No. 12-96

In The

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,

v.

ERIC HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

BRIEF *AMICI CURIAE* OF CONSTITUTIONAL LAW SCHOLARS AND CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The following scholars are experts in the field of constitutional law, each of whom has published a book or law review article on the Fourteenth Amendment or Fifteenth Amendments. *Amici* law professors teach courses in constitutional law and have devoted significant attention to studying the Reconstruction Amendments:

Jack M. Balkin is Knight Professor of Constitutional Law and the First Amendment at Yale Law School.

Guy-Uriel Charles is the Charles S. Rhyne Professor of Law at Duke Law School and Founding Director of the Duke Law Center on Race, Law & Politics.

Luis Fuentes-Rohwer is Professor of Law and Harry T. Ice Faculty Fellow at Indiana University Maurer School of Law at Bloomington.

Adam Winkler is Professor of Law at UCLA School of Law.

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center 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 and freedoms it guarantees. CAC accordingly has a strong interest in this case and the scope of the protections of the

Fourteenth and Fifteenth Amendments. CAC has filed *amicus curiae* briefs in the U.S. Supreme Court in cases raising significant issues regarding the text and history of the Reconstruction Amendments, including *Northwest Austin Municipal Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009), *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), *Coleman v. Maryland Court of Appeals*, 132 S. Ct. 1327 (2012); and *Fisher v. University of Texas at Austin*, No. 11-345.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Shelby County's constitutional attack on the preclearance requirement of the Voting Rights Act—one of the Act's most successful provisions in preventing and deterring voting discrimination—depends on a cramped understanding of Congress's express power to "enforce" by "appropriate legislation" the guarantees of the Fifteenth Amendment. In Shelby County's view, courts have an obligation to strictly scrutinize the legislative remedies Congress deems "appropriate" to enforce

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, *amici curiae* state that all parties have consented to the filing of this brief; blanket letters of consent have been filed with the Clerk of the Court.

the constitutional right to vote free from racial discrimination. This deeply flawed vision has no basis in the text, history, and original meaning of the Fifteenth Amendment, which, along with the Thirteenth and Fourteenth Amendments, significantly expanded the powers of Congress.

The Reconstruction Amendments fit together like an interlocking puzzle with pieces that both stand alone and build off each other. In Section One, we show that these Amendments and their nearly identically worded Enforcement Clauses collectively reflect the lessons of the antebellum period and the Civil War and significantly change the balance of power between the federal government and the states. Against the backdrop of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), the framers chose language—"appropriate legislation"—intended to give Congress broad discretion to select the means to "enforce" the Constitution's new guarantees of personal, individual rights. In Section Two, we discuss the ratification of each of the Amendments separately, illustrating how each subsequent Amendment built off the experience of Congress in trying to enforce the Constitution in the face of continuing discrimination by recalcitrant southern states. Culminating this historical progression, the Fifteenth Amendment's plain language and history demonstrates that Congress, not the courts and certainly not the states, was being given sweeping powers to stamp out every conceivable attempt by the states to deny the franchise on account of race. With the Fifteenth Amendment's simple and focused mandate and the clear textual and historical evidence of the intended role of Congress, the

Court's deference to Congress should be at its apex in reviewing legislation duly enacted under Section 2 of the Fifteenth Amendment.

In resisting the force of the Reconstruction Amendments' grants of enforcement authority, Shelby County's argument that the Voting Rights Act offends state sovereignty echoes the same rejected arguments opponents of the Amendments made in challenging their adoption in Congress and their ratification by the states. The County ignores the historical reality that the Amendments ratified at the end of the Civil War were "the result of [a] great constitutional revolution" that "ended with the vindication of individual rights by the national power." Cong. Globe, 41st Cong., 2nd Sess. 3608 (1870). History shows that the Reconstruction Amendments gave Congress broad power—no less sweeping than Congress's Article I powers—to ensure the rights guaranteed by those Amendments, including the right to vote free from racial discrimination.

The text and history of the Fifteenth Amendment support the constitutionality of Congress's near-unanimous 2006 reauthorization of the Voting Rights Act, demonstrating that when Congress acts to prevent racial discrimination in voting, its authority is broad and entitled to great deference. Congress had ample basis for maintaining Section 5 as a bulwark against current and ongoing state-sponsored racial discrimination in voting concentrated in the covered jurisdictions. Accordingly, the judgment of the court of appeals should be affirmed.

ARGUMENT

I. The Plain Language and Original Meaning of the Enforcement Clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments Give Congress Broad Power to Enact Measures to Protect Individual Rights and Prevent State-Sponsored Discrimination.

The Thirteenth, Fourteenth, and Fifteenth Amendments fundamentally altered our Constitution, establishing broad guarantees of freedom, equality under the law, and the right to vote free from racial discrimination and empowering Congress to protect these personal, individual rights. The Thirteenth Amendment outlaws "slavery" and "involuntary servitude . . . within the United States," U.S. Const. amend XIII, §1; the Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," "deprive any person of life, liberty and property, without due process of law," or deny "to any persons within its jurisdiction the equal protection of the law." U.S. Const. XIV, § 1. Finally, in language "as simple in command as it was 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 . . . on account of race, color, or previous condition of servitude." U.S.

Const. amend. XV, § 1. To make these guarantees a reality, each of the Amendments provides that "Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amends. XIII, § 2; XIV, § 5, XV § 2.

In writing the Enforcement Clauses, the framers of the Reconstruction Amendments did not simply add to the list of express congressional powers enumerated in Article I and elsewhere in the Constitution. Instead, they explicitly invested Congress with a central role in enforcing the constitutional rights protected by our fundamental charter, including the right to vote, a right this Court has long described as "preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886).[2] Where, as here, Congress acts to enforce the right to vote free from racial discrimination expressly granted in the Fifteenth Amendment and protected as well by this Court's cases construing the Fourteenth Amendment's guarantee of equal protection, see *Rogers v. Lodge*, 458 U.S. 613 (1982); *Hunter v. Underwood*, 471 U.S. 222 (1985); *Shaw v. Reno*, 509 U.S. 630 (1993), Congress may "make stronger the rights" guaranteed by these Amendments, including by "legislat[ing]

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[2] As this Court has recognized, the framers of the Fourteenth Amendment considered and rejected proposals that would have granted Congress a plenary power to enact laws to secure various individual rights, preferring instead constitutional language taken from the Thirteenth Amendment that gave Congress the power to "enforce" constitutional guarantees by "appropriate legislation." *See City of Boerne v. Flores*, 521 U.S. 507, 520-23 (1997).

prophylactically against new evils that it anticipates may soon arise." Stephen G. Calabresi & Nicholas P. Stabile, *On Section 5 of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1431, 1439, 1442 (2009).

The language that the framers used to define the scope of Congress's authority under the Thirteenth, Fourteenth and Fifteenth Amendments—"appropriate legislation"—reflects a decision to give Congress wide discretion to enact whatever measures it deemed "appropriate" for achieving the purpose of the Amendment. In giving Congress the power 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 Framers of those Amendments. *See, e.g.*, JOHN T. NOONAN, NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 28-31 (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); Evan Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1158-66 (2001); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822-27 (1999); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 188 (1997); Steven A. Engel, *Note, The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding*, 109 YALE L.J. 115, 131-34 (1999). When Congress acts to enforce the

Reconstruction Amendments, including the Fifteenth Amendment, its authority is broad and entitled to great deference.

Both the plain language of the text and the context against which the framers acted confirm that the "Amendments' enforcement clauses are most naturally read as new, sweeping 'necessary and proper' clauses." Paulsen, 31 HARV. J. L. & PUB. POL'Y at 1002. The framers of the Reconstruction Amendments, including the Fifteenth Amendment, chose language conferring on Congress the power to "enforce" by all "appropriate legislation"—language taken from Chief Justice Marshall's foundational opinion in *McCulloch* sustaining the broad federal powers of Congress under Article I—because they were reluctant to leave the judiciary with sole responsibility for protecting against racial discrimination in voting and other constitutional violations.

With Southern states acting to strip African Americans of precious rights less than a decade after *Dred Scott v. Sandford*, the framers were determined to give Congress a leading role in securing the constitutional guarantees of the three Reconstruction Amendments. "[T]he remedy for the violation" of the Fifteenth Amendment, like the remedies for violation of the Thirteenth and Fourteenth 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, 42nd Cong., 2nd Sess. 525 (1872). The Amendments "were intended to be, what they really are, limitations of the power of

the States and enlargements of the power of Congress." *Ex Parte Virginia*, 100 U.S. 339, 345 (1880). "Born of the fear that the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power," McConnell, 111 HARV. L. REV. at 182, the text of the Reconstruction Amendments incorporated the language of *McCulloch*, establishing a broad federal legislative power to protect constitutional rights with corresponding deference from the courts to respect this new authority.

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." 17 U.S. at 421 (emphasis added); *see also Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 614-15 (1870) (quoting this passage in full and declaring that "[i]t must be taken then as finally settled . . . that the words" of the Necessary and Proper Clause are "equivalent" to the word "appropriate"); McConnell, 111 HARV. L. REV. at 178 n.153 ("In *McCulloch v. Maryland*, the terms 'appropriate and 'necessary and proper' were used interchangeably."). Indeed, in *McCulloch*, Chief Justice Marshall 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 power to enforce the constitutional prohibition on racial discrimination in

voting by "appropriate legislation," the framers "actually *embedded in the text*" the "language of *McCulloch*." Balkin, 85 N.Y.U. L. REV. at 1815 (emphasis in original).

McCulloch's broad construction of congressional power requires great deference by the courts in reviewing legislation enacted by Congress pursuant to an affirmative grant of power, such as the Enforcement Clause of the Fourteenth and Fifteenth Amendments. *McCulloch*, 17 U.S. at 421 (explaining that "the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution"). For the courts to substitute their own judgment regarding the necessity of measures enacted by Congress pursuant to its express powers would be to violate the separation of powers between the courts and Congress, "to pass the line which circumscribes the judicial department and to tread on legislative ground." *Id.* at 423.

Throughout Reconstruction, the framers repeatedly stressed that *McCulloch* was the measure of congressional power under the Enforcement Clauses of the three Reconstruction Amendments, entrusting to the discretion of Congress a broad power to enforce constitutional rights. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1124 (1866) ("When Congress was clothed with power to enforce . . . by appropriate legislation, it meant . . . that Congress should be the judge of what is necessary for the purpose of securing to [the freemen] those rights."); Cong. Globe, 41st Cong., 2nd Sess. 3882 (1870)

(“Congress, then, is clothed with so much power as is necessary and proper to enforce the two amendments to the Constitution, and is to judge from the exigencies of the case what is necessary and what is proper.”); Cong. Rec., 43rd Cong., 1st Sess. 414 (1874) (“The power to secure equal civil rights by ‘appropriate legislation’ is an express power; and Congress, therefore, is the exclusive judge of the proper means to employ. This has been settled in *McCulloch vs. Maryland*.”). Indeed, even opponents of the Reconstruction Amendments conceded that congressional enforcement power under the Amendments was equivalent to congressional power under Article I’s Necessary and Proper Clause. *See, e.g.*, *id*. at 4084-85 (“[W]hence comes these words ‘appropriate legislation’? They come from the language of Marshall in deciding the case *McCulloch vs. The State of Maryland*.”).

In drafting the Enforcement Clauses of the Reconstruction Amendments, the framers were also acutely aware of pre-Civil War Supreme Court decisions that gave a broad construction to Congress’s power to enforce what the Court viewed as a constitutional “right” to the return of slaves, as recognized by the Fugitive Slave Clause, U.S. Const. art. IV, § 2, cl. 3—one of the few provisions of the antebellum Constitution that limited state action. *See* Robert J. Kaczorowski, *The Supreme Court and Congress’ Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153, 221-30 (2004). In *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), the Court upheld the constitutionality of the Fugitive Slave Act of 1793, concluding that it was justified as “appropriate”

legislation to enforce the Fugitive Slave Clause. *Id.* at 615. Relying on *McCulloch*, Justice Story expressed this conclusion using language that the framers of the Reconstruction Amendments would later adopt: "the natural inference" from the existence of the right of recapture was that Congress was "clothed with the *appropriate* authority and functions to *enforce* it." *Id.* at 615 (emphasis added). *See also Ableman v. Booth*, 62 U.S. (21 How.) 506, 517, 526 (1859) (stating that Congress had power to "protect and guard the rights of all by *appropriate* laws" and upholding the Fugitive Slave Act of 1850) (emphasis added). Under *Prigg*, Congress had the same broad discretion to choose "appropriate" means for enforcing rights as it did when it acted to "carry into execution" its Article I powers, even when the Constitution provided no explicit textual authority for an enforcement power.

The framers of the Reconstruction Amendments, though they abhorred the "right" the Court had upheld in *Prigg*, made sure to incorporate the *Prigg* Court's understanding of congressional power, and enlisted it in support of racial equality. Throughout Reconstruction, the framers invoked *Prigg* "as fixing the interpretation of the Constitution" as "authorizing affirmative legislation in protection of the rights of citizenship under Federal law . . . ." Cong. Globe, 42nd Cong., 1st Sess. app. 70 (1871); Cong. Globe, 41st Cong., 2nd Sess. 3680 (1870) (invoking *Prigg* in support of legislation to "secure[] the right of the man to cast his ballot"). Under the Enforcement Clauses in the Reconstruction Amendments, they argued, "[s]urely we have the authority to enact a law as efficient in

the interests of freedom . . . as we had in the interests of slavery." Cong. Globe, 39th Cong. 1st Sess. at 475.

Like *McCulloch* and *Prigg*, Supreme Court cases of the era interpreting the scope of Congress's express powers used "appropriate" interchangeably with "necessary and proper" and emphasized Congress' broad discretion to enact laws pursuant to its express constitutional powers. *See Legal Tender Cases*, 79 U.S. 457, 542 (1870) ("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 . . . ? That would be to assume legislative power, and to disregard the accepted rules for construing the Constitution."); *Texas v. White*, 74 U.S. 700, 729 (1869) (explaining that "in the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed").

Finally, the influential treatise-writers of the age also read *McCulloch* as embracing congressional power to take "appropriate" measures to implement its powers, a point not lost on the framers of the Reconstruction Amendments. The accounts of congressional power authored by Justice Story and Chancellor Kent, for example, were cited repeatedly during the debates over the Amendments. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1093 (1866) (quoting Story); *id.* at 1118 (quoting Kent); *id.* at 1292 (quoting Kent); *id.* at 1294 (quoting Story). Story used the word "appropriate" to emphasize that

Congress "must have wide discretion as to the choice of means." 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 417 (1833) ("[T]he only limitation upon the discretion would seem to be, that the means are *appropriate* to the end. And this must naturally admit of considerable latitude; for the relation between the action and the end . . . is not always so direct and palpable, as to strike the eye of every observer.") (emphasis added). Chancellor Kent likewise invoked *McCulloch* when stressing the importance of Congress's power to adopt any means "which might be *appropriate* and conducive" to a permissible end. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 238 (1826) (emphasis added).

By using the phrase "by appropriate legislation," the framers wrote *McCulloch*'s broad construction of congressional power into the Enforcement Clause of the Reconstruction Amendments. From their perspective, with respect to the Fifteenth Amendment, Congress had broad authority to choose how to remedy violations of the Fifteenth Amendment's prohibition on racial discrimination in voting by the states.

II. The Debates over the Thirteenth, Fourteenth, and Fifteenth Amendments and Contemporaneous Enforcement Legislation Reflect the Broad Legislative Powers that the Framers Sought to Confer on Congress to Protect Personal, Individual Rights and Prevent State-Sponsored Discrimination.

The debates over the Thirteenth, Fourteenth, and Fifteenth Amendments, both before Congress and in the states, and enforcement legislation enacted contemporaneously with the Amendments confirm what the text and original meaning of the Enforcement Clauses provide: the Constitution gives Congress broad enforcement power to "secure to citizens the actual enjoyment of the rights and privileges guaranteed." Cong. Globe, 42nd Cong., 1st Sess. 375 (1871). As the debates reflect, the text was intended and understood to give Congress the same broad legislative powers recognized in foundational Supreme Court precedents, such as *McCulloch* and *Prigg*.

A. The Thirteenth Amendment Was Written to Give Congress the Power to Enforce the Thirteenth Amendment's Promise of Freedom.

The Thirteenth Amendment eliminated slavery and, for the first time in the Constitution's history, explicitly gave Congress the power to enforce the Constitution's promise of freedom. Introducing the Thirteenth Amendment on behalf of the Senate Judiciary Committee, Senator Lyman Trumbull likened the Amendment's Enforcement Clause to Article I's Necessary and Proper Clause, explaining that the Thirteenth Amendment would "authorize the Congress of the United States to pass such laws as may be necessary to carry this provision into effect." Cong. Globe, 38th Cong., 1st Sess. 1313 (1864); *see also* Cong. Globe, 38th Cong., 2nd Sess. 214 (1865) (describing the Enforcement Clause as "conferring upon Congress plenary power to pass all necessary

enactments to enforce this provision of the Constitution.").

As Senator Trumbull's comments reflect, the framers understood that the grant of enforcement power was critical to secure true freedom to the enslaved. Because of the grant of power to Congress, the Amendment would not merely end slavery, but would "obliterate the last lingering vestiges of the slave system [and] its chattelizing, degrading, and bloody codes," Cong. Globe, 38th Cong., 1st Sess. 1324 (1864), and ensure that "the rights of mankind, without regard to color or race, are respected and protected." *Id.* at 2989. Indeed, opponents of the Thirteenth Amendment, both in Congress and in the states, understood that the Enforcement Clause would grant Congress broad powers and objected that the Enforcement Clause "confers on the Congress the power to invade any State to enforce the freedom of the African in war or peace" and "strikes down the corner-stone of the Republic, the local sovereignty of the States," *id.* at 2962, providing Congress with a "dangerous grant of power." MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 230 (2001) (quoting Mississippi's objection to Thirteenth Amendment).

This new congressional enforcement power was put into effect almost immediately. As the 39th Congress met in late 1865, Southern states were trying to wipe out the promise of freedom. States across the South passed Black Codes, harsh and discriminatory laws aimed at making African Americans second-class citizens. *See* Akhil Reed

Amar, *Foreward; The Document and the Doctrine*, 114 HARV. L. REV. 26, 64-65 (2000); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3038-40 (2010) (describing provisions of Black Codes that denied the freed slaves the right to bear arms). In order "to destroy all these discriminations and to carry into effect the constitutional amendment," Cong. Globe, 39th Cong., 1st Sess. 474 (1866), the 39th Congress enacted the Civil Rights Act of 1866. The Act, which prohibited denial or abridgment, on the basis of race, of the rights to make or enforce contracts, sue in courts, give evidence, own real and personal property, as well as to keep and bear arms, extended far beyond the self-executing provisions of the Thirteenth Amendment; in today's terms, they were prophylactic enforcement measures. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-40 (1968) ("[T]he majority leaders in Congress—who were, after all, the authors of the Thirteenth Amendment—had no doubt that its Enabling Clause contemplated the sort of positive legislation that was embodied in the 1866 Civil Rights Act."); Amar, *Intratextualism*, 112 HARV. L. REV. at 823 (explaining that the 1866 Act, which "swept far beyond merely prohibiting slavery and involuntary servitude" illustrates the 39th Congress's "broad view" of the enforcement power).

The legislators who had just framed the Thirteenth Amendment pointed to *McCulloch*'s and *Prigg*'s expansive construction of congressional power in defending the Act's constitutionality. Republicans drew on "the celebrated case of *McCulloch v. The State of Maryland*" to demonstrate why Congress had power to enact the 1866 Act. Cong. Globe, 39th Cong.,

1st Sess. 1118 (1866). Under *McCulloch*, Congress was the "sole judge" of the necessity of a measure that was indisputably directed at a legitimate end—"the maintenance of the freedom to the citizen," a federal power "defined by the Constitution itself." *Id.* The framers in the 39th Congress argued that *Prigg*'s broad understanding of the congressional enforcement power, previously a weapon against liberty, could now be applied in equality's service: "We will turn the artillery of slavery upon itself." *Id.*; *see also id.* at 1294 ("[W]e are not without light as to the power of Congress in relation to the protection of these rights. In the case of *Prigg vs. Commonwealth of Pennsylvania*—and this it will be remembered was uttered in behalf of slavery—I find this doctrine, and it is perfectly applicable to this case.").

The overwhelming consensus among those who had framed the Thirteenth Amendment was that "Congress shall have the power to secure the rights of freemen to those men who had been slaves" and that "Congress must judge as to what legislation is appropriate and necessary to secure these men the rights of free men . . . ." *Id.* at 1124. As Senator Trumbull observed, the Enforcement Clause was an express grant of power "to secure freedom to all people in the United States" that "vests Congress with the discretion of selecting that 'appropriate' legislation, which it is believed will best accomplish the end." *Id.* at 475.

B. The Fourteenth Amendment Was Written to Give Congress the Power to Protect Personal, Individual Rights and Prevent State-Sponsored Racial Discrimination.

The 39th Congress demonstrated its broad understanding of the enforcement power conferred by the Thirteenth Amendment by passing the Civil Rights Act of 1866 over President Johnson's veto, but this fight crystallized the need for more constitutional change. Two months after the Act's passage, Congress approved the Fourteenth Amendment to secure fundamental rights and equality against the hostile acts of state governments, once again arming Congress with broad enforcement power. This new grant of power ended any doubt about the constitutionality of the Civil Rights Act of 1866. *See McDonald*, 130 S. Ct. at 3041 (explaining that "the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866").

The debates over the Fourteenth Amendment, unsurprisingly, stressed the importance of a broad legislative power to protect constitutional rights. The leading proponents of the Amendment, Senator Jacob Howard and Representative John Bingham, delivered important speeches explaining that Congress would have wide latitude to enact "appropriate" measures for protecting constitutional rights. In their view, "whatever legislation is appropriate, that is . . . whatever tends to enforce

submission to the prohibitions [of the Fourteenth Amendment], and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws . . . is brought within the domain of congressional power." *Ex Parte Virginia*, 100 U.S. at 346.

Introducing the Amendment in May 1866, Senator Howard emphasized the Enforcement Clause's relation to the Necessary and Proper Clause interpreted in *McCulloch*, explaining that the Amendment brought the power to enforce the Constitution's guarantees "within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper." Cong. Globe, 39th Cong., 1st Sess. at 2765-66. "Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution." *Id.*

Senator Howard's speech refutes a narrow reading of Congress's power to "enforce" the Fourteenth Amendment by "appropriate legislation." The enforcement provision, Howard said, conferred "authority to pass laws which are appropriate to the *attainment of the great object* of the amendment." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (emphasis added). Section 5 "casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property." *Id.* at 2768. For Senator Howard, the enforcement provision was "indispensable" because it "imposes upon Congress this power and this duty. It enables Congress, in case

the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment." *Id.*

In the House debates, Representative Bingham argued that Section 5 corrected "a want . . . in the Constitution of our country" by expressly giving the people the power "by congressional enactment" to protect "the inborn rights of every person . . . whenever the same shall be abridged or denied by the unconstitutional acts of any State." Cong. Globe, 39th Cong., 1st Sess. 2542 (1866). This new grant of power would enable Congress to prevent "state injustice and oppression" *id.*, and to "correct the unjust legislation of the states." *Id.* at 2459; s*ee also id.* at 2498 ("We propose . . . to give power to the Government of the United States to protect its own citizens within the States, within its own jurisdiction. Who will deny the necessity of this? No one."); *id.* at app. 257 (explaining that the fifth section of the Amendment was "necessary in order to carry the proposed article into practical effect").

The Fourteenth Amendment's opponents also understood Section 5 to confer a broad discretion on Congress to enforce the Amendment's provisions—and, in fact, this broad power was one of the reasons for their opposition to the Amendment. *See id.* at 2500 (arguing that that the Fourteenth Amendment would "strike down . . . State rights and invest all power in the General Government"); *id.* at 2940 (calling the enforcement clause "most dangerous"). Accordingly, while supporters and opponents of the Fourteenth Amendment parted ways on the merit of the Amendment's broad enforcement power, both

sides agreed that the Amendment would provide Congress significant authority to enforce its provisions.

Likewise, during ratification, opponents of the Fourteenth Amendment expressed the fear that the authority to pass "appropriate legislation" would give Congress extensive power to define the obligations of states with respect to their citizens. *See* JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT 254-55 (1997). One Texas Senator summed up these concerns: "What is 'appropriate legislation?' The Constitution is silent; therefore, it is left for the Congress to determine." *Journal of the Senate of the State of Texas*, 11th Legis., 422 (1866). Likewise, Governor Jenkins of Georgia worried that Congress is "the proper judge[] of what constitutes appropriate legislation. If therefore, the amendment be adopted, and a fractional Congress . . . be empowered 'to enforce it by appropriate legislation,'what vestige of hope remains to the people of those States?" BOND, NO EASY WALK TO FREEDOM at 238.

In 1867, President Johnson tried to strip Section 5 out of the Fourteenth Amendment, urging adoption of an alternative proposal that "eliminated Congress' power to enforce the Amendment." *McDonald*, 130 S. Ct. at 3078 (Thomas, J., concurring). That proposal failed, and "the American people ratified the Fourteenth Amendment . . . [k]nowing full well that . . . th[e] language authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality." AKHIL REED

AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 363 (2005).

C. The Fifteenth Amendment Was Written to Give Congress the Power to Ensure Enjoyment of the Right to Vote Free From Racial Discrimination.

The culmination of the Amendments to the Constitution designed to guarantee personal rights and outlaw state-sponsored racial discrimination was the Fifteenth Amendment. In writing into the Constitution the "fundamental principle" that state and federal governments "may not deny or abridge the right to vote on account of race," *Rice*, 528 U.S. at 512, the framers explained that the Fifteenth Amendment would be "the capstone in the great temple of American freedom," Cong. Globe, 40th Cong., 3rd Sess. 724 (1869), that would "make every citizen equal in rights and privileges." *Id.* at 672. Once again, a broad congressional power to ensure that the right to vote was actually enjoyed was critical to the Amendment.

During the debates on the Fifteenth Amendment, leading framers, such as John Bingham, made clear that the Amendment's Enforcement Clause, like that of the Thirteenth and Fourteenth Amendments, gave Congress a broad "affirmative power" to secure the right to vote. *Id.* at 727; *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."). Without a broad enforcement power, the framers feared that the

constitutional guarantee 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.

In 1870, the year the Fifteenth Amendment was ratified, Congress invoked the Amendment's Enforcement Clause in support of voting rights legislation, reflecting the framers' judgment that the Fifteenth Amendment is "ample and full and clothes Congress with all the power to secure the end which it declares shall be accomplished." Cong. Globe, 41st Cong., 2nd Sess. 3563 (1870). The Enforcement Clause, Senator Oliver Morton explained, "intended to give Congress the power of conferring upon the colored man the full enjoyment of his right. We so understood it when we passed it. . . . [T]he second section was put there . . . 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.* at 3670; *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 . . . ."); *id.* at app. 392 (explaining that "some stringent law is necessary to neutralize the deep-rooted prejudice of the white race there against the negro"). *See also* Cong. Rec., 43rd Cong., 1st Sess.

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 power between the federal government and the states, giving Congress broad authority to secure the right to vote to African Americans 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., 3rd Sess. at 989. Opponents of the Fifteenth Amendment, both in Congress and in the states, worried that Congress would use its enforcement power to "send their satraps into every election district in this country," 41st Cong., 2nd Sess. 255 (1869), and put into effect "registry laws and laws regulating elections at our doors, enacted by a power we cannot reach or control," 2 *Journal of the State of Michigan House of Rep.* 1101 (Mar. 5, 1869). In their view, "nothing could be more loose and objectionable than the clause which authorizes 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 California*, 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 secure the right to vote free from racial discrimination. In giving Congress the power to remedy voting discrimination by the states, the Fifteenth Amendment specifically limited state sovereignty. As Senator Carl Schurz explained during debates over Congress's first attempt to enforce the Fifteenth Amendment:

> [T]he Constitution of the United States has been changed in some most essential points; that change does amount to a great 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.

Cong. Globe, 41st Cong., 2nd Sess. at 3607-08.

III. The History of the Fifteenth Amendment Demonstrates that "Appropriate" Enforcement Legislation Includes Broad, Prophylactic Regulation to Protect the Right to Vote.

Most relevant here, the history of the Fifteenth Amendment demonstrates that Congress's broad legislative power was particularly important to secure the right to vote free from racial discrimination. Because states extensively regulate elections, including by regulating voter qualifications and drawing district lines, states hostile to the

Fifteenth Amendment could easily use their power over the election system to deny or abridge the right to vote free from discrimination, as they often did. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 590-91 (1988) (discussing efforts to defy the Fifteenth Amendment through racial gerrymandering and adoption of discriminatory voting laws); *Shaw*, 509 U.S. at 640 (discussing racial gerrymandering enacted in the 1870s to dilute the right of African Americans to vote).

Accordingly, 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 heavy-handed and subtle—was critical to ensuring "the colored man the full enjoyment of his right," Cong. Globe, 41st Cong., 2nd Sess. 3670 (1870), and "prevent[ing] any state from discriminating against a voter on account of his race . . . ." *Id.* at 3663. As the debates over the Fifteenth Amendment and contemporaneous congressional enforcement legislation show, the framers were well aware that Congress needed broad authority to enact prophylactic legislation to root out all forms of racial discrimination in voting.

For example, during the debates on the Fifteenth Amendment, the framers observed 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," emphasizing that "[w]hat we desire to reach" is "to insure by constitutional enactment . . . the

right of suffrage" of citizens without regard to race. Cong. Globe, 40th Cong., 3rd Sess. 725 (1869). In the months following ratification of the Fifteenth Amendment, Congress recognized the grim reality that many states would pursue novel methods of disenfranchising African Americans on account of their race. Highlighting the importance of providing "proper machinery . . . for enforcing the fifteenth amendment," Senator William Stewart explained that "it is impossible to enumerate over-specifically all the requirements that might be made as prerequisites for voting . . . . The States can invent just as many requirements [for voting] as you have fingers and toes. They could make one every day." Cong. Globe, 41st Cong., 2nd Sess. 3658 (1870). "There may be a hundred prerequisites invented by the States," *id.*, "a hundred modes whereby [the colored man] can be deprived of his vote." *Id.* at 3657; *see also id.* at 3568 (noting "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"). The only means to ensure minority voting rights, the framers recognized, "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.

The framers recognized that the right to vote would actually be enjoyed by the newly freed slaves only if Congress had the authority to stamp out and deter the full range of racial discrimination in voting, including by enacting prophylactic regulation to ensure the right to vote was actually enjoyed. As

Senator Schurz commented, under the Fifteenth Amendment, "[a] State shall have full power to do that which is right in its own way; but it is prohibited from doing that which is wrong in any way." *Id.* at 3608.

IV. This Court's Precedents Establish that the Constitution Gives Congress Broad Power to Prevent and Deter Racial Discrimination in Voting.

A. The Court Has Consistently Held that McCulloch's Broad Construction of Congressional Power Applies to Legislation Enforcing the Fifteenth Amendment.

Consistent with the text and history discussed above, this Court has consistently held that *McCulloch*'s broad interpretation of Congress's power under the Necessary and Proper Clause applies equally to legislation enforcing the right to vote free from discrimination secured by the text of the Fifteenth Amendment. "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, 174-75 (1980). Under these cases, broad *McCulloch*-style deference applies to the means Congress adopts to enforce the constitutional right to vote free from racial discrimination. The preclearance requirement contained in Section 5 of the Voting Rights Act seeks to enforce the core purpose of the Fifteenth Amendment, and the nearly unanimous, bipartisan

decision of Congress to re-authorize it falls squarely within Congress's broad power to enforce the Fifteenth Amendment.

In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court applied *McCulloch* deference in holding that the preclearance and coverage provisions of the Voting Rights Act—the same provisions Shelby County attacks here—were "appropriate legislation" within Congress's Fifteenth Amendment enforcement power. "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Id.* at 324. As the *Katzenbach* Court explained, "[b]y adding th[e] authorization [for congressional enforcement in Section 2], the framers indicated that Congress was to be chiefly responsible for implementing the rights created. . . . Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *Id.* at 325-26.

Based on this text and history, the Court held that the "basic test" set forth by Chief Justice Marshall in *McCulloch* "concerning the express powers of Congress" applied, and rejected "South Carolina's argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms. . . . Congress is not circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment." *Id.* at 326, 327; *cf. Jones*, 392 U.S. at 439 (explaining that the Enforcement Clause of the Thirteenth Amendment "clothed 'Congress with power to pass all

laws necessary and proper for abolishing all badges and incidents of slavery in the United States'") (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1886)); *James Everard's Breweries v. Day*, 265 U.S. 545, 558-559 (1924) (applying *McCulloch* to analyze constitutionality of congressional action under the Enforcement Clause of the Eighteenth Amendment).

Shelby County contends that *Katzenbach* is a relic of the 1960s that must be confined to its facts, but this Court's cases have refused to impose such artificial limits on the power of Congress to enforce the Fifteenth Amendment's promise of voting equality. Despite considerable progress in the towards fulfilling the command of the Fifteenth Amendment, this Court has reaffirmed *Katzenbach*'s reasoning three separate times, upholding Congress's renewal of the preclearance requirement in 1970, 1975, and 1982. As these cases hold, "Congress has the constitutional authority to designate covered jurisdictions and to guard against changes that give rise to a discriminatory effect in those jurisdictions," *Lopez v. Monterrey County*, 525 U.S. 266, 283 (1999), because "the Act's ban on electoral changes that are discriminatory . . . is an appropriate method of promoting the purposes of the Fifteenth Amendment." *City of Rome*, 446 U.S. at 177. *Accord Georgia v. United States*, 411 U.S. 526, 535 (1973).

The text, of course, gives Congress the authority to select the means of enforcing constitutional rights; it does not eliminate the requirement that Congress act to "enforce" rights protected by the Constitution. In order to ensure that Congress is actually enforcing, not inventing,

new constitutional rights, this Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), refined the *McCulloch* standard, applying a congruence and proportionality test to smoke out congressional efforts to establish new rights in the guise of enforcement. But these concerns do not have the same force when it comes to the Fifteenth Amendment's focused and express prohibition on racial discrimination in voting. In the text of the Constitution itself, the Fifteenth Amendment protects against governmental efforts to deny or abridge the right to vote on account of race.

Consistent with the text's plain language, Supreme Court precedent dictates that Congress has broad leeway to design remedies to protect against discrimination based on race—the most constitutionally suspect form of discrimination—in order to protect the right to vote, which has always been recognized as a fundamental right of the highest order. "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Katzenbach*, 383 U.S. at 324. As Justice Scalia has recognized, "[g]iving [Congress] . . . more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctly violative of the principal purpose of the [Civil War] Amendment[s] . . . ." *Tennessee v. Lane*, 541 U.S. 509, 561 (2004) (Scalia, J., dissenting); *see also Oregon v. Mitchell*, 400 U.S. 112, 129 (1970) (opinion of Black, J.) ("Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intentions of the framers of the Thirteenth, Fourteenth, and Fifteenth

Amendments."). *See* Br. of Fed. Respondent at 17-19; Br. of Cunningham Resp-Intervenors at 5.

Boerne itself recognized that when Congress enforces recognized, fundamental constitutional rights—such as the right to vote expressly enumerated in the Fifteenth Amendment and protected as well by this Court's equal protection precedents—"[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Boerne*, 521 U.S. at 518 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)). As history shows, the Fifteenth Amendment was designed to radically alter constitutional principles of federalism, giving to Congress a broad sweeping power to ensure that the right to vote free from racial discrimination was actually enjoyed by all Americans. While "the Voting Rights Act, by its nature, intrudes on state sovereignty," "[t]he Fifteenth Amendment permits this intrusion." *Lopez*, 525 U.S. at 284-85.

Indeed, *Boerne* is best understood as a refinement of long established fundamental principles giving Congress broad authority to choose the means of remedying violations of constitutional guarantees, designed to ensure that the "object of valid [enforcement] legislation [is] the ... remediation or prevention of constitutional violations." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 672 (1999). Since the function of *Boerne*'s congruence and proportionality

test is to distinguish "measures that remedy or prevent unconstitutional actions" and "measures that make a substantive change in the governing law," *Boerne*, 521 U.S. at 519, when Congress enforces an expressly enumerated constitutional right, such as the Fifteenth Amendment's prohibition on racial discrimination in voting, "Congress ought to have wide latitude in choosing among enforcement remedies." Calabresi & Stabile, 11 U. PA. J. CONST. L. at 1436. As the Constitution's text reflects, "[t]he Fifteenth Amendment empowers Congress, not the Court, to determine . . . what legislation is needed to enforce it." *Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 205 (2009).

B. The Court Has Consistently Held that the Fifteenth Amendment Permits Congress to Single Out Jurisdictions With Proven Histories of Racial Discrimination in Voting for Prophylactic Regulation.

Consistent with the text and history of the Fifteenth Amendment, this Court has also held that prophylactic legislation that targets states with a long history of racial discrimination in voting for special, more stringent remedies is "appropriate legislation" within the scope of the Fifteenth Amendment's Enforcement Clause. In *South Carolina v. Katzenbach*, this Court upheld the preclearance requirement of the Voting Rights Act, explaining that "[i]n acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed

necessary." *Katzenbach*, 383 U.S. at 328. Having found that "substantial voting discrimination presently occurs in certain sections of the country and knowing "no way of accurately forecasting where the evil might spread in the future," Congress's decision to focus on "a small number of States and political subdivisions which in most instances were familiar to Congress by name" was a "permissible method of dealing with the problem." *Id.*

This Court in *Katzenbach* recognized that the Constitution does not require Congress to treat the States all alike, or ignore a history of racial discrimination in voting in certain States, when it enforces the Fifteenth Amendment's command of voting equality. "[T]he doctrine of the equality of states . . . does not bar th[e] [VRA's] approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared." *Id.* at 328-29; *see also Northwest Austin*, 557 U.S. at 203. Since the doctrine of equality of states is not a textual limit on the enumerated legislative powers of Congress, but rather is rooted in the fact that, since the Constitution's founding, new states have been admitted to the nation on an equal footing with the original states, see *Coyle v. Smith*, 221 U.S. 559, 566-67 (1911), "the principle of equality is not disturbed by a legitimate exertion of the United States of its constitutional power . . . ." *United States v. Chavez*, 290 U.S. 357, 365 (1933); *see also Coyle*, 221 U.S. at 568 (distinguishing invalid conditions on admission of new states from "affirmative legislation intended to operate *in futuro*,

which are within the scope of the conceded powers of Congress over the subject").

Indeed, this Court has always recognized that the preclearance provision of the Voting Rights Act is the quintessential example of "appropriate legislation" enforcing the Fifteenth Amendment's command of voting equality because it only applies to jurisdictions with longstanding, proven histories of racial discrimination in voting. Rather than applying the preclearance requirement "equally to cases arising in states which have the justest laws respecting the personal rights of citizens . . . as to those which arise in states that may have violated the prohibitions of the amendment," *Civil Rights Cases*, 109 U.S. at 14, Congress "confined [preclearance] to those regions of the country where voting discrimination had been most flagrant" and "limited [it] to those cases in which constitutional violations were most likely." *Boerne,* 521 U.S. at 532-33. As this Court has affirmed on many occasions, by providing a remedy "directed only to those States in which Congress found that there had been discrimination," *United States v. Morrison*, 529 U.S. 598, 627 (2000), Congress appropriately tailored the Voting Rights Act "to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *Boerne*, 521 U.S. at 526.

* * * * * * *

Whether this Court applies the *McCulloch* standard reflected in the text of Section 2 of the Fifteenth Amendment or *Boerne*'s refinement of it,

the result is the same: Congress's 2006 reauthorization of the Act's preclearance requirement is "appropriate legislation" enforcing the Fifteenth Amendment.

In extending the preclearance requirement of the Voting Rights Act in 2006, Congress acted to protect against racial discrimination in voting—the single core purpose of the Fifteenth Amendment. Acting within its wide discretion to select appropriate means, Congress conducted an extensive inquiry into the current state of racial discrimination in voting and permissibly determined that prophylactic measures were "current[ly] need[ed]," *Northwest Austin,* 557 U.S. at 203, to protect against unconstitutional racial discrimination in the administration of elections persisting in the covered jurisdictions.

As it had in 1965, when the Act was first passed, and in 1970, 1975, and 1982, when preclearance was renewed, Congress found that "substantial voting discrimination presently occurs in certain sections of the country, and it knew no way of accurately forecasting where the evil might spread elsewhere in the future." *Katzenbach*, 383 U.S. at 328. Choosing to limit its attention to the geographic areas where federal remedies were most pressing, Congress continued in effect the preclearance requirement and its associated coverage formula—one of the American law's most successful civil rights provisions—in order to prevent and deter state-sponsored racial discrimination in voting. In so doing, Congress found that the Act's burdens—while by no means insignificant—had been lessened by decades

of familiarity with the preclearance process and the availability of bailout, and were, in any event, fully justified by the need to ensure continued progress toward the promise of voting equality commanded by the Fifteenth Amendment. *Cf. Dickerson v. United States*, 530 U.S. 428 (2000).

By an overwhelming margin—98-0 in the Senate and 390-33 in the House—bipartisan majorities agreed that the preclearance provision of the historic Voting Rights Act continued to serve the critical purpose of preventing and deterring racial discrimination in voting that persist in the covered jurisdictions. As the comprehensive opinions below demonstrate, these findings are amply supported by the massive record Congress assembled of voting discrimination in all phases of the electoral process. Pursuant to the original understanding of the Fifteenth Amendment's Enforcement Clause—that Congress would have broad power to determine what is appropriate to protect the right to vote free from racial discrimination—the Court should defer to Congress's near-unanimous judgment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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