No. 06-35669

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MUHAMMAD SHABAZZ FARRAKHAN, et al.,
Plaintiffs-Appellants,

v.

CHRISTINE O. GREGOIRE, GOVERNOR OF THE STATE OF WASHINGTON, et al.,
Defendants-Appellees.

On Appeal from a Judgment of the United States District Court
for the Eastern District of Washington, No. CV-96-076-RHW,
The Honorable Judge Robert H. Whaley Presiding

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PLAINTIFFS/APPELLANTS

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IDENTITY AND INTEREST OF AMICI CURIAE

This brief is submitted by two amici: the American Civil Liberties Union ("ACLU") and the American Civil Liberties Union of Washington ("ACLU of Washington"). Both amici are uniquely able to provide additional analysis regarding the issues presented on en banc review. The parties to this proceeding have consented to the filing of this amici brief, and amici ask that the En Banc Panel consider this brief.

Amicus ACLU of Washington is a statewide, nonprofit, nonpartisan organization with over 20,000 members dedicated to the preservation of civil liberties and civil rights. For the past 10 years, the ACLU of Washington has worked to change Washington's felon disenfranchisement law and restore the voting rights of convicted felons. The ACLU of Washington first proposed legislation in 2001 to restore the voting rights of persons with felony convictions more quickly and through a less burdensome process. In 2009, those efforts came to fruition when the Washington legislature passed H.B. 1517 (2009 Wash. Sess. Laws, ch. 325, § 1) ("HB 1517"). Subsequent to passage of HB 1517, the ACLU of Washington has worked to educate the public about the amended law. That law – discussed at length below – is central to this case because Defendants erroneously claim that passage of the law mooted Plaintiffs' claims.

Amicus 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 ACLU's Voting Rights Project has defended the voting rights of minorities and advocated

on behalf of individuals with felony convictions who seek the right to vote. The ACLU has participated in numerous cases involving interpretation of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (the "VRA"), including a recent Supreme Court case (*Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009)), and several other cases addressing the application of the VRA to felon disenfranchisement. Like the ACLU of Washington, the ACLU is uniquely positioned to address the issues currently before the Court on en banc review.

For convenience and ease of reference, the remainder of this amici brief will refer to the ACLU of Washington and the ACLU collectively as the "ACLU."

ISSUES ADDRESSED BY AMICI

1. Did Washington's passage of HB 1517, provisionally restoring voting rights only to felons not on Department of Corrections ("DOC") supervision or in DOC physical custody, leaving approximately 43,000 people still disenfranchised by Washington's felon disenfranchisement law, render Plaintiffs' VRA vote-denial claim moot?

2. If the En Banc Panel believes the passage of HB 1517 alters the analysis of the VRA violation in this case, is the appropriate remedy remand, because the relevant evidence is not in the current record, rather than a grant of summary judgment for the State?

RELEVANT FACTS

"Plaintiffs, minority citizens of Washington state who have lost their right to vote pursuant to the state's felon disenfranchisement provision, filed this action in 1996 challenging that provision on the ground that, due to racial discrimination in

the state's criminal justice system, the automatic disenfranchisement of felons results in the denial of the right to vote on account of race, in violation of § 2 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973." *Farrakhan v. Gregoire* (*Farrakhan II*), 590 F.3d 989, 993, *rehearing en banc granted*, 603 F.3d 1072 (9th Cir. 2010). It is this challenge to the loss of the right to vote that results from a felony conviction that is currently at issue in this case. For the reasons explained below, Plaintiffs' claim remains valid even after the 2009 passage of HB 1517, which provisionally restores voting rights to persons no longer in DOC physical custody or on DOC community custody.[1]

In 2006, following extensive discovery and presentation of evidence by both parties in cross-motions for summary judgment, the district court ruled that Plaintiffs had presented "compelling" evidence that racial disparities exist at every stage of Washington's criminal justice system. *Farrakhan v. Gregoire*, No. CV-96-76-RHW, 2006 U.S. Dist. LEXIS 45987, at *17 (E.D. Wash. July 7, 2006); *Farrakhan II*, 590 F.3d at 994-95, 1004. Plaintiffs' evidence showed disparities with respect to searches, charging, bail, length of confinement (African-Americans spend approximately half a day more for each day a white defendant is recommended to be confined to prison and are 75% less likely than whites to be recommended for an alternative sentence) and incarceration (African-Americans are nine times more likely to be imprisoned than whites). Brief of Plaintiffs/Appellants filed Dec. 1, 2006 at 9-12; ER 179-255, 258-74. As the

[1] "Community custody" refers to individuals who are on parole or supervised release, not to individuals who are currently incarcerated.

State's own sentencing commission found, "[p]eople of color are over-represented at every stage of Washington's criminal justice system, from arrest through sentencing and incarceration." Washington State Sentencing Guidelines Commission, *Disproportionality and Disparity in Adult Felony Sentencing* (2003) (contained in the record at ER 498). Indeed, for every year between 1996 and 2005, 19% to 22.9% of the incarcerated population in Washington State was African-American, even though African-Americans comprise only 3% of the general population. *Id*. Native Americans, who constitute only 2% of the State population, represent nearly 4% of the prison population. *Id*. Collectively, though African-Americans, Latinos and Native Americans constitute only 12% of Washington State's general population, they represent an incredible 36% of the State's prison population. *Id*.

Based on this evidence, the district court concluded that it "ha[d] no doubt that members of racial minorities have experienced discrimination in Washington's criminal justice system," 2006 U.S. Dist. LEXIS 45987, at *28, and that such discrimination "clearly hinder[s] the ability of racial minorities to participate effectively in the political process," *Farrakhan v. Washington* (*Farrakhan I*), 338 F.3d 1009, 1020 (9th Cir. 2003). Plaintiffs' evidence consisted of far more than "mere statistics"; it demonstrated the causal connection among voting qualification, the interaction with social and historical conditions, and vote denial on the basis of race. The district court ruled that the evidence demonstrated that these disparities could not be explained in a race-neutral way and instead were the product of race discrimination. The State did not dispute these factual rulings.

In 2009, while this case was awaiting decision on appeal for the second time, the Washington legislature passed HB 1517, provisionally restoring voting rights to felons who complete both their prison terms and their terms of community custody. HB 1517 did not change the fact that felons in Washington still automatically lose the right to vote upon conviction, and at the present time approximately 43,000 felons remain disenfranchised. The State has not presented evidence of the number of persons whose right to vote has been restored by HB 1517, nor has it shown that the racial disparity shown by the record below has been eliminated or even reduced. Likewise, because five of the six Plaintiffs in this case remain in prison serving lengthy terms, they will not have their voting rights restored under HB 1517 any time soon.

ARGUMENT

A. The Panel Dissent Is Factually Flawed As To The Category Of Persons Affected By The 2009 Amendment To Washington's Voting Rights Law (HB 1517). Even With The Amendment, Plaintiffs And 43,000 People (Including 27,000 On Community Custody Overlooked By The Dissent) Are Still Denied The Right To Vote.

At the time the district court issued the summary judgment ruling at issue in this appeal, the Washington felon disfranchisement statute provided that convicted felons could not regain the right to vote until they had completed all of the requirements of their criminal sentences. Supplemental Brief of Defendants filed May 29, 2009 at 1-2. In 2009, Washington amended the statute to provide that "the right to vote is provisionally restored" upon release from physical custody and from "supervision" by the DOC. HB 1517, § 1. HB 1517 does not restore voting

rights for the thousands of individuals who are either in DOC's physical custody or on DOC "community custody" and therefore remain under the authority of the DOC. *Id*. DOC has approximately 16,000 inmates in physical custody and 27,000 active community custody cases. *See* Washington Department of Corrections, http://www.doc.wa.gov/aboutdoc/prisons.asp and http://www.doc.wa.gov/aboutdoc/communitycorrections.asp (last visited June 8, 2010). Therefore, 43,000 individuals remain ineligible to vote even after the passage of HB 1517. Wash. Rev. Code § 29A.08.520(1), (7) ("[T]he right to vote is provisionally restored as long as the person is not under the authority of the department of corrections. … For the purposes of this section, a person is under the authority of the department of corrections if the person is: (a) Serving a sentence of confinement in the custody of the department of corrections; or (b) Subject to community custody as defined in RCW 9.94A.030.").

The Panel Dissent suggests repeatedly, without supporting evidence, that HB 1517 changed "the landscape of this case," requiring remand to the district court, because only the voting rights of incarcerated felons are now in issue. *Farrakhan II*, 590 F.3d at 1016, 1018. Even the State acknowledges that is incorrect. Supplemental Brief of Defendants filed May 29, 2009 at 2, 10. Moreover, the Panel Dissent's analysis rests on crucial factual errors. The Panel Dissent materially misstates the effect of HB 1517, asserting that "we are left to consider the Voting Rights Act challenge of only those felons still serving their prison terms. Interestingly, the case up to this point has never contemplated the two distinct sets of felons affected by the prior Washington law--those still

incarcerated and those already released." *Farrakhan II*, 590 F.3d at 1017. That is incorrect because it ignores the 27,000 individuals who remain on DOC community custody and whose voting rights, in *addition* to those of all persons in DOC physical custody, are therefore *not* restored by the amended law.

The State has not come forward with any evidence that the racial disparities demonstrated in the record have changed in any way legally relevant to this case. Instead it speculates that HB 1517 disproportionally benefitted minority voters, without offering any supporting evidence for that assertion. Supplemental Brief of Defendants filed May 29, 2009. It is more likely HB 1517 made the race-based disparities worse because the evidence in the record shows that African-Americans disproportionally suffer longer sentences of confinement than whites. The lack of evidence supporting the State's claims about the effect of HB 1517 justifies awarding summary judgment to Plaintiffs. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681 (2009) (Court granted summary judgment to petitioners because "there [was] no evidence--let alone the required strong basis in evidence" to support respondent's position).

B. The Passage Of HB 1517 Does Not Alter The Legal Analysis Applicable To The Evidence Of The VRA Vote-Denial Violation In This Case.

"'Vote denial' refers to practices that prevent people from voting or having their votes counted. … Vote denial cases are different from vote dilution cases. The most obvious difference is that next-generation vote denial cases, like first-generation vote denial cases, mainly implicate the value of participation; by contrast, second-generation cases involving vote dilution mainly implicate the

value of aggregation." Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 691, 718 (2006).

The passage of HB 1517 does not alter the conclusion that, under the totality of the circumstances, Washington's disfranchisement statute violates the VRA. The claim in this lawsuit involves denial of the right to vote upon conviction,[2] not the system for restoring voting rights at some later point:

> [N]o matter how well the amended law functions to restore at an earlier time the voting rights of felons who have emerged from incarceration, it does not protect minorities from being denied the right to vote upon conviction by a criminal justice system that Plaintiffs have demonstrated is materially tainted by discrimination and bias. Accordingly, it does not alter our analysis as to Senate Factor 5 or as to the totality of the circumstances.

Farrakhan II, 590 F.3d at 1016. Both logically and legally, the Panel Majority's analysis is correct.

It is well-established that strong evidence of one Senate Factor can establish a VRA vote-denial claim; it is a totality-of-the-circumstances test and not the "mechanistic application of the Senate factors that the Senate report emphatically rejects." *United States v. Blaine Cnty., Mont.*, 363 F.3d 897, 903, 913 (9th Cir. 2004) (upholding district court's ruling that VRA Section 2 violation was

[2] This Court's recent rulings in *Harvey v. Brewer* and *Coronado v. Brewer*, Nos. 08-17253, 08-17567, 2010 U.S. App. LEXIS 10822 (9th Cir. May 27, 2010), are therefore distinguishable. The *Harvey* and *Coronado* cases involved constitutional challenges to Arizona's felon disenfranchisement law, not the VRA violation alleged here, and the *Coronado* case also involved challenges to Arizona's laws on restoring the right to vote. Neither issue is currently part of this case.

established and citing Supreme Court precedent, noting that "there is no requirement that a particular number of factors be proved, or that a majority of them point one way or the other" (internal quotation marks and citation omitted)). See also Senate Report No. 97-417, confirming that "Congress did not intend this list [of the nine Senate Factors] to be comprehensive or exclusive, nor did it intend that 'any particular number of factors be proved, or that a majority of them point one way or the other.'" *Farrakhan I*, 338 F.3d at 1015 (*quoting* S. Rep. No. 97-417, at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207). In *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), the Court similarly recognized that the Senate Factors are "not a mandatory . . . test" but are only "meant as a guide to illustrate some of the variables that should be considered by the court." *Id.* at 1412. Thus, "the range of factors that [are] relevant in any given case will vary depending upon the nature of the claim and the facts of the case." *Id.* The Senate Report on the 1982 amendments to the VRA provides further support for this analysis.

Also, because five of the six Plaintiffs remain incarcerated and have not had their rights to vote restored by HB 1517, it is clear that their claims are not moot. *See W. Oil & Gas Ass'n v. Sonoma Cnty.*, 905 F.2d 1287, 1290 (9th Cir. 1990) ("[W]hen the possibility of controversy remains, the case is not yet moot."). A VRA vote-denial case is moot when the government completely ceases using the challenged practice, as occurred when Ohio chose to stop using challenged punch card ballots. *Stewart v. Blackwell*, 444 F.3d 843 (2006), *vacated for mootness*, 473 F.3d 692 (6th Cir. 2007). But the State here has not ceased disenfranchising

felons; as noted above, 43,000 remain disenfranchised. *See also Blackmoon v. Charles Mix Cnty.*, 505 F. Supp. 2d 585, 593 (D.S.D. 2007) (rejecting mootness claim when districts challenged in vote dilution case had changed while lawsuit was pending but change did not automatically preclude VRA remedy); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 549 (9th Cir. 1998) (ruling that Hispanic residents' Section 2 VRA challenge against city's at-large system of elections was not moot despite election of two Hispanics to city council while lawsuit was pending).

Furthermore, since most of the named Plaintiffs in this case remain in the physical custody of DOC, they retain standing to assert the VRA violation at issue here. 42 U.S.C. § 1973a (aggrieved voters have standing to bring VRA claims); *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *Janis v. Nelson*, No. CR 09-5019-KES, 2009 U.S. Dist. LEXIS 109569 (D.S.D. Nov. 24, 2009) (ruling that Native American plaintiffs had standing to challenge denial of their right to vote under Section 2 of VRA despite county's voluntary act of placing their names back on voter registration rolls).

Logic also dictates that the same evidence that established a Section 2 violation under the former version of the statute also establishes a violation under the statute's current incarnation. The pervasive racial discrimination in Washington's criminal justice system, demonstrated by the evidence in this record, has not been eliminated by HB 1517. Under both regimes, a voting qualification "interacts with external factors" such as "racial bias in Washington's criminal justice system to deny minorities an equal opportunity to participate in the state's political process." *Farrakhan I*, 338 F.3d at 1012, 1014 (emphasis omitted). It

was race-based disparities in who enters Washington's criminal justice system and who is incarcerated by it that were established by this record. *See* discussion on page 4 above. The thousands of persons incarcerated by this system and on community custody even after the passage of HB 1517 are precisely the persons who are still denied their voting rights. Reasonable inferences from this evidence therefore support that African-American, Latino and Native American individuals are still adversely affected by the disfranchisement statute at significantly disproportionate levels, and there is still no race-neutral explanation for that racial disparity.

C. Remand Is The Appropriate Remedy If The Court Believes The Effect Of HB 1517 Is Relevant To The VRA Analysis.

Finally, if the En Banc Panel is inclined to reverse the Panel Majority's decision, the appropriate disposition is not to rule in Defendants' favor on the VRA claim but rather to remand this matter to the district court so that Plaintiffs can present additional evidence showing that the Washington disfranchisement statute violates Section 2 of the VRA *even after* HB 1517 was enacted. As the Panel Dissent notes, "It is not our job to consider, in the first instance, the effect this new law has on plaintiffs' case and whether the totality of the circumstances analysis under § 2 of the Voting Rights Act should be different …." *Farrakhan II*, 590 F.3d at 1018. The Panel Dissent agrees that the State is not entitled to summary judgment but urges a remand to consider the effect of HB 1517. Additionally, the Dissent notes, "As to Senate Factor 5 itself, significant factual issues remain." *Id.* at 1019.

Any factual issues and the inferences to be drawn from them should be addressed by the district court on remand. To prove the State's claim that the racial disparity shown in this record has been eliminated by HB 1517, or its claim that minorities have disproportionately benefitted in the restoration of their rights to vote under HB 1517, evidence would need to be gathered as to the number of felons who remain disenfranchised and the racial breakdown of that group of persons, then the new numbers would need to be subjected to a statistical analysis comparing the already-established racial disparities under the prior law to the new numbers. The analysis would need to consider that HB 1517 only "provisionally" restores voting rights to persons who have completed prison and community custody, and the restoration can be revoked for non-payment of legal financial obligations in some circumstances. *See* Supplemental Brief of Defendants filed May 29, 2009 at 2 (noting that provisional restoration of voting rights under HB 1517 can be revoked); *see also Stewart v. Blackwell*, 444 F.3d 843 (exemplifying comparative statistical analysis necessary for vote-denial claim under VRA results test). At the very least, Plaintiffs should be given the opportunity, before a final decision issues in this case, to rebut and test whatever evidence the State claims supports summary judgment after HB 1517. *See Levy v. Lexington Cnty., S.C.*, 589 F.3d 708, 714 n.8 (4th Cir. 2009) (ruling that subsequent evidence favorable to government in VRA case should be considered, but explaining that to "allow one side to supplement the record without allowing the opposing party the opportunity to contest the admissibility, reliability, and accuracy of the new evidence, and to offer rebuttal evidence, would implicate due process concerns").

CONCLUSION

Over the 14 years that this case has been litigated, extensive and compelling evidence has been presented showing that Washington's felon disenfranchisement law violates the VRA and perpetuates the illegal denial of the fundamental right to vote on the basis of race in this state. The evidence in this record, gathered before the passage of HB 1517 but still valid and compelling after its passage, confirms that Washington's felon disenfranchisement law imports racial discrimination from the criminal justice system into the political process. This is precisely the kind of "result" that Section 2 of the VRA was designed to eradicate. *See South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (recognizing Congress enacted VRA in 1965 with intent to "banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century"). As the Panel Majority correctly recognizes, "Section 2 of the VRA demands that such racial discrimination not spread to the ballot box." *Farrakhan II*, 590 F.3d at 1015. The Panel Majority's analysis is correct: both the law and the facts in this case justify summary judgment for Plaintiffs, and ACLU respectfully urges the En Banc Panel to rule accordingly. Alternatively, if the En Banc Panel believes more factual development is needed regarding the effect of HB 1517, a remand to the district court is the appropriate remedy.

Dated: June 11, 2010.

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CERTIFICATE OF COMPLIANCE

(Fed. R. App. P. 29(c)(5) and Circuit Rule 29-2(c)(3))

1. This brief complies with the type-volume limitation of Circuit Rule 29-2(c)(3) because this brief contains 3,614 words, excluding the parts of the brief exempted by Fed R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type style requirements of Fed R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2007 in 14-point Times New Roman font.

Dated: June 11, 2010.

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CERTIFICATE OF SERVICE

United States Court of Appeals Docket Number: No. 06-35669

I hereby certify that I electronically filed the foregoing BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PLAINTIFFS/APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 11, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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