U.S. Department of Justice

Civil Rights Division

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April 26, 2005

The Honorable Roseann MacKechnie
Clerk, United States Court of Appeals
for the Second Circuit
40 Foley Square, Room 1803
New York, New York 10007

Re: *Hayden* v. *Pataki*, No. 04-3886 consolidated with *Muntaqim* v. *Coombe*, No. 01-7260

Dear Ms. MacKechnie:

On February 24, 2005, this Court consolidated *Hayden* v. *Pataki* with *Muntaqim* v. *Coombe* and scheduled these cases for rehearing en banc on June 22, 2005. These cases were consolidated because they raised the same issue: Whether Section 2 of the Voting Rights Act (VRA), 42 U.S.C. 1973, applies to New York's felon disenfranchisement law, N.Y. Elec. Law § 5-106. On March 4, 2005, the United States as *amicus curiae* filed a brief with this Court in *Muntaqim* asserting that Section 2 of the VRA did not apply to § 5-106. The United States asserted further that extending Section 2 of the VRA to felon disenfranchisement laws raised serious constitutional questions that should properly be avoided.

After the United States filed its brief in *Muntaqim*, this Court extended the filing date for filing consolidated briefs addressing both *Muntaqim* and *Hayden*. In extending the filing date, this Court stated that the parties and *amici* could rely on briefs that they filed in *Muntaqim* for purposes of addressing *Hayden* or could file supplemental briefs. Rather than filing a supplemental brief addressing *Hayden*, the United States incorporates by reference the arguments it advanced in its *Muntaqim* brief in support of defendant-appellees.

The United States makes the following additional points regarding *Hayden*: First, the *Hayden* complaint purports to allege claims of both vote denial and vote dilution under the VRA, while the *Muntaqim* complaint only purported to aver a claim of vote denial under the VRA. In its brief, the United States explained the manifold reasons that Muntaqim could not state a vote denial claim as a matter of law. (Br. at 4-15). Although denial and dilution claims under the VRA are distinct claims, the courts generally use the same analysis in evaluating these claims. See *Smith* v. *Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 596 n.8 (9th

Cir. 1999). For the same reasons the *Muntaqim* plaintiffs could not succeed on their denial claim, the *Hayden* plaintiffs likewise cannot state either vote denial or vote dilution claims as a matter of law.

In this connection, Section 2 of the VRA has a limited, specific purpose: to eradicate discrimination in voting because of race or color. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). Section 2 of the VRA was not enacted to protect the voting rights of felons. Indeed, the legislative history of the VRA and the 1982 Amendments establish that felon disenfranchisement laws were excepted from the VRA's purview. See S. Rep. No. 162, 89th Cong., 1st Sess., 2562 (1965); H.R. Rep. No. 439, 89th Cong., 1st Sess., 2458 (1965). Accordingly, even if there were any putative vote dilution, such dilution would not be "on account of race" as Section 2 of the VRA requires, but rather would be the result of the plaintiffs' own forfeiture of their right to vote by committing felonies. In other words, in both *Hayden* and *Muntaqim*, the plaintiffs chose to commit felonies, which conduct deprived them of the right to vote – race played no part in the calculus.

Second, as the district court correctly found, the allegations in the *Hayden* complaint regarding intentional discrimination are conclusory and unsupported by any factual assertions. See Dist. Ct. Slip Op. at 8-9. The district court noted that, in contrast to the facts provided by the plaintiffs in *Hunter* v. *Underwood*, 471 U.S. 222 (1985), the plaintiffs in this case have not alleged any facts "showing a long history of racial discrimination with respect to the enactment" of any of New York's felon disenfranchisement provisions. Dist. Ct. Slip Op. at 9 n.3. Accordingly, the district court held that the plaintiffs' allegations of intentional discrimination are simply insufficient to withstand a motion to dismiss. See *id*. at 9; see also *Farrakhan* v. *Locke*, 987 F. Supp. 1304, 1313 (E.D. Wash. 1997) (dismissing a Section 2 vote dilution claim because the allegations were "conclusory"). This holding was manifestly correct and should be affirmed by this Court.

Finally, New York's felon disenfranchisement laws were "enacted for compelling, nondiscriminatory reasons":

> The early exclusion of felons from the franchise by many states could well have rested on Locke's concept * * * that by entering into society every man "authorizes the society, or which is all one, the legislature thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own assistance (as to his own decrees) is due." . . . On a less theoretical plane, it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.

Baker v. *Pataki*, 85 F.3d 919, 929-930 (2d Cir. 1996) (en banc) (Mahoney, J., concurring)

(quoting *Green* v. *Board of Elections*, 380 F.2d 445, 451 (2d Cir. 1968)). Plaintiffs point to a number of other provisions of New York's constitution and laws limiting the franchise, including property-holder requirements, that they claim were adopted with discriminatory animus and, indeed, expressly discriminated on the basis of race. However, they have not pointed to *any* similar history of overt discrimination in connection with the disenfranchisement of felons, which they appear to concede at all times has, by its terms, applied equally to all New York residents *regardless of race*. As the district court concluded, there is no basis to conclude that New York adopted its provision disenfranchising felons in 1821 – fifty years before the passage of the Reconstruction amendments – for racially discriminatory reasons, and plaintiffs' reliance in their complaint on other overtly discriminatory restrictions on the franchise only serves to demonstrate that New York considered the race-neutral disenfranchisement of felons to be entirely unconnected to racial discrimination. See *id.* at 928 ("The prevalence of this practice prior to the passage of the Civil War Amendments indicates that felon disenfranchisement was not an attempt to evade the requirements of the Civil War Amendments or to perpetuate racial discrimination forbidden by those amendments."). Consequently, § 5-106 is not tainted with invidious racial discrimination.

Respectfully submitted,

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