No. 06-35669
In the
United States Court of Appeals for the Ninth Circuit

Muhammad Shabazz Farrakhan, aka Ernest S. Walker; Al-Kareem Shaheed; 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 AMICI CURIAE LAW PROFESSORS ANGELO N. ANCHETA, ERWIN CHEMERINSKY, KAREEM U. CRAYTON, JOSHUA A. DOUGLAS, CHRISTOPHER S. ELMENDORF, LUIS FUENTES-ROHWER, LANI GUINIER, MICHAEL S. KANG, PAMELA S. KARLAN, ELLEN D. KATZ, JANAI S. NELSON, MICHAEL J. PITTS, AND DANIEL P. TOKAJI IN SUPPORT OF PLAINTIFF-APPELLANTS

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici curiae are the following professors who teach and write in areas related to constitutional law and legal regulation of the political process. They participate in this case in their personal capacity; titles are used only for purposes of identification.

Angelo N. Ancheta, Assistant Professor of Law, Santa Clara University School of Law

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[1] Pursuant to Fed. R. App. P. 29(a) and this Circuit's Rule 29-2(a), *amici* state that they have received the consent of the parties. To be precise, counsel for plaintiff-appellants gave their consent; counsel for defendant-appellees responded that "The State does not oppose your request" to participate.

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Amici take no position, as a group, on the question whether Washington State's felon disenfranchisement statute violates Section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973 (2006). Rather, they write solely to explain that Congress has the power, under the enforcement clauses of the Fourteenth and Fifteenth Amendments, to enact legislation that reaches and prohibits the use of felon disenfranchisement statutes, including ones that have a discriminatory result.

SUMMARY OF ARGUMENT

The concern that applying Section 2 of the Voting Rights Act of 1965 to felon disenfranchisement laws would seriously jeopardize the Act's constitutionality is misplaced.

First, that concern reads too much into the Supreme Court's decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974). While that decision insulates offender disenfranchisement laws from strict scrutiny under the "fundamental rights" strand of equal protection doctrine, it provides no protection against equal protection challenges involving allegations of racial discrimination. *Hunter v. Underwood*, 471 U.S. 222 (1985). Moreover, the Fifteenth Amendment categorically bars race-

based denial or abridgement of the right to vote. *Rice v. Cayetano*, 528 U.S. 495 (2000).

Second, that concern takes an unjustifiably narrow view of congressional enforcement power under the Reconstruction Amendments. For more than forty years, the Supreme Court has upheld Congress's power to go beyond prohibiting voting practices that themselves violate the Constitution to reach other restrictions on the right to vote as well. Congress has the power to prohibit voting practices that perpetuate the effects of unconstitutional conduct elsewhere. *Gaston County v. United States*, 395 U.S. 285 (1969); *Oregon v. Mitchell*, 400 U.S. 112 (1970). Moreover, Congress can enact voting protections designed to prevent future unconstitutional conduct in the provision of government services. *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Finally, Congress may prohibit practices that have only a discriminatory effect. *City of Rome v. United States*, 446 U.S. 156 (1980); *Connecticut v. Teal*, 457 U.S. 440 (1982). Any suggestion that Section 2's constitutionality presents an open question overstates the current legal landscape. Lower federal courts have unanimously upheld Section 2 against constitutional challenge and the Supreme Court, after summarily affirming a decision on the question, has applied the results test in a variety of contexts.

In light of the framework provided by the Supreme Court's decisions, the conclusion that Congress has the power to include felon disenfranchisement laws

within Section 2 easily follows. Some such laws plausibly violate the Constitution themselves. Others may perpetuate discrimination originating outside the electoral process. And the fact that Section 2 might reach offender disenfranchisement provisions that have a discriminatory result even though they cannot be connected to a racially discriminatory purpose poses no constitutional difficulty.

Finally, nothing in the Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), undermines the scope of Congress's power with respect to voting rights. *Boerne* does not itself limit Congress's broad power to enforce the Fifteenth Amendment, and this court should not infer such limits. Nor, in light of *Boerne*'s treatment of the VRA or the Supreme Court's post-*Boerne* decisions in *Lopez v. Monterey County*, 525 U.S. 266 (1999), and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), is there reason to think that *Boerne* casts constitutional doubt on Section 2's results test.

ARGUMENT

In his dissent from a prior decision by this court denying rehearing en banc, *Farrakhan v. Washington*, 359 F.3d 1116 (9th Cir.), *cert. denied*, 543 U.S. 984 (2004) (*Farrakhan I*), now-Chief Judge Kozinski, joined by several other members of the court, suggested that "extending" Section 2 of the Voting Rights Act to reach felon disenfranchisement laws "seriously jeopardizes its constitutionality." *Id.* at 1121. That concern is unwarranted. First, it reads too much into the

Supreme Court's decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974), exempting felon disenfranchisement laws from heightened scrutiny under the "fundamental rights" strand of equal protection jurisprudence. *Ramirez* in no way diminishes Congress's power to address felon disenfranchisement laws that implicate racial discrimination. Second, that concern mistakenly downplays a series of other Supreme Court decisions that establish and reaffirm Congress's power to prohibit qualifications on the right to vote, including felon disenfranchisement statutes, that violate Section 2's results test.

I. *Richardson v. Ramirez* Was A Narrow Decision Addressing Only The "Fundamental Rights" Strand Of Equal Protection Jurisprudence, And Provides No Protection Against Other Fourteenth Or Fifteenth Amendment-Based Challenges To Felon Disenfranchisement Laws.

1. Challenges to restrictions on the franchise implicate at least two distinct strands of equal protection jurisprudence. The first has come to be known as the "fundamental rights" strand. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (challenging a poll tax), *Kramer v. Union Free School District*, 395 U.S. 621 (1969) (challenging a rule restricting the vote in school board elections to owners or lessons of property in the district and parents of schoolchildren), and *Dunn v. Blumstein*, 405 U.S. 330 (1972) (challenging durational residence requirements), for example, establish that when a state denies the franchise to

resident citizens of voting age, that restriction is permissible only if "necessary to promote a compelling state interest." *Kramer*, 395 U.S. at 627.[2]

The second strand of equal protection law involving restrictions on the franchise focuses not on the fact that the state is denying citizens the right to vote, but rather on the nature of the line the government has drawn between those who can vote and those who cannot. While lines drawn on the basis of characteristics such as citizenship or bona fide residency are presumptively legitimate and can be justified under deferential rationality review, *see, e.g.*, *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 70 (1978), those based on race – whether explicit, *see, e.g.*, *Nixon v. Herndon*, 273 U.S. 536 (1927) (challenging a state law limiting participation in a party's primary to white voters), or covert, *see, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (challenging the redrawing of municipal boundaries) – are not. While theoretically one might suppose that race-based restrictions on the right to vote could survive strict scrutiny under the Fourteenth Amendment, the Supreme Court has treated the Fifteenth Amendment, which provides in pertinent part that "[t]he right of citizens of the United States to vote

[2] The Court's recent decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), is not to the contrary. Justice Stevens's opinion announcing the judgment of the Court used a balancing test derived from *Anderson v. Celebrezze*, 460 U.S. 780 (1983), to assess whether voter ID laws violated the Equal Protection Clause, but the issue in that case was not the scope of the franchise itself, but rather a restriction on eligible voters that was designed to "protect the integrity and reliability of the electoral process." *Crawford*, 553 U.S. at 189-90 (quoting *Anderson*, 460 U.S. at 788 n.9).

shall not be denied or abridged by the United States or by any State on account of race," as an absolute bar to racial discrimination in voting. U.S. Const. amendment XV, § 1; *see Rice v. Cayetano*, 528 U.S. 495, 511-12, 520 (2000); *infra* at pages 9-11.

2. The Supreme Court's decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974), addressed only the first, "fundamental rights," strand of equal protection doctrine. In *Ramirez*, the Court concluded that the Reduction of Representation Clause in Section 2 of the Fourteenth Amendment – which strips states of seats in the House of Representatives if they disenfranchise male citizens over the age of 21 "except for participation in rebellion, or other crime" – provided an "affirmative sanction" for felon disenfranchisement that "was not present in the case of other restrictions on the franchise" to which the Court had applied strict scrutiny. 418 U.S. at 54.

The plaintiffs in *Ramirez* made no allegations regarding any racially discriminatory purpose or effect of the California provision at issue. Nonetheless, the Court went out of its way to describe how even the Congress that had proposed the Fourteenth Amendment and exempted felon disenfranchisement from the reduction-of-representation penalty sought to ensure that states could not "misuse the exception for felons to disenfranchise Negroes." *Id*. at 52.

That the Supreme Court's decision in *Ramirez* provides no protection to offender disenfranchisement statutes that were enacted or maintained for racially discriminatory purposes is confirmed by the Court's unanimous decision in *Hunter v. Underwood*, 471 U.S. 222 (1985). *Hunter* concerned a provision in the 1901 Alabama Constitution that disenfranchised persons convicted of selected crimes. As then-Justice Rehnquist's opinion for the Court explained, the drafters had singled out for disenfranchisement those crimes they believed to be "more frequently committed by blacks." *Id.* at 227. The challenged provision continued, into the latter quarter of the twentieth century, to result in disproportionate disenfranchisement of black citizens. *Id.* (noting that blacks were at least 1.7 times as likely as whites to be excluded).

The Court recognized that the Alabama law "on its face [was] racially neutral," *id.*, but nonetheless struck it down under the framework developed in *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (itself a housing, not a voting, case). Because the challenged provision "would not have been adopted by the convention or ratified by the electorate in the absence of the racially discriminatory motivation," it violated the Equal Protection Clause. *Hunter*, 471 U.S. at 231. And the Supreme Court rejected out of hand Alabama's invocation of *Ramirez* and the Reduction of Representation Clause: "[W]e are confident that § 2 [of the Fourteenth Amendment] was not designed to

permit the purposeful racial discrimination attending the enactment and operation of [Alabama's statute] which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson* v. *Ramirez* suggests the contrary." *Id.* at 233 (internal cross-reference omitted).

3. The text and history of the Fifteenth Amendment reinforce the conclusion that racially discriminatory voting practices violate the Constitution regardless of whether similar practices enacted without a racially discriminatory purpose would be subjected to heightened scrutiny. The Supreme Court has repeatedly used the Fifteenth Amendment to strike down voting qualifications adopted or maintained for the purpose of disenfranchising racial minorities. *See, e.g.*, *Louisiana v. United States*, 380 U.S. 145 (1965) (striking down a facially neutral "interpretation" test for being applied in a racially discriminatory manner even though the Court had refused to apply heightened scrutiny to other literacy tests); *Gomillion v. Lightfoot*, 364 U.S. at 342 (striking down the redrawn boundaries of a municipality as a purposeful scheme for removing all black voters from the city even though states' general power to define municipal boundaries was subject to great deference). Thus, the statute at issue in *Hunter v. Underwood* surely violated the Fifteenth Amendment as well as the Fourteenth.

While Fourteenth and Fifteenth Amendment protections often overlap, the Supreme Court has emphasized that the Fifteenth Amendment's express

prohibition on denial or abridgement of the right to vote on account of race "has independent meaning and force." *Rice v. Cayetano*, 528 U.S. at 522. Thus, in *Rice*, the Supreme Court reversed this court's determination that "compliance with the one-person, one-vote rule of the Fourteenth Amendment somehow excuses compliance with the Fifteenth Amendment." *Id*. Moreover, the Court suggested that even if a government's interests might justify other forms of race-conscious affirmative action, in light of the Fifteenth Amendment they could not justify racial restrictions on the franchise. *See id.* at 518-22.[3]

Congress in fact proposed the Fifteenth Amendment because "[a] few years' experience satisfied the thoughtful men who had been the authors of the other two amendments" that the powers granted to Congress by the Thirteenth and Fourteenth Amendments to eradicate racial discrimination in voting "were inadequate." *Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 71 (1873); *see also United States. v. Reese*, 92 U.S. 214, 218 (1875) (stating that "[p]revious to th[e] [Fifteenth] [A]mendment, there was no constitutional guaranty against this discrimination: now there is"). Because the Fifteenth Amendment comes after the Fourteenth, the Fifteenth sets the controlling standard for the scope of

[3] While sometimes the Fifteenth Amendment provides broader protection than the Fourteenth, the converse is also true. Although the Supreme Court has not held that purposeful dilution of a racial minority's voting strength is actionable under the Fifteenth Amendment, it has found such dilution to violate the Fourteenth. *Compare Reno v. Bossier Parish School Board*, 528 U.S. 320, 334 n.3 (2000) *with Rogers v. Lodge*, 458 U.S. 613, 617 (1982).

constitutional protections when these amendments are inconsistent. Of special salience to the question before this court, as the *amicus* brief for the Constitutional Accountability Center details, the Congress that drafted the Fifteenth Amendment considered and rejected attempts to include the Fourteenth Amendment's exception for felon disenfranchisement in the Fifteenth as well. Thus, even under the erroneous assumption that the Fourteenth Amendment somehow would not itself forbid racially discriminatory felon disenfranchisement statutes (an assumption unanimously rejected in *Hunter*), such disenfranchisement would still independently violate the Fifteenth Amendment.

4. Finally, *Ramirez* does not immunize offender disenfranchisement laws from statutory prohibitions that enforce either the Fifteenth Amendment or the suspect classification strand of equal protection. "[T]he absence of a constitutional prohibition does not somehow bar a statutory one. 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 through legislation – provided, of course, that Congress has the authority to enact such a prohibition." *Harvey v. Brewer*, 2010 U.S. App. LEXIS 10822, * 22 (9th Cir. May 27, 2010). As *amici* explain in the next section, Congress does have such authority.

II. In Enforcing The Fourteenth And Fifteenth Amendments, Congress Can Go Beyond Forbidding The Use Of Felon Disenfranchisement Statutes That Plaintiffs Can Prove Violate The Constitution.

Congress enacted VRA Section 2 expressly to enforce the guarantees of the Fourteenth and Fifteenth Amendments.[4] The question whether Congress has the enforcement authority to reach offender disenfranchisement provisions has a straightforward answer. As this court concluded the first time this case was before it, that answer is "yes."

1. Chief Judge Kozinski's dissent itself recognizes that Congress can use its enforcement power to ban practices that violate the Constitution directly. In *United States v. Georgia*, 546 U.S. 151 (2006), Justice Scalia's opinion for a unanimous court confirmed that "no one doubts" Congress's "power to 'enforce … the provisions' of the [Reconstruction] Amendment[s] by creating private remedies

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[4] Initially, Congress enacted the VRA "to enforce the fifteenth amendment to the Constitution of the United States, and for other purposes." Voting Rights Act of 1965, Pub. L. No. 89-110, pmbl, *reprinted in* 1965 U.S. Cong. Code & Ad. News, 480, 480. In 1965, Congress relied explicitly on its Fourteenth Amendment enforcement power only with respect to a section of the Act involving citizens who had been educated in American-flag schools where English was not the primary language of instruction. *See* Voting Rights Act of 1965, § 4(e), Pub. L. No. 89-110, reprinted in 1965 U.S. Cong. Code & Ad. News, 480, 483 (codified at 42 U.S.C. § 1973b(e) (2006)). In 1975, when Congress amended Section 2 of the VRA to protect members of language as well as racial minorities, it specifically invoked its enforcement powers under both the Fourteenth and Fifteenth Amendments. *See* Voting Rights Act Amendments of 1975, § 203, Pub. L. No. 94-73, 89 Stat. 400, 401 (codified as amended at 42 U.S.C. § 1973b(f)(1) (2006)); *see also* S. Rep. No. 97-417, at 40 n. 152 (1982) (declaring that Congress's further amendment of VRA in 1982 § 2 to impose a results test "rests on both amendments").

against the States for *actual* violations of those provisions." *Id*. at 158 (omission in original). That is true even when another constitutional provision might seem to provide express protection for the state. In *United States v. Georgia*, for example, the Eleventh Amendment's declaration of sovereign immunity provided no protection against an Americans With Disabilities Act claim when Congress used its enforcement power to abrogate that immunity with respect to claims based on the Fourteenth Amendment's incorporation of the prohibition on cruel and unusual punishments. So, too, the exemption of offender disenfranchisement from the Reduction of Representation Clause provided no protection against the constitutional challenge in *Hunter*, and would have provided no protection against a VRA Section 2 claim either.[5] There should be no doubt, then, that Congress has the authority to use its Fourteenth and Fifteenth Amendment enforcement powers to prohibit voting qualifications, including ones based on criminal convictions, that are adopted or maintained, at least in part, because of their adverse impact on minority citizens, and to provide a cause of action for citizens whose right to vote has been denied.

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[5] The complaint in *Hunter* was filed in 1978, before the 1982 amendments to VRA Section 2. At the time, the language of § 2 essentially tracked the language of § 1 of the Fifteenth Amendment and a few years later a plurality of the Supreme Court construed § 2 "to have an effect no different from that of the Fifteenth Amendment itself." *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980) (plurality op.).

2. Congress's enforcement power, however, goes beyond simply authorizing it to provide a cause of action for citizens whose constitutional rights have been violated. Congress can also prohibit voting qualifications where there is a plausible risk that such practices were enacted or maintained for a discriminatory purpose. Moreover, it can also forbid qualifications that perpetuate the effects of unconstitutional conduct outside the electoral process. And it can reach practices that impair minority citizens' efforts to prevent future unconstitutional conduct.

The Supreme Court's treatment of congressional bans on literacy tests shows how Congress's enforcement power extends beyond simply prohibiting practices that themselves directly violate the Constitution. In *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959), the Supreme Court held that literacy tests do not in and of themselves violate the equal protection clause. The Court explained that, absent a showing of intentional racial discrimination, North Carolina's literacy test could not be condemned "on its face as a device unrelated" to the state's legitimate desire "to raise the standards for people of all races who cast the ballot." *Id.* at 54. And yet, over the course of the next decade, the Supreme Court upheld increasingly sweeping statutory bans on literacy tests as an appropriate use of congressional enforcement powers.

a. *Congressional power to reach potentially unconstitutional conduct within the electoral process itself.* In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966),

the Supreme Court upheld Congress's temporary suspension of literacy tests in jurisdictions with significantly depressed levels of political participation. In upholding the suspension, the Court employed a deferential standard for reviewing exercises of Congress's Fifteenth Amendment enforcement powers similar to that it had long used to evaluate Congress's exercise of its Article I powers under the Necessary and Proper Clause. *See id.* at 324 (Congress may "use *any rational means* to effectuate the constitutional prohibition of racial discrimination in voting" (emphasis added)).

Based on the previous "century of systematic resistance to the Fifteenth Amendment," *id.* at 328, the Court concluded that Congress could properly go beyond authorizing, or even facilitating, case-by-case adjudication of the constitutionality of literacy tests, in favor of a more wholesale approach. Congress could rely on evidence from some of the covered jurisdictions that the tests "have been instituted with the purpose of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been administered in a discriminatory fashion for many years," *id.* at 333-34, to ban them throughout all of those jurisdictions.

b. *Congressional power to forbid voting-related practices because of unconstitutional discrimination outside the electoral process.* Three years after *South Carolina v. Katzenbach*, the Supreme Court rejected any suggestion that the

initial congressional ban on literacy tests depended on proof of intentional discrimination in the use of a particular test. In *Gaston County v. United States*, 395 U.S. 285 (1969), the Court held that Congress had the power to prohibit the use of literacy tests even where the disparate impact of the test was attributable to discrimination outside the electoral process – there, in the public education system. Because Gaston County had "systematically deprived its black citizens of the educational opportunities it granted to its white citizens," even "'[i]mpartial' administration of the literacy test today would serve only to perpetuate these inequities in a different form." *Id.* at 297.

In the 1970 amendments to the Voting Rights Act, Congress went even further, imposing a nationwide ban on the use of literacy tests. *See* Voting Rights Act Amendments of 1970, § 6, Pub. L. No. 91-285, 84 Stat. 314, 315.[6] This ban extended beyond the originally covered jurisdictions – as to which Congress had had extensive evidence of intentional racial discrimination – to reach jurisdictions as to which Congress had no particularized evidence of unconstitutional conduct at all.

In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Supreme Court unanimously upheld this wholesale national prohibition against the State of Arizona's challenge.

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[6] That ban, which was initially temporary, became permanent in 1975. *See* Voting Rights Act Amendments of 1975, § 102, Pub. L. No. 94-73, 89 Stat. 400, 400 (codified as amended at 42 U.S.C. § 1973aa (2006)).

Even assuming that Arizona's test had not been adopted or administered invidiously and that the state's own education system was free from unconstitutional discrimination, Congress could permissibly conclude that due to discrimination elsewhere "the use of literacy tests anywhere within the United States has the inevitable effect of denying the vote to members of racial minorities whose inability to pass such tests is the direct consequence of previous governmental discrimination in education." *Id.* at 235 (Brennan, J., joined by White and Marshall, JJ.); *see also id.* at 133 (Black, J.) (Congress can address the nationwide effects of "educational inequality); *id.* at 147 (Douglas, J.) (Congress could act given that tests had been "used at times as a discriminatory weapon"); *id.* at 216 (Harlan, J.) (the "danger of [constitutional] violation" justified congressional action "[d]espite the lack of evidence" in some jurisdictions); *id.* at 283-84 (Stewart, J., joined by Burger, C.J., and Blackmun, J.) (unequal educational opportunities meant the tests "work[ed] unfairly against Negroes in practice"; the justification for a nationwide ban "need not turn" on proof of discrimination "in every State"). Notably, in neither *Gaston County* nor *Oregon v. Mitchell* was Congress limited to providing relief only to those citizens who could show that racial discrimination in the education system was a but-for cause of their inability to pass a fairly administered literacy test. The literacy test was permissibly

suspended even as to those aspiring voters who had never been victims of unconstitutional discrimination themselves.

c. *Congressional power to forbid voting-related practices not proven themselves to be discriminatory in order to provide minority citizens with the ability to prevent future discrimination outside the electoral process.* The same year that the Supreme Court decided *South Carolina v. Katzenbach*, it also upheld Congress's decision under Section 4(e) of the VRA to override state statutory requirements for literacy in English as applied to citizens who attended American-flag schools where English was not the primary language of instruction. *Katzenbach v. Morgan*, 384 U.S. 641 (1966). In finding that Section 4(e) represented an appropriate use of Congress's Fourteenth Amendment enforcement powers, the Court did not base its ruling on the existence of "some evidence suggesting that prejudice played a prominent role in [New York's] enactment of the [English literacy] requirement," *id.* at 654, and did not "confine" itself to asking whether Congress had aimed only "at the elimination of an invidious discrimination in establishing voter qualifications," *id.* at 653-54. Instead, the Court adopted a markedly more capacious approach to Congress's enforcement power, viewing Section 4(e)'s protection of voting rights as a measure also to secure "nondiscriminatory treatment by government" in "the provision or

administration of governmental services, such as public schools, public housing and law enforcement." *Id.* at 652.

3. The Supreme Court has upheld the broad treatment of voting-related regulations under VRA Section 2 as an appropriate exercise of congressional enforcement powers. While Congress singled out literacy tests for special treatment under the VRA, it also enacted a more categorical ban on state practices that deny or abridge the right to vote. Instead of setting out an exhaustive, or exclusive, list of forbidden restrictions, Section 2 declares that "[*n*]*o* voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision 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 membership in a language minority group.]" 42 U.S.C. § 1973(a) (emphasis added).[7] In 1982, Congress amended Section 2 to reach practices that had a discriminatory result regardless of the purpose for which they were enacted or maintained. As amended, Section 2 has been used to reach a

[7] The question before this court thus is not whether Congress could use its enforcement powers to enact a statute banning *only* offender disenfranchisement laws. Offender disenfranchisement statutes undeniably impose a voting qualification, and thus fall within the express scope of Section 2. So the question is simply whether Congress could treat offender disenfranchisement laws the same way it treats all other laws restricting the franchise: namely, forbidding their use when, "based on the totality of circumstances," 42 U.S.C. § 1973(b), they violate the "results test."

wide range of practices that are not expressly identified in the text of the statute. *See infra* pages 23-24 (discussing some of these cases).

The Supreme Court early on summarily affirmed a district court decision upholding the constitutionality of amended Section 2, *see Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984), and has repeatedly applied Section 2 without requiring proof of an unconstitutional purpose. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Chisom v. Roemer*, 501 U.S. 380 (1991); *LULAC v. Perry*, 548 U.S. 399 (2006). That is hardly surprising, given the Court's earlier holding in *City of Rome v. United States*, 446 U.S. 156 (1980), that "under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect." *Id.* at 175.[8]

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[8] It is a bit of an exaggeration to state that "section 2's constitutionality remains an open question." *Farrakhan I*, 359 F.3d at 1124 (Kozinski, J., dissenting). Indeed, in the very concurrence in *Bush v. Vera*, 517 U.S. 952 (1996), to which Chief Judge Kozinski points, Justice O'Connor noted that lower federal courts "have unanimously affirmed [the results test's] constitutionality," *id.* at 991, and concluded that the general presumption in favor of constitutionality was

> bolstered by concerns of respect for the authority of Congress under the Reconstruction Amendments. See *City of Rome* v. *United States*, 446 U.S. 156, 179 (1980). The results test of § 2 is an important part of the apparatus chosen by Congress to effectuate this Nation's commitment "to confront its conscience and fulfill the guarantee of the Constitution" with respect to equality in voting. S. Rep. No. 97-417, p. 4 (1982). Congress considered the test "necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth Amendments rights." *Id.*, at 27. It believed that without the results test, nothing could be done about "overwhelming evidence of unequal access to the electoral system," *id.*, at 26, or about "voting practices

4. In light of the analytic framework provided by the Supreme Court's decisions, reaching the conclusion that Congress has the power to include felon disenfranchisement laws within Section 2 of the VRA is straightforward.

First, as with literacy tests, some felon disenfranchisement laws were themselves adopted or maintained for racially discriminatory purposes. Alabama's law was unanimously struck down by the Supreme Court in *Hunter v. Underwood* on exactly this ground, and other states' laws were similarly tainted. *See Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998) (the design of the Mississippi offender provision in effect from 1890 to 1968 "was motivated by a desire to discriminate against blacks"); *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896) (the Mississippi constitutional convention "swept the circle of expedients to obstruct the exercise of the franchise by the negro race" in picking the offenses which would trigger disenfranchisement). A recent comprehensive study tracing the origins of felon disenfranchisement notes that while the practice began in the 1840s, a "second

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> and procedures [that] perpetuate the effects of past purposeful discrimination," *id.*, at 40. And it founded those beliefs on the sad reality that "there still are some communities in our Nation where racial politics do dominate the electoral process." *Id.*, at 33. Respect for those legislative conclusions mandates that the § 2 results test be accepted and applied unless and until current lower court precedent is reversed and it is held unconstitutional.

Id. at 992; *see also United States v. Blaine County*, 363 F.3d 897, 909 (9th Cir. 2004) ("hold[ing] that the results test is a constitutional exercise of Congress' Fourteenth and Fifteenth Amendment enforcement powers"), *cert. denied*, 544 U.S. 992 (2005).

wave of restrictions occurred in the South after the Civil War, in some cases following passage of the Fifteenth Amendment and extension of voting rights to African American men." Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* 51 (2006). *See generally id.* at 41-68 (tracing the relationship between race and felon disenfranchisement laws). Laws like Alabama's would violate VRA Section 2 under any construction of the statute. That not all such statutes have been challenged and that some of them have thankfully been repealed or amended without the need for litigation has no bearing on Congress's power to reach them.

Second – and of special salience to this case – the literacy test decisions demonstrate that Congress can use its enforcement power to prohibit the use of voting qualifications that "perpetuate" discrimination coming from outside the electoral system. *Gaston County*, 395 U.S. at 297. Chief Judge Kozinski's skepticism about Congress's power to reach offender disenfranchisement statutes rested on his assumption that there was not "a shred of evidence of intentional discrimination in Washington's criminal justice system." *Farrakhan I*, 359 F.3d at 1117. But the constitutional question is not whether Washington State's criminal justice system violates the equal protection clause, but rather whether Congress could conclude that there is a plausible risk that offender disenfranchisement laws perpetuate discrimination outside the electoral process. The evidence below

supports finding such a risk. On remand, the district court found abundant and "compelling evidence of racial discrimination and bias in Washington's criminal justice system." *Farrakhan v. Gregoire*, 2006 U.S. Dist. LEXIS 45987, *17 (E.D. Wash. 2006). That evidence showed an overrepresentation of minority citizens at every stage of the criminal justice system from treatment by the police during initial encounters through arrest, conviction, sentencing, and incarceration that was inexplicable by reference to any nondiscriminatory factors. Just as educational inequality provided a sufficient basis for Congress to ban literacy tests that interacted with that discrimination to exclude minority voters, so too inequities in the criminal justice system can provide a sufficient basis for Congress to prohibit the use of offender disenfranchisement provisions that result in a disproportionate exclusion of minority citizens. And as was true with respect to literacy tests, application of that ban does not depend on an aspiring voter proving that unconstitutional conduct was a but-for cause of his own exclusion.

Third, the fact that Section 2 might reach some offender disenfranchisement provisions that have a discriminatory result even though they are tainted neither by a discriminatory purpose themselves nor by unconstitutional discrimination elsewhere poses no constitutional difficulty. *See Blaine County*, 363 F.3d at 907-09 (holding that § 2 can prohibit practices that have a discriminatory result without any proof of unconstitutional purpose in the specific case). Courts have used the

results test of VRA Section 2 to invalidate a wide variety of practices ranging from restrictive registration requirements, *see, e.g.*, *Mississippi State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), to polling place locations, *see, e.g.*, *Brown v. Dean*, 555 F. Supp. 502, 505-06 (D.R.I. 1982), to at-large elections, *Blaine County*, 363 F.3d at 910-15, without tying those practices directly to unconstitutional discrimination in the defendant jurisdiction. *See also* Ellen Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, *in* Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation and Power 183, 192 (Ana Henderson ed. 2007) (noting that since 1982 there have been more than forty published opinions in lawsuits challenging election administration procedures). Just as Congress had the constitutional power to reach particular voter registration requirements or electoral practices under the results test without first requiring proof that the defendant jurisdiction itself has engaged in unconstitutional conduct, so too, Congress has the power to bring offender disenfranchisement provisions within the scope of VRA Section 2's totality-of-the-circumstances results test. Of course, at the end of the day, a court might conclude that a particular offender disenfranchisement law passes statutory muster despite there being some disparate impact, in the same way that other practices have been upheld despite some racial disparity. But that is a

far cry from exempting the law from scrutiny under VRA Section 2 as a matter of constitutional avoidance.

5. Contrary to the concerns raised by Chief Judge Kozinski's earlier dissent, *see Farrakhan I*, 359 F.3d at 1122-25, nothing in the Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), undermines the conclusion that Congress has the power to address offender disenfranchisement statutes that have discriminatory results. In *Boerne*, the Supreme Court held that Congress's power under Section 5 of the Fourteenth Amendment must be congruent and proportional to the constitutional violation Congress aims to remedy. *Id.* at 520. But *Boerne* does not itself limit in any way the broad powers Congress enjoys in light of the decisions in *South Carolina v. Katzenbach* and *City of Rome* to enforce the *Fifteenth* Amendment. Nor, in light of the Court's subsequent decisions, does *City of Boerne* actually diminish Congress's power under even the Fourteenth Amendment to retain a results test in voting cases.

In *City of Boerne* itself, the Court expressly pointed to the VRA – and its suspension of literacy tests without regard to proof of purposeful discrimination in a particular jurisdiction – as an example of appropriate enforcement legislation. *See* 521 U.S. at 518, 525-28. And two years after *City of Boerne*, the Supreme reaffirmed that *Boerne* had not affected its analysis of Congress's ability to prohibit practices with a discriminatory effect on voting eligibility. In *Lopez v.*

Monterey County, 525 U.S. 266 (1999), the Court cited both *Katzenbach* and *City of Rome* to show Congress's broad enforcement power under the Fifteenth Amendment. *Id.* at 283. Indeed, even the *Lopez* dissent accepted that *Katzenbach* and *City of Rome* "compared Congress' Fifteenth Amendment enforcement power to its broad authority under the Necessary and Proper Clause." *Id.* at 294 (Thomas, J., dissenting).

Thus, this court should follow the longstanding rule that Supreme Court decisions "remain binding precedent" unless that Court itself "see[s] fit to reconsider them." *Hohn v. United States*, 524 U.S. 236, 252-53 (1998). Courts of appeals are not permitted to steal a march on potential doctrinal change. In *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989), for example, even though the Supreme Court ultimately overruled a prior decision, it stopped along the way to criticize the Fifth Circuit, which should not "on its own authority" have "taken the step of renouncing" the earlier decision. "If a precedent of this Court has direct application in a case," the Supreme Court emphasized, other courts "should follow the case which directly controls," rather than adopting a contrary analysis resting on "some other line of decisions." *Id.* at 484.

6. In any event, the VRA's results test satisfies *City of Boerne*'s "congruence and proportionality standard." The Supreme Court has consistently upheld civil rights legislation that reaches government action having a racially

disparate impact as being within Congress's power under Section 5 of the Fourteenth Amendment. This reflects a pragmatic realization that "the search for the 'actual' or the 'primary' purpose of a statute is likely to be elusive." *Michael M. v. Superior Court*, 450 U.S. 464, 469-70 (1981). Thus, Congress can justifiably conclude that the costs of requiring this inquiry are unwarranted, at least in cases where the challenged practice violates the results test. *See also Gingles*, 478 U.S. at 44 (explaining that Congress adopted the results test after concluding that an intent test "is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities" and "places an inordinately difficult burden of proof on plaintiffs" (internal quotation marks omitted)).

In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Supreme Court found that the extension of Title VII's antidiscrimination protections to state government employees constituted a valid abrogation of state sovereign immunity, as Congress could override states' immunity from suit in order to "enforce[e] the substantive guarantees of the Fourteenth Amendment." *Id.* at 448. The Supreme Court had already interpreted Title VII to reach practices with a disparate impact as well as those involving a discriminatory purpose. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). While *Bitzer* itself involved a facially discriminatory practice – gender-based differences in eligibility for retirement – in *Connecticut v. Teal*, 457 U.S. 440 (1982), the Court found state liability for a pure disparate impact Title

VII claim. Any suggestion that Congress cannot reach practices with a discriminatory impact under the *Boerne* standard would thus require rejecting *Bitzer* and *Teal*.

Congress's authority to enact results tests is reinforced by the Court's post-*Boerne* decisions. In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Court applied the *Boerne* standard in upholding the Family and Medical Leave Act of 1993. The Court found that the requirement that states provide employees with unpaid leave to care for family members represented appropriate Fourteenth Amendment-based legislation to remedy and prevent sex discrimination. While Congress had before it evidence of intentional discrimination in state employment and of differential maternity and paternity leave policies, *see* 538 U.S. at 730-32, the Court pointed to no direct evidence of intentional official discrimination with respect to other familial leave policies. Nor did it identify evidence that Nevada itself had ever acted unconstitutionally. Nonetheless, the record in *Hibbs* was sufficient to justify congressional action that went beyond equalizing maternity and paternity leave to requiring government employers to provide all workers with gender-neutral caretaking leave.

In a similar vein, the national record of intentional racial discrimination in voting is also sufficient to permit Congress to subject all voting qualifications to Section 2's results test without requiring that Congress first amass a record of past

discrimination with regard to every particular voting qualification that falls within the scope of Section 2. That point is already well established. For example, courts, including this one, have entertained claims that punch card ballot systems violate Section 2, despite the absence of any discussion of these systems in the legislative record. *See, e.g.*, *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 918-19 (9th Cir. 2003) (en banc) (recognizing, in the context of proceedings for a preliminary injunction, the availability of such a claim). If the VRA can reach claims involving punchcard ballots, it can reach claims regarding offender disenfranchisement statutes too. As Justice Scalia, who has generally adopted a restrictive view of congressional enforcement power explained in his dissent in *Tennessee v. Lane*, 541 U.S. 509 (2004), "[g]iving § 5 more expansive scope with regard to measures directed against racial discrimination by the States" fulfills the "principal purpose of the Fourteenth Amendment." *Id.* at 561. He would accordingly "leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under § 5 to prevent or remedy racial discrimination by the States." *Id.* at 564. Thus, nothing in *Boerne* or the subsequent cases applying its analysis suggests new limits on Congress's power to reach voting qualifications or regulations that have a disparate racial impact.

CONCLUSION

In addressing the question whether Washington State's felon disenfranchisement statute violates Section 2 of the Voting Rights Act, this court should recognize Congress's power under the enforcement clauses to reach voting qualifications, including offender disenfranchisement statutes, that result in minority citizens having less opportunity to participate in the political process.

Respectfully submitted,

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