No. 83-1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LACY H. THORNBURG, *et al.*,
Appellants,

v.

RALPH GINGLES, *et al.*,
Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

MOTION FOR LEAVE TO FILE AND BRIEF OF SENATORS DENNIS DeCONCINI, ROBERT J. DOLE, CHARLES E. GRASSLEY, EDWARD M. KENNEDY, CHARLES McC. MATHIAS, JR., AND HOWARD M. METZENBAUM, AND REPRESENTATIVES DON EDWARDS, HAMILTON FISH, JR., PETER W. RODINO, JR., AND F. JAMES SENSENBRENNER AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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Amici Curiae are members of the United States Congress who were principal co-sponsors and supporters of amended Section 2 of the Voting Rights Act. 42 U.S.C. § 1973 (1982). Pursuant to Supreme Court Rule 36.3, amici respectfully request leave to file the accompanying amicus brief.*

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* Appellees have consented to amici's participation in this case. Appellants, however, have denied consent.

As members of the United States Senate and House of Representatives and the respective Judiciary Committees of the Senate and House, and as key co-sponsors of amended Section 2, amici are vitally interested in ensuring that the Voting Rights Act is properly interpreted. The position taken by the Solicitor General and appellants in this case is inconsistent with the literal provisions of Section 2. Moreover, it discounts the importance of the Senate Report, the key source of legislative history in this case. We are concerned both with preserving the integrity of Congressional Committee Reports and ensuring that Section 2 of the Voting Rights Act is preserved as an effective mechanism to ensure that people of all races will be accorded an equal opportunity to participate in the political processes of this country and to elect representatives of their choice.

The accompanying brief undertakes a detailed review of the language and legislative history of amended Section 2 of the Voting Rights Act, issues that the parties will not address in the same detail. Thus, amici believe that the perspective they bring to the issues in this case will materially aid the Court in reaching its decision.

Members of the House of Representatives and Senate have participated as amici curiae in numerous cases before this Court involving issues affecting the legislative branch, both by motion, *e.g., United States* v. *Helstoski,* 442 U.S. 477 (1979), and consent, *e.g., National Organization for Women* v. *Idaho,* 455 U.S. 918 (1982).

For the foregoing reasons, amici respectfully request leave to file the accompanying amicus brief.

Respectfully submitted,

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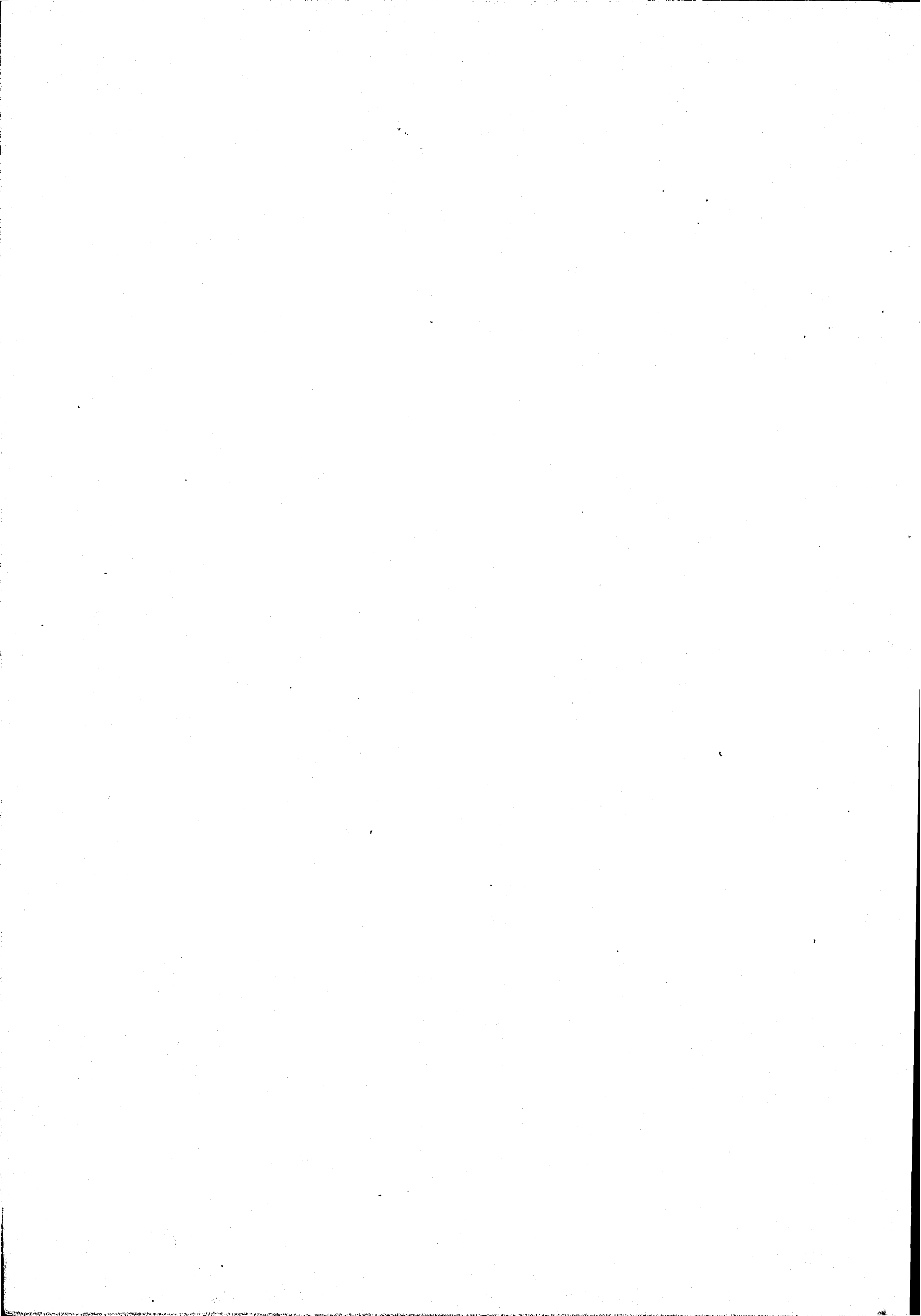

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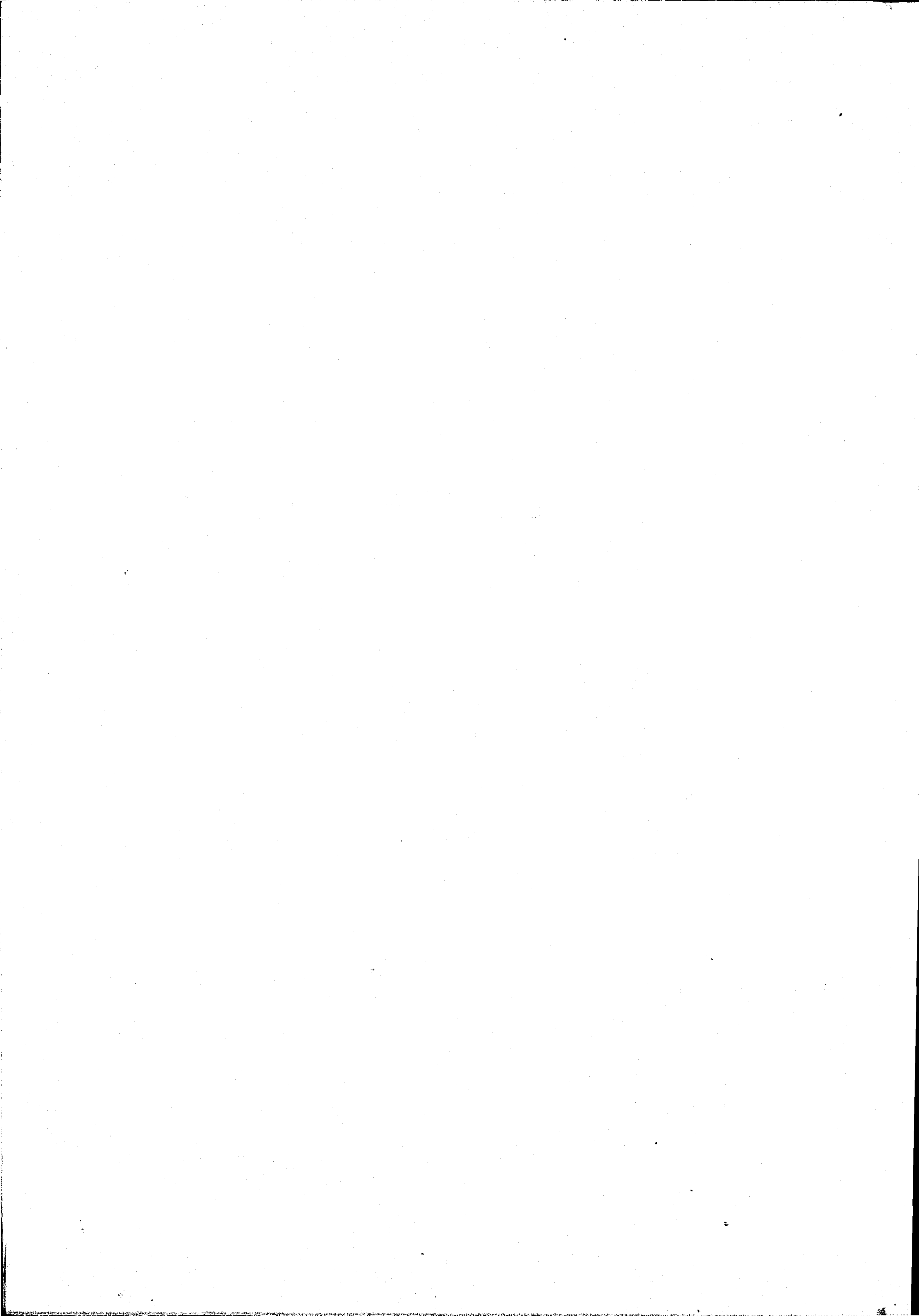

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Report of the Senate Judiciary Committee on S. 1992, S. Rep. No. 417, 97th Cong., 2d Sess. (1982) .... *passim*

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Senators Dennis DeConcini, Robert J. Dole, Charles E. Grassley, Edward M. Kennedy, Charles McC. Mathias, Jr., and Howard M. Metzenbaum, and Representatives Don Edwards, Hamilton Fish, Jr., Peter W. Rodino, Jr., and F. James Sensenbrenner hereby appear as amici curiae pursuant to the motion filed herewith.

STATEMENT OF INTEREST

This case presents an important issue of interpreting the Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, as

they pertain to Section 2 of the Voting Rights Act. 42 U.S.C. § 1973. As members of the United States House of Representatives and Senate, amici are vitally interested in this case, which could determine whether Section 2 is to be preserved as an effective mechanism to ensure that people of all races will be accorded an equal opportunity to participate in the political processes of this country and in the election of representatives of their choice. This case also raises an important question of the weight to be given congressional committee reports by which the intent underlying a statute is expressed.

Members of the House of Representatives and Senate have participated as amici curiae in numerous cases before this Court involving issues affecting the legislative branch, both by motion, *e.g., United States* v. *Helstoski,* 442 U.S. 477 (1979), and consent, *e.g., National Organization for Women* v. *Idaho,* 455 U.S. 918 (1982).

SUMMARY OF ARGUMENT

As the authors and principal proponents of the 1982 amendments to Section 2, our primary concern in this case is to ensure that Section 2 is interpreted and applied in a manner consistent with Congress' intent. The Solicitor General and the appellants contend that the district court's finding that the challenged multimember legislative districts violated Section 2 of the Voting Rights Act "cannot be reconciled" with the evidence of some recent electoral success by black candidates in those districts. Brief for the United States as Amicus Curiae 24, 28.

The three-judge district court, using the "totality of circumstances" analysis made relevant by Section 2, found blacks were denied an equal opportunity to participate in the political process in the challenged districts on the basis of a wide variety of factors. It considered the evidence of electoral success at length in its opinion, and found such successes to be "too minimal in total numbers" and of "too recent" vintage to support a finding that black candidates were not disadvantaged

because of their race. *Gingles* v. *Edmisten,* 590 F. Supp. 345, 367 (E.D.N.C. 1984). Appellants and the Solicitor General, on the other hand, ascribing definitive weight to a single factor, argue that "given the proven electoral success that black candidates have had under the multimember system," no violation of Section 2 can be established. Brief for the United States as Amicus Curiae 28.

The Solicitor General and appellants seemingly ask this court to rule that evidence of recent, and limited, electoral success should be preclusive of a Section 2 claim, though evidence of other factors overwhelmingly may compel a finding that blacks are denied an equal opportunity to participate in the political process. This position is contrary to the express terms of Section 2, which requires a comprehensive and realistic analysis of voting rights claims, and it could raise an artificial barrier to legitimate claims of denial of voting rights which in some ways would pose as significant an impediment to the enforcement of Section 2 as the specific intent rule of *City of Mobile* v. *Bolden,* 446 U.S. 55 (1980), rejected by Congress in 1982.

To assume that some electoral success by some members of a minority group, no matter how limited or incidental such success may be, conclusively evidences an equal opportunity for members of that group, confuses the occasional success of black candidates with the statutory guarantee of an equal opportunity for black citizens to participate in the political process and to elect candidates of their choice. Experience, as documented by the pre-*Bolden* case law, proves that the systematic denial of full and equal voting rights to blacks may be accompanied by the sporadic success of some blacks in primary or general elections. As the courts have uniformly recognized, the vice of the denial of equal voting rights to a minority group is not obviated by such token or incidental successes of its members.

Most importantly, the position advocated by the Solicitor General and appellants is inconsistent with the literal language of Section 2, and was expressly rejected by Congress when it considered the 1982 amendments, as is made clear in the

Report of the Senate Judiciary Committee on S. 1992, S. Rep. No. 417, 97th Cong., 2d Sess. (1982) (hereinafter the "Senate Report"). This Report cannot be treated as the view of "one faction in the controversy," as argued in the amicus brief of the Solicitor General (Brief for the United States as Amicus Curiae 8 n.12), in the face of clear evidence that the Report accurately expresses the intent of Congress generally, and importantly of the authors of the compromise legislation that was reported by the Senate Judiciary Committee and enacted, essentially unchanged, into law.

If this Court were to discount the importance of the views expressed in the Senate Report, it would have significance beyond this particular case. A majority of the Judiciary Committee sought to provide, in the Senate Report, a detailed statement of the purpose and effect of the 1982 amendments. That statement was relied upon by members of the Senate in approving the legislation, and by members of the House in accepting the Senate bill as consistent with the House position. This Court should not cut the 1982 amendments free from their legislative history, and adopt an interpretation of that legislation inconsistent with the view of the congressional majority. To do so would undermine firmly established principles of interpretation of Acts of Congress, and sow confusion in the lower courts that are so often called upon to determine the legislative intent of federal statutes.

The Voting Rights Act Amendments of 1982 were intended to reinstate fair and effective standards for enforcing the rights of minority citizens so as to provide full and equal participation in this nation's political and electoral processes. In 1982, Congress had before it an extensive record showing that much had been accomplished towards this end since the Voting Rights Act was adopted in 1965, but that much more remained to be done. In construing and applying Section 2, the Court should be mindful of Congress' remedial goal to overcome the various impediments to political participation by blacks and other minority groups.

ARGUMENT

I. TO ASSUME COMPLIANCE WITH SECTION 2 UPON EVIDENCE OF SOME ELECTORAL SUCCESS BY MEMBERS OF A MINORITY GROUP VIOLATES THE LITERAL REQUIREMENTS OF THAT PROVISION; EVIDENCE OF SOME ELECTORAL SUCCESS MUST BE VIEWED AS PART OF THE "TOTALITY OF CIRCUMSTANCES" TO BE CONSIDERED

The evidence of some electoral success by blacks in the challenged districts in North Carolina is not dispositive of a Section 2 claim, as is evident from the plain language of the statute.[1] Section 2 requires that claims brought thereunder be analyzed on the basis of the "totality of circumstances" present

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[1] We make no effort herein to state the facts at issue in this case in a complete manner, though we do note the limited nature of black electoral success as presented in the district court's findings:

House District No. 36 (Mecklenburg County) and Senate District No. 22 (Mecklenburg and Cabarrus Counties)—Only two black candidates have won elections in this century. One black won a seat in the eight member House delegation in 1982 after this litigation was filed (running without white opposition in the Democratic primary), and one served in the four-member Senate delegation from 1975-1980. This limited success is offset by frequent electoral defeats. In House District 36, seven black candidates have tried and failed to win seats from 1965-1982, and in Senate District 22 black candidates failed in bids for seats in 1980 and 1982. Blacks comprise approximately 25 percent of the population in these Districts. 590 F. Supp. at 357, 365.

House District No. 39 (part of Forsyth County)—The first black to serve as one of the five-member delegation served from 1975-1978. He resigned in 1978 and his appointed successor ran for reelection in 1978 but was defeated; a black candidate was also defeated in 1980. In 1982, after this litigation was filed, two blacks were elected to the House. This pattern of election, followed by defeats, mirrors elections for the Board of County Commissioners, in which the only black elected was defeated in her first reelection bid in 1980, and for elections to the Board of Education, in which the first black elected was defeated in his bids for reelection in 1978 and 1980. Blacks comprise 25.1 percent of the County's population. 590 F. Supp. at 357, 366.

House District No. 23 (Durham County)—Since 1973, one black has been elected to the three-member delegation. He faced no white opposition

(footnote continues)

in the challenged district. The focus is on whether there is equal access to the process. The extent of past black electoral success is only one relevant circumstance.

The controlling provision is Section 2(b), which states:

> "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) of this section in that its members have less opportunity than other members of the electorate to participate in the political 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."

This express statutory provision clarifies that 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 . . . ." Obviously, other factors which comprise the "totality of circumstances" surrounding the political process must also be considered, as they were by the district court in finding a violation of Section 2 here. *See* Section III,

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(footnote continued)

in the primary in 1980 or 1982 and no substantial opposition in the general election either of those years. Blacks constitute 36.3 percent of the population of the county. 590 F. Supp. at 357, 366, 370-71.

House District No. 21 (Wake County)—The first time in this century a black candidate successfully ran for the six-member delegation was in 1980. That same candidate had been defeated in 1978. Blacks comprise 21.8 percent of the population of the county. 590 F. Supp. at 357, 366, 371.

House District No. 8 (Wilson, Edgecomb and Nash Counties)—No black was ever elected to serve from this four-member district although it is 39.5 percent black in population. 590 F. Supp. at 357, 366, 371.

infra. Electoral success is a relevant criterion, but not the sole or dominant concern, as posited by the Solicitor General.[2]

As will be shown below, the primary reason Congress adopted Section 2(b), which originally was offered as a clarifying amendment by Senator Dole, was to ensure that the focus of the Section 2 "results" standard would be on whether there was equal opportunity to participate in the electoral process.

The statutory language necessarily contemplates that a Section 2 violation may be proven despite some minority candidate electoral success. The focus on the "extent" of minority group electoral success contemplates gradations of success—from token or incidental victories to electoral domination—and makes clear that a violation of Section 2 may be proven in cases where some members of the group have been elected to office, but the group nevertheless has been denied a full-scale equal opportunity to participate in the political process.[3]

Because Section 2 is plain on its face, it should not be necessary to look further to the legislative history. *Maine* v. *Thiboutot,* 448 U.S. 1, 6 n.4 (1980), *quoting TVA* v. *Hill,* 437

[2] The Solicitor General seems to suggest that black electoral success in rough proportion to the black proportion of the population should be preclusive of a Section 2 claim. Brief for the United States as Amicus Curiae 24-25. At most, this argument appears relevant only to House District No. 23 (Durham County), and, in any event, is plainly inconsistent with Congress' clearly stated intent that Section 2 claims should not depend upon the race of elected officials. Section 2 seeks to deflect excessive concern with the racial or ethnic identity of individual officeholders and, instead, to focus attention where it properly belongs: on the existence of an equal opportunity for members of the minority group to participate in the political process and to elect representatives of their choice.

[3] Consistent with this clear statutory mandate, and the legislative history discussed below, the lower courts which have considered this issue all have expressly rejected the position espoused by the Solicitor General and appellants. *United States* v. *Marengo County Comm'n,* 731 F.2d 1546, 1571-72 (11th Cir.), *cert. denied,* _____U.S._____, 105 S. Ct. 375 (1984) ("It is equally clear that the election of one or a small number of minority elected officials will not compel a finding of no dilution."); *Velasquez* v. *City of Abilene,* 725 F.2d 1017, 1022 (5th Cir. 1984).

U.S. 153, 184 n.29 (1978). Nevertheless, we will examine that history because it confirms, in the most unequivocal terms, the intent of Congress that the extent of minority group electoral success be analyzed as a part of the totality of circumstances from which to measure the openness of the challenged political system to minority group participation. Further, that history provides an important indication of the manner in which such analysis should be undertaken, and supports the analysis and conclusions of the court below.

II. THE LEGISLATIVE HISTORY OF THE 1982 AMENDMENTS AND THE PRE-*BOLDEN* CASE LAW CONCLUSIVELY DEMONSTRATE THAT A VIOLATION OF SECTION 2 MAY BE FOUND ALTHOUGH MEMBERS OF A MINORITY GROUP HAVE EXPERIENCED LIMITED ELECTORAL SUCCESS

A. The Legislative History: The Majority Statement in the Senate Report Specifically Provides that Some Minority Group Electoral Success Does Not Preclude a Section 2 Claim if Other Circumstances Evidence a Lack of Equal Access

The legislative history of the 1982 amendments shows very clearly that Congress did not intend that limited electoral success by a minority would foreclose a Section 2 claim. This intent is most plainly stated in the Senate Report, but a similar intent also is evident from the House deliberations, the individual views of members of the Senate Judiciary Committee appended to the Senate Report, and the floor debates in the Senate.

The 1982 amendments originated in the House, which initially determined that the *Bolden* intent test was unworkable, and that it was necessary to evaluate voting rights claims

brought under Section 2 on the basis of "[a]n aggregate of objective factors." [4] Report of the House Committee on the Judiciary on H.R. 3112, H.R. Rep. No. 227, 97th Cong., 1st Sess. 30 (1981) (hereinafter the "House Report"). As would the Senate, the House rejected the position that any single factor should be determinative of a Section 2 claim. The House Report noted that "[a]ll of these [described] factors need not be proved to establish a Section 2 violation." *Id.* at 30. Thus, while the House bill did not by its terms require the consideration of the "totality of circumstances," that plainly was the intent of the House.

The Senate refined the House bill, and made explicit the intent that Section 2 claims be addressed on the basis of the "totality of circumstances." This refinement came about because of a compromise authored by Senator Dole and others, the import of which will be addressed in detail below. Of immediate significance, though, is the fact that the Senate Report explaining this compromise expressly dealt with the issue of the significance of minority group electoral success to Section 2 claims. Indeed, the intent of the Committee with regard to the handling of this factor was expressed more than once.

The Senate Report includes, as one "typical factor" to consider in determining whether a violation has been established under Section 2, "the extent to which members of the minority group have been elected to public office in the jurisdiction." Senate Report at 29. Additional important commentary with regard to this factor is then provided:

> "The fact that no members of a minority group have been elected to office over an extended period of time

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[4] Relevant factors, drawn from the Court's decision in *White* v. *Regester,* 412 U.S. 755 (1973), and its progeny included "a history of discrimination affecting the right to vote, racially polarity [sic] voting which impedes the election opportunities of minority group members, discriminatory elements of the electoral system such as at-large elections, a majority vote requirement, a prohibition on single-shot voting, and numbered posts which enhance the opportunity for discrimination, and discriminatory slating or the failure of minorities to win party nomination." House Report 30.

> is probative. However, the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote,' in violation of this section. *Zimmer* 485 F.2d at 1307. If it did, the possibility exists that the majority citizens might evade the section e.g., by manipulating the election of a 'safe' minority candidate. 'Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution. . . . Instead we shall continue to require an independent consideration of the record.' Ibid." Senate Report at 29 n.115. (References are to *Zimmer* v. *McKeithen,* 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom. East Carroll Parish School Bd.* v. *Marshall,* 424 U.S. 636 (1976).)

No clearer statement of the intent of the Committee with regard to this issue seems possible. *See Velasquez* v. *City of Abilene,* 725 F.2d 1017, 1022 (5th Cir. 1984) ("In the Senate Report . . . it was specifically noted that the mere election of a few minority candidates was not sufficient to bar a finding of voting dilution under the results test.").[5]

Further, this analysis, and its reliance on *Zimmer* v. *McKeithen,* 485 F.2d at 1307, is consistent with the express view of the Committee that "[t]he 'results' standard is meant to restore the pre-*Mobile* legal standards which governed cases

[5] The Solicitor General suggests that this statement indicates that minority group electoral success will not defeat a Section 2 claim *only* if it can be shown that such success was the result of the majority "engineering the election of a 'safe' minority candidate." Brief for the United States as Amicus Curiae 24 n.49. Amici, who were integrally involved in writing the Senate Report, view this statement as providing an example which illustrates why some success should not be dispositive, not a legal rule defining the only circumstance where it is not. Of course, there are numerous other reasons why some electoral success might not evidence an equality of opportunity to participate in the electoral process. For example, as in the instant case, the ability to single-shot vote in multimember districts may produce some black officeholders, but at the expense of denying blacks the opportunity to vote for a full slate of candidates. *See* 590 F. Supp. at 369.

challenging election systems or practices as an illegal dilution of the minority vote. Specifically, subsection (b) embodies the test laid down by the Supreme Court in *White* [v. *Regester,* 412 U.S. 755 (1973)]." Senate Report at 27.[6] This reliance on pre-*Bolden* case law is important, for it was firmly established under that case law that a voting rights violation could be established even though members of the plaintiff minority group had experienced some electoral success within the challenged system.

The Committee was acutely aware of this precedent.[7] Indeed, in the case set by Congress as the polestar of Section 2 analysis—*White* v. *Regester*—a voting rights denial was found by this Court despite limited black and Hispanic electoral success in the challenged districts in Dallas and Bexar Counties in Texas. Senate Report at 22.[8]

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[6] There can be no doubt that this was the view of a Congressional majority as well. Thus, in his additional views, Senator Dole remarked that "the new subsection [2(b)] codifies the legal standard articulated in *White* v. *Regester*, a standard which was first applied by the Supreme Court in *Whitcomb* v. *Chavis,* and which was subsequently applied in some 23 Federal Courts of Appeals decisions." Senate Report at 194. Senator Grassley, in his supplemental views, similarly remarked that "the new language of Section 2 is the test utilized by the Supreme Court in White." *Id.* at 197.

[7] The Senate Report states:

> "What has been the judicial track record under the 'results test'? That record received intensive scrutiny during the Committee hearings. The Committee reviewed not only the Supreme Court decisions in *Whitecomb* [sic] and *White,* but also some 23 reported vote dilution cases in which federal courts of appeals, prior to 1978, followed *White.*" Senate Report at 32.

A list and analysis of these 23 cases appears in *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. of the Judiciary,* Vol. I, 97th Cong., 2d Sess. 1216-26 (1982) (hereinafter "I Senate Hearings") (appendix to prepared statement of Frank R. Parker, director, Voting Rights Project, Lawyers' Committee for Civil Rights Under the Law).

[8] The Senate Report cites the portion of this Court's opinion in *White* v. *Regester* wherein it was observed that "[s]ince Reconstruction, only two black candidates from Dallas County had been elected to the Texas House of Representatives, and these two were the only blacks ever slated by the Dallas Committee for Responsible Government, white-dominated slating group."

(footnote continues)

The Committee also expressly relied upon the opinion of the Fifth Circuit Court of Appeals in *Zimmer* v. *McKeithen,* which it described as "[t]he seminal court of appeals decision . . . subsequently relied upon in the vast majority of nearly two dozen reported dilution cases." Senate Report at 23. In *Zimmer,* the Circuit Court found inconclusive the fact that three black candidates had won seats in the challenged at-large district since the institution of the suit. The Court reasoned that while the appellee urged that "the attendant success of three black candidates, dictated a finding that the at-large scheme did not in fact dilute the black vote . . . . [W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote." 485 F.2d at 1307.

Similarly, the Committee considered with approval a recent case involving Edgefield County, South Carolina, where prior to *Bolden* a voting rights violation had been found, despite limited black electoral success, because "[b]lack participation in Edgefield County has been merely tokenism and even this has been on a very small scale." *McCain* v. *Lybrand,* No. 74-

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(footnote continued)

412 U.S. at 766-67. The decision of the district court indicates that the first of these candidates ran in 1966, and that they were selected by the white-dominated Dallas Committee for Responsible Government without the participation of the black community. *Graves* v. *Barnes,* 343 F. Supp. 704, 726 (W.D. Tex. 1972), *aff'd in part and rev'd in part sub nom. White* v. *Regester,* 412 U.S. 755 (1973).

A similar point was made with respect to Hispanic success in Bexar County, where "[o]nly five Mexican-Americans since 1880 have served in the Texas Legislature from Bexar County. Of these, only two were from the barrio area." 412 U.S. at 768-69. The district court indicated that four of these five were elected after 1960. *Graves* v. *Barnes,* 343 F. Supp. at 732.

The findings in *White* v. *Regester* seem unremarkable until it is realized that in the instant case the same or a *lesser* showing of black electoral success in all of the districts here at issue (except House District No. 23), is being relied upon as conclusive evidence that no voting rights violation has occurred.

281, slip op. at 18 (D.S.C. April 17, 1980), *quoted* at Senate Report 26.[9]

There is absolutely no indication in the legislative history that *any* member of either House of Congress thought that evidence of minority group electoral success should be preclusive of a Section 2 claim. The Solicitor General and appellants recite at some length numerous statements to the effect that Section 2 was not meant to require proportional representation. This point is made on the face of the statute, and there is no question that Section 2 does not require that minority group representation be, at a minimum, equal to the group's percentage of the population. However, the finding of a violation of Section 2 in the face of some minority group electoral success does not depend upon a rule requiring proportional representation. Rather, as the reasoning of the court below illustrates, the finding of a violation depends upon the assessment of the "totality of circumstances" to determine whether members of the minority group have been denied an equal opportunity to participate in the political process and to

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[9] In addition, there are other pre-*Bolden* decisions of similar import not specifically addressed in the Senate Report or in the floor debates. So, in one of the 23 appellate decisions studied by the Committee, the Fifth Circuit Court, rejecting a reapportionment plan ordered by the district court because it left the chances for black success unlikely, noted its continuing adherence to the *Zimmer* rule: "we add the caveat that the election of black candidates does not automatically mean that black voting strength is not minimized or canceled out." *Kirksey* v. *Board of Supervisors*, 554 F.2d 139, 149 n.21 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977).

This rule of common sense was respected by the district courts. For example, in *Graves* v. *Barnes*, 378 F. Supp. 641, 659-61 (W.D. Tex. 1974), the court concluded that the recent election of Hispanics to the Texas House of Representatives and to the school board did not frustrate a voting rights claim.

Similarly, a district court refused in *Beer* v. *United States*, 374 F. Supp. 363 (D.D.C. 1974), *rev'd on other grounds*, 425 U.S. 130 (1976), to deem the city of New Orleans to be entitled to pre-clearance under Section 5 despite a showing that four blacks recently had won elective office in the municipality. Although the Section 5 retrogression standard differs from the Section 2 standard, *Beer* is relevant to the case at hand in that the Court recognized that minority candidate success can be attributable to factors other than equal access to the electoral process by minority group members.

elect representatives of their choice. The disproportionality of minority group representation is, at most, one factor in the analysis.

B. The Majority Statement in the Senate Report Is an Accurate Statement of the Intent of Congress with Regard to the 1982 Amendments

The Solicitor General appears to believe that Congress intended to adopt in 1982, the rule rejected in *Zimmer* v. *McKeithen*, drawing from certain statements by amicus Senator Dole and others that Section 2 was not intended to require proportional representation, an inference that a Section 2 claim is foreclosed wherever limited electoral success is shown. *See* Brief for the United States as Amicus Curiae 11-14.[10]

In making this argument, the Solicitor General also argues, as he did in another recent appeal to this Court regarding a Section 2 claim, *City Council of Chicago* v. *Ketchum,* 105 S. Ct. 2673 (1985), that the Senate Report is not determinative of the intent of Congress, and attaches greater significance to the individual views of amici Senators Dole and Grassley, and Senator Hatch.[11] Brief for the United States as Amicus Curiae,

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[10] The Solicitor General also cites the Report of the Subcommittee on the Constitution to the Senate Committee on the Judiciary on S. 1992, 97th Cong., 2d Sess. (1982) ("Subcommittee Report"). 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. *Id.* at 20-52. At the time the Subcommittee Report was written, a 3-2 majority of the Senate Subcommittee supported existing law, a position squarely rejected by the full Committee and by the Senate as a whole. The Chairman of the Subcommittee—Senator Orrin Hatch—opposed the Dole compromise and voted for the bill ultimately enacted only with great reluctance, continuing to state until the final vote on the bill his view "that these amendments promise to effect a destructive transformation in the Voting Rights Act. . . ." 128 Cong. Rec. S7139 (daily ed. June 18, 1982). Of the four other members of the Subcommittee: Senator Strom Thurmond opposed the Dole compromise; Senator Charles Grassley supported the compromise, and, as noted below, expressly acceded to the majority view of the Senate Report; and Senators Dennis DeConcini and Patrick Leahy objected to the conclusions of the Subcommittee Report.

[11] As noted in the preceding footnote, while Senator Hatch did ultimately vote for the bill, he opposed the Dole compromise in Committee and voiced opposition to it on the floor of the Senate.

13 n.27. These efforts are misguided on both factual and legal grounds.

1. The Majority Statement in the Senate Report Plainly Reflects the Intent and Effect of the Legislation

To understand the significance of the majority view stated in the Senate Report, and of the individual views of amici Senators Dole and Grassley, it is necessary to understand the nature and the genesis of what is aptly termed the Dole compromise. The purpose of the compromise was to clarify what standard should be used under the results test to ensure that the amended Section 2 would not be interpreted by courts to require proportional representation. The bill originally adopted by the House—H.R. 3112—attempted to accomplish this with a disclaimer that "[t]he 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." In addition, the stated purpose of the House bill was to reinstate the standards of pre-*Bolden* case law, which was understood by the House not to require proportional representation. House Report at 29-30.

The House bill attracted immediate support in the Senate. Senators Mathias and Kennedy introduced the House bill as S. 1992, and enlisted the support of approximately two-thirds of the members of the Senate as co-sponsors.[12] Still, certain members of the Senate, and, in particular Senator Dole, had lingering doubts as to whether the language of the House bill was sufficient to foreclose the interpretation of the Voting Rights Act as requiring proportional representation. To ame-

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[12] Initially S. 1992 had 61 co-sponsors, and by the time the Senate Judiciary Committee passed upon the Dole compromise, this number had grown to 66. Thus, as Senator Dole himself recognized in Committee deliberations, "without any change the House bill would have passed." Executive Session of the Senate Judiciary Committee, May 4, 1982, reported at *Voting Rights Act: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* Vol. II, 97th Cong., 2d Sess. 57 (1982) (hereinafter "II Senate Hearings").

liorate this concern, Senator Dole—in conjunction with Senators Grassley, Kennedy and Mathias, among others [13]—proposed that Section 2(b) be added to pick up the standard enunciated by this Court in *White* v. *Regester.* In addition, the disclaimer included in the House bill was strengthened to state expressly that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion of the population."

As Senator Dole himself was careful to emphasize, the compromise was consistent with the Section 2 amendments passed by the House.[14] As Senator Joseph Biden explained in the Committee debate over the Dole compromise, "What it does [is], it clarifies what everyone intended to be the situation from the outset." Executive Session of the Senate Judiciary Committee, May 4, 1982, reported at II Senate Hearings 68. In introducing S. 1992 on the floor, Senator Mathias also termed the Committee actions on Section 2 "clarifying amendment[s]" which "are consistent with the basic thrust of S. 1992 as introduced and are helpful in clarifying the basic meaning of the proposed amendment." 128 Cong. Rec. S6942, S6944 (daily ed. June 17, 1982).[15]

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[13] Senator Dole explained that he "along with [amici] Senators DeConcini, Grassley, Kennedy, and Metzenbaum and Senator Mathias . . . had worked out a compromise on [Section 2]." *Id.* at 58.

[14] Thus, Senator Dole explained the proposed compromise as follows:

> "[T]he compromise retains the results standards of the Mathias/Kennedy bill. However, we also feel that the legislation should be strengthened with additional language delineating what legal standard should apply under the results test and clarifying that it is not a mandate for proportional representation. Thus, our compromise adds a new subsection to section 2, which codified language from the 1973 Supreme Court decision of *White* v. *Regester.*" Executive Session of the Senate Judiciary Committee, May 4, 1982, reported at II Senate Hearings, 60.

See also United States v. *Marengo County Comm'n,* 731 F. 2d 1546, 1565 n.30 (11th Cir.), *cert. denied,* ____ U.S. ____, 105 S. Ct. 375 (1984).

[15] A similar understanding of the Senate bill was expressed on the floor of the House by Representative Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary:

(footnote continues)

The authors of the compromise—in particular amici Senators Dole and Grassley—did not perceive it as inconsistent with the majority view of the proposed legislation. Indeed, in additional comments to the Senate Report, both amici Senators Dole and Grassley clearly stated that they thought the majority statement to be accurate. Thus, Senator Dole prefaced his additional views with the comment that "[t]he Committee Report is an accurate statement of the intent of S. 1992, as reported by the Committee." [16] Senate Report at 193. And Senator Grassley prefaced his views with the cautionary remark that "I express my views not to take issue with the body of the Report." Senate Report at 196. So that there could be no doubt as to his position, he later added that "I concur with the interpretation of this action in the Committee Report." Senate Report at 199. Moreover, the individual views expressed by both these Senators were in complete accord with the majority statement.[17]

(footnote continued)

> "Basically, the amendments to H.R. 3112 would . . . clarify the basic intent of the section 2 amendment adopted previously by the House.
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> . . .
>
> "These members [the sponsors of the Senate compromise] were able to maintain the basic integrity and intent of the House-passed bill while at the same time finding language which more effectively addresses the concern that the results test would lead to proportional representation in every jurisdiction throughout the country and which delineates more specifically the legal standard to be used under section 2." 128 Cong. Rec. H3840-3841 (daily ed. June 23, 1982).

[16] As Senator Dole stated in his additional views, his primary purpose in offering the compromise was to allay fears about proportional representation and thereby secure the overwhelming bipartisan support he thought the bill deserved. For this reason, his comments primarily were concerned with stressing the intent of the Committee that the results test and the standard of *White* v. *Regester* should not be construed to require proportional representation. Senate Report at 193-94. This in no way suggests that he disagreed with the views expressed in the majority report, for that report also went to great pains to explain that neither the results test nor the standard of *White* v. *Regester* implied a guarantee of proportional representation. Senate Report at 30-31. A disclaimer to the same effect appears, of course on the face of the statute.

[17] Senator Dole objected to efforts by opponents to redefine the intent of the 1982 amendments on the floor of the Senate. *See* 128 Cong. Rec. S6553 (daily ed. June 9, 1982).

Both proponents and opponents of S. 1992 recognized in the floor debates the significance of the majority statement in the Committee Report as an explanation of the bill's purpose. So, early on in the debates Senator Kennedy noted that:

> "Those provisions, and the interpretation of those provisions, are spelled out as clearly and, I think, as well as any committee report that I have seen in a long time in this body.
>
> "I have spent a good deal of time personally on this report, and I think it is a superb commentary on exactly what this legislation is about.
>
> "In short, what this legislative report points out is who won and who lost on this issue. There should be no confusion for future generations as to what the intention of the language was for those who carried the day." 128 Cong. Rec. S6553 (daily ed. June 9, 1982).[18]

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[18] Senator Kennedy reemphasized this point a week later:

> "If there is any question about the meaning of the language, we urge the judges to read the report for its meaning or to listen to those who were the principal sponsors of the proposal, not to Senators who fought against the proposal and who have an entirely different concept of what a Voting Rights Act should be."

128 Cong. Rec. S6780 (daily ed. June 15, 1982).

An admonition which Senator Dole heartily echoed:

> "I join the Senator from Massachusetts in the hope that when the judges look at the legislative history, they will look at those who supported vigorously and enthusiastically the so-called compromise."

128 Cong. Rec. S6781 (daily ed. June 15, 1982).

Senator Kennedy later remarked to the same effect:

> "Fortunately, I will not have to be exhaustive because the Senate Judiciary Committee Report, presented by Senator Mathias, was an excellent exposition of the intended meaning and operation of the bill."

128 Cong. Rec. S7095 (daily ed. June 18, 1982).

Thus, the proponents of the legislation, including Senators Dole,[19] Grassley,[20] DeConcini,[21] Mathias,[22] and Kennedy,[23] repeatedly pointed their colleagues to the majority statement of the Senate Report for an explanation of the legislation. Conversely, opponents of the compromise,[24] or proponents of particular amendments,[25] looked to the majority statement of the Senate Report as a basis for their individual criticisms of the bill. At no point in the debates did any Senator claim that the majority statement of the Senate Report was inaccurate, or that it represented the peculiar views of "one faction in the controversy."

Respect for the majority statement of the Senate Report carried to the floor of the House during the abbreviated debate on the Senate bill. Thus, amicus Representative F. James Sensenbrenner explained to his colleagues:

> "First, addressing the amendment to section 2, which incorporates the 'results' test in place of the 'intent' test set out in the plurality opinion in Mobile against Bolden, there is an extensive discussion of how this test is to be applied in the Senate committee report." 128 Cong. Rec. H3841 (daily ed. June 23, 1982).

Again, there is no suggestion by any member of the House that the majority statement in the Senate Report was less than an accurate statement of the intent of Congress with regard to the bill.

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[19] 128 Cong. Rec. S6960-62, S6993 (daily ed. June 17, 1982).

[20] 128 Cong. Rec. S6646-48 (daily ed. June 10, 1982).

[21] 128 Cong. Rec. S6930-34 (daily ed. June 17, 1982).

[22] 128 Cong. Rec. S6941-44, S6967 (daily ed. June 17, 1982).

[23] 128 Cong. Rec. S6995 (daily ed. June 17, 1982); S7095-96 (June 18, 1982).

[24] 128 Cong. Rec. S6919-21, S6939-40 (daily ed. June 17, 1982); S7091-92 (June 18, 1982).

[25] 128 Cong. Rec. S6991, S6993 (daily ed. June 17, 1982). The amendment offered by Senator Stevens is particularly noteworthy—it concerned the application of the standards of Section 2(b) in pre-clearance cases—because he largely sought to justify it on the basis of a consistent statement in the Senate Report.

2. As a Matter of Law, the Majority Statement in the Senate Report Is Entitled to Great Respect

Under fundamental tenets of statutory construction, Committee Reports are accorded the greatest weight as the views of the Committee and of Congress as a whole.

In the preceding term, this Court reaffirmed the long-established principle that committee reports are the authoritative guide to congressional intent:[26]

> "In surveying legislative history we have repeatedly stated that the authoritative source for finding the legislature's intent lies in the Committee reports on the bill, 'represent [ ] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.' *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969)."

Garcia v. *United States*, ____U.S.____, 105 S. Ct. 479, 483 (1984); *accord Chandler* v. *Roudebush*, 425 U.S. 840, 859 n.36 (1976); *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969); *United States* v. *O'Brien*, 391 U.S. 367, 385 (1968); *United States* v. *International Union of Automobile Workers*, 352 U.S. 567, 585 (1957). The *Garcia* Court also reiterated the principle that committee reports provide "more authoritative" evidence of congressional purpose than statements by individual legislators. *Garcia*, 105 S. Ct. at 483; *United States* v. *O'Brien*, 391 U.S. at 385; *cf. United States* v. *Automobile Workers*, 352 U.S. at 585.

In light of these well-established principles, the effort to undermine the value of the Committee Report as a guide to legislative intent by citation to statements made during floor debates is misguided. Committee reports are "more authoritative" than statements by individual legislators, regardless of

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[26] Consistent with this longstanding principle, the Senate Report has been the authoritative source of legislative history relied on by courts interpreting the 1982 Voting Rights Act Amendments. *See, e.g., McMillan* v. *Escambia County*, 748 F.2d 1037 (11th Cir. 1984); *United States* v. *Dallas County Comm'n*, 739 F.2d 1529 (11th Cir. 1984); *United States* v. *Marengo County Comm'n*, 731 F.2d 1546 (11th Cir.), *cert. denied*, ___ U.S. ___, 105 S. Ct. 375 (1984); *Velasquez* v. *City of Abilene*, 725 F.2d 1017 (5th Cir. 1984).

the fact that the individual legislator is a sponsor or floor manager of the bill. *See National Association of Greeting Card Publishers* v. *United States Postal Service,* 462 U.S. 810, 832-33 n.28 (1983); *Chandler* v. *Roudebush,* 425 U.S. at 859 n.36; *Monterey Coal* v. *Federal Mine Safety & Health Review Commission,* 743 F.2d 589, 596-98 (7th Cir. 1984); *Sperling* v. *United States,* 515 F.2d 465, 480 (3d Cir. 1975), *cert. denied,* 462 U.S. 919 (1976).[27]

The basis for this rule is quite simple, for to give controlling effect to any legislator's remarks in contradiction of a committee report "would be to run too great a risk of permitting one member to override the intent of Congress. . . ." *Monterey Coal* v. *Fed. Mine Safety & Health Review,* 743 F.2d at 598. The rule also reflects the traditions and practices of both Houses of Congress, in which members customarily rely on the report of the committee of jurisdiction to provide an authoritative explanation of the purpose and intent of legislation before any floor consideration begins. For example, the Senate Rules forbid the consideration of "any matter or measure reported by any standing committee . . . unless the report of that committee upon that matter or measure has been available to members for at least three calendar days . . . prior to the consideration . . . ." Rule XVII, para. 5, Standing Rules of the Senate. In this way, each member has the opportunity to examine not only the text of proposed legislation, but also the explanation and justification for it, well in advance of any vote on the bill. By contrast, the vast majority of members may be completely unaware of the content of a statement made during

[27] In *National Association of Greeting Card Publishers,* the Court ruled that a statement by the floor managers of a bill, appended to the conference committee report, lacked "the status of a conference report, or even a report of a single House available to both Houses." 462 U.S. at 832 n.28. The Court in *Chandler* v. *Roudebush* held a committee report to be "more probative of congressional intent" than a statement by Senator Williams, the sponsor of the legislation. 425 U.S. at 859 n.36. In *Monterey Coal,* the court noted that the sponsor's statements "are the only mention in the legislative history of the specific issue before us." *Monterey Coal* v. *Fed. Mine Safety & Health Review,* 743 F.2d at 596. Nevertheless, because the sponsor's position was not "clearly supported by the conference committee report," the court declined to give the sponsor's remarks controlling weight. 743 F.2d at 598.

floor debates. It is impossible to determine from the official record of congressional proceedings whether a given member, or a majority or any particular number of members, was present when a certain statement was made. It is even customary for statements to be delivered orally only in part, with the balance printed in the *Congressional Record* "as if read." Given these facts, well known to amici from their decades of experience in both Houses, there is little basis for concluding that any given statement made in floor debate accurately states the intent of any member other than the one who made it.[28]

Furthermore, the "compromise character" of the 1982 amendments does not detract from the validity of the majority views. Here the proponents of the compromise wording expressly agreed with the majority views and viewed the

[28] The cases cited by the Solicitor General in support of the effort to amplify the statements of individual senators and disparage the significance of the Senate Report, are inapposite.

In *North Haven Bd. of Education* v. *Bell,* 456 U.S. 512 (1982), the Court noted that "the statements of one legislator made during debate may not be controlling," but indicated that statements made by Senator Bayh, a sponsor of the legislation, were "the only authoritative indications of congressional intent regarding the scope of §§ 901 and 902" of Title IX, because §§ 901 and 902 originated as a floor amendment and no committee report discussed them. 456 U.S. at 526-27.

The other case cited by the Solicitor General, *Grove City College* v. *Bell,* ___ U.S. ___, 104 S. Ct. 1211 (1984), also involved an interpretation of Title IX. The Court in *Grove City* again recognized that "statements by individual legislators should not be given controlling effect," but cited *North Haven* to support its position that "Sen. Bayh's remarks are 'an authoritative guide to the statute's construction.'" 104 S. Ct. at 1219. The Court indicated that Sen. Bayh's remarks were authoritative only to the extent that they were consistent with the language of the statute and the legislative history. *Id.*

Thus, *North Haven* and *Grove City* concern the significance of a sponsor's expressed views in the absence of a relevant statement in a committee report. Here, in marked contrast, the Solicitor General draws an unwarranted inference that electoral success might preclude a Section 2 claim from Senator Dole's expressed desire to avoid a requirement of proportional representation, and then asserts that inference as superior to an express statement to the contrary in the Senate Report.

compromise wording as merely a clarification of the intent of Congress.[29] In these circumstances, there is no reason to conclude that the Committee Report, prepared after adoption of the compromise, and accepted by all as an accurate explanation of it, loses its status as the most authoritative guide to legislative intent.

III. THE DISTRICT COURT APPROPRIATELY LOOKED TO THE TOTALITY OF CIRCUMSTANCES INCLUDING THE EVIDENCE OF SOME BLACK ELECTORAL SUCCESS TO DETERMINE WHETHER BLACKS HAD EQUAL OPPORTUNITY TO PARTICIPATE IN THE ELECTORAL SYSTEM; THE COURT DID NOT REQUIRE PROPORTIONAL REPRESENTATION

At bottom, the argument of the Solicitor General and appellants, that limited electoral success by members of a minority group should be conclusive evidence that the group enjoys an equal opportunity to participate, rests on the claim that such a rule is implicit in the disclaimer that Section 2 does not provide a minority group the right to proportional representation. All parties agree that Section 2 was not intended by Congress to provide a right to proportional representation—but that point has no significance to the immediate issue.

As the pre-*Bolden* case law discussed previously illustrates, the trier of fact may find a denial of equal voting opportunity where, despite evidence of some minority group electoral success, evidence of other historical, social and political factors indicates such a denial. *See, e.g., White* v. *Regester,* 412 U.S. 755 (1973); *Kirksey* v. *Board of Supervisors,* 554 F.2d 139 (5th Cir.), *cert. denied,* 434 U.S. 968 (1977); *Zimmer* v. *McKeithen,* 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom. East Carroll Parish School Bd.* v. *Marshall,* 424 U.S. 636. Such a finding in no way implies or necessitates that Section 2 be applied as a guarantee of proportional representation. The "disproportionality" of minority group representation is not the gravamen

[29] *See* text and notes accompanying nn.14-17, *supra.*

of the Section 2 claim in such a case, though it may be a factor; rather, it is the confluence of factors which indicates that an equal opportunity to participate in the political process and to elect representatives of their choice has been denied members of the group.[30]

In order to determine whether a violation of Section 2 has occurred, courts are to consider whether, given the "totality of circumstances," members of a protected class have been given an equal opportunity to participate in the electoral process and to elect representatives of their choice. In its opinion, the district court appeared to undertake just the sort of "totality of circumstances" analysis in the challenged state legislative districts as is required by Section 2. In fact, the district court, quoting the Senate Report at 28-29, set forth the nine so-called *"Zimmer"* factors which may be relevant in determining whether a Section 2 violation has been established, and proceeded to analyze those factors. 590 F. Supp. at 354.

The court stated that it found a high degree of racially polarized or bloc voting, such that in all districts a majority of the white voters never voted for any black candidate. The existence of racially polarized voting is a significant factor in determining whether vote dilution exists, particularly where, as here, large multimember districts are involved.[31] *See McMillan*

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[30] As the Solicitor General himself points out, "[a]mended Section 2 . . . focuses not on guaranteeing election results, but instead on securing to every citizen the right to equal 'opportunity . . . to participate in the political process. . . .' " Brief for the United States as Amicus Curiae 14. Congress could not have been more clear in expressing its intention that election results alone should not be determinative of a Section 2 claim.

[31] We do not suggest that white voters should be forced to vote for minority candidates. Every voter, regardless of race has the right to vote for the candidate of his or her choice. If, however, a majority of white voters will not vote for a black candidate in any circumstance, and large multimember districts with majority white voting populations are drawn, the minority vote is likely to be of relatively little consequence. At best, minority voters are required to "single-shot" their votes to elect any black candidates in the face of the majority white opposition.

Because of idiosyncrasies that may be present in any particular election, the court should look at more than one election, as the district court did, to assess the pattern of racially polarized voting. Of course, for this reason, black success in a single election, even with some white support, cannot be determinative.

v. *Escambia County,* 748 F.2d 1037 (5th Cir. 1984); *United States* v. *Dallas County Commission,* 739 F.2d 1529 (11th Cir. 1984); *United States* v. *Marengo County Comm'n,* 731 F.2d 1546 (11th Cir.), *cert. denied,* ___U.S.___, 105 S. Ct. 375 (1984). This brief does not contend that all at-large, multimember districts should be suspect or subject to challenge under Section 2. Rather, the district court acknowledged that "a multimember district does not alone establish that vote dilution has resulted," 590 F. Supp. at 355, but found that large multimember districts along with severe racial polarization in voting and other factors combined here to create such dilution.[32]

The district court stated further that it found a history of official discrimination against blacks in voting matters—including the use of devices such as a poll tax, a literacy test, and an anti-single-shot voting law—which had continuing effect to depress black voter registration. 590 F. Supp. at 359-61. Although the district court acknowledged that these devices were no longer employed by the early 1970s, it also recognized that their existence for over half a century has had a lasting impact. *Id.* at 360. The lasting impact of historical discrimination on the present-day ability to participate in the electoral process has also been recognized in other recent cases. *Cf. United States* v. *Marengo County Comm'n,* 731 F.2d at 1567 ("[P]ast discrimination can severely impair the present-day ability of minorities to participate on an equal footing in the political process."); *McMillan* v. *Escambia County,* 748 F.2d at 1043-44.

The district court decision rests, in part, on the fact that this history of official discrimination is still relatively close in terms of time. The court noted that a "good faith" effort is now being

[32] The Solicitor General mischaracterizes the district court's position in suggesting that it improperly defined racially polarized voting to exist where more than 50 percent of whites and blacks vote for a different candidate. The district court's finding of racially polarized voting instead was based on extensive expert testimony which established that a majority of white voters will not vote for any minority candidates. This was the case even when blacks ran for office unopposed.

made by the responsible state agency to remedy the effects of past discrimination. The court observed:

> "'... If continued on a sustained basis over a sufficient period, the effort might succeed in removing the disparity in registration which survives as a legacy of the long period of direct denial and chilling by the state of registration by black citizens. But at the present time the gap has not been closed, and there is of course no guarantee that the effort will be continued past the end of the present state administration.'" 590 F. Supp. at 361.

The court below also recognized as significant the majority vote requirement imposed by North Carolina in primaries. *Cf. Zimmer,* 485 F.2d at 1305. Because of the historical domination of the Democratic party in local races, this majority vote requirement in primaries substantially impeded minority voters from electing candidates of their choice. 590 F. Supp. at 363. Recent cases which have considered amended Section 2 have reached similar conclusions. *Cf. McMillan* v. *Escambia County, supra,* 748 F.2d at 1044 ("[A] majority vote is required during the primary in an area where the Democratic Party is dominant. This factor weighs in favor of a finding of dilution."); *United States* v. *Dallas County Commission, supra,* 739 F.2d at 1536 ("[T]he requirement of a majority in the primary plus the significance of the Democratic primary combined to 'weigh[] in favor of a finding of dilution. ...'"); *United States* v. *Marengo County Commission,* 731 F.2d at 1570 (A showing of vote dilution is "enhanced" by a majority vote requirement in the primary).

The district court found that "[f]rom the Reconstruction era to the present time, appeals to racial prejudice against black citizens have been effectively used by persons, either candidates or their supporters, as a means of influencing voters in North Carolina political campaigns." 590 F. Supp. at 364.

Moreover, the racial appeals "have tended to be most overt and blatant in those periods when blacks were openly asserting political and civil rights." *Id.* The district court

concluded that the effect of racial appeals "is presently to lessen to some degree the opportunity of black citizens to participate effectively in the political processes and to elect candidates of their choice." *Id.* Racial electoral appeals are a relevant factor. Senate Report at 29. While not present in this case, one must be sensitive to the possibility of racial electoral appeals by minority candidates as well.

And, the district court found that North Carolina had offered no legitimate policy justification for the form of the challenged districts. 590 F. Supp. at 373-74. As the court in *Marengo County* acknowledged, "the tenuousness of the justification for a state policy may indicate that the policy is unfair." 731 F.2d at 1571 (citation omitted).

The foregoing findings contained in the district court's opinion illustrate that in deciding this case the court appropriately considered the factors that Congress found relevant in assessing the "totality of circumstances." Amici also note that the district court analyzed black electoral success at length, as the statute contemplates, as "one circumstance to be considered." However, the Court found that in light of the totality of circumstances this evidence of electoral success was inadequate to establish that blacks had an equal opportunity to participate in the political process, because it was due to the presence of a variety of factors other than those which indicated that blacks had been given an equal opportunity to participate in the political process.

In the 1982 election in House District 36 (Mecklenburg County), for example, black candidate Berry was elected. 590 F. Supp. at 369. In that election, however, there were only 7 white candidates for 8 positions so that 1 black candidate had to be elected. *Id.* Even under these circumstances, only 42 percent of the white voters voted for Berry, the black candidate, in the general election, and Berry was the first black representative elected from House District 36 in this century. 590 F. Supp. at 365, 369. Seven other black candidates ran unsuccessfully for office between 1966 and 1981, and there was another black candidate in the 1982 election who lost. *Id.*

In Senate District 22, which also includes Mecklenburg County, only one black candidate has been elected, and he served from 1975-1980. 590 F. Supp. at 365. In 1980 and 1982, black candidates ran unsuccessfully, leaving an all-white four-member Senate delegation for this District. *Id.* In the 1980 and 1982 elections, not more than 33 percent of white voters voted for the black candidates, 590 F. Supp. at 369, while 78-94 percent of the black voters voted for the black candidates. *Id.* Even in the 1982 general election, where 94 percent of the black voters voted for the black candidate, the black candidate lost. *Id.* This illustrates the extreme difficulty blacks have in electing black candidates where there is racially polarized voting in a large, predominantly white multimember district.

Even in House District 23 (Durham County), which, on the surface, has a relatively successful rate of minority electoral success compared with some of the other challenged districts, factors other than equal access to the political process have contributed to that success. One black has been elected to the House each term since 1973. 590 F. Supp. at 366. In the 1978 general election and the 1980 primary and general elections, however, the black candidate ran uncontested. *Id.* at 370. Furthermore, in the 1982 primary there were only two white candidates for three seats so that one black necessarily had to win. *Id.* Nevertheless, more than half of the white voters failed to vote for the black candidates, even when they had no other choice. *Id.* at 370-71.[33]

In light of these findings, the district court found a denial of voting rights under its "totality of circumstances" analysis, despite some evidence of black electoral success. 590 F. Supp. at 376. The court observed that because of the racially polarized electorate, this electoral success came at a price. "[T]o have a chance of success in electing candidates of their choice in these districts, black voters must rely extensively on single-shot voting, thereby forfeiting by practical necessity their right to vote for a full slate of candidates." *Id.* at 369.

[33] *See* footnote 1 at p. 5, *supra,* for a brief outline of other minority electoral successes at issue here.

Furthermore, the court stressed that even this success was a recent phenomenon, and insofar as the 1982 elections were concerned, was "too 'haphazard' and aberrational in terms of specific candidates, issues, and political trends, and, in any event, still too minimal in numbers, to support any such ultimate inference" of equality of opportunity. *Id.* at 367 n.27.

The Solicitor General and appellants' position would narrow the scope of analysis in a fashion Section 2 does not permit. It would require the Court to ignore the totality of circumstances evidencing a denial of equal political and electoral opportunity in favor of focusing on only the most recent election returns. If those returns evidenced any noticeable success by minority candidates, that would be dispositive.

The Solicitor General and appellants try to justify this approach by arguing that the congressional rejection of a test of proportionality necessitates a finding that limited electoral success is dispositive of a Section 2 claim. The district court, in analyzing the "totality of circumstances," neither ignored electoral success by minorities, nor found this one factor to be conclusive. There is no suggestion in the opinion of the district court that it misinterpreted the intent of Congress and found a denial of voting rights simply because blacks had attained less than proportional success. Rather, the district court expressly acknowledged that the lack of proportional representation is insufficient to establish a Section 2 violation. 590 F. Supp. at 355.

CONCLUSION

For the reasons set forth above, amici respectfully request that this Court affirm the decision below, and recognize the necessity of measuring a violation of Section 2 on the basis of the "totality of circumstances," with particular emphasis on the factors set forth in *Zimmer* and the Senate Report.

Respectfully submitted,

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