
No. 01-7260

In the

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

JALIL ABDUL MUNTAQIM,
Plaintiff-Appellant
vs.
PHILLIP COOMBE, ET AL.,
Defendants-Appellees

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

**EN BANC BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW, PEOPLE FOR THE AMERICAN WAY FOUNDATION,
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
AND NATIONAL BLACK LAW STUDENTS ASSOCIATION NORTHEAST REGION
IN SUPPORT OF APPELLANT AND IN SUPPORT OF REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 28 of the Federal Rules of Appellate Procedure, the undersigned *amici curiae* counsel of record certifies that *amici* are non-partisan, non-profit organizations. *Amici* have neither a parent organization, nor have they issued shares or securities.

Respectfully submitted this 28th day of January, 2005.

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STATEMENT OF INTEREST OF THE AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, a past Attorney General of the United States, law school deans and professors, and many of the nation's leading lawyers. It has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C. Through the Lawyers' Committee and its affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country challenging discrimination in virtually all aspects of American life.

The Lawyers' Committee has decades of experience litigating individual and class action voting rights claims in federal and state courts, and is highly knowledgeable about the legal and policy issues relevant to this case. For example, the Lawyers' Committee is counsel for plaintiffs in *Johnson v. Bush*, No. 02-14469C, a challenge to Florida's felon disenfranchisement law that is now pending before the Eleventh Circuit.

In a letter dated January 4, 2005, this Court invited the Lawyers Committee to file an *amicus* brief with the Court in the above-entitled matter.

People For the American Way Foundation (“People For”) is a nonpartisan, education-oriented citizens’ organization established to promote and protect civil and constitutional rights, including voting rights, and to encourage citizen participation in the political process. Founded in 1981 by a group of religious, civic and educational leaders devoted to our nation’s heritage of tolerance, pluralism and liberty, People For now has more than 600,000 members and supporters nationwide. People For has represented litigants in important voting rights cases and has joined in filing this *amicus* brief to help secure the voting rights of people of color, language minorities and others who have historically been discriminated against and disenfranchised.

The NAACP, established in 1909, is the nation’s oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of racial and ethnic bias. The NAACP has a long history of working to ensure voting rights via litigation, legislative advocacy, voter registration, voter education, “get out the vote” activities, as well as election

protection activities. The NAACP has also examined issues surrounding ex-felon disenfranchisement.

The National Black Law Students Association (NBLSA), the largest student-run organization in America, has over 200 chapters at law schools throughout the country. This represents almost every ABA accredited law school, plus several non-accredited law schools. These chapters represent over 6,000 Black law students in six regions which encompass 48 states including Hawaii, and the Commonwealth of Puerto Rico. Recently, NBLSA established international links with Black law students in Canada, England and South Africa who decided to model their student organizations after NBLSA. The Northeastern Region is comprised of thirty-three chapters in Connecticut, Maine, Massachusetts, New York, Northern New Jersey, Rhode Island, and Vermont.

In 1968, Algernon Johnson "A.J." Cooper, former mayor of Prichard, Alabama, founded the Black American Law Students Association (BALSA) at the New York University Law School. BALSA's purpose was to effectuate change in the legal system. The association endeavored to sensitize the law and legal profession to the ever-increasing needs of the Black community. This commitment has never wavered. In its effort

to remain responsive to the needs of the Black community in general and the Black law student in particular, the NBLSA has initiated many worthy programs and is often active in joint-effort programming with other organizations that have goals and objectives analogous to its own.

SUMMARY OF ARGUMENT

Amici urge this Court to reverse the ruling of the District Court granting defendants' motion for summary judgment. The lower court incorrectly held that New York Election Law § 5-106, which disenfranchises citizens convicted of felonies who are incarcerated or on parole, and other disenfranchisement statutes are exempt from discriminatory results claims under Section 2 of the Voting Rights Act (the "VRA"), 42 U.S.C. § 1973

This brief addresses only the issue of whether Section 2 is sufficiently broad to permit a claim that a statute which disenfranchises citizens for committing felonies results in the denial or dilution of the voting rights of minority citizens.¹ *Amici* are not taking a position as to whether New York Election Law § 5-106 actually violates Section 2. When Congress originally

¹ This brief does not address several issues raised by the Court that we understand other *amici* are addressing, such as whether Section 2 challenges to disenfranchisement statutes exceed Congress' authority or what factors should be considered in determining whether New York Election Law § 5-106 violates Section 2.

enacted Section 2 in 1965, and when it amended Section 2 to explicitly provide for results claims in 1982, it had before it a record replete with voting discrimination against racial and ethnic minorities. Congress indicated unambiguously that its purpose was to eradicate this discrimination completely, and that the role of Section 2 in the statutory scheme was to provide a general anti-discrimination statute that encompassed all aspects of the voting process. Accordingly, the language of Section 2 makes clear that *no* practice or procedure affecting voting may have a discriminatory purpose or result. Consistent with this language and the legislative history, the courts have repeatedly held that Section 2 is broad enough to encompass any voting practice or procedure that has the potential to discriminate.

Laws which disenfranchise citizens of voting age that are convicted of felonies fall within the scope of Section 2. These laws not only affect voting but their impact is tremendous. The infringement on affected citizens' right to vote is absolute. Several million people are currently disenfranchised by felon disenfranchisement laws. Moreover, minority citizens are affected disproportionately when people with felony convictions are disenfranchised. To exempt felon disenfranchisement statutes, such as Election Law § 5-106, entirely from discriminatory results analysis under Section 2 when they have such a significant effect on the voting rights of minority citizens cannot be

reconciled with the language and intent of the statute to bar any law or practice that has the result of discriminating against minorities. For this reason, the district court should be reversed and this court should make it clear that Election Law § 5-106 should not be exempted from a challenge under Section 2 of the VRA.

ARGUMENT AND CITATION OF AUTHORITY

I. THE LANGUAGE OF SECTION 2 ENCOMPASSES ANY PRACTICE OR PROCEDURE THAT AFFECTS VOTING, INCLUDING FELON DISENFRANCHISEMENT STATUTES

“The starting point for [the] interpretation of a statute is always its language.” *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). In this case, Section 2 explicitly bars any practice or procedure affecting voting which results in discrimination on the basis of race or color or membership in a minority language group:

(a) No 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, or [membership in a minority language group.]

(b) A violation of subsection (a) of this section is 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.

Further, Section 14(c)(1) of the VRA, 42 U.S.C. § 1973l(c)(1) makes clear that the use of the term “voting” in Section 2 and other portions of the VRA is intended to apply to any activity affecting a citizen’s ability to participate in the electoral process:

The terms “vote” or “voting” shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, *registration*, listing pursuant to this subchapter, or other action required by law prerequisite to voting, *casting a ballot*, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election. (emphasis added)

The language of the VRA is unambiguous that any action by a State or political subdivision which affects voting and results in discrimination against citizens from a racial or minority language group violates Section 2. In terms of the scope of voting-related activities that are covered by Section 2, the language of the VRA does not contain any exceptions. Because felon disenfranchisement statutes are clearly voting practices or procedures, they are encompassed in the language of the statute.

II. THE LEGISLATIVE HISTORY OF THE VRA DEMONSTRATES THAT CONGRESS INTENDED SECTION 2 TO REACH ANY VOTING RELATED PROCEDURE, INCLUDING FELON DISENFRANCHISEMENT STATUTES

The legislative history of the VRA reinforces the plain language of the statute where Congress sought to have the scope of voting-related activities covered by Section 2 be as broad as possible and also demonstrates why Congress saw the need to enact such broad remedial legislation.

In enacting the VRA in 1965 and reauthorizing it, Congress's primary purpose was to provide a means to attach the many creative ways in which the states had prevented minority voters from participating in the electoral process in violation of the 15th Amendment, as well as the 14th Amendment. H. Rep. No. 89-439, 89th Cong., 1st Sess., 6 (1965) ("The bill, as amended, is designed primarily to enforce the 15th amendment to the Constitution of the United States and is also designed to enforce the 14th amendment and article I, section 4"); S. Rep. No. 89-162, Part 3, 89th Cong., 1st Sess., 2 (1965) ("We all recognize the necessity to eradicate once and for all the chronic system of racial discrimination which has for so long excluded so many citizens from the electorate because of the color of their skins, contrary to the explicit command of the 15th amendment").

The 15th Amendment forbids the national or state governments from denying or abridging the right of citizens to vote on account of race, color or

previous condition of servitude. In enacting the VRA, Congress took up the mandate of the 15th Amendment to “enforce this article by appropriate legislation.” *See* H. Rep. No. 89-439, 89th Cong., 1st Sess., 17; S. Rep. No. 89-162, Part 3, 89th Cong., 1st Sess., 17 (“Here then we draw on one of the powers expressly delegated by the people and by the States to the Congress – the power to prevent the denial or abridgement of the right to vote on account of race or color.”).

Congress had before it a record of state and local governments denying minorities the right to vote on a wide scale through a variety of means: “The history of the 15th amendment litigation in the Supreme Court reveals both the variety of means used to bar Negro voting and the durability of such discriminatory policies.” H. Rep. No. 89-439, 89th Cong., 1st Sess., 8 (1965). On three occasions during the decade preceding passage of the VRA, Congress attempted to address discrimination in voting. Although each of these bills became law, it was apparent to Congress that they were inadequate in addressing the problem of discrimination in voting and led Congress to pass the VRA.² S. Rep. No. 89-162, Part 3, 89th Cong., 1st Sess., 2, 5-6 (1965); H. Rep.

² The Civil Rights Act of 1957 gave the Attorney General the right to bring suits where the right to vote was denied because of race or color. The Civil Rights Act of 1960 required that elections officials retain their records and allowed federal courts or a voting referee to issue registration certificates. The

No. 97-227, 97th Cong., 1st. Sess. 3-4 (1965). The Congressional record is replete with references to the mandate of the 15th Amendment and the ways in which its obligations had been repeatedly undermined. *See* H. Rep. No. 89-439, 89th Cong., 1st Sess., 8-13 and S. Rep. No. 89-162, Part 3, 89th Cong., 1st Sess., 2, 6-12 (1965) (Noting the intransigence of State and local officials and repeated delays in the judicial process). As a result Congress fashioned a remedy that would defeat the many ingenious ways that states found to discriminate against minority voters.

In considering the VRA, Congress acknowledged the right of states to fix voter qualifications but noted that this right was limited by the 15th Amendment. H. Rep. No. 89-439, 89th Cong., 1st Sess., 18 and S. Rep. No. 89-162, Part 3, 89th Cong., 1st Sess., 18 (1965) ("Article I, section 2, and the 17th amendment to the Constitution permit the right of the States to fix the qualifications for voting. However, the 15th Amendment outlaws voting discrimination, whether accomplished by procedural or substantive means.") Congress wanted a broad test to assure that government actors could not evade the purpose of the VRA. Consequently, Congress reserved the right to place any law that resulted in voter discrimination under the umbrella of the VRA: "In enforcing the 15th amendment, Congress may forbid the use of voter

Civil Rights Act of 1964 sought to expedite voting rights lawsuits. S. Rep. No. 89-162, Part 3, 89th Cong., 1st Sess., 5-6 (1965).

qualification laws where necessary to meet the risk of continued or renewed violations of constitutional rights even though, in the absence of the course of illegal conduct predicated upon the use of such tests, the same State laws might be unobjectionable.” *Id.*

In order to address the 95 year history of undermining the right of minorities to vote, Congress fashioned several remedies. Two of the most significant remedies are embodied in Sections 2 and 5. Section 2 serves as a general non-discrimination statute applicable nationwide. *See* H. Rep. No. 97-227, 97th Cong., 1st Sess., 4; S. Rep. No. 97-417, 97th Cong., 1st Sess. 15 (“Most important, Section 2 – the Act’s general prohibition against voting discrimination – applies to every state and county.”) Section 5 was designed to apply to the most culpable jurisdictions that used tests and devices fostering widespread discrimination at the time Congress enacted the legislation; jurisdictions covered by Section 5 must demonstrate to the federal government that any voting change they seek to administer does not worsen the position of minority voters. *See Reno v. Bossier Parish*, 528 U.S. 320, 328-41 (2000). While Sections 2 and 5 differ in terms of the circumstances in which they are applicable and the proof that is needed to establish a violation, one significant similarity between Sections 2 and 5 is that the types of voting-related activities covered by the two Sections are identical: any “voting qualification or

prerequisite to voting, or standard practice or procedure.” 42 U.S.C. §§ 1973, 1973c.

Congress makes clear that while other provisions of the VRA may address specific conduct known at the time of its enactment to discriminate against certain voters, Section 2 covers any voting qualification throughout the nation that would deny or abridge the right to vote on account of race or color: The House report vividly demonstrates the intended scope of Section 2 : “This section grants to *all citizens* of the United States a right to be free *from enactment or enforcement of voting qualifications or prerequisites to voting or procedures, standards, or practices* which deny or abridge the right to vote on account of race or color.” H. Rep. No. 89-439, 89th Cong., 1st Sess., 22 (emphasis added); *see also*, S. Rep. No. 97-417, 97th Cong., 1st Sess. 17 (“During the hearings on the Voting Rights Act of 1965, Attorney General Katzenbach testified that section 2 would ban “any kind of practice . . . if its *purpose or effect* was to deny or abridge the right to vote on account of race or color.”).

During the reauthorization of the VRA in 1982, Congress reiterated the broad scope of Section 2 by clarifying the test that was to be applied under this section. “Section 2 would be violated if the alleged unlawful conduct has the effect or impact of discrimination on the basis of race, color, or membership in

a language minority group.” H. Rep. No. 97-227, 97th Cong., 1st Sess., 2; S. Rep. No. 97-417, 97th Cong., 1st Sess. 27. This clarification was in response to the test imposed by the Supreme Court in *City of Mobile v. Bolden*, 446 U.S. 55 (1980) which imposed an intent requirement. *Id.* Congress stated in unmistakable terms that its intent was to clarify that “proof of purpose or intent is not a prerequisite to establishing voting discrimination violations in Section 2 cases.” *Id.* Congress noted that Section 2 is not limited to any particular type of voting law, including those mentioned in the report, but “would also prohibit other practices which would result in unequal access to the political process.” H. Rep. No. 97-227, 97th Cong., 1st Sess., 31. It reiterated court findings of the broad scope of Section 2: “Voting practices which have a discriminatory result also frequently perpetuate the effects of past purposeful discrimination, and continue the denial to minorities of equal access to the political processes which was commenced in an era in which minorities were purposefully excluded from opportunities to register and vote.” *Id.*

Through Congress’ initial enactment of the VRA and its subsequent reauthorizations, Congress has consistently stated that no voting qualification law is excluded from the reach of Section 2 of the VRA. *See* S. Rep. No. 97-417, 97th Cong., 1st Sess. 15 (“The revised version of Section 2 contained in this bill could be used effectively to challenge voting discrimination anywhere

that it might be proved to occur.”) As a qualification to voting, New York’s felon disenfranchisement statute falls within the reach of Section 2.³

III. FOLLOWING THE PLAIN LANGUAGE AND THE LEGISLATIVE INTENT, THE COURTS HAVE CONSISTENTLY HELD THAT ANY VOTING PRACTICE OR PROCEDURE IS COVERED BY SECTION 2

Not long after Congress originally enacted the VRA, the Supreme Court confirmed that the scope of voting-related activities it covers is as broad as possible. In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the Supreme Court held that several different types of changes in voting laws and regulations, including moving from district to at-large methods of election, changes from elected to appointed offices, and requirements for independent candidates were subject to Section 5.⁴ In doing so, the *Allen* court specifically

³ The panel opinion in this case noted the statement in the House and Senate reports from 1965 that statutes which disenfranchise citizens for felony convictions are not considered to be tests or devices under Section 4(c) of the VRA, 42 U.S.C. § 1973(4)(c). *Muntaqim v. Coombe*, 366 F.3d 102, 108-09 (2d Cir. 2004). The exclusion of felon disenfranchisement statutes from Section 4(c) has no bearing on whether they are exempted from Section 2. The tests or devices under Section 4(c) are banned *per se* and serve as one of the prerequisites for subjecting a jurisdiction to the preclearance requirements of Section 5. Indeed, if Congress had stated that felon disenfranchisement statutes were tests or devices under Section 4(c), they would be banned *per se* and there would be no need to look at whether a particular felon disenfranchisement law had a discriminatory purpose or result under Section 2.

⁴ Several of the cases discussed in the brief regarding the scope of voting-related procedures covered by Section 2 involve Section 5 cases. As the Supreme Court noted in *Chisom v. Roemer*, 501 U.S. 380 (1991), the scope of

referenced the broad definition found in Section 14 of the VRA. *Id.* at 564. The court also relied on an exchange between Attorney General Katzenbach and Senator Fong regarding the scope of Section 2 during the Senate hearings on the VRA in 1965. Senator Fong had expressed concern that the language prohibiting qualifications or procedures related to voting contained in the original draft of Section 2 was not broad enough. Attorney General Katzenbach stated that Section 2 was intended to bar “*any kind of practice . . . if its purpose or effect was to deny or abridge the right on account of race or color,*” and that he had no objection to expanding the language to make that intention clear. *Id.* at 566-67 & n.31 (emphasis added). As reflected in the statute, Congress expanded the language, which the Supreme Court found was “[i]ndicative of an intention to give the VRA the broadest possible scope.” *Id.* at 566-67.

The Supreme Court has also stated that the omission of a type of voting-related practice in the VRA or in the legislative history does not exempt it from coverage under Section 2. In *Chisom v. Roemer*, 501 U.S. 380 (1991) and *Houston Lawyers Ass’n v. Attorney General of Texas*, 501 U.S. 419 (1991), the

§2 and the scope of §5 are analogous. 501 U.S. at 401; *see also Holder v. Hall*, 512 U.S. 874, 887 (1994)(O’Connor, J., concurring); *Armstrong v. Allain*, 893 F.Supp. 1320, 1323 (S.D. Miss. 1994). Section 2 is at least as broad as Section 5, otherwise, there would be the anomalous result that a jurisdiction not covered under §5 could enact a voting procedure that discriminates while a covered jurisdiction would be barred from enacting the same provision. *Chisom*, 501 U.S. at 401.

Supreme Court rejected arguments that Section 2 does not apply to judicial elections. The defendants in *Chisom* contended that vote dilution claims regarding judicial elections did not fall within the ambit of Section 2 because Congress used the word “representatives” in the statute. The Supreme Court rejected this hyper-technical argument “because we are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history in the 1982 amendment.” *Chisom v. Roemer*, 501 U.S. at 395-96. Indeed, the Court stated that “Congress’s silence in this regard can be likened to the dog that did not bark.” *Id.* at 396 n.23.

The fact that the legislative history of Section 2 is silent on laws disenfranchising citizens convicted of felonies does not create the exemption that appellees seek. To the contrary, the broad scope of the Section 2 in its language, legislative history, and application lead to the inescapable conclusion that disenfranchising laws are subject to Section 2.

Section 2’s scope covers both subtle and obvious government actions that have the potential for discrimination and that alter the voting process, even in a minor way. *City of Pleasant Grove v. United States*, 479 U.S. 462, 467 (1987); *Dougherty County Georgia Bd. of Education v. White*, 439 U.S. 32, 42 (1978);

Barnett v. City of Chicago, 141 F.3d 699, 701 (7th Cir. 1998). A provision has the potential for discrimination if it affects the ability to make a vote effective in any election.⁵ See *Chisom*, 501 U.S. at 391, *National Assoc. for the Advancement of Colored People v. Hampton County Election Commission*, 470 U.S. 166, 181 (1985); *White*, 439 U.S. at 42. Because §5-106 is a requirement to eligibility for voting in New York, it affects the ability to make a vote effective and, therefore it has the potential to be discriminatory.

The courts have closely adhered to the guidance of the VRA's legislative history that it should be given the widest possible scope. According to the courts, such a reading is necessary to address the historical barriers minority voters have faced in access to political decision making. See *White*, 439 U.S. at 37-38; *South Carolina v. Katzenbach*, 388 U.S. 301, 312 (1966). In passing the Act, Congress was reacting to the systemic failures of earlier approaches to remedy discrimination in the electoral process through existing constitutional and legislative structures. *United States v. Bd. of Commissioners of Sheffield Alabama*, 435 U.S. 110, 118 (1978). Before the dramatic protections offered by the Act, government decision makers frequently subverted attempts by the

⁵ In order to make out a successful Section 2 challenge, plaintiffs must also prove that the standard, practice or procedure either denies minority voters the right to vote or dilutes minority voting strength. See e.g., *Holder v. Hall*, 512 U.S. 874, 887 (1994)(O'Connor, J. Concurring). This brief, however, only addresses the definition of "standard, practice or procedure" covered by Section 2.

courts to curtail discriminatory activity in voting by devising creative devices for discrimination not covered by federal decrees. *Id.* at 122 (citing similar frustrations in the desegregation context). To guard against facially innocuous statutes that negatively impact minority political strength, Congress chose not to limit the VRA to only cover impairments of minority voting power so egregious as to compel an inference of discrimination. *See Barnett v. City of Chicago*, 141 F.3d 699 (7th Cir. 1998). Along with correcting a history of discrimination in the electoral process, Congress attempted to address the way accumulated societal discrimination and disadvantage denied minority voters an equal voice in the political process. *Thornburg v. Gingles*, 478 U.S. 30, 44 n.9, 47 (1986).

In *Lucas v. Townsend*, 908 F.2d 851, 852 (11th Cir. 1990), the 11th Circuit held that the form in which referendum questions are presented to voters constitutes a standard, practice or procedure that can be challenged by Section 2 because of the potential for a discriminatory result. In that case, the plaintiffs asserted that a change in language in a school bond referendum - combining multiple bond projects in a single referendum - violated Section 2. *Id.* By combining multiple bond projects in a single referendum, minority voters supporting a single project were forced to vote in favor of other projects that they did not support, refrain from voting for a project that is favored, or abstain from voting entirely; in this way, the combination of bond measures has the

potential to discriminate because minority votes are less effective than if the measures were separated. *Id.* at 857.

Requirements that voters register twice, once for municipal elections and once for state elections, have been successfully challenged under Section 2. *Mississippi Chapter, Operation Push v. Allain*, 674 F.Supp 1245 (N.D.Miss. 1987). In *Allain*, the court found that Section 2 was intended to cover voter registration practices because voter registration is a necessary predicate to successfully exercising the right to vote that has the potential to effect minority political participation. *Id.* at 1262. In order to accomplish Congress's intent in passing the VRA, a court must cast a wide net to catch any potentially discriminatory practice that is necessary to make a vote effective, including facially nondiscriminatory provisions that have a disproportionate impact on minority voters. *See id.* at 1263. Like dual registration requirements, disenfranchisement schemes based on felony status affect an explicit predicate to the eligibility of citizens to participate in the political process.

Allain also found that Section 2 is broad enough to address the discretion given to county election officials to make certain registration related decisions. *See id.* at 1248. Unfettered discretion in decisions regarding voting registration unnecessarily restricts access to the political process by allowing politically motivated government actors to select who should have access to registration

procedures. *Id.* at 1267. Similarly, other courts have found that Section 2 applies not just to formal election procedures, but to *ad hoc*, discretionary procedures that have the potential to be discriminatory. *See Allen*, 393 U.S. at 566; *Harris v. Siegelman*, 695 F.Supp 517, 527 (M.D. Al. 1988). Felon disenfranchisement statutes suffer the same fate, especially when, like in New York, discretionary decision makers frequently determine if someone convicted of a crime will have his right to vote rescinded. § 5-106 denies the right to vote to all New Yorkers who have been convicted of a felony and sentenced to incarceration or are on parole. Offenders who receive only probation are not disenfranchised. As detailed by appellant, black and Latino offenders are sentenced to incarceration in disproportionate numbers to white offenders convicted of the same crime. *See, e.g., The Franklin H. Williams Judicial Commission on Minorities, Equal Justice: A Work in Progress, Five Year Report* (1991-1996). Like in *Allain*, prosecutors and sentencing judges retain a significant amount of discretion in determining the access minority voters have to the ballot box.

The boundaries of Section 2 are not limitless. The courts have refused to entertain challenges under Section 2 where the provision under consideration does not impact the right to vote. *See, e.g., Holder v. Hall*, 512 U.S. 874, 876 (1994)(holding the size of a governing body is not subject to section 2

coverage); *Chisom*, 501 U.S. at 401 (opining that appointed officials are not subject to Section 2 coverage); *McGee v. City of Warrensville Heights*, 16 F.Supp.2d 837 (N.D. Oh. 1998)(holding police investigation into African American candidate is not covered by Section 2 because it was a product of political maneuvering and did not impact the right of minority citizens to vote for their candidate of choice); *Irby v. Virginia*, 889 F.2d 1352 (4th Cir. 1989) (court expressed “doubts as to whether Congress intended the scope of Section 2 to extend so broadly as to encompass a state's choice between an elective and an appointive system for filling a given office, even when that choice was made years before enactment of the Voting Rights Act”).

What is covered under Section 2 is focused on the voter. While there is a predicate requirement that the challenged structure may impact an election, once that requirement is reached, any process or provision which affects that election is under the watchful eye of the VRA because it is necessary to make a vote effective. *City of Pleasant Grove v. United States*, 479 U.S. 462, 467 (1987)(annexation of uninhabited land is covered because it may impact elections); *Smith v. Salt River Project Agricultural Improvement and Power District*, 109 F.3d 586 (9th Cir. 1997)(Section 2 challenge proper to land ownership eligibility requirement to vote in water district elections); *Armstrong v. Allain*, 893 F.Supp. 1320, 1321 (S.D. Miss. 1994)(challenge to requirement

that school bond referenda pass with a 60% supermajority instead of a simple majority proper); *Harris*, 695 F.Supp. at 520 (Section 2 covers challenge to lack of black poll workers because it directly relates to comfort of black voters to go to the polls); *Roberts v. Wagner*, 679 F.Supp. 1513, 1523 (E.D.Mo. 1987) (Section 2 challenge to counting of ballots permitted), *rev'd on other grounds*, 883 F.2d 617 (8th Cir. 1989); *Goodloe v. The Madison City Bd. of Election Commissioners*, 610 F.Supp. 240, 243 (S.D. Miss. 1985)(Section 2 covers invalidation of absentee ballots).

In short, Section 2 has been broadly applied to cover situations where the right to vote has been denied or diluted. Felon disenfranchisement statutes obviously have the potential to do both and are within the coverage of Section 2.

IV. A VOTING PROCEDURE AS SIGNIFICANT AS FELON DISENFRANCHISEMENT STATUTES SHOULD NOT BE EXEMPTED FROM SECTION 2

The impact of felon disenfranchisement laws on the ability of citizens, and particularly minority citizens, to vote cannot be overstated. It is estimated that about 4.7 million citizens in 48 states are disenfranchised because of a felony conviction and that 1.8 million of those citizens are African Americans. Christopher Uggen and Jeff Manza, *Democratic Contraction: Political Consequences of Felon Disenfranchisement in the United States*, 67 American

Sociological Review 777, 780-82 (2002). Thus, African Americans comprise about 38% of those disenfranchised although they are less than 12% of the voting age citizens in the United States according to the 2000 Census. See United States Bureau of the Census, *United States Census 2000: Voting Age-Population and Voting Age Citizens (PHC-T-31)*, Tables 1-1, 1-2, available at <http://www.census.gov/population/www/cen2000/phc-t31.html> (last visited Jan. 28, 2005).

Latinos, like African-Americans, are disproportionately convicted and incarcerated in our criminal justice system. Latinos are now the largest minority population in the United States, accounting for 13% of the national population, yet they comprise 16% of the state and federal prison and jail population. See U.S. Census Bureau, Resident Population Estimates of the U.S. By Sex, Race, and Hispanic or Latino Origin, April 1, 2000, July 1, 2000, and July 1, 2001, www.census.gov; Bureau of Justice Statistics, Prison and Jail Inmates at Midyear 2001 (April 2002, Revised May 10, 2002). Felon disenfranchisement laws thus have a disproportionately negative effect on Latinos and diminish the voting power of the Latino community.

The Mexican American Legal Defense and Educational Fund, in collaboration with the Right to Vote (RTV) coalition, recently completed a study of the impact of state felon disenfranchisement laws on Latinos. In ten

states (Arizona, California, Florida, Nebraska, Nevada, New York, North Carolina, Texas, Virginia, and Washington), approximately half a million Latino citizens cannot vote because of these restrictive laws. See Marisa Demeo and Steven Ochoa, MALDEF/RTV, *Diminished Voting Power in the Latino Community: The Impact of Felony Disenfranchisement Laws in Ten Targeted States* (2003) (hereinafter the "MALDEF Study"). In six out of the ten states studied, Latinos constitute more than ten percent of the total number of persons disenfranchised by felony disenfranchisement laws in the state. In Arizona, 44,467 of the 161,744 (27%) disenfranchised persons in the state are Latinos. In California, 103,325 of the 281,198 (36%) disenfranchised persons are Latino. In Florida, 119,100 of the 958,375 (12%) persons precluded from voting are Latinos. In New York, 41,908 of the 124,656 (34%) disenfranchised persons are Latinos. In Texas, 155,102 of the 523,472 (30%) disenfranchised person are Latinos, and in Nevada, Latinos make up 7,879 of the 69,629 (11%) persons that are prohibited from voting. See *id.*

Section 5-106 of the New York State Election Law disproportionately disenfranchises Latino citizens. For example, the MALDEF Study found that although Latinos make up 13.8% of the voting age population in New York and 10.47% of the citizen voting age population, 33% of the estimated 125,000 persons disenfranchised in New York are Latinos. See *id.*

The disparate impact of felony disenfranchisement laws on Latinos is likely to increase, both in New York and nationally. Latinos, unfortunately, represent the fastest growing segment of the U.S. prison population. *See* NCLR, *Latinos and the Texas Criminal Justice System* (2003) (describing national Bureau of Justice Statistics (BJS) data). As overall incarceration rates increase, we can expect an increase in the negative impact of felony disenfranchisement laws on the Latino community.

Because the VRA is intended to eradicate racial discrimination in voting, its scope encompasses even “minor” aspects of election law that might have the potential for discrimination. *See Allen*, 393 U.S. at 566. It is completely at odds with the language, purpose, and history of the VRA that statutes which disenfranchise millions of voters, and a disproportionate number of minority voters, would be totally exempt from Section 2. Instead, a felon disenfranchisement statute, like New York Election Law § 5-106, should be treated like any other voting procedure or practice under Section 2: it should be determined case-by-case determination whether a particular statute has the purpose or result of discriminating against minority or minority language citizens.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court reverse the district court's grant of summary judgment for defendants and remand this case for trial.

Respectfully submitted this 28th day of January, 2005

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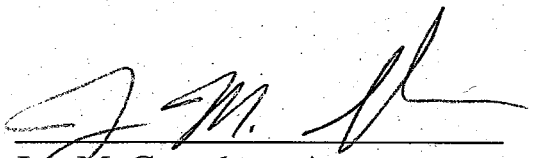
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CERTIFICATE OF COMPLIANCE

This brief contains 6061 words, excluding the portions of the brief exempted by Fed. R. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2000 in a 14-point font of Times New Roman type style.

Dated: January 28, 2005

A handwritten signature in black ink, appearing to read "Jon M. Greenbaum", is written over a horizontal line.

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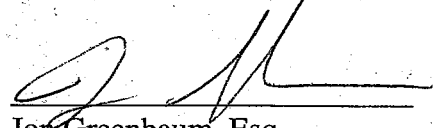
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