

No. 23-13914
(consolidated with Nos. 23-13916 and 23-13921)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ALPHA PHI ALPHA FRATERNITY, INC., et al.,
Plaintiffs-Appellees,

v.

SECRETARY, STATE OF GEORGIA,
Defendant-Appellant.

*On Appeal from the United States District Court
for the Northern District of Georgia*

**BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER
AS *AMICUS CURIAE* IN SUPPORT OF
PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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Plaintiffs-Appellees,

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ANNIE LOIS GRANT, et al.,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

I also hereby certify that I am aware of no persons or entities, in addition to those listed in the party and *amicus* briefs filed in this case, that have a financial interest in the outcome of this litigation. Further, I am aware of no persons with any interest in the outcome of this litigation other than the signatory to this brief and its counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: April 15, 2024

/s/ Brianne J. Gorod

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	5
I. The Fifteenth Amendment Gives Congress Sweeping Power to Enforce the Amendment’s Ban on Racial Discrimination in Voting	5
II. Congress Constitutionally Used Its Fifteenth Amendment Enforcement Power to Enact Section 2’s Prohibition of Vote Dilution.....	12
III. Section 2’s Application to Present Circumstances Does Not Exceed Congress’s Fifteenth Amendment Power to Prohibit Redistricting Maps that Dilute Black Voters’ Electoral Strength.....	20
CONCLUSION	27

TABLE OF AUTHORITIES

	Page(s)
<u>CASES</u>	
<i>Ala. State Conf. of the NAACP v. Alabama</i> , 949 F.3d 647 (11th Cir. 2020)	19
<i>Ala. State Conf. of the NAACP v. Alabama</i> , 141 S. Ct. 2618 (2021)	19
<i>Allen v. Milligan</i> , 599 U.S. 1 (2023)	2, 4, 12, 16-18, 20, 23-25
<i>Bostock v. Clayton County</i> , 590 U.S. 644 (2020)	22
<i>Brnovich v. Democratic Nat’l Comm.</i> , 141 S. Ct. 2321 (2021)	16
<i>Bush v. Vera</i> , 517 U.S. 952 (1996)	19
<i>Chisolm v. Roemer</i> , 501 U.S. 380 (1991)	15
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997)	24, 25
<i>City of Mobile v. Bolden</i> , 446 U.S. 55 (1980)	14, 15
<i>City of Rome v. United States</i> , 446 U.S. 156 (1980)	8, 16, 21, 24
<i>Friends of the Everglades v. S. Fla. Water Mgmt. Dist.</i> , 570 F.3d 1210 (11th Cir. 2009)	19
<i>Gomillion v. Lightfoot</i> , 364 U.S. 339 (1960)	13, 14

TABLE OF AUTHORITIES — cont'd

	Page(s)
<i>Johnson v. De Grandy</i> , 512 U.S. 997 (1994).....	17
<i>Johnson v. Hamrick</i> , 196 F.3d 1216 (11th Cir. 1999)	19, 21, 25
<i>Kimel v. Fla. Bd. of Regents</i> , 528 U.S. 62 (2000).....	25
<i>Knox v. Lee</i> , 79 U.S. (12 Wall.) 457 (1871)	9
<i>Lane v. Wilson</i> , 307 U.S. 268 (1939).....	5, 13
<i>League of Latin Am. Citizens v. Perry</i> , 548 U.S. 399 (2006).....	17
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819).....	8, 9
<i>Nw. Austin Mun. Util. Dist. No. 1 v. Holder</i> , 557 U.S. 193 (2009).....	21
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970).....	20
<i>Reno v. Bossier Par. Sch. Bd.</i> , 528 U.S. 320 (2000).....	5
<i>Rice v. Cayetano</i> , 528 U.S. 495 (2000).....	5
<i>Shelby County v. Holder</i> , 570 U.S. 529 (2013).....	24, 26, 27

TABLE OF AUTHORITIES — cont’d

	Page(s)
<i>South Carolina v. Katzenbach</i> , 383 U.S. 301 (1966).....	7, 8, 13, 24, 26
<i>Tennessee v. Lane</i> , 541 U.S. 509 (2004).....	26
<i>Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project</i> , 576 U.S. 519 (2015).....	18
<i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986).....	2, 17, 23
<i>United States v. Marengo Cnty. Comm’n</i> , 731 F.2d 1546 (11th Cir. 1984)	4, 18, 19, 24, 25, 27
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964).....	6
<i>White v. Regester</i> , 412 U.S. 755 (1973).....	14
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886).....	6

STATUTES AND LEGISLATIVE MATERIALS

52 U.S.C. § 10301(b)	12, 16
Cong. Globe, 39th Cong., 1st Sess. (1866).....	6
Cong. Globe, 40th Cong., 3d Sess. (1869)	5, 6, 9, 10
Cong. Globe, 41st Cong., 2d Sess. (1870).....	2-4, 10-12
Cong. Globe, 42d Cong., 2d Sess. (1872).....	7

TABLE OF AUTHORITIES — cont'd

	Page(s)
2 Cong. Rec. (1874)	11
S. Rep. No. 97-417 (1982)	15, 17, 20

CONSTITUTIONAL MATERIALS

U.S. Const. amend. XV	5, 6, 8
-----------------------------	---------

OTHER AUTHORITIES

Vikram David Amar & Alan Brownstein, <i>The Hybrid Nature of Political Rights</i> , 50 Stan. L. Rev. 915 (1998)	3, 11
Jack M. Balkin, <i>The Reconstruction Power</i> , 85 N.Y.U. L. Rev. 1801 (2010)	8, 9
Brief for Appellants, <i>Allen v. Milligan</i> , 599 U.S. 1 (2023) (Nos. 21-1086, 21-1087)	25
Brief of Appellant, <i>Johnson v. Hamrick</i> , 196 F.3d 1216 (11th Cir. 1999) (No. 98-8896)	21, 24
Chandler Davidson, <i>White Gerrymandering of Black Voters: A Response to Professor Everett</i> , 79 N.C. L. Rev. 1333 (2001)	3, 13
J. Morgan Kousser, <i>Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction</i> (1999)	13
Douglas Laycock, <i>Conceptual Gulfs in City of Boerne v. Flores</i> , 39 Wm. & Mary L. Rev. 743 (1998)	7
Michael W. McConnell, Comment, <i>Institutions and Interpretation: A Critique of City of Boerne v. Flores</i> , 111 Harv. L. Rev. 153 (1997)	7-9

TABLE OF AUTHORITIES — cont'd

	Page(s)
John T. Noonan, Jr., <i>Narrowing the Nation’s Power: The Supreme Court Sides with the States</i> (2002)	8
Michael Stokes Paulsen, <i>A Government of Adequate Powers</i> , 31 Harv. J.L. & Pub. Pol’y 991 (2008)	8
<i>Webster’s New International Dictionary</i> (2d ed. 1950)	6

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 the 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, Congress’s power to enforce those protections, and the Voting Rights Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

After an eight-day trial, the district court in this case issued a comprehensive opinion totaling over 500 pages that held that Georgia’s 2021 congressional and legislative maps (“2021 Maps”) diluted the voting strength of Black voters and therefore violated Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. Doc. 333 at 9, 20.² In reaching this result, the district court conducted a “holistic

¹ *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief’s preparation or submission. Plaintiffs-Appellees, Intervenor-Appellee, and Defendant-Appellant have consented to the filing of this brief.

² Record citations refer to the docket in *Alpha Phi Alpha Fraternity, Inc., et al. v. Raffensperger*, No. 1:21-cv-05337.

analysis and searching local appraisal of the facts” using “the existing three-part framework developed in” *Thornburg v. Gingles*, 478 U.S. 30 (1986), which was reaffirmed by the Supreme Court just last year in *Allen v. Milligan*, 599 U.S. 1 (2023). Doc. 333 at 19, 511.

In this appeal, Appellant argues that the district court’s application of Section 2 to the 2021 Maps was unconstitutional because, in his view, Section 2 is no longer necessary to enforce the Fifteenth Amendment in Georgia. Contrary to decades of this Court’s and the Supreme Court’s precedent, Appellant contends that statutes enacted under Congress’s Fifteenth Amendment enforcement authority must be justified by Congress with present-day evidence and that Section 2, which was last amended in 1982, therefore cannot be applied today. Appellant’s Br. 16-17. Appellant’s arguments cannot be squared with the text and history of the Fifteenth Amendment and the Voting Rights 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 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.

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 [their] 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. By prohibiting maps that dilute the voting strength of communities of color, Section 2 enforces the Fifteenth Amendment’s ban on racial discrimination in voting and thereby strengthens our nation’s multiracial democracy. Consistent with this history, this Court and the Supreme Court have repeatedly affirmed that Section 2’s prohibition of discriminatory results is a constitutional exercise of Congress’s Fifteenth Amendment enforcement powers. *See, e.g., United States v. Marengo Cnty. Comm’n*, 731 F.2d 1546, 1560 (11th Cir. 1984); *Milligan*, 599 U.S. at 41.

If this Court were to conclude that Section 2 and *Gingles*—which have been applied to redistricting maps for decades, *see id.* at 19 (collecting cases)—cannot be constitutionally applied to the 2021 Maps, it would undermine Congress’s constitutional prerogative to enforce the Fifteenth Amendment by empowering courts—not Congress—to determine what remedy is necessary to enforce the Fifteenth Amendment. That result would be fundamentally at odds with the text and history of the Fifteenth Amendment. This Court should reject Appellant’s argument and affirm the judgment of the court below.

ARGUMENT

I. The Fifteenth Amendment Gives Congress Sweeping Power to Enforce the Amendment’s Ban on Racial Discrimination in Voting.

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, and “nullifies sophisticated as well as simple-minded modes of discrimination,” *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

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 Par. 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))).

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. 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 “Congress shall have power to enforce this article by appropriate legislation.” U.S. Const. amend. XV, § 2. By adding this language, “the 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, 326 (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. Sandford*. Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 743, 765 (1998).

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 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.

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”). 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 colored man the full enjoyment of his right.” Cong. Globe, 41st Cong., 2d Sess. 3670 (1870).

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 to pass the Voting Rights Act and thereby prohibit dilutive electoral practices, like the 2021 Maps, which had long been used to undercut the Fifteenth Amendment’s guarantee of equal political opportunity.

II. Congress Constitutionally Used Its Fifteenth Amendment Enforcement Power to Enact Section 2’s Prohibition of Vote Dilution.

Tragically, the Fifteenth Amendment “proved little more than a parchment promise.” *Milligan*, 599 U.S. at 10. 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). With the Voting Rights Act, Congress evinced its “firm intention to rid the country of racial discrimination in voting.” *Katzenbach*, 383 U.S. at 315.

A. After the enactment of the Fifteenth Amendment, “[g]errymanders were the paradigm of the dilution strategy” in the South. J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* 26 (1999). State governments packed and cracked Black voters into gerrymandered districts to undercut the Fifteenth Amendment’s guarantee of equal political opportunity. See Davidson, *supra*, at 1334 (“Briefly put, whites have ruthlessly, systematically, and pretty much without hindrance gerrymandered African-American voters in this country from Reconstruction to the modern era.”).

The Supreme Court subsequently 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*, 307 U.S. at 275. In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the 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. The 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.

And in other cases, the Supreme Court has held that the Fourteenth Amendment’s more general guarantee of equal protection also limits states’ ability to put in place districting schemes that function “to cancel out or minimize the voting strength of racial groups.” *White v. Regester*, 412 U.S. 755, 765 (1973). In *White*, the Court 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,” the Court affirmed a lower court’s finding of racial vote dilution. *Id.*

B. In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), a plurality of the Supreme 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.

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 the Supreme Court has made clear, 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 *Milligan*, 599 U.S. at 18.

Congress thus used its power to enforce the Fifteenth Amendment to “prohibit voting practices 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* S. Rep. No. 97-417, at 40 (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.

C. Courts have applied Section 2 to districting maps “in an unbroken line of decisions stretching four decades,” *Milligan*, 599 U.S. at 38, using the framework the Supreme Court established in *Gingles*, *see id.* at 17; *see also id.* at 19 (collecting cases). *Gingles* demands “‘an intensely local appraisal’ of the electoral mechanism at issue,” *id.* at 19 (quoting *Gingles*, 478 U.S. at 79), and it requires that close attention be paid to whether the “effect of the[] [State’s] choices” is to “deny[] equal opportunity” to voters of color, *League of Latin Am. Citizens v. Perry*, 548 U.S. 399, 441-42 (2006); *see Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994) (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 Cmty. Project*, 576 U.S. 519, 540 (2015).

D. The Supreme Court has consistently recognized that Section 2’s results test is constitutional. Just last year, in *Milligan*, the Supreme Court used the *Gingles* test and affirmed a district court’s ruling that Alabama’s 2021 congressional maps violated Section 2. *See* 599 U.S. at 23. In so doing, the Court rejected the state’s arguments against Section 2’s constitutionality. *See id.* at 41 (“We . . . reject [the State’s] argument that § 2 as applied to redistricting is unconstitutional under the Fifteenth Amendment.”); *id.* (“[W]e are not persuaded by [the State’s] arguments that § 2 as interpreted in *Gingles* exceeds the remedial authority of Congress.”).

Any other result in *Milligan* would have been unfaithful to the text and history of the Fifteenth Amendment. Indeed, as this Court observed in *Marengo*, “[t]he Civil War Amendments granted national citizenship to all blacks and guaranteed their right of access to the voting process. By their very nature they plainly empowered the federal government to intervene in state and local affairs to protect the rights of minorities newly granted national citizenship.” 731 F.2d at

1561. Acting pursuant to this power, “Congress could justifiably conclude that a nationwide prohibition of voting practices with discriminatory results was necessary to remedy the effects of purposeful discrimination throughout the country” and “to reduce the risk of constitutional violations and the perpetuation of past violations.” *Id.* at 1560, 1561. Section 2, this Court thus concluded, “is clearly an ‘appropriate’ means for carrying out the goals of the Civil War Amendments.” *Id.* at 1560; *id.* at 1550 (“[S]ection 2 is a constitutional exercise of congressional enforcement power under the Fourteenth and Fifteenth Amendments.”). Since *Marengo*, this Court has consistently upheld Section 2 against challenges to its constitutionality. *See, e.g., Ala. State Conf. of the NAACP v. Alabama*, 949 F.3d 647, 655 n.7 (11th Cir. 2020) (“*Ala. NAACP*”), *vacated as moot*, 141 S. Ct. 2618 (2021) (mem.); *Johnson v. Hamrick*, 196 F.3d 1216, 1219 n.3 (11th Cir. 1999).³

* * *

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.*

³ While this Court’s decision in *Alabama NAACP* was vacated as moot by the Supreme Court, *see* 141 S. Ct. 2618 (2021) (mem.), the vacatur had nothing to do with the merits of the panel decision. Thus, *Alabama NAACP* remains persuasive authority. *See Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1218 (11th Cir. 2009).

Vera, 517 U.S. 952, 992 (1996) (O’Connor, J., concurring) (quoting S. Rep. No. 97-417, at 4). Section 2 falls squarely within the broad scope of Congress’s power to enforce the Fifteenth Amendment’s ban on 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”).

III. Section 2’s Application to Present Circumstances Does Not Exceed Congress’s Fifteenth Amendment Power to Prohibit Redistricting Maps that Dilute Black Voters’ Electoral Strength.

Notwithstanding the Supreme Court’s and this Court’s precedent, Appellant lodges a novel challenge to Section 2. Critically, Appellant does not assert that Section 2 exceeded Congress’s remedial powers when it was enacted in 1965 or amended in 1982. Appellant also does not argue that Section 2 impermissibly infringes on states’ authority over redistricting or that Section 2 violates equal protection principles. Understandably so, as the Supreme Court rejected each of these arguments in *Milligan*. *See* 599 U.S. at 41; 29-30; 31-32 (plurality opinion).

Instead, Appellant argues that Congress has exceeded its Fifteenth Amendment enforcement power simply because, according to Appellant, Section 2

is no longer necessary today. Appellant asserts that legislation enacted pursuant to Congress's Fourteenth and Fifteenth Amendment enforcement powers must be continuously justified by Congress with present-day evidence. *See* Appellant's Br. 49. Absent that, Appellant posits, such legislation exceeds Congress's enforcement authority and cannot be constitutionally applied against states. *Id.*

Appellant is wrong. “[S]o long as the prohibitions attacking racial discrimination in voting are appropriate,” *City of Rome*, 446 U.S. at 177 (internal quotation marks omitted), Congress's chosen remedies are constitutional exercises of Congress's Fifteenth Amendment enforcement authority. And significantly, the appropriateness of those remedies is not a time-dependent inquiry. In fact, this Court has already rejected, in the context of a challenge to Section 2, the argument that Fourteenth Amendment enforcement “legislation that was appropriately adapted at one time may become inappropriate at another time.” Brief of Appellant at 53, *Hamrick*, 196 F.3d 1216 (No. 98-8896); *see Hamrick*, 196 F.3d at 1219 n.3 (rejecting that argument). Simply put, there is no constitutional requirement that Congress continuously justify the present-day application of statutes enacted under its Fifteenth Amendment enforcement authority. As the Constitution's text reflects, “[t]he Fifteenth Amendment empowers ‘Congress,’ not the Court, to determine . . . what legislation is needed to enforce it.” *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 205 (2009).

Appellant’s arguments suffer from at least three fundamental flaws.

First, Appellant’s position is irreconcilable with the text and history of the Fifteenth Amendment. As previously described, the Fifteenth Amendment gave Congress sweeping authority to ensure that Black voters were fully able to realize their constitutional right to vote. *See supra* Section I. The Framers of the Fifteenth Amendment repeatedly emphasized the need for national legislation to guard against states’ efforts to disenfranchise communities of color. By leaving the Amendment’s enforcement to Congress and not the courts, the Framers made clear that it was up to Congress to determine how best to promote the Amendment’s promise of a multiracial democracy free from discrimination.

Appellant nevertheless asks this Court to hold that “the situation on the ground” in Georgia—in particular, the improvements in ballot access and electoral success of voters and candidates of color since the 1960s—means that the continued application of Section 2 to the 2021 Maps cannot be justified as a means of effectuating the Fifteenth Amendment’s ban on racial discrimination.

Appellant’s Br. 52. In other words, Appellant seeks to subvert Congress’s constitutional prerogative to enforce the Fifteenth Amendment by asking this Court to find that Congress’s chosen remedy, Section 2, is no longer needed. But that is not this Court’s role. *Cf. Bostock v. Clayton County*, 590 U.S. 644, 680-81 (2020)

(“The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress.”).

Moreover, the district court was keenly aware of present-day circumstances in Georgia. Section 2 and the *Gingles* inquiry require courts to conduct a “searching practical evaluation of the ‘past and present reality,’” *Milligan*, 599 U.S. at 19 (quoting *Gingles*, 478 U.S. at 79), and the district court did just that. *See, e.g.*, Doc. 333 at 219-30; 243-49; 256-57; 438; 458-64; 471. Reviewing the relevant factors, the district court concluded that the totality of the circumstances weighed in favor of finding that, under the 2021 Maps, the political process was not equally open to Black voters. *See id.* at 212-13; 428. Appellant may, and does, challenge the district court’s factual findings and legal conclusions in its totality of the circumstances analysis. *See* Appellant’s Br. 35-42. But Appellant’s disagreements with the district court’s *Gingles* analysis have no bearing on Section 2’s constitutionality.

In brief, under the Fifteenth Amendment, Congress has the power to enforce the Amendment’s ban on racial discrimination by appropriate legislation. Congress did so when it amended Section 2 to prohibit vote dilution, and for over forty years, Congress has kept Section 2 on the books. As *Milligan* makes clear, there is nothing constitutionally suspect about *Gingles*’s continued application

today. *See Milligan*, 599 U.S. at 23 (applying *Gingles* to a congressional map enacted in 2021).

Second, Appellant argues that this Court should use the congruence and proportionality standard articulated by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), to assess Section 2's constitutionality. *See* Appellant's Br. 46, 48. But that standard has never been applied in a Fifteenth Amendment case by this Court or the Supreme Court. *See Marengo*, 731 F.2d at 1556; *Katzenbach*, 383 U.S. at 326-27; *City of Rome*, 446 U.S. at 174-78; *cf. Shelby County v. Holder*, 570 U.S. 529, 555 (2013) (striking down coverage provision under *McCulloch*). Under the correct standard, Section 2 is plainly constitutional, as decades of precedent make clear.

Indeed, Appellant fundamentally misunderstands how the congruence and proportionality standard interacts with Congress's Fifteenth Amendment authority. To ensure that Congress is enforcing, not inventing, new constitutional rights, *City of Boerne* refined the *McCulloch* standard, applying a congruence and proportionality test to smoke out congressional efforts to establish new rights in the guise of enforcement. Section 2 does not raise this concern, as this Court and the Supreme Court have made clear when rejecting challenges to Section 2's constitutionality based on *City of Boerne*. *Compare* Brief of Appellant at 53-54, *Hamrick*, 196 F.3d 1216 (No. 98-8896) (arguing that Section 2 is not congruent

and proportional), *and* Brief for Appellants at 74, *Milligan*, 599 U.S. 1 (Nos. 21-1086, 21-1087) (arguing that Section 2’s remedy is “so out of proportion to a supposed remedial” purpose that “it cannot be understood as responsive to . . . unconstitutional behavior” (quoting *City of Boerne*, 521 U.S. at 532)), *with Hamrick*, 196 F.3d at 1219 n.3 (rejecting that argument), *and Milligan*, 599 U.S. at 41 (same). Instead, before and after *City of Boerne*, this Court and the Supreme Court have consistently held that Section 2 is an appropriate means of enforcing the Fifteenth Amendment. *See Marengo*, 731 F.2d at 1556; *Hamrick*, 196 F.3d at 1219 n.3; *Milligan*, 599 U.S. at 41.

Compounding his errors, Appellant asserts that the congruence and proportionality standard requires Congress to explain on a continuous basis why statutes enacted under its Fourteenth and Fifteenth Amendment enforcement authority are necessary remedies. *See* Appellant’s Br. 47. Not so. When conducting congruence and proportionality review for statutes enacted under Congress’s Fourteenth Amendment powers, courts have looked only to Congress’s justifications for the statute at the time of its enactment. *See, e.g., City of Boerne*, 521 U.S. at 530 (examining the legislative record for the Religious Freedom Restoration Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000) (“Our examination of the ADEA’s legislative record confirms that Congress’ 1974 extension of the Act to the States was an unwarranted response to a perhaps

inconsequential problem.”); *Tennessee v. Lane*, 541 U.S. 509, 522 (2004) (“Whether [the statute] validly enforces these constitutional rights is a question that ‘must be judged with reference to the historical experience which it reflects.’” (quoting *Katzenbach*, 383 U.S. at 308)). Thus, even if *City of Boerne* and its progeny applied to Section 2 as Appellant suggests, his argument would still fail.

Third, Appellant contends that under *Shelby County*, Voting Rights Act provisions cannot be supported by “outdated evidence,” and that, therefore, Congress must justify Section 2’s application to states today with current data of racial discrimination in voting. Appellant’s Br. 48-49. Appellant grossly misconstrues *Shelby County*.

There, the Supreme Court struck down the Voting Rights Act’s coverage formula as an impermissible infringement of states’ equal sovereignty because the statutory formula used state action from the 1960s and 1970s to determine which states were subject to preclearance in 2013. *Shelby County*, 570 U.S. at 551, 557. Put differently, the Court held that the statutory formula—that is, the formula included in the statute’s text—must be “based on current conditions” to comply with the Constitution’s mandate of equal sovereignty. *Id.* at 557. *Shelby County* only applies to the statutory formula and has no bearing on Section 2’s constitutionality, as Chief Justice Roberts, writing for the majority, expressly stated. *See id.* at 557 (“Our decision in no way affects the permanent, nationwide

ban on racial discrimination in voting found in § 2.”). This makes sense. In *Shelby County*, the Court was troubled by two unique aspects of the coverage formula: its unequal treatment of states, *see id.* at 544, and its use of decades-old data to define the coverage formula enshrined in the statute itself, *see id.* at 551. Section 2 does not raise either of these concerns.

* * *

In 1984, this Court emphasized that “it is a small thing and not a great intrusion into state autonomy to require the states to live up to their obligation to avoid discriminatory practices in the election process.” *Marengo*, 731 F.2d at 1561. This is no less true today. This Court should reject Appellant’s efforts to evade “[Georgia’s] obligation” to heed Section 2’s demands. *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because it contains 6,379 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached brief *amicus curiae* complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Executed this 15th day of April, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on April 15, 2024.

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