01-7260

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JALIL ABDUL MUNTAQIM, a/k/a ANTHONY BOTTOM,
Plaintiff — Appellant,

— v. —

PHILLIP COOMBE, ANTHONY ANNUCCI, LOUIS F. MANN,
Defendants — Appellees.

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

BRIEF *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT JALIL ABDUL MUNTAQIM, A/K/A/ ANTHONY BOTTOM, URGING REVERSAL OF THE DISTRICT COURT, ON BEHALF OF NATIONAL VOTING RIGHTS INSTITUTE AND PRISON POLICY INITIATIVE

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CORPORATE DISCLOSURE STATEMENT

The National Voting Rights Institute is a non-profit organization organized under Section 501(c)(3) of the Internal Revenue Code. As such, it has no parent corporations and does not issue stock. The Prison Policy Initiative is not a corporation.

TABLE OF CONTENTS

Page

Corporate Disclosure Statement i

Table of Contents ii

Table of Authorities iv

Interest of Amici 1

Introduction and Summary of Argument 2

Factual Background 6

A. New York's Prisoner Counting Rules 6

B. Three Trends in New York State's Prison Policies 8

1. Growing Rates of Incarceration 9

2. Growing Racial Disparities in Incarceration 10

3. Growing Geographical Disparities in Prison Construction 11

Argument 13

I. CREDITING PRISON TOWNS WITH THE PRESENCE OF DISENFRANCHISED PRISONERS ENHANCES THE VOTING STRENGTH OF WHITE COMMUNITIES THAT HOST PRISONS AT THE EXPENSE OF URBAN MINORITY COMMUNITIES 13

A. Counting Prisoners As Residents of Prison Towns Has A Discriminatory Impact in Legislative Redistricting . 13

TABLE OF CONTENTS

Page

B. Although Representatives of Upstate Prison District Owe Their Seats to Prison Populations, They Do Not Provide Actual Representation to Inmates in Their Districts . . 18

C. New York's Allocation of Disenfranchised Prison Populations for Purposes of State Legislative Redistricting Is Inconsistent With Local Redistricting Practices and Rules Governing Prisoners' Legal Residences In Other Contexts 22

II. THE DILUTIVE EFFECT OF ASSIGNING PRISON POPULATIONS TO PRISON COMMUNITIES RATHER THAN TO THEIR HOME COMMUNITIES FOR LEGISLATIVE REDISTRICTING SHOULD BE CONSIDERED UNDER THE TOTALITY OF CIRCUMSTANCES INQUIRY ON REMAND 27

Conclusion 30

Certificate of Compliance 32

Certificate of Service 33

TABLE OF AUTHORITIES

Page

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449 F.2d 575 (3rd Cir. 1971) 8

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180 F.3d 476 (2d Cir. 1999) 27

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TABLE OF AUTHORITIES

Page

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Page

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Page

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INTEREST OF AMICI

The National Voting Rights Institute ("NVRI") is a nonprofit, nonpartisan legal center. Through litigation and public education, NVRI seeks to make real the promise of American democracy that meaningful political participation and power should be accessible to all regardless of economic or social status. Around the country, NVRI has litigated to challenge barriers that operate to deny equal political participation to socially and economically disadvantaged citizens and communities of color. *See, e.g., Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), *petition for reh'g en banc pending*; *Belitskus v. Pizzingrilli*, 343 F.3d 632 (3d Cir. 2003), *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291 (D. Mass. 2004) (three-judge court); *Meza v. Galvin*, 322 F. Supp. 2d 52 (D. Mass. 2004) (three-judge court). New York's laws disenfranchising felons and parolees are in direct tension with NVRI's mission.

The Prison Policy Initiative ("PPI") conducts research and advocacy on incarceration policy. PPI has issued several reports, including one about New York, that quantify the redistricting impact of disenfranchised prison populations. In particular, the New York report, *Importing Constituents: Prisoners and Political Clout in New York*, demonstrates that the transfer of a large, non-voting population to upstate prisons, where it is counted as part of the population base for redistricting, artificially enhances the representation

afforded to predominantly white, upstate legislative districts. *See* Peter Wagner, Prison Policy Initiative, *Importing Constituents: Prisoners and Political Clout in New York* (April 2002) (Main Report), at http://www.prisonpolicy.org/importing (last viewed January 28, 2005) (hereafter, "*Importing Constituents*"). The facts and conclusions in *Importing Constituents* are directly relevant to felon and parolee disenfranchisement and to the "totality of circumstances" to be considered under Section 2 of the Voting Rights Act.

Amici have separately filed a motion for leave to file this brief. The parties do not oppose the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The "essence of a § 2 claim is that a certain electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). In this brief, the National Voting Rights Institute and the Prison Policy Initiative seek to illuminate how New York's state legislative redistricting practices, in combination with its disenfranchisement of incarcerated felons, interact to compound the discriminatory impact of felon disenfranchisement on New York's communities of color. *Amici* respectfully submit that the facts

canvassed here are relevant to the third question that this Court has invited the parties and *amici* to address, which includes a discussion of the type of evidence the district court should consider if its judgment is modified or vacated and the cause remanded for further presentation of facts or evidence.[1]

Because New York counts prisoners as part of the population base for redistricting in the prisons where they are housed, rather than as residents of their homes of record in the communities where they resided prior to incarceration, New York in effect uses the non-voting prison population to award greater legislative representation to rural, overwhelmingly white districts at the expense of the urban, largely minority communities from which the prisoners come. Although most prisoners in New York State come from New York City, all new prisons built since 1976 have been built in upstate counties.[2] Prisoners, denied the right to vote, nevertheless are counted as residents of their prison in a manner that pads the population levels of these upstate counties, artificially inflating the population base of representatives the prisoners are powerless to hold politically accountable. This in turn diminishes the representation afforded to the heavily minority and urban communities from

[1] *Muntaqim v. Coombe*, No. 01-7260 (2d Cir. Dec. 29, 2004) (Amended Order).
[2] Peter Wagner, Prison Policy Initiative, *Importing Constituents: Prisoners and Political Clout in New York* (April 2002) (Further Research & Methodology,

which much of New York's prison population comes, and where the prisoners, under the very terms of New York's Constitution, should be deemed to reside.

New York's assignment of disenfranchised prison populations to upstate legislative districts also means that representatives of these districts have a political stake in promoting higher rates of incarceration and maintaining long sentences. Several upstate legislative districts in New York would not have sufficient population to justify a representative if prisoner counts were to decline in their districts. Representatives of these districts thus directly benefit from keeping as many persons as possible incarcerated for as long as possible. And, precisely because their prisoner constituents cannot vote, the representatives of these districts need fear no political backlash for ignoring the interests of the prisoners they "represent," the overwhelming majority of whom are black and Latino.

The result is a striking modern-day parallel to the "Three-Fifths Clause" of the United States Constitution, under which a slave counted as three-fifths of a person in determining the apportionment of congressional seats among the states and, in turn, the number of Electoral College votes allotted to each state. U.S. Const. art. I, § 2; *see also* U.S. Const. art. II, § 1. Slave populations,

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January 2005), at http://www.prisonpolicy.org/importing (last viewed January 28, 2005) (hereafter, "*Importing Constituents*").

though denied the right to vote, thus substantially enhanced the representation of Southern states in Congress and in selecting the President and Vice President; the Three-Fifths Clause is credited with assuring Thomas Jefferson's victory over John Adams in 1800, facilitating Missouri's admission to the Union as a slave state, and otherwise giving the South "important political leverage in Congress." Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 Yale J.L. & Human. 413, 427 (2001); *see also id.* at 442-43. Similarly, as shown below, New York's allocation of non-voting prisoners to prison towns for redistricting purposes, rather than to their homes of record prior to incarceration, exacerbates the discriminatory effect of the disenfranchising laws challenged here, enhancing the political clout of the representatives who promote the very criminal justice policies that fill New York's prisons with "constituents."

The interplay between felon disenfranchisement and the state's redistricting practices deserves this Court's attention as part of the fact-intensive, functional examination of voting discrimination that Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(b), is meant to encompass – an examination improperly truncated by the district court's holding that claims by disenfranchised prisoners are wholly outside of Section 2's coverage. As shown below, if this case is remanded for consideration of appellants' Section

2 claim, the impact of allocating prisoners to prison towns for redistricting purposes, rather than to their homes of record prior to incarceration, is a legitimate factor for the district court to consider in determining whether prisoner disenfranchisement, under the "totality of circumstances," violates appellants' rights protected by Section 2.

FACTUAL BACKGROUND

A. New York's Prisoner Counting Rules

Although New York does not allow incarcerated persons to vote, it nevertheless counts them as part of the population base when drawing its legislative districts, using Census data that treats prisoners as residents of the facility in which they are incarcerated rather than as residents of the home communities in which they lived prior to imprisonment. The Census Bureau admits that where it counts some populations "is not necessarily the same as the person's voting residence or legal residence."[3] In New York, the contradiction is explicit; the New York State Constitution provides: "for purposes of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence ... while confined in any public prison." N.Y. Const. art. II, § 4.

[3] U.S. Census Bureau, *Census 2000: Plans and Rules for Taking the Census*, at http://www.census.gov/population/www/censusdata/resid_rules.html (last viewed January 27, 2005).

The counting of prisoners as residents of their place of incarceration predates modern redistricting practices and was developed in 1790 to comply with the federal constitutional mandate to count the number of persons in each state.[4] While the Census Bureau's methods of counting other special populations such as the military, missionaries, and students have evolved over the centuries,[5] the method of counting prisoners has remained unchanged.

Although states are required to redraw state legislative districts each decade to assure compliance with the federal Constitution's one-person, one-vote requirements, they are not required to use federal Census data in doing so. *See Mahan v. Howell*, 410 U.S. 315, 330-332 (1973) (rejecting Virginia's argument that it was compelled to use Census Bureau assignments of residences of military personnel in its state legislative redistricting). As the Third Circuit has explained:

> Although a state is entitled to the number of representatives in the House of Representatives as determined by the federal census, it is not required to use these census figures as a basis for apportioning its own legislature.

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[4] U.S. Const. art. I, § 2.

[5] Peter Wagner, Prison Policy Initiative, *Prior to 1990 Census, prisoners were not explicitly excluded from Census counts* (posted August 12, 2003), at http://www.prisonersofthecensus.org/news/fact-8-12-2003.shtml (last viewed January 27, 2005).

Borough of Bethel Park v. Stans, 449 F.2d 575, 583 n.4 (3rd Cir. 1971). States are therefore free to use their own censuses or to correct how the federal census counts prisoners.[6] *See also* Taren Stinebrickner-Kaufman, *Counting Matters – Prison Inmates, Population Bases, and "One Person-One Vote,"* 11 Va. J. Soc. Pol'y & Law 229, 251 (2004) (hereafter, "*Counting Matters*") (discussing case law addressing states' ability to use population base other than total population as enumerated by Census Bureau for state legislative redistricting).

B. Three Trends in New York State's Prison Policies

Counting prisoners as residents of the prison town for redistricting purposes has profound implications for minority voting strength because of three simultaneous trends in New York state's prison policies: a growing

[6] The New York Constitution requires that the state use the Census data for internal apportionment only "in so far as such census and the tabulation thereof purport to give the information necessary therefore." N.Y. Const. art. III, § 4. The New York Court of Appeals has ruled that, for purposes of redistricting, it is permissible to count prisoners as residents of the prison in which they are incarcerated, despite the provision of Article II, Section 4 of the New York State Constitution providing that legal residence is not changed by incarceration for purposes of voting, *Longway v. Jefferson*, 83 N.Y.2d 17, 628 N.E.2d 1316, 607 N.Y.S.2d 606 (1993), but the decision does not hold that this practice is *required* under New York law. *See Kaplan v. County of Sullivan*, 74 F.3d 398, 401 (2d Cir. 1996) (opinion of Feinberg, J.). Of course, even if the New York State Constitution more definitively required prison populations to be assigned to prison towns in redistricting, this would not immunize New York's redistricting practices from scrutiny under Section 2 of the Voting Rights Act. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966) (striking down state constitutional provision as violative of Voting Rights Act).

incarceration rate; a large and increasing racial disparity in the prison population; and a large and growing trend to locate prisons in majority white rural areas. Because of the combined effect of these trends, using Census data to draw district lines in New York results in the sizable transfer of disenfranchised minority populations to predominantly white legislative districts.

1. Growing Rates of Incarceration

New York State has experienced tremendous growth in both the size of its prison population and the percentage of citizens incarcerated since 1970. Thirty years ago, New York incarcerated 69 out of every 100,000 citizens. By 2000, New York was incarcerating 377 out of every 100,000 residents – a more than 5-fold increase.[7]

It is important to distinguish the rise in incarceration from the rise in crime. Incarceration rates reflect political and institutional decisions about the length of sentences and the extent to which arrests and convictions should result in prison terms rather than other interventions. As one researcher has written:

> Looking at the overall factors leading to the rise in incarceration, research has demonstrated that changes in criminal justice policy, rather

[7] *Importing Constituents* (Further Research & Methodology), at http://www.prisonpolicy.org/importing.

> than changes in crime rates, have been the most significant contributors leading to the rise in state prison populations. A regression analysis of the rise in the number of inmates from 1980 to 1996 concluded that one half (51.4 percent) of the increase was explained by a greater likelihood of a prison sentence upon arrest, one third (36.6 percent) by an increase in time served in prison, and just one ninth (11.5 percent) by higher offense rates.

Marc Mauer, *Race to Incarcerate* 34 (1999) (*citing* Alfred Blumstein and Allen J. Beck, "Population Growth in U.S. Prisons, 1980-1996," *in* 26 *Crime and Justice: A Review of Research* 43 (Michael Tonry & Joan Petersilia, eds., 2000)). Political choices, not an increased crime rate, largely control the tremendous increase in the numbers of persons incarcerated and, accordingly, the numbers of persons disenfranchised by New York State.

2. Growing Racial Disparities in Incarceration

New York State's population is 62% white.[8] The prison population, however, is overwhelmingly made up of persons of color: the New York State Department of Correctional Services reports that 82% of New York State's prison population is black or Latino (51% non-Hispanic black, 31.1% Latino).[9]

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[8] U.S. Census Bureau, *American Factfinder: Data Sets* (SF 1 Detailed Tables – Table P4 regarding New York data on Hispanics and Latinos), at http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=DEC&_lang=en (last viewed Jan. 27, 2005).

[9] New York State Department of Correctional Services, *The Hub System: Profile of Inmates Under Custody on January 1, 2000* i (2000). Throughout this brief, figures on black population refer to non-Hispanic blacks.

The sizable racial disparity between black and white incarceration in New York State grew from 1970 to 2000. The number of people in state prison in New York grew by 58,887 from 1970 to 2000, but 85% of this growth was in black and Latino prisoners.[10]

As it has elsewhere in the United States, the "War on Drugs" in New York has disproportionately focused on minorities. In New York State from 1980 to 2000, the number of whites admitted to prison for drug law violations increased only 86%. For blacks, the number increased 1,197%, and for Latinos 1,167%.[11] In 2000, blacks were sent to prison in New York for drug law violations at a rate 34.5 times higher than whites. The Latino rate is 25.7 times higher than the rate for whites.[12] As a result, in a state that is 62% white,[13] blacks and Latinos account for 93% of prison sentences for drug offenses in New York State.[14]

3. Growing Geographical Disparities in Prison Construction

Alongside the trends towards increasing rates of incarceration and growing racial disparities in incarceration has been an increasing geographic

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[10] *Importing Constituents* (Further Research & Methodology), at http://www.prisonpolicy.org/importing.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*

disparity in the locations where prisons are constructed. While the portion of New York State's prisoners that come from New York City has generally remained close to the current figure of 66%,[15] all of the 43 new prisons built in New York since 1976 have been built upstate.[16] Only 24% of prisoners in New York are from the upstate region, but 91% of prisoners are incarcerated there.[17] More specifically, only 10% of prisoners are from rural upstate counties in New York, but 75% of the state's prisoners are housed in such counties.[18] These upstate rural counties are predominantly white in population, even when the non-voting prison populations are included.[19]

Accordingly, the geographical disparities in prison construction translate into clear racial disparities as well: 98% of all prison cells in New York State are located in Senate districts whose population is disproportionately white as compared to the State's overall population.[20]

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[15] *Id.*
[16] *Id.*
[17] *Id.* (Fig. 12, January 2005).
[18] *Id.*
[19] *Id.* (Fig. 7)(Fig. 14, January 2005).
[20] Peter Wagner, Prison Policy Initiative, *98% of New York's prison cells are in disproportionately white districts* (posted January 17, 2005), available at http://www.prisonersofthecensus.org/news/fact-17-1-2005.shtml (last viewed Jan. 27, 2005).

ARGUMENT

I. CREDITING PRISON TOWNS WITH THE PRESENCE OF DISENFRANCHISED PRISONERS ENHANCES THE VOTING STRENGTH OF WHITE COMMUNITIES THAT HOST PRISONS AT THE EXPENSE OF URBAN COMMUNITIES OF COLOR.

A. Counting Prisoners As Residents of Prison Towns Has a Discriminatory Impact in Legislative Redistricting.

The smaller the population of a district that elects a representative, the greater the representation enjoyed by its constituents in the legislative body to which their representative is elected; conversely, constituents of overpopulated districts suffer a dilution of their voting strength compared to those in less populated districts. *Reynolds v. Sims*, 377 U.S. 533, 562-63 (1964). However, as demonstrated by the history of the Three-Fifths Clause, U.S. Const. art. I, § 2, representational equality is affected not only by deviations in the size of districts, but also by decisions about the population base to be included when apportioning representatives among districts. During the ante-bellum period, counting non-voting slaves as part of the population base enhanced the South's influence in Congress and in choosing the President and Vice-President, although southern congressmen clearly did not view slaves as their political constituents. Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained,* 13 Yale J.L. & Human. at 427, 442-43.

As a result of New York's prisoner disenfranchisement laws and its legislative redistricting practices, a similar dynamic now affects legislative representation in New York. According to *Importing Constituents*, the first study to quantify the redistricting impact of disenfranchised prison populations, New York City, as of 2000, suffered a net loss of 43,740 residents to prison towns outside of the city.[21] The transfer of this large, predominantly minority, non-voting population to upstate prisons, where it is counted as part of the population base for state legislative redistricting, artificially enhances the representation afforded to predominantly white, upstate legislative districts.

Under Supreme Court rulings applying the one-person, one-vote requirements of the Fourteenth Amendment to state legislative redistricting, total population deviations of more than 10% from ideal population size are presumptively unconstitutional. *Brown v. Thompson*, 462 U.S. 835, 842-43 (1983); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1339-40 (N.D. Ga. 2004) (three-judge court), *summarily aff'd*, __ U.S. __, 124 S. Ct. 2806 (2004). Because total population deviation is calculated by adding the deviation of the most

[21] *Importing Constituents* (Main Report, Part IV), at http://www.prisonpolicy.org/importing. *Importing Constituents* combines Department of Correctional Services data on the demographics of its prison population with the legislative district lines and data published by the New York State Legislative Task Force on Demographic Research and Reapportionment.

underpopulated district to the deviation of the most overpopulated district, redistricting plans generally strive to assure that no single district varies from ideal population size by more than 5%. *See Larios v. Cox*, 300 F. Supp. 2d at 1323.

The New York state senate districts drawn after the 2000 Census illustrate how legislative representation in New York is distorted by assigning disenfranchised prison populations to prison towns instead of to their home communities. As shown by Table 1, below, under the redistricting plan adopted in 2002 by the New York legislature, seven rural upstate senate districts with substantial prison populations are underpopulated – and therefore overrepresented – with five of these at almost a 5% deviation, close to the maximum presumptively constitutional amount. Each of these seven districts would have insufficient population to satisfy the 5% rule without counting the disenfranchised prisoners as part of their population base. These districts are all overwhelmingly white in population.

The representatives of these districts literally have imported their constituents by advocating construction of prisons in upstate areas and maintenance of harsh sentencing laws.[22] Indeed, nearly 30 percent of the

[22] *Importing Constituents* (Main Report, Part VI), at http://www.prisonpolicy.org/importing.

people who moved into upstate New York during the 1990s were prison inmates.[23]

Table 1. Selected underpopulated/overrepresented upstate Senate districts with prisoners removed.[24]

Senate District	Incumbent Senator (April 2002)	Type	% Non-Hispanic White	Reported Population	Reported Deviation %	Prisoners in District	Corrected Population	Corrected Deviation
45	Ronald Stafford	Rural	92%	299,603	-2.11%	12,989	286,614	-6.36%
47	Raymond Meier	Rural	91%	291,303	-4.83%	3,563	287,740	-5.99%
48	James Wright	Rural	92%	290,925	-4.95%	5,291	285,634	-6.68%
49	Nancy Larraine Hoffman	Rural	82%	291,303	-4.83%	2,881	288,422	-5.77%
51	James Seward	Rural	95%	291,482	-4.77%	3,108	288,374	-5.78%
54	Michael Nozzolio	Rural	92%	291,303	-4.83%	3,551	287,752	-5.99%
59	Dale Volker	Rural	94%	294,256	-3.86%	8,951	285,305	-6.79%

Clearly, if prisoners were allocated to their home communities, rather than to their place of incarceration, for purposes of determining the population base for redistricting, the seven rural upstate senate districts with substantial prison populations would be pushed over the edge of allowable deviation from ideal population.

While none of the most underpopulated senate districts has a substantial minority population, three of the most overpopulated districts in the New York state senate are majority black or Latino. Senate Districts 10 and 13 are

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[23] Rolf Pendall, Brookings Institution, *Upstate New York's Population Plateau: The Third Slowest-Growing 'State,'* (August 2003), available at http://www.brookings.edu/es/urban/publications/200308_Pendall.htm (last viewed January 26, 2005); *see also* Brent Staples, *Why Some Politicians Need Their Prisons to Stay Full*, The New York Times, December 27, 2004.

[24] *Importing Constituents* (Fig. 10)(Fig. 13, January 2005), at http://www.prisonpolicy.org/importing. If prisoners had not been counted as local constituents, the districts would report even higher percentages of Non-Hispanic whites.

predominantly black and are overpopulated by over 4%. Similarly, Senate District 14 is predominantly Latino and also is overpopulated by 4%.[25] Indeed, of the eight senate districts that are overpopulated by more than 4%, six have a majority non-white population.[26] These disparities, moreover, do not take into account the effect of the transfer of New York City's predominantly minority prisoners to the districts of upstate legislators. The overpopulation of these districts would be even more extreme, and in excess of permissible population deviations, if prisoners were included in their home districts for redistricting purposes. These minority areas, in other words, would be entitled to greater representation in the legislature than they currently enjoy. Indeed, if the thousands of prisoners in upstate rural districts were not counted as residents of those districts, and by chance not a single prisoner resided prior to incarceration in any of the most overpopulated New York City districts, the maximum population deviation between those districts and the underpopulated upstate districts still would be 10.84% - in excess of the facially constitutional threshold.[27]

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[25] *Importing Constituents* (Figs. 10, 13), at http://www.prisonpolicy.org/importing.

[26] *Id.* (Main Report, Part V, and Figs. 10, 13).

[27] *Id.* (Main Report, Part V). Although the Department of Correctional Services does not publish information allowing a determination of the specific New York City legislative districts from which prisoners housed upstate are drawn, it is clear, given the racial disparities in prison populations documented

Understanding the impact of how prisoners are counted for redistricting purposes thus helps illustrate a critical principle for this Court's consideration: the disenfranchisement of prisoners is not a "punishment" visited solely on the guilty. Its effects are felt as well by the innocent families and communities from which the prison population is taken, because their legislative representation is diminished by the interplay of New York's felon disenfranchisement laws and its method of counting prisoners for redistricting purposes.

B. Although Representatives of Upstate Prison Districts Owe Their Seats to Prison Populations, They Do Not Provide Actual Representation to Inmates in their Districts.

In pointing out the discriminatory impact of New York's redistricting practices with respect to disenfranchised prisoners, *amici* do not contend that prisoners should be disregarded in carrying out redistricting. Counting non-voting populations – such as minors and non-U.S. citizens -- as part of the population base for redistricting is often defended by pointing out that the

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above, that the overrepresentation of white upstate regions comes at the expense of urban minority neighborhoods from which the prison population is heavily drawn. If appellant's claim is permitted to go forward, discovery could readily determine the home districts of incarcerated prisoners, and provide a fuller picture of the minority vote dilution caused by treating prisoners as residents of prison towns.

interests of such populations deserve representation on elected bodies even if they are ineligible to vote. *See Garza v. County of Los Angeles*, 918 F.2d 763, 775-76 (9th Cir. 1990). The treatment of prisoners for redistricting purposes, however, does not involve a choice merely about *whether* to count prisoners, but also, most critically, about *where* they should be counted.

In New York, legislators whose districts are dependent on including prison populations nevertheless make little pretense of providing actual representation to the prisoners in their districts. Indeed, the evidence indicates that representatives of such districts do not merely ignore their incarcerated constituents, but advocate policies inimical to their interests. The leading defenders of the Rockefeller Drug Laws requiring long mandatory prison sentences have been upstate senators Dale Volker and Michael Nozzolio, heads of the New York State Senate Committees on Codes and Crimes, respectively.[28] The prisons in their districts together account for more than 17% of the state's prisoners.[29]

Senator Volker has been particularly blunt in rejecting the notion that he represents the interests of the 8,951 prisoners assigned to his district, 77% of

[28] *Importing Constituents* (Main Report, Part VI), at http://www.prisonpolicy.org/importing/
[29] *Id.* (Fig. 10).

whom are Black or Latino (4,447 Black, 2,427 Latino).[30] As reported in a 2002 interview:

> The inmates at Attica prison in western New York state are represented in Albany by state Sen. Dale Volker, a conservative Republican who says it's a good thing his captive constituents can't vote, because if they could, "They would never vote for me."[31]

In the same article, Senator Volker acknowledged that he comes from a part of the state with "more cows than people" – and would sooner view the cows as constituents than the incarcerated persons in his district:

> [B]etween the cows and the inmates, [Volker] would sooner trust his electoral fate to the cows. 'I'd take my chances with them,' Volker said. 'They would be more likely to vote for me.'"[32]

Senator Volker has more prisoners in his district than any other senator except one.[33] By New York's counting methods, which include the Attica prison population in Senator Volker's district total, Senator Volker's district is already short of its ideal population size by 11,816 people.[34] Reducing his district by the 8,951 prisoners whom he disclaims as constituents, and counting

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[30] *Importing Constituents* (Figs. 10, 13), at http://www.prisonpolicy.org/importing

[31] Jonathan Tilove, *Minority Prison Inmates Skew Local Populations as States Redistrict* (2002), at http://www.newhousenews.com/archive/story1a031202.html (last visited January 26, 2005).

[32] *Id.*

[33] *Importing Constituents* (Fig. 10), at http://www.prisonpolicy.org/importing

[34] *Id.* (Main Report, Fig. 3).

only actual residents of his district, would leave his district 6.79% under-populated, outside of facially permissible population deviations.[35] Yet, by his own admission, the cows in his district are better represented than the prisoners on whom his district depends.

The views expressed by Senator Volker are by no means unique. One researcher conducted a survey of all of the members of the lower house of the Indiana state legislature, asking the following question:

> Which inmate would you feel was more truly a part of your constituency?
>
> a) An inmate who is currently incarcerated in a prison located in your district, but has no other ties to your district.
> b) An inmate who is currently incarcerated in a prison in another district, but who lived in your district before being convicted and/or whose family still lives in your district.[36]

[35] While exact home residences of prison inmates are not available from information published by the New York State Department of Correctional Services, it is safe to say that only a tiny fraction of the prisoners in Senator Volker's district resided in his district prior to their incarceration. Only a small minority of prisoners originates from any one place in the vast upstate region. For example, in 2001, Wyoming County (located within the 59th Senate District) was the county of indictment for 32 people, or .2% of the total state commitments that year. New York State Department of Correctional Services, *Characteristics of New Court Commitments, 2001* Table 11.5 (2002). Even this small figure may overstate the total number of prisoners that are from Wyoming County, as county of indictment figures may also include prisoners convicted of new offenses while they were in a correctional facility in the county.

[36] Taren Stinebrickner-Kaufman, *Counting Matters*, 11 Va. J. Soc. Pol'y & Law at 303.

The results were uniform. "Every single one of the forty respondents who answered the question – regardless of their political party or the presence or absence of a prison in their district – chose answer (b)." *Id.* Accordingly, "[U]nless there is something highly anomalous about Indiana, it is quite clear that representatives do not consider inmates to be constituents of the districts in which they are incarcerated – unless, of course, they happen to have prior ties to those districts." *Id.*

C. New York's Allocation of Disenfranchised Prison Populations for Purposes of State Legislative Redistricting Is Inconsistent With Local Redistricting Practices and Rules Governing Prisoners' Legal Residences in Other Contexts.

Some populations that are counted for redistricting purposes but do not necessarily vote in the district, such as minors, non-U.S. citizens, and residents of college dorms, nevertheless interact with the local population on a social and business level and share interests with members of the community in which they are represented. Citizens of prison towns, however, generally do not consider prisoners to be members of their communities.[37] Prisoners have no contact with the outside community in which they are housed, except for their contact with prison guards.

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[37] *See* Peter Wagner, Prison Policy Initiative, *Actual Constituents: Students and Political Clout in New York* (October 2004), at http://www.prisonersofthecensus.org/students (last visited January 27, 2005).

When county governments draw county legislative districts in prison-hosting counties, the prison population is often disregarded for this very reason. As residents of Franklin County, which houses five prisons, explained in a letter to the Census Bureau:

> Franklin County has always excluded state prisoners from the base figures used to draw our legislative districts. To do otherwise would contradict how we view our community and would lead to an absurd result: creating a district near Malone that was 2/3rds disenfranchised prisoners who come from other parts of the state. Such a district would dilute the votes of every Franklin County resident outside of that area and skew the county legislature. We know of no complaints from prisoners as a result, as they no doubt look to the New York City Council for the local issues of interest to them.[38]

Almost a third of the town of Coxsackie's 8,884 population is in prison.[39] The majority of Dannemora, New York's population is housed in its supermax prison.[40] Like Franklin, the counties that contain these towns, Greene and Clinton counties, respectively, treat prisoners as non-residents for purposes of

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[38] *See* Peter Wagner, Prison Policy Initiative, *Rural Citizens Call for Change in How Census Counts Prisoners* (posted Sept. 6, 2004) (including text of letter to Director, U.S. Census Bureau), at http://www.prisonersofthecensus.org/news/fact-6-9-2004.shtml (last viewed January 27, 2005).

[39] U.S. Census Bureau, American Factfinder: Data Sets (SF 1 Detailed Tables - Table P1 and Table PCT16 regarding Coxsackie town and Dannemora town data on population and state prison population), at http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=DEC&_lang=en (last viewed Jan. 27, 2005).

[40] *Id.*

county redistricting.[41] Thus, while the New York Legislature embraces the fiction that disenfranchised prisoners are residents of prison towns for determining representation in Albany, these same prisoners somehow transform into non-residents when some local governments determine how to draw district lines.

Assigning prisoners as residents of the prison in which they are incarcerated, rather than their home communities, is not only inconsistent with the realities of representation, but also with legal rules applied to determine prisoner residence in other contexts. For example, when prisoners in Washington County seek an indigent divorce in the local courts, they are refused with the instruction to file "in the county in which you lived prior to incarceration." This is true even if the marriage itself took place in the prison county.[42]

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[41] Deborah Clemens, *Task force takes inmates out of equation*, The Daily Mail, Catskill, New York (February 25, 2003), A1, A10; St. Lawrence County, Survey of NYS Counties: Policies Regarding Redistricting/Reapportionment, August 31, 2001 (on file with the Prison Policy Initiative).

[42] Letter dated February 27, 2003 from Kathleen M. Labelle, Chief Clerk of the Washington County Supreme and County Courts, to Troy Johnson (on file with Prison Policy Initiative). *See also* Peter Wagner, Prison Policy Initiative, *Local Officials Tell Prisoners, "You Don't Live Here"* (posted June 7, 2004) (quoting letter), at http://www.prisonersofthecensus.org/news/fact-7-6-2004.shtml (last viewed January 27, 2005).

This practice is enforced in other counties as well. In denying a prisoner housed in Saratoga County the right to have that county pay his court costs, the court rejected the prisoner's assertion that "his physical presence there as an inmate made him a resident of that county":

> Here, plaintiff was a resident of Nassau County prior to his incarceration. His current presence in Saratoga County is not the result of a voluntary decision on his part. He is there at the discretion of the Commissioner and can be involuntarily transferred to a facility in another county at any time *(see*, Correction Law § 23; *Matter of Cole v Smith, 84 AD2d 942, appeal dismissed 55 NY2d 877).*

Beckett v. Beckett, 133 A.D.2d 968, 520 N.Y.S.2d 674, 675 (App. Div. 1987), *appeal dism'd*, 71 A.D. 2d 890, 522 N.Y.S. 2d 1069, 527 N.E.2d 771 (1988).

Similarly, when determining a prisoner's residence for purposes of diversity jurisdiction, the federal courts enforce a presumption that a prisoner remains domiciled, for purposes of legal residence, in the place where he or she resided prior to incarceration:

> It makes eminent good sense to say as a matter of law that one who is in a place solely by virtue of superior force exerted by another should not be held to have abandoned his former domicile.

Stifel v. Hopkins, 477 F.2d 1116, 1121 (6th Cir. 1973).

Further, as noted above, the New York Constitution expressly provides that, for purposes of voting, a prison cannot be a legal residence. The case of

People v. Cady, 143 NY 100, 37 N.E. 673 (1894), vividly illustrates the reality that a prison is not a home. As described in *Importing Constituents*:[43]

> Michael Cady would repeatedly confess to vagrancy and have himself committed for six months at a time to the Tombs. He had been doing so for about seven years, and intended to do so indefinitely. He was even allowed outside on occasion to do paid errands. As he was only committed to prison for vagrancy, Cady was allowed to vote, and he registered using his Tombs address.
>
> Cady was prosecuted for illegal registration -- not for registering to vote -- but for registering to vote as a resident of the Tombs. The prosecution's theory was that under the Constitution and common sense, a prison cannot be a residence, and Cady must have lived somewhere else before he went to prison. The New York Court of Appeals upheld the conviction, citing to the New York Constitution prohibition on gaining or losing a residence from imprisonment, and further defined residence:
>
> > The domicile or home requisite as a qualification for voting purposes means a residence which the voter voluntarily chooses and has a right to take as such, and which he is at liberty to leave, as interest or caprice may dictate, but without any present intention to change it.
> >
> > The Tombs is not a place of residence. It is not constructed or maintained for that purpose. It is a place of confinement for all except the keeper and his family, and a person cannot under the guise of a commitment, or even without any commitment, go there as a prisoner, having a right to be there only as a prisoner, and gain a residence there.

[43] *Importing Constituents* (Main Report, Part III) (*quoting People v. Cady*, 143 NY at 106), at http://www.prisonpolicy.org/importing.

The inconsistent rules that New York applies in determining prisoner residence underscore the fact that New York has made a policy choice in allocating prisoners to prison towns for purposes of state legislative redistricting – a policy choice that, as shown above, enhances the discrimination caused by its disenfranchisement laws.

II. THE DILUTIVE EFFECT OF ASSIGNING PRISON POPULATIONS TO PRISON COMMUNITIES RATHER THAN TO THEIR HOME COMMUNITIES FOR LEGISLATIVE REDISTRICTING SHOULD BE CONSIDERED UNDER THE TOTALITY OF CIRCUMSTANCES INQUIRY ON REMAND.

Congress intended that claims under Section 2 of the Voting Rights Act be assessed based on "comprehensive, not limited canvassing of relevant facts." *Johnson v. DeGrandy*, 512 U.S. 997, 1011 (1994); *accord, Goosby v. Town of Hempstead*, 180 F.3d 476, 492 (2d Cir. 1999). As the Senate report accompanying the 1982 amendments to the Voting Rights Act explains, Section 2 is violated where "the challenged system or practice, *in the context of all the circumstances in the jurisdiction in question*, results in minorities being denied equal access to the political process." S. Rep. No. 97-417, at 27 (1982) (hereafter, "Senate Report"), reprinted in 1982 U.S. Code Cong. & Admin. News 177, 205-07 (emphasis added). Accordingly, the overrepresentation of

white rural areas caused by New York's assignment of prisoners' residences to their prisons for purposes of redistricting, and the dilutive impact on urban communities of color where most prisoners have their permanent residence, is a factor the lower court should consider in assessing whether New York's felon disenfranchisement laws violate Section 2 under the "totality of circumstances." 42 U.S.C. s 1973(b).

Indeed, the Senate Report accompanying amended Section 2 specifically states that a jurisdiction's use of electoral practices that may "enhance the opportunity for discrimination against the minority group" is a relevant factor for courts to consider under Section 2's "totality of circumstances" test. Senate Report at 28. Given the clear racial impact of New York's assignment of prisoners to prison towns for purposes of redistricting, *see* Part I, *supra*, this should be considered a practice that "enhance[s] the opportunity for discrimination" caused by the disenfranchisement of incarcerated persons. Further discovery on the impact of prisoner assignment, including discovery to establish the precise New York City legislative districts from which prisoners are drawn, will allow a more precise appraisal of the full impact of New York's

practices and the extent to which they cause underrepresentation of communities of color.[44]

Moreover, the Senate Report factors are not intended to be exclusive, *see* Senate Report at 29-30**.** Accordingly, the discriminatory impact of assigning prisoners to prison towns for redistricting should properly be part of the Section 2 inquiry into whether disenfranchisement violates Section 2,

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[44] The facts canvassed in this brief suggest that New York's method of assigning prisoners to prison towns for purposes of state legislative redistricting may well constitute an independent violation of Section 2 and/or the Fourteenth Amendment. *See also* Taren Stinebrickner-Kaufman, *Counting Matters*, 11 Va. J. Soc. Pol'y & Law at 282-303 (arguing that discrepancies in population deviations caused by selection of population base that includes disenfranchised prisoners may be unconstitutional under Supreme Court's one-person, one-vote jurisprudence). A challenge to New York's method of allocating prisoner populations for redistricting, moreover, would be distinct from the one-person, one-vote claim addressed in *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004), *summarily aff'd*, __ U.S. __, 125 U.S. 627 (2004), which did not attack New York's choice of a population base for redistricting, but instead argued that the overall population deviation in New York's senate redistricting plan was unconstitutional even assuming the state had used the correct population base.

In any event, however, it is not necessary to show that an "enhancing" practice itself violates the law before it can be deemed relevant to a Section 2 claim as a Senate Report factor. For example, a jurisdiction's use of a majority vote requirement is often considered a factor supporting a claim that an at-large voting scheme violates Section 2, even though the plaintiffs do not challenge the lawfulness of the majority vote requirement itself. *See, e.g., Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 499 (5th Cir. 1987). Thus, under the fact-intensive analysis required by Section 2, a factor that *enhances* the opportunity for discrimination resulting from disenfranchisement weighs in favor of finding a violation of Section 2, regardless of whether the practice independently violates Section 2.

regardless of whether it fits specifically within the enumerated Senate Report factors. The "totality of circumstances" inquiry under Section 2 contemplates a "searching practical evaluation of the 'past and present reality'" and a "'functional'" view of the political process." *Gingles*, 478 U.S. at 45 (citation omitted). "'This determination is peculiarly dependent on the facts of each case,' and requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Id.* at 79 (citations omitted). Accordingly, if this case is remanded for development of evidence on plaintiff's Section 2 claim, New York's use of disenfranchised prisoners to award enhanced representation to white rural areas at the expense of urban communities of color should be part of an "intensely local appraisal" of the design and impact of New York's disenfranchisement laws.

CONCLUSION

The judgment of the district court should be reversed, and the case should be remanded for examination of whether New York's disenfranchisement laws violate Section 2 of the Voting Rights Act.

Respectfully submitted,

_____/s/_____

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JALIL ABDUL MUNTAQIM, a/k/a
ANTHONY BOTTOM,

Plaintiff-Appellant, Docket No. 01-7260

v.

Phillip Coombe, *et al.*,

Defendants-Appellants.

CERTIFICATE OF COMPLIANCE

I, Brenda Wright, hereby certify that the foregoing brief complies with Federal Rule of Appellate Procedure 32(a)(7)(b), as it contains 6,872 words.

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CERTIFICATE OF SERVICE

I hereby certify that, on January 28, 2005, I have caused two true and correct copies of the foregoing Brief *Amici Curiae* In Support of Plaintiff-Appellant Jalil Abdul Muntaqim, a/k/a/ Anthony Bottom, Urging Reversal of The District Court, On Behalf of National Voting Rights Institute And Prison Policy Initiative, to be served via Federal Express Standard Overnight Delivery to the following attorneys:

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