Nos. 19-1257 and 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 Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF SENATE STAFFERS AND OTHER LEADING PARTICIPANTS IN THE 1982 AMENDMENTS TO THE VOTING RIGHTS ACT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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January 20, 2021

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INTEREST OF AMICI CURIAE[1]

Amici are a group of former staffers to Democratic and Republican Senators and leaders of nongovernmental organizations. All were intimately involved in the legislative effort that led to the enactment of the 1982 amendments to the Voting Rights Act. All have deep personal knowledge of the legislative background of those amendments. They write to provide the Court with an accurate account of the legislative history of the 1982 amendments, and of Congress' understanding of the amendments at the time of enactment. Given that the 1982 amendments are now before the Court, *amici* have an interest in ensuring that Congress' actions and intention in 1982 are accurately represented. Specifically, *amici* are:

Armand Derfner, former director of the Voting Rights Act Project for the Joint Center for Political Studies in Washington, D.C.

Michael R. Klipper, former Senate Judiciary Committee Chief Counsel to Senator Charles Mathias (R. Md.), the chief sponsor of Senate Bill 1992 (97th).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici* certify that *Amici* and their counsel authored this brief in its entirety, and no party or its counsel, nor any person or entity other than *Amici* or their counsel, made a monetary contribution to this brief's preparation or submission. All parties have provided written consent to the filing of this brief.

Ralph G. Neas, former [1981-82] Executive Director, The Leadership Conference on Civil Rights, a leading participant in legislative history of the 1982 Amendments to the Voting Rights Act, and former Chief Counsel to Senator Edward Brooke (R. Mass.).

Burton V. Wides, former Senate Judiciary Committee Chief Counsel to Senator Edward M. Kennedy (D. Mass.), a chief co-sponsor of Senate Bill 1992 (97th).

SUMMARY OF ARGUMENT

In 1982, Congress amended the Voting Rights Act, including the critical amendments to Section 2 that are currently before the Court. *Amici* were Congressional staffers and nongovernmental legal community leaders intimately involved with those amendments. *Amici* write to provide an accurate account of what Congress did in 1982 regarding Section 2, and the background reasons behind the amendments. They also write to correct material misunderstandings of Congressional intent (a) contained in certain of the party and *amicus* briefs, particularly the *amicus* brief submitted by Senator Ted Cruz and ten other members of the United States Senate ("Cruz Brief") and (b) adopted by the Seventh Circuit in *Frank v. Walker*, 768 F.3d 744, 752-54 (7th Cir. 2014).

Four points are critical.

First, Section 2, as amended, was always understood by Congress, including when it amended the VRA in 1982, to apply to ***all*** "procedures" that, as a practical matter, deny minority groups equal opportunity to participate in the political process. The language of the statute is clear and was meant to be clear. Section 2 applies to ***any*** discriminatory "standard, practice, or procedure . . . which results in a denial or abridgement" of the right to vote. 52 U.S.C. § 10301(a). A "denial or abridgement" is shown when, based on the "totality of the circumstances," members of a minority group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b). In

addition, Section 2 does not impose a "proportional representation" requirement. Contrary to the suggestion by the Private Petitioners in their merits brief and some *amici*, nothing in the text or legislative history of Section 2 and the 1982 amendments suggests—in any way—that there be one voting-rights regime for redistricting cases and another, entirely separate regime for supposed "time, place, and manner" restrictions like limits on polling places or rules about absentee ballots. Rather, as the Senate Report (the same report that this Court has already relied upon as the major guide to Congress' intent in adopting the amendments) explicitly stated, Section 2 "remains the major statutory prohibition of ***all*** voting rights discrimination." S. Rep. No. 97-417, at 207 (1982) (emphasis added); *see Thornburg v. Gingles*, 478 U.S. 30, 43 (1986) (relying on Senate Report to ascertain the "the nature of § 2 violations and . . . the proof required to establish these violations").

Second, whether in a redistricting case or a case where a "time, place, and manner" voting procedure like a polling place location is at issue, Congress intended the fundamental approach to establishing a Section 2 violation to remain the same. The fundamental idea behind the 1982 amendments to Section 2 was to adopt the approach of Justice White's opinion for the Court in *White v. Regester*, 412 U.S. 755, 766 (1973). That means assessing whether the procedure in fact provides members of minority groups "less opportunity" than the white majority to participate in the political and election process. And, as *Regester* makes clear, this is a deeply pragmatic analysis. It is focused on results (i.e., impacts and causation), not on an ability to show

that the practice or procedure was a product of express legislative intent to discriminate. It must take into account history, practice, and context. Most critically, and contrary to the theory advanced by the State Petitioners, the United States, and many *amici*, "opportunity" means a ***practical***, not merely theoretical, opportunity to participate in the political process to the same extent as the majority. As *Regester* recognized (and as Congress unquestionably recognized in its enactment of Section 2), it is not enough to speak of a merely formal legal "opportunity" to participate in the political process. The minority group must ***in fact*** have the same opportunity to participate. Pointing to a theoretical "opportunity" under the law was never intended to be enough. Thus, to cite an example before the House in 1981, it was well known that if limiting voter registration hours was more likely to make it difficult for overwhelmingly black farmworkers to vote, the measure would violate Section 2—even if, theoretically, both black and white voters had the same opportunity to register to vote during those hours. *See Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil & Constitutional Rights of the H. Committee on the Judiciary,* 97th Cong. (hereinafter "House Hearings"), pt. 2, at 1521-22 (1981).

Third, contrary to the brief of the Private Petitioners, the *amicus* brief submitted by Senator Ted Cruz and other current U.S. Senators who were not in office in 1982, and the arguments of several other *amici*, Congress never intended to ban all forms of a "disparate impact" analysis in analyzing a Section 2 claim. Congress did—thanks to a compromise initiated by then-Senator Robert Dole—

indicate both in the statute itself and in the Legislative History that Section 2 did not establish a "right to have members of a protected class elected in numbers equal to their proportion in the population," i.e., that a mere failure to show proportional representation would not suffice to state a Section 2 claim. But "proportional representation" is not the same as "disparate impact." It is a mistake to conflate the two. Congress believed that policies, such as closing of polling places or irregular scheduling of polling hours, could violate Section 2 if they disparately impacted minority voters and the minority voters could show that the disparate impact was caused by an underlying history of discrimination and lack of opportunity to participate in the political process (i.e., "disparate impact plus causation").

Fourth, contrary to the Seventh Circuit's assertion in *Frank*, the brief of the State Petitioners and the United States, and the Cruz Brief, Congress never understood Section 2 in 1982 (or in 1965) to be limited to instances in which the voting procedure itself "created" the underlying discrimination, as opposed to having a discriminatory effect because of the context in which the procedure operates. Such a reading of Section 2 is simply incompatible with both the legislative history (which considered and discussed instances of prohibited voting discrimination under Section 2 that the Seventh Circuit's test would not find to violate Section 2) and with *Regester* itself.

Put simply, Congress intended Section 2 to apply broadly and pragmatically to root out a wide range of procedures that perpetuate discrimination, based on

Congress' recognition that such discrimination could and would appear in endlessly novel and inventive forms. It would be grave error, and contrary to Congress' clear intent, for this Court to impose a cramped construction of Section 2 that limits the broad and wholistic approach that was the fundamental purpose equally of the Voting Rights Act and its amendment in 1982.

ARGUMENT

I. JUSTICE SCALIA'S *CHISOM* HYPOTHETICAL ACCURATELY DESCRIBES CONGRESS' UNDERSTANDING OF THE 1982 AMENDMENTS.

Approximately 30 years ago, Justice Scalia offered a hypothetical that succinctly and accurately described Congress' intent in its 1982 amendments to the Voting Rights Act. He wrote as follows:

> If, for example, 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, blacks would have less opportunity "to participate in the political process" than whites, and § 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.

Chisom v. Roemer, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting).

Justice Scalia's example accurately and succinctly captures how Congress in 1982 understood that Section 2 would operate. It does so in at least four ways. First, Justice Scalia correctly recognized that Section 2, without a shadow of a doubt, applies to facially neutral policies, like "time, place, and manner" restrictions, that abridge voting rights, not merely redistricting issues. *See infra* Section II. Second, he correctly understood that the analysis of the "opportunity" to "participate in the political process" requires a ***practical*** assessment of voting opportunity, and that a facially-neutral measure which formally gave blacks and whites the same "opportunity" to register to vote could be, when put into practice, a highly effective means of ***reducing*** the opportunity of minority groups to vote, even if there was no practical impact on the ability to elect a "minority" candidate. *See infra* Section III. Third, he recognized that a voting regulation that imposes a "disparate" impact on minority groups could and often would violate Section 2, even when a policy was facially neutral and non-race based. *See infra* Section IV. Finally, he recognized that Section 2 was intended to cover "procedures" that disparately made it difficult for minority groups to exercise the right to vote, even when the reason for the disparate difficulty was not created by the procedure itself, but by some underlying difference in social or economic status (in the hypothetical, the fact that black voters would find it more difficult to register given extremely limited registration hours, a problem due not to the restriction itself but, presumably, to the increased difficulty in leaving work to register during the restricted hours). *See infra* Section V.

Whether he knew it or not, Justice Scalia's hypothetical example was strikingly similar to an actual voting procedure that Congress considered at the time of the 1982 amendments to Section 2. On June 12, 1981, the House Subcommittee on Civil and Constitutional Rights, considering the legislation that would ultimately be adopted by the House as H.R. 3112 (97th), the House bill amending Section 2. House Hearings, pt. 2, at 1521-22. In that hearing, the subcommittee discussed an Alabama law that required voters to "reregister" in certain counties during inconvenient hours, i.e., only from nine to four, and that made it substantially more difficult for black voters to vote. *Id.* This kind of restriction caused bipartisan outrage. The Chairman of the subcommittee, Democratic Congressman Don Edwards, explained as follows:

> In Choctaw County, in Alabama, how do you explain this? In Choctaw County the reregistration bill that was passed by the legislature puts the burden on the voter to register to vote from the hours of 9 to 4. Now, this is when a poor black is working, perhaps out in the field, 30, 40 miles from home. He or she has to find his or her way 20, 30, 40 miles and reidentify or reregister or something like that when it is very easy for most white people in Choctaw County to reregister. They have much better transportation and so forth. How can we sitting up here look at that in any way and say that it is designed and it does reduce the number of black people who can vote?

Id. Republican Congressman Henry Hyde, up until that point the leading opponent of an amendment that would revise Section 2, after hearing that testimony, "erupted" and indicated that he would support amendments to bar such practices as unlawful discrimination:

> I want to say that I have listened with great interest and concern, and I will tell you, registration hours from 9 to 4 [are] outrageous. It is absolutely designed to keep people who are working and who have difficulty in traveling from registering. If that persists and exists, it is more than wrong.

Id. at 1584. Days later, Congressman Hyde introduced an amendment containing language amending Section 2. *Id.*, pt. 3, at 1815-17; *see also* H.R. Rep. No. 97-227, at 16 (1981) (referring to Choctaw County hours issue and effect on registration).

Put simply, and as explained further below, Justice Scalia was correct. No Congressman had any doubt in 1982 that Section 2 would apply to a "facially neutral" situation like that described in Justice Scalia's hypothetical. Intimations to the contrary are simply wrong.

II. SECTION 2 WAS INTENDED TO APPLY TO ALL "PROCEDURES" THAT REDUCE EQUAL VOTING OPPORTUNITY FOR RACIAL MINORITIES, INCLUDING FACIALLY-NEUTRAL "TIME, PLACE, AND MANNER" MEASURES LIKE LOCATION OF POLLING PLACES.

Congress clearly understood that the "procedure[s]" at issue in Section 2 included things like undue limitations on registration hours, polling place location restrictions, and other similar facially-neutral "procedures" that might differentially impact the ability of minority groups to register to vote and to vote—what the Private Petitioners' Merits Brief describes as "ordinary time, place, and manner rules." Br. of Private Pet'rs at 2, 15-16. Indeed, the inclusion of such procedures under Section 2 was uncontroversial in 1982, because they had widely been understood as "procedures" regulated by Section 2 from the date of the initial passage of the initial Voting Rights Act in 1965.

As this Court explained, just four years after passage of the 1965 Act:

> [Section] 2 of the Act, as originally drafted, included a prohibition against any 'qualification or procedure.' During the Senate hearings on the bill, Senator Fong expressed concern that the word 'procedure' was not broad enough to cover various practices that might effectively be employed to deny citizens their right to vote. In response, the Attorney General said he had no objection to expanding the language of

> the section, as the word 'procedure' 'was intended to be all-inclusive of any kind of practice.' Indicative of an intention to give the Act the broadest possible scope, Congress [in 1965] expanded the language in the final version of [Section] 2 to include any 'voting qualifications or prerequisite to voting, or standard, practice, or procedure.'

Allen v. State Bd. of Elections, 393 U.S. 544, 566-67 (1969), *abrogation on other grounds recognized in Ziglar v. Abbasi*, 137 S.Ct. 1843, 1855 (2017). That "all-inclusive" understanding of the term "procedure," intended to give the Voting Rights Act the "broadest possible scope," was also intended by Congress when it amended the Act in 1982. The 1982 Senate Report emphasized that the discussion between the Attorney General and Senator Fong referred to in *Allen* "is not a stray remark in the extensive proceedings that led to the [1965] Act's passage. ***It is the most direct evidence of how the Congress understood the provision***, since Congress relied upon the Attorney General to explain the meaning and operation of this Executive Branch initiative." S. Rep. No. 97-417, at 194 (emphasis added). Indeed, the 1982 Senate Report quoted at length the exchange with Senator Fong — an exchange that dealt directly with a "time, place, and manner" voting restriction:

> Senator Fong . . . 'Mr. Attorney General, turning to Section 2 of the bill . . . there is no definition of the word 'procedure' here. I am a little afraid that there may be certain practices you may not be able to include in the word 'procedure.' For example, if there should be a certain statute in a State that

> says the registration office shall be open only 1 day in 3, or that the hours will be so restricted, I do not think you could bring such a statute under the word 'procedure,' could you? Attorney General Katzenbach. 'I would suppose that you could if it had that purpose. I had thought of the word 'procedure' as including any kind of practice of that kind if its purpose or effect was to deny or abridge the right to vote on account of race or color.

Id. at 194 n.50 (quoting "Hearings on S. 1564 Before the Comm. on Judiciary, U.S. Senate, 89th Cong., 1st Sess., 191 (1965)").

The House was even more explicit about its intention to cover "time, place, and manner" restrictions like burdens on voter registration or polling place locations under Section 2. It, too, emphasized that its understanding of the amended Section 2 was that it would apply to "prohibit any voting qualification, prerequisites, standard, practice, or procedure which results in discrimination." H.R. Rep. No. 97-227 at 2. The House emphasized that ***all*** such practices would be banned under the amended Section 2 if they had discriminatory effect or impact. *See id.* ("Section 2 would be violated if the alleged unlawful conduct has the effect or impact of discrimination on the basis of race, color, or membership in a language minority group."). Among the many kinds of procedures the House specifically identified as creating potentially discriminatory practices were countless instances of "vote denial" discrimination, including "numerous practices and procedures which act as continued barriers to

registration and voting" including "inconvenient location and hours of registration, dual registration for county and city elections, refusal to appoint minority registration and election officials, intimidation and harassment, frequent and unnecessary purgings and burdensome reregistration requirements, and failure to provide or abusive manipulation of assistance to illiterates." *Id.* at 14. The House identified countless examples of such practices with discriminatory effect, in Georgia, Alabama, Texas, Mississippi, and elsewhere. *See id.* at 14-17.

The House Report on the 1982 Amendments to Section 2 also identified polling place location as a major aspect of potential voting discrimination, explaining that "the placement of polling places is an important factor in determining whether minorities exercise their right to vote. Numerous instances of polling places located in or moved to places which are inconvenient, inaccessible, or intimidating to minorities have been documented." *Id.* at 35. Many specific examples of such "inconvenient" or "intimidating" relocations were cited. "For example, in Hopewell, Virginia, blacks are concerned about voting at the Veterans of Foreign Wars (VFW) Hall located in the white community. According to the president of the Virginia chapter of the Southern Christian Leadership Conference, there are no voting places in the black community. The present location is 'like having the polls at a country club.'" *Id.* at 17. The House Report noted that such "[e]xisting and changed locations of polling places can have a negative effect on minority voter turnout." *Id.*

Indeed, the House Report specifically states that "[t]he amendments [to Section 2] are not limited to districting or at-large voting. They would also prohibit other practices which would result in unequal access to the political process." *Id.* at 31. The House Report specifically identified some such potential violations: "For example, a violation would be proved by showing that election officials made absentee ballots available to white citizens without a corresponding opportunity being given to minority citizens similarly situated. As another example, purging of voter registration rolls would violate Section 2 if plaintiffs show a result which demonstrably disadvantages minority voters." *Id.* at 31 n.105.

Beyond the House and Senate reports, that Congress did not mean to shield purportedly "neutral" "time, place, and manner" laws from Section 2 scrutiny is repeated again and again in formal statements by those who voted for the amendments. These emphasized the critical role of Section 2 in guarding nationwide against the same kinds of practices that were subject to preclearance under Section 5 of the Act. One example is the statement of Senator Patrick Leahy, who served on the Subcommittee on the Constitution, before the Senate Judiciary Committee.

> Perhaps the major issues before this Judiciary Committee is the question of intent under Section 2 of the Act. If Section 5 is the engine that drives the Act and renders it enforceable as a practical matter, Section 2 is still the basic protection against discriminatory practices. Preclearance does

> not cover all areas and may not resolve every threatened violation where it does apply. Preclearance is designed to stop voting discrimination before it can start in covered Jurisdiction, and Section 2 is calculated to end it whenever and wherever it is found.

Voting Rights Act of 1982: Hearing on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Comm. on the Judiciary, vol. 2, 97th Cong. 121 (1982) (statement of Patrick J. Leahy, U.S. Senator of Vermont). *See also id.*, vol. 1 at 209 (statement of Charles Mathias Jr., U.S. Senator of Maryland) (citing "purging of voters, and even changes in established polling places" as "sophisticated dodges" that can discriminate based on race). Senator Metzenbaum was of a similar view. *See id.*, vol. 1 at 227 (statement of Howard M. Metzenbaum, U.S. Senator of Ohio) (addressing "ploys," such as "***dual registration***, ***reregistration***, gerrymandering, at-large elections, annexations, intimidation, ***inconvenience*** to name a few—is limited only by the imagination") (emphasis added). The Office of the Attorney General of the United States concurred. *See id.* at 193 & n.28 (letter of Hon. William Bradford Reynolds to Hon. Orrin G. Hatch) (describing breadth of voting procedures that can discriminate and noting that the terminology used in Section 4, such as "voting procedures," is similar to language appearing in Section 2 of the Act, 42 U.S.C. 1973, ("standard, practice, or procedure"), and Section 5, 42 U.S.C. 1973c, ("standard, practice, or procedure with respect to voting")). It made clear that "neutral" time, place, and manner regulations, such as restrictions on "hours and locations for

registration" could be found to be discriminatory practices under the Act, and specifically cited the examples raised in the House Report. *Id.* at 194 (citing H.R. Rep. No. 97-227, at 43-44) ("[t]he Committee hearing record is replete with examples").

Thus, Congress' understanding of the procedures covered by Section 2 was clear. While much of the legislative history of the 1982 amendments to Section 2 was focused on at-large districts and other instances where redistricting might violate Section 2, and related debates about "quotas" and proportionate representation requirements (issues that were the subjects of immediate controversy in light of their relationship with then pending, recent or potential litigation), there is no doubt that both the House and the Senate clearly understood that Section 2 would also apply to interference with voter registration, polling place locations, absentee ballot restrictions, purges of voter rolls, and other "vote denial" claims that differentially impacted a minority group's opportunity to cast a ballot, when compared to the white majority.

III. THE "OPPORTUNITY . . . TO PARTICIPATE IN THE POLITICAL PROCESS" GUARANTEED BY SECTION 2 IS A PRACTICAL, NOT MERELY A THEORETICAL, OPPORTUNITY TO AVAIL OF A VOTING PROCEDURE.

Congress in 1982 also understood that protecting equal opportunity to vote means far more than providing a hypothetical, but hollow, "opportunity" to comply with a facially neutral voting procedure. As

the Senate Report explicitly noted in its discussion of Section 2, "the requirement that the political processes leading to nomination and election be 'equally open to participation by the group in question' extends beyond formal or official bars to registering and voting." S. Rep. No. 97-417 at 395. Indeed, in many ways, preventing against discrimination that might have disparate effects against minority groups despite a formal "opportunity" to exercise the vote under a facially neutral law—like the hypothetical registration office open only one day in three mentioned by Senator Fong in 1965—can be seen as the primary purpose of the Voting Rights Act as a whole. *See id.*

The State Petitioners, the United States, and the Cruz Brief take a different position—one that finds no support in the legislative record. They focus on the word "opportunity" in Section 2 and suggests that this word gives license to a broad array of laws that are facially neutral but that nonetheless operate to the disadvantage of minority voters. For example, the Cruz Brief asserts that by including language prohibiting state voting laws that "result" in a denial of equal "opportunity," "Congress rejected a broad 'discriminatory effects' test or one requiring racially proportional outcomes." Cruz Brief at 4. From here, the brief marks out a category of so-called "neutral time, place, and manner voting laws"—a category that seems to include facially neutral laws, not expressly called out by name as prohibited in the text of the Constitution or the Voting Rights Act. *Id.* at 19-24. The Cruz Brief suggests that Congress saw such laws as providing an equal "*opportunity to participate* in the political process" even when they impose disparate impacts in light of the totality of the

circumstances. *Id.* at 24 (emphasis in original). *See also id.* at 15 ("§2 does not preempt neutral time, place, and manner voting laws that impose merely some disparate impact on different racial groups"); *id.* at 17 (characterizing prohibited voting laws as "'episodic' barriers," and "neutral time, place, and manner statutes").

The interpretation offered by these parties, the government, and other *amici* has no basis in the language of Section 2 (as Justice Scalia's hypothetical example shows). Nor does it have grounding in Congress' deliberations in enacting the 1982 amendments. Rather, as discussed above, Congress in 1982 cited example after example in the legislative record of such "time, place, and manner" regulations that formally offered minority groups and whites the same ability to register or to vote, but in fact substantially and disproportionately burdened the minority group. Indeed, the House explicitly stated that the "purging of voter registration rolls would violate Section 2 if plaintiffs show a result which demonstrably disadvantages minority voters." H.R. Rep. No. 97-227, at 31 n.105.

Equally important, the novel interpretation of the parties and *amici* ignores the fundamental purpose of the 1982 amendments—to adopt the approach to voting rights claims under Section 2 that Justice White, writing for this Court, adopted in *Regester*. As this Court has recognized, and as is crystal clear from both the House and Senate Reports, the fundamental purpose of the 1982 revisions to Section 2 was "to establish as the relevant legal standard the 'results test,' applied by this Court in *White v. Regester* and by other federal

courts." *Gingles*, 478 U.S. at 35; *see* S. Rep. No. 97–417, at 177, 205; H.R. Rep. No. 97-227, at 2, 29. *Regester* involved a challenge to facially-neutral laws that formally guaranteed equal opportunity to vote to all citizens residing in the single member-districts at issue in that case. But, when viewed in practice, and in the light of historical discrimination and then-current context, this Court held that the use of such normally-permissible single-member districts in fact prevented minority groups from participating equally in the political process. The Senate Report explicitly indicated that "opportunity" under Section 2, using the *Regester* standard, was to be applied on a context-specific basis focused on the "reality" of a measure, not its formal legal status. S. Rep. No. 97-417, at 208 ("As the Court said in [*Regester*], the question [of] whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.'").

Regester involved a challenge to the Texas 1970 reapportionment scheme for the state legislature. 412 U.S. at 758-59. A three-judge district court held that the multi-member districts provided for Bexar and Dallas Counties diluted the voting strength of African-American and Mexican-American voters and were constitutionally invalid. *Id.* Relying on past precedent, the *Regester* Court specifically explained that multi-member districts were ***not*** facially improper. *Id.* at 765 (citing *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971) (upholding multi-member districts as generally constitutional and holding that a multi-member districting plan for Indianapolis, Indiana did not violate any constitutional or statutory voting-rights provision). Nonetheless, based on the three-judge district court's careful

examination of the historical record and then-current political landscape (including language barriers to voting), the Court held that the specific multi-member districts imposed on Dallas and Bexar Counties did violate the protections of the Fifteenth Amendment. *Id.* at 766-770 ("we are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise"). Based on this "intensely local appraisal" the *Regester* Court found that the plaintiffs had met the necessary standard, of showing that "the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.* at 766.

Notably, there was no question but that the minority voters in *Regester* had the same ***hypothetical*** "opportunity" to vote and participate in elections in the multi-member districts as did white voters. Indeed, in Bexar County, Mexican-American voters formed a plurality of the eligible voting population, leading the State of Texas to argue in that case that the fundamental problem for Mexican-American voters in that case was a lack of "political organization," given their formal opportunity to dominate the political process. *Graves v. Barnes*, 343 F. Supp. 704, 733 (W.D. Tex. 1972) (district court case at issue in *Regester*). Nonetheless, the district court, in its holding that this Court upheld, stated as follows:

It has been argued that the facts of numerical majority and of low voting participation indicate that the Mexican-Americans are not entitled to constitutional relief, since they "could" do very well in multi-member district elections in Bexar County. We reject those arguments. . . .

[W]e draw very different conclusions than does the State from the fact that the Mexican-Americans register and vote in such low numbers. The State uses those facts to argue that the Mexican-Americans need political organization, not redistricting. We use those facts in the context of the other facts regarding the Mexican-Americans of San Antonio that we have previously discussed. And we conclude that the reason that the voter participation among the Mexican-Americans is so low is that their voting patterns were established under precisely the same sort of discriminatory State actions that we have already found both relevant and condemnatory . . . . Because they were denied access to the political processes through years of discrimination, the Mexican-Americans do not now register and vote in overwhelming numbers. We are not at all surprised at that result. Nor do we feel constitutionally able to respond, as does the State, that the Mexican-Americans should be left to the tool of political organization in order to remedy their electoral situation in San Antonio and to exert more influence in multi-member

> elections in Bexar County. The voting patterns and the language difficulties, which we have already concluded were caused or abetted by State action, have made the process of organization extremely onerous, if not illusive.

Id. at 733. Put differently, the analysis of *Regester*—which Congress incorporated into Section 2 in 1982—requires a close examination of whether any voting "procedure," be it a redistricting plan, a polling place location, or a registration requirement, has in a practical sense resulted in a reduced opportunity for a covered group to vote or influence the political process. The mere fact that the group "could" theoretically participate in the process equally because a statute or regulation is facially neutral is not enough.

IV. CONGRESS DID NOT INTEND TO REJECT "DISPARATE IMPACT" ANALYSIS IN THE 1982 AMENDMENTS.

Section 2, as amended in 1982, provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). The point of this provision, the inclusion of which was essential to the passage of the 1982 Amendments, *see Gingles*, 478 U.S. at 96 (O'Connor, J., concurring), was to make clear that Section 2 did not require that members of a protected class ***be elected*** in numbers proportionate to the population. In the words of Senator Dole, the architect of this compromise language:

> The language of the subsection explicitly rejects, as did *White* and its progeny, the notion that members of a protected class have a right to be elected in numbers equal to their proportion of the population. The extent to which members of a protected class have been elected under the challenged practice or structure is just one factor, among the totality of circumstances to be considered, and is not dispositive.

Id. (quoting S. Rep. No. 97-417, at 364).

Section 2's disclaimer of a right to have representatives ***actually elected*** in proportion to a minority group's share of the population has nothing whatsoever to do with whether a Section 2 violation can be shown based on the ***disparate impact*** of a requirement (like a requirement governing registration, polling place, or voting logistics) on a minority population. Nothing in the legislative history suggests an intention to reject a disparate impact analysis—indeed, as many of the examples cited in Sections I and II, *supra*, demonstrate, the very means by which such measures as polling place location restrictions, hour restrictions, and other restrictions would have an adverse impact on the minority vote arises from their disparate impact on minority populations. Thus, for example, the reason the voter registration office in Choctaw County with hours between 9-4 was believed to discriminate against black voters was precisely because of its "disparate impact" on the likelihood that black voters would register to vote—that was the essence of the violation. *See supra* Section I.

Amici, including the Cruz Brief, rely on examples taken from the separate statements of Senator Hatch, and the Report of the Subcommittee on the Constitution, which Senator Hatch chaired in 1982. Cruz Br. at 15. It takes the statements of Senator Hatch entirely out of context. Read in context, it is clear that Senator Hatch believed that the 1982 Amendments ***did*** impose a "disparate impact" test for Section 2 violations, precisely because the amendments removed the requirement, established in *City of Mobile v. Bolden*, to show discriminatory intent. Senator Hatch lamented this aspect of the amendments, but there can be no question that he believed that, in fact, Section 2 did require a disparate impact analysis, and that it did so regardless of its disclaimer of a right to have members of a protected class elected in numbers equal to their proportion of the population. As Senator Hatch explained his view,

> The root problem with the Amended Section 2 then is not with an inadequately strong disclaimer [i.e., the proportional election language proposed by Senator Dole]; the root problem is the results test itself. No disclaimer however strong—and the immediate disclaimer is not very strong, in any event, because of its failure to address proportional representation as a remedy—can overcome the inexorable and inevitable thrust of a results test, indeed of any test for uncovering 'discrimination' other than an intent test. If the concept of discrimination is going to be divorced entirely from the concept of wrongful motivation, then we are no longer referring

> to what has traditionally been viewed as discrimination; we are referring then simply to the notion of disparate impact.

S. Rep. No. 97-417, at 271-72. The majority of the Senate Judiciary Committee rejected Senator Hatch's view that a requirement of direct proof of intent was necessary or appropriate to show discrimination, but it never suggested, anywhere in its own portion of the Senate Report, that Congress did not intend to require analysis of disparate impacts via the Section 2 amendments. Thus, while Senator Hatch regretted the supposed "disparate impact" aspect of the amendments to Section 2, there is no doubt that he (and the rest of Congress) believed in 1982 that the legislation they were enacting contained a disparate impact component. It would be deeply ironic to read Senator Hatch's complaint about what he believed the 1982 amendments ***did*** do to conclude that the amendments somehow did ***not*** permit some form of disparate impact analysis.

V. CONGRESS IN NO WAY INTENDED SECTION 2 TO APPLY ONLY TO SITUATIONS IN WHICH THE CHALLENGED MEASURE ITSELF "CREATED" THE UNDERLYING DISCRIMINATION.

Finally, Section 2 was always intended to address the ways in which facially neutral laws interact with the ongoing effects of past discrimination. As this Court held in *Gingles*, "Congress intended that the Voting Rights Act eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful

discrimination," including "that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes." 478 U.S. at 69.

Thus, there is no basis whatsoever in the legislative history of the 1982 amendments (or the language of the statute) for the limit on the application of Section 2 which the Seventh Circuit incorrectly imposed in *Frank v. Walker*, 768 F.3d at 753, and which is now urged by the State Petitioners, the United States, and several *amici*. In *Frank*, the Seventh Circuit held that Section 2 somehow does not apply to voting procedures that have a discriminatory effect due to the underlying effects of past discrimination. *Id.* ("units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination."). The *Frank* case is cited repeatedly in the Cruz Brief. But nothing in the history or the language of the statute suggests that Congress ever intended to impose the limitation imposed by *Frank* on the application of Section 2.

Once again, many of the examples described in Section I, *supra*, suffice to make the point. A county registration office with limited hours has (potentially) discriminatory effect against minority groups because the historic deprivation of those groups means that those groups are less likely to be able to register to vote; but Congress had no problem whatsoever considering such an action discriminatory and remediable via Section 2. So too with polling place locations, absentee ballot restrictions, or many of the other measures that Congress found non-

controversially would be discriminatory and violate Section 2. *See supra* Section II.

The Seventh Circuit's view is also entirely incompatible with Congress' adoption of the *Regester* standard. This Court's discussion in *Regester* regarding the Bexar County Mexican-American community is particularly telling in rebutting the notion that Section 2 excludes consideration of discriminatory impacts that may involve the relationship between a voting rule and a history of past governmental as well as non-governmental discrimination in the relevant jurisdiction. The Court in *Regester* expressly noted that the Mexican-American community in Bexar County had long "suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others." 412 U.S. at 768. There is no suggestion whatsoever in *Regester* that the language barriers identified as well as discrimination in housing and employment were somehow all caused by official action by the state of Texas. What is clear is that the Court's analysis turns on a searching and fact-intensive inquiry regarding how the challenged voting law interacts with existing circumstances. And this is true despite the fact that what was at issue was a facially neutral voting law that merely identified certain counties for multi-member districts without adopting any racial classification.

Indeed, ***nothing*** in the 1982 legislative history—not a single stray statement, from a proponent or opponent of the amendments —suggests a basis for the limitation that the Seventh Circuit

sought to impose in *Frank*. No Congressman so much as suggested that the Act would be barred from applying to facially neutral policies that derived their discriminatory impact from the differential socioeconomic conditions that affect minority groups. Such a position would have been anathema to Congress' core purpose in enacting the Section 2 reforms.

CONCLUSION

The 1982 Amendments to Section 2 were one of the most significant acts of federal civil-rights legislation of the past 50 years. They were adopted after intensive debate and by an overwhelming bipartisan vote. Section 2's broad application is a necessary deterrent to the never-ending array of facially neutral schemes and ploys that can be conjured up to discriminate in an effort to deny minority voters equal opportunity. The Court should not adopt a cramped or constrained interpretation of Section 2 that departs from Congressional intent.

Respectfully submitted,

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