Case No. 5212

IN THE SUPREME COURT OF THE UNITED STATES
MARCH TERM, 2006

Thomas Johnson, et al.,

Petitioners.

v.

Governor of the State of Florida, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

Team A

QUESTIONS PRESENTED

1. Whether Florida's felon disenfranchisement provision constitutes impermissible racial discrimination in violation equal protection under the Fourteenth and Fifteenth Amendments to the United States Constitution.

2. Whether Florida's felon disenfranchisement provision violates Section 2 of the Voting Rights Act, where its disproportionate impact upon African-American citizens of Florida, combined with a long history of racial discrimination in the State's criminal justice system, prevents African-American Floridians from participating equally in the political process.

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This appeal is taken from the Court of Appeals' decision upon a rehearing *en banc,* reported at 405 F.3d 1214 (11th Cir. 2004).

The first Court of Appeals decision in this matter is reported at 353 F.3d 1287 (11th Cir. 2003), and the Court of Appeals' subsequent decision vacating the initial decision and granting rehearing *en banc* is at 377 F.3d 1163 (11th Cir. 2004).

The district court opinion in this matter is reported at 214 F.Supp.2d 1333 (S.D.Fla. 2002).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The State of Florida's felon disenfranchisement provision, codified in Article VI, Section 4 of the Constitution of the State of Florida:

> ARTICLE VI – SUFFRAGE AND ELECTIONS
> SECTION 4. Disqualifications.
> (a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.
>
> Fla. Const. art VI, § 4(a).

Provisions of the Constitution of the United States:

> Amendment XIV.
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due of process of law; nor to deny any person within its jurisdiction the equal protection of the laws.
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> Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
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> Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.
>
> Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection

or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV.

Amendment XV.
Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. amend. XV.

Section 2 of the Voting Rights Act of 1965 (as amended in 1982):

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section 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 member 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 participation in the population.

42 U.S.C. § 1973 (2005).

STATEMENT OF THE CASE

Article VI, Sec. 4, of the Florida Constitution ("felon disenfranchisement provision") precludes Florida citizens convicted of a felony from voting, even if they have successfully completed the terms of their sentences. Fla. Const. art. VI, § 4. Professor Christopher Uggen maintains that, since its first post- Civil War adoption in Florida's racially charged 1868 constitutional convention, "[f]elon disenfranchisement is likely to have affected the outcome of political elections, including at least one U.S. Senate election and at least one recent presidential election." App. 2 at 67.

Second-class citizenship

In 1866, Congress passed the Fourteenth Amendment. Id. at 73. President Johnson, who had particularly contentious relations with Congress at the time, recommended that the states reject it. Id. A Florida Committee examining the issue supported rejecting the amendment, arguing "[w]e must be shorn of our representation or give the inferior and unintelligent race the supremacy in State government." Id. at 74. Governor David Walker also opposed the Amendment and the Florida legislature then refused to ratify it. Id. Consistent with its refusal to ratify the Fourteenth Amendment, Florida's government enacted many discriminatory policies, the cumulative effect of which made blacks "second-class citizens." App. 2 at 7.

For example, the legislature created local criminal courts to adjudicate minor offenses. App. 2 at 6. Anderson Peeler, a legislative committee member, recommended the creation of such courts since the abolishment of slavery would result in a failure to punish such offenses, "the commission of which the great majority of this population is addicted." Id. at 6. Because most white judges and juries refused to trust black witnesses or defendants, these courts were incapable of fairly administering justice. Id. at 8. The legislature also sanctioned corporal

punishment—such as sentences of standing in pillories and whipping—in addition to fines and imprisonment. Id. at 6.

This legislation also defined new criminal acts, meant to address "'the altered condition of the colored race.'" App. 2 at 7. It criminalized petty larceny related to "severance from the freehold," heretofore only a civil violation. Id. Such larceny criminalized the stealing of small amounts of loose cotton or like products, a matter previously handled by slave masters. Id. The legislature also passed new laws punishing vagrancy, sanctioning the arrest of seemingly unemployed, able-bodied adults. Id. According to historian Jerrell Shofner, "[t]hese and other acts addressing labor contracts, apprenticeship, marriage, taxation, the judicial system, and crime and punishment, together with the denial of their right to vote or serve on juries, made blacks second class citizens." Id. at 7.

Origins of Florida's Felon Disenfranchisement Provision

In 1845, Florida's General Assembly enacted its first criminal disenfranchisement law. Johnson v. Governor of the State of Florida, 405 F.3d 1214, 1218 (11th Cir. 2005) ("Johnson III"). The state's first Constitution, adopted in 1838, authorized such the passage of such a regulation. Id. At the time, African-Americans did not have the right to vote. Id.

Immediately following the Civil War, the government of Florida refused to extend the right to vote to African-Americans and rejected the Fourteenth Amendment. Johnson v. Governor of State of Florida, 353 F.3d 1287, 1295 (11th Cir. 2003) ("Johnson II"). The legislature also passed laws creating new crimes "of which, according to one prominent legislature, the black freedmen were 'addicted.'" App. 2 at 1-2. In response to such discriminatory policies, Congress passed the Reconstruction Acts in 1867. Id. at 2. Pursuant to these Acts, state citizens elected both African-American and white delegates to draft a new

constitution. Johnson III, 405 F.3d at 1219. The purpose of this new constitution was to extend voting rights to all adult males. Id. at 9. The Acts also required that the state adopt the Fourteenth Amendment. Id. Only upon the fulfillment of these two conditions would Florida be readmitted to the Union. Id.

The constitutional convention soon devolved into a power struggle between "radical Republicans"—who sought to punish ex-Confederates—and more "moderate Republicans"—who supported policies favorable to the ex-slave holders. Id. at 2. Ultimately, two Constitutions were forwarded to Congress because of this turmoil, a moderate version and a radical version. Id. at 17. Congress approved the moderate version, with its more restrictive suffrage provisions, and recommended its adoption. Id. at 18.

The Moderate Republican Constitution

Moderate Republican representatives supported policies limiting the extent of black enfranchisement. Id. at 2. Since the Reconstruction Acts required only that the new Constitution guarantee universal male suffrage, "moderate Republicans made concessions which intentionally discriminated against the newly enfranchised blacks and severely diluted their votes." Id. at 15. For example, since most Florida blacks lived in eight agricultural counties in Central Florida, the moderate Republicans pushed legislative apportionment based on geography, rather than population. Id. at 15. This had the effect of diluting black representation, in favor of less populated and predominately white counties. Id. In addition, the moderate Republicans granted the governor the power to appoint many local officials, rather than endorsing local elections. Id. A moderate Republican who endorsed such policies wrote that drafters succeeded in "prevent[ing] a negro legislature." Id. at 16.

Moderate Republicans also supported a robust criminal disenfranchisement provision. This moderate position stood in marked contrast to the radical Republican version of the constitution, which contained no such provision. Id. at 17. Initially, moderate Republican representatives supported a more limited disenfranchisement provision, but the provision was later expanded. The initial draft excepted persons "convicted of infamous crimes" from the right to vote. Id. at 16. The later, more expansive draft disenfranchised any person "convicted of a felony." Id. The provision further excluded "all persons convicted of bribery, perjury, larceny, or infamous crime" from the right of suffrage. Id. Pursuant to its earlier criminalization of vagrancy and certain acts of larceny, the Florida legislature added these two acts to the list of "infamous crimes." Convictions for misdemeanors were also subject to the disfranchisement provision if they were considered "infamous crimes." I d. at 19. In a later report describing the drafting of the disenfranchisement provision, an ex-Senator noted that many politicians expanded the list of "infamous crimes" in order to reduce the number of black voters. Id. The moderate Republican constitution also extended suffrage rights to ex-Confederates, which the radical Republican constitution did not. Id. at 17.

In 1968, Florida ratified a new constitution. Johnson II, 353 F.3d at 1297. A five-person committee discussed the criminal disenfranchisement provision at one of its many meetings. Id. at 1302. Although the minutes of this meeting note "considerable discussion" of the felon disenfranchisement provision, it is unclear whether the substantive policies underlying the provision were discussed. Id. The committee made certain changes to the text, Id. at 1297, but the substance of the provision remained the same. Id.

Disproportionate Result

There are no conclusive figures on the numbers of disenfranchised black voters in Florida immediately following the adoption of the 1868 constitution, but historian John C. Powell, an expert in black prison camps, estimated that 95 percent of convicts were black in the 1870s and 1880s. App. 2 at 21. Later, in 1906, the warden of Florida's "model prison" similarly estimated that ninety percent of his convicts were black. Id. at 22. The dilution of the African-American vote was reflected in representation. In the period following the adoption of the 1968 constitution, only one black representative was elected to Congress. Id. at 26. Similarly, only one black politician was appointed to high office in Florida's state government. Id. at 26.

Today, African-Americans are still disproportionately represented amongst those convicted of felonies. App. 2 at 116. While blacks are under-represented for serious crimes like murder and sexual offenses, they are over-represented for lesser crimes like drug-related offenses. Id. According to Professor Theodore Chiricos, "[a]mong the sixty-two counties where blacks are *over-represented* at conviction, the disproportionality of conviction ranges from 9% to 451%." Id. (italics in original). Currently, there are approximately 256,000 disenfranchised black voters in Florida. App. 2 at 66. This figure represents 16 percent of the African-American citizens of Florida. Id. But amongst the general citizenship of Florida, only 7% are disenfranchised because of criminal conviction. Id. In addition, African-American disenfranchised voters are "significantly less likely" to be granted restoration of their voting rights. Id. at 67.

In addition to the evidence of racial bias in the criminal justice system, Dr. Richard Engstrom has demonstrated strong evidence of racial polarization in voting between African-American Floridians who are *not* disenfranchised and non-African-American voters. App. 2 at

34. For example, in all statewide and congressional elections from 1990 through 2000 in which there was a choice between or among African-American and non-African-American candidate, "African-American voters in these elections have expressed a clear preference for African-American candidates and this preference was not shared, except in one instance, by the non-African-American voters." Id. Apart from racially polarized voting patterns, Dr. Engstrom also concludes that, according to year 2000 census data, the voter registration rate for African-Americans in Florida was 56.1 percent, compared with 68.7 percent for non-African-Americans. App. 2 at 37.

Voting Rights Act and Congress' Remedial Powers

In the midst of the Civil Rights Movement, Congress passed the Voting Rights Act of 1965 ("VRA") in order to remedy and combat racially discriminatory voting practices. Johnson III, 405 F.3d at 1227. Congress enacted the VRA pursuant to its enforcement powers under the Fourteenth and Fifteenth Amendments. U.S. Const. amend. XIV, § 5; U.S. Const. amend. XV, § 2. In its initial discussions prior to passage of the VRA in 1965, Congress specifically cited legislative districting, literacy tests, and tests for good moral character as some of the kinds of state franchise provisions that ought to be scrutinized under the VRA. Johnson III, 405 F.3d at 1233. However, it never compiled an exhaustive list of provisions that were covered by the VRA, because "even after apparent defeat resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods." S. Rep. No. 89-162, at 10 (1965)

Following the Supreme Court's decision in City of Mobile v. Bolden, 446 U.S. 55 (1980), Congress amended Section 2 of the VRA in 1982. Johnson III, 405 F.3d at 1233. In so doing, it removed the requirement that plaintiffs seeking to establish a VRA claim must prove

discriminatory intent, and instead established a results-based test, 42 U.S.C. § 1973 (2005), in which the ultimate question is "whether the political processes are equally open to minority voters." S. Rep. No. 97-417, at 2 (1982). Section 2 of the VRA applies both to "a denial or [an] abridgement" of one's franchise rights—known as "vote denial" and "vote dilution." Id. Petitioners here contend that Florida's felon disenfranchisement provision is denying them the right to vote as a result of their race. Johnson III, 405 F.3d at 1226.

Procedural History

The petitioners are eight citizens of Florida ("Petitioners") who have been convicted of felonies, yet have completed their terms of imprisonment, probation and parole. Johnson III, 405 F.3d at 1216. Due to their status as ex-felons, all are prohibited from voting under Article VI, Sec. 4, of the Florida Constitution—the felon disenfranchisement provision. Id. In September 2000, Petitioners filed this suit on behalf of disenfranchised Florida citizens who have completed their felony sentences, against members of Florida's Clemency Board, which includes the Governor of Florida and his Cabinet, as well as Florida's county supervisor of elections ("Respondents"). Johnson II , 353 F.3d at 1292. In their complaint, Petitioners alleged that Florida's felon disenfranchisement provision violates the First, Fourteenth, Fifteenth, and Twenty-Fourth Amendments to the U.S. Constitution, as well as Sections 2 and 10 of the Voting Rights Act of 1965. Id.

In 2002, Respondents filed a motion for summary judgment. Johnson v. Bush, 214 F.Supp.2d 1333, 1335-36 (S.D.Fla.2002) ("Johnson I"). The district court granted the motion in July 2002. Id. at 1343-44. On appeal, a divided Eleventh Circuit panel reversed the district court's judgment and remanded with respect to Petitioners' equal protection and VRA claims. Johnson II, 353 F.3d 1287. Subsequently, the Court of Appeals vacated its decision and granted

a rehearing *en banc*. Johnson v. Governor of the State of Florida, 377 F.3d 1163, 1164 (11th Cir. 2004). Upon rehearing *en banc*, the Court of Appeals affirmed the district court's dismissal of the lawsuit, holding that Florida's 1968 amended felon disenfranchisement provision removed any equal protection taint from the original 1868 version, and that Section 2 of the VRA does not apply to felon disenfranchisement claims. Johnson III, 405 F.3d at 1235.

SUMMARY OF THE ARGUMENT

The Court of Appeals erred in dismissing Petitioners' lawsuit alleging that Florida's felon disenfranchisement provision violates equal protection under the Fourteenth Amendment. Petitioners have offered extensive historical evidence probative of the legislators' discriminatory intent in enacting the statute, as well as its disproportionate impact, both historically and to the present day, upon African-Americans. Further, Respondents have not proven that the statute was enacted for legitimate reasons. At the very least, Petitioners have overcome their summary judgment burden and have demonstrated a genuine issue of material fact as to the legislators' intent.

The Court of Appeals also erred in dismissing Petitioners' claim that Florida's felon disenfranchisement provision violates Section 2 of the Voting Rights Act ("VRA"), in two ways. As a threshold matter, the court erred in declining to apply Section 2 to the felon disenfranchisement provision by ignoring the plain language and clear statutory intent and instead applying the canon of constitutional avoidance. In addition, the court erred in dismissing Petitioners' Section 2 claim where Petitioners have proven that Florida's felon disenfranchisement statute produces a clear disparate impact upon African-Americans and that the disparate impact is causally connected to racial discrimination in Florida's criminal justice system.

ARGUMENT

I. FLORIDA'S FELON DISENFRANCHISEMENT PROVISION VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Summary judgment must only be granted when "no genuine issue of material fact" remains to be determined. Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, courts must view all evidence in a light favorable to the non-moving party, resolving all disputes in its favor. Brosseau v. Haugen, 543 U.S. 194, 195 (2004).

A. THE HISTORY AND IMPACT OF THE FELON DISENFRANCHISEMENT PROVISION REFLECT THE DRAFTERS' INVIDIOUS DISCRIMINATORY INTENT

The primary purpose of the Equal Protection clause of the Fourteenth Amendment is to prevent government bodies from practicing racial discrimination. Washington v. Davis, 426 U.S. 229, 239 (1976). Even a facially neutral law may violate the Fourteenth Amendment if it invidiously discriminates on the basis of race. Id. at 241. To prove that a facially neutral law violates the Fourteenth Amendment, a plaintiff must show racially discriminatory intent motivated the law's passage. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). But discriminatory intent need not be the sole reason supporting a law's passage. Id. Rather, a plaintiff must merely show that a discriminatory purpose was a "motivating" factor. Id. at 265-66.

To determine whether a discriminatory purpose was such a motivating factor requires a sensitive inquiry into all available circumstantial and direct evidence of intent. Id. at 266. An examination of a law's impact on a particular race is "an important starting point" in such an examination of official intent. Id. While a law is not per se unconstitutional because it disproportionate impacts one race over another, Washington, 426 U.S. at 242, such evidence is nonetheless probative of intent. See Arlington, 429 U.S. at 266.

Florida's felon disenfranchisement provision has a disproportionately negative impact on African-Americans. Currently, 256,000 African-Americans in Florida are ineligible to vote due to the felon disenfranchisement provision, representing 16% of the African-American population of the state. App. 2 at 66. In contrast, the provision prevents only 5.6% of the non-African-American population of Florida from voting. Id. at 86. When limiting this inquiry only to ex-felons, the numbers also show a disparate impact. While only 4.4% of the non-African-American population is ineligible to vote as ex-felons, this number jumps to 10.5% when examining the African-American voting-age population. Id. at 87.

A law's historical background is important to an inquiry into official intent. See Arlington at 267. Courts may examine "contemporary statements by members of the decision-making body, minutes of its meetings, or reports." Id. at 268. The Court has also looked to the testimony and opinions of historians in clarifying legislative intent. Hunter v. Underwood, 471 U.S. 222, 229 (1985).

Florida's post-Civil War history and the events surrounding the 1868 constitutional convention are probative evidence of the racist purpose of the felon disenfranchisement provision. The history of the drafting of this provision betrays such intent. The original 1868 constitution, drafted by radical Republicans favoring African-American enfranchisement, contained no criminal disenfranchisement provision. App. 2 at 17. The provision was added by moderate Republicans, who favored ex-Confederates and their policies. Id. at 16. The drafters expanded the initial version of the provision to disenfranchise those convicted of an "infamous crime," which the legislature defined to include new, indeterminate crimes of vagrancy and petty larceny. Id. Supporters of this expansion openly boasted that these offenses were added to the

list of "infamous crimes" specifically to reduce the number of African-American voters. Id. at 19.

Further, a slightly broader examination of Florida's post-Civil War history is probative evidence of the provision's discriminatory purpose. In the period immediately following the war, state officials supported numerous policies directed towards making African-Americans second-class citizens. App. 2 at 7. A committee supporting Florida's rejection of the Fourteenth Amendment openly referred to African-Americans as "the inferior and unintelligent race." Id. at 9. Florida continued to refuse to grant African-Americans the right to vote or to serve on juries. App. 2 at 7. Further, the Florida legislature criminalized certain minor offenses of petty larceny and vagrancy in order to fill the vacuum left by the abolishment of the slaveholders' absolute power. Id. Consequently, a supporter of the provision later bragged, "[h]undreds of men in the State have been convicted of offenses for which a fine of fifty cents or a dollar or confinement of three days or a week was imposed, and in consequence of which they are disenfranchised for life." App. 2 at 19.

The history of the 1868 constitutional convention itself also reflects a discriminatory intent. The moderate Republican party, which drafted the constitution which was ultimately adopted, supported policies favorable to ex-Confederates and discriminatory towards newly enfranchised African-American citizens. App. 2 at 2. The drafters of the Constitution developed a system of legislative apportionment based on geography, rather than population, in order to dilute the African-American vote. See App. 2 at 15. Further, the constitution delegated the duty of appointing most local officials to the governor, rather than voters, to limit African-American representation in local government. Id. A politician responsible for drafting this provision confidently predicted that these policies would "prevent a negro legislature." Id. at 16.

Once a plaintiff makes a threshold showing of discriminatory intent, the plaintiff will prevail unless the defendant shows by a preponderance of the evidence that the same official decision would have been made for legitimate reasons. Hunter, 471 U.S. at 226. Here, the defendants do not allege facts that wholly legitimate the final, more expansive criminal disenfranchisement provision in the moderate Republican constitution. Since Rule 56 requires that such facts be viewed in a light most favorable to the Plaintiffs, the Court should find such a contention "in dispute."

In Hunter v. Underwood, the court left open the question of whether intervening events can legitimate a law passed as a result of invidious discriminatory intent. 471 U.S. at 232-33. In Hunter, the Court upheld the invalidation of a criminal disenfranchisement provision which prevented those convicted of crimes of "moral turpitude" from voting. Id. at 223. In that case the Court rejected the defendant's argument that events occurring over the 80 years since the law's passage legitimated the provision. Id. at 232-33.

Even if the Court chooses to address this open question, the Court should reject Respondents' arguments since this issue is, at best, still in dispute. Respondents assert that the 1968 constitutional convention effectively purged Florida's criminal disenfranchisement provision of any taint of discriminatory intent. But substantively the provision has not changed since its initial passage in 1868. There is evidence that the Subcommittee on Suffrage and Elections addressed the provision, but the Committee's meeting minutes do not reflect any substantive discussion of the provision. The records are, at best, inconclusive. Thus, viewing this evidence in a light most favorable to the plaintiffs, the Court should find that Respondents did not meet their burden of proving a legitimate basis for the provision.

II. FLORIDA'S FELON DISENFRANCHISEMENT PROVISION AND THE HISTORICAL LEGACY OF RACIAL DISCRIMINATION IN ITS CRIMINAL JUSTICE SYSTEM HAVE PRODUCED DISCRIMINATORY EFFECTS INJURIOUS TO AFRICAN-AMERICAN FLORIDIANS IN VIOLATION OF THE INTENT AND PLAIN LANGUAGE OF SECTION 2 OF THE VOTING RIGHTS ACT.

A. SECTION 2 OF THE VRA EXEMPLIFIES A VALID USE OF CONGRESS'S REMEDIAL ENFORCEMENT POWERS AND IT APPLIES BY ITS PLAIN LANGUAGE TO FLORIDA'S FELON DISENFRANCHISEMENT PROVISION.

As this Court is aware, there is a split among the circuits—as well as disagreement between the individual judges on each circuit—as to whether Section 2 of the VRA applies to felon disenfranchisement provisions. Compare Farrakhan v. Washington, 338 F.3d 1009, 1020 (9th Cir. 2003) ("Farrakhan III") (reversing grant of summary judgment to defendants after applying Section 2 to Washington felon disenfranchisement provision), reh'g and reh'g en banc denied, 359 F.3d 1116 (9th Cir. 2004) (including lengthy dissent on denial of hearing joined by seven judges), cert. denied, Locke v. Farrakhan, __ U.S. ___, 125 S.Ct. 477 (2004); Howard v. Gilmore, 205 F.3d 1333, 2000 WL 203984 (4th Cir. Feb. 23, 2000) (unpublished) (affirming dismissal of challenge to Virginia's felon disenfranchisement provision for failure to make out Section 2 claim); Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986) (affirming judgment dismissing lawsuit following application of Section 2 to Tennessee felon disenfranchisement provision), with Johnson III, 405 F.3d at 1234-1227-51; Muntaqim v. Coombe, 366 F.3d 102, 124 (2d Cir. 2004) (declining to apply Section 2 to New York's felon disenfranchisement provision in light of uncertainty over Supreme Court's recent Fourteenth and Fifteenth Amendment jurisprudence), cert. denied, __U.S.___, 125 S.Ct. 480 (2004), and reh'g en banc granted, 396 F.3d 95 (2d Cir. 2004); Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996) (*en banc*)

(affirming dismissal of complaint in 5-5 decision). Thus, it is particularly important that this Court speak definitively and resolve the split.

In its opinion below, the Court of Appeals maintained that applying Section 2 of the VRA to Florida's disenfranchisement provision would create a serious constitutional conflict between the text of the Fourteenth Amendment—which implicitly permits states to enact felon disenfranchisement laws—and the VRA. Johnson III, 405 F.3d at 1229-30. Consequently, to avoid this conflict between state and federal powers, the majority construed Section 2 as inapplicable to felon disenfranchisement laws. Id. at 1232. The Court of Appeals' reasoning is faulty and unnecessary—not only is there no conflict between the VRA and the Fourteenth Amendment, but the clear command of the VRA in general and Section 2 in particular precludes the need for that type of extensive statutory interpretation. Id. at 1241, 1242 (Wilson, J., concurring in part and dissenting in part). See also City of Rome v. United States, 446 U.S. 156, 172 (1980). Further, Section 2 is an appropriate use of Congress' enforcement powers in order to combat invidious racial discrimination. See Tennessee v. Lane, 541 U.S. 509, 524-25 (2004); Rome, 446 U.S. at 174-75.

1. The plain language of Section 2 prohibits any inequality in the electoral process precipitated by racial discrimination.

Where a statute is unambiguous, its plain textual meaning should govern. See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) ("[w]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (internal citations omitted); Rome, 446 U.S. at 172-73. In the face of ambiguity, courts employ other canons of interpretation but, "[i]n the absence of a conflict between reasonably plain meaning and

legislative history, the words of a statute must prevail." Aaron v. SEC, 446 U.S. 680, 700 (1980). See also Rome, 446 U.S. at 172-73.

For example, in Rome, the city urged this Court to employ the canon of constitutional avoidance and, in so doing, abandon established Supreme Court precedent interpreting Section 5 of the VRA. 446 U.S. at 172. While Section 5 had been interpreted since its inception as requiring a voting practice in a targeted area to be precleared unless it lacked *both* discriminatory purpose and intent, the city advanced an interpretation of the statute that would waive the preclearance requirement if there was "only" a discriminatory effect. Id. Justice Marshall, in writing for the Court, noted that "[b]ecause the statutory meaning and congressional intent are plain, however, we are required to reject the appellants' suggestion that we engage in a saving construction and avoid the constitutional issues they raise." Id. at 173.

Similarly to Rome, by seeking to exclude felon disenfranchisement provisions from the scope of Section 2, Respondents are urging this Court to abandon both the plain language and the clear intent of the VRA. One need not plum the depths of the Congressional record to determine that Congress enacted the Voting Rights Act in order to eliminate discriminatory voting practices. See, e.g., Rome, 446 U.S. at 174; South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966); Johnson III, 405 F.3d at 1227. The general prohibition of Section 2 commands:

> *No voting qualification or prerequisite* to voting or standard, practice, or procedure shall be imposed or applied by any State …in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color…

42 U.S.C. § 1973(a) (2005) (emphasis added). Further, a plaintiff may establish a violation of Section 2 if he shows

> based on the totality of the circumstances…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 member have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b) (2005).

Section 2 is not ambiguous. Johnson III, 405 F.3d at 1240, 1248 (dissenting opinions of Wilson, J. and Barkett, J.); Baker, 85 F.3d at 940 (Feinberg, J., dissenting). In order to vote in Florida, one must meet the qualification of being free from a felony conviction, either by absence of a conviction or reinstitution of one's civil rights. Johnson III at 1248 (Barkett, J., dissenting). In evaluating whether, when such a qualification is put into place, it is done so in a way that compromises a citizen's voting rights on the basis of race, a court must consider the totality of the circumstances. 42 U.S.C. § 1973. See also Chisom v. Roemer, 501 U.S. 380, 384 (1991). As Judge Wilson noted in his opinion (dissenting with respect to the court's holding on the VRA claim) below, "[a]s a purely textual matter, a voting qualification based on felony status that interacts with social and historical conditions to produce a racially discriminatory effect, such as race bias in the criminal justice system, falls within the scope of the VRA." Johnson III, 405 F.3d at 1240.

While it is true that the Congressional record from the original enactment of the VRA in 1965 reflects Congress' understanding that felon disenfranchisement was not a "test or device" within the meaning of the VRA, S. Rep. No. 89-162 (1965), the 1982 record contains no such exclusion. S. Rep. No. 97-417 (1982). Instead, the 1982 amendment to Section 2—which "relieve[d] plaintiffs of the burden of discriminatory intent," Farrakhan III, 338 F.3d at 1014, — is widely understood to have expanded the VRA in response to states' increasingly cunning and covert attempts to disenfranchise racial minorities. Id. See also Chisom, 501 U.S. at 392 (recognizing Congress's intent to expand the coverage of Section 2 by the 1982 amendment); discussion, Section 3, infra. In sum, a plain language reading of the Voting Rights Act is

consistent with the history of the VRA, and the enactment of both Section 2 in 1982 and the original statute in 1965. To look beyond the plain language of Section 2 and thereby exclude from its reach Florida's disenfranchisement provision—a voting qualification that is historically connected to race and has a disproportionate impact upon racial minorities—is to create a conflict where none should exist.

2. Evaluating Florida's felon disenfranchisement provision in light of Section 2 of the VRA presents no conflict with the Fourteenth and Fifteenth Amendments.

In declining to apply Section 2 to Florida's felon disenfranchisement provision, the court below was focused primarily upon the plain statement (or "clear statement") rule and the possibility of a conflict between Section 2 of the VRA and the Fourteenth Amendment and Fifteenth Amendments. Johnson III, 405 F.3d at 1229. In essence, the plain statement rule requires that the court shall not construe a statute to significantly alter the balance of power between the states and the federal government unless Congress has provided a "clear and manifest" statement to that effect. Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991). See also Muntaqim, 366 F.3d at 107-12 (analyzing Second Circuit's split decision in Baker v. Pataki as disagreement over application of clear statement rule). "This plain statement rule is nothing more than an acknowledgment that the States retain substantial power under our constitutional scheme, powers with which Congress does not readily interfere." Gregory, 501 U.S. at 461. At issue in the present case is Florida's power to enact felon disenfranchisement laws, which this Court has held are authorized by Section 2 of the Fourteenth Amendment.[1] Johnson III, 405

[1] "But when the right to vote at any election… is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." U.S. Const. amend. XIV, § 2 (emphasis added).

F.3d at. See also Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (holding felon disenfranchisement laws have an "affirmative sanction" under Section 2 of the Fourteenth Amendment).

For a number of reasons, the clear statement rule does not apply to Section 2 of the VRA. As a preliminary matter, the plain textual meaning of the statute and its well-established intent must control. See Gregory, 501 U.S. at 470 (applying clear statement rule only *after* finding ambiguity); discussion, Section 1, supra. Also significantly, this Court has already declined to apply the clear statement rule to Section 2 of the VRA in Chisom, which was decided on the same day as Gregory. Chisom, 501 U.S. at 412 (Scalia, J., dissenting) (noting Court "tacitly rejected" plain statement rule in pre-amendment Section 2 case of Rome, and did not even consider applying it in Chisom).

In addition, to the extent that this Court seeks to prevent federal encroachment into state sovereignty, "[the Fourteenth and Fifteenth] Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty." Gregory, 501 U.S. at 468 (quoting Rome, 446 U.S. at 179). The very text of Section 2 of the Fourteenth Amendment ("rebellion or other crime") highlights the original purpose for which the felon disenfranchisement provisions were enacted—"to punish states who were slow to grant the franchise [to former slaves] by reducing their representation in Congress." Johnson III, 405 F.3d at 1240 (Wilson, J., dissenting with respect to the VRA claim).

Finally, regardless of whether Section 2 of the Fourteenth Amendment endorses or permits felon disenfranchisement statutes, this Court's jurisprudence is clear that states do not have an affirmative grant to disenfranchise felons at will. Johnson III at 1248 (Barkett, J., dissenting). Instead, it must be accomplished in a racially neutral way. See Hunter, 471 U.S. at

233; Richardson, 418 U.S. at 56 (upholding California felon disenfranchisement statutes in face of *non- race-based* equal protection challenge). In affirming the Eleventh Circuit's decision to strike down Alabama's felon disenfranchisement provision relating to crimes of "moral turpitude," this Court announced that "we are confident that Section 2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the *enactment* and *operation* of [Alabama's felon disenfranchisement statute.]" Hunter, 471 U.S. at 233 (emphasis added).

3. Section 2 as applied to felon disenfranchisement provisions is a valid use of Congress' enforcement powers and a congruent and proportional measure taken by Congress to combat invidious racial discrimination in the electoral process.

In enacting laws pursuant to its enforcement powers, Congress's discretion and authority are greatest when seeking to remedy discrimination against a suspect class, or to enforce a fundamental right. See Lane, 541 U.S. at 528-29 (upholding Congress' authority to enact Title II of Americans with Disabilities Act, dealing with access to courts); Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721, 735-36 (2003) (affirming right to sue by members of gender-based class for state's violation of Family and Medical Leave Act). While Lane and Hibbs each concern only a fundamental right *or* a protected class (access to the courts and gender, respectively), Petitioners here are *both* members of a protected class defined by race and consequently subject to the highest scrutiny, and they are seeking to enforce the fundamental right to vote. Johnson III, 405 F.3d at 1242-42 (Wilson, J., dissenting). Consequently, in the present case, Congress has the greatest remedial power permitted by the Fourteenth and Fifteenth Amendments. Id.

Despite its broad enforcement power, Congress is responsible for ensuring its remedial enforcement legislation is appropriate. See, e.g., Bd. of Trustees of Univ. of Ala. v. Garrett, 531

U.S. 356, 368 (2001); City of Boerne v. Flores, 521 U.S. 507, 536 (1997). This includes the duty to create a legislative record detailing a "history and pattern of unconstitutional… discrimination" before enacting remedial legislation. Garrett, 531 U.S. at 368 (finding an insufficient record of employment discrimination against the disabled as a result of state action).

In addition, the steps taken by the remedial legislation must be congruent and proportional to the injury sought to be remedied. Boerne, 521 U.S. at 536. In overturning the Religious Freedom Restoration Act ("RFRA") this Court found that Congress had exceeded its enforcement authority under the Fourteenth Amendment in enacting the RFRA. Id. In comparing the RFRA to the VRA, the Court noted that the RFRA gave Congress too much regulatory power without sufficient proof of pervasive religious discrimination and bigotry, whereas the VRA is supported by an extensive record evidencing the serious problem of voting discrimination since the Reconstruction. Id. at 530-34.

In light of the long history of invidious racial discrimination detailed by Congress in enacting the VRA, Section 2 is a congruent and proportional response to certain states' repeated attempts to stifle minority participation in the electoral process. See Johnson III, 405 F.3d at 1243 (Wilson, J., dissenting with respect to the VRA claim). While Congress did not specifically cite felon disenfranchisement as a particular target of the VRA or its Section 2 amendment, it could never compile an exhaustive list if the VRA was to effectively respond "to the increasing sophistication with which the states were denying racial minorities the right to vote." Farrakhan v. Locke, 987 F.Supp. 1304, 1308 (E.D.Wa. 1997) ("Farrakhan I"). "Congress found specifically that it was impossible to predict the variety of means that would be used to infringe on the right to vote." Johnson III, 405 F.3d at 1243 (Wilson, J., dissenting with respect to the VRA claim). See also S. Rep. No. 89-162, at 10 (1965) ("[E]ven after apparent defeat

resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods.") Indeed, many of the measures targeted by the VRA are, like Florida's felon disenfranchisement provision, facially valid laws that have discriminatory effects and originate from a long history of racial injustice. See Thornburg v. Gingles, 478 U.S. 30, 44 (1986).

B. IN CONSIDERATION OF THE TOTALITY OF THE CIRCUMSTANCES, FLORIDA'S FELON DISENFRANCHISEMENT PROVISION COMBINES WITH SOCIAL AND HISTORICAL CONDITIONS TO PRODUCE RACIALLY DISCRIMINATORY EFFECTS IN VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT.

By its very terms, Section 2 focuses on eradicating discriminatory *results*, not simply discriminatory *intent*. 42 U.S.C. § 1973(a) (2005). See also Chisom, 501 U.S. at 394. In order establish a Section 2 violation here, Petitioners must show, based on the totality of the circumstances, that the political process in Florida is not equally open to African-American Floridians as a result of Florida's felon disenfranchisement provision. 42 U.S.C. § 1973(b) (2005). In enacting the Section 2, Congress provided a list of factors ("Zimmer factors") extrapolated from White v. Regester, 412 U.S. 755 (1973) and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), which are typically relevant in analyzing an alleged Section 2 violation:

> (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of members of the minority group to register, to vote, or to otherwise to participate in the democratic process;
>
> (2) the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other 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 or political subdivision 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;
>
> (7) the extent to which members of the minority group have been elected to public office in the jurisdiction;
>
> (8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;
>
> (9) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. Rep. No. 97-147 at 28-29 (1982). Congress's list is necessarily non-comprehensive and, rather than weighing the factors in a rigid formula, a court must consider whether "a certain electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Thornburg, 478 U.S. at 47. See also Farrakhan III, 338 F.3d at 1015-16.

Although Petitioners currently appeal from a grant of summary judgment in favor of Respondents, an examination of the record even at this stage leads to the conclusion that Florida's felon disenfranchisement provision violates the VRA.

1. Florida's felon disenfranchisement provision has a glaringly disparate impact upon African-American voters.

The record provides persuasive evidence showing the disparate impact of Florida's felon disenfranchisement provision on African-American Floridians. See generally App. 2 at 66-113. Sixteen percent of African-Americans Floridians of voting age are disenfranchised as felons or ex-felons, compared with only five point six percent of the non-African-American population. App. 2 at 66, 86. African-Americans are underrepresented amongst ex-felon applicants seeking the restoration of civil rights and are significantly less likely to be successful at having their

rights reinstated when they do apply, Id., although statistically ex-felons whose civil rights are reinstated are more likely to get married, own a home, and have no history of mental illness. Id. These findings clearly demonstrate not only the disproportionate impact of Florida's felon disenfranchisement statute, but also its devastating long-term effects on those caught in its wake. See also discussion at Point I, A supra.

2. The disparate impact of the felon disenfranchisement provision upon Florida's African-American voters is caused by the history of racial discrimination in Florida's criminal justice system.

While a disparate impact is an important factor in Section 2's totality of the circumstances inquiry, plaintiffs must also establish a causal connection between the disparate impact and identifiable racial discrimination in order to successfully challenge a law under Section 2 of the VRA. See, e.g., Johnson III, 405 F.3d at 1238 (Tjoflat, J., concurring); Farrakhan III, 338 F.3d at 1018-19. For example, a causal connection may be shown where the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances. See Thornburg, 478 U.S. at 47; Farrakhan III, 338 F.3d at 1019 ("[T]he 1982 Amendments and subsequent case law make clear that factors outside the election system can contribute to a particular voting practice's disparate impact when those factors involve race discrimination.") In enacting the VRA, the Senate Committee noted that "voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination." S. Rep. 97-417, at 40 (1982) (footnote omitted). And further, the purpose of the VRA was "not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination." Id. at 5.

Here, Petitioners can demonstrate a causal connection between racial discrimination in the criminal justice system combined with socio-economic and historical factors and the disparate impact that Florida's felon disenfranchisement provision has upon African-Americans in order to establish that the statute violates Section 2 of the VRA. See Thornburg, 478 U.S. at 87; Farrakhan III, 338 F.3d at 1019. Because felon disenfranchisement comes as a result of interaction with the criminal justice system, the history and circumstances of invidious racial discrimination in Florida's criminal justice system are essential to Petitioners' Section 2 claim. In his research methods, Petitioners' expert Professor Theodore Chiricos differentiates statistically between disproportionate impacts that can be accounted for by more frequent arrests and greater participation in certain crimes, and "unexplained" disproportionality. App. 2 at 121-27. "Unexplained" disproportionality excludes those factors, as well as statistical racial disparities in socio-economic conditions, prior record, and residence in an area with a high overall conviction rate. Id. at 116. For example, African-Americans in Florida are disproportionately *over represented* amongst those convicted of all felonies, except for murder and sex offenses, and yet are *under represented* in those latter two categories of conviction. App. 2 at 116. Further, across Florida there is unexplained racial disproportionality where African-Americans are over represented at conviction in a degree of disproportionality ranging from 9% to 451%, with a median level of unexplained disproportionality at 51% and exceeding 100% in twelve counties. Id. Professor Chiricos "unexplained" racial disproportionality hints at other systemic disparities and biases that may be more difficult to quantify.

In addition to racial discrimination in the criminal justice system, Petitioners have demonstrated racially polarized electoral practices, App. at 34-36, one of the Zimmer factors used to evaluate Section 2 claims. See Farrakhan III, 338 F.3d at 1015-16. In fifteen statewide

and Congressional elections in Florida between 1990 and 2000 which included races between and among African-American candidates and non-African-American candidates, "African-American voters in these elections have expressed a clear preference for African-American candidates and their preference was not shared, except in one instance, by the non-African-American voters." See also Thornburg, 478 U.S. at 53. This racial polarization is reflected in and interacts with other factors that affect African-American participation in Florida's electoral process, including socio-economic conditions (App. 2 at 37-38) and voter registration practices (App. 2 at 37). For example, African-Americans of voting age in Florida are registered to vote 56.1 percent of the time, compared with 68.7 percent for their non-African-American counterparts. Id. at 37. Additionally, racial disparities in socioeconomic conditions mirror voter participation and polarization in a number of ways, Id., including 1990 census statistics that 43.6 percent of African-Americans aged 25 and over had not graduated from high school or the equivalent, while only 23.4 percent of non-African-Americans were in the same situation. Id.

Finally, Petitioners demonstrate deeply ingratiated racism and racial discrimination in Florida society in an historical context. App. 2 at 1-32. From the first efforts to limit the rights of newly-freed African-Americans prior to the 1868 enactment of Florida's constitution (Id. at 4-9), through the establishment of the Jim Crow system around the turn of the twentieth century (Id. at 30), Professor Shofner's report details pervasive racial discrimination in the State of Florida's early political institutions. See also discussion Point I, Section A, supra.

The well-documented disparate impact of the felon disenfranchisement statute upon African-Americans voting in Florida, App. 2 at 33-65, combined with the legacy of racism in Florida's political and criminal justice systems (Id. at 1-32, 114-170), combine to form a clear violation of the VRA.

CONCLUSION

The judgment of the Court of Appeals should be reversed and judgment ordered in favor of Petitioners or, in the alternative, the case remanded for a trial on the merits.

Respectfully submitted,

Petitioner (Team A)