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

BRIEF OF DEFENDANTS-APPELLEES

Paul Hancock
Deputy Attorney General
For Southern Florida
Office of the Attorney General
110 Southeast 6th Street, 10th Floor
Fort Lauderdale, FL 33301
Phone: (850) 414-3300

Charles J. Cooper
David H. Thompson
Hamish P.M. Hume
Derek L. Shaffer
COOPER & KIRK, PLLC
1500 K Street, N.W., Suite 200
Washington, D.C.20005
Phone: (202) 220-9600

George Waas
Assistant Attorney General
The Capitol
Tallahassee, FL 32399
Phone: (954) 712-4670

November 19, 2002

CERTIFICATE OF INTERESTED PERSONS

ACLU Voting Rights Project

Akin Gump Strauss Hauer & Feld

H. Ray Allen, Hillsborough County Attorney's Office

Jessie Allen, Brennan Center for Justice at NYU School of Law

Geoffrey P. Alpert

Derrick Andre

Kim Barry, Brennan Center for Justice at NYU School of Law

James J. Benjamin, Jr., Akin Gump Strauss Hauer & Feld

Donna M. Bishop

Jason Bloch, Miami-Dade County Attorney's Office

Alfred Blumstein

Lori Outz Borgen, Lawyers Committee for Civil Rights Under Law

Brennan Center for Justice at NYU School of Law

George S. Bridges

Charles Bronson, Commissioner of Agriculture

Robert Buschel, Buschel, Carter, Schwarzreich & Yates

Buschel, Carter, Schwarzreich & Yates

Jeb Bush, Governor

Robert Butterworth, Attorney General

Mary Helen Campbell, Hillsborough County Attorney's Office

William Candela, Miami-Dade County Attorney's Office

Jane Carrol, County Supervisor Broward County

Zachary W. Carter

The Center for Children of Incarcerated Parents

Nancy Chung, Akin Gump Strauss Hauer & Feld

Michael D. Cirullo, Jr., Josias, Goren, Cherof, Doody & Erzol

William Clark, County Supervisor Pinellas County

Todd Clear

Kendall Coffey

Veronica Coleman

Charles J. Cooper, Cooper & Kirk

Cooper & Kirk

John R. Cosgrove

William Cowles, County Supervisor Orange County

Robert Crawford, Former Commissioner of Agriculture

Charles Crist, Commissioner of Education

Robert D. Crutchfield

Francis T. Cullen

Elliot Currie

Dawn Michelle Davis

DEMOS, Democracy Program

Jeff Ehrlich, Miami-Dade County Attorney's Office

Paul A. Engelmeyer, Wilmer, Cutler, & Pickering

Jeffrey A. Fagan

M. Lorrane Ford, Morrison & Foerster

Dorothy Gaines

Thomas Gallagher, Former Commissioner of Education

Thomas Gallagher, Treasurer

Samuel Goren, Josias, Goren, Cherof, Doody & Erzol

James K. Green

James K. Green, P.A.

Paul Hancock, Office of the Attorney General

John Hanes

William Harlan, Alachua County Attorney's Office

Katherine Harris, Former Secretary of State

Darnell F. Hawkins

Adam Hernandez

Jau'dohn Hicks

Beverly Hill, County Supervisor Alachua County

Walter C. Holton, Jr.

Anita Hodgkiss, Lawyers Committee for Civil Rights Under Law

Eric H. Holder, Jr.

C. Ronald Huff

Ronald L. Humphrey

Hamish Hume, Cooper & Kirk

Pam Iorio, County Supervisor Hillsborough County

G. Douglas Jones

Josias, Goren, Cherof, Doody & Erzol

James E. Johnson, Morrison & Foerster

Thomas Johnson

Daryl Jones, Florida State Senator

Kimberly Kempf-Leonard

Michelle Kim, Morrison & Foerster

Ronald Labasky, Florida State Association of Supervisors of Elections

Scott Lassar

Honorable Judge James Lawrence King, U.S. District Court

Latham & Watkins

Lawyers Committee for Civil Rights Under Law

David C. Leahy, County Supervisor Miami-Dade County

Wilma A. Lewis

Ilana Makovoz, Latham & Watkins

MALDEF

Heather E. Marlow, Latham & Watkins

Ramiro Martinez Jr.

Aaron D. McCall

Candace McCoy

Janice Mckenzie Cole

Robert Milligan, Comptroller

Morrison & Foerster

NAACP

NAACP Legal Defense and Education Fund, Inc.

Robert Nash Parker

William Nelson, Former Treasurer

Nancy Northup, Brennan Center for Justice at NYU School of Law

People of the American Way Foundation

J. Brad Pigott

Michael L. Radelet

Steven Raphael

Craig Reinarman

Eric Robinson

James K. Robinson

Robert D. Schmidt

Cathy Schneider

Stacey M. Schwartz, Akin Gump Strauss Hauer & Feld

The Sentencing Project

Howard M. Shapiro

Paul Shechtman

James Smith, Secretary of State

Ralph B. Taylor

David H. Thompson, Cooper & Kirk

Charles S. Treat, Latham & Watkins

George Waas, Attorney General's Office

David Wagner, Alachua County Attorney's Office

Samuel Walker

Seth P. Waxman

Bruce Western

Kathryn Williams-Carpenter

William D. Wilmoth

Wilmer, Cutler, & Pickering

Paul M. Winke, Wilmer, Cutler, & Pickering

Donna Wysong, Hillsborough County Attorney's Office

Matthew T. Zingraff

STATEMENT REGARDING ORAL ARGUMENT

Because of the importance of Florida's voter qualification laws, Clemency Board Defendants-Appellees request oral argument. We respectfully submit that oral argument will assist the Court in analyzing and determining the disputed legal issues presented. See 11th Cir. R. 28-1(c) and 34-3(c).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

---

* - Cases upon which counsel chiefly relies.

Statutes and Rules:

Legislative Materials:

INDEX TO APPENDIX

JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court correctly held that Section 4(a) of Article VI of Florida's Constitution does not violate the Equal Protection Clause?

2. Whether the district court correctly held that Section 4(a) of Article VI of Florida's Constitution does not violate Section 2 of the Voting Rights Act?

3. Whether the district court correctly held that Section 4(a) of Article VI of Florida's Constitution is not a poll tax?

4. Whether it was within the district court's discretion to exclude (a) plaintiffs' "expert" on 1968 legislative history, and (b) certain out-of-time evidence plaintiffs sought to introduce, including testimony from an expert identified more than two months after the Court's deadline for identifying experts?

STATEMENT OF THE CASE

INTRODUCTION

Throughout its history, the State of Florida has maintained a constitutional provision prohibiting those convicted of felonies from voting. In this regard, Florida is no different from most other States in the Union. The traditional judgment that serious criminals should not be permitted to vote was reflected in

eleven state constitutions adopted between 1776 and 1821. In recognition of this widespread limitation on the right of franchise, section 2 of the Fourteenth Amendment expressly authorizes States to enforce just such prohibitions. Judge Friendly summarized the purpose of these laws as follows:

> The early exclusion of felons from the franchise by many states could well have rested on Locke's concept, so influential at the time, that by entering into society every man "authorizes the society . . . to make laws for him as the public good of the society shall require, to the execution whereof his own assistance . . . is due." . . . On a less theoretical plane, it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. . . A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.

Green v. Board of Elections, 380 F.2d 445, 451-52 (2d Cir. 1967) (citation omitted). And the United States Supreme Court has upheld the validity of this qualification against direct challenge. *See Richardson v. Ramirez*, 418 U.S. 24, 53 (1974).

Now comes before the Court a class of felons that complain that this venerable tradition must be struck down as racist. The composition of the class is notable in that it is overwhelmingly – more than 70 percent — white. And their claims are equally striking. Bereft of any evidence that the current version of the law was enacted with a racist intent, plaintiffs seek to impute the unrecorded

motives of legislators from a century earlier to the drafters of Florida's current Constitution. Such an approach to the invalidation of the laws of sovereign States is without precedent.

Plaintiffs' real complaint is that the rule currently has a "disparate impact" that mirrors the disparate impact in the criminal law, and they therefore try to rescue their doomed constitutional claim with a claim under section 2 of the Voting Rights Act. But it is inconceivable that Congress intended this legislation to invalidate, "sub silentio," a policy practiced to one degree or another by almost every state in the country.

Finally, it is telling that if a court were to accept any of plaintiffs' legal theories, the result would necessarily sweep beyond their strategically-cast complaint, and would prohibit states from disenfranchising *any* felons, including those who are still incarcerated. This contrasts starkly with the only prior instance of a federal court ever invalidating a disenfranchisement rule: there, the plaintiffs showed that Alabama had deliberately sought to target blacks by disenfranchising people convicted of a range of petty *misdemeanors*, including the suspiciously malleable "crimes of moral turpitude"; the Court struck down this pernicious practice, but left intact Alabama's ability to disenfranchise convicted *felons*, a practice it continues to this day.[1]

[1] *Hunter v. Underwood*, 471 U.S. 222, 226 (1985).

Thus, from the draftsmen of the Fourteenth Amendment to Judge Friendly, from *Richardson v. Ramirez* to *Hunter v. Underwood*, the authorities speak with one voice: plaintiffs' claims have no merit.

A. Procedural History

This appeal arises out of the district court's decision to grant summary judgment for defendants. R6-239. A more detailed procedural history is set forth by plaintiffs. Pl.Br.4-7.

B. Statement of Facts

Because this case was decided on summary judgment, plaintiffs claim to have set forth facts "in the light most favorable to plaintiffs." In many instances, however, plaintiffs go far beyond granting themselves "reasonable inferences" and assert as "fact" propositions that are wholly unsupported by the record. In order to clarify the nature of the evidence before the trial court, defendants' statement seeks to identify where plaintiffs have taken liberties, and to set forth in neutral terms the facts over which there is no dispute.

1. The History Of Felon Disenfranchisement In Florida

With disregard for this Court's command to identify all "inferences" that are presented in the Statement of Facts, Local Rule 28-1(g)(ii), plaintiffs assert as "fact" that "Florida's current felon disenfranchisement policy originated in 1868 in

the effort to suppress the political power of the newly freed slaves." Pl.Br.8 (*citing* R3-121-427,434-43).

The undisputed facts relevant to that claim are:

Ever since its first Constitution in 1838, Florida has disenfranchised individuals convicted of "infamous crimes." R3-121-560; R3-150-1001. The same disenfranchisement rules were set forth in both Florida's 1861 and its 1865 Constitution. R3-120-196. Plaintiffs have never alleged that any of these disenfranchisement provisions was motivated by racial discrimination. R1-1-13; R3-122-906-909. Plaintiffs also agree that under the common law, the term "infamous crime" included "all felonies." R4-152-15.

In 1868, Florida held a constitutional convention that for the first time ever included black delegates, who comprised 18 out of the total of 46 delegates. R3-122-783. According to plaintiffs' historical expert, Dr. Jerrell Shofner, only three of these delegates were "native white Conservatives." *Id.* The remainder were Republicans, *id.*, who, as Shofner agreed in his deposition, had "both ideological and self-interested reasons" for wanting to "maximize black voting power." R3-122-864. This convention passed what Shofner called "a good Constitution" that was "by far the most liberal organic law up to that time in Florida." R3-122-788. Like its predecessors, it contained a provision disenfranchising certain criminals, for the first time using the term "felony" to

describe those criminals. According to the Florida Code, 1868 was also the first year that the word "felony" was defined by statute. R3-150-995.

Prior to his engagement in this case, Dr. Shofner had written both a chapter in a book and an article that focused entirely upon the 1868 Constitutional Convention and were based on over "ten or eleven years" of research. R3-122-906-910. In those publications, he described how there had been a struggle between two rival factions in the Republican Party to gain control over the convention. R3-122-772-775, 782-788. While Shofner identified three differences where the "moderate" faction of the Republicans had compromised with Conservatives at the expense of diluting black voting power, he never once even mentioned the possibility that felon disenfranchisement might fall into the same category. R3-122-909. Moreover, he admitted in deposition that none of the "radical" Republicans who sought to maximize black voting power ever once complained about the felon disenfranchisement rule, even though they vociferously objected to the three compromises just described, specifically because they diluted black voting strength. R3-122-896-97, 909.

Shofner also admitted at his deposition that he was not aware of any scholarly work that had ever suggested that Florida's felon disenfranchisement rule had a discriminatory intent, and admitted that he only came to that opinion after being hired by the Brennan Center in this case. R3-122-908-09. His opinion rests

on the fact that when the radicals churned out a draft constitution during a two-day emergency session they omitted any felon disenfranchisement rule, R3-121-439, 442; yet when he was asked why he thought the radical delegates had done this, he responded, **"I don't know what their motivation was,"** and then admitted again **"I don't know what the intent was, I have no idea."** R3-122-888, 898.

Given that no historian had ever argued that Florida's 1868 felon disenfranchisement rule had a discriminatory intent, R3-122-909, it appears to be uncontested that when Florida revised its Constitution in 1968, neither its legislature nor its public had any reason to believe that the felon disenfranchisement rule was tainted with racism. The same is true for the subcommittee of Florida legislators that was assigned the task of proposing a replacement to Article VI of the Constitution, dealing with "Suffrage and Elections."

Minutes from the meetings of this subcommittee demonstrate that it considered proposing that the legislature should be permitted to disenfranchise convicted felons *only* during the period of their incarceration. R3-150-983. These minutes state that the subcommittee also devoted "considerable discussion" to a proposal that the issue of felon disenfranchisement should be delegated entirely to the legislature. *Id.* Eventually, however, the subcommittee adopted a proposal providing that all convicted felons should be disenfranchised. The subcommittee

also eliminated a rule that had previously required the legislature to disenfranchise individuals convicted of certain misdemeanors. *See State ex rel. Jordan v. Buckman*, 18 Fla. 267, 270 (1881).

The subcommittee's proposal was presented to the Florida legislature in the form of a "Senate Joint Resolution" that was voted on separately from the resolutions containing the other provisions of the Constitution. R3-122-645. This resolution passed by a vote of 97-4, and was then included in the constitution that was adopted into law by popular referendum. The plaintiffs admit that "[t]here is no evidence showing that any member of the CRC, the Subcommittee, the Legislature, or any official or staff member associated with the 1968 constitutional revision process ever[] considered the racial implications or consequences of the felon disenfranchisement provision." R3-142-13.

2. Plaintiffs' Claims Of Discrimination In The Criminal Justice System

Plaintiffs claim that "blacks in Florida are disproportionately represented among those convicted of felony crimes resulting in the loss of the right to vote." Pl.Br.13-14. As we demonstrate below, this is a very misleading statement because the evidence shows that when one compares the universe of those charged with felonies at arrest with those ultimately convicted of felonies, blacks are *not* disproportionately convicted of felonies.

Plaintiffs' showing of disproportionality rests on: (1) the exclusion of felony convictions that resulted in a sentence of "adjudication withheld"; (2) the inclusion of arrestees not charged with felonies. R3-133-Tab2,P003435.

3. Disproportionality In Restoration Rates

Plaintiffs do not dispute that the reason for the disproportionality in the restoration rates reflects nothing more than the application of race-neutral eligibility criteria that are applied in a completely race-blind fashion. R3-B2-2-5; R4-178-10-11.

4. Generalized Allegations Of Racism

Plaintiffs attempt to inundate the Court with references to articles, studies, cases, and statistics that were never submitted to the court below and that have no bearing on this case. Pl.Br.19-22. These citations should be disregarded.

C. Standard of Review

This Court reviews a grant of summary judgment *de novo*, applying the same legal standards that bound the district court, *see Loren v. Sasser*, No. 02-11090, 2002 U.S. App. LEXIS 21685, *13 (11th Cir. Oct. 17, 2002), and may affirm the District Court's judgment on any ground that finds support in the record, *see Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1256 (11th Cir. 2001). To survive a properly supported motion for summary judgment, the nonmoving party

must provide "significant probative evidence." *LaChance v. Duffy's Draft House*, 146 F.3d 832, 835 (11th Cir. 1998).

SUMMARY OF ARGUMENT

1. Plaintiffs seek to invalidate Section 4(a) of Article VI of Florida's Constitution under a theory of intentional race discrimination, but they admit they have no evidence that the legislators who enacted this provision in 1968 ever even considered race. To overcome this fatal deficiency, they attempt to raise the spectre of nineteenth-century racism as the animating force behind a predecessor version of the current law. But no court has ever invalidated a law that was enacted without a racist intent based on an allegation that a century-old predecessor version of that law had a discriminatory motive. Moreover, in 1968, Florida substantively revised its felon disenfranchisement rule pursuant to a deliberative process, and expressly considered adopting a rule that would only have disenfranchised felons who are incarcerated, the very result plaintiffs seek in this case.

In addition, plaintiffs concede that Florida's *original* decision to disenfranchise people convicted of "infamous crimes" was made in 1838 for reasons having nothing to do with race, and their expert also concedes that he has "no idea" what the delegates to the 1868 constitutional convention intended with respect to felon disenfranchisement. Thus, even if the relevant inquiry here were

to search for racist intent behind the felon rule in the nineteenth century, the trial court's decision should be affirmed on the alternative basis that plaintiffs have no probative evidence capable of demonstrating such an intent.

2. The plain language, structure, and purpose of the Voting Rights Act foreclose plaintiffs' claims under Section 2. At the most fundamental level, none of the plaintiffs has been denied the ability to vote "on account of race." Instead, the sole cause of plaintiffs' disqualification is their decision to engage in criminal conduct. Plaintiffs' sweeping interpretation would convert allegations of bias in the criminal justice system into a Voting Rights Act violation. Such an approach cannot be reconciled with this Court's admonition that Section 2 claims must demonstrate racial bias with respect to voting itself. Finally, if Section 2 is sufficiently elastic that Congress has sought to regulate voter qualifications explicitly sanctioned by the Fourteenth Amendment in the name of "enforcing" that Amendment, then Section 2 is unconstitutional. Not surprisingly, every Section 2 challenge to felon disenfranchisement laws has been rejected as a matter of law.

3. Finally, requiring convicted felons to compensate their victims is not a poll tax, since Florida has a legitimate penological interest in enforcing its restitution laws, and since the amount of the restitution obligation is conditioned entirely upon the prior criminal conduct of the felon.

ARGUMENT

I. FLORIDA'S FELON DISENFRANCHISEMENT RULE WAS NOT ENACTED WITH A RACIALLY DISCRIMINATORY MOTIVE

Plaintiffs challenge the constitutionality of "Section 4(a) of Article VI of the Florida Constitution," the full text of which provides "[n]o 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 of civil rights or removal of disability." R1-1-11. Plaintiffs do not dispute that this provision was first drafted in 1966 by a committee of Florida officials charged with revising the "Suffrage and Elections" provisions in Florida's constitution. Plaintiffs also do not dispute that this provision was then proposed to, and passed by, both houses of Florida's legislature, and was then enacted as part of Florida's 1968 Constitution through the approval of a popular referendum. And, although they recognize that they must allege intentional race discrimination in order to invalidate this provision under the Equal Protection Clause, plaintiffs also concede that there is absolutely no evidence that racial discrimination motivated "any official or staff member associated with the 1968 constitutional revision process" to approve the promulgation of this law. R3-142-13.

In light of these concessions, it is hardly surprising that the trial court granted summary judgment dismissing plaintiffs' claim of intentional race discrimination. Plaintiffs' only argument is that the 1968 law they challenge was

merely a "reenactment" of a provision that Florida enacted in 1868 pursuant to a discriminatory purpose. But for the Court to invalidate the *current law*, plaintiffs must prove that the legislature that enacted the *current law* had a racially discriminatory motive. No court has ever invalidated a race-neutral law, enacted without discriminatory intent, solely because, a century earlier, the legislature that passed an ancestral version of that law had an impermissible motivation. Indeed, this legal theory directly contradicts the Supreme Court's admonition that "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980).

A plaintiff seeking to invalidate a race-neutral law can invoke past discrimination as circumstantial evidence only to show that racism motivated the "present-day acts" of the legislature that enacted the law being challenged. *See United States v. Marengo County Comm'n*, 731 F.2d 1546, 1567 (11th Cir. 1984). But in this case, the plaintiffs have forfeited their ability to argue that nineteenth-century race discrimination is "circumstantial evidence" that race discrimination motivated the "present day acts" of the Florida legislature when it made the decision to enact the current felon disenfranchisement rule in 1968. Plaintiffs did not allege that racial discrimination motivated the 1968 action, and have explicitly conceded that there is "*no evidence*" of any such discriminatory intent. R3-142-13,

attached at Appendix 2 ("App.2") (materials in Defendants' Appendix are also contained in the record).

Moreover, no court has ever imputed racist intent to a modern legislature based upon evidence of racism from *one hundred years earlier*. And it would be especially inappropriate to do so in this case, because the charge of a discriminatory purpose behind Florida's nineteenth-century felon disenfranchisement rule had never even been leveled before this case was filed, and certainly was not known to Florida's legislature in 1968. Plaintiffs' own historical expert admitted that no historian had ever before argued that Florida's felon disenfranchisement rule had a racist pedigree, and also confirmed that even though his own, extensively-researched book about the 1868 constitution specifically highlighted all the provisions that hurt black voting-power, it had never before occurred to him that the felon rule could have had a racist intent. R-146-7; R-122-906-11. Thus, even if the Florida legislature had studied the work of plaintiffs' own expert in this case, their only reasonable conclusion would have been that the 1868 felon disenfranchisement rule was definitely *not* motivated by racism.

For these and other reasons elaborated upon below, this Court should affirm the trial court's rejection of plaintiffs' extraordinary claim.

A. The Trial Court Correctly Granted Summary Judgment On The Grounds That There Was No Evidence That The Provision Plaintiffs Challenge Was Motivated By Racial Discrimination

The plaintiffs try to fit their case within the Supreme Court's holding in *Hunter v. Underwood,* 471 U.S. 222 (1985), but the court there insisted upon proof that the challenged rule was enacted pursuant to a discriminatory intent. The provision challenged in *Hunter* was enacted in 1901 and had not been modified or reconsidered, let alone re-enacted, since then. Thus, *Hunter* in no way suggests that a showing that a *previous version* of a felon disenfranchisement rule was enacted with a discriminatory intent requires invalidation of a race-neutral statue enacted *without* discriminatory intent.

In *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998), the plaintiff was able to show that during the post-Reconstruction period, an all-white constitutional convention had a racist intent when it expanded Mississippi's traditional disenfranchisement rule to include petty crimes that were at the time thought to be committed more frequently by African-Americans. However, unlike in *Hunter*, where Alabama's law disenfranchising individuals convicted of "moral turpitude" had remained untouched and unconsidered since its 1901 enactment, in Mississippi the disenfranchisement provision that was enacted during the post-Reconstruction era was amended "in 1950, removing 'burglary' from the list of disenfranchising crimes"; then again "in 1968, the state broadened the provision by adding 'murder'

and 'rape' – crimes historically excluded from the list because they were not considered 'black' crimes." *Cotton*, 157 F.3d at 391. Accordingly, the Fifth Circuit concluded that "[b]ecause Mississippi's procedure resulted both in 1950 and in 1968 in a *reenactment* of § 241, each amendment superseded the previous provision and removed the discriminatory taint associated with the original version." *Id.* (emphasis added). The Court reinforced its holding by noting that the reenactment had occurred pursuant to "a deliberative process," in which the revised provision had to be approved by two-thirds of both houses of the state legislature as well as by a public referendum. *Id.*

The district court in this case found *Cotton* "persuasive" and therefore held that, "[w]ithout any evidence that Florida's disenfranchisement law enacted in 1968 was motivated by racial animus and with evidence that Florida's legislature significantly deliberated and substantively revised . . . Florida's 1868 disenfranchisement law, the Court grants summary judgement in favor of the State." R6-239-11. The plaintiffs do not and cannot question the trial court's conclusion that it was "*without any evidence*" of racist intent in 1968, because they themselves proposed as a finding of fact that "[t]here is *no evidence* showing that any member of the CRC [Constitutional Revision Commission], the Subcommittee [on Suffrage and Elections], the Legislature, or *any official or staff member* associated with the 1968 constitutional revision process ever[] considered the

racial implications or consequences of the felon disenfranchisement provision." R3-142-13 (App.2) (emphasis added). Thus, plaintiffs' only hope for reversal is to argue that (1) all Florida did in 1968 was to rubberstamp the earlier, "tainted" disenfranchisement rules, and that (2) the law places a "burden" on the Florida legislature in 1968 not only to "re-enact" the old law *without* discriminatory intent, but also to somehow "purge" all of the (only just now alleged) prior discriminatory intent. In order to reverse the trial court, plaintiffs must be right on both counts; as explained below, they are right on neither.

1. The felon disenfranchisement rule at issue in this case substantively modified its predecessor provisions pursuant to a deliberative process

The undisputed evidence demonstrates that the 1968 felon disenfranchisement rule was not a mere "rubberstamp" of the predecessor provision. As a matter of law, it is clear that the 1968 Constitution substantively modified the previous provision and that this substantive revision occurred pursuant to a "deliberative process." Contrary to plaintiffs' argument, *see* Pl.Br. 34-39, neither of these rulings required the court to draw "improper inferences."

(a) In 1968 Florida Substantively Modified Its Felon Disenfranchisement Rule

Before the 1968 Constitution was approved, Florida was governed by the 1885 Constitution, which contained the following provisions pertaining to criminal disenfranchisement:

> **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 vote 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.

R3-122-629.

In 1968, Florida replaced these provisions with the provision that plaintiffs challenge in this case — Article VI, section 4 of the Florida Constitution — which provides as follows:

> 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 of civil rights or removal of disability.

R3-122-676. A black-lined version reflecting the changes made in 1968 is attached as an Appendix (App. 3).

This is no "rubberstamp." As plaintiffs conceded below, "Florida's most recent 1968 constitution drops the whole enumerated list, and, indeed, the *entire approach* of the original 1838 [criminal disenfranchisement] sections." R4-152-19 (emphasis added). Most importantly, the deletion of old section 5 significantly

narrowed the class of crimes that trigger disenfranchisement. Prior to 1968, the Florida Supreme Court had made clear that anyone convicted of an offense specifically itemized in section 5 must be disenfranchised *even if* the offense was only a *misdemeanor*. *State ex rel. Jordan v. Buckman*, 18 Fla. at 270. In 1968, Florida ended that practice.

This proves that in 1968 Florida substantially revised the criminal disenfranchisement rule pursuant to a deliberative process. The district court needed to do no more than analyze the unambiguous law set forth in *Jordan* to rule that "[t]he framers and ratifiers of the 1968 Constitution deliberately chose to change the prohibition on voting by felons in order to achieve a different and new result in terms of the persons who would be disqualified." R6-239-11. Because plaintiffs have no answer to this straightforward legal analysis, they try to convert a pure question of law into a question of fact by suggesting that they were entitled to an "inference" that the deletion of section 5 was not *actually intended* to achieve the substantive modification of the law that it *did in fact achieve* (and which they concede it achieved), but was instead designed "to avoid unnecessary duplication" in the Constitution. Pl.Br. 35. Plaintiffs have no evidence, let alone significant probate evidence, to support the strained "inference" they seek, but more fundamentally, the district court is plainly entitled to rule as a matter of law that

the Florida legislature actually intended to effect the substantive change in the law that the parties agree was in fact effected.

The decision to end the practice of disenfranchising misdemeanants is particularly revealing because plaintiffs have argued that Florida tried to target African-Americans through its addition of "larceny" to the list of disenfranchising crimes in 1868 on the assumption that blacks would more frequently commit petty larceny. R3-130-Tab1,17. This argument is wrong as a matter of law because all forms of larceny triggered disenfranchisement even *before* 1868. R3-122-15. But even if plaintiffs were right, the *elimination* of misdemeanor disenfranchisement in 1968 completely eviscerates the entire theory: if Florida's racist sin was expanding disenfranchisement to misdemeanor larceny, that sin has been fully "purged" by the elimination of such disenfranchisement in 1968.

(b) Florida's 1968 modification of its felon disenfranchisement rule occurred pursuant to a deliberative process:

In *Cotton*, the Fifth Circuit affirmed the lower court's "judgment as a matter of law" by ruling that Mississippi's amendments to its criminal disenfranchisement rule had occurred pursuant to a "deliberative process" because "[b]oth houses of the state legislature had to approve the amendment by a two thirds vote," and "a majority of voters had to approve the entire provision." 157 F.3d at 391. In this case, the district court had far greater and more specific evidence of a deliberative process. Aside from the substantive changes already discussed, the undisputed

facts before the trial court established that (1) as in *Cotton*, both houses of Florida's legislature had to approve the 1968 rule; (2) as in *Cotton*, the provision (along with the rest of the revised constitution) was submitted to the entire Florida electorate, who also had to approve it by referendum; and (3) over and above the facts cited in *Cotton*, numerous proposals were made for substantial revisions to the felon disenfranchisement rule, and the Suffrage and Elections Subcommittee ("Subcommittee") of the Constitutional Revisions Commission ("CRC") actively considered these proposals, as plaintiffs have conceded.

The undisputed documents show that the Subcommittee actively debated various proposals, including one that would have accomplished *the very result the plaintiffs seek to accomplish here through litigation*:

> *After considerable discussion*, Mr. Pettigrew moved that Section 4 be deleted and the following inserted: "The Legislature may by law establish disqualifications for voting for mental incompetency or convication [sic] of felony." The motion was seconded.
>
> Mr. Goodrich offered the following substitute motion to Mr. Pettigrew's motion: Delete Section 4 and insert: "The Legislature may by law exclude persons from voting because of mental incompetence *or commitment to a jail or penal institution*." *After discussion*, Mr. Goodrich's motion failed for lack of a second.

R3-150-983 (emphasis added).

If Mr. Goodrich's proposal had been accepted, then the Florida legislature would have been prohibited from disenfranchising the class of plaintiffs

represented in this suit — *i.e.*, convicted felons who are no longer committed "to a jail or penal institution."

These undisputed facts from 1968 are not circumstantial evidence that requires the fact-finder to draw an inference of some kind in order to ascertain some overarching, disputed fact. Plaintiffs do not dispute what happened, they only dispute whether what happened amounts to a "deliberative process" within the meaning of *Cotton*. There is no need for a trial to resolve that question. Either "considerable discussion" by a subcommittee, followed by subsequent discussion and further proposed amendments, followed by a final proposal that is then approved by two houses of the legislature and by public referendum, constitutes a "deliberative process," or it does not. But whatever legal standard plaintiffs might seek, it defies credulity to assert that Florida has not engaged in a deliberative process when it specifically considered abandoning the very disenfranchisement rule that plaintiffs challenge, and then rejected that proposal for reasons that plaintiffs admit *had nothing to do with race*.

2. Plaintiffs cannot win by imposing an insurmountable burden onto defendants

Because they cannot prove that Florida had a discriminatory intent in 1968, plaintiffs cobble together various strands of inapposite case law in a vain effort to argue that *defendants* must prove that Florida somehow "*purged*" the felon disenfranchisement rule of the racist taint they claim infected it in 1868, even

though no one knew about this supposed infection until the Complaint was filed in this case.

(a) The *Mt. Healthy* Rule Provides An Alternate Ground to Affirm

Plaintiffs argue that "[w]hen a state adopts a policy for discriminatory reasons, the state bears the burden of proving that the law's discriminatory origin is immaterial," a burden it can satisfy by "demonstrat[ing] that the law would have been enacted without this factor." Pl.Br.29. This is a truly bizarre proposition for plaintiffs to invoke. The authorities they cite both enunciate the principle that even after plaintiffs prove that racial discrimination motivated the enactment of a *particular provision*, defendants may nonetheless successfully defend *that provision* from constitutional attack by showing that it would have been enacted even without the racist motivation shown by the plaintiffs. *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). In other words, even if (contrary to their stipulation) plaintiffs were somehow able to prove that Florida enacted the 1968 version of its felon disenfranchisement rule for discriminatory reasons, Florida could nonetheless defeat that challenge by showing that the rule would have been enacted *even without* those racist motivations.

The *Mt. Healthy* principle has never been applied where plaintiffs admit that they cannot prove race discrimination behind the *current* version of the provision

they challenge, nor where plaintiffs rely solely on their allegation that race discrimination caused the enactment of a *prior* version of that rule. Moreover, the logical outcome of applying the principle in such a context only underscores why the *Mt. Healthy* rule cannot possibly help plaintiffs: if their allegations of nineteenth-century race discrimination mean that defendants now have "to demonstrate that the law would have been enacted without this factor," then all defendants have to do is point to the 1968 enactment of the rule to provide proof positive that, *even without* any race discrimination, Florida *would* have enacted, and indeed *has* enacted, the rule plaintiffs seek to invalidate. Thus, if the *Mt. Healthy* rule that plaintiffs invoke actually applies in this case, it provides an independent ground on which to *affirm* the trial court's decision.

(b) The Law of Desegregation Is Inapposite

In an attempt to duck the whipsawing effect of *Mt. Healthy*, plaintiffs quickly move on to *United States v. Fordice*, 505 U.S. 717 (1992), a case that is totally inapposite because it deals with the utterly distinct question of what *remedy* the Constitution requires after a State has already been found liable for violating the Constitution by imposing *de jure* segregation on its state university system. *See Fordice*, 505 U.S. at 727 ("the primary issue in these cases is whether the State has met its affirmative duty to dismantle its prior dual university system."); *see also Green v. County Sch. Bd.*, 391 U.S. 430, 437 (1968) ("free choice" policy not

a sufficient way for school board "to *remedy* the *established* unconstitutional deficiencies of its segregated system") (emphasis added); *Freeman v. Pitts*, 503 U.S. 467, 501 (1992) ("the sole question in school desegregation cases . . . is one of *remedies* for past violations") (Scalia, J. concurring). The struggle to remedy the effects of *de jure* segregation simply does not translate to a case, such as this one, where plaintiffs are trying to establish that a facially race-neutral law was enacted with a discriminatory intent. Indeed, the plaintiffs and the ACLU agree that if Florida's nineteenth-century disenfranchisement law had been struck down, Florida would not have had an obligation to "remedy" the effects of that law, but would instead have been free to enact a *new* felon disenfranchisement provision, so long as it did so "for the right reasons." *See* ACLU Br.8; Pl.Br.28-29.

As this Court has recognized, the law of desegregation is unique and should not be extended into totally different contexts. *See Johnson v. DeSoto County Bd. of Comm'rs*, 204 F.3d 1335, 1344 n.18 (11th Cir. 2000) (declining to extend *Fordice* "for the first time" outside of education setting); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1190 (11th Cir. 1999) ("given the unique nature of school desegregation, we hesitate to extend *Fordice* to a property annexation case"). Indeed, no circuit court has ever extended *Fordice* beyond the unique context of desegregation.

In an effort to argue that this Court was "incorrect," the ACLU relies upon three cases that have cited *Fordice* or *Green* outside of the education context. ACLU Br.17-18. But these cases deal with desegregating public workplaces and parks, and their offhand references to *Fordice* or *Green* only confirm that they are limited to the problem of remedying the intractable effects of prior, *de jure* segregation.[2]

(c) No Court Has Ever Invalidated A Law That Was Reenacted Pursuant To A Deliberative Process Without Any Discriminatory Intent

The plaintiffs say "this Court's consistent practice is to focus on adoption, not reenactment," Pl.Br.30, but the cases they cite do not support this claim.

Plaintiffs first cite the former Fifth Circuit's decision in *McMillian v. Escambia County*, 638 F.2d 1239 (5th Cir. 1981), suggesting in a parenthetical that it "focus[ed] on discriminatory intent in 1901, although [the] challenged provision had been reenacted in [the] 1968 Florida constitutional revision." Pl.Br.30. That is false. *McMillian* rejected a challenge to *the county's* decision to implement an at-large system for electing county commissioners. The county's decision was made

[2] *See United States v. Paradise*, 480 U.S. 149, 176 (1987) (plurality makes two "cf." citations to *Green* to support holding that "District Court was plainly justified in imposing the remedy chosen" since "further delay" in desegregating work force would be "unacceptable"); *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974) (citing *Green* in support of holding that "respondent city's policy of allocating facilities to segregated private schools deprived petitioners of equal access"); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1575 (11th Cir.1994) (citing *Fordice* to support proposition that "the effects of past City and Board discrimination" may justify "affirmative action").

pursuant to the state's 1901 constitutional amendment, but unlike the state provision, the county's electoral scheme was never subsequently reenacted, readopted, or superseded in any way. It therefore made perfect sense for both the district court and the panel to inquire into the intent behind the 1901 amendment, since that was the "genesis" of the county scheme being challenged. But since the plaintiffs were not challenging any provision in Florida's Constitution, the 1968 constitutional revision was completely irrelevant. Indeed, plaintiffs had no quarrel at all with the 1968 Constitution, since it *rescinded* the 1901 rule mandating at-large elections, and specifically allowed counties to *abandon* that old policy. FLA. CONST. art. VIII, §1(e). Plaintiffs' complaint was that in spite of this progressive 1968 change, *the county* had "twice rejected the recommendations of its own charter government committees that the county change to single-member districts." *McMillian*, 638 F.2d at 1244. Accordingly, the courts focused primarily on this official action by the county, with the panel reversing the district court's finding that these two rejections were taken for "an invidious purpose." *Id.* at 1243.[3]

Plaintiffs also cite to *Brown v. Board of Sch. Comm'rs*, 706 F.2d 1103 (11th Cir.), *aff'd*, 464 U.S. 1005 (1983) and to *Bolden v. City of Mobile*, 542 F. Supp. 1050, 1074-76 (S.D. Ala. 1982). Both of these cases found that at-large election

[3] It should also be noted that the decision in *Cotton*, which upheld Mississippi's disenfranchisement rule even though it accepted that a *previous version* had been enacted with a discriminatory intent, confirms that the Fifth Circuit obviously does not believe *McMillian* requires it to look behind deliberative reenactments.

schemes enacted during the post-Reconstruction period of the late nineteenth and early twentieth centuries had been enacted with a racially discriminatory intent. In both cases, the original statutes had never been superseded, though they had apparently been modified by amendment. Neither decision devotes any discussion to the question whether a subsequent amendment might possibly be considered a "reenactment" or superseding event, so these cases appear to be of no relevance.

The plaintiffs also invoke a Fourth Circuit case that, if anything, appears to agree with *Cotton*'s holding that a deliberative process can cleanse any prior discrimination associated with a race-neutral law. In *Irby v. Virginia State Bd. Of Elections*, 889 F.2d 1352 (4th Cir.1989), the plaintiffs demonstrated that "the Virginia legislature clearly acted with a discriminatory intent" when, first in 1901 and then again in 1956, it required school boards to be appointed rather than popularly elected. *Id.* at 1356. As a result, plaintiffs argued that because they had proved discriminatory intent, the burden "shift[ed] to the defendants to prove that the system is not currently being maintained for discriminatory purposes." *Id.* at 1355. The Fourth Circuit held that it "need not decide whether the Equal Protection Clause mandates the burden-shifting scheme proposed by the plaintiffs because, even assuming that the burden shifted to the defendants, they have proved that racial discrimination no longer motivates Virginia's decision to retain an appointive system for selecting school board members." *Id.* Thus, even in a

context where the racist intent could be proven as recently as 1956 (only 15 years before the reenactment in *Irby*), the Fourth Circuit did *not* endorse the "burden-shifting" theory advanced by plaintiffs here. Rather, it indulged this theory in order to show why plaintiffs would lose *even if* their theory were correct. Moreover, plaintiffs themselves recognize (Pl.Br.32) that the reason why the 1971 reenactment was insufficient was that it "did not involve *any* alterations of the school board selection process and apparently *no debate* over the relative merits of appointed and elected school boards." *Irby*, 889 F.2d at 1356 (emphasis added).[4]

(d) Interpreting Ambiguous Statutory Text Is Completely Different From Proving The Existence Of An Illicit Legislative Motivation

Plaintiffs also argue that because courts routinely look to "prior enactments" in determining the *meaning* of statutes, this Court should not hesitate to look to a prior enactment to determine whether the current law was passed with a *discriminatory motive.* Pl.Br.31. While they acknowledge that "[a]n inquiry into discriminatory purpose is not identical to the question of legislative intent regarding a law's meaning," the plaintiffs try to blur that distinction by then arguing that "[c]ourts regularly rely . . . on evidence of legislatures' underlying

[4] The ACLU's discussion of *Kirksey v. Board of Supervisors*, 554 F.2d 139 (5th Cir. 1977), a case which it concedes is no longer good law, and of *McMillan*, ACLU Br.8-10, is inapposite because in this case, as in *Cotton*, Florida has not been "neutral" and time has not merely "passed" – to the contrary, as shown above, Florida affirmatively reenacted the challenged provision pursuant to a deliberative process.

purposes to determine the meaning of a statute." *Id.* But plaintiffs are confusing two fundamentally distinct inquiries: as the Supreme Court has made clear, it is commonplace for a court to inquire into legislative "purposes" in order to interpret ambiguous legislation, but "[i]t is *entirely a different matter* when we are asked to void a statute that is, under well-settled criteria, constitutional on its face," yet which is accused of having an "illicit motive." *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) (emphasis added). Thus, the inquiry called for here – whether "to void" a provision because plaintiffs claim it was enacted with an "illicit motive" – is *exceptional*.[5] It is wholly unlike the *routine* inquiry plaintiffs describe, where courts "regularly rely . . . on evidence of legislatures' purposes" to resolve subtle nuances of meaning in ambiguous statutes. Principles of statutory construction are therefore irrelevant.

(e) The Decision In *Cotton* Does Not Allow Legislatures To "Hide" Discriminatory Intent

The ACLU argues that *Cotton* makes it "far too easy to keep re-enacting the same discriminatory policies, while carefully avoiding creation of an 'evidence trail' that would enable plaintiffs to prove current bad intent." ACLU Br.8. If the ACLU's concern is that *Cotton* somehow allows a statute that was obviously

[5] *See generally South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257 (4th Cir. 1989) ("judicial inquiries into legislative motivation are to be avoided"); *Bulluck v. Washington*, 468 F.2d, 1096, 1102 (D.C. Cir. 1972) (citing sources for same).

enacted for racist reasons to be "saved" by a legislature that, before the law can be challenged, quickly reenacts it without any "evidence trail," the obvious answer is that plaintiffs in that situation can point to the fact that the reenacting legislature *clearly knew* that it was adopting an intentionally racist rule as evidence that the reenacting legislature was itself doing so for racist reasons without any legitimate, non-racist purpose for the law. *See generally Marengo County*, 731 F.2d at 1567 (past racism is "circumstantial evidence" of motive behind "present day acts").

For the same reason, the effort to undermine *Cotton* with citations to *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000), *cert. denied*, 532 U.S. 1046 (2001) and *Shaw v. Hunt*, 517 U.S. 899 (1996), is misplaced. Pl.Br.33,34n.13. Where a legislature re-adopts a plan that its immediate successor passed two or three years earlier, it very likely *knows* what that preceding legislature had in mind, and the inference that the subsequent law shares the same intent is plausible. In that instance, courts will often look to the previous as well as to the "present day" legislature in order to determine the true "intent" behind the re-adoption. *See generally Chen*, 206 F.3d at 521 ("what is precisely and directly the ultimate issue before the Court" is not "the state of mind involved in the prior plans" but the "intervening reenactment").

Here, however, plaintiffs have never argued that Florida's 1968 legislature *knew* that the 1868 felon disenfranchisement rule was intended to be racist, and

therefore reenacted that rule with a racist motive. And since this Court has found that even evidence of *de jure* racial segregation from the 1960s and 1970s is "far too remote and attenuated to be probative of any discriminatory purpose in 1995," *Burton*, 178 F.3d at 1195, it is hard to imagine how plaintiffs could possibly have shown that racism from 1868 somehow proves that Florida had a racist intent in 1968. Moreover, any purely theoretical chance plaintiffs had of making this argument evaporated completely when their own expert admitted that even if the Florida legislature in 1968 had studied all extant works itemizing all racially discriminatory provisions from the 1868 Constitution, it still would have had no reason to suspect that anyone would ever claim that the felon disenfranchisement rule was "racist." R3-122-906-10; R3-122-769-81; R3-122-782-91.

B. The Trial Court Can Be Affirmed On The Alternative Ground That Plaintiffs Failed To Present Evidence Showing That The Disenfranchisement Rule Had A Racist Original Intent

Even if this Court accepted plaintiffs' request to investigate why Florida first adopted its felon disenfranchisement policy, the undisputed facts show that plaintiffs must still lose. Florida made its original decision to disenfranchise people convicted of "infamous crimes" at the time of its founding, more than two decades before the end of the Civil War, a time when Florida lawmakers had no expectation that African-Americans would ever be allowed to vote. As plaintiffs' expert conceded, the "origin" of the felon disenfranchisement rule had nothing to

do with race discrimination. R3-122-866-67. *See Howard v. Gilmore*, No. 99-2285, 2000 U.S. App. LEXIS 2680, at *2 (4th Cir. Feb. 23, 2000) (Virginia's law lacks discriminatory intent because "decision to disenfranchise felons pre-dates . . . the extension of the franchise to African-Americans.").

Plaintiffs nevertheless claim that felon disenfranchisement became "infected" with racism in 1868. They claim Florida expanded the rule by disenfranchising all "felons," rather than all those convicted of "infamous crimes." As plaintiffs acknowledge, this is a question of law. R4-152-13,15. And plaintiffs concede that in 1838 the term "infamous crimes" was "understood *at common law* to include all felonies." R4-152-15. Thus, enacted against this common law background, Florida's 1838 Constitution authorized disenfranchisement for a category of crimes that included "all felonies." And right after promulgating this Constitution, Florida implemented its disenfranchisement provision with a statute providing that "no person who shall hereafter be convicted of bribery, perjury, or other infamous crime, shall be entitled to the [right] of suffrage." R3-150-1001. Since this implementing statute must have understood "infamous crime" to mean the same thing it meant in the Constitution, it clearly disenfranchised all those convicted of a category of crimes that included "all felonies." *See also In Re Claasen*, 140 U.S. 200, 205 (1891) (defining infamous crime as crime punishable by imprisonment in state penitentiary) *and* R3-150-995 (Florida statute defining

felony as crime punishable by imprisonment in state penitentiary). Thus, as a matter of law, there was no expansion of felon disenfranchisement in 1868, and therefore the central premise of plaintiffs' argument is wrong.

Plaintiffs also rely on an expert they describe as "[t]he leading historian of Florida Reconstruction." Pl.Br.28. It is true that over the past forty years Dr. Shofner has done a huge amount of work studying the 1868 Constitutional Convention, and has focused on provisions designed to diminish black voting power. But far from supporting plaintiffs' claim, Dr. Shofner admitted that even after spending "ten years . . . researching" the 1868 convention, and even after identifying all of the provisions that he believed operated, even indirectly, to diminish the political power of blacks in Florida, neither he nor any of the other scholars who have written in this area had ever even *speculated* that the 1868 felon disenfranchisement rule might have been enacted with a discriminatory purpose. R3-122-906-10; *see generally* R3-122-769-81; R3-122-782-91 He also readily admitted that there is *no* contemporaneous evidence or historical commentary with respect to the disenfranchisement rule, and that the delegates who complained about the "objectionable" provisions "[n]ever said anything about [the felon rule]." R3-122-897.

And Shofner's circumstantial evidence falls far short of raising a triable issue: He relied upon Florida's 1865 institution of "black codes" designed to

criminalize much of the newly freed black population – but then conceded that these had nothing to do with a desire to disenfranchise the black population who, at that time, were not expected to obtain the right to vote, and also recognized that the 1868 Constitutional Convention *rescinded* most of these pernicious codes. R3-136-5. He also relied on a "guilt by association" theory by arguing that the gubernatorial appointment power and the legislative apportionment scheme in the 1868 Constitution may have been designed to diminish black voting power – but he has previously praised the 1868 Constitution as being "liberal," and he does not deny that blacks enjoyed enormous electoral success between the 1868 Constitution and the end of Reconstruction. R3-122-788; R3-120-186-190. Finally, he relied on the fact that some of the "Radical Republicans" who sought to control the 1868 convention had introduced a draft constitution that did not contain a felon disenfranchisement rule, but then when asked on two separate occasions during his deposition about the *motivation* of these delegates, he stated candidly "*I don't know what their motivation was*," and then admitted again "*I don't know what the intent was, I have no idea.*" R3-122-888, 898 (emphasis added). Similarly, he expressed surprise at his deposition that defendants' rebuttal expert had shown that five African-Americans had explicitly *voted for* the felon disenfranchisement rule in 1868, stating that "I didn't realize it was going to come down to a head count." R3-122-873-874.

These stunning admissions demonstrate that this Court can affirm the dismissal of the intentional race discrimination claim on the alternative ground that it would be unreasonable for a fact-finder to accept plaintiffs' evidence of discriminatory intent in 1868.[6]

II. FLORIDA'S PROHIBITION ON FELON VOTING DOES NOT VIOLATE SECTION 2 OF THE VOTING RIGHTS ACT

A. The Sole Cause of Plaintiffs' Inability to Vote Is Their Own Criminal Conduct

Section 2 of the Voting Rights Act of 1982 prohibits the enforcement of any "qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote *on account of race or color*." 42 U.S.C. § 1973(a) (emphasis added). Here, it is plain that plaintiffs have been denied the right to vote on account of one — *and*

[6] Proof that plaintiffs have not uncovered any evidence to show racist intent in 1868 comes in startling form out of the brief for the former law enforcement amici ("Wilmer Brief"). While it purports not to deal at all with the issue of intent in 1868, the Wilmer Brief nonetheless includes, in two separate places, an inflammatory statement that would undoubtedly have been trumpeted by plaintiffs throughout this litigation if there were even a slight chance that it were true. Twice, the Wilmer Brief states that a proponent of the felon disenfranchisement rule argued that it would keep Florida from becoming "niggerized." Wilmer Br. at 4, 13. That is a serious charge, but it is *blatantly false*, as even the most cursory examination shows. Indeed, the record citation for this remark is a publication by Dr. Shofner in which he discusses all aspects of the 1868 constitutional convention, including this pernicious comment, but in which he never even *speculates* that the remark had anything to do with felon disenfranchisement, nor that such disenfranchisement was in any way intended to be an insidious tool to prevent blacks from voting. R3-122-771-91.

only one — factor: their conscious decision to commit crimes so serious that they constitute felonies. Thus, plaintiffs have not been denied the right to vote "on account of race." Indeed, more than 400,000 members of the plaintiff class are white, a fact that underscores that race is not the causative factor in plaintiffs' inability to vote. R3-132-Tab3,24.

In light of this dispositive reality, *every* court to consider a Section 2 challenge to a felon disenfranchisement statute has rejected such a claim *as a matter of law* without resort to trial. *See, e.g.*, *Wesley v. Collins*, 791 F.2d 1255, 1260 (6th Cir. 1986); *Howard*, 2000 U.S. App. LEXIS 2680; *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (affirming district court dismissal of Section 2 claim); *Jones v. Edgar*, 3 F. Supp. 2d 979, 981 (C.D. Ill. 1998) ("The mere fact that many incarcerated felons happen to be black and Latino is insufficient grounds to implicate the Fifteenth Amendment or the Voting Rights Act."); *Farrakhan v. Locke*, No. 96-76-RHW (E.D. Wash. 2000), R3-122-960. As the district court in *Wesley* explained:

> Felons are not disenfranchised based on any immutable characteristic, such as race, but on their conscious decision to commit an act for which they assume the risks of detection and punishment. The law presumes that all men know its sanctions. Accordingly, the performance of a felonious act carries with it the perpetrator's decision to risk disenfranchisement in pursuit of the fruits of his misdeed.

Wesley v. Collins, 605 F. Supp 802, 813 (M.D. Tenn. 1985), *aff'd* 791 F.2d 1255 (6th Cir. 1986).

B. Plaintiffs' Sweeping Interpretation of Section 2 Is Inconsistent With the Purpose, Structure, and History of the Voting Rights Act

In the face of this uniform precedent, plaintiffs advance a sweeping conception of the Voting Rights Act that negates this Court's repeated admonition that a violation of Section 2 must be founded upon a showing of *discrimination* and that there must be a *causal connection* between the discrimination shown and the claimed discriminatory effect. *See, e.g., Solomon v. Liberty County Comm'rs,* 221 F.3d 1218, 1225 (11th Cir. 2000) (*en banc*) (" '[T]o be actionable, a deprivation of a minority group's right to equal participation in the political process must be *on account of* a classification, decision, or practice that *depends on race or color, not on account of some other racially neutral cause.*' ") (quoting *Nipper v. Smith,* 39 F.3d 1494, 1515 (11th Cir. 1994) (*en banc*) (Tjoflat, T. J., plurality opinion)) (emphases added); *Southern Christian Leadership Conference v. Sessions (SCLC)*, 56 F.3d 1281, 1293 (11th Cir. 1995) (*en banc*) (finding no Section 2 liability because "factors other than race" caused election results with a disparate impact on minorities). And this Court's precedents make clear that plaintiffs must establish "*discrimination with respect to voting*." *Burton*, 178 F.3d at 1198 (emphasis added). This requirement stems from the very purpose of the Voting Rights Act, which not surprisingly, was aimed at eliminating "actual *voting*

discrimination." *South Carolina v. Katzenbach*, 383 U.S. 301, 329 (1966) (emphasis added); *see also id*. at 330, 331; *City of Rome v. United States*, 446 U.S. 156, 174 (1980) (Voting Rights Act aimed at "*racial discrimination in voting*") (emphasis added). Thus, Judge Tjoflat explained in *Nipper* that the essential feature of a Section 2 claim is the presence of "racial bias operating through the *electoral system.*" *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994) (opinion of Tjoflat, C.J.) (emphasis added). *See also id.* at 1523 (the "key" to a Section 2 claim is presence of "racial bias at work in the *electoral process*.") (emphasis added).

Plaintiffs cite not a single case in which a violation of Section 2 has been found in the absence of racial discrimination with respect to voting. The vast majority of plaintiffs' cases are vote dilution cases presenting challenges to redistricting. In *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986), the Supreme Court required plaintiffs in such cases to establish the existence of racial bloc voting. Judge Tjoflat has explained that if "the community is not motivated by *racial bias in its voting patterns,* then a case of vote dilution has not been made." *Id*. at 1515 (emphasis added). So while plaintiffs need not show *intentional public* discrimination, the existence of racial bias relating to voting remains the "cornerstone" of a Section 2 claim. *Id.* In the absence of a showing of racial bloc voting, the Section 2 claim must be dismissed without regard to the totality of the

circumstances. *See, e.g., Johnson v. Hamrick*, 296 F.3d 1065, 1073 (11th Cir. 2002). Thus, there is simply no truth to plaintiffs' claim that a violation of Section 2 "always depends on the totality of the circumstances" and may be predicated on amorphous vestiges of societal discrimination. *See* Pl.Br.42. In short, *all* of the vote dilution cases cited by plaintiffs require that a plaintiff demonstrate racial discrimination *in voting*.

The few vote denial claims cited by plaintiffs confirm the requirement of a causal connection between racial discrimination in voting and the disparate result complained of. As noted above, this Court in *Burton* recently expressly acknowledged this standard in a vote denial case. Although plaintiffs cite to *Harris v. Graddick*, 593 F. Supp. 128, 131 (M.D. Ala. 1984), the district court decision there predicated its analysis on the extreme disparities in the numbers of African-Americans employed as *poll* officials. Likewise, the authority cited from other jurisdictions focuses on racial bias relating directly to voting practices. Specifically, in *Operation Push v. Mabus*, 932 F.2d 400, 403-404 (5th Cir. 1991), the court focused on disparate impact resulting from *voter registration* procedures.

Plaintiffs' arguments under Section 2 must also be rejected as they prove far too much. Nowhere do plaintiffs dispute that their theory of liability would equally apply to *currently incarcerated* felons and would require the state of Florida to permit even the most depraved repeat offender to vote while in prison. Moreover,

plaintiffs' theory of Section 2 would sweep away the voting age requirements. Under plaintiffs' conception of Section 2, juveniles could prevail under Section 2 by showing that (1) they cannot vote because they are under the age of 18; (2) the birth rate is higher among minorities than nonminorities causing a disparate impact; (3) differential birth rate is contributable, at least in part, to a history of societal discrimination; and (4) therefore, they are denied the right to vote because of the interaction between racial bias and the challenged election practice. Such analysis simply cannot withstand scrutiny. *See, e.g., Wesley*, 791 F.2d at 1260-61.[7]

Plaintiffs complain that the district court's interpretation of Section 2 is too restrictive. Specifically, they claim that if the district court's understanding of Section 2 were correct, then "literacy tests and poll taxes would be legal." Pl.Br.50. But it could not be clearer that Section 2 does not even reach poll taxes and literacy tests as evidenced by separate provisions of the Voting Rights Act that specifically address each of these practices. *See* 42 U.S.C. § 1973b; 42 U.S.C. § 1973h. If

[7] In a final effort to resuscitate their legal theory, plaintiffs attempt to caricature defendants' description of the law. First, plaintiffs protest that "[a] typical Section 2 claim rests on statistical proof." Pl.Br.52. Statistical evidence is relevant where it demonstrates "race bias *in the electoral process*," as in the vote dilution context. Here, as noted, plaintiffs' statistical evidence does not speak to "race bias in the electoral process," but instead alleges discrimination in the criminal justice system. Second, plaintiffs suggest that defendants seek to resuscitate the intent standard that the 1982 Amendments to Section 2 were intended to override. As our acknowledgment of the validity of statistical evidence demonstrating racial bias in voting reflects, there is simply no merit to this contention. And to the extent individuals are convicted because of racial prejudice, plainly such conviction can be overturned.

Plaintiffs' interpretation of Section 2 were correct, then there would be no need for either provision. Thus, plaintiffs' reading of Section 2 violates the "cardinal principle of statutory construction that a statute ought, upon the whole, to be construed so that, if it can be prevented, no clause, sentence, or word shall be superfluous...." *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotations omitted). Thus, structure of the Voting Rights Act itself forecloses plaintiffs' sweeping interpretation of Section 2.

Given the textual and structural barriers to the adoption of plaintiffs' understanding of Section 2, it is not surprising that the statute's legislative history contains no support for plaintiffs' claim. Indeed, the legislative history accompanying passage of the Voting Rights Act of 1965 makes clear that its prohibition on tests and similar voting qualifications was not intended to extend to laws such as Florida's. Specifically, the Senate Report stated:

> The third type of test or device covered is any requirement of good moral character. *This definition would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony* or mental disability. It applies where lack of good moral character is defined in terms of conviction of lesser crimes.

S. REP. NO. 89-162 (1965), *reprinted in* 1965 U.S.C.C.A.N., 2508, 2562 (emphasis added). *See also* H.R. REP. NO. 89-439, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2457 (Subsection 4 (c)(3) "does not proscribe a requirement of a State or any

political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony. . . ."). As a result of the protracted debate surrounding the passage of the 1982 amendments, there is "unusually extensive legislative history." *Chisom v. Roemer*, 501 U.S. 380, 396 (1991). Nowhere in that debate, to our knowledge, was there any mention of Congress's intent to invalidate state prohibitions on felon voting that had a disproportionate impact on blacks. As the Supreme Court has stated, "Congress' silence in this regard can be likened to the dog that did not bark," *id*. at 396 n.23, and such silence is fundamentally inconsistent with interpreting a statute to effect sweeping changes — *i.e*., the invalidation of long-standing restrictions on voting maintained by virtually every state in the Union. *See Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 342 (1999) (plurality). Indeed, the Supreme Court has emphasized that congressional statutes should not be interpreted to invalidate state laws that touch upon traditional areas of local control, as is surely the case with voter qualifications, absent a "plain statement" of such intent. *See Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). Here, there is no indication, let alone a plain statement, that Congress intended to prohibit states from confining the exercise of the franchise to law-abiding citizens.

C. Plaintiffs' Interpretation Would Render Section 2 Unconstitutional

Finally, plaintiffs' expansive interpretation must be rejected as it would render Section 2 unconstitutional. Plaintiffs' claim is necessarily premised on the view that Congress can invoke its "enforcement" powers under section 5 of the Fourteenth Amendment to invalidate a practice sanctioned by another provision of that very Amendment, even in the absence of evidence that the practice is motivated by a racially discriminatory purpose. To state this claim is to refute it. In *Ramirez*, 418 U.S. at 55, the Court rejected the notion that the Fourteenth Amendment is at war with itself.

Even in the absence of explicit constitutional affirmation of a qualification on voting, the Supreme Court has emphasized that "[r]emedial legislation under § 5 'should be adapted to the mischief and wrong which the [Fourteenth Amendment] was intended to provide against.' " *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (quoting *Civil Rights Cases*, 109 U.S. 3, 13 (1883)). Where Congress has made no finding that an otherwise legitimate practice is a "pretext or proxy" for racial discrimination, the Supreme Court has invalidated such restrictions. *See Baker*, 85 F.3d at 929 (*citing Oregon v. Mitchell*, 400 U.S. 112, 130 (1970) (opinion of Black, J.) (invalidating lowering the minimum age for voting in state and local elections in the absence of a congressional finding that such practice was "used by the States to disenfranchise voters on account of race").

See also United States v. Morrison, 529 U.S. 598, 626 (2000) (holding that the Violence Against Women Act was not a legitimate exercise of Congress' authority under Section 5 in part because "it applie[d] uniformly throughout the Nation" and "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States"); *Board of Trustees v. Garrett*, 531 U.S. 356, 365-68 (2001). There are no such findings with respect to felon disenfranchisement. Quite to the contrary, Congress recognized that felon disenfranchisement statutes "are objective, easily applied, and do not lend themselves to fraudulent manipulation." *See* 111 CONG. REC. S. 8366 (1965) (Statement of Sen. Tydings). In light of this congressional record, five members of the Second Circuit in *Baker* declined to extend Section 2's reach even to cover felon disenfranchisement statutes. 85 F.3d at 929-930 (Mahoney, J., concurring). Plainly, such an interpretation is appropriate to avoid rendering Section 2 unconstitutional. *See, e.g., NLRB v. Catholic Bishop*, 440 U.S. 490, 500-01 (1979).

D. Plaintiffs' Broadside Attack On Florida's Criminal Justice System Is Legally Irrelevant

Plaintiffs have sought to indict Florida's criminal justice system by suggesting that it is infected by racism. This broadside attack is simply irrelevant to a voting rights challenge.

Plaintiffs' evidence on this issue fails to make the requisite causal connection between the challenged practice and racial bias relating to voting. Plaintiffs advance the following syllogism:

(1) plaintiffs cannot vote because they are convicted felons;

(2) conviction rates in Florida are tainted by racial bias; and

(3) therefore, plaintiffs have been denied the right to vote on account of racial bias.

The notion that such a superficial analysis gives rise to a violation under Section 2 of the Voting Rights Act is foreclosed by this Court's decision in *Burton.* There, this Court considered a vote denial claim under Section 2 challenging a decision not to annex a predominantly black housing project that was the product of historical intentional segregation. Plainly, the decision not to annex this area had a significant disparate impact given the demographic composition of the housing project's residents. Plaintiffs in *Burton* predicated their vote denial claim on just the same logic posited by plaintiffs here — they argued that:

(1) they could not vote because they lived outside the city limits;

(2) they lived outside of city limits because of racial bias that took the form of mandatory segregation in public housing; and

(3) therefore they were denied the right to vote in city elections because of racial bias.

This Court rejected this claim as a matter of law on summary judgment. Despite compelling evidence of racial bias in housing, there was "no evidence of any

discrimination *with respect to voting*." 178 F.3d at 1198 (emphasis added). So too here, plaintiffs' evidence of bias relates exclusively to the administration of the criminal justice system and thus does not satisfy this Court's standard.

Plaintiffs' efforts to distinguish *Burton* are unavailing. First, they maintained below that *Burton* is not a true vote denial case because plaintiffs there could vote in some elections, even if not in the elections of the City of Belle Glade. The decision itself, however, describes plaintiffs' claim as one of vote denial. 178 F.3d at 1197-98. Moreover, the Supreme Court's seminal case of *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960), analyzed the City of Tuskegee's grotesque racial gerrymander of the city limits as a vote denial case, even though the plaintiffs there were able to vote in state and federal elections. More generally, this Court's well-founded concerns over the availability of an appropriate remedy in the annexation case do not negate the force of the Court's holding with respect to the vote denial claim.

Relying on *Burton*, the court in *Farrakhan* reached this very conclusion. The district court explained in dismissing, on summary judgment, a challenge to Washington's felon disenfranchisement provision, a plaintiff cannot succeed under the Voting Rights Act where

> a discriminatory effect arises, if at all, only when the provision operates in light of discriminatory activity in the criminal justice system. Stated differently, if there were no discriminatory motivation or effect in the criminal justice system, then there is no evidence that

> the disenfranchisement provision would have a discriminatory effect. At most, this establishes a flaw with the criminal justice system, not with the disenfranchisement provision. Plaintiffs have failed to establish a claim for vote denial because the causal chain runs, if at all, to a factor outside of the challenged voting mechanism.

R3-122-965. Thus, despite finding plaintiffs' "evidence of discrimination in the criminal justice system" to be "compelling," the *Farrakhan* court rejected the Section 2 challenge as a matter of law. R3-122-967. In this case, by contrast, plaintiffs' own expert concedes that his analysis "would not allow an inference of certainly conscious intent on the part of any individual actors." R3-146-5.

The district court's conclusion that plaintiffs' evidence of an alleged disparity in conviction rates is irrelevant to the Section 2 analysis was completely justified given the nature of plaintiffs' claims. Plaintiffs must accept that each and every member of their class was properly convicted of a felony, and there is no evidence in the record that any member of the class was convicted because of racial bias. Thus, even ignoring all the conceded limitations and deficiencies in their expert's analysis, the most plaintiffs can aver is that the alleged disparity in conviction rates results in too many whites being acquitted under Florida's criminal justice system. Even if there were a scintilla of evidence supporting this argument, it in no way undermines, or even speaks to, the uncontroverted fact that plaintiffs here did not lose their voting rights "on account of race."

C. Plaintiffs Failed To Identify Significantly Probative Evidence Of Racial Bias In Florida's Criminal Justice System

Even if evidence relating to the criminal justice system were probative here, plaintiffs have failed to submit any evidence establishing a causal connection between conviction rates and race. Plaintiffs' expert on the criminal justice system, Dr. Chiricos, candidly admitted that his report "made no assertion as to the proof of causality." R3-146-9. That concession dooms plaintiffs' effort to satisfy the requirements of Section 2. *See*, *e.g.*, *Solomon*, 221 F.3d at 1225.

Dr. Chiricos' concession was wise given that his analysis made no effort to hold constant for any of the myriad "factors other than race" that might have explained the disparity in conviction rates he claimed to have observed. *SCLC*, 56 F.3d at 1293. For example, it is obvious that a defendant's prior criminal record is a critical variable that would have some predictive weight as to the likelihood of conviction. Despite the ready availability of such data, Dr. Chiricos simply ignored it. When defendants' expert, Dr. Joseph Katz, incorporated this variable into Dr. Chiricos' model, the disparity in conviction rates was entirely eliminated with respect to repeat offenders and was reduced for first time offenders. R3-120-136-38,167. As Dr. Chiricos readily conceded, there are numerous other variables including gravity of offense, strength of evidence, nature of legal representation, and age of offender, that could readily explain the disparity. R3-122-945-50. Thus, the differential in convictions is "unexplained" *because he made no attempt*

to explain it. In such circumstances, where crucial explanatory factors are omitted from a statistical analysis, courts have routinely dismissed the analysis as inadmissible. *People Who Care v. Rockford Bd. of Ed.*, 111 F.3d 528, 538 (7th Cir. 1997); *Coward v. ADT Sec. Sys., Inc.*, 140 F.3d 271, 274 (D.C. Cir. 1998) (refusing to admit regressions omitting a variable "that serves as a 'major factor' ") (citation omitted); *see Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 449-50 (2d Cir. 1999), *cert. denied*, 530 U.S. 1242 (2000).

The results of this slipshod approach confirm that Dr. Chiricos' "analysis" is totally unreliable. His findings purport to show that *whites* are the victims of disproportionate conviction rates for four of the nine categories of crimes he analyzes: murder, sex offenses, other violent crimes, and the catch-all category of "other" crimes. R3-120-60. Plaintiffs' speculation that there is less discretion to prosecute some of these crimes in no way explains why, according to Dr. Chiricos, whites are apparently being railroaded through the system for these crimes.

In any event, the *undisputed* evidence demonstrates that Florida's criminal justice system operates in a race-neutral manner: (1) there is *no racial disparity* as between "felony arrests" and "felony convictions," R3-120-130,163; and (2) there is *no racial disparity* in the sentences received by convicts with similar sentencing guideline scores. R3-120-166.

Plaintiffs' expert set out to measure the "disproportionality in felony convictions" between blacks and whites arrested for felonies. R3-120-2; R3-146-18. Yet, he ignored the entire population of offenders who were successfully convicted on a felony charge, but whose disposition reflected the judicial decision to "withhold adjudication."[8] Plaintiffs have argued that sentences of adjudication withheld should be ignored because they do not result in the loss of voting rights. But if plaintiffs are trying to prove that discretionary judgments made from arrest to conviction are biased against blacks (*i.e.*, that black "felony arrests" are more likely to lead to felony convictions than are white "felony arrests"), then they have to consider *all* felony convictions. There is no dispute that when *all* felony convictions are compared with the population of arrests actually identified as felony arrests by the state's official database, the "unexplained racial disproportionality" shown by Dr. Chiricos disappears *entirely*, and there is instead a slight unexplained racial disproportionality disfavoring *whites*. R3-120-130,163.

Plaintiffs' unwillingness to consider felony convictions with adjudication withheld reduces to nothing more than a complaint about Florida's sentencing

[8] In Florida, certain offenders, such as those who are found guilty of a non-violent offense, who have very low sentencing scores, or who have a very short or nonexistent record of prior convictions, are eligible for the disposition of "adjudication withheld," a disposition that carries no imprisonment and no loss of civil rights, but may require some level of supervision akin to house arrest or probation. *See* FLA. STAT. § 948.01. Under FLA. STAT. § 921.0011(2) and § 921.0021(2), individuals who receive the disposition of adjudication withheld are considered to have received "convictions." R3-122-973-975.

practices. Defendants' expert analyzed this very issue by comparing the sentencing guideline scores of whites and blacks receiving sentences of adjudication applied and adjudication withheld. As the table attached in our Appendix demonstrates, R3-120-166, there is almost no difference between the sentencing guideline scores of whites and blacks for both of these sentencing categories. Here again, plaintiffs never cited to any evidence in the district court undermining the undisputed finding that the sentence of adjudication withheld is rendered in a race-neutral manner.

These undisputed facts make it clear that plaintiffs' claims rest on nothing more than the disproportionate number of African-Americans in Florida's population of convicted felons. Such "an unvarnished" disparate impact approach cannot sustain a Section 2 claim. *Wesley*, 791 F.2d at 1260-61 (rejecting Section 2 challenge to Tennessee's felon disenfranchisement law because "it is well-settled . . . that a showing of disproportionate racial impact alone does not establish a *per se* violation of the Voting Rights Act"); *Smith v. Salt River*, 109 F.3d 586, 595 (9th Cir. 1997) ("a bare statistical showing of disproportionate impact on a racial minority does not satisfy the Section 2 'results' inquiry").

III. REQUIRING PAYMENT OF VICTIM RESTITUTION OWED BY A CONVICTED FELON DOES NOT CONSTITUTE A "POLL TAX"

Plaintiffs' final argument rests upon a wealth-discrimination claim they have not pled and a poll-tax claim no court has accepted. At the summary judgment

hearing, plaintiffs' counsel conceded that she did "not believe we have pleaded the wealth discrimination claim in the complaint." R11-240-102. In any event, any wealth-discrimination claim must necessarily fail, for "[t]he Fourteenth Amendment 'does not require absolute equality or precisely equal advantages,' *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 24 (1973), nor does it require the State to equalize economic conditions." *Ross v. Moffitt*, 417 U.S. 600, 612 (1974).

Plaintiffs' poll tax claim is equally without merit. The requirement that former felons pay whatever victim restitution they may owe under their initial sentences has nothing to do with the polls, nor is it a tax remitted to the state; it is part and parcel of the criminal punishment, the amount of which reflects the harm caused by the crime, not a price tag on the right to vote.

As the Fourth Circuit recently held, "it is not [plaintiff's] right to vote upon which payment of a fee is being conditioned; rather, it is the restoration of his civil rights upon which the payment of a fee is being conditioned. Consequently, [plaintiff] states no claim under the Twenty Fourth Amendment." *Howard*, 2000 U.S. App. LEXIS 2680, at * 4-5. Judge King reached the same inescapable conclusion in this case. R6-239-15-16. Felons stand apart from other members of society in that they may be constitutionally disenfranchised from it by virtue of their crimes. *See Richardson v. Ramirez*, 418 U.S. 24 (1974). And no court has

ever held that a State cannot constitutionally condition restoration of rights upon satisfaction of the criminal sentence itself.

Bynum v. Conn. Comm'n on Forfeited Rights, 410 F. 2d 173 (2d Cir. 1969), is the one case plaintiffs cite regarding the ability of an ex-felon to regain his voting rights. In that case, Bynum challenged a special $5 fee that the State of Connecticut had interposed as a precondition to considering his application to vote. The Second Circuit "did not determine the merits of Bynum's [constitutional] contention" but simply ordered that a three-judge district court be convened in order to do so. *Id.* at 176. The *Bynum* decision therefore supplies no precedent that could possibly assist plaintiffs here. Even if it did, "the required fee" assessed by Connecticut was peculiar to the voting process, separate and apart from Bynum's criminal sentence. In sharp contrast, the State of Florida in this case imposes no such additional fee upon felons seeking to vote.

IV. THERE IS NO MERIT TO PLAINTIFFS' EVIDENTIARY ARGUMENTS

By arguing that they would have fared better if they could have introduced more evidence in support of their doomed legal theories, plaintiffs only highlight the "kitchen-sink" approach they have had to this litigation from its inception.

1. The facts underlying Florida's promulgation of a new constitution in 1968 are not in dispute. For the district court to determine whether there was evidence of race discrimination, it needed only to look at plaintiffs' proposed

finding of fact 87; for it to conclude that there was a deliberative process, it need only look at the legislative history placed before it. Thus, the district court correctly excluded Professor Scher. A court does not need the "specialized knowledge" of an "expert" to tell it what the legislative history is to a 1968 enactment. *See* FRE 702. Moreover, Scher agreed with plaintiffs that there was "no evidence" of race discrimination, and sought only to confuse the "deliberative process" inquiry with vague (and irrelevant) opinions about the 1968 Constitution being "revision," not "reform." R3-131-Tab1,7-8.

Even more fundamentally, Scher was completely without credibility, since his report failed to mention the fact that there were committee minutes showing that there had been "considerable discussion" over various proposals to delete or significantly curtail the felon disenfranchisement rule. Thus, once he was excluded, plaintiffs jumped at the chance to introduce a host of new documentary materials that were *not* part of the legislative history, and that had *not* previously been made available to defendants. R6-232. Since this was an obvious attempt to rescue their claim from evidence they had either overlooked or ignored, and since discovery had long since ended, the court correctly denied their motion for leave to introduce new evidence. Indeed, this was a wholly unremarkable exercise of the trial court's ordinary discretion. *See* generally *Lee v. Russell County Bd. of Educ*.,

684 F.2d 769, 776 n.13 (11th Cir. 1982) (stating that the court has "broad discretion over the admission of evidence in a bench trial").

Nevertheless, since the relevant facts about 1968 simply are not disputed, it would have made absolutely no difference whatsoever if the court had accepted both Scher's report *and* the documentary materials: either way, they have no evidence of racism, and it is clear that Florida "deliberated." *See* generally *Perry v. State Farm Fire & Cas. Co.,* 734 F.2d 1441, 1446 (11th Cir. 1984) ("The admissibility of evidence is within the sound discretion of the district court . . . and even if error is found it must of course rise above the threshold of harmless error.")

2. Plaintiffs were required to identify their experts by November 16, 2001. Local Rule 16.1.K. Nevertheless, after a 12-month discovery period specially extended at plaintiffs' request, plaintiffs waited until they filed their response to defendants' motion for summary judgment on January 18, 2002, before disclosing that they planned to use an expert to rescue Dr. Chiricos' failed analysis by arguing that "felony arrests" may overstate criminal activity by blacks. The trial court had the discretion to exclude this late report.

The trial court also had the discretion to exclude the documents which the plaintiffs failed to identify until their "surprise" response brief on January 18, 2002, and which they expressly described as the documents on which Ginger would base his as-yet undisclosed report. R4-150-Att.E. These documents were

not produced to defendants as part of some supplemental response to discovery. They were dumped on defendants in a blatant "sandbag" maneuver that was designed to avoid summary judgment. Trial courts have the discretion to prevent that sort of gaming. *See e.g., Port Terminal & Warehousing Co. v. John S. James Co.,* 695 F.2d 1328, 1334-36 (11th Cir. 1983) (upholding as a valid exercise of discretion the trial court's exclusion of an expert witness when "[t]he late designation was the result of purposeful waiting on the part of defendants' counsel").

Plaintiffs hew and cry over these rulings is a red herring: even if Ginger had been accepted along with all of the various "bias studies" that plaintiffs drummed up, and even if the trial court pored over those documents with a fine-toothed comb, there is simply nothing there. Ginger employed no statistics whatsoever, and made no effort to explain how one could ever measure underlying criminal activity, R5-190-Tab8; and even plaintiffs can do no more than extract a generalized statement about "juvenile bias" from the studies Ginger relied on. Pl.Br.56. Thus, even if error, these rulings were clearly "harmless."

3. Plaintiffs claim that the pattern of racial bloc voting identified by their voting rights expert demonstrates the requisite causal connection. As plaintiffs have acknowledged, however, they are advancing a claim of vote *denial*, and thus they must demonstrate a causal nexus between some form of discrimination and

the denial of their voting rights. R2-68-15n.8. Thus, plaintiffs' attempt to show racial bloc voting, which merely describes the voting patterns of those blacks and non-blacks who are actually permitted to vote, has no bearing on the reasons for denial of plaintiffs' voting rights. Just as the state of Florida could not defend its *felon* disenfranchisement provision on the ground that *non-felons* do not vote along racially polarized lines, so too the plaintiffs cannot invoke such patterns as a basis for defeating the law. Such patterns are simply irrelevant to a vote denial claim.[9]

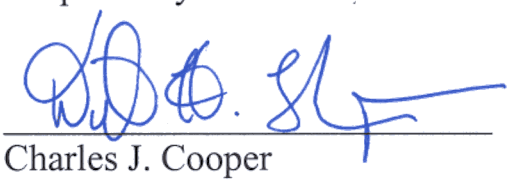
CONCLUSION

For the forgoing reasons, the trial court's decision should be affirmed.

[9] Moreover, their expert has advanced an analysis of that concept that is inconsistent with governing case law and that is concededly totally divorced from any showing of a causal connection between racial discrimination and voting. R3-122-952-53. Contrary to the rulings of this Court and the Fifth Circuit sitting *en banc*, plaintiffs' expert Professor Richard Engstrom has unequivocally stated that, in his opinion, the racial bloc voting inquiry should ignore race-neutral factors, such as partisan affiliation, that explain divergent voting patterns among voters of different races. *Compare SCLC*, 56 F.3d at 1293, *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 855, 892 (5th Cir. 1993) *with* R3-122-952-53. Indeed, in his view, even an electorate that is totally colorblind and votes without regard to the race of the candidate may be characterized as "racially polarized" if blacks and whites prefer candidates of different political parties. *Id.*

November 19, 2002

Respectfully submitted,



Charles J. Cooper
David H. Thompson
Hamish P.M. Hume
Derek L. Shaffer
COOPER & KIRK, PLLC
1500 K Street, N.W., Suite 200
Washington, D.C. 20005
(202) 220-9600

Paul Hancock
Deputy Attorney General
for Southern Florida
Office of the Attorney General
110 Southeast 6th St., 10th Floor
Fort Lauderdale, FL 33301
(954) 712-4670

George Waas
Assistant Attorney General
The Capitol
Tallahassee, FL 32399
(850) 414-3300

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(A)(7)(B). This brief contains 13,996 words.

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2002, I caused to be served two (2) true and correct copies of the Appendix to Brief of Defendants-Appellees by U.S. First Class mail upon the following:

Nancy Northup
Jessie Allen
Brennan Center for Justice
at New York Univeristy School of Law
161 Avenue of the Americas, 12th Floor
New York, NY 10013

James K. Green
Nina Zollo
James K. Green, P.A.
Suite 1630, Esperante'
222 Lakeview Ave.
West Palm Beach, FL 33401

Anita Hodgkiss
Lawyers' Committee for
Civil Rights Under Law
1401 New York Avenue, NW
Suite 400
Washington, D.C. 20005-2124

Jeff Ehrlich
William Candela
Jason Bloch
Miami-Dade County Attorney
Stephen P. Clark Center, Ste. 2810
11 NW 1st Street
Miami, FL 33128-1993

David Wagner
William Harlan
Litigation Attorney
Alachua County
Attorney's Office
12 S.E. 1st Street
Gainsville, FL 32602

Ronald Labasky
General Counsel
Florida State Association for Supervisors
Of Elections
318 North Monroe
Tallahassee, FL 32301

Robert C. Buschel
Ferrero, Buschel, Carter,
Shwarzreich, & Yates
201 Southeast 8th Street
Ft. Lauderdale, FL 33316

Samuel S. Goren
Michael D. Cirullo, Jr.
Josias, Goren, Cherof, Doody,
& Erzol, P.A.
3099 East Commercial Blvd., No. 200
Fort Lauderdale, FL 33308

H. Ray Allen, II
Donna Wysong
Mary Helen Campbell
Hillsborough County
Attorney's Office
601 E. Kennedy Blvd., #2700
Tampa, FL 33601

Charles S. Treat
Heather E. Marlow
Ilana Makovoz
Latham & Watkins
505 Montgomery Street, Ste. 1900
San Francisco, CA 9411

James J. Benjamin, Jr.
Nancy Chung
Stacey M. Schwartz
Akin Gump Strauss
Hauer & Feld LLP
590 Madison Avenue
New York, NY 10022

Paul A. Engelmeyer
Paul M. Winke
Wilmer, Cutler & Pickering
399 Park Avenue
New York, NY 10022

John R. Cosgrove
295 East Creek Drive
Menlo Park, CA 94025

The Internet upload of the brief in electronic format was completed November 19, 2002 at 11:45p.m.

Stephanie Sherman