No. 05-212

IN THE
Supreme Court of the United States

THOMAS JOHNSON, *et al.*,

Petitioners,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

Of Counsel:

JAMES E. JOHNSON
CAROLINE H. MOUSTAKIS
PHILIP ROHLIK
GREGORY A. DIAMOND
SHANYA DINGLE
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
(212) 909-6000

CATHERINE WEISS
Counsel of Record
BURT NEUBORNE
DEBORAH GOLDBERG
JUSTIN LEVITT
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Sixth Avenue, 12th Floor
New York, NY 10013
(212) 998-6730

Counsel for Petitioners

[Additional counsel listed on inside cover]

Of Counsel:

ANITA S. EARLS
UNC SCHOOL OF LAW
CENTER FOR CIVIL RIGHTS
CB No. 3380
Chapel Hill, NC 27599
(919) 843-7896

JESSIE ALLEN
NYU SCHOOL OF LAW
245 Sullivan Street
Room C37
New York, NY 10012
(212) 998-6449

JON M. GREENBAUM
BENJAMIN BLUSTEIN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Ave, NW
Suite 400
Washington, DC 20005
(202) 662-8600

TABLE OF CONTENTS

Table of Authorities ii

I. Respondents Misstate the Summary Judgment Record. 1

II. The Court Should Grant Review to Resolve the Circuit Split on Whether § 2 of the Voting Rights Act Applies to Felony Disenfranchisement. 3

A. The 15th Amendment Controls. 4

B. More Specific Findings Are Unnecessary. 5

III. The Court Should Grant Review To Bring the Lower Courts in Line with Its Precedent Regarding the Reenactment of a Tainted Law. 7

A. Respondents Misconstrue this Court's Precedent 7

B. The Lower Courts Are in Disarray. 8

C. This Case Squarely Presents the Issue. 9

Conclusion 10

TABLE OF AUTHORITIES

Cases: **Page(s)**

Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) 6

Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000) 8

City of Boerne v. Flores, 521 U.S. 507 (1997) 6

City of Rome v. United States, 446 U.S. 156 (1980) 5

Gonzales v. Raich, 125 S. Ct. 2195 (2005) 5

Graham v. Connor, 490 U.S. 386 (1989) 4

Gregory v. Ashcroft, 501 U.S. 452 (1991) 4

Hunter v. Underwood, 471 U.S. 222 (1985) 5, 7, 8, 9

Irby v. Va. State Bd. of Elections, 889 F.2d 1352 (4th Cir. 1989) 9

Johnson v. Bush, 405 F.3d 1214 (11th Cir. 2005) (en banc) 8

Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973) 2

Lopez v. Monterey County, 525 U.S. 266 (1999) 5

McCreary County v. ACLU of Ky., 125 S. Ct. 2722 (2005) 7

McLaughlin v. City of Canton, 947 F. Supp. 954 (S.D. Miss. 1995) 9

Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) 6

Oregon v. Mitchell, 400 U.S. 112 (1970) 6, 7

Seminole Tribe v. Florida, 517 U.S. 44 (1996) 4

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 6

Tennessee v. Lane, 541 U.S. 509 (2004) 6

Thornburg v. Gingles, 478 U.S. 30 (1986) 3

Cases – Continued:

United States v. Blaine County, 363 F.3d 897 (9th Cir. 2004) 6

United States v. Fordice, 505 U.S. 717 (1992)..... 7

United States v. Reese, 92 U.S. 214 (1875)..... 4

Federal Constitutional & Statutory Provisions:

U.S. Const. amend. XIV ..... *passim*

U.S. Const. amend. XV ..... *passim*

Voting Rights Act of 1965, 42 U.S.C. §§ 1973 *et seq*.. *passim*

State Constitutional & Statutory Provisions:

Fla. Const. art. VI, § 4 9

Fla. Const. of 1868, art. XIV, §§ 2, 4 ..... 2, 9

Legislative Materials:

S. Rep. No. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 3

H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437 6

Miscellaneous:

J. Morgan Kousser, *Poll Tax*, *in International Encyclopedia of Elections* 208-09 (Richard Rose et al. eds., 2000)..... 9

The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (2005), http://www.sentencingproject.org/pdfs/1046.pdf..... 1

The Opposition to Certiorari only underscores that each question presented in the Petition demands review. Respondents acknowledge, as they must, that the circuits are divided on whether the Voting Rights Act reaches felony disenfranchisement. Opp. at 5. As to the constitutional question, lower courts and litigants need guidance in determining when a reenactment salvages a policy tainted by an improper purpose and persistent discriminatory effects.

Respondents warn the Court to avoid "cast[ing] into doubt the criminal justice system of 48 States." Opp. at 1. Yet Florida does not keep company with 47 other states in its anti-democratic practices. Only two others (Kentucky and Virginia) permanently disenfranchise all people with felony convictions who have not received discretionary executive clemency. Florida is the nation's leading disenfranchiser. Of the 4.7 million Americans who have lost the right to vote because of a criminal conviction, 827,000 live in Florida.[1] Three-quarters of them—Petitioners here—have fully served their felony sentences and put the criminal justice system behind them, but remain political outcasts. They deserve a chance to prove at trial that Florida's voting ban violates the Voting Rights Act and the 15th and 14th Amendments.

I. Respondents Misstate the Summary Judgment Record.

1. Contrary to Respondents' assertions, Opp. at 3, 29-30, the summary judgment record is replete with contemporaneous evidence of racism behind Florida's 1868 felony disenfranchisement provision. One of Petitioners' expert reports details the obsession of Florida's prevailing Reconstruction leaders with constraining the political power of freedmen. Shofner Rep. (App. 197a-254a). Toward this end, the 1868 Constitution provided several tools for eviscerating such power. A skewed legislative apportion-

---

[1] The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (2005), http://www.sentencingproject.org/pdfs/1046.pdf; Uggen Rep. (App. 259a, 296a).

ment provision diluted the representation of counties where freed slaves were concentrated, while inflating the representation of white counties. Another provision empowered the governor to appoint local officials, precluding their election by local black majorities. As a Moderate Republican delegate wrote during the convention, "the Judiciary and State officers will be appointed & the apportionment will prevent a negro legislature." *Id.* (App. 222-24a).[2] In addition, for the first time, the Florida Constitution of 1868 disenfranchised all persons convicted of felonies. (App. 190a). Later that year, the legislature expanded the list of felonies and designated vagrancy, and other "crimes" intended to address "the altered condition of the colored race," as among the many that would trigger disenfranchisement. Shofner Rep. (App. 207-08a, 224-26a, 229-30a). These measures had the expected result. A captain in the Florida convict camps at the time estimated that 95% of the convicts in the 1870s and '80s were black. *Id.* (App. 234a).

2. Respondents charge that Petitioners have shown nothing beyond "mere disparate impact." Opp. at 18. On the contrary, Petitioners' summary judgment evidence demonstrates not only racial animus behind the felony disenfranchisement provision, but also a long history of both intentional and structural race discrimination in the criminal justice system, the clemency process, the franchise, and the purging of the voter rolls—all contributing to racial disparities in felony disenfranchisement.[3] If allowed to make

---

[2] The State's clear intention to suppress the black vote through these other provisions is highly probative of the same intent in the same convention's contemporaneous adoption of the felony disenfranchisement provision. *See Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 207 (1973) ("[A] finding of illicit intent as to a meaningful portion of the item under consideration has substantial probative value on the question of illicit intent as to the remainder.").

[3] *See* Shofner Rep. (App. 197-254a); Uggen Rep. (App. 255-300a); Uggen Add. (App. 301a); Uggen Supp. (App. 361-73a); Chiricos Rep. (App. 310-60a); Pet. at 4-7, 19-20.

their case at trial, Petitioners will show through this and other evidence that African Americans are disproportionately disenfranchised under the law at issue, not because they commit more crimes than others, but because they are particular targets of both law enforcement and vote suppression.

II. The Court Should Grant Review to Resolve the Circuit Split on Whether § 2 of the Voting Rights Act Applies to Felony Disenfranchisement.

Respondents concede that the courts of appeals are split on whether § 2 of the Act applies to felony disenfranchisement. Opp. at 5. This question requires resolution.

Dire predictions of a flood of insubstantial § 2 cases notwithstanding, Opp. at 17, a decision for Petitioners here would not throw open the courthouse doors. Section 2 is not a *per se* prohibition, but forbids only "qualification[s] . . . which result[] in a denial . . . of the right . . . to vote on account of race." 42 U.S.C. § 1973 (2005). It subjects such qualifications to a "totality of the circumstances" test, requiring pragmatic application of the "Senate factors" to determine whether a qualification that has a disparate impact on racial minorities also results in the denial of the right to vote "on account of race." *Id.*; *Thornburg v. Gingles*, 478 U.S. 30, 43-45 (1986).[4] The record in this case contains ample evidence of the interaction of Florida's felony disenfranchisement provision with discrimination in voting and other areas of public life. *Supra* Point I. And the amicus briefs demonstrate the tenuousness of the policies generally offered to support felony disenfranchisement laws.[5]

---

[4] *See* S. Rep. No. 97-417, at 33 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 211 (results test of § 2 "d[oes] not assure victory for plaintiffs," who must still establish race discrimination in totality of circumstances).

[5] *See* Brief for Amici Curiae Nat'l Black Police Ass'n et al.; Brief for Amicus Curiae League of Women Voters of Fla.

Respondents disregard the plain text of § 2 in contending that its comprehensive language excludes felony disenfranchisement, unless it is intentionally discriminatory, in which case it is covered. Opp. at 8 n.4. They explain this contorted interpretation by positing constitutional obstacles to the exercise of Congress's enforcement power. These impediments vanish upon inspection.

A. The 15th Amendment Controls.

Respondents assert that applying the results test of § 2 to felony disenfranchisement would encroach upon authority reserved to the states. Opp. at 15. But the 15th Amendment was enacted specifically to recast the state-federal balance of power with respect to denials of the franchise on account of race. As this Court recognized just five years after its passage, "Previous to this amendment, there was no constitutional guaranty against this discrimination [in the franchise]: now there is." *United States v. Reese*, 92 U.S. 214, 218 (1875). Because the application of § 2 of the Voting Rights Act to felony disenfranchisement is consistent with the state-federal balance already struck by the 15th Amendment, the clear statement rule of *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), does not apply here.

Respondents argue that the Penalty Clause of the 14th Amendment prevents Congress from reaching any felony disenfranchisement provision not born of racial animus. The 15th Amendment repudiates any such limit. Its specific ban on race discrimination in voting more directly controls this case than the 14th Amendment's general guarantee of equal protection. *See Graham v. Connor*, 490 U.S. 386, 394-95 (1989). Because it was enacted later, the 15th Amendment takes precedence over inconsistent provisions of the 14th. *See Seminole Tribe v. Florida*, 517 U.S. 44, 65-66 (1996). And Congress considered and rejected proposed versions of the 15th Amendment that explicitly exempted felony

disenfranchisement. Pet. at 15.[6] Whatever its effect on enforcement of the 14th Amendment,[7] the Penalty Clause simply does not limit Congress's power to enforce the 15th Amendment, including its power to prohibit race discrimination in voting that may not itself be demonstrably unconstitutional.[8] This power extends to felony disenfranchisement as to all other voting qualifications.

B. More Specific Findings Are Unnecessary.

Finally, Respondents charge Congress with neglecting an ostensible constitutional obligation to make specific findings regarding felony disenfranchisement. Opp. at 8. This charge has no basis. This Court has never demanded that Congress identify in advance every discriminatory tactic it intends to redress. Comprehensive remedial legislation would be impossible if Congress were forced to act as a court, condemning discriminatory tactics one by one on particularized findings of guilt, rather than as a legislature, responding to broader patterns of state discrimination.[9]

---

[6] Contrary to Respondents' suggestion, Opp. at 11 n.6, it is immaterial whether the rejected exemptions were embedded in proposals that would have expanded the Amendment's protections beyond race. In the end, Congress banned race discrimination in voting without an exception for felony disenfranchisement; there is therefore no basis for the Court to imply an exception here.

[7] This Court has held that the 14th Amendment prohibits racially discriminatory felony disenfranchisement, notwithstanding the Penalty Clause. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

[8] *See Lopez v. Monterey County*, 525 U.S. 266, 282-83 (1999) (Congress has the power under the 15th Amendment to "'prohibit voting practices that have only a discriminatory effect.'" (quoting *City of Rome v. United States*, 446 U.S. 156, 175 (1980))).

[9] As this Court recognized just last term in an analogous context, it "is not only unprecedented, it is also impractical" to require Congress to make "detailed findings proving that each activity regulated within a comprehensive statute is essential to the statutory scheme." *Gonzales v. Raich*, 125 S. Ct. 2195, 2208 n.32 (2005).

Instead, in assessing remedial legislation, this Court has required that Congress find a pattern of violations of the constitutional *right* at issue sufficient to justify legislation that reaches beyond what the Constitution mandates. Thus, for example, Congress's failure to find unconstitutional religious discrimination doomed the Religious Freedom Restoration Act, *City of Boerne v. Flores*, 521 U.S. 507, 530-31 (1997), while findings of unconstitutional gender discrimination in leave policies sufficed to uphold the Family and Medical Leave Act, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728-31 (2003). Similarly, Congressional findings of unconstitutional incursions on the fundamental right of access to the courts supported the relevant applications of the Americans with Disabilities Act, *Tennessee v. Lane*, 541 U.S. 509, 523, 527-28 (2004), but the same legislative record revealed insufficient constitutional violations to uphold the Act's protections of the non-fundamental right to public employment, *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 370-71 (2001).

This Court has repeatedly characterized the legislative record supporting the Voting Rights Act as the paradigm of a "serious pattern of constitutional violations" by the states. *Garrett*, 531 U.S. at 373 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)).[10] Congress found that this pattern would continue without strong prophylactic legislation. *See* H.R. Rep. No. 89-439, at 9-11 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2439-42. This record more than justifies the comprehensive remedial scope of § 2. The statute therefore reaches any course of state conduct that may violate its terms, with no implied exception for permanent felony disenfranchisement.

Nothing in Justice Black's opinion in *Oregon v. Mitchell*, 400 U.S. 112 (1970), striking down a federal minimum

---

[10] *See also City of Boerne*, 521 U.S. at 530; *United States v. Blaine County*, 363 F.3d 897, 905-07 (9th Cir. 2004).

voting age for state elections, suggests a different conclusion. In his view, the Reconstruction Amendments gave Congress the power to override state voting qualifications only with regard to race, not with regard to age. *Id.* at 126-27 (Black, J.). Justice Black was concerned not about the quality of Congressional findings, but about Congress's redefinition of substantive violations of the Constitution. His opinion reaffirms Congress's "unquestionabl[e]" power to "condemn and forbid every distinction, however trifling, on account of race." *Id.* at 127.

III. The Court Should Grant Review To Bring the Lower Courts in Line with Its Precedent Regarding the Reenactment of a Tainted Law.

This Court has consistently invalidated any policy that is tainted by an impermissible purpose and continues to achieve its intended result—unless a state can show that a legitimate justification actually purged the taint. *See McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2739-41 (2005); *United States v. Fordice*, 505 U.S. 717, 731 (1992); *id.* at 746-47 (Thomas, J., concurring); *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). Yet the Eleventh Circuit below failed to hold the State to its burden; Respondents produced no evidence of a contemporaneous, legitimate reason for the 1968 reenactment. Other courts also ignore or sidestep this Court's precedent. With hundreds of thousands of citizens permanently disenfranchised because of the silent reenactment of Florida's tainted policy, and with the growing importance of establishing impermissible purpose in a range of cases, this Court should ensure that its rule is followed.

A. Respondents Misconstrue this Court's Precedent.

This Court's precedents require that a state show a legitimate, intervening justification to break the link between the unconstitutional intent of a predecessor policy and the continuing discriminatory effects of a reenactment. Respondents attempt to distinguish *Fordice* and *McCreary*

County by emphasizing the passage of time since 1868, Opp. at 25-27, but a discriminatory taint persists until the link is affirmatively broken, even eighty years later. *See Hunter*, 471 U.S. at 233. The passage of time may allow a state more easily to establish a legitimate reason for a reenactment, but it does not eliminate this requirement.[11]

Respondents also seek to discredit this straightforward shift in the evidentiary burden by exaggerating what it requires. It is not that a discriminatory law "necessarily suffices to call into question the constitutionality of anything and everything that may have followed in its wake." Opp. at 27. It is not that a state must confess and repent the illicit intent of a prior provision. Opp. at 28. Rather, this Court has required that a state demonstrate that it had a legitimate reason for reenacting a tainted policy. This demand is hardly onerous, but Respondents have failed to meet it here.

B. The Lower Courts Are in Disarray.

Respondents fail to rationalize and harmonize the lower courts' decisions. Those courts have not recognized that the reenactment of a tainted policy is a distinct problem with a clear resolution. Without directly acknowledging the issue, the Fifth Circuit has asked whether the government articulated a valid reason upon reenacting a tainted policy. *See Chen v. City of Houston*, 206 F.3d 502, 520-21 (5th Cir. 2000).[12] The Eleventh Circuit does not. App. 20-25a. The

---

[11] Thousands of older members of the Plaintiff class have directly experienced the continuity of Florida's policy: They were disenfranchised under the 1868 provision, and its reenactment in 1968 provided no new, valid reason for their continuing second-class citizenship.

[12] As Respondents note, *Chen* states that despite a once-tainted policy, an "intervening reenactment with meaningful alterations may render the current law valid." *Id.* at 521; Opp. at 22. If the reenacting body explains its legitimate reason for such a reenactment, as Houston did, there is no dispute that the policy may stand. *See Chen*, 206 F.3d at 520 (noting "that the City's plans were independently substantially justified by

Fourth Circuit has recognized the issue but declined to decide it. *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1355 (4th Cir. 1989). This Court should clarify the governing principle.

C. This Case Squarely Presents the Issue.

Respondents maintain that this case does not actually involve the reenactment of a tainted policy. They claim that, because criminal disenfranchisement in Florida predates African-American voting rights, the 1868 provision could not have been adopted with racist intent. Opp. at 29. Not so. Poll taxes predated the extension of the franchise, but were turned to illegitimate ends when the franchise was extended; so, too, with felony disenfranchisement laws.[13]

Second, Respondents claim that the 1868 felony disenfranchisement provision was meaningfully amended, rather than merely reenacted, in 1968. Again, not so. Florida's current felony voting ban (Fla. Const. art. VI, § 4 (App. 192a)) is the same as its 1868 ban (Fla. Const. of 1868, art. XIV, § 2 (App. 190a)), and is expressed in virtually identical language: citizens with felony convictions are barred from the polls for life, unless the executive chooses to restore their rights. Pet. at 9 n.5. The only change in 1968 was the omission of a separate and largely redundant provision (Fla. Const. of 1868, art. XIV, § 4 (App. 190a)) that directed the legislature to disenfranchise people based on certain enumerated and "infamous" crimes, including some

---

traditional [race-neutral] districting factors"); *Hunter*, 471 U.S. at 228. But Florida has offered no reason for its 1968 reenactment.

[13] *See* J. Morgan Kousser, *Poll Tax*, *in International Encyclopedia of Elections* 208-09 (Richard Rose et al. eds., 2000) (noting the 18th-century history and later discriminatory use of the poll tax); *McLaughlin v. City of Canton*, 947 F. Supp. 954, 969-70, 976-78 (S.D. Miss. 1995) (reviewing the pre-Civil War history of criminal disenfranchisement in Mississippi, and evidence of its later discriminatory expansion); *cf. Irby*, 889 F.2d at 1354-56 (reviewing the race-neutral history of appointment of local school board officials and its later discriminatory application).

misdemeanors. The felony disenfranchisement provision, however, stands unchanged—in its intent, its terms, and its consequences.

Finally, Respondents claim—at least five times—that Petitioners conceded the absence of "any illegitimate purpose behind the 1968 provision." Opp. at 27; *see also id.* at 2, 19, 20, 28 n.15. Petitioners, however, did *not* concede that the 1968 provision was free of discriminatory intent. Petitioners acknowledged only that there is no evidence *in the R.H. Gray state archives* that race was considered in 1968. Pet. at 5.

This final quibble is a distraction, for it is premised on the wrong question. The real issue is whether, once Petitioners have shown a tainted history and continuous discriminatory impact, the State must prove that it had a legitimate reason to reenact its permanent felony disenfranchisement provision. This void cannot be filled by passing reference to the "penal laws," Opp. at 15 n.8, the existence of an "extensive deliberative process [of indeterminate content]" in the legislature, *id.* at 3, or the invocation of "an important [but unspecified] racially neutral public policy," *id.* at 16. Yet Respondents offer nothing more. This case turns on the allocation of the burden of proof; it therefore offers an excellent vehicle for this Court to clarify the issue.

CONCLUSION

For these reasons and those in the Petition, Petitioners respectfully request that this Court grant a writ of certiorari.

Dated: October 25, 2005

Respectfully submitted,

Of Counsel
James E. Johnson
Caroline H. Moustakis
Philip Rohlik
Gregory A. Diamond
Shanya Dingle
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
(212) 909-6000

Anita S. Earls
UNC SCHOOL OF LAW
CENTER FOR CIVIL RIGHTS
CB No. 3380
Chapel Hill, NC 27599
(919) 843-7896

Jon M. Greenbaum
Benjamin Blustein
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Ave., N.W.
Suite 400
Washington, DC 20005
(202) 662-8600

Catherine Weiss
Counsel of Record
Burt Neuborne
Deborah Goldberg
Justin Levitt
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Sixth Avenue, 12th Fl.
New York, NY 10013
(212) 998-6730

Jessie Allen
NYU SCHOOL OF LAW
245 SULLIVAN ST., ROOM C37
NEW YORK, NY 10012
(212) 998-6449