under § 2 of the Fifteenth Amendment . . . [is] no less broad than its authority under the Necessary and Proper Clause." *City of Rome v. United States*, 446 U.S. 156, 175 (1980); *see Katzenbach*, 383 U.S. at 326 (explaining that *McCulloch*'s "classic formulation" provides "[t]he basic test to be applied in a case involving [Section] 2 of the Fifteenth Amendment").

In *McCulloch*, Chief Justice Marshall laid down the fundamental principle determining the scope of Congress's powers under the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. at 421 (emphasis added); *see Knox v. Lee*, 79 U.S. (12 Wall.) 457, 542 (1871) ("Is it our province to decide that the means selected were beyond the constitutional power of Congress, because we may think that other means to the same ends would have been more appropriate and equally efficient? That would be to assume legislative power, and to disregard the accepted rules for construing the Constitution."); McConnell, *supra*, at 178 n.153 ("In *McCulloch v. Maryland*, the terms 'appropriate' and 'necessary and proper' were used interchangeably." (citation omitted)). Indeed, in *McCulloch*, Chief Justice Marshall

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used the word "appropriate" to describe the scope of congressional power no fewer than six times. *McCulloch*, 17 U.S. at 408, 410, 415, 421, 422, 423. Thus, by giving Congress the power to enforce the constitutional prohibition on denying or abridging the right to vote on account of race by "appropriate legislation," the Framers "actually *embedded in the text*" the "language of *McCulloch*." Balkin, *supra*, at 1815.

As the text and history of the Fifteenth Amendment demonstrate, the Enforcement Clause gives Congress a broad "affirmative power" to secure the right to vote. Cong. Globe, 40th Cong., 3d Sess. 727 (1869); *see id.* at 1625 ("Congress . . . under the second clause of this amendment" has the power to "impart by direct congressional legislation to the colored man his right to vote. No one can dispute this."). The Framers of the Fifteenth Amendment feared that without a broad enforcement power the constitutional guarantee of equal voting rights would not be fully realized. "Who is to stand as the champion of the individual and enforce the guarantees of the Constitution in his behalf as against the so-called sovereignty of the States? Clearly no power but that of the central Government is or can be competent for their adjustment . . . ." *Id.* at 984.

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In 1870, the same year the Fifteenth Amendment was ratified, Congress employed the Amendment's Enforcement Clause to enact federal voting rights legislation. As the debates over the Enforcement Act of 1870 reflect, the Fifteenth Amendment "clothes Congress with all power to secure the end which it declares shall be accomplished." Cong. Globe, 41st Cong., 2d Sess. 3563 (1870). The Amendment's Enforcement Clause, Senator Oliver Morton explained, was "intended to give to Congress the power of conferring upon the colored man the full enjoyment of his right.

We so understood it when we passed it." *Id.* at 3670. "[T]he second section was put there," he went on to explain, "for the purpose of enabling Congress to take every step that might be necessary to secure the colored man in the enjoyment of these rights." *Id.* Thus, "the colored man, so far as voting is concerned, shall be placed on the same level and footing with the white man and . . . Congress shall have the power to secure him that right." *Id.*; *see id.* at 3655 (explaining that the "intention and purpose" of the Fifteenth Amendment's Enforcement Clause was to "secure to the colored man by proper legislation the right to go to the polls and quietly and peacefully deposit his ballot there"); *id.* at 3663 ("Congress has a right by appropriate legislation to prevent any State from discriminating against a voter on account of his race . . . ."); *see also* 2 Cong. Rec. 4085 (1874) (observing that the Enforcement Clause of the Fifteenth Amendment was added to allow Congress "to act affirmatively" and ensure that "the right to vote, should be enjoyed").

Both supporters and opponents alike recognized that the Fifteenth Amendment's Enforcement Clause significantly altered the balance of powers between the federal government and the states, giving Congress broad authority to guarantee Black citizens the right to vote and to eradicate racial discrimination in the electoral process. Congressional opponents of the Fifteenth Amendment objected that "when the Constitution of the United States takes away from the State the control over the subject of suffrage it takes away from the State the control of her own laws upon a subject that the Constitution of the United States intended she should be sovereign upon." Cong. Globe, 40th Cong., 3d Sess. 989 (1869). To opponents of the Fifteenth Amendment, "[n]othing could be more loose and objectionable than the clause which authorizes

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Congress to enforce the restraint upon the States by 'appropriate' legislation . . . . Under this phraseology, Congress is made the exclusive judge." Journal of the Senate, State of Cal., 18th Sess. 150 (1869-70).

These concerns over state sovereignty were flatly rejected by the Framers of the Fifteenth Amendment and the American people, who explicitly conferred on Congress the power to enact legislation to protect the right to vote free from racial discrimination. In giving Congress the power to protect the right to vote, the Fifteenth Amendment specifically limited state sovereignty. During debates over Congress's first attempt to enforce the Fifteenth Amendment, Senator Carl Schurz explained that "the Constitution of the United States has been changed in some most essential points; that change does amount to a great revolution." Cong. Globe, 41st Cong., 2d Sess. 3607 (1870). He went on to describe the nature of that revolution:

> The revolution found the rights of the individual at the mercy of the States; it rescued them from their arbitrary discretion, and placed them under the shield of national protection. It made the liberty and rights of every citizen in every State a matter of national concern. . . . It grafted upon the Constitution of the United States the guarantee of national citizenship; and it empowered Congress, as the organ of the national will, to enforce that guarantee by national legislation.

Id. at 3608.

As the debates reflect, the Framers of the Fifteenth Amendment specifically recognized that a broad legislative power to protect the right to vote against all forms of racial discrimination—both denials and abridgements—was critical to ensuring "the

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colored man the full enjoyment of his right." *Id.* at 3670.

In the months following ratification of the Fifteenth Amendment, "[l]egislators anticipated that the majority of whites, who harbored virulent ill-will toward their former slaves, would engage in racial bloc voting; only the votes of the black masses could offset this white political aggression." Amar & Brownstein, *supra*, at 941. The grim reality that "[t]he States can invent just as many requirements [for voting] as you have fingers and toes," made it "essential to provide "proper machinery . . . for enforcing the fifteenth amendment." Cong. Globe, 41st Cong., 2d Sess. 3658 (1870). Congressmen insisted that "it is our imperative duty . . . to pass suitable laws to enforce the fifteenth amendment" because, without them, "the fifteenth amendment will be practically disregarded in every community where there is a strong prejudice against negro voting." *Id.* at 3568. The only means to safeguard equal political opportunities and ensure the multiracial democracy the Fifteenth Amendment promised, Congressmen insisted, "are to be found in national legislation. This security cannot be obtained through State legislation," where "the laws are made by an oppressing race." *Id.* at app. 392. Stringent national safeguards were needed to "neutralize the deep-rooted prejudice of the white race there against the negro" and "secure his dearest privileges" at the ballot box. *Id.*

The Fifteenth Amendment thus gave Congress a significant new power. As the next Section shows, Congress used this power in passing the Voting Rights Act to set aside dilutive electoral practices, like the maps challenged in this case, which have long been used to undercut the Fifteenth Amendment's guarantee of equal political opportunity.

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II. Congress Used Its Express Power to Enforce the Fifteenth Amendment to Prohibit Dilutive Practices that Nullify the Effectiveness of Black Votes.

The Fifteenth Amendment gave "live expression" to the right of Black citizens "to have a voice in government" by enabling the Black voter "to choose from among his-fellow citizens the man who suits him for his representative," Cong. Globe, 40th Cong., 3d Sess. 1626 (1869), so that "their voices may be heard in your halls and their votes recorded upon public measures." Rufus Bullock, *Governor's Message to the General Assembly,* Ga. House J. 601 (1869), *in* 2 *The Reconstruction Amendments*, *supra*, at 556.

Tragically, the Fifteenth Amendment would not be enough to protect the voting rights of Black citizens. The passage of the Voting Rights Act—after nearly a century of efforts to flout the Fifteenth Amendment's mandate—was necessary precisely because the Fifteenth Amendment alone was insufficient to ensure that citizens of color in fact enjoyed equal opportunity "to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

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Efforts to circumvent the Fifteenth Amendment's broad mandate of equality emerged almost immediately. "Manipulative devices and practices were soon employed to deny the vote to blacks," *Rice*, 528 U.S. at 513, or to "reduce or nullify minority voters' ability, as a group, 'to elect the candidate of their choice.'" *Shaw v. Reno,* 509 U.S. 630, 641 (1993) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969)). One of the "weapons in the States' arsenal was the racial gerrymander—'the deliberate and arbitrary distortion of district boundaries . . . for racial purposes.'" *Id.* at 640. "In the 1870s, for example, opponents of Reconstruction in Mississippi 'concentrated the bulk of the

black population in a 'shoestring' congressional district running the length of the Mississippi River, leaving five others with white majorities.'" *Id.* (citations omitted). The state's manipulation of district boundaries, as one congressman observed, was designed for the purpose of "gerrymandering all the black voters as far as possible into one district so that the potency of their votes might not be felt as against the potency of white votes in the other districts." 13 Cong. Rec. H3442 (daily ed., Apr. 29, 1882).

Other states drew district lines that packed and cracked Black communities in order, in the words of one Texas newspaper, "to disfranchise the blacks by indirection." Weekly Democratic Statesman (Austin), Feb. 3, 1876, at 1, https://texashistory.unt.edu/ark:/67531/metapth277561/m1/1/. In the 1870s, North Carolina mapmakers packed African Americans into a single district—known as the Black Second—"effectively confin[ing] black control in a state that was approximately one-third African American to a maximum of one district in eight or nine." J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* 26 (1999). In Alabama, in 1875, the state legislature "gerrymandered five of the most populous counties into the fourth district so that it was composed entirely of [five] black counties," while "[t]he other black counties of central Alabama were distributed into districts where white voters outnumbered blacks." Wiggins, *supra*, at 104.

Throughout the South, "[g]errymanders were the paradigm of the dilution strategy." Kousser, *supra*, at 26. State governments packed and cracked Black voters into gerrymandered districts in order to undercut the Fifteenth Amendment's guarantee of equal political opportunity. *See* Davidson, *supra*, at 1334 ("Briefly

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put, whites have ruthlessly, systematically, and pretty much without hindrance gerrymandered African-American voters in this country from Reconstruction to the modern era.").

This Court has since made clear that the Fifteenth Amendment prohibits any "contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color." *Lane v. Wilson*, 307 U.S. 268, 275 (1939). In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), this Court struck down racial gerrymandering by the City of Tuskegee, Alabama as a violation of the Fifteenth Amendment's commands. The city had attempted to redefine its boundaries "from a square to an uncouth twenty-eight-sided figure" for the purpose of "segregating white and colored voters." *Id.* at 340, 341. This Court concluded that "the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights." *Id.* at 347. *Gomillion* held that "[w]hen a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment." *Id.* at 346.

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And in other cases, this Court has held that the ability of states to put in place districting schemes that function "to cancel out or minimize the voting strength of racial groups" is also limited by the Fourteenth Amendment's more general requirement of equal protection. *White v. Register*, 412 U.S. 755, 765 (1973). This Court's opinion in *White* held that plaintiffs bringing vote dilution claims must show that "the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity . . . to participate in the political processes and to elect

legislators of their choice." *Id.* at 766. Taking into account "the history of official racial discrimination," racially polarized voting, and other characteristics of the electoral system that "enhanced the opportunity for racial discrimination," this Court affirmed a lower court's finding of racial vote dilution. *Id.*

However, in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), a plurality of this Court stated that a challenge to a municipality's at-large election system, whether brought under the Fourteenth or Fifteenth Amendment, failed absent proof of a "racially discriminatory motivation," which the plurality insisted was a "necessary ingredient of a Fifteenth Amendment violation." *Id.* at 62; *id.* at 66 (stressing "the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment"). And because the national prohibition on racial discrimination in voting contained in Section 2 of the Voting Rights Act "no more than elaborates upon . . . the Fifteenth Amendment," the plurality insisted that "it was intended to have an effect no different than the Fifteenth Amendment itself." *Id.* at 60, 61.

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Congress responded by amending Section 2 of the Voting Rights Act, employing its express power to enforce the right to vote free from racial discrimination "to make clear that certain practices and procedures that *result* in the denial or abridgement of the right to vote are forbidden even though the absence of proof of discriminatory intent protects them from constitutional challenge." *Chisolm v. Roemer*, 501 U.S. 380, 383-84 (1991). Congress recognized that "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot" and acted to eliminate all "discriminatory election systems or practices which operate, designedly or

otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups." S. Rep. No. 97-417, at 6, 28 (1982); *see id.* at 19 ("There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have . . . the vote counted at full value without dilution or discount."). Significantly, state practices, including districting schemes, that exploited racially polarized voting to dilute the voting strength of communities of color and nullify the effectiveness of their votes were paradigmatic examples of state practices that *resulted* in the denial or abridgment of the right to vote.

To effectuate its goal of prohibiting state practices that resulted in the denial or abridgment of the right to vote, Congress chose language "taken almost verbatim from *White*," *see Brnovich v. Democratic Nat'l Comm.,* 141 S. Ct. 2321, 2333 (2021). This language was designed to enforce the constitutional guarantee of equal political opportunities for all citizens regardless of race and strike at the full range of state practices that limit the ability of citizens of color "to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). As this Court has repeatedly held, it covers instances in which state mapmakers exploit racially polarized voting by packing and cracking communities of color to dilute the effectiveness of their votes. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 438-42 (2006); *Johnson v. DeGrandy*, 512 U.S. 997, 1007 (1994); *Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993); *Thornburgh v. Gingles*, 478 U.S. 30, 47-51 (1986).

Congress thus may use its power to enforce "the Fifteenth Amendment" to "prohibit voting practices

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that have only a discriminatory effect," particularly when those practices create a "risk of purposeful discrimination." *City of Rome*, 446 U.S. at 175, 177. That is certainly the case with vote dilutive practices, which, as Congress well knew when amending the Voting Rights Act, had long been employed to gut the Fifteenth Amendment's promise of equal political opportunities for all citizens regardless of race. A strict test for purposeful discrimination, Congress reasonably feared, would ratify, not rein in, vote dilutive practices by the states. *See* Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 Wm. & Mary L. Rev. 725, 738 (1998) (arguing that the results test is appropriate under Section 2 of the Fifteenth Amendment because of "the difficulty of detecting and stopping serious constitutional injuries" solely under an intent test); S. Rep. No. 97-417, at 40 (1982) (finding that "the difficulties faced by plaintiffs forced to prove discriminatory intent through case-by-case adjudication create a substantial risk that intentional discrimination . . . will go undetected, uncorrected and undeterred"). The "right" question, Congress concluded, was not whether state practices were adopted or maintained with discriminatory intent, but whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Id.* at 28.

Section 2 requires courts to carefully review state laws and practices to ensure that they do not unfairly constrict equal political opportunities. Thus, Section 2 demands an "'intensely local appraisal of the design and impact'" of challenged state laws and practices, *Gingles*, 478 U.S. at 79 (quoting *Rogers v. Lodge*, 458 U.S. 613, 622 (1982)), and it requires that close attention be paid to whether the "effect of the[] [State's]

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choices" is to "deny[] equal opportunity" to voters of color, *League of United Latin Am. Citizens*, 548 U.S. at 441-42; *see Johnson*, 512 U.S. at 1018 (explaining that "[t]he need for such 'totality' review springs from the demonstrated ingenuity of state and local governments in hobbling minority voting power"). In this respect, the results test "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, 576 U.S. 519, 540 (2015).

In sum, Section 2's results test "is an important part of the apparatus chosen by Congress to effectuate this Nation's commitment 'to confront its conscience and fulfill the guarantee of the Constitution' with respect to equality in voting," *Bush v. Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring) (quoting S. Rep. No. 97-417, at 4 (1982)). Section 2 falls squarely within the broad scope of Congress's power to enforce the Fifteenth Amendment's ban on racial discrimination in voting. Whatever the outer bounds of Congress's power to enforce the Fifteenth Amendment, Congress has the power to annul electoral practices, such as packing and cracking communities of color, that have long been used to gut the Fifteenth Amendment's promise of an inclusive multiracial democracy open to all citizens regardless of race. *See Oregon v. Mitchell*, 400 U.S. 112, 132 (1970) (opinion of Black, J.) (upholding congressional ban on literacy tests to enforce the Fifteenth Amendment in light of the "long history of the discriminatory use of literacy tests to disfranchise voters on account of their race").

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III. Race-consciousness Is Baked into the Text and History of the Fifteenth Amendment.

Alabama contends that the Fifteenth Amendment prohibits Congress from taking race into account in

formulating remedies for violations of the Voting Rights Act. In Alabama's view, race-blind enforcement might be constitutionally acceptable, but it is constitutionally impermissible to take race into account in order to vindicate the right of citizens of color "to participate in the political process and to elect representatives of their choice," 52 U.S.C. § 10301(b). In Alabama's vision, to require Alabama to draw a second district in which citizens of color can elect representatives of their choice is tantamount to "[r]equiring racial preferences in single-member districts" and "[r]acially segregating Alabama's congressional districts." Appellants' Br. 71, 74. Indeed, in Alabama's view, states can pack and crack citizens of color to nullify the effectiveness of their votes with impunity.

Alabama's argument cannot be squared with the text and history of the Fifteenth Amendment. Those who wrote and ratified the Fifteenth Amendment did not view the world through rose-tinted, colorblind glasses. They confronted a political system sharply divided along racial lines, and they viewed the Fifteenth Amendment's guarantee of equal political opportunity as an essential "bulwark of liberty" that would enable Black people "to protect themselves in the southern reconstructed States." Cong. Globe, 40th Cong., 3d. Sess. 983, 1008 (1869). The Fifteenth Amendment guaranteed the right to vote free from racial discrimination not only because the right to participate in the political process was a matter of basic liberty, dignity, and self-governance, see *id.* at app. 95 ("It is absurd to speak of self-government as belonging to one who is denied the ballot, for without the ballot no man governs himself."), but also because "[B]lack people needed the right to vote in order to be able to protect themselves against the enactment of pernicious laws by white southerners," Amar & Brownstein, *supra*, at

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939. Without the equal right to vote, Black citizens would be "without . . . power" and "in constant danger from the cupidity of men who have been and expect again to be his masters," Cong. Globe, 40th Cong., 3d Sess. 983 (1869).

The Fifteenth Amendment gave Congress a broad enforcement power precisely because of the reality of an electoral system divided along racial lines. The Amendment's Framers recognized that congressional enforcement was vital to "neutralize the deep-rooted prejudice of the white race there against the negro" and "secure his dearest privileges" at the ballot box. *Id.* at app. 392. And they understood that the persistence of racially polarized voting would "provide an incentive for intentional discrimination in the regulation of elections." *N.C. St. Conf. of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016). In this respect, race-consciousness is baked into the text and history of the Fifteenth Amendment.

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This broad enforcement power plainly allows Congress to take race and the continuing persistence of racially polarized voting into account to ensure that citizens of color, like their white counterparts, can participate in the political process and elect representatives of their choice. Congress need not turn a blind eye to the fact that "racial discrimination and racially polarized voting are not ancient history," *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009).

Nothing in the text and history of the Fifteenth Amendment supports Alabama's crabbed view of the express power to enforce the Fifteenth Amendment's guarantee of equal political opportunity. Indeed, color-blindness arguments—of the sort Alabama makes here—were invoked to oppose the Fifteenth Amendment and prevent congressional efforts to enforce it. States opposed ratification of the Fifteenth

Amendment on the ground that it "single[d] out the colored races as its especial wards and favorites." Tenn. House J. 185-88 (1869-70), *in* 2 *The Reconstruction Amendments*, *supra*, at 579.

After ratification, opponents of the Fifteenth Amendment claimed that enforcement legislation, such as the Enforcement Act of 1870, that sought to prevent efforts to intimidate and hinder Black citizens from voting was a form of "class legislation against the great white race to which we all belong." Cong. Globe, 41st Cong., 2d Sess. 3874 (1870). Democratic opponents of congressional efforts to ensure that the right to vote was actually enjoyed by persons "to whom the right of suffrage is secured or guaranteed by the fifteenth amendment," *see* Act of May 31, 1870, ch. 114, § 5, 16 Stat. 140, 141, insisted that providing safeguards to ensure that Black citizens could exercise their right to vote "discriminate[d] in favor of the black and against the white" in violation of the Fifteenth Amendment. Cong. Globe, 41st Cong., 2d Sess. app. 400 (1870). Opponents decried enforcement efforts as "giv[ing] the negro rights, safeguards, and remedies which are withheld from the white man." *Id.* at 3874.

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For the Reconstruction Framers, the Fifteenth Amendment's touchstone was empowering Black voters in order to ensure equal political opportunities, not the colorblind notion that race could not be considered. As the debates over the Enforcement Act of 1870 reflect, nothing in the Fifteenth Amendment requires Congress to ignore the "deep rooted prejudice of the white race there against the negro" in securing to Black citizens their "just and constitutional position" as equal citizens. *Id.* at app. 392-93. In enforcing the Fifteenth Amendment, Congress can take account of race and how our political system remains divided along racial lines in order to ensure that Black, as well

as white, citizens can enjoy the Fifteenth Amendment's promise of equal political opportunity. That, as Representative Washington Townsend observed, "does not elevate one race above another; it gives no exclusive privileges, but in obedience to the Constitution it secures equality under the Constitution to all." *Id.* at app. 393.

The congressional maps at issue here, like those enacted by Alabama lawmakers in 1875 to gut the promise of the Fifteenth Amendment, pack and crack communities of color in order to minimize Black voting strength and to nullify the effectiveness of their votes. Alabama's claim that, faced with overwhelming proof of packing and cracking, a federal court cannot require the state to revise its map to create a second district in which Black voters can elect representatives of their choice would license the kind of gerrymandering that state mapmakers have long employed to dilute Black voting strength and turn the Fifteenth Amendment on its head.

Prohibitions on discriminatory results—like those contained in the Voting Rights Act—help enforce the Fifteenth Amendment's guarantee of equality by ensuring that Black citizens, like their white counterparts, can participate in the political process as equals and elect representatives of their choice. *See United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1561 (11th Cir. 1984) ("Section 2 is not meant to create race-conscious voting but to attack the discriminatory results of such voting where it is present."). Striking down dilutive practices that result in a denial of equal political opportunity raises no constitutional concern.

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CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court below.

Respectfully submitted,

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July 18, 2022

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