No. 01-35032

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United States Court of Appeals
For the Ninth Circuit

MUHAMMAD SHABAZZ FARRAKHAN, *et al.*,

Plaintiffs-Appellants,

v.

GARY LOCKE, *et al.*,

Defendants-Appellees.

On Appeal From the United States District Court
for the Eastern District of Washington
District Court No. 96-CS-76
Honorable ROBERT H. WHALEY

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AND AT NEW YORK UNIVERSITY SCHOOL OF LAW AND THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICI CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS

Anita Hodgkiss
Lori Outzs Borgen
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave., NW, Suite 400
Washington, DC 20005-2124
(202) 662-8600

Nancy Northup
Jessie Allen
Gillian E. Metzger
Glenn J. Moramarco
BRENNAN CENTER FOR JUSTICE
at N.Y.U. School of Law
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(212) 998-6730

Attorneys for Amici Curiae

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important aspect of the work of the Committee. The Committee has provided legal representation to litigants in numerous voting rights cases throughout the nation over the last 35 years, including cases before the Supreme Court, *see, e.g., Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Lawyer v. Department of Justice*, 521 U.S. 567 (1997); *Young v. Fordice*, 520 U.S. 273 (1997); *United States v. Hays,* 515 U.S. 737 (1995); and *Chisom v. Roemer*, 500 U.S. 646 (1991). The issue of restoring voting rights to felons and former offenders is of particular interest to the Lawyers' Committee.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Under Washington's felon disenfranchisement scheme, one in four African American men have lost the right to vote. *See* J. Fellner & M. Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* 8 (Human Rights Watch & The Sentencing Project 1998). The disproportionate effect on the minority community is stark: While the laws challenged in this case currently disenfranchise some 3% of the state's total voting age population, the rate for African American men is 24%. *See* Christopher Uggen & Jeffrey Manza, *The Political Consequences of Felon Disfranchisement Laws in the United States,* app. 1 (2000).[1] As the District Court found, that racial disparity is attributable, in part, to discrimination in the criminal justice system. *See Farrakhan v. Locke*, No. CS-96-76-RHW, Order Granting Summ. J. at *8 (E.D. Wash. Dec. 1, 2000). In effect, the felon disenfranchisement provision transforms racial biases in the criminal justice system and the surrounding society into voter inequality.

That transformation has a potentially enormous impact on the ability of the affected minority communities to elect representatives of their choice. For instance, the outcome of the recent presidential contest might well have been

[1] Unpublished paper presented at the annual meeting of the American Sociological Association, on file with the authors and at the Brennan Center.

different but for felon disenfranchisement. In urban settings, where disenfranchised felons are concentrated, the impact on elections is likely much greater. *See* Uggen & Manza, *supra*, at 25. Thus Washington's disenfranchisement provision works like a lever to shift racial inequality from the surrounding social circumstances into the political process.

This is exactly the kind of discriminatory obstacle the Voting Rights Act of 1965 is meant to overturn. As Congress clarified with its 1982 amendments, the Act reaches beyond intentionally discriminatory voting schemes to deal with practices that have discriminatory results when judged in the "totality of circumstances." 42 U.S.C. § 1973. Yet, the District Court granted summary judgment to the State on the theory that the Plaintiffs could not establish that Washington's felon disenfranchisement provision, "by itself," had a discriminatory effect in violation of Section 2 of the Act.

Amici contend in Point I that the District Court fundamentally misunderstood the analysis that applies to a Voting Rights Act claim. Certainly the Plaintiffs must prove that the challenged voter qualification denies or abridges their right to vote *on account of race*. But the text of the amended Act and the case law interpreting it make clear that factors outside the election system can

contribute to a particular voting practice's disparate impact. When, in the totality of circumstances, the challenged provision interacts with discrimination in the surrounding social circumstances to limit minority access to the political process, it violates Section 2.

The District Court's theory of "by itself" causation would effectively read back into the Act a requirement of proving intentional discrimination. Unless applied with discriminatory animus, a facially race neutral voting qualification, like the one challenged here, can only cause a racially disparate impact when there are race-based differences in the surrounding social context. Without intentional discrimination, a race-neutral device will only deny the right to vote "on account of race" in combination with external discrimination.

The District Court's "by itself" causation analysis is also unsupported by existing precedent, including this Court's decision in *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586 (9th Cir. 1997). Other courts evaluating Section 2 claims look to see whether the disparate racial impact of challenged practices results from discrimination in the surrounding circumstances. That interactive analysis accords with the Voting Rights Act's focus on

discriminatory devices and their results, as opposed to individual liability for intentional discrimination.

In Point II, Amici contend that the District Court also erred when it suggested that finding Washington's felon disenfranchisement provision violated the Voting Rights Act would lead to an equal protection violation. Plaintiffs did not seek a ruling that the disenfranchisement and restoration laws are invalid only as applied to racial minorities. They asked the court to declare that the laws violate Section 2 and enjoin their enforcement altogether. This is the standard form of relief granted under the Act. It is also the relief that should result under a severability analysis. Since a voter qualification that applied only to one racial group would clearly violate the Equal Protection Clause, courts should presume that the challenged application to minorities is not severable and enjoin the qualification device entirely. Thus a finding that Washington's felon disenfranchisement laws deny minorities the right to vote should lead the Court to enjoin the laws in their application to everyone.

ARGUMENT

POINT I

THE DISTRICT COURT'S "BY ITSELF" CAUSATION TEST CONFLICTS WITH THE TOTALITY OF CIRCUMSTANCES ANALYSIS MANDATED IN VOTING RIGHTS ACT CASES.

Congress passed the Voting Rights Act "not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination." *Thornburg v. Gingles*, 478 U.S. 30, 44 n. 9 (1986) (quoting S. Rep. No. 417, 97th Cong. 2d Sess. (1982) at 5, U.S.C.C.A.N. (1982) at 182). A critical weapon in the attack on the effects of accumulated racial discrimination is Section 2 of the Act, which bars election practices that deny or abridge the right to vote "on account of race." *See* 42 U.S.C. § 1973.[2] In 1982, Congress amended Section 2 to clarify that "practices

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[2] In relevant part, Section 2 provides as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its

and procedures that *result* in the denial or abridgment of the right to vote are forbidden" even without proof of discriminatory intent. *Chisom v. Roemer*, 501 U.S. 380, 383 (1991).

The District Court below read the "results test" of Section 2 to require the Plaintiffs to demonstrate that Washington's felon disenfranchisement provision was either "motivated by racial animus or that its operation *by itself* has a discriminatory effect." *Farrakhan*, Order Granting Summ. J. at *6. Although concluding that Washington's felon disenfranchisement law had a significant disproportionate racial impact, the Court held that Plaintiffs failed to satisfy their causal burden because the cause of this inequality "is not the voting qualification; instead, the cause is bias external to the voting qualification," *id.* at *2-*3 – specifically, discrimination in the criminal justice system.

In so ruling, the District Court fundamentally misconceived the analysis for a Section 2 claim. Its demand that a challenged voter qualification by itself create the basis of disqualification on account of race creates a causal standard at odds with the plain language of the Act, its legislative history, judicial precedent

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> members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

interpreting the Act, and the social realities that all of these reflect. Contrary to the District Court's ruling, it is well established that Section 2's results test is satisfied when a challenged voting practice interacts with other circumstances in the jurisdiction to deny minority groups equal opportunity to participate in the political process.

A. A Section 2 Claim Must Be Analyzed by Considering How a Challenged Practice Interacts with Other Circumstances in the Jurisdiction to Cause Racial Discrimination in Voting.

1. A challenged voting requirement need not "by itself" cause racial discrimination to violate Section 2.

Under the applicable results test, a plaintiff "can prevail under Section 2 by demonstrating that a challenged election practice has resulted in the denial or abridgement of the right to vote based on color or race." *Chisom,* 501 U.S. at 394. To be sure, Section 2 is only violated by practices that deny or abridge the right to vote "on account of race." 42 U.S.C. § 1973. But it is clear that this "on account of race" requirement can be established by evidence showing that the interaction of the challenged practice with other circumstances in the jurisdiction causes minorities to lack equal opportunity to participate in the political process. As the Supreme Court stated in *Thornburg*, "[t]he essence of a [Section] 2 claim is that a certain electoral law, practice, or structure interacts with social and historical

conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." 478 U.S. at 47. Thus, whether a particular practice results in vote denial or vote dilution in violation of Section 2 always depends on the "totality of the circumstances" in which the practice operates.

The test for Section 2 liability is contextual. This contextual approach means that a challenged voting practice is never evaluated by itself, causally or otherwise. On the one hand, "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the [Section] 2 'results' inquiry," because plaintiffs must show that the totality of circumstances creates less opportunity to participate in the political process. *See Salt River*, 109 F.3d at 595. On the other hand, "[e]ven a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." S. Rep. 417, at 207 n. 117. Whether a voting practice works a prohibited racial inequality depends on how the practice interacts with the surrounding social conditions.

Aside from intentionally biased application, the basic question is whether a facially neutral voting device somehow turns existing discrimination into voter

disqualification or abridges the right to vote by impeding participation in the political process. Such an impediment to participation may come from any combination of the various "Senate factors," including, for instance, voting polarization and a history of official race discrimination, or from any other relevant social circumstances. *See Old Person v. Cooney*, 230 F.3d 1113, 1120, 1128-29 (9th Cir. 2000); *Gomez v. City of Watsonville*, 863 F.2d 1407, 1411-13 (9th Cir. 1988). Hence, the disparate impact of a practice and the background of official discrimination in the jurisdiction may combine to constitute sufficient circumstantial evidence that the practice works its disadvantage to minority voting strength "on account of race." *See, e.g., United States v. Marengo County Commission*, 731 F.2d 1546, 1574 (11th Cir. 1984)(overturning district court finding that voter "apathy" was responsible for lack of black electoral success and finding a Section 2 violation where evidence revealed, *inter alia*, racially polarized voting, a near complete absence of black elected officials, and a history of pervasive racial discrimination leaving blacks economically, educationally, socially, and politically disadvantaged); *Harris v. Graddick*, 593 F. Supp 128, 130 (M.D. Ala. 1984) (finding likelihood of success on a Section 2 claim that blacks were underrepresented among poll officials based on findings of a history of

pervasive official race discrimination "manifested . . . in practically every area of political, social, and economic life").

Demanding "by itself" causation would defeat the interactive and contextual totality of the circumstances analysis Congress put in place in Section 2, and deviate substantially from the analysis repeatedly used in Section 2 decisions. This point is well illustrated by the numerous vote dilution cases addressing whether at-large election systems dilute minority voting power in violation of Section 2. It is clear that at-large systems are not *per se* violative of the Act and do not necessarily deny minorities equal access to the political process. *See Thornburg*, 478 U.S. at 46. Nonetheless, these decisions establish that such systems will be found to violate the Voting Rights Act if they interact with racially polarized voting patterns to prevent a geographically cohesive minority group from electing candidates of its choice. *See, e.g.,Gomez*, 863 F.2d at 1419; *see also Thornburg*, 478 U.S. at 50, n. 17 (explaining that the requirements of geographic concentration and political cohesiveness insure that vote dilution is only found where it is "proximately caused by the districting plan")(internal quotations omitted).

The District Court's "by itself" causation standard also would effectively read an intent requirement back into the Act, in contradiction to the clear command of the 1982 amendments to Section 2. A facially neutral voting qualification can have a disproportionate impact on minority voters only if it is either administered in a discriminatory fashion or interacts with existing racial divisions and disparities to disadvantage minority voters. That is how disparate impact comes about. If there is no proof that the challenged qualification was adopted or maintained out of racial animus, its disproportionate effect on minority groups can only be "on account of race" through its connection to race discrimination "outside of the challenged voting mechanism." *Farrakhan*, Order Granting Summ. J. at *6.

2. Existing precedent does not support the District Court's insistence on "by itself" causation.

In demanding evidence of "by itself" causation, the District Court relied on this Court's statement in *Salt River* that "Section 2 plaintiffs must show a causal connection between the challenged voting practice and [a] prohibited discriminatory result." 109 F.3d at 595; *see Farrakhan*, Order Granting Summ. J. at *6, *8-*9. Neither *Salt River*, however, nor other opinions discussing

causation as an element of a Section 2 claim supports the District Court's approach.

In *Salt River* this Court actually applied a totality of the circumstances test that considered the interaction of the challenged voting qualification with numerous "external" factors to determine whether or not a Section 2 violation had been established. *Salt River* involved a challenge to an agricultural improvement district's criterion of land ownership for voting in district elections. *See* 109 F.3d at 588. The *Salt River* plaintiffs, African American residents who did not own real property, alleged that the land ownership requirement was a racially discriminatory voting qualification because land owners in the district were disproportionately white.

In analyzing this claim, this Court carefully considered the interaction of the challenged landowner qualification with the surrounding circumstances and expert testimony regarding the reasons for the underlying racial disparity. Crucially, it affirmed the lower court's finding of no causal connection between racial discrimination and the landowner qualification only after noting the finding that "the observed difference in rates of home ownership between non-Hispanic whites and African-Americans *is not substantially explained by race but is better*

explained by other factors independent of race."[3] 109 F.3d at 591 (emphasis added). In short, the *Salt River* Court did not exclude factors external to the voting qualification that helped to determine the qualification's disparate racial impact. Instead, it considered these factors but ultimately concluded that the differential land ownership rates did not reflect racial discrimination. In addition, the plaintiffs in *Salt River* apparently admitted that there was no evidence of discrimination as measured by nearly all of the Senate Factors, *id.* at 596, and stipulated to "the nonexistence of virtually every circumstance which might indicate that landowner-only voting results in racial discrimination." *Id.* at 595. Thus, it appears that almost the only evidence left supporting the Section 2 claim in *Salt River* was a bare statistical showing of disparate impact.

Given this context, *Salt River*'s statement regarding the need for evidence of a connection between a challenged practice and racial discrimination in voting in no way stands for the proposition that the practice must, "by itself," cause racial discrimination to exist. Indeed, if this Court had intended to apply such a standard, there would have been no need for it to consider whether land ownership

[3] The court considered information about home ownership as a proxy for information on landownership, as direct data on the factors affecting the latter were unavailable. 109 F.3d at 589.

rates reflected racial discrimination or assess other totality of the circumstances factors. As the text of *Salt River* makes clear, the decision's reference to causation simply attests to the fact that "a bare statistical showing of disproportionate impact does not satisfy the [Section] 2 'results' test"; instead, some relationship between the challenged practice and racial discrimination must be shown. *Id.* Under *Salt River* that relationship can be shown by proving that the disparate impact of the challenged practice results from the effects of discrimination in the surrounding social circumstances. In particular, the requisite link is established where the underlying status that triggers a voting qualification (land ownership in *Salt River*, or felony conviction here) itself reflects racial discrimination.[4]

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[4] The District Court also relied on *Burton v. City of Belle Glade*, 178 F.3d 1175 (11th Cir. 1999). That case involved a Section 2 challenge to a city's refusal to annex a black housing project into the city limits. *Belle Glade* is clearly distinguishable from this case from the outset, because the most significant factor driving the decision was the Eleventh Circuit's concern that ordering annexation would be an unprecedented and extreme judicial remedy. The court noted that it had been unable to find a single case of court ordered annexation. *Id.* at 1200. Here, however, the remedy necessitated by upholding the Plaintiffs' challenge, invalidating the challenged voting qualification, is typical Section 2 relief. Moreover, in the equal protection context, a felon disenfranchisement law has been overturned because of racial bias. *See Hunter v. Underwood*, 471 U.S. 222, 233 (1985). In any event, like this Court in *Salt River*, in *Belle Glade* the Eleventh Circuit undertook a totality of the circumstances analysis, finding that plaintiffs had failed to introduce any evidence of relevant Section 2 factors.

Other cases cited by this Court in *Salt River* for the proposition that a statistical showing of disparate impact alone is insufficient to support a Section 2 claim also follow the established totality of the circumstances approach. These courts conduct a searching, functionally-focused review of the facts to determine whether the challenged voting practice interacts with surrounding racial discrimination in a meaningful way or whether the practice's disparate impact "is better explained by other factors independent of race." *Id.* at 591; *see Ortiz v. City of Philadelphia*, 28 F.3d 306, 310-12, 315-17 (1994) (acknowledging that a challenged practice can violate Section 2 if it interacts with social and historical factors to deny minorities equal access to the political process but finding that the cause of disproportionately lowered Latino voting strength under Pennsylvania's voter purge law was not discrimination but low Latino voter turnout not attributable to "societal disadvantages"); *Salas v. Southwest Texas Junior College Dist.*, 964 F.2d 1542, 1555-56 (5th Cir. 1992) (holding that – in a district where Hispanics were a *majority* of registered voters – the ultimate cause of Hispanics' lack of electoral success was not the challenged at-large district but low Hispanic turnout and noting that "practical impediments to voting" are relevant in assessing

a Section 2 challenge);[5] *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1358 (4th Cir. 1990) (upholding an appointive scheme for selecting county school boards on the ground that racial disparities in the boards' memberships were explained by the fact that fewer blacks sought appointment); *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986) (making no reference to data indicating that race affects criminal conviction rates in concluding that a felon disenfranchisement banned voting by felons not because of race, "but rather because of their conscious decision to commit a criminal act").

Notably, courts have found violations of Section 2 where the disparate racial impact of challenged devices is attributable to the effects of official or private discrimination in the surrounding social circumstances. *See, e.g., Marengo County Comm'n*, 731 F.2d at, 1574 (holding that at-large county commission election system violated Section 2 and overturning as clearly erroneous lower

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[5]The conclusions in *Salas* and *Ortiz* that low voter turnout was not connected to societal discrimination are highly questionable. *See* 28 F.3d at 336 (Lewis, J., dissenting); *see also Windy Boy v. County of Big Horn*, 647 F. Supp. 1002, 1017 (D. Mont. 1986)(finding that despite comparable white and Indian registration rates, lower Indian turnout in recent elections showed "that effects of past discrimination still linger"). But the important point for purposes of this appeal is that these courts concluded that the requisite causal link was lacking *only* after having ruled out the interaction of external discrimination with the challenged voting device.

court's finding that voter "'apathy,' not the at-large election system, was responsible for the lack of black success at the polls," emphasizing "history of pervasive racial discrimination that has left Marengo County blacks economically, educationally, socially, and politically disadvantaged"); *Mississippi State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245, 1255-56, 1269 (N.D. Miss. 1987) (striking down Mississippi's dual registration requirements and restrictions on satellite registration after finding the challenged devices interacted with socioeconomic disparities between blacks and whites that were the lingering effects of official discrimination to make it more onerous for blacks to register), *aff'd sub nom. Mississippi State Chapter Operation PUSH, Inc. v. Mabus*, 932 F.2d 400 (5th Cir. 1991); *see also Gomez*, 863 F.2d at 1418-19 (criticizing district court's rejection of evidence of discrimination by state and private actors in assessing Section 2 challenge to city's at-large election system).

3. The District Court's "by itself" causation requirement reflects its failure to appreciate the Voting Rights Act's focus on discriminatory devices rather than discriminatory animus.

Oddly enough, in justifying its "by itself" causal requirement, the District Court drew an analogy that may actually help to show why no such requirement exists in the context of the Voting Rights Act. The Court likened the challenged

felon disenfranchisement provision to a criminal statute under which a minority defendant is prosecuted by a racially biased prosecutor. The resulting conviction might be due to discrimination, the court explained, but "that does not mean that the criminal statute causes the discriminatory result"; the statute is just a "vehicle" used by the racist district attorney, who is the real cause of the discriminatory outcome. *Farrakhan*, Order Granting Summ. J. at *9 n. 8. In other words, statutes do not discriminate, people do.

The flaw in the District Court's reasoning is its failure to recognize that the Act was created to eradicate the discriminatory devices, or vehicles, used to restrict minority political access. Moreover, in repudiating the need to prove discriminatory intent, Congress further moved the focus of the Act off the bad behavior of individuals or communities and onto the devices that stood between minority citizens and full political participation. As this Court has noted, "the 'results' test asks the right question – whether minorities have equal opportunity to participate in the political processes or to elect their chosen candidates *as a result of a challenged practice or structure*." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 557 (9th Cir. 1998) (emphasis added).

In a civil rights case concerned with assessing damages for individual discriminatory harms, it might make sense to require the sort of causal connection sought by the District Court. Unlike civil rights cases that seek to make individuals accountable for discrimination, however, the Voting Rights Act aims to restore the integrity of the democratic process against a background of historical race discrimination. To that end, it targets *mechanisms* that have racially discriminatory *results*. *See Belle Glade*, 178 F.3d at 1196 ("Section 2 'was designed as a means of eradicating voting practices that minimize or cancel out the voting strength and political effectiveness of minority groups.'") (quoting *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479 (1997)) (citation and additional internal quotation omitted). The fact that a voting practice would not accomplish its discriminatory impact without the presence of discrimination elsewhere in the surrounding society is not a reason to uphold the challenged practice. In short, the requirement of independent causation imposed by the District Court is completely out of place in the voting rights context.

B. Plaintiffs Here Have Offered Evidence that, Considered in the Totality of Circumstances Goes to Show that Washington's Felon Disenfranchisement Provision Violates Section 2.

Had the District Court followed the standard totality of the circumstances analysis and not applied its novel "by itself" causation standard, the Plaintiffs' evidence would have survived summary judgment. As the Plaintiffs emphasize, the District Court's factual findings here are significant. The Court found that Washington's felon disenfranchisement provision has a disparate impact on minorities, concluding that the provision "disenfranchises a disproportionate number of minorities; as a result, minorities are under-represented in Washington's political process." *Farrakhan*, Order Granting Summ. J. at *2. Moreover, it recognized that the disparate racial impact of the provision was the result of discrimination, as indicated by the further finding that "Plaintiffs' evidence of discrimination in the criminal justice system, and the *resulting* disproportionate impact on minority voting power, is compelling." *Id.* at *8 (emphasis added).

These findings represent the type of racial discrimination found sufficient to support Section 2 claims in other cases, such as *PUSH* and *Marengo*. While the District Court found no evidence of historical discrimination underlying the

challenged provision or in regard to the voting rights of minorities generally, the Court credited the Plaintiffs' evidence that racial disparities in the status triggering the challenged voter qualification resulted from race bias. Such evidence is hardly irrelevant to the totality of the circumstances inquiry. In fact, the Court's conclusion that race bias in the criminal justice system accounts for the disparate impact of the felon disenfranchisement provision is precisely the sort of proof this Court found lacking in *Salt River*.

Of course, the totality of circumstances inquiry requires a court to balance factors indicating that a challenged practice limits political participation on account of race with evidence suggesting more innocuous explanations. As noted above, substantial evidence of a non-racial explanation for a voting practice's disparate racial impact can suffice to defeat a claim of a Section 2 violation. For instance, in *Salt River* this Court noted an expert finding that while rates of home ownership were not well explained by race, the "largest net effect on home ownership" was "persons per dwelling." 109 F.3d at 590. Hence, the District Court's strong findings regarding the interaction between discrimination in the criminal justice system and Washington's felon disenfranchisement provision do

not necessarily make out a violation of Section 2, regardless of the extent to which other Section 2 factors are present.

The District Court, however, gave no weight to its findings of interaction between the felon disenfranchisement law and discrimination in the criminal justice system. Its failure to take adequate account of these findings is clear from its startling assertion that "[e]ven if Plaintiffs established that the disproportionate representation of minorities in the criminal justice system was due to discriminatory animus on the part of prosecutors and judicial officials, this would not establish a causal connection between the voting qualification and the prohibited result in this case." *Farrakhan*, Order Granting Summ. J. at *9. Only by applying its erroneous "by itself" causation standard could the District Court have come to this conclusion. For if such evidence of intentional discrimination were indeed irrelevant, Section 2 would be powerless as a means of ensuring that discrimination in other realms did not deny minority groups equal access to the political process.

In this case, whether its findings regarding discrimination in the criminal justice system would be sufficient to support a Section 2 violation under the appropriate totality of circumstances analysis is a determination for the District

Court to make in the first instance. Given its failure to undertake the appropriate analysis below, Amici ask this Court to reverse and remand the case to provide the District Court with an opportunity to do so.

POINT II

THE DISTRICT COURT ALSO ERRED IN SUGGESTING THAT HOLDING WASHINGTON'S FELON DISENFRANCHISEMENT LAWS TO VIOLATE SECTION 2 WOULD CONFLICT WITH THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

At the outset of its discussion of the merits, the District Court held that if it "ultimately concluded that Washington's provision was invalid with respect to racial minorities, then only white felons could be disenfranchised so long as racial bias existed in the criminal justice system." *Id.* at *4. It found that this "would obviously create an Equal Protection problem" and that it was "compelled to read the [Act] in a manner that does not lead to the conclusion Plaintiffs urge." *Id.*

The District Court's holding is both a misstatement of the relief sought by the Plaintiffs and a misapplication of the Voting Rights Act. The extent to which this ruling affected the Court's analysis is unclear, given its additional conclusion that the Plaintiffs had failed to establish the "by itself" causal link it viewed as necessary to sustain a Section 2 violation. However, since the District Court's error in applying such a causal requirement merits reversal, it is also important to

underscore that its concern regarding a potential conflict between remedying a Voting Rights Act violation and the dictates of the Equal Protection Clause is similarly misplaced.

The Plaintiffs in this case did not seek a holding that Washington's felon disenfranchisement laws are invalid only with respect to racial minorities. Rather, they asked the Court to declare that these laws violate Section 2 of the Act and to enjoin the laws' enforcement against all convicted felons.[6] This is the standard form of relief granted where unlawful racial discrimination is established – elimination of the challenged practice as to every applicable party – and it is the relief sought in cases such as this challenging felon disenfranchisement laws. For example, in *Hunter v. Underwood*, 471 U.S. 222 (1985), the Supreme Court concluded that the "original enactment" of Alabama's broad criminal disenfranchisement law was "motivated by a desire to discriminate against blacks

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[6] Specifically, their Request for Relief asked:

> For the Court to issue a permanent and preliminary injunction preventing defendants and each of them, their officers, agents, employees, and successors in office and all people in active concert or participation with them from enforcing Article 6 sec. 3 of the Washington State Constitution or otherwise preventing convicted felons from voting or registering to vote on the basis of their felony convictions.

(Plaintiffs' Fourth Amended Compl., Request for Relief, ¶ 5, at 12-13.)

on account of race and the section continues to this day to have that effect," and thus, it violated equal protection. *Id.* at 233. Having concluded that there was a constitutional violation due to racial discrimination, the Court affirmed the Eleventh Circuit's decision to strike down the law as to all voters, not just those who are black.

Consistent with the basic tenets of equal protection, where the Supreme Court has found that a voting practice violates the Voting Rights Act because of its discriminatory impact, the Court has struck down the challenged practice for all voters, not only those who suffered the disparate treatment. From the beginning, the Act has been applied in a manner that results in the complete elimination of a voting practice that is found to have a discriminatory impact on minorities. In many Voting Rights Act cases, striking down a provision in its entirety could be seen as a practical necessity in order to remedy the harm to minority voters – for example, an at-large election system cannot be maintained for white voters without affecting black voters as well. But even where drawing a distinction between black and white voters is technically feasible – as when a voting qualification such as a literacy test is challenged as denying minorities the right to vote – courts finding a Voting Rights Act violation have enjoined the challenged

voting practice in all of its applications. Thus, in *Gaston County v. United States*, 395 U.S. 285 (1969), county officials sought to reinstate a literacy requirement to register to vote. The Court concluded that the use of such a test would have a discriminatory effect on black voters in light of discrimination in the North Carolina educational system. *See id.*, at 295-96. The Court did not allow the use of a literacy test for white voters only, but instead denied the request to use such a test for any voter. *See id.*, at 288, 297; *see also South Carolina v. Katzenbach*, 383 U.S. 301, 319, 333-34 (1966) (upholding Voting Rights Act prohibition on literacy tests, which is not limited to prohibiting imposition of such tests on minority voters); *Mississippi State Chapter, Operation PUSH*, 674 F. Supp. at 1268 (holding that Mississippi's dual registration and satellite voting restrictions violated Section 2 because of the burdens they imposed on minorities, without suggesting that these restrictions could be applied to white voters).

In these cases, because the disputed practice had a disparate impact on the rights of black voters, the practice could not be applied to any voter. Nor is the explanation for this approach of invalidating a voting practice found to violate the Act *in toto* difficult to discern. To do otherwise would, as the District Court

noted, create an equal protection problem and render the Act unenforceable in every instance.[7]

The same conclusion results if the question of what relief should be granted is approached under standard severability analysis. When a court upholds a challenge to a law, the general practice is for it to determine whether the invalid provision – or, as in this case, invalid application – can be severed from the scope of the law. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) ("'[A] court should refrain from invalidating more of the statute than is necessary. . . . Whenever an act . . . contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court . . . to maintain the act in so far as it is valid.'") (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)); *see generally* R. Fallon *et al.*, Hart and Wechsler's The Federal Courts and the Federal System 197-99 (4th ed. 1996). In assessing severability, the key consideration is whether the statute created when an invalid

[7] In addition to violating the Equal Protection Clause, a law that facially distinguished between whites and minorities with regard to voting qualifications would run afoul of the Fifteenth Amendment. *See United States v. Reese*, 92 U.S. 214, 217-18 (1875) (under the Fifteenth Amendment "[i]f citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be").

provision is severed is one the legislature would not have enacted, *see Alaska Airlines*, 480 U.S. at 684-85, and courts presume that – absent plain language or evidence to the contrary – legislatures do not intend to enact unconstitutional laws, *see, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Hence, since invalidating a challenged voting provision under Section 2 only as applied to minorities would render the law unconstitutional, courts instead legitimately presume that the challenged application is not severable and enjoin the voting practice in its entirety.

The Plaintiffs here sought to overturn the disenfranchisement of all convicted felons because under Washington's disenfranchisement and restoration scheme racial minority groups have less opportunity than whites to participate in the political process, in violation of the Voting Rights Act. The injunction they requested would apply to anyone disenfranchised through the challenged provisions, and no equal protection violation would result. In the absence of a constitutional conflict, the Court is required to interpret the Voting Rights Act in a manner which will protect the right to vote of all Americans.

CONCLUSION

For the foregoing reasons, the District Court's decision granting summary judgment to the Defendants-Appellees should be reversed and this case remanded to the District Court.

Dated: April 26, 2001

By: 

Anita Hodgkiss
Lori Outzs Borgen
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Ave., NW, Suite 400
Washington, DC 20005-2124
(202) 662-8600

Nancy Northup
Jessie Allen
Gillian E. Metzger
Glenn J. Moramarco
BRENNAN CENTER FOR JUSTICE
at N.Y.U. School of Law
161 Avenue of the Americas, 12th
Floor New York, NY 10013
(212) 998-6730

Attorneys for Amici Curiae

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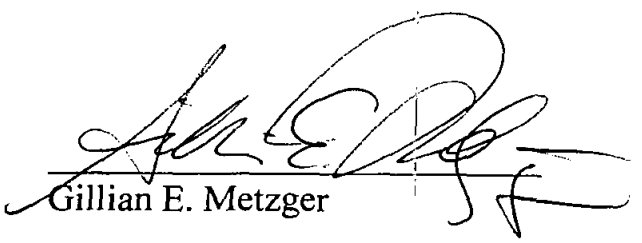
The undersigned hereby certifies that she served two true and correct copies of the foregoing Brief of *Amici Curiae* in Support of Plaintiffs-Appellants by ordinary mail, this 26th of April 2001, addressed to:

Daniel Judge
Attorney General's Office, Torts Division
629 Woodland Sq. Loop, S.E.
P.O. Box 40126
Olympia, WA 98504-0126

Nancy Talner
American Civil Liberties Union of Washington
705 Second Ave., #300
Seattle, WA 98104

Jeffrey Even
Attorney General's Office
General Legal Services
P.O. Box 40100
Olympia, WA 98504-0100

Larry Weiser
Jason Vail
University Legal Assistance
721 North Cincinnati - P.O. Box 3528
Spokane, WA 99220-3528



Gillian E. Metzger