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 U.S. Court of Appeals for the Ninth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *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 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 Congress's power to enforce those protections.

INTRODUCTION AND SUMMARY OF ARGUMENT

Exercising its express constitutional authority to enforce the Fifteenth Amendment, Congress passed the Voting Rights Act to prohibit all state electoral regulations that result in citizens being denied equal political opportunities on account of race, "a powerful, albeit sometimes blunt, weapon with which to attack even the most subtle forms of discrimination." *Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting). Section 2 of the Voting Rights Act provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that 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* or its counsel made a monetary contribution to its preparation or submission.

applied by any State or political subdivision in a manner which results 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). Section 2's text thus prohibits election rules and practices that function to exclude voters of color from full participation in our democracy.

The original impetus for Section 2's results test was the need to redress state practices that diluted the votes of citizens in communities of color. But its reach is far broader than the original evil it was designed to counteract. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) ("[T]he limits of the drafters' imagination supply no reason to ignore the law's demands."). "[W]hen Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." *Id.* at 1747. Section 2's text is indeed "written in starkly broad terms," *id.* at 1753, and provides for no exceptions.

By forbidding any state electoral regulation that "results" in the denial or abridgement of the right to vote on account of race, the plain language of Section 2 of the Voting Rights Act annuls arbitrary and discriminatory barriers that make it harder for voters of color to exercise their constitutionally guaranteed right to vote. To help realize the Fifteenth Amendment's promise of a multiracial democracy, Section 2 prevents the imposition of "onerous procedural requirements which effectively handicap exercise of the franchise" by voters of color, *Lane v. Wilson*, 307 U.S. 268, 275 (1939), as well other efforts to "manipulate[]" the "voting process" to "deny any citizen the right to cast a ballot and have it properly counted" on account of race, *Holder v. Hall*, 512 U.S. 874, 922 (1994) (Thomas, J., concurring).

Even if neutrally written and generally applicable, a state voting regulation violates the Voting Rights Act if, based on "the totality of circumstances," it causes voters of color to have "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). This rule incorporates "the 'simple' and 'traditional' standard of but-for causation," which asks whether "a particular outcome would not have happened 'but for' the purported cause." *Bostock*, 140 S. Ct. at 1739.

In this case, the court below applied the basic rule of voter equality enshrined in the Voting Rights Act to strike down Arizona's ban on out-of-precinct voting and its criminal prohibition on third-party ballot collection, finding that the regulations made it harder for voters in communities of color to exercise their right to vote and resulted in the disproportionate disenfranchisement of voters of color without any adequate justification. Petitioners and their *amici*, however, insist that, if Section 2 of the Voting Rights Act is interpreted to prohibit enforcement of these sorts of generally applicable "time, place, and manner" regulations of the voting process, it would exceed the scope of Congress's power to enforce the Fifteenth Amendment. And they therefore urge this Court to rewrite Section 2's text to curtail drastically its scope. State Pet'rs Br. 22-23 (adding to Section 2's text a requirement that plaintiffs establish a substantial disparate impact); Private Pet'rs Br. 19 (arguing that race-neutral "time, place, and manner" electoral regulations should be exempt from Section 2 scrutiny across-the-board).

Petitioners' claim cannot be squared with the text and history of the Fifteenth Amendment, which give Congress broad powers to prohibit the denial or abridgment of the right to vote on account of race 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. Petitioners' argument, if accepted, would "effectively nullif[y] the protections of the Voting Rights Act by giving states a free pass to enact needlessly burdensome laws with impermissible racially discriminatory impacts." *Veasey v. Abbott*, 830 F.3d 216, 247 (5th Cir. 2016) (en banc).

As its text and history demonstrate, the Fifteenth Amendment gave Congress the "power of conferring upon the colored man the full enjoyment of his right" and "enable[d] Congress to take every step that might be necessary to secure the colored man in the enjoyment of these rights." Cong. Globe, 41st Cong., 2d Sess. 3670 (1870). 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 on account of race. 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.

The "results" test contained in Section 2 of the Voting Rights Act falls squarely within the scope of Congress's express authority to enforce the Fifteenth Amendment, and prohibits the enforcement of state electoral regulations, such as the Arizona regulations at issue here, that "arbitrarily creat[e] discriminatory effects," *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, 576 U.S. 519, 540 (2015), and perpetuate "prior electoral discrimination," *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 442 (2006). Tenuous election regulations that disproportionately disenfranchise voters of color, such as the Arizona regulations at issue here, cannot be squared with the principle of voter equality enshrined in the

Constitution and the Voting Rights Act. Even if such measures are neutrally drawn and enacted for benign motives, they cause voters of color to have "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), in violation of the textual mandate of equality of political opportunity. The judgment of the court below 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 VOTERS OF COLOR 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. "Fundamental in purpose and effect . . . , the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race." *Rice*, 528 U.S. at 512.

Recognizing that "[i]t is difficult by any language to provide against every imaginary wrong or evil which may arise in the administration of the law of suffrage in the several States," Cong. Globe, 40th Cong., 3d Sess. 725 (1869), the Framers of the Fifteenth Amendment chose sweeping language requiring "the equality of races at the most basic level of the democratic process, the exercise of the voting franchise," *Rice*, 528

U.S. at 512. The Fifteenth Amendment equally forbids laws that deny the right to vote outright on account of race, as well as those that abridge the right by making it harder for individuals in communities of color to exercise their constitutional right to vote. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 333-34 (2000) (explaining that the "core meaning" of "'abridge'" is "'shorten'" (quoting Webster's New International Dictionary 7 (2d ed. 1950))); *Lane*, 307 U.S. at 275 (observing that the Fifteenth Amendment "hits 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"); Steven G. Calabresi & Andrea Matthews, *Originalism and* Loving v. Virginia, 2012 B.Y.U. L. Rev. 1393, 1417-18 (2012) (demonstrating that "[t]he word 'abridge' in 1868 meant . . . [t]o lessen" or "to diminish" and that laws that gave "African Americans a lesser and diminished" set of freedoms unconstitutionally abridged their constitutional rights).

To make the Fifteenth Amendment's guarantee a reality, the Framers explicitly invested Congress with a central role in protecting the right to vote—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. Const. amend. XV, § 2. By adding this language, "the Framers indicated that Congress was to be chiefly responsible for implementing the rights created" by the Amendment and that Congress would have "full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1966). 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).

The original meaning of the Fifteenth Amendment's express grant of power to enact "appropriate legislation" gives Congress wide discretion to enact whatever measures it deems "appropriate" for achieving the Amendment's objective of ensuring that "[t]he right of citizens of the United States to vote shall not be denied or abridged . . . by any State on account of race." U.S. Const. amend. XV. By authorizing Congress to enact "appropriate legislation," the Framers granted Congress the sweeping authority of Article I's "necessary and proper" powers as interpreted by the Supreme Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), a seminal case well known to the Reconstruction Framers. *See, e.g.*, John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States* 29-31 (2002); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801, 1810-15 (2010); Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 Harv. J.L. & Pub. Pol'y 991, 1002-03 (2008); Michael W. McConnell, Comment, *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 v. United States*, 446 U.S. 156, 175 (1980); *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 [Section] 2 of the Fifteenth Amendment").

In *McCulloch*, Chief Justice Marshall laid down the fundamental principle determining the scope of Congress's powers under the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. at 421 (emphasis added); *see 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 U.S. (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 the power to enforce the constitutional prohibition on denying or abridging the right to vote on account of race by "appropriate legislation," the Framers "actually *embedded in the text*" the "language of *McCulloch*." Balkin, *supra*, at 1815 (emphasis added).

As the text and history of the Fifteenth Amendment demonstrate, the Enforcement Clause gives Congress a broad "affirmative power" to secure the right to vote. Cong. Globe, 40th Cong., 3d Sess. 727 (1869); *see id.* at 1625 ("Congress . . . under the second clause of this amendment" has the power to "impart by direct

congressional legislation to the colored man his right to vote. No one can dispute this."). Without a broad enforcement power, the Framers of the Fifteenth Amendment feared that the constitutional guarantee of equal voting rights would not be fully realized. "Who is to stand as the champion of the individual and enforce the guarantees of the Constitution in his behalf as against the so-called sovereignty of the States? Clearly no power but that of the central Government is or can be competent for their adjustment . . . ." *Id.* at 984.

In 1870, the same year the Fifteenth Amendment was ratified, Congress employed the Amendment's Enforcement Clause to enact federal voting rights legislation. As the debates over the Enforcement Act of 1870 reflect, the Fifteenth Amendment "clothes Congress with all power to secure the end which it declares shall be accomplished." Cong. Globe, 41st Cong., 2d Sess. 3563 (1870). The Amendment's Enforcement Clause, Senator Oliver Morton explained, was "intended to give to Congress the power of conferring upon the colored man the full enjoyment of his right. We so understood it when we passed it." *Id.* at 3670. "[T]he second section was put there," he went on to explain, "for the purpose of enabling Congress to take every step that might be necessary to secure the colored man in the enjoyment of these rights." *Id.*; *see id.* at 3655 (explaining that the "intention and purpose" of the Fifteenth Amendment's Enforcement Clause was to "secure to the colored man by proper legislation the right to go to the polls and quietly and peacefully deposit his ballot there"); *id.* at 3663 ("Congress has a right by appropriate legislation to prevent any State from discriminating against a voter on account of his race . . . ."); *see also* 2 Cong. Rec. 4085 (1874) (observing that the Enforcement Clause of the Fifteenth

Amendment was added to allow Congress "to act affirmatively" and ensure that "the right to vote, should be enjoyed").

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 guarantee African Americans the right to vote 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). Opponents of the Fifteenth Amendment, both in Congress and in the states, worried that Congress would use its enforcement power to "send their satraps into every election district in this country," Cong. Globe, 41st Cong., 2d Sess. 255 (1869), and put into effect "registry laws and laws regulating elections at our own doors, enacted by a power we cannot reach or control," 2 Journal of the State of Mich. H.R. 1101 (Mar. 5, 1869). In their view, "[n]othing could be more loose and objectionable than the clause which authorizes Congress to enforce the restraint upon the States by 'appropriate' legislation . . . . Under this phraseology, Congress is made the exclusive judge." Journal of the Senate, State of Cal., 18th Sess. 150 (1869-70).

These concerns over state sovereignty were flatly rejected by the Framers of the Fifteenth Amendment and the American people, who explicitly conferred on Congress the power to enact legislation to protect the right to vote free from racial discrimination. In giving

Congress the power to protect the right to vote, the Fifteenth Amendment specifically limited state sovereignty. During debates over Congress's first attempt to enforce the Fifteenth Amendment, Senator Carl Schurz explained that "the Constitution of the United States has been changed in some most essential points; that change does amount to a great revolution." Cong. Globe, 41st Cong., 2d Sess. 3607 (1870). As he put it:

> 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.

Id. at 3608.

As the debates reflect, the Framers of the Fifteenth Amendment specifically recognized that a broad legislative power to protect the right to vote against all forms of racial discrimination—both denials and abridgements—was critical to ensuring "the colored man the full enjoyment of his right." *Id.* at 3670 .

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." *Id.* at 3658. "There may be a hundred prerequisites invented by the States," *id.*, "a hundred modes whereby [the African American 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 voting rights for African Americans, 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 diluting or carving out an exception to the Voting Rights Act's prohibition on nationwide discrimination for "time, place, and manner" regulations such as the Arizona regulations at issue here.

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.*, 576 U.S. at 539; *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419, 427-28 (1991). "[U]nder the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect," particularly when those practices create a "risk of purposeful discrimination." *City of Rome*, 446 U.S. at 175, 177; DNC Resps. Br. at 47. Even Petitioners' *amici* concede as much. *See* U.S. Br. at 16.

In this way, the results test "plays a role in uncovering discriminatory intent." *Inclusive Cmtys.*, 576 U.S. at 540; Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 Wm. & Mary L. Rev. 725, 738 (1998) (arguing that the results test is appropriate under Section 2 of the Fifteenth Amendment because of "the difficulty of detecting and stopping serious constitutional injuries" solely under an intent test); S. Rep. No. 97-417, at 40 (1982) (finding that "the difficulties faced by plaintiffs forced to prove discriminatory intent through case-by-case adjudication create a substantial risk that intentional discrimination . . . will go undetected, uncorrected and undeterred"). This is important because election laws that result in racial discrimination and cannot be adequately justified likely reflect "unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Inclusive Cmtys.*, 576 U.S. at 540. "Section 2's protections" thus "remain closely tied to the power granted Congress by the Fifteenth Amendment." *Veasey*, 830 F.3d at 253.

Section 2 of the Voting Rights Act—the statute's "permanent, nationwide ban on racial discrimination in voting," *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (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 to vote of citizens of color, 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 Hispanic voters (quoting *Gingles*, 478 U.S. at 45)); *see also Chisom*, 501 U.S. at 408 (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—even if the number of potential black voters was so small that they would on no hypothesis be able *to elect* their own candidate."). Laws that impose 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*, 572 U.S. 291, 305 (2014) (Kennedy, J., plurality opinion); *see Veasey*, 830 F.3d at 253 (observing that Section 2 liability attaches where "any such abridgement" of the right to vote "is linked to social and historical conditions of discrimination such that the abridgement has occurred 'on account of race'"); DNC Resp. Br. 32-36 (discussing causation); Hobbs Resp. Br. 18-22 (same). Using its authority to enforce the Fifteenth

Amendment, Congress determined that, whether intentional or not, "any racial discrimination in voting is too much." *Shelby Cty.*, 570 U.S. at 557.

Congress enacted the results test against the backdrop of a long history of, 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)); *see* Hobbs Resp. Br. 27 (observing that "many of the policies that inspired the VRA were facially neutral"); *see also N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016) (noting how "racially polarized voting may motivate politicians to entrench themselves through discriminatory election laws"). 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*, 572 U.S. at 313; *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 underrepresentation of Black poll officials "substantially imped[ed] and impair[ed] the access of many black persons to the political process, in violation of section 2");

Spirit Lake Tribe v. Benson Cty., N.D., 2010 WL 4226614, at *3 (D.N.D. Oct. 21, 2010) (granting relief under Section 2 because "closure of the voting places on the reservation will have a disparate impact on members of the Spirit Lake Tribe because a significant percentage of the population will be unable to get to" the other available "voting places . . . to vote").

Aiming to redress "current conditions" that offend the Fifteenth Amendment's guarantee of equality, *see Shelby Cty.*, 570 U.S. at 553, Section 2 requires courts to carefully review state laws to ensure that they do not unfairly constrict equal access to the political process. Thus, Section 2 demands an "'intensely local appraisal of the design and impact'" of challenged state laws and practices, *Gingles*, 478 U.S. at 79 (quoting *Rogers v. Lodge*, 458 U.S. 613, 622 (1982)), and it requires that close attention be paid to whether the "effect of the[] [State's] choices" is to "deny[] equal opportunity" to voters of color, *League of United Latin Am. Citizens,* 548 U.S. at 441-42; *see also Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994) (explaining that "[t]he need for such 'totality' review springs from the demonstrated ingenuity of state and local governments in hobbling minority voting power"). In this respect, the results test, 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.*, 576 U.S. at 540.

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 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 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); *see United States v. Marengo Cty. 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 Cty., Mont.*, 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 Cty. Comm'n*, 731 F.2d at 1557)).

Any other result would be unfaithful to the text and history of the Fifteenth Amendment. As the Eleventh Circuit has 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 Cty. 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.). It thus falls squarely within the power of Congress to enforce the Fifteenth Amendment.

Applying Section 2's results test here raises no constitutional concerns. The text and history of the Fifteenth Amendment, as well as court precedent,

leave no doubt that Congress has the power to prohibit arbitrary, discriminatory state laws that make it harder for citizens of color to exercise their constitutional right to vote. The Fifteenth Amendment gave Congress the "power of conferring upon the colored man the full enjoyment of his right" and "enable[d] Congress to take every step that might be necessary to secure the colored man in the enjoyment of these rights." Cong. Globe, 41st Cong., 2d Sess. 3670 (1870). Using its enforcement authority, Congress can—as it did in passing Section 2 of the Voting Rights Act—"prohibit[] 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.*, 576 U.S. at 540.

III. THERE IS NO "TIME, PLACE, AND MANNER" EXCEPTION TO THE FIFTEENTH AMENDMENT'S GUARANTEE OF EQUAL POLITICAL OPPORTUNITY.

Petitioners distort the Section 2 analysis engaged in by the court below, claiming that its interpretation of the results test is so sweeping that it "subject[s] nearly all ordinary election rules to § 2 challenge," Private Pet'rs Br. 2, effectively allowing "federal judges" to "impose their policy preferences on States' voting practices under the guise of applying § 2," State Pet'rs Br. 33. And they insist that courts should close their eyes to the ways that voting laws can interact with socioeconomic disparities to deprive citizens in communities of color of equal political opportunity, insisting states cannot be forced to "compensate for underlying social inequalities," Private Pet'rs Br. 41; State Pet'rs Br. 28,

32. Urging this Court to apply the congruence and proportionality standard—a standard this 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 Cty.*, 570 U.S. at 555 (striking down coverage provision under *McCulloch*)—Petitioners argue that if Section 2 prohibits the Arizona laws at issue here, Section 2 is necessarily unconstitutional. This argument ignores the breadth of the enforcement power the Fifteenth Amendment confers on Congress.

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 laws that make it harder for citizens of color to exercise their constitutional right to vote. There is no "time, place, and manner" exception to the Fifteenth Amendment's guarantee of equal political opportunity and grant of enforcement power.

Petitioners argue that Congress lacks the power to prohibit the Arizona regulations at issue here because they "apply equally to everyone and impose only the ordinary, inherent burdens of voting," Private Pet'rs Br. 20, 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. *See Veasey*, 830 F.3d at 253 ("If the State had its way, the Fifteenth Amendment and Section 2 would only prohibit outright *denial* of the right to vote and overtly purposeful discrimination. Yet, both the Fifteenth Amendment and Section 2 also explicitly prohibit *abridgement* of the right to vote."); *City of Mobile v. Bolden*, 446 U.S. 55, 126 (1980) (Marshall, J., dissenting) ("By providing that the right to vote cannot be discriminatorily

'denied *or* abridged,' . . ., the [Fifteenth] Amendment assuredly strikes down the diminution as well as the outright denial of the exercise of the franchise.").

Under the Fifteenth Amendment, Congress has broad power to 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 any "contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color," *Lane*, 307 U.S. at 275, whether those "contrivances" deny or abridge the right to vote. To fulfill the promise of the Fifteenth Amendment, Congress has broad power to ensure that "[t]he abstract right to vote" in fact "becomes a reality at the polling place on election day," *Perkins v. Matthews*, 400 U.S. 379, 387 (1971), and to prevent electoral regulations that result in "[r]ace . . . qualify[ing] some and disqualify[ing] others from full participation in our democracy," *Rice*, 528 U.S. at 523. Petitioners simply refuse to grapple with the Constitution's explicit grant of this broad power to Congress.

The State's effort to excise socioeconomic disadvantage from the Section 2 inquiry fares no better. Congress has the power to set aside state laws that interact with socioeconomic inequalities—no less than other vestiges of state-sponsored racial discrimination—to deprive citizens in communities of color 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," *id.* 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*, 512 U.S. at 1018, 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). Petitioners simply refuse 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.*, 576 U.S. at 540 (discussing how disparate impact liability under the Fair Housing Act prevents government policies "perpetuating segregation").

Petitioners also claim that the reading of Section 2 adopted below would improperly limit the State's authority to ensure the integrity of its electoral process, but Section 2, like other forms of disparate impact liability, "mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies." *Id.* (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)). "[C]ourts can and should distinguish between nondiscriminatory [regulations] which safeguard voter integrity and those which, whatever their intentions, interact with the effects of past discrimination to abridge minorities' opportunities to participate in the political process." *Veasey*, 830 F.3d at 280 (Higginson, J., concurring). Indeed, a critical part of the Section 2 inquiry asks whether "the policy underlying" the challenged regulations is "tenuous," allowing courts to carefully probe the asserted state interests offered in support of an electoral policy that is challenged as resulting in a denial of equal opportunity. S. Rep. No. 97-417, at 29 (1982); *see League of Latin Am. Citizens*, 548 U.S. at 441; *Veasey*, 830 F.3d at 262-63; Hobbs Resp. Br. 14, 43-44; Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77

Ohio St. L. J. 763, 768 (2016) ("The strength of the government's proffered policy justifications goes to the heart of whether the practice imposes a burden and whether that burden is discriminatory."). The court below recognized this very point. *See* J.A. 624 ("Of the various factors, we regard . . . []the tenuousness of the justification for the challenged voting practices[] as particularly important."). In short, Section 2 requires careful scrutiny of the discriminatory features of a law and places the onus on the government to justify them. This allows courts to smoke out neutrally written electoral regulations that operate to arbitrarily exclude voters of color from full participation in our democracy.

Finally, Petitioners suggest that the interpretation of Section 2 provided by the court below "compel[s]race-conscious state action," Private Pet'rs Br. 41; State Petr's Br. 26-27, in violation of the Fourteenth Amendment's guarantee of equal protection. This is wrong. Section 2 of the Voting Rights Act requires equal political opportunity for all regardless of race, forbidding states from enacting laws and policies that operate to exclude voters of color from the polls or to dilute their voting strength without sufficient justification. As this Court made clear in rejecting a similar argument in *Inclusive Communities*, federal civil rights laws that prohibit unjustified discriminatory impacts 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.*, 576 U.S. at 540. Prohibitions on discriminatory results—like those contained in the Voting Rights Act—help enforce the Fifteenth Amendment's guarantee of equality. *See Marengo Cty.*, 731 F.2d at 1561 ("Section 2 is not meant to create race-conscious voting but to attack the discriminatory

results of such voting where it is present."). Striking down electoral regulations that result in a denial of equal political opportunity raises no equal protection concern.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court below.

Respectfully submitted,

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