Nos. 19-1257 & 19-1258

IN THE

Supreme Court of the United States

MARK BRNOVICH, ATTORNEY GENERAL OF ARIZONA, *et al.*,

Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

Respondents.

ARIZONA REPUBLICAN PARTY, *et al.*,

Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* PROFESSOR TRAVIS CRUM IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Professor Travis Crum is an Associate Professor of Law at Washington University in St. Louis,[2] where he teaches and writes about voting rights and constitutional law. His scholarship focuses on the Fifteenth Amendment and the Voting Rights Act of 1965. *See* Travis Crum, *Reconstructing Racially Polarized Voting*, 70 Duke L.J. 261 (2020); Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 Nw. U. L. Rev. 1549 (2020); Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L.J. 1992 (2010).

SUMMARY OF THE ARGUMENT

This case is the first time ever that this Court will hear a vote-denial claim brought under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, and the first time in two decades that it will hear a case on the substantive scope of the Fifteenth Amendment. This case, therefore, presents a rare opportunity to consider the Fifteenth Amendment as an independent constitutional provision and to clarify Congress's enforcement authority under that Amendment.

Passed by the lame-duck Fortieth Congress in 1869 and ratified by the States in 1870, the Fifteenth Amendment was the final act in the trilogy of Reconstruction Amendments. *See* 15 Stat. 356 (1869); 16

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[1] All parties have filed blanket consents to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no person other than *amici*'s counsel made a monetary contribution to fund the preparation or submission of this brief.

[2] Professor Crum's institution is noted for identification purposes only. The views expressed in this brief are entirely his own.

Stat. 1131 (1870). Its broad prohibition of racial discrimination in voting and its clause empowering "Congress … to enforce [its provisions] by appropriate legislation," U.S. Const. amend. XV, § 2, represent the crowning achievement of Reconstruction. In less than a decade, the United States fought a bloody Civil War to preserve the Union and transformed itself from a slaveholding nation to the world's first multi-racial democracy.

The Reconstruction Framers did not add a superfluous amendment to the Constitution. *Cf. Texas Dep't of Housing & Community Affairs* v. *Inclusive Communities Project*, 576 U.S. 519, 538 (2015) (noting, in the statutory context, that Congress does not add "superfluous" amendments). When the Reconstruction Framers debated how to enfranchise Black men nationwide, they considered whether to pass an ordinary statute to achieve that goal. Based on their interpretation of the Fourteenth Amendment as well as party politics, the Reconstruction Framers concluded that the only way to prohibit racial discrimination in voting by *States* was to ratify a new constitutional amendment.

Moreover, when the Fifteenth Amendment is properly understood as an independent constitutional provision, it is clear that *City of Boerne* v. *Flores*'s congruence and proportionality test should be cabined to the Fourteenth Amendment. 521 U.S. 507 (1997). Nothing in *Shelby County* v. *Holder*, 570 U.S. 529 (2013), nor *Northwest Austin Municipal Utility District Number One* v. *Holder*, 557 U.S. 193 (2009), mandates otherwise.

Finally, although the rights of Black men were first and foremost in the ratification debates, the Fif-

teenth Amendment was originally understood to prohibit discrimination against all races. As the court below found, Arizona intentionally discriminated against not only Black voters but also Hispanic and Native American voters. This invidious intent is equally inappropriate under the Fifteenth Amendment.

ARGUMENT

I. The Fifteenth Amendment Enfranchised Men Nationwide Regardless Of Race Or Color and Is An Independent Source of Congressional Authority

"The Fifteenth Amendment has independent meaning and force." *Rice* v. *Cayetano*, 528 U.S. 495, 522 (2000). The Fifteenth Amendment was *not* a mere clarification of the Fourteenth Amendment, which is now construed to also prohibit racial discrimination in voting. *See, e.g.*, *Hunter* v. *Underwood*, 471 U.S. 222, 233 (1985). Rather, the Fifteenth Amendment barred racial discrimination in voting by *States* and bestowed authority on Congress to enforce this mandate.

It is well established that the Civil Rights Act of 1866 was passed pursuant to Congress's Thirteenth Amendment enforcement authority and provided the blueprint for Section One of the Fourteenth Amendment. Accordingly, this Court has analyzed the Civil Rights Act in construing the Fourteenth Amendment. *See, e.g.*, *McDonald* v. *City of Chicago*, 561 U.S. 742, 774-75 (2010).

In interpreting the Fourteenth and the Fifteenth Amendments in this case, this Court should similarly look to the congressional debate over proposals to ban racial discrimination in voting by States via ordinary legislation, which preceded the congressional debate

over the Fifteenth Amendment. As the first post-ratification discussion of the Fourteenth Amendment, this debate provides valuable insights into the meaning of both the Fourteenth and Fifteenth Amendments. *Cf. Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171, 184-85 (2012) (looking at post-ratification events in interpreting the First Amendment).

A. Prior to the Fifteenth Amendment, Congress Never Imposed Suffrage Qualifications On The States.

The Fourteenth and Fifteenth Amendments were ratified with distinct scopes. The Framers of the Reconstruction Amendments understood civil rights and political rights as occupying distinct spheres. Civil rights were inherent in citizenship; political rights were not. Thus, they drafted Section One of the Fourteenth Amendment to exclude protections for political rights—meaning that the Fourteenth Amendment did not enfranchise any Black voters when it was ratified in July 1868. *See* Crum, *Superfluous*, *supra*, at 1602.[3] This exclusion was purposeful, as "[m]oderate Republicans feared they could not sell the equal-suffrage

[3] *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard) ("[T]he first section of the proposed amendment does not give to either of these classes [Whites or Blacks] the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution."); *id.* at 2542 (statement of Rep. Bingham) ("[T]he exercise of the elective franchise … is exclusively under the control of the States."); *id.* at 1159 (statement of Rep. Windom) (commenting that the Fourteenth Amendment "does not … confer the privilege of voting, for that is a political right"); Michael W. McConnell, *Originalism and the Desegregation Decision*, 81 Va. L. Rev. 947, 1016 (1995) (discussing the Reconstruction-era distinctions between civil and political rights).

idea in the North, where white bigotry remained a stubborn fact of life." Akhil Reed Amar, *America's Constitution: A Biography* 392-93 (2005).

When the lame-duck Fortieth Congress started debating the Fifteenth Amendment in January 1869, the Nation was evenly divided: 17 States permitted Black suffrage, and 17 did not. Racially discriminatory suffrage laws remained on the books in the Border States, the Mid-Atlantic, the West, and parts of the Midwest.[4]

By contrast, Black men had the right to vote in New England, parts of the Midwest, and the former Confederacy.[5] Five States in New England had enfranchised Black men by the end of the Civil War. See Crum*, Superfluous, supra*, at 1593. During Reconstruction, Wisconsin adopted Black suffrage via a judicial decision interpreting the state constitution, *see Gillespie* v. *Palmer*, 20 Wis. 544 (1866), and voters in Iowa and Minnesota passed referenda enfranchising Black men, *see* William Gillette, *The Right to Vote:*

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[4] To be specific, these States barred Blacks from voting: California, Connecticut, Delaware, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Missouri, Nevada, New Jersey, Ohio, Oregon, Pennsylvania, and West Virginia. *See* Crum, *Superfluous*, *supra*, at 1602-03 n.362. In addition, New York technically permitted Black men to vote, but racially discriminatory property and residency qualifications disenfranchised virtually all Blacks. *See id.* at 1593.

[5] The right to vote free of racial discrimination existed in these States: Alabama, Arkansas, Florida, Georgia, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, New Hampshire, North Carolina, South Carolina, Tennessee, Rhode Island, Vermont, and Wisconsin. *See* Crum, *Superfluous*, *supra*, at 1602 n.363. Furthermore, Black men could vote in Mississippi, Texas, and Virginia, but those States had not yet been re-admitted to the Union. *See id.* at 1603.

Politics and the Passage of the Fifteenth Amendment 26 (1965). And Tennessee enfranchised Black men in 1867 following its re-admission to the Union, becoming the only ex-Confederate State to do so voluntarily. *See* W.E.B. DuBois, *Black Reconstruction in America* 575 (2d. ed. 1962).

At the same time, Congress had played a pivotal role in expanding the voting rights of Black men. In January 1867, Congress overcame President Andrew Johnson's veto and mandated Black suffrage in the District of Columbia. *See* An Act to Regulate the Elective Franchise in the District of Columbia, ch. 6, 14 Stat. 375 (1867). That same month, Congress enfranchised Blacks in the federal territories. *See* An Act to Regulate the Elective Franchise in the Territories of the United States, ch. 15, 14 Stat. 379 (1867). Congress also overrode President Johnson's veto when it required Nebraska to abolish its racially discriminatory suffrage laws as a condition of statehood. *See* An Act for the Admission of the State and Nebraska into the Union, ch. 36, § 3, 14 Stat. 391, 392 (1867).

Most importantly, Congress passed the First Reconstruction Act of 1867, which mandated Black suffrage in 10 of the 11 ex-Confederate States. *See* First Reconstruction Act, ch. 153, § 5, 14 Stat. 428, 429 (1867). The political significance of the First Reconstruction Act in transforming the South cannot be overstated. The Act enfranchised nearly 80 percent of Black men nationwide. *See* Richard M. Valelly, *The Two Reconstructions: The Struggle For Black Enfranchisement* 24 (2004). With enfranchisement, Black voters constituted effective majorities in five Southern States—Alabama, Florida, Louisiana, Mississippi, and South Carolina. *See* Crum, *Reconstructing*, *supra*, at 302-03.

These newly enfranchised Black voters overwhelmingly backed the Republican Party, supported new state constitutions, helped ratify the Fourteenth Amendment, and elected the first Black politicians to office. *See id.* at 303-04. Black voters were crucial to President Ulysses S. Grant's victory in the popular vote in 1868 and helped him win every re-admitted ex-Confederate State, except Georgia and Louisiana, where Klan-related violence suppressed the Black vote. *See* Ron Chernow, *Grant* 623 (2017).

Following the 1868 election, Republicans coalesced behind nationwide Black male suffrage for a variety of reasons. For many veterans of the abolitionist movement, Black suffrage was a "triumphant conclusion to four decades of agitation." Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 448 (1988). Other Republicans were moved by Black soldiers' sacrifices on behalf of the Union during the Civil War. *See* Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 Stan. L. Rev. 915, 933 (1998). Still others acted out of partisan self-interest, recognizing that Black voters would reliably back Republicans. *See id.* at 943. The Republican Party's 1868 platform—which advocated Black suffrage in the South but not the North—had also proven politically problematic. *See* Crum, *Superfluous*, *supra*, at 1600.

B. The Reconstruction Framers Deliberately Chose a Constitutional Amendment Over a Statutory Solution.

Notwithstanding this newfound Republican support for nationwide Black suffrage, the choice of means to secure it was still undecided. When the Thirty-Ninth Congress mandated Black suffrage, it

did so in areas of federal control. As its fonts of authority, Congress relied on the Guarantee Clause in the Reconstructed South and on the District of Columbia's and the territories' statuses as federal domains. *See id.* at 1596. The question whether Congress had the independent authority to mandate Black suffrage in *States* was contested within the Republican Party. *See* Earl M. Maltz, *Civil Rights, The Constitution, and Congress, 1863-1869*, at 131-36 (1990). The salience of Congress's authority over suffrage qualifications was further heightened by the re-admission of Southern States and the (prescient) concern that those States would backslide and seek to disenfranchise Black men. *See* Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 29 (2004).

When the lame-duck Fortieth Congress convened, Radical Republicans backed a "double-barreled approach" to nationwide Black suffrage. Gillette, *supra*, at 51. In the House, Representative George Boutwell introduced *both* a statute and a constitutional amendment, the latter of which was nearly identical to what would become the Fifteenth Amendment. *See* Cong. Globe, 40th Cong., 3d Sess. 285 (1869); H.R. 1667, 40th Cong. (1869). Senator Charles Sumner introduced a similar suffrage statute in the Senate. *See* Cong. Globe, 40th Cong., 3d Sess. 5 (1868); S. 650, 40th Cong. (1868).

In support of their suffrage statute, the Radicals advanced numerous theories concerning federal authority over suffrage qualifications in the States. *See* Crum, *Superfluous*, *supra*, at 1604-17 (canvassing these debates). Of particular importance here, the Radicals invoked the recently ratified Fourteenth Amendment as a novel source of authority. Boutwell, for example, claimed that voting was covered by the

Privileges or Immunities Clause, *see* Cong. Globe, 40th Cong., 3d Sess. 559 (1869) (statement of Rep. Boutwell), and that the Apportionment Clause was a "political penalty for doing that which in the first section it is declared the State has no right to do," *id.* (discussing U.S. Const. amend. XIV, § 2); *see also id.* at 903 (statement of Sen. Sumner) (arguing that voting is protected under the Privileges or Immunities Clause); Crum, *Superfluous*, *supra*, at 1610 n.411 & 1616 n.464 (collecting additional statements). The Radicals also relied on Congress's enforcement authority under Section Five, gesturing to the *McCulloch* standard for support. *See* Cong. Globe, 40th Cong., 3d Sess. 903 (1869) (statement of Sen. Sumner) (discussing the "familiar rule of interpretation, expounded by Chief Justice Marshall in his most masterly judgment").

Unsurprisingly, Democrats opposed the Radicals' suffrage statute. In a lengthy debate with Boutwell, Representatives Charles Eldredge and Michael Kerr provided detailed critiques of the Radicals' arguments. *See id.* at 642-45 (statement of Rep. Eldredge); *id.* at 653-62 (statement of Rep. Kerr).[6] Critically, although the Democrats disagreed with the Radicals on whether the Fourteenth Amendment protected the right to vote, neither Eldredge nor Kerr contested that *McCulloch* provided the proper standard for Congress's enforcement authority. *See id.* at 654 ("The language of the fourteenth amendment seems to have been intended to give Congress the power to enforce [its] provisions."). But as Democrats were outnumbered three-to-one, they could not stop the Radicals'

[6] The Congressional Globe misspells Eldredge's name as "Eldridge." David P. Currie, *The Reconstruction Congress*, 75 U. Chi. L. Rev. 383, 453 & n.403 (2008).

suffrage statute. *See* Crum, *Superfluous*, *supra*, at 1613.

Rather, moderate Republicans objected to the suffrage statute on constitutional and political grounds. Moderate Republicans disagreed with the Radicals' position that the Fourteenth Amendment protected the right to vote. *See* Cong. Globe, 40th Cong., 3d Sess. 727 (1869) (statement of Rep. Bingham) (arguing that a constitutional amendment was necessary to accomplish "impartial suffrage"); Crum, *Superfluous*, *supra*, at 1613 (discussing the views of President Grant and Republican newspapers); Gillette, *supra*, at 51 (discussing the constitutional objections of the Ohio House Republican delegation). On the political front, moderate Republicans worried that a suffrage statute would backfire, potentially derailing the Fifteenth Amendment's ratification and leaving open the possibility of the statute's subsequent repeal. *See id.* at 51-52.

In light of these objections, Boutwell pulled his bill, citing the "general agreement that some amendment to the Constitution should be proposed." Cong. Globe, 40th Cong., 3d Sess. 686 (1869). Following Boutwell's capitulation in the House, the debate in the Senate largely shifted to adopting a constitutional amendment, rather than passing a statute. However, about two weeks later, Sumner belatedly attempted to advance his own bill—complete with jurisdictional provisions and criminal sanctions—under the guise of a constitutional amendment. Sumner's proposal was defeated 9-47. *See id.* at 1041. In concluding that it could not pass ordinary legislation to prohibit racial discrimination in voting by States under its Fourteenth Amendment enforcement power, the Reconstruction Congress adhered to the long-standing distinction between civil and political rights.

Thus, when the Fifteenth Amendment was passed by Congress and ratified by the States, it imposed novel obligations on the States and created a new font of federal authority. It was the Fifteenth—not the Fourteenth—Amendment that eradicated "white" from suffrage laws and "expanded the right to vote to include tens of thousands of previously disenfranchised black men" "in the North or along the sectional border." Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* 108-09 (2019). The Fifteenth Amendment also guaranteed that Congress could take appropriate action if and when Southern States sought to restrict the right to vote. *See id.* at 109. As originally understood, "[t]he Fifteenth Amendment ha[d] independent meaning and force." *Rice*, 528 U.S. at 522; *see also Oregon* v. *Mitchell*, 400 U.S. 112, 166 (1972) (Harlan, J., concurring in part and dissenting in part) (observing that the Fifteenth Amendment's existence "is evidence that [Congress] did not understand the Fourteenth Amendment to have" "extend[ed] the suffrage").

II. Congress Can Enact A Discriminatory-Effects Standard Pursuant To Its Fifteenth Amendment Enforcement Authority

Petitioners assert that an expansive interpretation of Section 2's discriminatory effects standard raises serious constitutional concerns.[7] In support of

[7] Here, it is important to emphasize that this Court has never held that intentional discrimination is a necessary ingredient of a Fifteenth Amendment claim. In *City of Mobile* v. *Bolden*, a mere plurality reached that conclusion. 446 U.S. 55, 62 (1980). Given that plaintiffs have not brought a discriminatory-effect claim under the Fifteenth Amendment, there is no need to reach this question. In a similar vein, "[t]his Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims." *Voinovich* v. *Quilter*, 507 U.S. 146, 159 (1993). Because

this claim, petitioners contend that Section 2 must satisfy *Boerne*'s congruence and proportionality test. *See* State Pet'rs Br. 26; Private Pet'rs Br. 39. Arizona, moreover, claims that *Shelby County* applied *Boerne* to the Fifteenth Amendment. *See* State Pet'rs Br. 26 (citing *Shelby County*, 570 U.S. at 542 n.1, and *Northwest Austin*, 557 U.S. at 204).

Boerne's congruence and proportionality test "has no demonstrable basis in the text of the Constitution" and is a "standing invitation to judicial arbitrariness and policy-driven decisionmaking." *Tennessee* v. *Lane*, 541 U.S. 509, 558 (2004) (Scalia, J., dissenting). *Boerne* was, in *amicus*'s view, wrongly decided, but this case does not require the Court to address, much less apply, *Boerne*. Contrary to petitioners' claims, this Court has never held that *Boerne* governs Congress's *Fifteenth* Amendment enforcement authority. Properly understood, that authority permits Congress to enact a discriminatory-effects standard to enforce the Fifteenth Amendment.

A. The Reconstruction Congress Conferred Itself Broad Enforcement Authority Under the Reconstruction Amendments.

Section Two of the Fifteenth Amendment provides that "Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XV, § 2. The key term here is "appropriate," which the Reconstruction Framers first included in the Thirteenth Amendment's enforcement clause and used again in

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this case implicates only vote-*denial* claims, there is also no need to reach this question. Finally, for the reasons given by respondents, Section 2 is constitutional even under *Boerne*'s congruence and proportionality test. *See* DNC Br. 46-58; Hobbs Br. 33-36.

the Fourteenth and Fifteenth Amendments' enforcement clauses.

During Reconstruction, the term "appropriate" was understood to embody the deferential approach to congressional authority articulated in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). It is well established that the Reconstruction Framers' selection of the term "appropriate" was a deliberate adoption of *McCulloch*'s broad conception of congressional authority. *See, e.g.*, *Katzenbach* v. *Morgan*, 384 U.S. 641, 650 (1966) ("By including § 5 the draftsmen sought to grant Congress … the same broad powers expressed in the Necessary and Proper Clause."); Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 825-26 (1999) (discussing the historical linkages between "appropriate" and *McCulloch*); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153, 188 (1997) (observing that the term "appropriate" "has its origins in the latitudinarian construction of congressional power in *McCulloch*"). The Reconstruction Framers' borrowing of *McCulloch*'s standard may be the most significant example of Justice Frankfurter's adage that "if a word is obviously transplanted from another legal source … it brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947).

Nearly a century after the Fifteenth Amendment was ratified, Congress passed the Voting Rights Act of 1965. In upholding Section 5's preclearance provisions, this Court made clear that Congress's use of the term "appropriate" in Section Two of the Fifteenth Amendment was a clear adoption of the *McCulloch* standard. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 325-26 (1966). Under the *Katzenbach* standard, "Congress may use any rational means to effectuate

the constitutional prohibition of racial discrimination in voting." *Id.* at 324.

B. *Boerne*'s Congruence and Proportionality Test Should Not Be Extended to the Fifteenth Amendment.

In *Boerne*, this Court established a new standard for adjudicating Congress's Fourteenth Amendment enforcement authority. Under *Boerne*'s three-pronged congruence and proportionality test, this Court begins by "identify[ing] with some precision the scope of the constitutional right at issue." *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356, 365 (2001). This Court then "examine[s] whether Congress identified a history and pattern of unconstitutional [conduct] by the States." *Id.* at 368. This Court concludes by determining whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520.

Since *Boerne*, this Court has continued applying the congruence and proportionality test. *See Allen* v. *Cooper*, 140 S. Ct. 994, 1004-05 (2020) (Copyright Remedy Clarification Act of 1990); *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 43-44 (2012) (plurality opinion) (FMLA's self-care provision); *Lane*, 541 U.S. at 533-34 (Title II of the ADA's application to state courts); *Nevada Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721, 733-35 (2003) (FMLA's family-care provision); *Garrett*, 531 U.S. at 374 (2001) (Title I of the ADA); *Kimel* v. *Florida Board of Regents*, 528 U.S. 62, 91 (2000) (ADEA); *United States* v. *Morrison*, 529 U.S. 598, 627 (2000) (VAWA's civil-remedies provision); *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627, 647 (1999) (Patent and Plant Variety Protection Act).

With the exception of *Morrison*, all of these cases implicated Congress's power to abrogate state sovereign immunity. None involved race, voting, or the Fifteenth Amendment.[8]

Despite "virtually identical" enforcement clauses, *Garrett*, 531 U.S. at 373 n.8, there are several reasons to not extend *Boerne* to the Fifteenth Amendment. First and foremost, *Boerne* misconstrues the original public understanding of the Reconstruction Amendments. *See supra* Section II.A. Moreover, the most on-point precedent for Congress's Fifteenth Amendment enforcement authority remains *Katzenbach*. Indeed, this Court repeatedly upheld the VRA's coverage formula and preclearance provisions under *Katzenbach*, including after *Boerne*. *See Lopez* v. *Monterey County*, 525 U.S. 266, 283-85 (1999) (upholding, after *Boerne*, the 1982 reauthorization); *City of Rome* v. *United States*, 446 U.S. 156, 182-83 (1980) (upholding the 1975 reauthorization); *Georgia* v. *United States*, 411 U.S. 526, 535 (1973) (upholding the 1970 reauthorization). There is no warrant to extend *Boerne*'s unduly constrained view of congressional authority to another amendment.

Second, the *Katzenbach* standard accords with principles of judicial minimalism and respect for the separation of powers. Recall that at *Boerne*'s first step,

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[8] Although the focus of this *amicus* brief is on Congress's Fifteenth Amendment enforcement authority, this Court could follow Justice Scalia's suggestion and decline to apply *Boerne* to "congressional measures designed to remedy racial discrimination by the States." *Lane*, 541 U.S. at 564 (Scalia, J., dissenting); *see also id.* ("I shall leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under § 5 to prevent or remedy racial discrimination by the States.").

courts must "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. By contrast, in cases applying *Katzenbach*'s rationality standard, this Court has repeatedly dodged questions about the underlying constitutional right by deferring to Congress's considered judgment. *See Morgan*, 384 U.S. at 648 ("A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the [Fourteenth] Amendment … would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment."); *City of Rome*, 446 U.S. at 173 ("We hold that, *even if* § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect." (emphasis added)).

Third, *Boerne* creates unnecessary "conflict with a coequal branch of Government." *Lane*, 541 U.S. at 558 (Scalia, J., dissenting). *Boerne*'s second and third prongs require, in effect, that courts "regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional." *Id.* This practice improperly treats Congress "as if it were an administrative agency." *Garrett*, 531 U.S. at 376 (Breyer, J., dissenting).

Finally, the Fourteenth and Fifteenth Amendments' substantive scopes—and thus their enforcement clauses—implicate different separation-of-powers and federalism concerns. The Fourteenth Amendment's broad language encompasses a panoply of rights and protected classes. *See Lane*, 541 U.S. at 562-63 (Scalia, J., dissenting) (collecting examples).

By contrast, the Fifteenth Amendment prohibits racial discrimination in voting—an assuredly critical but nevertheless narrow right. Given the Fifteenth Amendment's targeted language, it is unlikely that Congress could invoke it to exercise "virtually plenary police power." Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 Stan. L. Rev. 1127, 1191 (2001).

C. Neither *Northwest Austin* nor *Shelby County* Extended *Boerne* to the Fifteenth Amendment.

Arizona asserts that *Shelby County* applied *Boerne* to the Fifteenth Amendment. *See* State Pet'rs Br. 26. That is incorrect. The Court in *Shelby County* did not even mention *Boerne*, much less hold that its congruence and proportionality test governs Congress's Fifteenth Amendment enforcement authority. Furthermore, *Shelby County*'s equal sovereignty principle and current-burdens standard are inapt for a nationwide statute like Section 2 of the VRA.

1. *Shelby County*'s Equal Sovereignty Principle Is Distinct From *Boerne*'s Congruence and Proportionality Test.

In striking down the VRA's coverage formula, the *Shelby County* Court looked to two "basic principles" from *Northwest Austin* for guidance. *Shelby County*, 570 U.S. at 542. The first principle was *Northwest Austin*'s statement that the VRA's "'current burdens … must be justified by current needs.'" *Id.* (quoting *Northwest Austin*, 557 U.S. at 203). The second principle was *Northwest Austin*'s "conclusion that 'a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.'" *Id.* (quoting *Northwest Austin*,

557 U.S. at 203). In a key passage, the Court melded these two principles into one standard: "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions." *Id.* at 553. Thus, the Court determined that the current-conditions requirement is contingent on disparate treatment of the States. *See id.* at 550 ("The provisions of § 5 apply only to those jurisdictions singled out by § 4. We *now* consider whether that coverage formula is constitutional in light of current conditions." (emphasis added)).

The Court's opinion in *Shelby County* does not even cite *Boerne*—not for the standard of review, not for its application, and not for its praise of previous versions of the coverage formula. Nor does it cite to any of the *Boerne* line of cases. The words "congruent" and "proportional" do not appear either. Thus, on its face, *Shelby County* does not hold that *Boerne* applies to the Fifteenth Amendment.[9]

To be sure, the *Shelby County* Court stated in passing in a footnote that "[b]oth the Fourteenth and Fifteenth Amendments were at issue in *Northwest Austin*" and that decision "guides our review *under both Amendments* in this case." *Shelby County*, 570 U.S. at 542 n.1 (emphasis added). This language, however, does not mandate that *Boerne* applies to the Fifteenth Amendment. In *Northwest Austin*, the parties disputed whether *Boerne* or *Katzenbach* supplied the

[9] By contrast, the *Shelby County* Court gestured toward *Katzenbach*'s rationality standard. *See Shelby County*, 570 U.S. at 556 (characterizing Congress's reauthorization of the coverage formula as "irrational"); *id.* at 550 (noting that the original coverage formula was "'rational in both practice and theory'" (quoting *Katzenbach*, 383 U.S. at 330)).

governing constitutional standard, but the Court concluded that it "need not resolve" that dispute as the VRA's "preclearance requirements and its coverage formula raise serious constitutional questions under either test." *Northwest Austin*, 557 U.S. at 204.

Rather than being a restriction on Congress's Reconstruction Amendment enforcement authority, the equal sovereignty principle is best conceptualized as a freestanding federalism norm. *See* Leah M. Litman, *Inventing Equal Sovereignty*, 114 Mich. L. Rev. 1207, 1259 (2016); *see also* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 Harv. L. Rev. 2003, 2005 (2009) (defining "freestanding federalism" as a structural argument that does not "purport to [be] ground[ed] … in any particular provision of the constitutional text"). Indeed, the Court focused on the coverage formula's differentiation between the States, i.e., the issue "in th[e] case." *Shelby County*, 570 U.S. at 542 n.1. If the equal sovereignty principle reflected a structural protection, then it would apply to statutes enacted under "both Amendments," *id.*, just as it would apply to statutes enacted under any other constitutional provision, such as the Commerce Clause.

This Court's explicit limits on its holding elucidates this point. This Court made clear that its holding applied "only [to] the coverage formula," not to "§ 5 itself." *Id.* at 557. This Court further stated that its "decision in *no way affects the permanent, nationwide* ban on racial discrimination in voting found in § 2." *Id.* (emphasis added). Given these statements, *Shelby County* cannot have changed the standard of review for all statutes enacted under Congress's Reconstruction Amendment enforcement authority. After all, applying a more stringent constitutional standard for

Congress's enforcement authority would obviously "affect" a neighboring statutory provision. *Id.* And this Court's emphasis on Section 2's nationwide application reinforces the point that *Shelby County* applies only to coverage formulas that "divide the States." 570 U.S. at 553.[10]

2. Shelby County's Equal Sovereignty Principle Does Not Apply to Nationwide Statutes.

Moreover, a recent post-*Shelby County* decision clarifies that the equal sovereignty principle is distinct from the congruence and proportionality test applied in *Boerne*. Just last Term, in *Allen* v. *Cooper*, the Court held that Congress unconstitutionally abrogated state sovereign immunity in the Copyright Remedy Clarification Act of 1990. 140 S. Ct. 994 (2020). In applying *Boerne*'s test, the *Allen* Court observed that a prior decision invalidating a "basically identical statute" "all but prewrote [its] decision." *Id.* at 998, 1004-05, 1007 (discussing *Florida Prepaid*, 527 U.S. at 627). Of course, if *Shelby County* had changed the standard of review for Congress's Fourteenth Amendment enforcement authority, this pre-*Shelby County* precedent would have been inapt.

And contrary to the claim of some *amici* that Section 2's current burdens must be justified by current needs, *see, e.g.*, Cruz Amicus Br. 31 (citing *Shelby County*, 570 U.S. at 536), the *Allen* Court declined to cite *Shelby County* or its current-burdens standard.

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[10] For similar reasons, *Shelby County*'s equal sovereignty principle does not apply to the VRA's bail-in provision—a nationwide provision that authorizes courts to grant preclearance relief following a State or political subdivision's violation of the Fourteenth or Fifteenth Amendments. *See* 52 U.S.C. § 10302(c); Crum, *Pocket Trigger*, *supra*, at 2006-07.

Rather than examine extra-record evidence of copyright infringement from the past three decades, this Court confined its analysis to the "legislative record" compiled by Congress *in 1990*. *Allen*, 140 S. Ct. at 1005-06. This Court then put the ball back in Congress's court, observing that it was free to pass a new law with an updated "legislative record to back up th[e] connection" between abrogating state sovereign immunity and "the redress or prevention of unconstitutional injuries." *Id.* at 1007. Thus, *Allen* makes clear that *Shelby County*'s current-burdens requirement is triggered by coverage formulas—not a nationwide statute like Section 2.

III. The Fifteenth Amendment's Protections Apply To All Races

The court below concluded that Arizona intentionally discriminated against not only Blacks but also Hispanics and Native Americans. Pet. App. 104. By its plain terms, the Fifteenth Amendment prohibits the "deni[al] or abridg[ment]" of the "right … to vote" "on account of race." U.S. Const. amend. XV, § 1. As the Constitution's first and only use of the word "race," the Fifteenth Amendment embraces a rainbow coalition of all voters, regardless of their race. *See Rice*, 528 U.S. at 523 ("Under the Fifteenth Amendment voters are treated not as members of a distinct race but as members of the whole citizenry.").

Although the primary motivations behind the Fifteenth Amendment was to enfranchise Black men nationwide and prevent backsliding in the South, *see* Gillette, *supra*, at 46, the voting rights of other minorities were discussed in Congress and during the ratification debates. And it was acknowledged during Reconstruction that the Fifteenth Amendment would enfranchise men of all races.

Indeed, versions of the Fifteenth Amendment that would have limited its protections to Black men were rejected. Senator Jacob Howard, a leading Radical Republican, proposed an amendment which provided that "[c]itizens of the United States of African descent shall have the same right to vote and hold office as other citizens." *See* Cong. Globe, 40th Cong., 3d Sess. 828 (1869). Howard's proposal, however, was defeated 16-35, with 15 abstentions. *See id.* at 1012.

The Fifteenth Amendment's implications for the voting rights of Asians living on the West Coast—the overwhelming majority of whom were born abroad and not then eligible to become citizens, *see* Foner, *Second Founding*, *supra*, at 108—was debated at length. Congressional opposition to Chinese-American suffrage was overtly and grotesquely racist.[11]

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[11] *See, e.g.*, Cong. Globe, 40th Cong., 3d Sess. 901 (1869) (statement of Sen. Williams (R-OR)) ("I hope, sir, that this nation will not bind itself hand and foot for all coming time, and deliver itself up to the political filth and moral pollution that are flowing with a fearfully increasing tide into our country from the shores of Asia."); *id.* at 939 (statement of Sen. Corbett (R-OR)) ("Allow Chinese suffrage, and you may soon find established pagan institutions in our midst which may eventually supersede those Christian influences which have so long been the pride of our country."); *id.* at 1628 (statement of Sen. Doolittle (R-WI)) ("Now, is it wise for us to put the governments of the Pacific States into the hands of the Asiatic population? Is it not better that we leave the political power in those States where we find it, in the hands of our own people and our own race, who can best judge when this right of citizenship shall be extended to the Chinese?"). One Senator even introduced a constitutional amendment that would have prohibited Chinese and Native persons from being naturalized. *See id.* at 939 (statement of Sen. Corbett (R-OR)) ("But Chinamen not born in the United States and Indians not taxed shall not be deemed or made citizens.").

This anti-Chinese bigotry surfaced again during the ratification debates. California rejected the Fifteenth Amendment on the grounds that it would enfranchise Chinese Americans. *See id.* For the same reason, Oregon declined to take action on the Fifteenth Amendment until after it had been ratified—and then perversely rejected it. *See* Gillette, *supra*, at 156-57.

The question of the Fifteenth Amendment's application to Irish Americans was also debated. During Reconstruction, several New England States imposed property qualifications and literacy tests only on naturalized citizens—a policy that disproportionately impacted Irish Americans and disenfranchised a large Democratic-leaning voting bloc. *See id.* at 151. In Rhode Island, the belief that the Irish would be considered a "race" caused some Radical Republicans to vote against the Fifteenth Amendment out of partisan self-interest. *See id.* at 152-53.

Given the Fifteenth Amendment's plain language and its historical context, courts have properly extended its protections to members of all races. *See Rice*, 528 U.S. at 499 (invalidating constitutional provision that limited suffrage to "native Hawaiians"); *Davis* v. *Guam*, 932 F.3d 822, 824 (9th Cir. 2019) (striking down law limiting suffrage to "Native Inhabitants of Guam").

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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