No. 06-35669

IN THE
United States Court of Appeals for the Ninth Circuit

MUHAMMAD SHABAZZ FARRAKHAN, ET AL.,

Plaintiffs-Appellants,

v.

CHRISTINE O. GREGOIRE, ET AL.,

Defendants-Appellees.

Appeal From the United States District Court, Eastern District of Washington
Hon. Robert H. Whaley, District Judge, Case No. CV 96-0076 RHW

BRIEF OF *AMICUS CURIAE* CONSTITUTIONAL ACCOUNTABILITY CENTER, IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT REGARDING CONSENT TO FILE

Appellants and Appellees have given *amicus* consent to file this brief, which is being filed consistent with the Court's May 28, 2010 order extending the deadline for filing *amicus* briefs to June 11, 2010.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus* states that it is not a publicly-held corporation, does not issue stock and does not have a parent corporation. *Amicus* Constitutional Accountability Center is a non-profit 501(c)(3) organization.

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INTEREST OF THE AMICUS CURIAE

The Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars and the public to improve understanding of the Constitution and to preserve the rights, freedoms, and structural safeguards that our charter guarantees. CAC accordingly has a strong interest in this case and in the scope of Congress's enforcement powers under the Reconstruction Amendments. CAC has filed *amicus* briefs in the U.S. Supreme Court in cases raising significant issues regarding the text and history of these Amendments, including *Northwest Austin Municipal Util. Dist. v. Holder*, 129 S. Ct. 2504 (2009).

SUMMARY OF ARGUMENT

Applying the Voting Rights Act to reach felon disenfranchisement laws that result in racial discrimination does not jeopardize the Act's constitutionality. The Fifteenth Amendment gives Congress broad power to prevent and root out racial discrimination in voting.

Congress's power to enforce the Fifteenth Amendment's guarantee of the right to vote free from racial discrimination does not stop at the prison door. While Section 2 of the Fourteenth Amendment expressly permits states to disenfranchise citizens based on conviction of a crime, Section 2 was limited by the explicit text of the Fifteenth Amendment, which requires racial neutrality in voting laws and practices, and gives Congress broad power to enforce the constitutional prohibition on racial discrimination in voting. Indeed, the framers of the Fifteenth Amendment considered and rejected proposed amendments to the Amendment's language that would have permitted states to disenfranchise citizens convicted of felonies. Section 2 of the Fourteenth Amendment gives states the option of enacting felon disenfranchisement laws, but the ratification of the Fifteenth Amendment gives Congress the author-

ity to prevent and prohibit state felon disenfranchisement laws and practices that are racially discriminatory.

ARGUMENT

The first time the Court considered—and ultimately denied—hearing this Voting Rights Act (VRA) case *en banc*, the dissent to the denial of rehearing *en banc* raised the concern that there is a "fundamental problem with extending the VRA to reach felon disenfranchisement laws" because "[d]oing so seriously jeopardizes its constitutionality." *Farrakhan v. Washington*, 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, J., dissenting from denial of reh'g en banc). Citing the "explicit constitutional recognition in § 2 of the Fourteenth Amendment" of felon disenfranchisement laws, *id.* (quoting *Baker v. Pataki*, 85 F.3d 919, 928 (2d Cir. 1996)), the dissent argued "subject[ing] felon disenfranchisement provisions to the 'results' methodology of the VRA would pose a serious constitutional question concerning the scope of Congress's power to enforce the Fourteenth and Fifteenth Amendments." *Id.* (quoting *Baker*, 85 F.3d at 930).

However, the text and history of the Fourteenth and Fifteenth Amendments show that Congress's power to enforce the Fifteenth

Amendment's guarantee of non-discriminatory voting laws and practices extends to felon disenfranchisement laws—and that this enforcement power is extensive and grants Congress broad discretion to carry out the Amendment's mandate. Section 2 of the Fourteenth Amendment, which allows states to disenfranchise citizens convicted of a "crime," does not cabin Congress's Fifteenth Amendment enforcement power. The framers of the Fifteenth Amendment acknowledged that the text of the Amendment would abrogate Section 2 of the Fourteenth Amendment concerning racial discrimination in voting, and rejected proposals to include an exemption for felon disenfranchisement laws in the Fifteenth Amendment.

I. THE FIFTEENTH AMENDMENT GIVES CONGRESS BROAD ENFORCEMENT POWER TO ERADICATE RACIAL DISCRIMINATION IN VOTING.

Congress enacted the Voting Rights Act pursuant to its powers to enforce the Fifteenth Amendment's guarantee of the right to vote free from racial discrimination and the Fourteenth Amendment's guarantee of equality. *See* S. Rep. No. 97-417 at 27, 39 (1982). Both of these Amendments give Congress broad power to enforce the text's promises

of liberty and equality.[1] For the purposes of this case, it is ultimately the text and history of the Fifteenth Amendment that controls the outcome of the constitutional question, since the Fifteenth Amendment provides a right to vote free from discrimination that was not included in the Fourteenth Amendment. *See generally Rice v. Cayetano*, 528 U.S. 495, 522 (2000) (explaining that the "Fifteenth Amendment has independent meaning and force").

The Fifteenth Amendment provides that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1. To make this guarantee a reality, the Amendment then provides that "The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, § 2. As the Supreme Court recognized just five years after the Fifteenth Amendment's ratification, "the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption

[1] The Thirteenth Amendment's prohibition of slavery similarly includes a provision that states, "Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII, § 2.

from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude." *United States v. Reese*, 92 U.S. 214, 218 (1875). Further recognizing that this right was one that had not been protected prior to the enactment of the Fifteenth Amendment, even by the majestic guarantees of liberty and equality in the Fourteenth Amendment, the Court stated that, "[p]revious to this amendment, there was no constitutional guaranty against this discrimination: now there is." *Id.*

The Fifteenth Amendment's enforcement clause is virtually identical to the enforcement clause in the Fourteenth Amendment. To enforce the Fourteenth Amendment's guarantees of "due process of law" and "equal protection of the laws," Section 5 of the Amendment states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, §§ 1, 5. The framers of the Fourteenth Amendment described the power to enforce as a "direct affirmative delegation of power" that "casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State in-

fringes the rights of persons or property." Cong. Globe, 39th Cong., 1st Sess. 2766, 2768 (1866) (Sen. Howard).

These same understandings of congressional power shaped the Fifteenth Amendment's identically-worded enforcement clause. During the debates on the Fifteenth Amendment, the framers made clear that the Amendment's Enforcement Clause, like that of the Fourteenth Amendment, gave Congress a broad "affirmative power" to secure the right to vote. Cong. Globe, 40th Cong., 3rd Sess. 727 (1869) (Rep. Bingham). In 1870, the same year the Fifteenth Amendment was ratified, Congress invoked the Amendment's enforcement clause in support of voting rights legislation, reflecting the framers' judgment that the Fifteenth Amendment is "ample and full and clothes Congress with all power to secure the end which it declares shall be accomplished." Cong. Globe, 41st Cong., 2nd Sess. 3563 (1870) (Sen. Carpenter). The Amendment's enforcement clause, Senator Morton explained, "intended to give to Congress the power of conferring upon the colored man the full enjoyment of his right." *Id.* at 3670.

The language that the Framers used to define the scope of Congress's authority under the Thirteenth, Fourteenth and Fifteenth

Amendments—"appropriate legislation"—reflects a decision to give Congress ample berth to make legislative choices. *See*, *e.g.*, JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 28-31 (2002); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822-27 (1999); Michael W. McConnell, *Institutions and Interpretation*, 111 HARV. L. REV. 153, 178 n.153 (1997); Steven A. Engel, Note, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 YALE L.J. 115, 133-43 (1999). In giving Congress the power to enact "appropriate legislation," the framers of each of the Civil War Amendments, including the Fifteenth, were granting Congress the sweeping authority of Article I's "necessary and proper" powers as interpreted by the famous case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Throughout Reconstruction, the framers repeatedly made the point that *McCulloch* was the measure of congressional power under the enforcement clauses of the three Civil War Amendments. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1118, 1294, 1836 (1866); Cong. Globe, 42nd Cong., 2nd Sess. 728 (1872); Cong. Rec., 43rd Cong., 1st Sess. 414 (1874); Cong. Rec., 43rd Cong. 2nd Sess. 980 (1875).

In *McCulloch*, Chief Justice Marshall laid down the fundamental principle determining the scope of Congress's powers under the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 17 U.S. (4 Wheat.) at 421 (emphasis added). Chief Justice Marshall used the word "appropriate"—the same word used in the Fifteenth Amendment's enforcement clause—to describe the scope of congressional power no fewer than six times. *Id.* at 408, 410, 415, 421, 422, 423.[2] This

[2] The treatise writers who were most influential at the time the Fifteenth Amendment was ratified followed *McCulloch*'s understanding of the breadth of congressional freedom to choose "appropriate" measures. The accounts of congressional power authored by Justice Story and Chancellor Kent, for example, were cited repeatedly during the debates over the Reconstruction Amendments. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1093 (1866) (statement of Rep. Bingham) (quoting Story); *id.* at 1118 (statement of Rep. Wilson) (quoting Kent); *id.* at 1292 (statement of Rep. Bingham) (quoting Kent); *id.* at 1294 (statement of Rep. Shellabarger) (quoting Story). Story used the word "appropriate" to emphasize that Congress "must have wide discretion as to the choice of means." 1 Joseph Story, *Commentaries on the Constitution of the United States* 417 (1833) ("[T]he only limitation upon the discretion would seem to be, that the means are *appropriate* to the end. And this must naturally admit of considerable latitude; for the relation between the action and the end . . . is not always so direct and palpable, as to

This broad construction of congressional power entails a deferential role for judicial scrutiny when Congress has acted pursuant to an affirmative grant of power, such as the affirmative grant of enforcement power in the Fifteenth Amendment. For the courts to review the necessity of Congress's chosen measures would be to violate the separation of powers between the Courts and Congress, "to pass the line which circumscribes the judicial department, and to tread on legislative ground." *Id.* at 423.

In short, the Reconstruction Congress specifically drafted the enforcement clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments to give Congress broad discretion to enact legislation that would secure the rights protected in those Amendments. *Cf. Tennessee v. Lane*, 541 U.S. 509, 561 (2004) (Scalia, J., dissenting) (noting that the Court has given *McCulloch*-style deference to enforcement legislation under all three Reconstruction Amendments with respect to measures

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strike the eye of every observer.") (emphasis added). Chancellor Kent likewise invoked *McCulloch* when stressing the importance of Congress's power to adopt any means "which might be *appropriate* and conducive" to a permissible end. 1 James Kent, *Commentaries on American Law* 238 (1826) (emphasis added).

directed against racial discrimination).[3] With respect to the Fifteenth Amendment, Congress was empowered with broad authority to enact legislation that would secure the right to vote free from discrimination, and prevent the infringement of that right. *See City of Rome v. United States*, 446 U.S. 156, 175 (1980) ("Congress' authority under § 2 of the Fifteenth Amendment . . . [is] no less broad than its authority under the Necessary and Proper Clause."). Applying the Voting Rights Act to felon disenfranchisement laws is within this broad authority.

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[3] While the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), announced a congruence and proportionality test to limit Congress' power to enforce the broadly-worded guarantees of the Fourteenth Amendment in order to ensure that Congress does not invent new constitutional rights and trench deeply on principles of federalism, these same concerns do not have the same force when it comes to the Fifteenth Amendment's focused prohibition on racial discrimination in voting. Congress necessarily has more leeway in protecting against racial discrimination– the most constitutionally suspect class – in order to protect the right to vote, which has always been recognized as a fundamental right of the highest order. *Cf. Lane*, 541 U.S. at 561 (Scalia, J., dissenting) ("Giving [Congress]. . . more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctly violative of the principal purpose of the [Civil War] Amendment[s] . . . .").

II. SECTION 2 OF THE FOURTEENTH AMENDMENT DOES NOT LIMIT CONGRESS'S POWER TO ENFORCE THE CONSTITUTIONAL PROHIBITION ON RACIAL DISCRIMINATION IN VOTING.

A. The Fifteenth Amendment Superseded Section 2 of the Fourteenth Amendment Concerning Racial Discrimination in Voting.

Congress's broad enforcement powers are in no way lessened here because of the mention of criminal disenfranchisement in Section 2 of the Fourteenth Amendment. The text and history of the Fourteenth and Fifteenth Amendments leaves no doubt that Section 2 of the Fourteenth Amendment neither qualifies the Fifteenth Amendment's substantive prohibition on racial discrimination in voting nor limits Congress's sweeping authority to enforce, through prophylactic measures like the Voting Rights Act, the Fifteenth Amendment. On the contrary, while Section 2 of the Fourteenth Amendment permitted states to disenfranchise African-American voters, the Fifteenth Amendment flatly prohibited racial discrimination in voting, and gave Congress broad authority to enforce this new constitutional command.

Section 2 of the Fourteenth Amendment, in relevant part, reads as follows:

> [W]hen the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, 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 in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2.

Section 2 of the Fourteenth Amendment was principally concerned not with criminal disenfranchisement laws at all, but with creating a new procedure for apportioning representatives to Congress to account for the fact that the freed slaves were now citizens and had to be counted as full persons, but still lacked the right to vote. With the Three-Fifths Clause a nullity, the framers were concerned that counting the newly freed slaves as full persons would give the Southern States far more congressional representation than they had before they seceded from the Union, even "while at home" the newly freed slaves "are counted politically as nothing." Cong. Globe, 39th Cong., 1st Sess. 2464 (1866) (Rep. Thayer); *id.* at 2468 (Rep. Kelley) ("Shall the pardoned rebels of the South include in the basis of representation four million peo-

ple to whom they deny political rights, and to no one of whom is allowed a vote in the selection of a Representative?").

Section 2 put the States to a choice. In the words of Sen. Jacob Howard, a member of the Joint Committee on Reconstruction that was responsible for drafting the Fourteenth Amendment, Section 2 left "the right to regulate the elective franchise . . . with the States," but imposed a penalty of reduced congressional representation on States that "persist in refusing suffrage to the colored race." Cong. Globe, 39th Cong., 1st Sess. 2766, 2767 (1866); *id.* at 2543 (Rep. Bingham) ("If [a] . . . State discriminates against her colored population as to the elective franchise . . . she loses to that extent her representation in Congress.").[4]

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[4] As Rep. Bingham's and Sen. Howard's comments reflect, the Reconstruction framers' central concern was limiting the size of the congressional delegation of formerly slaveholding states that continued to deny African Americans the right to vote. For that reason, the framers "were primarily concerned with the effect of reduced representation upon the States, rather than with the two forms of disenfranchisement which were exempted from that consequence." *Richardson v. Ramirez*, 418 U.S. 24, 43 (1974). While *Richardson* held that Section 2's exemption for felon disenfranchisement laws must be given some effect, and concluded that the Constitution imposes no per se ban on felon disenfranchisement laws, *id.* at 55, the Supreme Court has since held that "§ 2 was not designed to permit . . . purposeful racial discrimination . . . ." *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

Section 2, as it relates to racial discrimination in voting, was superseded two years later with the passage and ratification of the Fifteenth Amendment. The Fifteenth Amendment replaced Section 2's "permit but penalize" approach with an across-the-board ban on racial discrimination in voting, a change that was necessary because the Fourteenth Amendment did not protect the right to vote. See Cong. Globe, 40th Cong., 3rd Sess. 980 (1869) (Sen. Frelinghuysen) (pointing to Section 2 to explain the need for "a further amendment" to have "our rights . . . written in the Constitution"); *id.* at app. 294 (Rep. Higby) (finding the Fifteenth Amendment a "great improvement" over Section 2 of the Fourteenth because it "will secure to the citizen the political rights to which he is entitled . . . .").

The Fifteenth Amendment barred states from denying the right to vote to African Americans on account of race outright, a remedy incompatible with Section 2's penalty of excluding voters disenfranchised on account of race from the count of the number of persons residing in the state.[5] As George Boutwell, a member of the Joint Committee on Re-

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[5] To be sure, Section 2 might still have independent bite as applied to statutes that denied the vote to citizens for nonracial reasons, *see, e.g.,*

construction and one of the principal drafters of the Fifteenth Amendment, later put it:

> By virtue of the Fifteenth Amendment the last sentence of section two of the Fourteenth Amendment is inoperative wholly, for the Supreme Court . . . could not do otherwise than declare a State statute void which should disenfranchise any of the citizens described, even if accompanied with the assent of the State to a proportionate loss of representative power in Congress.

GEORGE BOUTWELL, THE CONSTITUTION OF THE UNITED STATES AT THE END OF THE FIRST CENTURY 389 (1895).[6] Indeed, during the debates on the Amendment, opponents of the Fifteenth Amendment repeatedly complained about the fundamental inconsistency between the Fourteenth Amendment's Section 2 and the Fifteenth Amendment, noting

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McPherson v. Blacker, 146 U.S. 1, 38-39 (1892) (rejecting argument that section 2 conferred a right to vote for presidential electors), but as to racial discrimination in voting, Section 2 was a dead letter after the passage of the Fifteenth Amendment.

[6] In fact, in December 1869, before the States ratified the Fifteenth Amendment, Rep. James Garfield successfully persuaded Congress to postpone enforcement of Section 2's penalty provision until the next census, noting the irreconcilable differences between the proposed Fifteenth Amendment and the Fourteenth Amendment's Section 2. "If we should adjust the apportionment before the fifteenth amendment prevails, then when it does prevail all the States entitled to an increase under the fifteenth amendment will be deprived of that increase during the whole of the coming ten years." Cong. Globe, 41st Cong., 2nd Sess. 124 (1869).

that the Fifteenth Amendment "propose[s] to undo the work just completed in the adoption of a constitutional amendment, expressly leaving the question of suffrage to the action of each State," Cong. Globe, 40th Cong., 3rd Sess. app. 153 (1869) (Sen. Doolittle), and "virtually contradicts . . . that constitutional amendment." *Id.* at 939 (Sen. Corbett).

Not surprisingly, the Supreme Court quickly recognized the change the Fifteenth Amendment wrought. In *United States v. Reese*, 92 U.S. (2 Otto) 214 (1875), the Court explained that the "amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress." *Id.* at 218. "Before its adoption . . . [i]t was . . . within the power of a State to exclude citizens of the United States from voting on account of race . . . . Now it is not." *Id.* The dissent agreed, noting the stark differences between the Fourteenth Amendment and the Fifteenth Amendment. While Section 2 of the Fourteenth Amendment permitted "the late slaveholding States . . . to exclude all its colored population from the right of voting, at the expense of reducing its representation in Congress," the Fifteenth Amendment "expressly negatived" the "power of any State to

any State to deprive a citizen of the right to vote on account of race . . ." *Id.* at 247-248 (Hunt, J., dissenting).

This constitutional text and history demonstrates that Section 2 of the Fourteenth Amendment does not limit Congress's power to enforce the Fifteenth Amendment's prohibition on racial discrimination in voting. The Fourteenth Amendment did not limit at all the authority of states to disenfranchise voters on account of race, and was superseded when the American people ratified the Fifteenth Amendment. Consequently, Section 2 of the Fourteenth Amendment does not limit Congress's power to enforce the Fifteenth Amendment, which was specifically designed to ban racial discrimination in voting, "invest[ing] the citizens of the United States with a new constitutional right . . . within the protecting power of Congress." *Reese*, 92 U.S. at 218. The Fifteenth Amendment radically altered the Fourteenth, and should be read according to its plain terms.

B. The Fifteenth Amendment Lacks Any Exception for Criminal Disenfranchisement Laws Similar To that Contained in Section 2 of the Fourteenth Amendment.

Not only did the Fifteenth Amendment specifically supersede Section 2 of the Fourteenth Amendment concerning racial discrimination in voting, but the framers of the Fifteenth Amendment declined to carve out an exception for criminal disenfranchisement similar to that found in Section 2 of the Fourteenth Amendment. During debates over the Fifteenth Amendment, the Reconstruction framers consistently rejected proposed amendments that would have codified in the Fifteenth Amendment an exception for felon disenfranchisement laws. Although the framers of the Fifteenth Amendment plainly knew how to draft such an exception, the framers insisted on, and enacted, a sweeping ban on racial discrimination in voting without exceptions.

During the debates, a central issue dividing the Republican proponents of the Fifteenth Amendment was whether to prohibit racial discrimination in voting (and/or officeholding), or to provide a broader guarantee of equal voting rights that extended beyond racial discrimination. But whether the Amendment's basic mandate was limited to

racial discrimination in voting or more broadly guaranteed the right to vote, the 40th Congress that wrote the Fifteenth Amendment repeatedly voted down proposals to carve out an exemption for any sort of criminal disenfranchisement laws.

During the debate in the Senate, for example, Republicans overwhelmingly rejected proposals that would have permitted racially discriminatory criminal disenfranchisement laws. For example, the Senate rejected an amendment, offered by Senator Doolittle, that would have added to the existing version banning racial discrimination in voting and office-holding a carve out for criminal disenfranchisement laws. Senator Doolittle's proposal provided:

> The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude; nor shall any citizen be so denied, by reason of any alleged crime, unless duly convicted thereof according to law.

Cong. Globe, 40th Cong., 3rd Sess. 1305 (1869). The Senate rejected the amendment by a vote of 30-13. *Id.*

In both the Senate and the House, members of Congress proposed adding exemptions for felon disenfranchisements as part of efforts to

expand the reach of constitutional protection for the right to vote beyond race. For example, early in the House debates, Rep. Shellabarger offered an amendment that would have guaranteed to

> any male citizen of the United States of the age of twenty-one years, or over . . . an equal vote at all elections in the State in which he shall have such actual residence as shall be prescribed by law, except to such as have engaged or may hereafter engage in insurrection or rebellion against the United States, and to such as shall be duly convicted of treason, felony, or other infamous crime.

Cong. Globe, 40th Cong., 3rd Sess. 744 (1869). The amendment was rejected by a vote of 126-61. Over the course of the debates, numerous other similarly-worded amendments that would have protected the equal right to vote while exempting felon disenfranchisement laws, too, were defeated or withdrawn. *See, e.g.*, Cong. Globe, 40th Cong., 3rd Sess. 743-44, 1012-13, 1029, 1041, 1426-28 (1869). In short, the framers of the Fifteenth Amendment rejected proposals, in whatever form they were offered, to create an exemption similar to the one contained in Section 2 of the Fourteenth Amendment that would exempt felon disenfranchisement laws from the Fifteenth Amendment's ban on racial discrimination in voting.

The stark differences between the text of the Fourteenth and Fifteenth Amendments foreclose reading an exception for felon disenfranchisement laws into the text of the Fifteenth Amendment that would limit Congress's power to prohibit racially discriminatory felon disenfranchisement laws. As this Court has recently observed, the framers of the Civil War Amendments were "quite capable" of writing broad exceptions into the Constitution's new constitutional guarantees to permit criminal disenfranchisement when they "intended to do so." *Harvey v. Brewer*, Nos. 08-17253, 17567, 2010 WL 2106623, at *7 (9th Cir. May, 27, 2010) (O'Connor, Ret. J.).[7] While Section 2 of the Fourteenth Amendment includes a broad exemption for felon disenfranchisement laws, the framers of the Fifteenth Amendment explicitly rejected a similar exemption. The Fifteenth Amendment's text and history shows that the framers did not want to carve out permission for states to enact ra-

[7] The Thirteen Amendment, too, contains a "crime" exception, permitting states to sentence persons convicted of a crime to forced labor. U.S. CONST. amend. XIII, § 1. While this exception sanctions forcing prisoners to work, it does not limit Congress's power under the Fourteenth Amendment to prohibit racially discriminatory work assignments. *Cf. Gates v. Collier*, 501 F.2d 1291, 1299 (5th Cir. 1974) (holding that segregated work details for prisoners violated the Equal Protection Clause).

cially discriminatory felon disenfranchisement. Accordingly, the plain meaning of the Fifteenth Amendment unquestionably invests Congress with broad authority to prohibit all forms of racial discrimination in voting, including racially discriminatory felon disenfranchisement laws.

III. APPLYING THE VOTING RIGHTS ACT TO WASHINGTON'S FELON DISENFRANCHISEMENT LAWS IS APPROPRIATE IN LIGHT OF THE LONG HISTORY OF RACIALLY DISCRIMINATORY FELON DISENFRANCHISEMENT LAWS.

Section 2 of the Voting Rights Act, prohibits state and local government from using any "voting qualification . . . in a manner which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color," 42 U.S. C. § 1973(a), in order to "end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote." *Bartlett v. Strickland*, 129 S. Ct. 1231, 1240 (2009) (plurality opinion of Kennedy, J.); *see also United States v. Blaine County, Mont.*, 363 F.3d 897, 909 (9th Cir. 2004) (holding that the Act's results test was a constitutional means of "'secur[ing] the right to vote and . . . eliminat[ing] the effects of past purposeful discrimination.'") (quoting *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1557 (11th Cir. 1984)).

Applying the Act's nationwide prohibition on discriminatory denial of the right to vote to felon disenfranchisement statutes is an appropriate use of Congress's power to enforce the Fifteenth Amendment. States have a long history of enacting felon disenfranchisement laws in order to bar African Americans from voting, and these statutes continue to have this effect today, operating in tandem with racial discrimination in the criminal justice system.

During and after Reconstruction, just as African Americans were gaining the franchise, state governments turned to felon disenfranchisement statutes to deny the right to vote. Between 1865-1900, eighteen states enacted or expanded felon disenfranchisement statutes, including virtually all the Southern states as well as Washington State, which included a felon disenfranchisement provision in its first State Constitution, adopted in 1899. *See* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 50 (2006).

Throughout the South, states did not try to hide the racial animus behind felon disenfranchisement statutes, but rather trumpeted the fact that such statutes would bar African Americans from voting. In Flor-

ida, for example, the 1868 State Constitution provided a greatly expanded felon disenfranchisement law, a part of what one convention leader called a plan to keep Florida from being "niggerized." *See* Jerrell H. Shofner, *The Constitution of 1868*, 41 FLA. HIST. Q. 356, 374 (1963). In Mississippi, the 1890 Constitution added a sweeping criminal disenfranchisement provision designed to bar African Americans from voting. As the Mississippi Supreme Court boasted in 1896, "the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race," using criminal disenfranchisement to "discriminate[] against its characteristics and the offenses to which its weaker members were prone." *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896); *see also Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998) (noting provision "was enacted in an era in when southern states discriminated against blacks by disenfranchising convicts for crimes that, it was thought, were committed primarily by blacks"). Likewise, in 1901, Alabama, too, expanded the criminal disenfranchisement provision of the State Constitution in order to keep African Americans off the voting rolls. As the Supreme Court observed in striking this provision, "[t]he delegates to the all-white convention were not secretive about their purpose . . . .

[Z]eal for white supremacy ran rampant at the convention." *Hunter v. Underwood*, 471 U.S. 222, 229 (1985).

In light of this history and the continuing discriminatory effect felon disenfranchisement statutes have when operating in tandem with racial discrimination in the criminal justice system, *see* Plaintiffs-Appellants' Brief at pp. 2, 9-16, the Fifteenth Amendment unquestionably gives Congress authority to prohibit criminal disenfranchisement statutes that result in a discriminatory denial of the right to vote.

CONCLUSION

For the foregoing reasons, *amicus* respectfully request that the Court reverse the ruling of the District Court.

Respectfully submitted,

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Dated: June 11, 2010

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,106 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 14-point Century Schoolbook font.

Executed this 11th day of June, 2010.

/s/ Elizabeth B. Wydra
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 11, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 11th day of June, 2010.

/s/ Elizabeth B. Wydra
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