

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 OF THE BRENNAN CENTER FOR JUSTICE AT NEW YORK
UNIVERSITY SCHOOL OF LAW AND THE UNIVERSITY OF NORTH
CAROLINA SCHOOL OF LAW CENTER FOR CIVIL RIGHTS AS *AMICI
CURIAE* SUPPORTING PLAINTIFF-APPELLANT JALIL ABDUL MUNTAQIM
AND IN SUPPORT OF REVERSAL**

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INTEREST OF AMICI

The Brennan Center for Justice at New York University School of Law and The University of North Carolina School of Law Center for Civil Rights respectfully submit this brief *amicus curiae* in support of Plaintiff-Appellant.

The Brennan Center is a nonprofit, nonpartisan institute that promotes full and equal participation in our democracy. The Brennan Center works to advance this goal by, among other efforts, advocating to end the racial distortions in the electorate created by felony disenfranchisement. Much of the Brennan Center's work in this area takes place under the auspices of the Right to Vote Campaign, a consortium of national organizations and state coalitions working to reenfranchise people with felony convictions. Currently, the Brennan Center is lead counsel in *Johnson v. Bush*, challenging Florida's felony disenfranchisement law on behalf of a class of over 600,000 people with felony convictions, all of whom have fully served their sentences but are nevertheless indefinitely denied the right to vote. Dismissed by the district court, *Johnson v. Bush*, 214 F. Supp. 2d 1333 (S.D. Fla. 2002), *Johnson's* claims of vote denial under Section 2 of the Voting Rights Act and intentional race discrimination under the Fourteenth and Fifteenth Amendments were reinstated and remanded by a divided panel of the United States Court of Appeals for the Eleventh Circuit, *Johnson v. Bush*, 353 F.3d 1287

(11th Cir. 2003), whose opinion was in turn vacated when the Eleventh Circuit granted *en banc* review, *Johnson v. Bush*, 377 F.3d 1163 (11th Cir. 2004). The case was argued *en banc* in October 2004 and is currently pending decision by the *en banc* court.

The University of North Carolina School of Law Center for Civil Rights is a non-profit public interest advocacy organization whose mission and purpose includes expanding democracy by encouraging participation in the political process by traditionally underrepresented minority and poor voters. The Center for Civil Rights works to achieve this goal by encouraging scholarship, training law students, and engaging in public service, including providing legal representation to individuals whose right to vote has been abridged or denied. The Center for Civil Rights has been one of the co-counsel in *Johnson v. Bush*, and it is currently representing people with felony convictions in other states who have been permanently disenfranchised. The Center for Civil Rights also participates in public education efforts to advise people with past felony convictions about their right to vote and the voting rights restoration process in their jurisdiction.

SUMMARY OF THE ARGUMENT

Amici address the first two issues identified by the Court in its Amended Order dated December 29, 2004. The Constitutionality of applying Section 2 of

the Voting Rights Act of 1965, 42 U.S.C. § 1973, to state statutes disenfranchising individuals in prison and on parole must be evaluated in light of the Fifteenth Amendment. Designed to accomplish more than the Fourteenth Amendment in the area of race and voting rights, the Fifteenth Amendment's command of race neutrality does not exempt felony disenfranchisement. In fact, proposed amendments to the Fifteenth Amendment that would have explicitly permitted states to disenfranchise citizens convicted of felonies were rejected. The Fifteenth Amendment's broad prohibition of racial discrimination in voting supersedes Section 2 of the Fourteenth Amendment. Thus, Congress' power to enforce the Fifteenth Amendment includes the ability to require states to abandon felony disenfranchisement laws and practices that are racially discriminatory.

With regard to the second issue, the Supreme Court's "clear statement rule" does not apply in this case because Section 2 of the Voting Rights Act was enacted pursuant to the Fourteenth and Fifteenth Amendments, both of which explicitly call upon the federal government to impose its will on the states to eradicate racially discriminatory practices. The statute is unambiguous, broadly outlawing all voting qualifications that abridge the right to vote on account of race. Congress does not have to explicitly prohibit discriminatory felony disenfranchisement laws in order to satisfy the clear statement rule.

ARGUMENT

I.

Applying the Voting Rights Act to New York's Felony Disenfranchisement Law Is an Appropriate Congressional Enforcement of the Fifteenth Amendment.

The panel opinion in this case discusses Congress's power to reach New York's felony disenfranchisement law almost entirely in terms of the Fourteenth Amendment. *See Muntaqim v. Coombe*, 366 F.3d 102, 118-124 (2004). The opinion finds that the express exemption of criminal disenfranchisement from Section 2 of the Fourteenth Amendment undermines Congress' Fourteenth Amendment enforcement power to reach criminal disenfranchisement through the Voting Rights Act. *Id.* at 122-23. We agree with Plaintiff-Appellant's argument that the Supreme Court's decision in *Hunter v. Underwood*, 471 U.S. 222 (1985), clarified that Section 2 of the Fourteenth Amendment does *not* limit Fourteenth Amendment enforcement power to reach criminal disenfranchisement laws with racially discriminatory results. Panel Brief for Plaintiff-Appellant at 41-45; *see Baker v. Pataki*, 85 F.3d 919, 936-37 (2d Cir. 1996) (opinion of Feinberg, J.). But the panel's analysis fails in a more fundamental way. The narrow focus on the Fourteenth Amendment obscures the preeminent source of Congressional power to

reach criminal disenfranchisement laws that result in a denial of the right to vote “on account of race” – the Fifteenth Amendment. When Congressional regulation of criminal disenfranchisement laws with racially discriminatory effects is viewed as enforcement of the Fifteenth Amendment, there can be no doubt that the Voting Rights Act properly reaches New York’s disenfranchisement law.

A. This Case Requires Separate Analysis of Congress’s Fifteenth Amendment Enforcement Power.

Congress’s enforcement powers under the Fourteenth and Fifteenth Amendments are sometimes analyzed in tandem. Nevertheless, it is well established that the Fifteenth Amendment provides a distinct source of congressional power to regulate racially discriminatory voting restrictions. For instance, a voting qualification that satisfies the Fourteenth Amendment’s one person, one vote rule may nevertheless violate the Fifteenth Amendment’s “race neutrality command,” because the “Fifteenth Amendment has independent meaning and force.” *Rice v. Cayetano*, 528 U.S. 495, 522 (2000); *see also Neal v. Delaware*, 103 U.S. 370, 389 (1880) (“Beyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution, or render inoperative, that provision which restricts the right of suffrage to the white race.”)

The results test of Section 2 of the Voting Rights Act has a dual constitutional basis. In amending Section 2, Congress invoked its powers to enforce by “appropriate legislation,” both the Fifteenth Amendment’s guarantee that no citizen will be denied the right to vote on account of race and the Fourteenth Amendment’s guarantee of racial equality. *See* S. Rep. No. 97-417 at 27, 39 (1982). Practically speaking, there may be few challenges under the Act in which Congress’s independent Fifteenth Amendment enforcement power will be of legal significance. This, however, is one of those cases.

The need for independent evaluation of Congress’s Fifteenth Amendment enforcement power in this case stems from the mention of criminal disenfranchisement in Section 2 of the Fourteenth Amendment and the Supreme Court’s analysis of that section. *See Hunter v. Underwood*, 471 U.S. 222, 233 (1985); *Richardson v. Ramirez*, 418 U.S. 24, 41-55 (1974). As the panel opinion in this case explains, in *Richardson* “the Supreme Court relied on Section 2 of the Fourteenth Amendment to reject a nonracial equal protection challenge” to California’s felony disenfranchisement law. 366 F.3d at 122 (citing *Richardson* 418 U.S. at 43-52). The second sentence in Section 2 reads as follows:

But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the

members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV § 2. The *Richardson* Court reasoned that “those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in [the equal protection clause of] § 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment.” 418 U.S. at 43.

The *Muntaqim* panel opinion extended the reasoning of *Richardson* to Section 5 of the 14th Amendment, the enforcement clause, explaining,

It would be anomalous if the drafters and ratifiers of the Fourteenth Amendment, despite protecting felon disenfranchisement laws from the sanction of reduced representation, would allow Congress to *prohibit* some of these laws even when they were not passed with any discriminatory intent, and in the absence of a legislative record of intentional voting rights discrimination through felon disenfranchisement.

366 F.3d at 122. In light of the Supreme Court’s subsequent felony disenfranchisement decision in *Hunter*, the panel’s reliance on *Richardson* to question Congress’s enforcement power under the Fourteenth Amendment here is misguided. *Hunter* clarified that Section 2 of the Fourteenth Amendment does not

limit the Equal Protection Clause's prohibition on felony disenfranchisement laws that deny voting rights *on account of race*. *Hunter*, 471 U.S. at 233. Reading *Richardson* and *Hunter* together, it is clear, notwithstanding the exemption for criminal disenfranchisement in Section 2, that the Fourteenth Amendment creates a right to be free from racially discriminatory felony disenfranchisement laws.¹ *See Baker*, 85 F.3d at 936-37. But even if the mention of criminal disenfranchisement in Section 2 of the Fourteenth Amendment were found to somehow limit Congress's power under that Amendment to reach criminal disenfranchisement laws with racially discriminatory results, the Fifteenth Amendment's subsequent broad ban on race discrimination in voting clearly carries no such exemption. The language and legislative history of the Fifteenth Amendment reveal that it does not replicate or incorporate Section 2 of the Fourteenth Amendment but replaces it with a clean, exceptionless ban on any disenfranchisement based on race.

¹This structure is hardly unique. The Takings Clause, for example, plainly approves the states' power to regulate land use by taking private property for public use subject to just compensation, but would not exempt from federal regulation under Equal Protection a state's policy of taking only property belonging to African Americans on account of race. Ultimately, the issue in this case is not a special product of Section 2 of the Fourteenth Amendment, but the general question of the extent of congressional power to remedy race discrimination.

B. The Fifteenth Amendment Supersedes Section 2 of the Fourteenth Amendment.

Section 2 of the Fourteenth Amendment is properly understood as a structural successor to the Three-Fifths Clause of the original Constitution. *See Richardson v. Ramirez*, 418 U.S. 24, 43-45 (1974). The concern of the Republican legislators who drafted Section 2 was that, with the slaves emancipated, the Three-Fifths Compromise would be inoperative, freedmen would therefore be counted fully in decennial censuses, and the former slave states would soon be entitled to enough additional representatives to threaten Republican control of the federal government. Section 2 of the Fourteenth Amendment explicitly contemplated that states would deny voting rights to their citizens, including through race-based disenfranchisement, and therefore adjusted the states' representation in Congress to ensure that southern white Democrats could not control the national government by disenfranchising black citizens. *See Xi Wang, Black Suffrage and the Redefinition of American Freedom*, 17 *Cardozo L. Rev.* 2153, 2194-2195 (1996). As the Supreme Court pointed out in *Richardson*, the framers of Section 2 “were primarily concerned with the effect of reduced representation upon the States, rather than with the two forms of disenfranchisement which were exempted from that consequence.” 418 U.S. at

43.

In practice, Section 2 of the Fourteenth Amendment was immediately succeeded by the Reconstruction Acts of 1867, which prohibited any state from re-entering the Union if it barred blacks from voting in state constitutional conventions. In effect, Southern states that denied the franchise to blacks would be denied any representation in Congress. Robert M. Goldman, *Reconstruction & Black Suffrage: Losing the Vote in Reese and Cruikshank* 12-13 (2001). Then, with Southern blacks voting in large numbers by the election of 1868, Congress enacted the Fifteenth Amendment to enfranchise blacks in Northern and border states, entrench the franchise for black males nationwide, and prevent any retrenchment from black voting rights in the future. *See Wang*, 17 *Cardozo L. Rev.* at 2215-18. Enacted a year and a half after the Fourteenth Amendment, the Fifteenth Amendment could only have been adopted to provide some additional tool for rooting out racial oppression. In fact, the Fifteenth Amendment was enacted precisely because the Fourteenth Amendment – including Section 2 – did not prohibit states from disenfranchising blacks. Section 2 of the Fourteenth Amendment, after all, expressly contemplates that a state might bar blacks from the polls; it simply exacts a price in reduced representation. In direct contrast, the Fifteenth Amendment prohibits states from disenfranchising “on account of race,

color, or previous condition of servitude” and empowers Congress to do everything appropriate to enforce that prohibition.

The Fifteenth Amendment is thus not an extension or continuation of Section 2 of the Fourteenth Amendment. It takes a diametrically different approach and confers a right not previously understood to be provided by the federal Constitution, even including the two previous Reconstruction Amendments. As the Supreme Court held five years after the Fifteenth Amendment was ratified, “the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination of the elective franchise on account of race, color, or previous condition of servitude.” *United States v. Reese*, 92 U.S. 214, 218 (1875). Put simply, “Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is.” *Id.*; see also *Neal v. Delaware*, 103 U.S. 370, 389 (1880) (explaining that the Fifteenth Amendment had the effect of rendering inoperative state constitutional provisions that restricted voting to whites), *United States v. Miller*, 107 F. 913, 915 (D. Ind. 1901) (“Before the adoption of the fifteenth amendment, it was within the power of the state to exclude citizens of the United States from voting on account of race, age, property, education, or on any other ground however arbitrary or

whimsical.”).

Although the Supreme Court has not found felony disenfranchisement laws to be *per se* unconstitutional under the Fourteenth Amendment, *Richardson*, 418 U.S. at 24, it has never suggested that those laws remain insulated from challenges under a statute designed to enforce the Fifteenth Amendment’s prohibition of race discrimination in voting. The right at issue in this case – the right to be free from racially discriminatory felony disenfranchisement – is therefore unaffected by the analysis in *Richardson*, an equal protection challenge that was not based on race. The claim in *Richardson* was simply that felony disenfranchisement laws impaired the fundamental right to vote. Thus *Richardson*’s discussion of the effect of Section 2 of the Fourteenth Amendment on an equal protection challenge to felony disenfranchisement did not implicate the Fifteenth Amendment. And Congress retains full authority to legislate against criminal disenfranchisement laws with racially discriminatory results under the Fifteenth Amendment, which completely abolished the states’ ability “to exclude citizens of the United States from voting on account of race.” *Reese*, 92 U.S. at 217-18.

C. The Legislative History Makes Clear that the Fifteenth Amendment Was not Intended to Incorporate any Exemption for Criminal Disenfranchisement Laws.

The legislative history of the Reconstruction amendments confirms that the

straightforward, exemptionless language of the Fifteenth Amendment was not meant to include any special exception for criminal disenfranchisement. In finding that Section 2 of the Fourteenth Amendment should be read to protect felony disenfranchisement from the usual strict scrutiny required by equal protection, the Supreme Court emphasized that throughout the Section's legislative history, although numerous changes in the Section's language were proposed, the wording of the exemption for criminal disenfranchisement was never altered. *See Richardson*, 418 U.S. at 45. In contrast, during the floor debates on the Fifteenth Amendment, legislators repeatedly proposed altering the broad, exemptionless ban on race discrimination in voting to prohibit other kinds of disenfranchisement *and* to add explicit exemptions for certain voting qualifications, *including criminal disenfranchisement*. In the end, however, every proposal for exempting criminal disenfranchisement from the Fifteenth Amendment was rejected.

In early February 1869, the Senate began debating a working version of the Fifteenth Amendment, the broad language of which was very like the final text, except that it extended to officeholding:

The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Cong. Globe., 40th Cong., 3d Sess. 828 (1869). Senator Warner offered two separate amendments that would have specifically exempted criminal disenfranchisement from the working Senate version. First, he proposed the following language:

The right of the citizens of the United States to hold office shall not be denied or abridged by the United States or any State on account of property, race, color, or previous condition of servitude; and every male citizen of the United States of the age of twenty-one years, or over, and who is of sound mind, shall have an equal vote at all elections in the State in which he shall have actually resided for a period of one year next preceding such election, *except such as may hereafter engage in insurrection or rebellion against the United States, and such as shall be duly convicted of treason, felony, or other infamous crimes.*

Cong. Globe, 40th Cong., 3d Sess. 1012-13 (1869) (emphasis added). A day later, Warner offered an even more expansive variation:

No State shall make or enforce any law which shall abridge or deny to any male citizen of the United States, of sound mind and over twenty-one years of age, the equal exercise of the elective franchise at all elections in the State wherein he shall have such actual residence as shall be prescribed by law, *except to such of said citizens as have engaged or shall hereafter engage in rebellion or insurrection or who may have been or shall be duly convicted of treason or other crime of the grade of felony at common law;* nor shall the right to hold office be denied or abridged on account of race, color, nativity, property, religious belief, or previous condition of servitude.

Cong. Globe, 40th Cong., 3d Sess. 1041 (1869) (emphasis added). This version was rejected by a vote of 47 to 5. *Id.* Notably, at a later point in the proceedings

the Senate accepted an amendment that, like Warner's, greatly expanded the forbidden kinds of discrimination beyond the category of race, but which did not exempt criminal disenfranchisement. This expansive intermediate version of what became the Fifteenth Amendment prohibited discrimination "in the exercise of the elective franchise or in the right to hold office in any State on account of race, color, nativity, property, education or religious creed" without exception. Cong. Globe, 40th Cong., 3d Sess., 1035, 1040 (1869). In the end, however, Congress chose to impose neither additional constitutional bars nor protections for specific voting qualifications, including felony disenfranchisement, when it banned race discrimination in voting.

Before signing off on the amendment, Congress considered several other proposals to exempt state criminal disenfranchisement laws from its reach. Two other Senators offered amendments that provided an affirmative right to vote and contained exemptions for criminal disenfranchisement. Senator Sawyer introduced the following ambitious attempt at creating a national standard of voter qualifications:

The right to vote and hold office in the United States and the several States and Territories shall belong to all male citizens of the United States who are twenty-one years old, and *who have not been or shall not be duly convicted of treason or other infamous crime: Provided,* That nothing herein contained shall deprive the several States of the

right to make such registration laws as shall be deemed necessary to guard the purity of elections and to fix the terms of residence which shall precede the exercise of the right to vote: *And provided*, That the United States and the several States shall have the right to fix the age and other qualifications for office under their respective jurisdictions, which said registration laws, terms of residence, age, and other qualifications shall be uniformly applicable to all male citizens of the United States.

Cong. Globe, 40th Cong., 3d Sess. 1029 (1869) (emphasis added). After Sawyer's amendment was rejected, Senator Fowler offered a simpler affirmative version, also exempting criminal disenfranchisement:

All the male citizens of the United States residents of the several States now or hereafter comprehended in the Union, of the age of twenty-one years and upward, shall be entitled to an equal vote in all elections in the State wherein they shall reside; the period of such residence as a qualification for voting to be decided by each State, *except such citizens as shall engage in rebellion or insurrection, or shall be duly convicted of treason or other infamous crime.*

Id. (emphasis added). This version failed by a vote of 35 to 9. *Id.*

On the House side, amendments that would have added exemptions for criminal disenfranchisement were also proposed and rejected. One proposed by Representative Shellabarger, provided:

No State shall make or enforce any law which shall deny or abridge to any male citizen of the United States of the age of twenty-one years or over, and who is of sound mind, an equal vote at all elections in the State in which he shall have such actual residence as shall be prescribed by law, *except to such as have engaged or may hereafter*

engage in insurrection or rebellion against the United States, and to such as shall be duly convicted of treason, felony, or other infamous crime.

H. Rec. J., 40th Cong., 3d Sess. 233-34 (Jan. 30, 1869) (emphasis added). This amendment was rejected by a vote of 125 to 62. *Id.* at 234.

The text of the Fifteenth Amendment that finally passed both Houses of Congress made no reference to felony disenfranchisement. Whether or not the members of the Reconstruction Congress personally approved of criminal disenfranchisement is thus irrelevant. In framing the Fifteenth Amendment they expressly considered exempting criminal disenfranchisement laws from the general ban on race discrimination in voting and rejected every such exemption. Ultimately, Congress opted for a blanket rule, without the caveats of Section 2 of the Fourteenth Amendment. Its reach was broad and clear: It banned *any* disenfranchisement “on account of race.” With the Fifteenth Amendment, Congress adopted a clean ban on disenfranchisement on account of race, without importing expressly, or implicitly, the exemption of felony disenfranchisement contained in Section 2 of the Fourteenth Amendment.

The Fifteenth Amendment, including its enforcement provision, is therefore unaffected by the Fourteenth Amendment’s reference to criminal disenfranchisement. In fact, some authorities at the time viewed passage of the

Fifteenth Amendment as effectively repealing Section 2. George S. Boutwell, one of the framers of the Fifteenth Amendment, explained, “By virtue of the Fifteenth Amendment the last sentence of section two of the Fourteenth Amendment is inoperative wholly.” *The Constitution of the United States at the End of the First Century* 389 (1895)²; see also Gabriel J. Chin, “Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?” 92 *Georgetown L. J.* 259 (2004).

Whether by repeal or by implication, the Fifteenth Amendment’s comprehensive ban on denying voting rights on account of race removes any limitation Section 2 of the Fourteenth Amendment might otherwise have placed on the right to be free from *racially discriminatory* criminal disenfranchisement.

D. The History of States’ Use of Criminal Disenfranchisement Intentionally to Bar Blacks from Voting Supports Their Appropriateness as a Target of Fifteenth Amendment Enforcement.

The *Munraqim* panel opined that States’ use of criminal disenfranchisement before the Civil War indicated that such laws are not linked to race discrimination

²Boutwell, a member of the House Judiciary Committee, on January 11, 1869, reported the Committee’s initial proposed broad language to the H. Rec. J., 40th Cong., 3d Sess. 139 (1869). He was also a member of the Joint Conference Committee that eventually brokered the final language adopted by the House and Senate in February 1869. *Cong. Globe*, 40th Cong., 3d Sess. 1563 (1869).

in voting and thus do not offend the Reconstruction amendments. *Muntaqim*, 366 F.3d at 123. This was error on two counts. In the first place, the fact that criminal disenfranchisement policies existed in some states before passage of the Fourteenth and Fifteenth Amendments does not insulate them from subsequent discriminatory deployment. Poll taxes, too, were in effect prior to Reconstruction and yet were indisputably used at a later date to obstruct black suffrage. *See Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 684 (1966) (Harlan, J., dissenting) (Explaining that “[p]roperty qualifications and poll taxes have been a traditional part of our political structure,” and that “[m]ost of the early Colonies had [property qualifications]; many of the States have had them during much of their histories.”). In the second place, there is an extensive record of post-Reconstruction use of criminal disenfranchisement to deplete black political power.

In *Hunter*, the Supreme Court observed that the original enactment of Alabama’s criminal disenfranchisement provision “was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect.” 471 U.S. at 233. Courts have similarly recognized the racist origins of Mississippi’s criminal disenfranchisement policy. *See Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998); *McLaughlin v. City of Canton*, 947 F.

Supp. 954, 976-78 (S.D. Miss. 1995). Indeed, the Fifth Circuit has acknowledged that criminal disenfranchisement was used to obstruct black suffrage in the South in general. *Cotton*, 157 F.3d at 390 (“[S]tate defendants do not dispute that [the challenged disenfranchisement statute] was enacted in an era when southern states discriminated against blacks by disenfranchising convicts for crimes that, it was thought, were committed primarily by blacks.”); *see also Baker*, 85 F.3d at 938 (Feinberg, J., concurring); *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896) (tracing devices, including criminal disenfranchisement, added to the 1890 Mississippi Constitution to “obstruct the exercise of the franchise by the negro race”).

Considering a claim that Florida’s felony disenfranchisement provision was adopted during Reconstruction deliberately to evade the Reconstruction Acts’ command to enfranchise black men, a panel of the Eleventh Circuit decided that “[a]ccepting the Plaintiffs’ evidence, a reasonable fact-finder could conclude that the discriminatory animus behind the felon disenfranchisement provision’s 1868 adoption satisfies the Plaintiffs’ initial burden of showing that race was a substantial or motivating factor.” *Johnson v. Bush*, 353 F.3d 1287, 1296 (11th Cir. 2003), *vacated for en banc review*, 377 F.3d 1163 (11th Cir. 2004).

Nor is the association between felony disenfranchisement and race discrimination a historical anomaly confined to a few aberrant examples. An

analysis of states' adoption and modification of felony disenfranchisement laws over the past 150 years concluded that "the racial composition of state prisons is firmly associated with the adoption of state felon disenfranchisement laws. States with greater nonwhite prison populations have been more likely to ban convicted felons from voting than states with proportionally fewer nonwhites in the criminal justice system." Angela Behrens, Christopher Uggen, and Jeff Manza, "*Ballot Manipulation and the 'Menace of Negro Domination': Racial Threat and Felon Disfranchisement in the United States, 1850-2002*," 109 Am. J. Soc. 559, 596 (2003). Even when controlling for timing and region, among other factors, the study finds that "a larger nonwhite prison population significantly increases the odds that more restrictive felon disenfranchisement laws will be adopted." *Id.* Moreover, the authors point out that "[m]any felon voting bans were passed in the late 1860s and 1870s, when implementation of the Fifteenth Amendment and its extension of voting rights to African-Americans were ardently contested." *Id.* at 559.

In short, it would be perverse to limit the Fifteenth Amendment's guarantee of freedom from racial discrimination in voting rights by reference to Section 2 of the Fourteenth Amendment, which expressly contemplated race discrimination in the franchise. Congress explicitly rejected efforts to reproduce that section in the

Fifteenth Amendment. Even if Congress's Fourteenth Amendment enforcement power is limited by Section 2, Congress's power to regulate felony disenfranchisement as it pertains to race under the Fifteenth Amendment is coextensive with its power to regulate any other racially discriminatory voting scheme.³ Having been superseded by the Fifteenth Amendment with respect to race and voting rights, Section 2 of the Fourteenth Amendment presents no constitutional obstacle to federal enforcement of racial equality in voting. Thus the Voting Rights Act appropriately and constitutionally reaches criminal disenfranchisement laws with discriminatory results, in New York and elsewhere.

II.

The Clear Statement Rule Does Not Require Congress to Identify All Possible Applications of the Voting Rights Act in the Text of the Statute.

The panel held that Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, cannot be applied to New York's felony disenfranchisement law because doing so

³Note also that the Supreme Court has never applied the "congruence and proportionality" test to Congressional enforcement of the Fifteenth Amendment. Under the principles of the recent Fourteenth Amendment cases on which the *Muntaqim* panel relied, however, the Fifteenth Amendment is entirely concerned with an area in which Congress's enforcement power is at its zenith. So far, the Court has not invalidated any regulation protecting a "suspect class" and a "fundamental right." Though the Fifteenth Amendment's ban on discrimination is unqualified, its target is surgically narrow: race discrimination in voting, the paradigmatic suspect classification and perhaps the most fundamental of all rights.

would fundamentally alter the balance of power between the States and the Federal government and the Act had not clearly expressed an intention to cover such laws. *Muntaqim*, 366 F.3d at 129. As argued above, the panel mistakenly believed that felony disenfranchisement laws enjoy a special presumption of constitutionality, by virtue of Section 2 of the Fourteenth Amendment. In addition, the panel misapplied the approach to statutory interpretation articulated as the “plain statement rule” in *Gregory v. Ashcroft*, 501 U.S. 452 (1991). A correct analysis of *Gregory*, in context of several other relevant Supreme Court cases, shows where the panel opinion went wrong.

Gregory v. Ashcroft involved a challenge under the federal Age Discrimination in Employment Act (“ADEA”), to the Missouri Constitution’s provision compelling the retirement of most state judges by the age of 70. The ADEA made it unlawful for any “employer” to discharge any individual who was at least 40 years old “because of such individual’s age.” *Gregory*, 501 U.S. at 456. Missouri clearly qualified as an “employer” under the statute. Less clear was whether an appointed state judge was an “employee” and thereby covered by the statute or “an appointee on the policymaking level,” a category exempted from the statute’s coverage. *Id.* at 464-65 (citing 29 U.S.C. § 630(f)).

The majority reasoned that in the “delicate balance” between federal and

state government, the federal government enjoys the “decided advantage” of the Supremacy Clause. *Gregory*, 501 U.S. at 460. Therefore, the Court must ensure that Congress does not wrongfully “impose its will on the States.” *Id.* As the state law before the Court was “of the most fundamental sort for a sovereign entity,” it was incumbent on Congress to provide a clear statutory statement of its intention to override it. *Id.*

The Court found that the ADEA contained no such clear congressional statement. *Id.* at 467. Because the statutory exclusion of “appointee[s] on the policymaking level” could be interpreted to include judges, the Court could not say that the ADEA unequivocally covers judges. Without an explicit statement that made it “plain to anyone reading the Act that it covers judges,” the Court refused to invalidate the state law. *Id.* “If Congress intends to alter the usual constitutional balance between the States and the Federal Government,” warned the Court, “it must make its intention to do so unmistakably clear in the language of the statute.” *Id.* at 460-61 (*citations omitted*).

The application of the clear statement rule to the Voting Rights Act is better illustrated by a case decided on the same day as *Gregory*, *Chisom v. Roemer*, 501 U.S. 380 (1991). *Chisom* is *Gregory*’s mirror image: it presents an almost identical legal question but with dramatically divergent results. *Chisom*, like

Gregory, addressed the applicability of a federal statute to a state constitutional provision involving state judges. In *Chisom*, the Court examined whether Section 2 of the Voting Rights Act reached a provision in the Louisiana Constitution that established the procedure for electing judges to the state supreme court. The ambiguity revolved around the definition of the term “representatives” as used in Section 2(b) of the Voting Rights Act. If Congress intended the term to encompass judges—and therefore judicial elections—Section 2 would invalidate the state law. If, as in *Gregory*, the Court found uncertainty in the definition of the term “representatives,” the state law would stand. But unlike the Court’s approach in *Gregory*, in *Chisom* the clear statement figured nowhere in the analysis.

The *Muntaqim* panel incorrectly dismissed *Chisom*’s significance. It is not merely that the majority in *Chisom* failed to mention the clear statement rule, the dissenting opinion explained that failure and endorsed it. The dissent, written by Justice Scalia with the Chief Justice and Justice Kennedy joining, did not rely on the clear statement rule but would have found that judges are not covered by the Act because they are not representatives. They interpreted “representative” by looking at the “ordinary meaning of the language in its textual context.” *Chisom*, 501 U.S. at 404 (Scalia, J., dissenting).

The dissent identifies the distinctions between *Gregory* and *Chisom* that

explain why the plain statement rule is not applied to the Voting Rights Act. First, had the Court in *Gregory* construed the ADEA to include appointed judges, they would have been the only high-level state officials embraced by the statute, resulting in an anomalous bubble of statutory coverage where none otherwise existed. 501 U.S. 411-12. In *Chisom*, on the other hand, no equivalent exception existed. The Voting Rights Act placed a general imposition upon state elections; a decision exempting judicial elections would have created a bubble of non-coverage in a sea of protected elections. 501 U.S. at 412 (Scalia, J., dissenting).

Second, it was “questionable” whether Congress passed the ADEA under its Commerce Clause or Fourteenth Amendment power. In contrast, it was “obvious” that Congress enacted the Voting Rights Act pursuant to the Fourteenth Amendment. *Id.* These two factors alone suffice to explain why the clear statement rule does not apply to the Voting Rights Act. In addition, however, in *City of Rome v. United States*, 446 U.S. 156, 178-180 (1980), the Court had “tacitly rejected a ‘plain statement rule’ as applied to the unamended § 2.” *Chisom*, 501 U.S. at 412. “I am content,” the opinion continues, “to dispense with the ‘plain statement’ rule in the present cases.” *Id.*

Chisom thus explains the difference between Section 2 of the Voting Rights Act and the ADEA, and why the plain statement rule applies to the latter but not

the former. The *Muntaqim* panel failed to square the Supreme Court’s holding in *Chisom* with its clear statement analysis. Given that *Muntaqim*, like *Chisom* before it, involves a conflict between the Voting Rights Act and a state law, it is incumbent on the defendants here to explain why *Chisom* does not control.

The parameters of the clear statement rule have been clarified subsequently by *Pennsylvania Department of Corrections v. Yeskey*. 524 U.S. 206 (1998). Here, the Court examined whether state prisons and state prisoners fell under the aegis of Title II of the Americans with Disabilities Act (“ADA”), which prohibited discrimination by “public entit[ies]” against individuals with disabilities. The unanimous opinion assumed without deciding that the management of state prisons was a “traditional and essential” state function susceptible to the clear statement rule. *Id.* at 209. Applying the rule, the Court summarily rejected the State’s contention that, as in *Gregory*, no clear congressional intent to apply Title II to state prisons could be salvaged from the statute’s sweeping terms.

Although Title II did not contain any explicit references to state prisons in its text, the Court encountered no difficulties finding the “requirement of the [clear statement] rule ... amply met.” *Yeskey*, 524 U.S. at 209. Title II’s “language unmistakably includes State prisons and prisoners within its coverage.” *Id.* Unlike the ADEA in *Gregory*, which contained an exception that made it

“impossible,” for the Court to conclude appointed state judges were covered, “the ADA plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt.” *Id.* (citation removed, italics in original).

The *Yeskey* decision indicates that Congress need not enumerate all the intended applications of a statute: “As we have said before, the fact that a statute can be ‘applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.’” 524 U.S. at 212 (quoting *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)). A statute comprised of broad, all-inclusive statements may be less prone to ambiguity and the hazards of the clear statement rule than a statute saddled with exceptions that strive for precision but, ironically, sow uncertainty. Not only are broad legislative strokes acceptable, from the viewpoint of the clear statement rule, they are preferable.

Moreover, the clear statement rule is not applicable here because nothing in the language of Section 2 qualifies as ambiguous. Congress has plainly expressed its intention to override state laws that conflict with Section 2. Nor does Section 2 contain any exceptions that could muddy the court’s understanding of the statute’s coverage. Congress thus had no need specifically to endorse the preemption of felony disfranchisement laws by Section 2.

In other words, the Supreme Court’s decision in *Yeskey* is the model for

Muntaqim. Because the ADA contained no ambiguity that threw the extent of its coverage into doubt, the Court assumed that state prisons were included. The same reasoning applies to Section 2 of the Voting Rights Act. While the sweep of Section 2's prohibitions is broad, nothing in the statute gives rise to ambiguity. Additionally, as Congress acknowledged in 1982, when it amended Section 2, a statute that focused expansively on discriminatory results, not individual catalogued practices, was the only way to eliminate state misconduct.

In sum, the Supreme Court's clear statement rule does not require Congress to have clearly stated that the Voting Rights Act was intended to limit states' discretion to disenfranchise incarcerated felons and parolees on account of race. The Act was passed pursuant to the Fourteenth and Fifteenth Amendments, which by their very terms empower Congress to impose its will on the states in matters relating to the equal right to vote. Restrictions that states have placed on the right to vote, such as literacy tests, poll taxes, or other voting structures that exclude certain voters on the basis of their race can all be enjoined, even though doing so impinges on a state's discretion. As the Supreme Court wrote of the Fifteenth Amendment in *Rice v. Cayetano*,

The design of the Amendment is to reaffirm the equality of races at the most basic level of the democratic process, the exercise of the voting franchise. A resolve so absolute required language as simple

in command as it was comprehensive in reach. Fundamental in purpose and effect and self-executing in operation, the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race.

Rice, 528 U.S. at 512. In enforcing that Amendment, Congress has the power to prohibit all practices that deprive persons of the right to vote on the basis of race, without having to specifically enumerate each such practice in the text of the statute.

CONCLUSION

Amici urge this Court to reverse the judgment of the court below and find that Section 2 of the Voting Rights Act is constitutional as applied to New York State's felony disenfranchisement statute. The Fifteenth Amendment was intended to prohibit all provisions and voting qualifications that deny the right to vote on the basis of race. There is no basis for exempting felon disenfranchisement from the Fifteenth Amendment's reach, and no reason why Congress cannot constitutionally enforce the Fifteenth Amendment as it has sought to do through the Voting Rights Act.

Dated: January 28, 2005

By,

 (JAA)

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Certificate of Service

The undersigned hereby certifies that, on this 28th day of January, 2005, I caused one true and accurate copy of the Motion of the Brennan Center for Justice at NYU School of Law and the University of North Carolina School of Law Center for Civil Rights to Appear as *Amici Curiae* and the Brief of *Amici Curiae* for the Brennan Center for Justice at NYU School of Law and the University of North Carolina School of Law Center for Civil Rights to be served by U.S. mail and email at the following addresses:

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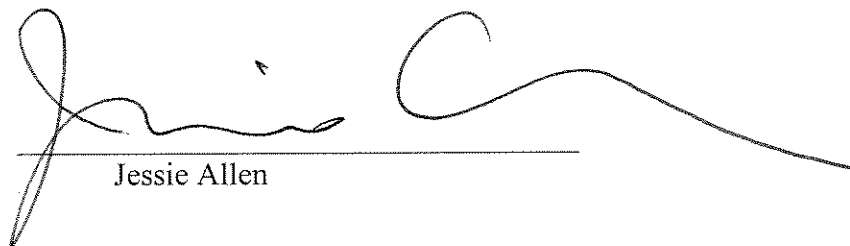
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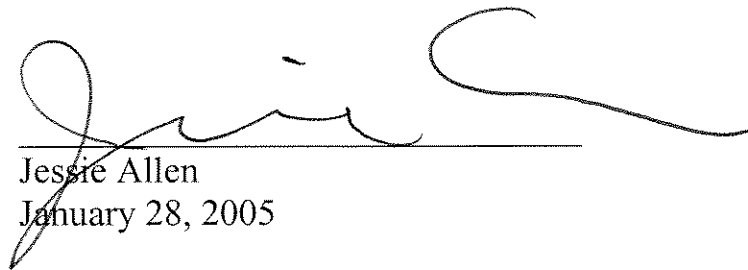
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Certificate of Compliance

The undersigned hereby certifies that the foregoing Brief of *Amici Curiae* in Support of Appellant Jalil Abdul Muntaqim complies with the type-volume limitation specified in the Federal Rule of Appellate Procedure 32(a)(7)(B)(i). The Brief is proportionately spaced, has a typeface of 14 points or more and contains less than 7,000 words exclusive of the table of contents, table of authorities, and certificate of service.



Jessie Allen
January 28, 2005