Nos. 21-1086, 21-1087

In The Supreme Court of the United States

JOHN H. MERRILL, *et al.*,

Appellants,

v.

EVAN MILLIGAN, *et al.*,

Appellees.

JOHN H. MERRILL, *et al.*,

Petitioners,

v.

MARCUS CASTER, *et al.*,

Respondents.

On Appeal From And Writ Of Certiorari To The United States District Court For The Northern District Of Alabama

BRIEF OF BIPARTISAN GROUP OF SENATORS AND CONGRESSIONAL STAFF MEMBER-SUPPORTERS OF THE 1982 VOTING RIGHTS ACT AMENDMENTS AND 2006 VOTING RIGHTS ACT REAUTHORIZATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are a bipartisan group including former members of Congress and former staffers to Democratic and Republican Senators as well as persons instrumental to the passage of the 1982 amendments to the Voting Rights Act. They participated in, were intimately involved in, or supported the legislative effort that led to the enactment of the 1982 amendments. Each has personal knowledge of the legislative background of those amendments. They write to provide the Court with an accurate historical account of the 1982 amendments, particularly with respect to the role of intent and proportionality in the analysis under Section 2.

Amici also include bipartisan current and former members of Congress who supported the re-enactment of the Voting Rights Act in 2006 and shared the identical understanding of the role of intent and proportionality. *Amici* thus comprise a broad, bipartisan group, and take no position on the ultimate issues of fact underlying the present controversy. This brief serves an entirely different and straightforward purpose: to address arguments that seek to give intent an outsized role, or to give proportionality no role, in Section 2 analysis.

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, other than *amici curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All of the parties have provided written consent to the filing of this brief.

Based on their historical role in supporting the 1982 amendments and 2006 reauthorization, *Amici*'s view is that the district court correctly applied the factors as Congress intended. The district court correctly held that Section 2 does not require proof of intentional discrimination, and it correctly considered the extent to which minority groups in Alabama have been able to elect leaders in proportion to their population, without affording that factor dispositive or disproportionate weight. When Congress amended Section 2 in 1982 (and re-enacted it in 2006), it painstakingly clarified that proof of intent was not required and that proportionality, while not dispositive, was a permissible factor that courts can consider.

Our primary purpose is to ensure that Section 2 is interpreted consistent with the statutory text and Congress's intent, and not given any unduly cramped interpretation that is divorced from the historical understanding of those amendments integral to its passage. This brief supports the district court and Appellees because, on these discrete issues, their position is historically accurate. This brief rebuts Appellants' position (and those of their *Amici*) only insofar as they misinterpret the text and intent of Section 2 as *requiring* proof of intent or *excluding* consideration of proportionality.

Amici include:

- John R. Danforth (R-Mo.), a United States Senator who represented Missouri from 1976–1995.

- Dennis W. DeConcini (D-Ariz.), a United States Senator who represented Arizona from 1977–1995. Sen. DeConcini supported and voted for the 1982 amendments to the Voting Rights Act.

- Richard J. Durbin (D-Ill.), a United States Senator who has represented Illinois in the Senate since 1997. Sen. Durbin supported and voted for the 2006 reauthorization of the Voting Rights Act.

- David F. Durenberger (R-Minn.), a United States Senator who represented Minnesota from 1978–1995. Sen. Durenberger supported and voted for the 1982 amendments to the Voting Rights Act.

- Patrick Leahy (D-Vt.), a United States Senator who has represented Vermont since 1974. Sen. Leahy supported and voted for the 1982 amendments to the Voting Rights Act as well as the 2006 reauthorization of the Voting Rights Act.

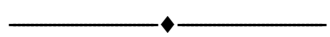
- Lisa Murkowski (R-Ak.), a United States Senator who has represented Alaska as a Senator since 2002. Sen. Murkowski supported and voted for the 2006 reauthorization of the Voting Rights Act.

- Armand Derfner, the former director of the Voting Rights Act Project for the Joint Center for Political Studies in Washington, D.C. Mr. Derfner litigated multiple, seminal cases under the Voting Rights Act brought by private plaintiffs, and he testified before both the House and Senate Judiciary Committees in support of the 1982 amendments to the Voting Rights Act.

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

- Ralph G. Neas, former (1981–1995) 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 W. Brooke (R-Mass.) and Senator David F. Durenberger (R-Minn.).

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



SUMMARY OF ARGUMENT

The Voting Rights Act ("VRA") is among the most important laws passed by Congress. Designed to help rectify decades of discrimination against African Americans and minority groups, it has helped transform American democracy.

Section 2 of the VRA is essential to those efforts. As drafted in 1965, it banned any laws or regulations that would "deny or abridge the right to vote on account of race or color." Initially, courts correctly understood Section 2 as creating an objective, results-focused rule. Thus, when plaintiffs brought claims arguing that a reapportionment scheme diluted their votes, courts would assess whether the challenged law

had the practical effect of denying them equal access to the political process.

That changed in 1980. In *Mobile* v. *Bolden*, this Court ruled that Section 2 plaintiffs were required to prove that challenged policies were intentionally discriminatory. Civil rights and political leaders around the country were quick to condemn the *Bolden* decision as inconsistent with the text and intent of the VRA and of making it unfairly difficult to challenge discriminatory policies.

Congress acted quickly. It amended Section 2 in 1982 to make clear that proof of intent was *not* required to establish a Section 2 violation. Rather, Section 2 is violated anytime a law has the result of preventing plaintiffs from enjoying equal access to the political process. Congress also clarified that proof of disproportionate representation was not enough, standing on its own, to establish a Section 2 violation, but that it could be considered as one among many factors in a "totality of the circumstances" analysis.

The district court correctly understood and applied those core elements of Section 2. To the extent Appellants or their *amici* argue that proof of intent is required, or that a consideration of proportionality is prohibited, they are historically incorrect. Congress spoke clearly when it rejected those arguments in 1982. The Court should honor that intent in interpreting Section 2.

BACKGROUND

I. Congress Passes the Voting Rights Act.

Ratified in 1870, the Fifteenth Amendment states that the right 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" and that "Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV. The Amendment did not, however, stop states from passing laws designed to suppress African American voters through indirect means. S. REP. NO. 89-162, pt. 3, at 4 (1965). "States employed a variety of notorious methods, including poll taxes, literacy tests, property qualifications, white primaries, and grandfather clauses." *Brnovich* v. *Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2330 (2021) (cleaned up). Many such practices were invalidated through case-by-case litigation, but others remained and, combined with fraud and violence, kept registration rates of African Americans distressingly low in the states in which those practices predominated. *See S.C.* v. *Katzenbach*, 383 U.S. 301, 311–13 (1966).

On March 7, 1965, nearly a century after the passage of the Fifteenth Amendment, civil rights activists departed Selma, Alabama, en route to Montgomery, Alabama in protest of voter suppression of African Americans. The activists were met with force, culminating into what is now known as "Bloody Sunday." *Brnovich*, 141 S. Ct. at 2353 (Kagan, J., dissenting).

Responding to the events in Alabama, President Johnson wrote to Congress, urging it to pass legislation to protect voting rights. *Ibid.* On March 17, 1965, a bill to enforce the promises made in the Fifteenth Amendment was sent to Congress. S. REP. NO. 89-162, pt. 3, at 2 (1965).

During the Congressional hearings on the Voting Rights Act, Attorney General Katzenbach testified that Section 2 would ban " 'any kind of practice . . . if its purpose or effect was to deny or abridge the right to vote on account of race or color.' " Hearings on S. 1564 before the Committee on the Judiciary, United States Senate, 89th Cong., 1st Sess., 191 (1965).

President Johnson signed the bill into law on August 6, 1965. Many of its provisions were designed to eliminate various tests and devices that had historically been used to prevent African Americans from voting, most notably Section 5's "preclearance" requirements. *See Katzenbach*, 383 U.S. at 315–16; Thomas Boyd & Stephen Markman, *The 1982 Amendments To The Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1348–49 (1983). Specific to this case, Section 2, which applied nationally, provided that "[n]o voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on the account of race or color." Voting Rights Act of 1965, Pub. L. 89-110 § 2, 79 Stat. 437, 437 (1965).

II. Federal Courts Use a "Results Test" to Analyze Vote-Dilution Cases.

In the years that followed the passage of Section 2 in 1965, federal courts developed a consensus view concerning the facts that a plaintiff must prove in order to show that a state or municipal law effectively diluted or canceled out the voting power of minority groups, known as vote-dilution cases. Two cases in particular—*Whitcomb* v. *Chavis*, 403 U.S. 124 (1971) and *White* v. *Regester*, 412 U.S. 755 (1973)—established a practical, results-based approach to these vote-dilution challenges.

In *Whitcomb*, residents of Marion County, Indiana alleged that a state law establishing the County as a multimember district diluted the voting strength of African Americans and poor people living in certain census tracts of the county. 403 U.S. at 128. Plaintiffs argued that, "[w]ith single-member districting," they could "elect three members of the house and one senator, whereas under the present districting voters in the area have almost no political force or control over legislators because the effect of their vote is cancelled out by other contrary interest groups in Marion County." *Id.*, at 129 (quotation marks omitted).

This Court ruled that there was "no suggestion . . . that Marion County's multi-member district, or similar districts throughout the State, were conceived or operated as purposeful devices to further racial or economic discrimination." *Id.*, at 149. Nor, the Court noted, was there evidence that African American

voters were prevented from participating equally in the electoral process, that their views and interests were ignored by their preferred candidates when they won, or even that their interests differed very much from other voters. *Id.*, at 150, 155. With no evidence of either invidious discrimination or unequal access to the political process, all plaintiffs were able to show was that they "suffer[ed] the disaster of losing too many elections." *Id.*, at 153. That was not, on its own, evidence of a constitutional violation. *Id.*, at 153–55.

This Court returned to the question whether a multi-member district improperly diluted the voting strength of a given racial group two years later in *White*. There, plaintiffs argued that Texas's creation of "multimember districts for Bexar County and Dallas County operated to dilute the voting strength of racial and ethnic minorities." 412 U.S. at 759. Building on *Whitcomb*, this Court explained that the plaintiffs' burden was to establish 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.

To carry that burden, plaintiffs presented evidence that African Americans and Mexican Americans were subjected to historical discrimination in Texas "in the fields of education, employment, economics, health, politics and others"; that they are more likely to live in areas "of poor housing" and to "have low income and a high rate of unemployment"; that political parties

employed "racial campaign tactics"; that they were very rarely able to elect members of their own groups to political office; that the political parties and elected leaders did not "exhibit good-faith concern for the political and other needs and aspirations of" their communities; and that "characteristics of the Texas electoral system, neither in themselves improper nor invidious, enhanced the opportunity for racial discrimination." *Id.*, at 765–69. Based on the "totality of the circumstances," this Court affirmed the three-judge district court's ruling that multimember districts, when overlaid on the practical realities facing those communities, served to "effectively remove[]" those communities "from the political processes . . . in violation of all the *Whitcomb* standards." *Id.*, at 769.

There were two key elements that characterized the *Whitcomb*/*White* approach. First, neither required proof of intentional discrimination. The opinions do not explicitly require proof of intent, nor did the *Whitcomb* or *White* Courts employ methods of analysis that would suggest intent is required. Instead, their analyses were based on a "blend of history and an intensely local appraisal of the design and impact of . . . multimember district[s] in the light of past and present reality, political and otherwise." *Id.*, at 769–70. Plaintiffs did not need to prove that they were intentionally denied equal access to the political process. Rather, it was enough to show that racial minorities "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.

Second, in both cases, the fact that a minority group was unable to secure "legislative seats in proportion to its voting potential" was deemed a relevant factor, but it was neither a necessary nor sufficient one. *White*, 412 U.S. at 765–66. Plaintiffs in both *Whitcomb* and *White* demonstrated that they were unable to secure representation in proportion to their voting potential, but that fact was not dispositive when weighed against the totality of other circumstances: the *White* plaintiffs prevailed while the *Whitcomb* plaintiffs did not. And the *White* Court was careful to say that it was "*not enough* that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential"—not that it was "not relevant." *Id.*, at 766–67 (emphasis added).

Federal appellate courts quickly synthesized and employed the approaches outlined in *Whitcomb* and *White*. Notably, the Fifth Circuit announced a multifactor, results-based approach to vote-dilution cases in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973). The *Zimmer* court, citing *Whitcomb* and *White*, stated that the relevant factors to consider include: the "lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system." *Id.*, at 1305.[2] The *Zimmer* court correctly omitted a

[2] The *Zimmer* court also pointed to several other factors as supporting a case of vote dilution. 485 F.2d at 1305.

requirement that there be proof of intentional discrimination. As in *White* and *Whitcomb*, it was enough to establish that a voting scheme "operate[s] to minimize or cancel out the voting strength of racial elements of the voting population." *Id.*, at 1303. Other courts followed suit, employing similar frameworks in assessing voter dilution claims. *See*, *e.g.*, *Kendrick* v. *Walder*, 527 F.2d 44, 48–49 (7th Cir. 1975); *Dove* v. *Moore*, 539 F.2d 1152, 1155 (8th Cir. 1976); *Black Voters* v. *McDonough*, 565 F.2d 1, 4 (1st Cir. 1977).

III. *Bolden* Disrupts the Consensus on Section 2 Claims.

The growing consensus on vote-dilution cases—that intent is not required and instead that the result of unequal access to the political process was sufficient—was disrupted by this Court's decision in *Mobile* v. *Bolden*, 446 U.S. 55 (1980). Citing *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), the *Bolden* Court definitively stated that a vote-dilution claim under either the Fourteenth or Fifteenth Amendment requires proof of intentional discrimination. 446 U.S. at 61–70. According to *Bolden*, it was not sufficient to demonstrate discriminatory effects or results; rather, plaintiffs were required to establish the challenged policies were "motivated by a discriminatory purpose." *Id.*, at 62.

Importantly for this case, *Bolden* next concluded that the textual similarities between the Fifteenth

Amendment and Section 2—namely, that both prohibit the "den[ial] or abridge[ment]" of the right to vote "on account of race"—meant that Section 2 also required proof of intentional discrimination. *Id.*, at 60–61. *Bolden* thus foreclosed the use of a "results test" for proving either constitutional or Section 2-based vote-dilution claims. *Id.*, at 61, 72–73.

IV. The 1982 Amendments to the VRA Abrogate *Bolden*.

The *Bolden* decision generated an immediate and widespread backlash from legal and political commentators, as well as from the civil rights community. *See* Boyd & Markman, 40 WASH. & LEE L. REV. at 1355. That criticism culminated in the 1982 amendments to the VRA, in which Congress altered Section 2 largely as a direct response to *Bolden*'s holding. Those amendments are at the heart of this appeal.

The amendments began in the House, which passed a version that moved the language of Section 2 further from the text of the Fifteenth Amendment while also more clearly establishing a results-based test:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision ~~to deny or abridge~~ **in a manner which results in a denial or abridgment of the right of** any citizen of the United States to vote on account of race or color, **or in contravention of the guarantees set**

> **forth in section 4(f)(2). The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.**

Compare Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437, 437 (1965), *with* H.R. REP. NO. 97-227, at 48 (1982) ("House Report"). That language was the result of months of negotiations and bipartisan compromises and was eventually passed with overwhelming support, earning 389 votes in the House from members across the political spectrum. 127 CONG. REC. 23,205 (1981); *see also* Boyd & Markman, 40 WASH. & LEE L. REV. at 1379.[3]

The Senate version of the bill, which was introduced with sixty-one co-sponsors, was similarly subjected to thorough debate, consideration, and compromise. The main focus of the Senate's deliberation was over the role that "intent" and "proportionality" would play in Section 2 claims. Of note, there were two factions within the Judiciary Committee, in which the bill originated. One wanted to preserve the language from the 1965 version as-is and the other supported the House version. Boyd & Markman, 40 WASH. & LEE L. REV. at 1411–16. The former group, consisting of 7 Senators

[3] The House also provided a list of objective factors that courts should consider to establish a Section 2 violation, including "a history of discrimination affecting the right to vote" and forms of "discriminatory elements of the electoral system such as at-large elections." House Report at 30.

and led by Senator Hatch, believed a "results test" would inevitably lead to a proportionality standard and consequently preferred that Section 2 require proof of intentional discrimination. *Ibid.* The latter group, consisting of 9 Senators, worried that an intent-based standard would too narrowly constrain Section 2 claims and believed that the results-based test in the House version could be employed without devolving into a proportionality analysis. Two Senators—Dole and Heflin—were uncommitted. *Ibid.*

Senator Dole eventually negotiated a compromise with Senators Mathias and Kennedy—for whom two of *Amici* worked closely, and thus who understand the compromise as well as anyone still living. That compromise retained the key elements of the House version but added additional language clarifying the scope of the results-based test that courts should use. *See* 128 CONG. REC. 14,326 (1982); Boyd & Markman, 40 WASH. & LEE L. REV. at 1414–16. It also further clarified and strengthened the language explaining that proportionality cannot be a dispositive factor in Section 2 claims. Boyd & Markman, 40 WASH. & LEE L. REV. at 1414–16. Senator Dole's new section, which is virtually identical to the language Congress eventually enacted, read:

> A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens

> protected by subsection (a) in that its members have less opportunity to participate in the electoral process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one "circumstance" which may be considered provided 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.

Id., at 1415.

Senator Dole's proposal attracted support from Senators who favored the results standard and effectively ended the debate because it established the 10-vote majority needed to pass the bill out of the Committee. *Id.*, at 1415–16. The Dole Compromise was passed by the Committee, fourteen to four, and the bill was eventually passed out of the Committee seventeen to one. *Id.*, at 1419.

That was not the end of the debate. Unlike some bills that receive substantial consideration in committee but relatively little discussion before the full Senate, the bill received a thorough consideration by the full Senate, including lengthy debate on potential Section 2 amendments. *See*, *e.g.*, 128 CONG. REC. 14,127–42 (1982). All of the substantive amendments to the bill, including an amendment that would have removed the results test from Section 2, were easily defeated. Boyd & Markman, 40 WASH. & LEE L. REV. at 1423–24. The bill passed the full Senate, eighty-five

to eight. 128 CONG. REC. 14,337 (1982). Senators Mathias and Kennedy, for whom *Amici* worked and who helped broker the compromise yielding the operative statutory language, were among the leaders of the floor debate.

The Senate version was taken up by the House several days later, where its members confirmed their understanding that Section 2, as drafted, writes "into law our understanding of the test of White against Regester" and that the test "looks only to the results of a challenged law . . . with no requirement of proving purpose." *Id.*, at 14,934–35 (statement of Rep. Sensenbrenner). The bill was given due consideration, *id.*, at 14,933–40, and passed by voice vote. Boyd & Markman, 40 WASH. & LEE L. REV. at 1425.

V. Subsequent Courts Adopt the Senate Report Factors.

Courts have favorably cited the above-described history of the 1982 Amendments, acknowledging Congress's intent in rejecting *Bolden*'s intent requirement and in considering proportionality *a* factor, but not a dispositive factor, in the Section 2 analysis.[4] In particular,

[4] Senator Hatch, Chairperson of the Subcommittee on the Constitution, took the "unusual" step of publishing a Subcommittee Report. Boyd & Markman, 40 WASH. & LEE L. REV. at 1412. Senator Hatch opposed the results test and published the Subcommittee Report, in part, "to consolidate his position and plead his case prior to full Committee action." *Ibid.* "The Subcommittee Report does not reflect, nor does it purport to reflect, the views of the Congressional majority who favored overturning the Bolden intent test and reinstating a results test." Brief for Senator

courts used the "Senate Report Factors" to inform Section 2's "totality of the circumstances" analysis. Those factors include:

1) "the extent of any history of official discrimination in the state";

2) "the extent to which voting in the elections of the state . . . is racially polarized";

3) "the extent to which the state . . . has used . . . voting practices or procedures that may enhance the opportunity for discrimination against the minority group";

4) "if there is a candidate slating process, whether the members of the minority group have been denied access to that process";

5) "the extent to which members of the minority group in the state . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process";

6) "whether political campaigns have been characterized by overt or subtle racial appeals"; and

7) "the extent to which members of the minority group have been elected to public office in the jurisdiction."

S. REP. NO. 97-417, at 28–29 (1982) ("Senate Report").

Charles E. Grassley, et al. as *Amici Curiae* Supporting Appellees at 23–24, *Thornburg* v. *Gingles*, No. 83-1968, 1985 WL 669643, at *14 n.10 (Oct. 1, 1985).

The Senate Report explained that those factors were "derived from the analytical framework used by the Supreme Court in *White*, as articulated in *Zimmer*." *Id.*, at 28 n.113. The factors are not exhaustive and there "is no requirement that any particular number of factors be proved." *Ibid.*

This Court adopted the Senate Report Factors in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), the first case interpreting Section 2 after the 1982 amendments. In *Gingles*, the Court recognized that Congress revised Section 2 in response to *Bolden* and in an effort to make clear that discriminatory intent was not required to prove a Section 2 violation. *Id.*, at 35. Citing language from the Senate Report, *Gingles* stated that the properly framed question in Section 2 cases is whether, "as a result of the challenged practice or structure, plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Id.*, at 44. And to answer that question, *Gingles* concluded that courts should look to the "objective factors" identified within the Senate Report. *Id.*, at 44–45; *see also Johnson* v. *De Grandy*, 512 U.S. 997, 1010 n.9, 1018–19 (1994) (citing *Gingles* and its reference to the Senate Report factors and explaining that "in modifying § 2, Congress thus endorsed our view in *White* v. *Regester*, 412 U.S. 755 (1973), that whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality" (cleaned up)).

VI. This Understanding Was Cemented in the 2006 Reauthorization.

Congress most recently reauthorized the Voting Rights Act in 2006. Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246, 120 Stat. 577 (2006). Even with single-party control—Republicans controlled the White House, Senate, and House of Representatives—"strong bipartisan support for renewing the VRA" led to the reauthorization's passage with 390 votes in the House and 98 votes in the Senate. *See* James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 252–65 (2007). When signing the bill into law, President Bush promised that his administration would both "vigorously enforce" the law and "defend it in court." *Id.*, at 264.

The 2006 reauthorization not only reaffirmed the importance of Section 2, *see* H.R. REP. NO. 109-478, at 11 (2006) (noting that Section 2 was "instrumental" and a "driving force" "in paving the way for minority voters to more fully participate in the political process"), but also showed how Congress continued to understand the 1982 amendments as rejecting an intent requirement and preserving a role for proportionality.

The 2006 House report described the 1982 amendments as "clarif[ying] Congress's intent with respect to Section 2," namely, "to require that plaintiffs bringing lawsuits under the section show only that an act resulted in a denial or abridgment . . . rather than

require a plaintiff prove both purpose and effect." *Id.*, at 10. Senator Ted Kennedy—who was serving in Congress in 1982, and for whom one of the *Amici* worked at the time—recalled when the 1980 *Bolden* decision "weakened" the original Act and how the 1982 amendments "were able to restore the act's vitality by replacing" the *Bolden* decision "with a results test." 152 CONG. REC. S7,967 (2006).

ARGUMENT

I. Proof of Discriminatory Intent Is Not Required to Establish a Violation of Section 2.

The text of the VRA, as amended in 1982, makes clear that intent is not a requirement for proving a Section 2 violation. As originally enacted in 1965, Section 2 prohibited policies that "deny or abridge" the right to vote "on account of race or color." Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437, 437 (1965). The 1982 amendments, however, changed Section 2 to prohibit any policy that "*results in* a denial or abridgment" of the right to vote. Voting Rights Act Amendments of 1982, Pub. L. 97-205, 96 Stat. 131, 134 (1982) (emphasis added) (codified at 52 U.S.C. § 10301(a)). However one may interpret the original 1965 version, the 1982 amendments clearly adopted an objective test: a policy can run afoul of Section 2 if it has the result of creating a political process that is not "equally open to participation by members" of protected classes,

regardless of whether it was designed to achieve that purpose. 52 U.S.C. §§ 10301(a), (b).

Even if the text of the law was unclear—and it is not—the legislative history would confirm that intent is not required. Congress amended the VRA in 1982 to "make clear that proof of discriminatory intent is not required[.]" Senate Report at 2; *see also* House Report at 2 ("It is intended by this clarification that proof of purpose or intent is not a prerequisite to establishing voting discrimination violations in Section 2 cases.").[5]

That legislative intent should be afforded broad deference given that Congress was taking the unusual step to respond to a decision of this Court.[6] Prior to this

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[5] *See also*, *e.g.*, Senate Report at 16 (explaining that "proof of discriminatory purpose should not be a prerequisite to establishing a violation of Section 2 of the Voting Rights Act"); *id.*, at 27 (same); *id.*, at 36 ("The intent test is inappropriate as the exclusive standard for establishing a violation of Section 2."); *id.*, at 67 ("The Committee expressly disavows any characterization of the results test codified in this statute as including an 'intent' requirement, whether or not such a requirement might be met in a particular case by inferences drawn from the same objective factors offered to establish a discriminatory result."); House Report at 29 ("The purpose of the amendment to Section 2 is to restate Congress's earlier intent that violations of the Voting Rights Act, including Section 2, could be established by showing the discriminatory effect of the challenged practice."); *id.*, at 29–30 (similar).

[6] Indeed, given that this Court adopted the Senate Report's understanding of Section 2 in *Gingles*, 478 U.S. 30, 44–45 (1986), and given that the 1982 amendments were drafted in response to *Bolden*'s interpretation of the original interpretation of Section 2, the *Gingles* precedent is certainly deserving of "special force," *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164,

Court's decision in *Bolden*, there was a broad understanding that Section 2 and vote-dilution claims would be assessed under a results-based test. By amending Section 2, Congress sought to "restore[] the legal standards . . . which applied in voting discrimination claims prior to the litigation involved in *Bolden*." Senate Report at 2; *see also* House Report at 2 ("The amendment is necessary because of the unsettling effect of the decision of the U.S. Supreme Court in *City of Mobile* v. *Bolden*[.]").[7] In Congress's view, a "results-based" test better served the VRA's original goals and realigned it with the prevailing understanding of Section 2 and vote-dilution claims prior to the *Bolden* decision. See Senate Report at 2, 17–18, 27–28.[8]

172–73 (1989)), and overruling it would require "superspecial justification." *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 447, 458 (2015).

[7] *See also*, *e.g.*, Senate Report at 27 (explaining that the " 'results' standard" restores "the pre-*Mobile* legal standard" and that "subsection (b) embodies the test laid down by the Supreme Court in *White*"); *id.*, at 67 ("With this clarification, Section 2 explicitly codifies a standard different from the interpretation . . . contained in the Supreme Court's *Bolden* plurality opinion, i.e. the interpretation that the former language of Section 2 prohibits only purposeful discrimination."); *id.*, at 188 (similar, in statement of Sen. Laxalt); *id.*, at 197 (similar, in statement of Sen. Grassley); 128 CONG. REC. 14,305 (1982) (similar, in statement of Sen. Tsongas); *id.*, at 14,308 (similar, in statement of Sen. Metzenbaum).

[8] Importantly, bipartisan members of Congress expressed their understanding that the *White*, *Whitcomb*, and other pre-*Bolden* cases did *not* require proof of intent. *See*, *e.g.*, Senate Report at 21–22 ("In fact, *White* does not contain a single word regarding the motives of the State Legislature Redistricting Board that adopted the challenged plans."); *see also id.* at 28; 128 CONG. REC. 14,934–35 (1982) ("We are writing into law

Statements in the House and Senate Reports matter because the 1982 Amendments were the result of a thoroughly-debated, consensus-building process and were supported by overwhelming majorities in both chambers of Congress. *See generally supra* at 10–13. Indeed, it would have been easy to add an intent requirement and even easier to leave the text unchanged. Senator East, for example, proposed an amendment during the full Senate hearing of the bill that would have had the effect of eliminating the results test. *See* 128 CONG. REC. 14,127–37 (1982); *see also* Boyd & Markman, 40 WASH. & LEE L. REV. at 1423. That amendment was rejected by a vote of 16 to 81. 128 CONG. REC. 14,137 (1982).[9] The fact that

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our understanding of the test in White against Regester. And our understanding is that this looks only to the results of a challenged law, in the totality of the circumstances—with no requirement of proving purpose. But should the Highest Court in the land—or a majority of the Court—conclude there is a purpose element in *White*, then the committee nonetheless has drafted a bill that does not incorporate this requirement, and that is the ultimate legislative intent of the bill we are adopting here today." (Statement of Rep. Sensenbrenner)).

[9] This amendment, like much of Section 2, was subject to significant discussion and debate. In urging the rejection of the amendment, Senator Mathias explained that the "intent test asks the wrong question" because, instead of "focusing on the crucial question of whether or not minority voters now have a fair chance to participate in the electoral process, the intent test diverts the inquiry to an analysis of the subjective motives of public officials." 128 CONG. REC. 14,130 (1982). Senator Kennedy read at length from an editorial that explained an "intent test" is overly burdensome and defending the Dole compromise. *Id.*, at 14,130–31. And Senator Dole further clarified that he believed it was

Congress used its considered judgment to draft the text at issue here should be given deference.

The ultimate reason for rejecting an intent standard was that it "asks the wrong question," Senate Report at 36, and directs courts' attention to a question of psychological archaeology rather than asking the key practical question with which the VRA was actually concerned. As the Senate Report explained:

> [I]f an electoral system operates today to exclude blacks or Hispanics from a fair chance to participate, then the matter of what motives were in an official's mind 100 years ago is of the most limited relevance. The standard . . . is whether minorities have equal access to the process of electing their representatives. If they are denied a fair opportunity to participate, the Committee believes that the system should be changed, regardless of what may or may not be provable about events which took place decades ago.

Senate Report at 36.

In short, even if the words of the 1965 version of Section 2 were open to a later reinterpretation, *see Bolden*, 446 U.S. at 60–61, there can be no doubt about Section 2 after Congress amended it in 1982. The text of Section 2 does not require, nor did Congress intend it to require, proof of discriminatory purpose. *Amici* know, because they were there.

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inappropriate to use an intent standard as "the sole means of establishing a voting rights claim." *Id.*, at 14,131–33.

To the extent Appellants suggest Section 2 does require proof of intentional discrimination, they are historically incorrect. Appellants cite Justice Rehnquist's dissenting opinion in *Mississippi Republican Executive Committee* v. *Brooks*, 469 U.S. 1002, 1010 (1984) for the confusing proposition that "the House[] failed . . . to write intent out of the statute." Appellant's Br. at 33, 73–74. The House never wrote "intent out of the statute" because, as far as Congress was concerned, it was never there to begin with. *See supra* notes 7–8 and accompanying text.

Some statements Appellants make mirror statements of certain Senators who insisted that eschewing an intent standard would necessarily lead to a de facto proportionality analysis. *See* Boyd & Markman, 40 WASH. & LEE L. REV. at 1397–1400. But that position was rejected in favor of the Dole Compromise, in support of which Senator Dole stated:

> Proponents of the results standard . . . persuasively argue that intentional discrimination is too difficult to prove to make enforcement of the law effective. Perhaps, more importantly, they have asked if the right to exercise a franchise has been denied or abridged, why should plaintiffs have to prove that the deprivation of this fundamental right was intentional. On the other hand, many of the Committee have expressed legitimate concerns that a results standard could be interpreted by the courts to mandate proportional representation. . . . The supporters of this compromise believe that a voting practice or procedure which is

> discriminatory in result should not be allowed to stand regardless of whether there exists a discriminatory purpose or intent.

Bills to Amend the Voting Rights Act of 1965: Hearing on S. 1992 before the S. Subcomm. on the Constitution of the Comm. on the Judiciary, 97th Cong. 59–60 (1982) ("Subcommittee Hearings") (statement of Sen. Dole); *see also* 128 CONG. REC. 13,171 (1982) (statement of Sen. Kennedy) ("The results test, codified by the committee bill, is a well-established one, familiar to the courts. It has a reliable and reassuring track record, which completely belies claims that it would make proportional representation the standard for avoiding a violation.").

Senator Dole explained that the addition of subsection (b)—which included the "totality of the circumstances" language and text clarifying that the results test "is not a mandate for proportional representation"—restores the *White* v. *Regester* approach. Subcommittee Hearings at 60. But neither Senator Dole nor those who supported his compromise believed that rejecting a mandate for proportional representation was incompatible with supporting a results test. And neither rejected the results test in favor of an intent standard.

II. Proportionality Is a Permissible Factor for Courts to Consider.

The 1982 Amendments also made clear the role that proportionality plays in assessing Section 2

claims. Congress did not want proportionality to be sufficient for proving a Section 2 violation, but it also wanted to preserve it as a factor to be considered as part of the "totality of the circumstances." It would have been difficult for Congress to have been clearer on this point.

After months of debate and compromise, Congress agreed to limiting language stating 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). At the same time, however, it stated that "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered." *Ibid.* Proportionality is not a dispositive factor in the "totality of the circumstances" analysis, but it is still *a* factor to consider.

This natural reading is reinforced by the legislative history. The Senate Judiciary Committee Report states that the language "codif[ies] the approach used in *Whitcomb*, *White* and subsequent cases, which is that the extent to which minorities have been elected to office is only one 'circumstance' among the 'totality' to be considered." Senate Report at 68. Critically, Senators Dole and Grassley—who were each integral to crafting the bipartisan compromise language—also wrote separate statements affirming that their understanding of the amended language was in line with that of the plain text and the Senate Committee Report. *See* Senate Report at 194 (statement of Sen. Dole)

("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."); *see also id.* at 197 (statement of Sen. Grassley) ("Thus the new language of Section 2 is the test utilized by the Supreme Court in *White*, nothing more and nothing less.").

Indeed, in contemporaneous amicus briefs filed in connection with *Gingles*, numerous Republican Members of Congress reaffirmed that proportionality may be *a* factor, though not a dispositive one. *See* Brief for Senator Charles E. Grassley, et al. as *Amici Curiae* Supporting Appellees at 23–24, *Thornburg* v. *Gingles*, No. 83-1968, 1985 WL 669643, at *23–24 (Oct. 1, 1985). ("The 'disproportionality' of minority group representation is not the gravamen of the Section 2 claim in such a case, though it may be a factor."); Brief for Republican National Committee as *Amici Curiae* Supporting Appellees at 5, *Thornburg* v. *Gingles*, No. 83-1968, 1985 WL 669647, at *5 (Aug. 30, 1985) ("the statute does not prohibit *any* consideration of the relative representation of a protected class.").

Even Senate opponents of the final amended language recognized that it was intended to incorporate the approach taken by the Court in *White* and *Whitcomb*. *See* Senate Report at 104, n.24 (statement of Sen. Hatch) ("The Committee Report could not be more explicit in its adoption of the standard of the Supreme Court in *White* v. *Regester*. . . . [C]ourts are obliged to recognize this and to appreciate that Congress (for

better or worse) chose to incorporate the case law of *White*—all of its case law—in rendering meaning to the new statutory language.").

Of course, Congress could have outright rejected the consideration of proportionality for Section 2 claims. But no such attempts were made, and Congress's decision to forgo that route and instead adopt the language before the Court today cements an understanding that proportionality is a permissible factor.[10]

To the extent Appellants and their *amici* argue that the district court should not have considered proportionality, or that it gave too much weight to that factor, they are incorrect. The trial court dedicated more than a dozen pages to assessing the Senate Report factors, including the history of discrimination in Alabama, "the extent to which members of the minority group" in Alabama "bear the effects of discrimination in such areas as education, employment and health," and the prevalence of racial appeals in political campaigning in Alabama. *Milligan* Stay Appendix ("MSA") 187–205. In its findings of fact and conclusions of law, the court's proportionality analysis consisted of just three pages, most of which is spent discussing whether and to what extent proportionality is relevant in the first place. *Id.*, at 203–05. Whatever might be said about the district court's ultimate conclusions, it

[10] Indeed, to the extent Senator East's amendment would have attempted to preclude considerations of proportionality by restoring the *Bolden* standard, it was handily rejected by the Senate. *See supra* note 8 and accompanying text.

was historically correct for the district court to consider this factor.

Appellants misleadingly suggest that the district court gave dispositive weight to proportionality, but that is not a fair reading of the district court's order. Appellants quote the district court as saying that a "*lack* of proportionality 'weighs decidedly in favor of the plaintiffs,'" Appellant's Br. at 27, 62 (quoting MSA205) (emphasis in Appellant's brief but not the district court Order), but the complete sentence from the order reads:

> We do not resolve the *Milligan* plaintiffs' motion for a preliminary injunction solely (or even in the main) by conducting a proportionality analysis; rather, consistent with *LULAC* and *De Grandy*, we consider the proportionality arguments of the plaintiffs as part and parcel of the totality of the circumstances, and we draw the limited and obvious conclusion that this consideration weighs decidedly in favor of the plaintiffs.

MSA205.

Proportionality was not the "decid[ing]" factor in the court's analysis. It was just one factor that weighed "decidedly," i.e., distinctly, in plaintiffs' favor. The district court went on to conclude that, "*every* Senate Factor we were able to make a finding about, along with proportionality, weighs in favor of the *Milligan* plaintiffs and the *Caster* plaintiffs, and that no Senate Factors or other circumstances we consider at this stage weigh in favor of Defendants." *Ibid.* (emphasis added).

Its findings consist of a "blend of history and an intensely local appraisal of the design and impact of" Alabama's districts, done "in the light of past and present reality, political and otherwise." *White*, 412 U.S. at 769–70. The opinion is consistent with the text and purpose behind Section 2, especially the 1982 Amendments.

III. The 2006 Amendments Further Cemented The Roles that Intent and Proportionality Play in Section 2 Analysis.

The 2006 VRA reauthorization confirmed that Section 2 rejected any intent requirement and preserved a role for proportionality. For example, the House Report understood the 1982 amendments as "clarify[ing] Congress's intent with respect to Section 2": plaintiffs did not need to "prove both purpose and effect," instead they could "show only that an act resulted in a denial or abridgement in the right to vote." H.R. REP. NO. 109-478, at 10 (2006).

Congress had the chance to amend Section 2 and recalibrate the role of intent and proportionality, yet it did no such thing. Instead, Congress had a shared understanding of Section 2's importance. *See* Pub. L. 109-246 § 2(b)(3)–(4), 120 Stat. 577, 577–78 (2006) (the final text of the bill pointed to "the continued filing of section 2 cases" as "[e]vidence of continued [voter] discrimination."). And Congress used that shared understanding to make other improvements in the VRA. For example, when Congress streamlined the recovery of expert witness fees, it was because "much of the

burden associated with either proving or defending a Section 2 vote dilution claim is established by information that only an expert can prepare." H.R. REP. NO. 109-478, at 64 (2006). Far from walking back its approach to proving Section 2 violations, Congress attempted to bolster people's access to that provision's protections.

If anything, the 2006 reauthorization revealed Congress's continued blessing of the 1982 approach to Section 2, meaning that this is a well-settled consensus that has stretched across decades.

CONCLUSION

To the extent that the Court considers the proper standard under Section 2, it should reaffirm that intent is not required, and that proportionality is a permissible, though not dispositive, factor courts may consider.

Respectfully submitted,

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