Nos. 01-7260, 04-3886

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JALIL ABDUL MUNTAQIM, a/k/a ANTHONY BOTTOM, JOSEPH HAYDEN, on behalf of himself and all individuals similarly situated; LUMUMBA AKINWOLE-BANDELLE, WILSON ANDINO, GINA ARIAS, WANDA BEST-DEVEAUX, CARLOS BRISTOL, AUGUSTINE CARMONA, DAVID GALARZA, KIMALEE GARNER, MARK GRAHAM, KERAN HOLMES, III, CHAUJUANTHEYIA LOCHARD, STEVEN MANGUAL, JAMEL MASSEY, STEPHEN RAMON, NILDA RIVERA, MARIO ROMERO, JESSICA SANCLEMENTE, PAUL SATTERFIELD and BARBARA SCOTT,

Plaintiffs-Appellants

(*For Continuation of Caption See Inside Cover*)

ON CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN DISTRICT OF NEW YORK AND THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*
IN SUPPORT OF DEFENDANTS-APPELLEES

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v.

PHILLIP COOMBE; ANTHONY ANNUCCI, LOUIS F. MANN, GEORGE PATAKI, Governor of the State of New York; CAROL BERMAN, Chairperson, New York Board of Elections; GLENN S. GOORD, Commissioner of New York State Department of Correctional Services,

Defendants-Appellees

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MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 01-7260

JALIL MUNTAQIM, *et al.*,

Plaintiffs-Appellants

v.

PHILLIP COOMBE, *et al.*,

Defendants-Appellees

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

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEE AND URGING AFFIRMANCE

INTEREST OF THE UNITED STATES

The United States submits this brief as an *amicus curiae* pursuant to this Court's request. Section 2 of the Voting Rights Act prohibits the use of voting qualifications that result in the denial of the right to vote on account of race or color, see 42 U.S.C. 1973(a), and the Attorney General is specifically charged with enforcing this provision, see 42 U.S.C. 1973j(d). As the governmental entity responsible for enforcing Section 2, the Department of Justice has a significant

interest in providing the Court with its views on the applicability of Section 2 to this lawsuit, and those views are entitled to considerable deference. See *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178-179 (1985) (recognizing that "the construction placed upon the [Voting Rights] Act by the Attorney General * * * is entitled to considerable deference").

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. 1331 and 28 U.S.C. 1343. The district court entered final judgment on January 25, 2001, and appellants filed a timely notice of appeal on February 20, 2001. This Court has appellate jurisdiction pursuant to 28 U.S.C. 1291 because this is an appeal from a final judgment disposing of all claims against all parties.

STATEMENT OF THE ISSUE

Whether Section 2 of the Voting Rights Act of 1965 (VRA) applies to New York Election Law § 5-106(2), which prohibits presently incarcerated felons from voting?

STATEMENT OF THE CASE

Named appellant Jalil Muntaqim is a black inmate incarcerated for life in a New York penal institution. On behalf of himself and other similarly situated

inmates, appellant sued various New York officials contending that § 5-106(2) of New York's Election Code (§ 5-106) unlawfully denies him the right to vote in violation of Section 2 of the VRA. Section 5-106 provides in relevant part:

> No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole. The governor, however, may attach as a condition to any such pardon a provision that any such person shall not have the right of suffrage until it shall have been separately restored to him.

N.Y. Elec. Law § 5-106(2) (McKinney 1998). Muntaqim alleges that § 5-106 violates Section 2 of the VRA because of the race-based disparity in New York's felon disenfranchisement rates. Specifically, Muntaqim contends that 83% of the individuals in New York convicted of felonies are black and Hispanic.

The district court granted summary judgment in favor of all appellees on all claims. Respecting the Section 2 claim, the district court ruled that the VRA did not apply to felon disenfranchisement laws. According to the district court, not only did the Constitution and legislative history of the VRA compel this conclusion, but equally, "[t]he application of the VRA to § 5-106 seemingly works to undermine the constitutional balance that exists between federal and state

governments. Consequently, an 'unmistakably clear' statement by Congress stating [its] intention to alter this balance must be provided." (Dist. Ct. Or. at 12). Because no unmistakably clear statement was forthcoming, the district court held that the VRA did not apply to § 5-106.

A panel of this court affirmed the conclusion that Section 2 of the VRA does not apply to felon disenfranchisement laws in general or § 5-106 in particular. See *Muntaqim* v. *Coombe*, 366 F.3d 102 (2d Cir. 2004). The panel held that given "the absence of a clear statement from Congress, [Section 2 of the VRA] should not be applied to state felon disenfranchisement statutes * * * which are expressly sanctioned in the text of the Constitution and have been widely used as a penological tool since before the Civil War." *Id.* at 104. Thereafter, an initial poll to rehear the case en banc failed, see *Muntaqim* v. *Coombe*, 385 F.3d 793 (2d Cir.), and the Supreme Court denied Muntaqim's petition for *certiorari*, see *Muntaqim* v. *Coombe*, 125 S. Ct. 480 (2004). On December 29, 2004, however, this Court entered an order voting to rehear the appeal en banc. See *Muntaqim* v. *Coombe*, 396 F.3d 95 (2d Cir. 2004).

SUMMARY OF ARGUMENT

New York, along with forty-seven other states, prohibits presently incarcerated felons from voting. Muntaqim contends that this New York law

disparately impacts black voters due to the race-based disparities in felony conviction rates in New York. Importantly, Muntaqim does not contend that this disparity in felony conviction rates is the result of historical or present intentional discrimination. Similarly, Muntaqim does not contend that New York's law was enacted with an individual or intentionally discriminatory purpose. Rather, Muntaqim contends that the mere existence of this disparity in felony conviction rates alone renders New York's franchise restriction unlawful.

The United States addresses the following issue: Whether Section 2 of the VRA applies to § 5-106(2), which prohibits presently incarcerated felons from voting. For the reasons briefly summarized here, Section 2 of the VRA should not be construed as applying to such laws.

First, felons are not within the class of voters covered by Section 2 of the VRA. Section 2 protects "the right to vote" from being denied or abridged on account of race or color. While the Constitution generally guarantees the "right to vote" to citizens of the United States, regardless of their race, who have obtained the age of 18, the Constitution does not guarantee that right to convicted felons. Indeed, Section 2 of the Fourteenth Amendment expressly contemplates state felon disenfranchisement laws. Consequently, felons have no substantive "right to vote" except as granted under state law, and the VRA simply does not apply to

racially neutral laws which prohibit such individuals from voting.

A contrary holding would raise serious constitutional questions. Congress's power to enact the VRA requires proportionality and congruence between the injury to be prevented or remedied and the means adopted as demonstrated in the legislative record, yet Congress has established no record and made no findings that laws such as New York's are discriminatory. Additionally, to construe the Act in such a manner as to invalidate the laws of New York and the 47 other States that impose a comparable legal injunction, which is expressly contemplated by the Fourteenth Amendment, would raise a constitutional issue that this Court should avoid. In analyzing the applicability of Section 2 to § 5-106, this Court must consider the historical context of New York's law in conjunction with the Constitution, with any disruption in the balance of state-federal relations that Muntaqim's construction would create and with whether Congress plainly intended to cause such a disruption.

Finally, evidence of a statistical disparity in an area external to voting, *e.g.*, a disparity in felony conviction rates, alone is insufficient to establish a "result[ing]" denial or abridgement of the right to vote "on account of race or color" as Section 2 explicitly requires. Rather, such disparity must bear some relationship to a history of intentional race discrimination of the sort contemplated

by the VRA "Senate Factors." These factors make clear that Section 2 does not apply to New York's restriction on felon voting.

ARGUMENT

The laws of the State of New York prohibit from voting any person who has been convicted of a felony "unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole." N.Y. Elec. Law § 5-106(2) (McKinney 1998). Thus, presently incarcerated felons may not participate in the elective franchise. This restriction, Muntaqim alleges, violates Section 2 of the VRA. The United States disagrees.

I

SECTION 2 OF THE VOTING RIGHTS ACT DOES NOT APPLY TO NEW YORK ELECTION LAW § 5-106(2)

A. Because The Constitution Does Not Require That Felons Be Given The Right To Vote, They Are Not Within The Class Of Voters Covered By Section 2 Of The Voting Rights Act

Section 2(a) of the VRA provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results *in a denial or abridgement of the right of any citizen of the United States to vote* on account

of race or color." 42 U.S.C. 1973(a) (emphasis added). Thus, Section 2 protects "the right to vote" from being denied or abridged on account of race or color. Given that Congress enacted the VRA pursuant to its authority to enforce the rights guaranteed by the Constitution, see Pub. L. No. 89-110 (preamble), it is necessary to look to the substantive provisions of that document to understand what the VRA means by "the right to vote."

Although the Constitution generally guarantees the "right to vote" to male and female citizens of the United States, regardless of race, who are 18 or older, see U.S. Const. Amends. XV (race); XIX (sex); XXVI (age), the Constitution, by its own terms, does not guarantee that right to convicted felons, see U.S. Const. Amend. XIV, § 2. It is well settled that Section 2 of the Fourteenth Amendment expressly contemplated and endorsed state felon disenfranchisement laws. See *Richardson* v. *Ramirez*, 418 U.S. 24, 43 (1974). That provision provides, in relevant part:

> when the right to vote * * * is * * * 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 States.

U.S. Const. Amend. XIV (emphasis added). In upholding California's felon disenfranchisement law, the *Richardson* Court concluded "that those who framed

and adopted the Fourteenth Amendment could not have intended to prohibit outright in [§] 1 of that Amendment that [i.e., felon disenfranchisement] which was expressly exempted from the lesser sanction of reduced representation imposed by [§] 2 of the Amendment." *Richardson*, 418 U.S. at 43.

In so holding, the Court discussed the history surrounding the adoption of Section 2 of the Fourteenth Amendment in considerable detail. See *Richardson*, 418 U.S. at 43-52. As the Court noted, the practice of disenfranchising felons predated the Civil War and the Reconstruction Amendments. In fact, at the time of the adoption of the Fourteenth Amendment, "29 [of 36] States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes." *Id.* at 48. As five members of this Court noted in *Baker* v. *Pataki*, 85 F.3d 919, 928 (2d Cir. 1996) (per curiam) (en banc) (Mahoney, J., concurring) "[t]he prevalence of this practice prior to the passage of the Civil War Amendments indicates that felon disenfranchisement was not an attempt to evade the requirements of the Civil War Amendments or to perpetuate racial discrimination forbidden by those amendments."

Since Section 2 of the Fourteenth Amendment expressly contemplates state felon disenfranchisement laws, felons have no substantive "right to vote" except

as granted under state law. As such, the VRA's reference to standards, practices or procedures that result in a denial or abridgement of that right cannot fairly be read to include felon disenfranchisement laws. The only possible exception would be for the type of law struck down in *Hunter*, *i.e.*, a law enacted with an invidious, racially discriminatory purpose. See *Hunter* v. *Underwood*, 471 U.S. 222, 233 (1985). See also *Farrakhan* v. *Washington*, 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, J., dissenting from denial of en banc rehearing) (Noting that felon disenfranchisement laws "are presumptively constitutional [and o]nly a narrow subset of them * * * is unconstitutional"). Plaintiff, however, does not raise any claim of intentional discrimination.[1]

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[1] Rather than alleging that New York Election Law § 5-106 was enacted with an invidious, racially discriminatory purpose, plaintiff contends only that the law has a disparate impact on black voters due to the race-based disparities in felony conviction rates in New York. As a result, this case does not raise, and we do not address, the question of whether Congress intended Section 2 of the VRA to reach felon disenfranchisement laws enacted with an invidious, racially discriminatory purpose. Cf. *Johnson* v. *Bush*, 353 F.3d 1287 (11th Cir. 2003) (addressing the purposeful, invidious use of felon disenfranchisement laws to deprive minorities of the right to vote). We would note, however, that regardless of Section 2s' applicability to such a statute, it is clear in light of *Hunter* that Congress could enact legislation prohibiting such a statute pursuant to Section 5 of the Fourteenth Amendment, see *Hunter* v. *Underwood*, 471 U.S. 222, 233 (1985) (holding that laws enacted for an invidious, racially discriminatory purpose violate the Equal Protection Clause), and, more importantly, that a mechanism already exists for challenging a law that violates the Equal Protection Clause, see 42 U.S.C. 1981 & 1983.

B. Congress Did Not Intend The Voting Rights Act To Apply To Laws Such As New York Election Law § 5-106(2)

1. VRA Legislative History

The VRA's legislative history demonstrates that Congress did not intend the Act to apply to laws that deny the franchise to felons. See *Muntaqim* v. *Coombe*, 366 F.3d 102, 127-128 (2d Cir. 2004); *Baker*, 85 F.3d at 929; *Johnson* v. *Bush*, 353 F.3d 1287, 1316-1318 (11th Cir. 2003) (Kravitch, J., dissenting), vacated 377 F.3d 1163 (2004) (en banc); *Farrakhan* v. *Washington*, 359 F.3d 1116, 1120-1121 (9th Cir. 2004) (Kozinski, J., dissenting). In enacting the VRA in 1965, Congress sought "to prevent states from discriminating against minorities in voting," *Johnson*, 353 F.3d at 1316, in part by prohibiting certain voting tests and devices as requirements for casting a ballot, see 42 U.S.C. 1973(b)(4); *Katzenbach* v. *Morgan*, 384 U.S. 641, 647 (1966). The Senate and House reports indicate unequivocally that felon disenfranchisement laws were *not* contemplated among these prohibitions. Indeed, the Senate Judiciary Committee report notes that, while Section 4 of the VRA prohibits any requirement of "good moral character" to vote, "[t]his definition *would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony* or mental disability." See

S. Rep. No. 162, 89th Cong., 1st Sess., Pt. 3, at 24 (1965) (Joint views of Senators Dodd, Hart, Long, Kennedy, Bayh, Burdick, Tydings, Dirksen, Hruska, Fong, Scott and Javits) (emphasis added). The House Judiciary Committee Report accords: "This subsection *does not proscribe a requirement of a State or any political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony* or mental disability." H.R. Rep. No. 439, 89th Cong., 1st Sess. 25-26 (1965) (emphasis added). A proponent of the VRA, Senator Tydings, further explained that the VRA did not apply to felon disenfranchisement laws because such laws "are objective, easily applied, and do not lend themselves to fraudulent manipulation." 111 Cong. Rec. S8366 (1965) (statement of Sen. Tydings).

Congress amended the VRA in 1982 to codify the totality of the circumstances test. See *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). Yet once again, "notwithstanding the prevalence of felon disenfranchisement laws [throughout the United States]," Congress made no indication "that it wanted to bring felon disenfranchisement laws within the scope of the VRA." *Muntaqim*, 366 F.3d at 128; see also *Johnson*, 353 F.3d at 1317. Indeed, "[t]he [1982] Senate Report, which goes into great detail on legislative intent, ma[kes] no mention of felon disenfranchisement provisions." *Johnson*, 353 F.3d at 1317-1318; see also

Farrakhan, 359 F.3d at 1121 ("There is * * * no evidence that Congress had changed its mind about the legitimacy of felon disenfranchisement when it enacted section 2."). Neither the House nor the Senate, therefore, ever intended to place within the ambit of the VRA a statute such as New York's.

2. Subsequently Enacted Provisions

Furthermore, since 1982, Congress has enacted a number of laws that not only recognize the States' authority to deny felons the franchise, but actually make "it easier for States to keep felons off the voting rosters." *Farrakhan*, 359 F.3d at 1121. These statutes provide further evidence that Congress does not believe that the VRA prohibits States from disenfranchising felons.

In 1993, Congress enacted the National Voter Registration Act (NVRA), which explicitly provides a felony conviction as grounds to cancel a voter's registration. See 42 U.S.C. 1973gg-6(a)(3)(B). Indeed, in that statute, Congress even "drafted federal prosecutors to help states disenfranchise felons." *Farrakhan*, 359 F.3d at 1121. The NVRA provides that federal prosecutors are to notify state election officials of a federal felony conviction, 42 U.S.C. 1973gg-6(g), and that "[o]n request of the chief State election official of a State or other State official with responsibility for determining the effect that a conviction may have on an offender's qualification to vote, the United States Attorney shall provide such

additional information as the United States Attorney may have concerning the offender and the offense of which the offender was convicted." 42 U.S.C. 1973gg-6(g)(3).

Similarly, both the statutory language and the legislative history of the Help America Vote Act of 2002 (HAVA) belie any contention that Congress believes that the states lack the ability to bar felons from voting. HAVA requires that states implement a computerized statewide voter registration list for elections for federal office and instructs state officials to regularly remove disenfranchised felons from the state's list. See 42 U.S.C 15483(a)(2)(A)(ii)(I).

In fact, Congress rejected a proposed amendment to HAVA, which sought to require the States to allow felons to vote in federal elections once they had completed their sentences, parole, and probation. See S. Rep. No. 797, p. 802.

Furthermore, in recent years, bills have been proposed in Congress to limit the States' ability to disenfranchise felons. See, *e.g.*, Civic Participation and Rehabilitation Act, H.R. 259, 108th Cong. 2(g) (2003), Ex-Offenders Voting Rights Act of 2003, H.R. 1433, 108th Cong. 2(a)(11) (2003), Ex-Offenders Voting Rights Act of 2005, H.R. 663, 109th Cong. (2005), Count Every Vote Act of 2005, S.R. 450, 109th Cong. (2005). As Judge Kravitch noted in dissent in *Johnson*, 353 F.3d at 1318 n.15., "it is unclear why these bills [were] proposed if Congress has

the clear understanding that the Voting Rights Act currently covers these cases."

As discussed *supra*, Congress clearly did not have that understanding when it passed the VRA in 1965 or when it amended the statute in 1982, and Congress just as clearly does not have that understanding today.

II

EXTENDING THE VOTING RIGHTS ACT TO REACH NEW YORK'S FELON DISENFRANCHISEMENT LAW, WHICH WAS NOT ENACTED WITH AN INVIDIOUS, RACIALLY DISCRIMINATORY PURPOSE, RAISES SERIOUS CONSTITUTIONAL QUESTIONS

Extending the VRA to reach non-invidious and non-intentionally discriminatory felon disenfranchisement laws would raise an even more fundamental problem: Doing so would seriously jeopardize the constitutionality of the Voting Rights Act itself. See, e.g., *Baker* v. *Pataki*, 85 F.3d 919, 930 (2d Cir. 1996) (Mahoney, J., concurring) (recognizing that "any attempt by Congress to subject felon disenfranchisement provisions to the 'results' methodology of [the VRA] would pose a serious constitutional question concerning the scope of Congress' power to enforce the Fourteenth and Fifteenth Amendments"). This follows from the power Congress has to enact such legislation.

When acting pursuant to the Fifteenth Amendment, Congress may proscribe otherwise facially constitutional conduct -- like the law at issue here -- in order to

prevent and deter further unconstitutional conduct, only after developing a legislative record establishing a history and pattern of unconstitutional conduct and a legislative scheme congruent and proportional to the constitutional injury to be remedied or prevented. See, *e.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 518 (1997). As discussed in greater detail below, it is highly doubtful that Section 2 would satisfy either requirement.

The Fourteenth and Fifteenth Amendments provide that "Congress shall have [the] power to enforce" the substantive provisions of those amendments "by appropriate legislation." U.S. Const. Amends. XIV, § 5; XV, § 2. While the substantive provisions of both the Fourteenth and Fifteenth Amendments prohibit intentional discrimination only, see, *e.g.*, *Washington* v. *Davis*, 426 U.S. 229, 239 (1976) (Fourteenth Amendment); *City of Mobile* v. *Bolden*, 446 U.S. 55, 62 (1980) (Fifteenth Amendment), superseded by 42 U.S.C. 1973, the Supreme Court has held that legislation which deters or remedies constitutional violations – like the VRA – "can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *City of Boerne*, 521 U.S. at 518. "In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nevada Dep't of Human Resources* v. *Hibbs*, 538

U.S. 721, 727-728 (2003). To ensure that Congress does not sweep too far, *i.e.*, attempt to substantively redefine, rather than permissibly enforce, the rights protected by the Constitution, courts must carefully police the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520.

When dealing with so-called prophylactic legislation, the "congruence and proportionality" inquiry has three overlapping requirements. First, it is necessary to "identify with some precision the scope of the constitutional right at issue." *Board of Tr. of the Univ. of Alabama* v. *Garrett*, 531 U.S. 356, 365 (2001). Second, Congress must specifically "identify conduct transgressing * * * [the] substantive provisions" of the Amendment being enforced. See *Florida Prepaid Postsecondary Educ. Bd.* v. *College Sav. Bank*, 527 U.S. 627, 639 (1999). This second step generally requires a detailed "legislative record" establishing a "history and pattern" of unconstitutional conduct. See, *e.g.*, *Garrett*, 531 U.S. at 368. Third, Congress must narrowly "tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid*, 527 U.S. at 628. Under this third step, the prophylactic legislation must not be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532.

With respect to the initial inquiry, the Constitution prohibits the intentional denial or abridgement of the right to vote. This includes within its sweep felon disenfranchisement provisions of the type at issue in *Hunter* v. *Underwood*, 471 U.S. 222, 233 (1985), *i.e.*, "the purposeful, invidious use of those laws to deprive minorities of the right to vote." *Farrakhan* v. *Washington*, 359 F.3d 1116, 1121 (9th Cir. 2004). Section 5-106(2), however, which was unquestionably enacted without racial animus, does not fall directly within the Constitution's sweep. In fact, statutes preventing felons from voting are a widespread historical practice that have been accorded explicit constitutional recognition in Section 2 of the Fourteenth Amendment. See *Richardson* v. *Ramirez*, 418 U.S. 24, 54 (1974).

Furthermore, prophylactic legislation hoping to survive judicial scrutiny under the second prong of the *City of Boerne* test should generally be supported by a well-documented legislative record establishing a history or pattern of constitutional violations. See, *e.g.*, *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004); *Oregon* v. *Mitchell*, 400 U.S. 112, 130-132 (1970) superseded by XXIII Amend. For example, in *Mitchell* the Court invalidated an amendment to the VRA that would have extended the right to vote to 18-year-olds while at the same time upholding a provision banning literacy tests. 400 U.S. at 130-132. In so ruling, the Court explained that "Congress had before it a long history of the

discriminatory use of literacy tests to disenfranchise voters on account of their race," *id.* at 132, but "Congress made no legislative findings that the 21-year-old vote requirement was used by the States to disenfranchise voters on account of race," *id.* at 130. Similarly, in both *Garrett* and *Kimel* v. *Florida Board of Regents*, 528 U.S. 62, 91 (2000), the Court found that Congress failed to make findings establishing a pattern of unconstitutional discrimination by the States with respect to the hiring of the disabled and the elderly, respectively, that would warrant prophylactic legislation. See *Garrett*, 531 U.S. at 369 (holding that the legislative record "fails to show that Congress did in fact identify a pattern" or history of unconstitutional employment discrimination by States against the disabled); *Kimel*, 528 U.S. at 91 (holding that the legislative record of the ADEA failed to establish a history or pattern of constitutional violations). Cf. *Lane*, 124 S. Ct. at 1992 (upholding Title II of the ADA with respect to fundamental right of accessing the courts as Congress made specific and numerous findings regarding a pattern of discrimination by the States); *Hibbs*, 538 U.S. at 727-728 (upholding the FMLA because Congress had a sufficient evidentiary basis for that legislation).

Here, notwithstanding the VRA's voluminous legislative record detailing specific ongoing and historic types of intentional discrimination in voting by certain States and jurisdictions, *e.g.*, the use of literacy tests, poll taxes, property

ownership requirements, etc., there is absolutely no evidence in the legislative record of the VRA establishing that any State was using (or had used) felon disenfranchisement laws in a purposeful, invidious manner, *i.e.*, a *Hunter* type violation, which Congress could legitimately remedy. Accord *Developments in the Law – The Law of Prisons*, 115 Harv. L. Rev. 1939, 1951-1952 (2002) (noting that *Hunter*-type violations are exceedingly rare).

In fact, "not only has Congress failed ever to make a legislative finding that felon disenfranchisement is a pretext * * * for racial discrimination[,] it has effectively determined that it is not." *Baker*, 85 F.3d at 929. Similarly, the Court has effectively determined that felon disenfranchisement is not a pretext for racial discrimination. In *Richardson*, the Court specifically recognized that the practice of disenfranchising felons preceded both the Civil War and the Reconstruction Amendments, with 29 of the 36 States having such laws at the time the Fourteenth Amendment was ratified. 418 U.S. at 48. Given "[t]he prevalence of this practice prior to the passage of the Civil War Amendments," it is abundantly clear "that felon disenfranchisement was not an attempt to evade the requirements of the Civil War Amendments or to perpetuate racial discrimination forbidden by those Amendments." *Baker*, 85 F.3d at 928. Without a documented history or pattern of unconstitutional discrimination upon which to predicate enforcement legislation, it

is unclear how the VRA could be constitutionally extended to reach felon disenfranchisement laws, particularly those enacted without an invidious, racially discriminatory purpose. See, *e.g.*, *Garrett*, 531 U.S. at 368-369; *Kimel*, 528 U.S. at 82-83.

Unlike Section 5 of the VRA, which applies only to the jurisdictions where Congress identified specific instances of purposeful discrimination, Section 2 applies uniformly throughout the entire nation. Without a legislative record establishing that some felon disenfranchisement laws would be unconstitutional on their own, the vast overinclusiveness of Section 2 – *i.e.*, invalidating the felon disenfranchisement law in every State with a race-based disparity in its felony conviction rate – raises serious questions about the provision under the third step. Indeed, extending Section 2 so as to invalidate the felon disenfranchisement laws in 48 States – as every state has a race-based disparity in its felony conviction rates – arguably would not be a congruent and proportional remedy given that Congress has failed to identify even one State to have enacted a felon disenfranchisement law with an invidious, racially discriminatory purpose and, to date, the Supreme Court has identified only one. See *Hunter*, 471 U.S. at 233 (Alabama). This is in sharp contrast to the Section 5 remedy upheld as congruent and proportional in *Katzenbach* v. *Morgan* and in *South Carolina* v. *Katzenbach*.

In those cases, the remedy was directed only to the States where the discrimination found by Congress existed. 384 U.S. 641 (1966); 383 U.S. 301 (1966).

Tellingly, the Court in *City of Boerne* and in *United States* v. *Morrison*, 529 U.S. 598, 626-627 (2000), cited the Section 5 remedy at issue in the two *Katzenbach* cases as the textbook example of the type of tailoring the Constitution requires. As *City of Boerne* explained, the remedy was "confined to those regions of the country where voting discrimination had been most flagrant." 521 U.S. at 532-533. Of particular importance here, the Court in *Morrison* struck down the Violence Against Women Act, which (like Section 2) applied uniformly throughout the entire nation, precisely because Congress failed to find evidence of gender-motivated crimes in most States. 529 U.S. at 626-627. Against this backdrop, applying Section 2 to the felon disenfranchisement laws in 48 States, without finding evidence that any of the States enacted the laws with an invidious, racially discriminatory purpose, raises the concern that it may be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections." *City of Boerne*, 521 U.S. at 532.

More importantly, even if Congress had specifically identified a history and

pattern of unconstitutional State conduct, it is unclear whether a statute could ever be congruent and proportional if it sweeps so broadly as to *completely* prevent the States from engaging in activity that the Constitution explicitly allows. In upholding California's felon disenfranchisement law, the Court in *Richardson* concluded "that those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in § 1 of that Amendment that [*i.e.*, felon disenfranchisement] which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment." 418 U.S. at 43. In light of the Court's decision in *Richardson*, the instant case differs in one crucial respect from every other case involving Congress's authority to enact prophylactic legislation, *i.e.*, legislation prohibiting facially constitutional conduct in order to prevent and deter unconstitutional conduct. In the typical case, legislation "sweeps in" conduct that the Constitution does not specifically prohibit. Here, however, the facially constitutional conduct at issue is conduct the Constitution explicitly contemplates. That the latter category may require heightened judicial scrutiny when undertaking the congruence and proportionality analysis is perhaps best illustrated by comparison to another area where the Constitution explicitly permits the States to engage in certain conduct. For example, while Congress has the power under Section 5 of the Fourteenth Amendment to enact legislation

preventing the States from discriminating against men in the sale of alcoholic beverages, see, *e.g.*, *Craig* v. *Boren*, 429 U.S. 190, 210 (1976), it is very unlikely that Congress could enact prophylactic legislation that sweeps so broadly as to completely prevent the States from regulating activity that the Constitution explicitly allows, see U.S. Const. Amend. XXI.

In any event, there is no need for this Court to go anywhere near this difficult terrain. It is well-settled that a court should avoid construing a statute to present a constitutional question when the statute permits an alternative construction. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg.*, 485 U.S. 568, 575 (1988) (noting that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"). In fact, the Supreme Court has repeatedly invoked this doctrine in interpreting the VRA. See *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) (declining to adopt possible interpretation of Section 5 of the VRA so as not to raise concerns about the constitutionality of that provision); *Miller* v. *Johnson*, 515 U.S. 900, 927 (1995) (rejecting Justice Department's interpretation of Section 5 of the VRA to avoid serious constitutional problem). As discussed above, the better reading of Section 2 is

that it does not apply to felon disenfranchisement laws that merely have a disparate impact on minorities due to the race-based disparities in felony conviction rates. Under constitutional avoidance this Court is obliged to adopt that reading.

III

THE CLEAR STATEMENT RULE PRECLUDES APPLICATION OF SECTION 2 TO NEW YORK ELECTION LAW § 5-106(2)

Construing Section 2 to apply to felon disenfranchisement laws would severely disrupt the balance of federal-state relations. The regulation of voting, the enforcement of the criminal law, and the administration of state prisons all fall within the traditional authority of the States. To read Section 2 as urged by Muntaqim would pre-empt these powers, thereby seriously disrupting the federal-state balance.

While Congress may, pursuant to its properly delegated powers, alter the federal-state relationship, it may do so only after making "its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-461 (1991) (quoting *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985)). When construing legislation involving "traditionally sensitive areas, such as legislation affecting the federal balance," *United States* v. *Bass*, 404 U.S.

336, 349 (1971), courts must find a clear statement that Congress intended to alter the federal-state balance of power and should "interpret a statute to preserve rather than destroy the States' 'substantial sovereign powers,'" *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 209 (1998) (quoting *Gregory*, 501 U.S. at 460-461).

A. Applying Section 2 To New York Election Law § 5-106(2) Would Seriously Disrupt The Balance Of Federal-State Relations

To construe the VRA in the manner proposed by Muntaqim would seriously disrupt the federal-state balance with respect to States' traditional authority over voting, criminal law, and prison management.

The Constitution explicitly commits the regulation of voting to the states. See U.S. Const. Art. I, § 4, Cl. 1. Indeed, a State may "provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Roudebush* v. *Hartke*, 405 U.S. 15, 23 (1972); see also *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (The States exercise "broad power to prescribe the 'Time, Places and Manner of holding Elections for Senators and Representative,' which power is

matched by state control over the election process for state offices."). In light of this broad grant of power to the states to regulate voting, "state legislatures may without transgressing the Constitution impose extensive restrictions on voting." *Griffin* v. *Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004). See also *New York State Democratic Party* v. *Lomenzo*, 460 F.2d 250, 251 (2d Cir. 1972) ("States have broad authority * * * to establish rules regulating the manner of conducting both primary and final elections."). A state's authority in this regard is particularly strong when organizing state elections. See *Muntaqim* v. *Coombe*, 366 F.3d 102, 121-122 (2d Cir. 2004). Moreover, the Fourteenth Amendment expressly recognizes the States' power to disenfranchise felons. U.S. Const. Amend. XIV, § 2.

Extending the VRA to reach New York Election Law § 5-106(2) would intrude on this power. In *Mitchell*, the Supreme Court struck down just such an intrusion. The *Mitchell* Court held that Congress exceeded its authority in amending the VRA to extend the vote in state and local elections to those 18 years of age. *Oregon* v. *Mitchell*, 400 U.S. 112, 130 (1970). Because the Constitution grants the states the right to regulate elections, the Court found that such an action wholly transgressed the bounds of federal power. *Ibid*. Applying Section 2 of the VRA to § 5-106 would similarly disrupt federal-state relations. As five judges of

this Court noted in *Baker*, "an explicit constitutional balance has been struck by the mandate in § 2 of the Fourteenth Amendment that the adverse consequences of reduced congressional representation shall not follow from the enactment and enforcement of state felon disenfranchisement statutes." *Baker* v. *Pataki*, 85 F.3d 919, 931 (2d Cir. 1996).

Muntaqim's proposed reading would likewise upset "[s]tates * * * primary authority for defining and enforcing the criminal law." *United States* v. *Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993)). The Supreme Court has repeatedly admonished that the States are principally charged with enacting and enforcing criminal laws, and "'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." *Jones* v. *United States*, 529 U.S. 848, 858 (2000) (quoting *Bass*, 404 U.S. at 349). Accordingly in *Jones*, the Court held that a statute criminalizing arson of property used in interstate or foreign commerce did not apply to owner-occupied private residences because such residences were not used in interstate commerce. *Jones*, 529 U.S. at 856-857. To criminalize such "traditionally local criminal conduct" as "a matter for federal enforcement" would constitute a significant intrusion on state regulation of criminal law. *Id.* at 858 (quoting *Bass*, 404 U.S. at 350). In this

regard, the Supreme Court has refused to expand the reach of federal statutes that encroach on the rights of the states to administer criminal laws. See, *e.g.*, *Cleveland* v. *United States*, 531 U.S. 12, 24-25 (2000) (refusing to apply the federal mail fraud statute to a state's issuance of a gaming license because doing so "would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities").

New York's statute is part and parcel of its criminal law. It is well settled that disenfranchisement during the term of incarceration and parole is an incident of an adjudication of feloniousness. Therefore, to apply Section 2 to § 5-106 would unsettle "the sensitive relations between federal and state criminal jurisdiction." *United States* v. *Enmons*, 410 U.S. 396, 411-412 (1973) (quoting *Bass*, 404 U.S. at 349).

Third, the states are also responsible for administering their prisons. As the Supreme Court has noted:

> It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a state and a private citizen. * * * Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important

> interest in not being bypassed in the correction of those problems.

Preiser v. *Rodriguez*, 411 U.S. 475, 491-492 (1973). This responsibility is "consigned to the states as part of their sovereign power to enforce the criminal law." *In re Wilkinson*, 137 F.3d 911, 914 (6th Cir. 1998); see also *Procunier* v. *Martinez*, 416 U.S. 396, 412 (1974) ("One of the primary functions of government is the preservation of societal order through enforcement of the criminal law, and the maintenance of the penal institutions is an essential part of that task."), overruled on other grounds *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989).

Because administration of prisons is for the states, "federal courts have adopted a broad hands-off attitude toward problems of prison administration." *Procunier*, 416 U.S. at 404. See also *Hite* v. *Leeke*, 564 F.2d 670, 671-672 (1977). The Supreme Court has repeatedly ruled that "federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States." *Meachum* v. *Fano*, 427 U.S. 215, 229 (1976). New York's statute prohibits felons who are currently incarcerated in state prisons from voting. Thus, construing Section 2 as applying to § 5-106 would seriously intrude on New York's strong interest in the administration of its prisons.

B. The VRA Does Not Contain An Unmistakably Clear Statement That Congress Intended Section 2 To Prohibit States From Denying Felons The Vote And Its Legislative History Clearly Indicates That Congress Did Not Intend Section 2 To Apply To Such Laws

Given the deep intrusion into traditional state activities that plaintiff's theory entails, Congress may achieve such a result only through an unmistakably clear statement of its intent to do so. See *Gregory*, 501 U.S. at 460-461. Absent such a statement, the Court must conclude that Section 2 has no such application.

As the three-judge panel of this Court held, neither the text nor the legislative history of the VRA contains such an unmistakably clear statement of intent. See *Muntaquim*, 366 F.3d at 129 ("Congress did not make an unmistakably clear statement that [Section 2] applies to state felon disenfranchisement statutes."); see also *Farrakhan* v. *Washington*, 359 F.3d 1116, 1120 (9th Cir. 2004) (finding that the VRA "was never intended to reach felon disenfranchisement laws").

First, the text of the statute plainly contains no such clear statement. Section 2 prohibits the enforcement of any "qualification or prerequisite to voting [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). Thus, Section 2 of the VRA safeguards only the right not to have a vote abridged because of race, not

because an individual chooses to commit a serious crime. Moreover, Section 2 of the Fourteenth Amendment expressly contemplates states' disenfranchising felons, and New York has done precisely that. See N.Y. Elec. Law § 5-106.

As discussed *infra,* Muntaqim has not alleged that New York enacted its felon disenfranchisement statute with an invidious, racially discriminatory purpose. Rather, plaintiff alleges only that the disparity in the felony conviction rates of blacks in New York has resulted in a disparity in the rate of disenfranchisement for blacks in that state. Thus, plaintiff is denied the ballot, not because he is black, but because he consciously elected to commit a felony. See *Johnson* v. *Bush*, 214 F. Supp. 2d 1333, 1341 (S.D. Fla. 2002) ("[I]t is not racial discrimination that deprives felons, black or white, of their right to vote but their own decisions to commit an act for which they assume the risks of detection and punishment."), rev'd, 353 F.3d 1287 (11th Cir. 2003), vacated by 377 F.3d 1163 (11th Cir. 2004) (en banc). As the *Muntaqim* panel opined, "considering the prevalence of felon disenfranchisement in every region of the country since the Founding, it seems unfathomable that Congress would silently amend the [VRA] in a way that would affect them." *Muntaqim*, 366 F.3d at 123-124.

Moreover, as previously discussed, the legislative history of the VRA also evinces no clear intent that Congress intended such a result. In fact, all evidence

establishes that Congress intended precisely the opposite: The VRA was *not* intended to apply to felon disenfranchisement. See *Johnson* v. *Bush*, 353 F.3d 1287, 1316 (11th Cir. 2003) (Kravitch, J., dissenting) ("The Senate and House reports make clear * * * that Congress did not intend the [VRA] to cover felon disenfranchisement provisions."); *Baker*, 85 F.3d at 932 ("[T]he only consideration of felon disenfranchisement statutes in the entire history of the [VRA] * * * is Congress' explicitly announced intention to exclude such statutes from the § 1973b(c) tabulation of prohibited tests and devices.") (emphasis omitted). Subsequent legislation, including the 1982 amendments to the VRA, further confirms that Congress does not believe that Section 2 of the VRA applies to felon disenfranchisement laws. As a result, the *only* clear statement is that Section 2 of the VRA was never intended to apply to felon disenfranchisement laws, including § 5-106.

IV

A STATISTICAL DISPARITY ALONE, PARTICULARLY IN AN AREA EXTERNAL TO VOTING, CANNOT ESTABLISH VOTE DENIAL ON ACCOUNT OF RACE AS SECTION 2 REQUIRES

Muntaqim's claim rests entirely on the existence of a race-based disparity in New York's felony conviction rates. Owing to that racial disparity, Muntaqim argues, blacks are disproportionately disenfranchised, thus violating Section 2.

Muntaqim's claim must fail, however, because even if the VRA applies in this case, it requires not only that the right to vote be curtailed, but that this be "on account of race." The law is clear that, even under Section 2s' "results" test, a statistical disparity alone, particularly in an area external to voting, (*e.g.*, felony conviction rates) is insufficient to establish vote denial on account of race. Simply put, Muntaqim voluntarily forfeited his right to vote not on account of his race, but rather on account of his decision to commit a felony. In New York, all law abiding citizens of all races have an equal opportunity to participate in the electoral process. The VRA requires no more.

The VRA – arguably the most important piece of civil rights legislation since Reconstruction – was enacted pursuant to Congress's authority to enforce the Fifteenth Amendment, see Pub. L. No. 89-110 (preamble), which guarantees that "[t]he right of citizens * * * to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV. As such, Section 2 of the VRA has a very specific purpose: It is intended to eradicate discrimination in voting because of race or color. See, *e.g.*, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966) (noting that the purpose of the Act was "to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our

country for nearly a century"); *Mallory* v. *Eyrich*, 839 F.2d 275, 278 (6th Cir. 1988) (same).

Section 2(a) of the VRA provides first that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. 1973(a). Section 2(a) thus prohibits state and local officials from enforcing racially motivated voting qualifications, prerequisites, or standards, practices, or procedures. In such cases of intentional discrimination, the intent required by Section 2(a) is identical to that under the Fifteenth Amendment. See, *e.g.*, *City of Mobile* v. *Bolden*, 446 U.S. 55, 66 (1980) superseded by 42 U.S.C. 1973.

Section 2(b) provides second that a violation of Section 2(a) is also established if:

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election * * * are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. 1973(b). Section 2 thus also applies to some situations where, despite

the lack of any improper racial motive, a voting qualification, voting prerequisite, or other procedures nevertheless "results" in unequal access to the electoral process. See, *e.g.*, *Thornburg* v. *Gingles*, 478 U.S. 30, 47 (1986); see also *Nixon* v. *Kent County*, 76 F.3d 1381, 1392 (6th Cir. 1996) (en banc).

Under this "results" test, however, a challenged voting qualification is not illegal per se. Rather, a plaintiff must demonstrate that, based on the totality of the circumstances, the qualification results in unequal access to the electoral process *on account of race*. See, *e.g.*, *Brooks* v. *Miller*, 158 F.3d 1230, 1238 (11th Cir. 1998) (citing *Gingles*, 478 U.S. at 46). Specifically, while this test does not require a showing of an illicit racial motivation, it does require that the challenged procedure be related in some manner to prior intentional discrimination.

It is clear that when Congress amended Section 2 to add the "results" test, the "totality of the circumstances" inquiry was designed to uncover and remedy the effects of past *intentional* discrimination on today's electoral process; the test manifestly was not intended to prohibit acts not tainted with the effects of historically discriminatory actions. See *United States* v. *Marengo County Comm'n*, 731 F.2d 1546, 1557 (11th Cir. 1984) ("Congress * * * concluded that the 'results' test was necessary to secure the right to vote and to eliminate the effects of past purposeful discrimination."); see also *Gingles*, 478 U.S. at 44 n.9.

Congress's intent in this regard is most apparent in the so-called "Senate Factors," listed in the Senate Report that accompanied the 1982 amendments to Section 2. These comprise a list of non-exclusive factors, essentially taken from *White* v. *Regester*, 412 U.S. 755 (1973), that courts should consider when determining whether the totality of the circumstances demonstrates that the effect of a voting practice on minority electoral opportunity violates Section 2. See S. Rep. No. 417, 97th Cong., 2d Sess. 28-89 (1982) (setting forth the nine Senate factors). Several of these factors inquire into the extent to which the vestiges of prior intentional discrimination distort the current opportunity of minority voters to participate equally in the electoral process. See, *e.g.*, S. Rep. No. 417, *supra*, at 29 (citing "the effects of discrimination [against minorities] in such areas as education, employment and health"). In approving the use of these factors in determining a violation of Section 2, the Supreme Court observed that a court must determine whether a challenged law "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47.

Thus, the "results" test requires inquiry into whether the effects of past racial discrimination impact today's political processes in such a manner as to diminish minorities' "fair chance to participate." S. Rep. No. 417, *supra*, at 36.

Absent this showing, a plaintiff cannot prevail under Section 2(b) of the VRA. See, *e.g.*, *Nipper* v. *Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994) (en banc) ("The existence of some form of racial discrimination * * * remains the cornerstone of Section 2 claims."). Because the "results" test thus depends entirely and inextricably on some link to past intentional discrimination, Muntaqim's statistics-driven "results" claim, which does not and cannot challenge the basis of adoption of § 5-106, simply cannot meet this standard.

Muntaqim's case relies entirely on a statistical disparity. Specifically, Muntaqim contends that the disparity in the felony conviction rates of blacks in New York (in relation to their percentage of the total population) necessarily results in a disparity in the rate of disenfranchisement for blacks under New York's felon disenfranchisement law. Muntaqim has neither produced any evidence of intentional discrimination in New York's criminal justice system nor argued that New York's felon disenfranchisement law itself was enacted with an invidious, racially discriminatory purpose. Rather, Muntaqim contends that the disparity in the felony conviction rates of blacks alone proves that blacks have an unequal opportunity to participate in the electoral process.

Of particular import, Muntaqim failed to produce any evidence making the required showing relating to the nine Senate factors this Court must weigh. See

Gingles, 478 U.S. at 47. Muntaqim has made no demonstration of a history of official discrimination in voting, of racially polarized voting, of voting practices or procedures often used to discriminate against minorities, of discrimination in candidate slating, of discrimination in health, education or employment, of racial appeals in campaigns, that minorities have a harder time winning elections, that representatives are unresponsive to minority communities, or that felon disenfranchisement is an unjustified policy. S. Rep. No. 417, *supra*, at 28-29. In short, Muntaqim has failed utterly to meet his burden of producing evidence showing that the New York statute curtails the right to vote on account of race. Rather, Muntaqim has simply produced evidence of a statistical disparity in an area external to voting, *i.e.*, the race-based disparity in felony conviction rates. In view of this lack of proof to the contrary, it is clear that the denial of Muntaqim's right to vote followed not from his race, but rather from his decision to commit a felony.

The Section 2 "results" test cannot be satisfied solely by statistics showing that a facially-neutral practice has a racially disparate effect on minority electoral opportunities. As seven members of the Ninth Circuit recently concluded, statistical disparities – particularly those in an area external to voting (e.g., felony conviction rates), which then result in statistical disparities in voting – are

insufficient to establish a violation of Section 2 because they do not establish that the vote denial was on account of race as Section 2 explicitly requires. See *Farrakhan* v. *Washington*, 359 F.3d 1116, 1117 (9th Cir. 2004).

Indeed, the contrary conclusion would conflict with virtually every other Circuit to consider whether a violation of Section 2 may be sustained solely on the basis of a statistical disparity. See, *e.g.*, *Ortiz* v. *City of Philadelphia Office of the City Comm'rs,* 28 F.3d 306, 314-315 (3d Cir. 1994) (rejecting Section 2 challenge to Pennsylvania statute that purged voters' names from the rolls if they failed to vote for two years notwithstanding disparate impact on minorities); *Salas* v. *Southwest Texas Junior Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992) (rejecting a Section 2 claim because it was based entirely on statistical disparities); *Irby* v. *Virginia State Bd. of Elections,* 889 F.2d 1352, 1358-1359 (4th Cir. 1989) (holding that statistical disparity alone not sufficient to support Section 2 claim); *Wesley* v. *Collins,* 791 F.2d 1255, 1262 (6th Cir. 1986) (rejecting a challenge to Tennessee's felon disenfranchisement law under Section 2 that was based primarily on statistical differences between minority and white convictions). But see *Farrakhan* v. *Washington*, 338 F.3d 1009, 1020 (9th Cir. 2003) (holding that a violation of Section 2 may be proved by introducing evidence establishing a race-based disparity in the criminal justice system) cert. denied 125 S. Ct. 2004; but cf.

Smith v. *Salt River,* 109 F.3d 586, 595 (9th Cir. 1997) ("[A] bare statistical showing of disproportionate impact on a racial minority does not satisfy the § 2 'results' inquiry.") (emphasis omitted).

The conclusion Muntaqim urges – that a disparity in felony conviction rates alone is sufficient under the "totality of the circumstances" test to establish a violation of Section 2 – would have far reaching consequences. For starters, it would clearly result in the invalidation of the felon disenfranchisement laws in every State in the country (save Maine and Vermont, which allow imprisoned felons to vote), as race-based statistical disparities in the rate of felon disenfranchisement are alleged in every State in the nation. See Human Rights Watch, The Sentencing Project, *Losing the Vote,* at 9 (Oct. 1998), *available at* http://sentencingproject.org/pdfs/9080.pdf. Indeed, such a holding would ultimately require the States to erect voting booths in prisons. See *Farrakhan*, 359 F.3d at 1125. Moreover, just as there are race-based disparities in felony conviction rates, there are, regrettably, race-based disparities in wealth and computer ownership. See United States Department of Commerce, *A Nation Online: How Americans Are Expanding Their Use of the Internet*, at 11-21, (Feb. 2002), *available at* www.ntia.doc.gov/opadhome/digitalnation,. As a result, state laws adopting Internet voting may violate Section 2 under Muntaqim's

construction of the Act. See *Farrakhan*, 359 F.3d at 1126.[2] Similarly, given that minority voters are disproportionately more likely to be hourly wage earners (and, therefore, are less likely to get time off from work), see United States Department of Labor, Bureau of Labor Statistics, Current Population Survey, *Employment and Earnings* (Jan. 2005), *available at* www.bls.gov/cps/cpsa2004.pdf (Tables, 10, 44), holding elections on Tuesdays may well also violate Section 2 if, as Muntaqim argues, it is simply sufficient to show a disparate impact in an area external to voting that translates into a disparate impact on voting. See *Farrakhan*, 359 F.3d at 1125.

One last example nicely illustrates the problem with Muntaqim's proposed construction of Section 2. The percentage of both the black population (31.3%) and the Hispanic population (35.0%) under the age of 18 is significantly higher than the percentage of the White population (22.6%) under the age of 18. See U.S. Census Bureau, Census 2000 Summary File 1 (SF1) 100 Percent Data, Tables

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[2] The validity of Internet voting under Section 5 of the VRA is an issue the Department has already carefully considered. For example, on January 27, 2000, the Arizona Democratic Party submitted Internet voting procedures for the 2000 Democratic primary election to the Department pursuant to Section 5 of the VRA. The Attorney General precleared the procedure with no objection on February 24, 2000. Similarly, the Internet voting procedures submitted by the Michigan Democratic Party on November 14, 2003, for the 2004 Democratic primary election were precleared by the Attorney General with no objection on January 1, 2004.

P3, P4, P5, and P6. Given this gross disparity, state laws limiting the franchise to individuals 18 and older have a significant disparate impact on minorities and, under Muntaqim's theory of the case, are clearly in violation of Section 2. If correct, Section 2 would require what the Supreme Court has already definitively held Congress cannot do under the VRA, *viz*., lower the voting age set by the States. See *Oregon* v. *Mitchell*, 400 U.S. 112, 130-132 (1970). As Judge Kozinski accurately noted, "[t]he permutations are endless." *See Farrakhan*, 359 F.3d at 1126.[3] At the end of the day, this Court should recognize that Muntaqim's

[3] One additional permutation merits consideration. This case includes some question regarding Muntaqim's eligibility to vote in New York. It is not entirely clear whether Muntaqim satisfied New York's residency requirements prior to his incarceration. While the United States does not address this standing issue, the United States notes that under Muntaqim's construction of the VRA, it is possible that New York's residency requirement – along with similar requirements in virtually every other State – violates Section 2. As minority voters are disproportionately more likely to be renters, see, *e.g.*, *Salt River*, 109 F.3d at 590 (noting that the rate of home ownership is much higher among whites than it is for blacks), and therefore subject to more frequent moves, they may be disproportionately less likely to establish residency under state law requirements such as those outlined in New York Election Law § 5-104(2). Such an outcome, *i.e.*, striking down residency requirements due to a race-based disparity in home ownership, aptly illustrates why plaintiff's interpretation of Section 2 should be rejected. See, *e.g.*, *Dunn* v. *Blumstein*, 405 U.S. 330, 337 n.7, 342 n.13, 343 (1972) (noting that "a State may require voters to be bona fide residents" and explaining that "nothing said today is meant to cast doubt on the validity of appropriately defined and uniformly applied bona fide residence requirements"); see also *Marston* v. *Lewis*, 410 U.S. 679 (1973) (upholding Arizona's 50-day durational voter residency requirement and 50-day voter registration requirement for local and state elections).

ability to participate in the democratic process has been forfeited not because of his race, and not because of a statistical disparity, but because of his own decision to commit a felony against the people of New York.

CONCLUSION

The United States respectfully requests that the Court hold that Section 2 of the VRA does not apply to New York Election Law § 5-106.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7) and 29(d), I certify that the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEE AND URGING AFFIRMANCE is proportionally spaced, has a typeface of 14 points, and contains 9,810 words, as determined using the word-counting feature of WordPerfect 9.0.

_____
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