NO. 06-35669

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MUHAMMAD SHABAZZ FARRAKHAN, et al.,

Plaintiffs-Appellants,

v.

CHRISTINE O. GREGOIRE, et al.,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

No. CV-96-076-RHW
The Honorable Robert H. Whaley
United States District Court Judge

BRIEF OF DEFENDANTS-APPELLEES

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I. STATEMENT OF JURISDICTION

This timely appeal is from an order of the United States District Court for the Eastern District of Washington, dismissing the sole remaining claim on cross-motions for summary judgment, in a lawsuit brought under 42 U.S.C. § 1973. ER 653-55; ER 636-51. This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291 and § 1331.

II. STATEMENT OF ISSUES PRESENTED

1. The United States Constitution and the legislative history of the Voting Rights Act (VRA), 42 U.S.C. § 1973, and subsequent federal enactments demonstrate that Congress did not intend the VRA to apply to felon disenfranchisement laws. Is Washington's felon disenfranchisement law outside the purview of the VRA?

2. No Plaintiff has demonstrated that his felony conviction was in any way the product of race discrimination. Absent such a showing, do the Plaintiffs lack standing to claim that they have been denied the right to vote on account of race in violation of Section 2 of the VRA?

3. Plaintiffs' evidence of racial disparities in Washington's criminal justice system is extremely limited in subject, geography, and time, and demonstrates no discriminatory motive or intent. Is this evidence insufficient to show that "members of the minority group . . . bear the effects of

discrimination . . . which hinder their ability to participate effectively in the political process" under Factor 5 of the VRA's totality of the circumstances test?

4. Apart from Plaintiffs' meager evidence of race discrimination in Washington's criminal justice system, the totality of the circumstances strongly support the conclusion that Washington's felon disenfranchisement laws do not deny citizens the right to vote on account of race. Did the district court thus correctly conclude that Plaintiffs failed to make out a claim of race-based vote denial under the VRA?

III. STATEMENT OF THE CASE

This case is before this Court for a second time. In 1996, six individuals, Muhammad Shabazz Farrakhan, Al-Kareem Shadeed, Marcus Price, Ramon Barientes, Timothy Schaaf, and Clifton Briceno—all of whom were convicted of felonies—filed this action in the United States District Court for the Eastern District of Washington. SER 1-34. They alleged that Washington's felon disenfranchisement law violated the Voting Rights Act (VRA) and the United States Constitution. The claim underlying this litigation for over a decade is the assertion that certain racial minorities are disproportionately prosecuted and sentenced, resulting in disproportionate representation among felons disenfranchised under Washington law. Plaintiffs alleged that this disproportionate

representation satisfied the results test under Section 2 of the VRA, constituting denial of the right to vote on account of race.

The district court dismissed all claims except the claim of vote denial under the VRA. *Farrakhan v. Locke*, 987 F. Supp. 1304, 1312-13 (E.D. Wash. 1997). Later, the six Plaintiffs filed a fourth amended complaint, alleging that Washington's felon disenfranchisement law, including procedures to restore the right to vote to felons, constituted denial of the right to vote on account of race in violation of the VRA. SER 35-47.

The district court dismissed the Plaintiffs' vote denial claim on summary judgment after review of statistics, reports, and expert testimony provided to the court by the parties. On Plaintiffs' appeal, this Court remanded the matter to the district court to again consider the totality of circumstances, including factors external to the challenged voting mechanism, specifically alleged racial discrimination in Washington's criminal justice system. *Farrakhan v. Washington*, 338 F.3d 1009, 1011-12 (9th Cir. 2003). The State Defendants petitioned for rehearing en banc, which was denied. *Farrakhan v. Washington*, 359 F.3d 1116 (9th Cir. 2004). The State's Petition for Writ of Certiorari was also denied. *Locke v. Farrakhan*, 543 U.S. 984, 125 S. Ct. 477, 16 L. Ed. 2d 365 (2004).

On remand, the district court again considered statistics, reports, and expert testimony submitted by the parties, and again dismissed the Plaintiffs' sole

remaining claim on summary judgment. ER 636-51. Based on the totality of the circumstances, including the lack of any history of racial bias in Washington's electoral process or its decision to enact felon disenfranchisement, the court below concluded that Washington's felon disenfranchisement law does not deny the right to vote on account of race. ER 650.

The six Plaintiffs again appeal to this Court, claiming that the district court erred when, as directed by this Court, it applied the VRA's totality of the circumstances test and when it determined that Plaintiffs failed to meet their burden to show that they were denied the right to vote on account of race in violation of Section 2 of the VRA.

IV. STATEMENT OF FACTS

A. Plaintiffs' Background

Of the six felon Plaintiffs, four are Black, one is Latino, and one is Native American. Plaintiffs-Appellants Br. at 6. At the time that they filed this lawsuit, the Plaintiffs could not vote because they were convicted of felonies. Neither in the course of their criminal proceedings nor in their criminal appeals, did any of the six Plaintiffs prove or even claim that racial bias played a part in their individual felony convictions. SER 49. Nor is there evidence in the record that any other individual was convicted of a felony as a result of racial discrimination.

There is no evidence in this record of the voting history of the individual six Plaintiffs who filed this lawsuit or of the voting history or voting patterns of felons—either by race or generally. Further, there is no evidence in this record of the voting history or voting patterns of Blacks, Latinos, or Native Americans.

B. Washington's Felon Disenfranchisement Law

Felon disenfranchisement in Washington began before statehood. The felon disenfranchisement provision adopted by the constitutional convention dates back to 1866, when Washington was a Territory and the Fifteenth Amendment extending the vote to Blacks had not yet been adopted. *See* Territorial Law of 1866, Rem & Bal. Code § 4755 ("[n]o . . . persons convicted of an infamous crime, shall be entitled to the privilege of an elector.").[1] Washington's 1889 Constitution declared that a person convicted of an "infamous crime unless restored to their civil rights" is ineligible to vote. Wash. Const. art. VI, §§ 1, 3. The provision has been virtually unchanged as related to felon disenfranchisement since its enactment. The legislature has defined "infamous crime" as essentially a felony punishable by death or imprisonment (for a year or more). Wash. Rev. Code § 29A.04.079 (2006). It is undisputed that there is no indication, historically or legally, of any racially discriminatory intent associated with Washington's felon

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[1] Voting rights of Blacks in Washington were protected by the Territorial Sufferage Act of 1867, three years before ratification of the Fifteenth Amendment. SER 205.

disenfranchisement law. SER 327-28, 379. There is no history of official discrimination in Washington against Blacks, Latinos, and Native Americans related to the right to vote. SER 327-28, 497-503. Washington does not have a history of laws designed to discriminate against Blacks. SER 201-02. Throughout its statehood, Washington voters have elected members of classes protected by 42 U.S.C. § 1973(a) to various legislative, judicial, and executive positions. Washington's top local elected positions, including Governor, Supreme Court Justice, and County Executive, have been filled by members of such classes. SER 205.

Washington has been a leader among states in addressing racial inequality in criminal sentencing and other aspects of the criminal justice system. In 1987, the Washington State Minority and Justice Task Force was established by the Washington Supreme Court in response to legislation seeking to improve the treatment of racial and ethnic minorities in courts and the legal system throughout the state. SER 84-86, 229. In 1990, the Washington Supreme Court formed a permanent Minority and Justice Commission. SER 231, 325-26. As a result of the work of the Commission, educational programs have been developed and taught to court personnel for increasing diversity, cultural awareness, and mutual respect among those who deliver court services. SER 242-89.

There is no evidence in Washington of racially-polarized voting, any election procedures that discriminate on the basis of race, political campaigns characterized by racial appeals, or a lack of responsiveness by elected officials to particular needs of minority groups. ER 649; SER 47-48, 328.

C. Enactment Of The Voting Rights Act

Congress enacted the Voting Rights Act of 1965, recognizing that some states were using voting procedures that discriminated on account of race. The Act specifically barred insidious exclusionary practices designed to prevent Blacks from voting (such as requiring literacy, educational achievement, or good moral character) in certain regions referred to as covered areas. Outside covered areas, the 1965 Act barred tests or devices that had "been used . . . for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color". 42 U.S.C. § 1973a[b].

As amended in 1982, Section 2 of the VRA states:

> (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 abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 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 members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973. (Emphasis in original.)

V. SUMMARY OF THE ARGUMENT

For the second time in this case, and as directed by this Court, the district court has applied the "totality of the circumstances" test, including consideration of the "Senate Factors", and has ruled that Washington's felon disenfranchisement laws do not violate Section 2 of the Voting Rights Act. The district court's decision should be affirmed for four reasons.

First, as the state argued in the first appeal of this case, and as the Second and Eleventh Circuits subsequently have concluded, the VRA does not apply to felon disenfranchisement provisions. This conclusion alone provides a complete basis for affirming the decision of the district court, and this Court need not proceed to consider any further issues. Second, none of the Plaintiffs in this case have alleged, let alone demonstrated, that their felony convictions and attendant disenfranchisement resulted from racial bias or discrimination in Washington's criminal justice system. Accordingly, no Plaintiff has standing to assert a claim of vote denial under Section 2 of the VRA, similarly providing a complete basis upon

which this Court should affirm the decision of the district court. Third, there is no substantial evidence in the record that racial discrimination in Washington's criminal justice system has resulted in denial of the right to vote based on race. Apart from a mere statistical disparity, inadequate to make out a claim under the VRA, the only additional evidence of race discrimination in Washington's criminal justice system that the Plaintiffs have presented is extremely narrow in subject and very limited in time and geographic area. It is not linked to race-motivated discrimination and does not establish 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 [Section 2 of the VRA] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). As a matter of law, under Senate Factor 5 and the totality of the circumstances test, Plaintiffs' meager evidence fails to demonstrate that Washington's criminal justice system has hindered VRA protected groups' ability to participate effectively in the political process. ER 646. Fourth, even considering Plaintiffs' limited evidence relating to racial bias in Washington's criminal justice system, the district court correctly concluded that, based on the "totality of the circumstances" test of the VRA, Plaintiffs have failed to demonstrate that Washington disenfranchises felons based on race in violation of

the VRA. For all of these reasons, this Court should affirm the decision of the district court.

VI. ARGUMENT

A. The Voting Rights Act Does Not Apply To Felon Disenfranchisement Laws

1. The Court Should Reexamine The Applicability Of The Voting Rights Act To Washington's Felon Disenfranchisement Law

Two other federal circuits, both sitting *en banc* in cases decided after a panel of this Court issued its first opinion in this case, have concluded that the Voting Rights Act does not apply to felon disenfranchisement laws. *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc); *Johnson v. Governor of the State of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc), *cert. denied, Johnson v. Bush*, 126 S. Ct. 650, 163 L. Ed. 2d 526 (2005). For the reasons expressed in those opinions, and in the opinion dissenting from the denial of rehearing *en banc* by this Court,[2] this Court should reexamine its contrary conclusion. *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003). This Court should join the other federal circuits that have considered the matter and conclude that the Voting Rights Act does not apply to felon disenfranchisement.

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[2] *Farrakhan*, 359 F.3d 1116 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing *en banc*).

In the context of the first appeal in this case, this Court concluded that, "as a preliminary matter," the challenge to felon disenfranchisement "is cognizable under Section 2 of the VRA." *Farrakhan*, 338 F.3d at 1016. This Court should reexamine that conclusion in light of the subsequent decisions of the Second and Eleventh Circuits. As this Court has explained, "a panel of this court has discretion to depart from the law of the case established by the same panel, or another," where at least one of several possible circumstances arise. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 787 (9th Cir. 2000). Those circumstances include: "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Id.* (quoting *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (*en banc*)). "The law of the case doctrine is not dispositive, particularly when a court is reconsidering its own judgment, for the law of the case 'directs the court's discretion, it does not limit the tribunal's power.'" *Mendenhall v. Nat'l Transp. Safety Bd.*, 213 F.3d 464, 469 (9th Cir. 2000) (quoting *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983)).

The subsequent intervening authority of sister circuits reveals that this Court's conclusion was clearly erroneous and works a manifest injustice. The Second and Eleventh Circuits both decided, *en banc*, that Section 2 of the Voting

Rights Act does not extend to a cause of action challenging a state's law disenfranchising convicted felons, a conclusion that makes further consideration of other issues unnecessary. Both circuits did so after this Court issued its opinion, and so those decisions obviously were not before this Court for consideration. *Hayden*, 449 F.3d 305; *Johnson*, 405 F.3d 1214.

2. Congress Did Not Intend The Voting Rights Act To Apply To Felon Disenfranchisement Laws

Both the Second and Eleventh Circuits carefully examined the text and history of the Voting Rights Act, and both concluded that Congress did not intend that it apply to felon disenfranchisement laws. This included the history and context of both the original enactment of the Voting Rights Act in 1965 and its 1982 amendments. *Hayden*, 449 F.3d at 317-23; *Johnson*, 405 F.3d at 1232-35.

Congress made clear when it originally enacted the Voting Rights Act in 1965 that it did not prohibit felon disenfranchisement. Despite the VRA's otherwise broad remedial purpose, it is "indisputable that Congress did not explicitly consider felon disenfranchisement laws to be covered by the Act and, indeed, affirmatively stated that such laws were *not* implicated by provisions of the statute." *Hayden*, 449 F.3d at 318 (emphasis by the court). In the context of discussing Section 4 of the VRA, "the Senate Report reflects that legislators intended to *exempt* the voting restrictions on felons from the statute's coverage". *Johnson*, 405 F.3d at 1233 (emphasis by the court). The report explained that the

VRA "would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony or mental disability." S. Rep. No. 89-162, at 24 (1965) (*reprinted in* 1965 U.S.C.C.A.N. 2508, 2562 (joint views of Senators Dodd, Hart, Long, Kennedy, Bayh, Burdick, Tydings, Dirksen, Hruska, Fong, Scott and Javits)) (*quoted in Hayden*, 449 F.3d at 318; *Johnson*, 405 F.3d at 1233). The House Report explained the Act similarly, agreeing that the VRA was not designed to reach felon disenfranchisement. "This subsection does not proscribe a requirement of a State or any political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony or mental disability." H.R. Rep. No. 89-439, at 25-26 (1965) (*reprinted in* 1965 U.S.C.C.A.N. 2437, 2457 (1965) (*quoted in Hayden*, 449 F.3d at 318; *Johnson*, 405 F.3d at 1233). It was also emphasized on the floor of the Senate that the VRA "was not intended to prohibit 'a requirement that an applicant for voting or registration for voting be free of conviction of a felony or mental disability.'" *Hayden*, 449 F.3d at 318 (*quoting* 111 Cong. Rec. S8366 (daily ed. April 23, 1965) (statement of Senator Tydings)).[3]

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[3] The *Hayden* court prefaced its discussion of this legislative history by explaining its reasons for examining that history rather than relying strictly upon the statutory language. "We are not convinced that the use of broad language in the statute necessarily means that the statute is unambiguous with regard to its

Both the *Hayden* and *Johnson* courts accordingly concluded that the VRA was not intended to prohibit felon disenfranchisement. *Hayden*, 449 F.3d at 319 ("it is apparent to us that Congress's effort to highlight the exclusion of felon disenfranchisement laws from a VRA provision that otherwise would likely be read to invalidate such laws is indicative of its broader intention to exclude such laws from the reach of the statute"); *Johnson*, 405 F.3d at 1233 ("These reports indicate that neither house of Congress intended to include felon

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application to felon disenfranchisement laws." *Hayden*, 449 F.3d at 315. The court found "persuasive reasons to believe that Congress did not intend to include felon disenfranchisement provisions within the coverage of the Voting Rights Act, and we must therefore look beyond the plaint text of the statute in construing the reach of its provisions." *Id.* (citing *Watt v. Alaska*, 451 U.S. 259, 266, 101 S. Ct. 1673, 68 L. Ed. 2d 80 (1981)). Those reasons included:

> (1) the explicit approval given such laws in the Fourteenth Amendment; (2) the long history and continuing prevalence of felon disenfranchisement provisions throughout the United States; (3) the statements in the House and Senate Judiciary Committee Reports and on the Senate floor explicitly excluding felon disenfranchisement laws from provisions of the statute; (4) the absence of any affirmative consideration of felon disenfranchisement laws during either the 1965 passage of the Act or its 1982 revision; (5) the introduction thereafter of bills specifically intended to include felon disenfranchisement provisions within the VRA's coverage; (6) the enactment of a felon disenfranchisement statute for the District of Columbia by Congress soon after the passage of the Voting Rights Act; and (7) the subsequent passage of statutes designed to facilitate the removal of convicted felons from the voting rolls.

Id. at 315-16. For these reasons, the court concluded that Section 2 "was not intended to—and thus does not—encompass felon disenfranchisement provisions." *Id.* at 316.

disenfranchisement within the statute's scope"). The *Hayden* court, in fact, described the statement of congressional intent on this point as "emphatic." *Hayden*, 449 F.3d at 319; *see also Farrakhan*, 359 F.3d at 1120 (Kozinski, J., dissenting from denial of rehearing) (reciting the same legislative history relied upon by the *Hayden* and *Johnson* courts).[4]

Congressional intent on this point did not change when Congress amended the VRA in 1982. "Neither the plain text nor the legislative history of the 1982 amendment declares Congress's intent to extend the Voting Rights Act to felon disenfranchisement provisions." *Johnson*, 405 F.3d at 1234. Indeed, even though the 1982 Senate Report recited "many discriminatory techniques used by certain jurisdictions, [it] made no mention of felon disenfranchisement provisions." *Id.* The 1982 amendments were designed for a very different purpose—that of responding to the Supreme Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980), "in an attempt to clarify the standard for finding Section 2 violations." *Johnson*, 405 F.3d at 1233. It "follows that

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[4] An earlier decision by the Fifth Circuit supports the same conclusion. In 1965, shortly after the original enactment of the Voting Rights Act, that court entered an injunction against various voting practices employed at that time by the state of Louisiana, but specifically exempted from the injunction any effect upon felon disenfranchisement rules. *United States v. Ward*, 352 F.2d 329, 332 (5th Cir. 1965).

Congress did not have [felon disenfranchisement] in mind when the VRA section at issue took its present form in 1982." *Hayden*. 449 F.3d at 321.[5]

Other congressional actions further bolster the conclusion that Congress has never viewed the VRA as prohibiting felon disenfranchisement. If Congress did regard the Voting Rights Act as prohibiting felon disenfranchisement, it seems unlikely that Congress would enact other statutes recognizing, or even mandating, that very practice. In 1971 "Congress affirmatively enacted a felon disenfranchisement statute in the District of Columbia, over which it had plenary power" at the time. *Hayden*, 449 F.3d at 320 (citing Pub. L. No. 92-220, § 4, 85 Stat. 788, 788 (1971)). More recently, the National Voter Registration Act of 1993 (NVRA) explicitly provides for "criminal conviction" as one of a limited number of grounds upon which a state can legitimately cancel a person's voter registration. 42 U.S.C. § 1973gg-6(a)(3)(B). The NVRA also elicits the aid of federal prosecutors in support of the removal of felons from the voting rolls by requiring United States Attorneys to give written notice to state election officials when

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[5] When Congress again reauthorized the Voting Rights Act in 2006, it made no amendments to Section 2 and made no reference to felon disenfranchisement. Pub. Law No. 109-246, 120 Stat 577 (2006). This is true despite "the development of one of the most extensive legislative records in the Committee on the Judiciary's history." House Report 109-478 at 5, 2006 WL 1403199, *5 (2006). Neither the House Report nor the Senate Report made any mention of felon disenfranchisement. House Report 109-478 (2006); Senate Report 109-295 (2006).

felony convictions occur. 42 U.S.C. § 1973gg-6(g)(3). The Help America Vote Act of 2002 goes farther, expressly instructing states to coordinate their voter registration lists with records of felony conviction for the purpose of removing disenfranchised felons from the rolls. 42 U.S.C. § 15483(a)(2)(A)(ii)(I). "These bills further indicate that Congress itself continues to assume that the Voting Rights Act does not apply to felon disenfranchisement provisions." *Hayden*, 449 F.3d at 322; *see also Johnson*, 405 F.3d at 1234 n.39 (observing that the NVRA provisions "suggest[] that Congress did not intend to sweep felon disenfranchisement laws within the scope of the VRA").

The *Hayden* and *Johnson* courts further noted the extensive history of felon disenfranchisement, including its "ancient origin." *Hayden*, 449 F.3d at 316; *see also Johnson*, 405 F.3d at 1228 (referring to felon disenfranchisement as, "deeply rooted in this Nation's history"). Felon disenfranchisement laws were adopted in America from colonial times, and most states had such provisions when the Fourteenth Amendment was adopted in 1868. Today virtually every state, including every state in this circuit,[6] disenfranchises felons. *Hayden,* 449 F.3d at 316-17. Based on all of this "persuasive evidence," the court concluded "that Congress has never intended to extend the coverage of the Voting Rights Act to

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[6] *Farrakhan*, 359 F.3d at 1125 (Kozinski, J., dissenting from denial of rehearing) ("[E]very state in our circuit—indeed, every state in the country save Maine and Vermont—does not allow imprisoned felons to vote.").

felon disenfranchisement provisions, [and] we deem this one of the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *Hayden*, 449 F.3d at 322-23 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989)).

3. Constitutional Provisions And Principles Further Bolster The Conclusion That The Voting Rights Act Does Not Address Felon Disenfranchisement

Both the Second and Eleventh Circuits considered an additional principle of statutory construction in concluding that the Voting Rights Act does not extend to felon disenfranchisement. "The starting point for our analysis is the explicit approval given felon disenfranchisement provisions in the Constitution." *Hayden*, 449 F.3d at 316; *see also Johnson*, 405 F.3d at 1228-29. A "cardinal principle" of statutory construction, in all circuits, is that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988) (tracing this principle to Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy*, 2 Cranch. 64, 6 U.S. 64, 118, 2 L. Ed. 208 (1804)); *see also Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997) ("At the