IN THE

Supreme Court of the United States

PAUL SIMMONS; PEDRO VALENTIN;
DENNIS BELDOTTI,

Petitioners,

v.

WILLIAM FRANCIS GALVIN,
in his capacity as Secretary of the
Commonwealth of Massachusetts,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Section 2 of the Voting Rights Act of 1965 ("VRA"), 42 U.S.C. 1973, apply to state felon disenfranchisement laws that result in discrimination on the basis of race?

2. Does the Massachusetts felon disenfranchisement scheme established in 2000 violate the Ex Post Facto Clause of the United States Constitution as applied to those Massachusetts felons who were incarcerated and yet had the right to vote prior to 2000?

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OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 575 F.3d 24 (1st Cir. 2009). (*See* Appendix ("App.") A.) The First Circuit affirmed in part and reversed in part the August 30, 2007 decision of the United States District Court for the District of Massachusetts, reported at 652 F. Supp. 2d 83 (D. Mass. 2007). (*See* App. B.)

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The First Circuit's opinion was rendered on July 31, 2009. (*See* App. A.) The Petition for Panel Rehearing and Rehearing En Banc was denied on September 2, 2009. (*See* App. C.) On November 25, 2009, Justice Breyer granted Petitioners an extension of time within which to file a petition for writ of certiorari to and including January 30, 2010.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 42 United States Code, Section 1973.

> **(a)** No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f)(2) of this title, as provided in subsection (b) of this section.

> **(b)** A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Massachusetts Constitution, amend. art. 3.

> Every citizen of eighteen years of age and upwards, excepting persons who are incarcerated in a correctional facility due to a felony conviction, and excepting persons under guardianship and persons temporarily or permanently disqualified by law because or corrupt practices in respect to elections who shall have resided within the town or district in which he may claim a right to vote, six calendar months next preceding any election of governor, lieutenant governor, senators or representatives, shall have a right to vote in

such election of governor, lieutenant governor, senators and representatives; and no other person shall be entitled to vote in such election.

Massachusetts General Laws, Chapter 51, Section 1 (as amended by Massachusetts Statute 2001, Chapter 150).

Qualifications of voters. Every citizen eighteen years of age or older, not being a person under guardianship or incarcerated in a correctional facility due to a felony conviction, and not being temporarily or permanently disqualified by law because of corrupt practices in respect to elections, who is a resident in the city or town where he claims the right to vote at the time he registers, and who has complied with the requirements of this chapter, may have his name entered on the list of voters in such city or town, and may vote therein in any such election, or except insofar as restricted in any town in which a representative town meeting form of government has been established, in any meeting held for the transaction of town affairs. Notwithstanding any special law to the contrary, every such citizen who resides within the boundaries of any district, as defined in section one A of chapter forty-one, may vote for district officers and in any district meeting thereof, and no other person may so vote. A person otherwise qualified to vote for national or state officers shall not, by reason of a change of residence within the commonwealth,

be disqualified from voting for such national or state officers in the city or town from which he has removed his residence until the expiration of 6 months from such removal.

United States Constitution, Amendment Fourteen.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when 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.

United States Constitution, Amendment Fifteen.

Section 1. 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.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

United States Constitution, Article I.

Section 10, Clause 1. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

STATEMENT OF THE CASE

1. Each of the named Petitioners in this case is a Massachusetts resident currently incarcerated in a Massachusetts correctional institution for a felony or felonies committed prior to December 6, 2000. Paul Simmons is African-American; Pedro Valentin is Hispanic-American; Dennis Beldotti is Caucasian-American.

Prior to that date, Massachusetts was one of only three states, along with Maine and Vermont, that permitted incarcerated felons to vote. Several Massachusetts lawmakers had tried for years to end that distinction. Beginning in 1988, bills were introduced that would have amended the state constitution to disenfranchise various classes of felons and/or incarcerated persons. These bills, as well as subsequent iterations thereof, were repeatedly defeated. On July 28, 1997, however, Lieutenant Governor Argeo Paul Cellucci was elevated to Acting Governor upon the resignation of Governor William F. Weld. On August 2, 1997, in response to reports that Massachusetts prisoners were planning to form their own political action committee, Cellucci announced plans to file a measure that would prohibit all current and future inmates in Massachusetts prisons from casting a ballot. At a news conference, Cellucci explained the purpose behind his proposal, stating that "[p]rison is supposed to mean punishment, not some opportunity to form a political group." (App. B. at 114a.) On August 12, 1997, Cellucci sent the Massachusetts Senate and House of Representatives a proposed amendment to the state constitution applicable to all persons incarcerated on

account of a criminal conviction. On the day Cellucci submitted the amendment, his spokesman stated that Cellucci believed that "[p]risons are a place for punishment." (App. A. at 42a.) Boston newspapers published these statements to the Massachusetts public.

Two consecutive joint sessions of the Massachusetts legislature passed a provision that was in large part identical to Cellucci's proposed amendment.[1] This provision, known as Article 120, was then ratified by Massachusetts voters in the 2000 state election. The tabulation of the vote occurred on December 6, 2000, meaning that Article 120 took effect on that day. As a result of Article 120's passage, Article 3 of the Massachusetts Constitution now reads:

> Every citizen of eighteen years of age an upwards, *excepting persons who are incarcerated in a correctional facility due to a felony conviction*, and excepting persons under guardianship and persons temporarily or permanently disqualified by law because or corrupt practices in respect to elections who shall have resided within the town or district in which he may claim a right to vote, six calendar months next preceding any election of governor, lieutenant governor, senators or representatives, shall have a right to vote in such election of governor, lieutenant governor,

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1. Under Massachusetts law, a petition for a constitutional amendment must receive the support of at least 25% of two successively elected legislatures (joint sessions of both the House and Senate) before being put on the popular ballot.

> senators and representatives; and no other person shall be entitled to vote in such election.

Mass. Const. art. 3 (emphasis added).

In 2001, the Massachusetts legislature enacted Chapter 150 of the Acts of 2001 ("Chapter 150"), which amended MASS. GEN. LAWS ch. 51, § 1, the statute regarding voting qualifications for *all* Massachusetts elections – that is, not just those elections where voting qualifications are set directly by the Massachusetts Constitution. Chapter 150 took effect on November 27, 2001.

2. Petitioners[2] commenced this action on a *pro se* basis, filing a Complaint on August 5, 2001. The Complaint alleged that Article 120 violated, *inter alia*, Section 2 of the Voting Rights Act, and the Equal Protection and Ex Post Facto Clauses of the United States Constitution. Counsel was appointed to represent Petitioners in July 2002. The parties entered into a "Stipulation in Lieu of Class Certification" in January 2003.[3] The parties filed cross-motions for summary

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2. The original complaint was filed by plaintiffs Darcy Lowe, Paul Simmons, Pedro Valentin, and Marcos Naranjo. Darcy S. Lowe and Marcos Naranjo are no longer incarcerated, and thus they are no longer parties to this action. Dennis Beldotti was subsequently substituted as a plaintiff for Darcy Lowe.

3. The stipulation provides that a class action is unnecessary because, if Petitioners prevail on the merits of any of their claims, then Secretary Galvin shall not apply any state law found to be unlawful against any otherwise eligible Massachusetts voter incarcerated in a correctional facility for a felony conviction.

judgment on the Ex Post Facto and Equal Protection claims, and the Commonwealth moved for judgment on the pleadings on the VRA § 2 claim. On August 30, 2007, the district court denied the Commonwealth's motion for judgment on the pleadings on the VRA claim, and granted the Commonwealth's motion for summary judgment (and denied Petitioners' motion for summary judgment) on the Ex Post Facto and Equal Protection claims. (*See* App. B.) Upon petition from the Commonwealth, the district court certified its denial of judgment on the pleadings on the VRA § 2 claim for interlocutory review under 28 U.S.C. § 1292(b).

3. The First Circuit granted leave for the parties to appeal all claims in the case under § 1292(b). (App. A at 11a.) The Commonwealth, as appellant, appealed the district court's denial of judgment on the pleadings as to the VRA § 2 claim. Petitioners, as cross-appellants, appealed the district court's grant of summary judgment in favor of the Commonwealth on the Ex Post Facto claim.[4] On July 31, 2009, the First Circuit reversed the district court as to Petitioners' VRA claim and affirmed the district court as to Petitioners' Ex Post Facto claim, ordering that Petitioners' claims be dismissed with prejudice. Petitioners timely filed a Petition for Panel Rehearing and Rehearing *En Banc* on September 17, 2009. The Petition was denied on September 2, 2009. (*See* App. C.)

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4. Petitioners did not appeal that portion of the district court's decision granting summary judgment on their Equal Protection claim.

REASONS FOR GRANTING THE PETITION

1. The first question presented in this case is whether VRA § 2 applies to state felon disenfranchisement laws that result in discrimination on the basis of race. The Ninth Circuit has concluded that such felon disenfranchisement claims are cognizable under VRA § 2. *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003) (*Farrakhan I*). The Second and Eleventh Circuits, both sitting *en banc*, have concluded that they are not. *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006); *Johnson v. Gov. of Fla.*, 405 F.3d 1214 (11th Cir.), *cert. denied sub nom. Johnson v. Bush*, 546 U.S. 1015 (2005). Further, the Ninth Circuit has recently held that such claims under VRA § 2 are not merely cognizable, but can also be proved if allowed to proceed beyond the pleading stage. *Farrakhan v. Gregoire*, No. 06-35669, 2010 WL 10969 (9th Cir. Jan. 5, 2010) (*Farrakhan II*). Indeed, the court in *Farrakhan II* concluded that *Farrakhan I* remains binding law in the Ninth Circuit, the intervening rulings in *Johnson*, *Hayden*, and this case notwithstanding. *Id.* at *7-8. The Ninth Circuit further held, after reviewing expert evidence, that "[p]laintiffs have demonstrated that the discriminatory impact of Washington's felon disenfranchisement is attributable to racial discrimination in Washington's criminal justice system," and thus that "Washington's felon disenfranchisement law violates § 2 of the VRA." *Id.* at *23.

The First Circuit's ruling is in harmony with certain aspects of Second and Eleventh Circuit opinions, but is in direct conflict with the Ninth Circuit in *Farrakhan I* and *Farrakhan II*. The First Circuit panel decision was issued over vigorous dissent (App. A at 50a (Torruella,

J., dissenting)), just as were the *en banc* decisions of the Second and Eleventh Circuits. *See Hayden*, 449 F.3d at 343-62 (Parker, J., dissenting, joined by Calabresi, Pooler, and Sotomayor, JJ.); *id.* at 362-67 (Calabresi, J., dissenting); *id.* at 367-68 (Sotomayor, J., dissenting); *id.* at 368-69 (Katzmann, J., dissenting); *Johnson*, 405 F.3d at 1239-44 (Wilson, J., dissenting in relevant part); *id.* at 1247-51 (Barkett, J., dissenting). This split among the circuits as to the application of VRA § 2 to state felon disenfranchisement laws requires resolution by this Court.[5]

2. With regard to the second question presented, the Ex Post Facto issue, the First Circuit has rendered an opinion that purports to decide an important question of federal law that should be settled by this Court. Specifically, in applying the "clearest proof" standard to assess the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), in the absence of a plain statement by the legislature of civil regulatory intent, the First Circuit forged ahead in a manner inconsistent with the holdings of this Court. *Hudson v. United States*, 522 U.S. 93, 100 (1997) (citing *United States v. Ward*, 448 U.S. 242, 249 (1980)). This use of the incorrect standard coupled with the First Circuit's cursory treatment of the relevant factors presented the Petitioners with an improperly enhanced

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5. The Fourth and Sixth Circuits, while they have addressed somewhat similar claims, have never directly considered the question presented here, *i.e.*, whether allegedly discriminatory felon disenfranchisement statutes may be challenged under VRA § 2. *See Howard v Gilmore*, No. 99-2285, 2000 WL 203984 (4th Cir. 2000) (per curiam); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986).

challenge despite the fact that each of the *Mendoza-Martinez* factors weighs in favor of the punitive nature of Article 120's brand of felon disenfranchisement. Only this Court can clearly set forth the proper standard to be applied to the *Mendoza-Martinez* factors when the legislature has not made its intentions sufficiently clear.

I. Review Is Warranted To Resolve A Conflict Concerning The Application Of VRA § 2 To Discriminatory Felon Disenfranchisement Laws On Statutory Grounds.

A. The text of VRA § 2(a) is clear, and its coverage is broad.

This Court has repeatedly instructed that in construing a statute, a court's analysis must start with the statute's text. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). A court "must presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Dodd v. United States*, 545 U.S. 353, 357 (2005) (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). While it is true that statutory interpretation also turns on "the specific context in which that language is used" and "the broader context of the statute as a whole," *Nken v. Holder*, 129 S. Ct. 1749, 1756, 173 L.Ed.2d 550 (2009) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)), that does not deflect from the primacy of a statute's text. "When a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

The threshold inquiry in this case is whether Petitioners' claims fall within the ambit of § 2(a) of the Voting Rights Act, which provides that:

> *No* voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .

42 U.S.C. § 1973(a) (emphasis added).

The coverage of § 2(a) is not qualified in any way. Thus, by the plain terms of the Act, if a state voting qualification or prerequisite is alleged to have resulted in a denial of the right to vote on account of race, that allegation should be permitted to proceed beyond the pleading stage. Indeed, there is little dispute as to the breadth of coverage of VRA § 2. *Chisom v. Roemer*, 501 U.S. 380, 403-04 (1991); *see also Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2509, 174 L.Ed.2d 140 (2009). It is "indisputable," the Second Circuit stated, that Congress intended to give the VRA "the broadest possible scope.'" *Hayden*, 449 F.3d at 318 (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

As originally enacted, § 2 of the VRA was construed to combat only voting qualifications or prerequisites that were determined to be intentionally discriminatory. Finding that this standard did not provide the protections it had originally hoped, and in response to

this Court's decision in *Mobile v. Bolden*, 446 U.S. 55 (1980), Congress amended the VRA in 1982, bifurcating it into the current § 2(a) and § 2(b). *Chisom*, 501 U.S. at 393-95. Section 2(a) adopted a results test, "thus providing that proof of discriminatory intent is no longer necessary to establish *any* violation of the section." *Id.* at 395 (emphasis in original). Section 2(b) established a totality-of-the-circumstances test, which provides "guidance about how the results test is to be applied." *Id.*

Based on text alone, there can be little argument that a claim for discriminatory felon disenfranchisement – an obvious "qualification" which results in the denial of an individual's right to vote – is covered by the broad and unambiguous language of VRA § 2(a).

B. Felon disenfranchisement laws are not so unique as to be excluded from the broad reach of the VRA.

Despite the breadth and clarity of VRA § 2(a), the First Circuit excluded felon disenfranchisement laws from its reach because, as the panel majority posited, "[f]elon disenfranchisement statutes are not like all other voting qualifications. Congress has treated such laws differently. They are deeply rooted in our history, in our laws, and in our Constitution." (App. A at 22a.) The First Circuit thus left the door open for a host of vote denial claims to be brought under VRA § 2 (as is proper given the Act's indisputably broad coverage), excluding *only* those based on felon disenfranchisement. *Id.* at 3a. This notion that felon disenfranchisement laws are *sui generis* is heavily disputed within and among the circuit courts.

1. The First Circuit allowed context and legislative history to trump the plain language of VRA § 2(a).

As judge Torruella pointed out in dissent, "this is a case about interpreting a clearly worded congressional statute . . . according to its own terms, when there is no persuasive reason to do otherwise." (App. A at 50a-51a.) The panel majority's rebuttal to this was to state, in conclusory fashion, that "[a]s a matter of textual analysis, it is neither plain nor clear that plaintiffs' claim fits within the text of § 2(a)." (*Id.* at 23a.) Yet this statement flies in the face of the text of the VRA itself, which clearly applies to all "voting qualifications." Article 120 to the Massachusetts Constitution, which sets forth the Commonwealth's disenfranchisement scheme, is plainly a "voting qualification." Petitioners have alleged that Article 120, in combination with "past practices in the Massachusetts criminal justice system," has "resulted in disproportionate disqualification of minorities from voting." (*Id.* at 2a.) The same is true of MASS. GEN. LAWS. ch. 51, § 1, which merely codified Article 120 and extended the incarcerated felon "voting qualification" to all state elections.

Such a plain reading is not simply of Petitioners' creation; rather, it was endorsed by the Ninth Circuit in *Farrakhan I*, and by several judges in *Hayden* and *Johnson*. In *Farrakhan I*, the court held that "[f]elon disenfranchisement is a voting qualification, and § 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA." 338 F.3d at 1016 (emphasis in original). Similarly, as then Judge Sotomayor stated in dissent in

Hayden: "It is plain to anyone reading the Voting Rights Act that it applies to all 'voting qualifications.' And it is equally plain that [the New York felon disenfranchisement statute] disqualifies a group of people from voting. These two propositions should constitute the entirety of our analysis." 449 F.3d at 367-68. Further, "[a]s a purely textual matter," the dissenters in *Johnson* stated, "a voting qualification based on felony status that interacts with social and historical conditions to produce a racially discriminatory effect, such as race bias in the criminal justice system, falls within the scope of the VRA." 405 F.3d at 1240.

The First Circuit's only argument based purely on text is cagily confined to a single paragraph of its lengthy opinion, in which it suggests that "it is logical to understand the state law disenfranchisement of incarcerated felons as not 'resulting' in a denial 'on account of race or color' but on account of imprisonment for a felony, and thus not within the text of § 2 at all." (App. A at 23a.) This argument is far from "logical," and indeed miscomprehends the nature of Petitioners' allegations. Article 120 and Chapter 150 dictate that in Massachusetts, disenfranchisement will result from imprisonment for a felony and will last for the period of incarceration. Petitioners do not contest this fact. What they allege, however, is that their felony imprisonments – and hence their loss of the right to vote upon enactment of Article 120 – were disparately (and negatively) impacted by their race. It is not Article 120 alone which is alleged to violate VRA § 2, but rather in conjunction with "past practices in the Massachusetts criminal justice system." (*Id.* at 2a.) Petitioners' claim may be a nuanced one, and it may indeed be difficult to

prove, but it is capable of being proven, *see Farrakhan II*, and it fits squarely within the text of VRA § 2.

In light of the clarity of the plain language of VRA § 2, it was error for the First Circuit to override it with context and legislative intent, as discussed in more detail below.

2. Application of VRA § 2 to discriminatory felon disenfranchisement laws is not inconsistent with Section 2 of the Fourteenth Amendment.

The First Circuit's contextual argument for why VRA § 2 should not be read to cover discriminatory felon disenfranchisement laws is straightforward. "The power of the states to disqualify from voting those convicted of crimes," the panel majority argued, "is explicitly set forth in § 2 of the Fourteenth Amendment." (App. A at 15a.) This is the same as the primary argument put forward by the Second and Eleventh Circuit majorities. *See Johnson*, 405 F.3d at 1218; *Hayden*, 449 F.3d at 316.

Section 2 of the Fourteenth Amendment does indeed "affirmative[ly] sanction" the exclusion of felons from the right to vote. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). An affirmative sanction, however, is not the same as an unlimited sanction. The sanction is limited, of course, by the constraints of the Fifteenth Amendment, which postdates the Fourteenth, and which expressly outlaws voting discrimination on account of race. *Hayden*, 449 F.3d at 350-51 (Parker, J., dissenting). It is by the power of the Fifteenth Amendment that § 2 of the VRA originally drew its force, and by which the

Act's prohibition against all voting qualifications imposed or applied by any state in a manner which results in a denial or abridgement of the right to vote on account of race or color is supported. *Id.*; *see also Chisom*, 501 U.S. at 391-92. Thus, the "constitutional grounding" for a state to deny felons the right to vote (App. A at 16a), can only go so far. And in the instant case, where racially *discriminatory* results are alleged on account of a felon disenfranchisement scheme in combination with other factors, the constitutional grounding disappears. Indeed, the reverse is true: there is constitutional grounding for plaintiffs' claims sounding in discrimination, and no constitutional grounding for the Commonwealth's alleged discriminatory method of denying felons the right to vote.[6] (App. A at 68a n.36 (Torruella, J., dissenting));

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6. For this reason, reliance on the "clear statement" rule is misplaced in the context of VRA § 2. While the First Circuit did not address it in precisely these terms, some judges have suggested that the VRA question presented in this case implicates the "clear statement" or "plain statement" rule, a rule of construction which places a heightened burden on Congress to make clear its intent when enacting statutes "that would alter the usual constitutional balance between the Federal Government and the States." *Hayden*, 449 F.3d at 323 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)); *see also Johnson*, 405 F.3d at 1229, 1232. Yet applying VRA § 2 to racially discriminatory felon disenfranchisement laws would maintain, not disrupt, the constitutional balance between Congress and the states. Congress has the power to target racially discriminatory state felon disenfranchisement laws under the VRA not because such laws involve felon disenfranchisement, but because they involve racial discrimination. In other words, the relevant "constitutional balance" was set by the Fifteenth

(Cont'd)

see also Hayden, 449 F.3d at 352 (Parker, J., dissenting); *Johnson*, 405 F.3d at 1241 (Wilson, J., dissenting in relevant part).

Section 2 of the Fourteenth Amendment was designed to penalize any state that disenfranchised its male citizens by reducing its proportional representation in the U.S. House of Representatives. *Hayden*, 449 F.3d at 351 (Parker, J., dissenting); *Johnson*, 405 F.3d at 1240 (Wilson, J., dissenting in relevant part). The exception to this penalty is for those citizens who participate in "rebellion" or "other crime."

(Cont'd)

Amendment, which permits the VRA to intrude on state sovereignty. *See Lopez v. Monterey County*, 525 U.S. 266, 284-85 (1999). The very purpose of the Fifteenth Amendment, after all, was to strip the states of their power to regulate voting, a power which had been abused by the states over and over again. *See Hayden*, 449 F.3d at 58 (Parker, J., dissenting) (quoting *Gregory*, 501 U.S. at 468).

It is instructive that in *Chisom*, the Supreme Court had a similar opportunity to apply the clear statement rule to the VRA, and yet that possibility "never crossed [the Court's] mind." 501 U.S. at 412 (Scalia, J., dissenting); *see also Baker v. Pataki*, 85 F.3d 919, 938 (2d Cir. 1996) (Feinberg, J., writing for half of an equally divided court) (describing *Chisom* as "clear Supreme Court authority that the plain statement rule does not apply when determining coverage under § 2 of the Voting Rights Act" (emphasis in original)). Even in *Hayden*, a majority of the Second Circuit rejected an application of the clear statement rule to the VRA. 449 F.3d at 337 (Straub, J., concurring) ("We do not join in any holding that a clear statement rule applies here, as we believe such a rule, in addition to being unnecessary to the disposition of this case, would be inappropriate in the voting rights context.").

This "other crime" exception, however, cannot reasonably be read to have been intended to sanction the behavior of states that disenfranchised their felons in a racially discriminatory manner. Such an interpretation would allow the narrow scope of § 2 of the Fourteenth Amendment (which, by any reasonable reading, is limited to the states' representation in Congress, not to the franchise in general) to trump the broad scope of § 1 of the same Amendment (which, among other things, prevents discrimination on the basis of race). *See Hunter v. Underwood*, 471 U.S. 222, 233 (1985). Even the *Hayden* majority was willing to concede as much: "The Fourteenth Amendment . . . does not completely insulate felon disenfranchisement provisions from constitutional scrutiny. It is clear, for example, that if a State disenfranchises felons with the intent of disenfranchising blacks, that State has run afoul of Section 1 of the Fourteenth Amendment." 449 F.3d at 316 n.11 (internal quotation marks omitted); *see also id.* at 323 n.20.

Thus, it does not follow that Congress, by not referring at all to felon disenfranchisement in § 2 of the VRA, was relying on § 2 of the Fourteenth Amendment to supply the default. If Congress had been so concerned that the "other crimes" exception to § 2 of the Fourteenth Amendment not be trammeled by the VRA, then it had every opportunity to say so expressly. Indeed, as Judge Parker pointed out in *Hayden*, "the Fifteenth Amendment was enacted, among other reasons, precisely because the Fourteenth Amendment – including § 2 – did not prohibit states from disenfranchising Blacks." 449 F.3d at 352.

3. Application of VRA § 2 to discriminatory felon disenfranchisement laws is not inconsistent the legislative history of the Act.

The First Circuit also relied on the legislative history of the VRA to buttress its rejection of Petitioners' claims. Yet even assuming a review of the legislative history of the VRA is merited in this case, *cf. Dodd*, 545 U.S. at 357, such history does not supply reliable or convincing evidence that Congress intended a complete carve-out for felon disenfranchisement laws, including those that were found to be discriminatory in nature or effect. Nothing in the legislative history of VRA § 2 indicates that felon disenfranchisement – and felon disenfranchisement *only* – was somehow immune from the Act's prohibitions. Construing VRA § 2 to apply to racially discriminatory felon disenfranchisement laws is by no means "absurd" or "unthinkable" in light of the Act's legislative history. *Cf. Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring); *but see Hayden*, 449 F.3d at 322-23.

When Congress first enacted the VRA, it documented numerous violations of the Fifteenth Amendment, including so-called "grandfather clauses," laws "restricting the participation in political primaries to whites only," "procedural hurdles," "racial gerrymandering," "improper challenges," and "the discriminatory use of tests." *Johnson*, 405 F.3d at 1243 (Wilson, J., dissenting in relevant part) (quoting H.R. Rep. No. 89-439, at 8 (1965)). Congress therefore included language in the narrower § 4 of the Act which banned certain nefarious practices regardless of

whether a plaintiff can show that they result in racial discrimination in a given case. *Hayden*, 449 F.3d at 352-53 (Parker, J., dissenting).

But Congress also concluded that "innovation in discrimination marked the landscape of voting rights." *Johnson*, 405 F.3d at 1243 (Wilson, J., dissenting in relevant part) (quoting S. Rep. No. 89-439, at 15 (1965)); *see also id.* ("[E]ven after apparent defeat resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods." (quoting S. Rep. No. 89-439, at 10)). "Congress found specifically that it was impossible to predict the variety of means that would be used to infringe on the right to vote." *Id.* In passing the 1982 amendments, Congress again documented the non-exhaustive nature of its findings. "Following the dramatic rise in registration, a broad array of dilution schemes were employed to cancel the impact on the new black vote . . . . The ingenuity of such schemes seems endless." S. Rep. No. 97-417, at 6 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 183.

For this reason, Congress intentionally kept § 2(a) as broad as possible. It enacted a general provision under which any "voting qualification" – including (i) those that Congress knew about but understood to be used sometimes for valid purposes, (ii) those voting qualifications with which it was not yet familiar, and even (iii) those practices that Congress understood to be entirely legitimate but that later could be twisted to ill purposes – would violate the VRA if it "result[ed] in a denial or abridgement of the right of any citizen of the United States to vote on account of race."

42 U.S.C. § 1973(a). Thus, just because Congress did not enact a *per se* ban on felon disenfranchisement laws (as § 4 did for "tests and devices"), it does not follow that all felon disenfranchisement laws are necessarily valid, or that such laws can never be challenged under VRA § 2. In other words, Congress did not intend the VRA to categorically ban felon disenfranchisement laws, but that does not mean that it did not intend § 2 to ban *discriminatory* felon disenfranchisement laws. *See Hayden*, 449 F.3d at 362-65 (Calabresi, J., dissenting).

As for the 1982 amendments, the First Circuit stated that "[n]othing in the legislative history of § 2(b) indicated any intent to expand the VRA to create a cause of action against a state felon disenfranchisement law such as Article 120." (App. A at 35a-36a.) Yet there would have been no need to expand the VRA to cover a cause of action which was already covered by the express language of § 2. This silence only demonstrates that Congress was not motivated by felon disenfranchisement problems when it passed the 1982 amendments. *See Hayden*, 449 F.3d at 356 (Parker, J., dissenting) ("It is hardly surprising that legislators did not focus on felon disenfranchisement and minority voting during the debates surrounding the passage of the VRA, or even during its amendment in 1982, since the problem as it currently manifests itself did not exist."). Even if felon disenfranchisement was a "well-known and accepted part of the voting landscape" in 1982 (App. A at 36a), that does not in any way undermine the clear intention of § 2 to prohibit racially *discriminatory* voting practices, including felon disenfranchisement laws. Indeed, by expanding the VRA in 1982 to cover claims based on discriminatory results, rather than merely discriminatory intent, Congress deliberately opened the

door for potentially more complex and nuanced theories of causation, such as the theory Petitioners advance here (*see* App. A at 64a-66a (Torruella, J., dissenting)), and such as the theory that was successfully proven after expert discovery in *Farrakhan II*. *See* 2010 WL 10969 at *11-21.

C. The "narrowness" of Article 120 is irrelevant to the basic question regarding the applicability of VRA § 2 to felon disenfranchisement laws that result in discrimination.

The First Circuit intimated that its decision was based in part on the fact that the Article 120 "is among the narrowest of state felon disenfranchisement provisions." (App. A at 13a.) For example, the court seemingly distinguished its holding from that of the Ninth Circuit in *Farrakhan I* by conceding that some courts have concluded that felon disenfranchisement statutes, "not as narrow as this one," may be challenged under VRA § 2. (*Id.* at 14a.) Yet if allegedly discriminatory felon disenfranchisement statutes are not covered by VRA § 2, then their relative scope should be irrelevant. (*Id.* at 55a (Torruella, J., dissenting); *see also Hayden*, 449 F.3d at 349 (Straub, J., concurring in part and concurring in judgment) (noting that "there may well be important distinctions between the impact of the felon disenfranchisement statute at issue here and those that provide for lifetime disenfranchisement," but that distinction does not matter for purposes of the VRA analysis)). Similarly, if discriminatory felon disenfranchisement statutes *are* covered by VRA § 2, then such a distinction is also not relevant. Indeed, in *Farrakhan II*, a completely new panel upheld the prior

panel's ruling as to the applicability of VRA § 2 to the Washington disenfranchisement statute, despite the passage of intervening amendments making the statute narrower. *See* 2010 WL 10969. "[N]o matter how well the amended law functions to restore at an earlier time the voting rights of felons who have emerged from incarceration," the Ninth Circuit held, "it does not protect minorities from being denied the right to vote upon conviction by a criminal justice system that Plaintiffs have demonstrated is materially tainted by discrimination and bias." *Id.* at *22.

By making the relative scope of a state's felon disenfranchisement scheme an important factor in its analysis, the First Circuit undercut its own holding. Any such inquiry – for example, whether the statutory scheme disenfranchises felons for life, or through parole, or only through incarceration – is more properly applied to the results tests under § 2(b) of the VRA. The relative scope of a state's disenfranchisement scheme *may* make it more or less difficult to prove an actual violation. *See, e.g., id.* at *24 (McKeown, J., dissenting) (advocating for remand to the district court to consider the effect of the amended law on the plaintiff's case and "whether the totality of the circumstances analysis under § 2 of the Voting Rights Act should be different now that plaintiffs' case remains viable only as to currently incarcerated felons"). But the proper application of the totality of the circumstances test under VRA § 2(b) is not at issue here, where the parties still remain at the pleading stage. *See id.* at *8 (majority opinion) ("Whether Plaintiffs can succeed on their VRA claim is irrelevant to the question whether they are entitled to bring that claim in the first place.").

II. Review Is Warranted To Resolve A Conflict Concerning The Application Of VRA § 2 To Discriminatory Felon Disenfranchisement Laws On Constitutional Grounds.

Choosing to base its decision entirely on statutory grounds, the First Circuit avoided discussion of the constitutional implications arising from the application VRA § 2 to discriminatory state felon disenfranchisement laws. (*See* App. at 41a.) This emphasis on constitutional avoidance is consistent with portions of the majority opinions in both *Hayden* and *Johnson*. However, other portions of the splintered decisions in *Hayden* and *Johnson* also raised constitutional concerns (primarily with respect to Congress's enforcement powers under § 2 of the Fifteenth Amendment), placing the Second and Eleventh Circuits in conflict with the Ninth Circuit in *Farrakhan I*, which viewed such concerns as entirely unfounded. These alleged constitutional implications, about which there is little consensus among the circuits, are addressed briefly below. Ultimately, they do not pose a significant barrier to Petitioners' claims.

The overall constitutionality of the Voting Rights Act is not, and never has been, in doubt. Indeed, this Court has lauded the VRA as a paradigm of appropriate remedial legislation under the Civil War Amendments. *See, e.g., Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003) (describing portions of the VRA as "valid exercises of Congress' § 5 power"); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001) (describing the VRA as a proper congressional response to a "serious pattern of constitutional violations");

Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640 (1999) (supporting congressional power under the VRA on account of the "undisputed record of racial discrimination confronting Congress in the voting rights cases"); *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (noting that "measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures place[ ] on the States"); *see also Hayden*, 449 F.3d at 360 (Parker, J., dissenting). Congress has expansive authority to enact laws that are designed to enforce the anti-discriminatory mandates of the Fourteenth and Fifteenth amendments. *See Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966) (speaking of the "broad scope" of § 5 of the Fourteenth Amendment, which is "a positive grant of legislative power," and observing that § 2 of the Fifteenth Amendment "grants Congress a similar power").

The fact that the VRA addresses race and voting rights, topics expressly referenced in the Fifteenth Amendment, further differentiates it from the statutes that have recently come under increased scrutiny with respect to Congress's Fifteenth Amendment enforcement powers. It would defeat Congress's intent to require that each and every application of the VRA to a voting practice be related to an express Congressional finding of past racial discrimination. *See, e.g., Oregon v. Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J., concurring in part and dissenting in part) ("Because the justification for extending the ban on literacy tests to the entire Nation need not turn on whether literacy tests unfairly discriminate against Negroes in every State in the Union, Congress was not

required to make state-by-state findings . . . on the Negro citizen's access to the ballot box."). Nor does the mere fact that Congress made findings with respect to certain voting practices that constitute *per se* violations of the VRA (outlined in VRA §§ 4 and 5) undermine Congress's broader powers under the Fourteenth and Fifteenth Amendments to limit those practices that fail § 2's "results" test. *See Hayden*, 449 F.3d at 352-53 (Parker, J., dissenting).

In sum, there is nothing unique to felon disenfranchisement laws – as opposed to other methods in which the right to vote might be abridged in discriminatory fashion – that makes the prospect of including them under the VRA's broad umbrella corrosive to the constitutionality of the VRA as a whole.

III. Review Is Warranted To Determine The Proper Standard To Be Applied To The *Mendoza-Martinez* Factors In The Absence Of Clear Legislative Intent To Regulate.

This Court has provided lower courts with limited guidance to aid in their evaluation of challenges brought under the Ex Post Facto clause. Specifically, the Court has held that when a legislative body has stated its intention to enact a civil regulatory scheme, deference should be accorded to that intent. *See Smith v. Doe*, 538 U.S. 84, 92-93 (2003). Courts have been instructed to demonstrate such deference by requiring the "clearest proof" in order to override legislative intent. *Id.* at 92 (citing *Hudson v. United States*, 522 U.S. 93, 100 (1997)). Where, however, the legislature has failed to make its intention known, courts are presently without sufficient

guidance as to the standard to be applied in analyzing Ex Post Facto challenges. *See Smith*, 538 U.S. at 107 (Souter, J., concurring) (suggesting that ambiguity on the part of the legislature should serve to reduce the burden on the party seeking to prove punitive intent); *see also id.* at 115 (Ginsburg, J. with Breyer, J., dissenting) (advocating for neutral evaluation of legislative purpose and effect in absence of clear statement of legislative intent). Review of Petitioners' claims would afford the Court an opportunity to fill this void.

Indeed, the First Circuit's decision in the present case stands as an example of how the lack of clear direction from this Court can adversely affect the lower courts' analyses of Ex Post Facto claims. As an initial step, the First Circuit improperly extracted from *Trop v. Dulles*, 356 U.S. 86 (1958) a flawed conclusion that all felon disenfranchisement schemes are regulatory and not punitive. (*See* App. A 43a.) The first step of a proper analysis requires a balanced consideration of legislative intent. *See Smith*, 538 U.S. at 92 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

Despite its initial missteps, the majority opinion eventually did consider the sparse but powerful legislative history demonstrating the punitive intention underlying the enactment of Article 120, as did Judge Torruella's dissent. *See* App. A at 42a, 83a-85a. Again, however, the First Circuit defaulted to an inappropriate presumption that what it perceived as the absence of evidence of punitive intent justified a finding of a civil regulatory scheme. *See* App. A at 44a-45a (focusing on the absence of language in Article 120 "indicating the

Commonwealth's provision is penal" and the fact that the "Voter Guide read by the voters . . . made no mention of any goal of punishing prisoners"). There is no authority from this Court that holds that civil intent should be assumed until proven otherwise, yet just such a presumption appears to taint the majority opinion. *Id.*

The limited legislative history concerning the enactment of Article 120 clearly indicates an underlying intention to enhance the punishment of incarcerated felons by stripping them of their right to vote. *See* App. A at 83a-85a (Torruella, J., dissenting) (recounting "public statements of proponents of the legislation"). Such a clear manifestation of punitive intent should have marked the end of the First Circuit's inquiry. *Smith*, 538 U.S. at 92. Instead, however, the court proceeded to analyze the *Mendoza-Martinez* factors employing the "clearest proof' standard. *See* App. A at 45a. Had the First Circuit not erroneously transformed what it perceived as a lack of evidence of punitive intent into a presumption of civil regulatory intent, the court would have found, at best, ambiguous legislative intent and employed a more appropriate standard such as a preponderance of the evidence.[7]

Such a lack of clearly-stated legislative intent to regulate rendered it impossible for the First Circuit to know what the Commonwealth's true motivation was,

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7. Petitioners also take issue with the First Circuit's cursory analysis of the *Mendoza-Martinez* factors. Had the court conducted an appropriately rigorous examination, it would have found overriding punitive effect whether employing a preponderance standard or the elevated "clearest proof" standard.

and therefore should have prevented the court from employing the deferential "clearest proof" standard. Indeed, where the legislature has failed to make its wishes know expressly or impliedly, the need for deference does not exist. *Smith*, 538 U.S. at 107 ("[T]his heightened burden makes sense only when the evidence of legislative intent clearly points in the civil direction.") (Souter, J., concurring); *see also id.* at 115 (rejecting the "clearest proof" standard where legislative intent is ambiguous) (Ginsburg, J. and Breyer, J., dissenting). Unfortunately for the Petitioners, this Court's opinion in *Smith* failed to provide guidance to the lower courts on this particular point, thereby leaving the first Circuit to its own devices in deciding to apply the "clearest proof" standard. Acceptance of this petition would allow the Court to resolve the confusion that led to this erroneous result.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that the Supreme Court grant review in this matter.

Respectfully submitted,

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