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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, JOSEPH HAYDEN, on  
behalf of himself and all individuals similarly situated; LUMUMBA  
*(For Continuation See Inside Cover),*

—against—

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

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**BRIEF OF DIANE PIAGENTINI, MARY PIAGENTINI,  
DEBORAH PIAGENTINI, THE CRIMINAL JUSTICE  
LEGAL FOUNDATION AND THE CENTER FOR EQUAL  
OPPORTUNITY AS *AMICI CURIAE* IN SUPPORT OF  
DEFENDANTS-APPELLEES AND AFFIRMANCE**

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*Plaintiffs-Appellants.*

## **CORPORATE DISCLOSURE STATEMENT**

The Criminal Justice Legal Foundation and the Center for Equal Opportunity are nonprofit corporations that have no parent corporations and no stockholders.

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### **INTEREST OF *AMICI CURIAE***

Diane Piagentini is the widow of Patrolman Joseph A. Piagentini, a New York City police officer who, in 1971, at the age of 28, was murdered by plaintiff Anthony Bottom (now Jalil Abdul Muntaqim). Mary and Deborah Piagentini are Patrolman Piagentini's daughters, and were eighteen months old and three years old, respectively, when their father was slain. The Piagentinis believe strongly that Bottom and other felons must forfeit their right to vote when they choose to commit crimes.

The Criminal Justice Legal Foundation ("CJLF") is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment. Because the plaintiffs' interpretation of the Voting Rights Act seeks to overturn what this Court has called the states' "frequently recognized" and "properly" exercised "historic exclusion from the franchise of persons convicted of all or certain types of felonies," *Green v. Board of Elections*, 380 F.2d 445, 451 (2d Cir. 1967) (Friendly, J.), that interpretation is contrary to the interests of justice and society that CJLF was formed to protect.

The Center for Equal Opportunity ("CEO") is a Virginia nonprofit corporation. CEO's main purpose is to study issues concerning race and ethnicity. CEO has participated in a wide variety of civil rights cases, including many where statistical disparities are asserted as the basis of a race-discrimination claim.

This brief is being submitted pursuant to this Court's order of December 29, 2004, inviting *amicus curiae* briefs, and pursuant to a motion for leave to file.

### STATEMENT OF THE CASE

On a Harlem sidewalk on May 21, 1971, plaintiff-appellant Anthony Bottom and an accomplice snuck up behind two New York City police officers—one black, one white—and, at point-blank range, began shooting. Patrolman Waverly Jones, 33, was dead before he hit the ground, .45-caliber slugs from Bottom's gun having ripped through his skull, his spine, his diaphragm, and one of his kidneys. The other gunman shot Patrolman Joseph A. Piagentini several times with a long-barreled .38, and continued to fire as the officer lay writhing on the ground, pleading for his life. But when the gun ran out of bullets, Piagentini was still alive. So Bottom's accomplice grabbed Piagentini's loaded service revolver and fired it at him until that weapon, too, was empty. Before fleeing, Bottom fired a final shot into Piagentini with the .45. Patrolman Piagentini died on the way to Harlem Hospital, where doctors found he had been shot a dozen times. "We offed two pigs," Bottom boasted to friends that night.<sup>1</sup>

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<sup>1</sup> See, e.g., *People v. Bell*, N.Y.L.J., Nov. 12, 1998, at 25 (N.Y. Sup. Ct. Nov. 11, 1998); ROBERT K. TANENBAUM & PHILIP ROSENBERG, *BADGE OF THE ASSASSIN* 3-5, 130-34 (1979); Joseph P. Fried, *2 Policemen Slain by Shots in Back; 2 Men are Sought*, N.Y. TIMES, May 22, 1971, at 1; Douglas Robinson, *Anatomy of an Unending Manhunt*, N.Y. TIMES, June 24, 1971, at 41.

The murders triggered one of the largest manhunts the State of New York had ever seen.<sup>2</sup> The President of the United States called the execution-style killings “especially reprehensible.”<sup>3</sup> Bottom was ultimately apprehended in San Francisco after he tried unsuccessfully to machine-gun a police officer there,<sup>4</sup> and, in 1975, a New York County jury convicted him on two counts of murder in the first degree for the killings of Officers Piagentini and Jones. “[T]he prosecution’s case was extremely strong,” and “rested on . . . compelling evidence,” *Bell v. Coughlin*, 820 F. Supp. 780, 790 (S.D.N.Y.) (denying petition for habeas corpus), *aff’d by summary order*, 17 F.3d 390 (2d Cir. 1993) (table), yet Bottom was unrepentant: the state trial judge later recalled that Bottom and his co-defendants “said they were at war with the United States”; and, at his sentencing, Bottom turned his back on the court and proclaimed himself a “revolutionary.”<sup>5</sup> Bottom received two concurrent prison

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<sup>2</sup> See, e.g., Robert D. McFadden, *Police Force of Hundreds Hunts Comrades’ Killers*, N.Y. TIMES, May 23, 1971, at 1.

<sup>3</sup> Robert B. Semple Jr., *Nixon Assails Slayings of Policemen*, N.Y. TIMES, May 27, 1971, at 43.

<sup>4</sup> See, e.g., Nicholas Gage, *2 in San Francisco Linked to Slaying of Patrolmen Here*, N.Y. TIMES, Sept. 18, 1971, at 1; TANENBAUM & ROSENBERG, *supra*, at 47-55. In 1972, Bottom was convicted of federal weapons charges and state attempted murder charges in California. See, e.g., *Bottom v. Coughlin*, No. 80 Civ. 541 (WCC), 1980 U.S. Dist. LEXIS 12563, at \*3 (S.D.N.Y. July 24, 1980); *Bottom v. Goord*, 764 N.Y.S.2d 667, 668 (App. Div. 3d Dep’t 2003).

<sup>5</sup> Marvine Howe, *3 Seek New Trial in 70’s Police Killings*, N.Y. TIMES, Dec. 26, 1989, at B3; Lawrence Van

terms of twenty-five years to life, and he has since been denied parole. *Bottom v. Travis*, 773 N.Y.S.2d 717, 717 (App. Div. 4th Dep't 2004).

The other lead plaintiff here, Joseph Hayden, committed a lesser offense against the State of New York and its citizens, but a serious and violent one nonetheless. On a Manhattan street on August 25, 1987, while paroled on a federal narcotics conviction for which he had received a fifteen-year sentence,<sup>6</sup> Hayden got into an argument, then an altercation, with Thomas Peters, a sanitation worker whose vehicle was blocking Hayden's. After Peters broke Hayden's car window, Hayden "ran into a nearby bakery, and exited with a butcher knife with which he stabbed Peters in the chest as Peters sat in his own car." *People v. Hayden*, 561 N.Y.S.2d 177, 177-78 (App. Div. 1st Dep't 1990). Peters died. In 1988, a

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Gelder, *Weapons Found Smuggled to 3 Sentenced in Murder*, N.Y. TIMES, May 13, 1975, at 1 (also reporting that just after sentencing, Bottom and co-defendants had been found with smuggled explosives, knives and lock picks in envelopes that had been on the defense table in court).

<sup>6</sup> The conviction came in one of the most publicized federal drug conspiracy cases in the Nation's history, the Leroy "Nicky" Barnes case, *see United States v. Barnes*, 604 F.2d 121, 131-35, 163-64 (2d Cir. 1979); *id.* at 168 (Meskill, J., dissenting) ("case[ ] of notorious criminals"; citation omitted); Arnold H. Lubasch, *Barnes Guilty In Drug Case; Could Get Life*, N.Y. TIMES, Dec. 3, 1977, at 1 (noting that United States Attorney Robert B. Fiske, Jr. had "personally headed the prosecution in the Barnes trial after President Carter had indicated that he considered the case particularly significant").

jury in New York County convicted Hayden of manslaughter, and he was sentenced to a term of ten to twenty years in prison. *Id.* The state paroled Hayden, and returned him to federal custody, in December 2000. *Hayden v. Keane*, 154 F. Supp. 2d 610, 613 (S.D.N.Y. 2001), *aff'd by summary order*, 34 Fed. Appx. 796 (2d Cir. 2002). His term of federal parole ends in 2007. 34 Fed. Appx. at 798 n.1.

Having thus transgressed the laws of the State of New York and the United States, Bottom and Hayden now claim that Congress, through the Voting Rights Act, intended to give them the right to participate in how those laws are made, even as they remain in prison or on parole. As is shown below, however, the Nation's voters and legislators and courts have almost always rejected the idea of giving felons the right to vote during their sentences—and the Congresses that enacted and amended the Voting Rights Act were no exception.

## ARGUMENT

### POINT I

#### **FELON DISENFRANCHISEMENT LAWS ARE DEEPLY ROOTED IN THE NATION'S HISTORY AND ARE NOT RACIALLY DISCRIMINATORY.**

The terrible facts of Bottom's and Hayden's cases could not better illustrate the justification for the law they seek to overturn. As Judge Henry Friendly once put it, someone "who breaks the laws" may "fairly have been thought to have abandoned the right to participate" in making them. *Green v. Board of Elections*, 380 F.2d 445, 451 (2d Cir. 1967). The idea "could well have rested

on Locke’s concept” of the social compact, “so influential at the time.” *Id.* Whatever its philosophical origins,

it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.

*Id.*

That view has prevailed throughout American history. “Felon disenfranchisement laws are unlike other voting qualifications,” as they are “deeply rooted in this Nation’s history.” *Johnson v. Governor of Fla.*, No. 02-14469, 2005 WL 832357, at \*9 (11th Cir. April 12, 2005) (en banc). “The practice of denying the vote to individuals convicted of certain crimes is a very old one that existed under English law, in the colonies, and in the earliest suffrage laws of the states.”<sup>7</sup> The prohibition challenged here traces its roots back to New York’s Constitution of 1821, which authorized the Legislature to pass laws “excluding from the right of suffrage persons who have been, or may be, convicted of infamous crimes.” N.Y. CONST. of 1821, art. II, § 2. By that time, “eleven state constitutions” either “prohibited or authorized the legislature to prohibit exercise of the franchise by convicted felons. Moreover, twenty-nine states had such provisions when the Fourteenth Amendment was

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<sup>7</sup> NAT’L COMM’N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 45 (2001), available at [http://millercenter.virginia.edu/programs/natl\\_commissions/final\\_report.html](http://millercenter.virginia.edu/programs/natl_commissions/final_report.html).

adopted . . . .” *Green*, 380 F.2d at 450; *accord Richardson v. Ramirez*, 418 U.S. 47, 48 (1974).

That long history refutes any suggestion that felony disenfranchisement provisions like New York’s are racially motivated. Their antebellum origins show plainly that they were aimed at whites. As the en banc Eleventh Circuit recently observed, “[a]t that time, the right to vote was not extended to African-Americans, and, therefore, they could not have been the targets of any [felon] disenfranchisement law.” *Johnson*, 2005 WL 832357, at \*2. “The prevalence of these laws before African-Americans were granted the right to vote indicates that states have historically maintained these laws for race-neutral reasons.” *Id.* at \*9 n.28; *accord Howard v. Gilmore*, No. 99-2285, 2000 WL 203984, at \*\*1 (4th Cir. Feb. 23, 2000) (unpublished opinion).<sup>8</sup> It also “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.” *Baker v. Pataki*, 85 F.3d 919, 928 (2d Cir. 1996) (Mahoney, J.).

The framers of the Civil War Amendments saw nothing racially discriminatory about felon disenfranchise-

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<sup>8</sup> In particular, there was no need for New York to use felon disenfranchisement to disenfranchise blacks, because it had already done so “by instituting a racially specific set of property and residence requirements.” ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 55 (2000); *see* N.Y. CONST. of 1821, art. II, § 1. The plaintiffs *themselves* allege that these property requirements disenfranchised 99 percent of New York’s (then tiny) black population. *See Hayden* First Amended Complaint ¶ 48.

ment. To the contrary, they expressly *recognized* the power of the states to prohibit felons from voting. Section 2 of the Fourteenth Amendment provides that a state’s denial of voting rights “for participation in rebellion, or other crime” could not serve as a basis for reducing its representation in Congress. U.S. CONST. amend. XIV, § 2. As the Supreme Court held in *Richardson v. Ramirez*, Section 2 is thus “an *affirmative sanction*” by the Constitution of “the exclusion of felons from the vote”—even felons who, like the plaintiffs in *Richardson*, had finished their sentences. 418 U.S. at 54 (emphasis added). This conclusion

rests on the demonstrably sound proposition that § 1 [the Equal Protection Clause], in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement.

*Id.* at 55. Section 2 of the Fourteenth Amendment thus “*expressly* permits states to disenfranchise convicted felons.” *Johnson*, 2005 WL 832357, at \*1 (emphasis added).

Nor did the Reconstruction Congresses see any conflict between felon disenfranchisement and the Fifteenth Amendment. As the Supreme Court observed at length in *Richardson*, Congress, in readmitting states to the Union, consistently approved state constitutions that excluded felons from the franchise. 418 U.S. at 48-52. In fact, the Fortieth Congress—the *very same Congress that proposed the Fifteenth Amendment*—approved such constitutions, and the next Congress did so both before *and after* the Fifteenth Amendment was ratified. *Id.* (citing

readmission statutes enacted in June 1868 and January, February, March, and May 1870); *see Johnson*, 2005 WL 832357, at \*2 n.7.<sup>9</sup>

As for the courts, they have consistently held not only that “the states had both a right to disenfranchise [felons and] ex-felons,” but that they had “a compelling interest in doing so.”<sup>10</sup> In 1890, for example, the Supreme Court held that a territorial legislature’s statute that “exclude[d] from the privilege of voting . . . those who have been convicted of certain offenses” was “not open to any constitutional or legal objection.” *Davis v. Beason*, 133 U.S. 333, 347 (1890). A unanimous Warren Court decision recognized that a “criminal record” is one of the “factors which a State may take into consideration in determining the qualifications of voters.” *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959) (Douglas, J.). Today’s Court agrees: the holding “that a convicted felon may be denied the right to vote” remains “unexceptionable.” *Romer v. Evans*, 517 U.S. 620, 634 (1996).<sup>11</sup>

Accordingly, as the National Commission on Federal Election Reform—a bipartisan, blue-ribbon panel chaired by former Presidents Ford and Carter—recently observed,

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<sup>9</sup> The Fifteenth Amendment was passed on February 26, 1869 by the Fortieth Congress (which began on March 4, 1867 and ended on March 3, 1869), and was ratified on February 3, 1870, during the Forty-First Congress.

<sup>10</sup> KEYSSAR, *supra*, at 162.

<sup>11</sup> *See also, e.g., Green*, 380 F.2d at 451 (Friendly, J.; noting that Supreme Court “frequently recognized” “propriety of excluding felons from the franchise,” and citing cases).

the states are free to disenfranchise felons if they see fit: “the question of whether felons should lose the right to vote is one that requires a moral judgment by the citizens of each state.”<sup>12</sup> The bipartisan commission recommended a judgment similar to New York’s—disenfranchisement until felons “have fully served their sentence, including any term of probation or parole”—while acknowledging that states were free even to disenfranchise felons for life.<sup>13</sup> The commission also concluded that “we doubt that Congress has the constitutional power to legislate a federal prescription on this subject.”<sup>14</sup>

Today, from the bluest of the blue to the reddest of the red, the states continue to judge felons unfit to vote. By 1967, the number of states disenfranchising felons had “risen to forty-two,” *Green*, 380 F.2d at 250; and today, “all states *except two* have some form of criminal disenfranchisement provision,” *Johnson*, 2005 WL 832357, at \*9 (emphasis added). Also having such a provision is the District of Columbia, a jurisdiction that is 60 percent black. The District’s current felon disenfranchisement law was enacted by its own locally elected Council after the introduction of home rule in 1974, and was submitted to—and not objected to—by the Congress of the United States, the very body claimed here to have outlawed felon disenfranchisement.<sup>15</sup>

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<sup>12</sup> NAT’L COMM’N ON FED. ELECTION REFORM, *supra*, at 45 (emphasis added).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Before granting home rule, Congress enacted felon disenfranchisement in the District. *See* Pub. L. 92-220,

And felon disenfranchisement enjoys overwhelming popular support. Massachusetts is the state whose citizens most recently spoke on the subject; until 2000, convicts there could vote, even while in jail. That November, however, the Bay State's voters faced a ballot question on a proposed state constitutional amendment to take away the incarcerated felons' franchise. The amendment passed by a landslide, with 60 percent voting yes and only 34 percent voting no.<sup>16</sup> So, too, with Utah. Incarcerated felons had the right to vote there until 1998, when the state's voters similarly approved a constitutional amendment taking away the felons' right to vote. The proposition passed virtually by acclamation, 82 percent to 18.<sup>17</sup>

The Massachusetts and Utah voters' moral judgment was the same judgment other states have made through-

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§ 4, 85 Stat. 788 (1971); District of Columbia Election Act, § 2(2)(C), 69 Stat. 699 (1955). Home rule gave the D.C. Council plenary power over voter qualifications in the District, D.C. CODE ANN. § 1-207.52, subject to congressional review, *id.* § 1-206.02(c)(1); the D.C. Council amended the election code to disenfranchise felons only during incarceration, *id.* §§ 1-1001.02(7)(A)-(B), 1-1001.07(k)(1), (3)-(4).

<sup>16</sup> See MASS. CONST. amend. III, *as amended by* MASS. CONST. amend. CXX; MASS. GEN. LAWS ch. 51, § 1 (same); <http://www.sec.state.ma.us/ele/elebalm/balm/pdf/balm2000.pdf> (referendum results for ballot question two).

<sup>17</sup> See UTAH CONST. art. IV, § 6; UTAH CODE ANN. 20A-2-101.5; [http://governor.state.ut.us/lt\\_gover/98GenPropView.htm](http://governor.state.ut.us/lt_gover/98GenPropView.htm) (referendum results for proposition number four).

out American history. It was perhaps put best by a Massachusetts state legislative leader, who said of that state's now-abolished practice of allowing incarcerated felons to vote:

It makes no sense. We incarcerate people and we take away their right to run their own lives and leave them with the ability to influence how we run *our* lives?<sup>18</sup>

But that is precisely the intent that the plaintiffs would have this Court ascribe to Congress here.

## POINT II

### CONGRESS DID NOT INTEND THE VOTING RIGHTS ACT TO APPLY TO FELONY DISENFRANCHISEMENT LAWS.

#### A. **Legislative history does not support plaintiffs' construction of the Voting Rights Act.**

The dispositive question is whether, in enacting and amending Section 2 of the Voting Rights Act, Congress

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<sup>18</sup> Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 172 (2001) (emphasis added; citation omitted). This article points out that, even if a prima facie case of a discriminatory "result" were allowed to be made out here under Section 2, the state's strong and legitimate interests in such a law—for the reasons discussed above—would overwhelmingly rebut that prima facie case. *Id.* at 173 (citing *Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419, 426 (1991) (state's interest "is a legitimate factor to be considered by courts among the 'totality of circumstances' in determining whether a § 2 violation has occurred"))).

intended to prohibit the states from denying the franchise to felons. The statutory text is notably ambiguous, for “[u]nfortunately, it ‘is exceedingly difficult to discern what [Section 2] means.’ ” *Muntaqim v. Coombe*, 366 F.3d 102, 116 (2d Cir. 2004) (quoting *Goosby v. Town Bd.*, 180 F.3d 476, 499 (2d Cir. 1999) (Leval, J., concurring)); accord *Johnson*, 2005 WL 832357, at \*10 n.30. Where, as here, “the plain language and canons of statutory interpretation fail to resolve statutory ambiguity, [this Court] will resort to legislative history.” *United States v. Dauray*, 215 F.3d 257, 264 (2d Cir. 2000).

The legislative history of the Voting Rights Act unambiguously resolves this case against plaintiffs. The only provision of the Act that Congress thought could even implicate felon disenfranchisement was Section 4, which prohibits any requirement of “good moral character” to vote. 42 U.S.C. § 1973b(c)(3). But the Senate Judiciary Committee’s report—in a joint statement by Senators Dodd, Hart, Long, Kennedy, Bayh, Burdick, Tydings, Dirksen, Hruska, Fong, Scott and Javits—took pains to note that even *that* provision

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.

S. REP. NO. 162, 89th Cong., 1st Sess., pt. 3, at 24 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2562. On the floor, Senator Tydings repeated the point: the law would not bar states from imposing

a requirement that an applicant for voting or registration for voting be free of conviction of a felony.  
 . . . These grounds for disqualification are objec-

tive, easily applied, and do not lend themselves to fraudulent manipulation.

111 CONG. REC. S8366 (1965).

The House Judiciary Committee report agreed. The Voting Rights Act, said the committee,

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.

H.R. REP. NO. 439, 89th Cong., 1st Sess. 25-26 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2457.

“These are the only references to felon disenfranchisement made in reports to the 1965 act.” *Johnson*, 2005 WL 832357, at \*12. As the en banc Eleventh Circuit recently held by a 10-2 vote, these reports demonstrate that

- “Congress did not intend Section 2 of the Voting Rights Act to cover felon disenfranchisement provisions”;
- “tests for literacy or good moral character should be scrutinized, but felon disenfranchisement provisions should not”; and
- “legislators intended to *exempt* the voting restrictions of felons from the statute’s coverage.”

*Id.* at \*12 (emphasis in original).

And there is no evidence that Congress, in amending the Voting Rights Act in 1982, changed its mind. The amendments’ history reflects not the slightest hint of any intent to outlaw felon disenfranchisement. Indeed, even though it “details many discriminatory techniques used

by certain jurisdictions,” “[t]here is simply *no* discussion of felon disenfranchisement in the legislative history surrounding the 1982 amendments.” *Id.* (emphasis added). Indeed, “considering the prevalence of felon disenfranchisement in every region of the country since the Founding, it seems unfathomable that Congress would silently amend the Voting Rights Act in a way that would affect them.” *Id.* (quoting *Muntaqim*, 366 F.3d at 123-24).

Overturing felon disenfranchisement remains unfathomable to Congress to this very day. The Voting Rights Act’s utterly “one-sided legislative history is buttressed by subsequent Congressional acts. Since 1982, Congress has enacted laws making it *easier* for states to disenfranchise felons.” *Id.* at \*12 n.37 (emphasis in original). Thus:

- *The National Voter Registration Act of 1993* not only provides that a felony conviction may be the basis for canceling a voter’s registration, but requires federal prosecutors to notify state election officials of federal felony convictions.<sup>19</sup>
- *The Help America Vote Act of 2002* actually *instructs* state election officials to purge disenfranchised felons “on a regular basis” from their computerized voting lists.<sup>20</sup>

The enactment of these provisions plainly “suggests that Congress did not intend to sweep felon disenfranchisement laws within the scope of the VRA.” *Johnson*, 2005

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<sup>19</sup> 42 U.S.C. §§ 1973gg-6(a)(3)(B) & (g)(1).

<sup>20</sup> 42 U.S.C. § 15483(a)(2)(A)(ii)(I).

WL 832357, at \*12 n.39; *accord Farrakhan v. Washington*, 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc).

Not only that, in considering what ultimately became the Help America Vote Act, the Senate actually voted on a floor amendment that would have required states to do what New York already does—namely, to allow felons to vote after they have completed their terms of incarceration, parole, or probation.<sup>21</sup> The proposal would only have applied to *federal* elections—and its sponsors emphasized they had *no* quarrel with denying the franchise to convicts who were still serving their sentences. In the words of the principal sponsor, Senator Reid, who was then the majority whip,

We have a saying in this country: “If you do the crime, you have to do the time.” I agree with that. . . . [T]he amendment . . . is narrow in scope. It does not extend voting rights to prisoners. . . . I don’t believe in that. It does not extend voting rights to ex-felons on parole . . . .<sup>22</sup>

Despite being “narrow in scope,” the amendment was *rejected* by a large bipartisan majority: 31 yeas, 63 nays.<sup>23</sup>

Since then, bills have been repeatedly introduced in Congress that essentially copy Senator Reid’s proposal verbatim—but not one has so much as been voted out of

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<sup>21</sup> 148 CONG. REC. S797-98 (2002) (proposed amendment 2879 to S. 565).

<sup>22</sup> *Id.* at S801, S802 (statement of Sen. Reid); *see also id.* at S804-05 (statement of co-sponsor, Sen. Specter).

<sup>23</sup> *Id.* at S809 (23 Democrats and 40 Republicans voted “nay”).

committee.<sup>24</sup> This legislative record belies the contention that Congress has ever sought to do away with felon disenfranchisement in any form. At the very least, submission of the Reid amendment and the subsequent bills would have made absolutely no sense “if Congress has the clear understanding that the Voting Rights Act currently covers those cases.” *Johnson v. Governor of Fla.*, 353 F.3d 1287, 1318 n.15 (2003) (Kravitch, J., dissenting), *panel opinion vacated and reh’g en banc granted*, 377 F.3d 1163 (2004), *judgment of district court aff’d*, No. 02-14469, 2005 WL 832357 (11th Cir. Apr. 12, 2005) (en banc majority opinion by Kravitch, J.).

Congress has never had any such understanding, ever.

**B. Section 2’s “results” test cannot be stretched to outlaw felony disenfranchisement.**

**1. The “clear statement” rule precludes plaintiffs’ reading of the statute.**

The manifest ambiguity of the statutory text not only requires that the legislative history set out above be followed, it triggers the “clear statement” rule of *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (emphasis added; citations and internal quotation marks omitted):

[I]f Congress intends to alter the usual constitutional balance between the States and the Federal

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<sup>24</sup> Count Every Vote Act of 2005, S. 450, 109th Cong. § 701(d) (2005); Ex-Offenders Voting Rights Act of 2005, H.R. 663, 109th Cong. § 4 (2005); Ex-Offenders Voting Rights Act of 2003, H.R. 1433, 108th Cong. § 4 (2003); *see also* Civic Participation and Rehabilitation Act of 2003, H.R. 259, 108th Cong. § 3 (2003).

Government, it must make its intention to do so *unmistakably clear* in the language of the statute.

Congress must

make its intention *clear and manifest* if it intends to pre-empt the historic powers of the States.

*Id.* at 461 (emphasis added; citations and internal quotation marks omitted).

This rule of construction controls whenever a federal statute touches on “traditionally sensitive areas, such as legislation affecting the federal balance.” *Id.* (citations and internal quotation marks omitted). When it applies, the rule requires that, absent a clear statement, courts must “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 461).

*Gregory* perfectly illustrates how the clear statement rule must be applied here. The Supreme Court there faced the question whether the Age Discrimination in Employment Act prohibited Missouri from enforcing a mandatory retirement age for state judges. The Court held that it did not. It applied the clear statement rule because the case implicated “the authority of the people of the States to determine the qualifications of their government officials.” 501 U.S. at 464. The fact that Congress’s intent on the issue was “at least ambiguous” was enough to resolve the question; the Court refused to “give the state-displacing weight of federal law to mere congressional *ambiguity*.” *Id.* at 464, 467 (emphasis in original; citation and internal quotation marks omitted).

So it is here. This case involves authority that is at least as important as the state’s power to determine the

qualifications of government officials, as it involves the power to determine who gets to *choose* those officials and their qualifications. “If defining the qualifications of important government officials lies at the heart of representative government, then surely defining who decides what those qualifications will be is equally important.” *Johnson*, 2005 WL 832357, at \*11 n.35. Indeed, *more* important, because “[n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices . . . .” *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (Black, J.) (emphasis added). That by itself suffices to require a clear statement, but even more is involved here: the fundamental state power to “defin[e] and enforc[e] the criminal law,” for which, of course, “the States possess primary authority.” *Muntaqim*, 366 F.3d at 121 (quoting *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995)).

The confluence of these two fundamental lines of state authority, indeed, expressly appears in the Constitution’s text. Thus, not only does the Constitution defer to the states to set voter qualifications even for *federal* elections, *see* U.S. CONST. art. I, § 2 (House of Representatives); *id.* amend. XVII (Senate), but, as noted above, the Constitution *affirmatively sanctions* the states’ historic authority to disenfranchise people “for participation in rebellion, *or other crime*,” *id.* amend. XIV, § 2 (emphasis added). The states have the authority to decide whether felons should vote. That is what the Constitution provides.

Accordingly, if it is to disturb the federal-state balance in the area of voter qualifications, Congress must be

clear—*unmistakably clear*—about it. And Congress certainly knows how to be clear when it comes to voting rights: it was clear about literacy tests, 42 U.S.C. §§ 1971(a)(2)(C) & (3)(B), 1973b(c)(1); clear about educational-attainment requirements, *id.* § 1973b(c)(2); clear about knowledge tests, *id.*; clear about moral character tests, *id.* § 1973b(c)(3); clear about vouching requirements, *id.*; clear about English-language requirements, *id.* § 1973b(e); clear about English-only elections, *id.* § 1973b(f)(3); and clear about poll taxes, *id.* § 1973h(a), to give just a few examples.

But the text of the Voting Rights Act makes no unmistakably clear statement—it makes no statement at all—about felony disenfranchisement. And so it cannot be construed “to pre-empt the historic powers of the States.” *Gregory*, 501 U.S. at 461 (citations and internal quotation marks omitted).

**2. Section 2’s “results” test cannot be met here in any event.**

Even apart from the legislative history and the clear statement rule, plaintiffs cannot show a violation of Section 2. For “Congress did not wholly abandon its focus on purposeful discrimination when it amended the Voting Rights Act in 1982,” *Muntaqim*, 366 F.3d at 117 (citation omitted), as it continued to bar only “practices that deny or abridge the right to vote “*on account of race or color*,” 42 U.S.C. § 1973(a) (emphasis added).

Convicts like Bottom, a double murderer, and Hayden, guilty of manslaughter, most certainly are not disenfranchised because of their race or color. Rather, they are disenfranchised “because of their conscious decision to commit a criminal act for which they assume the risks

of detention and punishment.” *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986). Accordingly, because “the causation of the denial of the right to vote to felons . . . consists entirely of their conviction, not their race,” *Johnson*, 2005 WL 832357, at \*16 (Tjoflat, J., specially concurring), it “does not ‘result’ from the state’s qualification of the right to vote on account of race or color and thus . . . does not violate the Voting Rights Act,” *Wesley*, 791 F.2d at 1262.

Moreover, “[d]espite its broad language, Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect.” *Johnson*, 2005 WL 832357, at \*9. Proving a violation requires more than a “showing of racially disparate effects,” *id.* at \*14 (Tjoflat, J., specially concurring); the “mere fact that many incarcerated felons happen to be black and [L]atino is insufficient grounds to implicate the Fifteenth Amendment or the Voting Rights Act,” even under Section 2, *Jones v. Edgar*, 3 F. Supp. 2d 979, 981 (C.D. Ill. 1998). Again, that is because, even with the “results” test, Section 2 still requires proof of discrimination “on account of race or color.” Section 2

explicitly retains racial bias as the gravamen of a . . . claim. The existence of some form of racial discrimination therefore remains the cornerstone of section 2 claims; to be actionable, a deprivation of the minority group’s right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race or color, not on account of some other racially neutral cause. “[T]he scope of the Voting Rights Act is indeed quite broad, but its rigorous protections, as the text of § 2 suggests, extend only to defeats experienced by voters ‘on account of race or color.’ ”

*Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994) (citation omitted; quoting *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (en banc)).

Statistics showing racial disparities accordingly do not alone suffice to establish a Section 2 violation even when the disparities *directly* relate to the electoral process. But here, of course, the statistics are at least one step *removed* from that: the claim is based upon “ ‘race-based disparities *in sentencing*’ ”—“that, *as a result of racial discrimination in sentencing*, black and Hispanic felons are more likely to be sentenced to a term of imprisonment than white felons and are therefore more likely to be disenfranchised.” *Muntaqim*, 366 F.3d at 118 (emphasis by the Court; quoting plaintiff’s brief).

That cannot suffice, either. The case law establishes clearly that “evidence of statistical disparities in an area external to voting, which then result in statistical disparities in voting,” do not prove a Section 2 violation. *Farrakhan*, 359 F.3d at 1117 (Kozinski, J., dissenting). See, for example,

- *Wesley v. Collins*, 791 F.2d at 1262, which upheld Tennessee’s felon disenfranchisement provision against a Section 2 claim that was based on statistical disparities in conviction rates;
- *Ortiz v. City of Philadelphia Office of City Commissioners*, 28 F.3d 306, 314-15 (3d Cir. 1994), which rejected a Section 2 claim that a statute purging voter registrations of those who did not vote for two years had a disparate statistical impact on minorities;

- *Salas v. Southwest Texas Junior College District*, 964 F.2d 1542, 1556 (5th Cir. 1992), which rejected a Section 2 claim that an at-large voting system harmed minorities because of statistical disparities in voter turnout; and
- *Irby v. Virginia State Board of Elections*, 889 F.2d 1352, 1358-59 (4th Cir. 1989), which rejected a Section 2 claim premised on disparities in the rates at which blacks and whites sought appointive positions.

Indeed, to ignore cases like these would lead to an absurdity here: the plaintiffs would be allowed to prove a denial of voting rights “as a result of racial discrimination in sentencing,” *Muntaqim*, 366 F.3d at 118 (quoting plaintiff’s brief; emphasis omitted), on the basis of evidence *legally insufficient* to establish an actual claim of racial discrimination in sentencing. The Supreme Court has held that statistical disparities cannot be the basis for a Fourteenth Amendment claim to overturn a criminal conviction or sentence; a defendant must show that *he himself* or *she herself* suffered discrimination on the basis of race, and must show that on the basis of things that happened *in his or her case*. “Because discretion is essential to the criminal justice process,” statistical evidence “is clearly insufficient to support any inference that any of the decisionmakers in [a particular] case acted with discriminatory purpose.” *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987). This is so even in a capital case, as *McCleskey* was.

But as plaintiffs would have it, convicted felons, to assert the right to vote, could invoke the very same racial statistics that they *cannot* invoke to assert the right to walk the streets. That result alone would be odd,

to say the least. Yet plaintiffs’ reasoning moves swiftly from the incongruous to the unimaginable. By their logic, the Voting Rights Act probably abolishes capital punishment nationwide. By their logic, if similar statistical disparities appear in capital sentences, then the execution of such sentences, which plainly effect a permanent denial of the right to vote, would necessarily constitute a “practice . . . which results in a denial or abridgment of the right . . . to vote on account of race or color.” 42 U.S.C. § 1973(a).

Did the Ninety-Seventh Congress and President Ronald Reagan intend and enact any such thing? Of course not.

### POINT III

#### PLAINTIFFS’ CONSTRUCTION OF SECTION 2 WOULD EXCEED CONGRESS’S ENFORCEMENT POWERS UNDER THE FIFTEENTH AMENDMENT.

Finally, plaintiffs’ construction of Section 2 must be rejected because it would exceed Congress’s powers to enforce the Fifteenth Amendment—or, at a minimum, would “present[ ] grave constitutional questions” that this Court, though a narrower reading, can and must avoid. *Johnson*, 2005 WL 832357, at \*10 (citing *DeBar- tolo Corp. v. Florida Gulf Coast Trades Council*, 585 U.S. 568, 575 (1988)). Indeed, as the bipartisan Ford-Carter commission concluded, it is “doubtful” that Congress has the power to require states to enfranchise even those felons who have *completed* their sentences.<sup>25</sup>

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<sup>25</sup> NAT’L COMM’N ON FED. ELECTION REFORM, BACKGROUND REPORT OF THE TASK FORCE ON LEGAL

Specifically, Congress may not rewrite the Fifteenth Amendment in the guise of enforcing it, as “Congress does not enforce a constitutional right by changing what that right is.” *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Congress can only “enact so-called prophylactic legislation” to the extent necessary “in order to *prevent and deter unconstitutional conduct.*” *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 727-28 (2003) (emphasis added). “There must be a *congruence and proportionality* between the injury to be prevented or remedied and the means adopted to that end.” *Boerne*, 521 U.S. at 520 (emphasis added). To meet that test, Congress must:

- *first*, develop a “legislative record” that demonstrates a “history and pattern” of unconstitutional state conduct, *Board of Trustees v. Garrett*, 531 U.S. 356, 368 (2001); and
- *second*, “tailor its legislative scheme to remedying or preventing such conduct,” *Florida Prepaid Postsecondary Educ. Bd. v. College Savs. Bank*, 527 U.S. 627, 639 (1999).

Section 2 would plainly fail to meet even the first test, let alone the second, were it construed to prohibit felon disenfranchisement. For “when Congress enacted the VRA and its subsequent amendments, there was a *complete absence* of congressional findings that felon disenfranchisement laws were used to discriminate against

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AND CONSTITUTIONAL ISSUES, PART X: THE FEDERAL REGULATION OF ELECTIONS 41 (2001), *available at* [http://millercenter.virginia.edu/programs/natl\\_commissions/commission\\_final\\_report/task\\_force\\_report/ortiz\\_chap10\\_fedreg.pdf](http://millercenter.virginia.edu/programs/natl_commissions/commission_final_report/task_force_report/ortiz_chap10_fedreg.pdf).

minority voters.” *Johnson*, 2005 WL 832357, at \*11 (emphasis added). “The legislative record . . . simply fails to show that Congress did in fact identify a pattern” of racial discrimination via felon disenfranchisement. *Garrett*, 531 U.S. at 369. To the contrary, the legislative history of the Voting Rights Act actually shows that Congress found the opposite—that “tests for literacy or good moral character should be scrutinized, but felon disenfranchisement provisions should not.” *Johnson*, 2005 WL 832357, at \*11. “[N]ot 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 (Mahoney, J.).

Nothing in *Hunter v. Underwood*, 471 U.S. 222 (1985), changes the record on this score. Even apart from the fact that it came *after* the 1982 Voting Rights Act amendments, *Hunter* was *not* a felon disenfranchisement case; it was a *misdemeanant* disenfranchisement case. It struck down an intentionally discriminatory Jim Crow-era provision that denied the franchise to those who committed “any . . . crime involving moral turpitude,” a phrase that referred to “many misdemeanors,” including “[v]arious minor nonfelony offenses such as presenting a worthless check and petty larceny,” offenses specifically “selected for inclusion” by Alabama’s 1901 constitutional convention because they “were believed by the delegates to be more frequently committed by blacks.” *Id.* at 226-27.

The findings of real racial animus in *Hunter* could not possibly support the construction of Section 2 that plaintiffs advance here. The plaintiffs’ construction goes far, far beyond a remedy for the specific form of intentional

discrimination found in *Hunter*. “Given that racial minorities are overrepresented in the felon population” throughout the Nation, “the plaintiffs’ theory would cast into doubt most felon disenfranchisement laws in this country.” *Johnson*, 2005 WL 832357, at \*11 n.32. But a discriminatory *misdemeanant* disenfranchisement law in *one* southern state simply cannot be “sufficient to support the regulation of *felon* disenfranchisement scheme[s] in *all* fifty states.” *Muntaqim*, 366 F.3d at 126 (emphasis added in part). Under the congruence and proportionality test, Congress may not create “remedies . . . appl[ying] uniformly throughout the Nation” when unconstitutional conduct “does not exist in all States, or even most States.” *United States v. Morrison*, 529 U.S. 598, 626 (2000).

In short, to apply Section 2 to strike down all felon disenfranchisement laws, including those enacted and enforced without a discriminatory purpose, would “attempt a substantive change in constitutional protections,” *Boerne*, 521 U.S. at 532—something the Constitution simply does not allow.

## CONCLUSION

New York has made the moral judgment that criminals like Messrs. Bottom and Hayden—who took away not only their victims’ suffrage but their victims’ lives—should, along with all other felons, be denied the right to vote while in prison or on parole. It is a policy that the Constitution specifically entitles the states to choose, that virtually every state has chosen, and that Congress has never, ever intended to change. That all being so, the “[f]ederal courts cannot question the wisdom of this policy choice.” *Johnson*, 2005 WL 832357, at \*13.

It is respectfully submitted that the judgments of the district courts below should be affirmed.

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April 27, 2005

## CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2005, I caused two true and correct copies of this Brief of Diane Piagentini, Mary Piagentini, Deborah Piagentini, the Criminal Justice Legal Foundation and the Center for Equal Opportunity as *Amici Curiae* in support of Defendants-Appellees and Affirmance, to be served by United States mail upon:

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