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"to the end
that human
rights shall
be more
sacred than
property
interests."
—Preamble, N.L.G.
Constitution*



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**FREE BUT NO LIBERTY:
HOW FLORIDA CONTRAVENES
THE VOTING RIGHTS ACT WITH
DISENFRANCHISEMENT OF FELONS**

Introduction

The United States has a long history of denying minorities their right to vote—of practicing racially-motivated disenfranchisement. In early 2011, Florida Governor Rick Scott continued this tradition by issuing an executive order permanently denying convicted felons their right to vote, unless they petition for executive clemency after a five-year waiting period following the completion of their sentences. These new procedures are a step backward for Florida to previous policies that disproportionately disenfranchised African-Americans. Actions like Governor Scott's demonstrate why the Voting Rights Act (VRA) of 1965,¹ most recently re-authorized in 2006, is still needed to prevent racially discriminatory voting practices.

This article argues that Florida's executive re-enfranchisement policies contravene the Voting Rights Act and should be nullified. A review of felon disenfranchisement in the United States and Florida, the VRA's basic mechanics, and Florida's recent challenge to the Act's constitutionality will help make this clear. The VRA continues to be a constitutional exercise of congressional power that requires Florida to seek pre-clearance for changes to felon disenfranchisement procedures under Section 5 of the Act, and would likely forbid the proposed changes under either a purposeful discrimination or disparate impact analysis under Section 2 of the Act. The article concludes that Florida must submit its proposed changes for pre-clearance, and that if it fails to do so, the U.S. Justice Department should act to prevent the implementation of arguably the harshest felon disenfranchisement procedures in the nation.

I. On felon disenfranchisement and the Voting Rights Act

Felon disenfranchisement strips certain civil rights, including the right to vote, from people convicted of certain crimes, sometimes for life. Globally, the

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United States is one of the few outlier countries with severe disenfranchisement laws that reach such a broad range and high number of people.² In the United States, felon disenfranchisement is regulated by the states, in accordance with Article 1, Section 4 of the U.S. Constitution, which gives states control over the time, place, and manner of federal voting, subject to congressional regulation.³ As of 2011, approximately 5.3 million people in the United States are ineligible to vote due to state felon disenfranchisement laws.⁴

Individual states have taken different approaches to felon disenfranchisement. Only two states, Maine and Vermont, allow all people with criminal convictions to vote, even those who are incarcerated.⁵ The remaining 48 states impose disenfranchisement at some stage of the post-conviction process.⁶ While some argue that felon disenfranchisement is an appropriate punishment for those convicted of crimes, others worry that felon disenfranchisement inhibits rehabilitation, thus preventing convicted persons from fully reintegrating into society.⁷ These concerns have prompted many states to automatically restore civil rights to convicted people after the completion of their sentences or after a waiting period. Florida, Iowa, Virginia, and Kentucky are the only four states that disenfranchise convicted felons for their entire lives.⁸ The only method by which felons in these states can restore their civil rights is through clemency from the governor.⁹

Racial discrimination was the impetus for many of the felon disenfranchisement laws enacted after the ratification of the Fifteenth Amendment.¹⁰ To this day, African Americans continue to be disproportionately impacted by disenfranchisement laws and stringent re-enfranchisement requirements. African American men, in particular, are disenfranchised at seven times the national average. Estimates indicate that if current incarceration levels stay the same, 30 percent of African American men are expected to be disenfranchised during their lives.¹¹ Therefore, felon disenfranchisement (and corresponding re-enfranchisement procedures) must be considered in the context of prophylactic laws aimed at preventing racial discrimination in voting, such as the Voting Rights Act of 1965.

A. Florida's re-enfranchisement policies and recent developments

Since Florida's original constitution was approved in 1868 it has mandated that, "No person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights."¹² The civil rights restoration procedures have varied by the political administration in power. Following public outcry after the 2000 presidential election, Governor Jeb Bush began a process, which was expanded by his successor, Governor Charlie Crist, to

automatically restore civil rights for felons convicted of non-violent crimes in certain circumstances.¹³

In the 2004 presidential election, 600,000 to 960,000 citizens in Florida were unable to participate in the electoral process because they had been convicted of a felony.¹⁴ Up to 25 percent of those excluded were African-American men.¹⁵ Some argue that the impact of the state's felon disenfranchisement law was a deciding factor in the election of President George W. Bush in 2000, who won by a mere 537-vote margin in Florida.¹⁶

In response to the ensuing controversy, Governor Jeb Bush made minor changes to the disenfranchisement laws. Previously, all convicted felons who had completed their sentences could apply for re-enfranchisement, but had to do so at a hearing before the executive clemency board.¹⁷ The executive clemency board could only hear the individual appeals of about 200 people per year.¹⁸ Governor Jeb Bush's changes established that people who had not committed a violent offense and had not committed another crime within five years could apply to have their civil rights automatically restored without an individual hearing.¹⁹ Additionally, any person who had been arrest-free for 15 years, regardless of the nature of her or his conviction, could also have her or his civil rights restored without a hearing.²⁰

In January 2007, Republican Charlie Crist took office as the newly elected governor of Florida. On April 5, 2007, the Florida Executive Clemency Board, which consisted of Governor Crist and three executive branch members,²¹ voted to automatically restore civil rights to felons convicted of non-violent crimes after their sentences were completed.²² The Florida Advisory Committee to the U.S. Civil Rights Commission, in a 2008 report praising the new policy, noted that Governor Crist's actions restored the rights of an estimated 154,000 people,²³ among the estimated one million Florida citizens stripped of their rights by the state's permanent disenfranchisement law.²⁴ By taking these steps Florida came into alignment with the majority of states that grant automatic restoration for citizens who have completed their sentences.²⁵

Rick Scott was elected Governor of Florida in 2010.²⁶ In 2011, promptly after his election, Governor Scott issued an executive order that permanently disenfranchised people convicted of felonies and imposed at least a five year waiting period to apply for rights restoration (seven years for "violent" offenders). Governor Scott's executive order not only reversed Governor Crist's historic reforms, but it also bucked the national trend toward automatic restoration by including further steps to prevent citizens convicted of felonies from restoring their rights.²⁷ The addition of the waiting period was significant because if a person were arrested at any point during the five-year waiting period, the clock would start over, even if no charges were ever filed against

the person.²⁸ Under these regulations, Florida now has the most burdensome felon re-enfranchisement procedures in the United States, which we argue violates the VRA.²⁹

B. Overview of the Voting Rights Act of 1965

The Voting Rights Act of 1965 (VRA) is considered the most important voting rights law because it broadly protects citizens against racial discrimination in exercising their franchise.³⁰ Congress passed the VRA in 1965 to enforce the protections guaranteed by the Fifteenth Amendment³¹ on a wave of momentum coming off the passage of the Civil Rights Act in 1964, and with the encouragement of President Johnson. The VRA prohibits voting discrimination based on race or minority language group, and authorizes federal government oversight of new election measures enacted by jurisdictions with discriminatory histories under certain criteria.³² There are two particularly relevant sections of the VRA: sections 2 and 5.

The general prohibition against racial discrimination appears in section 2, which provides a right of action against any state or political subdivision that applies a standard, practice, or procedure that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color,” and following reauthorization in 1975, because of membership in a “language minority group.”³³ These prohibitions forbid the use of “tests or devices,” such as poll taxes or literacy exams, as a means of preventing members of protected groups under the Act from exercising their right to vote.³⁴

In 1980, the Supreme Court held that section 2, as originally passed, was essentially a restatement of Fifteenth Amendment protections.³⁵ Under this analysis, a plaintiff had to show that there was an invidious purpose or discriminatory intent behind the voting standard, practice, or procedure.³⁶ In 1982, Congress amended section 2 to explicitly reject what became known as the “intent test,” instead allowing a cause of action when, given the totality of the circumstances, the effect of a standard, practice, or procedure denied a protected group an equal opportunity to vote.³⁷ The so-called “effects test” was subsequently endorsed by the Supreme Court in a section 2 case involving voter dilution, though it has come under scrutiny by Circuit Courts in felon disenfranchisement cases over the last twenty years.³⁸

Section 5 of the VRA requires federal pre-clearance before any changes to voting laws may take effect in a “covered jurisdiction” as defined by section 4.³⁹ “A state or political subdivision is covered by the VRA if it satisfies two elements under section 4. First, on November 1, 1964, the state or political subdivision must have maintained a test or device that restricted the

opportunity to vote or register to vote.⁴⁰ Second, the Director of the Census must determine that in that same state or political subdivision fewer than 50 percent of voting age persons were registered to vote on November 1, 1964, or that fewer than 50 percent of voting age persons had voted in the presidential election of November 1964.⁴¹ As part of an application for pre-clearance approval, the covered jurisdiction has the burden of showing that any proposed changes would not worsen or prove “retrogressive” toward the opportunity for racial minorities to vote.⁴³

In 1970, Congress renewed these provisions, setting November 1968 as the relevant date for both elements of the formula.⁴³ In 1975, two revisions were made: the provisions were extended to cover both race and language minority groups and the trigger date was changed to November 1972.⁴⁴ The coverage formula was extended again in 1982 and 2006.⁴⁵ Section 4, along with sections 5 and 8, which depend on it, will expire in 2031.⁴⁶ Under the 1972 based coverage formula, there are currently five Florida counties that are covered jurisdictions under the section four formula⁴⁷—Collier County, Hardee County, Hendry County, Hillsborough County, and Monroe County.⁴⁸

The concept of a “covered jurisdiction,” as determined by the section 4 formula, is the foundation for the federal government’s broad and important powers under section 5. The Supreme Court, in a seminal test case decided shortly after the VRA’s passage, *Allen v. State Board of Elections*, interpreted section 5 to be a broad grant of authority to review all proposed changes affecting voting.⁴⁹ The Court interpreted section 5 as requiring review of the “subtle, as well as the obvious, state regulations” because Congress intended that “all changes, no matter how small, be subject to section 5 scrutiny.”⁵⁰ As a result, section 5 has proven to be a vital mechanism for enforcing voting rights since its enactment.

There are two ways that a covered jurisdiction may comply with section 5.⁵¹ The first and by far most common is for the covered jurisdiction to seek administrative review of proposed changes by submitting them to the Civil Rights Division of the Department of Justice, which has been delegated review power by the Attorney General of the United States.⁵² If the Attorney General does not object to the change within sixty days, the covered jurisdiction may enforce its proposed change⁵³ and that decision may not later be challenged in court.⁵⁴ This prohibition, however, does not prevent a legal challenge under section 2 or other applicable law.⁵⁵

The second, and less common method of complying with section 5, is through filing an action for declaratory judgment before the United States District Court for the District of Columbia.⁵⁶ Under this method, the covered jurisdiction has the burden of proving that the proposed voting change(s)

“neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color or [membership in a language minority group].”⁵⁷ These actions are brought against the United States or the Attorney General and may be appealed directly to the Supreme Court.⁵⁸ If a jurisdiction brings a declaratory judgment action after the Attorney General has entered an objection during administrative review, the declaratory judgment action is heard de novo, as it is not considered an appeal of the Attorney General’s decision. Finally, if a covered jurisdiction fails to comply with the pre-clearance requirements of section 5, the Attorney General may file suit to enjoin the enforcement of the changes and any person or organization with standing may also sue seeking injunctive relief.⁵⁹

Covered jurisdictions may also apply to terminate coverage under the VRA’s section 5 “bailout” provisions.⁶⁰ To obtain a bailout, the covered jurisdiction must apply for a declaratory judgment to demonstrate that continued supervision is unnecessary. Specifically, it must prove that no discriminatory tests or devices have been used in the past five years and that all voting changes in the jurisdiction have been cleared under section 5.⁶¹ An increasing number of jurisdictions have successfully taken advantage of the bailout provision since the important *Northwest Austin Municipal Utility District No. 1 v. Holder* (“NAMUDNO”) decision of 2009.⁶² Eleven jurisdictions have bailed out in the three years since the decision, compared to seven in the previous three years, and only seventeen in the decade preceding the decision.⁶³

Despite repeated attacks, the Supreme Court has ruled that the VRA is constitutional. The Supreme Court held in *South Carolina v. Katzenbach* that the promulgation of the VRA fell within the full remedial powers to prevent racial discrimination granted Congress by the Fifteenth Amendment.⁶⁴ Accordingly, the VRA section 5 pre-clearance requirements were ruled constitutional in 1966.⁶⁵ In *NAMUDNO*, the Supreme Court declined to decide whether the 2006 extension of the VRA was constitutional, but instead found that any covered political sub-division could apply to bail out.⁶⁶ Despite many Supreme Court observers’ fears that the conservative Roberts Court would strike down the landmark law, the Court made a strategic choice to reach a “compromise” decision, which dodged the question of the VRA’s constitutionality (though hinting at certain bases for a future challenge) and explicitly encouraged localities to take advantage of the bailout provisions.

Since *NAMUDNO*, however, there have been two notable developments related to the VRA’s constitutionality. First, in September 2011, in *Shelby County v. Holder*, the D.C. District Court issued a very significant ruling which held that ample evidence supported the continued constitutionality of

section 5 of the 2006 VRA extension.⁶⁷ *Shelby County* addressed the very questions of the VRA's constitutionality that the Supreme Court skirted in *NAMUDNO*.⁶⁸ This decision was appealed to the U.S. Court of Appeals for the District of Columbia with oral arguments heard January 19, 2012. Many predict, and some fear, that this case is likely to reach the Supreme Court, where the conservative-leaning court will more heavily scrutinize constitutionality of section 5.⁶⁹

Moreover, in October 2011, Florida filed a complaint before the District Court of the District of Columbia, seeking either pre-clearance for several proposed voting regulation changes or a finding that section 4 and section 5 are unconstitutional.⁷⁰ The complaint argues that "subjecting Florida counties . . . covered exclusively under the language minority provisions of the VRA to pre-clearance is not a rational, congruent, or proportional means of enforcing the Fourteenth and/or Fifteenth Amendments and violates the Tenth Amendment and Article IV of the U.S. Constitution."⁷¹ The Court has yet to rule on this issue, though it seems like a weaker challenge in light of the *Shelby County* ruling.

II. Defending the VRA's constitutionality and expanding its reach to re-enfranchisement clemency schemes

The VRA remains a valid constitutional exercise of congressional power because it serves as a remedial statutory arm of the Fourteenth and Fifteenth Amendments against a backdrop of continued racial voting discrimination. The VRA's reach should extend to discriminatory executive clemency rules, such as those in Florida, because although the Supreme Court has yet to rule on this specific issue, the VRA applies broadly to cover all voting changes, even those made by executive order. The Justice Department should review Florida's procedures under section 5 as statewide changes to voting procedures must still be pre-cleared even if only five jurisdictions are covered. We argue that the Department should refuse to pre-clear Florida's disenfranchisement-related changes because the procedures have the purpose or effect of denying racial minorities' ability to exercise their franchise. Further, we argue that Florida's procedures also violate VRA section 2 and the Equal Protection Clause because African-American Florida citizens are disenfranchised at a far higher rate than non-racial minorities.

A. The VRA remains an appropriate and constitutional exercise of Congressional power

The Supreme Court has held that the VRA is constitutional.⁷² Not surprisingly, the first failed challenge to the VRA came in 1964, before the Act became law. In *South Carolina v. Katzenbach*, South Carolina, along with Alabama, Georgia, Louisiana, Mississippi, and Virginia, petitioned the Court

asking for an injunction against the enforcement of the VRA.⁷³ In *Katzenbach*, as with Florida's current challenge, South Carolina did not challenge the constitutionality of the VRA in its entirety, but rather specific sections of the Act, including section 4 and section 5 on Article III, Fifth and Fifteenth Amendment grounds.⁷⁴ The Court, in upholding the VRA's constitutionality, applied a rational basis test.⁷⁵ It reasoned that South Carolina's argument that Congress' enactment of the VRA was beyond the scope of its power failed because section 2 of the Fifteenth Amendment gives Congress the power to enforce the Amendment by appropriate legislation.⁷⁶ Thus, the VRA was found to be a valid exercise of congressional power because it was rationally intended to further the aim of the Fifteenth Amendment, which expressly allowed for Congress to act in such a fashion.⁷⁷

The VRA essentially went unchallenged for years following *Katzenbach*. Some of the factors that contributed to this were the initial congressional findings justifying the law, the Act's continued enforcement over time, and the strength of the *Katzenbach* decision. Then, in 2009, the issue of VRA's constitutionality was raised once again in *NAMUDNO*, but the Supreme Court declined to expressly rule on the 2006 extension's constitutionality. Instead, it re-opened the door to future constitutional challenges by questioning the Act's "federalism costs" and continued necessity.⁷⁸

NAMUDNO's challenge hinged on the continued constitutionality of section 5, which had long been considered controversial. In *NAMUDNO*, a Texas utility district sought to bail out of the pre-clearance requirements.⁷⁹ The Court found that because the VRA considered the district a political sub-division subject to pre-clearance coverage, the district was entitled to the corresponding right to bail out.⁸⁰

More importantly, however, the Court called into question the continued necessity of the Act because of recent improvements in minority voter registration and turnout.⁸¹ In the Court's estimation, these perceived improvements, while likely the result of the VRA itself, also weighed against the Act's continued validity because it "imposes current burdens and must be justified by current needs."⁸² This determination led the Court to endorse the argument put forth in *Boerne v. Flores* that the VRA should be assessed for "congruence and proportionality" between the injury the Act seeks to prevent or remedy and the means adopted to that end, instead of merely assessing whether the VRA passes a rational basis examination.⁸³

Nonetheless, in *Shelby County v. Holder*, the U.S. District Court for the District of Columbia found that even under a congruence and proportionality test, the 2006 extension was an appropriate and constitutional exercise of congressional power.⁸⁴ In a 151-page opinion, the Court examined the his-

tory of the Fifteenth Amendment, past Supreme Court cases upholding the constitutionality of the VRA, and the 15,000 page legislative record outlining continued patterns of voting discrimination.⁸⁵ The Court held that the VRA was constitutional because it enforced the Fifteenth Amendment, remedied past discrimination, preserved gains against discriminatory practices, and was still necessary to protect the fundamental right to vote of racial and language minorities.⁸⁶

Thus far, VRA section 5 critics have made only modest steps toward reforming the law. The new application of the congruence and proportionality test to VRA section 5 does little to attack the provision's constitutionality because ample evidence still unfortunately exists to support its continued necessity. Since the 2006 extension, the Department of Justice has denied clearance to many proposed changes in the voting regulations of covered jurisdictions⁸⁷ including, most recently, restrictive voter identification laws.⁸⁸

Arguments that the VRA is obsolete because minority voter registration has increased are flawed because such claims rely on misinterpreted data.⁸⁹ For example, in his dissent in *NAMUDNO*, Justice Thomas argued that African American and white voter registration rates are nearly the same.⁹⁰ However, Latino registration rates are considerably lower than white registration rates, yet Latino voters, as non-African Americans, were factored into white registration rates, since many Latinos (an ethnicity category) are racially classified as white.⁹¹ Such misrepresentations affect the overall non-African American registration rate, making it appear to be near the same level as African American registration rates.⁹² In reality, non-Hispanic white data clearly show that registration rates for whites are much higher than African Americans rates.⁹³ Florida's constitutional challenge of the VRA should fail, given long precedent upholding the law and revived concerns about minority voter suppression.⁹⁴ The voluminous legislative history supporting the VRA's extension, repeated endorsement of the Act by the lower courts, and the indisputable evidence of continued discrimination in voting procedures all weigh heavily against Florida.

B. Florida's executive clemency scheme is subject to VRA section 5 even though Florida is only partially covered

Florida's new procedures ban people convicted of felonies for life, unless they petition to the governor for restoration at least five years after the completion of their sentences. These procedures, established by executive order, should be subject to the pre-clearance under section 5. As such, they may not be implemented in the five Florida counties covered under section 5 until they are approved by the Justice Department or United States District Court for the District of Columbia. The Justice Department should review

Florida's re-enfranchisement scheme because statewide voting changes in partially covered states must be pre-cleared under VRA section 5.

There are seven states that are only partially covered by the VRA.⁹⁵ In those states, statewide voting changes must be submitted to the Justice Department or the D.C. District Court for review if they directly affect voting in the covered jurisdictions.⁹⁶ In 2002, the Justice Department objected to a Florida statewide redistricting plan that would have eliminated the only majority-Hispanic district in the state, which was located in a covered jurisdiction.⁹⁷ Of the five pre-clearance denials that the Justice Department has made to Florida voting procedures since 1984, four of them have been for state-wide voting changes.⁹⁸ The fifth denial was to a change in voting procedures taking effect specifically in a covered county, and was later withdrawn.⁹⁹

Past objections to Florida's voting procedures align with the Supreme Court's decision in *Lopez v. Monterey County*, which held that statewide voting changes that affect covered counties must be pre-cleared by the Justice Department.¹⁰⁰ In *Lopez*, the Court determined that even though only some counties in California were covered under section 5 of the VRA, measures enacted by the state were subject to pre-clearance to the extent that such measures would affect the covered county.¹⁰¹ Therefore, the covered county was not allowed to administer the changes until after it had received pre-clearance by the Justice Department.¹⁰²

The *Lopez* decision strongly suggests that covered jurisdictions in Florida, like California, must submit changes to felon disenfranchisement procedures for pre-clearance.¹⁰³ In *Lopez*, Monterey County, not the state of California, had to submit the changes for pre-clearance.¹⁰⁴ Similarly, the covered counties in Florida must submit the felon disenfranchisement procedures to the Justice Department. Until pre-cleared, the covered counties are not allowed to administer the changes that the stricter Florida disenfranchisement procedures require.

If the Department of Justice denied preclearance to the executive order, it could lead to an odd situation in which some Florida counties would be allowed to ban felon civil rights, while the covered counties could not. The administrative details of how this would work are complex, but it is possible that ex-felons who live in covered jurisdictions would be automatically allowed to vote after completing their sentences, as they could before Governor Scott's executive order, while in the rest of the state, ex-felons would be subject to Governor Scott's executive order.

State rules about election uniformity further complicate this process. In 1998, the Secretary of State Sandra Mortham issued an opinion that Florida

election laws must be consistent throughout the state.¹⁰⁵ The continued validity of this opinion is unclear, as a challenge by the American Civil Liberties Union (ACLU) to the implementation of a statewide voting change in the non-covered counties prior to pre-clearance was dismissed in June 2011 on procedural grounds.¹⁰⁶ Yet, because of the complexity, confusion, and possible violation of state law that would result if the felon voting procedures were different in different counties, it is imperative that the covered counties in Florida submit the felon disenfranchisement procedure to the Department of Justice. Since Florida's changes are likely to face an objection, Governor Scott may have to issue a new executive order that would comply with the VRA without leading to the complexity and confusion of having different rules in different counties.

1. The re-enfranchisement scheme must be pre-cleared because executive orders are voting changes that are subject to section 5.

VRA section 5 does not distinguish among the source of election law changes.¹⁰⁷ The Supreme Court, in *Foreman v. Dallas County*, held that even changes to the selection process of election judges who monitor voting in precincts was subject to pre-clearance requirements.¹⁰⁸ Further, Florida itself has consistently acknowledged the breadth of the pre-clearance requirement, as it has previously submitted House bills, redistricting plans, and home rule charters for Justice Department approval.¹⁰⁹ All of these submissions are consistent with section 5's broad mandate that all "standard[s], practice[s], and procedure[s]" must be submitted to the DOJ to be pre-cleared if they affect the voting process.¹¹⁰

The Northern District of Alabama is currently considering whether Governor Riley's executive order that changes voting procedures is subject to VRA pre-clearance, but the challenge there is less clear than in the Florida case.¹¹¹ In Alabama, an amendment to the state constitution was approved by referendum and then pre-cleared by the Department of Justice in accordance with section 5.¹¹² The pre-cleared amendment allowed a Local Constitutional Amendment Commission to decide whether a proposed local constitutional amendment affects more than one county or more than one subdivision in one or more counties.¹¹³ As a condition of pre-clearance, the Justice Department required Alabama to remove a provision allowing the Governor to veto any decisions.¹¹⁴

In the years preceding this amendment, several Alabama counties approved local constitutional amendments that authorized bingo operations within their jurisdictions.¹¹⁵ Governor Riley has since sought to stop the bingo operations in Greene County through executive orders and police actions.¹¹⁶

African American voters in the county alleged that Governor Riley's use of executive orders to reverse the local counties' decision was a *de-facto* veto of their vote and an unapproved change to voting standards and practices.¹¹⁷ This case is distinguishable from Florida's case because Governor Scott's executive order, which changed procedures for reinstating felons' right to vote, was never submitted for section 5 pre-clearance at all. Unlike in the Alabama case, where it is unclear whether bans on bingo operations can be considered a voting change, the executive order in the Florida case is clearly a voting change affecting the rights of hundreds of thousands of Florida citizens.

In addition, Governor Scott's executive order addresses a voting change—it is not simply a change to sentencing procedures, as he claims. The order affects the way that a disenfranchised felon may regain her or his civil rights, including voting rights. The procedures have no bearing on sentencing because they impact felons long after sentencing decisions have already been made, after individuals have fully completed their sentences. Therefore, because section 5 provides a very broad grant of out-of-jurisdiction review authority, executive orders are subject to section 5's pre-clearance requirements, and since Governor Scott's executive order deals with a voting change, it must be submitted to the Justice Department or D.C. District Court before the five covered jurisdictions may implement any changes.

2. If Florida's re-enfranchisement scheme is considered under section 5, Florida will not be able to show the change does not have a discriminatory purpose or effect

The Justice Department or the D.C. District Court should reject Florida's felon re-enfranchisement scheme after review because Florida will be unable to meet its burden showing that the proposed changes have neither a discriminatory purpose nor effect.¹¹⁸ In its review, the Justice Department or D.C. District Court will examine whether the voting changes will have a "retrogressive effect" on the ability of minorities to vote.¹¹⁹ Although, historically, there has not been an objection issued by the Justice Department regarding a re-enfranchisement scheme, there are analogous cases to suggest a likely denial. For example, the Justice Department issued a 2008 objection to Georgia's voter verification scheme because African American and Hispanic voters were disproportionately and incorrectly flagged by the so-called verification system in comparison to white voters.¹²⁰ Flagged voters had to take additional steps, which sometimes included going to the courthouse during business weekday hours on three days' notice, in order to prove their eligibility to vote.¹²¹ The Justice Department found that the voter verification system had a retrogressive impact on voting rights for minorities because the disproportionate impact on minorities who were incorrectly

flagged was statistically significant, and thus found that the law did not meet section 5 requirements.¹²²

Similarly, Florida's re-enfranchisement scheme has a disproportionate impact on minority voters, which has a retrogressive impact on their right to vote. The evidence is clear. Although about 15 percent of Florida's total population is African American, African Americans account for 25 percent of those who are disenfranchised.¹²³ In 2010, 34 percent of all people arrested and 41 percent of all people arrested for drug violations were African American.¹²⁴ In the 2000 election, about 4.4 percent of whites were disenfranchised due to a past felony, compared with 10.5 percent of African Americans.¹²⁵ In 2008, while 15.3 percent of Floridians were African American, they made up 49.8 percent of the Florida prison population.¹²⁶ And in Florida today, African Americans are disenfranchised at twice the rate of whites.¹²⁷

The 2011 re-enfranchisement scheme subjects all persons convicted of felonies to at least a five-year waiting period before they can even apply to regain the right to vote.¹²⁸ If a person is arrested at any time during the waiting period, even if there is no prosecution or conviction, the waiting period re-starts.¹²⁹ As African-Americans are overly represented in both arrests and incarcerations, the new Florida scheme will almost certainly have a harsher impact on minorities. As such, the scheme will have a retrogressive impact on the right of minorities to vote and should be pre-cleared.

C. Florida's scheme violates VRA section 2 and the Equal Protection Clause

Sections 2 and 5 operate independently of one another. Covered jurisdictions, under section 5, have a burden of proving that voting changes are not racially discriminatory.¹³⁰ Under section 2, an individual in any state or jurisdiction can sue if they are harmed by a voting practice that has a racially discriminatory purpose or effect.¹³¹ Unlike section 5, non-covered jurisdictions may also face section 2 challenges.¹³² In Florida, this means that a section 2 challenge would affect the felon re-enfranchisement scheme for the entire state, not just the five covered counties. The Supreme Court has not ruled on whether felon disenfranchisement can violate section 2 of the VRA, and if so, whether the disenfranchisement must be the result of intentionally discriminatory practices. There is currently a circuit split concerning whether felon disenfranchisement is subject to section 2.

In *Farrakhan v. Gregoire* ("Farrakhan I"), the Ninth Circuit found that the Washington State criminal justice system was infected with racial bias, and as such, felon disenfranchisement laws operated improperly based on race in violation of section 2.¹³³ In reaching this result, the Court did not require the

ex-felons to show any history of official discrimination.¹³⁴ Instead, the court found that a VRA section 2 analysis requires a “totality of the circumstances” review to determine how “a challenged voting practice interacts with external factors such as ‘social and historical conditions’ to result in denial of the right to vote on account of race or color.”¹³⁵ Therefore, statistical findings and sociological studies about racial discrimination in the criminal justice system were appropriate evidence to bolster a section 2 claim.¹³⁶ The Court concluded that even though Washington did not pass its felon disenfranchisement law with a racially discriminatory purpose, the law interacted with a racially discriminatory criminal justice system, which produced a constitutionally impermissible effect on minorities under the VRA.¹³⁷ Evidence the court found persuasive showed that prosecution of crack cocaine and street drug trafficking was not proportional to its harm on the community or share of the drug trade; that the proportion of African Americans and Latinos arrested for drug possession had no correlation to the proportion of users among those races; that police searches of African Americans and Latinos occurred at higher rates than whites, but led to fewer seizures; and that minority defendants were detained in disproportionate numbers when other factors were controlled.¹³⁸ This kind of evidentiary record was novel for such a challenge.

Ten months after *Farrakhan I*, the Ninth Circuit reheard this case *en banc* and vacated the prior ruling.¹³⁹ In *Farrakhan v. Gregoire* (“*Farrakhan III*”), it decided that to succeed in a section 2 challenge based on criminal justice system racial discrimination, a plaintiff must show that the system is infected with intentional discrimination.¹⁴⁰ The Ninth Circuit ultimately held that plaintiffs did not meet their burden in establishing a VRA section 2 claim because the plaintiffs had presented statistical data only proving discriminatory effect.¹⁴¹ While other circuits that have considered this issue have generally followed the *Farrakhan III* reasoning,¹⁴² the Supreme Court has yet to definitively say whether there is a cognizable VRA claim against felon disenfranchisement laws and if so, whether an intentional showing of racial discrimination is required.¹⁴³

1. Florida’s re-enfranchisement scheme is a relic of its discriminatory 1868 constitution and violates the Equal Protection Clause and VRA section 2 under an intentional discrimination analysis.

Farrakhan III, which takes the position adopted by all of the circuits, held that proof of intentional discrimination in the criminal justice system was sufficient for section 2 claims.¹⁴⁴ Unfortunately, the Court did not provide clear guidance on which standard to apply in determining whether a felon disenfranchisement or re-enfranchisement scheme is intentionally discriminatory under section 2.¹⁴⁵ Therefore, the most applicable standard is to consider the felon disenfranchisement scheme through a Fourteenth Amendment Equal

Protection analysis.¹⁴⁶ Any finding that Florida's felon re-enfranchisement scheme is intentionally discriminatory under section 2 would also meet Equal Protection scrutiny standards.

In *Richardson v. Ramirez*, the Supreme Court held that felon disenfranchisement was not subject to strict scrutiny under section 2 of the Fourteenth Amendment.¹⁴⁷ Although the right to vote is a fundamental right, the second clause of the Fourteenth Amendment states that the right to vote may be limited "for participation in rebellion, or other crime."¹⁴⁸ In *Richardson*, the dissent noted that this clause was passed as a political compromise that had little to do with the purpose of the Fourteenth Amendment.¹⁴⁹ In addition, it argued that even if a voting penalty was authorized in section 2, the practice might still violate section 1 if it was discriminatory.¹⁵⁰ While the dissent would have subjected felon disenfranchisement to strict scrutiny and found it unconstitutional, the majority decision upholding the laws' constitutionality continues to stand as the prevailing law today.¹⁵¹

In the 1985 case *Hunter v. Underwood*, however, the Supreme Court revisited the question of the felon disenfranchisement law's constitutionality and struck down a provision in the Alabama Constitution that disqualified voters who had committed a crime of moral turpitude.¹⁵² In its decision, the Court found that when the 1901 disenfranchisement amendment was written into the Alabama Constitution, legislators passed it with the intent to keep African Americans from voting and absent such intent that the measure would have never been enacted.¹⁵³ The Court held that because the original enactment was motivated by racial discrimination and that because it continued to have a discriminatory effect on African Americans, the law was unconstitutional.¹⁵⁴ Based on this evidence, the Court invalidated the Alabama Constitution's felon disenfranchisement clause on Equal Protection grounds.¹⁵⁵ This decision suggests that the constitutionality of felon disenfranchisement is not completely settled from the Supreme Court's perspective.¹⁵⁶

In 1992, the Supreme Court ruled in *United States v. Fordice* that future re-enactments of a law may be constitutional even if the law was originally promulgated for a racially discriminatory purpose.¹⁵⁷ *Fordice* explains that if a legislature subsequently re-enacts a discriminatory law, it must do so for independent and legitimate reasons, so as to break the discriminatory link from the original law.¹⁵⁸ However, the burden is on the State to prove that the legislature offered independent and legitimate reasons that supported a racially-neutral justification for the law's renewal.¹⁵⁹ Since *Hunter* and *Fordice*, some circuits have incorrectly allowed states to prove that re-enactments of racist laws were passed for a non-discriminatory purpose with very little evidence that the original taint had been removed.¹⁶⁰

Florida's disenfranchisement laws have been debated by courts on these grounds. In 2002, the Federal District Court for Southern Florida found that Florida passed the felon disenfranchisement provision in its 1868 constitution with the express intention to limit the ability of African Americans to vote.¹⁶¹ In 2005, the Eleventh Circuit in *Johnson v. Governor of the State of Florida* concluded that a subsequent 1968 re-enactment had removed the racially discriminatory taint because there was sufficient deliberation; therefore, the law did not violate the Equal Protection Clause, regardless of a disparate impact on African Americans.¹⁶²

The Eleventh Circuit's analysis in *Johnson* was incomplete because the Court did not thoroughly apply the *Fordice* test, opting instead to simply note that the 1968 re-enactment was "deliberate." More specifically, the dissent in *Johnson* found that the majority used flawed reasoning, since Florida did not meet its burden to prove that the legislature offered independent and legitimate reasons for reenacting its felon disenfranchisement law.¹⁶³ Without this evidence, the re-enactment is still tainted by the original intentionally discriminatory law. Thus, the majority should not have concluded that the State met its burden under the *Fordice* test.¹⁶⁴

While the felon disenfranchisement procedures in Florida have evolved since *Johnson*, and the most recent procedure is the result of an executive order, Florida arguably has never properly broken the link to its original 1868 felon disenfranchisement law because neither the legislature nor the executive have offered independent and legitimate reasons to remove the taint of the 1868 intentionally discriminatory law.¹⁶⁵ As such, if the Supreme Court were to consider these current procedures and properly apply the tests given in *Hunter* and *Fordice*, it would likely find that Florida's current felon re-enfranchisement procedures violate the Equal Protection Clause. If the Supreme Court also found that felon disenfranchisement and re-enfranchisement procedures can violate Equal Protection due to historical discriminatory taint, Florida's re-enfranchisement scheme would also violate VRA section 2 because it is intentionally racially discriminatory.

2. Florida's re-enfranchisement scheme violates VRA section 2 under a disparate impact analysis.

Even if the Court does not accept that Florida's felon disenfranchisement procedures are intentionally discriminatory, disenfranchised voters could still prevail on a VRA section 2 claim under the *Farrakhan I* disparate impact test.¹⁶⁶ Although the Ninth Circuit vacated *Farrakhan I* in an *en banc* decision and it is no longer good law, the Supreme Court has never definitively ruled on whether a felon disenfranchisement scheme in a jurisdiction where there is a disparate racial impact in the criminal justice system violates section 2.¹⁶⁷

If the Supreme Court were to adopt a disparate impact test similar to the one adopted in *Farrakhan I*, then a finding that the criminal justice system is statistically infected with racial bias would be sufficient to strike down many states' disenfranchisement laws.¹⁶⁸

Florida's current felon re-enfranchisement procedure almost certainly would violate section 2 because it has a direct disparate impact on African Americans as Florida's criminal justice system is infested with racial bias.¹⁶⁹ African Americans in Florida, as previously mentioned, are disproportionately arrested, incarcerated, and accordingly disenfranchised.¹⁷⁰ Florida's 2011 harsh re-enfranchisement scheme punishes those who are arrested, by restarting waiting periods, even if there is no prosecution. Statistics that show that African Americans in Florida are disproportionately arrested, convicted of felonies, and disenfranchised, and thus the 2011 re-enfranchisement scheme falls more heavily on African Americans. A statistical showing that African Americans are disproportionately affected by the Florida justice system, under a *Farrakhan* disparate impact test, is sufficient to find that within the "totality of the circumstances" the clemency scheme violates section 2.¹⁷¹ Florida's re-enfranchisement should be struck down using a disparate impact analysis based on ample evidence of the discriminatory nature of Florida's criminal justice system and the disproportionate effect these laws have on African Americans' ability to vote because it impermissibly denies people their right to vote because of their race.¹⁷²

While it is unlikely that the current Supreme Court would accept this disparate impact test if it were presented, it is impossible to predict what test the current Court would find most appropriate or future changes to the Court's composition that would influence a decision. Regardless, a strong evidentiary showing of Florida's discriminatory criminal justice system is still important because it would make it difficult for the Court to deny the continued need for the VRA or to ignore the ways in which African-Americans continue to suffer from unfair voting practices.

Conclusion

The Voting Rights Act continues to stand for an ideological commitment that racial discrimination in voting should not be tolerated. In contrast, Governor Scott's 2011 executive order creates the most restrictive felon disenfranchisement procedures in the United States, which has a disparate impact on African Americans. It follows that the VRA should reach and reverse the Governor's executive order.

The five counties in Florida covered under the VRA section 5 are required to submit the proposed felon disenfranchisement procedures to the Justice

Department or D.C. District Court before they can implement any changes. The counties must submit the changes because even executive orders must be pre-cleared if they impact voting practices and procedures; moreover, individual jurisdictions in partially covered states are required to submit statewide changes for pre-clearance to the extent it affects them. The Justice Department should refuse to pre-clear the executive order on two grounds: because it is rooted in the intentionally racially discriminatory felon disenfranchisement provision in the original Florida constitution and because it has a disparate impact on African Americans, who statistically have much higher rates of criminal arrests and convictions. Therefore, Florida has not met its burden of showing that the proposed changes will not harm the ability of African Americans to vote.

The Florida ACLU has requested that the Department of Justice require Florida to submit the 2011 executive order for review but has not received so much as a reply.¹⁸¹ The DOJ's failure to act could be a dangerous signal to other states that the Justice Department is not planning to regulate these types of voting changes. Action must be taken quickly to ensure equal access to the ballot for all to prevent widespread disenfranchisement of African Americans in the 2012 elections.

NOTES

1. 42 U.S.C. §§ 1971–1973 (2000), as amended in 1970, Pub. L. 91-285, 84 Stat. 314 (1970), in 1982, Pub. L. 97-205, 96 Stat. 131 (1982) and in 2006, Pub. L. 109-246 (2006).
2. See Katherine Shaw, *Comment Invoking the Penalty: How Florida's Disenfranchisement Law Violates the Requirement of Population Equality in Congressional Representation, and What To Do about It*, 100 NW. U. L. REV. 1439, 1468 (2006) (finding that 29 of the 37 in 1868 did not allow felons to vote, affirming the U.S.'s long history of denying this right to felons). *But see* Hirst v. United Kingdom, ECHR (2006) (holding that disenfranchisement is permissible only if there is a clear, direct connection to the crime for which the prisoner was convicted, such as electoral fraud or abuse of office, and should be left to judicial discretion as an aspect of sentencing; *August v. Electoral Commission*, (CCT8/99) SA 1 (1999) (reviewing South Africa's elections law that only restricts prisoners' right to vote due to (1) mental capacity; (2) current drug dependency; or (3) murder, robbery with aggravating circumstances, or rape).
3. See U.S. Const., art. 1, § 4, para. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."); see also *Oregon v. Mitchell*, 400 U.S. 112 (1970) (noting that while Congress can set limits for voting in federal elections, it may not set such limits for state and local elections).
4. Marc Mauer, "Letter to U.S. Senators Richard Durbin and Lindsay Graham," THE SENTENCING PROJECT 1, (September 8, 2011), http://sentencingproject.org/doc/publications/Subcommittee_hearing_letter_9-8-11.pdf Subcommittee Hearing Letter.
5. See ME. CONST. art. II, § 1 ("Every citizen of the United States of the age of 18 years and upwards, excepting persons under guardianship for reasons of mental illness, hav-

- ing his or her residence established in this State, shall be an elector . . .”); *see also* VT. STAT. ANN. tit. 28, § 807(a) (2000) (“Notwithstanding any other provision of law, a person who is convicted of a crime shall retain the right to vote by early voter absentee ballot in a primary or general election at the person’s last voluntary residence during the term of the person’s commitment under a sentence of confinement provided the person otherwise fulfills all voting requirements.”).
6. *See, e.g.*, MD. CODE ANN., Elections § 3-102(b) (2011) (restricting voting for felons only while serving a court-ordered sentence, including term of parole or probation). *See* Maurer, *supra* note 4, at 1 (relating that 35 states disenfranchise both prisoners and people who are in the community on parole or probation, four states permanently disenfranchise all people convicted of felonies, while the remaining states only restrict voting while actually in prison).
 7. Dara Kam, *Gov. Scott Willing to Reconsider Felon Rights Policy*, PALM BEACH POST, Nov. 1, 2011, <http://www.palmbeachpost.com/news/state/gov-scott-willing-to-reconsider-felon-rights-policy-1945750.html> (noting that Governor Scott himself has heard evidence and made statements about how important it is for ex-felons to regain their stake in society, and discussing studies that show recidivism rates are lower for felons who are restored voting rights).
 8. *See* FLA. CONST. art. VI, § 4(a) (2011) (“No person convicted of a felony . . . shall be qualified to vote, or hold office until restoration of civil rights.”); *see also* IOWA CODE § 48A.30 (2011); KY. REV. STATE ANN. § 116.025(1) (2011); VA. CONST. art. 2, § 1; *see also* *Felony Disenfranchisement Laws in the United States*, THE SENTENCING PROJECT, 3 (Mar. 2011) (charting the laws of the fifty states to demonstrate that only Florida, Iowa, Kentucky, and Virginia disenfranchise convicted felons for their entire lives, unless they are given a pardon by the governor).
 9. *See* Abby Goodnough, *Disenfranchised Florida Felons Struggle to Regain their Rights*, N.Y. TIMES, Mar. 28, 2004, at <http://www.nytimes.com/2004/03/28/us/disenfranchised-florida-felons-struggle-to-regain-their-rights.html?pagewanted=all&src=pm> (revealing that in Florida before 2005, restoration of voting rights was automatic upon application to the governor for some people, but those convicted of more serious offenses were required to undergo an investigation and attend a hearing at the state capital in Tallahassee). Because of serious back-logs, some applicants had to wait years for a decision regarding whether their voting rights would be restored. *Id.*
 10. *See* JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT & AMERICAN DEMOCRACY* 41-69 (2006) (arguing though there was a first wave of disenfranchisement laws that appeared in the 1840s targeted at white men without property, a distinct second wave of disenfranchisement laws appeared post-1870s during the Reconstruction era, particularly in the South, to explicitly create voting barriers for African-Americans and other racial minorities).
 11. *See* Maurer, *supra* note 4, at 2 (arguing that discrimination in the criminal justice system has the cyclical effect of leading to high prison rates for African American men, which leads to disenfranchisement, which may then lead to further criminal activity by those who feel alienated from the political process).
 12. FLA. CONST. art. VI, § 4(a) (2011).
 13. *See* Mark Christopher, *Florida’s Ex-Felons Right for Civil Rights Restoration Under Gov. Scott*, SUNSHINE SLATE (November 11, 2011), <http://www.sunshineslate.com/2011/11/17/civil-rights-restoration-under-gov-scott-in-focus/> (tracing one woman’s struggle to restore her voting rights, and the difficulties she is facing under Governor Scott’s administration, as compared to the procedures under prior administrations).

14. See Goodnough, *supra* note 9 (revealing the intense scrutiny Florida faced following this election for its voting regulations because the election was so close and a disenfranchisement law that more closely aligned with those of the majority of the states could have changed the outcome of the election); see also Shaw, *supra* note 2, at 1470 (relating that approximately two-thirds of disenfranchised felons in Florida have already completed their sentence but remain unable to vote).
15. See Goodnough, *supra* note 9 (citing a 2001 report from a University of Minnesota sociologist).
16. See *Political Punishment: The Consequences of Felon Disenfranchisement for Rhode Island Communities*, Rhode Island Family Life Center (2004), available at <http://opendoorsri.org/sites/default/files/PoliticalPunishment.pdf>; *The Vanishing Black Electorate: Felony Disenfranchisement in Atlanta, Georgia*, King & Mauer, THE SENTENCING PROJECT (2004), available at http://www.sentencingproject.org/doc/publications/fd_vanishingblackelectorate.pdf.
17. See *Ex-Felon Voting Rights in Florida: Revised Rules of Executive Clemency that Automatically Restore Civil Rights to Level 1 Offenders is the Right Policy* 15 (Florida Advisory Committee to the United States Commission on Civil Rights) (Aug. 2008), <http://www.usccr.gov/pubs/EX-FelonVRFL.pdf> [hereinafter *Ex-Felon Voting Rights in Florida*] (explaining the changes made by Governor Bush).
18. *Id.*
19. Ryan S. King, *Expanding the Vote: State Felony Disenfranchisement Reform, 1997-2008* 8, THE SENTENCING PROJECT (2008), at http://www.sentencingproject.org/doc/publications/fd_statedisenfranchisement.pdf.
20. *Ex-Felon Voting Rights in Florida*, *supra* note 17, at 15.
21. In 2007, the Commission consisted of Alex Smith, Chief Financial Officer, Charles Bronson, Commissioner of Agriculture, Charlie Crist, Governor, and Bill McCollum, Attorney General. The Commission always consists of the holders of those offices. See generally *Florida Parole Commission Annual Report 2007-2008*, available at <https://fpc.state.fl.us/PDFs/FPCAnnualreport200708.pdf>.
22. See *Ex-Felon Voting Rights in Florida*, *supra* note 17, at 17 (explaining that felons are categorized on a three tier system, and those on the lowest tier, Level 1, automatically have their voting rights restored at the completion of their sentence).
23. *Disenfranchisement News*, THE SENTENCING PROJECT, Sept. 13, 2011, http://www.sentencingproject.org/detail/news.cfm?news_id=1189.
24. *Id.* at 21.
25. See Mauer, *supra* note 4, at 1 (reporting that since 1997, state reforms have restored 800,000 people to voter registration polls).
26. See Amy Green, *Rick Scott Elected Florida Governor as Alex Sink Concedes Tight Race*, POLITICS DAILY, Nov. 6, 2010, <http://www.politicsdaily.com/2010/11/03/floridas-gubernatorial-race-too-close-to-call/> (representing the narrow margin of victory with forty-nine percent for Scott and forty-eight percent of the vote for his closest competitor).
27. *Governor Scott and Florida Cabinet Discuss Amended Rules of Executive Clemency*, PRESS RELEASE, March 9, 2011 https://fpc.state.fl.us/PDFs/clemency_press_release.pdf.
28. *Id.*
29. See Shaw, *supra* note 2, at 1441 (commenting that Florida's law applies to any felony committed in any state, which has led Florida to have the largest number of disenfranchised felons in the country).

30. This statement is a widely-held belief in the civil rights community. *See, e.g.*, U.S. Dep't of Justice, Voting Section, <http://www.justice.gov/crt/about/vot/> (last visited March 5, 2012) ("The Voting Rights Act, adopted initially in 1965 and extended in 1970, 1975, 1982, and 2006 is generally considered the most successful piece of civil rights legislation ever adopted by the United States Congress").
31. *See generally* WILLIAM GILLETE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* (1969) (tracing the origins and implementation of the Fifteenth Amendment through the passage of the Voting Rights Act).
32. *See* 42 U.S.C. §1973.
33. 42 U.S.C. §§ 1973(a), 1973b(f)(2); *see* 42 U.S.C. § 1973(l)(c)(3) (defining "language minorities" or "language minority group" as persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage).
34. 42 U.S.C. § 1973b.
35. *See* *Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980) (noting that during Senate hearings on the VRA, the view was expressed without contradiction that Section Two simply restated the prohibitions of the Fifteenth Amendment).
36. *See id.* at 66-75 (finding that the Equal Protection Clause required intent, not just effect); *see also* *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-68 (1977) (requiring that when discriminatory intent is alleged, plaintiffs must prove that the challenged practice was adopted, at least in part, because it would harm minority voting strength, and not merely with an expectation that it would do so).
37. Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1355-57 (1983); *see* S. Rep. No. 97-417, 97th Cong., 2d Sess., at 28-29 (1982) (listing several factors to consider when determining if the operation of an electoral device has a discriminatory effect).
38. *See* *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986) (holding that Congress explicitly stated that a voting practice that has a discriminatory effect on minorities violates section two of the VRA).
39. *See* 42 U.S.C. § 1973c (describing the pre-clearance procedure).
40. *Id.*
41. *Id.*
42. *See* 42 U.S.C. § 1973.
43. *Id.* (reflecting the change from 1964 to 1970).
44. *Id.*; 42 U.S.C. §§ 1973(a), 1973b(f)(2).
45. *See* 42 U.S.C. § 1973b(b).
46. *Id.*
47. *See* *Section 5 Covered Jurisdictions*, United States Department of Justice, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited November 5, 2011) (listing all covered jurisdictions under the VRA).
48. 40 FR 34329, 43746.
49. 393 U.S. 544, 565 (1969); *see also* 42 U.S.C. 1973c(a) ("Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice denies or abridges the right to vote.").
50. 393 U.S. at 565, 568.

51. 42 U.S.C. § 1973c.
52. See *Section 5 Changes by Type and Year*, United States Department of Justice, http://www.justice.gov/crt/about/vot/sec_5/changes.php (last visited November 6, 2011) (tabulating the total number of changes submitted for approval between 1965 and 2010 as of March 31, 2011 at 531,142).
53. See 42 U.S.C. § 1973c (noting that a covered jurisdiction may also request an expedited review if necessary).
54. See *Morris v. Gressette*, 432 U.S. 491, 501-03 (1977) (holding that it was not the intent of Congress to have the Attorney General's decision subject to judicial review).
55. See 42 U.S.C. § 1973b (prohibiting standards, practices, or policies which intend or have the effect of denying the right to vote to a protected racial or language minority group).
56. 42 U.S.C. § 1973c. For a list of declaratory judgment actions, see *Section 5 Declaratory Judgment Actions*, United States Department of Justice, http://www.justice.gov/crt/about/vot/sec_5/caselist_ddc.pdf (last visited November 6, 2011).
57. *Id.*
58. *Id.*
59. See *Allen v. State Board of Elections*, 393 U.S. 544, 555 (1969) (reasoning that while no explicit private right of action is listed, the language providing that "no person shall be denied the right to vote for failure to comply with [a new state enactment covered by, but not approved under, § 5]" allows plaintiffs to seek a declaratory judgment that a new state enactment is governed by section five). If a plaintiff can prove that a change was not properly submitted for approval, he or she has standing to seek an injunction preventing the state from enforcing the change until it has sought approval under Section 5. *Id.* See also *Lopez v. Monterey County*, 519 U.S. 9, 23 (1996) (describing the Attorney General's inquiry during a section five enforcement action).
60. 42 U.S.C. § 1973b(a)(1)(A)-(F); see *NAMUDNO v. Holder*, 129 S. Ct. 2504 (2009) (holding that if a political subdivision is subject to pre-clearance under the VRA it may also apply for a bailout).
61. See 42 U.S.C. § 1973b(a)(1)(A)-(F). For a list of jurisdictions that have successfully bailed out, see *Section 4 of the Voting Rights Act*, United States Department of Justice, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout (last visited February 10, 2012).
62. See *id.*
63. *Id.*
64. See 383 U.S. 301 (1966) (exercising original jurisdiction to rule that the Fifteenth Amendment provides Congress with the authority to enact legislation to prevent racially discriminatory voting practices).
65. *Id.* at 308.
66. 129 S. Ct. 2504 (2009).
67. 811 F.Supp.2d 424 (2011); see Mike Scarcella, *D.C. Circuit to Hear Voting Rights Act Case in January*, THE BLT: THE BLOG OF LEGAL TIMES (November 2, 2011, 1:31 PM), <http://legaltimes.typepad.com/blt/2011/11/dc-circuit-to-hear-voting-rights-act-case-in-january-.html> (citing the support the Department of Justice has received from the NAACP, ACLU, and the Lawyers' Committee for Civil Rights as friends of court).
68. See 811 F.Supp.2d 424 (2011), 427-28 (affirming the constitutionality of the VRA under a congruent and proportional standard of review after accepting the evidence in the Congressional record regarding the continued need for the VRA).

69. See Mary Orndorff, *Shelby County's appeal in voting rights case gets fast track*, AL.COM (October 7, 2011, 7:00 AM), http://blog.al.com/sweethome/2011/10/shelby_countys_appeal_in_votin.html (expressing concern that if this does reach the Supreme Court, it may find the pre-clearance requirements in the VRA outdated).
70. See First Amended Complaint for Declaratory Judgment for the Plaintiff, Florida v. U.S., Civ. No. 1:11-cv-01428-CKK-MG-ESH (D.C.D.C. 2011), (seeking pre-clearance of changes that would restrict third-party voter registration drives, shorten the 'shelf-life' of signatures collected for ballot initiatives, limit a voter's ability to change their registered address on election day, and reduce the number of early voting days).
71. *Id.* at 1, 27, 28.
72. See *Georgia v. United States*, 411 U.S. 526 (1973); *City of Rome v. United States*, 446 U.S. 156 (1980); *Lopez v. Monterey County*, 525 U.S. 266 (1999).
73. See 383 U.S. 301, 305, 308 fn. 2 (1966) (holding that passing the VRA was within Congress' power under section two of the Fifteenth Amendment).
74. See *id.* at 316-17 (categorizing constitutional attacks on other sections of the VRA as premature and noting that only some portions of the Act were being challenged).
75. See *id.* at 324 (citing *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258-59, 261-62 (1964) and *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964) to support the proposition that when Congress acts under the Fifteenth Amendment to prohibit racial discrimination in voting that action is judged under a rational basis standard).
76. See *id.* at 325-26 (holding that the Fifteenth Amendment allows Congress to preempt state laws to protect the voting rights of racial minority groups).
77. See *id.* at 327 (endorsing Congress' actions as constitutional).
78. See *Northwest Austin Municipal Utility District No. 1 v. Holder*, 129 S. Ct. 2504 (2009).
79. See *id.*; see also 42 U.S.C. § 1973b(a)(1)(A)-(F) (describing the VRA's bailout procedures).
80. *NAMUDNO*, 129 S. Ct at 2516 (widening the definition of political subdivisions eligible to file a bailout suit beyond those described in the VRA).
81. See *id.* at 2511 (recounting perceived improvements in combating discrimination in voting since the passage of the VRA, such as higher African American voter registration and turnout rates).
82. *Id.* at 2511-12.
83. See *id.* at 2512 (reasoning that the VRA is likely in trouble under either a congruence and proportionality test or a rational means test); see also *Boerne v. Flores*, 521 U.S. 507, 520 (1997).
84. See 811 F.Supp.2d 424, 427-28 (affirming the constitutionality of the VRA under a congruent and proportional standard of review).
85. *Id.*; see H.R. Rep. 109-478, **11 2nd sess. 2006 (finding that the testimony and reports considered in re-authorizing the Act supports the conclusion that "gains made under the VRA are the direct result of the VRA's temporary provisions, and that reauthorization of these provisions is both justified and necessary").
86. *Id.*
87. See *Section 5 Objection Determinations*, U.S. Department of Justice, http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php (last visited Dec. 18, 2011) (listing two objections in Alabama, three in Georgia, two in Louisiana, one in Michigan, two in Mississippi, two in North Carolina, one in South Carolina, one in South Dakota, and six in Texas, as well as many others in 2000 and 2001); 811 F.Supp.2d 424 (2011),

- 465 (noting that “the Justice Department determined that discriminatory purpose was a motivating factor in no less than 186 of the redistricting plans proposed by covered jurisdictions during the 1990s”).
88. See, e.g., Charlie Savage, *Justice Dept. Blocks Texas on Photo ID for Voting*, N.Y. TIMES, Mar. 3, 2012, available at <http://www.nytimes.com/2012/03/13/us/justice-dept-blocks-texas-photo-id-law.html> (reporting that Texas, South Carolina among other states’ voting identification laws that require voters to show IDs much narrower than the prevailing federal standard have failed pre-clearance due to evidence that such laws will significantly affect minority voters’ ability to vote).
 89. See *Northwest Austin Municipal Utility District No. 1 v. Mukasey*, 573 F.Supp.2d 221, 248 (describing how the House and Senate reports erroneously found higher levels of electoral participation by minorities because of a failure to separate Hispanic rates from white rates and to control for citizenship when assessing Hispanic registration rates).
 90. *Northwest Austin Municipal Utility District No. 1 v. Holder*, 129 S. Ct. 2504, 2525 (2009) (Thomas, J., concurring and dissenting) (citing statistics from the Southeastern Legal Foundation amicus curiae brief).
 91. 811 F.Supp.2d 424, 467; *Northwest Austin Municipal Utility District No. 1 v. Mukasey*, 573 F.Supp.2d at 221, 248.
 92. *Id.*
 93. *Id.*
 94. See *supra* note 97.
 95. See *Section 5 Covered Jurisdictions*, *supra* note 52 (listing California, Florida, North Carolina, Michigan, New Hampshire, New York, and South Dakota as the states where only some counties or townships are covered jurisdictions under section 5 of the VRA).
 96. See Letter from Ralph F. Boyd, Jr, Assistant Att’y Gen., Civil Rights Div., to John M. McKay, President of the Florida Senate and Tom Feeney, Speaker of the Florida House of Representatives, 2 (Jul. 1, 2002), available at http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_070102.pdf.
 97. See *id.* (noting that a portion of the majority-Hispanic district was located in Collier County, which is covered by the VRA).
 98. See JoNel Newman, *Voting Rights in Florida, 1982-2006*, RenewtheVRA.org, 8-9 (Mar. 2006), available at http://www.aclufi.org/issues/voting_rights/FloridaVRA2.pdf (revealing that the DOJ objected to both of Florida’s voting plans following their decennial redistricting based on new Census data).
 99. See *id.* at 8 (noting that an objection to a Home Rule Charter in Hillsborough County was later withdrawn).
 100. See 525 U.S. 266, 278 (1999) (agreeing with the County that it, not the State, must seek pre-clearance for state-wide voting changes).
 101. *Id.*
 102. See *id.* at 278-79 (concluding that a textual reading of the statute reveals that a covered county in a non-covered state must not administer state-wide voting changes until after that county submits the change to the Justice Department and received pre-clearance).
 103. *Id.*
 104. *Id.*
 105. See Dara Kam, *ACLU, Voting Rights Group Sue to Stop Implementation of New Florida Elections Law*, PALM BEACH POST, (June 3, 2011), <http://www.palmbeachpost.com/news/state/aclu-voting-rights-group-sue-to-stop-implementation-1517536.html?printArticle=y> (noting the ACLU’s reliance on the Mortham opinion, but also

- referring to a current elections supervisor arguing that the Mortham opinion does not apply because current circumstances are much different).
106. See Howard Simon, *New State Voting Laws II: Protecting the Right to Vote in the Sunshine State*, ACLU (Jan. 27, 2012) 8, n. 19, http://www.aclu.org/files/assets/aclu_fl_statement_for_senate_judiciary_subcomm_field_hearing_on_voter_suppression_2_2_12.pdf (reviewing the ACLU position that implementing a voting change in the sixty-two non-covered counties has negative consequences on voters in the remaining five counties).
 107. See 42 U.S.C. § 1973 (“No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied . . . in contravention of the guarantees set forth in [the VRA]”); *Allen v. State Board of Elections*, 393 U.S. 544, 565 (1969) (construing section five of the VRA to be a broad grant of authority to review “subtle, as well as obvious, state regulations” and indeed, to assess “all changes, no matter how small”).
 108. See 521 U.S. 979 (1997) (holding that the changes required pre-clearance under precedent demanding that even “an administrative effort to comply with a statute that had already received clearance may require separate pre-clearance, because section five reaches informal as well as formal changes” (internal quotation marks removed)).
 109. See *Florida Changes Submitted for Pre-Clearance*, United States Department of Justice, http://www.justice.gov/crt/about/vot/sec_5/fl_obj2.php (last visited Nov. 30, 2011) (listing Florida voting regulation changes submitted for approval to the DOJ).
 110. See 42 U.S.C. § 1973; *Allen v. State Board of Elections*, 393 U.S. 544, 565 (1969).
 111. See *Johnson v. Riley*, Complaint, 2010 WL 3423779 (N.D.Ala.) (alleging that Governor Riley’s executive order effectively nullifies the votes of electoral majorities in several counties and is in violation of the VRA because the order was not pre-cleared).
 112. *Id.* ¶¶ 39-40.
 113. *Id.*
 114. *Id.* ¶ 40.
 115. *Id.* ¶ 38.
 116. *Id.* ¶¶ 62-70.
 117. See *Johnson v. Riley*, Complaint, 2010 WL 3423779 (N.D.Ala.) ¶¶ 62-70; 71-75 (explaining that the counties affected by the Governor’s actions are majority African American, a racial group explicitly protected under the VRA).
 118. See Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. 51.52 (c).
 119. *Georgia v. United States*, 411 U.S. 526 (1973); 28 C.F.R. § 51.52; see also *Objection to Georgia Voting Change*, Department of Justice, May 29, 2009, http://www.justice.gov/crt/about/vot/sec_5/tr/1_052909.php.
 120. See *Objection to Georgia Voting Change*, *supra* note 127 (explaining that the system flagged minority voters as “non-citizens” far more often than it did white voters, meaning that the flagged minority voters had extra obstacles to prove that they were eligible to register to vote).
 121. *Id.*
 122. *Id.*
 123. See Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, STANFORD PUBLIC LAW AND LEGAL THEORY WORKING PAPER SERIES 13, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=484543 (revealing that the percentage of African Americans unable to vote was close to two and a half times that of Caucasian people).

124. See Part I and II Arrests for Florida by Age, Sex and Race, 1998-2010, 14 FLORIDA DEPARTMENT OF LAW ENFORCEMENT, available at http://www.fdle.state.fl.us/Content/getdoc/2c4b035b-369b-406f-a729-dc898ae08996/arr_age_race.aspx.
125. *Id.*
126. *Incarceration Trends in Florida, 1988-2008*, THE SENTENCING PROJECT 2 (Dec. 2009), http://www.sentencingproject.org/doc/publications/inc_FLTrends.pdf.
127. Laughlin McDonald, et al., *Letter to Governor Scott and Members of the Executive Clemency Board*, ACLU, (Mar. 4, 2011), <http://www.brennancenter.org/page/-/Democracy/Letter%20to%20Florida%20Clemency%20Board%20March%204%202011.pdf>.
128. *Governor Scott and Florida Cabinet Discuss Amended Rules of Executive Clemency*, *supra* note 32.
129. *Id.*
130. 42 U.S.C. § 1973c.
131. 42 U.S.C. § 1973b.
132. *Id.*
133. See 590 F.3d at 1016 (noting that although the Senate lists several factors to consider when determining if a voting procedure violates the VRA and that racial bias in the criminal justice system is not specifically listed, the Senate did not intend for their list to be exhaustive, and this type of bias is relevant to the totality of the circumstances).
134. *Id.* at 1008 (arguing that although affirmatively proving official history of discrimination would be strong evidence to support a VRA violation, lack of such evidence does not automatically negate a VRA violation claim).
135. *Id.* at 994.
136. *Id.* at 1006.
137. *Id.* at 1008.
138. *Id.* at 1012.
139. See *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (*en banc*) (granting that while intentional discrimination in the criminal justice system would be sufficient to find a violation of section two, the plaintiffs did not meet their burden of showing such intentionality).
140. *Id.* at 993.
141. *Id.* at 994.
142. *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (*en banc*); *Hayden v. Pataki*, 449 F.3d 305, 323 (2d Cir. 2006); *Simmons v. Galvin*, 575 F.3d 24, 41 (1st Cir. 2009).
143. See *Johnson v. Bush*, 126 S. Ct. 650 (2005) (denying certiorari to the Eleventh Circuit's decision regarding a felon disenfranchisement section two VRA challenge).
144. See U.S. CONST., amend. 14, § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."); see also *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (*en banc*) (holding that only intentional discrimination in enacting a felon disenfranchisement scheme is sufficient to find a section two violation).
145. *Farrakhan*, 623 F.3d at 993.
146. U.S. CONST., amend. 14, § 2.
147. See *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974) (relying on the argument that since section two of the Equal Protection Clause mentions felon disenfranchisement, the practice does not violate the Equal Protection Clause).

148. See U.S. CONST, amend. 14, § 2(4)(a).
149. See *Richardson* 418 U.S. at 72-73 (Marshall, J., dissenting) (recounting that section two was passed because the Republican-controlled House wanted to ensure its continued dominance by insuring that southern African Americans, who supported them, would be able to vote, but realized that unlimited suffrage rights to all African Americans would be politically infeasible).
150. See *id.* at 74 (reasoning that Congress did not intend to authorize discriminatory practices that fell into special categories named in section two, and that Congress likely did not appreciate the literal significance of impingement upon democratic values that the Court has allowed section two to impose).
151. See *id.* at 86 (concluding that judged under modern standards, felon disenfranchisement could not stand). But see *Richardson*, 418, U.S. at 54 (majority) (holding that the California Supreme Court erred in determining that felon disenfranchisement ran afoul of the Fourteenth Amendment).
152. See *Hunter v. Underwood*, 471 U.S. 222, 233 (1980) (holding that the obvious invidious motivation for passing the felon disenfranchisement clause in the Alabama Constitution in 1908 renders it unconstitutional, despite valid reasons under which it could be passed today).
153. See *Hunter*, 471 U.S. at 227-28 (describing that after establishing that racial bias was a substantial factor in passing the legislation, the State has the burden to prove the law would have been passed even absent this impermissible motivation).
154. See *id.* at 233 (expounding that it is irrelevant whether the same law could be passed for a facially neutral reason today if the actual original passage had a discriminatory intent).
155. *Id.*
156. See Matthew E. Feinberg, *Suffering without Suffrage: Why Felon Disenfranchisement Constitutes Vote Denial Under Section Two of the Voting Rights Act*, 8 HASTINGS RACE & POVERTY L.J. 61, 69 (2011) (admitting that this case is to date the only time the Supreme Court has struck down a felon disenfranchisement law, but suggesting that future challenges are possible).
157. See *United States v. Fordice*, 505 U.S. 717, 739 (1992) (finding that the burden is on the State to offer legitimate reasons to prove that a law is no longer rooted in its original discriminatory purpose); see also *Knight v. Alabama*, 14 F.3d 1534, 1550 (1994) (applying *Fordice* and requiring the State to provide independent and legitimate justifications to break the causal link between a reenacted law and its discriminatory predecessor).
158. 505 U.S. 717, 739 (1992).
159. *Fordice*, 505 at 739; *Knight*, 14 at 1550.
160. See *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (*en banc*) (finding that although it was clear that Florida originally passed its felon disenfranchisement law for a discriminatory purpose, later reenactments removed the taint of that law because they were passed for facially neutral reasons). But see *id.* at 1245 (Barkett, J., dissenting) (discrediting the majority's finding that Florida's reenactment of its felon disenfranchisement law was valid because it had been passed through a "deliberative process," and reiterating that deliberation is not sufficient if such deliberation does not result in articulable, legitimate policy justifications for the law).
161. See *Johnson v. Bush*, F.Supp.2d 1333 (S.D. Fla. 2002) (holding for the defendants, but conceding that plaintiffs did present ample evidence of a racially discriminatory motive for passing the 1868 law).

162. See *Johnson v. Governor of the State of Florida*, 405 F.3d 1214 (2005) (finding that the 1968 reenactment narrowed the class of the disenfranchised to those who had committed felonies, was considered by the Suffrage and Elections Committee, was approved by the legislature, and was then voted on by the populace).
163. See *id.* at 1244 (Barkett, J., dissenting) (noting that a deliberative process is not the same as a process in which independent, racially-neutral reasons are offered and accepted before a law is passed).
164. *Id.*; see also *Johnson v. Bush*, 126 S. Ct. 650 (2005) (denying certiorari to reconsider the decision).
165. See *id.* at 1247 (noting the Florida's subsequent reenactments were textual changes that were even less substantive than the changes made to the law that was struck down in *Hunter* (citation omitted)); see also Erika Wood, *Turning Back the Clock in Florida*, BRENNAN CENTER FOR JUSTICE, (March 2011) (arguing that Governor Scott's changes made via executive order are far more restrictive than the procedures that had been in place prior to 1999).
166. *Farrakhan v. Gregoire*, 590 F.3d 989 (9th Cir. 2010).
167. *Farrakhan*, 623 F.3d at 993.
168. *Id.* at 1008.
169. *Id.*
170. *Farrakhan v. Gregoire*, 590 F.3d 989, 1012 (9th Cir. 2010).
171. 42 U.S.C. 1973(a).
172. Letter from Laughlin McDonald, Director American Civil Liberties Union Voting Rights Project to Chris Herren, Chief, Voting Section, Civil Rights Division (April 25, 2011) available at <http://www.aclufl.org/pdfs/2011-04-ACLU DOJ Clemency Letter.pdf>.



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