No. 14-41127

In the United States Court of Appeals for the Fifth Circuit

MARC VEASEY; JANE HAMILTON; SERGIO DELEON; FLOYD CARRIER; ANNA BURNS; MICHAEL MONTEZ; PENNY POPE; OSCAR ORTIZ; KOBY OZIAS; LEAGUE OF OF UNITED LATIN AMERICAN CITIZENS; JOHN MELLOR-CRUMLEY, *Plaintiffs-Appellees*,

TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS, *Intervenor Plaintiffs-Appellees*

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS; CARLOS CASCOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STATE OF TEXAS; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, *Defendants-Appellants*.

(caption continued on inside cover)

On Appeal from the United States District Court for the Southern District of Texas, Nos. 2:13-cv-193, 2:13-cv-263, 2:13-cv-291, 2:13-cv-348 (Hon. Nelva Gonzales Ramos)

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

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UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND; IMANI CLARK, *Intervenor Plaintiffs-Appellees,*

v.

STATE OF TEXAS; CARLOS CASCOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, *Defendants-Appellants.*

TEXAS STATE CONFERENCE OF NAACP BRANCHES, MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES, *Plaintiffs-Appellees*,

v.

CARLOS CASCOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, *Defendants-Appellants.*

LENARD TAYLOR; EULALIO MENDEZ, JR.; LIONEL ESTRADA; ESTELA GARCIA ESPINSOSA; MARGARITO MARTINEZ LARA; LA UNION DEL PUEBLO ENTERO, INC., *Plaintiffs-Appellees*

v.

STATE OF TEXAS; TEXAS SECRETARY OF STATE; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, *Defendants-Appellants.*

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

No. 14-41127, *Veasey v. Abbott.*

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 29.2, the undersigned counsel of record for *amicus curiae* provides this supplemental statement of interested persons in order to fully disclose all those with an interest in this brief. The undersigned counsel of record certifies that the following supplemental list of persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Amicus curiae certifies that it is a non-profit 501(c)(3) organization. *Amicus curiae* has no corporate parent and is not owned in whole or in part by any publicly-held corporation.

Dated: May 16, 2016

Respectfully submitted,

/s/ Elizabeth B. Wydra
Counsel of Record for *Amicus Curiae* CAC

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES – cont'd.

Page(s)

TABLE OF AUTHORITIES – cont'd.

Page(s)

STATUTES

OTHER AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*[1]

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

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2011, Texas passed Senate Bill 14 ("S.B. 14"), a voter identification law that not only requires voters to present specific identification at the polls, but also expressly precludes as permissible identification many forms of government-issued photo identification possessed in significant number by registered minority voters. Section

[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. Counsel for all parties have consented to the filing of this brief.

2 of the Voting Rights Act, which enforces the Constitution's prohibition on racial discrimination in voting, provides that the government may not impose arbitrary and discriminatory barriers that make it harder for racial minorities to exercise their constitutionally guaranteed right to vote. Texas's voter identification law—the most stringent in the nation—violates the basic rule of voter equality enshrined in the Constitution and the Voting Rights Act.

Enacted against the backdrop of explosive growth in the State's African-American and Latino population, S.B. 14 imposes arbitrary and discriminatory burdens on minority voters, making it harder for the substantial number of African-American and Latino citizens who lack S.B. 14 qualifying identification to cast a ballot just at the moment when their votes may have the greatest impact. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) ("In essence the State took away the [African-Americans' and] Latinos' opportunity because [they] were about to exercise it."). In crafting S.B. 14, the Texas legislature went out of its way to impose "onerous procedural requirements which effectively handicap exercise of the franchise" by substantial numbers of minority voters. S*ee Lane v. Wilson*, 307 U.S.

268, 275 (1939). These burdens were not accidental: the legislature rejected scores of amendments that would have increased the kinds of photo identifications voters could present at the polls or made it easier for voters to obtain a state-created identification card to exercise their right to vote. In short, every effort to ensure that S.B. 14 would not disenfranchise a substantial number of minority voters was rejected by the legislature.

Significantly, S.B. 14 excludes federal, state, and local government employee photo IDs and student photo IDs from state colleges and universities (all of which had been used in past elections without problems), and it prohibits all of these forms of identification even as it allows use of concealed handgun permits that are disproportionately held by white voters. *See* Veasey Supplemental En Banc Br. 1, 37-38, 45; Tex. League of Young Voters Supplemental En Banc Br. 5-6, 17-18; Tex. State Conf. of NAACP Supplemental En Banc Br. 8-10. The effect of this discrimination is to keep from the polls registered voters who *have* government-issued photo identification. By denying these groups of registered voters *with photo identification* the ability to exercise their

constitutional right to vote, the statute undermines the interests S.B. 14 purports to protect.

The "abstract right to vote means little unless the right becomes a reality at the polling place on election day." *Perkins v. Matthews*, 400 U.S. 379, 387 (1971). To that end, the Texas legislature created Election Identification Cards ("EICs"), recognizing that, without some form of state-created photo identification, many voters would be unable to exercise their right to vote. But what the legislature gave with one hand, it took away with the other: the Texas legislature chose to make EICs difficult to obtain, opting for a system that perpetuates past discrimination. EICs—which can be costly to acquire for those who do not have a birth certificate or whose birth certificate contains mistakes—are only available from the State's Department of Public Safety ("DPS"), a law enforcement agency whose offices are only open limited hours and only exist in certain counties, and are difficult to reach for those without a car. Tellingly, although Texas has more than 8,000 polling places, there are only 225 DPS offices across the state. As the district court found, forcing registered voters who lack S.B. 14 qualifying ID—disproportionately racial minorities—to travel hundreds

of miles to obtain this new form of ID in order to exercise their right to vote perpetuates vestiges of discrimination that continue to hamper racial minorities in Texas. *See* U.S. Supplemental En Banc Br. 17-18; Tex. League of Young Voters Supplemental En Banc. Br. 37-38, 40-41; Tex. State Conf. of NAACP Supplemental En Banc Br. 38-39, 49.

"There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters," *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008), but here the Texas legislature discriminated against classes of voters—disproportionately racial minorities—that, in fact, possess government-issued photo identification and made it difficult for those individuals to exercise their right to vote. The lines drawn by S.B. 14—yet to be justified by Texas since the inception of this litigation—operate to exclude racial minorities from the polls without any adequate justification. The Voting Rights Act "nullifies sophisticated . . . modes of discrimination," *Lane*, 307 U.S. at 275, that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). S.B. 14 is such a law.

Texas and its *amici*, however, insist that, if Section 2 of the Voting Rights Act is interpreted to prohibit laws like S.B. 14, it would exceed the scope of Congress's power to enforce the Fifteenth Amendment. The State's argument cannot be squared with the text and history of the Fifteenth Amendment, which give Congress broad powers to prevent racial discrimination in voting by the states, including by adopting prophylactic rules to protect the right to vote, such as the results test contained in Section 2 of the Act. As the text and history of the Fifteenth Amendment demonstrate, the 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). History shows that the Fifteenth Amendment gave 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 to racial minorities. The Fifteenth Amendment's explicit grant of enforcement power gives Congress the authority to ensure that the right to vote is actually enjoyed by all citizens regardless of race.

S.B. 14 is a textbook example of a law that "arbitrarily creat[es] discriminatory effects," *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, 135 S. Ct. 2507, 2522 (2015), and perpetuates past discrimination, leaving racial minorities with "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). Whether S.B. 14 was enacted with discriminatory intent as the district court found, or merely reflects "unconscious prejudices," *Inclusive Cmtys.*, 135 S. Ct. at 2522, it violates the strictures of the Voting Rights Act. A State is surely entitled to "protect[] the integrity and reliability of the electoral process," *Crawford,* 553 U.S. at 191, but it may not do so by drawing arbitrary lines that result in racial discrimination. The district court's judgment invalidating S.B. 14 should be affirmed.

ARGUMENT

I. THE TEXT AND HISTORY OF THE FIFTEENTH AMENDMENT GIVE CONGRESS BROAD ENFORCEMENT POWER TO PROHIBIT LAWS THAT MAKE IT HARDER FOR RACIAL MINORITIES TO EXERCISE THEIR CONSTITUTIONAL RIGHT TO VOTE.

In language "as simple in command as it [is] comprehensive in reach," *Rice v. Cayetano*, 528 U.S. 495, 512 (2000), the Fifteenth

Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. In writing the Fifteenth Amendment, the Framers explicitly invested Congress with a central role in protecting this right—a constitutional right that is "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)—against all forms of racial discrimination. It did so by providing that "[t]he Congress shall have power to enforce this article by appropriate legislation." U.S. 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, 325-26 (1966). The Fifteenth Amendment—and the other Reconstruction Amendments added to guarantee equal citizenship stature regardless of race—"were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congres[s]." *Ex Parte Virginia*, 100 U.S. 339, 345 (1880). As the

Framers of the Fifteenth Amendment recognized, "the remedy for the violation" of the Fifteenth Amendment, like the remedies for 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).

To ensure that the right to vote is enjoyed by all regardless of race, the text and history of the Fifteenth Amendment empower Congress to "make stronger" the constitutional ban on racial discrimination in voting by "legislat[ing] prophylactically against new evils that it anticipates may soon arise." Stephen G. Calabresi & Nicholas P. Stabile, *On Section 5 of the Fourteenth Amendment*, 11 U. Pa. J. Const. L. 1431, 1439, 1442 (2009); *see City of Rome v. United States*, 446 U.S. 156, 173-78 (1980); *Oregon v. Mitchell*, 400 U.S. 112, 132-33 (1970) (opinion of Black, J.); *id.* at 216-17 (Harlan, J., concurring in part and dissenting in part); *id.* at 231-36 (Brennan, J., concurring in part and dissenting in part); *id.* at 282-84 (Stewart, J., concurring in part and dissenting in part); *see also Nev. Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 727-28 (2003) ("Congress may enact so-called prophylactic

legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct"); *Tennessee v. Lane*, 541 U.S. 509, 520 (2004) ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent . . . ."). Indeed, the language that the Framers used to define the scope of Congress's authority under the Fifteenth Amendment—"appropriate legislation"—reflects a decision to give Congress wide discretion to enact whatever measures it deemed "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.

In giving Congress the power to enact "appropriate legislation," the Framers granted Congress the sweeping authority of Article I's "necessary and proper" powers as interpreted by the Supreme Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), a seminal case well known to the Reconstruction Framers. *See, e.g.*, John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States* 28-31 (2002); Jack M. Balkin, *The Reconstruction Power*, 85

N.Y.U. L. Rev. 1801, 1810-15 (2010); Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 Harv. J.L. & Pub. Pol'y 991, 1002-03 (2008); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153, 188 (1997). 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*, 446 U.S. at 174-75; *see also South Carolina*, 383 U.S. at 326 (explaining that *McCulloch*'s "classic formulation" provides "[t]he basic test to be applied in a case involving s[ection] 2 of the Fifteenth Amendment"); *cf. United States v. Cannon*, 750 F.3d 492, 498-502 (5th Cir. 2014) (upholding federal Hate Crimes Prevention Act as a rational effort to enforce the Thirteenth 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 also Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 614-15 (1869) (quoting this passage in full and declaring that "[i]t must be taken then as finally settled, . . . that the words" of the Necessary and Proper Clause are "equivalent" to the word "appropriate"), *overruled in part by Legal Tender Cases*, 79 (12 Wall.) 457 (1870); 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 power to enforce the constitutional prohibition on racial discrimination in voting by "appropriate legislation," the Framers "actually *embedded in the text*" the "language of *McCulloch*." Balkin, *supra*, at 1815 (emphasis added).

In line with these foundational principles, the Framers made clear during the debates over the Fifteenth Amendment that the Amendment's Enforcement Clause gives Congress a broad "affirmative power" to secure the right to vote. Cong. Globe, 40th Cong., 3d Sess.

727 (1869); *id.* at 1625 ("Congress . . . under the second clause of this amendment" has the power to "impart by direct congressional legislation to the colored man his right to vote. No one can dispute this."). Without a broad enforcement power, the Framers feared that the constitutional guarantee would not be fully realized. "Who is to stand as the champion of the individual and enforce the guarantees of the Constitution in his behalf as against the so-called sovereignty of the States? Clearly no power but that of the central Government is or can be competent for their adjustment . . . ." *Id.* at 984.

In 1870, the same year the Fifteenth Amendment was ratified, Congress invoked the Amendment's Enforcement Clause in support of voting rights legislation, reflecting the Framers' judgment that the Fifteenth Amendment is "ample and full, and clothes Congress with all 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, "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. . . . [T]he second section was put there . . . for the purpose of enabling

Congress to take every step that might be necessary to secure the colored man in the enjoyment of these rights." *Id.* at 3670; *id.* at 3655 (explaining that the "intention and purpose" of the Fifteenth Amendment's Enforcement Clause was to "secure to the colored man by proper legislation the right to go to the polls and quietly and peacefully deposit his ballot there"); *id.* at 3663 ("Congress has a right by appropriate legislation to prevent any state from discriminating against a voter on account of his race . . . ."); *see also* 2 Cong. Rec. 4085 (1874) (observing that the Enforcement Clause of the Fifteenth Amendment was added to allow Congress "to act affirmatively" and ensure that "the right to vote, should be enjoyed").

Both supporters and opponents alike recognized that the Fifteenth Amendment's Enforcement Clause significantly altered the balance of powers between the federal government and the states, giving Congress broad authority to secure the right to vote of African Americans and to eradicate racial discrimination in the electoral process. Congressional opponents of the Fifteenth Amendment objected that "when the Constitution of the United States takes away from the State the control over the subject of suffrage it takes away from the State the control of

her own laws upon a subject that the Constitution of the United States intended she should be sovereign upon." Cong. Globe, 40th Cong., 3d Sess. 989 (1869). These concerns over state sovereignty were flatly rejected by the Framers of the Fifteenth Amendment. In giving Congress the power to remedy voting discrimination by the states, the Fifteenth Amendment specifically limited state sovereignty. As Sen. Carl Schurz explained during debates over Congress's first attempt to enforce the Fifteenth Amendment:

> [T]he Constitution of the United States has been changed in some most essential points; that change does amount to a great revolution . . . . The revolution found the rights of the individual at the mercy of the States; it rescued them from their arbitrary discretion, and placed them under the shield of national protection. It made the liberty and rights of every citizen in every State a matter of national concern. . . . . It grafted upon the Constitution of the United States the guarantee of national citizenship; and it empowered Congress, as the organ of the national will, to enforce that guarantee by national legislation.

Cong. Globe, 41st Cong., 2d Sess. 3607-08 (1870).

History shows that the Framers of the Fifteenth Amendment specifically recognized that a broad legislative power to protect the right to vote against all forms of racial discrimination—both heavy-handed and subtle—was critical to ensuring "the colored man the full

enjoyment of his right." *Id.* at 3670. For example, during the debates on the Fifteenth Amendment, the Framers observed that "[i]t is difficult by any language to provide against every imaginary wrong or evil which may arise in the administration of the law of suffrage in the several States," emphasizing that "[w]hat we desire to reach" is "to insure by constitutional enactment, . . . the right of suffrage" of citizens without regard to race. Cong. Globe, 40th Cong., 3d Sess. 725 (1869).

In the months following ratification of the Fifteenth Amendment, Congress recognized the grim reality that many states would pursue novel methods of disenfranchising African Americans on account of their race. Highlighting the importance of providing "proper machinery . . . for enforcing the fifteenth amendment," Senator William Stewart explained that "it is impossible to enumerate over-specifically all the requirements that might be made as prerequisites for voting, ... The States can invent just as many requirements [for voting] as you have fingers and toes. They could make one every day." Cong. Globe, 41st Cong., 2d Sess. 3658 (1870). "There may be a hundred prerequisites invented by the States," *id.*, "a hundred modes whereby [the colored man] can be deprived of his vote." *Id.* at 3657; *see also id.* at 3568

(noting "it is our imperative duty . . . to pass suitable laws to enforce the fifteenth amendment" because, without them, "the fifteenth amendment will be practically disregarded in every community where there is a strong prejudice against negro voting"). The only means to ensure minority voting rights, the Framers of the Fifteenth Amendment recognized, "are to be found in national legislation. This security cannot be obtained through State legislation," where "the laws are made by an oppressing race . . . ." *Id.* at app. 392.

The Framers thus granted Congress a significant new power when they enacted the Fifteenth Amendment, and as the next Section shows, the results test of the Voting Rights Act falls squarely within the scope of that broad enforcement power. There is no basis in constitutional law for carving out an exception to the Voting Rights Act's prohibition on nationwide discrimination for voter identification laws such as S.B. 14.

II. THE FIFTEENTH AMENDMENT GIVES CONGRESS THE POWER TO PROHIBIT STATE VOTER IDENTIFICATION LAWS THAT RESULT IN RACIAL DISCRIMINATION AS A MEANS OF EFFECTUATING THE AMENDMENT'S EQUALITY MANDATE.

The results test of the Voting Rights Act directly fulfills the Fifteenth Amendment's guarantee of equality by prohibiting the enforcement of state laws and policies that "function unfairly to exclude minorities" from the political process—either by denying or abridging their right to vote—"without any sufficient justification." *See Inclusive Cmtys.*, 135 S. Ct. at 2522; *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419, 427-27 (1991); Veasey Supplemental En Banc Br. 46; U.S. Supplemental En Banc Br. 14, 22-23. It is well established that, "under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect." *City of Rome*, 446 U.S. at 175.

Section 2 of the Voting Rights Act—the statute's "permanent, nationwide ban on racial discrimination in voting," *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013)—enforces the Fifteenth Amendment's command of racial equality by prohibiting a state from enforcing a state law that disproportionately denies or abridges the

right of racial minorities to vote, perpetuates past discrimination, and rests only on tenuous justifications. *See Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) ("The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."); *League of United Latin Am. Citizens,* 548 U.S. at 441 (finding state's policy "tenuous" where state sought to protect an incumbent at the expense of minority voters (quoting *Gingles*, 478 U.S. at 45)); *see also Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) ("If . . . a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, . . . § 2 would therefore be violated . . . ."). Laws—such as S.B. 14—that impose on racial minorities discriminatory barriers to access to the political process, and that cannot be adequately justified, run the "serious risk . . . of causing specific injuries on account of race." *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1633 (2014) (Kennedy, J., plurality opinion). Using its authority to enforce the Fifteenth Amendment,

Congress determined that, whether intentional or not, "any racial discrimination in voting is too much." *Shelby Cnty.*, 133 S. Ct. at 2631.

Congress enacted the results test against the backdrop of a long history and continuing use by state and local governments of "[m]anipulative devices and practices," including race-neutral measures, "to deny the vote to blacks," *Rice*, 528 U.S. at 513, or to "reduce or nullify minority voters' ability, as a group, 'to elect the candidate of their choice.'" *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969)). The Act's broad focus on discriminatory results helps to ensure that, regardless of the motives of lawmakers, no "hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action." *Coal. to Defend Affirmative Action*, 134 S. Ct. at 1637; *see League of United Latin Am. Citizens,* 548 U.S. at 439 (finding that, despite political motivation, states had "undermined the progress of a racial group that ha[d] been subject to significant voting-related discrimination"); *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 409 (5th Cir. 1991) (affirming the finding that "Mississippi's registration procedures hinder black citizens' ability to

participate in the political process" in violation of Section 2); *Harris v. Graddick*, 593 F. Supp. 128, 133 (M.D. Ala. 1984) (holding that under-representation of minority poll officials "substantially imped[ed] and impair[ed] the access of many black persons to the political process, in violation of section 2").

Aiming to redress "current conditions" that offend the Fifteenth Amendment's guarantee of equality, *see Shelby Cnty.*, 133 S. Ct. at 2629, Section 2 requires courts to carefully review state laws to ensure that they do not unfairly constrict equal access to the political process, demanding an "'intensely local appraisal of the design and impact,'" *Gingles*, 478 U.S. at 79 (quoting *Rogers v. Lodge*, 458 U.S. 613, 622 (1982)), of challenged state laws and practices, paying close attention to whether the "effect of the[] [State's] choices" is to "deny[] equal opportunity" to minority voters. *League of United Latin Am. Citizens,* 548 U.S. at 441-42. In this respect, the results test, like other kinds of disparate impact liability, "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Inclusive Cmtys.*, 135 S. Ct. at 2522.

The results test of § 2 "is an important part of the apparatus chosen by Congress to effectuate this Nation's commitment 'to confront its conscience and fulfill the guarantee of the Constitution' with respect to equality in voting," *Bush v. Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring) (quoting S. Rep. No. 97-417, at 4 (1982)), and this Court and other federal courts of appeals have repeatedly held that Section 2 falls squarely within the broad scope of Congress's power to enforce the Fifteenth Amendment's ban on racial discrimination in voting. Section 2's results test, as this Court has observed, protects "core [constitutional] values . . . through a remedial scheme that invalidates election systems that, although constitutionally permissible, might debase the amendments' guarantees." *Jones v. City of Lubbock*, 727 F.2d 364, 373 (5th Cir. 1984); *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1561 (11th Cir. 1984) ("Congress could reasonably conclude that practices with discriminatory results had to be prohibited to reduce the risk of constitutional violations and the perpetuation of past violations."); *United States v. Blaine Cnty.*, 363 F.3d 897, 909 (9th Cir. 2004) (upholding Congress's judgment that the results test was "'necessary to secure the right to vote and to eliminate the effects of

past purposeful discrimination'" (quoting *Marengo Cnty. Comm'n*, 731 F.2d at 1557)); *see also* U.S. Supplemental En Banc Br. 35-36; Tex. State Conf. of NAACP Supplemental En Banc Br. at 52-55.

Any other result would be unfaithful to the text and history of the Fifteenth Amendment. As the Eleventh Circuit observed, "[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." *Marengo Cnty. Comm'n*, 731 F.2d at 1561. Section 2 "remove[s] the vestiges of past official discrimination" and "ward[s] off such discrimination in the future," *Major v. Treen*, 574 F. Supp. 325, 347 (E.D. La. 1983) (mem.) (opinion of Politz, J.), and falls squarely within the power of Congress to enforce the Fifteenth Amendment.

Applying Section 2's results test here raises no constitutional concerns. Both the text and history of the Fifteenth Amendment and court precedent leave no doubt that Congress has the power to prohibit arbitrary, discriminatory state laws that make it harder for racial

minorities to exercise their constitutional right to vote. The Fifteenth Amendment, as its Framers stressed, 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). Using its enforcement authority, Congress can—as it did in passing Section 2 of the Voting Rights Act—"prohibits all forms of voting discrimination," *Gingles*, 478 U.S. at 45 n.10, including state laws that result in unequal political opportunity, in order to strengthen the "core values" of the Fifteenth Amendment, prevent their "debase[ment]," *Jones*, 727 F.2d at 373, and "counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Inclusive Cmtys.*, 135 S. Ct. at 2522.

III. THERE IS NO "VOTER IDENTIFICATION" EXCEPTION TO THE FIFTEENTH AMENDMENT'S GUARANTEE OF EQUAL POLITICAL OPPORTUNITY.

In the hopes of manufacturing a constitutional question, the State distorts the district court's careful Section 2 analysis, claiming that the district court's interpretation of the results test is so sweeping that it

"puts virtually every election regulation at risk," Appellants Supplemental En Banc Br. 46, and allows plaintiffs to strike down state regulation of the electoral process "without evidence of an effect on voter behavior and based instead on mere socioeconomic disparities," *id.* at 47. Urging this Court to apply the congruence and proportionality standard—a standard the Supreme Court has never applied in a Fifteenth Amendment case, *see South Carolina*, 383 U.S. at 326-27; *City of Rome*, 446 U.S. at 174-78; *cf. Shelby Cnty.*, 133 S. Ct. at 2630 (striking down coverage provision under *McCulloch*)—the State argues that if Section 2 prohibits S.B. 14, Section 2 is necessarily unconstitutional. Texas is wrong. As just discussed, Section 2's results test plainly falls within the scope of Congress's broad enforcement power, meaning Congress possesses the authority to prohibit—as it did when it enacted the results test—arbitrary, discriminatory voter identification laws that make it harder for racial minorities to exercise their constitutional right to vote. There is no "voter identification" exception to the Fifteenth Amendment's guarantee and grant of enforcement power.

Texas and its *amici* argue that Congress lacks the power to prohibit voter identification laws because they do not actually deprive anyone of the vote, but the Fifteenth Amendment not only outlaws state voting rules that "deny" the right to vote on account of race, it also expressly outlaws state voting regulations that "abridge" that right. Under the Fifteenth Amendment, Congress can ensure that the right to vote is actually enjoyed by all regardless of race by prohibiting "sophisticated as well as simple-minded modes of discrimination" and eliminating "onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Lane*, 307 U.S. at 275. As the district court concluded, S.B 14 is such a law: its provisions without adequate justification make it harder for a substantial number of racial minorities to cast a vote.

The State's effort to excise socio-economic disadvantage from the Section 2 inquiry fares no better. Congress has the power to set aside state laws like S.B. 14 that interact with socio-economic inequalities—no less than other vestiges of state-sponsored racial discrimination—to deprive racial minorities of equal political opportunity. To enforce 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, Section 2 requires courts to take a careful look at all factors bearing on electoral inequality to redress "the demonstrated ingenuity of state and local governments in hobbling minority voting power," *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994), including the fact that the "'the political, social, and economic legacy of past discrimination' . . . may well 'hinder [minorities'] ability to participate effectively in the political process.'" *League of United Latin Am. Citizens*, 548 U.S. at 440 (citations omitted); *see also Jones*, 727 F.2d at 383. Texas simply refuses to accept that Congress has the power under the Fifteenth Amendment to prohibit voting practices that "perpetuate[] the effects of past discrimination." *City of Rome*, 446 U.S. at 176; *see also Inclusive Cmtys.*, 135 S. Ct. at 2522 (discussing how disparate impact liability under the Fair Housing Act prevents "perpetuating segregation"); Tex. League of Young Voters Supplemental En Banc Br. 48-49.

Texas also claims that the district court's reading of Section 2 would improperly limit the State's authority to ensure the integrity of its electoral process, but, as in *League of United Latin American*

Citizens, "the problem here is entirely of the State's own making." *League of United Latin Am. Citizens*, 548 U.S. at 441. The Texas legislature went out of its way to write a voter identification law that unfairly excludes racial minorities from the political process, preventing federal, state, and local government employees and students attending state colleges and universities—disproportionately racial minorities—from exercising their constitutional right to vote even though these individuals all possess government-issued photo identification. The State then chose to create an EIC to safeguard the right to vote, but designed the program in a way that forces the state's most disadvantaged citizens—disproportionately minorities—to travel huge distances to preserve their right to vote. *Cf. Perkins*, 400 U.S. at 387, 388 (observing that the "accessibility, prominence, facilities, and prior notice of the polling place's location all have an effect on a person's ability to exercise his franchise" and that "there inheres in the determination of the location of polling places an obvious potential for 'denying or abridging the right to vote on account of race or color'" (quoting 42 U.S.C. § 1973c (1964 ed.))). "Under § 2, the State must be accountable for the effect of these choices in denying equal opportunity

to [African-American and] Latino voters." *League of United Latin Am. Citizens,* 548 U.S. at 441-42. States have significant authority to ensure "the integrity and reliability of the electoral process," *Crawford*, 553 U.S. at 191, but they may not use means—as S.B. 14 does—that result in racial discrimination.

Finally, Texas suggests that the district court's interpretation of Section 2 "compels the States to engage in race-based decisionmaking," Appellants Supplemental En Banc Br. 48, in violation of the Fourteenth Amendment's guarantee of equal protection. This argument borders on the frivolous. Section 2 of the Voting Rights Act requires equal political opportunity for all regardless of race, forbidding states from enacting laws and policies—such as S.B. 14—that operate to exclude minorities from the polls or to dilute their voting strength without sufficient justification. As the Supreme Court made clear in rejecting a similar argument last Term, federal civil rights laws that prohibit unjustified discriminatory impacts or results prevent the government from "arbitrarily creating discriminatory effects," and thereby "counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Inclusive Cmtys.*, 135 S. Ct. at

2522. Prohibitions on discriminatory results—like those contained in the Voting Rights Act—help enforce the Fourteenth Amendment's, as well as the Fifteenth Amendment's, guarantee of equality.

CONCLUSION

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

Respectfully submitted,

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Dated: May 16, 2016

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(d) because it contains 5,855 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached brief *amici 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 14-point Century Schoolbook font.

Executed this 16th day of May, 2016.

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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 Fifth Circuit by using the appellate CM/ECF system on May 16, 2016.

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