No. 02-14469C

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

THOMAS JOHNSON, et al.,

Plaintiffs-Appellants,

—v.—

JEB BUSH, GOVERNOR OF FLORIDA, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA (MIAMI)
DISTRICT COURT DOCKET NO. 00-3542-CIV-KING

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Johnson et al. v. Bush et al., Civil Appeal No. 02-14469 CC

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Johnson et al. v. Bush et al., Civil Appeal No. 02-14469 CC

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Johnson et al. v. Bush et al., Civil Appeal No. 02-14469 CC

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A certified class of all Florida citizens who have been convicted of felonies and fully completed the periods of incarceration and/or supervision to which they were sentenced, but nonetheless remain ineligible to register or vote because a felony conviction results in permanent disenfranchisement under Florida's Constitution and statutes.

STATEMENT REGARDING ORAL ARGUMENT

Because this case involves complex issues arising under the United States Constitution and the Voting Rights Act, 42 U.S.C. § 1973, Plaintiffs-Appellants request oral argument. Plaintiffs-Appellants respectfully submit that oral argument will assist the Court in analyzing and determining the disputed legal issues presented. Fed. R. App. P. 34(a); *see also* 11th Cir. R. 28-1(c) and 34-3(c).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Page

STATUTES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

This is an appeal from a summary judgment. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 (a)(4); 42 U.S.C. §§ 1973h and 1983; and the First, Fourteenth, Fifteenth, and Twenty-Fourth Amendments to the United States Constitution. This Court has jurisdiction over the final judgment under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Viewing the record in the light most favorable to Plaintiffs, did the District Court err in granting summary judgment to the State on the claim that Florida's felon disenfranchisement policy violates Equal Protection, where Plaintiffs established that the policy was initially enacted to discriminate on the basis of race, the policy continues to have that effect, and the State has failed to prove that the 1968 reenactment of the policy purged its original discriminatory intent?

2. Did the District Court abuse its discretion in excluding expert and documentary evidence of Florida's 1968 revision process, including documents the Court itself considered "legislative history"?

3. Did the District Court legally err by failing to apply the standard mandated by *Thornburg v. Gingles*, 478 U.S. 30 (1986), to consider whether Florida's felon disenfranchisement policy violates Section 2 of the Voting Rights Act by interacting with social and historical conditions to cause racial inequalities in voting?

4. Did the District Court legally err in holding that evidence of racial bias in Florida's criminal justice system is not relevant to establishing whether

Florida's felon disenfranchisement policy violates Section 2 of the Voting Rights Act?

5. Did the District Court err in excluding evidence of the "totality of circumstances" in which Florida's felon disenfranchisement practice operates, including evidence of racial bias in the criminal justice system, racially skewed policing practices, and racially polarized voting?

6. Are Plaintiffs entitled to summary judgment on their claim that providing more burdensome clemency procedures to ex-felons owing restitution constitutes a poll tax in violation of the 24th Amendment to the United States Constitution and Section 10 of the Voting Rights Act, as well as wealth discrimination under the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

A. Procedural History

On September 21, 2000, eight Florida citizens[1] filed this class action lawsuit in the United States District Court for the Southern District of Florida on behalf of over 600,000 Floridians denied the vote under Florida's constitution and laws because of a past felony conviction for which they have fully served any sentences of incarceration, probation, or parole ("ex-felons"). Plaintiffs-Appellants ("Plaintiffs") assert that Florida's felon disenfranchisement laws represent intentional racial discrimination, deny the right to vote on account of race, are arbitrary and irrational, infringe their right to vote, and impose a poll tax and wealth qualification in violation of the First, Fourteenth, Fifteenth, and Twenty-Fourth Amendments of the United States Constitution and Sections 2 and 10 of the Voting Rights Act of 1965, codified at 42 U.S.C. § 1973 et seq., and 42 U.S.C. § 1983. Defendants-Appellees, all sued in their official capacities, are Florida's Clemency

[1] Thomas Johnson, Derrick Andre Thomas, Eric Robinson, Omali Yeshitela, Adam Hernandez, Kathyrn Williams-Carpenter, Jau'dohn Hicks, and John Hanes. On January 17, 2001, the Court dismissed Yeshitela whose his civil rights had been restored. (Doc1,61.)

Board[2] (the "State Defendants"), which has the power to restore the franchise, and county supervisors of elections[3] (the "County Defendants"), who are responsible for removing from registration books, or failing to add to those books, ex-felons who have not had their civil rights restored. (Doc1-Pg7-9.)

On January 5, 2001, Defendants moved, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the Complaint. (Doc40,44,449-51.) The District Court denied the motion on January 30, 2001. (Doc74.) Defendants then answered the Complaint. (Doc78-82,85.)

On February 9, 2001, United States District Judge James Lawrence King granted Plaintiffs' motion for certification of a Plaintiff class of ex-felons in Florida, including a subclass of ex-felons with outstanding pecuniary penalties, and a Defendant class of all county election supervisors. (Doc77.) The County Defendants ultimately abated their participation pending the determination of liability. (Docs126,184.)

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[2] The State Defendants named in the Complaint are: Jeb Bush, Governor; Katherine Harris, Secretary of State; Robert Butterworth, Attorney General; Robert Milligan, Comptroller; William Nelson, Treasurer; Robert Crawford, Commissioner of Agriculture; and Thomas Gallagher, Commissioner of Education.

[3] The named County Defendants are: Beverly Hill, Jane Carroll, Pam Iorio, David C. Leahy, William Cowles, and Deborah Clark, the county supervisors of elections for Alachua, Broward, Hillsborough, Miami-Dade, Orange, and Pinellas counties, respectively.

On January 4, 2002, the State Defendants moved for summary judgment. (Doc123.) On January 18, Plaintiffs responded and cross-moved for summary judgment. (Doc139,152.) Discovery closed on February 8, 2002. (Doc115.)

While the motions for summary judgment were pending, motions *in limine* were filed. On January 16, 2002, Plaintiffs moved to exclude Defendants' historical expert, Lance deHaven-Smith. (Doc128.) The District Court denied the motion on April 22. (Doc219.)

On January 16 and 17, 2002, the State Defendants moved to exclude part or all of the testimony of five of Plaintiffs' expert witnesses: Theodore Chiricos, Christopher Uggen, Jerrell Shofner, Richard Scher, and Richard Engstrom. (Doc130-36.) On January 31, 2002, Defendants moved to exclude, among other things, Plaintiffs' remaining expert witness, James D. Ginger, a report by a commission of the Florida Supreme Court, and other documents on which Ginger might rely. (Doc158.)

On February 11, 2002, the District Court adjourned the March 18, 2002, trial without setting a new date. (Doc180.)

On April 4, 2002, the District Court ordered Ginger and related documents excluded. (Doc205.) On May 8, the District Court denied Plaintiffs' motion for partial reconsideration of that order. (Doc226.) On April 18, the District Court (i)

granted in part and denied in part Defendants' motion to exclude Engstrom, excluding that portion of this testimony relating to racially polarized voting (Doc210); and (ii) granted Defendants' motion to exclude Scher. (Doc211.) On April 19, the District Court denied Defendants' motions to exclude Chiricos and Uggen. (Doc212.) On April 22, the District Court denied Defendants' motion to exclude Shofner. (Doc219.)

Because the District Court excluded the testimony of Scher, Plaintiffs moved, on May 23, to supplement the record with the historical documents underlying the 1968 constitutional revision process. (Doc232.) On May 30, the motion was denied. (Doc235.)

At oral argument on May 24, 2002, Plaintiffs clarified their position on the cross-motions for summary judgment: (i) regarding the intentional race discrimination claim, Plaintiffs were not seeking summary judgment in light of the ruling admitting Defendants' historical expert, creating material issues of fact; (ii) regarding the claim under Section 2 of the Voting Rights Act, there were material issues of fact that precluded summary judgment for Defendants; and (iii) regarding the poll tax and wealth discrimination claims, the parties agreed the claims presented legal issues properly resolved on summary judgment. (Doc240-Pg47-50.)

On July 18, 2002, the District Court granted Defendants' summary judgment motion. (Doc239.) This appeal followed. (Doc241.)

B. Statement of Facts

The District Court excluded some of Plaintiffs' evidence, rulings that are challenged on this appeal. For clarity's sake, however, the facts below are based only on the record evidence admitted by the District Court. The excluded evidence is discussed in the argument section of this brief. Because this case comes to the Court on summary judgment, the facts below are described in the light most favorable to Plaintiffs.

1. The history of Florida's policy of felon disenfranchisement

a. *The racially discriminatory origins of felony disenfranchisement in Florida's 1868 Constitution.*

Florida's current felon disenfranchisement policy originated in 1868 in the effort to suppress the political power of the newly freed slaves. (Doc121-Pg427,434-43.) Following the Civil War, Florida refused to extend civil and political rights to African Americans, including denying blacks the vote in Florida's 1865 Constitution. (Doc121-Pg428-33.) But Congress required Florida to give black men the vote as a condition to readmission to the Union. (Doc121-Pg427-28.) It was against this historical backdrop that Florida, in 1868, convened the

constitutional convention that first enacted the blanket felon disenfranchisement provision at issue in this case. The record below presents that history in rich detail, which can only briefly be summarized here.

During Florida's 1868 constitutional convention, two rival political factions battled for control, each drafting markedly different constitutions regarding black political participation. At the time, blacks constituted almost half of Florida's population, and were the majority of residents in certain counties. (Doc122-Pg865; Doc121-Pg440.) If given equal access to the franchise, fair representation in the legislative bodies, and the power to elect county officials, the newly freed slaves would wield significant political power in Florida. One faction of the convention – the "Moderate" Republicans – wanted to foster Florida's economic development and to that end sought to appease well-heeled ex-Confederates, who were strongly opposed to black political power. (Doc121-Pg435,440; Doc122-Pg780.) In the words of their leader William J. Purman, the Moderates' goal at the 1868 convention was to keep Florida from becoming "niggerized." (*See* Doc122-Pg791); (*see also* Doc122-Pg869 (phrasing more politely); *see also* Doc120-Pg180-81 (noting Purman's leadership role).) The opposing faction at the 1868 convention – the "Radical" Republicans – supported political power for African Americans. (Doc121-Pg435-37.) The Moderate and Radical factions each drafted

their own constitution. To support black political power, the Radicals' constitution (i) disenfranchised Confederates, (ii) provided for equal population legislative districts, (iii) continued Florida's longstanding practice of electing county officials, and (iv) *contained no provision denying the vote based on any criminal conviction*. (Doc121-Pg439,442.) To suppress the political opportunities of the newly enfranchised blacks, the Moderates' constitution (i) did not disenfranchise Confederates, (ii) contained a legislative apportionment scheme that enhanced representation from sparsely-populated white counties while diminishing representation from densely-populated black counties, (iii) gave the governor power to appoint all county officials except constables, and (iv) *inserted a new blanket felon disenfranchisement policy* that supplemented prior constitutional provisions that allowed, and in some instances required, disenfranchisement for enumerated crimes.[4] (Doc121-Pg440-42; Doc122-Pg787-88.) In the end, the Moderates' constitution prevailed. Professor Jerrell Shofner, the leading historian of Florida Reconstruction and Plaintiffs' expert, is unequivocal that the adoption of the "felony disenfranchisement provision . . . of the 1868 Constitution . . . [was]

[4] A chart at page 35 *infra* sets forth the changes in Florida's constitutional provisions respecting criminal disenfranchisement. In 1868, when the felony disenfranchisement policy was enacted, felony was a far broader and different category than "infamous crime," which the legislature was directed to use as an additional basis for disenfranchisment. (Doc140-Pg15-17; Doc147-Pg776-77.)

intentionally racially discriminatory." (Doc121-Pg427.)

b. *The 1968 reenactment of the felon disenfranchisement policy*

In 1965, the Florida Legislature sought recommendations on revising the state constitution. (Doc181-Pg21-22.) The Legislature established a Constitutional Revision Commission ("CRC") to make such recommendations. (Doc181-Pg22.)

The CRC in turn established several subcommittees, including a five-person Committee on Suffrage and Elections.[5] (Doc239-Pg9; Doc150-Pg977,988.) This subcommittee was charged with reviewing a number of constitutional provisions, including the felon disenfranchisement provision. (Doc150-Pg978; Doc122-Pg629.)

The sole record of any subcommittee discussion of the felon disenfranchisement provision is the minutes of its afternoon session on February 2, 1966. (Doc239-Pg9-10.) Those minutes report "considerable discussion" leading up to a failed proposal to switch from direct constitutional disenfranchisement to legislative authorization for felon disenfranchisement, but do not record the substance of that discussion. (Doc150-Pg982-93.)

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[5] Plaintiffs refer to the Committee on Suffrage and Elections as a "subcommittee" to distinguish it from the full Commission.

The revised constitution was ratified by both houses of the legislature in the late summer of 1967, and by the electorate at a referendum in November 1968. (Doc181-Pg22.)[6]

The archival records of the revision process include no evidence that anybody involved ever considered the racial impact of felon disenfranchisement. (Doc181-Pg22.)

When the 1968 Constitution emerged from the reenactment process, the State's practice of automatically disqualifying felons remained intact and unaltered from its prior version.[7]

Meanwhile, the old provision directing exclusion from office and the right of suffrage to those individuals who had been convicted of "infamous" and similar crimes was eliminated altogether, and the office-holding exclusion was transported into the felon disenfranchisement provision. (See statutory Addendum for complete text of disenfranchisement provisions.)

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[6] If the District Court believed that there were legislative "deliberations" about whether to disenfranchise ex-felons (Doc239-Pg10-11), that unsourced conclusion has no support in the record.

[7] The 1885 version had made only one textual change to the 1868 provision, disenfranchising those "convicted of felony by a court of record . . . unless restored to civil rights." (Fla. Const. art. VI, § 4 (1885).) The 1968 (the current) version provides "No person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights . . . ." (Fla. Const. art. VI, § 4 (1968).)

2. The racially discriminatory roots and impact of Florida's criminal justice system

Since its enactment in 1868, Florida's felon disenfranchisement policy has disproportionately disenfranchised blacks. In 1968, when Florida's Constitution was re-enacted, the percentage of Florida's African American voting age population disenfranchised on account of a prior felony conviction (1.97%) was more than double the rate for non-African Americans (0.9%). (Doc163-Addendum.) Today, Florida denies the right to vote to approximately 10.5% of voting age African Americans (over 167,000 men and women) on account of a prior felony conviction, compared with 4.4% of the non-African American population.[8] (Doc121-Pg488,490,509.) More than one in six African American men in Florida are disenfranchised as ex-felons. (Doc121-Pg509.)

The racial disparity in disenfranchisement also stems from the fact that blacks in Florida are disproportionately represented among those convicted of

[8] The effect on Florida's population as a whole is significant: currently, Florida disenfranchises over 613,000 men and women – one in 20 voting age Floridians – due to a prior felony conviction. (Doc121-Pg490,509.) Including those still under Department of Corrections supervision, a total of over 837,000 Floridians have lost their voting rights. Over time the proportion of the population barred from voting as ex-felons has increased dramatically, from less than 1% in the 1970s to over 5% today. (Doc121-Pg513.)

felony crimes resulting in the loss of the right to vote.[9] In 1998, blacks constituted 14% of Florida's population and over 48% of those convicted of felonies. (Doc120-Pg17-18,45.) These racially disproportionate conviction rates are not simply a function of racial differences in criminal involvement. In Florida, blacks are convicted of felonies at higher rates than their involvement in criminal activity – as measured through their arrest rates – would otherwise predict.[10] When arrest is used as a proxy for criminal involvement and taken as a basis for expected conviction outcomes, the racial disproportionality in felony convictions for all crimes combined that is unexplained by racial differences in arrest rates is substantial. (Doc120-Pg60.) This is so even though using arrests as a proxy for criminal involvement may overstate the relative level of criminal activity by blacks. (Doc120-Pg9.)

a. ***The history of race discrimination in Florida's criminal justice system***

Directly following emancipation, Florida's criminal justice system was used

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[9] In Florida, certain felony convictions – those in which the defendant successfully serves a sentence of adjudication withheld – do not lead to disenfranchisement. (Doc181-Pg30.) Unless specifically stated, all references to felony convictions in this memorandum refer to convictions that result in the loss of the right to vote.

[10] Arrest rates actually tend to overstate the rate of blacks' involvement in criminal activity. (Doc120-Pg28-29.)

as a tool for the subjugation of newly freed slaves. (Doc121-Pg443-50, Doc122-Pg867-68,878-85,899-900,908-09.) Criminalization of the class of newly freed slaves in post-emancipation Florida took many forms, including the enactment of the Black Codes, the redefinition of larceny to include taking agricultural products (believed a common practice among indigent ex-slaves) along with larceny's addition to the list of crimes mandating disenfranchisement, and the targeting of blacks for arrests. (Doc121-Pgs430,432,443-45; Doc122-Pgs867-68,878-84,899-900,908-09.) Reflecting the effectiveness of this policy, by the last quarter of the nineteenth century at least 82% of Florida's prison population was African American. (Doc146-Pg379.)

Racial bias in the criminal justice system continued well into the twentieth century. (Doc121-Pgs445-50.) Through the 1980s, black Floridians were tried and convicted under a regime that systematically excluded blacks from juries in criminal cases. *See, e.g., Porter v. Sinclair*, 389 F.2d 277, 279 (5th Cir. 1967); *Spencer v. State*, 545 So. 2d 1352, 1353-55 (Fla. 1989); *State v. Silva*, 259 So. 2d 153, 156 (Fla. 1972); *see also e.g., State v. Neil*, 457 So. 2d 481 (Fla. 1984). Even today, prosecutors have continued to use peremptory challenges to exclude blacks from petit juries on account of their race. *See e.g., Brown v. State*, 733 So. 2d 1128 (Fla. Dist. Ct. App. 1999); *Foster v. State*, 732 So. 2d 22 (Fla. Dist. Ct. App.

1999).

As a commission of the Florida Supreme Court recently reported, blacks are largely absent from participation in the criminal justice system as judges, lawyers, prosecutors, and law enforcement officers. *See Nipper v. Smith*, 1 F.3d 1171, 1175-76 (11th Cir. 1993) (quoting Report of Fla. Sup. Ct. Racial and Ethnic Bias Commission), rev'd *en banc* on other grounds, 39 F.3d 1494 (11th Cir. 1994).

b. *The relationship of discretion in Florida's criminal justice system to racial disparities in felony convictions*

Aside from intentional discrimination, Florida's criminal justice system, through discretionary decisions to police specific neighborhoods or grant lenient dispositions, consistently operates to the disadvantage of blacks. (Doc146-Pg288); *See* Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry, *Race, and Disorder in New York City*, 28 Fordham Urban L. J. 457, 458 (2000); *The Supreme Court 1995 Term Leading Case: Constitutional Law, B. Equal Protection: Race Based Selective Prosecution*, 110 Harv. L. Rev. 165, 166-7, 173-74 (1996); *Practicing Law Institute, Litigation and Administrative Practice Course Handbook Series: Race, Sentencing, and Criminal Justice*, 159 PLI/Crim 31, 38, 57 (1991) (quoting Rand Corp. expert).

The racial disproportionality in felony convictions is most pronounced where

prosecutorial discretion is greatest – cases involving drug and weapons offenses and defendants without prior records. (Doc146-Pg25.) Similarly, white offenders are more likely than blacks to receive the discretionary and lenient disposition of "adjudication withheld." (Doc146-Pg288.) In the adjudication withheld process, a defendant pleads guilty to a felony offense, but if he successfully completes his term of probation, will not have a felony record and not be disenfranchised. (*See* Doc146-Pg287; Doc120-Pg121.)

3. The racial disparities ex-felons' success in restoring their voting rights

The only way ex-felons in Florida can regain their voting rights is to obtain restoration from Florida's Clemency Board. (Doc121-Pg493,519.) Very few successfully do so. (*Id*.) In 1999, 54,661 felons completed supervision, but only 2,155 – a mere 3.9% – had their voting rights restored. *(Id.)* This rate has not exceeded 5.5% in a decade. (*Id.)* Of the tiny number of ex-felons who receive restoration of their voting rights, only 15.2% since 1996 are African Americans. (*Id.* at 501.)

The Governor and his Cabinet constitute the Clemency Board. (Doc122-Pg714.) The Governor has the power to deny clemency himself, but it takes the Governor plus three Cabinet members to restore voting rights. (*Id.* at 715.)

Florida has two routes for applying for restoration of voting rights. The first does not require a hearing before the Clemency Board, and is unavailable to many ex-felons, including those convicted of certain drug offenses and those who owe restitution. (*Id*. at 721-22.) Ex-felons ineligible for restoration without a hearing must submit an application to the Clemency Board.[11] (*Id*.)

Florida's rights restoration process enhances the racial disparities in disenfranchisement, since the restoration rate is significantly lower for African American applicants than others. (Doc121-Pgs492-97;537-44.) At each stage of the rights-restoration process, blacks fare worse than other applicants. In 2000, African Americans were 43.3% of the 9,750 applicants for restoration without a hearing, but only 29.2% of those determined eligible (compared to 68.7% who were white) and only 25.3% of those ultimately restored to civil rights (compared to 72.3% white)[12] (*Id*. at 539-42). Among those applying for the hearing process,

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[11] When the lawsuit was filed, an ex-felon with over $1,000 in pecuniary penalties or liabilities or any restitution owing, was ineligible for restoration without a hearing. (Doc122-Pg735.) Subsequently, Florida amended its clemency rules to chop the $1,000 penalties and liabilities bar to having civil rights restored without a hearing. *Id*. at 722. This change does not ameliorate existing racial disparities in felon disenfranchisement. (Doc121-Pg492-95,537-44.)

[12] Even after meeting initial eligibility requirements, if three or more Board members object to automatic restoration, that individual must pursue restoration through the hearing process.

blacks were more likely than others to be ineligible because of outstanding financial obligations: 13.2% African American applicants are ineligible on this ground, compared with 6.8% of whites. (*Id*. at 524) Once deemed eligible, applications of African Americans submitted for Clemency Board review are still more likely to be denied, although the small size of the pool does not rise to the level of statistical significance. (Doc121-Pg494.) Overall, rather than ameliorating the discriminatory effect of Florida's felon disenfranchisement scheme, the restoration process increases the racial imbalance.

4. *The lingering effects of past racial discrimination on black Floridians lower socio-economic status, which correlates with criminal convictions*

Black Floridians continue to bear the effects of past official race discrimination, reflected in their lower levels of education and income. In Florida in 1990, over 40% of African Americans age 25 or over had not graduated from high school or achieved the equivalent, compared with 23% for others. (Doc120-Pg67.) Less than 10% of African Americans age 25 or over had received a college degree or higher, almost half the rate for non-African Americans. (Doc120-Pg67.) Blacks in Florida had the lowest average per capita income – $7,550 – of all census groups, less than half that of whites. (Doc120-Pg67.) More than one in four African Americans age 18 or older were living below the poverty line – almost three

times higher than other Floridians. (Doc120-Pg68.) Blacks also have lower voter registration rates than whites. In 2000, the registration rate for African Americans was 56.1% compared with 68.7% for non-African Americans. (Doc120-Pg67.)

Blacks' depressed socioeconomic status interacts with felon disenfranchisement to cause inequality in voting. First, blacks' arrest rates for some offenses are increased by their tendency to live in poor neighborhoods with greater police presence. (Doc146-Pg288); *See* Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry, *Race, and Disorder in New York City*, 28 Fordham Urban L. J. 457, 458 (2000); *The Supreme Court 1995 Term Leading Case: Constitutional Law, B. Equal Protection: Race Based Selective Prosecution*, 110 Harv. L. Rev. 165, 166-7, 173-74 (1996); *Practicing Law Institute, Litigation and Administrative Practice Course Handbook Series: Race, Sentencing, and Criminal Justice*, 159 PLI/Crim 31, 38, 57 (1991) (quoting Rand Corp. expert). Thus, depressed socioeconomic status is positively correlated with blacks' higher conviction rates and the disparate racial impact of felon disenfranchisement. Moreover, blacks' depressed socioeconomic status makes it harder for them to pursue restoration of voting rights, because payment of all restitution orders is a prerequisite. (Doc121-Pg495-96.)

5. *Past and present race discrimination in Florida's electoral*

processes

Felon disenfranchisement has not been the only electoral process employed to minimize black voting power in Florida. Dozens of court decisions recount the history of racial discrimination in Florida's elections and electoral systems. *See, e.g., McMillan v. Escambia County, Fla.*, 748 F.2d 1037, 1044 (Former 5th Cir. 1984); *NAACP v. Gadsden County Sch. Bd.*, 691 F.2d 978 (11th Cir. 1982); *see also* Addendum (listing Florida statutes and constitutional provisions codifying forms of official discrimination as well as consent judgments from voting rights litigation describing discriminatory official practices in numerous Florida counties). Until the relatively recent creation of majority black electoral districts in Florida, minorities had "very little success in being elected to either the United States Congress or the Florida Legislature." *De Grandy v. Wetherell*, 794 F. Supp. 1076, 1079 (N.D. Fla. 1992). While blacks have had some electoral success in races for state legislative and congressional offices in the 1990s, none has ever been elected in Florida to the statewide offices of Governor or Cabinet member. *See* Jt. Ctr. for Polit. and Econ. Studies, Table 2: Number of Black Elected Officials in the U.S., avail. at http://www.jointcenter.org/DB/table/graphs; *Black Elected Officials, A National Roster*, Jt. Ctr. for Polit. and Econ. Studies, Washington, D.C. (21st ed. 1993).

Moreover, the felon disenfranchisement scheme has been disparately applied to preclude even those black Floridians who have not committed felonies from voting. As reported by the U.S. Commission on Civil Rights, from 1998 - 2000, the "practice of felon disenfranchisement has resulted in the greater likelihood of people of color, particularly African Americans, appearing erroneously on the Florida felon exclusion list." *See* U.S. Commission on Civil Rights, *Voting Irregularities in Florida During the 2000 Presidential Election*, June 2001.

As racially skewed disenfranchisement in Florida has grown, African American communities have found their ability to elect representatives of their choice increasingly diminished. Voting throughout Florida has been and continues to be racially polarized. *See Solomon v. Liberty County, Fla.*, 899 F.2d 1012, 1020-21 (11th Cir. 1990) (Kravitch, J., concurring); *id.* at 1037 (Tjoflat, C.J., concurring); *NAACP v. Gadsen County Sch. Bd.*, 691 F.2d at 982-83. Because of such racial preferences in voting, Florida's felon disenfranchisement provision has affected and will continue to affect election outcomes. (Doc121-Pg499.)

C. Standard of Review

This Court gives plenary review to a grant of summary judgment. *See Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1242-43 (11th Cir. 2002). Summary judgment is

proper only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In making this assessment, the Court should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion, and all reasonable doubts about the facts should be resolved in favor of the non-movant. *Bailey*, 284 F.3d at 1243. "Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts." *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 (11th Cir. 1999) (citations omitted).

The District Court's orders excluding evidence before entering summary judgment are reviewed for an abuse of discretion. *See City of Tuscaloosa v. Harcros Chems.*, 158 F.3d 548, 556 (11th Cir. 1998).

SUMMARY OF ARGUMENT

Plaintiffs have established that Florida adopted blanket felon disenfranchisement after the Civil War to deplete black votes. To this day, the policy continues to serve that purpose, disenfranchising as ex-felons over 10% of Florida's black voting-age population, more than twice the rate for whites. Under the rule of *Hunter v. Underwood*, 471 U.S. 222 (1985), these facts establish an Equal Protection violation.

The continuing discriminatory effect of felon disenfranchisement in Florida is undisputed. Defendants can prevail on summary judgment, then, only by proving that the law's intentionally discriminatory enactment is immaterial. The District Court held that Florida's reenactment of its felon disenfranchisement policy as part of the state's 1968 constitutional revision cleansed the law of its discriminatory nature. Neither the caselaw nor the record in this case, however, supports that conclusion.

When a state enacts a policy for discriminatory reasons, the state bears the burden to show that subsequent events have purged the policy's invidious purpose. Defendants have failed to make such a showing. The 1968 revision left intact the policy Plaintiffs challenge, and the archival record of the revision process reveals no evidence that the legislature considered any legitimate reasons for continuing

felon disenfranchisement. The District Court reached the opposite conclusion only by drawing improper inferences from textual changes and from a cryptic report of a single subcommittee meeting during the revision process. At the same time, the Court excluded Plaintiffs' expert evidence of the revision process on the grounds that it was essentially legislative history and then refused to allow Plaintiffs to supplement the record with the official documentation of that history. Summary judgment on this claim should be reversed and the evidence of the 1968 constitutional process admitted.

Florida's practice of felon disenfranchisement also violates Section 2 of the Voting Rights Act, because it interacts with social and historical conditions to cause a racial inequality in voting. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Plaintiffs established that challenged practice interacts with racial bias in the criminal justice system and with the lingering effects of official racial exclusion to result in the disproportionate disenfranchisement of blacks. The District Court rejected Plaintiffs' vote denial claim, however, using a legal standard under which a Section 2 violation could never be established by showing that a facially neutral practice interacts with racial bias in the surrounding society.

The District Court refused to consider Plaintiffs' expert statistical evidence that Florida's disproportionate rate of black felony convictions (and thus the racial

disproportion in disenfranchisement) is unexplained by blacks' rates of arrest. The District Court deemed this evidence irrelevant because Plaintiffs, "in effect, disenfranchised themselves by committing a felony." (Doc239-Pg14.) But this evidence supports an inference that blacks in Florida are disproportionately subject to felony conviction relative to their participation in crime. The Court also disregarded evidence of the totality of circumstances in which Florida's felon disenfranchisement policy works, including, for example, other State practices that enhance its discriminatory effect. And the Court excluded as untimely additional evidence of the way Florida's criminal justice and law enforcement policies more harshly affect African Americans. The District Court granted summary judgment on the Section 2 claim under an erroneous legal theory; that ruling should be reversed and the excluded evidence admitted.

By conditioning access to less burdensome restoration procedures on payment of all restitution, Florida has imposed a poll tax and engaged in wealth discrimination in violation of the Fourteenth and Twenty-Fourth Amendments. Having created a process for restoring voting rights, the State may not deny access to that process based on ability to pay. The legitimacy of the state's restitution policy itself is not dispositive. "The use of the franchise to compel compliance with other, independent state objectives is questionable in any context." *Hill v.*

Stone, 421 U.S. 289, 299 (1975). Requiring restitution payments as part of voting eligibility violates the basic rule that access to the franchise cannot be made to depend on financial resources. These issues are purely legal, and Plaintiffs are entitled to summary judgment on their poll tax and wealth discrimination claims.

In addition to violating the Equal Protection Clause due to its racially discriminatory intent and effect, Florida's felon disenfranchisement law violates the First and Fourteenth Amendments because, even absent a discriminatory purpose, the disenfranchisement of felons is invidious, irrational, and warrants heightened judicial scrutiny because it impinges on the fundamental right to vote. Recognizing that this Court is bound by the Supreme Court's decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974), we do not raise these contentions in the Argument below. We simply note them here to preserve them for possible Supreme Court consideration at a later date.

ARGUMENT

I. MATERIAL ISSUES OF FACT REGARDING THE DISCRIMINATORY PURPOSE OF FLORIDA'S FELON DISENFRANCHISEMENT POLICY PRECLUDE SUMMARY JUDGMENT OF THE EQUAL PROTECTION CLAIM.

Plaintiffs have established that Florida's felon disenfranchisement policy is intentionally discriminatory under the rule of *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). The leading historian of Florida Reconstruction testified that the State adopted blanket felon disenfranchisement in 1868 as part of an attempt to suppress black suffrage, testimony that must be credited on summary judgment. (Doc121-Pg427,434-43), and the policy continues to disenfranchise blacks at twice the rate of whites. (Doc121-Pg509.) Defendants can prevail on summary judgment, then, only by proving that the policy's original discriminatory purpose is for some reason not operative. The point is not that discriminatory intent is ineradicable, like original sin, but that it takes concerted effort to eradicate it.

The record below utterly fails to support the State's claim that any such effort took place. In particular, Defendants have offered no convincing proof that the 1968 reenactment of the discriminatory policy entailed any significant substantive consideration of legitimate bases for felon disenfranchisement. To the extent the District Court undertook a factual inquiry into the 1968 reenactment, the Court's findings are clearly erroneous. The opinion cites statements taken out of

context from expert evidence the Court had *excluded*, and relies principally on a single page of the massive legislative record, improperly drawing inferences in the State's favor. Moreover, the Court ignored the bulk of the documentary evidence, refusing to allow Plaintiffs to replace their excluded expert with the public documents on which his testimony was based. Because it is impossible to analyze the 1968 revision process without reference to either the excluded expert evidence or the underlying public records, Plaintiffs refer in the discussion below to documents from the official legislative history of the 1968 constitutional revision, available in the state archives in Tallahassee.

A. Defendants Have the Burden to Prove That Reenactment Purged the Discriminatory Intent Behind Florida's Adoption of Blanket Felon Disenfranchisement.

When a state adopts a policy for discriminatory reasons, the state bears the burden of proving that the law's discriminatory origin is immaterial. One way to neutralize discriminatory enactment is "to demonstrate that the law would have been enacted without this factor," *Hunter*, 471 U.S. at 228. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Similarly, the State might prevail by proving that a subsequent reenactment "purged the discriminatory intent originally underlying" the policy. *Irby v. Va. State Bd. of*

Elections, 889 F.2d 1352, 1356 (4th Cir. 1989).

There is no reason, however, to presume that reenactment legitimates discriminatory policies. Such an approach would be contrary to the rule of *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), embraced by *Hunter*, and to the Supreme Court's emphasis on original discriminatory enactment. As the Court has explained, "given an initially tainted policy, it is eminently reasonable to make the State bear the risk of nonpersuasion with respect to intent at some future time." *United States v. Fordice*, 505 U.S. 717, 746 (1992) (citations omitted); *see also Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1575 (11th Cir. 1994) (applying *Fordice* in a case involving affirmative action in public employment).

Unsurprisingly, then, this Court's consistent practice is to focus on adoption, not reenactment. *See McMillan v. Escambia County, Fla.*, 638 F.2d 1239 (Former 5th Cir. 1981) (focusing on discriminatory intent in 1901, although challenged provision had been reenacted in 1968 Florida constitutional revision), *vacated in part*, 688 F.2d 960 (Former 5th Cir. 1982), *vacated and remanded on other grounds*, 466 U.S. 48 (1984); *see also Brown v. Board of School Comm'rs*, 706 F.2d 1103 (11th Cir.), *aff'd*, 464 U.S. 1005 (1983) (upholding finding of intentional discrimination based on election system's 1876 enactment with no

analysis of the challenged law's subsequent amendment and reenactment); *Bolden v. City of Mobile*, 542 F. Supp. 1050, 1074-76 (S.D. Ala. 1982) (concluding at-large election system was motivated by unconstitutional discriminatory intent based on evidence from post-Reconstruction period through 1911, notwithstanding lack of evidence of discriminatory intent in recent amendments to system).

This emphasis on original enactment stems in part from the well-established presumption that "[a] re-enactment is . . . not a new law but the continuation of the former law. In determining its meaning it must be found out what was intended by the prior enactment." *People ex rel. Donegan v. Dooling*, 125 N.Y.S. 783, 783 (1910); *see also Pierce v. Underwood*, 487 U.S. 552, 567 (1988). Where a statute has been amended, the presumption is that any provisions that the legislature did not alter did not change in meaning. *See, e.g., Le Mars Mut. Ins. Co. v. Bonnecroy*, 304 N.W.2d 422, 424 (Iowa 1981); *Misle v. Miller*, 125 N.W.2d 512, 517 (Neb. 1963). An inquiry into discriminatory purpose is not identical to the question of legislative intent regarding a law's meaning. Courts regularly rely, however, on evidence of legislatures' underlying purposes to determine the meaning of a statute. Thus if reenactment is presumed not to change statutory meaning, the law's underlying purpose must likewise be presumed unchanged. *See, e.g., FDIC v. Philadelphia Gear Corp.*, 476 U.S.

426, 433-34 (1986) ("Despite the fact Congress revisited the deposit insurance statute in 1935, 1950, and 1960, [the original 1933 legislative record] remain[s] the best indication of Congress' underlying purpose in creating deposit insurance.").

Proving that reenactment changed the original discriminatory purpose of a law thus requires a searching inquiry into the legislative history and factual context of the reenactment. For instance, in *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989), plaintiffs challenged as racially discriminatory Virginia's longstanding appointive system for selecting school board members, but the state maintained, as Florida does here, that amendment and reenactment as part of a constitutional revision process in the late 1960s cleansed the policy's discriminatory purpose. *Id.* at 1354-55. The Fourth Circuit disagreed because there had been no fundamental "alterations of the school board selection process and apparently no debate over the relative merits of appointed and elected school boards." *Id.* at 1356.

Ultimately, the court in *Irby* found that the underlying discriminatory intent had been purged, but not by the constitutional revision. After the revision, Virginia appointed a commission to study the challenged policy. The commission's public

report "clearly set forth solely legitimate reasons for choosing an appointed school board over a popularly elected body" and "the state legislature subsequently considered bills that would have changed the law to allow elected school boards." *Id.* at 1356. No remotely comparable evidence was produced by Defendants here.

B. The District Court Erroneously Held That Florida's Reenactment of Felon Disenfranchisement Cleansed Its Discriminatory Intent "As a Matter of Law."

Ignoring most of the relevant case law, the District Court held that "as a matter of law" the reenactment of the felon disenfranchisement provision cleansed its discriminatory purpose. (Doc239-Pg8.) For that result, the Court relied on a Fifth Circuit decision, *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998), that was litigated by a *pro se* inmate who offered no evidence about the reenactment process. To the extent *Cotton* suggests that plaintiffs have a burden to disprove the "cleansing" effect of reenactment (Doc239-Pg8, quoting 157 F.3d at 391), the case is wrongly decided. More recently, the Fifth Circuit has explained that *Cotton* "broadly stands for the important point 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." *Chen v. City of Houston*, 206 F.3d 502, 521 (5th Cir. 2000) (emphasis in original), *cert. denied*, 532 U.S. 1046 (2001).

C. The District Court's Factual Findings Supporting Summary Judgment Are Clearly Erroneous.

As the Supreme Court recently reiterated in the voting rights context, "assessing a jurisdiction's motivation . . . is an inherently complex endeavor, one requiring the trial court to perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (quoting *Arlington Heights*, 429 U.S. at 266). To the extent the District Court inquired into the intent of the framers and ratifiers of the 1968 reenactment, the opinion ignores much of the available evidence, distorts the evidence on which it focuses, and consistently draws inferences in favor of Defendants, all in violation of the principles of summary judgment.[13]

1. *The direct, blanket felon disenfranchisement first enacted in Florida's 1868 constitution was not substantively changed in the constitutional revision of 1968.*

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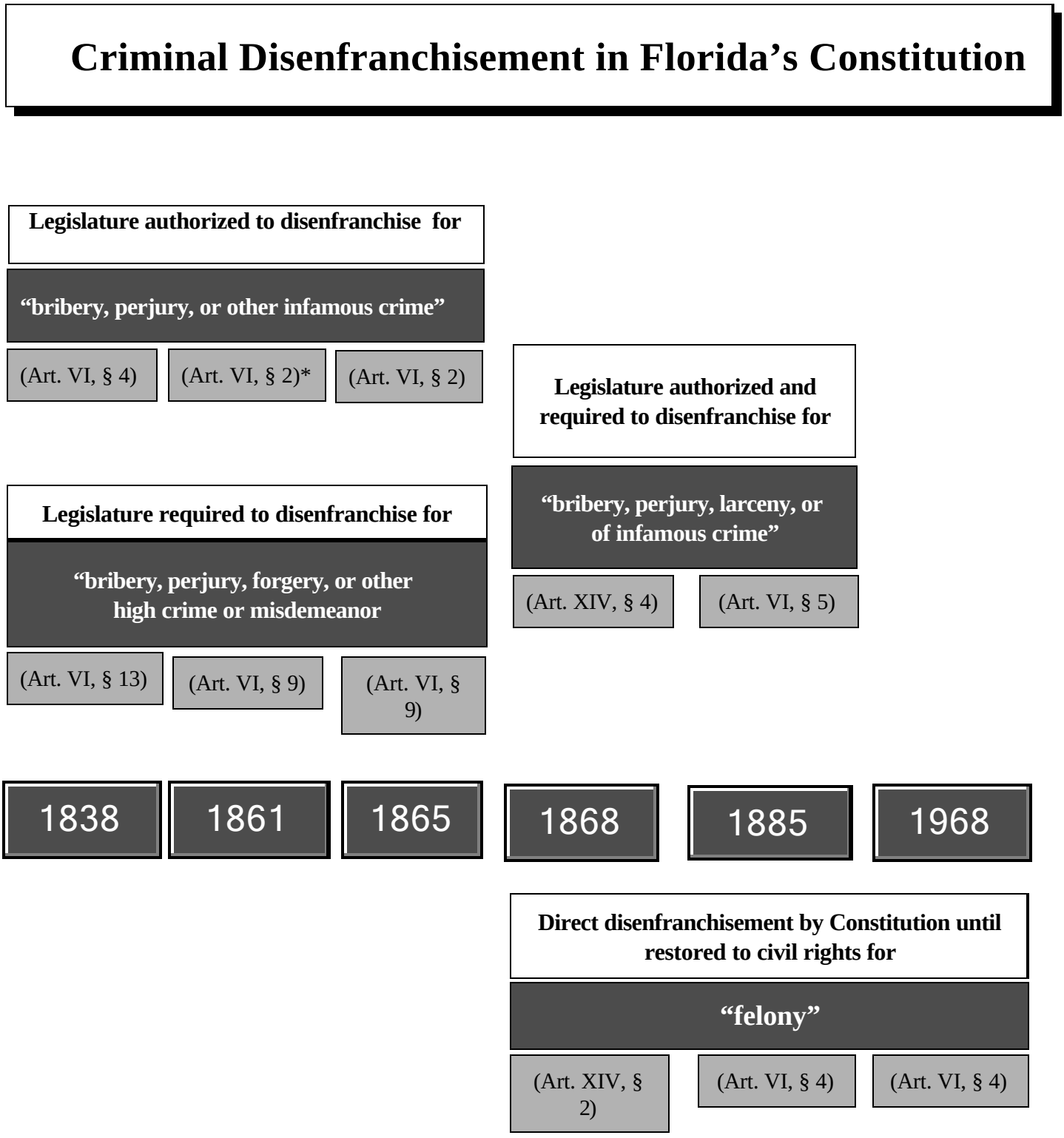
[13] In *Shaw v. Hunt*, 517 U.S. 899 (1996), the Supreme Court upheld an equal protection challeng to North Carolina's redistricting plan. Under the theory espoused by the District Court, if the North Carolina legislature had re-adopted the same plan the folllowing year, with discussion and notes from one committee meeting suggesting that traditional redistricting criteria might have been discussed, that would have "cleanse[d] the prior unconstitutional racial intent." The Supreme Court's subsequent review of the *Shaw* plan, however, *see Hunt v. Cromartie*, 526 U.S. 541 (1999) and *Hunt v. Cromartie*, 121 S. Ct. 1452 (2001), establishes that this *de minimus* reivew is not the proper intent inquiry.

The 1968 constitutional revision left intact the blanket ban on felon voting at issue in this case, the policy that Plaintiffs' evidence shows was originally enacted to suppress the voting power of African Americans. As shown by the chart at 36 *infra*, the 1968 revision deleted the separate constitutional provision enumerating crimes that would trigger legislative disenfranchisement and shifted the prohibition on office-holding from that provision into the felon disenfranchisement provision. Although those changes did nothing to alter the policy at issue in this case, the District Court characterized them as "substantial revisions" to the law. (Doc239-Pg11.)

Moreover, without support, the Court deemed these textual changes "deliberately chose[n] . . .to achieve a different and new result in terms of the persons who would be disqualified." (*Id.)* In fact, the most likely reason for the changes was to avoid redundancy. By 1968 most of the enumerated crimes that triggered legislative disenfranchisement were felonies. Thus, the most logical inference to draw from the deletion of the legislative disenfranchisement section was not that it was intended to change the category of persons disqualified from voting, but rather to avoid unnecessary duplication.[14] At the very least, the District

[14] Though the District Court cited one page of an excluded expert report in support of its finding that the revision process aimed to "completely overhaul" the constitution (Doc239-Pg9), the report makes clear that what was being overhauled was form, not substance, with a focus on streamlining and reducing redundancy.

Court's conclusion about the significance of the language changes depends on improper inferences for Defendants.



*As of 1845, "infamous crime" was limited to murder, perjury, piracy, forgery, larceny, robbery, arson, sodomy, and buggery. (Act of 1845, Section 6 (Doc147-Pg776-77.); *King v. State*, 17 Fla. 183, 1879 WL 2157 (1879))

2. *The 1968 constitutional revision process did not include any significant deliberation of the felon disenfranchisement policy.*

There is no record evidence that the legislature considered the substance of the blanket felon disenfranchisement policy before reenacting it. In fact, the only evidence of any review by the legislature as a whole is a failed amendment to move the words "in this or any other state" forward in the provision to apply to felony conviction as well as to adjudications of incompetence. H. Amend. No. 199 to HJR3-XXX (67); Rep. Henry J. Prominski, *in* Article VI Suffrage and Elections, available in Fl. State Archives, Dept. of State, R.A. Gray Bldg., Tallahassee, FL ("State Archives"), Series 727, Carton 4. The scant evidence of the ratifying public's views suggests, if anything, continued racial bias. At the public hearings on the constitutional revision, the only speaker to address felon disenfranchisement did so in rambling comments that also encompassed support for segregated schools and laws prohibiting racially mixed marriages. Pensacola Public Hearing Trans. 7/29/66; State Archives, CRC 1965-67, Box 2, Folder 15, at 109, 116-17, 121.

Nor is there any evidence that the Constitutional Revision Commission (CRC) ever discussed the felon disenfranchisement provision in full convention. The subcommittee charged with preliminary work on the article containing felon disenfranchisement, among other things, certified several questions it deemed important enough for consideration by the full CRC. Felon disenfranchisement was not among them. (Doc150-Pg992.) The District Court's opinion creates the impression that the subcommittee focused entirely on felon disenfranchisement. In fact, it was responsible for revising all or part of six constitutional articles and two additional resolutions. (Doc150-Pg978.)

The District Court focused on the minutes of one afternoon session of that 5-person subcommittee. (Doc150-Pg982-83.) Although those minutes state that "considerable discussion" preceded a vote on shifting to legislatively authorized (rather than constitutionally mandated) criminal disenfranchisment, they do not reveal the discussion's content. Presumably, the discussion related to that procedural issue – legislative rather than direct constitutional disenfranchisement – and not to substantive policy. Moreover, there was little time for discussion on any topic: the three-hour session covered at least eight other provisions and matters having nothing to do with felon disenfranchisement. (Doc150-Pg980-84.) Nevertheless, again, the District Court improperly drew an inference for Defendants

and concluded that the minutes are proof of a significant policy discussion on felony disenfranchisement.

In sum, the District Court reached the conclusion that significant legislative deliberation had taken place by illogically and improperly interpreting the reason for the textual changes made, distorting the significance of a single subcommittee discussion, and ignoring the vast bulk of the record of the 1968 revision process. That record resounds with silence on the felon disenfranchisement issue and does not suggest that the legislature or the Florida public in 1968 engaged in any serious discussion of legitimate reasons for maintaining ex-felon disenfranchisement, let alone confronted or repudiated its discriminatory history and ongoing racial impact.

D. The District Court Improperly Excluded an Expert Review of the 1968 Revision Process, as Well as the Archival Records of That Process.

The District Court's lack of attention to the bulk of the 1968 revision record resulted from two erroneous exclusionary rulings that excised most available evidence on the revision process. The Court excluded the report and testimony of Professor Richard Scher, who had examined records and press coverage from the 1965-68 revision process, because the Court viewed the issue on which he would testify as a form of "legislative history . . . . well within the core competence of lawyers and Courts." (Doc211-Pg2.) The Court then excluded the documents that

would have constituted that legislative history, a three-fold abuse of discretion. First, Defendants had not even moved to exclude many of the records. (Doc 234-Pg1-2 (expressing "no objection to plaintiffs' proposal that the 'archives of the Florida Constitutional Revision Commission, 1965-67' be formally considered part of the record").) Second, although the District Court asserted that the documents had never been previously furnished to Defendants (Doc235-Pg1), Professor Scher had identified them at deposition and discussed them in his report. (Doc120-Pg5,8,10; Doc146-Pg79-81,87,96.) Finally, most of the documents were public records. If the revision had happened more recently, parties would simply have cited such documents on Lexis or Westlaw while discussing legislative intent.

Clearly, Professor Scher's testimony would in fact help the Court understand the revision process, because the District Court actually relied on his excluded report in the summary judgment opinion. (*See* Doc239-Pg9.) Alternatively, if this Court accepts the District Court's view that Professor Scher's testimony would amount to little more than legislative history, then the underlying documents must be admissible legislative history.

Having rejected a summary of the revision documents, and without access to most of the archival records, which are in Tallahassee, the District Court evaluated the revision process based on the few documents Defendants had chosen to put

into the record. Such an approach could not possibly give Plaintiffs a fair hearing. *See* L. Harold Levinson, *Interpreting State Constitutions by Resort to the Record*, 6 Fla. St. U. L. Rev. 567, 570-71 (1978) (collective intent of state constitutional framers should be established by court's independent search of the entire record).

II. THE DISTRICT COURT APPLIED THE WRONG LEGAL STANDARD IN DECIDING THAT FLORIDA'S FELON DISENFRANCHISEMENT POLICY DOES NOT VIOLATE SECTION 2 OF THE VOTING RIGHTS ACT.

Plaintiffs raised factual issues which, if resolved in their favor, establish that Florida's felon disenfranchisement scheme violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(b). The District Court did not analyze the merits of Plaintiffs' fact-based claim. Instead, the Court granted summary judgment on a legal theory that erroneously narrows the scope of Section 2. Under the District Court's theory, a vote denial claim under Section 2 may never be established by showing that a facially neutral voting qualification interacts with racial bias in the surrounding social circumstances. Yet such a showing is precisely the method the Supreme Court mandated for establishing a Section 2 claim in *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). The ruling below is in direct conflict with *Gingles* and the numerous cases that have applied *Gingles's* interactive standard.

A. Felon Disenfranchisement Violates Section 2 if, Under the Totality of Circumstances, It Interacts with Social and Historical Conditions to Cause Racial Inequality in Voting

Opportunities.

Congress passed the Voting Rights Act "'not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination.'" *Gingles*, 478 U.S. at 44 n.9 (quoting S. Rep. No. 417, 97th Cong. 2d Sess. (1982) at 5). As amended in 1982, Section 2 of the Act prohibits any "voting qualification . . . or practice . . . which results in a denial . . . of the right . . . to vote on account of race." 42 U.S.C. § 1973. (*See* statutory Addendum at V for full text.) Plaintiffs' vote denial claim under Section 2 is established if "based on the totality of circumstances, . . . the political processes leading to nomination or election in the State . . . are not equally open" to African Americans. 42 U.S.C. § 1973(b).

Thus, by the statute's own terms, whether a particular practice is sufficiently connected with racial bias to result in vote denial in violation of Section 2 always depends on the "totality of the circumstances" in which the practice operates. 42 U.S.C. §1973(b). The Senate Report that accompanied the 1982 amendments listed a series of nine factors that "typically may be relevant to a § 2 claim." *Gingles*, 478 U.S. at 44; S. Rep. No. 417, 97th Cong. 2d Sess. at 27. The enumerated factors are "neither comprehensive nor exhaustive," and "other factors may also be relevant and may be considered." *Gingles*, 478 U.S. at 45. Moreover,

there is no requirement that any particular factor be proved or that most of the factors point in the direction of a violation. *Id.* As described *infra* at pages 45-47, Plaintiffs brought evidence of six of the nine Senate factors.

In *Thornburg v. Gingles*, the Supreme Court explained that under the results test, "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." 478 U.S. at 47. While Section 2 is violated only by practices that deny or abridge the right to vote "on account of race," 42 U.S.C. § 1973, *Gingles* makes clear that the requisite connection to race is established by showing that a facially neutral practice interacts with other social circumstances to deny minorities equal opportunity to participate in the political process. *See also Johnson v. DeGrandy*, 512 U.S. 997, 1007 (1994).

Determining whether a voting qualification violates Section 2 thus does not entail drawing a direct line between the challenged practice and intentional race discrimination. *See Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp 1245, 1262-68 (N.D. Miss. 1987) (undertaking totality of circumstances analysis in vote denial claim), *aff'd sub nom. Miss. State Chapter, Operation Push v. Mabus*, 932 F.2d 400 (5th Cir. 1991). In some cases the disparate impact of a

voting practice and the historical background of official discrimination may combine to constitute sufficient circumstantial evidence that the practice operates "on account of race." *See, e.g., United States v. Marengo County Comm'n*, 731 F.2d 1546, 1574 (11th Cir. 1984); *see also Harris v. Graddick*, 593 F. Supp. 128, 132 (M.D. Ala. 1984).

B. Plaintiffs' Case Details How Florida's Felon Disenfranchisement Scheme Interacts with Social and Historical Conditions to Cause Racial Inequality in Voting.

The disparate racial effect of felon disenfranchisement in Florida results from the State's racial disproportion in felony convictions. Although blacks make up only 14% of the Florida population, they constitute over 48% of those convicted of felonies. (Doc120-Pg45.) Plaintiffs have offered expert witnesses and documentary evidence to prove that this disproportion results from racial bias and socioeconomic differences stemming from previous official race discrimination.

The District Court disregarded this evidence, ruling simply that "Plaintiffs have, in effect, disenfranchised themselves by committing a felony." (Doc239-Pg14.) Thus the Court adopted the State's theory that Florida's high rates of black disenfranchisement reflect higher rates of black criminal activity (*see, e.g.,* Doc225-Pg12), ignoring Plaintiffs' explanation for the racially disproportionate impact.

That evidence raises an inference that African Americans are disproportionately disenfranchised in part because of racial bias in the criminal justice system and that system's interaction with social and economic racial differences that are themselves the product of racial bias.

Convicted felons are indisputably a small subset of those who engage in felonious behavior. A host of discretionary decisions at every level of the criminal justice system determines who among the law breakers will be arrested, prosecuted, and, ultimately, convicted. There is nothing inherently illegitimate about this situation, reflecting as it does, policy choices by a government with limited resources and a host of problems and goals. When the discretionary decisions that lead to or away from felony convictions intersect with racial bias, however, the Voting Rights Act prohibits using those convictions as a voter qualification. *See Baker v. Pataki,* 85 F.3d 919, 934 (2d Cir. 1996) (Feinberg, J., concurring)[15] (dismissal of vote denial claim under Section 2 was inappropriate where plaintiffs alleged racially disparate treatment in sentencing).

Plaintiffs introduced significant evidence that such discretionary decisions underlie the racially disparate impact of felon disenfranchisement in Florida. In the

[15] In the voting rights challenge to felon disenfranchisement brought before the Second Circuit, the en banc court split evenly, ultimately affirming the lower court's dismissal of the case but creating no precedent in the circuit. *Id.* at 921 n.2.

first place, some members of the Plaintiff Class were convicted, and thus disenfranchised, during a time when it is well-recognized that the Florida criminal justice system harbored officially sanctioned race bias. *See* pp 15-16 *supra*. Regarding those Plaintiffs disenfranchised through more recent convictions, Plaintiffs offered expert testimony by Professor Theodore Chiricos, a criminologist at Florida State University.

When Professor Chiricos compared all 1998 Florida arrestees identified by the State as having a "felony" charge at arrest with all individuals convicted of felonies in Florida in 1998, excluding those convicted who did not lose their voting rights, he found a significant racial disproportionality. (Doc120-Pg60-Table4A.) Disproportionality was highest for drug and weapons offenses, where there is generally greater discretion in arrest and prosecution decisions than for crimes such as murder and rape, which show lower levels of disproportionality. (Doc120-Pg23-25.) *See also* Alfred Blumstein, *Racial Disporportionality of U.S. Prison Populations Revisited*, 64 Colo. L. Rev. 743, 759 (1993) ("For less serious crimes, there is greater disparity between the race ratio at arrest and that in prison, probably because there is more room for the exercise of discretion.") And blacks with no prior felony record compared with others with no prior record are disproportionately convicted, again showing greater racial disparity where there is

more room for discretion. (Doc120-Pg136; Doc146-Pg291.) Defendants have not established any persuasive alternative explanation for these observed race disparities, and the District Court cited none in the summary judgment ruling.

In addition to the Chiricos study, Plaintiffs offered a host of evidence relevant to the totality of circumstances in which Florida's felon disenfranchisement scheme functions, including six of the nine Senate Factors:

(1) Florida's undisputed history of official discrimination touching the right to vote, *see* pp 21-22 *supra*;

(2) Racially polarized voting, *see* pp 22 *supra*;

(3) Lack of black electoral success, *see* p 21 *supra*;

(4) Data on socioeconomic and political-participation differences between blacks and whites that result in part from previous *de jure* discrimination and that hamper blacks' access to the political process, and that interact with the criminal justice system to make blacks more vulnerable to arrest, prosecution, and conviction in various ways, *see* pp 19-20 *supra*;

(5) State practices that work closely with felon disenfranchisement laws to enhance the State's opportunity for using those laws in a discriminatory fashion, including: (a) the State's process for administering the restoration of felons' civil rights, which tends to disadvantage African Americans (Doc142-Pg19-20.); and (b)

the State's orchestration from 1998 to 2000 of a voter roll purge of alleged ex-felons who had not had their rights restored (*See* Fla. Stat. ch. 98.0975 (repealed 2001)), which increased the disparate racial impact of felon disenfranchisement by erroneously barring from voting disproportionate numbers of law abiding African Americans. *See* U.S. Comm'n on Civil Rights, Voting Irregularities in Florida During the 2000 Presidential Election, ch. 5 (2001).

(6) The tenuousness of the State's asserted interest "in confining participation in the lawmaking process to those who have obeyed society's laws."[16] (Doc119-Pg20.) Florida justifies its disenfranchisement of ex-felons by asserting that they "have shown an unwillingness to abide by [society's] rules") (*id*.) and arguing ex-felons "do not deserve to vote." (*Id*. at 21.) But felon disenfranchisement rests on discretionary decisions wholly unrelated to voting, such as crime reporting rates and law enforcement priorities and resources. For example, almost two-thirds of all small businesses under report their income to the IRS, David Joulafian & Mark Rider, *Tax Evasion by Small Business* tbl. 2 (Office of Tax Analysis Paper No. 77, 1998), but only about 600 taxpayers in the entire

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[16] *Cf. Furst v. New York City Transit Auth.*, 631 F. Supp. 1331, 1337-38 (E.D.N.Y. 1986) (irrational for a municipality to fire all ex-felons); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 536-37 (1973) (questioning rationality of food-stamp regulation designed to prevent fraud when government also criminalized such fraud).

country are convicted each year of federal tax felonies, *Sourcebook* at 426 tbl. 5.16. And while over 25 million people nationwide admitted using illegal drugs, fewer than one-seventieth of that number were convicted of drug felonies in the relevant reporting period. (*Id.* at 259 tbl. 3.90, 426 tbl. 5.16, 456 tbl. 5.40.)

At each level, the criminal justice system captures only a small subset of people who violate Florida and federal law. That subset may be rationally related to law enforcement objectives, but as a qualification for voting rights, it is irrational, arbitrary, racially skewed, certainly tenuous, and therefore evidence that the policy is discriminatory. *See Marengo County*, 731 F.2d at 1571.

C. The District Court's Decision Conflicts with *Gingles'* Interactive Standard, Is Inconsistent with the Results Test, and Leads to the Untenable Conclusion That Voting Rights May Be Predicted on an Intentionally Discriminatory Criminal Justice System.

Although the District Court purported to apply the "results test" (Doc239-Pg11-12), the opinion never analyzes Plaintiffs' proof that the discriminatory effect of felon disenfranchisement results from its interaction with social and historical conditions. Instead, the District Court effectively applied a standard that demands that a voting qualification challenged under Section 2 functions autonomously, rather than interactively, to deny the right to vote "on account of race." The District Court reasoned that Plaintiffs "in effect, disenfranchised themselves by

committing a felony," and thus had failed to show "that they are denied the right to vote on account of race." (Doc239-Pg14.) Under this logic, literacy tests and poll taxes would be legal, since they bar only those who have "disenfranchised themselves" by failing to learn to read or refusing to pay the required fees. *Cf. Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that employer's high school diploma rquirement violated Title VII by having disparate impact on minority applicants).

In the voting rights context, courts have consistently rejected the view that "voluntary choice" not to register or vote should trump Section 2's multi-factor results test, particularly when such choices are affected by a history of discrimination. *See, e.g.*, *Barnett v. City of Chicago*, 141 F.3d 699, 702-03 (7th Cir. 1998); *Teague v. Attala County*, 92 F.3d 283, 293-95 (5th Cir. 1996); *Ketchum v. Byrne*, 740 F.2d 1398, 1415-17 (7th Cir. 1984) (Section 2 requires creation of supermajorities for minority districts to compensate for minorities' typically lower registration and electoral participation rates).

Moreover, as a matter of logic, the District Court's ruling cannot be squared with Congress's rejection of the need for "proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters." *Gingles*, 478 U.S. at 43-44. Unless the racially disparate

effects are occurring by mere chance – a contention Defendants do not and could not make here – a facially neutral voter qualification can have a racially disparate effect in only one of two ways. Either the facially neutral provision is being intentionally used to produce differential racial results, or those results stem from the provision's interaction with racial disparities and race bias in the surrounding society. Short of deliberate discriminatory application, then, the only way a facially race-neutral law like felon disenfranchisement can deny Plaintiffs' right to vote on account of race is by shifting racial disparities from the criminal justice system and the surrounding social context into the process of voter qualification.

Finally, under the District Court's theory, even if felony convictions are obtained through an intentionally racially discriminatory criminal justice system, felon disenfranchisement cannot violate Section 2 "because it is discrimination in the criminal justice system, not the disenfranchisement provision itself, that causes the vote denial." (Doc239-Pg13.) Such a view thwarts Section 2's purpose of preventing race discrimination from undermining blacks' participation in choosing elected officials. *See Marengo County*, 731 F.2d at 1556. Neither the Supreme Court nor this Court, nor, for that matter, any federal appellate court, has ever

advanced such a narrow interpretation of Section 2.[17]

[17] This is, apparently, the position taken by another district court in *Farrakhan v. Locke*, No. CS-96-97-RHW (E.D. Wash. Dec. 1, 2000) (Doc158-App.J.), now before the Ninth Circuit.

D. The District Court Erred in Holding That Plaintiffs' Evidence of Disproportionate Impact Was Irrelevant.

The District Court held that Plaintiffs' statistical "evidence of disproportionate impact is irrelevant to the voting rights challenge." (Doc239-Pg13.) To the contrary, while "a showing of disproportionate racial impact alone does not establish a per se violation of the Voting Rights Act," (Doc239-Pg13 (quoting *Wesley v. Collins*, 791 F.2d 1255, 1260-61 (6th Cir. 1986))), it is clearly relevant to the Section 2 inquiry. First, disparate racial impact is circumstantial proof of discriminatory intent. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1189 (11th Cir. 1999) (evaluating all direct and circumstantial evidence of intent, including evidence of "substantial disparate impact."). "Disproportionate impact is not irrelevant" to the question of discriminatory intent, it simply "is not the sole touchstone" of invidious racial discrimination. *Washington v. Davis*, 426 U.S. 229, 242 (1976).

Moreover, Plaintiffs' expert statistical evidence of racial disparities in Florida's criminal justice system supports a Section 2 violation just as statistical evidence of voter polarization supports a violation in Section 2 districting challenges. Statistical proof is treated as "circumstantial evidence of racial bias operating through the electoral system to deny minority voters equal access to the

political process," *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994). So long as a feasible remedy exists, such statistical evidence alone "generally will be sufficient to warrant relief." *Id*.

Plaintiffs' targeted evidence of racial amplification in Florida's felony conviction rate is one factor that distinguishes their case from *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986).[18] In rejecting that Section 2 challenge to Tennessee's felon disenfranchisement, the Sixth Circuit gave no hint that it received any evidence on the source of the challenged law's disparate racial impact. *Id.* at 1260. In contrast, Plaintiffs have used statistics to raise an inference that the source of the disparity is in the criminal justice system, not in racial differences in criminal behavior. Plaintiffs have shown a racial disproportion using the criminal justice system's own point of reference for criminal behavior – arrest – as a baseline. Plaintiffs' proof shows that when blacks and whites are arrested for the same

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[18] Three Circuits have addressed § 2 challenges to felon disenfranchisement, with different results. *See Howard v. Gilmore*, No. 99-2285, 2000 WL 203984 (4th Cir. Feb. 23, 2000) (panel rejects pro se plaintiff's § 2 claim); *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (en banc court equally divided on whether fact that black convicts are more likely to receive prison time and, therefore, to be disenfranchised supports a § 2 claim); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986) (panel rejects vote dilution claim). The Second and Ninth Circuits are now considering such cases. *Farrakhan v. Locke*, No. 01-35032 (9th Cir. argued Apr. 4, 2002); *Muntaqim v. Coombe*, No. 01-7260 (2d Cir. briefed Aug. 9, 2002).

crime, blacks are convicted disproportionate to their arrest rates, especially if the type of crime and the background circumstances allow for considerable discretion. (Doc120-Pg12,17-23,25-26,29-30; Doc146-Pg291.) This is beyond a bare showing of disparate impact. The difference between the two kinds of proof is analogous to the requirement in hiring discrimination suits under Title VII that plaintiffs compare the hiring rates of minorities with the percentage of qualified individuals who are eligible for hire, rather than the simple proportion of minorities in the general population. *See, e.g., Crum v. Alabama*, 198 F.3d 1305, 1312 & n.1 (11th Cir. 1999). By comparing blacks and whites convicted of felonies with the numbers of those arrested, rather than with the general population, Plaintiffs have met an analogous standard of relevance.

Plaintiffs' statistical evidence raises an inference that the disparate impact of felon disenfranchisement results from the interaction of that scheme with race bias in the criminal justice system and the lingering effects of racial exclusion. While the inference "is not immutable, . . . it is strong; it will endure unless and until the defendant adduces credible evidence" to explain the observed racial disproportions as the result of factors other than race. *Vecinos de Barrio Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995). In granting summary judgment to the State, the District Court cited no alternative explanation for Plaintiffs' evidence of racial

disproportions.

E. The District Court Wrongly Excluded Additional Evidence of Racial Bias in Florida's Criminal Justice Systems and the Systems' Interraction With Socioeconomic Racial Differences That Stem from Race Discrimination.

The District Court's exclusion of additional evidence of official racial bias supporting the Section 2 claim was a clear abuse of discretion. Plaintiffs sought to introduce five reports of the Florida Supreme Court's Racial and Ethnic Bias Study Commission (the "Commission Reports") (Doc148-Pg796-1269) that describe persistent racial bias within Florida's criminal justice system and expert testimony concerning the tendency of Florida's law enforcement policies to have a disproportionately harsh impact on African American communities. In addition, the Court rejected testimony by Plaintiffs' voting rights expert addressing racially polarized voting. The Court failed to explain why it was excluding the Commission Reports. (Doc205.) The testimony of the law enforcement expert was excluded as identified after the Court's disclosure deadline. (*Id*.) The testimony concerning voting patterns was deemed irrelevant. (Doc210.) Each of these rulings should be reversed.

1. The exclusion of the Florida Supreme Court Commission Reports, disclosed three weeks before discovery ended, was an abuse of discretion.

The District Court had no basis for excluding the Commission Reports, which were disclosed in compliance with Plaintiffs' discovery obligations. The deadline for the close of discovery was February 8, 2002. (Doc115.) Plaintiffs served the Commission Reports on Defendants on January 19, 2002, in the appendix to Plaintiffs' Summary Judgment Motion (Doc148-Pg796-1269) and again on January 22, 2002, as documents relied by Professor Ginger. The Commission Reports support Plaintiffs' contention that African Americans in Florida have been disproportionately subject to arrest (and thus to felony conviction) relative to their participation in crime. Among other things, the reports conclude that "minority juveniles are being treated more harshly than non-minority juveniles at almost all stages of the juvenile system" (Doc148-Pg943) and "the confluence of crime, race, ethnicity, and drugs has produced an enforcement pattern which disproportionately impacts upon black and other minority juvenile and adult males" (Doc148–Pg1022).

The District Court's rejection, without explanation, of these highly relevant reports should be reversed.

2. Professor Ginger's testimony should be admitted at trial.

a. *Relevant facts*

On January 18, 2002, three weeks before the close of discovery, Plaintiffs

notified Defendants that they intended to call an additional expert, Professor James Ginger, who is a former law enforcement executive, a professor of criminology, and a consultant in connection with efforts to reform troubled law enforcement agencies. (Doc158-TabE-Pg2.) On February 6, 2002, the day after he completed it, Plaintiffs delivered Professor Ginger's report to Defendants. (Doc190-Tab7-8.) The report was a straightforward, non-statistical analysis of Florida's law enforcement policies based on data provided by the State, government reports, and other readily available sources. (Doc190-Tab8.) Among other things, the report concluded that the academic literature shows that policing in the United States is highly discretionary and disproportionately affects minorities' arrest rates (Doc190-Tab8-Pg2), that Florida funded discretionary law enforcement activities that specifically targeted blacks in efforts to control street crime (*id*.), that law enforcement funding in Florida has fostered a system that has produced a disproportionate impact on black residents (*id*.), and that this disproportionate impact was exacerbated by deliberate funding of police activities known to result in over-arrest and over-charging of blacks. (*id*. at 10.) As explained in a sworn declaration, Plaintiffs' counsel understood the deadline for expert disclosures to be February 6, 2002, based on the District Court's scheduling order, which set trial for March 18, 2002, set a pre-trial conference date of February 15, 2002, and provided

that the "resume of experts reports must be exchanged" seven days prior to the pre trial conference. (Doc189-Pg2.)

On January 31, 2002, the State moved to exclude Professor Ginger's testimony as "identified . . . on an untimely basis." (Doc158-Pg1.) On February 11, 2002, the District Court canceled the pretrial conference scheduled for February 15, set argument for a series of motions regarding other experts in the case, and removed the case from the Court's trial calender. (Doc180.) On April 4, 2002, without argument, the District Court granted the State's motion to exclude Professor Ginger's testimony. (Doc205.) Plaintiffs moved for reconsideration, which was denied. (Doc218, Doc226.) Although summary judgment motions were briefed in January and February, the District Court did not hear argument on the motions until May 24, 2002. (Doc240.)

b. ***The District Court's failure to consider any of the factorsrelevant to late exclusion of witnesses in excluding Profesor Ginger's testimony was an abuse of discretion.***

In deciding whether to admit late identified witnesses, this Circuit has made clear that a district court should review: "(1) the importance of the testimony, (2) the reason for the failure to disclose the witness earlier, and (3) the prejudice to the opposing party if the witness had been allowed to testify." *Rogers v. Muscogee*

County Sch. Dist., 165 F.2d 812, 818 (11th Cir. 1999); *see also Alimenta (U.S.A.) V. Anheuser-Busch Cos*., 803 F.2d 1160 (11th Cir. 1986) (noting the additional considerations of the possibility of a continuance and the need for time to prepare). Nothing in the record indicates that the District Court considered these factors, all of which support the admission of Professor Ginger's expert evidence.

(i.) The excluded evidence is highly probative.

Plaintiffs' claim is predicated in part on the contention that blacks in Florida are more likely to be disenfranchised as ex-felons not because they commit more crimes, but because of discretion exercised by policymakers, prosecutors, law enforcement managers and personnel. Professor Ginger would testify that Florida's law enforcement system targets African Americans and activities and neighborhoods that are disproportionately African American for criminal sanctions, with the result that blacks are more likely than whites to be arrested, convicted, and ultimately disenfranchised on account of race. (Doc190-Tab8.) In addition, Professor Ginger's report indicates that Florida has employed discretionary law enforcement policies that specifically target blacks in efforts to control street crime. These include, for example, anti-crime patrols, drug interdiction task forces, and gang abatement programs. (Doc190-Tab8-Pg2,6-10.) And the more discretionary the police activities, the more likely minorities, particularly blacks, are to be over-

represented in police activity statistics. (*Id.*) Moreover, Florida law enforcement projects focus almost exclusively on drug law enforcement and street crime, to the exclusion of white collar crime. (*Id*.)

(ii.) The late disclosure was a good faith error.

As set forth in an affidavit submitted in the District Court, Plaintiffs' counsel understood the District Court's Scheduling Order of October 31, 2001, which determined that seven days prior to the pretrial conference "[r]esume of expert reports must be exchanged," to have superceded the default rules deadlines set under Rule 26(a)(2)(C) of the Federal Rules of Civil Procedure, and the Southern District of Florida's Local Rule 16.1.K. That error was made in good faith. Moreover, the error was not unreasonable in light of the confusion in the discovery deadlines.

Local Rule 16.1K sets a date for the parties to "Exchange Expert Witness Summaries/Reports" 90 days before the pretrial conference, contemplating "summaries of the expert's anticipated testimony" as an alternative to "written expert reports." Given the language conflating "summaries" with reports, it was not unreasonable for Plaintiffs to read the District Court's deadline for exchange of "[r]esume of experts' reports" to refer to the expert reports themselves and to supercede the local rule. (Doc189-Pg1.) Neither the rules nor typical discovery

practice require production of separate summaries or resumes of expert reports in addition to full-length reports. Indeed, in the order characterizing Plaintiffs' reading as "strained" the District Court explained that the scheduling order "provided a deadline to submit a resume or *summary* of the expert reports" (emphasis added), reintroducing the confusing language of the local rule. (Doc205-Pg1.)

(iii.) The admission of Professor Ginger's testimony would not prejudice Defendants.

At the time the District Court excluded Professor Ginger, the Court had removed this case from its trial calender. As matters developed, the summary judgment argument was not to be heard for four months after Plaintiffs identified Professor Ginger to Defendants. The Court could have allowed Defendants time to depose Professor Ginger and find a rebuttal expert before any dispositive ruling on the case. Numerous courts have rejected the exclusion of late-identified witnesses as harmless where there is time for the party opponent to prepare a response for trial. *See, e.g.*, *Ellison v. Windt*, No. 6:99-CV-1268, 2001 WL 118617, at *3 (M.D. Fla. Jan. 24, 2001) (belated disclosure of expert report harmless because opponent has opportunity to depose expert); *Potomac Elec. Power Co. v. Elec. Motor Supply, Inc.* 190 F.R.D. 372, 374, 376-78 (D. Md. 1999) (allowing untimely designation of expert because trial date had not been set); *Bowers v. N. Telecom,*

Inc., 905 F. Supp. 1004, 1008 (N.D. Fla. 1995) (depositions of late-identified experts would be considered on summary judgment because trial process was not interrupted, any prejudice was cured by opponent's deposition of witnesses, and ambiguity in pretrial order was plausible explanation for good faith misinterpretation of deadline).

In sum, the timing of the disclosure would not have resulted in any significant prejudice to Defendants. The District Court's decision to adjudicate a case involving issues of such broad public importance, without the benefit of an expert whose testimony is strongly probative of a key issue in the case, when admitting the expert would not prejudice Defendants, is not only an abuse of the Court's discretion, it is manifestly unjust.

3. Evidence of racially polarized voting in Florida is relevant to Plaintiffs' Section 2 claim.

The District Court erroneously reasoned that racial polarization is irrelevant in this matter because it does not reflect the voting patterns of the Plaintiff Class, who cannot vote. Circuit precedent, however, makes polarization part of the totality of circumstances.

A court hearing a vote denial case must assess blacks' opportunity for political participation. Courts therefore consider Senate Report Factors that affect

the franchise indirectly as well as directly. *See Burton v. City of Belle Glade*, 178 F.3d 1175 (11th Cir. 1999) (vote denial case discussing voting practices that may enhance the opportunity for discrimination); *see also Miss. State Chapter, Operation Push v. Mabus*, 932 F.2d 400 (5th Cir. 1991) (applying totality of the circumstances to Section 2 claim on behalf of citizens not registered voters).

Polarized voting, like lingering economic effects of discrimination (another Senate Report factor), interacts with the felon disenfranchisement policy to deny blacks an opportunity to exercise the full strength of their vote. (Doc210-Pg3-4.) Furthermore, polarized voting suggests that the voting community is driven by racial bias. That fact is relevant to a Section 2 claim. *See Nipper v. Smith*, 39 F.3d 1494, 1511-12 (11th Cir. 1994).

Accordingly, Professor Engstrom's analysis of vote polarization should be admitted.

III. BY CONDITIONING PLAINTIFFS' RE-ENFRANCHISEMENT ON PAYMENT, DEFENDANTS HAVE IMPOSED A POLL TAX AND ENGAGED IN WEALTH DISCRIMINATION IN VIOLATION OF THE FOURTEENTH AND TWENTY-FOURTH AMENDMENTS AND THE VOTING RIGHTS ACT.

Besides being almost totally ineffectual as a method of restoring voting

rights,[19] Florida's automatic restoration scheme violates constitutional and statutory prohibitions on wealth discrimination and poll taxes. Once the state has disenfranchised certain citizens it may not selectively re-enfranchise some of them based on their ability to pay. Whatever other conditions a state may require before granting restoration of civil rights, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the Twenty-fourth Amendment, and Section 10 of the Voting Rights Act do not permit Defendants to use ex-felons' financial status to deny them the right to vote. Yet Florida's Rule of Executive Clemency 9(A)(2) attempts to do just that by deeming ineligible for civil rights restoration without a hearing ex-felons who have not paid restitution, and requiring them to follow the more burdensome procedures of Clemency Rules 6, 7, 10, 11, and 12. The question whether Florida may relegate its ex-felon citizens to a political debtors' prison is a purely legal one to which Plaintiffs are entitled to summary judgment.

Access to the franchise cannot be made to depend on an individual's financial resources. *Harper v. Va. State Bd. Of Elections*, 383 U.S. 663, 668 (1966). The Supreme Court has struck down numerous voting qualifications that conditioned voting or other political participation on payment or on a financial

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[19] Of the estimated 155,511 ex-felons released in 1998-2000, only 4,277 regained their voting rights through this process. (Doc121-Pg540,542.)

surrogate, such as property ownership. *See, e.g.*, *Hill v. Stone*, 421 U.S. 289, 298 (1975) (having property available for taxation); *Harper*, 383 U.S. at 667-69 ($1.50 poll tax); *Harman v. Forssenius*, 380 U.S. 528, 538 (1965) (certificate of residence or poll tax). Like other restrictions on the right to vote, financial prerequisites cannot stand unless "necessary to serve a compelling state interest." *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969) (striking property ownership requirement for utility bond election).

Even if Florida could permanently deny ex-felons the right to vote with constitutional impunity, it cannot condition restoration of the right to vote on an ex-felon's financial resources. *See Harman*, 380 U.S. at 538, 543. As the Second Circuit has put it, "[t]he focal question is whether [a state], once having agreed to permit ex-felons to regain their vote and having established administrative machinery for this purpose, can then deny access to this relief, solely because one is too poor to pay the required fee." *Bynum v. Conn. Comm'n on Forfeited Rights*, 410 F. 2d 173, 175-76 (2d Cir. 1969).

The Supreme Court's wealth discrimination and poll tax decisions apply even though the payments being demanded by Florida stem from Plaintiffs' criminal actions. The Court has held that a state cannot require criminal offenders to spend additional time in jail to pay off fines. *Williams v. Illinois*, 399 U.S. 235,

241-42 (1970). *Williams* held that the state's legitimate interest in enforcing its punishments does not allow it to subject poor offenders to greater punishment than others. *See id.* at 244.

The District Court accepted Defendants' unsupported argument that payment of restitution "furthers rehabilitation and readiness for return to the electorate." (Doc239-Pg16.) But this justification misses the point. Plaintiffs do not challenge the State's restitution policy but rather its unwarranted transfer into the electoral process. "The use of the franchise to compel compliance with other, independent state objectives is questionable in any context." *Hill*, 421 U.S. at 299. The Supreme Court has invalidated payment-based distinctions among probationers despite asserted state interests in restitution and punishment. *See Bearden v. Georgia*, 461 U.S. 660, 665-66, 670-72 (1983). Moreover, Florida could pursue alternative measures, such as the imposition of liens, to ensure that ex-felons pay outstanding fines. There is no basis to conclude that denying restoration of the right to vote is necessary to serve Florida's penal interests. *See id.* at 671-72.

The District Court also erred in finding that the repayment obligation relates solely to restoration and thus does not fit within the poll tax model. (Doc239-Pg15.) Under the broad and pragmatic analysis characteristic of the poll tax cases,

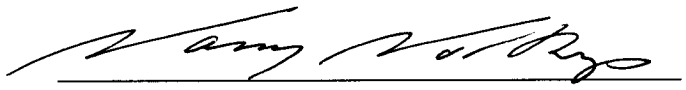
the Supreme Court has struck even requirements that did not directly require financial payment. *See Harman*, 380 U.S. at 538 (invalidating certificate of residence requirement as alternative to poll tax). Given its failure to consider this precedent, the Fourth Circuit's conclusion in an unpublished *pro-se* case that restoration filing fee requirements do not violate the Twenty-fourth Amendment deserves a little weight. *See Howard v. Gilmore*, No. 99-2285, 2000 WL 203984 at *2 (4th Cir. Feb. 23, 2000). In any event, *Howard* leaves open the possibility that conditioning restoration on payment is unconstitutional wealth discrimination because it makes access to important rights depend on financial resources. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996).

CONCLUSION

For the foregoing reasons, the District Court's grant of summary judgment to Defendants and the underlying exclusionary rulings should be reversed. Plaintiffs' claims of intentional discrimination under the Equal Protection clause of the Fourteenth Amendment and Section 2 of the Voting Rights Act should be remanded for trial. This Court should grant summary judgment to Plaintiffs on the poll tax and wealth discrimination claims.

Dated: October 8, 2002

Respectfully submitted,



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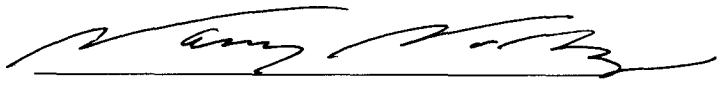
CERTIFICATE OF TYPE SIZE AND STYLE

Pursuant to Rule 32(a)(7), Plaintiffs-Appellants' counsel hereby certify that they have used 14 point Times New Roman in the preparation of this brief and that it contains less than 14,000 words.



ADDENDUM

ADDENDUM

Florida Constitution of 1838

ARTICLE VI

The Right of Suffrage and Qualifications of Officers; Civil Offices; and Impeachments, and Removals from Office.

Section 4. The General Assembly shall have power to exclude from every office of honor, trust or profit, within the State, and from the right of suffrage, all persons convicted of bribery, perjury, or other infamous crime.

* * *

Section 13. Laws shall be made by the General Assembly, to exclude from office, and from suffrage, those who shall have been or may thereafter be convicted of bribery, perjury, forgery, or other high crime, or misdemeanor; and the privilege of suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper practices.

Florida Constitution of 1861

ARTICLE VI

The Right of Suffrage and Qualifications of Officers; Civil Officers, and Impeachments and Removals from Office.

Section 2. The General Assembly shall have power to exclude from every office of honor, trust or profit within the State, and from the right of suffrage, all persons convicted of bribery, perjury or other infamous crime.

* * *

Section 9. Laws shall be made by the General Assembly to exclude from office and from suffrage those who shall have been or may hereafter be convicted of

bribery, perjury, forgery, or other high crime or misdemeanor; and the privilege of suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper practices.

Florida Constitution of 1865

ARTICLE VI

The Right of Suffrage and Qualifications of Officers, Civil Officers, and Impeachments, and Removals from Office.

Section 2. The General Assembly shall have power to exclude from every office of honor, trust or profit within the State, and from the right of suffrage, all persons convicted of bribery, perjury or other infamous crimes.

* * *

Section 9. Laws shall be made by the General Assembly to exclude from office, and from suffrage, those who shall have been, or may hereafter be convicted of bribery, perjury, forgery, or other high crime or misdemeanor; and the privilege of suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper practices.

Florida Constitution of 1868

ARTICLE XIV

Suffrage and Eligibility.

Section 2. No person under guardianship *non compos mentis*, or insane, shall be qualified to vote at any election, nor shall any person convicted of felony be qualified to vote at any election unless restored to civil rights.

* * *

Section 4. The Legislature shall have power and shall enact the necessary laws to exclude from every office of honor, power, trust, or profit, civil or military, within the State, and from the right of suffrage, all persons convicted of bribery, perjury, larceny, or of infamous crime, or who shall make or become, directly or indirectly, interested in any bet or wager, the result of which shall depend upon any election; or who shall hereafter fight a duel, or send or accept a challenge to fight, or who shall be a second to either party, or be the bearer of such challenge or acceptance; but the legal disability shall not accrue until after trial and conviction by due form of law.

Florida Constitution of 1885

ARTICLE VI

Suffrage and Eligibility.

Section 4. No person under guardianship, *non compos mentis* or insane shall be qualified to vote at any election, nor shall any person convicted of felony by a court of record be qualified to at any election unless restored to civil rights.

* * *

Section 5. The Legislature shall have power to, and shall, enact the necessary laws to exclude from every office of honor, power, trust or profit, civil or military, within the State, and from the right of suffrage, all persons convicted of bribery, perjury, larceny, or of infamous crime, or who shall make, or become directly or indirectly interested in, any bet or wager, the result of which shall depend upon any election; or that shall hereafter fight a duel or send or accept a challenge to fight, or that shall be a second to either party, or that shall be the bearer of such challenge or acceptance; but the legal disability shall not accrue until after trial and conviction by due form of law.

Florida Constitution of 1968

ARTICLE VI

Suffrage and Elections.

Section 4. Disqualifications. No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration or civil rights or removal of disability.

42 U.S.C § 1973
(Voting Rights Act, Section 2)

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

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

SELECT HISTORIC RACIAL DISCRIMINATION IN FLORIDA
Post-1864 State Statutory Provisions

Plaintiffs request that the Court take judicial notice of the following evidence[1] pursuant to Rule 201, F.R.E.:

1. 1865 Fla. Laws ch. 1466, sec. 12, pp. 23, 25 (making it a crime for "any negro, mulatto, or other person of color, to own, use or keep in his possession or under his control, any Bowie-knife, dirk, sword, fire-arms or ammunition of any kind").

2. 1865 Fla. Laws ch. 1468, p. 30 (making it a crime for a white female to "intermarry [or] live in a state of adultery, or fornication with any negro, mulatto, or other person of color," defining "person of color" as any person having "one-eighth or more of negro blood", and setting out the penalty for both white women and "person of color" convicted of crime).

3. 1865 Fla. Laws ch. 1469, p. 31 (requiring all "colored inhabitants of this State claiming to be living together in the relation of husband and wife, and who have not been joined as such . . . be regularly joined in the bonds of matrimony").

4. 1865 Fla. Laws ch. 1470, p. 32 (requiring all contracts with "persons of color" to be in writing and fully explained before two credible witnesses).

5. 1865 Fla. Laws ch. 1474, p. 37 (repealing all laws previously passed referring to "slaves, free negroes and mulattoes, except the law to prevent their migration into the State, and the act prohibiting the sale of fire-arms and ammunition to them" and making all criminal laws previously applicable to white persons applicable to "all

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[1]Copies of these statutes are available from Plaintiffs' counsel upon request.

inhabitants . . . without distinction of color").

6. 1865 Fla. Laws ch. 1475, p. 37 (establishing "schools for freedmen" and providing for a tax "upon all male persons of color between the ages of twenty-one years and fifty-five" to fund such schools).

7. 1865 Fla. Laws, Res. No. 18, p. 113 (requesting that "the colored troops [be] removed from the State of Florida, at the earliest date possible").

8. 1865 Fla. Laws, Res. No. 20, p. 114 (requesting "to have removed if possible the colored troops from the State and at any rate from the interior" and noting that "[t]he experience of the people of Florida has been that the demoralization of labor has been in almost exact proportion to the proximity of the freedmen to the colored troops").

9. 1865 Fla. Laws, Res. No. 1, p. 101 (Joint Resolution ratifying the Thirteenth Amendment abolishing slavery but with the caveat that the amendment does not authorize Congress to legislate regarding "Freedmen in this state").

10. 1866 Fla. Laws, ch. 1468, sec. 5 (holding marriages between white persons and persons of color, contracted and solemnized prior to January 12, 1866 valid). Codified at 1892 Rev. St. sec. 2062; 1906 Gen. St. sec. 2585; 1920 Rev. Gen. St. sec. 3944; 1927 Comp. Gen. Laws sec. 5863; 1941 Fla. Stats. sec. 741.19.

11. 1866 Fla. Laws, ch. 1469 (laws regulating marriages for white persons are to apply to "colored persons"). Codified at 1892 Rev. St. sec. 2067; 1906 Gen. St. sec. 2583; 1920 Rev. Gen. St. sec. 3942; 1927 Comp. Gen. Laws sec. 5861; 1941 Fla. Stat. sec. 741.17. Repealed by 1969 Fla. Laws ch. 69-195.

12. 1866 Fla. Laws ch. 1551, p. 21 (extending requirement that contracts with persons of

color be in writing to contracts between all persons).

13. 1866 Fla. Laws ch. 1552, p. 22 ("An Act Legalizing the Marriage of Persons of Color"). Codified at 1892 Rev. St. sec. 2068.

14. 1866 Fla. Laws ch. 1537, p. 12 (qualifications for jurors being limited to "all white males...").

15. 1866 Fla. Laws ch. 1566, p. 30 (providing that persons of color previously unable to inherit property due to legal incapacity to contract marriage in a state of slavery are allowed to inherit). Codified at 1892 Rev. St. sec. 1829; 1906 Gen. St. sec. 2305; 1920 Rev. St. sec. 3628; and 1927 Gen. St. sec. 5492.

16. 1868 Fla. Laws ch. 1628, p. 16 (providing that all qualified electors of state are liable to be drawn as jurors, requiring board of county commissioners to make a list every year from list of registered voters, and imposing an "integrity, fair character, sound judgment and intelligence" test).

17. 1873 Fla. Laws ch. 1947, p. 25 (anti-discrimination statute for public accommodations, removes race qualification for jury duty).

18. 1881 Fla. Laws ch. 3282, p. 85 (making it a misdemeanor for any white woman and "colored" man or white man and "colored" woman, who are not married to each other, to habitually occupy the same room in the nighttime). Codified at 1892 Rev. St. secs. 2612, 2613; 1906 Gen. St. sec. 3533; 1920 Rev. St. sec. 5423; 1927 Gen. Laws sec. 7566; 1941 Fla. Stats. sec. 798.05. Repealed by 1969 Fla. Laws ch. 69-195.

19. 1881 Fla. Laws ch. 3283, p. 86 (making it a felony for "any white man . . . [to] intermarry with a negro, mulatto or any person who has one-eighth of negro blood in

her, or . . . any white woman . . . [to] intermarry with a negro, mulatto or any person who has one-eighth negro blood in him" and making it a felony for anyone to perform the marriage ceremony for such couples). Codified at 1892 Rev. St. secs. 2606, 2607, 2608; 1906 Gen. St. secs. 3529, 3530, 3531; 1920 Rev. St. secs. 5419, 5420, 5421; 1927 Gen. Laws secs. 7562, 7563, 7564; 1941 Fla. Stat. secs. 741.12, 741.14, 741.16. Repealed by 1969 Fla. Laws ch. 69-195.

20. 1887 Fla. Laws ch. 3743, p. 116 (requiring railroad companies to provide a separate car for "persons of color" who buy a first class ticket). Codified at 1892 Rev. St. secs. 2268, 2686; 1906 Gen. secs. 2860, 3632; 1920 Rev. Gen. St. secs. 4554, 5565; 1927 Gen. Comp. Laws secs. 6617, 7751; 1941 Fla. Stat. secs. 352.03, 352.18. Repealed by 1969 Fla. Laws ch. 69-195.

21. 1887 Fla. Laws ch. 3809, sec. 7, p. 256 (limiting enrollment at the "Normal School and Business Institute" to whites).

22. 1887 Fla. Laws ch. 3692, p. 36 (establishing separate schools for white and "colored" teachers).

23. 1889 Fla. Laws ch. 3883, sec. 32, pp. 116, 122 (requiring separate apartments for white and "colored" prisoners).

24. 1889 Fla. Laws ch. 3872, sec. 19, pp. 73, 76 (limiting voting in school bond elections to freeholders).

25. 1889 Fla. Laws ch. 3879, secs. 22, 25 & 26, pp. 88, 101-102 (requiring federal offices to be voted for at a polling place separate from state and local offices, requiring separate ballots and ballot boxes for each state and local office at the polls, requiring

voter to place ballot for each office in correct box, and prohibiting anyone but Inspectors of Election from talking to voter while in polling place).

26. 1889 Fla. Laws ch. 3850, p. 13 ("An Act to Provide for the Payment of a Capitation or Poll Tax as a Prerequisite for Voting and Prescribing the Duties of Tax Collectors and Supervisors of Registration in Relation Thereto").

27. 1891 Fla. Laws ch. 4072, p. 114 ("An Act to Confer Police Powers on all Conductors in Charge of Passenger Trains on the Railroads in this State").

28. 1892 Rev. St. sec. 1 (defining "'negro' [to] include[] every person having one-eighth or more negro blood" and providing that "the terms 'colored person', or 'person of color', or 'colored', as applied to any person, have the same signification as is herein attached to 'negro', as aforesaid"). Recodified, 1941 Fla. Stat. sec. 1.01(6).

29. 1892 Rev. St. sec. 2064 (defining "colored person" as "every person who shall have one-eighth or more of negro blood..."). Recodified at 1906 Gen. St. sec. 2580, p. 1019; 1920 Rev. Gen. St. sec. 3939; 1927 Comp. Gen. Laws sec. 5858.

30. 1892 Rev. St. sec. 2609 (providing that "[a]ny white person who shall hereafter live in a state of adultery or fornication with any negro, mulatto, or other person of color, shall be punished by imprisonment not exceeding twelve months, or by fine not exceeding one thousand dollars"). Recodified at 1906 Gen. St. sec. 3532; 1920 Rev. Gen. St. sec. 5422; 1927 Comp. Gen. Laws sec. 7565; 1941 Fla. Stat. sec. 798.04. Repealed by 1969 Fla. Laws ch. 69-195.

31. 1892 Rev. St. sec. 2610 (providing that "[a]ny negro, mulatto, or other person of color who shall hereafter live in a state of adultery or fornication with any white person,

shall be punished by imprisonment not exceeding twelve months, or by fine not exceeding one thousand dollars"). Recodified at 1906 Gen. St. sec. 3532; 1920 Rev. Gen. St. sec. 5422; 1927 Comp. Gen. Laws sec. 7565; 1941 Fla. Stat. sec. 798.04.

32. 1892 Rev. St. sec. 2611 (defining "a person of color" as "[e]very person who shall have one-eighth or more of negro blood"). Recodified at 1906 Gen. St. sec. 3532; 1920 Rev. Gen. St. sec. 5422; 1927 Comp. Gen. Laws sec. 7565.

33. 1895 Fla. Laws ch. 4328, secs. 1, 44, pp. 56, 77 (establishing the qualifications for voters, including payment of a poll tax for two years prior to election, and providing that "[n]o elector while receiving, preparing and casting his ballot, shall occupy a booth or compartment for a longer time than five minutes"). Codified at 1906 Gen. St. secs. 170, 208, 226, 228, 229, 231; 1920 Rev. Gen. St. secs. 215, 252, 271, 273, 274, 276; 1927 Comp. Gen. Laws secs. 248, 308, 327, 329, 330, 332; 1941 Fla. Stat. secs. 99.06, 99.25, 99.27, 99.28, 99.30.

34. 1895 Fla. Laws ch. 4335, p. 96 (making it a crime for any "individual, body of individuals, corporation or association to conduct within this State any school of any grade, public, private or parochial wherein white persons and negroes shall be instructed or boarded within the same building, or taught in the same class, or at the same time by the same teachers.") Codified at 1920 Rev. Gen. St. sec. 5866; 1927 Comp. Gen. Laws sec. 8107; 1941 Fla. Stat. sec. 242.25. Repealed by 1943 Fla. Laws ch. 21989.

35. 1895 Fla. Laws ch. 4336, p. 97 (limiting who may petition for referendum election on establishing school sub-districts to "tax payers on real or personal property").

36. 1897 Fla. Laws ch. 4565, sec, 3, p. 107 (providing for the construction of a state reform school and requiring construction of "two separate buildings, not nearer than one-half mile to each other, one for white and one for colored; and provided further, that the colored and white convicts shall not be in any manner associated together, or worked together, or instructed in same building"). Codified at 1906 Gen. St. sec. 4169; 1920 Rev. Gen. St. sec. 6310; 1927 Comp. Gen. Laws sec. 8636; 1941 Fla. Stat. sec. 955.12. Repealed by 1969 Fla. Laws ch. 69-195 and 69-365.

37. 1897 Fla. Laws ch. 4536, p. 65 (limiting amount of time a voter may stay in voting booth).

38. 1897 Fla. Laws ch. 4535, p. 62 (requiring poll tax for voting in primaries).

39. 1897 Fla. Laws ch. 4565, sec. 3, pp. 107-108 (providing for different buildings separated by one-half mile for white and "colored" convicts and prohibiting convicts of different races from associating or being worked together). Codified at 1941 Fla. Stat. sec. 955.12. Repealed by 1969 Fla. Laws ch. 69-195 and 69-365.

40. 1899 Fla. Laws ch. 4749, sec. 1, p. 135 ("An Act to legalize the Marriages and Offspring of Persons of African Descent"). Codified at 1906 Gen. St. sec. 2586; 1920 Rev. Gen. St. sec. 3945; 1927 Comp. Gen. Laws sec. 5864; 1941 Fla. Stat. sec. 741.20. Repealed by 1969 Fla. Laws ch. 69-195.

41. 1901 Fla. Laws ch. 5014, secs. 2, 3, p. 160 (regulating holding of primary elections; authorizing Executive Committee to "declare terms and conditions" of voting; making payment of poll tax a qualification of voting).

42. 1902 Fla. Laws ch. 4997, p. 147 (establishing scholarships at the white "State Normal

School").

43. 1903 Fla. Laws ch. 5140, p. 76 (prohibiting marriages between white person and any person with "one-eighth negro blood").

44. 1905 Fla. Laws ch. 5384, secs. 11, 21, 23, p. 37 (creating the University of the State of Florida and consolidating institutions within new system but maintaining racial segregation). Codified at 1920 Rev. Gen. St. sec. 606-610, 622-623, 632, 642; 1927 Comp. Gen. Laws sec. 762-766, 789-790, 804, 814; 1941 Fla. Stat. secs. 241.01, 241.03, 241.39, 241.41. Repealed by 1965 Fla. Laws ch. 65-130.

45. 1905 Fla. Laws ch. 5420, p. 99 (requiring street car companies to separate white and "colored" passengers).

46. 1905 Fla. Laws ch. 5447, p. 133 (prohibiting the chaining or handcuffing of white prisoners to "colored" prisoners). Codified at 1920 Rev. Gen. St. sec. 5369; 1927 Comp. Gen. Laws sec. 7503; 1941 Fla. Stat. sec. 952.15. Repealed by 1957 Fla. Laws ch. 57-121.

47. 1907 Fla. Laws ch. 5602, p. 79 (appropriating money for schools, including the "Colored Normal School").

48. 1907 Fla. Laws ch. 5617, p. 99 (requiring separate accommodations for white and "negro" passengers). Codified at 1920 Rev. Gen. St. secs. 4557-4561, 5600-5603; 1927 Comp. Gen. Laws secs. 6620-6624, 7787-7790; 1941 Fla. Stat. secs. 352.07, 352.08, 352.09, 352.10, 352.11, 352.12, 352.13, 352.14, 352.15. Repealed by 1969 Fla. Laws ch. 69-195.

49. 1907 Fla. Laws ch. 5619, p. 103 (requiring railroad and terminal companies to provide separate waiting rooms and ticket windows for white and "colored" passengers). Codified at 1920 Rev. Gen. St. secs. 4562-4563, 4626; 1927 Comp. Gen. Laws secs. 6625-6626, 6712; 1941 Fla. Stat. secs. 350.21, 352.16, 352.17. Repealed by 1969 Fla. Laws ch. 69-195.

50. 1907 Fla. Laws Res. No. 2, p. 767 (proposing constitutional amendment providing for a special tax for the support and maintenance of the University of the State of Florida, the Florida Female College, the Institute for the Blind, Deaf and Dumb, and the "Colored Normal School").

51. 1909 Fla. Laws ch. 5893, p. 39 (requiring railroad companies and common carriers to provide separate accommodations for white and "colored" passengers). Codified at 1920 Rev. Gen. St. secs. 4555-4556, 4625, 5566; 1927 Comp. Gen. Laws secs. 6618-6619, 6711, 7752; 1941 Fla. Stat. secs. 350.20, 352.04, 352.05, 352.06. Repealed by 1969 Fla. Laws ch. 69-195, and 1971 Fla. Laws ch. 71-355, sec. 102, p. 1643.

52. 1909 Fla. Laws ch. 5925, p. 69 (changing the name of the "Colored Normal School" to the "Florida Agricultural and Mechanical College for Negroes"). Codified at 1920 Rev. Gen. St. sec. 643; 1927 Comp. Gen. Laws sec. 815; 1941 Fla. Stat. sec. 241.41. Repealed by 1965 Fla. Laws, ch. 65-130.

53. 1909 Fla. Laws ch. 5928, p. 70 (making it unlawful for "any person or corporation in this State to pay the poll tax for any other person, or furnish the money to any other person's poll tax").

54. 1909 Fla. Laws ch. 5961, p. 161 (appropriating funds to state universities, including

"Florida Agricultural and Mechanical College for Negroes").

55. 1909 Fla. Laws ch. 5967, p. 171 (requiring the separation of white and "negro" prisoners). Codified at 1920 Rev. Gen. St. secs. 6213-6216; 1927 Comp. Gen. Laws secs. 8545-8548; 1941 Fla. Stats. secs. 950.05, 950.06, 950.07, 950.08. Repealed by 1965 Fla. Laws, ch. 65-172, sec. 2.

56. 1909 Fla. Laws Res. No. 26, p. 704 (requesting "Senators and Representatives in the Congress of the United States to exert their influence at Washington against the appointment, and the confirmation of any such appointment, of negroes to Federal offices and appointments in the State of Florida").

57. 1911 Fla. Laws ch. 6125, p. 31 (appropriating funds for segregated universities).

58. 1913 Fla. Laws ch. 6438, p. 106 (appropriating funds for segregated universities).

59. 1913 Fla. Laws ch. 6469, sec. 11, pp. 242, 246 (requiriing poll tax for voting in primary). Codified at 1920 Rev. Gen. St. sec. 314; 1927 Comp. Gen. Laws sec. 371.

60. 1913 Fla. Laws ch. 6490, p. 311 ("An Act Prohibiting White Persons From Teaching Negroes in Negro Schools, and Prohibiting Negro Teachers From Teaching White Children in White Schools in the State of Florida, and Providing for the Penalty Therefor"). Codified at 1920 Rev. Gen. St. sec. 5870; 1927 Comp. Gen. Laws sec. 8112; 1941 Fla. Stat. sec. 242.26. Repealed by 1943 Fla. Laws ch. 21989, sec. 17.

61. 1915 Fla. Laws ch. 6827, p. 55 (appropriating funds for segregated universities).

62. 1915 Fla. Laws ch. 6830, p. 60 (providing for a teacher training department in one high school in each county). Codified at 1920 Rev. Gen. St. sec. 604; 1927 Comp. Gen. Laws sec. 759 (providing for segregated programs).

63. 1915 Fla. Laws ch. 6835, p. 72 (providing for maintenance of three segregated summer schools for teachers). Codified at 1920 Rev. Gen. St. sec. 634, 637; 1927 Comp. Gen. Laws sec. 806, 809; 1941 Fla. Stat. secs. 239.11 & 239.14. Repealed by 1963 Fla. Laws ch. 63-572, sec. 20.

64. 1915 Fla. Laws, ch. 6840, p. 79 (providing that school for girls operate in same manner as school for boys, which requires segregated facilities). Codified at 1920 Rev. Gen. St. sec. 6326; 1927 Comp. Gen. Laws sec. 8652; 1941 Fla. Stat. sec. 956.02. Repealed by 1969 Fla. Laws ch. 69-365.

65. 1915 Fla. Laws ch. 6874, secs. 3, 8, p. 149, 152, 158 (requiring poll tax for voting in primary elections and requiring that candidates be nominated from groups when "more than one candidate is to be nominated for the same office and there are more candidates than should be nominated therefor"). Codified at 1920 Rev. Gen. St. secs. 314, 344, 348, 356; 1927 Comp. Gen. Laws secs. 371, 405, 413; 1941 Fla. Stat. sec. 102.49.

66. 1915 Fla. Laws Res. 82, p. 497 (proposing amendment to the state constitution providing for literacy test and freeholder requirement for voting and making an exception for any "person or lineal descendants of any such persons who was on January first, 1867, or prior thereto, entitled to vote").

67. 1917 Fla. Laws ch. 7279, p. 60 (appropriating funds for segregated universities). See also 1919 Fla. Laws ch. 7797.

68. 1921 Fla. Laws ch. 8583, p. 401 (requiring poll tax for voting). Codified at 1927 Comp. Gen. Laws sec. 371.

69. 1923 Fla. Laws ch. 9134, p. 130 (providing for the annual appropriation of funds for scholarships for students to attend the two state white universities). Codified at 1927 Comp. Gen. Laws secs. 769, 771-774; 1941 Fla. Stat. sec. 239.19.

70. 1923 Fla. Laws ch. 9294, p. 326 (freeholder requirement for voting in all bond elections). Codified at 1927 Gen. Comp. Laws sec. 250; 1941 Fla. Stat. sec. 98.03.

71. 1925 Fla. Laws ch. 10248, p. 467 (providing for the maintenance of three segregated summer schools for teachers). Codified at 1927 Comp. Gen. Laws secs. 806-808, 810, 813; 1941 Fla. Stat. secs. 239.11 & 239.14. Repealed by 1963 Fla. Laws ch. 63-572, sec. 20.

72. 1927 Fla. Laws ch. 12261, p. 1153 (providing for scholarships for attendance at the two state white universities). Codified at 1927 Comp. Gen. Laws secs. 769-770; 1941 Fla. Stat. sec. 239.19.

73. 1927 Fla. Laws ch. 12416, p. 1339 (providing for separate teacher-training departments for whites and "negroes"). Codified at 1927 Comp. Gen. Laws secs. 759-760.

74. 1927 Fla. Laws Res. 27, p. 1599 (authorizing levying of a school tax "whenever a majority of the qualified electors thereof that pay a tax on real or personal property, shall vote in favor of such levy").

75. 1929 Fla. Laws ch. 13761, secs. 9, 14, 16, pp. 480, 485, 488, 491 (abolishing second choice voting and requiring poll tax for voting).

76. 1929 Fla. Laws ch. 14567, p. 1090 (providing for separate teacher-training departments for whites and "negroes").

77. 1933 Fla. Laws ch. 16181, p. 744 (providing that "[w]hite and negro convicts worked upon the public roads of the State, or of any County of this State, shall be worked in separate squads and confined in separate vans, stockades or other structures"). Repealed, 1957 Fla. Laws ch. 121.

78. 1933 Fla. Laws ch. 16013, p. 300 (limiting voting in special tax school districts to those who "paid a tax on real or personal property and voted in the General Election next preceding the date of holding any election pertaining to such Special Tax School District"). Codified at 1941 Fla. Stat. secs. 227.13, 236.32. Fla. Stat. sec. 227.13. Repealed by 1955 Fla. Laws, ch. 29764, sec. 1.

79. 1933 Fla. Laws ch. 16103, sec. 33, pp. 544, 552 (regarding "inheritance from persons of color"). Codified at 1941 Fla. Stat. sec. 731.32. Repealed by 1969 Fla. Laws ch. 69-195.

80. 1939 Fla. Laws ch. 19355, secs. 118, 209, 210, pp. 730, 734-735, 741 (limiting school bond elections to freeholders; providing for segregated schools; prohibiting white teachers from teaching at "negro schools"; and prohibiting "negro teacher" from teaching in white schools). Codified at 1941 Fla. Stat. secs. 227.13, 228.09, 228.10. Fla. Stat. sec. 227.13 repealed by 1955 Fla. Laws ch. 29764. Fla. Stat. sec. 228.09 repealed by 1965 Fla. Laws ch. 65-239. Fla. Stat. sec. 228.10 repealed by 1941 Fla. Laws ch. 20970.

81. 1941 Fla. Stat. sec. 239.10 (providing for the salaries of the Presidents of the state segregated universities). Repealed by 1965 Fla. Laws ch. 65-130.

82. 1941 Fla. Laws ch. 20986, sec. 1 (abolishing poll tax requirement for voting).

Codified at 1941 Fla. Stat. sec. 193.75.

83. 1945 Fla. Laws ch. 22944, p. 1055 (appropriating funds for scholarships and providing for attendance at segregated universities).

84. 1947 Fla. Laws ch. 23669, p. 112 (providing for a segregated university system). Codified at 1963 Fla. Stat. sec. 239.01. Repealed by 1965 Fla. Laws ch. 65-130.

85. 1947 Fla. Laws ch. 23726, secs. 7, 9, pp. 185, 189 and 190 (providing that nominations in primary elections for school board are to be at-large from residency districts). Currently codified at Fla. Stat. secs. 230.08, 230.10.

86. 1947 Fla. Laws ch. 23957, p. 704 (requiring candidates to run in groups whenever there are two or more similar offices are to be filled). Amended, 1977 Fla. Laws ch. 77-175. Currently codified at Fla. Stat. sec. 100.071.

87. 1951 Fla. Laws ch. 26906, p. 1052 (defining persons entitled to pensions for "military or naval service of the confederate states during the war between the states of the United States"). Codified at 1989 Fla. Stat. ch. 291. Repealed by 1991 Fla. Laws ch. 91-50.

88. 1955 Fla. Laws ch. 29746, p. 302 (granting county boards of public instruction "full and complete" authority regarding the enrollment of pupils in public schools. "[T]he purpose of this act [is] to ease the impact of [the United States Supreme Court desegregation] decisions and to avoid tensions and disruptions in the public school system").

89. 1955 Fla. Laws ch. 29937, p. 905 (requiring the grouping of candidates to numbered posts whenever two or more similar offices to be filled in one election). Currently

codified at Fla. Stat. sec. 100.071.

90. 1956 Fla. Laws ch. 31404, p. 62 (authorizing county commissioners to call for a reregistration of freeholder electors for county elections).

91. 1957 Fla. Laws ch. 57-315, p. 617 (establishing the "Governor's Advisory Commission on Race Relations" to render assistance to the governor because "as a result of certain decisions of the supreme court [sic] of the United States relating to segregation of the white and colored races [] serious social tensions have developed").

92. 1959 Fla. Laws, ch. 59-158, p. 291 (authorizing county commissioners, or governing body of any municipality, to call for a reregistration of freeholder electors).

93. 1959 Fla. Laws, ch. 59-412, p. 1402 (providing for the withdrawal of a child from a school where the races are "commingled" upon a parent's request).

94. 1961 Fla. Laws ch. 61-115, p. 181 ("prohibiting any person from mutilating, defacing, defying, trampling upon, defiling or casting contempt upon the flags of the Confederacy or replicas thereof"). Currently codified at Fla. Stat. sec. 256.10.

95. 1961 Fla. Laws, ch. 61-332, p. 648 (defining "freeholder" as it relates to elections).

96. 1965 Fla. Laws, ch. 65-130, secs. 1 & 4, pp. 238-240 (changing the name of the "Florida Agricultural & Mechanical College for Negroes" to "Florida Agricultural & Mechanical University," amending sec. 239.34 of the Fla. Statutes relating to scholarship funds for lineal descendants of confederate soldiers or sailors, and providing further for the erection of "a permanent memorial to the confederate soldiers and sailors").

97. 1965 Fla. Laws, ch. 65-131, p. 245 (authorizing owners of public accommodations to

refuse service to patrons with undesirable conduct).

98. 1969 Fla. Laws, ch. 69-117, p. 604 (prohibiting district school boards from prohibiting school band to play "Dixie"). Codified at 1989 Fla. Stat. sec. 230.222. Repealed by 1991 Fla. Laws ch. 91-105, sec. 81.

99. 1969 Fla. Laws, ch. 69-377, p. 1328 (redefining "freeholder"; requiring voters in all county and municipal bond elections to be "freeholders" and making it unlawful for non-freeholders to vote in bond elections; and establishing a permanent single registration system).

100. 1970 Fla. Laws, ch. 70-95, sec. 30, p. 226, 346 (requiring that "[n]o moneys appropriated in this act or by any county shall be used, directly or indirectly, to assign, transport or compel attendance of any student to any school based solely upon considerations of race, creed, color, or national origin, or for the purpose of achieving equality in attendance or increased attendance or reduced attendance at any school at which persons of one or more particular races, creeds, colors or national origins are enrolled").

101. 1972 Fla. Laws, ch. 72-3, p. 114 (providing for a straw ballot referendum on whether, *inter alia*, voters are in favor of an amendment to the U.S. Constitution that would prohibit forced busing).

SELECT CONSENT JUDGMENTS FROM VOTING RIGHTS LITIGATION INVOLVING FLORIDA COUNTIES

Case Name	*Final Judgment Date*	*District/Challenge*	*Racial Polarization or other VRA Finding in Approving Settlement*
Bellamy v. City of Perry, No. TCA 83-7125-MMP	12/05/83, N.D. Fl.	City of Perry in Taylor County; at-large city council	The Court found racial polarization and history of official racial discrimination in both the city and the state.
Bellamy v. Taylor County Sch. Bd., No. TCA 83-7124-MMP	12/07/83, N.D. Fl.	Taylor County; at-large county commission	The Court found racial polarization and history of official racial discrimination in both the county and the state.
Bradford County Branch of the NAACP v. Bradford County Sch. Bd., No. 86-4-CIV-J-12	07/18/84, N.D. Fl.	Taylor County; at-large school board	The Court found racial polarization and history of official racial discrimination in both the county and the state.
Bradford County Branch of the NAACP v. Bradford County Comm'rs, No. 86-6-CIV-J-14	07/11/86, M.D. Fl.	Bradford County; at-large school board	The Court found vote dilution in violation of §2 due to a series of factors though not racial polarization.
Columbia County Branch of the NAACP v. Columbia County, No. 84-609-CIV-J-12	12/19/85, M.D. Fl.	Columbia County; at-large county commission	The Court found racial polarization, history of official racial discrimination in both the county and the state, and socio-economic conditions preventing African Americans from participating fully in the political process.

Columbia County Branch of the NAACP v. Columbia County Sch. Bd., No. 84-610-CIV-J-12	03/20/86, M.D. Fl.	Columbia County; at-large school board	The Court found racial polarization, history of official racial discrimination in both the county and the state, and socio-economic conditions preventing African Americans from participating fully in the political process.
Hamilton County Branch of the NAACP v. Hamilton County, No. 840644-CIV-J-14	06/25/85, M.D. Fl.	Hamilton County; at-large county commission	The Court found racial polarization, history of official racial discrimination in both the county and the state, and socio-economic conditions preventing African Americans from participating fully in the political process.
Hamilton County Branch of the NAACP v. City of Jasper, No. 84-645-CIV-J-16	12/24/85, M.D. Fl.	City of Jasper; at-large city council	The Court found racial polarization and history of official racial discrimination in both the city and the state, and socio-economic conditions preventing African Americans from participating fully in the political process.
Madison County Chapter of the NAACP v. City of Madison, No. TCA-84-7232-WS	06/10/85, N.D. Fl.	City of Madison; at-large county commission	The Court found racial polarization in the city and lingering effects of official racial discrimination in the city and state.
Madison County Chapter of the NAACP v. Madison County, No. TCA-84-7234-WS	05/30/85, N.D. Fl.	Madison County; at-large county commission	The Court found racial polarization in the county and lingering effects of official racial discrimination in the county and state.

Mayhue v. Suwanee County, No. 84-1103-Civ-J-16	09/09/85, M.D. Fl.	Suwanee County; at-large county commission	The Court found vote dilution in violation of §2 due to a series of factors but does not specify racial polarization.
Parrish v. Jefferson County, No. TCA-83-7481-MMP	12/18/85, N.D. Fl.	Jefferson County; at-large county commission	The Court found history of official racial discrimination in both the county and the state, and socio-economic conditions preventing African Americans from participating fully in the political process.
Parrish v. Jefferson County Sch. Bd., No. TCA-84-7351-MMP	02/28/86, N.D. Fl.	Jefferson County; at-large school board	The Court found history of official racial discrimination in both the county and the state, and socio-economic conditions preventing African Americans from participating fully in the political process.

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STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.

Howard Daniels, being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on the 8, day of October 2002 deponent caused to be served 2 copy(s) of the within

BRIEF OF PLAINTIFFS-APPELLANTS

upon the attorneys at the addresses below, and by the following method:

By Federal Express Next Business Day Delivery

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BY REGULAR FIRST CLASS U.S. MAIL TO:

SEE ATTACHED SERVICE LIST

ELECTRONIC UPLOAD COMPLETED AT

5:00 PM

Sworn to me this
October 8, 2002

DONNA A. ERASMOUS
Notary Public, State of New York
No. 01ER6050284
Qualified in Kings County
Commission Expires October 30, 2002

Donna Erasmous

Case Name: JOHNSON V. BUSH

Docket/Case No. 02-1446C

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