No. 05-212

In The
Supreme Court of the United States

THOMAS JOHNSON, *et al.*,

Petitioners,

v.

JEB BUSH, Governor of Florida, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GEORGE WAAS
Assistant Attorney General
The Capitol
Tallahassee, FL 32399
(954) 712-4670

CHARLES J. COOPER
Counsel of Record
DAVID H. THOMPSON
DEREK L. SHAFFER
DAVID M. LEHN
COOPER & KIRK, PLLC
1500 K Street, NW, Suite 200
Washington, DC 20005
(202) 220-9600

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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INTRODUCTION

Every State in the Union, save two, prohibits, to one degree or another, felons from voting. This penal restriction on the franchise is deeply rooted in the Nation's history and is expressly sanctioned by the Fourteenth Amendment itself. Judge Friendly summarized the purposes of these laws as follows:

> [I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. . . . A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.

Green v. Board of Elections, 380 F.2d 445, 451-52 (2d Cir. 1967). As recently as *Romer v. Evans*, 517 U.S. 620, 634 (1996), this Court observed that felon disenfranchisement laws are "unexceptionable."

Petitioners advance the claim that Congress has sought to enforce the Fourteenth Amendment by extending the "results" standard of Section 2 of the Voting Rights Act to all felon disenfranchisement laws. To accept petitioners' interpretation of Section 2, this Court must conclude that Congress in 1982 intended to cast into doubt the criminal justice system of 48 States and intended to apply a standard that threatens to forbid a venerable and ubiquitous practice that is expressly contemplated and sanctioned by the very same Amendment. Petition Appendix ("Pet. App.") 35a n.32. It is unfathomable that Congress would intrude so deeply into the sovereign right of every State to set qualifications for voting and to establish punishments for

felons without leaving at least some indication in the legislative record that it intended such a radical result.

Petitioners' interpretation of Section 2 is foreclosed because it would expand that statute beyond the limits of Congress's enforcement power under Section 5 of the Fourteenth Amendment. This Court has repeatedly emphasized that Congress can apply prophylactic legislation to the States under its Fourteenth Amendment enforcement powers only if it has made explicit findings that the States have engaged in a widespread pattern of unconstitutional conduct that warrants such a federal remedy. Where, as here, there are no such findings, Congress cannot act. Moreover, the clear statement rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), requires that any such incursion into a core function of the States must be expressed in unmistakable terms – surely, a legislative record in 1965 *approving* felon disenfranchisement laws and a silent legislative record in 1982 does not satisfy this standard.

Perhaps in light of this reality, petitioners also mount an equal protection challenge to Florida's felon disenfranchisement law. As the Eleventh Circuit stressed, however, petitioners themselves stipulated that Florida's current law, enacted in 1968, was not adopted for racially discriminatory purposes. Petitioners nevertheless seek to impute the unrecorded motives of legislators from a century earlier to the drafters of Florida's current Constitution. Not surprisingly, there is no split among the circuits on this issue. A racially neutral state law adopted without invidious purpose plainly does not violate the Equal Protection Clause.

COUNTERSTATEMENT OF THE CASE

Petitioners' statement of the case is neither complete nor accurate, and we offer this brief counterstatement to address their more important omissions and errors.

1. At its founding in 1838, Florida adopted its original criminal disenfranchisement provision, which extended to those convicted of "infamous crimes." Given that blacks were unable to vote at that time, petitioners' historical expert conceded, and the Eleventh Circuit found, that the "origin" of the felon disenfranchisement rule had nothing to do with race discrimination. Pet. App. 7a.

The Eleventh Circuit observed that "[t]he [petitioners] introduced *no* contemporaneous evidence showing that racial discrimination motivated the adoption of the 1868 provision." Pet. App. 18a (emphasis added). Instead, petitioners rest their claim that the 1868 provision was motivated by a racist intent on a series of inflammatory racist comments, but none – *not one* – of these statements relates to the intent behind the felon disenfranchisement provision adopted in 1868. Pet. App. 10a. Rather, the racist comments cited by petitioners all relate to the other provisions in the 1868 Constitution. Pet. App. 10a. Indeed, as the Eleventh Circuit noted, "the [petitioners'] own historical expert conceded that prior to the instant case, no historian who had studied Florida's 1868 Constitution had ever contemplated that the 1868 criminal disenfranchisement provision was enacted with discriminatory intent." Pet. App. 9a.

2. Florida's current felon disenfranchisement provision was enacted in 1968 as a result of an extensive deliberative process. Pet. App. 11a-15a. Specifically, the Constitutional Review Commission established a Subcommittee on Elections and Suffrage to draft, *inter alia*, a constitutional provision specifying the qualifications for voters. The Subcommittee considered several competing alternatives that would have ended automatic felon disenfranchisement. Pet. App. 13a-14a. After "considerable discussion," the Subcommittee adopted the current provision, which substantively narrowed the scope of the disenfranchisement provision by re-enfranchising those

convicted of petty larceny and other misdemeanors. Pet. App. 14a n.16. Thus, the Eleventh Circuit concluded that the 1968 law was "markedly different from Florida's 1868 version." Pet. App. 12a; *see* Pet. App. 11a-13a.[1]

3. Petitioners emphasize the disproportionate impact of Florida's felon disenfranchisement laws, and contend that Florida's criminal justice system discriminates against blacks in convictions. But the overwhelming number of Florida's disenfranchised felons are white – some 70 percent of the 617,000-member Plaintiff class. Pet. App. 3a n.2. For these felons, race has obviously played no role in their disenfranchisement.

In any event, the *undisputed* evidence demonstrates that Florida's criminal justice system operates in a race-neutral manner: (1) there is *no racial disparity* as between "felony arrests" and "felony convictions," and (2) there is *no racial disparity* in the sentences received by convicts with similar sentencing guideline scores.[2] Pet. App. 33a n.31.

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[1] As the Eleventh Circuit noted, petitioners attempted below to argue to the contrary based on materials that were not part of the record and that had been specifically excluded by the district court. Pet. App. 11a n.13. Petitioners have not sought review of this evidentiary ruling, and thus it is inappropriate for them to continue to cite to these extra-record materials. *See*, *e.g.*, Pet. 5 & n.3, 7 n.4.

[2] Petitioners' expert attempted to evade this conclusion by ignoring the entire population of offenders who were successfully convicted on a felony charge, but whose disposition reflected the judicial decision to "withhold adjudication." In Florida, certain offenders are eligible for "adjudication withheld," which carries no imprisonment and no loss of civil rights, but may require supervision akin to house arrest or probation. *See* FLA. STAT. § 948.01. Individuals who receive this have received "convictions." Petitioners have argued that sentences of "adjudication withheld" should be ignored because they do not result in the loss of voting rights. But if petitioners are trying to prove that discretionary judgments made from arrest to conviction are biased against blacks (*i.e.*, that black "felony arrests" are more likely to lead to

(Continued on following page)

REASONS FOR DENYING THE WRIT

I. Section 2 Of The Voting Rights Act Does Not Reach Felon Disenfranchisement Provisions.

Petitioners are correct that the courts of appeals have reached different conclusions as to whether Section 2 of the Voting Rights Act applies to felon disenfranchisement laws. With the exception of the Ninth Circuit, however, every court to consider a Section 2 challenge to a felon disenfranchisement law has dismissed such a claim as a matter of law. Indeed, Judge Paez's decision for the Ninth Circuit did not analyze the applicability of the constitutional avoidance and clear statement doctrines that led the Eleventh Circuit *en banc* in this case and a panel of the Second Circuit in *Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir.), *cert. denied*, 125 S. Ct. 480, *and rehearing en banc granted*, 396 F.3d 95 (2d Cir. 2004), to conclude that Section 2 does not even reach such statutes.[3] As we demonstrate below, if the Ninth Circuit had considered the proper scope of Section 2, it would have been compelled to

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felony convictions than are white "felony arrests"), then they have to consider *all* felony convictions. There is no dispute that when *all* felony convictions are compared with the population of arrests actually identified as felony arrests by the State's official database, the "unexplained racial disproportionality" shown by petitioners' expert disappears *entirely*, and there is instead a slight unexplained racial disproportionality disfavoring *whites*.

[3] Petitioners trumpet the decisions of the Sixth Circuit in *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986), and the Fourth Circuit in *Howard v. Gilmore*, No. 99-2285, 2000 U.S. App. LEXIS 2680 (4th Cir. Feb. 23, 2000). But both cases dismissed Section 2 challenges to felon disenfranchisement laws as a matter of law without addressing whether Section 2 applies to such laws. The Sixth Circuit concluded that Tennessee's felon disenfranchisement law did not result in a denial of the vote "on account of race," but rather on account of the plaintiffs' decision to commit felonies. 791 F.2d at 1262. The same reasoning applies equally here and serves as an independent basis of affirmance. *See also Howard*, 2000 U.S. App. LEXIS 2680, at *3 (citing *Wesley*).

reach the same conclusion as the Eleventh Circuit in this case. Moreover, the Eleventh Circuit's reasoning closely parallels the Second Circuit's in *Muntaqim*, a decision this Court declined to review. Petitioners here fail to articulate any reason why their petition should not be denied for the same reasons.

A. Extending The Results Test Of Section 2 To Felon Disenfranchisement Laws Would Exceed Congress's Enforcement Power Under The Fourteenth Amendment.

Section 5 of the Fourteenth Amendment gives Congress power to "enforce" that Amendment's substantive provisions "by appropriate legislation." U.S. CONST. amend. XIV, § 5. This Court has held that this power is not limited to enforcing the Amendment's substantive provisions: "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . . ." *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). "In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727-28 (2003).

"[A]s broad as the congressional enforcement power is, it is not unlimited." *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970) (Black, J.). "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520; *Hibbs*, 538 U.S. at 728. This standard has two overlapping requirements. For Congress to enact prophylactic legislation, it must (1) "identify conduct transgressing the . . . substantive provisions" of the Amendment and (2) "tailor its legislative scheme to remedying or preventing such

conduct." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639 (1999). The first step requires a "legislative record" that demonstrates a "history and pattern" of unconstitutional state conduct. *Board of Trs. v. Garrett*, 531 U.S. 356, 368 (2001); *see also Hibbs*, 538 U.S. at 729; *Florida Prepaid*, 527 U.S. at 640. Under the second step, the purportedly prophylactic legislation must not be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U.S. at 532; *see also Garrett*, 531 U.S. at 372-73.

This Court instructed in *Oregon v. Mitchell* that this analytical framework applies to the Voting Rights Act and warrants careful scrutiny to ensure that the relevant provisions actually enforce a substantive constitutional right, as opposed to redefine the right. In *Oregon*, the Court reviewed the 1970 amendments to the Voting Rights Act, which (among other things) imposed a temporary nationwide ban on literacy tests and lowered from 21 to 18 the minimum voting age. *Oregon*, 400 U.S. at 117 (Black, J.). The Court affirmed the literacy-test ban and the voting-age rule as applied to federal elections, but invalidated the voting-age rule as applied to state elections. *Id.* at 117-19 (Black, J.). Justice Black, who announced the fractured Court's judgment, explained in affirming the literacy-test ban that "Congress had before it a long history of discriminatory use of literacy tests to disfranchise [sic] voters on account of their race." *Id.* at 132 (Black, J.). But he distinguished the voting-age rule as applied to state elections – as well as the provisions of the Act upheld in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (Black, J., dissenting) and *Katzenbach v. Morgan*, 384 U.S. 641 (1966) – by noting that "Congress made *no legislative findings* that the 21-year-old vote requirement was used by the States to disenfranchise voters on account

of race." *Oregon*, 400 U.S. at 130 (Black, J.) (emphasis added).

Because this proto-*Boerne* analysis "applies as much to felon disenfranchisement laws as it does to state laws governing the minimum voting age," the courts must scrutinize applying Section 2 to felon disenfranchisement laws with equal care. *Muntaqim*, 366 F.3d at 122; *Farrakhan v. Washington*, 359 F.3d 1116, 1122 (9th Cir. 2004) (Kozinski, J., dissenting); *Baker v. Pataki*, 85 F.3d 919, 927-28 (2d Cir. 1996) (Mahoney, J.). Applying this analytical framework, the *en banc* Eleventh Circuit in this case concluded, by a vote of 10-2, that Section 2 does not apply to felon disenfranchisement provisions. Pet. App. 32a-43a.[4]

1. The legislative record of Section 2 does not mention, let alone establish, a history and pattern of purposefully discriminatory use of felon disenfranchisement laws against minorities. Pet. App. 36a (noting the "complete absence of congressional findings that felon disenfranchisement laws

[4] In analyzing this issue, it is critical to distinguish between felon disenfranchisement laws that either were enacted or are maintained for the *purpose* of discriminating against blacks, on the one hand, and felon disenfranchisement laws that are not infected by such a racially discriminatory purpose, on the other hand. There is little doubt that a purposefully discriminatory provision, such as the Alabama disenfranchisement law struck down as unconstitutional in *Hunter v. Underwood*, 471 U.S. 222 (1985), falls within Section 2's prohibition. First, a felon disenfranchisement law, although facially neutral, whose very purpose is to deny the vote "on account of race" is unambiguously within the text and intent of Section 2. Second, the *Gregory* clear statement rule *does not apply* to require an affirmative textual manifestation in Section 2 of Congress's intent to reach a purposefully discriminatory felon disenfranchisement provision: applying Section 2's prohibition to invalidate such a law *coincides* with, rather than upsets, the constitutional state-federal balance struck by the Fourteenth and Fifteenth Amendments. But applying Section 2 to invalidate a felon disenfranchisement law that, like Florida's, is racially neutral both on its face and in its intent would dramatically upset the constitutional state-federal balance.

were used to discriminate against minority voters"). Petitioners' failure to identify any such findings should end this Court's inquiry. Since *Oregon*, this Court has consistently required a legislative record reflecting a history and pattern of unconstitutional state conduct that justifies prophylactic legislation. *See*, *e.g.*, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91 (2000); *Garrett*, 531 U.S. at 368, 370.

Nothing in this Court's recent decisions in *Hibbs* and *Tennessee v. Lane*, 541 U.S. 509 (2004), suggests that the Court has retreated from this rule that prophylactic legislation must be supported with a legislative record reflecting a history and pattern of unconstitutional state conduct. To the contrary, the Court simply applied the rule in those cases and found that Congress had made the necessary findings. In *Hibbs*, for example, the Court said that it had to "inquire whether Congress had evidence of a pattern" of gender-based discrimination in the workplace by States to assess the validity of the Family and Medical Leave Act. *Hibbs*, 538 U.S. at 729. After thoroughly reviewing the record, the Court concluded that "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic [Enforcement Clause] legislation." *Id.* at 729-35. Similarly, the Court in *Lane* upheld Title II of the ADA, which prohibits disability discrimination in public services, as applied to state-court access because Congress collected an "extensive record of disability discrimination." *Lane*, 541 U.S. at 529. In other words, *Hibbs* and *Lane*, like *Oregon*, *Boerne*, and this Court's other recent federalism cases, carefully reviewed the legislative record to ensure that Congress had an adequate constitutional basis

for prophylactic legislation – and did not suggest that such findings are unnecessary.[5]

When one examines the Voting Rights Act's legislative record, it becomes evident why petitioners wish to avoid this inquiry, for "[i]nstead of a clear statement from Congress indicating that the [petitioners'] interpretation is correct, the legislative history indicates just the opposite – that Congress never intended the Voting Rights Act to reach felon disenfranchisement provisions." Pet. App. 38a; *see also Baker*, 85 F.3d at 929 (Mahoney, J.) ("[n]ot only has Congress failed ever to make a legislative finding that felon disenfranchisement is a pretext or proxy for racial discrimination; it has effectively determined that it is not.").

2. Applying Section 2 to all felon disenfranchisement laws, including those enacted and enforced without a racially discriminatory purpose, plainly would not be a congruent and proportional remedy to the problem of state legislatures, as the Second Circuit put it, "motivated by racial animus . . . avoiding the strictures of the Voting Rights Act by enacting facially neutral election laws that disproportionately affected black voters." *Muntaqim*, 366

[5] Petitioners suggest that the legislative record must be read with greater deference when Congress acts against racial discrimination in voting. Pet. 17. True enough, this Court has asked less of the congressional record when purportedly prophylactic legislation protects fundamental rights and protected classes. *Lane*, 541 U.S. at 527-29 (court access); *Hibbs*, 538 U.S. at 735-36 (sex). But neither *Lane* nor *Hibbs* involved a specific practice such as felon disenfranchisement that is expressly reserved to the States in the text of the Constitution. U.S. CONST. amend. XIV, § 2. Thus, the structure and substance of the Constitution require deference to the States' policy decisions on felon disenfranchisement. In any event, there must be at least *some* legislative findings of a historical pattern of unconstitutional use of the challenged practice; here there are *none*. Pet. App. 35a-36a (noting "absence of congressional findings [showing] that felon disenfranchisement laws [a]re used to discriminate").

F.3d at 124. Most important, applying Section 2 to felon disenfranchisement laws would conflict with the Fourteenth Amendment's explicit acceptance of such laws. U.S. CONST. amend. XIV, § 2. In upholding California's felon disenfranchisement law against a nonracial equal protection challenge, this Court explained that the Framers of the Fourteenth Amendment "could not have intended to prohibit outright in [the Equal Protection Clause of] § 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment." *Richardson v. Ramirez*, 418 U.S. 24, 43 (1974). So too here. It would be anomalous, to say the least, if the Framers of the Civil War Amendments protected felon disenfranchisement laws from the penalty of reduced representation, but authorized Congress to prohibit such laws even if passed without racially discriminatory intent and in the absence of any congressional findings of their purposefully discriminatory use.[6]

[6] Petitioners misleadingly imply that Congress decided not to add a felon disenfranchisement proviso to the Fifteenth Amendment after debating its merits. Pet. 15. This is not so. Congressional Republicans disagreed over how far the proposed amendment should reach. *See* Xi Wang, *Bondage, Freedom, and the Constitution*, 17 CARDOZO L. REV. 2153, 2216 (1996). Radicals like Representative Shellabarger wanted to ban all voting qualifications except those relating to age, citizenship, sex, mental status, and law-abiding status. Hence, his proposal affirmatively protected the voting rights of 21-year-old male citizens who were "of sound mind" and had not been "duly convicted of treason, felony, or other infamous crime." 67 H.R.J. 233-34 (Jan. 30 1869). Moderates, on the other hand, merely wanted to protect black suffrage. Wang, *supra*, at 2216. Shellabarger's proposal was a typical Radical effort to ban qualifications in addition to race; as his ally explained in the same debate that petitioners cite, the Moderates' language would still permit qualifications based on "property," "intellect," and "sect." CONG. GLOBE, 40th Cong., 3d Sess. 722 (1869). Congress defeated the Radicals' proposals not because they permitted felon disenfranchisement, but because they went far beyond "the great trouble and the great disgrace of the country" – namely, racial discrimination. *Id.* at

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In any event, extending petitioners' expansive conception of Section 2 to felon disenfranchisement laws would render it, to that extent, unconstitutional. Section 2 applies nationwide to the felon disenfranchisement laws of all States, no matter when enacted and regardless of whether the State has any history of discriminatory voting practices. When the Fourteenth Amendment was ratified, 29 of 36 States had constitutions prohibiting felons from voting or authorizing their legislatures to adopt felon disenfranchisement laws. *Richardson*, 418 U.S. at 48. As the court below noted, since blacks could not vote at the time, it is clear that these felon disenfranchisement laws were not enacted for a racially discriminatory purpose. Pet. App. 29a; *see Muntaqim*, 366 F.3d at 123; *Howard v. Gilmore*, No. 99-2285, 2000 U.S. App. LEXIS 2680 (4th Cir. Feb. 23, 2000). But, if petitioners' theory is correct, Section 2 nonetheless threatens felon disenfranchisement laws nationwide because racial minorities are overrepresented in the prison populations throughout the country. Pet. App. 35a.

Petitioners' theory thus creates a sweeping, radical remedy that would cast grave doubt on all felon disenfranchisement laws nationwide, laws not only as old as our Republic, but also expressly and uniquely authorized by the Constitution. This grossly disproportionate remedy would far exceed Congress's Enforcement Clause powers. In *United States v. Morrison*, 529 U.S. 598, 626 (2000), the Court invalidated the Violence Against Women Act's civil-remedy provision because it "applie[d]

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725. Indeed, the very fact that the Radicals recognized that their sweeping proposals would ban felon disenfranchisement and therefore included provisos expressly authorizing that practice – just as they had in Section 2 of the Fourteenth Amendment – demonstrates that even the Radicals did not intend to affect felon disenfranchisement with the Fifteenth Amendment.

uniformly throughout the [n]ation," including States that had no history of discriminating against victims of gender-motivated crimes. The Court distinguished this provision from certain sections of the Voting Rights Act upheld in *Morgan* and *South Carolina*, because those sections carefully targeted States with a history of discrimination. *Morrison*, 529 U.S. at 626-27. Moreover, Section 2, as applied to felon disenfranchisement laws, would have no termination date or mechanism. In striking down the Religious Freedom Restoration Act, the Court specifically noted this very flaw. *Boerne*, 521 U.S. at 532. The Court contrasted these features with the Voting Rights Act sections upheld in *South Carolina* and *City of Rome v. United States*, 446 U.S. 156 (1980), *Boerne*, 521 U.S. at 532-33, which were in place for 5 and 7 years, respectively.

While antidiscrimination legislation need not have "termination dates, geographic restrictions[,] or egregious predicates[,] . . . limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under" the Enforcement Clause. *Boerne*, 521 U.S. at 533. But applying Section 2 to all felon disenfranchisement laws, including those enacted and enforced without racially discriminatory purpose, would be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532. Thus, the *en banc* Eleventh Circuit quite properly avoided reaching this result by interpreting Section 2 not to reach felon disenfranchisement laws that are racially neutral in purpose. "[W]here 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 (1988) (citation omitted).

B. The Clear Statement Rule Precludes Petitioners' Interpretation Of Section 2.

The clear statement rule of *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991), serves as an independent basis supporting the court of appeals' conclusion that Section 2 does not apply to felon disenfranchisement laws. Pet. App. 37a n.35. "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." *Gregory*, 501 U.S. at 460-61 (citations and internal quotation marks omitted). This "clear statement" rule applies to the construction of federal statutes touching on "traditionally sensitive areas, such as legislation affecting the federal balance," and it is designed to "assure[ ] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* at 461 (citations and internal quotation marks omitted). In *Gregory*, the Court applied this canon to the sweeping language of the Age Discrimination in Employment Act ("ADEA"), holding that it did not reach Missouri's mandatory retirement age for state judges even though the Act covered all state "employees." Although the ADEA's exception for " 'appointee[s] on the policymaking level' " did not appear on its face to apply to judges, Congress's intent on the issue was "at least ambiguous," and in light of the State's traditional authority in this area, this Court insisted on an "unmistakably clear" statutory expression of Congress's intent to include state judges within the Act's scope. *Id.* at 467.[7]

Construing Section 2 to apply to felon disenfranchisement laws would obviously implicate the constitutional balance between the States and the federal

[7] *See, e.g.*, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 506 (1979); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

government. Pet. App. 37a n.35. "'[T]he states have the primary responsibility for regulating the times, places, and manner of conducting federal elections, U.S. CONST. art. I, § 4, cl. 1, and even more obviously for regulating elections to state office.'" *Muntaqim*, 366 F.3d at 122 (quoting *Baker v. Pataki*, 85 F.3d 919, 931 (2d Cir. 1996) (Mahoney, J.)). Indeed, as previously emphasized, the States' authority to disenfranchise felons is expressly recognized in Section 2 of the Fourteenth Amendment. It is therefore clear that applying Section 2 to invalidate a felon disenfranchisement law that was neither enacted nor maintained with a racially discriminatory purpose would upset the state-federal balance of constitutional authority. *Gregory*'s clear statement rule therefore applies, and the text of Section 2 does not satisfy it.[8]

Section 2 of the Voting Rights Act prohibits the enforcement of any "qualification or prerequisite to voting" that "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). Applying Section 2 to invalidate a felon disenfranchisement law that is racially neutral both on its face and in its intent would

[8] Petitioners' reliance on *Chisom v. Roemer*, 501 U.S. 380 (1991), is misplaced. Pet. 17. *Chisom* applied Section 2 to multimember districts for state judicial office without mentioning the clear statement rule. *Chisom*, 501 U.S. at 383-84. But this holding cannot be read to mean that the clear statement rule should not apply to an effort to extend Section 2 to racially neutral felon disenfranchisement laws. Felon disenfranchisement laws sweep across all state and federal offices, have textually recognized constitutional status, and have been in widespread use by the States since the Founding. In contrast, judicial office is just one kind of state office, has no textually recognized constitutional status, and need not even be elective. Further, regulating judicial elections does not impede a state's ability to enforce its penal laws, as would applying Section 2 to racially neutral felon disenfranchisement laws.

dramatically upset the constitutional state-federal balance.[9] As noted previously, all States, save two, have some form of felon disenfranchisement law, and such provisions have been common to States throughout our Nation's history. *Muntaqim*, 366 F.3d at 123; *Farrakhan*, 359 F.3d at 1125 (Kozinski, J., dissenting). Racial disparities in the rates of felony convictions, and thus in felon disenfranchisement, are equally ubiquitous among States. *See Muntaqim*, 366 F.3d at 1125; Pet. App. 35a. That Congress intended to sweep all such felon disenfranchisement laws within Section 2's prohibition against laws denying the vote "on account of race" is not at all clear from the text of the statute. To the contrary, to the extent that Section 2's language – "results in a denial . . . of the right . . . to vote *on account of race*" – can be said to have any plain meaning, surely that meaning does not include disenfranchisement pursuant to a law that is facially neutral, that has no racial purpose, that is motivated by an important racially neutral public policy, that is materially indistinguishable from similar laws in virtually every state in the country, both North and South, that results in the disenfranchisement of approximately three times more whites than blacks, and that can trace its ancestry, like most similar state laws, to a time that predates ratification of the Fourteenth and Fifteenth Amendments. Pet. App. 31a n.30. Indeed, as some courts have concluded: "[I]t is not racial discrimination that deprives felons, black or white, of their right to vote but their own decisions to commit an act for which they assume the risks of detection and punishment." *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1341 (S.D. Fla. 2002) (citing *Wesley v. Collins*, 605 F. Supp. 802,

[9] Of course, an intentionally discriminatory provision would violate Section 1 of the Fourteenth Amendment. *See Hunter v. Underwood*, 471 U.S. 222 (1985).

813 (M.D. Tenn. 1985), *aff'd*, 791 F.2d 1255 (6th Cir. 1986)).

But even assuming that Section 2's text is "at least ambiguous" on this issue,[10] all other evidence of congressional intent cuts sharply against the conclusion that Congress intended the Act to apply to felon disenfranchisement laws that are racially neutral in purpose. It is clear that Section 2 "does not prohibit *all* voting restrictions that have a racially disproportional effect." *Muntaqim*, 366 F.3d at 116 (emphasis in original). And the Act's legislative history strongly indicates, as the *en banc* Eleventh Circuit concluded, "Congress never intended the Voting Rights Act to reach felon disenfranchisement provisions." Pet. App. 38a. Finally, petitioners' sweeping conception of Section 2 cannot be confined to released felons, but would also extend to *incarcerated* felons. And if petitioners' theory is correct, then a wide variety of provisions would be subject to invalidation, including age restrictions on voting that have a disparate impact on minorities. The notion that Congress intended Section 2's "results" test to have this result is, to say no more, highly dubious.[11]

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[10] The language of Section 2's "results" test is anything but plain, and discerning its meaning has given rise to a wealth of conflicting judicial opinions, both among and within the circuits. *See*, *e.g.*, *Muntaqim*, 366 F.3d at 116 ("Unfortunately, it 'is exceedingly difficult to discern what [Section 2] means.' ") (quoting *Goosby v. Hempstead*, 180 F.3d 476, 499 (2d Cir. 1999) (Leval, J., concurring)); Pet. App. 31a n.30. Accordingly, the question whether Congress intended Section 2 to apply to racially neutral felon disenfranchisement laws is not one on which the statutory language and congressional intent are so plain as to preclude a savings construction.

[11] *See Farrakhan*, 359 F.3d at 1126 (discussing implications for updating voter lists, Internet voting, and weekday elections) (Kozinski, J., dissenting).

C. This Case Is A Poor Vehicle To Resolve The Section 2 Issue.

This case is a poor vehicle in which to consider the issue of whether Section 2 applies to felon disenfranchisement laws. As the *en banc* Eleventh Circuit found, "a review of the record strongly suggests that the [petitioners'] Section 2 claim would still fail." Pet. App. 33a n.31. Specifically, the Eleventh Circuit stated:

> Although the record includes some evidence of a statistical difference in the rate of felony convictions along racial lines, these disparities do not demonstrate racial bias. There are a myriad of factors other than race that may explain the disparity. For example, an individual's socioeconomic status, prior criminal record, gravity of offense, strength of evidence, nature of legal representation, and age of offender might explain the disparity. Moreover, the [petitioners'] own expert found that *whites* have disproportionately high conviction rates for four of the nine categories of crimes he analyzed. Furthermore, there is no significant racial disparity in the sentences received by convicts with similar guideline scores.

Pet. App. 33a n.31 (emphasis in original). Judge Tjoflat in his separate concurrence noted that petitioners' "brief does not appear to advance a single showing of contemporary race bias." Pet. App. 54a. In short, petitioners' case reduces to nothing more than a showing of a disparity among the relative numbers of minorities and nonminorities serving prison sentences in Florida. Courts have consistently rejected the Section 2 challenges based on such a showing of mere disparate impact.[12]

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[12] *See*, *e.g.*, *Ortiz v. City of Philadelphia*, 28 F.3d 306, 315 (3d Cir. 1994); *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1358-59

(Continued on following page)

At a more fundamental level, petitioners lost their voting rights not "on account of race," but on account of one – and only one – factor: their decision to commit a crime so serious that it was designated a felony. *Wesley v. Collins*, 605 F. Supp. 802, 813 (M.D. Tenn. 1985); Pet. App. 53a (Tjoflat, J., concurring) ("[T]he cause of the denial of the right to vote to felons in Florida consists entirely of their conviction, not their race."). Disparities in arrest, conviction, incarceration, and parole rates in Florida's criminal justice system do not change the fact that those in prison lost their voting rights on account of their own conduct.

II. Petitioners' Equal Protection Theory Does Not Warrant This Court's Review, As The Circuits Are In Agreement On It And It Cannot Succeed In Any Event.

The second question that petitioners maintain warrants review by this Court is not even colorable. As the Eleventh Circuit noted, "we are concerned here with the validity of the *1968 provision*, not the 1868 provision and the [petitioners] concede that the 1968 provision was not enacted with discriminatory intent." Pet. App. 18a (emphasis in original). Moreover, what petitioners consistently characterize as a mere "reenactment" in 1968 of the preceding 1868 provision was in fact a substantive revision that gave rise to a "markedly different" provision from its predecessor, as the decision below explained and petitioners do not refute. Pet. App. 12a. This revision occurred only "[a]fter considerable discussion" of the

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(4th Cir. 1989); *Salas v. Southwest Texas Junior Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992); *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986); *Baird v. Indianapolis*, 976 F.2d 357, 359 (7th Cir. 1992); *Smith v. Salt River Project*, 109 F.3d 586, 595 (9th Cir. 1997).

provision and consideration of several competing substantive alternatives thereto, followed by full deliberation surrounding legislative adoption and public ratification. Pet. App. 13a-15a & n.16. There is "no allegation in the [petitioners'] complaint," let alone evidence, that the 1968 process was tainted by any discriminatory intent; "[i]ndeed, the [petitioners] stipulated that there is no evidence that legislators in 1968 were concerned with or considered the consequences of the policy along racial lines." Pet. App. 18a n.19.

In the absence of any evidence of discrimination in the enactment of Florida's current felon disenfranchisement provision, petitioners have sought to condemn this law by imputing to the 1968 legislators the motives of legislators who adopted a predecessor version a century earlier. The Fifth Circuit rejected a similar claim in *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998). Thus, petitioners' equal protection theory has garnered only one vote from among the courts of appeals to have considered it – namely, that of Judge Barkett, the lone dissenter on the *en banc* court below who believed that the issue should go to trial.

A. No Court Accepts Petitioners' Equal Protection Theory And The Decision Below Neither Creates Nor Implicates Any Circuit Split.

This Court in *Hunter v. Underwood*, 471 U.S. 222 (1985), struck down Alabama's then-existing misdemeanant disenfranchisement provision because it had been adopted with a discriminatory intent, holding that "the proper approach to the Fourteenth Amendment discrimination claim was established in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270, and n.21

(1977), and *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977)."[13] 471 U.S. at 225. The Court did so "[w]ithout deciding whether [Alabama's disenfranchisement provision] would be valid if enacted today without any impermissible motivation." *Id*. at 233.

The Fifth Circuit in *Cotton v. Fordice* applied this standard in rejecting a challenge to Mississippi's felon disenfranchisement law. According to the Fifth Circuit in *Cotton*, "by amendment, a facially neutral provision . . . might overcome its odious origin" under an *Arlington Heights* analysis, specifically if it was reenacted pursuant to a "deliberative process." 157 F.3d at 391. The court below agreed, holding that, "as in *Cotton v. Fordice*, Florida's 1968 re-enactment eliminated any taint from the allegedly discriminatory 1868 provision." Pet. App. 19a-20a. And the *en banc* Eleventh Circuit added that, even if a presumption of discriminatory intent behind the existing law somehow carried over from its 1868 predecessor, any such presumption was successfully rebutted under the second prong of *Arlington Heights*: "Florida's re-enactment of the felon disenfranchisement provision in the 1968 Constitution conclusively demonstrates that the state would enact this provision even without an impermissible motive and did enact the provision without an impermissible motive." Pet. App. 20a-21a.

[13] According to the first prong of this approach, a challenger seeking "[t]o establish a violation of the fourteenth amendment in the face of mixed motives' " must initially show that "racial discrimination is a 'substantial' or 'motivating' factor behind enactment of the law." *Hunter*, 471 U.S. at 225-28 (citation omitted). If such a showing is successfully made, then, under the second prong, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Id.* at 228.

The governing doctrine is clear. It has fostered no confusion or disagreement among the courts of appeals. No court has held, as petitioners would ask this Court to hold, that an allegation of discriminatory intent behind a predecessor law enacted a century earlier stands to invalidate an existing law, notwithstanding that the law at issue reflects substantive revision pursuant to a deliberative process that was concededly free of any discriminatory intent. These are the irrefutable facts of this case upon which the decision below turned. Nevertheless, petitioners attempt to conjure a circuit split where there is none.

1. As petitioners correctly say, the Fourth Circuit in *Irby v. Virginia State Board of Elections*, 889 F.2d 1352, 1355 (4th Cir. 1989), simply "declined to decide," Pet. 27, whether a finding of discriminatory intent behind a predecessor policy might suffice to invalidate the policy at issue and simply assumed *arguendo* that it might, holding that any inference of discriminatory intent had been factually rebutted in any event. The Fourth Circuit's agnosticism on petitioners' proposed burden shifting is no basis for granting certiorari.

2. The Fifth Circuit's decision in *Cotton* is, as explained above, in full accord with the decision below and stands as the Fifth Circuit's governing precedent. Much as petitioners argue that *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000), subsequently created tension with *Cotton*, that decision expressly acknowledged *Cotton* as the Circuit's governing law; *Chen* correctly described *Cotton* as establishing that, "while under *Hunter* the discriminatory intent of the original drafter may carry forward despite subsequent judicial invalidation of the most obviously discriminatory provisions, intervening reenactment with meaningful alterations may render the current law valid." *Id*. at 521.

Chen was a racial gerrymandering case that was governed by this Court's decision in *Shaw v. Hunt*, 517

U.S. 899 (1996). The Fifth Circuit took care to observe "that the state of mind involved in prior [districting] plans is not of itself what is precisely and directly the ultimate issue before the court." *Chen*, 206 F.3d at 521. Rather, the intent behind the *current* law is the ultimate issue. That is why the Fifth Circuit emphasized, per *Cotton*, that "when a plan is reenacted – as opposed to merely remaining on the books like the provision in *Hunter* – the state of mind of the reenacting body must also be considered." *Id*. To be sure, the Fifth Circuit in *Chen* discussed the intent behind both the initial districting plan and the immediately ensuing changes because only seven years had passed. Given that there was such a short span between the passages of the prior discriminatory law and the extant law, it was entirely reasonable to look to the motivation behind the predecessor version to assess the intent behind the current law. Even so, the Fifth Circuit reached the same holding as it had in *Cotton*, albeit in a different factual and legal context, rejecting the plaintiffs' *Shaw* challenge in light of the intervening reenactments.

No serious argument can be made that the Fifth Circuit panel in *Chen* thereby overruled or departed from that court's decision in *Cotton*, let alone that *this* Court should intercede in order to resolve some indistinct, intra-circuit split between *Cotton* and *Chen*. Moreover, the potential factual distinction floated in *Chen* – namely, that incremental changes made over a seven-year period following the original discriminatory intent "were not as dramatic as those in *Cotton*" – cannot avail petitioners here, where Florida's predecessor law supposedly bearing a discriminatory intent was thereafter substantively revised, debated, and adopted a full century later by wholly different decision-makers, including both Houses of Florida's Legislature and its voting public.

3. Finally, petitioners are left pointing to the Eleventh Circuit's prior decision in *Knight v. Alabama*, 14 F.3d 1534 (11th Cir. 1994), now claiming it is inconsistent with

the decision below. Their claim is spurious. But even if petitioners were entirely right that the Eleventh Circuit here departed from its earlier decision in *Knight*, that would not in any event warrant the attention of this Court. By sitting *en banc* in deciding this case as it did, the Eleventh Circuit has already ensured the clarity of its own precedents and harmony with its sister circuits.

Even setting that aside, the Eleventh Circuit's decision in *Knight* is inapposite. *Knight* addressed the persisting vestiges in Alabama's system of public higher education of recent, prior *de jure* segregation. Plaintiffs there argued that limited "mission" assignments still constraining the course offerings at Alabama's two historically black universities "[we]re traceable to the limited missions that were imposed on th[ose] two [universities] in the past" pursuant to segregation. *Id*. at 1543. The Eleventh Circuit, heeding this Court's decision in *United States v. Fordice*, 505 U.S. 717 (1992), initially observed that the limited missions were indeed traceable to prior *de jure* segregation, presenting a constitutional violation in need of remedy. 14 F.3d at 1544. This then necessitated a second inquiry under *Fordice* – namely, "whether this vestige of [discrimination] has continuing segregative effects." *Id*. The court carefully delineated that as an "entirely separate question" from one the district court had addressed – namely, "whether the adoption and maintenance since 1975 of the current classification system [imposing the limited missions] can *itself* be deemed an act of intentional discrimination that gives rise to liability *in its own right*." *Id*. at 1544-45 (emphases added).

Here, petitioners pose the very question that the Eleventh Circuit took pains to distinguish from the one it resolved in *Knight*. That is, petitioners here effectively argue that Florida's 1968 disenfranchisement provision, as it currently exists, "can *itself* be deemed an act of intentional discrimination that gives rise to liability *in its own*

right." *See* Pet. App. 22a n.22 ("By contrast [to *de jure* desegregation at issue in *Fordice*], here the question is one of liability, not remedy."). Indeed, the 1868 provision does not have any persisting effects akin to those of segregation (which were the concern of *Knight*) that might justify the drastic remedy of invalidating the existing law. No one is currently disenfranchised under the 1868 law, nor might it credibly be maintained that the 1868 law has any other ongoing practical effect.

4. In the absence of a circuit split, petitioners suggest that the decision below is inconsistent with this Court's decisions in *Fordice* and *McCreary County v. American Civil Liberties Union*, 125 S. Ct. 2722 (2005). That claim cannot withstand scrutiny.

a. Although Mississippi's higher-education admission policies at issue in *Fordice* were race-neutral, this Court deemed them suspect and demanded heightened justifications for them precisely because they followed closely upon Mississippi's prior, intractable system of *de jure* segregation in its schools. *Fordice* therefore reflected the unremarkable proposition that "[t]he Equal Protection Clause is offended by 'sophisticated as well as simple-minded forms of discrimination.'" *Fordice*, 505 U.S. at 729 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). The court of appeals explained at length why *Fordice* is, accordingly, inapposite here:

> First, Florida has a valid public policy reason for disenfranchising felons, where Mississippi did not have a sound justification for its education policies. . . .
>
> Second, the current Florida provision was passed one hundred years after the alleged intentional discrimination occurred, whereas Mississippi's provision was passed shortly after the end of *de jure* segregation in education. . . . Given the proximity in time between Mississippi's

> intentional discrimination and the facially neutral provision in education, the Court had a healthy skepticism that the facially neutral provision was indeed neutral. . . . But this skepticism does not apply here, because it is not reasonable to assign any impermissible motives held by the 1868 Florida legislators to the 1968 legislators who voted for the present felon disenfranchisement provision.
>
> Third, Florida's 1968 felon disenfranchisement provision did not continue the adverse disparate impact of earlier *de jure* measures, which makes the present case entirely different than the situation in *Fordice*. . . . In 1968, Florida legislators and voters were not attempting to extend the effects of *de jure* discrimination with a facially-neutral provision because there was little adverse impact to extend by passing the felon disenfranchisement provision. Florida's provision simply did not maintain a pattern of discrimination the way Mississippi's provision did.

Pet. App. 22a-25a. Petitioners tellingly say nothing in response to this thoroughgoing treatment of *Fordice* below.

b. This Court's decision in *McCreary County* is no more availing for petitioners. There, the county had, in the face of a challenge under the Establishment Clause, erected three different displays of the Ten Commandments "within a year." 125 S. Ct. at 2730. In that context, the Court refused to "limit the scope of the purpose enquiry so severely that any trivial rationalization would suffice, under a standard oblivious to the history of religious government action like the progression of exhibits in this case." *Id*. at 2732. A contrary decision would render the "purpose enquiry . . . so naïve that any transparent claim to secularity would satisfy it." *Id*. at 2735. This case falls comfortably beyond any such concern. Just as the "close[ness] . . . in time and subject" connecting the three

displays centrally concerned this Court in *McCreary*, *id*. at 2737, the marked separation between the 1868 and 1968 provisions forecloses any such concern. Indeed, all agree here that there is no evidence of any illegitimate purpose behind the 1968 provision.[14]

B. Petitioners' Equal Protection Theory Cannot Possibly Succeed.

Petitioners' equal protection theory is inconsistent with settled law and devoid of record support.

1. Florida's felon disenfranchisement law, like any other State law, is "entitled to a presumption of validity against attack under the Equal Protection Clause." *Parham v. Hughes*, 441 U.S. 347, 351 (1979) (citation omitted). Petitioners' premise is that an ancient law, if alleged to be discriminatory, necessarily suffices to call into question the constitutionality of anything and everything that may have followed in its wake. This approach would likewise run contrary to this Court's instruction that "past discrimination cannot, in the manner of original sin,

[14] Petitioners' notion that *McCreary* requires more in order to uphold the provision at issue here against constitutional challenge cannot be reconciled with *McCreary*'s own express approval of *McGowan v. Maryland*, 366 U.S. 420 (1961), for teaching that "Sunday closing statutes [should be upheld] on practical, secular grounds [upon] finding that the government had forsaken the religious purposes behind centuries-old predecessor laws." *McCreary*, 125 S. Ct. at 2733-34 (citation omitted). *McGowan* demanded no more than what the court below did here: It canvassed the secular justifications generally accepted in support of such laws, *see McGowan*, 366 U.S. at 450-51, and observed that "[t]he existing Maryland Sunday laws [we]re not simply verbatim re-enactments of their religiously-oriented antecedents," and had been the object of "[c]ontemporary concern . . . [as] evidenced by the dozen changes made in 1959 and by the recent enactment of the majority of exceptions" to the law. *Id*. at 448-49.

condemn governmental action that is not itself unlawful." *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980).[15]

Petitioners disregard these fundaments, arguing that "it only makes sense for the state to bear the evidentiary burden[ ] in proving" that it has purged any discriminatory intent behind a predecessor law in order to defend the constitutionality of an existing law. Pet. 26. Nonsense. The opinion below explained what petitioners' theory contemplates: the 1968 provision would fall absent affirmative proof by the State "that it acknowledged that racial discrimination tainted the 1868 provision, and yet it knowingly reenacted the disenfranchisement provision for non-discriminatory reasons in 1968." Pet. App. 21a. This standard would be virtually impossible for the State to meet. Given that "[p]rior to this case, no expert had ever suggested that the 1868 disenfranchisement provision was motivated by racial discrimination," how would "present day legislators . . . be aware of the past discrimination" that they must renounce in order to insulate the successor law from petitioners' "original sin" theory of unconstitutionality? Pet. App. 21a n.21. Rather than account for these points, the Petition studiously ignores them.

2. Even if this case turned on the historical origins of predecessors to Florida's 1968 disenfranchisement provision

[15] This is not to say that evidence of discriminatory intent behind a predecessor law cannot be invoked to support a challenge under the Equal Protection Clause. A plaintiff challenging a race-neutral law may invoke past discrimination as circumstantial evidence to show that racism motivated the "present-day acts" of the decision-makers who actually enacted that law at issue. *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1567 (11th Cir. 1984). Petitioners here expressly stipulated, however, that there was no evidence, circumstantial or otherwise, of any discriminatory intent at work in 1968. What happened in 1868 is, therefore, categorically irrelevant to the intent behind the present-day law.

and not the legitimate intent behind the law itself, petitioners' equal protection theory would still fail and the court below was right to reject it.

To begin with, petitioners' fixation upon the 1868 Constitution as the supposed origin of felon disenfranchisement in Florida is misplaced. As explained, felon disenfranchisement in Florida actually began with "Florida's earliest Constitution, adopted in 1838, [which] authorized the General Assembly to enact criminal disenfranchisement laws," which the General Assembly proceeded to do in 1845. Pet. App. 6a. "At that time, the right to vote was not extended to African Americans, and, therefore, they could not have been the targets of any disenfranchisement law." Pet. App. 7a. Petitioners' equal protection claim and the historical exegesis upon which it relies conspicuously fail to account for this.

Nor do petitioners have persuasive evidence of a discriminatory intent behind the enactment of Florida's felon disenfranchisement provision in 1868. Their claimed proof on this point is ultimately deficient in any number of respects. In order to survive a summary judgment motion, petitioners must have some evidence of discriminatory intent, but the Eleventh Circuit emphasized that petitioners "introduced *no contemporaneous evidence* showing that racial discrimination motivated the adoption of [Florida's] 1868 [disenfranchisement] provision." Pet. App. 18a (emphasis added); *see also id.* at 9a. The court of appeals catalogued the other deficiencies with petitioners' arguments:

- Petitioners' "own historical expert conceded that prior to the instant case, no historian who had studied Florida's 1868 Constitution had ever contemplated that the 1868 criminal disenfranchisement provision was enacted with discriminatory intent." Pet. App. 9a.

- Petitioners' supposed proof of a discriminatory intent behind the felon disenfranchisement provision in fact relates to "certain other provisions in Florida's 1868 Constitution such as a legislative apportionment scheme." Pet. App. 8a; *see* Pet. App. 10a & n.11.
- "Furthermore, Florida did not act alone in choosing its Constitution – the United States Congress expressly approved Florida's 1868 Constitution in readmitting the State to the Union." Pet. App. 10a.

Thus, there is no evidence of a discriminatory intent behind the predecessors to the provision at issue, and no meaningful prospect that a decision by this Court accepting petitioners' legal theory would alter the ultimate result in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. Alternatively, the Court should grant plenary review only as to the first question presented.

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Respectfully submitted,

GEORGE WAAS
Assistant Attorney General
The Capitol
Tallahassee, FL 32399
(954) 712-4670

CHARLES J. COOPER
Counsel of Record
DAVID H. THOMPSON
DEREK L. SHAFFER
DAVID M. LEHN
COOPER & KIRK, PLLC
1500 K Street, NW, Suite 200
Washington, DC 20005
(202) 220-9600