

United States Court of Appeals

FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 24th day of February, two thousand and five,

ORDER

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**JOSEPH HAYDEN, LUMUMBA AKINWOLE-BANDELLE,
WILSON ANDINO, GINA ARIAS, WANDA BEST-DEVEAUX,
CARLOS BRISTOL, AUGUSTINE CARMONA, DAVID
GALARZA, KIMALEE GARNER, MARK GRAHAM, KERAN
HOLMES, III, CHAUJUAN THEYIA LOCHARD, STEVEN
MANGUAL, JAMEL MASSEY, STEPHEN RAMON,
LILLIAN M. RIVERA, NILDA RIVERA, MARIO ROMERO,
JESSICA SANCLEMENTE, PAUL SATTERFIELD,
BARBARA SCOTT, on behalf of themselves
and all individuals similarly situated,
Plaintiffs-Appellants,**

v.

Docket No. 04-3886-pr

**GEORGE PATAKI, Governor of the State of New York;
CAROL BERMAN, Chairperson, New York Board of Elections,
Defendants-Appellees.**

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A poll of the judges in regular active service having been requested and conducted, and a majority of the active judges of the court having voted to hear the appeal in this case *in banc*, IT IS HEREBY ORDERED that the appeal be heard *in banc*. See Fed. R. App. P. 35(a). The *in banc* panel will consist of the active judges of the Court. See 28 U.S.C. § 46(c). This *in banc* order applies only to that part of the appeal in this case that involves plaintiffs' Voting Rights Act claims. All other claims raised in the parties' briefs on appeal will be heard by a three-judge panel in the ordinary course.

It is further ORDERED that this case be consolidated with *Muntaqim v. Coombe*, No. 01-7260-cv, which involves a common question of law and which this Court has already designated to be heard *in banc*.

The question presented in this case is whether, on the pleadings, a claim that a New York State statute, Section 5-106 of the New York Election Law, that disenfranchises currently imprisoned felons and parolees results in unlawful vote denial and/or vote dilution can state a claim for violation of Section 2 of the Voting Rights Act.

The parties are requested to address, *inter alia*, the following issues in their *in banc* briefs:

(1) Whether Section 2 of the Voting Rights Act can constitutionally be applied to a state statute like Section 5-106, that disenfranchises persons currently incarcerated as felons and parolees, in light of the Supreme Court's recent jurisprudence regarding Section 5 of the Fourteenth Amendment;

(2) Whether the Supreme Court's "clear statement rule," articulated in *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991), requires Congress to have clearly stated that the Voting Rights Act was intended to infringe upon the states' discretion to deprive persons currently incarcerated as felons and parolees of the right to vote, and whether Congress did in fact make that intent clear;

(3) (a) If the judgment of the district court were modified or vacated and the cause remanded for further presentation of questions of fact (either on a motion for summary judgment or a trial before a factfinder), what kinds of data demonstrating racial bias in investigation, prosecution, conviction, sentencing, and/or other stages of the criminal process, statistical and otherwise, should the factfinder rely upon in assessing the claim? (b) What type and quantum of statistical evidence would plaintiffs have to provide in order to prevail on the vote dilution claim? Specifically, what data should such statistical studies include, and what variables should they compare? (c) Should any statistical and other evidence of racial disparity distinguish between the federal and state criminal justice systems or consider them together, and how would a finding of discrimination in one and not the other affect the ultimate determination on the vote dilution question? (d) How might such evidence of racial disparity be considered in light of the Voting Rights Act's "totality of the circumstances" test, 42 U.S.C. § 1973(b)?

(4) (a) Whether Lumumba Akinwole-Bandelle, Gina Arias, Wanda Best-Deveaux, Carlos Bristol, David Galarza, Chaujuantheyia Lochard, Stephen Ramon, Lillian M. Rivera, Nilda Rivera, Jessica Sanclemente, and Barbara Scott are proper class representatives for the class of minority voters who allegedly experienced vote dilution as a result of the operation of Section 5-106; (b) Whether Joseph Hayden, Wilson Andino, Augustine Carmona, Kimalee Garner, Mark Graham, Keran Holmes, III, Steven Mangual, Jamel Massey, Mario Romero, and Paul Satterfield would each first have to prove that his or her particular incarceration was a result of discrimination and that a similarly situated white person would have been treated differently.

The appellants' brief and appendix shall be filed by March 23, 2005, the appellees' brief shall be filed by April 20, 2005, and the appellants' reply brief shall be filed by May 6, 2005. We

note that counsel for appellants has already filed an amicus brief in *Muntaqim*; appellants may rely on that brief to the extent it is responsive to the questions presented.

Amicus curiae briefs filed in *Muntaqim* will be considered for purposes of *Hayden*, as well. Because *Hayden* raises issues of vote dilution not briefed in *Muntaqim*, amici who have filed briefs in *Muntaqim* may wish to file supplemental briefs. Amicus briefs are to be filed by the date set for the filing of the brief of the party whose position they support.

The date of oral argument will be announced in a subsequent order.

FOR THE COURT:
ROSEANN B. MacKECHNIE
CLERK OF COURT

By: _____
Lucille Carr, Deputy Clerk

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 24th day of February, two thousand and five,

ORDER

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JALIL ABDUL MUNTAQIM, a/k/a Anthony Bottom,
Plaintiff-Appellant,

v.

Docket No. 01-7260

PHILLIP COOMBE; ANTHONY ANNUCCI;
LOUIS F. MANN,
Defendants-Appellees.

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It is ORDERED that this case be consolidated with *Hayden v. Pataki*, No. 04-3886-pr, which involves a common question of law and which this Court has already designated to be heard *in banc*.

Although oral argument in this case will no longer be held on April 7, 2005, the briefing schedule set forth in this Court's amended order of December 29, 2004 will be adhered to. A new oral argument date will be announced in a subsequent order.

FOR THE COURT:
ROSEANN B. MacKECHNIE
CLERK OF COURT

By: _____
Lucille Carr, Deputy Clerk