04-3886(pr)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

v.

GEORGE PATAKI, Governor of the State of New York, and CAROL BERMAN, Chairperson, New York State Board of Elections; GLENN S. GOORD, Comissioner of New York State Department of Correctional Services,

Defendants-Appellees.

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

BRIEF FOR DEFENDANTS-APPELLEES PATAKI AND GOORD

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PRELIMINARY STATEMENT

In this appeal, plaintiffs-appellants challenge the dismissal of their claims that New York's decision not to permit incarcerated and paroled felons to vote violates the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment and the Voting Rights Act of 1964. The district court correctly dismissed the plaintiffs' Equal Protection Clause and Fifteenth Amendment claims because the legislative histories of the most recent amendments to the challenged provisions demonstrate beyond cavil that they were reenacted with a nondiscriminatory motive and because the disenfranchisement of this class of felons is rationally related to a legitimate government purpose. The plaintiffs' claims under the Voting Rights Act were properly dismissed under Muntaqim v. Combe, 366 F.3d 102, en banc hearing denied, 385 F.3d 793 (2d Cir.), cert. denied, No. 04-175, 73 U.S.L.W. 3285 (Nov. 8, 2004).

ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly dismiss the plaintiffs' third claim, which alleges racially discriminatory legislative intent in violation of the Equal Protection Clause and the Fifteenth Amendment, where the legislative histories of Article II, section 3 of the New York Constitution and of New York Election Law section 5-106(2) demonstrate as a matter of law

that racial discrimination was not a substantial or motivating factor in the most recent reenactments of those provisions?

2. Did the district court properly dismiss the plaintiffs' first claim, which alleges violations of the Equal Protection Clause and does not allege a racially discriminatory legislative intent, where New York's decision not to permit felons incarcerated or on parole to vote is rationally related to a legitimate government interest?

4. Did the district court properly dismiss the plaintiffs' fourth and fifth claims, brought under the Voting Rights Act of 1964, based on Muntaqim v. Combe?

STATEMENT OF THE CASE

A. New York's Felon Disenfranchisement Law

Article II, section 3 of the New York State Constitution provides that "[t]he Legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime." New York Election Law section 5-106(2) stipulates:

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

In accordance with these provisions, New York does not permit convicted felons who are currently incarcerated or on parole to vote. All other felons are permitted to vote.

B. Procedural History

Plaintiffs-appellants are convicted New York felons either incarcerated or on parole. In an amended complaint submitted on January 15, 2003 (Joint Appendix 98-117 ("J.A. ___")), the plaintiffs alleged that the above provisions of New York law violated: (1) the Equal Protection Clause of the Fourteenth Amendment, based on an impermissible statutory classification that disenfranchises only those convicted felons currently incarcerated or on parole; (2) the Due Process Clause of the Fourteenth Amendment, based on New York's allegedly non-uniform sentencing practices; (3) the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment and the Civil Rights Acts of 1957 and 1960 (codified as amended at 42 U.S.C. § 1971), based on alleged intentional race discrimination; (4) Section 2 of the Voting Rights Act of 1965 ("VRA") (codified as amended at 42 U.S.C. § 1973), based on the alleged denial of the right to vote to incarcerated and paroled Blacks and Latinos; (5) Section 2 of the VRA, based on alleged dilution of the voting strength of Blacks and Latinos and certain minority communities in New York State; (6) the First Amendment; and (7) customary

international law.

Defendants-appellees moved to dismiss all of the claims pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. The United States District Court for the Southern District of New York (McKenna, J.) granted that motion in its entirety on June 14, 2004 (J.A. 12-30).

With respect to the Equal Protection Clause and Fifteenth Amendment claims (numbers one and three), the district court held that under Hunter v. Underwood, 471 U.S. 222 (1985), New York's facially neutral voting classification could violate these constitutional provisions if its enactment was motivated by discriminatory intent, and that absent such intent, the provisions were subject to rational basis review (J.A. 17-18, 21).

Applying these standards, the court acknowledged the complaint's detailed allegations that the New York Legislature enacted other voting qualifications in other periods with a discriminatory intent, but concluded that the plaintiffs had failed to allege facts that would support a finding of discriminatory intent in the enactment of the challenged provisions (J.A. 18-20). The court therefore granted the motion to dismiss plaintiffs' third claim for relief, a decision the plaintiffs challenge on appeal.

The court then applied rational basis review to the

plaintiffs' first claim for relief, which alleged violations of the Equal Protection Clause based on impermissible statutory classification. Focusing on the legislative history of the most recent amendments to section 5-106(2), which extended the right to vote to nonincarcerated felons while reaffirming the disenfranchisement of felons in prison or on parole, Act of Feb. 16, 1971, ch. 310, 1971 McKinney's N.Y. Laws 430; Act of Jan. 30, 1973, ch. 679, 1973 McKinney's N.Y. Laws 1287, the court observed that the "Legislature's justification for the proposed amendment was that disenfranchising felons after they had served their maximum term of imprisonment or were released from parole was inconsistent with the primary concerns of the penal system, which is rehabilitation of the offender" (J.A. 21).

The court also considered the difference in the severity of punishment marked by the challenged classification. It concluded that New York's distinction "between felons who are incarcerated or on parole [and] those serving suspended sentences or probation is entirely rational" and accordingly dismissed the plaintiffs' first claim for relief (J.A. 22). The plaintiffs challenge this ruling on appeal.

The district court dismissed the plaintiffs' two VRA claims (numbers four and five) on the basis of Muntaqim v. Combe, in which this court held that the VRA "cannot be used to challenge the legality of § 5-106." 366 F.3d at 104 (J.A. 12). The

plaintiffs do not challenge the correctness of this ruling or ask the court to reconsider its holding in Muntaqim, but merely request that the district court's ruling be vacated in light of petitions for certiorari in Muntaqim and a case from the Ninth Circuit. Hayden Br. at 43. The Supreme Court denied both those petitions on November 8, 2004.

With respect to the alleged violation of the Civil Rights Act of 1957 and 1960 (under claim number three), the district court followed the majority of other courts in holding that "this section does not provide for a private right of action" and additionally concluded that even if the plaintiffs had a private right of action, their claim would fail since they are not "otherwise qualified to vote," as the statute requires (J.A. 23, 25). The court dismissed the plaintiffs' First Amendment claim (number six) because "the case law is clear that the First Amendment does not guarantee felons the right to vote" (J.A. 25). The plaintiffs' due process claim (number two) failed because criminal defendants are represented by counsel during plea bargaining and sentencing and because the proper remedy would be not a revision of New York's election laws, but a change in New York's criminal procedure law (J.A. 26-27). Finally, the court dismissed the plaintiffs' international law claim (number seven) because neither customary international law nor the relevant treaties created a cause of action under U.S. law (J.A. 28-30).

The plaintiffs do not appeal any of these portions of the decision below. Hayden Br. at 1.

ARGUMENT

The plaintiffs' Equal Protection Clause and Fifteenth Amendment claims is are governed by two Supreme Court cases, Richardson v. Ramirez, 418 U.S. 24 (1974), and Hunter v. Underwood, 471 U.S. 222 (1985).

In Richardson, the Court held that in order to determine how the Equal Protection Clause in section 1 of the Fourteenth Amendment applied to felon voting rights, it was necessary to read it in light of section 2 of the Amendment. 418 U.S. at 43. Section 2 provides that the number of federal representatives from a state shall be reduced in proportion to the percentage of otherwise qualified voters to whom the state denies the franchise. U.S. Const. Am. XIV, § 2. It excepts from that calculation, however, persons excluded from the vote "for participation in rebellion, or other crime." Id.

After an extensive analysis of the history and purpose of both sections 1 and 2, Richardson concluded that section 1, "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." 418

U.S. at 55. The Court accordingly upheld California's felon disenfranchisement statute against an Equal Protection challenge. Id.

Eleven years later, the Supreme Court held that an Alabama felon disenfranchisement statute, who's "original enactment was motivated by a desire to discriminate against blacks on account of race and [that] continues to this day to have that effect," violated the Equal Protection Clause. Hunter v. Underwood, 471 U.S. 222, 233 (1985). Hunter did not overrule Richardson, but carved out an exception where there is proof of discriminatory intent or purpose. "[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Id. at 227-28 (quoting Village of Arlington Heights v. Metropolitan Housing Authority, 429 U.S. 252, 264-65 (1976)).

The plaintiffs' third claim for relief is pled under Hunter and alleges that "Section 5-106(2) of New York Election Law was enacted pursuant to Article I, section 2 [sic] of the New York State Constitution with the intent to disenfranchise Blacks." Am. Compl. ¶ 85 (J.A. 113). This claim fails because the legislative history of the most recent amendments to the challenged provisions decisively demonstrates that they were

reenacted with a permissible, nondiscriminatory intent. This legislative history, which is subject to judicial notice, is so unequivocal with respect to the Legislature's intent as to demonstrate that the plaintiffs can prove no set of facts that would support their intentional discrimination claim.

The plaintiffs' first claim alleges violation of the Equal Protection Clause without alleging discriminatory intent. This court has already held, however, that Richardson and Hunter together entail that, absent an allegation of race-based discriminatory motive, a state's felon disenfranchisement statute is subject only to rational basis review. Baker v. Cuomo, 58 F.3d 814, 820-21 (2d Cir. 1995), vacated in part on other grounds, 85 F.3d 919 (2d Cir. 1996) (en banc) (per curiam). Baker also held that New York Election Law section 5-106(2)'s distinctive treatment of incarcerated and paroled felons was rationally related to a legitimate government interest. Id. at 821. This holding forecloses the plaintiffs' first claim for relief.

Finally, the plaintiffs' fourth and fifth claims, which allege violations of the Voting Rights Act of 1964, are precluded by this court's recent ruling in Muntaqim, 366 F.3d at 104.

POINT I

NEW YORK'S DENIAL OF THE FRANCHISE ONLY TO FELONS CURRENTLY INCARCERATED OR ON PAROLE WAS NOT MOTIVED BY DISCRIMINATORY INTENT AND IS SUPPORTED BY A RATIONAL BASIS, AND THEREFORE THE APPELLANTS' EQUAL PROTECTION AND FIFTEENTH AMENDMENT CLAIMS WERE PROPERLY DISMISSED.

In their first and third claims for relief, the plaintiffs maintain that New York Election Law section 5-106(2) violates the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment. The third claim alleges that the provision violates the Equal Protection Clause and the Fifteenth Amendment because it is the result of a racially discriminatory intent; the first claim alleges that even absent such an intent, the law violates the Fourteenth Amendment because it employs an constitutionally impermissible statutory classification.

The legislative histories of the challenged provisions demonstrate that the plaintiffs' allegation of discriminatory legislative intent fail as a matter of law. Even assuming arguendo that, as the plaintiffs have pled, earlier constitutional felon disenfranchisement provisions were the result of discriminatory legislative intent, the legislative histories of the extensive redrafting of the constitutional provisions in 1874 and the most recent statutory amendments of 1971 and 1973 clearly demonstrate a permissible nondiscriminatory intent. Consequently, "the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to

relief." Phillip v. University of Rochester, 316 F.3d 291, 293 (2d Cir. 2003); Patel v. Contemporary Classics of Beverly Hills, 259 F.3d 123, 126 (2d Cir. 2001) ("The standard for granting a Rule 12(c) motion for judgment on the pleadings is identical to that of a Rule 12(b)(6) motion for failure to state a claim.").

With respect to their claim of impermissible statutory classification, the plaintiffs argue, first, that even absent a showing of discriminatory intent, the challenged provisions are subject to strict scrutiny and, second and in the alternative, that they should be given further opportunity to argue that New York's classification fails rational basis review. Neither of these arguments can be squared with the Supreme Court's holdings in Richardson and Hunter, or with this court's holding in Baker.

A. The legislative history of the challenged provisions demonstrate that they were not motivated by an intent to discriminate against blacks on account of race.

The amended complaint claimed that section 5-106(2) violates the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment in that it was enacted "with the intent to disenfranchise Blacks" (J.A. 113). The complaint also alleged detailed historical evidence of such intent at various nineteenth-century constitutional conventions, apparently in an attempt to make a prima facie case for the plaintiffs' claim.

On appeal the plaintiffs argue that the district court

imposed the wrong pleading standard under Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002), and that the allegations of impermissible intent in their recitation of facts and in the claims section sufficed to state a claim. Hayden Br. at 17-23. The plaintiffs' Memorandum of Law in Opposition to the Defendants' Motion to Dismiss failed to raise Swierkiewicz and did not argue that Rule 8(a) did not require that the complaint state a prima facie case. Plaint. Mem. of Law in Opp. at 7-21. Nonetheless, the defendants acknowledge that the complaint's allegations satisfy Swierkiewicz's minimal pleading requirements.

This court should affirm the dismissal, however, because the legislative histories of the most recent substantive amendments to the challenged statutory and constitutional provisions clearly demonstrate a nondiscriminatory legislative intent. These judicially noticeable documents establish as a matter of law that the plaintiffs cannot prove an unconstitutional motive.

"An appellate court is free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." Gmurzynska v. Hutton, 355 F.3d 206, 210 (2d Cir. 2004) (internal quotation marks omitted).

This court can take judicial notice of published and publicly available legislative histories in an appeal of a motion to dismiss. As Wright and Miller explain, "matters incorporated

by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned" are not considered outside of the pleadings and may be considered by the court without converting a motion to dismiss into one for summary judgment. Wright & Miller, Federal Practice and Procedure: Civ. 3d § 1357, 376 (2004) (emphasis added). The Second Circuit has held that public records and other matters of which judicial notice may be taken may be considered in a motion to dismiss without converting it into a motion for summary judgment. Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 217 (2d Cir. 2004) (public records); Taylor v. Vermont Dept. of Educ., 313 F.3d 768, 776 (2d Cir. 2002) (same); Leonard F. v. Israel Discount Bank, 199 F.3d 99, 107 (2d Cir. 1999) (matters of which judicial notice may be taken); Automated Salvage Transp. v. Wheelabrator Envtl. Sys., 155 F.3d 59, 67 (2d Cir. 1998) (same); Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 75 (2d Cir. 1998) (public records). Other circuits, as well as lower courts within the Second Circuit, have specifically recognized that legislative history falls within those categories. Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305, 1312 (4th Cir. 1995), vacated and remanded on other grounds 517 U.S. 1206 (1996) ("For purposes of Rule 12(b)(6), the legislative

history of an ordinance is not a matter beyond the pleadings but is an adjunct to the ordinance which may be considered by the court as a matter of law."); Tremblay v. Riley, 917 F. Supp. 195, 199 n.2 (W.D.N.Y., 1996) ("Legislative history is not considered to be a matter 'outside the pleadings' for purposes of Rule 12(b)(6) and therefore may properly be considered on a motion to dismiss for failure to state a claim.").

Moreover, legislative intent is not an adjudicative fact, but a legislative one. It is therefore also within this court's power to make findings on its own as to whether the challenged provisions were the product of discriminatory intent. See Landell v. Sorrell, 382 F.3d 91, 106 (2d Cir. 2004) (Winter dissenting) (Legislative facts, such as the legislature's intent, "are subject to de novo review and appellate courts not only can find legislative facts on their own but they also usually do so."); Fed. R. Evid. 201, Notes of Advisory Committee, subdivision (a); Kenneth Culp Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364, 403-07 (1942). An examination of the legislative histories of the challenged statutory and constitutional provisions demonstrates beyond question that the relevant reenactments of those provisions were not motivated by discriminatory intent.

Hunter did not consider whether or when the subsequent reenactment of a statute originally enacted with an impermissibly

discriminatory motive removes the taint of the earlier legislative intent. Indeed, the Court expressly reserved the question of "whether [the Alabama law] would be valid if enacted today without any impermissible motivation." 471 U.S. at 233. Two circuits have since ruled on that question in cases involving felon disenfranchisement statutes and both have reached the same result. In Cotton v. Fordice, 157 F.3d 388 (5th Cir. 1998), the Fifth Circuit held that the 1950 and 1968 revisions to Mississippi's felon disenfranchisement statute "superseded the previous provision and removed the discriminatory taint associated with the original version." Id. at 391. The Eleventh Circuit similarly held that "an original discriminatory purpose behind Florida's felon disenfranchisement provision establishes an equal protection violation that persists with the provision unless it is subsequently reenacted on the basis of an independent, non-discriminatory purpose." Johnson v. Florida, 353 F.3d 1287, 1301 (11th Cir. 2003), vacated and rehearing en banc granted by 377 F.3d 1163 (11th Cir. 2004); see United States v. Adkinson, 135 F.3d 1363, 1371 n.23 (11th Cir. 1998) ("The announcement of an en banc rehearing by a court of appeals does not suspend stare decisis.").[1]

[1] The Eleventh Circuit panel disagreed with the Fifth Circuit with respect to which party bore the burden of proof as to subsequent reenactment, holding that "the Defendants have the burden to show that the State knowingly and deliberately reenacted [the provision] for a non-discriminatory reason." 353

The most recent substantive amendments to New York Election Law section 5-106(2) were in 1971 and 1973. Act of Feb. 16, 1971, ch. 310, 1971 McKinney's N.Y. Laws 430; Act of Jan. 30, 1973, ch. 679, 1973 McKinney's N.Y. Laws 1287.[2] Those amendments reaffirmed that felons either currently incarcerated or on parole were not permitted to vote, while changing the law to extend the franchise to all other felons. See N.Y. Elec. Law § 5-106(2). In the Bill Memorandum attached to the 1971 amendment, the sponsor explained the Legislature's reasoning as follows:

> Once the offender has served his sentence or has been discharged from parole, he is presumed to be capable of rejoining society. . . . It is inconsistent with the general philosophy of corrections to continue punishment after a person has accounted.

Bill Memorandum of Mr. Corbett (Feb. 5, 1971), reprinted in Bill Jacket for ch. 310 (1971), at 3 (J.A. 46); compare Baker v. Cuomo, 58 F.3d 814, 821 (2d Cir. 1995) ("[F]elon disenfranchisement is reasonably related to social contract principles, penal considerations and the state's interest in

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F.3d 1301. Because the plaintiffs in this case appeal from a 12(c) motion to dismiss, this court need not address the burden of proof issue. Even if the plaintiffs have the ultimate burden of proving that the taint of an impermissible original intent persisted, on a 12(c) motion to dismiss the defendants bear the burden of showing that "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Phillip, 316 F.3d at 293.

[2] Subsequent amendments in 1976 were intended merely to recodify the earlier law. Act in Relation to the Election Law, Recodifying the Provisions Thereof, ch. 233, 1976 McKinney's N.Y. Laws 474, 536.

ensuring that elections are free from fraud and corruption."). Once the term of punishment ended, however, that rationale no longer applied.

There is not the slightest hint of a discriminatory intent behind the 1971 or 1973 amendments. Quite the contrary, the amendments were supported by numerous groups committed to civil rights, including the New York Urban Coalition, Citizens Union, The Legal Aid Society, the New York Civil Liberties Union, and the New York State Catholic Committee. Bill Jacket for ch. 310, at 12 (J.A. 50); Bill Jacket for ch. 679 (1973), at 28, 30-31, 35-36, 38-39 (J.A. 80, 82-83, 87-88, 90-91). The clarity of the legislative record in this case leaves no room for doubt: The Legislature considered the purpose of disenfranchising incarcerated and paroled felons and reenacted the challenged provisions with a legitimate, nondiscriminatory purpose.

Even though the Legislature acted with a nondiscriminatory purpose in 1971 and 1973, however, it passed those amendments pursuant to Article II, section 3 of the New York Constitution, which stipulates that "[t]he legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime." The plaintiffs' complaint suggests that if the constitutional provision was the result of an impermissible motive, its taint seeps through to the statute passed pursuant to it. Am. Compl. ¶ 85 (J.A. 113).

The relevant sentence of Article II, section 3 is the product of three substantive constitutional amendments, occurring in 1821, 1846 and 1874. See Robert Carter, New York State Constitution: Sources of Legislative Intent 15 (2d ed. 2001). Assuming arguendo that the provision was added in 1821 and then retained in 1846 with the purpose of disenfranchising blacks (which the defendants do not admit), if the 1874 amendment and reenactment was the result of "an independent, non-discriminatory purpose," Johnson, 353 F.3d at 1301, the causal chain is broken and there is no Hunter violation.

The plaintiffs have argued that the timing and circumstances of the 1874 amendment indicate an intent to disenfranchise blacks. Hayden Br. at 30. An examination of the actual legislative history of that amendment, however, demonstrates that after extensive debate and consideration, the delegates chose to deny the vote to those convicted of "infamous crimes" not with an intent to disenfranchise blacks or other minorities, but as part of a larger project aimed at preventing vote buying and other forms of ballot-box corruption.

As the plaintiffs note in their complaint, the significant constitutional change with respect to felon disenfranchisement in 1874 was the replacement of a permissive "may" with mandatory "shall." Am. Compl. ¶ 56 (J.A. 108). Article II, section 2 (the ancestor of the current section 3) of the 1846 New York

Constitution read:

> Laws may be passed excluding from the right of suffrage all persons who have been or may be convicted of bribery, larceny, or any infamous crime; and for depriving every person who shall make, or become directly or indirectly interested in, any bet or wager depending upon the result of any election, from the right to vote at such election.

Third Constitution of New York, 1846, Art. II, § 2 (emphasis added), reprinted in New York State Constitution Annotated 48 (1938). In 1874, that section was modified by an amendment that, inter alia, also changed the sentence concerning "infamous crime" to read:

> The legislature, at the session thereof next after the adoption of this section, shall, and from time to time thereafter may, enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime.

1874 Amendments to the New York Constitution, Art. II, § 2 (emphasis added), reprinted in New York State Constitution Annotated, at 85, and in Charles Z. Lincoln, 2 The Constitutional History of New York 482 (1906). In 1894, the occasion of the next constitutional convention, this temporary wording was changed to its current form:

> The Legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime.

Lincoln, 3 Constitutional History, at 85.

The language enacted in the 1874 amendment originated in a proposed revised constitution produced by New York's 1867/68

Constitutional Convention. Constitution Proposed by the Convention of 1867, Art. II, § 2, reprinted in Lincoln, 2 Constitutional History, at 428. The delegates to that convention discussed at length a number of proposed modifications to section 2, almost all of which focused on a single issue: the need to prevent corruption at the ballot box in general, and vote buying in particular. See E.F. Underhill, 1 Report of the Proceedings and Debates of the Convention for the Revision of the Constitution of the State of New York 1867-'68 226-27, 473-79, 483-89, 501-08, 515-27, 547-68, 611-12 (1868). Delegates were particularly concerned that the Legislature could not be trusted to pass laws to police the very mechanisms that had put them in power. The majority sentiment was summarized as follows:

> This corruption has reached a point where the people absolutely demand that there shall be a remedy provided in the organic law. They are not willing to turn this matter over to the Legislature. They lack confidence in the Legislature. . . . They are not willing to trust men to enact laws against bribery and corruption, who have themselves secured their places by corrupt practices. . . . I beg that we may not turn this whole matter over to the Legislature; for, by so doing, I greatly fear that we should fail to obtain what is absolutely necessary to secure the purity of our elections, and the stability of our government.

Id. at 558 (statement of Mr. Smith); see also id. at 483-85, 501-04, 507, 516, 560-61.

It was precisely this concern that caused the delegates to change the permissive "may" of the 1847 constitution to a mandatory "shall." Thus on January 24, 1867, delegate A.J.

Parker suggested that a proposed amendment by Mr. Masten, id. at 501, "substitute the word 'shall' . . . for the word 'may' so as to make it imperative upon the Legislature to pass such laws," id. at 503 (statement of Mr. A.J. Parker). While most of Masten's wording did not survive through to the end of the convention, the use of "shall" remained, and was consistently justified by the delegates' desire to ensure legislative action. See, e.g., id. at 516 (statement of Mr. Conger), 528 (statement of President), 547 (statement of Secretary), 557-58 (statements of Mr. Folger), 562 (statement of President), 564 (statements of Mr. Masten and Mr. Evarts).

This remained the purpose of the amended section 2 when it was ultimately enacted in 1874. See Reports of Committees of the Constitutional Commission, Article II, reprinted in Amendments Proposed to the Constitution of the State of New York 26, 28 (1873) ("The proposed amendment contains a stringent provision excluding from the right to vote all persons guilty of bribery, whether directly or indirectly, or of corruptly influencing votes."); Annual Message of Gov. Hoffman, Jan. 2, 1872, reprinted in 6 State of New York, Messages from the Governors 387 (Charles Z. Lincoln ed. 1909) (describing the proposed section 2 as "relat[ing] to the corrupt expenditure of money to influence electors . . . which will, if rigidly enforced, tend to check an evil which has assumed proportions of great magnitude");

Communication from Gov. Hoffman, Jan. 26, 1871, reprinted in 6 Messages from the Governors 263 (urging constitutional amendment to combat "the corrupt use of money to influence the votes of electors.").

Nor was the retention of the provision withholding the vote from "persons convicted . . . of any infamous crime" a matter of oversight. The precise wording of that provision was discussed on the floor. 1 Report of the Proceedings and Debates, at 226-227 (amendment of Mr. Spencer limiting provision to those convicted of infamous crimes), 232 (statement of Mr. Endress recommending that "larceny" be removed as a ground for disenfranchisement), 478-79 (proposal of Mr. Duganne to empower legislature to disenfranchise twice-convicted felons), 501 (proposal of Mr. Matsen to retain "persons convicted . . . of any infamous crime" rather than substituting "felons"), 566 (amendment of Mr. Harris replacing "all persons who have been or may be convicted" with "all persons convicted"). Individual delegates explained the denial of the vote to these persons both as furthering the anti-corruption purpose of the amendment and in terms of traditional social contract principles. Id. at 501 (statement of Mr. Masten that the object of disenfranchising felons "doubtless is to protect and secure the purity of elections"), 520 (Mr. Hand: "[W]e exclude criminals because they have forfeited the right of citizenship by their crimes and are

unsafe persons to be intrusted with these important responsibilities.").

Nowhere in the discussion of Article II, section 2 is there any hint that the substitution of "shall" for "may" or the retention of "infamous crime" was the product of a discriminatory purpose or intent. On the contrary, there is strong evidence of a concern to protect the franchise for minorities. Thus while several facially discriminatory amendments were proposed, each was roundly defeated after little or no discussion. See, e.g., id. at 481 (restrictions on right of blacks to vote defeated without debate), 501 (imposition 5-year residency requirement for emancipated blacks defeated 77 to 37), 549-50 (literacy test to protect against "foreign born citizens" defeated with no debate). And in drafting section 1, the delegates purposively chose to permit all "citizens," rather than "citizens of the United States," to vote, in order to avoid any possible limitation of the rights of blacks under Dred Scott, whose contemporary legal status was subject to some doubt among the delegates. Id. at 473, 517-18, 542-43. While some individual delegates may have harbored racist beliefs, the record as a whole demonstrates beyond question that those delegates did not control the outcome of the drafting process with respect to section 2.

The debates surrounding the revisions in the 1874 amendment to the challenged constitutional provision exhibit with force and

clarity that the amendment was the product of a permissible, nondiscriminatory motive, namely to prevent vote buying, bribery and other forms of ballot-box corruption. Given the extent of and lack of ambiguity in the published record, this court should conclude that no amount of extrinsic or circumstantial evidence the plaintiffs might produce could suffice to controvert the evidence of permissible intent. That is, the legislative history demonstrates that the plaintiffs "can prove no set of facts in support of [their] claim which would entitle [them] to relief." Phillip, 316 F.3d at 293. The district court's dismissal of the plaintiffs' Equal Protection and Fifteenth Amendment claim should therefore be affirmed.

Finally, should this court reverse and remand on this issue, while affirming the dismissal of the plaintiffs' other claims for relief, the defendants respectfully request that it consider clarifying the appropriate scope of discovery on remand. During the one-year pendency of the defendants' motion to dismiss, discovery on contemporary disparate impact and other issues was ongoing and extremely burdensome to New York State agencies, including the Division of Criminal Justice Services, the Division of Probation, the Division of Parole, and the Department of Correctional Services. Were the plaintiffs' only remaining claim the allegation of discriminatory legislative intent, the non-existence of such an intent would be dispositive and subject to a

motion for summary judgment. In that case, it would be appropriate for the district court preliminarily to limit discovery to this one issue.

B. Supreme Court and Second Circuit cases establish as a matter of law that, absent a showing of race-based discriminatory intent, the challenged provisions do not violate the Equal Protection Clause.

Section 5-106(2) distinguishes between, on the one hand, incarcerated and paroled felons and, on the other, felons not sentenced to a period of incarceration or who have completed their sentence, withdrawing the vote from the former group and extending it to the latter. On appeal, the plaintiffs argue that, even absent a showing of discriminatory intent, "the distinction [should be] subject to strict scrutiny review," or, at the very least, that they should have been given "an opportunity to prove that no rational basis is served by the felon disenfranchisement scheme." Hayden Br. at 35.

The Second Circuit has already rejected both of these propositions. In Baker v. Cuomo, this court held (1) that absent proof of discriminatory intent, a state's felon disenfranchisement statute is subject only to rational basis review and (2) that New York Election Law section 5-106(2) passed such review. 58 F.3d 814, 820-21 (2d Cir. 1995), vacated in part on other grounds, 85 F.3d 919, 921 (2d Cir. 1996) (en banc) (per curiam) (vacating panel decision with respect to VRA claims, on which en

banc review had been granted, while leaving in place panel ruling on Fourteenth and Fifteenth Amendments); see Connecticut v. Physicians Health Services Of Connecticut, Inc., 287 F.3d 110, 119 (2d Cir. 2002) (relying on prior Second Circuit decision vacated in part on other grounds); United States v. Biaggi, 909 F.2d 662, 687 (2d Cir. 1990) (same). The holding in Baker forecloses the plaintiffs' claim that section 5-106(2) employs a statutory classification that violates the Equal Protection Clause.

Moreover, this court's reasoning in Baker was entirely correct. The decision was based on the Supreme Court's rulings in Richardson v. Rodriguez and Hunter v. Underwood. In Richardson, three convicted felons challenged California's felon disenfranchisement statute, asserting a strict scrutiny argument similar to that advanced by the plaintiffs: "that a compelling state interest must be found to justify exclusion of a class from the franchise, and that [the state] could assert no such interest with respect to ex-felons." 418 U.S. at 33. As noted above, after examining the history of sections 1 and 2 of the Fourteenth Amendment, the Supreme Court concluded that the Equal Protection Clause "could not have been meant to bar [felon disenfranchisement] outright" and, without further analysis, held that the California statute did not violate the Fourteenth Amendment. Id. at 55.

Eleven years later in Hunter, the Court revisited the issue and held that an Alabama felon disenfranchisement statute violated the Equal Protection Clause where there was proof that the "original enactment was motivated by a desire to discriminate against blacks on account of race and the [law] continues to this day to have that effect." 471 U.S. at 233. Hunter did not state what level of review should be applied where there is no proof of discriminatory intent.

Baker considered a Fourteenth and Fifteenth Amendment challenge to section 5-106(2) and held that, under Richardson and Hunter, "statutes that deny felons the right to vote are not subject to strict judicial scrutiny." 58 F.3d at 820. Instead, the court held, rational basis review was the appropriate test for determining whether, absent an allegation of racially discriminatory intent, section 5-106 conformed with the Fourteenth Amendment. Id. at 820-21; see also Owens v. Barnes, 711 F.2d 25, 27 (3d Cir.), cert. denied, 464 U.S. 963 (1983); Shepherd v. Trevino, 575 F.2d 1110, 1114-15 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979). Baker therefore forecloses the plaintiffs' argument for heightened scrutiny.

Rational basis review in equal protection analysis is an extremely deferential standard. Such review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." FCC v. Beach Communications, Inc., 508 U.S. 307, 313

(1993). All that is required is "a rational relationship between the disparity of treatment and some legitimate governmental purpose." Heller v. Doe, 509 U.S. 312, 320 (1993). Moreover, in seeking out a rational basis for the legislation, the question is not the actual intent of the legislature. "[A] legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification." Id. (internal quotation omitted). Rather, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Beach Communications, 508 U.S. at 313.

Applying this standard, the Baker court concluded that there was a rational basis for section 5-106(2)'s distinctive treatment of felons who were incarcerated or on parole. The court agreed with the Third Circuit that the deprivation of liberty justified restricting participation in the democratic processes that govern those who remain at liberty. 58 F.3d at 821 (discussing Owens, 711 F.2d at 27). It also noted that "felon disenfranchisement is reasonably related to social contract principles, penal considerations and the state's interest in ensuring that elections are free from fraud and corruption." Id. The court concluded that these state interests are "reasonably related to disenfranchisement of those felons who commit crimes serious

enough to warrant incarceration." Id.

In their brief to this court, the plaintiffs do not cite Baker, much less attempt to explain why it is not controlling with respect to their claim of impermissible classification. In fact, they cannot. The plaintiffs' argument that strict scrutiny must apply because voting is a fundamental right, Hayden Br. at 37-39, was rejected by the Supreme Court in Rodriguez, 418 U.S. at 33, 55, and by this court in Baker, 58 F.3d at 820-21. Nor is it necessary to provide the plaintiffs "the opportunity to develop and present evidence" on whether the facially neutral categories New York employs are rational. Hayden Br. at 42. Rational basis review asks whether there is "any reasonably conceivable state of facts that could provide a rational basis for the classification," Beach Communications, 508 U.S. at 313, and this court has already held that the legally defined characteristics of incarceration and parole provide such a basis. Baker, 58 F.3d at 821.

POINT II

THERE ARE NO GROUNDS TO VACATE THE DISTRICT COURT'S DISMISSAL OF THE APPELLANTS' VOTING RIGHTS ACT CLAIMS.

The district court dismissed the plaintiffs' VRA claims (numbers four and five) based on this court's holding in Muntaqim v. Coombe, 366 F.3d 102, en banc hearing denied, 385 F.3d 793 (2d Cir. 2004), that the VRA does not apply to felon disenfranchise-

ment statutes (J.A. 23). On appeal, the plaintiffs have neither argued that Muntaqim got the law wrong nor asked the court to revisit the question. Instead, they have simply requested that the court vacate the decision below in light of pending petitions for certiorari in Muntaqim and in Farrakhan v. Washington, 359 F.3d 1116 (9th Cir. 2004). On November 8, 2004, the Supreme Court denied certiorari in both cases. Locke v. Farrakhan, No. 03-1597, 73 U.S.L.W. 3286 (Nov. 8, 2004); Muntaqim v. Coombe, No. 04-175, 73 U.S.L.W. 3285 (Nov. 8, 2004). Consequently, the plaintiffs' sole argument for vacatur no longer exists.[3]

Nor have the plaintiffs asserted, much less argued, that Muntaqim was decided wrongly. Consequently, they have waived any such argument to this court. Norton v. Sam's Club, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."); Keefe v. Shalala, 71 F.3d 1060, 1066 n.2 (2d Cir. 1995) (Second Circuit will normally not consider arguments not raised in appellant's brief); O'Hara v. Weeks Marine, Inc., 294 F.3d 55, 67 n.5 (2d Cir. 2002) (same).

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[3] Even if these petitions were still pending, they would not be grounds to vacate the district court's decision. See, e.g., United States v. Desist, 384 F.2d 889, 898 (2d Cir. 1967) (grant of certiorari on issue did not change fact that panel was bound by Second Circuit case law); United States v. Ianniello, 808 F.2d 184, 190 (2d Cir. 1986) ("This Court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court en banc.").

CONCLUSION

For all of the foregoing reasons, the judgment of the district court should be affirmed.

Dated: New York, New York
November 24, 2004

Respectfully submitted,

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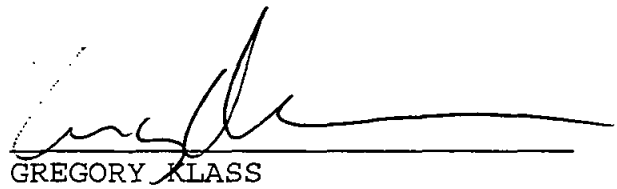
By: 
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I, Gregory Klass, counsel for the defendants-appellees George Pataki and Glenn S. Goord, do hereby certify that the foregoing brief complies with the type-volume limitation as set forth in Federal Rule of Appellate Procedure 32(a)(7). According to the word-count function of the word processor used to prepare the foregoing brief, the total number of words in the brief is 6,969.

Gregory Klass