IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

01-7260

JALIL ABDUL MUNTAQIM, A/K/A ANTHONY BOTTOM,
PLAINTIFF–APPELLANT,

vs.

PHILLIP COOMBE, ANTHONY ANNUCCI, LOUIS F. MANN,
DEFENDANTS–APPELLEES

BRIEF FOR PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

This appeal is from an unreported decision and judgment of the United States District Court for the Northern District of New York (Norman A. Mordue, J.) granting Defendants' motion for summary judgment and dismissing Plaintiff-Appellant Jalil Abdul Muntaqim, a/k/a Anthony Bottom's ("Appellant") action in its entirety. The decision is set forth in the Joint Appendix ("JA") at 58-77.[1]

STATEMENT OF JURISDICTION

This action arises from a pro se complaint filed by an inmate in a New York State prison, alleging violations of 42 U.S.C. §§ 1981, 1983, and 1985, and

[1] References herein to parts of the record shall refer to pages in the Joint Appendix.

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331. The district court entered final judgment in this case on January 25, 2001, (JA 78), disposing of all claims with respect to all parties. Appellant filed a timely notice of appeal on February 20, 2001. (JA 79-85). This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether New York's felon disenfranchisement statute is immune from challenge under Section 2 of the Voting Rights Act as a matter of law.[2]

STATEMENT OF THE CASE

On September 26, 1994, Appellant, an African American serving a life sentence in the custody of the New York State Department of Correctional Services ("DOCS"), filed a pro se complaint which alleged that Section 5-106 of the New York State Election Law, N.Y. Elec. Law § 5-106 (2002), the New York felon disenfranchisement statute, denies him the right to vote in violation of the Voting Rights Act of 1965. (JA 7-21). Appellant further alleged that Section 5-106 results in the unlawful dilution of the African-American and Hispanic vote in New York State. Id. Finally, Appellant's Complaint challenged the

[2] Although the district court dismissed the Complaint in its entirety, Appellant only appeals the dismissal of his claims under Section 2 of the Voting Rights Act.

constitutionality of Section 5-106 and certain New York State statutes relating to "civil death" and the award of "good time" credits to inmates serving life sentences. (JA 11-20).

The case languished for five years until Defendants moved for summary judgment on October 25, 1999, based on the pleadings and one affidavit, relevant only to the "civil death" claim, from a DOCS Correction Counselor. (JA 30-37). The district court granted Defendants' motion in its entirety in a Memorandum-Decision and Order dated January 24, 2001. (JA 58-78). The court held that the "results test" of the Voting Rights Act would pose a serious constitutional question concerning the scope of Congress's power to enforce the Fourteenth and Fifteenth Amendments if applied to a state disenfranchisement law. (JA 69). On that basis, the court rejected Appellant's claims under the Voting Rights Act, finding the "VRA inapplicable to Section 5-106." (JA 69). On June 4, 2002, this Court, sua sponte, appointed appellate counsel for Appellant.

STATEMENT OF RELEVANT FACTS

Appellant has been denied the right to vote by New York's felon disenfranchisement statute. He claims that this statute law interacts with racial disparities in the criminal justice system and with the lingering social, economic, and political effects of racial discrimination to disproportionately disenfranchise blacks and Hispanics in violation of the Voting Rights Act. His allegations are

supported by a substantial and growing public record of the existence of significant racial disparity in felony sentencing in New York.[3] Also relevant to Appellant's Voting Rights Act claims is the history of discrimination against minority participation in New York's electoral processes. Ultimate resolution of Appellant's Voting Rights Act claims requires consideration of these disproportionate effects on blacks and Hispanics to determine whether, under the Act's results test, the felon disenfranchisement law causes a denial or dilution of the right to vote on account of race.

A. **Racial Disparities In The Criminal Justice System.**

Although African Americans and Hispanics make up less than 30 percent of New York's voting-age population, they comprise over 80 percent of the

[3] See, e.g., Report of the New York State Judicial Commission on Minorities (April 1991) (hereinafter, "1991 Report"); The Franklin H. Williams Judicial Commission on Minorities, Equal Justice: A Work In Progress, Five Year Report (1991-1996) (hereinafter, "Five Year Report"); James F. Nelson, Division of Criminal Justice Services, Disparities in Processing Felony Arrests in New York State 1990-1992 (1995) (hereinafter, "DCJS Study"); Jamie Fellner, Cruel and Usual: Disproportionate Sentences for New York Drug Offenders, 9 Human Rights Violations in the United States 2(B) (1997), at http://www.hrw.org/summaries/s.us973.html.

inmates in New York's state prison population.[4] The incarceration rate for voting-age African Americans and Hispanics in New York is over 10 times that of the rest of the voting-age population. Accordingly, because Section 5-106 only disenfranchises felons whose sentences include incarceration, African-Americans and Hispanics in New York lose their right to vote at more than ten times the rate of non-minorities.[5]

Numerous public reports, including reports issued by Defendants' own criminal justice agencies, uniformly show that the gross racial disparity in New York's prison population is caused, at least in part, by race-based disparities in sentencing. See supra, n.3. For example, New York State's Judicial Commission on Minorities, which was convened in 1988 in response to the widespread belief that race plays a significant role in the outcome of court cases, has consistently concluded that minority defendants are given harsher sentences

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[4] See U.S. Census Bureau, Census 2000 Redistricting Data Summary File, New York State data available in table format at http://www.census.gov/census2000/states/ny.html (hereinafter, "Census 2000" State of New York Department of Correctional Services, HUB System: Profile of Inmate Population Under Custody on January 1, 2002 (2002) (hereinafter, "DOCS 2002 Profile"). This Court may take judicial notice of published statistics. See United States v. Gonzalez, 442 F.2d 698, 707 (2d Cir. 1971) (en banc); accord Nipper v. Smith, 39 F.3d 1494, 1498 n.1 (11th Cir. 1994).

[5] According to New York DOCS statistics and the 2000 Census, 54,380 out of New York's 3,953,198 voting-age African Americans and Hispanics were incarcerated as of January 1, 2002, for an incarceration rate of .01375. By contrast, 13,014 out of New York's approximately 10 million non-blacks and Hispanics were incarcerated for an incarceration rate of .00129. (.01375 ÷ .00129 = 10.66).

than white defendants. See 1991 Report, supra, at 40; Five Year Report, supra, at 34. In its Five Year Report, the Commission, citing a two-year study by the Division of Criminal Justice Services ("DCJS"), see DCJS Study, supra, reported that minorities are sentenced to incarceration more often than comparably situated whites. See Five Year Report, supra, at 34. Commenting on the magnitude of the disparity, the Commission noted that "one in three minorities sentenced to jail would have received a different sentence if they were processed as comparably situated whites." Id. Based on disparity in sentencing and other evidence of discrimination, the Commission concluded that "rampant racism still infects our criminal justice system, disproportionately impacting the lives of minority male defendants and their families." Id.

Section 5-106 of the New York Election law disenfranchises felons who are currently incarcerated or on parole. Felons who receive probation retain their right to vote. Unfortunately, the above studies establish that whether a convicted felon receives probation rather than a prison sentence depends, in part, on race. See DCJS Study, supra, at viii. Persons convicted of a felony in New York may receive a prison sentence, probation, a fine, conditional or unconditional discharge, or some combination of these sanctions. Id. The DCJS Study, after controlling for differences in prior criminal histories, seriousness of charges, and several other variables, found that minorities were sentenced to incarceration more

often than comparably situated whites, and further that whites were sentenced to probation more often than comparably situated minorities. Id. As a result, it appears that in New York, African-American and Hispanic felons are disenfranchised more often than similarly situated non-minority felons for no reason other than their race.

Racial disparities in sentencing are particularly pronounced with respect to incarceration for drug offenses. According to a 1993 national survey by the National Institute on Drug Abuse, African Americans, though comprising only 13 percent of monthly drug users, account for approximately 39 percent of all drug arrests. Marc Mauer and Tracy Huling, The Sentencing Project, Young Black Americans and the Criminal Justice System: Five Years Later 9 (October 1995). The numbers are even more striking in New York, where, even though whites constitute the majority of people who use and sell drugs, Blacks and Hispanics represent over 85 percent of people indicted for drug felonies and 94 percent of drug felons that are sent to prison. See Fellner, supra n.3, at 4. The implications of this disparity become clear when one considers how much of the disenfranchised population is made up of drug offenders. Drug offenders currently make up over a quarter of the total inmate population, see DOCS 2002 Profile, supra n.4, at 27, and in the year 2000, over 40 percent of all newly incarcerated prisoners had been

convicted of drug offenses. See State of New York Dep't of Correctional Servs., Year 2000 Court Commitments, Preliminary Data Table 9.1 (2001).

B. Racial Discrimination Outside The Criminal Justice System.

The Voting Rights Act was enacted in 1965 to rid the country of racial discrimination in voting. Some provisions of the Act apply only to specified "covered jurisdictions," including certain New York counties.[6] Section 2, which applies nationwide, was amended in 1982 to prohibit any voting qualification that results in vote denial or vote dilution, eliminating the requirement that a plaintiff prove discriminatory intent.

Black and Hispanic New Yorkers do contend with vestiges of racial discrimination outside the criminal justice system and the VRA recognizes that fact. Shortly after the VRA was enacted, the Supreme Court held that New York's literacy test violated the Act. Katzenbach v. Morgan, 384 U.S. 641 (1966). Nonetheless, New York maintained an English literacy requirement for voters until

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[6] Pursuant to Section 5 of the Act, a "covered jurisdiction" cannot enact new voting qualifications, prerequisites to voting, or standards, practices, or procedures without first obtaining pre-clearance from either the Attorney General or the U.S. District Court for the District of Columbia. 42 U.S.C. § 1973(c). Neither New York State nor any of its subdivisions were designated as "covered jurisdictions" under the original Act.

1976, ten years after that decision. See 49 NY Jur. 2d. Elections § 126. New York's discriminatory voting practices were a specific target of the 1970 amendments to the Act, which designated New York, Bronx, and Kings Counties as "covered jurisdictions." See NAACP v. New York, 413 U.S. 345, 352-53, 357 (1973) ("Indeed, it is clear that the three counties were a definite target of the 1970 amendments."). When Congress amended the Act again in 1982, it cited a redistricting plan for New York, Kings, and Bronx counties, which "discriminated against black and Hispanic voters," as evidence of the continuing need for the pre-clearance requirement. See S. Rep. No. 97-417, at 11, reprinted in 1982 U.S.C.C.A.N. 177, 188. New York is the only major Northeastern state in which pre-clearance is required.

C. The Decision Below.

Despite New York's history of voting rights abuses and the "rampant racism" that still infects the criminal justice system, the district court denied Appellant his right to show how this pattern of discrimination interacts with Section 5-106 to disenfranchise black and Hispanic New Yorkers on account of race. The court dismissed Appellant's Voting Rights Act claims on the finding that Section 2 of the Act does not apply to state felon disenfranchisement statutes. Thus, Appellant was denied the opportunity to develop and present facts in support of his claims so that the court could evaluate whether, as he alleged, discrimination

within and without the criminal justice system interacts with New York's felon disenfranchisement law to deny and abridge the vote of African Americans and Hispanics in violation of the Voting Rights Act.

SUMMARY OF ARGUMENT

This appeal presents a single, discrete issue: whether, as a matter of law, a plaintiff may bring a cause of action under Section 2 of the Voting Rights Act of 1965,[7] on the grounds that he has been disenfranchised on the basis of race by New York's felon disenfranchisement statute.[8] This issue comes before the Court with an unusual history, as it was the subject of a prior en banc decision of the Court in Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996). In that case, ten judges of the Court split evenly on the issue, resulting in three non-precedential opinions and an affirmance of the district court, which had dismissed the plaintiffs' claims for failure to state a claim upon which relief can be granted. Id. at 921 & n.2. Therefore, the question remains unresolved.

The district court relied exclusively on the rationale of Judge Mahoney's non-binding opinion in Baker and a misinterpretation of the Fourth Circuit's decision in Howard v. Gilmore, 205 F.3d 1333, 2000 WL 203984 (4th

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[7] 42 U.S.C. §§ 1973(a)-(b). The Voting Rights Act is sometimes referenced herein as "the VRA" or "the Act." The full text of Section 2 of the VRA is provided in the Addendum, infra.

[8] The full text of the New York felon disenfranchisement statute N.Y. Elec. Law § 5-106(2)-(b) is provided in the Addendum, infra.

Cir. Feb. 23, 2000) (unpublished table decision), to find "the VRA inapplicable to Section 5-106."[9] (JA 68-69.) Seeking to avoid the clear reach of the VRA, the district court, supposedly in deference to constitutional restraints, engaged in legislative interpretation that ignored the plain language of the statute. As discussed below, the clear, unambiguous language of Section 2 of the VRA encompasses all "voting qualifications" or "prerequisites to voting," and the required and constitutionally permissible application of the VRA to felon disenfranchisement laws cannot be dismissed by employing the plain statement rule or the doctrine of constitutional avoidance, as the district court did. Analysis of the VRA using the appropriate rules of statutory interpretation leads to the inescapable conclusion that the VRA provides for scrutiny of the New York felon disenfranchisement law.

The district court erroneously construed the VRA to deny Appellant the right to challenge the alleged denial and abridgment of his fundamental

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[9] The district court mistakenly perceived a "general disagreement . . . among Circuit courts" on this issue. (JA 69). The district court correctly believed that Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986) "found the VRA applicable to felon disenfranchisement statutes," (JA 68), but misread the Howard decision to hold the "VRA not applicable to felon disenfranchisement statutes." Id. In fact, the Fourth Circuit dismissed the plaintiff's claim in Howard because he "failed to plead" that Virginia's felon disenfranchisement law either was enacted with discriminatory intent or that there was "any nexus between the disenfranchisement of felons and race." 2000 WL 203984, at *1 (citing Wesley v. Collins, 605 F. Supp. 882, aff'd 791 F.2d 1255 (6th Cir. 1986)).

constitutional right to vote. Reviewed de novo, see, e.g., Ward v. Cross Sound Ferry, 273 F.3d 520, 523 (2d Cir. 2001), the district court's dismissal of Appellant's claims under the Voting Rights Act for failure to state a claim should be reversed.

ARGUMENT

I.

APPELLANT HAS STATED SUSTAINABLE CLAIMS UNDER SECTION 2 OF THE VOTING RIGHTS ACT

Appellant has been permanently disenfranchised by Section 5-106 of the New York Election Law. Appellant filed a complaint alleging that the New York felon disenfranchisement statute violates Section 2 of the Voting Rights Act because it is a "voting qualification or prerequisite to voting" applied by New York State "in a manner which results in a denial or abridgment of the right . . . to vote on account of race or color". 42 U.S.C. § 1973(a). The right to vote is fundamental, see, e.g., Bush v. Gore, 531 U.S. 98, 104 (2000); Harper v. Virginia Board of Elections, 383 U.S. 663, 667 (1966), and to protect this right, Section 2 "was designed as a means of eradicating voting practices that 'minimize or cancel out the voting strength and political effectiveness of minority groups.'" Reno v. Bossier Parish School Board, ("Reno I") 520 U.S. 471, 479 (1997) (quoting S. Rep. No. 97-417, at 28 (1982)). Two distinct types of discriminatory practices are prohibited by Section 2: vote denial and vote dilution. See, e.g., Chisom v.

Roemer, 501 U.S. 380, 394 (1991). Vote denial occurs when an individual's right to vote is denied on account of race. Vote dilution occurs when a voting or election practice results in the dilution of minority voting strength. See, e.g., Baker, 85 F.3d at 924 n.6. Giving Appellant the benefit of the liberal construction of his pro se complaint to which he is entitled, see infra, Part IVA, Appellant states claims for both vote denial and vote dilution under Section 2 of the Voting Rights Act.

"The essence of a § 2 claim is that 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). To state a claim under Section 2, a plaintiff must allege that: (1) the use of an electoral standard, practice, or procedure (2) results in the diminution of the opportunity of minority voters to participate in the political process and to elect representatives of their choice. 42 U.S.C. §§ 1973(a)-(b); Black v. McGuffage, Nos. 01-208, 01-796, 2002 WL 483403, at *6 (N.D. Ill. Mar. 29, 2002) (denying motion to dismiss Section 2 claim). In his Complaint, Plaintiff alleges that "defendants are . . . engaging in conduct that discriminates and established [sic] a class system of disenfranchisement," (JA 10, at ¶8), and that his "federal right to vote cannot be prohibited by state statute . . . ." (JA 11, at ¶12). He further asserts that "Section 2

of the Voting Rights Act provides that a violation is established if, based upon the 'totality of the circumstances,' the challenged legislation 'results' in unlawful dilution." (JA 11, at ¶13). Finally, Plaintiff alleges:

> [T]he 'totality of the circumstances' of the challenged legislation has 'resulted' in unlawful dilution of voting rolls in the African-American and Hispanic communities of New York City. DOCS confines over 65,000 males and females, 83% of these 65,000 are African American and Hispanics of which 80% of this 65,000 come from New York City and it's environs. It doesn't take a scholar to comprehend the implications and level of dilution from the voting rolls of these communities, and the irreparable harm being done over the years as tens of thousands of African American and Hispanics who have encountered the criminal justice system, and now are prohibited from voting.

(JA 11, at ¶18).

These allegations are sufficient to state claims under Section 2. See Chisom, 501 U.S. at 394; Gingles, 478 U.S. at 47; Black, 2002 WL 483403, at *6-7. However, the district court summarily dismissed Appellant's Voting Rights Act claims – with no analysis of the pleadings or weighing of evidence – because it found that Section 2 of the VRA, as a matter of law, was "inapplicable" to a state disenfranchisement statute. (JA 69). The district court's holding that a plaintiff cannot challenge a state felon disenfranchisement statute under the VRA as a matter of law is at odds with the decision at every other court that has addressed the issue. See Johnson v. Bush, No. 00-3542-CIV-KING, slip op. at 2 (S.D. Fla. Jan. 30. 2001) (unpublished) (denying motion to dismiss, holding that "Plaintiffs

have sufficiently alleged . . . a claim that Florida's felon disenfranchisement laws deny them the right to vote in violation of Section 2 of the Voting Rights Act . . . ."); Farrakhan v. Locke, 987 F. Supp. 1304, 1308-11 (E.D. Wash. 1997) (holding that "the VRA can apply to felon disenfranchisement laws," and declining to dismiss plaintiffs' Section 2 claim for vote denial); see also Howard, 2000 WL 203984 (dismissing claim under the VRA for pleading defects rather than its inapplicability to state felon disenfranchisement statute); Wesley, 791 F.2d at 1259-63 (dismissing claim under the VRA for defects in pleading and proof based on the "social and political factors" present in Tennessee under a "totality of the circumstances" test, rather than its inapplicability to state felon disenfranchisement statute); Jones v. Edgar, 3 F. Supp. 2d 979, 981 (C.D. Ill. 1998) (dismissing claim, following Wesley); Baker v. Cuomo, 842 F. Supp. 718 (S.D.N.Y. 1995) (dismissing claim because the "profound issues" it raised were "more appropriate" for consideration by a higher court, citing Wesley.).

"While a State may choose to disenfranchise some, all or none of its felons based on legitimate concerns, it may not do so . . . because of their race." Baker, 85 F.3d at 937 (Feinberg, J.); see also Hunter v. Underwood, 471 U.S. 222, 232-33 (1985); Shepherd v. Trevino, 575 F.2d 1110, 1114 (5th Cir. 1978). The VRA is intended to prevent this result, and the plain language of Section 2 of the Act applies to Appellant's claims: Appellant is a citizen, the New York felon

disenfranchisement law is a "voting qualification or prerequisite to voting", and Appellant has alleged that it denies and dilutes his right to vote on account of race.

II.

THE RULES OF STATUTORY CONSTRUCTION DICTATE THAT SECTION 2 OF THE VOTING RIGHTS ACT ENCOMPASS STATE FELON DISENFRANCHISEMENT LAWS.

Rather than subjecting New York's felon disenfranchisement law to scrutiny under the VRA, the district court sought to avoid a perceived "serious constitutional question" by relying on the plain statement rule. (JA 69). Ignoring the plain meaning rule, which is the cardinal rule of statutory interpretation, see, e.g., Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992); Demarest v. Manspeaker, 498 U.S. 184, 187 (1991); Schick v. Schmutz (In re Venture Mortgage Fund L.P.), 282 F.3d 185, 188 (2d Cir. 2002); Sanders v. Jackson, 209 F.3d 998, 1000 (7th Cir. 2000), the district court resorted to the plain statement rule, a narrow rule that may be employed only when a statute is ambiguous and its enforcement would disturb the existing balance of federal and state powers. See, e.g., Salinas v. United States, 522 U.S. 52, 60 (1997); Gregory v. Ashcroft, 501 U.S. 452, 470 (1991).

Instead of accepting the plain meaning of Section 2, the district court held that the ordinary meaning should not be given effect unless there was a "plain statement" of intent that the ordinary meaning of the statute should apply. By

requiring a "plain statement" of intent before implementing the plain meaning of Section 2, the district court allowed a limited exception to swallow the rule. See Salinas, 522 U.S. at 60 ("The plain-statement requirement . . . does not warrant a departure from the statute's terms."); Pennsylvania v. Union Gas Co., 491 U.S. 1, 29-30 (1989) (Scalia, J., dissenting) (rejecting "clear statement" methodology in favor of applying the plain meaning of the text of the statute), abrogated by Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)).

A. The Plain Meaning of Section 2 Of The Voting Rights Act Requires Its Application To State Felon Disenfranchisement Statutes.

The plain meaning rule is simple and fundamental:

> It is axiomatic that the plain meaning of a statute controls its interpretation, and that judicial review must end at the statute's unambiguous terms. Legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous.

Schick, 282 F.3d at 188 (quoting Lee v. Bankers Trust Co., 166 F.3d 540, 544 (2d Cir. 1999)). When "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (citation omitted); see Connecticut Nat'l Bank, 503 U.S. at 253-54 ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); see also Conroy v. Aniskoff, 507 U.S. 511, 514 (1993); West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98-99

(1991); Schick, 282 F.3d at 188. Unless truly exceptional circumstances dictate otherwise, "where the terms of a statute are unambiguous, judicial review begins and ends with a review of the statute's terms." Kruman v. Christie's Int'l PLC, 284 F.3d 384, 400 (2d Cir. 2002) (citation omitted); see also Demarest, 498 U.S. at 190-91; Rubin v. United States, 449 U.S. 424, 430 (1981).

The plain meaning rule has been regularly applied to Section 2 of the VRA by federal courts throughout the nation. See, e.g., Campos v. City of Houston, 113 F.3d 544, 548 (5th Cir. 1997); Nixon v. Kent County, 76 F.3d 1381, 1386-87 (6th Cir. 1996); Johnson v. Desoto County Bd. of Comm'rs, 72 F.3d 1556, 1563 (11th Cir. 1996); France v. Pataki, 71 F. Supp. 2d 317, 326 (S.D.N.Y. 1999); Williams v. State Board of Elections, 696 F. Supp. 1563, 1568 (N.D. Ill. 1988); see also Lopez v. Monterey County, 525 U.S. 266, 282 (1999) (Section 5 case); City of Rome v. United States, 446 U.S. 156, 172-73 (1980) (same). Under the plain meaning rule, the unambiguous language of Section 2 of the VRA precludes a finding that felon disenfranchisement laws fall outside its scope. Section 2 of the VRA prohibits – without exception – any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "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).

1. A State Felon Disenfranchisement Law is a "Voting Qualification Or Prerequisite To Voting Or Standard, Practice, Or Procedure".

On its face, the phrase any "voting qualification, prerequisite to voting, or standard, practice, or procedure" must include felon disenfranchisement statutes. As the Supreme Court has made clear, "Section 2 protect[s] the right to vote, and it d[oes] so without making any distinctions . . . ." Chisom, 501 U.S. at 392; see City of Lockhart v. United States, 460 U.S. 125, 139 (1983) (Marshall, J., concurring in part and dissenting in part) (noting that Congress provided "a general prohibition on discriminatory practices" in Section 2). Accordingly, Courts have interpreted the broad language in Section 2 to apply to a wide variety of election and voting practices. See, e.g., Houston Lawyers' Ass'n v. Attorney General of Texas, 501 U.S. 419, 421 & 426-27 (1991) (rejecting a "single-member office" exception to Section 2); Gingles, 478 U.S. 30 (multi-member districts); Mississippi State Chapter, Operation PUSH, Inc. v. Mabus, 932 F.2d 400 (5th Cir. 1991) (dual registration system and prohibition on satellite registration); United States v. Marengo County Comm'n, 731 F.2d 1546, 1570 (11th Cir. 1984) (failure of board of registration to visit rural areas); Harris v. Siegelman, 695 F. Supp. 517, 527-29 (M.D. Ala. 1988) (appointing only white poll officials, intimidation of minorities at polls, limitation on time allowed in voting booth, requiring voters seeking assistance to swear oath of inability to write in English); Roberts v. Wamser, 679

F. Supp. 1513, 1529-32 (E.D. Mo. 1987) (failure to manually count non-computer-readable ballots), rev'd on other grounds, 883 F.2d 617 (8th Cir. 1987); Goodloe v. Madison County Bd. of Election Comm'rs, 610 F. Supp. 240, 243 (S.D. Miss. 1985) (invalidation of absentee ballots); Brown v. Dean, 555 F. Supp. 502, 505-06 (D.R.I. 1982) (location of polling place); Brown v. Post, 279 Supp. 60, 63-64 (W.D. La. 1968) (discriminatory denial of absentee ballots); but see Mixon v. Ohio, 193 F.3d 389, 407 (6th Cir. 1999) (holding that Section 2 does not apply to appointive office systems, citing cases holding same).

The sweeping coverage of the language in Section 2 is reinforced by the Supreme Court's interpretation of identical language in Section 5 of the Act. Section 5 requires covered jurisdictions to preclear a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c (emphasis added). Because this language in Sections 2 and 5 is identical, "for determining threshold coverage, §§ 2 and 5 have parallel scope." Holder v. Hall, 512 U.S. 874, 886-87 (O'Connor, J., concurring); see also id. at 946-57 (Blackmun, J., dissenting); Chisom, 501 U.S. at 401-02. The Supreme Court has characterized the coverage of this language in Section 5 as having "the broadest possible scope," that should be considered "comprehensive,"

and "unlimited," United States v. Board of Comm'rs, 435 U.S. 122, 123, 133 (1978) and has applied it to a wide variety of offending practices.[10]

Significantly, the Supreme Court has recently held that apart from the identical coverage language in the sections, Section 2 has an even broader remedial scope than does Section 5. See Reno I 520 U.S. at 478-79 (holding that an election procedure has an "impermissible effect under § 5 only if it would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," whereas the "broader mandate" of Section 2 bars all election standards or practices that "result [] in a denial or abridgment of the right . . . to vote on account of race or color.") (citations omitted); see also Reno v. Bossier Parish School Board, ("Reno II") 528 U.S. 320 (2000). Since New York Election Law Section 5-106 prevents Appellant from voting because he is an imprisoned felon, there should be no room for dispute that the plain meaning of a "voting qualification or prerequisite to voting or standard, practice, or procedure" encompasses this state-imposed disqualification.

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[10] See, e.g., Pleasant Grove v. United States, 479 U.S. 462, 467 (1987) (annexation of land to enlarge municipal boundaries); NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 176-77 (1985) (candidate filing dates); McCain v. Lybrand, 465 U.S. 236, 282 n.17 (1984) (change from an appointed office to an elected one); Doughtery County Bd. of Ed. v. White, 439 U.S. 32, 34 (1978) (rule requiring employees to take a leave of absence from employment while they campaign for office); Bunton v. Patterson, 393 U.S. 544, 569-70 (1969) (change from an elected office to an appointed one).

2. The Ordinary Meaning Of Section 2 Effectuates The Intent Of The Voting Rights Act.

The plain meaning of unambiguous legislation is only inconclusive in the extraordinary situation where the "literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." Ron Pair Enters., 489 U.S. at 242 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)); see also Kruman, 184 F.3d at 400. The VRA was enacted with the "broad remedial purpose of ridding the country of racial discrimination in voting," and to that end, Section 2 should be interpreted to give it "the broadest possible scope in combatting racial discrimination." Chisom, 501 U.S. at 403 (citations and internal brackets omitted). Application of Section 2 to a state felon disenfranchisement law is not at odds with – but indeed, advances – the intentions of the drafters of the Voting Rights Act.

Nothing in the language or in the legislative history of Section 2 precludes its application to a state felon disenfranchisement law.[11] The bedrock

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[11] Judge Mahoney relied on the legislative history of Section 4 of the Act which indicates that state felon disenfranchisement laws were not intended to be included as a "good moral character" test under the statutory definition of "tests or devices" in that Section. Baker, 85 F.3d at 929. However, since Section 2 does not even contain the words "test," "device," or "good moral character," applying more broadly to any "voting qualification, prerequisite to voting, or standard, practice, or procedure", and because Sections 2 and 4 operate differently, the use of the legislative history of Section 4 to illuminate the meaning of Section 2 is misguided. See United States v. Uvalde Consol. Indep. Sch. Dist., 625 F.2d 547 &

(continued...)

principle of the plain meaning rule is that courts will "not resort to legislative history to cloud a statutory text that is clear." Ratzlaf v. United States, 510 U.S. 135, 147-148 (1994) see also Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001) (quoting same). Even if the Court were to conclude that Congress did not foresee that Section 2 would be applied to state felon disenfranchisement laws, that simply does not matter since the plain language of the statute still mandates its application to such laws. "[T]he fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" Pennsylvania Dept. of Corrections v. Yesky, 524 U.S. 206, 212 (1998) (quoting Sedima, S.P.L.R. v. Imrex Co., 473 U.S. 479, 499 (1985)) (holding that plain language "qualified individual" in the ADA includes state prisoners). Furthermore, "[a] statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be plain to anyone reading the Act that the statute encompasses the conduct at issue." Salinas, 522 U.S. at 60 (citation omitted); see also United States v. Glick, 142 F.3d 520, 524 (2d Cir. 1998) (same). Consistent with these principles, there is no question that the plain language of Section 2 includes state felon disenfranchisement laws.

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[11] (...continued)

n.4 (5th Cir. 1980). (recognizing that since the Voting Rights Act operates in different ways, the legislative history of different sections of the Act would not be helpful to understand other sections).

B. The District Court's Resort to The Plain Statement Rule Was Error.

In an effort to avoid the plain meaning of Section 2 of the VRA, the district court invoked the plain statement rule. The plain statement rule, as applied by the district court following Judge Mahoney in Baker, is actually a conflation of two independent, pre-existing strands of statutory interpretation. The first, articulated in NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), is the doctrine of constitutional doubt or avoidance. See, e.g., University of Great Falls v. NLRB, 278 F.3d 1335, 1340-41 (D.C. Cir. 2002); Galliano v. United States Postal Serv., 836 F.2d 1362, 1369 (D.C. Cir. 1988); see generally Miller v. French, 530 U.S. 327, 341 (2000); Yeskey, 524 U.S. at 212; Universal City Studios, Inc. v. Corley, 273 F.3d 429, 443-44 (2d Cir. 2001). This rule requires that, when "a statute is susceptible of two constructions," a court must "interpret [the] statute[] to avoid 'grave and doubtful constitutional questions.'" Yeskey, 524 U.S. at 212 (quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

The second doctrine is the "plain statement rule" formulated in Gregory v. Ashcroft: "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute'." 501 U.S. at 460-41

(quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)). As the Gregory court explained:

> Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States, Rice v. Santa Fe Page Elevator Corp., 331 U.S. 218, 230 (1947).... "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." United States v. Bass, 404 U.S. 336, 349 (1971); Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989).
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> *   *   *   *
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> This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.

501 U.S. at 461 (1991).[12]

Here, however, with no ambiguity in the statutory language and a clear expression that Congress was acting pursuant to its enforcement powers under the Fourteenth Amendment,[13] there can be no emasculation of Section 2 of the VRA because of some perceived unsettling of the federal balance of power.

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[12] The Gregory court also cited to the rule established by Pennhurst v. Halderman, 451 U.S. 1, 16 (1981), which requires that when it is unclear whether Congress was acting pursuant to its enforcement power under the Civil War Amendments, or some other power, the Court should assume that Congress had acted pursuant to the lesser power, since it would be less intrusive on state authority. Gregory, 501 U.S. at 469 (citing and quoting Pennhurst).

[13] As discussed below, in enacting the VRA, Congress expressly acted under its Fourteenth Amendment enforcement powers, and courts considering the VRA have universally acknowledged as much.

Section 2 of the VRA triggers neither the doctrine of constitutional avoidance nor Gregory's plain statement rule.

1. Neither The Plain Statement Rule Nor The Doctrine Of Constitutional Avoidance Should Be Used Because Section 2 Of The VRA Is Not Ambiguous.

The basic precept of the plain statement rule is that it only applies to ambiguous statutes. Salinas, 522 U.S. at 60; Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 206 (1991); Gregory, 501 U.S. at 470; accord Virginia v. Browner, 80 F.3d 869, 879 (4th Cir. 1996); Gately v. Massachusetts, 2 F.3d 1221, 1230 (1st Cir. 1993). Similarly, the doctrine of constitutional avoidance, "has no application in the absence of statutory ambiguity." United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 494 (2001); see also HUD v. Rucker, 122 S. Ct. 1230, 1235 (2002) (quoting Oakland Cannabis Buyers' Cooperative); Miller v. French, 530 U.S. 327, 341 (2000); Yeskey, 524 U.S. at 212.

There is no ambiguity in the text or the constitutional underpinnings of Section 2 of the VRA. The ordinary meaning of the plain language of Section 2 of the VRA encompasses state felon disenfranchisement statutes. See supra Part IIA. Likewise, there can be no doubt as to the source of Congressional authority for Section 2 of the VRA. Congress enacted the amendment to Section 2 of the Act in 1982 pursuant to its authority under the enforcement provisions of the

Fourteenth and Fifteenth Amendments. Baker, 85 F.3d at 926 (Mahoney, J.); see also Pennhurst, 451 U.S. at 16 (1981) (recognizing that in enacting the VRA, "Congress . . . expressly articulated its intent to legislate pursuant to § 5 [of the Fourteenth Amendment]"). Accordingly, neither the plain statement rule nor the constitutional avoidance rule license courts to exclude state felon disenfranchisement laws from the coverage of Section 2.

"The plain-statement requirement articulated in Gregory . . . does not warrant a departure from the statute's terms." Salinas, 522 U.S. at 60. A court "'cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question' . . . . Gregory itself held as much when it noted the principle it articulated did not apply when a statute was unambiguous." Id. (quoting Seminole Tribe, 517 U.S. at 57 n.9). Likewise, the doctrine of constitutional avoidance can only be applied where the statute can be reasonably construed to avoid the constitutional issue. See, e.g., Miller, 530 U.S. at 341 (2000) ("[T]he canon of constitutional doubt permits us to avoid such questions only where the saving construction is not 'plainly contrary to the intent of Congress'") (quoting Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)); Yeskey, 524 U.S. at 212; see also Miller, 530 U.S. at 341; Heckler v. Mathews, 465 U.S. 728, 741-42 (1984);

City of Rome, 446 U.S. at 173 (declining to apply Catholic Bishop's constitutional avoidance rule to the unambiguous language of Section 5 of the VRA).

Other than the district court and Judge Mahoney's Baker opinion which it cites, no court has ever required a plain statement of intent when determining whether a voting practice is covered by the Voting Rights Act.[14] Most significantly, the Supreme Court declined to apply the plain statement rule to Section 2 of the VRA in two cases, both of which were decided on the same day as Gregory, and, to date, it has not applied the plain statement methodology to any section of the Act in any context. Chisom, 501 U.S. 380; Houston Lawyers, 501 U.S. 419.[15]

2. VRA Section 2's Application To A State Felon Disenfranchisement Law Does Not Alter The Existing Balance Of Federal And State Powers.

The plain statement rule also may not be invoked unless enforcement of the statute as contemplated will alter the existing balance of state and federal

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[14] Mixon v. Ohio, 193 F.3d 389, 398 (6th Cir. 1999), is not to the contrary. In that case, the issue before the court was whether Section 2 of the VRA was clearly intended to abrogate a state's Eleventh Amendment immunity defense. In two sentences, the Court determined that it was.

[15] Justice Scalia dissented in both Chisom and Houston Lawyers. In Houston Lawyers, he indicated that his dissent in Chisom applied to both cases. 501 U.S. at 428. Justice Scalia stated "I am content to dispense [, as did the majority,] with the 'plain statement' rule in the present cases." Chisom, 501 U.S. at 412. That statement cites to his dissent in Union Gas Co., which rejects the plain statement methodology in favor of adherence to the plain meaning rule. 491 U.S. at 29-30.

powers. Gregory, 501 U.S. at 460-61; see also Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985). Application of Section 2 of the VRA to a state felon disenfranchisement law will not alter the balance between state and federal government, since it is well settled that state felon disenfranchisement laws can be invalidated under the Equal Protection Clause of the Fourteenth Amendment. See Hunter v. Underwood, 471 U.S. at 233 (invalidating state disenfranchisement statute enacted with racial discriminatory intent); McLaughlin v. City of Canton, 947 F. Supp. 954, 973-76 (S.D. Miss. 1995) (invalidating state disenfranchisement statute that had the effect of disenfranchising persons who committed certain misdemeanors without compelling state reason for classification); Hobson v. Pow, 434 F. Supp. 362, 366 (N.D. Ala. 1977) (invalidating state disenfranchisement statute that contained a gender-based classification without any rational reason). Since the amendment of Section 2 of the Voting Rights Act, plaintiffs such as those in Hunter and McLaughlin may bring the same claims under the VRA that they had brought previously under the Fourteenth and Fifteenth Amendments, but without the burden of proving discriminatory intent.

At least two courts have explicitly recognized that Gregory's plain statement rule simply has no application to Section 2 of the Act since it involves no novel implementation of Congress's enforcement powers under the Civil War

Amendments. See League of United Latin American Citizens v. Clements, 986 F.2d 728, 759 (5th Cir. 1993) ("The concerns underlying the Court's application of the plain statement rule in Gregory do not, in our view, exist in this case.") rev'd on other grounds, 999 F.2d 831 (5th Cir. 1993) (en banc); Farrakhan, 987 F. Supp. at 1309 ("[T]he 'plain statement' rule is simply inapplicable in the context of the VRA."); see also Chisom, 501 U.S. at 412 (Scalia, J., dissenting).

Accordingly, since the effect of the Amendment is nothing so weighty as to alter the "usual constitutional balance between the States and the Federal Government," see Will, 491 U.S. at 65, it was error for the district court to invoke the plain statement rule in this case.

C. Even If The Plain Statement Rule Were To Be Employed Section 2 Of The VRA Meets Its Requirements.

Even if this Court were to apply the plain statement rule to the Voting Rights Act, it would be unquestionably satisfied. The purpose of the plain statement rule is to determine whether Congress clearly intended an ambiguous statute to apply in a fashion that might raise troublesome constitutional questions. See, e.g., Gregory, 501 U.S. at 460-61. Under such circumstances, absent a clear statement of congressional intent, the plain statement rule allows a court to interpret the statute in a way that avoids the constitutional issue. Id. at 470. However, if there is a clear statement of congressional intent, the court may not depend on the plain statement rule to avoid the conflict; rather, it must proceed to

the next step of the analysis to determine whether the statute is constitutional. See, e.g., Board of Trustees of the Univ. of Al. v. Garrett, 531 U.S. 356, 363-64, 374 (2001) (holding that Congress had clearly intended to abrogate the State's 11th Amendment immunity in enacting certain provisions of the Americans with Disabilities Act, but had exceeded its authority in doing so.).

Here, it is difficult to imagine how Congress could have expressed its intent more clearly. Under Section 2, an action may be brought challenging any "voting qualification or prerequisite to voting or standard, practice, or procedure," imposed by "any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color". 42 U.S.C. § 1973(a). Congress clearly intended Section 2 to apply to states and to apply to voting and election practices that result in discrimination on account of race. See League of United Latin American Citizens v. Clements, 914 F.2d 620, 642 (5th Cir. 1990) (Higginbotham, J., concurring) ("Congress has clearly expressed the Act's application to the states, and has clearly expressed its intent that violations of the Act be determined by a results test rather than an intent standard. By these actions, the Act, with all its intrusive effect, has been made to apply to the states."), rev'd on other grounds sub nom., Houston Lawyers, 501 U.S. 419 (1991); see also S. Rep. No. 97-417, at 28 (1982) ("[T]he specific intent of this [1982] amendment is that the plaintiffs may choose to

establish discriminatory results without proving any kind of discriminatory purpose.") (emphasis added).

The Court should reject out of hand any argument that Section 2 of the VRA is not clearly intended to apply to state felon disenfranchisement laws because there is no mention of such laws in the text or legislative history of the Section. This argument, if accepted, would require every statute of general applicability to list every conceivable act to which it could apply. Such a requirement – that Section 2 enumerate every conceivable voting qualification or prerequisite to voting or standard, practice, or procedure before it will be given its intended effect – was explicitly rejected by Gregory. See Gregory at 467 ("This does not mean that the Act must mention judges explicitly."); see also United States v. Cueto, 151 F.3d 620, 635 (7th Cir. 1998) (holding that the plain statement rule does not require Congress to "specifically articulate[] in the statute" every type of agreement a statute applies to); Amos v. Maryland Dep't of Pub. Safety and Correctional Servs., 126 F.3d 589, 614 (4th Cir. 1997) (Murnaghan, J., dissenting) (rejecting holding that the plain statement rule requires the statute to "separately list[] each state agency that the statutes apply to in the statutory text."), abrogated by Yeskey, 524 U.S. 206 (1998).

Section 2 prohibits any state voting restriction that results in denial or abridgment of the right to vote on account of race or color. See cases cited supra at

19-20 (applying Section 2 to non-enumerated voting and election practices). The fact that neither the statutory text nor the legislative history of the Act includes a laundry list of condemned voting practices hardly means that Congress has not spoken with requisite clarity.

III.

CONGRESS HAS THE POWER TO ENFORCE THE CIVIL WAR AMENDMENTS BY PROHIBITING STATES FROM DISENFRANCHISING FELONS ON THE BASIS OF RACE.

As further justification for ignoring the plain meaning of Section 2 of the VRA, the district court held that "the application of the 'results test' to a state disenfranchisement provision would pose a 'serious constitutional question concerning the scope of Congress' power to enforce the Fourteenth and Fifteenth Amendments,'" (quoting Baker, 85 F.3d at 930), and would "seemingly work[] to undermine the constitutional balance that exists between federal and state governments." (JA 69). However, any lingering concerns about the constitutionality of the results test as applied to state disenfranchisement laws have been laid to rest by decisions of the Supreme Court that resolve this question in favor of this exercise of Congressional power.

A. Section 2 Of The Voting Rights Act Is Constitutional As Applied To A State Felon Disenfranchisement Statute.

Congress acts at the peak of its powers when legislating to remedy racial discrimination in voting since eradication of discrimination based on race lies at the heart of the Civil War Amendments. See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986); Hunter v. Erikson, 393 U.S. 385, 391-92 (1969); In re Employment Discrimination Litig. Against Alabama, 198 F.3d 1305, 1323 (11th Cir. 1999) ("There can be little doubt that the core motivation animating the Fourteenth Amendment's Equal Protection Clause was a concern for protecting the rights of racial minorities subject to historical discrimination, and Congress is acting most comfortably under the Amendment when it is acting to cure racial prejudice."). It is a fundamental principle that as against the reserved powers of the states, "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." South Carolina v. Katzenbach, 383 U.S., 301, 324 (1966); see Katzenbach v. Morgan, 384 U.S. 641, 650-51 n.9 (1966).

When enforcing the Civil War Amendments, Congress has the power not only to prohibit specific discriminatory practices but also to pass any "appropriate legislation" to further the objectives of the Amendments. Katzenbach v. Morgan, 384 U.S. at 650-51 (citations omitted); see also City of Rome, 446 U.S. at 174-75; South Carolina v. Katzenbach, 383 U.S. at 326-27. Accordingly,

Congress may "prohibit voting practices that have only a discriminatory effect" even if they do not directly violate the Civil War Amendments. City of Rome, 446 U.S. at 175-77; see also Reno I, 520 U.S. at 482 ("The Voting Rights Act is the best example of Congress' power to enact implementing legislation that goes beyond the direct prohibitions of the Constitution itself.") (quoting S. Rep. No. 97-417, at 39 (1982)).

Congress had the power to enact the "results test" of Section 2 even though the Section includes within its prohibition conduct that does not violate the Fourteenth Amendment. As Justice O'Connor noted in an effort to provide lower courts with "more definite guidance as they toil with the twin demands of the Fourteenth Amendment and the VRA," the Supreme Court has assumed the constitutionality of Section 2 of the VRA, and "lower courts have unanimously affirmed its constitutionality." Bush v. Vera, 517 U.S. 952, 990-92 (1996) (O'Connor, J., concurring). Justice O'Connor therefore instructed that "the § 2 results test be accepted and applied unless and until current lower court precedent is reversed and it is held unconstitutional." Id. at 992.

With respect to the role of amended Section 2 of the Act, Justice O'Connor succinctly explained:

> The results test of § 2 is an important part of the apparatus chosen by Congress to effectuate this Nation's commitment "to confront its conscience and fulfill the guarantee of the Constitution" with respect to equality in voting. Congress considered the test "necessary and

> appropriate to ensure full protection of the Fourteenth and Fifteenth Amendment rights." It believed that without the results test, nothing could be done about "overwhelming evidence of unequal access to the electoral system," or about "voting practices and procedures [that] perpetuate the effects of past discrimination."

Id. at 992 (quoting S. Rep. No. 97-417, at 4, 27, 26, 40, 33 (1982)) (internal citations omitted). Therefore, unless and until the Supreme Court holds otherwise, the "results test" of the VRA should be accepted as a valid exercise of Congressional power.[16]

Despite these precedents, the district court, following Judge Mahoney's opinion in Baker, suggested that application of Section 2's results test to the New York felon disenfranchisement law would exceed Congress's constitutional authority. In relying upon the Baker opinion, the district court also ignored subsequent Supreme Court Fourteenth Amendment jurisprudence, in

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[16] Every court to reach the issue has upheld the constitutionality of Section 2 of the VRA. See Mixon v. Ohio, 193 F.3d 389, 397-99 (6th Cir. 1999); Marengo County Comm'n, 731 F.2d at 1556-1563; Jones v. Lubbock, 727 F.2d 364, 372-375 (5th Cir. 1984); Farrakhan, 987 F. Supp. at 1309-11 (as applied to a felon disenfranchisement law); Shaw v. Hunt, 861 F. Supp. 408, 438 (E.D.N.C. 1994), rev'd on other grounds 517 U.S. 899 (1996); Prosser v. Elections Bd., 793 F. Supp. 859, 869 (W.D. Wis. 1992); Wesley v. Collins, 605 F. Supp. 802, 808 (M.D. Tenn. 1985) (as applied to a felon disenfranchisement law), aff'd, 791 F.2d 1255 (6th Cir. 1986); Jordan v. Winter, 604 F. Supp. 807, 811 (N.D. Miss. 1984), aff'd sub nom., Allain v. Brooks, 469 U.S. 1002 (1984); Sierra v. El Paso Independent School Dist., 591 F. Supp. 802, 806 (W.D. Tex. 1984); Major v. Treen, 574 F. Supp. 325, 342-349 (E.D. La. 1983).

particular, the "congruence and proportionality" test. See Board of Trustees of Univ. of Al. v. Garrett, 531 U.S. 356 (2001); Kimel v. Florida Bd. of Reg., 528 U.S. 62 (2000); Florida Prepaid Postsecondary Ed. Exp. Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997). The Court explained the test in Boerne:

> While preventative rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.

Id. at 530 (citing South Carolina v. Katzenbach, 383 U.S. at 308, 334).

Using this framework, the Court has struck down provisions of the Religious Freedom Restoration Act ("RFRA"), the Patent Remedy Act, the Age Discrimination in Employment Act ("ADEA"), and the Americans with Disabilities Act ("ADA") as invalid exercises of Congressional power. See Boerne, 521 U.S. at 536; Florida Prepaid, 527 U.S. at 645; Kimel, 528 U.S. at 83-83; Garrett, 531 U.S. at 373-74. In each instance, the Court found that Congress had exceeded its authority by invading an area preserved to the States without any findings of unconstitutional conduct by the States in those areas. See Boerne, 521 U.S. at 533-34; Florida Prepaid, 527 U.S. at 645; Kimel 528 U.S. at 88-89; Garrett, 531 U.S. at 373. However, in each of these recent decisions, the Court distinguished the Voting Rights Act as legislation that satisfies the "congruence

and proportionality" test, because unlike discrimination based on religion, disability, age, or patent property rights, there was an undisputed record of racial discrimination confronting Congress in the area of voting rights. See Boerne, 521 U.S. at 526, 530 (distinguishing RFRA from VRA); Florida Prepaid, 527 U.S. at 640 (distinguishing Patent Remedy Act from VRA); Kimel, 528 U.S. at 83 (distinguishing age classifications from race classifications); Garrett, 531 U.S. at 373 (distinguishing ADA from VRA).

1. Congruence.

To be congruent, remedial legislation must be must be responsive to, or designed to prevent, unconstitutional behavior. E.g., Boerne, 521 U.S. at 532. The VRA was Congress's response to a long history of racial discrimination in the electoral process. Id.; South Carolina v. Katzenbach, 383 U.S. at 308 ("Before enacting the [VRA], Congress explored with great care the problem of racial discrimination in voting."); see also Garrett, 531 U.S. at 373 ("In [the VRA], Congress documented a marked pattern of unconstitutional action by the States."); Florida Prepaid, 527 U.S. at 640 (contrasting the legislative history of the Patent Protection Act with the "undisputed record of racial discrimination confronting Congress in the voting rights cases"). Just as significantly, there is a substantial and judicially acknowledged historical record that criminal disenfranchisement laws have been enacted and enforced for racially discriminatory purposes and with

racially discriminatory results. In Hunter, the Supreme Court unanimously found that a criminal disenfranchisement statute "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. Similarly, in McLaughlin, which invalidated a Mississippi criminal disenfranchisement law on Equal Protection grounds, the court noted that there was substantial evidence that the law had been enacted "with the intent of disenfranchising black voters."[17] 947 F. Supp. at 977; see also Williams v. Mississippi, 170 U.S. 213, 222 (1898) (acknowledging racist intent of criminal disenfranchisement act); Cotton v. Fordice, 157 F.3d 388, 391 (5th Cir. 1998); Hunter v. Underwood, 730 F.2d 614, 619 (11th Cir. 1984), aff'd 471 U.S. 222 (1985) (commenting on State legislators' attempts to subvert the guarantees of

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[17] The McLaughlin court cited a Mississippi Supreme Court case which discussed the intent of the drafters of the Mississippi criminal disenfranchisement statute, Ratliff v. Beale, 20 So. 865 (Miss. 1896):

> [T]he convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit . . . and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone.
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> Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications, while robbery and murder and other crimes in which violence was the principal ingredient were not.

Id. at 868

the Civil War Amendments without directly provoking a legal challenge by resorting to, among other devices, "disqualification for conviction of certain crimes") (quoting S. Hackney, Populism to Progressivism in Alabama 192 (1969)); see generally Andrew L. Shapiro, Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy, 103 Yale L.J. 537 (1993).[18]

2. Proportionality.

The propriety of a remedial measure is "considered in light of the evil presented". See, e.g., Kimel 528 U.S. at 89 (quoting Boerne, 521 U.S. at 530-31). The Section 2 "results test" is an appropriate remedial measure because it was enacted to combat a most severe and insidious evil. The Voting Rights Act was intended "not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination." Gingles, 478 U.S. at 44 n.9. Section 2 was specifically aimed at state laws that, although facially neutral, effectively thwarted the obligations

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[18] As the foregoing authorities make clear, in at least some states, felon disenfranchisement statutes were enacted to further racially discriminatory purposes. While some states' felon disenfranchisement laws may not have been enacted with discriminatory intent, that does not render the application of Section 2 to New York's felon disenfranchisement law unconstitutional. Like the ban on literacy tests, Congress can permissibly legislate to counter racial discrimination in the operation and effect of felon disenfranchisement laws – and all other voting qualifications – without specific geographic findings that such statutes violate the Fourteenth and Fifteenth Amendments. See Oregon v. Mitchell, 400 U.S. at 284 (Stewart, J.) accord Baker, 85 F.3d at 937 (Feinberg, J.).

imposed by the Act. See, e.g., Bush v. Vera, 517 U.S. 992; Gingles, 478 U.S. at 44. As held by numerous courts, Section 2 of the VRA is an appropriate remedial measure to target facially neutral state laws that produce racially discriminatory results. E.g. Farrakhan, 987 F. Supp. at 1310-11 (holding that, under Boerne, application of Section 2 of the VRA to a state felon disenfranchisement statute did not constitute an impermissible exercise of congressional power); Wesley, 605 F. Supp. at 808 (holding that "Section 2 is a constitutional exercise of congressional authority" as applied to a state felon disenfranchisement statute); see also cases cited supra n.16. Allowing a plaintiff to challenge a state felon disenfranchisement statute under the Voting Rights Act fulfills the purpose of the Act and its 1982 Amendment, and is well within the broad scope of Congressional power to remedy racial discrimination in voting.

B. The "Other Crime" Provision Of The Fourteenth Amendment Does Not Limit Congress's Power To Bar States From Disenfranchising Felons On The Basis Of Race.

As previously noted, Appellant does not claim that state felon disenfranchisement laws are per se unconstitutional; that contention was rejected by Richardson v. Ramirez, 418 U.S. 24 (1974). Accord Shepherd, 575 F.2d at 1112; see also Green v. Board of Elections, 380 F.2d 445, 451-52 (2d Cir. 1967). In Richardson, which involved neither claims of racial discrimination nor the Voting Rights Act, the Court held that Section 2 of the Fourteenth Amendment

provides a constitutional sanction for state felon disenfranchisement laws. Richardson, however, did not address the question of whether Section 2 of the Fourteenth Amendment proscribes Congress from using its enforcement powers under the Fourteenth and Fifteenth Amendments to prohibit racially discriminatory felon disenfranchisement. That question was answered by Hunter, 471 U.S. at 228-33, in which the Court held that no category of people, including felons, may be discriminated against on account of their race.

In Hunter, a unanimous Supreme Court held that an Alabama criminal disenfranchisement statute, that was "on its face . . . racially neutral, applying equally to anyone convicted of one of the enumerated crimes . . ." violated the Equal Protection Clause of the Fourteenth Amendment because it disproportionately disenfranchised blacks and had been enacted with racially discriminatory intent. 471 U.S. at 227, 228-33 (Rehnquist, J.). In defense of the statute, the State contended that Richardson and Section 2 of the Fourteenth Amendment exempted the Alabama law from the proscriptions of the Equal Protection Clause. The Hunter court made short work of that argument:

> The single remaining question is whether § 182 [Alabama's criminal disenfranchisement statute] is excepted from the operation of the Equal Protection Clause of § 1 of the Fourteenth Amendment by the "other crime" provision of § 2 of that Amendment. Without again considering the implicit authorization of § 2 to deny the vote to citizens "for participation in rebellion, or other crime," see Richardson v. Ramirez, 418 U.S. 24, 94 S. Ct. 2655, 41 L. Ed. 2d 551 (1974), we are confident that § 2 was not designed to permit the purposeful racial

> discrimination attending the enactment and operation of § 182 which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in Richardson v. Ramirez, supra, suggests the contrary.

Hunter, 471 U.S. at 233. Hunter makes two things clear: (1) state felon disenfranchisement laws which were enacted with racially discriminatory intent and have a discriminatory impact violate the Equal Protection Clause, and (2) Congress's power to apply the Equal Protection Clause to state felon disenfranchisement laws is therefore not limited by Section 2 of the Fourteenth Amendment.

Since the "other crime" provision of the Fourteenth Amendment did not limit the application of the Equal Protection Clause to a state criminal disenfranchisement law in Hunter, it cannot now be a barrier to a plaintiff challenging a state criminal disenfranchisement law under Section 2 of the VRA. See Farrakhan, 987 F. Supp. at 1310 (holding that, after Hunter, "[i]t necessarily follows, then, that Congress also has the power to protect against discriminatory uses of felon disenfranchisement statutes through the VRA."). Prior to its amendment, Section 2 of the VRA was "coextensive" with the coverage provided by the Fourteenth and Fifteenth Amendments. See Chisom, 501 U.S. at 392. The Supreme Court has recognized that the purpose of amending the Act in 1982 was to broaden the causes of action available to plaintiffs by providing them with a lower burden of proof for Section 2 claims than is required for Constitutional

claims. See, e.g., Reno I, 520 U.S. at 482. ("When Congress amended § 2 in 1982, it clearly expressed its desire that § 2 not have an intent component."); Chisom, 501 U.S. at 394 n.21 ("The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose . . . . [p]laintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice . . . results in minorities being denied equal access to the political process.").

If the Court were to hold that Section 2 of the Fourteenth Amendment did not permit plaintiffs to challenge state felon disenfranchisement laws under the Voting Rights Act, it would thwart the purpose of the 1982 Amendment to the Act, and lead to anomalous results. Plaintiffs, such as those in Hunter, who could prove a constitutional violation under the Fourteenth or Fifteenth Amendments, would be inexplicably barred from proceeding under the Voting Rights Act to remedy the same harm. See Baker, 85 F.3d at 940 (Feinberg, J.) (noting that Hunter plaintiffs could have brought a claim under the VRA); see generally McLaughlin v. City of Canton, 947 F. Supp. 954, 976 (S.D. Miss. 1995) (striking portion of Mississippi criminal disenfranchisement statute as violative of Equal Protection Clause of Fourteenth Amendment). More importantly, the consequence of such a holding would be that plaintiffs, such as those in Hunter and McLaughlin who challenge a state felon disenfranchisement law, would be without a remedy if they could not

make the difficult, sometimes impossible, showing of discriminatory intent. Hunter, 471 U.S. at 228 ("Proving the motivation behind official action is often a problematic undertaking."); see Gingles, 478 U.S. at 44 ("The intent test was repudiated [because] "it places an 'inordinately difficult' burden of proof on plaintiffs . . . .'" (quoting S. Rep. 97-417, at 36 (1982)); see also Chisom, 501 U.S. at 383-84 (Congress amended Section 2 "to make clear that certain practices and procedures that result in the denial or abridgement of the right to vote are forbidden even though the absence of proof of discriminatory intent protects them from constitutional challenge."). Interpreting the Fourteenth Amendment in this fashion would afford plaintiffs who attempt to challenge felon disenfranchisement statutes less protection under the Voting Rights Act than they have under the Constitution. Obviously, this is not what Congress intended when it amended the Act in 1982. Application of Section 2 of the Voting Rights Act to state felon disenfranchisement statutes is consistent with the entirety of the Fourteenth Amendment, the purpose of the 1982 Amendment to the Act, and Supreme Court precedent.

IV.

APPELLANT'S ORIGINAL PRO SE COMPLAINT SHOULD NOT BE DISMISSED ON THE RECORD BEFORE THE COURT.

Although Appellant expects the State of New York to seek an affirmance of the district court's grant of summary judgment on alternate grounds

in the face of the inevitable finding that the Voting Rights Act applies to New York's felon disenfranchisement statute, an affirmance on any alternative ground would be unwarranted. First, the district court dismissed Appellant's claims under the Act solely because it believed that he had failed to state a legally cognizable claim. (JA 69) ("[T]he VRA does not limit New York's authority to disenfranchise felons . . . [b]ecause this Court finds the VRA inapplicable to Section 5-106, a discussion of the merits of this portion of plaintiff's claim is unnecessary."). Second, the Defendants offered no evidence in support of their motion for summary judgment to refute Appellant's claims of race-based denial and dilution under the Voting Rights Act, and there is nothing in the record before this Court to rebut the State's own findings of racially disparate sentencing in the criminal justice system. See, e.g., New York State Judicial Commission on Minorities, Five Year Report at 34 ("[R]ampant racism still infects our criminal justice system . . . .").

A. Appellant's Complaint May Not Be Dismissed For Pleading Defects Without Giving Him An Opportunity To Replead.

The district court's tacit conversion of Defendants' summary judgment motion into a motion to dismiss was procedurally proper. See Schwartz v. Compagnie General Transatlantique, 405 F. 2d 270, 273 (2d Cir. 1968); Katz v. Molic, 128 F.R.D. 35, 38 (S.D.N.Y. 1989) (holding conversion of summary judgment motion into motion to dismiss permissible without notice to parties);

accord North Arkansas Med. Ctr. v. Barrett, 962 F.2d 780, 784 (8th Cir. 1992) ("[A] summary judgment motion filed solely on the basis of pleadings is the functional equivalent of a dismissal motion"); Sarter v. Mays, 491 F.2d 675, 676 n.1 (5th Cir. 1974) (presuming dismissal to have been made under Rule 12(b)(6) because there were no depositions, interrogatories, or affidavits considered in summary judgment determination). Once such a conversion occurs, however, the court must construe a plaintiff's complaint liberally in accordance with the motion to dismiss standard, accepting factual allegations as true and declining to dismiss unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. See Blum v. Morgan Guaranty Trust Co., 709 F.2d 1463, 1466 (11th Cir. 1983); Franklin & Joseph v. Cont. Health Indus., 664 F. Supp. 719, 720 (S.D.N.Y. 1987); see generally Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

The liberal nature of the foregoing pleading requirements assumes even greater significance here, because the complaint was drafted by a pro se litigant. It is well settled that the allegations of a pro se plaintiff's complaint are held to a less stringent standard than formal pleadings drafted by counsel. Hughes v. Rowe, 449 U.S. 5, 9 (1980) (citing Haines v. Kerner, 404 U.S. 519, 520 (1972)); Lerman v. Board of Elecs., 232 F.3d 135, 140 (2d Cir. 2000). Such pleadings

should be read liberally and interpreted "to raise the strongest arguments that they suggest." Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994).

Appellant's pro se Complaint adequately states his claims under the VRA. See supra Part I. However, if this Court determines that Appellant has not sufficiently pleaded his Section 2 claims, the Court should remand the case with instructions for the district court to employ a more flexible standard in reviewing this pro se plaintiff's complaint than if it were submitted by counsel, see Platsky v. CIA, 953 F.2d 26, 28 (2d Cir. 1991); Robles v. T.A. Coughlin, 725 F.2d 12, 15 (2d Cir. 1983); Katz, 128 F.R.D. at 38-39; Frasier v. HHS, 779 F. Supp. 213, 217 (N.D.N.Y. 1991), and not to dismiss without affording Appellant an opportunity to replead.[19] Bobal v. Rensselaer Polytechnic Inst., 916 F.2d 759, 763 (2d Cir. 1990) ("[A] pro se plaintiff who brings a civil rights action should be fairly freely afforded an opportunity to amend . . . .") (internal quotations omitted); see also Platsky, 953 F.2d at 28 (holding that a pro se complaint should not be dismissed without granting leave to replead); Tufano v. One Toms Pt. Lane Corp., 64 F. Supp. 2d 119, 129 (E.D.N.Y. 1999) (same).

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[19] Leave to replead is especially justified in this case considering that Appellant filed his Complaint in September 1994, before this Court's decision in Baker and much of the significant jurisprudence cited herein.

B. Appellant's Complaint May Not Be Dismissed Because Defendants Offered No Evidence to Refute Appellant's Claims Under the Voting Rights Act.

An affirmance would be particularly unwarranted here in light of the record before the Court. In their motion for summary judgment, Defendants did not offer a wisp of evidence to contradict Appellant's allegations of voting rights violations. Specifically, Defendants did not address paragraph 18 of the Complaint, wherein Appellant offered statistics concerning the rate of incarceration and disenfranchisement of African Americans and Hispanics in New York. (JA 13). Even in the face of Appellant's allegations and the publicly available statistics cited in this brief (of which the Court may take judicial notice, see supra n. 3), Defendants have offered nothing. Thus, Appellant's allegations and evidence of vote denial and dilution stand unrebutted. Accordingly, since Defendants have not met their summary judgment burden, see, e.g., Adickes v. S.H. Kress & Co., 398 U.S. 144, 160 (1970), the district court's decision cannot be affirmed on the record before this Court.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and remand this case for further proceedings.

Respectfully submitted,

____

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Jalil Abdul Muntaqim, a/k/a Anthony Bottom,	:	Docket No. 01-7260
Plaintiff – Appellant,	:	
v.	:	
Phillip Coombe, Anthony Annucci, Louis F. Mann,	:	
Defendants – Appellees.	:	

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CERTIFICATE OF COMPLIANCE

I, JONATHAN W. RAUCHWAY, hereby certify that the foregoing brief complies with Federal Rule of Appellate Procedure 32(a)(7)(b), as it contains 12,550 words.

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Jonathan W. Rauchway

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