No. 06-35669
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MUHAMMAD SHABAZZ FARRAKHAN, et al.,

Plaintiffs-Appellants,

v.

CHRISTINE O. GREGOIRE, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Washington
District Court No. CV-96-076-RHW
Honorable ROBERT H. WHALEY

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF REVERSAL

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief is prepared in a double-spaced 14 point proportionally-spaced font (Times New Roman) and contains 4,895 words, below the maximum permitted 7,000 words.

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since 1966, the Voting Rights Project of the ACLU has sought to advance the rights of elective franchise for minority communities and has advocated on behalf of individuals with felony convictions who seek the right to vote.

The ACLU of Washington is the state affiliate. It submitted an amicus brief in the instant case when the case was before this Court in 2001. *Farrakhan v. Locke*, Ninth Circuit Case No. 01-35032. Additionally, the ACLU of Washington has often participated as amicus curiae or as direct counsel in federal cases involving voting rights: see, for example, *Boerner v. State*, C991-1658, Western District of Washington (direct representation of plaintiffs; equal protection challenge to state law requiring dual majority to pass referendum); *Colony v. Munro*, 75 F.3d 454 (9th Cir. 1996) (amicus in case challenging term limits law); *US Term Limits v. Hill*, 514 U.S. 779 (1995) (amicus in challenge to term limits law); *Cunningham v. METRO*, C89-1587, Western District of Washington (direct representation of plaintiffs alleging violation of one-person one-vote rule in process for electing local government board).

A motion requesting leave to file this brief, pursuant to Fed. R. App. P. 29,

is being filed simultaneously with the brief.

ISSUES ADDRESSED BY AMICUS

After the District Court found "compelling evidence" of "discrimination in Washington's criminal justice system on account of race," and that such discrimination "clearly hinder[s] the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic," did the District Court err in refusing to find that a violation of the VRA had been established?

RELEVANT FACTS AND PROCEDURAL HISTORY

Plaintiffs are African-American, Hispanic-American, or Native American, and all are convicted felons. *Farrakhan v. Locke*, No. CS-96-76-RHW, 2000 U.S. Dist. LEXIS 22212, *2 (E.D. Wash. Dec. 1, 2000). Washington's Constitution and statutes automatically deny the vote to all persons convicted of a felony. Wash. Const. art. VI, sec. 3.[1] Plaintiffs' suit alleged that, because of racial discrimination in Washington's criminal justice system, the scheme of automatic felon disenfranchisement disqualifies a disproportionate number of members of minority

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[1] *See* Wash. Const. art. VI, sec. 3. (denying voting rights to persons convicted of an "infamous crime unless restored to their civil rights"); Wash. Rev. Code § 29A.04.079 (2000) ("infamous crime" is one punishable by death or imprisonment in a state correctional facility); Wash. Rev. Code § 9A.20.021 (2000) (all felonies are punishable by imprisonment in state correctional facility).

groups from voting on account of race; the felon disenfranchisement law therefore denies Plaintiffs' right to vote on account of race in violation of Section 2 of the federal Voting Rights Act (VRA). 42 U.S.C. § 1973.

The District Court first addressed Plaintiffs' vote denial claim in denying Defendants' motion to dismiss in 1997, holding that "Congress . . . has the power to protect against discriminatory uses of felon disenfranchisement statutes through the VRA." CR 81; *Farrakhan v. Washington*, 987 F. Supp. 1304, 1310 (E.D. Wash. 1997). The District Court concluded that Plaintiffs' allegations of racial discrimination in Washington's criminal justice system—including, for example, that minorities "are targeted for prosecution of serious crimes and that they are over-represented in prison populations"—had "alleged sufficient facts to state a claim for vote denial under the VRA." *Id*. at 1312. "If true, Plaintiffs' allegations may establish a causal connection between Washington's disenfranchisement scheme and the denial of voting rights to racial minorities." *Id*.

On subsequent cross-motions for summary judgment in 2000, the District Court addressed evidence that racial bias in Washington's criminal justice system led to disproportionate felony convictions of minorities, and held:

> The Court concludes that Washington's felon disenfranchisement provision disenfranchises a disproportionate number of minorities; as a result, minorities are under-represented in Washington's political process. . . . [R]acial minorities are clearly being disenfranchised in numbers disproportionate to that of their white fellow citizens.

CR 153; *Farrakhan v. Locke*, 2000 U.S. Dist. LEXIS 22212 at *3-4. The District Court held, however, that no VRA violation was established because the cause of the disproportionate disenfranchisement of minorities was "not the voting qualification [felon disenfranchisement]; instead the cause is bias *external to* the voting qualification"—i.e., racial bias in Washington's criminal justice system. *Id*. at *4 (emphasis added). Even though felon disenfranchisement is automatic, the District Court construed the "totality of circumstances" test as not allowing it to consider the effect of racial bias in felony convictions in determining whether there was a "causal connection between the challenged voting practice and [a] prohibited discriminatory result." *Id*. at *8-9. The District Court stated:

> *Plaintiffs' evidence of discrimination in the criminal justice system, and the resulting disproportionate impact on minority voting power, is compelling*; however, it is not enough to establish a causal link [between the disenfranchisement law and the discriminatory result] under controlling Ninth Circuit authority.

Id. at *14 (emphasis added).

Following plaintiffs' appeal from the 2000 summary judgment ruling in favor of the State, this Court reversed. The Ninth Circuit panel held that the District Court's refusal to consider Washington's racially biased criminal justice system as a potential cause of vote denial in violation of Section 2 was at odds with

the plain language of the VRA, this Court's opinion in *Smith v. Salt River Project Agric. Improvement and Power Dist.*, 109 F.3d 586 (9th Cir. 1997), and Supreme Court authority, all of which require courts to consider the "totality of the circumstances," including circumstances external to the voting qualification itself. *Farrakhan v. Washington*, 338 F.3d 1009, 1017 (9th Cir. 2003) ("*Farrakhan I*"):

> Section 2 plainly provides that a voting practice or procedure violates the VRA when a plaintiff is able to show, based on the *totality of the circumstances*, that the challenged voting practice results in discrimination on account of race.

Id. This Court held that "[t]he essence of a [Section] 2 claim" is "that a certain electoral law . . . *interacts with social and historical conditions* to cause an inequality" in minorities' opportunity to vote. *Id*., quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (emphasis added by this Court). The Court added that racial bias in Washington's criminal justice system was just such a "condition," akin to other types of discrimination that were suggested in the Senate Report to the 1982 VRA Amendments (including discrimination in education, employment or health[2]), because it "may very well interact with voter disqualifications to create

[2] This Court concluded that evidence of discrimination in Washington's criminal justice system was within the scope of the fifth Senate factor, "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas of education, employment and health, which hinder their ability to participate effectively in the political process." S. Rep. No. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177.

the kinds of barriers to political participation on account of race that are prohibited by Section 2[.]" *Id*. at 1020. *See* S. Rep. No. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177. This Court described the purpose of the factors listed in the Senate Report, holding:

> This factor underscores Congress's intent to provide courts *with a means of identifying voting practices that have the effect of shifting racial inequality from the surrounding social circumstances into the political process*. To the extent that racial bias and discrimination in the criminal justice system contribute to the conviction of minorities for "infamous crimes," such discrimination would clearly hinder the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic.

Id., 338 F.3d at 1020 (emphasis added).

This Court also held in *Farrakhan I* that the District Court's ruling was inconsistent with *Salt River*, involving a law restricting voting in district elections to landowners. Applying the "totality of the circumstances" test, the Court there considered external societal factors to determine whether a racial disparity in the rates of home ownership in the District "reflect[ed] racial discrimination," and concluded the disparity "is not substantially explained by race but . . . by factors independent of race." Thus, the "on account of race" requirement of the VRA was not satisfied. *Farrakhan I*, 338 F.3d at 1017-18 (quoting *Salt River*, 109 F.3d at 591). In contrast to *Salt River*, this Court noted that the District Court in this case had found "compelling" evidence of racial bias in the state's criminal justice

system. *Id*., 338 F.3d at 1020. This Court commented, "[i]ndeed, had the district court properly interpreted the causation requirement" and considered that evidence, "the court might have reached a different conclusion." *Id*.

On remand following the Ninth Circuit's mandate (CR 171, filed March 2004), the District Court was presented with considerable evidence of racial disparities in Washington's criminal justice system, including racial disparities in felony convictions. That presentation included *new* evidence pointing to the conclusion that the disparity is caused by racial bias, rather than non-racial factors. Expert reports analyzed the disparities and concluded they could not be explained in race-neutral terms but rather "point[ed] directly to the existence of race discrimination" in law enforcement and the criminal justice system generally. *Farrakhan v. Gregoire*, No. CV-96-76-RHW, 2006 WL 1889273, at *5, 6 n. 6 (E.D. Wash. July 7, 2006). Based on this evidence, the District Court made additional, enhanced findings that the evidence was relevant, persuasive and unrebutted:

> The Court finds . . . these reports to be *compelling evidence of racial discrimination and bias in Washington's criminal justice system*. Contrary to Defendants' assertion that these reports are based solely on statistics and are thus insufficient evidence for a VRA claim, the Court finds these experts' conclusions, drawn from the available statistical data, are admissible, relevant, and persuasive. Significantly, Defendants do not present any evidence to refute Plaintiffs' experts' conclusions. Viewing the evidence in a light most favorable to the non-movants, *the Court is compelled to find that there is*

> *discrimination in Washington's criminal justice system on account of race. Furthermore, this discrimination "clearly hinder[s] the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic.*"

Id., 2006 WL 1889273 at *6 (quoting *Farrakhan I*, 338 F.3d at 1220) (emphasis added).

But the District Court again granted summary judgment for the State and dismissed Plaintiffs' claims, because Plaintiffs had not produced evidence of other possible types of discrimination described in the Senate Report for the 1982 VRA amendments (such as racial polarization of the vote, voting mechanisms, candidate slating processes, the use of racial appeals in political campaigns, election of minorities to political office, and the responsiveness of elected officials to minority groups' needs). *Id*. at *8. The District Court interpreted the "totality of the circumstances" test to mean that a lack of evidence of other possible forms of official discrimination "favor[s] Defendants' position," *id.* at *8, and "counterbalance[s] the contemporary discriminatory effects" of racial bias in the state's criminal justice system. *Id*. at *9.

Plaintiffs appealed and the ACLU submits this amicus brief in support of reversal of the District Court's summary judgment ruling and entry of summary judgment in Plaintiffs' favor.

SUMMARY OF ARGUMENT

Section 2 of the Voting Rights Act provides that "no voting qualification . . . shall be imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right of any citizen to vote on account of race or color." Voting Rights Act (VRA), 42 U.S.C. § 1973(a).

The plain language of the VRA, and this Court's own decisions, establish that a voting practice that has a disparate impact on minority voting violates the VRA when the evidence shows that disparate impact is due to race discrimination, and not to other non-racial factors. *Smith v. Salt River Agricultural Improvement and Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) ("a voting practice that results in discrimination" on account of race violates Section 2); *Farrakhan I*, 338 F.3d 1009, 1016 (9th Cir. 2003) (the VRA is violated if "any disparate racial impact of facially neutral voting requirements . . . result[s] from racial discrimination"). Under the standards announced by this Court, the District Court's findings establish that it was error to grant summary judgment for the State.

It is undisputed in this case that the challenged voting practice results in a denial of the right to vote: Washington's felon disenfranchisement law automatically disenfranchises the Plaintiffs and other convicted felons. Thus, the sole issue before the District Court was whether this denial of the right to vote was caused by discrimination "on account of race or color," 42 U.S.C. § 1973(a), "or

whether the practice's disparate impact is better explained by factors independent of race." *Farrakhan I*, 338 F.3d at 1018. The District Court, when presented with new evidence on remand, found "compelling" evidence that the disparate level of minority felony convictions—and resulting disenfranchisement—was in fact caused by racial bias in the criminal justice system. *Farrakhan v. Gregoire*, 2006 WL 1889273, at *6. Moreover, the District Court found no evidence rebutting that conclusion. *Id*.

A violation of Section 2 was established, for purposes of denying the State's summary judgment motion, when the District Court held that racial discrimination in Washington's criminal justice system caused a disproportionate number of minorities to be convicted of felonies on account of race, resulting in the automatic loss of their voting rights. The District Court erred in holding that the *absence* of proof of *other* forms of official discrimination could somehow "counterbalance"—and essentially "unprove"—a proven violation of the VRA. In addition, many of the other forms of discrimination the District Court considered would be relevant, if at all, only to a vote dilution claim, not to Plaintiffs' vote denial claim. On the basis of the District Court's factual findings alone—establishing a proven form of racial discrimination that leads automatically to disenfranchisement—the Plaintiffs have shown that "based on the *totality of the circumstances* . . . the challenged voting practice results in discrimination on account of race." *Farrakhan I*, 338 F.3d

at 1017 (emphasis in original). This Court should therefore reverse the District Court's judgment for Defendants and grant summary judgment to the Plaintiffs.

ARGUMENT

A. Under This Court's Announced Standards, the District Court's Findings Establish that Washington's Felon Disenfranchisement Law Violates the VRA Because It Results in Denial of the Right to Vote On Account of Race.

1. This Court Held Felony Disenfranchisement Could Violate the VRA If Coupled With Proof of Racial Bias in Felony Convictions.

This Court's announced standard for analysis of VRA claims applies with greatest force in cases like this one, where a proven form of racial discrimination leads automatically to complete loss of the affected citizens' right to vote.[3] In the first appeal of this case, this Court held that a voting practice violates the VRA if it

[3] The District Court erroneously held that Section 2 claims do not apply to the violation of an individual person's right to vote, but must relate to "the existence of discrimination in voting on a broader scale." *Farrakhan v. Gregoire*, 2006 WL 1889273, at *9. A Section 2 plaintiff always may challenge a state's disenfranchisement law either solely in his or her individual capacity or on behalf of other similarly situated persons. *See, e.g., Wesley v. Collins*, 605 F. Supp. 802 (M.D. Tenn. 1985) (African-American plaintiff challenged Tennessee's felon disenfranchisement law and was joined in suit by non-profit organization); *Hunter v. Underwood*, 471 U.S. 222, 105 S. Ct. 1916, 85 L. Ed. 2d 222 (1985) (two plaintiffs challenged the denial of their right to vote under Alabama's disenfranchisement law). Contrary to the District Court's ruling, the VRA bars any voting qualification that results in denial "of the right of *any citizen* to vote on account of race or color." 42 U.S.C. § 1973(a) (emphasis added).

has "the effect of shifting racial inequality from the surrounding social circumstances into the political process." *Farrakhan I*, 338 F.3d at 1020. This Court instructed the District Court to consider any pertinent evidence and determine whether under the "totality of the circumstances," the challenged voting practice results in the denial of the vote on account of race. As this Court stated,

> Section 2 plainly provides that a voting practice or procedure violates the VRA when a plaintiff is able to show, based on the *totality of the circumstances*, that the challenged voting practice results in discrimination on account of race.

Farrakhan I, 338 F.3d at 1017.[4]

Specifically, this Court held that in this case, racial bias in the criminal justice system would violate Section 2 if it "interact[s] with voter disqualification to create [a barrier] to political participation on account of race." *Id*. The Court observed that that test would be met if racial bias in the criminal justice system increases felony convictions of minorities, "as disenfranchisement [of felons] is

[4] This Court's standard is consistent with other circuits' interpretation of Section 2. *See, e.g.*, *Wesley v. Collins*, 791 F.2d 1255, 1259-60 (6th Cir. 1986) (in a vote dilution case, stating that "Section 2 of the Voting Rights Act provides that a violation is established if, based upon the totality of the circumstances, the challenged legislation results in unlawful dilution"); *United States v. Marengo*, 731 F.2d 1546, 1574 (11th Cir. 1984) (holding in a vote dilution case that "[t]he statute explicitly calls for a 'totality-of the circumstances' approach and the Senate Report indicates that no particular factor is an indispensable element of a dilution claim").

automatic." *Id*. Plaintiffs may establish a Section 2 claim by proving racial discrimination outside of the electoral system which increases the disparate impact that felon disenfranchisement has on minorities. *See Smith v. Salt River Project Agric. Improvement and Power Dist.*, 109 F.3d 586, 595 n.7 (9th Cir. 1997); *Farrakhan*, 338 F.3d at 1019.

That test was met in all respects by the District Court's findings on remand.

2. Under This Court's Announced Standard, the District Court's Findings of "Compelling" and Unrebutted Evidence of Racial Discrimination in Felony Convictions Established a VRA Violation for the Purpose of Overcoming the State's Motion for Summary Judgment.

The District Court on remand was presented with new evidence of discrimination in the criminal justice system, and made expanded findings that established a Section 2 violation under this Court's standards: that racial bias in Washington's criminal justice system resulted in disproportionate felony convictions of minority defendants, leading directly to their disenfranchisement. The District Court found:

- The Plaintiffs' expert evidence proved that the disproportionate effect of felon disenfranchisement on minorities is more than a mere statistical disparity. Rather, Plaintiffs' expert evidence persuasively eliminated race-neutral explanations for the disparate impact. Defendants presented no evidence to rebut the experts' conclusions. 2006 WL 1889273 at *6.

- The expert reports are "compelling evidence of racial discrimination and bias in Washington's criminal justice system." *Id*. "The court is compelled to find that there is discrimination in Washington's criminal justice system on account of race." *Id*.

- That racial discrimination "lead[s] to a disproportionate number of minority disenfranchised felons." *Id*. at *7.

- That racial "discrimination 'clearly hinders the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic.'" *Id*. at *6, quoting *Farrakhan I*, 338 F.3d at 1220.

Based on this Court's own VRA analysis in this case, the District Court's findings establish a violation of Section 2 of the VRA, and this Court should reverse the District Court's summary judgment in the State's favor. As this Court recognized, in light of Washington's automatic disenfranchisement of felons, proof of racial discrimination in felony convictions was not only a relevant consideration, but a sufficient and controlling one. *Farrakhan I*, 338 F.3d at 1020 ("To the extent that racial bias and discrimination in the criminal justice system contribute to the conviction of minorities for 'infamous crimes,' such discrimination would clearly hinder the ability of racial minorities to participate in the political process."). As this Court emphasized,

> Permitting a citizen, even a convicted felon, to challenge felon disenfranchisement laws that result in . . . the denial of the right to vote . . . on account of race animates the right that every citizen has of protection against racially discriminatory voting practices. Although states may deprive felons of the right to vote without violating the

> Fourteenth Amendment, . . . *when felon disenfranchisement results in denial of the right to vote . . . on account of race or color, Section 2 affords disenfranchised felons the means to seek redress*.

Id. at 1016 (emphasis added; citation omitted). The District Court's expanded findings on remand sufficed to show, in satisfaction of this Court's announced standards, that Washington's scheme of felon disenfranchisement results in denial of the right to vote on account of race or color, in violation of the VRA.

B. The District Court Erred in its Legal Analysis Holding the Absence of Evidence of Other Types of Societal Discrimination Can "Counterbalance" a Proven Violation of the VRA.

The District Court acknowledged this Court's instructions to consider the "totality of the circumstances" in determining whether the disparate impact of felon disenfranchisement was due to race, or instead was the result of nonracial factors. *Farrakhan I*, 338 F.3d at 1015, 1017-18. That led the District Court correctly to consider the evidence of racial bias in the state's criminal justice system and to find that it caused felon disenfranchisement to disproportionately deny the vote to minorities.

But the District Court then erred, misinterpreting this Court's guidance, and held that the *absence* of proof of race discrimination in *other* areas listed in the Senate Report, particularly regarding the voting process, "counterbalanced" its finding of racial bias in felony convictions that led to disenfranchisement.

Farrakhan v. Gregoire, 2006 WL 1889273 at *9. That is simply wrong: having concluded that Plaintiffs had proved one form of race discrimination that led directly and inescapably to their disenfranchisement, the District Court erred in ruling that the lack of other different types of race discrimination could "unprove" the proven VRA violation.

In the Senate Report accompanying the 1982 amendments to the VRA, Congress suggested nine factors (the "Senate factors") that might be relevant when evaluating a Section 2 claim. Congress specifically noted that it did not intend for courts to use the Senate factors "as a mechanical 'point counting' device" to measure the strength of a Section 2 claim. Congress went on to say:

> While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution. The cases demonstrate, and the Committee intends, that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.

S. Rep. No. 97-417, at 28-29 and n.118.

Which, if any, of the Senate factors may be indicative of a Section 2 violation depends on "the kind of rule, practice, or procedure called into question." *Id*. at 28. The legislative history behind the 1982 amendments to the VRA reveals that Congress principally was concerned with helping courts analyze vote dilution claims, and most of the Senate factors pertain only to vote dilution claims, not this vote denial case. *See* S. Rep. 97-417; *Thornburg*, 478 U.S. at 51, 58 (1986);

Harris v. Siegelman, 695 F. Supp. 517, 528 (M.D. Ala. 1988). *See also* Daniel Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 707-08 (2006). These cases do not authorize using factors relevant only to vote dilution claims for the purpose of rejecting a vote denial claim.

Several courts, including this one, repeatedly have recognized that the Senate factors offer courts guidance in evaluating the merits of a Section 2 challenge but that no particular factor, let alone all of the factors, must be applied to each claim. *See Farrakhan*, 338 F.3d at 1015, citing S. Rep. No. 97-417, at 29; *Wesley v. Collins*, 791 F.2d 1255, 1260 (6th Cir. 1986) ("To the extent that the enumerated factors are not factually relevant, they may be replaced or substituted by other more meaningful factors."); *United States v. Marengo*, 731 F.2d 1546, 1574 (11th Cir. 1984) (recognizing that "[n]o formula for aggregating the [Senate] factors applies in every case"). Congress made it clear that the factors were typical and illustrative evidence, but a Section 2 violation could be proved by evidence of discrimination shown to affect the right to vote, regardless of whether that evidence fits neatly into one of the Senate factors.

But contrary to that guidance, the District Court effectively required Plaintiffs to show that many or most of the listed societal conditions further bolstered the District Court's finding that race discrimination led to felon

disenfranchisement on account of race. The District Court held that a lack of evidence of discrimination in these other areas, such as voting registration and political campaigns, "weigh[ed] in favor of Defendants' position," and justified dismissal of Plaintiffs' claim. *Farrakhan v. Gregoire*, 2006 WL 1889273 at *7-9. In fact, however, the lack of evidence of other "Senate factors" was irrelevant after the District Court reached the conclusion that felon disenfranchisement led to the denial of the vote on account of race. The purpose of considering factors such as those listed in the Senate Report is to determine whether the challenged practice's disparate effect on minority voting is due to racial bias, or "is better explained by factors independent of race." *Farrakhan I*, 338 F.3d at 1018, quoting *Salt River*, 109 F.3d at 591. Since the District Court had already determined (1) that unrebutted evidence showed racial discrimination was in fact the cause of disproportionate felony convictions of minority group members, *Farrakhan v. Gregoire*, 2006 WL 1889273 at *6, and (2) that disenfranchisement of felons was automatic, *id.*, Plaintiffs had proved a VRA violation. It is legally and logically irrelevant to either of those findings whether *other* forms of official discrimination *also* exist in Washington.

The District Court, after considering extensive expert analysis, found compelling proof that racial bias in the state's criminal justice system leads to disproportionate felony convictions of minorities "on account of race." 42 U.S.C.

§ 1973(a). That fact is not "unproved" by a lack of evidence of racial bias in voting registration, or in political campaigns. *Cf. Farrakhan v. Gregoire*, 2006 WL 1889273 at *8. Similarly, there is no dispute that racial bias in felony convictions "results in a denial . . . of the right . . . to vote," 42 U.S.C. § 1973(a), since disenfranchisement of felons is automatic. That causal connection is not "unproved" by a lack of evidence of racially polarized voting, or the extent to which minority group members are elected to office. *Cf. Farrakhan v. Gregoire*, 2006 WL 1889273 at *8.

The District Court's emphasis on the Plaintiffs' alleged lack of evidence of the first Senate factor,[5] which it apparently interpreted to mean evidence of official discrimination other than the proven discrimination in the State's criminal justice system, was erroneous for the same reason. Plaintiffs had already presented direct evidence that racial discrimination in Washington's criminal justice system leads to the denial of minority votes. Any additional proof regarding the history of discrimination against minorities in the electoral process could only be useful for purposes of supporting Plaintiffs' vote denial claim, not negating it.[6]

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[5] "The extent of any history of official discrimination in the state or political subdivision that touched on the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." S. Rep. No. 97-417, at 29.

[6] Similarly, the District incorrectly analyzed the ninth Senate factor: whether

(Footnote Continued)

Thus, none of the remaining Senate factors could undercut the causal link between racial bias in the criminal justice system and felon disenfranchisement's denial of minority voting rights. Because the District Court found persuasive and unrebutted evidence that a racially biased criminal justice system results directly and automatically in the loss of felons' voting rights on account of race, a VRA violation was established. No lack of evidence of "discrimination in voting on a broader scale" can affect that outcome.

CONCLUSION

For the reasons set forth in this amicus brief, the briefs of other amici in support of Plaintiffs/Appellants, and the Appellants' briefs, this Court should reverse the district court's summary judgment in favor of the State, and direct entry

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the policy underlying felon disenfranchisement is "tenuous." *See Farrakhan v. Gregoire*, 2006 WL 1889273 at *8; S. Rep. 97-417 at 29. No policy justification could overcome Plaintiffs' proof that felon disenfranchisement led directly to loss of voting rights on account of race in violation of Section 2. If it had any weight in this case, that factor would weigh in favor of the Plaintiffs. In *Dillenburg v. Kramer*, this Court found that "[c]ourts have been hard pressed to define the state interest served by laws disenfranchising persons convicted of crimes," and that "[w]hen the façade of the classification has been pierced, the disenfranchising laws have fared ill." 469 F.2d 1222, 1224 (9th Cir. 1972). Plaintiffs submitted an expert report and other evidence showing why the rationale for maintaining Washington's felon disfranchisement law is extremely weak. *Farrakhan v. Gregoire*, 2006 WL 1889273, at *8. Other than pointing to the right of states to enact felon disfranchisement laws, the State offered nothing to contradict Plaintiffs' argument. Defs.' Reply in Support of Motion for Summary Judgment and Resp. to Plaintiffs' Cross-Motion for Summary Judgment at 15-19.

of summary judgment for the Plaintiffs.

DATED: December 11, 2006

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
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