01-7260

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JALIL ABDUL MUNTAQIM, a/k/a Anthony Bottom,

Plaintiff-Appellant,

v.

PHILLIP COMBE, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of New York

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF PLAINTIFF-APPELLANT JALIL ABDUL MUNTAQIM AND IN SUPPORT OF REVERSAL

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IDENTITY AND INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a private, nationwide membership organization with over 400,000 members. It is dedicated to defending the principles of liberty and equality embodied in the United States Constitution and the nation's civil rights laws. As part of its program, the ACLU has been active in defending the equal right of racial and other minorities to participate in the electoral process, acting in numerous voting cases as direct counsel, e.g., Rogers v. Lodge, 458 U.S. 613 (1982); McCain v. Lybrand, 465 U.S. 236 (1984); Hunter v. Underwood, 471 U.S. 222 (1985), Holder v. Hall, 512 U.S. 874 (1994), and Abrams v. Johnson, 521 U.S. 74 (1997), and in others as amicus curiae. The New York Civil Liberties Union (NYCLU) is the New York state affiliate of the ACLU. It too is devoted to the protection and enhancement of fundamental principles of liberty and equality and, in that regard, is deeply committed to protecting the equal right of racial and other minorities to participate fully in the electoral process. This brief is being filed pursuant to the order of the Court of December 29, 2004, inviting amicus curiae briefs from interested parties, and the motion of the ACLU and NYCLU for leave to file an amici brief.

Amici will address the first issue identified by the Court in its December 29, 2004, order, i.e., "Whether Section 2 of the Voting Rights Act can constitutionally be applied to a state statute like Section 5-106, that disenfranchises persons currently incarcerated as felons and paroles, in light of the Supreme Court's

recent jurisprudence regarding Section 5 of the Fourteenth Amendment?"

ARGUMENT

I. SECTION 2 HAS BEEN HELD TO BE CONSTITUTIONAL AND HAS BEEN REPEATEDLY APPLIED BY THE COURTS.

Amici submit that Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, can constitutionally be applied to state statutes that disfranchise persons convicted of criminal offenses. Section 2 by its express language applies to any "voting qualification or prerequisite to voting or standard, practice, or procedure" that results in a denial or abridgement of the right to vote on account of race or color or membership in a language minority. Section 5-106 of the New York Election Law, which disfranchises persons currently incarcerated as felons and parolees, is plainly a "voting qualification or prerequisite to voting or standard, practice, or procedure" within the plain meaning of Section 2.

Amici note initially that the Supreme Court affirmed the constitutionality of Section 2 in Mississippi Republican Executive Committee v. Brooks, 469 U.S. 1002 (1984), aff'g Jordan v. Winter, 604 F.Supp. 807 (N.D.Miss. 1984) (three-judge court). The three-judge district court, relying upon the legislative history and "judicial and scholarly interpretation" of the statute, rejected the defendant's contention that Section 2 "exceeds Congress's enforcement power under the fifteenth amendment." Jordan v. Winter, 604 F.Supp. at 810-11. One of the questions presented in the statement of jurisdiction to the Supreme Court on appeal was:

"Whether Section 2, if construed to prohibit anything other than intentional discrimination on the basis of race in registration and voting, exceeds the power vested in Congress by the Fifteenth Amendment." Mississippi Republican Executive Committee v. Brooks, 469 U.S. at 1003 (Stevens, J., concurring).[1] In affirming the district court, the Supreme Court necessarily "rejec[ted] the specific challenges presented in the statement of jurisdiction." Id. (quoting Mandel v. Bradley, 432 U.S. 173, 176 (1977)). A summary affirmance is a decision on the merits, and is binding upon lower federal courts until such time as the Supreme Court tells them it is not. Hicks v. Miranda, 422 U.S. 332, 344-45 (1975); Doe v. Hodgson, 478 F.2d 537, 539 (2d Cir. 1973) ("we are bound by the Supreme Court's summary affirmances 'until such time as the Court informs us that we are not'"). Indeed, in Agostini v. Felton, 521 U.S. 203, 237 (1997), the Court reaffirmed that "'[i]f a precedent of [the Supreme] Court has a direct application in a case, yet appears to rest on reasons rejected in some other line of decision, the Court[s] of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of

[1] The basic provisions of the Voting Rights Act of 1965 were enacted pursuant to Congress's powers under the Fifteenth Amendment, South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966), although Section 4(e) of the act, 42 U.S.C. § 1973b(e), was enacted to enforce the equal protection clause of the Fourteenth Amendment. See Katzenbach v. Morgan, 384 U.S. 641, 652 (1966). Subsequent amendments and extension of the act in 1970, 1975, and 1982, were pursuant to congressional authority to enforce both the Fourteenth and Fifteenth Amendments. See Oregon v. Mitchell, 400 U.S. 112, 117-18 (1970); S.Rep. No. 94-295, 94th Cong., 1st Sess. 35-6 (1975); S.Rep. No. 97-417, 97th Cong., 2d Sess. 9-10, 27 (1982).

overruling its own decisions.'" Quoting from Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

Subsequent to Brooks, the court construed and applied Section 2 in Thornburg v. Gingles, 478 U.S. 30 (1986). It invalidated four multi-member legislative districts in North Carolina on the ground that they impaired "the opportunity of black voters 'to participate in the political process and to elect representatives of their choice.'" 478 U.S. at 34. The Court would not have done so had it doubted the constitutionality of the statute or that the statute reached voting procedures that diluted minority voting strength.

Moreover, the judgment of the Court in Gingles that the four districts violated Section 2 was unanimous. Justice O'Connor, for example, in a concurring opinion joined by Chief Justice Burger and Justices Powell and Rehnquist, expressly "agree[d] with the Court that proof of vote dilution can establish a violation of § 2 as amended." 478 U.S. at 87. Again, it is improbable that the Court would have reached the decision it did, and concurred unanimously in the judgment that the four legislative districts violated Section 2, if it had doubts about the constitutionality of the statute.

In cases involving Section 2 decided by it subsequent to Mississippi Republican Executive Committee v. Brooks and Gingles, the Court has never expressed any doubts or reservations about the constitutionality of the statute and has consistently enforced the obligations it places upon the several States. See, e.g., Chisom v. Roemer, 501 U.S. 380, 404 (1991) (applying Section 2 to the

method of electing appellate court judges); Houston Lawyers' Ass'n v. Atty. Gen. of Texas, 501 U.S. 419 (1991) (applying Section 2 to the method of electing state trial court judges); Growe v. Emison, 507 U.S. 25, 40 (1993) (applying Section 2 analysis to single member district plans); Voinovich v. Quilter, 507 U.S. 146, 154 (1993) (applying Section 2 analysis to claims of "influence" dilution); Holder v. Hall, 512 U.S. 874, 885-86, 951 n.3, 962-63 (1994) (rejecting the narrow interpretation that Section 2 should be limited to state laws that regulate access to the ballot or the process for counting a ballot); Johnson v. De Grandy, 512 U.S. 997 (1994) (applying Section 2 analysis to a state legislative redistricting plan); Reno v. Bossier Parish School Board, 520 U.S. 471, 486 (1997) (holding that discriminatory effects of dilution under Section 2 were relevant in determining whether there was a discriminatory purpose under Section 5); Abrams v. Johnson, 521 U.S. 74, 90 (1997) (noting that "Section 2 of the Voting Rights Act applies to any 'voting qualification or prerequisite to voting or standard, practice, or procedure . . . imposed or applied by any State or political subdivision'" and applying Section 2 analysis to a court ordered redistricting plan); Georgia v, Ashcroft, 539 U.S. 461, 478 (2003) (confirming that "§ 2 applies to all States"); Charleston County, S.C. v. United States, 125 S.Ct. 606 (2004), den'g cert. in 365 F.3d 341 (4th Cir. 2004) (successful Section 2 challenge to at-large elections in Charleston County).

The lower federal courts have similarly unanimously affirmed the constitutionality of Section 2. See, e.g., Mixon v. Ohio, 193

F.3d 389, 398 (6th Cir. 1999) ("Congress had the authority to regulate state and local voting though the provisions of the Voting Rights Act"); United States v. Marengo County Commission, 731 F.2d 1546, 1563 (11th Cir. 1984) ("[u]nder the test of McCulloch, section 2 is 'consis[tent] with the letter and spirit of the constitution' . . . and is clearly constitutional"); Jones v. City of Lubbock, 727 F.2d 364, 373 (5th Cir. 1984) ("Congressional power to adopt prophylactic measures to vindicate the purposes of the fourteenth and fifteenth amendments is unquestioned"); LULAC v. Clements, 986 F.2d 728, 760 (5th Cir. 1993) (affirming the constitutionality of Section 2 and holding that "concerns of federalism must not be allowed to emasculate Congress' power to adopt prophylactic measures to vindicate the purposes of those Amendments"); Sanchez v. Colorado, 97 F.3d 1303, 1314 (10th Cir. 1996); United States v. Blaine County, Montana, 363 F.3d 897, 907 (9th Cir. 2004) ("Congress did not exceed its Fourteenth and Fifteenth Amendment enforcement powers by applying section 2 nationwide"). See also Buckanaga v. Sisseton Independent School District No. 54-5, 804 F.2d 469, 471 (8th Cir. 1986) (applying Section 2 to a vote dilution claim by American Indians); Stabler v. County of Thurston, Neb., 129 F.3d 1015, 1020 (8th Cir. 1997) (same).

Given the decisions of the Supreme Court interpreting and applying Section 2, Justice O'Connor has concluded that "it would be irresponsible for a State to disregard the §2 results test."

Bush v. Vera, 517 U.S. 952, 991 (1996) (O'Connor, J., concurring).[2] In light of its consistent application by the federal courts, the constitutionality of Section 2 is apparent.

II. THE SUPREME COURT HAS CONSISTENTLY REJECTED CONSTITUTIONAL CHALLENGES TO OTHER PROVISIONS OF THE VOTING RIGHTS ACT.

In South Carolina v. Katzenbach, 383 U.S. 301 (1966), a number of Southern states challenged the constitutionality of several provisions of the Voting Rights Act of 1965: Section 5, 42 U.S.C. § 1973c; the suspension of literacy tests in the covered jurisdictions, 42 U.S.C. § 1973b(a); and the use of federal examiners to register voters, 42 U.S.C. § 1973d. The Court held that all the challenged practices were constitutional, despite the fact that Section 5 prohibited the use of new voting practices or procedures that had only a discriminatory effect, and despite the fact that the Court had earlier held that literacy tests were not per se violations of the Fourteenth and Fifteenth Amendments. See Lassiter v. Northampton County School Board of Elections, 360 U.S. 45, 52 (1959) (a literacy test for voting is "an allowable one measured by constitutional standards"). The Court concluded that the challenged provisions were appropriate measures enacted by Congress pursuant to Section 2 of the Fifteenth Amendment. South Carolina v. Katzenbach, 383 U.S. at 309.

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[2] Justice O'Connor further noted that while the Court had never granted plenary review of the constitutionality of the statute, "[i]n the 14 years since the enactment of § 2(b), we have interpreted and enforced the obligation that it places on States in a succession of cases." 517 U.S. at 990.

The Court, relying upon the rationale of South Carolina v. Katzenbach, and as appears more fully infra, has rejected other challenges to: the constitutionality of Section 4(e) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e)(2),[3] Katzenbach v. Morgan, 384 U.S. 641, 651 (1966); the 1965 act's ban on literacy tests in jurisdictions with no recent history of their discriminatory use, Gaston County v. United States, 395 U.S. 285, 287 (1969); the 1970 amendment of the Voting Rights Act which made the ban on literacy tests nationwide, Oregon v. Mitchell, 400 U.S. 112, 118 (1970); and, a challenge to the constitutionality of the 1975 extension of Section 5. City of Rome v. United States, 446 U.S. 156, 173 (1980).

In recognition of the central place that the franchise occupies in our constitutional system, the Court has consistently rejected attempts to limit or restrict the power of Congress to enforce the equal voting rights provisions of the Fourteenth and Fifteenth Amendments.

III. RECENT SUPREME COURT DECISIONS DO NOT CAST DOUBT ON THE CONSTITUTIONALITY OF SECTION 2.

The recent decisions of the Supreme Court regarding the power of Congress to enforce the Fourteenth Amendment pursuant to Section 5 of the amendment do not cast doubt upon the constitutionality of

[3] Section 4(e) provides that no person who has completed the sixth grade in a Puerto Rican school in which the predominant classroom language was not English can be denied the right to vote because of the inability to read or write English. The statute effectively prohibited enforcement of a New York law requiring the ability to read and write English as a condition for voting. Katzenbach v. Morgan, 384 U.S. at 643-44.

Section 2 of the Voting Rights Act. See City of Boerne v. Flores, 521 U.S. 507 (1997); Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999); Kimel v. Florida Board of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000); Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001); Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003); and Tennessee v. Lane, 124 S. Ct. 1978 (2004). None of these decisions involved voting rights or discrimination based upon race. Indeed, to the extent that the cases discuss voting rights legislation at all, they cite them as examples of the proper exercise of congressional power to enforce the Fourteenth and Fifteenth Amendments.

In City of Boerne v. Flores, 521 U.S. at 520, the Court invalidated the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb et seq., because of an absence of "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." However, the Court repeatedly cited the Voting Rights Act as an example of congressional legislation that was constitutional. See, e.g., 521 U.S. at 518 (citing the Voting Rights Act's suspension of literacy tests as an appropriate measure enacted under the Fifteenth Amendment "to combat racial discrimination in voting"); id. at 518 (the seven year extension of Section 5 of the Voting Rights Act and the nationwide ban on literacy tests were "within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States"); id. at 532 (citing

Section 5 of the Voting Rights Act as an "appropriate" measure "'adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against'" (quoting Civil Rights Cases, 109 U.S. 3, 13 (1883). The Court described various remedies imposed by the Voting Rights Act as "unprecedented," but deemed them "necessary given the ineffectiveness of the existing voting rights laws." 521 U.S. at 526.

The Court in City of Boerne also contrasted the extensive record of discrimination compiled by Congress when it passed the Voting Rights Act with what it characterized as the scant record of discrimination supporting passage of RFRA. The evidence of discrimination in voting was "subsisting and pervasive." 521 U.S. at 525. The deprivation of constitutionally protected voting rights was "widespread and persisting." Id. at 526. Congress had before it "a long history" of disfranchisement of voters on account of their race. Id. at 526 (quoting Oregon v. Mitchell, 400 U.S. at 147 (opinion of Black, J.)). Congress acted in light of the "evil" of "racial discrimination [in voting] which in varying degrees manifests itself in every part of the country." Id. at 526 (quoting Oregon v. Mitchell, 400 U.S. at 284 (opinion of Stewart, J.)). The legislative record disclosed "95 years of pervasive voting discrimination," id. at 526 (quoting City of Rome v. United States, 446 U.S. at 182), and "modern instances of generally applicable laws passed because of [racial] bigotry." Id. at 530. By contrast the legislative history of RFRA, in the view of the Court, contained no such evidence, leading it to conclude that

"RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." Id. at 532. Again, nothing in City of Boerne casts doubt upon the constitutionality of Section 2, or any other provision of the Voting Rights Act, which the Court has repeatedly held was proportional to a remedial objective.

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, like City of Boerne, involved neither voting rights nor racial discrimination. The Court invalidated the Patent Remedy Act, 35 U.S.C. §§ 271(h) & 296(a), allowing suits against a state because "Congress identified no pattern of patent infringement by the States, let alone a pattern of unconstitutional violations." Florida Prepaid, 527 U.S. at 640. But as in City of Boerne, the Court in Florida Prepaid expressly and repeatedly noted the constitutionality "of Congress' various voting rights measures" passed pursuant to the Fourteenth and Fifteenth Amendments, which it described as tailored to "remedying or preventing" discrimination based upon race. 527 U.S. at 639 and n.5.

Lest there be any doubt about the constitutionality of the Voting Rights Act, the Court in Florida Prepaid stressed that "[u]nlike the undisputed record of racial discrimination confronting Congress in the voting cases, . . . Congress came up with little evidence of [patent] infringing conduct on the part of the States." 527 U.S. at 640 (citation omitted). And to underscore the point, the Court repeated that "[t]he legislative

record thus suggests that the Patent Remedy Act does not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic § 5 legislation." Id. at 645 (quoting City of Boerne, 521 U.S. at 526, and its references to congressional voting rights enactments). As is apparent, nothing in Florida Prepaid remotely suggests that Section 2 of the Voting Rights Act is unconstitutional.

Kimel v. Florida Board of Regents invalidated the provision of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et seq., which subjected states to suit for money damages for age discrimination. Nothing in the opinion suggests that Section 2 of the Voting Rights Act is infirm. First, the Court held that classifications based upon age were unlike those based upon race, and that "age is not a suspect classification under the Equal Protection Clause." 528 U.S. at 83. Second, the Court held that states may discriminate on the basis of age if the classification "is rationally related to a legitimate state interest." Id. Classifications based on race, however, are constitutional only if they are narrowly tailored to further a compelling governmental interest. Id. at 84. According to the Court, age classifications, unlike racial classifications, are "presumptively rational." Id. Against this backdrop, the Court concluded that ADEA was not "responsive to, or designed to prevent, unconstitutional behavior." Id. at 86 (quoting City of Boerne, 521 U.S. at 532). The opposite is true of Section 2 of the Voting Rights Act. See South Carolina

v. Katzenbach, 383 U.S. at 309 (in enacting the Voting Rights Act Congress "felt itself confronted by an insidious and pervasive evil ...[and] unremitting and ingenious defiance of the Constitution").

In addition, according to the Court in the legislative history of ADEA "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." Kimel, 528 U.S. at 89. Again, the opposite can be said of the Voting Rights Act. Kimel casts no doubt upon the constitutionality of Section 2.

In United States v. Morrison the Court invalidated a section of the Violence Against Women Act of 1994, 42 U.S.C. § 13981, which provided civil penalties against private individuals who had committed criminal acts motivated by gender bias. The Court concluded that the disputed provision could not be upheld as a proper exercise of congressional power under Section 5 of the Fourteenth Amendment because "it is directed not at any State or state actor, but at individuals." 529 U.S. at 626. Section 2 of the Voting Rights Act, by contrast, is by its express terms directed at states and state actors, i.e., at "any State or political subdivision." It contains no provision for civil penalties or a cause of action against individual voters. Moreover, the Court cited as examples of the proper exercise of congressional power voting rights laws enacted pursuant to the Fourteenth and Fifteenth Amendments and found to be constitutional in Katzenbach v. Morgan and South Carolina v. Katzenbach. Id. Yet

again, nothing in United States v. Morrison casts any doubt upon the constitutionality of Section 2 of the Voting Rights Act.

In Board of Trustees of the University of Alabama v. Garrett the Court invalidated a portion of Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12112(a), allowing state employees to recover money damages by reason of the state's failure to comply with the statute. The Court concluded that there was no evidence of a "pattern of unconstitutional discrimination on which § 5 [of the Fourteenth Amendment] legislation must be based." 531 U.S. at 370. However, the Court was careful to underscore the constitutionality of the Voting Rights Act and singled it out as a preeminent example of appropriate legislation enacted to enforce the race discrimination provisions of the Civil War Amendments in the area of voting. Id. at 373 (the Voting Rights Act was "a valid exercise of Congress' enforcement power under § 2 of the Fifteenth Amendment").[4]

In Nevada Department of Human Resources v. Hibbs, 538 U.S. at 736, the Court affirmed the constitutionality of the family leave provisions of the Family and Maternal Leave Act, 29 U.S.C. §§ 2601-2654, noting that "state gender discrimination . . . triggers a heightened level of scrutiny." In doing so, it cited with approval the decisions in Katzenbach v. Morgan, Oregon v. Mitchell, and South Carolina v. Katzenbach, which rejected challenges to

[4] The Court noted that "Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment." 538 U.S. at 373 n.8.

provisions of the Voting Rights Act "as valid exercises of Congress' § 5 power [under the Fourteenth Amendment]." Hibbs, 538 U.S. at 738. Once again, nothing in Hibbs would support an argument that Section 2 was unconstitutional.

Finally, in Tennessee v. Lane, 124 S. Ct. at 1994, the Court held that Title II of the Americans With Disabilities Act, 42 U.S.C. §§ 12131-12165, as applied to the fundamental right of access to the courts, "constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." In doing so, it noted that "other measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments." Id. at 1986 n.4. Yet again, nothing in Lane suggests that Section 2 of the Voting Rights Act is unconstitutional.

None of the Supreme Court's recent jurisprudence regarding Section 5 of the Fourteenth Amendment casts any doubt on the constitutionality of Section 2. To the extent that the Court discusses legislation enacted by Congress pursuant to the enforcement provisions of the Fourteenth and Fifteenth Amendments to redress the problem of racial discrimination in voting, it does so to affirm the constitutionality of the Voting Rights Act. The Boerne line of cases thus removes, rather than raises, any questions about the constitutionality of Section 2.

The Ninth Circuit reached precisely that conclusion in United States v. Blaine County, Montana, in which it rejected the argument that Section 2 was unconstitutional in light of the Boerne line of cases. According to the court, "[w]hile it is true that the

Supreme Court has, in a series of recent cases, adopted a congruence-and-proportionality limitation on Congressional authority, this line of authority strengthens the case for section 2's constitutionality." 363 F.3d at 904. That was true because Boerne and "subsequent congruence-and-proportionality cases have continued to rely on the Voting Rights Act as the baseline for congruent and proportional legislation." Id. at 904-05. Again, the Boerne line of cases supports and does not undermine the constitutionality of Section 2.

IV. THE LEGISLATIVE HISTORY STRONGLY SUPPORTS THE CONSTITUTIONALITY OF SECTION 2.

When it enacted the Voting Rights Act in 1965, Congress documented a pervasive, chronic history of "unremitting and ingenious defiance of the Constitution" by many states in denying racial minorities the equal right to vote. South Carolina v. Katzenbach, 383 U.S. at 309. Although the Court expressed the hope that "millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live," id. at 337, the act in fact set off a new wave of purposeful discrimination against racial minorities. According to the 1982 Senate report:

> Following the dramatic rise in registration [after passage of the 1965 act], a broad array of dilution schemes were employed to cancel the impact of the new lack vote. Elective posts were made appointive; election boundaries were gerrymandered; majority runoffs were instituted to prevent victories under a prior plurality system; at-large elections were substituted for election by single-member districts, or combined with other sophisticated rules to prevent an effective minority vote. The ingenuity of such schemes seems endless. Their

> common purpose and effect had been to offset the gains at the ballot box under the Act.

S.Rep. No. 417, 97th Cong., 2d Sess. 6 (1982). The testimony and evidence before the Senate documenting these and other discriminatory voting practices was extensive.[5]

The House report noted similar instances of discrimination and widespread opposition to equal voting rights that followed passage of the 1965 act.

> Since the passage of the Act in 1965, reports presented by the U.S. Commission on Civil Rights, studies conducted by social and political scientists, and Congressional hearings have all identified discriminatory elements of the election process such as at-large elections, high fees and bonding requirements, shifts from elective to appointive office, majority vote run-off requirements, numbered posts, staggered terms, full slate voting requirements, residency requirements, annexations, retrocessions, incorporations, and malapportionment and racial gerry[mandering].

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[5] See, e.g., Voting Rights Act: Hearings Before the Senate Subcomm. on the Constitution of the Comm. of the Judiciary, 97th Cong., 2d Sess. 208-09 (1982) (statement of U.S. Sen. Charles Mathias, Jr., of Maryland); id. at 229 (statement of U.S. Sen. Edward M. Kennedy of Massachusetts); id. at 226 (statement of U.S. Sen. Howard M. Metzenbaum of Ohio); id. at 246 (testimony of Benjamin Hooks, Executive Director, NAACP); id. at 299 (testimony of Vilma Martinez, Executive Director, MALDEF); id. at 458-59 (testimony of Henry L. Marsh, Mayor of the City of Richmond, Virginia); id. at 676 (testimony of Henry J. Kirksey, Mississippi State Senator); id. at 802 (testimony of Armand Derfner, Joint Center for Political Studies); id. at 960 (testimony of Prof. Norman Dorsen, NYU School of Law); id. at 993-995 (testimony of Rolando Rios, Legal Director, Southwest Voter Registration Education Project); id. at 1180-81 (testimony of Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights); id. at 1189, 1201-04, 1209-10 (testimony of Frank R. Parker, Director of the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law); id. at 1286 (testimony of Steve Suitts, Executive Director, Southern Regional Council); id. at 1385 (testimony of Drew Days, Prof. of Law, Yale University); id. at 1430 (testimony of Archibald Cox, Chairman, Common Cause); id. at 1674 (statement of U.S. Sen. Patrick Leahy of Vermont).

H.Rep. No. 227, 97th Cong., 1st Sess. 18 (1981). The testimony and evidence before the House documenting these and other discriminatory voting practices was also extensive.[6]

Congress concluded:

> (1) that the difficulties faced by plaintiffs forced to prove discriminatory intent through case-by-case adjudication create a substantial risk that intentional discrimination barred by the Fourteenth and Fifteenth Amendments will go undetected, uncorrected and undeterred unless the results test proposed for section 2 is adopted; and (2) that voting practices and procedures that have discriminatory results perpetuate the effects of past discrimination.

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[6] See, e.g., 1 Extension of the Voting Rights Act: Hearings Before the House Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 97th Cong., 1st Sess. 38-41 (1981) (testimony of Rolando L. Rios, Legal Director, Southwest Voter Registration Education Project); id. at 226-27 (testimony of State Sen. Julian Bond of Georgia); id. at 401-02 (testimony of Rev. Curtis W. Harris, President of the Southern Christian Leadership Conference for the State of Virginia); id. at 452-53 (testimony of Prof. Richard Engstrom, University of New Orleans); id. at 511-16 (testimony of Frank R. Parker, Director of the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law); id. at 610-23 (testimony of Laughlin McDonald, Director, Southern Regional Office, American Civil Liberties Union Foundation, Inc.); id. at 790-99 (testimony of Abigail Turner, Esq.); 2 Extension of the Voting Rights Act: Hearings Before the House Subcomm. On Civil and Constitutional Rights of the Comm. on the Judiciary, 97th Cong., 1st Sess. 942-49 (1981) (testimony of Joaquin G. Avila, Associate Counsel, Mexican American Legal Defense and Educational Fund); id. at 1767-68 (testimony of Arthur S. Fleming, Chairman, U.S. Commission on Civil Rights); id. at 1797 (testimony of Raymond Brown, Southern Regional Council; 3 Extension of the Voting Rights Act: Hearings Before the House Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 97th Cong., 1st Sess. 1901 (1981) (testimony of David Dunbar, General Counsel, National Congress of American Indians); id. at 2007-08 (testimony of Prof. C. Vann Woodward, Yale University); id. at 2038 (testimony of James U. Blacksher, Esq.); id. at 2749-68 (testimony of Prof. Peyton McCrary, University of South Alabama).

S.Rep. No. 417 at 40. Congress plainly has the power to prohibit the use of voting practices that result in discrimination, whether or not such practices would also violate the discriminatory purpose standards of the Fourteenth or Fifteenth Amendments.

In identifying various practices that had been used to deny or dilute minority voting strength, Congress made it clear that the reach of Section 2 was not limited to those specific practices. The 1982 Senate report cited with approval the testimony of Attorney General Katzenbach during the hearings that led to the Act's passage in 1965, that the prohibitions of the Voting Rights Act were to apply to "any kind of practice . . . if its purpose or effect was to deny or abridge the right to vote an account of race or color." S.Rep. No 417 at 17. In addition, the report stressed that the Attorney General's testimony "is the most direct evidence of how the Congress understood the provision." Id. The report further noted that while many voting cases dealt with electoral features such as at-large elections, majority vote requirements, and districting plans, "Section 2 remains the major statutory prohibition of all voting rights discrimination." Id. at 30 (emphasis added).

That Section 2 was intended to reach any and all voting practices or procedures that result in discrimination is further apparent from the operation of a companion provision of the act, Section 5. Section 5 is not a discrete list of voting changes subject to preclearance, but "was designed to insure that old devices for disenfranchisement would not simply be replaced by new

ones." S.Rep. No 417 at 6. For that reason, any new voting practice or procedure sought to be implemented by a covered jurisdiction is subject to Section 5. In Allen v. State Board of Elections, 393 U.S. 544, 566-67 (1969), the Court made it clear that Section 5 is to be given the "the broadest possible scope" and that "Congress intended to reach any state enactment which alters the election law of a covered state in even a minor way." By the same token, any voting practice or procedure that results in discrimination, including state felon disfranchisement schemes, is subject to challenge under Section 2.

V. A STATE MAY NOT DISFRANCHISE FELONS IN A RACIALLY DISCRIMINATORY MANNER.

While the Supreme Court has held that the Fourteenth Amendment permits states to disfranchise persons convicted of felonies, Richardson v. Ramirez, 418 U.S. 24, 54 (1974), the Fourteenth Amendment is not a license for states to do so in a way that discriminates on the basis of race. Subsequent to Richardson, the Court decided Hunter v. Underwood, 471 U.S. 222 (1985), and invalidated a scheme in Alabama which disfranchised persons convicted of misdemeanors on the grounds that the offences had been chosen in a racially discriminatory manner. As for the argument that the Fourteenth Amendment authorized the disfranchisement of persons convicted of crimes, the Court held that

> we are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of [state law] which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in Richardson v. Ramirez . . . suggests to the contrary.

Id. at 233.

In Hobson v. Pow, 434 F. Supp. 362 (N.D.Ala. 1977), another post-Richardson v. Ramirez decision, the court invalidated an Alabama law disfranchising persons convicted of the crime of "assault and battery on the wife." There was no comparable provision disfranchising women for "assault and battery on the husband." The court held that the law was a gender based classification for which the state had presented no reasonable justification, and was therefore in violation of the Fourteenth Amendment. Id. at 367. And in Williams v. Taylor, 677 F.2d 510 (5th Cir. 1982), the Court of Appeals vacated and remanded for trial a convicted felon's claim that local election officials in Marshall County, Mississippi, selectively removed him from the list of registered voters because of his race and political association. The court held that while plaintiff, as a convicted felon, had no right to vote under state law, "he has the right not to be the arbitrary target of the Board's enforcement of the statute." Id. at 517. Richardson v. Ramirez is plainly no barrier to state action which otherwise violates the constitution.

Moreover, given the fact that Congress, in enforcing the non-discrimination provisions of the Fourteenth and Fifteenth Amendments, may prohibit practices that would not themselves violate the constitution, Congress has the power to prohibit discriminatory felon disfranchisement which would not otherwise be unconstitutional. As noted supra, the Court in South Carolina v. Katzenbach upheld the Voting Rights Act's suspension of literacy

tests and ban on new voting practices that had a discriminatory effect in jurisdictions covered by Section 5, even though the tests and practices would not themselves be unconstitutional. The Court concluded that the provisions of the act were appropriate measures enacted by Congress pursuant to Section 2 of the Fifteenth Amendment. 383 U.S. at 309.

Similarly, in Katzenbach v. Morgan, 384 U.S. at 648-49, the Court held that the "inability to read or write" English provisions of § 4(e) of the Voting Rights Act were constitutional, despite the constitutionality of literacy tests. Requiring proof of a constitutional violation:

> would deprecate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional.

384 U.S. at 648-49. Legislation enacted to enforce the Fourteenth Amendment, such as Section 4(e), was constitutional, according to the Court, if it could find that it "is plainly adapted to [the] end" of enforcing the equal protection clause and "is not prohibited by but is consistent with 'the letter and spirit of the Constitution,'" regardless whether the practices outlawed by Congress themselves violated the equal protection clause. Id. at 651 (quoting McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

The Court rejected a similar contention by Gaston County, North Carolina, which argued that the 1965 Voting Rights Act's ban on literacy tests should not be applied because the county had not

used any such test during the preceding five years to discriminate against anyone on account of race or color. Gaston County v. United States, 395 U.S. at 287. The Court accepted the county's representations as true, but, pointing to the history of discrimination in education in the county, concluded that "'[i]mpartial' administration of the literacy test today would serve only to perpetuate these inequities [in education] in a different form." 395 U.S. at 297.

Similarly, in Oregon v. Mitchell, 400 U.S. at 117-188, the Court unanimously rejected a challenge by Arizona to the 1970 amendment of the Voting Rights Act enacted pursuant to the Fourteenth and Fifteenth Amendments which made the ban on literacy tests nationwide. In a concurring opinion, Justice Harlan explained that:

> Despite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious. This danger of violation of § 1 of the Fifteenth Amendment was sufficient to authorize the exercise of congressional power under § 2.

400 U.S. at 216.

And in City of Rome v. United States, the Court rejected a challenge to the constitutionality of Section 5 of the Voting Rights Act. It held that "even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect."

446 U.S. at 173. Section 5 of the Voting Rights Act was "an appropriate method of promoting the purposes of the Fifteenth Amendment." Id. at 177. In reaching this conclusion, the Court cited with approval Katzenbach v. Morgan and Oregon v. Mitchell, which held other provisions of the Voting Rights Act constitutional as appropriate exercises of congressional power under the Fourteenth Amendment. Id. at 176-77.

At the heart of the argument that Section 2 of the Voting Rights Act exceeds Congress' authority under the Fourteenth and Fifteenth Amendments is the claim that those two constitutional amendments prohibit only "intentional discrimination" and Section 2 of the Voting Rights Act extends beyond merely a prohibition against "intentional discrimination." But the nationwide prohibition against literacy tests imposed by the Voting Rights Act also extended well beyond the "intentional discrimination" limits of the substantive prohibition of the Fourteenth and Fifteenth Amendment. And yet, in Oregon v. Mitchell, the Supreme Court upheld the constitutionality of this statutory prohibition and in Boerne the Court held that the nationwide ban on literacy tests were well "within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens that those measures placed on the States." Boerne, 521 U.S. at 532. If the nationwide ban on literacy tests, as set forth in the Voting Rights Act, is constitutional so too is the application of Section 2 to the circumstances of a felony disfranchisement statute of the sort at issue here. And in light of the relevant decisions of the Supreme

Court, Section 2 of the Voting Rights Act may be used to challenge felon disfranchisement schemes that have a discriminatory result, even if they are not purposefully discriminatory, as an appropriate way of enforcing the guarantees of the Fourteenth and Fifteenth Amendments.

The court in Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003), relying, inter alia, upon Hunter v. Underwood and the legislative history, rejected the argument that Section 2 could not be used to reach a state's felon disfranchisement laws. The court concluded that "when felon disenfranchisement results in denial of the right to vote or vote dilution on account of race or color, Section 2 affords disenfranchised felons the means to seek redress." Farrakhan, 338 F.3d at 1016. In remanding for trial on plaintiffs' Section 2 claim, the Court of Appeals expressed "no opinion" on the merits. Id. at 1020. The Supreme Court denied the state's petition for a writ of certiorari. See Locke v. Farrakhan, 125 S. Ct. 477 (2004). Amici submit that the court in Farrakhan reached the correct conclusion that Section 2 may be used to challenge state felon disfranchisement laws that have a discriminatory result.[7]

[7] In Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986), while it ultimately rejected the claim, the court applied Section 2 in analyzing plaintiff's contention that Tennessee's felon disfranchising law had an unlawful discriminatory result.

CONCLUSION

Amici respectfully submit that the decision of the district court should be reversed and the case remanded for trial on the merits.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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