DOCKET NO.: 01-35032

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MUHAMMAD SHABAZZ FARRAKHAN, et. al.,

Appellant,

– against –

GARY LOCKE, et. al.,

Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT EASTERN DISTRICT OF
WASHINGTON AT SPOKANE

No: CS-96-076-RHW
The Honorable Robert H. Whaley
United States District Court Judge

REPLY BRIEF OF PETITIONERS-APPELLANTS

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I. SUMMARY OF ARGUMENT

The issues raised by the State in the Brief of Appellees in most part are discussed in the Appellant's Brief and the amici briefs of the ACLU and the Brennan Center for Justice. The State first raised the issue of the application of the Voting Rights Act (VRA), 42 U.S.C. § 1973 to disenfranchisement laws in its Motion to Dismiss. The District Court in *Farrakhan v. Locke*, et. al., 987 F.Supp. 1304 (E.D. Wash. 1997), ruled that disenfranchisement laws were covered by the Voting Rights Act. Although the State did not cross appeal the Court's denial of its Motion to Dismiss, the State has raised this issue again in its Brief of Appellees. However, the issue in this case is not whether the VRA prevents states from disenfranchising felons, or was intended to do so. (Br. of Appellees at 5, 9-11.) Instead the issue is whether, given the evidence of how African-Americans are disproportionately disenfranchised in a particular State, is that state's felon disenfranchisement law an illegal voting device under the VRA?

II. ARGUMENT

THE SCOPE OF THE VOTING RIGHTS ACT ENCOMPASSES STATE DISENFRANCHISEMENT LAWS SUCH AS ARTICLE 6 § 3 OF THE WASHINGTON STATE CONSTITUTION.

A. The Language Of The Voting Rights Act is Clear.

Under well established principles of statutory construction, the clear and unambiguous language of § 2 of the Voting Rights Act precludes a finding state disenfranchisement laws fall outside its scope. On its face, the plain meaning of the Act provides broad protection to minority voting rights barring, without exception, all voting qualifications, standards, practices, and procedures resulting "in a denial or abridgement of the right of *any citizen* of the United States to vote on account of race or color, or " [membership in a protected language minority group]. 42 U.S.C. § 1973 (a) (Emphasis added); See also *Baker v. Pataki,* 85 F.3d 919, 935, 937 (2nd Cir. 1996). Since all plaintiffs are still citizens of the United States of America, the plain language of 42 U.S.C. § 1973 (a) unambiguously encompasses Washington State disenfranchisement laws. As stated in *Burlington N. R.R. Co. v. Oklahoma Tax Commission,* 481 U.S. 454, 461 (1987):

> "In the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.' ...

> (citations omitted)... Unless exceptional circumstances dictate otherwise, 'when we find the terms of a statute unambiguous, judicial inquiry is complete.' . . ."

see also, *Ratzlaf v. United States*, 510 U.S. 135 (1994) ("we do not resort to legislative history to cloud a statutory test that is clear."); *Gregory v. Ashcroft*, 501 U.S 452, (1991); *Baker v. Pataki*, 85 F.3d 937 (2nd Cir. 1996).

There is no need to look past the plain and unambiguous statute to the legislative history. The statute clearly encompasses all discriminatory processes. As written, the Voting Rights Act precludes the State of Washington from abridging plaintiffs rights to vote on account of race by employment of qualifications (no felony convictions), standards (no felony convictions), practices (no felony convictions), and procedures (restoration of civil rights).

B. The Legislative History Underlying The Federal Voting Rights Act of 1965 Provides No Basis For Excluding From Coverage Article 6 § 3 Of The Washington Constitution.

1. The Voting Rights Act.

History does not support a finding the Federal Congress intended to exclude criminal disenfranchisement laws from the scope of the Voting Rights Act's coverage. Consistent with the plain language of § 2 of the Voting Rights Act, the Senate Judiciary Committee Majority Report accompanying the 1982 amendments to the Voting Rights Act ("Senate Report") characterized § 2 as a "general

prohibition against voting discrimination nationwide." S. Rep. No. 417, 97 the Congress 2nd Sess. 9, 15 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 186, 197 (hereinafter S. Rep. 417). As indicated in *Baker v. Pataki,* 85 F. 3d. 919, 938 (2nd Cir. 1996), this general prohibition includes within its ambit Article 6 § 3 of the Washington State Constitution.

The State's argument disenfranchisement laws are outside the scope of § 2 because disenfranchisement laws are not "tests or devices" is erroneous. Courts have repeatedly barred voting qualifications and practices not within the "tests or devices" definition of § 4. See, e.g. *Thornburg v. Gingles,* 478 U.S. 30 (1986) (multi member districts); *Mississippi State Chapter Operation Push, Inc. v. Mabus,* 932 F. 2d 400 (5th Cir. 1991) (dual registration system and prohibition on satellite registration); *United States v. Marengo County Comm'n,* 731 F. 2d 1546, 1570 (11th Cir. 1984) (failure of board registration to visit rural areas), cert denied, 469 U.S. 976(1984). The State of Washington cites no cases to the contrary.[1] Indeed, as stated in *Baker v. Pataki* at 85 F. 3d 938:

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It should be also noted that all of the State' citations to the Congressional Record are irrelevant to this case as they relate to the legislative history of § 4 of the Voting Right Act. For example, the out of context quote taken from the 1965 Senate Report cited on page 11 of Appellee's Brief, (1965 U.S.C.C.A.N.), relates to § 4(c)(2) (42 U.S.C. 1973b(c)). As stated above, no claim is being brought under § 4 and § 4 is notably different from § 2.

> The Voting Rights Act operates in two different ways. The use of tests and devices (as defined in see 4(c) at the time the act was first passed), combined with low voter registration or low voter turnout, subjects a particular jurisdiction to § 5,which prevents any future change in voting practices without first obtaining either a declaratory judgment from the United States District Court for the District of Columbia or pre-clearance from the Attorney General.... In contrast, § 2 applies nationwide and covers any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right . . . to vote." 42 U.S.C. see 1973; see also *Allen v. State Bd. of Elections,* 393 U.S. 544, 566 (1969) (by using the terms "standard, practice, or procedure" Congress indicated its intention to give § 2 of the Act "the broadest possible scope). Because §§ 2 and 4 have different purposes, scope, and language, the legislative history of § 4 (c) is not necessarily applicable to interpretation of § 2, *United States v. Uvalde Consol. Indep. School Dist.,* 625 F. 2d 547, 550 (5th Cir. 1980) cert. denied, 451 U.S. 1002, 101 S. Ct. 2341, 68 L.Ed.2d 858 (1981) and certainly cannot create an ambiguity requiring use of the plain statement rule where the textual language of § 2 is perfectly clear.

Indeed, as explained in the Senate Report, the Voting Rights Act was intended to do much more than just curtail the use of tests or devices. As therein stated:

> The Voting Rights Act [of 1965] was designed to operate on two levels. First, it contained special remedies applicable to particular states or counties covered by the so-called trigger formula of § 4 .... This section was based on the recognition that specific practices and

> procedure - - - literacy tests and similar devices - - - had been used to prevent blacks from participating in the electoral process. The second level on the Act operated was a general prohibition of discriminatory practices nationwide. S. Rep. 417, at 5-6, 1982 U.S.C.A.N.N. 177, 182 - 83.

2. The 1982 Amendments to the Voting Rights Act.

The 1982 amendments to the Voting Rights Act expressly established a "results test" for § 2 of the Act. Thus, if Article 6 § 3 of the Washington Constitution "results" in racially discriminatory disenfranchisement of minority voters, the Voting Rights Act has been violated. The "results test" of § 2 prohibits Washington from imposing electoral qualifications that result in a minority group having less opportunity than other voters to participate in the electoral process, Pub L. No. 89-110, 79 Stat 437 (1965) (codified as amended at 42 U.S.C. § 1973 (b)(1988)), and plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system or practice to establish a violation. 1982 Senate Report at 27, reprinted in 1982 U.S.C.C.A.N., p. 205.

Thus, for the State to claim the Voting Rights Act does not apply to this case because "there is no indication in any record of legislative history that Congress intended that its 1982 amendments would be applied to incarcerated felons" is preposterous. Rather, Congress' **silence** on the issue is positive evidence

Congress **did not intend to exclude** State disenfranchisement. *Chisom v. Roemer,* 501 U.S. 380, 395-396 (1991); (Congress failure to mention a category of voting claims in legislative history demonstrates Congress did not intend to exclude the category from § 2 coverage); See also, *R.E. Dietz Corp. v. United States,* 939 F. 2d 1, 7 (2nd Cir. 1991) (refusing to foreclose the application of a statute to circumstances that fall squarely within its meaning but that are not mentioned in the legislative history).

3. The National Voter Registration Act of 1993.

In 1993, Congress enacted the National Voter Registration Act of 1993, 107 Stat. 77, 42 U.S.C. § 1973gg et seq. (NVRA), to take effect for states on January 1, 1995. The NVRA requires States to provide simplified systems for registering to vote in federal elections, i.e., elections for federal officials, such as the President, congressional Representatives, and United States Senators. The States must provide a system for voter registration by mail, 42 U.S.C. § 1973gg-4, a system for voter registration at various state offices (including those that provide "public assistance" and those that provide services to people with disabilities), § 1973gg-5, and, particularly important, a system for voter registration on a driver's license application. 42 U.S.C. § 1973gg-3.

The NVRA states a "registrant may not be removed from the official list of eligible voters except . . . as provided by State law, by reason of criminal conviction or mental incapacity . . . ." 42 U.S.C. § 1973gg-6(a) (3). The NVRA also provides a process of providing federal felony conviction information to those states which have felony disenfranchisement laws. 42 U.S.C. §1973-gg (6). While these provisions recognize state felony disenfranchisement laws, it also demonstrates Congress contemplated the co-existence of disenfranchisement laws via the National Voter Registration Act of 1993 and Voting Rights Act of 1965. In fact, this co-existence is fully realized with the NVRA provision which adds the NVRA is not to "supersede, restrict or limit the application of the Voting Rights Act of 1965," and that it does not "authorize or require conduct that is prohibited by the Voting Rights Act of 1965." 42 U.S.C. § 1973gg-9(d).

In short, Congress intended the NVRA be interpreted to effectuate the goals of the VRA. See *Young v. Fordice*, 520 U.S. 273 (1997) (Court held states must still seek, in accordance with VRA, pre-clearance of laws passed under NVRA even though the new laws are passed to comply with NVRA standards). 42 U.S.C. § 1973gg-9(d), interpreted along with the other 42 U.S.C. § 1973gg provisions, clearly establishes Congress not only contemplated and recognized state disenfranchisement laws, Congress also contemplated the possibility an attempt

might be made to use the NVRA for purposes contradictory to the VRA. Clearly, Congress meant the VRA's goal of eliminating all voting restrictions which have a discriminatory result was not to be contradicted by the NVRA's recognition of state disenfranchisement laws.

While Congress recognizes state disenfranchisement, Congress also clearly recognizes, pursuant to the VRA, **any voting restriction which has a discriminatory result**, is unconstitutional. The NVRA and VRA interpreted together clarify the issue on felon disenfranchisement-- just because disenfranchisement based on a felony conviction is generally recognized as a valid means of disenfranchisement does not mean it remains valid once a discriminatory result has been proven. Indeed, any substantive burden on the right to vote would be constitutionally suspect. *Store v. Brown*, 415 U.S. 724, 730 (1974).

C. Application Of The Voting Rights Act Does Not Alter The Usual Balance Between State and Federal Constitutional Power.

The State cites *Gregory v. Ashcroft,* 501 U.S. 452 (1991); *Richardson v. Ramierez,* 418 U.S. 24, (1974); *Hunter v. Underwood,* 471 U.S. 222 (1985); *Wesley v. Collins,* 791 F. 2d. 1255 (6th Cir. 1986); However, not one of these decisions is of help to the State's position. In fact, *Gregory v. Ashcroft,* supra., *Richardson,* supra., *Hunter, supra*, and *Wesley, supra*, were all discussed or

considered in *Baker v. Pataki, supra.* and found unpersuasive. As stated in *Baker,* "the Supreme Court has already decided § 2 of the Voting Rights Act is not subject to the plain statement rule. See *Chisom v. Roemer,* 501 U.S. 380 (1991)." *Baker,* at 941-42. In fact, as one Court of Appeals recognized, *Gregory* simply has no application to the Voting Rights Act since the Act lies at the core of Congress enforcement powers under the Civil War Amendments. See, *League of United Latin American Citizens v. Clements,* 986 F. 2d. 728, 759 (5th Cir.), rev'd on other grounds, 999 F. 2d 831 (5th Cir. 1993) (en banc). And, even assuming a clear statement of Congressional intent was needed, the Voting Rights Act unquestionably would meet this requirement since the Act's plain language reflects the intent to intrude on state power, prohibiting any election practice or procedure that produces discriminatory results. *Baker v. Pataki,* 85 F.3d. at 825;[2] see also, *League of Untied Latin American Citizens v. Clement,* 914 F. 2d 620, 642 (5th Cir. 1990) (Higginbotham, J., concurring) "(Congress has clearly expressed its intent violations of the act be determined by a results test rather than an intent standard. By these actions, the Act, with all of its intrusive effect, has been made to apply to the states.)", rev'd on other grounds sub nom. *Houston Lawyers Ass'n*

[2]Judge Feinberg wrote for the five Second Circuit Judges who held that § 2 extended to felon disenfranchisement challenges. As the Second Circuit *en banc* split evenly on this question, with five judges holding that § 2 did not cover felon disenfranchisement laws, neither opinion in *Baker* carries any precedential weight. *See* 85 F.3d at 921 n.2.

v. Attorney General of Texas, 501 U. S. 419 (1991); As stated by Judge Fineberg in *Baker v. Pataki*, 85 F.3d 919, 936 (2d Cir. 1996):

> I agree that States have the right to disenfranchise felons; § 2 of the Fourteenth Amendment makes that clear. States, however, do not have the right to disenfranchise felons on the basis of race. And, to prevent such discrimination, I see no persuasive reason, in view of *Hunter*, why Congress may not use its enforcing power under § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment to bar racially discriminatory results, as it did in the Voting Rights Act.

Finally, the District Court in its decision on Defendant's Motion for Dismissal specifically ruled that the VRA can apply to felon disenfranchisment laws. *Farrakhan v. Locke*, et. al., 987 F.Supp. 1304 (E.D. Wash. 1997).

D. *Dillenburg v. Kramer*, 469 F. d. 1222 (9th Cir. 1972) continues to be the law of this Circuit despite *Richardson v. Ramirez*, 418 U.S. 24 94 S.Ct. 2655, 41 L.Ed. 2d 551(1974).

In *Dillenburg v. Kramer*, 469 F. 2d 1222 (9th Cir. 1972) this circuit indicated an inmate may challenge state disenfranchisement laws under the Equal Protection Clause of the United States Constitution. Despite *Richardson v. Ramierez, supra., Dillenburg* is still good law.

In *Hunter v. Underwood,* 471 U.S. 222 (1985), the Supreme Court struck down a racially discriminatory disenfranchising statute from the State of Alabama based upon equal protection grounds. Although *Richardson* indicated state

prisoners have no right to vote because of the language in U.S. Const. amend XIV, § 2, here, plaintiffs, prior to incarceration had the right to vote already in their possession. And in *Hunter*, the court specifically determined the Equal Protection Clause applies to prevent purposeful discrimination which would otherwise violate § 1 of the Fourteenth Amendment. As such, the States citation to other non-voting rights claims is inapposite. And finally, the Supreme Court in the recent case of *Bush v. Gore*, 531 U.S. 98 (2000) ratified the application of the Equal Protection Clause to the right to vote. In that case, the Supreme Court indicated a change toward more Federal intervention in "traditional" state voting practices citing the fundamental nature of voting rights.

E. Washington State's History of the Treatment of African Americans and Minorities do not Insulate it from VRA claims.

The fact that Washington's history of racism compares favorably with that of other states do not insulate it from VRA claims. (Br. Of Appellees at 6, 21-26). Otherwise any State can point to its most recent history and avoid a finding of a violation of the VRA. "Taken at its fullest, this argument would dramatically limit the scope of § 2 of the VRA, prohibiting a §2 claim by any minority citizen in the absence of an allegation that the particular discriminatory practice had been intentionally imposed in the past in the particular jurisdicion." *Baker v. Pataki*,

supa at 936. The reasoning of Congress in amending the VRA and inserting the results test was to avoid this type of defense. As stated previously, §. 2 of the VRA created a nationwide statutory remedy.

Nothing in Washington's "reputation" of being "liberal" re race relations or its election of some minority candidates changes the fact that it is one of only five states that disenfranchise over 20% of African-American men due to felony convictions. Fellner and Mauer, Human Rights Watch and the Sentencing Project, *Losing the Vote The Impact of Felony Disenfranchisement Laws in the United States* (1998) Nothing about the percentage of individuals registered to vote at the time of their convictions changes this. As the District Court recognized, the plaintiffs' evidence clearly showed that minorities are under represented in Washington's political process and that Washington's felon disenfranchisement provision disenfranchises a disproportionate number of minorities. The well-meaning statements of state officials should be contrasted with the evidence in this record of total lack of effort by the State to assist felons in regaining voting rights when eligible to do so. (Br. of Appellees at 23-24; ACLU amicus brief at 5-7.) Besides, Washington's political history is not as unblemished as the State portrays; one of the original African-American plaintiffs in this suit, the late attorney, Carl Maxey, successfully sued the state Democratic party in 1970

because it was violating the one-person, one-vote rule and equal protection in its nomination processes. *Maxey v. Washington State Democratic Committee*, 319 F.Supp. 673 (W.D. Wash. 1970). (Cf., Br. of Appellees at 27-28.)

The State has indicated that felon disenfranchisement has been part of our nation's legal tradition. (Br. of Appellees at 5, 7-8.) However, it should be noted that excluding African-Americans from voting by means of poll taxes and literacy tests were also part of our nation's "legal tradition". But this does not mean they comply with the VRA or with the constitution. 42 U.S.C. 1973b(a) and (c); *Hunter v. Underwood,* 471 U.S. 222; *Harper v. Virginia State Board of Elections*, 383 U. S. 663 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) *Dillenburg v. Kramer*, 469 F.2d 1222 (1972).

And finally, the State indicates that there is no evidence that Washington's disenfranchisement laws were intended to disenfranchise African Americans. (Br. of Appellee at 25-26). However, as outlined in the Brief of Appellant, it was the Southern states' "tradition" of racist felon disenfranchisement that was borrowed by Washington so the history in the other states is very relevant here. (Br. of Appellant at 4-5). Also see *Baker v. Pataki*, supra at 938. Conversely, there is no evidence that Washington independently disqualified felons, for its own special reasons, without reference to the other states' "tradition."

CONCLUSION

For the foregoing reasons, the issues discussed in this Reply Brief should be considered by this Court, and the summary judgement in favor of the Defendants should be reversed and the case remanded for further proceedings.

Respectfully Submitted this 3rd Day of July, 2001.

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DATED this 3rd day of July, 2001.

Respectfully submitted,

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