04-3886-PR

To be argued by
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United States Court of Appeals

for the

Second Circuit

JOSEPH HAYDEN; 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 RAMÓN; LILLIAN M. RIVERA; NILDA RIVERA; MARIO ROMERO; JESSICA SANCLEMENTE; PAUL SATTERFIELD; and BARBARA SCOTT, on behalf of themselves and all individuals similarly situated,

Plaintiffs-Appellants,

- against -

GEORGE PATAKI, Governor of the State of New York, and CAROL BERMAN, Chairperson, New York State Board of Elections,

Defendants-Appellees.

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Plaintiffs have clearly demonstrated that the district court's Rule 12(c) dismissal of their claims challenging New York's felon disfranchisement laws under the Fourteenth and Fifteenth Amendments of the United States Constitution was in error. As a threshold matter, Defendant George Pataki[1] concedes that Plaintiffs meet the basic pleading requirements for an intentional discrimination claim and does not challenge the sufficiency of the pleadings with respect to any of the claims on appeal. Moreover, not only does Defendant Pataki's response[2] offer no reliable justification for upholding the decision below, it highlights the searching and exacting factual inquiry merited by Plaintiffs' claims that was thwarted by the district court's premature dismissal of Plaintiffs' complaint. Defendant attempts to circumvent this inquiry by misleading the court on the content and interpretation of the legislative history at issue and by limiting the analysis of Plaintiffs' claims to the legislative record when a fuller examination is

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[1] Defendant George Pataki, Governor of the State of New York, ("Defendant Pataki" or "Defendant") submitted a brief in response to Plaintiffs' opening brief on appeal on behalf of himself and Glenn S. Goord, Commissioner of New York State Department of Correctional Services. Commissioner Goord was dismissed from this action upon the filing of Plaintiffs' First Amended Complaint ("Amended Complaint") in January 15, 2003. Carol Berman, Chairperson of the New York State Board of Elections, who is a current Defendant in this lawsuit, did not file a response to Plaintiffs' brief on appeal.

[2] Brief for Defendants-Appellees Pataki and Goord [sic] ("Defendant's Response" or "Def's Br.").

required. However, Plaintiffs have pleaded sufficient facts that are supported by the legislative record and historical context, to withstand dismissal under Rule 12(c). Likewise, Plaintiffs have shown that the disparate application of New York State's felon disfranchisement statute among persons with felony convictions is subject to heightened scrutiny that requires further factual development by the parties. Finally, the intervening petition for rehearing en banc in Muntaqim v. Coombe, counsels toward vacating the district court's dismissal of Plaintiffs' Voting Rights Act claims.

ARGUMENT

I. DEFENDANT, LIKE THE DISTRICT COURT, MISAPPLIES THE RULE 12(c) STANDARD

While it is unclear what standard the district court used in dismissing Plaintiffs' claims, Defendant stipulates that "the complaint's allegations satisfy [] minimal pleading requirements." Def's Br. at 12. However, like the district court's opinion below, Defendant's Response conflates the standard for withstanding a Rule 12(c) motion with the standard required to prevail on a Rule 56 motion for summary judgment, and urges the Court to engage in an unwarranted investigation of the merits of this case.

As set forth in their opening brief, Plaintiffs' Amended Complaint alleges specific facts demonstrating intentional discrimination and disparate application of New York's felon disfranchisement laws. If construed in the light most favorable to the Plaintiffs and accepted as true, as required by Rule 12(c), these allegations entitle Plaintiffs to relief. DeMuria v. Hawkes, 328 F.3d 704, 706 (2d Cir. 2003)(citing Scuttie Enters. v. Park Place Entm't Corp., 322 F.3d 211, 214 (2d Cir. 2003)); Patel v. Contemporary Classics of Beverly Hills, 259 F.3d 123, 126 (2d Cir. 2001)(citing Irish Lesbian & Gay Org. v. Giuliani, 143 F.3d 638, 644 (2d Cir. 1998)). By presenting issues of fact that were never raised before the district court, and inviting interpretations of legislative history that are at best contested, Defendant seeks to have this Court conduct an evidentiary exercise that is improper at this stage in litigation.

Specifically, Defendant suggests that this Court should blindly accept his narrow and misleading interpretation of the legislative history of New York's felon disfranchisement provisions. However, Defendant's argument that the legislative history of New York's felon disfranchisement provisions "decisively demonstrates," Def's Br. at 9, his position that subsequent re-enactments of the laws removed any discriminatory intent is nothing more than Defendant's opinion about a severely contested factual issue that cannot be resolved without a remand for further discovery. See Williams v. Apfel, 204 F.3d 48, 50 (2d Cir. 1999)

(vacating a district court judgment and remanding for further proceedings where the administrative record was undeveloped).

Defendant asks this Court to take judicial notice of his interpretation of the legislative history of the laws in question. Def's Br. at 12-14. However, the Advisory Committee Notes to Rule 201, Fed. R. Evid., state that the Rule "deals only with judicial notice of 'adjudicative'" and not "legislative" facts and defines legislative facts as those "which have relevance to legal reasoning and the law-making process, whether in formulation of a legal principle or [ ] in the enactment of a legislative body." See Fed. R. Evid. 201 Notes of Advisory Committee on Rules citing Kenneth Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364, 404-407 (1942). Defendant admits in his brief that "legislative intent is not an adjudicative fact but a legislative one," Def's Br. at 14, making it clear that his proffered interpretation of legislative history does not fall under Rule 201. See also United States v. Hernandez-Fundora, 58 F.3d 802, 811 (2d Cir. 1995) ("[R]esolution of the jurisdictional issue [ ] requires the determination of legislative facts, rather than 'adjudicative facts' within the meaning of Rule 201(a), with the result that Rule 201(g) is inapplicable.").

Although courts have taken judicial notice of legislative history showing the reason for the passage of certain legislation, see, e.g., Carolene Prod. Co. v. United States, 323 U.S. 18, 28 (1944) ("The trial court took judicial notice, as did the District Court of the District of Columbia, and as we do, of the reports of the committees of the House of Representatives and the Senate which show that other considerations [] influenced the [legislation at issue]."), this Court has held that it may not take notice of legislative facts if those facts are in dispute and especially when they are dispositive and the record is not developed. Landell v. Sorrell, 382 F.3d 91, 135 n.24 (2d Cir. 2004) ("The fact that this Court may ultimately undertake de novo review of any legislative facts found by the District Court on remand or that appellate courts take judicial notice of legislative facts under appropriate circumstances, does not mean that we must resolve disputed legislative facts — particularly facts that are dispositive of the case before us — on an insufficiently developed record."). Indeed, Landell states that the legislative facts addressed by this Court have largely dealt with straightforward questions such as geography, jurisdiction, or scientific fact. Id. ("[T]he types of 'legislative facts' that have been addressed most recently in our caselaw deal with much more straightforward questions, e.g., geography and jurisdiction or the fact that cocaine is derived from coca leaves."). Accordingly, this Court should not take judicial notice of Defendant's proffered interpretation of the legislative history of New

York's felon disfranchisement laws, and certainly not in the context of a Rule 12(c) determination. Moreover, should this Court determine that judicial notice is appropriate, Plaintiffs must be afforded an adequate opportunity to be heard on this issue. See Fed. R. Evid. 201(e).

Plaintiffs' Amended Complaint also sufficiently alleges that New York's felon disfranchisement provisions, as applied, make impermissible distinctions among persons with felony convictions. Defendant argues that Baker v. Cuomo, 58 F.3d 814 (2d Cir. 1995), vacated by Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996), forecloses Plaintiffs' Equal Protection claim. Def's Br. at 25, 28-29. However, Baker does not foreclose Plaintiffs' argument that this case should be vacated and remanded for development of a complete factual record necessary to support heightened scrutiny, or a rational basis equal protection analysis, regarding the severity of the crimes committed by individuals sentenced to incarceration or parole (as compared to probationers) and the implications of prohibiting such individuals to exercise their fundamental right to vote. See Baker, 58 F.3d at 818-819. Therefore, dismissal below should be reversed and this case remanded for further proceedings.

II. PLAINTIFFS HAVE ALLEGED SUFFICIENT FACTS OF INTENTIONAL DISCRIMINATION THAT ARE NOT REFUTED BY DEFENDANT'S MISLEADING INTERPRETATION OF THE LEGISLATIVE HISTORY OF NEW YORK'S FELON DISFRANCHISMENT LAWS

Against the weight of legislative history to the contrary, Defendant alleges that the "legislative histories of the challenged [felon disfranchisement] provisions demonstrate that the plaintiffs' allegation of discriminatory legislative intent fail [sic] as a matter of law." Def's Br. at 10. To support this assertion, Defendant attempts to divert this Court's attention from the discriminatory origins of New York's felon disfranchisement statute (the corrosive effects of which endure to this day) by claiming that an alleged "redrafting of the constitutional provisions" more than half a century later in 1874 and "statutory amendments of 1971 and 1973" purged the provisions of their discriminatory intent. Id. "Consequently," Defendant concludes, "the plaintiff[s] can prove no facts" in support of their intentional discrimination claim that would entitle them to relief. Id. at 10-11. As we show below, Defendant's argument is factually erroneous because (like the opinion below) it fails to address the naked reality of New York's long history of intentional discrimination against Blacks in voting.

Defendant also relies on a misstatement of established legal principle. To satisfy a Rule 12(c) motion, Plaintiffs need only state facts, which taken together as true, would entitle them to relief under a particular claim. See Patel, 259 F.3d at

126. Here, Plaintiffs assert that New York's extensive history of intentional racial discrimination in voting dates back to its Constitution in 1777 and spans more than a century. During this time, delegates to Constitutional Conventions and legislators purposefully erected barriers (culminating in the mandated enactment of a felon disqualification statute) that were intended to, and have had the effect of, disfranchising Blacks and other racial minorities. These allegations, taken as true, sufficiently state the basis for this Court to find a violation of the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment.

A. Defendant and the District Court Ignore the Arlington Heights Standard for Pleading Intentional Discrimination that Plaintiffs Have Clearly Met.

By suggesting that Plaintiffs attempted in their Amended Complaint to make a "prima facie case" that New York's felon disfranchisement statute was "enacted with the intent to "disenfranchise [sic] Blacks," Def's Br. at 11, Defendant, like the district court, seeks to heighten the standard for alleging intentional discrimination under the Equal Protection Clause of the Fourteenth Amendment. The appropriate test for determining whether a facially neutral state law that has a racially disparate impact violates the Equal Protection Clause was outlined by the Supreme Court in Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977). In Arlington Heights, the Supreme Court held that proof of intent to discriminate can be derived from a contextual analysis of a variety of factors that collectively

support an inference of racial animus — including that the impact of an action bears more heavily on one race than another, the historical background of an official decision, and the legislative or administrative history of an official action, particularly where there are statements by members of the decision-making body. 429 U.S. at 266-267 (finding that "whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available").

Arlington Heights requires an evaluation of these factors taken as a whole—and not in isolation as the Defendant and the district court did here—in order to appreciate the full context of the origin and effect of a challenged law. Contrary to the holding of Arlington Heights, however, Defendant relies exclusively on limited portrayals of "legislative histories of the most recent substantive amendments to the challenged statutory and constitutional provisions," Def's Br. at 12, to demonstrate a nondiscriminatory legislative intent, and proffers that inadequate, narrow interpretation as the justification for the district court's dismissal.

To substantiate their intentional racial discrimination claim, Plaintiffs cited telling portions of the available historical background and legislative history of New York's felon disfranchisement restrictions, (JA 00105-109 [FAC ¶¶ 39-60]), and their disproportionate impact on Blacks and Latinos. (JA 00109-00111 [FAC

¶¶ 61-71]). Plaintiffs' Amended Complaint contains numerous, specific allegations that support a complete review by the trial court of the "circumstantial and direct evidence of intent as available," Arlington Heights, 429 U.S. at 266, regarding the central role of race in the enactment of New York's felon disfranchisement laws.

Specifically, the Amended Complaint alleges that, in the 18th and 19th centuries, both the Legislature and delegates to the various New York State Constitutional Conventions — intended to, and did, discriminate against Blacks with respect to the franchise and made "explicit statements of [their] intent" to that effect. (JA 00106 [FAC ¶ 41]). The Amended Complaint sets forth the unmistakable, de jure limitations on the ability of Black New Yorkers to vote, (JA 00106 [FAC ¶¶ 43-45]), that provided an historical context for the actions taken at the 1821 New York Constitutional Convention — a convention dominated by an express, racist purpose to deprive the vote from "men of color." (JA 00107 [FAC ¶48]). Plaintiffs' Amended Complaint also alleges that Blacks in New York have been routinely denied suffrage on an equal basis as whites, (JA 00105-107 [FAC ¶¶ 39-50]), were openly regarded by various state legislators and delegates to constitutional conventions as being biologically inferior and, therefore, unfit for suffrage, (JA 00106-107 [FAC¶¶ 46, 51]), and were described as being 13 times as likely as whites to commit infamous crimes. (JA 00107 [FAC ¶51]).

Rather than refuting the discernable discriminatory origins of New York's felon disfranchisement regime at the 1821 Constitutional Convention, Defendant assumes, arguendo, that New York's "provision was added in 1821 and then retained in 1846 with the purpose of disenfranchising [B]lacks." Def's Br. at 18, and then asserts that an 1874 amendment, allegedly enacted for "an independent, non-discriminatory purpose," broke the causal chain. Def's Br. at 18. Defendant's attempt to distract the Court by masking the central issue of New York's original discrimination through a tale of revisionist history is unavailing for two reasons.

First, contrary to Defendant's and the district court's erroneous conclusions, the allegations contained in Plaintiffs' Amended Complaint are clearly sufficient under Hunter, and are, as set out in detail in Plaintiffs' opening brief, Pls.' Mem. at 18-20, more detailed and specific than those alleged in the complaint in Hunter.

Second, Defendant puts forth unsupported assertions that the "extensive redrafting of the constitutional provisions in 1874," and the "recent statutory amendments of 1971 and 1973 clearly demonstrate a permissible nondiscriminatory intent," Def's Br. at 10, that can cure the invidious intent hat gave rise to New York's original felon disfranchisement provision. These assertions are not only unsupported, but they are also insufficient under Hunter. Hunter v. Underwood, 471 U.S at 222, 232-33 (1985). There, the Supreme Court

found that the enactment of Alabama's felon disfranchisement provision in 1901 was "motivated by a desire to discriminate against blacks on account of race and the section continue[d] to have that effect" more than 80 years later. Id. "As such," the Court concluded, "it violates equal protection under Arlington Heights." Id. The Supreme Court also upheld the Eleventh Circuit's ruling that, although the current administrators of the law acted in "good faith" and without reference to race, "neither impartiality nor the passage of time . . . can render immune a purposefully discriminatory scheme whose invidious effects still reverberate today." Underwood v. Hunter, 730 F.2d 614, 621 (11th Cir. 1984)), aff'd, Hunter v. Underwood, 471 U.S. 222 (1985).

Plaintiffs' Amended Complaint sufficiently alleges the discriminatory origins of the New York's felon disfranchisement provision, and Defendant has failed to show that the subsequent re-enactments purged New York's felon disfranchisement law of its discriminatory intent or effect. Defendant does not demonstrate that later amendments to the felon disfranchisement laws were guided by a recognition of the discriminatory origins of the provisions and a purpose to remove the taint of racial bias or to demonstrate, as required by Hunter, 471 U.S. at 228, that prior discrimination is not still a motivating or substantial factor behind New York's felon disfranchisement laws. Defendant also ignores that the effects

of New York's purposefully discriminatory felon disfranchisement law still reverberate today.

B. Defendant Misstates the Legislative Record in Support of His Purge Argument, which Fails Both As A Matter of Law and Fact at This Stage.

Even if Defendant properly dealt with the original discrimination that infected the enactment of New York's felon disfranchisement statute, which he did not, there is yet another deeply problematic aspect of Defendant's argument: It misstates the history of New York State between 1867 and 1874 in order to persuade this Court that legislative action in the latter year was nondiscriminatory. Specifically, Defendant asserts that the 1874 amendment to New York's Constitution, which replaced the permissive "may" with respect to felon disfranchisement laws with the mandatory "shall," was originated by delegates to the 1867 Constitutional Convention who sought not intentionally to "disenfranchise [B]lacks or other minorities, but [acted] as part of a larger project aimed at preventing vote buying and other forms of ballot-box corruption." Def's Br. at 18-20. Defendant also asserts that "there is strong evidence of a concern to protect the franchise for minorities." Id. However, Defendant's reference is to the proceedings of 1867-68 Constitutional Convention, not the 1872-73 Constitutional Commission and is, therefore, misleading and unreliable. See id.

Moreover, Defendant completely fails to recognize or account for the political hurricane that stormed through New York between 1867 and 1874, removing from power the Radical Republicans, who were sympathetic to Black equal manhood suffrage, in favor of Democrats, who were vehemently opposed to the same. This failure on Defendant Pataki's part obscures rather than facilitates an accurate understanding as to why the "shall" language was adopted in 1874. It is to a discussion of the historical backdrop against which the 1874 amendment was created that we briefly turn.[3]

The influence of Radical Republicans, who had a strong presence at the 1867-68 Constitutional Convention and opposed the 1821 voting requirement that conditioned access to the franchise on a requirement that Blacks possess a freehold estate worth $250, was severely weakened by a decisive Democratic victory in the November 1867 elections. Phyllis F. Field, The Politics of Race in New York: The Struggle for Black Suffrage in the Civil War Era (1982). "The overwhelming majority of Democrats, however, were not willing to surrender on the race issue."

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[3] It is important to note that this historical context is evidence that must be developed through discovery, including expert reports and testimony, and is not required to be proven or alleged in exhaustive detail by Plaintiffs at this stage in the litigation. As in Hunter, Plaintiffs here should be afforded an adequate opportunity to develop their case. Toward that end, Plaintiffs have retained an expert who has conducted substantial research in support of their intentional discrimination claim. However, the district court dismissed Plaintiffs' claims before discovery was concluded.

Id. at 173. Vehemently opposed to removing the racially discriminatory property requirements, Democrats (who were emboldened by victories in the 1867 state elections in which Black suffrage was a critical issue) put the issue to the voters of New York in 1869, with the express understanding and expectation that New Yorkers would oppose such a measure. See id. In 1869, New Yorkers, as expected, voted to maintain the racially discriminatory language of the 1821 Constitution. David Nathaniel Gellman & David Quigley, Jim Crow New York: A Documentary History of Race and Citizenship, 1777-1877 293 (NYU Press 2003). Indeed, it was not until the enactment of the Fifteenth Amendment (which New York opposed by attempting to withdraw its earlier ratification of the Amendment, Cong. Globe, 41st Cong., 2d Sess. at 1447-81), and the Federal Enforcement Acts of 1870 and 1871, that equal manhood suffrage came to the Empire State, despite the opposition of New York's voters and political leadership, dominated by anti-Black Democrats in 1870 and 1871. David Quigley, Second Founding: New York City, Reconstruction, and the Making of American Democracy Ch. 5 (2004).

Moreover, the Governor of New York from 1869-1872 was John T. Hoffman, Mayor of New York City from 1866-1868 and one of the leaders of Manhattan's Tammany Hall. Edwin G. Burrows & Mike Wallace, Gotham: A History of New York City to 1898 927, 1009 (1998). In 1867, as Mayor of New York City, amid the push by some for Black suffrage, Governor Hoffman declared

that "the people of the North are not willing . . . that there should be [N]egro judges, [N]egro magistrates, [N]egro jurors, [N]egro legislators, [N]egro Congressmen." Irish Citizen, October 19, 1867, at 5. In Hoffman's first speech of his gubernatorial campaign in 1868, he declared that "in ten Southern States the white man is subject to the domination of the [N]egro. [Applause.] That by an act of Congress [N]egro suffrage is forced upon them, while white men are disfranchised." Hoffman's speech to Erie County Democrats in Buffalo on September 8, 1868, in New York Times, September 9, 1868, at 1. Consistent with his deeply held racist beliefs, Governor Hoffman opposed the Fifteenth Amendment, complaining that it was "another step in the direction of centralized power." Hoffman's Address, January 5, 1869, Messages from the Governor. Volume 6 (1869-1876) (Charles Z. Lincoln, ed. 1909). In 1870, Governor Hoffman wrote: "I protest against the revolutionary course of Congress with reference to amendments of the Constitution." Hoffman's Address, January 1870, Messages from the Governor. Volume 6 (1869-1876) (Charles Z. Lincoln, ed. 1909).

Significantly, Governor Hoffman — in conjunction with the state Senate — appointed the members (who are normally elected) to the State Constitutional Commission of 1872-73, which drafted the revisions to the 1874 Constitution at issue here. Charles Z. Lincoln, The Constitutional History of New York from the

Beginning of the Colonial Period to the Year 1905, Showing the Origin, Development, and Judicial Construction of the Constitution 464-71 (1906). Governor Hoffman's anti-Black Democratic appointees in 1872-73 were not, as the Defendant suggests, the Radical Republicans who grappled with issues of equal manhood suffrage for Blacks at the 1867-68 Constitutional Convention. Indeed, only six (or fewer than 20 percent) of the 32 delegates of the 1872-73 Convention were veterans of the 1867-67 Convention. Id.

Though the 1872-73 Constitutional Commission strenuously debated whether to replace the word "may" with "shall" in Article II, Section 2 of New York's Constitution, there was no clear move to embrace the anti-discriminatory language of the Radical Republicans of 1867. Id. at 22, 96-97, 170. Instead, the 1872-73 Constitutional Commission, recognizing the impossibility of erecting explicitly racial barriers in the aftermath of the Fifteenth Amendment, supported a range of barriers — each of which disproportionately impacted New York's Black population.

First, as Plaintiffs alleged in their Amended Complaint, "two years after the passage of the Fifteenth Amendment, an unprecedented committee convened and amended the disfranchisement provision of the New York Constitution to require the state legislature, at its following session, to enact laws excluding persons

convicted of infamous crimes from the right to vote . . . . Theretofore, the enactment of such laws was permissive." (JA 00108 [FAC ¶ 56]). Second, they urged the incorporation of literacy tests for suffrage in New York State. Journal of the Constitutional Commission of the State of New York. Begun and Held in the Common Council Chamber, in the City of Albany, on the Fourth Day of December, 1872 339-93 (Weed, Parsons & Co. 1873). Third, they proposed a new Article of the Constitution, number XIV, which focused on municipal government and created a new Board of Audit for New York's large cities, id. at 318, 373-74, 397; however, reminiscent of the 1821 property requirement that existed for Blacks only until the passage of the Fifteenth Amendment, only voters with $250 in property would be allowed to elect members of such boards. Id. at 282.

Against this historical backdrop, Defendant's assertion that the Radical Republicans' concern in 1867-68 to protect the ballot box from fraud "remained the purpose of the amended section 2 when it was ultimately enacted [by anti-Black Democrats] in 1874," Def's Br. at 23, is simply unsupported by a fair and accurate reading of the historical record. Accordingly, Defendant's conclusion — that "[g]iven the lack of the ambiguity in the published record, this court should conclude that no amount of extrinsic or circumstantial evidence" could provide evidence of discriminatory intent, Def's Br. at 24, is simply unreliable, and is an

unfortunate attempt to preclude New York's historical discrimination against Blacks in voting from coming to light.

When read together in the light most favorable to the Plaintiffs, the allegations in the Amended Complaint tell a persuasive story of a pervasive pattern of historical intentional discrimination in voting, including repeated explicit statements about Blacks' unfitness for suffrage, their perceived criminality, and the codification of mandatory disfranchisement during an unprecedented special session at a time when overt denial of the franchise to Blacks was newly outlawed by the Fifteenth Amendment. These allegations satisfy the Rule 12(c) standard, and justify reversal of the district court's ruling.

III. DEFENDANT HAS NOT PROVEN THAT NEW YORK'S FELON DISFRANCHISEMENT LAWS WERE PURGED OF THEIR DISCRIMINATORY TAINT, NOR IS THAT DETERMINATION APPROPRIATE ON A RULE 12(c) MOTION

In order to prevail on his argument that New York's felon disfranchisement laws have been purged of any original discriminatory intent, Defendant has the burden of proving that the legislature enacted the 1874 amendment for wholly non-

discriminatory reasons, notwithstanding the racist origins of the felon disfranchisement provision.[4] Defendant has failed to meet his burden.

As the Supreme Court stated in Hunter, proof of discriminatory intent underlying a specific policy in the past raises an inference that the discriminatory purpose continues into the present, the passage of time and subsequent changes to the policy notwithstanding. Hunter, 471 U.S. at 233. Indeed, as the Court noted, "[o]nce racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." 471 U.S. at 228 (citing Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

Here, Plaintiffs have clearly shown the discriminatory origins of the felon disfranchisement provision. Thus, Defendant has the burden of proving that any subsequent amendment to the law was enacted without a discriminatory intent, to the extent that the amendment so changes the intention of the original enactment that it cleanses it of its original discriminatory purpose. See Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 266-70 (1979) (indicating that the gender

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[4] Defendant Pataki further recognizes that "on a 12(c) motion to dismiss the defendants bear the burden of showing that 'it appears beyond doubt that the plaintiffs can prove no set of facts in support of his claim which would entitle him to relief.'" Def's Br. at 16 n.1 (quoting Phillip v. Univ. of Rochester, 316 F.3d 291, 293 (2d Cir. 2003)).

discriminatory purpose of veteran's preference law may be found in its 1896 origins, notwithstanding the enactment of a number of subsequent amendments). Indeed, as Justice Thomas noted in his concurring opinion in United States v. Fordice, once a law is infected with racist intent, it is not easily cleansed: "[G]iven an initially tainted policy, it is eminently reasonable to make the State bear the risk of nonpersuasion with respect to intent a some future time, both because the State has created the dispute through its own prior unlawful conduct, and because discriminatory intent does tend to persist through time." United States v. Fordice, 505 U.S. 717, 746-47 (1992) (Thomas, J., concurring). But see Cotton v. Fordice, 157 F.3d 388 (5th Cir. 1998) (requiring pro se plaintiff to prove that state enacted amendment with discriminatory purpose).[5]

Likewise, in the context of de jure segregation, courts routinely examine whether race-neutral policies have the effect of perpetuating past intentional racial discrimination. In such cases, courts require that the state show that the original taint of discriminatory intent has been purged and, that the state has taken affirmative steps to remove the effects of past discrimination. See Fordice, 505

[5] In Chen v. City of Houston, 206 F.3d 502, 521 (5th Cir. 2000), cert. denied, 532 U.S. 1046 (2001), the Fifth Circuit noted that the Cotton decision "broadly stands for the important point that when a plan is reenacted — as opposed to merely remaining on the books like the provision in Hunter — the state of mind of the reenacting body must also be considered."

U.S. at 729 (reiterating that states have an affirmative duty to dismantle the vestiges of past de jure desegregation in higher education, which is not satisfied "through the adoption and implementation of race-neutral policies alone"); see also Knight v. Alabama, 14 F.3d 1534, 1540 (11th Cir. 1994) (requiring state to prove that it has dismantled past discrimination "root and branch") (quoting Fordice, 505 U.S. at 728).

In this context, proving that an amendment neutralizes the original discriminatory purpose of New York's felon disfranchisement law thus requires a meaningful and demanding inquiry into the legislative history of the amendment. Indeed, in order to neutralize a discriminatory law by showing that "the law would have been enacted without [the discriminatory motive]," Hunter, 471 U.S. at 228, Defendant must show that the prior discrimination is not still one of the motivating or substantial factors behind the challenged policy. The state cannot merely reenact or amend a purposefully discriminatory policy and thereby perpetuate its prior discrimination. See Ensley Branch, NAACP v. Siebels, 31 F.3d 1548, 1575 (11th Cir. 1994) (noting that, in an employment context, "[p]ublic employers cannot escape their constitutional responsibilities merely by adopting facially-neutral policies that institutionalize the effects of prior discrimination and thus perpetuate de facto discrimination").

Here, after a long history of using felon disfranchisement to prevent Blacks from voting, New York's legislators sought to amend the state's constitution to mandate such disfranchisement. Defendant takes numerous occurrences and statements out of context to assert that the justification for the amendment was nondiscriminatory. See supra Section II. Defendant's meager evidence, however, fails to prove that the 1874 amendment was enacted with a wholly non-discriminatory purpose. Had Defendant shown, for example, that delegates to the 1874 Constitutional Convention were actually aware of the felon disfranchisement provision's past discriminatory purpose and contemporary effect, but nevertheless re-enacted it for a different, bona fide, nondiscriminatory reason, the result might be different. However, Defendant offers no evidence that the legislature acknowledged the discriminatory genesis of the law and adopted the amendment for a wholly different purpose. Defendant does not even offer convincing proof that the amendment was enacted for the non-discriminatory reasons he states. He offers only fragments of ahistorical evidence from a previous constitutional convention, which it contends is incontrovertible proof that the 1874 amendment was enacted for nondiscriminatory reasons. In fact, the amendment can reasonably be interpreted as intending to perpetuate the past discriminatory purpose while at the same time guaranteeing its continuation. Additionally, Plaintiffs have been denied the opportunity to refute Defendant's evidence with historical fact and

expert opinion. See supra Section I. Thus, Defendant has failed to prove that the 1874 amendment to New York's felon disfranchisement scheme adequately cleansed the provision of its discriminatory purpose.

Similarly, Defendant's failure to show that the 1874 Constitutional Convention purged the original discriminatory intent of New York's constitutional felon disfranchisement provision defeats his argument that the 1971 and 1973 amendments, which were enacted pursuant to the 1874 Constitutional Convention, do not "contain the slightest hint of discriminatory intent." Def's Br. at 17. Moreover, Defendant's argument regarding the 1971 and 1973 amendments fails to satisfy the standards in Hunter and, therefore, does not provide a basis for upholding the district court's dismissal of Plaintiffs' intentional discrimination claims.

IV. PLAINTIFFS' EQUAL PROTECTION CLAIM IS NOT BARRED BY RICHARDSON OR BAKER NOR IS IT SUBJECT TO RULE 12(c) DISMISSAL WITHOUT FURTHER DEVELOPMENT OF THE RECORD

Plaintiffs allege that New York's felon disfranchisement scheme further violates the Equal Protection guarantees of the Fourteenth Amendment by impermissibly distinguishing between individuals convicted of a felony who are sentenced to incarceration and/or serving a sentence of parole, on the one hand, and those convicted of a felony who are pardoned, who receive a suspended or

commuted sentence, or who are sentenced to probation or conditional or unconditional discharge, on the other. In his attempt to skirt any meaningful scrutiny of New York's non-uniform felon disfranchisement scheme, Defendant incorrectly relies upon a portion of the panel decision in Baker v. Cuomo, which applied a wholly deferential rational basis standard of review to a challenge to New York's felon disfranchisement provision by incarcerated individuals. Defendant's contention that the equal protection claims raised by Plaintiffs are foreclosed under Baker fails to recognize key distinctions between the allegations in this case and those at issue both in Baker and Richardson v. Ramirez, 418 U.S. 24 (1974), upon which Defendant also relies.

In Richardson, the Supreme Court held that felon disfranchisement is not prohibited under the Equal Protection Clause of the Fourteenth Amendment. Richardson did not, however, foreclose all constitutional challenges to felon disfranchisement provisions. Nor did it, as the panel in Baker incorrectly suggests, mandate that all challenges to disfranchisement schemes—other than those alleging race or other suspect classifications—be reviewed under a highly deferential rational basis standard of scrutiny. The Richardson Court rejected strict scrutiny analysis only for a facial challenge to laws that disfranchise individuals convicted of an infamous crime.

Neither the Court in Richardson nor the Second Circuit panel in Baker addressed the Equal Protection issues raised by Plaintiffs in this case. Specifically, neither court addressed whether states and election officials, when enacting and implementing felon disfranchisement provisions, may disfranchise only some individuals with felony convictions but not others—or settled the question whether "rational basis" or "strict scrutiny" review would be applied to such a statute if challenged. Indeed, the Richardson Court noted that it was leaving open to the "alternative contention that there was such a total lack of uniformity in county election officials' enforcement of the challenged state laws as to work a separate denial of equal protection." Richardson, 418 U.S. at 56.

In contrast to the wholesale challenge to felon disfranchisement at issue in Richardson, Plaintiffs here challenge specific features of New York's felon disfranchisement scheme: the non-uniform practice of disfranchising persons convicted of a felony who are sentenced to incarceration and/or on parole but allowing those who receive a suspended or commuted sentence, or are sentenced to probation or conditional or unconditional discharge, to vote. (JA 00112-113

[Compl. ¶¶ 79; 82]).[6] Richardson does not dispose of these claims or reject application of strict scrutiny to them.

In addition and in the alternative, Plaintiffs urge the Court to apply an intermediate level of scrutiny to their equal protection claims. As this Court recently noted in Ramos v. Town of Vernon, 353 F.3d 171 (2d Cir. 2003), intermediate scrutiny, which lies "between [the] extremes of rational basis review and strict scrutiny," 353 F.3d at 175 (quoting Clark v. Jeter, 486 U.S. 456, 461 (1988)), is appropriate to review quasi-suspect classifications such as gender or legitimacy, as well as to review "a law that affects 'an important, though not constitutional, right.'" 353 F.3d at 175 (quoting United States v. Coleman, 166 F.3d 428, 431 (2d Cir. 1999) (per curiam)).

Similarly, it has long been recognized that the right to vote is "of the most fundamental significance under our constitutional structure." Burdick v. Takushi, 504 U.S. 428, 433 (1992) (quoting Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979)); see also Reynolds v. Sims, 377 U.S. 533, 561-562

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[6] Furthermore, Plaintiffs have alleged that as a result of disparities in prosecution, conviction and sentencing, Blacks and Latinos are sentenced to incarceration at substantially higher rates than whites and sentenced to probation at substantially lower rates than whites. (JA 00108-109 [FAC ¶¶ 60-65]). Plaintiffs contend that as a result of these racial disparities, as well as the disfranchisement of only certain classes of individuals with felony convictions, Blacks and Latinos collectively comprise nearly 87% of those currently denied the right to vote pursuant to §5-106(2), (JA 00110 [FAC ¶ 67]), which underscores the Equal Protection violation.

(1964); Dunn v. Blumstein, 405 U.S. 330, 336 (1972). While the Baker court rejected strict scrutiny to protect the otherwise fundamental right to vote of felons in cases where there was no allegation of discrimination on the basis of race or other suspect criteria, Baker, 58 F.3d at 820, in this case, which challenges New York's felon disfranchisement scheme because it denies the right to vote to persons who are convicted of a felony and sentenced to incarceration and/or parole but not similarly situated individuals who are sentenced to probation, the court should review Plaintiffs' claims under a heightened, intermediate scrutiny standard.

However, even assuming, arguendo, that rational basis review applies to Plaintiffs' claims, Defendant nevertheless errs in arguing that Baker controls the instant case. In Baker, this Court interpreted the plaintiffs' Equal Protection claim as a challenge to the way in which New York disfranchises incarcerated felons but not those who are not incarcerated. Baker, 58 F.3d at 820. Citing Richardson v. Ramirez to reject heightened scrutiny, and relying on its previous decision in Green v. Bd. of Elections, 380 F.2d 445 (2d Cir. 1967), the Court applied rational basis review and held that such a classification "is not irrational." Id.

Unlike in Baker, Plaintiffs' Equal Protection claim also focuses on distinctions among individuals who live in their communities, subject to state supervision. New York's felon disfranchisement scheme distinguishes between

those individuals living in the community on parole and those on probation. (JA 00109 [FAC ¶¶ 58-59]). Thus, the Baker Court's determination of the rationality of distinctions between incarcerated felons and felons who are not incarcerated is not controlling for purposes of disposing of Plaintiffs' claims.

Moreover, application of rational basis scrutiny need not be wholly deferential, particularly where the challenged distinction is based solely on the status of the individual—here, whether he or she is convicted of a felony and sentenced to incarceration and/or parole or sentenced to probation. Rather, in such cases, courts may apply rational basis review in such a way as to inquire into "the relation between the classification adopted and the object to be attained." Romer v. Evans, 517 U.S. 620, 632 (1996). While Baker held that the distinction between incarcerated and non-incarcerated persons with felony convictions was "not irrational," both Baker and of Green, upon which Baker relies, were decided prior to the Supreme Court's decision in Romer v. Evans, 517 U.S. 620 (1996), in which the Court applied a more searching rational basis review. Such review is warranted here.

Thus, even if this court determines that rational basis is the appropriate level of review, the district court still must allow Plaintiffs the opportunity to develop evidence regarding the interests served by the voting ban and whether the

distinction is, in fact, rational. By dismissing Plaintiffs' claims prematurely, the district court denied Plaintiffs the opportunity to engage in this analysis.

V. PLAINTIFFS' VOTING RIGHTS ACT CLAIMS SHOULD BE PRESERVED PENDING FINAL DISPOSITION IN MUNTAQIM

The district court dismissed Plaintiffs' Voting Rights Act claims based upon this Court's intervening ruling in Muntaqim v. Coombe, 366 F.3d 102 (2d Cir. 2004), which held that the Voting Rights Act does not apply to New York's felon disfranchisement laws.[7] Subsequently, the plaintiff-appellant in Muntaqim filed a petition for a writ of certiorari in the United States Supreme Court. Muntaqim v. Coombe, 385 F.3d 793 (2d Cir. 2004), pet. for cert. filed, 73 U.S.L.W. 3113 (U.S. July 21, 2004) (No. 04-175). Since Plaintiffs' filed their opening brief in this appeal and while the petition in Muntaqim was pending before the United States Supreme Court, this Court, sua sponte, conducted a poll on whether to rehear Muntaqim en banc. Muntaqim v. Coombe, 385 F.3d 793 (2d Cir. 2004) (denying petition for rehearing en banc). The suggestion for rehearing did not garner a sufficient number of votes and, therefore, failed. Id. But see id. at 795 (Jacobs, J., dissenting) ("[A] majority [of this court] now expresses—or signals—an interest in

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[7] Although Plaintiffs disagree with the holding in Muntaqim concerning the application of the Voting Rights Act to felon disfranchisement laws, we recognize that it is the law of this circuit and, therefore, have appealed from the district court's dismissal of their Voting Rights Act claims to preserve the issue and seek the limited relief described below.

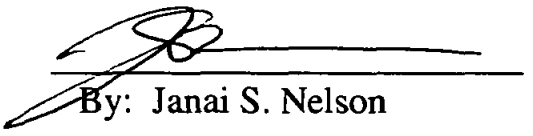
hearing this appeal in banc."). The petition for certiorari in Muntaqim was subsequently denied and the plaintiff-appellant then petitioned this Court for a rehearing en banc. See Pet. for Reh'g En Banc, in Muntaqim v. Coombe, 366 F.3d 102 (2d Cir. 2004) (No. 01-7260) filed Nov. 16, 2004.

The disposition of the pending petition in Muntaqim will have a direct bearing on Plaintiffs' Voting Rights Act claims. Accordingly, Plaintiffs request that this Court vacate the judgment below, with instructions to the district court to reconsider its dismissal in light of any action taken by this court in Muntaqim.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed in part, vacated in part, and the case remanded for further proceedings.

Dated: New York, New York
December 8, 2004



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RULE 32(a)(7)(B)(ii) CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the type-volume limitations of Rule 32(a)(7)(B)(ii) of the Federal Rules of Appellate Procedure. Relying on the word count of the word processing system used to prepare this brief, I hereby represent that the brief of the NAACP Legal Defense and Educational Fund, Inc., Community Service Society of New York, and the Center for Law and Social Justice at Medgar Evers College for Plaintiffs-Appellants contains 6,963 words, not including the table of contents, table of authorities, and certificate of counsel, and is therefore within the word limit for 7,000 set forth under Fed. R. App. P. 32(a)(7)(B)(ii).

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CERTFICATE OF SERVICE

I certify under penalty of perjury pursuant to 28 U.S.C. § 1746 that on December 8, 2004, I served upon the following, by United States Postal Service priority mail, postage prepaid, a true and correct copy of the attached REPLY BRIEF FOR PLAINTIFFS-APPELLANTS:

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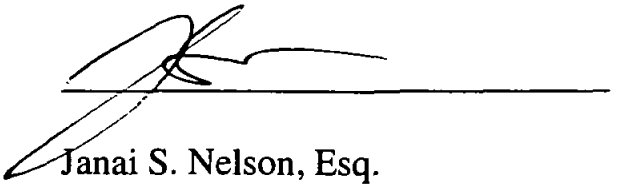

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