

01-7260

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

JALIL ABDUL MUNTAQIM, a/k/a ANTHONY BOTTOM,
Plaintiff — Appellant,

— v. —

Phillip Coombe, Anthony Annucci, Louis F. Mann,
Defendants — Appellees.

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

**EN BANC BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT JALIL ABDUL
MUNTAQIM, A/K/A/ ANTHONY BOTTOM, AND IN SUPPORT OF REVERSAL, ON
BEHALF OF AMICI CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND,
INC., COMMUNITY SERVICE SOCIETY OF NEW YORK, AND CENTER FOR LAW
AND SOCIAL JUSTICE AT MEDGAR EVERS COLLEGE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the NAACP Legal Defense & Educational Fund, Inc., Community Service Society of New York, and the Center for Law and Social Justice at Medgar Evers College, by and through the undersigned counsel, make the following disclosures:

Counsel for Plaintiffs-Appellants, all not-for-profit corporations of the State of New York, are neither subsidiaries nor affiliates of a publicly owned corporation.



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TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
INTEREST OF <u>AMICI CURIAE</u>	1
BACKGROUND	3
INTRODUCTION AND SUMMARY OF THE ARGUMENT	5
ARGUMENT	7
I. Proof Required to Establish A Violation of Section 2 of the VRA (Court’s <u>En Banc</u> Question No. 3)	7
A. Disparate Impact of New York Election Law §5-106	8
B. Totality of the Circumstances Test	8
i. Evidence of Discrimination in the Criminal Justice System ..	11
a. <u>Type of Evidence (Court’s En Banc Question No. 3(a))</u>	11
b. <u>Quantum of Proof (Court’s En Banc Question No. 3(b))</u>	20
c. <u>Relevance of Evidence of Discrimination in Federal and State Criminal Justice System (Court’s En Banc Question No. 3(c))</u>	22
II. Additional Senate Factors	23
III. Evidence of Intentional Discrimination in the Enactment of New York’s Felon Disfranchisement Laws	26
CONCLUSION	29

TABLE OF AUTHORITIES

CASES

<u>Baker v. Pataki</u> , 58 F.3d 814, 816 (2d Cir. 1995), <u>vacated in part</u> , 1996 U.S. App. LEXIS 13133 (2d Cir. 1996)	12, 13
<u>Baker v. Pataki</u> , 85 F.3d 919 (2d Cir. 1996)	13
<u>Burton v. City of Belle Glade</u> , 178 F.3d 1175 (11th Cir. 1999)	9
<u>Campaign for Fiscal Equity v. New York</u> , 719 N.Y.S.2d 475 (2002), <u>rev'd</u> , 245 A.D.2d 1, 744 N.Y. S.2d 130 (1st Dept. 2002)	24
<u>Farrakhan v. Washington</u> , 338 F.3d 1009 (9th Cir. 1003), <u>cert. denied</u> , ___ U.S. ___, 125 S. Ct. 477 (2004)	4, 9, 12
<u>Farrakhan v. Washington</u> , No. CS-96-76-RHW (E.D. Wash.)	3, 4
<u>Goosby v. Town Board of the Town of Hempstead</u> , 180 F.3d 476 (2d Cir. 1999)	10
<u>Hayden v. Pataki</u> , 2004 WL 1335921 (S.D.N.Y. June 14, 2004) (order granting motion for judgment on the pleadings), <u>appeal docketed</u> , No. 04-3886-PR	3
<u>Johnson v. Bush</u> , 353 F.3d 1287 (11th Cir. 2003)	3, 4
<u>Johnson v. DeGrandy</u> , 512 U.S. 997 (1994)	9, 10

<u>McCleskey v. Kemp</u> , 481 U.S. 279 (1987)	20
<u>Muntaqim v. Coombe</u> , 366 F.3d 102 (2d Cir. 2004)	12
<u>Rodriquez v. Pataki</u> , 308 F. Supp. 2d 346 (S.D.N.Y. 2004), <u>affd</u> , 125 S. Ct. 627 (2004)	3
<u>Thornburg v. Gingles</u> , 478 U.S. 30 (1986)	9, 10, 20, 21, 22
<u>U.S. v. Armstrong</u> , 517 U.S. 456 (1996)	20

CONSTITUTIONS AND STATUTES

N.Y. Const. (1821), art. II, § 2	27
N.Y. Const. art. II, § 2 (amended 1894)	28
N.Y. Elect. Law §5-106	<i>passim</i>
Section 2 of Voting Rights Act, 42 U.S.C. § 1973	<i>passim</i>
S. Rep. No. 97-417 (1982), <u>reprinted in</u> 1992 U.S.C.C.A.N. 177, 179	<i>passim</i>
42 U.S.C. § 1973(a)	8, 9
U.S. Const. amend. XV	28

OTHER AUTHORITIES

Brief for Plaintiff-Appellant <u>In Banc</u>	7
Nathaniel Carter, William Stone and Marcus Gould, <u>Reports of the Proceedings and Debates of the Convention of 1821</u> , at 198	26

Cong. Globe, 41st Cong. 2d Sess., at 1447-81	28
Constitutional Convention of 1846, <u>Debates of 1846</u> , at 1033	27, 28
Jeffrey Fagan & Garth Davies, <u>Street Stops and Broken Windows: Terry, Race and Disorder in New York City</u> , 28 Fordham Urb. L. J. 457, 458-462 (2000)	17
Jeffrey Fagan, Valerie West, and Jan Holland, <u>Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods</u> , 30 Fordham Urb. L. J. 1551 (2003)	18, 19
The Franklin H. Williams Judicial Commission on Minorities, <u>Equal Justice: A Work in Progress, Five Year Report, 1991-1996</u>	34
Tushar Kansal, The Sentencing Project, <u>Racial Disparity in Sentencing: A Review of the Literature</u>	13
Mark Levitan, Community Service Society, <u>A Crisis of Black Male Employment: Unemployment and Joblessness in New York City 2003</u> , 2, 6 (2004)	25
Manhattan Borough President's Commission to Close the Health Divide, <u>Closing The Health Divide: What Government Can Do to Eliminate Health Disparities Among Communities of Color in New York City</u> (October 2004)	24
Mason Tillman Associates, Ltd., <u>Report: City of New York Disparity Study</u> (December 2004), <u>available at http://www.nycouncil.info/pdf_files/reports/citynyrpt.pdf</u> . ..	24
James Nelson, New York State Division of Criminal Justice Services, <u>Disparities in the Processing Felony Arrests in NYS, 1990-1992</u> (1995).	14, 15

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Courts, 139-177 (Apr. 1991) 13, 14

Office of the Attorney General of the State of New York, Civil
Rights Bureau, The New York City Police Department’s “Stop & Frisk”
Practices (1999) 15, 16

Cassia Spohn, U.S. Dep't of Justice, Thirty Years of Sentencing
Reform: The Quest for a Racially Neutral Sentencing Process, 3 Crim. J.
427, 444-450, 475 (2000) 13

INTEREST OF AMICI CURIAE

Amici curiae are three non-profit, non-partisan legal organizations with lengthy histories in advocacy and litigation in the area of voting rights. Amici curiae are also the attorneys for the plaintiffs in Hayden v. Pataki, a class action brought on behalf of Black and Latino prisoners, parolees, and community members to challenge New York State's felon disfranchisement laws on the grounds that these laws impermissibly deny and dilute the right to vote of plaintiffs in violation of, inter alia, the Fourteenth and Fifteenth Amendments to the U.S. Constitution and Section 2 of the Voting Rights Act of 1965 (VRA). Hayden is currently on appeal before this Court.¹

The NAACP Legal Defense and Educational Fund, Inc. (LDF) was founded in 1940 under the leadership of the late Associate Supreme Court Justice Thurgood Marshall. Its primary purpose is to provide legal assistance to poor African Americans. LDF has been involved in more cases before the United States Supreme Court than any other legal organization, except for the U.S. Department of Justice, including every seminal Supreme Court case on the issue of voting rights. In addition to serving as co-counsel in Hayden, LDF is also co-counsel for the plaintiffs in

¹ Hayden v. Pataki, 2004 WL 1335921 (S.D.N.Y. June 14, 2004) (order granting motion for judgment on the pleadings), appeal docketed, No. 04-3886-PR (2d Cir. July 13, 2004).

Farrakhan v. Washington, No. CS-96-76-RHW (E.D. Wash.), a case brought by Blacks, Latinos and Native Americans challenging Washington State's felon disfranchisement laws. LDF is also a founding member of the Right to Vote Campaign, a national collaborative of eight organizations seeking to challenge state felon disfranchisement laws through litigation, legislative action, and public education.

For more than 160 years, the Community Service Society of New York (CSS) has worked to improve the lives and enhance the political participation of the poor. CSS has challenged an array of barriers to and discrimination in voting in New York. Since 2002 CSS has directly challenged New York laws and policies that impede poor voters from participating in the political process because of felony convictions. In addition to serving as co-counsel in Hayden, CSS, along with other civil rights organizations, was instrumental in changing New York State policies for re-integrating eligible persons with felony convictions to the voting rolls.

The Center for Law and Social Justice (CLSJ) is a unit in the School of Continuing Education and Community Programs at Medgar Evers College of the City University of New York. Founded in 1985, CLSJ's mission is to be a resource for the liberation of people of African descent in order to achieve equitable distribution of wealth and resources, as well as cultural, economic, political, and social equity. CLSJ

seeks to achieve its mission through research, education, advocacy and litigation projects. CLSJ is widely recognized as one of the few community-based organizations in New York City that is actively committed to ensuring the voting rights of Black people, including incarcerated and formerly incarcerated persons. CLSJ's work has been pivotal in protecting the right to vote of communities of color and in determining the City Council, State Assembly and Senate, and U.S. Congressional districts in New York City. In addition to serving as co-counsel in Hayden, CLSJ was counsel to intervening Black voters residing in the three New York counties covered by Section 5 of the VRA in Rodriguez v. Pataki, 308 F. Supp. 2d 346 (S.D.N.Y. 2004), aff'd, 125 S. Ct. 627 (2004).

BACKGROUND

Whether Section 2 of the VRA, as amended, applies to felon disenfranchisement laws is a question that will shape the modern civil rights struggle to ensure equal access to the franchise for all Americans. The Court's resolution of this question not only has direct bearing upon this case, but will be germane to the resolution of at least three other felon disenfranchisement cases currently before federal courts — Johnson

v. Bush,² Farrakhan v. Washington,³ and Hayden⁴ — as well as to the development of Section 2 jurisprudence in general.

In Johnson, a challenge to Florida’s permanent disfranchisement of individuals with felony convictions who have completed their sentences, the Eleventh Circuit vacated for reconsideration en banc a panel decision reversing a lower court decision holding that Section 2 applies to felon disfranchisement laws. In Farrakhan, the Ninth Circuit upheld the application of Section 2 to felon disfranchisement laws. Farrakhan v. Washington, 338 F.3d 1009, 1019-20 (9th Cir. 1003), cert. denied, ___ U.S. ___, 125 S. Ct. 477 (2004). The Supreme Court denied a petition for certiorari and remanded the case for further proceedings.

Finally, Hayden, a challenge to New York State’s felon disfranchisement laws on behalf of Blacks and Latinos who are incarcerated or on parole for a felony conviction, is pending on appeal before this Court from a dismissal on the pleadings. The Hayden pleadings describe the pervasive history of discrimination that motivated the enactment of New York’s felon disfranchisement laws. Moreover, the Hayden pleadings set forth the disparate impact of felon disfranchisement laws on New York

² 353 F.3d 1287 (11th Cir. 2003).

³ No. CS-96-76-RHW (E.D. Wash.).

⁴ See supra n.1.

State’s Black and Latino communities. Consideration of the Hayden plaintiffs’ vote denial and vote dilution claims under Section 2 was explicitly reserved on appeal, pending the outcome of the instant case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The resolution of the issues raised in this appeal will reflect this country’s commitment to democracy and the eradication of racially discriminatory practices in the electoral process. This Court will decide whether voting eligibility requirements — namely felon disenfranchisement laws — that disparately impact racial minorities may be challenged under legislation specifically enacted to rid this country of discrimination in the electoral arena.⁵ As a threshold matter, Amici submit that the VRA unequivocally applies to felon disenfranchisement laws such as N.Y. Elect. Law §5-106 (hereinafter “§5-106”). Moreover, Amici assert that Congress’ power to legislate against such practices where they yield racially disparate results is firmly grounded in the Fourteenth and Fifteenth Amendments to the United States Constitution. For purposes of this brief, however, we focus upon the specific

⁵ According to a 2005 report by the Sentencing Project, 4.7 million, or one in forty-three adults, have currently or permanently lost their voting rights because of felony convictions. Of that number, 1.4 million or 13 percent are Black men, a rate seven times the national average. Given current rates of incarceration, three in ten of the next generation of Black men can expect to be disenfranchised at some point in their lifetime — an eventuality that, if allowed to occur, places Black people’s right to vote and to elect representatives of their choice on a path to extinction.

questions posed by this Court in its order granting rehearing en banc regarding the nature and quantum of proof required to support a challenge to felon disenfranchisement laws under Section 2 of the VRA (Court's En Banc Question No. 3).

Like other Section 2 challenges, claims regarding the racially disparate impact of felon disenfranchisement laws — whether in the context of vote dilution or vote denial — are governed by the totality of the circumstances test articulated in Section 2 jurisprudence since the 1982 amendments to the VRA. Once the disparate impact of a voting practice, procedure or qualification is established, the totality of the circumstances test requires courts to consider various external and contextual factors that interact with the electoral mechanism at issue. The most salient of these factors in a felon disenfranchisement challenge is the extent to which racial bias in the criminal justice system interacts with the disenfranchisement law to create the racially disparate impact. Like any other factor considered within the totality of the circumstances, bias in the criminal justice system is not measured through a qualitative or quantitative formula, but rather involves a probing assessment of the nature, magnitude, and extent of the bias, along with consideration of other relevant factors.

As demonstrated below, there are several objective measures of bias within the criminal justice system in New York State, some of which have been analyzed in governmental reports and data. Plaintiff should be allowed an opportunity to marshal

such evidence and have it weighed by the district court as part of the totality of the circumstances analysis prescribed by the law of this Circuit and Section 2 jurisprudence generally. We, therefore, urge the Court not only to affirm the breadth of the protections afforded by Section 2, but to establish a flexible standard by which to guide future felon disfranchisement jurisprudence.

ARGUMENT

I. **Proof Required to Establish A Violation of Section 2 of the VRA (Court's En Banc Question No. 3)**

In its order granting rehearing en banc, this Court posed specific questions about the proof required to support a felon disfranchisement challenge under Section 2 of the VRA. While these questions are framed in the context of vote dilution, they are equally relevant to an evaluation of Plaintiff's vote denial claim, which is the only claim being pursued in his en banc appeal.⁶ Indeed, the totality of the circumstances

⁶ Brief for Plaintiff-Appellant In Banc at 3. As described above, Amici represent plaintiffs in Hayden, a felon disfranchisement challenge currently on appeal before this Court, which raises, inter alia, a vote dilution claim under the VRA. The vote dilution claim, which specifically challenges the erosive effects of §5-106 on the voting strength of Black and Latino communities, is brought on behalf of Black and Latino registered voters in those communities. These individuals undeniably have standing to pursue a vote dilution claim under Section 2 of the VRA given their allegation that §5-106 denies them an equal opportunity to participate in the political process in New York State because of the disproportionate disfranchisement of Blacks and Latinos under the statute.

Because the vote dilution claim is no longer before the Court in the instant matter, Amici respectfully submit that any decision rendered by this Court should

analysis required under Section 2 applies to both vote denial and vote dilution claims, although, as discussed below, the factors most relevant to the inquiry will depend on the electoral procedure at issue, the specific facts of the case, and the nature of the violation.

A. Disparate Impact of N.Y. Elect. Law §5-106

As an initial matter, Section 2's application is triggered upon sufficient allegations of disparate impact, and relief under the statute is appropriate upon a showing that the electoral mechanism at issue is either intentionally discriminatory or has a discriminatory result on account of race. See 42 U.S.C. §1973(a). In the instant case, Plaintiff has alleged facts and statistical evidence of the racially disparate impact of §5-106 sufficient to trigger application of the "results" test of Section 2.

The racially disparate impact of §5-106 is starkly demonstrated by the fact that a staggering 80% or more of the persons denied the right to vote under the statute are Black or Latino. Blacks comprise over 50% of the disfranchised population in New York State and Latinos comprise approximately 30% of the same, despite the fact that, collectively, Blacks and Latinos comprise only 31% of the state population. These numerical truths demonstrate beyond cavil the disparate impact of §5-106.

B. Totality of the Circumstances Test

reserve for further inquiry whether a vote dilution claim may be pursued under the VRA.

Section 2 of the VRA prohibits the use of any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . 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). The statute expressly requires courts to assess the “totality of the circumstances,” 42 U.S.C. § 1973(b), to determine whether “a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” Thornburg v. Gingles, 478 U.S. 30, 47 (1986); see also Johnson v. DeGrandy, 512 U.S. 997, 1010 n.9 (1994). This totality of circumstances analysis applies to both vote denial and dilution claims. 42 U.S.C. § 1973; S. Rep. No. 97-417, at 30 (1982), reprinted in 1992 U.S.C.A.N.N. 177, 179 (hereinafter “S. Rep.”) (“Section 2 remains the major statutory prohibition of all voting rights discrimination”); Gingles, 478 U.S. at 42-46; Burton v. City of Belle Glade, 178 F.3d 1175, 1197-98 (11th Cir. 1999); Farrakhan, 338 F.3d at 1015 n.11.

The Senate Judiciary Committee report (hereinafter “Senate Report”) lays out a broad, non-exclusive list of factors that “typically may be relevant to a §2 claim” in assessing whether a VRA violation has occurred (hereinafter “Senate factors”). Id. at 44; see S. Rep. at 28-29 (listing factors). However, the Supreme Court has recognized that while the Senate factors provide guidance for a totality of

circumstances analysis, they are “neither comprehensive nor exhaustive.” Gingles, 478 U.S. at 45. Indeed, no particular or specific number of factors must be proven to establish a Section 2 violation, id.; S. Rep. at 29, and courts are free to evaluate other factors to determine whether a challenged electoral procedure violates Section 2. S. Rep. at 207. The factors most relevant to the court’s analysis will depend on the electoral procedure at issue, the nature of the claim, and the specific facts of the case. See id. at 206; see also Goosby v. Town Bd. of the Town of Hempstead, 180 F.3d 476, 492 (2d Cir. 1999) (“[T]he ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts.”) (quoting Johnson, 512 U.S. at 1011).

Having put forth evidence of the significant disparate impact of §5-106, Plaintiff may proffer additional evidence relevant to whether New York State’s felon disfranchisement laws result in discrimination on account of race. One clearly pertinent factor in this inquiry is evidence of racial disparities and bias in New York’s criminal justice system. In addition, Plaintiff may show other evidence of official discrimination that touches on the right of Blacks and Latinos who are incarcerated or on parole for a felony conviction to participate in New York’s political process, including, inter alia, evidence of intentional discrimination in the enactment of New York’s felon disfranchisement statute; evidence of the effects of discrimination in the

areas of education, employment, health, and housing; and evidence of the tenuousness of the felon disfranchisement statute to any legitimate State policy. Consistent with the flexible approach mandated by Section 2, however, none of these factors is singly dispositive, and the weight given to each is measured by its relevance to Plaintiff's claim.⁷

i. Evidence of Discrimination in the Criminal Justice System

a. Type of Evidence (Court's En Banc Question No. 3(a))

Proof of racially disparate outcomes in the underlying criminal justice system is indispensable to the totality of circumstances analysis and a successful felon disfranchisement challenge under the VRA. However, no court has yet explicitly addressed the types and quantum of evidence necessary to establish that racial bias in a criminal justice system operates to deny an equal opportunity to vote in Section 2 challenges to felon disfranchisement laws.

Evidence of racial disparities in New York's criminal justice system that contribute to §5-106's racially disparate impact fits squarely within the analysis of the Senate factors. For example, the Senate Report expressly notes the relevance of

⁷ While the totality of circumstances test applies equally to vote denial and vote dilution claims, the factors relevant to the court's analysis may vary depending on which type of claim is at issue and the specific facts involved. Amici thus propose a standard for a vote denial challenge to felon disfranchisement laws consistent with Section 2 jurisprudence.

“the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.” S. Rep. at 29. This factor clearly contemplates proof of discrimination in a variety of areas to the extent that such discrimination limits equal opportunity to participate in the political process. See Farrakhan, 338 F.3d at 1020.

Indeed, in Farrakhan, the Ninth Circuit held that the totality of circumstances test “requires the court to consider the way in which the disfranchisement law interacts with racial bias in Washington’s criminal justice system to deny minorities an equal opportunity to participate in the state’s political process.” 338 F.3d at 1014 (emphasis added). The court held that “a causal connection may be shown where the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances.” Id. at 1019. The racially discriminatory evidence that the lower court in Farrakhan found “compelling,” id. at 1020, consisted of statistical evidence regarding disparities in arrest, bail and pre-trial release rates, charging decisions, and sentencing outcomes. Id. at 1013.⁸

⁸ In the instant case, the Court’s prior panel decision recognized that racial disparities in sentencing in New York were at the heart of Plaintiff’s allegations that §5-106 discriminated against Blacks and Latinos. Muntaqim v. Coombe, 366 F.3d 102, 105 n.3 (2d Cir. 2004). Moreover, in the second appeal of Baker v. Pataki this

To this end, the extent to which race, ethnicity and sentencing are correlated is a relevant consideration. In 2000 the U.S. Department of Justice sponsored a major national review of the research addressing race and sentencing that included 32 studies of sentencing decisions in state courts and 8 studies at the federal court level using data from the 1980s and 1990s. These studies revealed that race and ethnicity are strong determinants in sentencing.⁹

While Plaintiff should have the benefit of full discovery on remand, a number of prominent and well-known studies have analyzed the racial bias prevalent in New York's criminal justice system with respect to some of these factors. For example, the 1991 report of the New York State Judicial Commission on Minorities¹⁰ cited a report

Court was prepared to remand the case for further factual development on the strength of allegations regarding, *inter alia*, the racial composition of the prison population and racially discriminatory sentencing in the courts. 58 F.3d 814, 816 (2d Cir. 1995), *vacated in part*, 1996 U.S. App. LEXIS 13133 (2d Cir. 1996); *see also Baker v. Pataki*, 85 F.3d 919, 934-35 (2d Cir. 1996) (Feinberg, J.).

⁹ Cassia Spohn, U.S. Dep't of Justice, Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process, 3 Crim. J. 427, 444-450, 475 (2000), available at http://www.ncjrs.org/criminal_justice2000/vol_3/03i.pdf (hereinafter "Spohn Review"). Three of the studies reviewed investigated sentencing decisions by New York State courts. *Id.* at 444-450; accord Tushar Kansal, The Sentencing Project, Racial Disparity in Sentencing: A Review of the Literature 1, available at <http://www.sentencingproject.org/pdfs/disparity.pdf> (Jan. 2005) ("The most recent generation of evidence suggests that while racial dynamics have changed over time, race still exerts an undeniable presence in the sentencing process.").

¹⁰ New York State Judicial Commission on the Courts, Report of the New York State Judicial Commission on Minorities, Volume Two: The Public and the Courts,

on bail disparities, which concluded that “race was found to affect both the decision to release the defendant on bail and the amount of bail offered.”¹¹ The Commission also cited the New York State Committee on Sentencing Guidelines’s report documenting significant differences in sentencing that turned on race.¹² Each of these reports firmly suggests that there is evidence of racial bias in many areas of the criminal justice system that adversely impacts Blacks and Latinos.

Moreover, in 1995 the New York State Division of Criminal Justice Services issued an empirical study of nearly 300,000 adult felony arrests addressing a number of factors that resulted in the disproportionate representation of Blacks and Latinos in New York State prison.¹³ Specifically, this report found: (1) statistically significant differentials in detention rates for minorities and whites;¹⁴ (2) that minorities were sentenced to prison more often than comparably situated whites;¹⁵ and (3) that whites

139-177 (Apr. 1991).

¹¹ Id. at 142 (citing Nagel, The Legal/Extra-Legal Controversy: Judicial Decisions in Pretrial Release, 17 Law & Soc’y Rev. 481 (1983)).

¹² Id. at 164 (citing New York State Committee on Sentencing Guidelines, New York State Sentencing Patterns: An Analysis of Disparity (1985)).

¹³ James Nelson, New York State Division of Criminal Justice Services, Disparities in the Processing Felony Arrests in NYS, 1990-1992 (1995) (hereinafter “Nelson Report”).

¹⁴ Id. at vi.

¹⁵ Id. at viii.

were sentenced to probation more than comparably situated minorities.¹⁶ Indeed, statewide, for certain categories of defendants, one in five minority defendants sentenced to prison would have been sentenced to a different sanction if they were sentenced comparably to whites.¹⁷ Additionally, among certain probation-eligible minority defendants, one in seven sentenced to prison in New York City and one in three sentenced to prison in the rest of the state would have been sentenced to a different sanction if processed as similarly situated Whites.¹⁸ Relying on the Nelson Report, the Franklin Williams Judicial Commission observed that “rampant racism still infects our criminal justice system.”¹⁹

In 1999 the New York State Attorney General issued an historic report on stop and frisk practices by the New York City police force which included a quantitative analysis of nearly 175,000 “stops” in the City.²⁰ The data analyzed by the Attorney General demonstrate that the decisions regarding stops in the City are marked by racial disparities: Even when controlling for population and crime, the differences in

¹⁶ Id.

¹⁷ Id. at 27.

¹⁸ Id. at 43.

¹⁹ The Franklin H. Williams Judicial Commission on Minorities, Equal Justice: A Work in Progress, Five Year Report, 1991-1996 34 (1997).

²⁰ Office of the Attorney General of the State of New York, Civil Rights Bureau, The New York City Police Department’s “Stop & Frisk” Practices (1999).

stop rates for Blacks versus Whites and Latinos versus Whites remain statistically significant.²¹ Blacks, who constitute only 25.6% of the City’s population, comprise 62.7% of all persons “stopped” by the New York Police Department’s Street Crime Unit.²²

Indeed, even when it controlled for racial demographics, the Attorney General’s report concluded that Blacks and Latinos are specifically targeted by the police in areas where they comprise the smallest proportion of the population. In those precincts, Blacks were stopped at a rate ten times greater than their percentage of the overall population, and Latinos at a rate more than three times greater. Whites, by contrast, were stopped at only half the rate of their population.²³ Higher crime rates in minority communities, as measured by race-specific arrest counts, also did not explain why Blacks and Latinos are stopped at higher rates than Whites: “[A]fter accounting for the effect of differing crime rates, Hispanics were ‘stopped’ 39% more often than whites across crime categories. . . . [B]lacks were ‘stopped’ 23% more often than whites, across all crime categories.”²⁴

²¹ Id. at 121.

²² Id. at viii.

²³ Id. at 106.

²⁴ Id. at ix-x.

Moreover, the breadth and depth of these empirical studies dwarf the sample sizes in most national literature.²⁵ Professor Jeffrey Fagan, Professor of Law and Public Health at Columbia University, has used these data to study issues of mass incarceration, policing, crime and health in New York City neighborhoods. In one study,²⁶ he examines “whether, after controlling for disorder, the city’s stop and frisk policy is, in fact, a form of policing that disproportionately targets racial minorities”²⁷ and found “little evidence to support claims that policing targeted places and signs of physical disorder.”²⁸ Instead, “stops of citizens were more often concentrated in minority neighborhoods characterized by poverty and social disadvantage.”²⁹ As Fagan notes, consistent with the findings of the Attorney General, when objective measures of social disorder were analyzed, such as physical characteristics of neighborhoods, stops had less to do with order-maintenance policing and more to do with race and ethnicity.³⁰ Accordingly, there is ample data that could be presented on

²⁵ See Spohn Review, supra, at 444-452.

²⁶ Jeffrey Fagan & Garth Davies, Street Stops and Broken Windows: Terry, Race and Disorder in New York City, 28 Fordham Urb. L. J. 457, 458-462 (2000).

²⁷ Id. at 463.

²⁸ Id.

²⁹ Id. at 463-464.

³⁰ Id. at 489.

remand demonstrating that police practices in New York — the entry point to prosecution in the criminal justice system — are racially biased.

The pattern of prosecution and incarceration in the City's neighborhoods is another relevant area of inquiry. Analyzing incarceration data in New York City in five waves from 1985 to 1996, Fagan and his colleagues geocoded data on prison admissions by the residential address of the incarcerated to show the spatial concentration of incarceration.³¹ The study found that arrests and incarceration have long been concentrated in only a few of the poorest neighborhoods, accounting for a majority of New York's prisoners and suggests that this concentration reflects a correlation between race and policing.³² Moreover, the spatial concentration of incarceration was independent of crime rates, including during a period from 1990 to 1996 when felony crimes declined by almost half across the City.³³

These specific community impacts are so pervasive in minority neighborhoods that Fagan characterizes them as endogenous or “grown from within, seeping into and

³¹ Jeffrey Fagan, Valerie West, and Jan Holland, Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods, 30 *Fordham Urb. L. J.* 1551 (2003). The sample in this study included 25% of all prison admissions and 5% of all jail admissions in five waves, yielding annual samples of two to four thousand in the former and three to four thousand in the latter. Id. at 1567.

³² Id.

³³ Id. at 1569.

permanently staining the social and psychological fabric of neighborhood life in poor communities in New York.”³⁴ In the same vein, felon disfranchisement has an identifiable community impact because of the excessive concentration of incarcerated persons from predominantly Black and Latino neighborhoods who are ensnared by a racially-flawed criminal justice system.

Thus, there is a significant body of research already available that provides a substantial foundation for an analysis of Plaintiff’s allegations concerning discrimination in New York’s criminal justice system and its relation to §5-106’s disparate impact on Blacks and Latinos. It is important to note that the studies that have focused on sentencing outcomes (the Nelson Report and the research review by Prof. Spohn, above) all control in some way for the seriousness of the offense and the defendant’s prior criminal history in order to assess how significantly race and ethnicity factor into sentencing outcomes. The variables included in the important work on policing practices (the Attorney General’s report and the report of Fagan, et al., on stop and frisk practices) all control, at a minimum, for population and incidence of crime to assess the significance of race and ethnicity in these discretionary decisions by the police.

³⁴ Id. at 1589.

b. Quantum of Proof (Court's En Banc Question No. 3(b))

The appropriate quantum of proof of bias in the criminal justice system sufficient to prevail under Section 2 in a felon disfranchisement challenge must be grounded in the seminal case of Thornburg v. Gingles, and its progeny. These cases have interpreted the amended Section 2 to create a results test that requires a searching analysis of all relevant evidence concerning whether minority voters' opportunity to participate in the political process is effectively limited on the basis of race or ethnicity.³⁵

Although felon disfranchisement implicates issues related to criminal justice, it is important to distinguish this civil challenge from the standards of proof required in criminal proceedings and appeals. A vote denial plaintiff in a felon disfranchisement challenge need not offer proof of discrimination in the criminal justice system sufficient to overturn her criminal conviction or a sentencing decision. To be sure, were Plaintiff challenging his conviction or sentence, he would have to meet such standards and show ultimately that these decisions were made in furtherance of a discriminatory purpose.³⁶ This Section 2 challenge, however, is

³⁵ Gingles, 478 U.S. at 62-63.

³⁶ See McCleskey v. Kemp, 481 U.S. 279 (1987) (requiring proof of discriminatory intent in an Equal Protection challenge to a death sentence); see also U.S. v. Armstrong, 517 U.S. 456, 465 (1996) (summarizing case law requiring that for selective prosecution claim, defendant must "demonstrate that the federal

simply not that case. Instead, Plaintiff asks this Court to examine the application of a statute that unquestionably has a disparate impact to determine whether his right to vote has been unlawfully denied. Success or failure on this claim will have no effect on his conviction, the length of his sentence, or his chances for parole.

Section 2 jurisprudence also cautions against requiring the heightened evidentiary standard of discriminatory intent used in criminal cases that focus on the racial bias of the criminal justice apparatus. For example, under Gingles, evidence of racially polarized voting is now a threshold evidentiary showing in all vote dilution challenges to at-large electoral schemes. However, the plurality opinion in Gingles rejected the proposition that racially polarized voting is present only when voting behavior is caused by race, that is, when the race of Black voters is the determining cause in their voting behavior and, conversely, when voting behavior by Whites is explained primarily by their racial hostility to candidates preferred by Blacks.³⁷ Instead, racially polarized voting is a function of patterns that are merely correlated with the race of the voter:

[T]he reason why black and white voters vote differently is irrelevant to the central inquiry of Section 2. . . . It is the *difference* between the choices made

prosecutorial policy ‘. . . was motivated by a discriminatory purpose’”).

³⁷ Id. at 63, 71-72.

by blacks and whites — not the reasons for that difference — that results in blacks having less opportunity than whites to elect their preferred representatives.³⁸

The plurality in Gingles noted that requiring that racial intent or racial hostility be the cause of racially polarized voting asks the wrong question under Section 2 and converts the result standard Congress created into an intent standard that it sought to undo.³⁹

Similarly, Amici submit that the quantum of proof required in felon disfranchisement challenges is a showing that race is significantly correlated to the outcomes produced by the criminal justice system. For these reasons, this Court should remand this case for further discovery with instructions to the district court to re-open discovery and apply the totality of circumstances test to all of the evidence of discrimination in the criminal justice system that may be marshaled by the Plaintiff, in accordance with the mandates of Section 2.

c. Relevance of Evidence of Discrimination in Federal and State Criminal Justice System (Court's En Banc Question No. 3(c))

This Court's query about whether to distinguish between the state and federal criminal justice systems in weighing statistical and other evidence of racial

³⁸ Id. at 63 (emphasis in original).

³⁹ Id. at 73. The Supreme Court has never disapproved the plurality's approach.

discrimination should be answered in the negative. First, the factors contributing to the discrimination in each system — including the existence of joint state and federal policing task forces — are sufficiently commingled as to make any distinction between the two systems irrelevant for purposes of Section 2’s totality of the circumstances analysis. Moreover, it is clear that Section 2, as the “major statutory prohibition of all voting rights discrimination,” 42 U.S.C. § 1973; S. Rep. at 30, was enacted to stamp out racial discrimination in voting without regard to where it is found.

II. Additional Senate Factors

In addition to evidence of discrimination in the criminal justice system, the district court may consider other Senate factors in a Section 2 totality of the circumstances analysis of felon disfranchisement laws. For example, the Senate factor No. 5 is particularly relevant in this regard, as it considers the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.

A substantial body of evidence shows that Blacks and Latinos in New York State and in New York City, in particular, bear the effects of discrimination in education, health, housing and employment which hinder their ability to participate

in the political process. For example, Blacks and Latinos in New York City have been found to be disadvantaged with respect to public education funding and, consequently, denied a minimally adequate education.⁴⁰

Government sponsored and scholarly reports have also found that Blacks and Latinos in New York, especially in New York City, continue to suffer significant disadvantages in housing, health, and public and private employment. See, e.g., Manhattan Borough President's Commission to Close the Health Divide, Closing The Health Divide: What Government Can Do to Eliminate Health Disparities Among Communities of Color in New York City (October 2004). In addition, a recent New York City "disparity study" conducted under the supervision of Amicus CLSJ and the DuBois-Bunche Center for Public Policy at Medgar Evers College for the New York City Council identified statistically significant disparities between minority and white-owned businesses in the City's award of prime contracts for construction, architecture and engineering, professional services, standard services, and goods. See Mason Tillman Associates, Ltd., Report: City of New York Disparity Study (December

⁴⁰ See, e.g., Campaign for Fiscal Equity v. New York, 719 N.Y.S. 2d 475 (2002), rev'd, 245 A.D.2d 1, 744 N.Y. S.2d 130 (1st Dept. 2002), aff'd in part and modified in part, 100 N.Y.2d 893, 801 N.E.2d 326, 769 N.Y.S.2d 106 (2003) (holding that New York State violated the state constitutional mandate to make available a "sound basic education" to all the children of the state by establishing an education financing system that failed to afford New York City's public school students, 84% of whom are "racial minorities," the opportunity for a meaningful high school education).

2004), available at http://www.nyccouncil.info/pdf_files/reports/citynyrpt.pdf. Further, in 2003, according to a study undertaken by Amicus CSS, the citywide unemployment rate for Blacks and Latinos was respectively 12.9 percent and 9.6 percent, as compared to 6.2 percent for Whites. Indeed, 50% of all Black males in that year were unemployed. Mark Levitan, Community Service Society, A Crisis of Black Male Employment: Unemployment and Joblessness in New York City 2003, 2, 6 (2004). These disparities in educational and employment opportunities undoubtedly contribute to the concentration of minority citizens in impoverished neighborhoods which, as suggested above, become the focus of racially skewed police practices leading to the dramatic impact of New York's felon disfranchisement statute.

Moreover, Senate factor No. 9 concerns “[w]hether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.” Under the totality of circumstances analysis, this Senate factor No. 9 would require a court to consider, among other things, the extent to which felon disfranchisement serves an effective rehabilitative, retributive, deterrent, and/or punitive function.

The above factors represent a relevant but not exhaustive list of factors for the district court to consider in assessing whether felon disfranchisement results in discrimination based on race.

III. Evidence of Intentional Discrimination in the Enactment of New York’s Felon Disfranchisement Laws

There is also considerable evidence that §5-106 was specifically enacted with the intent to discriminate against Blacks. If presented below, that evidence should also be considered under the totality of circumstances analysis by the court below on remand.

As alleged in Hayden, the historical origins of New York’s felon disfranchisement provisions are rooted in the Constitutional Convention of 1821 — a convention dominated by an express, racist purpose to deprive Blacks of the right to vote. At that convention, the question of Black suffrage sparked heated debates, during which delegates expressed their conviction that Blacks, as a “degraded” people, and by virtue of their natural inferiority, were unequipped and unfit to participate in the democratic process. Nathaniel Carter, William Stone and Marcus Gould, Reports of the Proceedings and Debates of the Convention of 1821, at 198 (Albany: E. & E. Hosford, 1821) (hereinafter “Debates of 1821”). One delegate to the 1821 convention instructed his colleagues to “[l]ook to your jails and penitentiaries. By whom are they filled? By the very race, whom it is now proposed to cloth with power of deciding upon your political rights.” Id. at 191. Another delegate urged the other delegates to “[s]urvey your prisons — your alms houses — your bridewells and your penitentiaries and what a darkening host meets your eye! More than one-third of the convicts and

felons which those walls enclose, are of your sable population.” Id. at 199.

Against this backdrop of racial hostility, the delegates to the 1821 convention adopted a provision that permitted the legislature to exclude from the franchise those “who have been, or may be, convicted of infamous crimes.” N.Y. Const. (1821), art. II, § 2. As is made manifest by their own language, the delegates to the 1821 convention not only understood that enacting the felon disfranchisement provision would result in the disproportionate disfranchisement of the “sable” or Black population, but actively sought to preserve the franchise for Whites only: “[A]ll who are not white ought to be excluded from political rights.” Debates of 1821, at 183. Another delegate summed up the goals of the 1821 Constitutional Convention — to exclude Blacks from “any footing of equality in the right of voting.” Id. at 180.

Delegates to subsequent conventions continued to advocate for the denial of equal suffrage rights to Blacks, including the 1846 Constitutional Convention, at which one delegate pronounced that “[Blacks] were an inferior race to whites, and would always remain so.” Constitutional Convention of 1846, Debates of 1846, at 1033 (hereinafter “Debates of 1846”). Moreover, the delegates were well aware of and sought the same success as other slaveholding states in excluding Blacks from the ballot. As one delegate suggested to the convention, “in nearly all the western and southern states . . . the [B]lacks are excluded . . . would it not be well to listen to the

decisive weight of precedents furnished in this case also?” Id. at 181.

New York’s explicitly racially discriminatory suffrage requirements were firmly in place until the passage of the Fifteenth Amendment, which sought to finally bring equal manhood suffrage to New York. See U.S. Const. amend. XV. However, two years after the passage of the Fifteenth Amendment, which New York attempted to withdraw its ratification of, Cong. Globe, 41st Cong. 2d Sess., at 1447-81, an unprecedented committee convened to amend the New York State Constitution’s disfranchisement provision to require the State Legislature, at its following session, to enact laws excluding persons convicted of infamous crimes from the franchise. See N.Y. Const. art. II, § 2 (amended 1894). Until that point, enactment of such laws had been permissive.

The corrosive effects of New York’s purposefully discriminatory felon disfranchisement law still reverberate today in the incontrovertible disparate impact of New York State Election Law § 5-106 on Blacks and Latinos. The pervasive pattern of historical intentional discrimination against Blacks in voting in New York, including repeated explicit statements by legislators about Blacks’ biological unfitness for suffrage and, their perceived criminality, as well as the codification of mandatory disfranchisement during an unprecedented special session at a time when overt denial of the franchise to Blacks was newly outlawed by the Fifteenth Amendment provide

additional evidentiary support for a conclusion that Section 5-106 violates Section 2 of the VRA.

CONCLUSION

For the foregoing reasons, this Court should hold that Section 2 of the VRA can constitutionally be applied to New York's felon disfranchisement statute that results in the denial of the right to vote on account of race, and should reverse the district court's grant of summary judgment with instructions to reopen discovery and evaluate Plaintiff's claims within the totality of circumstances.

Respectfully submitted,

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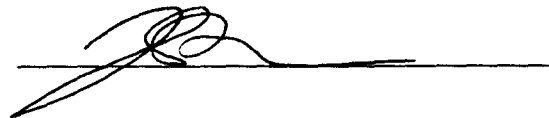
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RULE 29(d) CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Relying on the word count of the word processing system used to prepare this brief, I hereby represent that the brief of the NAACP Legal Defense & Educational Fund, Inc., Community Service Society of New York, and the Center for Law and Social Justice at Medgar Evers College for Plaintiff-Appellant contains 6,772 words, not including the corporate disclosure statement, table of contents, table of authorities, and certificates of counsel, and is, therefore, within the 7,000 word limit set forth under Fed. R. App. P. 29(d).



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CERTIFICATE OF SERVICE

I certify under penalty of perjury pursuant to 28 U.S.C. § 1746 that, on February 4, 2005, I caused two true and correct copies of the foregoing En Banc Brief in Support of Plaintiff-Appellant Jalil Abdul Muntaqim, a/k/a Anthony Bottom, in Support of Reversal, on Behalf of Amici Curiae NAACP Legal Defense & Educational Fund, Inc., Community Service Society of New York, and Center for Law and Social Justice at Medgar Evers College, to be served via United States Postal Service priority mail, postage prepaid, to the following attorneys:

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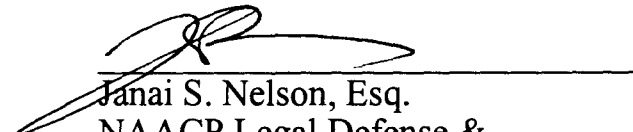
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