# 01-7260

United States Court of Appeals
FOR THE SECOND CIRCUIT

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JALIL ABDUL MUNTAQIM, a/k/a ANTHONY BOTTOM,

*Plaintiff-Appellant,*

v.

PHILLIP COOMBE, ANTHONY ANNUCCI, LOUIS F. MANN,

*Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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The Association of the Bar of the City of New York (the "Association") respectfully submits this brief as *amicus curiae* in support of the appeal of Jalil Abdul Muntaqim from the grant of defendants' motion for summary judgment, pursuant to the Court's December 29, 2004 Order granting a rehearing *en banc* and inviting *amicus curiae* briefs from interested parties.

## INTEREST OF AMICUS CURIAE AND SOURCE OF AUTHORITY TO FILE

Founded in 1870, the Association is a professional association of more than 22,000 attorneys. Through its many standing committees, including those on Civil Rights and Corrections the Association educates the bar and the public about legal issues relating to civil rights, including voting rights, incarceration and its alternatives, and the nature of Congressional power to enact remedial legislation to curb discriminatory state action. By the contributions of these committees, the Association also seeks to promote racial equality under law, including the equal treatment of people of color in our state's criminal justice system.

The Association considers the right to vote to be a fundamental right of citizenship. As lawyers, we believe that universal suffrage is the cornerstone of the rule of law and of our participatory democracy. Accordingly, the Association is concerned about any mechanisms that impede

full political participation or diminish the minority vote, countering decades of voting rights gains.

This Court last addressed New York's felon disenfranchisement statute in *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996). In the intervening decade, compelling new research, as well as national electoral events, suggest that felon disenfranchisement statutes such as New York's may in fact demonstrably change the outcomes of national elections. *See* Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 Am. Sociological Review, No. 6, 777-803 (2002) (hereinafter "*Democratic Contraction*") (finding that felon disenfranchisement laws may have altered the outcomes of seven recent Senate elections and at least one presidential election). In light of the 2000 election, which was determined by a margin of 537 votes in Florida, and research indicating that hundreds of thousands of persons in Florida were disenfranchised due to a prior felony conviction, the Association is more concerned than ever that N.Y. Elec. Law § 5-106 (McKinney 2004) poses a serious challenge to the legitimacy of our elections.

The Association is also deeply concerned by the federal courts' recent jurisprudence curtailing Congress's power to enact remedial legislation under § 5 of the Fourteenth Amendment. The Association believes that further

limits on Congress's power eventually will undermine the substantial progress the country has made in civil rights over the past several decades. Particularly where racial discrimination -- an evil that has plagued the nation's history and, as set forth below, unfortunately is still alive today -- intersects with the fundamental right to vote, Congress's powers ought to be at their height. To limit Congress's power in this crucial area in the name of federalism -- as the district court and a panel of this Court have attempted to do -- is to take federalism much too far.

For these reasons, the Association submits this brief in support of Mr. Muntaqim's appeal. The parties have consented to the filing of this brief.

## FACTUAL BACKGROUND

Although, as discussed below, Mr. Muntaqim was improperly denied the ability to do so, he would be able to marshal powerful evidence demonstrating that racial discrimination remains stubbornly prevalent in New York's criminal justice system.

Recent data shows that 126,800 citizens were disenfranchised under New York's felon disenfranchisement statute, 69,700 of whom were incarcerated and 57,100 of whom were on parole. *See* Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (The Sentencing Project and Human Rights Watch: Oct. 1998)

(hereinafter "*Losing the Vote*"). The New York State Division of Criminal Justice Services (the "DCJS") calculates that while African-Americans and Latinos represent less than one quarter of the population, they made up more than three-quarters of the prison and parole population. New York State Division of Criminal Justice Services, *Disparities in Processing Felony Arrests in New York State*, 1990-1992 at 1 (1995) (hereinafter "DCJS Study"). Specifically, African-Americans account for approximately 50 percent of the prison and parole populations, although they comprise less than 16 percent of the state population, and Latinos account for almost 30 percent of those in prison or on parole, although they comprise only about 15 percent of the state population. *Id.*

A significant cause of the racial disparity in New York's prison and parole population is racial discrimination in the criminal justice system, particularly discrimination in sentencing. There is by now a substantial public record, much of it generated by New York State-sponsored entities, establishing that: (1) minorities are held in jail at indictment and sentenced to incarceration more often than comparably situated whites; (2) one out of every three minority defendants sentenced to jail would have received a different and more lenient sentence if they were processed as comparably situated whites; and (3) disparities in sentencing decisions account for approximately 300

prison and 4000 jail sentences of minority defendants each year. *See* DCJS Study at i; *see also* Clifford J. Levy, *A Racial Study Finds Differences in Jail Sentences*, N.Y. Times, April 10, 1996, at B1.

In evaluating the nexus between discrimination and disenfranchisement, the DCJS findings that similarly situated minorities were sentenced to probation considerably *less often* than whites, and sentenced to jail considerably *more often* than whites, are particularly significant because § 5-106 permits probationers, although not inmates or parolees, to vote. Several New York State-convened Judicial Commissions have reached similar conclusions. *See Report of the New York State Judicial Commission on Minorities* (April 1991) at 1 (concluding there are "two justice systems at work in the courts of New York State, one for Whites, and a very different one for minorities and the poor"); *see also* The Franklin H. Williams New York State Judicial Commission on Minorities, *Equal Justice: A Work In Progress, Five Year Report* (1991-1996) at 4, 34 (finding that "[r]ampant racism still infects our criminal justice system", and that "progress on the treatment of minorities remains bleak", including with respect to "disparities in all aspects of the criminal justice system -- from the bail stage, through plea bargaining to sentencing").

Particularly in New York State, the Rockefeller drug laws and other drug control policies have a highly skewed impact on communities of color, and thus are a significant contributor to the racially disproportionate rate of incarceration. *See, e.g., Losing the Vote* at 13. According to the Correctional Association of New York, 94 percent of those incarcerated for drug offenses in New York State are African-American or Latino. Although drug use and selling cuts across all racial, socio-economic and geographic lines, law enforcement strategies have targeted street-level drug dealers and users from low-income, predominantly minority, urban areas. *Id.* As a result, although the black proportion of all drug users is generally in the range of 13 to 15 percent, blacks constitute 36 percent of arrests for drug possession. *Id.* In the words of Charles J. Hynes, the District Attorney for Kings County in New York: "the simple fact is that minority drug defendants are serving substantially longer prison sentences than non-minority defendants although both populations have similar rates of drug abuse." *Federal Cocaine Sentencing Policy: Hearings Before the Senate Comm. on the Judiciary*, 107th Cong. 911, at 133.

**SUMMARY OF ARGUMENT**

As set forth above, there is a vast body of evidence showing that African-Americans and Latinos are arrested more often, convicted more often

and given harsher sentences than members of other racial groups who commit the same types of crimes. Because New York does not allow incarcerated or paroled felons to vote, that evidence would show that people are being denied the right to vote on account of their race, in violation of the Voting Rights Act. Mr. Muntaqim, however, has been denied the opportunity to adduce that evidence because the district court ruled -- based on the pleadings alone -- that § 2 of the Voting Rights Act cannot constitutionally be applied to the provision of New York's election law that disenfranchises incarcerated and paroled felons. Mr. Muntaqim has, however, pleaded the facts set forth above, and at the pleadings stage, those facts must be presumed to be true. The only question properly before the Court is the threshold legal question of whether § 2 of the Voting Rights Act can be applied to the New York statute. As set forth herein, it can, and the decision of the district court should be reversed.

As an initial matter, the plain language of § 2 of the Voting Rights Act, which applies to any "voting qualification or prerequisite to voting", clearly encompasses the New York statute. Although appellees (and the opinions of the district court and a panel of this Court) struggle mightily to obscure this fact, they do not -- because they cannot -- refute it. This should end the interpretive inquiry. Moreover, appellees' argument that § 2 of the Voting Rights Act cannot be interpreted to cover felon disenfranchisement

laws because such an interpretation would conflict with § 2 of the Fourteenth Amendment is wrong. Although § 2 of the Fourteenth Amendment suggests that felon disenfranchisement statutes are not *per se* unconstitutional, it does not begin to suggest that such statutes are always constitutional, let alone that they are immune from Congressional regulation. Furthermore, the "clear statement" rule -- a tool of statutory construction used to interpret *ambiguous* statutes -- cannot be used here, both because the statute is unambiguous and because its application to felon disenfranchisement statutes would not alter the balance between the federal government and the states. In any event, if it did alter the federal-state balance, Congress's intent to do so could not have been more clear. Fundamentally, Congress's intent in enacting the Voting Rights Act was to eradicate racially discriminatory voter disenfranchisement, no matter what its cause. To hold that Congress intended to exempt felon disenfranchisement statutes from that law is to hold that Congress actually intended to permit certain forms of racially discriminatory voter disenfranchisement. That plainly was not Congress's intent.

Not only did Congress unmistakably ban felon disenfranchisement statutes that were racially discriminatory, it had the authority to do so. Although the Supreme Court recently has struck down certain laws as exceeding Congress's enforcement powers under § 5 of the Fourteenth

Amendment, it has never questioned Congress's power to enact the Voting Rights Act. To the contrary, it has touted the Voting Rights Act as the quintessential example of an appropriate use of Congress's enforcement power. The intersection of race and voting has historically been the sphere of the most egregious constitutional violations. Because it brings together one of the most fundamental rights and one of the most potent forms of historical discrimination, Congress has been given greater latitude in forming appropriate remedies than in other spheres. In fact, the Supreme Court has never questioned the authority of Congress to prohibit even non-purposeful racial discrimination relating to voting.

Felon disenfranchisement is no exception. Like other core state functions which historically have been subject to Congressional regulation in order to prevent discrimination, felon disenfranchisement is not an absolute right of the states -- a fact also recognized by the Supreme Court. Indeed, to hold that Congress lacks the power to prohibit felon disenfranchisement statutes even if they result in the denial of the right to vote on account of race is to hold that Congress is simply powerless in the face of certain forms of race-based voter disenfranchisement by the states. At least since Reconstruction, federalism has not required such a result.

## ARGUMENT

### I. SECTION 2 OF THE VOTING RIGHTS ACT CAN CONSTITUTIONALLY BE APPLIED TO STATE STATUTES THAT DISENFRANCHISE INCARCERATED FELONS WHERE SUCH STATUTES RESULT IN THE DENIAL OF THE RIGHT TO VOTE ON ACCOUNT OF RACE.

#### A. Standard of Review.

When a summary judgment motion is decided only on the pleadings, the motion for summary judgment is to be treated as a motion on the pleadings. *Schwartz v. Compagnie General Transatlantique*, 405 F.2d 270, 273 (2d Cir. 1968). The District Court's grant of summary judgment is therefore reviewed *de novo*, with all evidence construed in the light most favorable to the non-moving party and all reasonable inferences drawn in his favor. *Schneider v. Feinberg*, 345 F.3d 135, 144 (2d Cir. 2003); *see also Jorgensen v. EPIC/SONY Records*, 351 F.3d 46, 50 (2d Cir. 2003). A court deciding a motion on the pleadings "must construe allegations in the pleadings liberally in favor of the plaintiffs". *Schneider*, 345 F.3d at 144 (*quoting Ad-Hoc Comm. Branch of Baruch Black & Hispanic Alumni Ass'n v. Bernard M. Baruch Coll.*, 835 F.2d 980, 982 (2d Cir. 1987)).

The District Court ruled that appellant's complaint failed to state a claim under § 2 of the Voting Rights Act. As such, its ruling is treated as a ruling on a motion to dismiss rather than a motion for summary judgment. *See*

*Schwartz*, 405 F.2d at 273. Mr. Muntaqim has pleaded that racial minorities are subjected to discrimination on account of their race at various levels of the criminal justice system, with the result that minorities are often incarcerated, and thus denied the right to vote, on account of their race. On this appeal, these facts must be accepted as true, and the only issue properly before the Court is thus the purely legal question of whether § 2 of the Voting Rights Act can constitutionally be applied to New York's felon disenfranchisement statute.

**B. Section 2 of the Voting Rights Act Applies to State Felon Disenfranchisement Statutes.**

**1. The Plain Language of Section 2 Applies to § 5-106.**

The Fifteenth Amendment, ratified in 1870, provides that "the right of citizens of the United States to vote shall not be denied or abridged by . . . any State on account of race, color, or previous condition of servitude". U.S. Const. amend. XV, § 1. Nevertheless, nearly one hundred years later, citizens were still being denied their right to vote on account of their race. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966). To put an end to the variety of attempts by some of the states to evade the Fifteenth Amendment, Congress enacted the Voting Rights Act of 1965. *See id.* at 308 ("The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.").

Congress aimed the statute "at the subtle, as well as the obvious, state regulations that have the effect of denying citizens their right to vote because of their race". *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969). Congress was careful not to limit the statute's prohibitions to methods of discriminating that had been used in the past. Instead, Congress sought to make the statute "broad enough to cover various practices that might effectively be employed to deny citizens the right to vote". *Id.* at 566-67. In so doing, Congress drafted § 2 with broad language. Rather than listing all of the various methods that had been or could be used to discriminate on the basis of race -- which would have been impossible -- Congress prohibited *any* practice used to discriminate on the basis of race in voting.

In 1982, Congress amended § 2 in response to *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 60-62 (1980), in which a plurality of the Supreme Court held that a facially neutral state action violates § 2 only if it is motivated by a discriminatory purpose. The amendment removed any "discriminatory purpose" requirement, and the amended version thus bans any voting qualification that "results" in the denial of the right to vote "on account of race". 42 U.S.C. § 1973(a). Accordingly, § 2 of the Act (as amended) 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 . . .". *Id.*

The statute plainly covers § 5-106 of the New York Election Law. Section 5-106 provides that no person who has been convicted of a felony "shall have the right to register for or vote in any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole". N.Y. Elec. Law § 5-106. Section 5-106 is thus indisputably a voting qualification, and is therefore prohibited by § 2 of the Voting Rights Act if it "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race". 42 U.S.C. § 1973(a).

Where the language of a statute is unambiguous, courts should not attempt to discern whether Congress intended the statute to mean something other than what the language says. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *In re Venture Mortgage Fund, L.P.*, 282 F.3d 185, 188 (2d Cir. 2002) ("It is axiomatic that the plain meaning of a statute controls its interpretation, and that judicial review must end at the statute's unambiguous terms. Legislative history and other tools of interpretation may be relied upon only if the terms of the statute

are ambiguous.") Because the language here is unambiguous, the Court should look no further.

### 2. Section 2 of the Fourteenth Amendment Does Not Compel an Interpretation at Odds With the Plain Meaning of the Statute.

Appellees argue, improperly, that the plain meaning of the statute should be ignored and that §2 should be interpreted so as not to apply to felon disenfranchisement statutes because such statutes are sanctioned by § 2 of the Fourteenth Amendment. (Appellees' Br. at 12-16.) Section 2 of the Fourteenth Amendment provides that if the right of any male citizen over the age of 21 is denied or abridged by any state "except for participation in rebellion, or other crime", that state's representation in Congress would be reduced by the percentage of the electorate that was disenfranchised. U.S. Const. amend. XIV, § 2. At the time of the ratification of the Fourteenth Amendment (in 1868), the right of former slaves to vote had not yet been guaranteed. (That was accomplished by the Fifteenth Amendment, ratified in 1870. *See* U.S. Const. amend. XV.) The Fifteenth Amendment thus rendered § 2 of the Fourteenth Amendment obsolete.

Based on this obsolete provision, the Supreme Court held in *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974), that § 1 of the Fourteenth Amendment does not "bar outright" felon disenfranchisement. However, the

fact that felon disenfranchisement statutes may *sometimes* be constitutional does not mean that they are *always* constitutional, much less that they are somehow immune from Congressional regulation. Indeed, the Supreme Court has made clear that such statutes are *not* always constitutional.

In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Supreme Court held that a provision of the Alabama Constitution that disenfranchised persons convicted of certain crimes, and that the Court found was enacted with a discriminatory purpose, violated § 1 of the Fourteenth Amendment's prohibitions against racial discrimination. In so holding, the Supreme Court explicitly rejected an argument that § 2 of the Fourteenth Amendment (as interpreted by *Ramirez*) somehow immunized racially discriminatory disenfranchisement statutes. *Id.* at 233 ("[W]e are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of [the provision of the Alabama Constitution] . . . . Nothing in our opinion in *Richardson v. Ramirez* . . . suggests the contrary.").

Furthermore, as set forth more fully in the brief of the Brennan Center as *amicus curiae*, the Fifteenth Amendment, which made disenfranchisement on account of race unconstitutional, superseded the Fourteenth Amendment to the extent it allowed race-based disenfranchisement. The Fourteenth Amendment, even under appellees' interpretation, cannot save

legislation prohibited by the subsequently enacted Fifteenth Amendment. *Cf. Hunter*, 471 U.S. at 233 ("[T]he Tenth Amendment cannot save legislation prohibited by the subsequently enacted Fourteenth Amendment.").

### 3. The "Clear Statement" Rule Does Not Preclude Application of the Voting Rights Act to § 5-106.

The Supreme Court recently has followed a "clear statement" or "plain statement" rule when interpreting ambiguous statutes. According to that rule, "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intent to do so unmistakably clear in the language of the statute". *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).

Because § 2 of the Voting Rights Act is unambiguous (a point that, as noted above, is undisputed here), the "clear statement" rule is inapplicable. *See Salinas v. United States*, 522 U.S. 52, 60 (1997) ("The plain-statement requirement . . . does not warrant a departure from the statute's terms."); *Gregory*, 501 U.S. at 470 ("*Pennhurst* established [the plain statement rule] to be applied where statutory intent is ambiguous.").

Even if the "clear statement" rule did apply here (which it does not), it would not preclude application of § 2 of the Voting Rights Act to the New York statute at issue. Under the clear statement rule, the first question is whether the proposed application of the statute alters the balance of power

between Congress and the states. *See Gregory*, 501 U.S. at 460-61. Here there is no question that applying § 2 of the Voting Rights Act to *intentionally* discriminatory felon disenfranchisement statutes would not alter the federal-state balance at all. Indeed, as the Supreme Court made clear in *Hunter*, *intentionally* discriminatory felon disenfranchisement statutes are prohibited by the Fourteenth Amendment itself. *See Hunter*, 471 U.S. at 233. The only question then is whether applying § 2 to felon disenfranchisement statutes that were not enacted with a discriminatory purpose but with a discriminatory result -- using the standard clarified by the 1982 amendments -- would alter the federal-state balance.

The panel opinion in this case suggests that it would, but its reasoning is flawed. The central flaw in the reasoning of the panel opinion is that it fails to focus on the relevant question -- i.e., whether applying the "results" standard clarified by the 1982 amendments alters the federal-state balance. The panel opinion suggests that the federal-state balance would be altered because (i) the application of § 2 to § 5-106 "would upset the sensitive relation between federal and state criminal jurisdiction" and "infringe upon the states' traditional authority over its own elections"; (ii) a state's "discretion to deny the vote to convicted felons is fixed by the text of § 2 of the Fourteenth Amendment"; and (iii) "there is a longstanding practice in this country of

disenfranchising felons as a form of punishment". *Muntaqim v. Coombe*, (hereinafter "Panel Op.") 366 F.3d 102, 122-123 (2d Cir. 2004). Those are all arguments, however, for why even prohibitions on *intentionally* discriminatory felon disenfranchisement statutes would alter the federal-state balance. As such, they all have been squarely rejected by *Hunter*. None of those arguments address the only relevant question -- i.e., whether the incremental effect of the 1982 amendments alters the federal-state balance. There is thus no basis for the panel's conclusion that the federal-state balance would be altered.

In any event, even assuming *arguendo* that the incremental change in standard did alter the federal-state balance, Congress's intent was unmistakably clear. Indeed, the entire purpose of the 1982 amendments to § 2 was to remove the "discriminatory purpose" requirement. *See* S. Rep. No. 97-417, at 28 (1982) ("[T]he specific intent of this amendment is that the plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose.").

Despite Congress's statement -- the clarity of which cannot reasonably be disputed -- the panel, citing *Gregory,* asserts that "when sweeping language in a statute would alter the federal balance were it given its full effect, that language should not be construed to alter the federal balance in the absence of a clear statement where Congress has otherwise indicated that it

did not intend to achieve such a drastic result". Panel Op., 366 F.3d at 127. That statement is not only confusing, but is wholly unsupported by *Gregory*. In *Gregory*, there was a patent ambiguity in the language of the statute: whether an exception for "appointees at the policy-making level" included appointed judges. *See Gregory*, 501 U.S. at 467. It was based on that ambiguity that the Supreme Court held Congress had not made it unmistakably clear that the statute at issue was intended to apply to appointed judges. *See id.* Here, there is no such ambiguity, and nothing in *Gregory* suggests that the "clear statement" rule applies where there is no ambiguity *in the language of the statute.*[1]

The panel goes on to argue that "the clear statement rule also applies with full force in the instant case, because there is ample evidence that Congress did not intend to prohibit felon disenfranchisement statutes when it enacted and amended the [Voting Rights Act]". Panel Op., 366 F.3d at 127. This argument is not, however, a "clear statement" argument at all, but an argument that the plain language of the statute should be ignored because of the legislative history. Not only is such an approach improper, *see supra* Part B.1; *In re Venture Mortgage*, 282 F.3d at 188 ("Legislative history and other

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[1] Indeed, the panel opinion merely highlights the absurdity of applying the clear statement rule to an unambiguous statute. If a statute is unambiguous, its application will, by definition, be unmistakably clear.

tools of interpretation may be relied upon only if the terms of the statute are ambiguous"), but the legislative history does not in fact show what the panel claims it does.

The legislative history, as described in the panel opinion, boils down to this: Congress considered and rejected an *outright* ban on felon disenfranchisement statutes. Panel Op., 366 F.3d at 127-28. Accordingly, Congress did not list felon disenfranchisement among the practices absolutely prohibited by § 4. This does not, however, support the conclusion that Congress intended to exclude such statutes from the reach of § 2. Indeed, such an interpretation requires improperly writing in an exception to § 2 that is nowhere to be found in the statute.

Moreover, Congress was not required specifically to mention felon disenfranchisement statutes. The plain language of § 2 covers all voting qualifications, which indisputably includes felon disenfranchisement statutes. As set forth above, when the Voting Rights Act initially was enacted, Congress used language that was deliberately broad and generic. Congress did not attempt to list every possible potentially discriminatory practice, because to do so would have left the states free to devise new means to discriminate that were not covered. Put another way, Congress's intent was to guarantee that there be no more race-based disenfranchisement, i.e., to prohibit that result no matter

what the means by which it is achieved. Indeed, to hold that Congress did not intend the Voting Rights Act to cover felon disenfranchisement statutes -- or any other practice, for that matter -- is to hold that Congress actually intended to *allow* some forms of race-based voter disenfranchisement. That is implausible.

Felon disenfranchisement statutes were thus plainly covered by the original Voting Rights Act. To suggest that when Congress amended the statute in 1982, it was required to list every possible application of the statute and explicitly state that the new standard was intended to apply to each one is absurd. It is also contrary to Supreme Court precedent holding that the "clear statement" rule does not require that each particular application be specifically mentioned. *See Gregory*, 501 U.S. at 467 ("This does not mean that the Act must mention judges explicitly.")

Finally, the Supreme Court did not apply the "clear statement" rule in *Chisom v. Roemer*, 501 U.S. 380 (1991), in deciding that the results test of § 2 applies to the election of state court judges, despite the fact that it decided *Chisom* the same day it decided *Gregory*, in which it did apply the "clear statement" rule. This strongly indicates that the failure to apply the "clear statement" rule was no mere oversight or coincidence -- as the panel suggests -- but rather was an indication that the Supreme Court would not

apply the test to cases, such as this one, arising under § 2 of the Voting Rights Act. The panel was able to dismiss this argument (Panel Op., 366 F.3d at 128-29) only by ignoring the critical fact that *Chisom* and *Gregory* were decided on the same day.

### C. Section 2 of the Voting Rights Act is a Justifiable Exercise of Congress's Enforcement Powers Under Section 2 of the Fifteenth Amendment.

Since 1997, the Supreme Court has issued several decisions concerning the scope of Congress's authority to enact legislation pursuant to § 5 of the Fourteenth Amendment, striking down certain laws because they failed to respond to a pattern of constitutional violations with a congruent and proportional remedy. *See, e.g., City of Boerne v. Flores,* 521 U.S. 507, 520 (1997). The Supreme Court has never, however, applied this analysis to a statute enacted pursuant to Congress's enforcement powers under § 2 of the Fifteenth Amendment. As demonstrated in the brief of *amicus curiae* the Brennan Center, such an analysis is inappropriate in the context of the Fifteenth Amendment for several reasons. In any event, assuming *arguendo* that the analysis would apply equally to statutes enacted pursuant to Congress's

power under § 2 of the Fifteenth Amendment, § 2 of the Voting Rights Act is a valid exercise of that power.[2]

### 1. The Voting Rights Act is the Paradigm of a Congruent and Proportional Remedy.

In recent years, as noted, the Supreme Court has restricted Congressional power, striking down remedial legislation in certain areas. The Court held, for example, that Congress lacked the power under § 5 of the Fourteenth Amendment to ban state discrimination on the basis of age, religion and disability. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (age); *City of Boerne*, 521 U.S. at 530 (religion); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (disability). The Court's decisions turned on a lack of "congruence and proportionality", *see, e.g., City of Boerne*, 521 U.S. at 530; there was insufficient evidence of discrimination to justify federal intrusion into matters traditionally regulated by the States.

By contrast, the Supreme Court has never questioned the constitutionality of the Voting Rights Act. The distinction is based on two factors: (i) the right to vote is considered "fundamental", *see Rice v. Cayetano*, 528 U.S. 495 (2000) (the right to vote free of racial discrimination is a "fundamental principle" of the Constitution); *Katzenbach v. Morgan*, 384 U.S.

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[2] The Voting Rights Act was enacted pursuant to § 2 of the Fifteenth Amendment. *South Carolina v. Katzenbach*, 383 U.S. at 308.

641, 652, 654 (1966) (describing the right to vote as "precious and fundamental" and "the right that is preservative of all rights") (internal citations omitted); and (ii) the country's long and persistent history of racial discrimination gives Congress greater latitude in fashioning appropriate remedies for racial discrimination than for other types of discrimination, *see Vieth v. Jubelirer*, 541 U.S. 267 (2004) (holding that federal legislation meant to remedy racial discrimination in voting warrants less federalism related scrutiny than legislation targeted at other types of discrimination); *City of Boerne*, 521 U.S. at 526 (acknowledging "the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination"); *see also* S. Rep. No. 97-417, at 4 (1982) (Committee considered and rejected adding provisions to the Voting Rights Act prohibiting discrimination based on sex and religion).

Indeed, the Supreme Court has referred to the Voting Rights Act as an exemplar of appropriate remedial legislation. *See Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 737-738 (2003) (upholding the FMLA and likening it to the Voting Rights Act, a "valid [exercise] of Congress' § 5 power"); *Garrett*, 531 U.S. at 373 ("The ADA's constitutional shortcomings are apparent when the Act is compared to Congress' efforts in the Voting

Rights Act of 1965 to respond to a serious pattern of constitutional violations."); *Kimel*, 528 U.S. at 83 (distinguishing age discrimination from racial discrimination because "[o]lder persons . . . unlike those who suffer discrimination on the basis of race . . . have not been subjected to a history of purposeful unequal treatment") (internal citations omitted); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640 (1999) (distinguishing the Patent Remedy Act from the Voting Rights Act on account of the "undisputed record of racial discrimination confronting Congress in voting rights cases"); *City of Boerne*, 521 U.S. at 518 ("[M]easures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures [place] on the States" ).

### 2. Congress Has the Authority to Prohibit Discriminatory Voting Requirements That Lack a Discriminatory Purpose.

Congressional authority generally extends to remedying non-intentional, as well as intentional, discriminatory state action. *See Tennessee v. Lane*, 541 U.S. 509 (2004) ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent."). This is particularly so in the context of voting; the Supreme Court

has even called the right to vote free of racial discrimination a "fundamental principle" of the Constitution. *Rice*, 528 U.S. at 512. Accordingly, the Supreme Court has never questioned Congress's authority to prohibit voting requirements that are not intentionally discriminatory. *See, e.g., Lopez v. Monterey County*, 525 U.S. 266, 283 (1999) ("Under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect."); *see also Bush v. Vera*, 517 U.S. 952, 990-92 (1996) (O'Connor, J. concurring) ("[T]his Court has thus far assumed without deciding that compliance with the results test of [Voting Rights Act] § 2(b) is a compelling state interest".); *Miss. Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984), *aff'g Jordan v. Winter*, 604 F. Supp. 807, 811 (N.D. Miss. 1984); *City of Rome v. United States*, 446 U.S. 156, 175 (1980) (acknowledging Congress's power to "prohibit voting practices that have only a discriminatory effect").

### 3. There is No Basis for a Felon Disenfranchisement Exception to the Voting Rights Act.

Two principles are clear from the foregoing: (i) Congress has the authority to prohibit felon disenfranchisement statutes that have a discriminatory purpose, *see Hunter*, 471 U.S. at 233, and (ii) Congress's authority to remedy discrimination is not generally limited to the regulation of state action that has a discriminatory purpose. Unless it is established that

there is something unique about felon disenfranchisement that allows it to be prohibited where it is intentionally discriminatory -- but, unlike every other type of voting qualification, *only* when it is intentionally discriminatory -- § 5-106 ought to be governed by § 2 of the Voting Rights Act. Four primary arguments have been made for creating a felon disenfranchisement exception to the Voting Rights Act: (i) that felon disenfranchisement is shielded by § 2 of the Fourteenth Amendment; (ii) that felon disenfranchisement is a core state function; (iii) that Congress did not make specific findings of discrimination through felon disenfranchisement; and (iv) that felon disenfranchisement has been common since before the Civil War. Each of those arguments fails.

The primary argument for felon disenfranchisement's uniqueness -- that it is purportedly shielded by Section 2 of the Fourteenth Amendment (*see* Appellees Br. at 12-16) -- fails for the reasons discussed above. (*See supra* Part B.2.) At most, § 2 of the Fourteenth Amendment suggests that felon disenfranchisement statutes are not *per se* unconstitutional; it does not begin to suggest that such statutes are immune from Congressional regulation where they result in discrimination in voting on account of race or color.

The argument that felon disenfranchisement should be exempted from Congressional regulation because it is a core state function is also flawed. Numerous other core state functions have been deemed properly within

Congress's regulatory reach when preventing discrimination in voting. *See Lopez*, 525 U.S. 266 (holding that Voting Rights Act's pre-clearance requirement could be applied to voting changes adopted by non-covered state if the changes had an effect on a covered county); *Young v. Fordice*, 520 U.S. 273 (1997) (holding that state's new plan for separate state and federal voter registration was a "discretionary change" and therefore required pre-clearance under the Voting Rights Act); *Vera*, 517 U.S. 952 (1996) (applying Voting Rights Act to state's drawing of voting districts); *Chisom v. Roemer*, 501 U.S. 380 (1991) (applying Voting Rights Act to state laws regarding election of state court judges); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (holding that state's English literacy voting requirement could not be enforced to the extent it was at odds with the Voting Rights Act). Felon disenfranchisement is no more a core state function than any of the foregoing examples.[3]

Nor is the fact that Congress did not make specific findings of racial discrimination through felon disenfranchisement persuasive. Racial

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[3] While it is true that "states possess primary authority for defining and enforcing the criminal law", *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (internal citations omitted), Section 5-106 is not a criminal law. It is a voting law found in New York's Election code. As noted above, despite the fact that the states generally have primary responsibility for regulating the time, place and manner of voting, that state function is plainly subject to Congressional regulation. Indeed, that core concept lies at the heart of the Voting Rights Act.

discrimination in voting has proven resilient in the face of narrow prohibitions and in light of the ingenuity of state and local efforts to erect subtle barriers. Congress determined that it was necessary to enact broad and flexible remedies to eliminate the vestiges and effects of pervasive discrimination that existed for more than 100 years after the promise made in the Fifteenth Amendment. It therefore provided that "No voting qualification may be imposed" if it "results" in the abridgement of the right to vote on account of race or color. To require Congress to catalogue a history of discrimination through each conceivably discriminatory practice in order to regulate that practice would run directly counter to the purpose of the Voting Rights Act, which was to ban discrimination not only by certain enumerated means, but by any means that could be devised by the states in their unending ingenuity. *See* S. Rep. No. 97-417 at 6 ("The ingenuity of such schemes seems endless."); *Allen*, 393 U.S. at 566-67 (stating that the statute was deliberately "broad enough to cover various practices that might effectively be employed to deny citizens the right to vote"). Accordingly, Congress has never been required to find that a particular voting practice had resulted in discrimination before it could ban or regulate such a practice.[4] In any event, in *Hunter*, the Supreme Court found that there

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[4] The Voting Rights Act has been applied to many discriminatory voting devices and practices that were not mentioned in the Act's legislative history.

*was* evidence that states had used felon disenfranchisement statues as a mechanism for disenfranchising citizens on the basis of their race. Such judicial determinations can support Congress's authority to regulate state felon disenfranchisement. *See Lane*, 541 U.S. at 509, 124 S. Ct. at 1989 (finding that court decisions that documented a pattern of unconstitutional discrimination against people with disabilities supported Congressional regulation).

Finally, the fact that felon disenfranchisement was common at the time the Voting Rights Act was enacted, and even before the Civil War, also does not support an exception for felon disenfranchisement. It suggests that Congress did not intend to ban it outright, but not that Congress intended to allow it even where it resulted in the denial of the right to vote on the basis of race.

In sum, it stretches federalism well beyond any reasonable limit to hold that Congress lacks the authority to prohibit felon disenfranchisement statutes where they result in the denial of the right to vote on account of race. To so hold is to hold that there are some forms of race-based voter

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*See, e.g., Harris v. Graddick*, 593 F. Supp. 128, 132-33 (M.D. Ala. 1984) (applying § 2 to state's policy of not hiring black poll workers); *Brown v. Dean*, 555 F. Supp. 502, 504-06 (D.R.I. 1982) (applying § 2 to location of state's polling places and finding a "constructive disenfranchisement" of minority voters); *Brown v. Post*, 279 F. Supp. 60, 64 (W.D. La. 1968) (applying § 2 to state's failure to provide voters with absentee ballots).

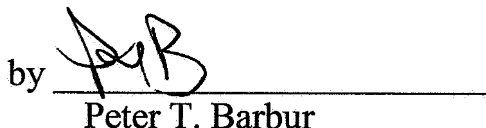
disenfranchisement that Congress has no authority to stop. No Court has ever so held.

## CONCLUSION

For the foregoing reasons, the Court should hold that § 2 of the Voting Rights Act can constitutionally be applied to felon disenfranchisement statutes that result in the denial of the right to vote on account of race, and should reverse the district court's grant of summary judgment.

January 28, 2005

CRAVATH, SWAINE & MOORE LLP

by 

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January 28, 2005

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