

No. 06-35669

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

Muhammad Shabazz Farrakhan, aka Ernest S. Walker; Al-Kareem Shadeed;
Marcus X. Price; Ramon Barrientes; Timothy Schaaf; Clifton Briceno,

Plaintiffs-Appellants,

v.

Christine O. Gregoire; Sam Reed; Harold W. Clarke; State of Washington,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Washington at Spokane

No. CV 96-0076 (RHW)

Honorable Robert H. Whaley, District Judge

**BRIEF OF AMICUS CURIAE BRENNAN CENTER
FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* Brennan Center for Justice at New York University School of Law states that it is a nonprofit organization, that it has no parent corporation, and that it has not issued shares of stock.

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IDENTITY AND INTEREST OF AMICUS

The Brennan Center for Justice at New York University School of Law respectfully submits this brief *amicus curiae* in support of Plaintiffs-Appellants. This brief addresses the scope of Section 2 of the Voting Rights Act (“VRA”) and its applicability to discrimination that has been shown to result from Washington State’s felon disenfranchisement law. This brief does not address in detail issues as to the Fourteenth and Fifteenth Amendments, which are addressed in briefs filed by other *amici* in this case. The Plaintiffs-Appellants have consented to the filing of this brief, and Defendants-Appellees do not object to its filing.

The Brennan Center is a not-for-profit, nonpartisan public policy and law institute that focuses on issues of democracy and justice. Through the activities of its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality by working to eliminate barriers to full and equal political participation and to ensure that public policy and institutions reflect the diverse voices and interests that make for a rich and energetic democracy. The Brennan Center’s Right to Vote project focuses exclusively on restoring voting rights, and engages in litigation, legislative and administrative advocacy, and public education nationwide. The Brennan Center’s efforts in the promotion and protection of voting rights, particularly on behalf of disadvantaged and minority communities, are extensive, including authoring

numerous reports; launching legislative initiatives; and participating as counsel or *amicus* in a number of federal and state cases involving voting and elections issues.

The Brennan Center has an interest in assuring that the VRA is enforced to fulfill its purpose to eliminate racial discrimination in voting. We urge this Court to affirm its two prior decisions and hold that Washington's felon disenfranchisement law violates the VRA because it results in a denial of the right to vote on account of race.

SUMMARY OF THE ARGUMENT

Section 2 of the VRA unequivocally prohibits *any* voting qualifications, standards, practices and procedures applied by any State “which result[] 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) (emphasis added) (hereinafter “Section 2”). The statute's language is clear. And it contains no exceptions. Interpreting that language, a unanimous panel of this Court has already concluded that Washington's felon disenfranchisement law is a “voting qualification” subject to Section 2. *Farrakhan v. State of Washington*, 338 F.3d 1009 (9th Cir. 2003), *cert. denied*, 543 U.S. 984 (2004) (“*Farrakhan I*”). That decision should be affirmed.

A touchstone of statutory interpretation is that the plain meaning of the statute controls when it is clear on its face. No party or opinion from any other Circuit to address this issue has identified any ambiguity in Section 2's broad

language. Washington State's felon disenfranchisement law is a voting qualification, and based on the uncontroverted record in this case, this Court found that it results in the denial of the right to vote on account of race. A host of cases from this and other Circuits and from the Supreme Court make clear that the analysis should properly end there.

Instead, Defendants-Appellees would have the Court read an exception for felon disenfranchisement statutes into Section 2 that has no basis in the statutory language or the legislative history, and that is inconsistent with the well-established broad and remedial purpose of the VRA. If Congress had wanted to include an exception for felon disenfranchisement laws, it could have done so by writing the exception into the statute. It did not. And there is no basis upon which the Court should now, decades later, seek to do so. To the contrary, this Court and the Supreme Court have repeatedly recognized that the objective of the VRA is to "rid[] the country of racial discrimination in voting." *Farrakhan I*, 338 F.3d at 1014 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966)), and that it is a statute of "the broadest possible scope," *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969).

In spite of this, divided courts of the First, Second and Eleventh Circuits have concluded that the VRA does not apply to state felony disenfranchisement laws on the basis of: (1) congressional intent, (2) legislative history, or (3) the clear

statement rule.¹ For the reasons set forth below – and as previously determined by this Court – such considerations are neither proper nor persuasive because the statutory text of Section 2 is clear and unambiguous.

On this appeal, the Court need not address the *per se* validity of felon disenfranchisement laws. Nor does the Court need to consider the intent of the Washington legislature or question the validity of any particular felony conviction. Instead, this appeal presents a simple, narrow question of statutory interpretation, whether – under the totality of the circumstances – Washington’s law results in voting discrimination in violation of VRA Section 2. On the uncontroverted record in this case, it does.

THIS COURT’S PRIOR DECISIONS IN THIS CASE

A unanimous three-judge panel of this Court concluded that Plaintiffs-Appellants’ claim of vote denial under Washington’s felon disenfranchisement law is cognizable under Section 2 of the VRA. *Farrakhan I*, 338 F.3d at 1016. Looking to the plain language of Section 2, the Court recognized that “[f]elon disenfranchisement is a voting qualification, and Section 2 is clear that *any* voting

¹The Fourth and Sixth Circuits affirmed decisions dismissing claims that Virginia and Tennessee’s felon disenfranchisement laws violated Section 2 because plaintiffs failed to demonstrate discrimination on account of race. These considerations do not apply here because of the uncontroverted record on appeal. Notably, those Circuits did not question the VRA’s applicability to felon disenfranchisement laws. *See Howard v. Gilmore*, No. 99-2285, 2000 WL 203984 (4th Cir. Feb. 23, 2000); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986).

qualification that denies citizens the right to vote in a discriminatory manner violates the VRA.” *Id.* (emphasis in original).

The Court explained that this conclusion holds regardless of whether the statute at issue is facially neutral, emphasizing that “Congress specifically amended the VRA to ensure that, ‘in the context of all the circumstances in the jurisdiction in question,’ any disparate racial impact of facially neutral voting requirements did not result from racial discrimination.” *Id.* The Court also specifically addressed and rejected the notion that the Fourteenth Amendment somehow exempts felon disenfranchisement statutes. *Id.*

The Court also rejected the argument that Section 2 contains an implied limitation under which Plaintiffs-Appellants would need to establish that Washington’s law “was either ‘motivated by racial animus, or that its operation *by itself* has a discriminatory effect.’” *Id.* Instead, tracking the language of the VRA, the panel held that the district court must consider the totality of the circumstances in which the disenfranchisement law operates, and determine whether Washington’s law “interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” *Id.* at 1017 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)).

On a second appeal, this Court found that the disproportionate impact of Washington’s law on racial minorities could *not* be explained by factors other than race. *Farrakhan v. Gregoire*, 590 F.3d 989, 1012 (9th Cir.), *reh’g granted*, 603 F.3d 1072 (9th Cir. 2010) (“*Farrakhan II*”). Based on that conclusion, the Court held that “Plaintiffs have demonstrated that the discriminatory impact of Washington’s felon disenfranchisement law is attributable to racial discrimination in Washington’s criminal justice system; thus, that Washington’s felon disenfranchisement law violates §2 of the VRA.” *Id.* at 1016.

ARGUMENT

I. THE VRA APPLIES TO WASHINGTON’S FELON DISENFRANCHISEMENT LAW

A. Section 2 of the VRA Should be Read According to its Plain Meaning

Section 2 of the VRA is clear on its face. It provides, in relevant part:

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.

42 U.S.C. § 1973(a) (emphasis added). There is nothing ambiguous about this language. It contains no exceptions, and nothing about it even hints that Congress intended courts to exempt an entire category of statutes from its reach.

Since the plain language of the VRA is clear, this Court’s analysis of its meaning must begin and end there. As the Supreme Court has explained, “[w]hen

the words of a statute are unambiguous, this first canon is also the last: ‘judicial inquiry is complete.’” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

1. *Washington’s Felon Disenfranchisement Law Is a “Voting Qualification” That Denies “Citizens of the United States” the Right to Vote*

As this Court explained in *Farrakhan I*, Washington’s felon disenfranchisement law, W.A. Const. art. VI, § 3, is indisputably a voting qualification.² 338 F.3d at 1016. It affects one’s qualification to vote because “[i]t denies those convicted of felonies the opportunity to vote.” *Hayden v. Pataki*, 449 F.3d 305, 343 (2d Cir. 2006) (Parker, J., dissenting).³

It is just as clear that Section 2 protects *any* American citizen from qualifications resulting in the denial or abridgement of the right to vote on account of race. 42 U.S.C. § 1973(a) (emphasis added). Nothing in the statute suggests

² And even if it were not, it would clearly be a “standard, practice, or procedure.”

³ Indeed, as defined in the VRA, the term “vote” includes “all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting.” 42 U.S.C. § 19731(c)(1).

that Section 2's protections are available only to citizens who have never been convicted of a crime.⁴

2. *The Vote Denial Occurs "in a Manner which Results in" Discrimination "on Account of Race"*

As this Court explained in *Farrakhan I*, to violate Section 2 a voting statute need not operate *by itself* to discriminate. This Court rightly emphasized that a "by itself" causation standard would effectively read an intent requirement back into the VRA." *Farrakhan I*, 338 F.3d at 1019. Instead, Section 2 requires evidence only of a discriminatory result, and not of a discriminatory intent. *See Chisom v. Roemer*, 501 U.S. 380, 394 (1991).

Section 2 provides that a voting qualification violates the VRA when a plaintiff is able to show, based on the "totality of the circumstances," that the challenged practice results in discrimination on account of race. Under this standard, courts must determine whether a challenged policy or practice "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47; *see also Smith v. Salt River Project Agric. Improvement & Power*

⁴ Individuals with felony convictions in Washington State and elsewhere are quite clearly still "citizen[s] of the United States." "Citizenship is not a license that expires upon misbehavior," *Trop v. Dulles*, 356 U.S. 86, 92 (1958), and, thus, cannot be revoked solely by virtue of felony convictions, "however reprehensible that conduct may be," *id.* at 93.

Dist., 109 F.3d 586, 595-96 (9th Cir. 1997).⁵ As the panel in *Farrakhan I* concluded, “racial bias in the criminal justice system may very well *interact with* voter disqualifications to create the kinds of barriers to political participation on account of race that are prohibited by Section 2.” *Farrakhan I*, 338 F.3d at 1020 (emphasis added).

A bare statistical showing that a statute has a disproportionate impact on racial minorities is not enough for a Section 2 violation. Plaintiffs must show that the disproportionate impact reflects racial discrimination in order to satisfy the “on account of race” evidentiary burden of the results test. Where plaintiffs have failed to satisfy the “on account of race” requirement, Section 2 claims have rightly been dismissed. This Court’s decision in *Salt River* is one example. In *Salt River*, this Court declined to strike down a property ownership requirement because the allegations of discrimination in that case were supported *only* by a “bare statistical

⁵ Because the focus is on the result and not on the intent, facially neutral voting practices have been appropriately challenged under Section 2. *See, e.g., Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), *aff’d sub nom. Miss. State Chapter, Operation Push v. Mabus*, 932 F.2d 400 (5th Cir. 1991) (requirement that voters register twice); *Goodloe v. Madison County Bd. of Election Commissioners*, 610 F. Supp. 240, 243 (S.D. Miss. 1985) (invalidation of absentee ballots).

showing of disproportionate impact” without further evidence of discrimination “on account of race.” *Salt River*, 109 F.3d at 595.⁶

Unlike *Salt River* or other similar cases, Plaintiffs-Appellants have satisfied their burden in this case. The uncontroverted record in this case demonstrates that the evidence of differing treatment of racial minorities under Washington’s criminal justice system cannot be explained by “legitimate factors” and is thus “unwarranted.” *Farrakhan II*, 590 F.3d at 994-95. The Court concluded that – as shown on this record – when racial bias results in “some people becoming felons not just because they have committed a crime, but because of their race, then that felon status cannot, under [Section 2] disqualify felons from voting.” *Id.* at 1014. The record here is thus not limited to a bare statistical showing of disparate impact on racial minorities, but instead has been found to establish that the right to vote has been denied “on account of race.”

⁶ Other courts have likewise concluded that a bare statistical showing of disparate impact *by itself*, without a showing of discrimination “on account of race” does not satisfy Section 2. *See, e.g., Salas v. Southwest Texas Junior College District*, 964 F.2d 1542 (5th Cir. 1992) (rejecting a claim under Section 2 where there was a 7% disparity between turnout for Hispanic and white voters because plaintiffs “offered no evidence directly linking this low turnout with past official discrimination”); *Ortiz v. City of Philadelphia*, 824 F. Supp. 514 (E.D. Pa. 1993) (holding that voter purge laws were not a *per se* violation of Section 2 because there was no evidence that the law interacted with social and historical factors to result in discrimination).

3. *The Breadth of the VRA Does Not Render it Ambiguous*

The Supreme Court has made clear that voting is a fundamental right and that “the right to vote freely for the candidate of one’s choice is the essence of a democratic society.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). In recognition of the importance of voting rights to our society, the goal of the VRA is to root out and eliminate *all* race-based discrimination in voting. *See Chisom*, 501 U.S. at 403 (citing *Katzenbach*, 383 U.S. at 315). To that end, Section 2 was intended to have “the broadest possible scope.” *Allen*, 393 U.S. at 566-67 (1969); *accord Chisom*, 501 U.S. at 403; *Katzenbach*, 383 U.S. at 316. None of the majority opinions in other Circuits dispute the breadth of Section 2. *Simmons v. Galvin*, 575 F.3d 24, 35 (1st Cir. 2009) (“[T]he language of § 2(a) is . . . broad.”); *Hayden*, 449 F.3d at 315 (“There is no question that the language of § 1973 is extremely broad.”); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1228 (11th Cir. 2005) (noting the statute’s “broad language”).

As the Supreme Court has stated expressly, a statute’s breadth does not mean it is ambiguous: “[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.” *Pa. Dep’t of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (citation and internal quotation marks omitted).

4. *This Court's Analysis Must Begin and End with Plain Meaning*

Because the text of the VRA is clear and unambiguous, this Court need not go further to determine the meaning of the statute.⁷ As the Supreme Court has

⁷ See, e.g., *Amalgamated Sugar Co. LLC v. Vilsack*, 563 F.3d 822, 829 (9th Cir. 2009) (Smith, N., J.), *cert. denied*, 130 S. Ct. 280 (2009); *Sanchez v. Holder*, 560 F.3d 1028, 1033-34 (9th Cir. 2009) (Silverman, J.); *United States v. Nader*, 542 F.3d 713, 717 (9th Cir. 2008) (Clifton, J.), *cert. denied*, 129 S. Ct. 1984 (2009); *Maney v. Kagenveama*, 541 F.3d 868, 872 (9th Cir. 2008) (Siler, J.); *Golden W. Ref. Co. v. Suntrust Bank*, 538 F.3d 1233, 1238 (9th Cir. 2008) (Gould, J.); *Texaco Inc. v. United States*, 528 F.3d 703, 710 (9th Cir. 2008) (Callahan, J.); *United States v. Gamboa-Cardenas*, 508 F.3d 491, 496 (9th Cir. 2007) (Smith, M., J.); *United States v. Gonzales*, 506 F.3d 940, 949 (9th Cir. 2007) (en banc) (Ikuta, J., dissenting); *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1083-84 (9th Cir. 2007) (Paez, J.); *United States v. Young*, 458 F.3d 998, 1009 (9th Cir. 2006) (O'Scannlain, J.); *United States v. Johnson Controls, Inc.*, 457 F.3d 1009, 1014 (9th Cir. 2006) (Berzon, J.); *Nuclear Info. & Res. Serv. v. United States DOT Research & Special Programs Admin.*, 457 F.3d 956, 960 (9th Cir. 2006) (Rymer, J.); *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs.*, 448 F.3d 1092, 1095-96 (9th Cir. 2006) (en banc) (Bybee, J., dissenting); *United States v. TRW Rifle 7.62 x 51mm Caliber*, 447 F.3d 686, 689 (9th Cir. 2006) (McKeown, J.); *United States v. Stephens*, 439 F.3d 1083, 1083 (9th Cir. 2006) (en banc) (Tallman, J., dissenting); *United States v. Stewart*, 420 F.3d 1007, 1021-22 (9th Cir. 2005) (Bea, J.); *Cleveland v. City of Los Angeles*, 420 F.3d 981, 989 (9th Cir. 2005) (Pregerson, J.); *Azarte v. Ashcroft*, 394 F.3d 1278, 1285 (9th Cir. 2005) (Reinhardt, J.); *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 752-53 (9th Cir. 2003) (en banc) (Tashima, J.); *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1114-15 (9th Cir. 2003) (Fisher, J.); *United States v. Cabaccang*, 332 F.3d 622, 640 (9th Cir. 2003) (en banc) (Kozinski, J., dissenting); *Majewski v. St. Rose Dominican Hosp.*, 310 F.3d 653, 656 (9th Cir. 2002) (Schroeder, J.); *United States v. Gonzalez-Torres*, 309 F.3d 594, 601 (9th Cir. 2002) (Rawlinson, J.); *United States v. Rashkovski*, 301 F.3d 1133, 1136 (9th Cir. 2002) (Wardlaw, J.); *Gibson v. Chrysler Corp.*, 261 F.3d 927, 940 (9th Cir. 2001) (Fletcher, W., J.); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1110 (9th Cir. 2000) (Kleinfeld, J.); *Crown Pac. v. OSHRC*, 197 F.3d 1036, 1038-40 (9th Cir. 1999) (Thomas, J.); (...continued)

stated, “[o]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous.” *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (Rehnquist, C.J.). Indeed, where a “statute’s language is plain, ‘the sole function of the courts is to enforce it according to its terms.’” *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). The language of Section 2 contains no exemption for discrimination resulting from felon disenfranchisement laws, and such exceptions may not be read into unambiguous statutes. See *Flowers v. First Hawaiian Bank*, 295 F.3d 966, 975 (9th Cir. 2002); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001); *United States v. Fontanilla*, 849 F.2d 1257, 1258 (9th Cir. 1988).

When faced with an unambiguous statute, searching the legislative history for signs of ambiguity or contrary meaning is not only unnecessary, but also inappropriate. *Dep’t of Hous. v. Rucker*, 535 U.S. 125, 132-33 (2002). Courts must not “resort to legislative history to cloud a statutory text that is clear.”⁸

(continued...)

Gov’t of Guam, ex rel. Guam Economic Dev. Auth. v. United States, 179 F.3d 630, 633 (9th Cir. 1999) (Graber, J.).

⁸ See *Cleveland*, 420 F.3d at 990 (“According to the rules of statutory construction, the court can only look to legislative intent when a statute is ambiguous.... The best evidence of [legislative] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous – that has a clearly accepted meaning in (...continued)

Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994); accord *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 878 (9th Cir. 2001) (en banc). The “authoritative statement” of Congress’s intent is “the statutory text, not the legislative history or any other extrinsic material.” *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005); see also *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009) (“Congress, not the [c]ourt[s],” is empowered “to determine in the first instance what legislation is needed to enforce [the Fifteenth Amendment].”).

The only instance when a court should look past the plain meaning of an unambiguous statute to other sources is when the plain meaning would create a result “so bizarre that Congress could not have intended it.” *Demarest v. Manspeaker*, 498 U.S. 184, 191 (1991) (quoting *Griffin v. Oceanic Contractors*, 458 U.S. 564, 571 (1982)); see *SEC v. McCarthy*, 322 F.3d 650, 655 (9th Cir. 2003) (“The plain meaning of a statute is always controlling ‘unless that meaning would lead to absurd results.’”) (quoting *Reno v. Nat’l Transp. Safety Bd.*, 45 F.3d 1375, 1379 (9th Cir. 1995)). No such case is presented here.

(continued...)

both legislative and judicial practice – we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.”) (internal citations omitted).

None of the other Circuits to confront this issue has identified a supportable reason to follow a different course. No opinion in any of these courts has identified any ambiguity in the VRA's text. Instead, the majority opinions in other Circuits – each of which was accompanied by one or more dissenting opinions – have suggested that, beyond the statutory language, the history of felon disenfranchisement makes these statutes somehow different, and therefore impliedly exempt from Section 2 of the VRA.⁹ *See Simmons*, 575 F.3d at 34; *Johnson*, 405 F.3d at 1228; *Hayden*, 449 F.3d at 315-16. In particular, the majority opinions in other Circuits have emphasized and placed great weight on legislative history and other statutes accepting, or even endorsing, felon disenfranchisement *as such* – including, for example, the passage of a felon disenfranchisement law in Washington, D.C. at approximately the same time as the passage of the VRA. *See Simmons*, 575 F.3d at 34, 46; *Johnson*, 405 F.3d at 1228; *Hayden*, 449 F.3d at 316, 318-20.

⁹ Nor, as a panel of this Court recently recognized, does any “affirmative sanction” for felon disenfranchisement laws in Section 2 of the Fourteenth Amendment immunize such laws from congressional regulation. *See Harvey v. Brewer*, Nos. 08-17253, 08-17567, 2010 U.S. App. LEXIS 10822, at *22 (9th Cir. May 27, 2010) (“Simply because the Fourteenth Amendment does not itself prohibit States from enacting a broad array of felon disenfranchisement schemes *does not mean that Congress cannot do so by legislation . . .*”) (emphasis added).

But whether or not Congress believed felon disenfranchisement was acceptable generally does not mean Congress silently created a blanket exception for felon disenfranchisement laws that result in discrimination. Indeed, as Judge Parker stressed in his dissent in *Hayden*, “[t]o hold that Congress did not intend the VRA to cover felon disenfranchisement statutes is to hold that Congress actually intended to allow some forms of race-based voter disenfranchisement.” *Hayden*, 449 F.3d at 357 (Parker, J., dissenting).

Nothing in any of the opinions in other Circuit courts supports the notion that Congress expressly – or impliedly – decided to give a free pass to felon disenfranchisement laws that result in uncontroverted racial discrimination. As Judge Calabresi said in his dissent in *Hayden*: “How the majority moves from the fact that Congress declined to proscribe *race-neutral* felon disenfranchisement to the conclusion that Congress intended to exempt *racially discriminatory* felon disenfranchisement from the coverage of the Voting Rights Act is beyond me.” *Hayden*, 449 F.3d at 365 (Calabresi, J., dissenting) (emphasis in original).

Nor do policy considerations justify this Court departing from the plain meaning of Section 2’s text. For example, an assertion in the Second Circuit opinion, *Hayden*, 449 F.3d at 340 (Raggi, J., concurring), hypothesizing that the application of Section 2’s prohibitions to New York’s felon disenfranchisement law may “significantly intrude on” the “orderly administration of criminal justice”

is immaterial to the question of statutory interpretation before this Court. The VRA broadly proscribes racial discrimination as to voting rights *only*.¹⁰ That proscription contains no implied exception to account for concerns about possible incidental impact in other areas when faithfully applying the statute to address discrimination in voting rights. Likewise, it is of no moment that some victims of discrimination in the criminal justice system may also seek individual relief in other ways, including petitions for *habeas corpus*. The issue before the Court is a much simpler one of interpretation of a statute limited to voting rights.

Such efforts by the majorities in other Circuits in seeking to reach past the plain meaning of the statute are contrary to both the Supreme Court's well-established canons of statutory interpretation and to the clear language chosen by Congress in adopting the VRA. As then-Judge Sotomayor explained in her dissent when the Second Circuit considered this issue:

The duty of a judge is to follow the law, not to question its plain terms. I do not believe that Congress wishes us to disregard the plain language of any statute or to invent exceptions to the statutes it has created. . . . But even if

¹⁰ Washington courts have held that the disenfranchisement law, which is codified as part of the elections law and not the criminal code, is a non-penal law. *See State v. Schmidt*, 23 P.3d 462, 474, 143 Wash. 2d 658, 681 (Wash. 2001) (arguing that felon disenfranchisement is “a nonpenal exercise of the power to regulate the franchise.”); *Fernandez v. Kiner*, 673 P.2d 191, 193, 336 Wash. App. 210 (Wash. App. 1983) (“The statute disenfranchising convicted felons is sustained as a nonpenal exercise of the power to regulate the franchise. The purpose of the statute is to designate a reasonable ground of eligibility for voting.”).

Congress had doubts about the wisdom of subjecting felony disenfranchisement laws to the results test of § 2, I trust that Congress would prefer to make any needed changes itself, rather than have courts do so for it.

Hayden, 449 F.3d at 368 (Sotomayor, J., dissenting).

B. Even If the Court Were To Look Beyond the Statute’s Plain Meaning, the VRA’s Legislative History is Consistent with the Words of the Statute

Although the statute’s plain meaning controls, the legislative history does confirm that the purpose of the VRA was to root out all racial discrimination in voting without qualification. By 1965, Congress had documented a pervasive history of many states’ “unremitting and ingenious defiance of the Constitution” in denying the right to vote to racial minorities for 95 years. *See Katzenbach*, 383 U.S. at 309.

Demonstrating Congress’s intention to give the statute expansive reach, during the Senate hearings on the bill, Senators and the Attorney General discussed the concern that using only the term “procedure” in the statute would not be broad enough to cover “various practices that might effectively be employed to deny citizens their right to vote.” *Allen*, 393 U.S. 544, 566-67 (1969). For this reason, Congress “expanded the language to include any ‘voting qualifications or prerequisite to voting, or standard, practice, or procedure.’” *Id.* (quoting 42 U.S.C. § 1973). Legislative history surrounding the VRA’s subsequent reauthorizations states that “[t]he revised version of Section 2 contained in this bill could be used

effectively to challenge voting discrimination *anywhere* that it might be proved to occur.” S. REP. NO. 97-417, at 15 (1982), *reprinted in* 1982 U.S.C.C.A.N. 178, 192 (emphasis added). The VRA’s 1982 amendments further broadened its reach by clarifying that discriminatory intent is not required to prove a plaintiff’s claim. Rather, if the challenged law interacts with the surrounding social and historical circumstances in such a way as to *result* in the denial of the right to vote on account of race, that law violates the VRA. *See Gingles*, 478 U.S. at 47;¹¹ *see also supra* Section I.A.2.

There is no support whatsoever in the legislative history of Section 2 for a broad based exemption for discriminatory felon disenfranchisement laws. As then-Judge Sotomayor explained in her dissenting opinion in the Second Circuit: “The majority’s ‘wealth of persuasive evidence’ that Congress intended felony disenfranchisement laws to be immune from scrutiny under § 2 of the Act includes not a single legislator actually saying so.” *Hayden*, 449 F.3d at 368 (Sotomayor, J., dissenting) (internal citation omitted).

The majority decisions in *Hayden* and *Simmons* look not to Section 2’s legislative history to support an implied exemption, but rather to the legislative

¹¹ In *Gingles*, the Supreme Court explained that “[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” 478 U.S. at 47.

history of Section 4. *See Simmons*, 575 F.3d at 37-38; *Hayden*, 449 F.3d at 319. Such an approach is, *inter alia*, flatly inconsistent with the Supreme Court’s rejection of attempts to use the legislative history of one section of the VRA to interpret another. *See Holder v. Hall*, 512 U.S. 874, 883 (1994) (holding that the legislative history of Section 5 of the VRA should not be employed to interpret Section 2 of the VRA); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977) (holding that the legislative history of a statutory provision that is not at bar is “entitled to little if any weight”).

And even if such an approach were proper, Section 4’s legislative history does not support a blanket exclusion from Section 2 for felon disenfranchisement. Section 2 and Section 4 have different structures and purposes within the VRA. Section 4 placed an outright ban on any “test or device” that limited the right to vote in jurisdictions with a demonstrated history of racial discrimination, which included “moral character tests.” The accompanying legislative history notes that Section 4 in itself “would not result in the proscription of the frequent requirement of States ... that an applicant for voting ... be free of conviction of a felony.” S. REP. NO. 89-162, pt. 3, at 24 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2562. The language merely clarifies that felon disenfranchisement laws would not be considered “moral character tests” for purposes of the outright ban on “tests and devices” in Section 4. This language does nothing more than reinforce the idea –

not in dispute here – that felon disenfranchisement laws are not *per se* violations of the VRA and may be legally permissible if they do not result in racial discrimination. That language cannot properly be interpreted to exclude felon disenfranchisement from the “qualification[s] or prerequisite[s]” subject to the results-based test of Section 2.

There is no basis for a conclusion that Congress not raising felon disenfranchisement laws specifically in the legislative history in 1965 or 1982 meant that it intended to exclude discrimination resulting from Section 2. “It would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute.” *Harrison v. PPG Indus.*, 446 U.S. 578, 592 (1980). Further, “mere silence in the legislative history cannot justify” reading a meaning into a statute which is not present in the text. *Whitfield v. United States*, 543 U.S. 209, 216 (2005). Congress is not required to affirmatively list all possible applications of a statute, particularly in the case of a broad remedial statute. *See Moskal v. United States*, 498 U.S. 103, 111 (1990). Indeed, part of the reason Congress wrote Section 2 to be so broad is because it would be “impossible to predict the variety of means that would be used to infringe on the right to vote.” *Johnson*, 405 F.3d at 1243 (Wilson, J., dissenting).

Instead, Congress's silence supports the conclusion that it did *not* intend to exempt felon disenfranchisement laws. "Had Congress . . . intended to exclude this particular type of qualification from the reach of the statute, it could have done so explicitly." *Simmons*, 575 F.3d at 52 (Torruella, J., dissenting); *see also Hayden*, 449 F.3d at 348 ("[W]e are hard pressed to understand the majority's conclusion that . . . Congress, without comment, intended to except such an important voting test from [the VRA's] protection.") (Parker, J., dissenting).

II. THE CLEAR STATEMENT RULE IS NOT IMPLICATED BY THE VRA

The Supreme Court's "clear statement rule" is intended to ensure that Congress does not wrongfully "impose its will on the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). If Congress intends to alter the "usual constitutional balance" between the states and the federal government, "it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Id.* at 460-61. Contrary to the conclusion reached by the Eleventh Circuit,¹² the clear statement rule does not apply in this case because: (1) Section 2 is unambiguous, broadly prohibiting all voting qualifications that result in the denial of the right to vote on

¹² Although Judge Cabranes in the Second Circuit concluded that the clear statement rule did apply, Judges Sack and Straub did not join this portion of the majority opinion. Thus the clear statement rule portion of the opinion was actually rejected by a majority of judges on the Second Circuit. *See Hayden*, 449 F.3d at 337 (Straub, J., concurring in part and concurring in judgment, Sack, J., joining).

account of race; and (2) Section 2 is a consistent reflection of the constitutional balance established by the Fourteenth and Fifteenth Amendments, conferring upon the federal government broad power to eradicate racial discrimination in voting.

The necessary corollary to the clear statement rule is that “‘in the context of an unambiguous statutory text,’ arguments concerning whether Congress has made its intention clear are ‘irrelevant.’” *Hayden*, 449 F.3d at 357 (Parker, J., dissenting) (quoting *Yeskey*, 524 U.S. at 212). As the Supreme Court explained subsequent to the *Gregory* case, 501 U.S. at 460-61, “*Gregory* itself . . . noted [that] the principle it articulated did not apply when a statute was unambiguous.” *Salinas v. United States*, 522 U.S. 52, 60 (1997). As explained in detail above, there is no question that Section 2’s language and intention to root out racial discrimination in voting – no matter where it lies – is unmistakably clear. *See Hayden*, 449 F.3d at 346 (Parker, J., dissenting) (“Tellingly, the majority never attempts to argue that § 2(a) is ambiguous, instead stating that ‘we are not convinced that the use of broad language in [§ 2(a)] necessarily means that the statute is unambiguous with regard to its application to felon disenfranchisement laws.’ But this statement is not a finding of ambiguity.”) (quoting *Hayden*, 449 F.3d at 315).

Moreover, Congress did not alter the constitutional balance between the federal government and the states with the passage of the VRA, as must be the case for the clear statement rule to apply. That balance was altered long before, by the

passage of the Fourteenth and Fifteenth Amendments. 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 *City of Rome v. United States*, 446 U.S. 156, 179 (1980)); *see also Mitchum v. Foster*, 407 U.S. 225, 238 & n.28 (1972) (recognizing the “basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment” such as the Fourteenth and Fifteenth Amendments). The power to craft legislation addressing the conduct at issue in these Amendments – racial discrimination as to voting rights perpetuated by the states – was thus transferred from the states to the federal government nearly a hundred years before the passage of the VRA. *See Lopez v. Monterey County*, 525 U.S. 266, 282-86 (1999).

Section 2 of the Fifteenth Amendment secures Congress’s authority to legislate within the intersection of the right to vote, a fundamental right, and racial discrimination against a suspect class. At this intersection, Congress’s authority was intended to be and is extremely broad. *See Hayden*, 449 F.3d at 360 (Parker, J., dissenting) (recognizing that Congress’s ability to enact prophylactic legislation

under the Fifteenth Amendment is a “broad power indeed”) (quoting *Tennessee v. Lane*, 541 U.S. 509, 518 (2004)).¹³

For purposes of the clear statement rule, it is important to understand that Congress intended that its Fifteenth Amendment enforcement powers be perpetual, to continue to proscribe new and unanticipated racially discriminatory voting practices. At the time it framed the Fifteenth Amendment, Congress understood that expansive enforcement powers would be necessary to protect its hard-won gains in voting rights from erosion within the states.¹⁴ This broader effort was necessary because formal race discrimination in voting had been eliminated in the states by the time of the Fifteenth Amendment’s ratification, as a condition for re-entry into the Union. *See* An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428, § 5 (1867). In the same way, the reach of Congress’s remedial legislation cannot be confined to particular voting practices already found to have resulted in discrimination at the time of the legislation’s

¹³ “[W]hile the Supreme Court has found some statutes were not an appropriate means of enforcing the Fourteenth Amendment, the Court has been far more deferential when Congress’s Fifteenth Amendment powers are at stake.” *Northwest Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 236 (D.D.C. 2008), *rev’d sub nom. on other grounds, Northwest Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009).

¹⁴ J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, in *Controversies in Minority Voting: The Voting Rights Act in Perspective* 138-39 (Bernard Grofman & Chandler Davidson eds., 1992).

enactment, as has been urged by majority and concurring opinions in the other Circuit cases. *See Hayden*, 449 F.3d at 330-31; *Johnson*, 405 F.3d at 1230-31. If it were, states “would always have one free bite at the apple,” and there would be forms of race-based voting discrimination that Congress would be unable to reach. *Johnson*, 405 F.3d at 1244 (Wilson, J., dissenting); *see Hayden*, 449 F.3d at 360 (Parker, J., dissenting).

The Fifteenth Amendment empowers Congress to protect against racial discrimination in voting; Section 2, enacted pursuant to Congress’s Fourteenth and Fifteenth Amendment powers, does not alter the “usual constitutional balance” between the states and federal government, but instead reflects the power given to Congress.

CONCLUSION

Amicus urges this Court to affirm its two prior decisions and hold that Section 2 of the VRA prohibits race discrimination in felon disenfranchisement laws.

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and Ninth Circuit Rule 29-2, the attached brief of *Amicus Curiae* is proportionately spaced, has a typeface of 14 points or more and contains 6,571 words.

Dated: June 11, 2010

/s/ Edmund Polubinski III

Edmund Polubinski III

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2010, I electronically filed the foregoing Brief of *Amicus Curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 11, 2010

/s/ Edmund Polubinski III

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