No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,

v.

ERIC H. 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 OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Named for the late Associate Justice William J. Brennan, Jr., the Brennan Center for Justice at NYU School of Law is a not-for-profit, non-partisan public-policy and law institute that focuses on issues of democracy and justice. Through the activities of its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality by working to eliminate barriers to full and equal political participation, and to ensure that public policy and institutions reflect the diverse voices and interests that make for a rich and energetic democracy. The Brennan Center has focused extensively on protecting minority voting rights, including by authoring a report on minority representation and reports on other issues relating to voting rights; launching a major, multi-year initiative on redistricting; and participating as counsel or *amicus* in a number of federal and state cases involving voting and election issues. The Brennan Center has submitted *amicus curiae* briefs in a number of Supreme Court cases involving the Voting Rights Act, including *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009), and *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2005).

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[1] Letters from the parties consenting to the filing of this brief are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amicus curiae the Brennan Center for Justice submits this brief in support of Respondents urging affirmance of the D.C. Circuit's decision upholding the constitutionality of the preclearance and coverage provisions — Sections 5 and 4(b) — of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 ("VRARA").

The Court of Appeals and Respondents persuasively demonstrate that the evidence of racially discriminatory practices in the covered jurisdictions is sufficient to show a continuing need for the preclearance provisions. The coverage formula is likewise justified when viewed in light of the deference to which Congress is entitled and the system Congress established for modifying coverage upon changed circumstances.

In this brief, *amicus* shows that the history of the Fifteenth Amendment supports special deference to Congress's findings. With the Fifteenth Amendment, the Framers elevated the right to vote as a central concern of the federal government and made Congress the primary enforcer of that right. A core purpose of the Amendment was to give Congress significantly broader, constitutionally-based legislative authority to protect citizens' right to vote from racial discrimination.

Soon after the abolition of slavery, Congress embarked on legislative efforts to enfranchise the newly emancipated former slaves. These efforts

were limited by federalism concerns and were frustrated by fierce resistance in the former Confederate states. Of particularly grave concern, Congress feared it could lose its power to regulate voting in the former Confederate states once they were readmitted to the Union.

The Fifteenth Amendment was adopted to address these problems. To that end, Congress crafted two simple, straightforward, and interdependent sections. The first section elevated protection of the "right of citizens of the United States" to vote from all forms of discrimination "on account of race, color or previous condition of servitude" to constitutional status. U.S. CONST. amend. XV, § 1. To give those words their full meaning, the second section delegated to Congress broad authority to enforce these words by "appropriate legislation." U.S. CONST. amend. XV, § 2. Congress adopted these sections with the conviction that the right to vote was the right on which all other rights were founded and was therefore indispensable to achieve equality for all citizens.

Both Congress and the states recognized that the Fifteenth Amendment fundamentally altered the balance of power between Congress and the states, and gave Congress paramount authority to prohibit racially discriminatory practices that denied or abridged the right to vote, notwithstanding the states' traditional role in regulating voting and elections. This understanding of the broad authority the Framers intended to give Congress is confirmed

by the vigorous enforcement legislation Congress enacted immediately after ratifying the Amendment.

The Reconstruction Congress was well aware that the former Confederate states might use various stratagems to evade the terms of the Fifteenth Amendment. The choice, therefore, to prohibit not only those practices that "deny" the right to vote on account of race, but also those that "abridge" it reflected the Framers' purpose to end all practices—whatever their form—that might diminish or lessen the value of a citizen's voting rights, including specifically dilution of their votes. This Court's subsequent precedent has honored this original intent by reading the Fifteenth Amendment's prohibition against "abridg[ing]" the right to vote to encompass protection against vote dilution.

In sum, the history of the Fifteenth Amendment confirms that its Framers entrusted to Congress the primary responsibility for determining whether and what legislation is needed to enforce and give meaning to the Amendment's prohibition of practices that deny or abridge the right to vote on account of race. In light of that history, Congress's legislative judgment that the evidence is sufficient to justify reauthorization of the Voting Rights Act's preclearance and coverage provisions is entitled to special deference.

ARGUMENT

I. The Fifteenth Amendment was Designed to Give Congress Adequate Authority to Protect Against Discrimination in Voting Rights and to Ensure Citizens Could Use the Vote to Attain the Equality Promised by the Other Reconstruction Amendments.

The history leading up to the adoption and ratification of the Fifteenth Amendment vividly demonstrates that its Framers deliberately chose to protect the right to vote as the one right that was paramount to the goal of achieving racial equality. Congress passed the Fifteenth Amendment immediately after the 1868 elections and at the end of a two-year period in which it had expanded black enfranchisement as far as possible through ordinary legislation. The limits imposed on such legislation by federalism, pervasive violence, obstructionist practices, and the looming readmission of the former Confederate states convinced Congress that its authority to protect black enfranchisement was fragile and tenuous.

Congress responded by passing a constitutional amendment that would prohibit practices by the states that "denied or abridged" the right to vote "on account of race" and would give Congress adequate authority to enforce its terms through appropriate legislation. Congress adopted the Fifteenth Amendment with the solemn understanding that protecting the right to vote against racial discrimination was indispensable to securing the

equality promised by the other Reconstruction Amendments, and that the right to vote was the right on which all other rights depended. Congress's authority to enforce the Fifteenth Amendment should be interpreted in light of that understanding.

A. Congress Drafted the Fifteenth Amendment to Overcome Deficiencies in its Pre-Amendment Legislative Authority to Protect Citizens' Voting Rights.

In 1867 and 1868, prior to passage of the Fifteenth Amendment, Congress enacted a series of aggressive statutes designed to extend black male enfranchisement as far as Republicans believed possible without another constitutional amendment — namely, in territories over which Congress had plenary control and in the former states of the Confederacy then still under federal military authority.[2] From the beginning, Congress believed that the success of voting rights laws depended on forceful legislation, including ancillary civil and criminal enforcement mechanisms, to ensure that those rights could be meaningfully exercised.

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[2] Although U.S. Const. art. I, § 4, and U.S. Const. art. II, § 1, cl. 4, gave Congress power to regulate federal elections, Congress had not frequently used its Article I powers. Congress did not pass any regulations of federal elections until 1842 and did not pass comprehensive regulations until 1870 as part of the First Enforcement Act. *See Ex parte Siebold*, 100 U.S. 371, 382-84 (1879); *Ex parte Yarbrough (The Ku Klux Klan Cases)*, 110 U.S. 651, 662 (1884) (noting that, before the Enforcement Acts, Congress had, "through long habit and long years of forbearance ... in deference and respect to the states, refrained from the exercise of these powers").

Congress first passed legislation enfranchising blacks in the District of Columbia, overcoming a presidential veto. *See* An Act to Regulate the Elective Franchise in the District of Columbia, ch. 6, 14 Stat. 375 (1867); *see also* William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* 30 (1965). Because Congress realized that enfranchisement on paper would not necessarily produce enfranchisement in practice, it also included two sections penalizing interference with the voting rights established by the Act. *See* 14 Stat. 375, §§ 2, 3. Congress then passed legislation enfranchising blacks in other federal territories. *See* An Act to Regulate the Elective Franchise in the Territories of the United States, ch. 15, 14 Stat. 379 (1867); An Act for the Admission of the Territory of Nebraska into the Union, ch. 36, 14 Stat. 391, § 3 (1867).

Most significantly, in the First Reconstruction Act, Congress refused to re-admit the former Confederate states into the Union unless the states amended their constitutions to allow voting by male citizens "of whatever race, color, or previous condition." An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428, § 5 (1867) ("First Reconstruction Act"). To prevent backsliding, Congress also required that, in the future, "the constitutions of neither of [the readmitted states] shall ever be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote in said State." An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia,

Alabama, and Florida to Representation in Congress, ch. 70, 15 Stat. 73, § 1 (1868). Congress was acutely aware that the fragile gains it had achieved could easily be rolled back if left unprotected.

Although Congress succeeded in formally enfranchising blacks throughout the former Confederacy and federally controlled territories by the end of 1868, those legal rights were almost immediately undermined by violence, intimidation, and obstructionist practices. The period leading up to the 1868 election saw one of the greatest waves of racial violence in American history. *See, e.g.*, Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* 342-44 (1st Perennial Classic ed. 2002); Gilles Vandal, *Rethinking Southern Violence* 93-94 (2000); Allen W. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction* 101 (1971). The connection between violence and suffrage was both explicit and pervasive. For example, L.N. Trammell, who eventually became president of the Georgia Senate when the Democrats gained control in 1871, demanded in March 1868 that "'the negroes should as far as possible be kept from the polls,'" adding that "'the organization of the KKK might effect this more than anything else.'" Laughlin McDonald, *A Voting Rights Odyssey: Black Enfranchisement in Georgia* 21 (2003); *see also* Lee W. Formwalt, *The Camilla Massacre of 1868: Racial Violence as Political Propaganda*, 71 Ga. Hist. Q. 400, 402-03 (1987).

The southern resistance did not end once the ballots were counted. In 1868, the Klan assassinated

a black Republican congressman from Arkansas and three black members of the South Carolina state legislature. Charles Lane, *The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* 3 (2008). And in the summer of 1868, Georgia's governor—despite the State's ratification of the Fourteenth Amendment—asserted that the state constitution did not permit blacks to hold legislative office and expelled 32 black representatives from the state assembly, prompting Congress to place Georgia under military rule. *See* McDonald, *Voting Rights Odyssey*, at 23.

The Congress that drafted the Fifteenth Amendment was well aware of this devastating bloodshed and properly understood it as an effort to nullify the First Reconstruction Act's establishment of voting rights for southern blacks. *See* Foner, *Reconstruction*, at 342-44; Angela Behrens, Christopher Uggen, & Jeff Manza, *Ballot Manipulation and the 'Menace of Negro Domination': Racial Threat and Felon Disenfranchisement, 1850-2002*, 109 Am. J. Soc. 559, 560 (2003).

The Congress drafting the Fifteenth Amendment feared that as the Confederate states began to return to the Union, and Congress lost plenary control over these areas, Congress's power to protect black voting rights in those states would vanish. "Now that most of the ex-Confederate States had been in measure rehabilitated it was realized that the practically complete control which Congress had exercised over them was gradually slipping away and must eventually come to an end." John Mabry Mathews, *Legislative and Judicial History of the Fifteenth*

Amendment 20 (1909). In theory, the former Confederate states were bound in perpetuity never to amend their constitutions to disenfranchise their citizens on account of race, but "[t]he fear was freely expressed however that the theory of the equality of the States was too deeply rooted in our constitutional system ever to make the observance of such a condition practically enforceable." *Id.* at 18. At a time when enforcement was most needed, Congress thus faced the possibility of losing its legal authority to protect the right to vote.[3]

The Fifteenth Amendment was therefore necessary to "supply[] a new basis for the continuance of congressional control over the suffrage conditions of the Southern States. This basis could be surely and safely supplied only by means of a new grant of power from the nation in the form of a suffrage amendment to the Constitution which should contain the authorization to Congress to enforce its provisions." Mathews, *History of the Fifteenth Amendment* at 21.

B. Congress Viewed the Fifteenth Amendment as Essential for Achieving Racial Equality.

The urgency for adopting the Fifteenth Amendment to remedy existing deficiencies in Congress's authority to protect voting rights reflected Congress's view that the franchise was

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[3] Congressional Republicans also believed that the Fifteenth Amendment was necessary to empower Congress to override referenda opposing suffrage in Northern states and enfranchise blacks in the loyal states that had never seceded. *See, e.g.,* Cong. Globe, 40th Cong., 3d Sess. 555 (1869).

"[t]he centerpiece of Reconstruction." J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, *in Controversies in Minority Voting: The Voting Rights Act in Perspective* 135, 136 (Bernard Grofman & Chandler Davidson eds. 1992). Through the Fourteenth Amendment, Congress and the states had already guaranteed equal protection generally. But the Framers of the Fifteenth Amendment singled out the right to vote for special protection. They recognized the right to vote as a fundamental right needed to secure all others.

"Without the elective franchise," they asked, "what insurance has a man of his life, what security for his liberties, what protection in his pursuit of happiness?" Cong. Globe, 40th Cong., 3d Sess. app. 100 (1869) (statement of Rep. Hamilton). Congress knew that the ballot box could ultimately provide more lasting protections than piecemeal legislation: "[T]he ballot was absolutely essential to [the] protection against oppression and wrong in a thousand forms where the general law would be powerless." Thomas M. Cooley, *Impartial Suffrage Established*, *in* II Joseph Story, *Commentaries on the Constitution of the United States* 718 (Melville Madison Bigelow, ed., 5th ed. 1891). "A man with a ballot in his hand is the master of the situation. He defines all his other rights. What is not already given him, he takes.... The Ballot is opportunity, education, fair play, right to office, and elbow-room." William Gillette, *Retreat from Reconstruction, 1869-1879* 23 (1979) (quoting Wendell Phillips).

In drafting the Fifteenth Amendment, the Framers sought to leave nothing to chance, ensuring that this foundational principle of electoral equality received full constitutional protection, both in theory and in practice. Recognizing that "[i]t is difficult by any language to provide against every imaginary wrong or evil which may arise," the Framers sought to create a broad amendment that would successfully prevent discrimination in all facets of voting. Cong. Globe, 40th Cong., 3d Sess. 725 (1869) (statement of Rep. Pile).

To ensure that Congress would be able to protect the right to vote against evolving threats, the two clauses of the Fifteenth Amendment were designed to serve complementary purposes. First, the substantive guarantee in the first section of the Amendment would consolidate the formal gains that had been previously made and ensure that they were not rolled back by future electoral majorities. The Amendment would set a constitutional floor to "make it impossible, if the Democrats ever returned to power in Washington, to repudiate Negro voting, North or South." Gillette, *Right to Vote,* at 73; *see also* Cong. Globe, 40th Cong., 3d Sess. app. 97 (1869) (statement of Rep. Bowen) ("This rule ... should be established by constitutional amendment ... otherwise it will be subject to change, and thus of uncertain duration and use."); *id.* at app. 102 (statement of Rep. Broomall) ("Laws may be repealed, and it is not advisable that so important a principle of republican government should be left to the caprices of party. Its proper place is in the organic law."). The first section also extended

protections of voting rights against interference by the states, notwithstanding the states' role in administering elections.

Second, the enforcement power provided in the second section of the Amendment would give Congress continuing constitutional power to protect black suffrage: It gave Congress "a general commission to make detailed statutes" protecting against racial discrimination in voting. Richard Vallely, *The Two Reconstructions: The Struggle for Black Enfranchisement* 103 (2004). The power given to Congress to protect the franchise thus provided an "alternative to ... the continued military occupation of the South." Vikram D. Amar & Alan E. Brownstein, *The Hybrid Nature of Political Rights*, 50 Stan. L. Rev. 915, 940-41 (1998). And it gave Congress power to protect the right to vote in the North, where elections had been under the exclusive control of the states. Gillette, *Right to Vote,* at 73.

By codifying a prohibition on racial discrimination in voting as part of the Constitution, the Framers of the Fifteenth Amendment thus singled out the right to vote as a uniquely important right. With the Fifteenth Amendment, Congress enshrined the right to vote as a centerpiece of Reconstruction and as a foundational constitutional guarantee of racial equality.[4] By creating a

[4] The debates surrounding the passage of the Fifteenth Amendment make clear that the final version of the Amendment was also understood to protect racial groups other than those of African descent. *See Extension of the Voting Rights Act of 1965: Hearing Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 94th

nationwide ban on racial discrimination in voting and providing Congress a new source of power to enforce that right, the provisions of the Fifteenth Amendment were designed to ensure that recent gains in enfranchisement would be doubly protected, both from future electoral rollbacks and from attempts to undermine the formal promise of racial equality in voting through more invidious methods.

II. The Fifteenth Amendment Provides Congress with Exceptionally Broad Powers of Enforcement.

Conscious of the importance and fragility of the right to vote, the Framers used the Fifteenth Amendment to confer extensive powers upon Congress to prevent racial discrimination in voting. The Amendment entrusted Congress with primary authority for enforcement as well as sweeping powers to accomplish this task. With the Amendment, the Framers consciously altered the balance of federalism, providing powers to Congress

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Cong. 698 (1975) (noting that some legislators opposed the Fifteenth Amendment precisely because it would protect more than just blacks and that California and Oregon refused to ratify the Amendment because of "fear that it would lead to enfranchisement of Chinese Persons"). Indeed, the Reconstruction Senate "twice rejected ... a provision which stated that: 'Citizens ... of African descent shall have the same right to hold office ... as other citizens.'" *Id.* Additionally, this Court's precedent establishes that Latinos, Asian Americans, and Native Americans are protected by the Fifteenth Amendment. *See Rice v. Cayetano*, 528 U.S. 495, 514 (2000) (holding that because "[a]ncestry can be a proxy for a race," discrimination based on common ancestry or culture violates the Fifteenth Amendment).

that traditionally had been reserved to the states. Mindful of this commitment of broad power to Congress, this Court has, ever since the Amendment's passage, recognized that Congressional action under the Fifteenth Amendment is entitled to special deference.

A. The Fifteenth Amendment Gave Congress Primary Enforcement Authority for Protecting the Right to Vote.

The Fifteenth Amendment vested Congress with primary authority for enforcing the new constitutional guarantee against racial discrimination in voting, and with wide remedial powers to achieve that goal. Based upon its experience with prior efforts to enfranchise blacks in the District of Columbia, federal territories, and former Confederate states, Congress knew that the Fifteenth Amendment would require a vigorous enforcement mechanism. "[T]here was never any difference of opinion among the friends of the measure, either as to the desirability of including ... [an enforcement provision] in the Amendment or as to the form which it should assume." Mathews, *History of the Fifteenth Amendment*, at 36 n.55.

Indeed, Republicans who preferred a broader constitutional amendment were willing to accept a narrower version of the first section of the Fifteenth Amendment precisely because the second section would provide Congress with additional enforcement power to transform the negatively phrased first section into a positive guarantee:

> If there were nothing at all here except the first section I might see a great deal of weight in [a concern that the first section's purely negative formulation leaves states able to devise indirect means of disenfranchising African-Americans]. But there happens to be added to that a second section, giving to Congress the express power to enforce the prohibition. The result of the whole matter is that if we amend this first section [to a form almost identical to the one ultimately enacted], ... by the second section Congress is invested with express authority to enforce the limitation.

Cong. Globe, 40th Cong., 3d Sess. 727 (1869) (statement of Rep. Bingham); *see also id.* at 1625 (statement of Sen. Howard).

Opponents of the Amendment similarly noted that the enforcement clause would give Congress substantial discretion to determine the scope of its own enforcement power. *See id.* at app. 163 (statement of Sen. Saulsbury) (warning that enforcement clause language "leav[es] [the] legitimate and proper meaning [of 'appropriate' legislation] to be determined by each particular head in this Senate Chamber and in the House of Representatives" and asking "[u]nder the exercise of the power to carry this amendment into execution by appropriate legislation what cannot you do?").

Almost immediately after the Amendment was ratified, Congress enacted the Enforcement Act of 1870, which reflected Congress's belief that the

Amendment was designed to give Congress broad enforcement powers to pass affirmative legislation protecting against racial discrimination in voting. *See* Mathews, *History of the Fifteenth Amendment*, at 78-79. Supporters of the bill, almost all of whom had voted for the Amendment sixteen months earlier, invoked Congress's broad power when discussing the Act. For example, Senator Carpenter stated that "[t]his amendment to the Constitution is ample and full, and clothes Congress with all power to secure the end which it declares shall be accomplished." Cong. Globe, 41st Cong., 2d Sess. 3563 (1870). Representative Davis similarly argued that "[i]n amending the Constitution of the United States the people have seen fit to clothe Congress with the power to enforce by appropriate legislation.... No broader language could be adopted than this with which to clothe Congress with power." *Id.* at 3882.

Senator Morton referred to "the spirit and the true intent of the fifteenth amendment" while rebutting arguments that the 1870 enforcement legislation intruded too far on the sovereignty of the states. *Id.* at 3670. Recalling the 1868 debates, Morton argued that the Fifteenth Amendment's purpose was to ensure that "the colored man, so far as voting is concerned, shall be placed upon the same level and footing with the white man, and that Congress shall have the power to secure him that right.... We know that the second Section was put there for the purpose of enabling Congress itself to carry out the provision. It was not to be left to State legislation." *Id.* And Senator Howard similarly

warned that the Amendment should not be given a "narrow construction" that would prevent Congress from "apply[ing] the remedies which are proper in the case to punish individuals for interrupting, preventing, delaying, or hindering the colored man from the peaceful and free exercise of his right of suffrage; which was the great object we had in view in proposing this amendment to the people of the United States." *Id.* at 3655.

Congress ultimately enacted seven suffrage-related sections as part of the 1870 Enforcement Act, powerfully demonstrating that the Forty-First Congress viewed the Fifteenth Amendment's enforcement clause as a substantial source of authority. *See* Act of May 31, 1870, ch. 114, 16 Stat. 140. Section 1 of the Enforcement Act simply restated the core principle behind the Fifteenth Amendment without creating any enforceable rights. But each of the other six sections contained an aggressive, affirmative mandate that was national in scope. Sections 2 and 3 of the Enforcement Act prohibited discrimination in voter registration and provided remedies to voters for any such violation. *See* 16 Stat. 140, §§ 2, 3. Sections 4, 5, and 6 targeted a broad range of methods of voter intimidation, ranging from outright violence, *id.* § 4, to retaliation by landlords and employers, *id.* § 5, to conspiracies to "threaten, or intimidate any citizen with intent to prevent or *hinder* his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same," *id.* § 6 (emphasis added). Finally, Section 23

permitted a candidate for office who lost "by reason of the denial to any citizen or citizens ... of the right to vote, on account of race, color, or previous condition of servitude" to sue to "recover possession" of the office, thereby nullifying a state election. *Id.* § 23. Taken together, this set of bold provisions makes clear that the contemporary Congress was not "constrained by traditional theories of federalism." Kousser, *The Voting Rights Act and the Two Reconstructions*, at 139. Congress understood its enforcement power to be extremely broad, encompassing a range of prophylactic measures not compelled by the first clause of the Fifteenth Amendment, but which Congress nonetheless deemed necessary to achieve the Amendment's objectives.

A year after passing the 1870 Enforcement Act, Congress went even further, amending Section 20 of the Act to place congressional elections more firmly under federal control. Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 ("1871 Enforcement Act"). The amendments provided for the appointment of federal observers with detailed supervisory powers over the electoral process, from registration to the certification of returns. *Id.* § 2; *see also* VI James Ford Rhodes, *History of the United States from the Compromise of 1850 to the McKinley-Bryan Campaign of 1896* 423 (1906). These broad enforcement acts "were comprehensive ... but the fact is that they did not go beyond the intent of the Fifteenth Amendment." Everette Swinney, *Enforcing the Fifteenth Amendment, 1870-1877*, 28 J. So. Hist. 202, 204 (1962).

In addition to the provisions in the 1871 Enforcement Act, the Ku Klux Klan Act of 1871 authorized the President to deploy the army to respond to "insurrection, domestic violence, unlawful combinations, or conspiracies" that had the effect of depriving citizens of "any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by this act," including the Fifteenth Amendment's guarantee of equal suffrage. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, § 3.

These enforcement laws, which were enacted by substantially the same Congress that drafted the Fifteenth Amendment, are entitled to special weight in construing the Amendment. Like the first Congress in 1789, the Congress in 1870 "must have felt, with peculiar force, the obligation of providing efficient means by which [a] great constitutional privilege should receive life and activity." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807); *cf. Marsh v. Chambers*, 463 U.S. 783, 790 (1983) ("An act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, ... is contemporaneous and weighty evidence of its true meaning.'" (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888))). The enforcement legislation reflects the contemporary understanding that the Fifteenth Amendment entrusted to Congress primary responsibility for protecting against racial discrimination in voting and vested Congress with all the powers necessary for accomplishing that task.

B. The Fifteenth Amendment Altered the Federal-State Balance to Empower Congress to Protect a Right of Extreme National Importance.

By vesting Congress with broad powers of enforcement, the Fifteenth Amendment radically altered the balance of power between the federal government and the states with respect to regulation of the franchise. The Amendment was passed against a status quo in which the states had exercised control over the franchise and Congress's control, as a practical matter, had been limited to protecting the right to vote in federal territories. As late as 1866, even among northern Republicans, "[t]here was a feeling too widespread to be safely antagonized that the regulation of the suffrage was a matter properly belonging to the state governments." Mathews, *History of the Fifteenth Amendment,* at 12. The Fifteenth Amendment broke with that status quo by transferring ultimate power to protect against racial discrimination in voting away from the states and to the federal government—even with respect to the states' own elections. *See id.* at 36. The Congress that passed the Fifteenth Amendment and the states that ratified it determined that the traditional federal-state balance had been insufficient to protect against racial discrimination in voting.

Supporters and opponents of the Fifteenth Amendment recognized that the Amendment would transfer to the federal government responsibility over an area that had once been left exclusively to the states. For example, Senator John Pool, a strong

supporter of the Amendment, explained that: "If a State by omission neglects to give every citizen within its borders a free, fair, and full exercise and enjoyment of his rights, it is the duty of the United States Government to go into the State." Xi Wang, *The Making of Federal Enforcement Laws, 1870-1872*, 70 Chi.-Kent L. Rev. 1013, 1030 (1995). Senator Bayard, an opponent of the proposed Amendment, contrasted the power provided by the Amendment with the autonomy states had previously enjoyed over their own elections: "The Federal Government in the past has neither attempted to usurp the power as within the limits of the Constitution, nor has it been yielded by the States or their people." Cong. Globe, 40th Cong., 3d Sess. app. 166 (1869).

Even some abolitionists and former Republicans protested the Amendment's intrusion on principles of state sovereignty. James Doolittle, a Wisconsin Republican who supported the abolition of slavery but believed questions of voting were best left to the states, predicted that the power to enforce the Fifteenth Amendment would give Congress complete control over state elections:

> [T]he power to enforce it of necessity implies power over the elections of the States. In order to give the colored man of the States the right to vote at the elections in the States, to secure to his vote a fair count, and to make sure that if his vote be counted and determine the result that the person elected shall have the office, will draw to this Government the

> power to control the elections themselves. It is impossible to separate the two.

Id. at app. 151.

Thus, both proponents and opponents of the Amendment understood it to dramatically alter the status quo by establishing the federal government, and Congress in particular, as the ultimate protector against racial discrimination in voting. As this Court recognized soon after the Amendment's passage: "The fifteenth amendment of the constitution, by its limitation on the power of the states in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the states." *Ex parte Yarbrough (The Ku Klux Klan Cases)*, 110 U.S. 651, 664 (1884).

C. Congress's Decisions About How to Enforce the Fifteenth Amendment are Entitled to Special Deference, as This Court Has Long Recognized.

As *Yarbrough* shows, this Court has long recognized that the Fifteenth Amendment vested Congress with broad powers to protect against racial discrimination. In the years immediately following the Amendment's ratification, this Court shared the contemporary understanding that the Fifteenth Amendment represented a major transfer of authority from the states to the federal government

and vested Congress with broad powers to enforce the Amendment's prohibition on racial discrimination in voting. Even as it placed severe restrictions on Congress's efforts to enforce the Reconstruction Amendments in the 1870s and 1880s, the Court signaled that Congress's authority to enforce the Fifteenth Amendment was greater than its authority to enforce the Fourteenth Amendment.

The Court's decision in *United States v. Cruikshank*, 92 U.S. 542 (1876), illustrates its differing approaches to the Fourteenth and Fifteenth Amendments. The Court in *Cruikshank* overturned the convictions of white supremacists who led the infamous Colfax Massacre, "the bloodiest single act of carnage in all of Reconstruction," Foner, *Reconstruction*, at 530, and "the largest murder of African Americans in American history," Kousser, *The Voting Rights Act and the Two Reconstructions*, at 160. While the decision led to "disastrous" interference with Reconstruction, for example by imposing insurmountable burdens of proof on the prosecution, *id.*, it actually upheld the constitutionality of the Enforcement Acts and affirmed that Congress had particularly broad authority with respect to the Fifteenth Amendment. *See* Robert M. Goldman, *Reconstruction and Black Suffrage: Losing the Vote in* Reese *and* Cruikshank 106 (2001) (noting that *Cruikshank* was a surprisingly "narrow" decision that "clearly and explicitly confirmed congressional authority" to protect against racial discrimination in voting).

The *Cruikshank* Court pointedly did not invalidate Congress's power to protect equal

suffrage, and it affirmed that the Fifteenth Amendment (unlike the Fourteenth) created "a new constitutional right" that Congress could protect against individual interference. *Cruikshank*, 92 U.S. at 555. The Fifteenth Amendment, the Court explained, had established the "exemption from discrimination in the exercise of" the right to vote as a "necessary attribute of national citizenship." *Id.* Congress had primary responsibility for protecting against racial discrimination in voting because "[t]he right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States." *Id.* at 556. And within this intersection of race and voting, primary responsibility was vested in Congress, not the states.

This Court's early interpretation of the Amendment thus shows that Congress's Fifteenth Amendment power is sweeping, and that so long as Congress is acting to prevent racial discrimination in voting, this Court will defer to Congress's judgment about how best to do that. Thus, "[o]n the rare occasions when the Court has found an unconstitutional exercise of [Fifteenth Amendment] powers, in its opinion Congress had attacked evils not comprehended by the Fifteenth Amendment." *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966). Indeed, when Congress passed the Voting Rights Act in 1965, the Senate and House Reports noted that "[n]o statute confined to enforcing the 15th amendment exemption from racial discrimination in voting has ever been voided by the Supreme Court." S. Rep. No. 89-162, at 17 (1965);

H.R. Rep. No. 89-439, at 17 (1965). That remains true today.

III. The Fifteenth Amendment Provides Congress with the Flexibility to Address All Practices Which Abridge the Right to Vote, Including Vote Dilution.

The language and history of the Fifteenth Amendment confirms that Congress, in reauthorizing Section 5 and Section 4(b) of the Voting Rights Act, properly considered current evidence of vote dilution through racial gerrymandering to justify the continued need for these sections. The Framers of the Fifteenth Amendment considered vote dilution an abridgement of the right to vote that diminished the franchise's value and potency.

The Framers understood the Fifteenth Amendment as having a broad substantive sweep, prohibiting not only denials of the right to vote but also more indirect abridgements of the franchise, such as vote dilution. Indeed, the text of the Amendment confirms that its Framers were interested not only in protecting against outright denials of the right to vote, but also in guarding against any "abridge[ment]" of the right. Honoring the intentions of the Framers, this Court has continually confirmed that the Fifteenth Amendment confers upon Congress broad, flexible powers to address all practices which diminish or devalue the right to vote. In light of this history, the VRARA is a valid exercise of Congress's extensive enforcement

powers and is fully consistent with the intent of the Fifteenth Amendment's drafters.

A. The Text and History of the Fifteenth Amendment Confirm that the Framers Understood it to Prohibit All Abridgements of the Right to Vote, Not Merely Denials of that Right.

Both the text and the history of the Fifteenth Amendment show that the Framers were concerned with far more than outright denials of the franchise on the basis of race. The Framers consciously chose to prohibit both denials *and abridgments* of the right to vote. For the Framers and their contemporaries, an abridgment of the right to vote implied a diminution of the right to vote that fell short of a denial. Indeed, contemporary dictionary definitions demonstrate that to "abridge" means something quite different than to "deny." The 1865 edition of Noah Webster's authoritative *American Dictionary of the English Language* defines "abridge" as "[t]o lessen; to diminish; as to *abridge* labor; to *abridge* power or rights." Noah Webster, *An American Dictionary of the English Language* 6 (1865). By using the word "abridge," in addition to the word "deny" in the Fifteenth Amendment, the Framers plainly sought to reach acts of interference with the right to vote that did not result in a complete denial of the franchise, including through dilution of the vote that "diminishes" and "lessens" the franchise's effectiveness.

As Representative George Boutwell, who managed the Amendment in the House of

Representatives emphasized, "The amendment which we propose secures the people against *any abridgment of their electoral power*, either by the United States or by the States." Cong. Globe, 40th Cong., 3d Sess. 560 (1869) (statement of Rep. Boutwell) (emphasis added). *See also* Vallely, *The Two Reconstructions*, at 102.

Reflecting this broad understanding of disenfranchisement as reaching abridgements of the right to vote that fell short of outright denial, the Framers of the Fifteenth Amendment closely tied the right to vote to representation. Of the former slaves, one Senator noted: "[W]e must sooner or later see to it that they are citizens possessed of the right to vote and to be represented in the legislative bodies who have control of their persons and their property." Cong. Globe, 40th Cong., 3d Sess. 986 (1869) (statement of Sen. Howard). In the eyes of the Framers, the Amendment would provide the former slave not merely a nominal vote, but also a real voice in the political process, and thus "place in the hand of the black man of Georgia a rod of power before which all politicians quail." Cong. Globe, 40th Cong., 3d Sess. 1629 (1869) (statement of Sen. Stewart).

The Framers of the Fifteenth Amendment were well aware of the problems of vote dilution through gerrymandering as a means of abridging the right to vote. In debates concurrent with the passage of the Fifteenth Amendment, members of the Fortieth Congress discussed their concerns about the problems of gerrymandering as a means of diluting the vote. *See, e.g.*, Cong. Globe, 40th Cong., 3d Sess. app. 268-69 (1869) (Report of Sen. Buckalew). They

worried that redistricting inherently "secure[s] an unjust measure of power to [its] authors, and it may be expected that each successive district apportionment will be more unjust than its predecessor." *Id.* at 269. This concern, which was initially focused on partisan gerrymandering, grew as the first racial gerrymanders began to appear during and immediately after Reconstruction in the former Confederate states and the neighboring border states. *See, e.g.,* Goldman, *Reconstruction and Black Suffrage*, at 65; Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 105 (2000); Chandler Davidson, *The Voting Rights Act: A Brief History*, *in Controversies in Minority Voting: The Voting Rights Act in Perspective* 7, 10 (Bernard Grofman & Chandler Davidson eds. 1992). As early as 1867, Maryland "reoriented representation toward the plantation counties at the expense of Baltimore and the small farming regions to its north and west" as part of an "ingenious method[] of limiting black voting power." Foner, *Reconstruction*, at 422. In Mississippi, "Redeemers concentrated the bulk of the black population in a 'shoestring' Congressional district running the length of the Mississippi River, leaving five others with white majorities." *Id.* at 590.

For the Framers, this gerrymandering and vote dilution represented a form of disenfranchisement, trampling on minority rights. In the partisan context, members of Congress spoke of "the entire disenfranchisement of minorities, which is done in almost every State by gerrymandering," and noted that, "[t]he disenfranchisement suffered through one

decade by a political party may be repeated upon it in the next with increased severity." Cong. Globe, 40th Cong., 3d Sess. app. 212, 269 (1869) (statement of Rep. Ashley, Report of Sen. Buckalew). For the authors of the Fifteenth Amendment, the right to vote did not exist in isolation, but rather was closely tied to the district in which one voted. Through districting, they realized, a majority could effectively deprive a minority of the franchise. Thus, the Framers understood that the "elective franchise" encompassed "the right to vote by ballot in *convenient election districts*." Cong. Globe, 40th Cong., 3d Sess. 1226 (1869) (statement of Rep. Lawrence) (emphasis added).

Opponents of the Fifteenth Amendment shared this understanding of disenfranchisement, arguing perversely that black suffrage would dilute the votes of the white population, and thus disenfranchise the nation's Anglo citizens. "If we introduce these votes which are to be cast" they noted, "it is an injury, a positive injury, to those who have the right to vote ... it impairs and weakens the weight and force of the legal votes which are cast." Cong. Globe, 40th Cong., 3d Sess. 910 (1869) (statement of Sen. Vickers).

Thus, the text and contemporaneous history of the Fifteenth Amendment show that the Framers were concerned with the problems of gerrymandering and vote dilution as an abridgement of the right to vote.

B. This Court's Jurisprudence Confirms the Framers' Understanding that the Fifteenth Amendment Protects Against All Abridgements of the Franchise.

The last century of this Court's jurisprudence confirms what is manifest in the history and text of the Fifteenth Amendment: The Fifteenth Amendment reaches not only outright denials of access to the ballot box, but also more indirect abridgments of the franchise. This Court has made clear that assessment of whether a restriction "abridge[s]" the right to vote under the Fifteenth Amendment requires a comparison "with a hypothetical alternative ... to what the right to vote *ought to be*." *Reno v. Bossier Parish Sch. Bd. (Bossier II)*, 528 U.S. 320, 334 (2000) (emphasis in original).

This broad reading of "abridge" as a comparison to the ideal version of the right to vote accords with the Framers' original understanding of the term and comports with this Court's interpretation of "abridge" more generally in the voting rights context as encompassing infringements of a protected right that are something less than an outright denial. Notably, this Court has interpreted the parallel language of Section 2 of the Voting Rights Act, which "track[s], in part, the text of the Fifteenth Amendment," *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009), to prohibit indirect interference with the right to vote, primarily through vote dilution. *See e.g., Thornburg v. Gingles,* 478 U.S. 30 (1986); *Johnson v. DeGrandy,* 512 U.S. 997 (1994)*; see also Northcross v. Bd. of Educ. Of Memphis City Schs.*, 412 U.S. 427, 428 (1973)

(stating that the similarity in the language of two provisions is "a strong indication that the two statutes should be interpreted *pari passu*.").[5]

Just as this Court's precedent has given full meaning to the prohibition against any "abridge[ment]" of the right to vote, so too it has confirmed the Framers' understanding of "what the right to vote *ought to be*," *Bossier II*, 528 U.S. at 334, both before and after the passage of the Voting Rights Act. Throughout the course of the last century, this Court's Fifteenth Amendment jurisprudence prohibited indirect methods of racial discrimination in voting. As early as *Guinn v. United States*, which struck down an Oklahoma grandfather clause, this Court has noted that the Fifteenth Amendment extends far beyond "express words of ... exclusion." 238 U.S. 347, 364 (1915). "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination," reaching all "contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color." *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

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[5] Similarly, in the context of the First Amendment, this Court has read the term "abridge" to include restrictions on speech that fall far short of outright prohibition of speech. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) (noting that government action can "abridg[e] the freedom of speech ... in many ways" including through "overbroad laws that chill speech") (internal quotation marks omitted); *Alexander v. United States*, 509 U.S. 544, 566 (1993) (Kennedy, J., dissenting) (observing that government action "may abridge speech in a direct way by suppressing it, or in an indirect way by chilling its dissemination").

In keeping with the Framers' intentions, this Court has long recognized that these prohibited "contrivances" include the practice of diluting minority votes via improper vote counting. In affirming a conviction for the refusal to count valid ballots, this Court explained that "the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box." *United States v. Mosley*, 238 U.S. 383, 386 (1915); *see also United States v. Saylor*, 322 U.S. 385, 388 (1944) (affirming conviction for ballot box stuffing). In the one-person, one-vote context, this Court has expressly noted that "[i]f a State in a statewide election weighted ... the white vote more heavily than the Negro vote," such action would "deny[] or abridg[e] a Negro's right to vote" in violation of the Fifteenth Amendment. *Gray v. Sanders*, 372 U.S. 368, 379 (1963). "None could successfully contend that this discrimination was allowable." *Id.*

These cases viewing vote dilution in its various forms as an abridgement of the right to vote extend to the recognition that the Fifteenth Amendment prohibits race-based gerrymandering and intentional vote dilution in redistricting. As this Court noted over five decades ago, "[a] statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is the redefinition of municipal boundaries." *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960). In *Gomillion*, this Court explicitly held that the Fifteenth Amendment does not "sanction the achievement by a State of any impairment of voting

rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions." *Id.* at 345. Like the Framers of the Fifteenth Amendment, the *Gomillion* Court recognized that gerrymandering had the potential to disenfranchise by rendering access to the voting booth meaningless: "[T]he Alabama Legislature has not merely redrawn the Tuskeegee city limits ... it is more accurate to say that it has deprived the petitioners of the municipal franchise." *Id.* at 347.[6]

Since *Gomillion*, this Court has continued to treat claims of intentional vote dilution as cognizable under the Fifteenth Amendment. *Wright v. Rockefeller*, 376 U.S. 52, 56 (1964), decided four years after *Gomillion*, reiterated that plaintiffs alleging vote dilution in redistricting may state a claim under the Fifteenth Amendment. *See also United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 165 (1977); *City of Mobile v. Bolden*, 446 U.S. 55, 62-63 (plurality opinion); *Reno v. Bossier Parish Sch. Bd. (Bossier I)*, 520 U.S. 471, 481 (1997) (noting that "a plaintiff" may "bring[] a constitutional vote dilution challenge" either "under the Fourteenth or Fifteenth Amendment"). To the extent this Court questioned this proposition and deviated from the intent of the Framers in *Bossier II*,

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[6] *Gomillion* remains a core part of Fifteenth Amendment doctrine. Although some language in *Shaw v. Reno*, 509 U.S. 630, 645 (1993), suggests that *Gomillion* turned on the Equal Protection Clause of the Fourteenth Amendment, this Court's most recent extended discussion of the Fifteenth Amendment continues to treat *Gomillion* as grounded in the Fifteenth, and not the Fourteenth, Amendment. *See Rice,* 528 U.S. at 513, 522.

528 U.S. at 334 n.3, it did so in dicta in a footnote addressing an issue that was not part of the question presented. This Court's otherwise consistent treatment of vote dilution as a Fifteenth Amendment concern shows the extent to which *Bossier II* failed to fully consider the issue. As this Court noted in *Rice v. Cayetano*—a case decided *after Bossier II*—"state authority over the boundaries of political subdivisions, 'extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution.'" 528 U.S. 495, 522 (2000) (quoting *Gomillion*, 364 U.S. at 345).

In short, the last century of this Court's precedent, understanding the Fifteenth Amendment as protecting against vote dilution, accords with the intention of the Amendment's Framers, who sought to guarantee former slaves a truly effective voice in their democracy.

C. The Voting Rights Act Addresses the Same Concerns that Animated the Framers of the Fifteenth Amendment and is a Valid Exercise of Congress's Fifteenth Amendment Powers.

With the passage of the Voting Rights Act in 1965, Congress acted to fulfill the promise of the Fifteenth Amendment. "Passage of the Voting Rights Act was an important first step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote." *Bartlett*, 556 U.S. at 10. Sections 4(b) and 5 of the Voting Rights Act (both as originally enacted and as reenacted) were designed to prevent renewed

retrogression. These provisions address the same concerns that animated the Framers of the Fifteenth Amendment.

This Court has observed that "Section 5 was directed at preventing a particular set of invidious practices that had the effect of 'undo[ing] or defeat[ing] the rights recently won by nonwhite voters.'" *Miller v. Johnson*, 515 U.S. 909, 925 (1995) (quoting H.R. Rep. No. 91-397, at 8 (1969)). "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). Like the Fifteenth Amendment itself, Sections 4(b) and 5 focus not only on the current exercise of the right to vote, but also on ensuring that rights currently held are not eroded in the future.

It was not until after Congress enacted the Voting Rights Act of 1965 that the dream of equality at the core of the Fifteenth Amendment began to become a reality. This Court's decisions upholding Congress's renewed enforcement efforts have enabled Congress to make significant progress in reversing decades of discrimination and fulfilling the promise of racial equality. *See Lopez v. Monterey County*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Katzenbach*, 383 U.S. 301.

Relying on this Court's precedent, extensive hearings, and voluminous evidence, Congress has now once again concluded that discrimination

against voters on the basis of race or color is far from eradicated and that the rights protected by the Fifteenth Amendment are still sufficiently fragile to require renewal of Sections 4(b) and 5 of the Voting Rights Act. The Fifteenth Amendment's history and this Court's decisions require that Congress's determination be given special deference and that Shelby County's challenge be rejected.

History shows that restricting Congress's Fifteenth Amendment power would pose significant risks, and that gains in voting rights are fragile and tenuous. The Framers of the Fifteenth Amendment "fully realized that enfranchisement required practical safeguards against evasions of the law and retrogression." Kousser, *The Voting Rights Act and the Two Reconstructions*, at 137. One of the central lessons of the Reconstruction Era is that "revolutions and advances in popular rights and democratic rights can be reversed; that history can move backward; that enormous gains can be lost and jeopardized, eroded, or diluted, and abridged in spite of the enormous cost that those advances have made." *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 2027 (1982) (statement of C. Vann Woodward, Professor Emeritus of History, Yale University). Declaring Sections 4(b) and 5 of the Voting Rights Act to be beyond Congress's Fifteenth Amendment enforcement powers would ignore the lessons of history and weaken the essential constitutional guarantee that Congress has sought to enforce.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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