No. 02-14469-CC

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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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE IN PART AND URGING AFFIRMANCE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE AND URGING AFFIRMANCE

INTEREST OF THE UNITED STATES

Plaintiffs in this case allege that a provision in the Florida constitution barring felons from voting violates the Equal Protection Clause and Section 2 of the Voting Rights Act (VRA), 42 U.S.C. 1973. This appeal addresses the application of the Equal Protection Clause to that provision and the standards of proof necessary to establish that the Florida provision, in interaction with the Florida criminal justice system, violates Section 2.

The United States enforces Section 2, 42 U.S.C. 1973j(d), which prohibits discrimination in voting practices on account of race or color, as well as various

other provisions of the Voting Rights Act. The United States therefore has a significant interest in providing the Court with its views.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. 1331 and 28 U.S.C. 1343. The district court entered final judgment on July 18, 2002, and appellants filed a timely notice of appeal on August 9, 2002. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly entered summary judgment for defendants on plaintiffs' claim that the Florida constitutional provision that bars felons from voting was discriminatorily motivated.

2. Whether the district court correctly entered summary judgment for defendants on plaintiffs' claim that the Florida constitutional provision that bars felons from voting violates the results test of Section 2 of the Voting Rights Act, 42 U.S.C. 1973.[1]

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[1] These issues correspond to issues 1, 3, 4, and 5 in the Brief of Plaintiffs-Appellants (Pltf. Br. at 2-3). Appellants also raise an evidentiary issue (Issue 2) and a poll tax issue (Issue 6) that the United States does not address.

STATEMENT OF FACTS, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

A. *Background.*

1. Plaintiffs are seven Florida citizens convicted of felonies and therefore ineligible to vote under Florida law. This class action alleged that the provision of the Florida Constitution of 1968 that bars felons from voting discriminates on the basis of race in denying plaintiffs and other members of their class of convicted felons the right to vote, and imposes an improper poll tax and wealth qualification on voting in violation of the First, Fourteenth, Fifteenth, and Twenty-Fourth Amendments to the United States Constitution, and Sections 2 and 10 of the Voting Rights Act (VRA). Defendants are the Governor, Attorney General, and Secretary of State of Florida, members of the Florida Clemency Board, and six county election supervisors (as representatives of all Florida county election supervisors). On July 18, 2002, the district court granted defendants' motion for summary judgment. *Johnson* v. *Bush*, 214 F. Supp. 2d 1333 (S.D. Fla. 2002) (*Johnson*).

2. Florida's constitution provides: "No person convicted of a felony * * * shall be qualified to vote or hold office until restoration of civil rights * * *." Fla. Const. Art. VI, § 4(a) (1968). "Felony" means "any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by death or by imprisonment in the state penitentiary." Fla. Const. Art. X, § 10 (1968).

Section 2 of the VRA provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color * * * as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. 1973. In 1982, Congress amended Section 2 "to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test,' applied by [the Supreme] Court in *White* v. *Regester*, 412 U.S. 755 [] (1973), and by other federal courts * * *." *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986). When amending Section 2 in 1982 to enact the results test, Congress made clear that the test was a means to uncover and remedy the effects that intentionally discriminatory actions continue to have on the electoral process; the test was not intended to prohibit acts devoid of any entanglement with the effects of intentional racial discrimination. *United States* v. *Marengo County Comm'n*, 731 F.2d 1546, 1557 (11th Cir.), appeal dismissed and cert. denied, 469 U.S. 976 (1984).

B. *Facts.*

Plaintiffs' first contention has two elements. First, they argue that when Florida adopted its 1868 constitution, in order to deny African-Americans the right to vote Florida altered earlier constitutional provisions barring persons convicted of a crime from voting. Second, plaintiffs contend that when Florida adopted its current constitution in 1968, it left the 1868 disenfranchisement scheme essentially unaltered and that, therefore, the 1868 discriminatory intent infects the 1968 provision. Since the parties' briefs set out the facts, this brief will provide only a brief summary.

1. The 1838 constitution provided that "[t]he General Assembly shall have power to exclude * * * from the right of suffrage, all persons convicted of bribery, perjury, or other infamous crime." Fla. Const. Art. VI, § 4 (1838) (Pltf. Br. Addendum at i). It also provided that

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

Fla. Const. Art. VI, § 13 (1838) (Pltf. Br. Addendum at i) (see U.S. Addendum 1). These provisions remained essentially unchanged in the 1861 constitution, when Florida seceded from the Union, and in the 1865 constitution, when Florida sought to rejoin the Union (*id.* at i-ii). Since the only persons granted the right to vote at that time were white men above twenty-one, Fla. Const. Art. VI, § 1 (1838), plaintiffs do

not claim that the 1838 provisions that barred felons from voting were directed at black persons.

2. When Congress rejected Florida's 1865 constitution, Florida convened a convention to write a new one. The original draft of the new constitution did not contain a provision barring felons from voting (Doc. 121 at 426-427, 434 (Shofner Expert Report) (see U.S. Addendum 2)[2]). "Moderate" delegates, allied with ex-Confederates, took control of the convention, refused to admit "radical" delegates who favored suffrage for freed slaves, and replaced the draft with one containing two provisions addressing voting by persons convicted of a crime (*id.* at 434-443). The first provision explicitly disqualified felons from voting: "No person * * * convicted of felony [shall] be qualified to vote at any election unless restored to civil rights." Fla. Const Art. XIV, § 2 (1868) (Pltf. Br. Addendum at ii). The second provision instructed the legislature to "enact the necessary laws to exclude * * * from the right of suffrage, all persons convicted of bribery, perjury, larceny, or of infamous crime * * *." Fla. Const. Art. XIV, § 4 (1868) (Pltf. Br. Addendum at iii).

Under the 1868 constitution:

> Conviction for misdemeanors also led to disenfranchisement if they were "infamous crimes." Those crimes were "offenses against chastity, morality, and decency," such as adultery, polygamy, keeping houses of ill fame, crimes against nature, and 25 others. Vagrancy was included in this section of the statute. "Rogues and vagabonds, idle and dissolute persons. . ., stubborn children, runaways, . . . and all other idle and disorderly persons," are only examples of a lengthy list of persons

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[2] For the convenience of the Court, record items cited herein and not contained in the Appellant's Record Excerpts are reproduced as Addenda to this brief.

> whose conduct subjected them to punishment as vagrants by confinement in the county jail for terms not exceeding six months.

(Doc. 121 at 444). The legislature added provisions to the criminal code that plaintiffs allege had been regarded as civil offenses before 1865 - petty crimes that would have been handled by the master on the plantation (Doc. 122 at 883 (Shofner Deposition) (see U.S. Addendum 3)).

Plaintiffs allege that by 1876, "the conservative Democrats with the control of the state election machinery found that it was increasingly easy to arrest, incarcerate and disenfranchise blacks * * * [without having] to go to felony in most cases, just petty crimes" (*id.* at 900).[3] These constitutional provisions barring the vote to persons convicted of certain crimes remained essentially unchanged by the Constitution of 1885 (Pltf. Br. Addendum at iii).

3. In 1965, the Florida Legislature created a Constitution Revision Commission ("CRC") to revise Florida's constitution (Doc. 120 at 3 (Scher Expert Report) (See U.S. Addendum 4)).[4] The CRC, in turn, formed a Subcommittee on Suffrage and Elections that had authority over the voting provisions.

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[3] While the district court and the parties use the term "felon disenfranchisement" when referring to the 1868 constitution, the disenfranchisement scheme established in 1868 was not limited to felons.

[4] In an order entered April 18, 2002, the district court excluded the expert report and testimony of plaintiffs' expert Scher. Nevertheless, the court referred to his expert report and deposition in its opinion. See *Johnson*, 214 F. Supp. 2d at 1339.

Minutes of the Committee on Suffrage and Elections' meetings state that one member moved to adopt the initial version of Article VI, Section 4. A motion was then made to amend the original draft by striking "judicially determined to be of unsound mind, or under judicial guardianship because of mental disability" and to substitute "persons adjudicated mentally incompetent." This motion was seconded and passed. Another amendment was offered adding "in this or any other state and who have not had their competency judicially restored." This amendment was also seconded and passed. After considerable discussion, a member moved that Section 4 be deleted and the following inserted: "The Legislature may by law establish disqualifications for voting for mental incompetency or conviction of a felony." The motion was seconded. Another member then offered a substitute motion to 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, this motion failed for lack of a second. The vote was taken on the pending motion, but it failed adoption. It was then moved that the word "felony" in line 2 of Section 4 be changed to "crime." The motion failed for lack of a second.

With no further amendments, the Committee then adopted Section 4 of Article VI, (Suffrage and Elections Committee Meeting, February 2 and 3, 1966, pp. 6-7 (Doc. 150 at 982-983 (see U.S. Addendum 5); see *Johnson*, 214 F. Supp. 2d at 1339-1340)):

> 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.

Fla. Const. Art. VI, § 4(a) (1968). This eliminated the provision authorizing the legislature to enact laws excluding from suffrage persons convicted of infamous crimes (Doc. 120 at 4). The CRC and the legislature apparently had available, and considered, alternative provisions from other states, but chose not to adopt them (Doc. 120 at 8 (Scher Expert Report)).[5]

4. Plaintiffs also contend that "Florida's criminal justice system, through discretionary decisions to police neighborhoods or grant lenient dispositions, consistently operates to the disadvantage of blacks" (Pltf. Br. at 16) (citations omitted). Plaintiffs claim that discrimination in the criminal justice system, in conjunction with the provisions barring felons from voting, results in denial or abridgement of their right to vote on account of race or color in violation of Section 2.

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[5] In a case involving another section of the 1968 constitution, the Florida Supreme Court gave the following summary of subsequent events leading to adoption of the 1968 constitution:

> The Florida Constitution Revision Commission at its Convention beginning November 28, 1966, was presented an initial draft of a proposed Constitution prepared on the basis of final committee reports compiled after public hearings had been held throughout the state. * * * The Constitution Revision Commission met in Tallahassee from November 28, 1966, through December 16, 1966. * * * A Special Session of the Legislature was held from July 31, 1967, through August 18, 1967, for the purposes of constitutional revision. * * * [T]he proposed Constitution [was] presented to the people of Florida and adopted by their vote November 5, 1968.

State v. *City of St. Augustine*, 235 So. 2d 1, 5 n.7 (Fla. 1970).

Plaintiffs primarily rely on statistics compiled and analyzed by expert witnesses to support their claim that Florida's criminal justice system discriminates against black persons because of race or color (Pltf. Br. at 13-19, 44-46). Plaintiffs assert that the statistical analyses demonstrate that "discretionary decisions at every level of the criminal justice system determine[] who among the law breakers will be arrested, prosecuted, and, ultimately, convicted," and that those discretionary decisions "intersect with racial bias" (Pltf. Br. at 45). Defendants presented their own experts challenging the conclusions of plaintiffs' experts (see, *e.g.*, Doc. 120 at 116-138) (Katz Expert Report) (see U.S. Addendum 6)). The district court did not resolve this conflicting expert testimony.

C. *District Court Decision.*

The district court analyzed the circumstances under which the 1968 constitution was adopted. Citing *Cotton* v. *Fordice*, 157 F.3d 388, 391 (5th Cir. 1998), the court stated that "'a facially neutral provision . . . might overcome its odious origin.' Further, a new provision may supersede the previous provision and remove the discriminatory taint associated with the original version." *Johnson*, 214 F. Supp. 2d at 1339 (citation omitted).

Finding that the 1968 "revision process was designed to completely overhaul the state constitution," *ibid.,* the court examined the deliberations relating to the 1968 provision, and found that the new constitution was "ultimately adopted by Florida's voters without any evidence of discussion of discriminatory intent based upon race. * * * The 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." *Id.* at 1340.

> Plaintiffs at most have presented evidence to suggest that Florida's felon disenfranchisement policies were racially motivated in 1868. However, they have not presented any evidence that the legislature that enacted the felon disenfranchisement provision in 1968 did so to discriminate against African Americans. Without 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 to the [*sic*] Florida's 1868 disenfranchisement law, the Court grants summary judgement in favor of the State on Plaintiffs' claim of intentional racial discrimination.

Id. at 1340-1341.

The court then turned to plaintiffs' claim that the provision that bars felons from voting violates the results test of Section 2. Citing *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986), the district court recognized that plaintiffs could demonstrate a violation of Section 2 by showing that "under the totality of the circumstances, the political process are [*sic*] not equally open to participation by members of a protected class in that its members have less opportunity than other members of the electorate to participate in the political process." *Johnson*, 214 F. Supp. 2d at 1341. The court was guided by the principle that

> the existence of some form of racial discrimination remains the cornerstone of section 2 claims. * * * [T]he 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. * * * Thus, no Section 2 violation occurs when factors other than race caused election results with a disparate impact on minorities.

Ibid. (citations omitted). As a result, the court concluded:

> The African American ex-felon Plaintiffs have not been denied the right to vote because of an immutable characteristic but because of their own criminal acts. This is also true of the non-African American class members. Thus, it is not racial discrimination that deprives felons, black or white, of their right to vote but their own decision to commit an act for which they assume the risks of detection and punishment. * * * * * [P]laintiffs have failed to make the requisite showing that they are denied the right to vote on account of race rather than some racially neutral cause. * * * Plaintiffs have, in effect, disenfranchised themselves by committing a felony.

Id. at 1341-1342 (citations omitted).

Addressing the claim that Florida operated its criminal justice system in an intentionally discriminatory manner, thereby infecting the decision to bar felons from voting, the court stated that the plaintiffs offered only statistics to prove their claim of intentional discrimination and held that statistics alone are insufficient to prove discriminatory intent. The court stated that even if there were intentional discrimination in the criminal justice system, the disqualification of convicted felons would not violate Section 2 because the discrimination would be on the part of prosecutors and judicial officials – discrimination that is not part of the "disenfranchisement provision" and therefore does not "cause[] the vote denial." *Id.* at 1342. Accordingly, the district court entered summary judgment on plaintiffs' Section 2 claim. *Ibid.*

D. *Standard Of Review.*

This Court "review[s] a summary judgment ruling *de novo*, applying the same legal standards used by the district court." *Johnson* v. *Board of Regents*, 263 F.3d

1234, 1242 (11th Cir. 2001). The Court views the materials presented and all factual inferences in the light most favorable to the non-moving party. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Rule 56 requires a court to grant summary judgment in favor of the moving party when the record shows that there are no genuine issues of material fact to be tried, and that the moving party is entitled to judgment as a matter of law. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

SUMMARY OF ARGUMENT

The district court correctly entered summary judgment for defendants on the Equal Protection and Section 2 claims.

Provisions that bar persons convicted of a crime from voting are recognized by the U.S. Constitution as legitimate and unexceptional qualifications of the right to vote. U.S. Const. Amend. XIV, § 2. There is, therefore, nothing inherently suspect about the enactment of such provisions.

Plaintiffs claim that Florida adopted predecessor provisions in the mid-1800's with the intent to discriminate against minorities because of race or color, and that this intent carries over to the 1968 provisions. While it is true that the Fourteenth Amendment forbids the implementation of voting practices adopted with the intent of discriminating because of race or color, proof of such discrimination is lacking here. The district court correctly held that even if racial bias infected the adoption of provisions in 1868, the 1968 legislative reconsideration of the constitutional provision effectively eradicated any discriminatory intent infecting the adoption of

the 1868 provisions. In addition, the fact that the 1968 provisions ultimately were ratified by popular vote, in which there is no evidence of discriminatory motivation by the electorate or discriminatory manipulation of the vote by legislators, further establishes the lack of discriminatory intent in 1968. Section 2 of the Voting Rights Act prohibits actions made with discriminatory motivation that affect voting practices; the standards it imposes are identical to constitutional standards. See *City of Mobile* v. *Bolden*, 446 U.S. 55, 60-61 (1980). The district court's decision on the Equal Protection issue, therefore, also establishes that the intent portion of Section 2 has not been violated.

Section 2 of the VRA also forbids the use of voting practices that result in discrimination because of race or color even where there is no proof of discriminatory motivation in the adoption of the voting practice. Plaintiffs claim that Florida's criminal justice system operates in a racially discriminatory manner, and that this intentional discrimination interacts with the provision that bars felons from voting, resulting in a violation of Section 2. The results test of Section 2 prohibits actions that, based on the totality of circumstances, affect current voting practices and serve to extend the effects of past actions grounded in historical, intentional discrimination. The statistics plaintiffs submitted to the district court, however, wholly fail to demonstrate that the Florida criminal justice system is in fact operated in a racially discriminatory manner. Therefore, plaintiffs failed as a matter of law to demonstrate discrimination that interacts with provisions that affect the right to vote.

Thus, the district court properly entered summary judgment for defendants on plaintiffs' Section 2 results claim.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY ENTERED SUMMARY JUDGMENT FOR DEFENDANTS ON PLAINTIFFS' CLAIM THAT FLORIDA ADOPTED THE 1968 PROVISION OF THE FLORIDA CONSTITUTION THAT BARS FELONS FROM VOTING WITH THE INTENT TO DISCRIMINATE BECAUSE OF RACE

1. The United States Constitution recognizes that provisions of State law barring persons convicted of crimes from voting are legitimate qualifications of the right to vote. U.S. Const. Amend. XIV, § 2 ("But when the right to vote * * * is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced") (emphasis added).

The Supreme Court has twice considered this Constitutional language. In the first instance, *Richardson* v. *Ramirez*, 418 U.S. 24 (1974), plaintiffs claimed that a provision of the California constitution denying convicted felons the right to vote was a *per se* violation of the Equal Protection Clause because voting is a fundamental right. *Id.* at 33. Rejecting that claim, the Court held that the phrase "other crime" in Section 2 of the Fourteenth Amendment was "intended by Congress to mean what it says," *id.* at 43, and that Section 2 "affirmative[ly] sanction[ed]" the

exclusion of felons from the franchise, thereby giving Constitutional support to laws that bar felons from voting. *Id.* at 54.

The second review of similar provisions, in *Hunter* v. *Underwood*, 471 U.S. 222 (1985), established that provisions barring persons convicted of a crime from voting are not completely free from careful judicial scrutiny. In *Hunter*, plaintiffs challenged a provision of the Alabama constitution, racially neutral on its face, that barred from voting any person convicted of, among other offenses, "any crime . . . involving moral turpitude," including certain misdemeanors. *Id.* at 223-224. Plaintiffs claimed that the constitutional provision was "intentionally adopted to disenfranchise blacks on account of their race" and that the provision "has had the intended effect." *Id.* at 224. The official proceedings of the State convention indicated that one of the intentions of the delegates was "to establish white supremacy in this State," *id.* at 229 (citing 1 Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901, p. 8 (1940)), and at oral argument counsel for Alabama conceded that racial discrimination was a significant factor in adoption of the challenged provision. *Id.* at 229-230.

The Court considered plaintiffs' intentional discrimination claim under the standards articulated in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). "The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." *Id.* at 267. The Court held unanimously that the

legislative history of the 1901 Alabama Constitution indicated "beyond peradventure" that "the purpose to discriminate against all blacks" was a "but-for" motivation. *Hunter* v. *Underwood*, 471 U.S. at 232. The Court also held that the voting provision violated the Equal Protection Clause. "[Section] 2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the enactment and operation" of the Alabama constitutional provision. *Id.* at 233. The Court, however, explicitly left open the argument that a nondiscriminatory amendment could cure a defective origin. *Id.* at 232-233. See also *Cotton* v. *Fordice*, 157 F.3d 388, 391 (5th Cir. 1998) ("each amendment superseded the previous provision and removed the discriminatory taint associated with the original version.").

2. Plaintiffs do not claim here that the provision in Florida's 1968 constitution that bars felons from voting is discriminatory on its face or that there is direct evidence establishing that either the legislature or the people of Florida intended to discriminate against black persons because of race or color when that constitution was adopted. Rather, plaintiffs argue that the historical record of the 1868 constitutional provisions demonstrates that Florida established that voting scheme for racially discriminatory reasons, and did not sufficiently alter the provision in 1968 to extirpate that 100-year old intent. Therefore, plaintiffs argue, *Hunter* v. *Underwood* requires a finding that Florida's 1968 provision discriminates because of race (Pltf. Br. at 28-29).

Since the district court decided this case on summary judgment, this Court must view the materials presented and all factual inferences in the light most favorable to the non-moving party. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). For purposes of this appeal, this Court must assume that the 1868 disenfranchisement scheme was adopted with discriminatory intent.

The 1868 constitution is not in effect, however, having been fully superseded by the 1968 constitution. The focus of this case, therefore, is the 1968 action, and this Court must begin its analysis with a presumption that the legislature acted in good faith when it adopted the Constitution of 1968 and presented it to the people of Florida for ratification. *Miller* v. *Johnson*, 515 U.S. 900, 915 (1995); *Parham* v. *Hughes*, 441 U.S. 347, 351 (1979). Indeed, the Supreme Court's acknowledgment in *Ramirez* that barring felons from voting is recognized in the United States Constitution itself establishes, in our view, that there is nothing inherently suspect about such a provision. Indeed, forty-eight states bar felons from voting in some respect.

The proper question for the court here, therefore, is whether the actions of the legislature in 1968 were taken with discriminatory intent. See, *e.g.*, *Chen* v. *City of Houston*, 206 F.3d 502, 521 (5th Cir. 2000) ("[W]hen a plan is reenacted – as opposed to merely remaining on the books like the provision in *Hunter* – the state of mind of the reenacting body must also be considered."), cert. denied, 532 U.S. 1046 (2001). See also *Cotton* v. *Fordice, supra.*

The record here simply is devoid of evidence that the legislature was exercising discriminatory intent when it reconsidered and rewrote the state constitution in 1968. First, the evidence supports the district court's conclusion that the 1968 provision barring felons from voting came about after "significant deliberation" by the legislature and legislative committees. *Johnson*, 214 F. Supp. 2d at 1339. The CRC and the legislature revised the language, considered alternatives, and chose the final language of Article VI, section 4. *Supra*, at 8. Plaintiffs have identified no evidence demonstrating that the legislature's "state of mind" during those deliberations was to discriminate against black persons; indeed, plaintiffs appear to concede that there is no such evidence.

In addition, the 1968 language barring convicted felons from voting was not identical to the 1868 version. Florida's 1868 constitution permitted the loss of the right to vote for persons convicted of misdemeanors deemed to be "infamous crimes" (Doc. 121 at 444). Under the 1968 constitution, only those persons convicted of felonies are barred from voting; the power of the legislature to disenfranchise persons convicted of misdemeanors deemed to be "infamous crimes" was eliminated. Thus, as the district court correctly found, "the legislature in 19[68] disqualified a different category of person than its predecessors." *Johnson*, 214 F. Supp. 2d at 1340.

Whether or not discriminatory intent was exercised in 1868, the action in 1968 was sufficient to eliminate any continuing effects of that hundred-year old action.

Therefore, the revisions here, as in *Chen* and *Cotton*, support the district court's holding that there was no exercise of discriminatory motivation in 1968.

Finally, the fact that the 1968 constitution, including the felon voting provision, was approved by popular vote is another significant factor preventing plaintiffs from establishing that the 1968 action was motivated by discrimination. The "sensitive inquiry" into discriminatory intent envisioned by the Supreme Court in *Arlington Heights* requires particular sensitivity to the important First Amendment rights implicated in a voter ratification process. As in other contexts involving motive-based challenges to actions protected by the First Amendment, this Court may find discrimination in voter approval of race-neutral language only if the electoral adoption of the new state constitution was a sham to disguise unlawful discrimination by government officials or Florida voters. Here, there were clearly many non-discriminatory reasons why members of the electorate would vote for the state constitution, and plaintiffs offered no evidence (beyond statements of *one* voter) that racial discrimination was a factor in the electoral decisions of any, let alone a significant number, of voters. Cf. *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961) ("under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution"). There is no evidence that the voter ratification process in 1968 was

manipulated by governmental officials to hide the exercise of discriminatory motivation on the part of the legislators or the voters.

Accordingly, the district court's conclusion that the 1968 constitutional provisions were not discriminatorily motivated is clearly correct, precluding a finding that either the Equal Protection Clause, or the intent prong of Section 2, was violated.

II

THE DISTRICT COURT CORRECTLY ENTERED SUMMARY JUDGMENT FOR DEFENDANTS ON PLAINTIFFS' CLAIM THAT THE PROVISION OF THE FLORIDA CONSTITUTION THAT BARS FELONS FROM VOTING RESULTS IN A VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT

While Section 2 prohibits actions taken with respect to voting that are racially discriminatorily motivated, the intent standard of Section 2 is identical to the intent standard under the Fourteenth Amendment. *City of Mobile* v. *Bolden*, 446 U.S. 55, 66 (1980). Therefore, the district court's decision that the record does not establish that state officials, or the state electorate, acted with racially discriminatory intent also establishes that the 1968 action does not violate that portion of Section 2 of the Voting Rights Act that prohibits action taken with discriminatory intent that affects voting. Further discussion of whether there is an "intent" violation of Section 2 is unnecessary.

Section 2 also prohibits voting practices that, under the totality of circumstances, "result" in denial of equal access to the electoral process for minority group members. The"results" test, however, is not devoid of any entanglement with

actions that were discriminatorily motivated. Rather, the results test is a method to uncover actions that may cause the continuing effects of historically racially discriminatory practices on minorities to affect current voting practices or procedures. As this Court stated, the results test "was necessary to *** eliminate the effects of past purposeful discrimination" on current voting practices. *United States* v. *Marengo County Comm'n*, 731 F.2d 1546, 1557 (11th Cir.), appeal dismissed and cert. denied, 469 U.S. 976 (1984).

The Senate Report specified a number of non-exclusive factors, essentially taken from *White* v. *Regester*, 412 U.S. 755 (1973), that courts should consider when determining whether the totality of circumstances demonstrates that the effect of a voting practice on minority electoral opportunity violates Section 2. See S. Rep. No. 417 at 28-29. Several of these factors are based on the premise that the continuing effects of past acts of intentional discrimination may affect the current opportunity of minority voters to participate equally in the electoral process. See, *e.g.*, *id.* at 29 (citing "the effects of discrimination [against minorities] in such areas as education, employment and health"). The Supreme Court specifically approved the use of these factors in addition to statistical analysis, stating that a court must determine whether a challenged law "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg* v. *Gingles*, 478 U.S. 30, 47 (1986).

These factors demonstrate that the Section 2 "results" test cannot be satisfied solely by statistics showing that a facially-neutral practice has a racially disparate

effect on minority electoral opportunities. When amending Section 2, Congress made clear that the "totality of circumstances" test was a means to uncover and remedy the effects that past intentionally discriminatory actions continue to have on the electoral process; the test was not intended to prohibit acts devoid of any entanglement with the effects of historically discriminatory actions. See *Marengo County*, 731 F.2d at 1557 ("Congress * * * concluded that the 'results' test was necessary to secure the right to vote and to eliminate the effects of past purposeful discrimination"). See also, *Gingles*, 478 U.S. at 44 n.9 (1986). The results test focuses the inquiry on whether the current electoral practices interact with effects of past racial discrimination to diminish minorities' "fair chance to participate" in the electoral process. S. Rep. No. 417 at 36.

Therefore, a plaintiff must demonstrate that the challenged voting practice interacts with the continuing effects of past historical and official racial discrimination to produce a racially discriminatory result in voting. *Solomon* v. *Liberty County*, 899 F.2d 1012, 1032 (11th Cir. 1990) (en banc) (Tjoflat, concurring), cert. denied, 498 U.S. 1023 (1991); *Nipper* v. *Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994) (en banc) ("The existence of some form of racial discrimination * * * remains the cornerstone of section 2 claims * * *."), cert. denied, 514 U.S. 1083 (1995); *Marengo County*, 731 F.2d at 1557 ("Congress * * * concluded that the 'results' test was necessary to secure the right to vote and to

eliminate the effects of past purposeful discrimination").[6] As explained below, plaintiffs' results test claims cannot meet that standard.

Plaintiffs allege that Florida operates its criminal justice system in a racially biased manner. See Br. 3 (referring to "racial bias in the criminal justice system"); see also Br. 16-17, 44-45, 59. They claim that, because of this intentional discrimination, minorities are more likely than white persons to enter the criminal justice system through apprehension and, once in the system, are treated more harshly than white persons. Plaintiffs argue that intentional racial discrimination in the criminal justice system results in a disproportionate number of minorities losing their right to vote through felony conviction.

While prosecutorial discretion is constrained by the Equal Protection Clause, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996), quoting *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978). To make their case of intentional discrimination in

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[6] The Senate Report sets forth the factors to be considered in the "totality of circumstances" inquiry. One of these factors is "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." S. Rep. No. 417 at 28. Other factors, such as "the extent to which members of the minority group[] * * * bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process," *id.* at 28-29, also focus on the extent to which current effects of past discrimination persist.

Florida's criminal justice system, plaintiffs must show that discretionary decisions made by a significant number of public officials – police officers, prosecutors, judges – as well as by grand and petit juries, are being exercised in a racially discriminatory manner. In other words, they must show that intentional discrimination is the *modus operandi* of the Florida criminal justice system. An allegation that a State's entire criminal justice system operates in an intentionally discriminatory manner clearly requires significant proof; the party making this allegation rightfully should bear a heavy evidentiary burden.

"'Discriminatory purpose' implies more than intent as volition or intent as awareness of consequences; it implies that the decision maker selected or reaffirmed a particular course of action at least in part 'because of,' not merely, 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 258 (1979). As the Supreme Court stated in *Village of Arlington Heights* v. *Metropolitan Housing Developoment Corp.*, 429 U.S. 252, 264-265 (1977):

> [O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.

See also *McCleskey* v. *Kemp*, 481 U.S. 279, 313 (1987) (statistical analysis purporting to show that prosecutors in Georgia were more likely to seek the death penalty for black persons who kill whites than white persons who kill blacks did not

"demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process").

Plaintiffs' evidence that the Florida criminal justice system allegedly has a disparate impact on minorities clearly does not prove that the system is motivated by racial bias or represents an extension of historical discrimination within that system. The district court found that the factual record on this point is statistical, 214 F. Supp. 2d at 1341, and plaintiffs identify no other evidence to demonstrate that the Florida criminal justice system intentionally discriminates against minorities.[7] While plaintiffs' statistics may show, at best, that the decision to deny convicted felons the right to vote may have a disparate effect on minorities, that effect, without more, does not satisfy the *Feeney* standard. Given the complexity of the criminal justice system and the myriad number of steps and participants, the statistics here fall far below the evidence necessary to establish that Florida's criminal justice system is comprehensively infected by racial bias.

Indeed, the proper way for an individual to allege that he or she is barred from voting because of a conviction in a criminal justice system that discriminates because of race is to challenge the criminal proceeding itself. In the absence of such proof, it would be unlikely that sufficient evidence of Section 2 violations could even exist.

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[7] No evidence was presented about discrimination in other state systems or the federal system that might be responsible for convictions that disqualify Florida residents. At least three of the named plaintiffs are disenfranchised as a result of felony convictions by criminal justice systems other than the Florida state system. See Compl. at 3, 5, 7.

Indeed, a felon who can demonstrate that the disqualifying conviction resulted from racial discrimination on the part of the criminal justice system can have that conviction set aside, see, *e.g.*, *Batson* v. *Kentucky*, 476 U.S. 79, 100 (1986); *Vasquez* v. *Hillery*, 474 U.S. 254, 261-262 (1986); *Wayte* v. *United States*, 470 U.S. 598, 608 (1985), and regain the right to vote.[8]

3. We note, in passing, that the district court's statement that intentional discrimination in the operation of the criminal justice system is "irrelevant" to the application of Section 2, because such discrimination is not part of the electoral process, may be overstated. As stated before, the Senate factors establish that acts of discrimination that may affect minority individuals' opportunities to participate equally in the electoral process are not limited only to acts that are directly part of the voting process. S. Rep. No. 417 at 29 (citing "the effects of discrimination in such areas as education, employment and health * * * "); see also *Gingles*, 478 U.S. at 47. The continuing effects of past intentional discrimination in the areas of "education, employment or health care," are not part of the electoral process, yet the Court and Congress have deemed them relevant to a Section 2 case.

For the reasons stated above, the court's entry of summary judgment against plaintiffs on their Section 2 results claim should be affirmed.

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[8] In our view, it is extremely curious, given their belief that Florida's criminal justice system is discriminatory, that plaintiffs focus their attention on regaining the vote for persons who, in their view, have been convicted, sentenced, and incarcerated by an allegedly discriminatory system rather than challenging these convictions.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

I, Clay G. Guthridge, counsel for amicus curiae United States, certify that this brief conforms to the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 6803 words and has been prepared in proportionally spaced typeface using WordPerfect 9 software in Times New Roman, 14 point typeface. I relied on my word processor to count the words.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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CERTIFICATE OF SERVICE

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