# No. 06-35669

# United States Court of Appeals for the Ninth Circuit

MUHAMMAD SHABAZZ FARRAKHAN, A/K/A ERNEST S. WALKER-BEY; AL-KAREEM SHADEED; MARCUS PRICE; RAMON BARRIENTES; TIMOTHY SCHAAF; AND CLIFTON BRICENO,

*Plaintiffs-Appellants,*

— v. —

CHRISTINE O. GREGOIRE, GOVERNOR OF THE STATE OF WASHINGTON; SAM REED, SECRETARY OF STATE FOR THE STATE OF WASHINGTON; HAROLD W. CLARKE, DIRECTOR OF THE WASHINGTON DEPARTMENT OF CORRECTIONS; AND THE STATE OF WASHINGTON,

*Defendants-Appellees.*

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 PLAINTIFFS-APPELLANTS IN OPPOSITION TO REHEARING *EN BANC***

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiffs-Appellants, the University Legal Assistance at Gonzaga Law School and the NAACP Legal Defense and Educational Fund, Inc., by and through undersigned counsel, hereby certify that Counsel for Plaintiffs-Appellants are neither subsidiaries nor affiliates of a publicly owned corporation.

Dated this 5th day of March, 2010.

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Plaintiffs Muhammad Shabazz Farrakhan, Al-Kareem Shadeed, Marcus Price, Ramon Barrientes, Timothy Schaaf, and Clifton Briceno (collectively, "Plaintiffs") submit this brief pursuant to the Court's order, dated February 12, 2010, directing the parties to set forth their respective positions on whether this case should be reheard *en banc*.

## SUMMARY OF ARGUMENT

Six years ago, this Court declined to consider this matter *en banc*. *See Farrakhan v. Washington*, 359 F.3d 1116 (9th Cir. 2004). Nothing has changed that would warrant a different decision today. Under Federal Rule of Appellate Procedure 35(a), *en banc* review "is not favored and ordinarily will not be ordered unless: (1) [it] is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." As was the case six years ago, neither circumstance applies.

First, Rule 35(a)(1) is inapplicable, as there is no lack of uniformity amongst the decisions of this Circuit. In an opinion consistent with the case law of this Circuit, the three-judge panel of this Court properly reversed the district court's denial of summary judgment for Plaintiffs in light of the finding that Plaintiffs had demonstrated "compelling" evidence that racial disparities at every stage of Washington State's criminal justice system—from arrest to charging to sentencing and incarceration—are reflective of racial discrimination, not the extent to which

racial minorities actually participate in criminal activity. *See Farrakhan v. Gregoire*, 590 F.3d 989, 994-95, 1004 (9th Cir. 2010) ("*Farrakhan II*"). As a result of the interaction of racial discrimination in the criminal justice system with Washington State's felon disfranchisement scheme, Blacks, Latinos and Native Americans are disproportionately denied access to the one right that is the foundation of all others: the right to vote. Nearly one-quarter—an incredible 24%—of all Black men in Washington, and nearly 15% of the entire Black population in the State are disfranchised.

As the panel recognized, this racially discriminatory result is precisely what Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973 (the "VRA"), was enacted to proscribe. This Circuit's decision in *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003) ("*Farrakhan I*") made clear that a Section 2 violation can be established by evidence that 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." 338 F.3d at 1012, 1014. Thus, in light of the record, the panel's ruling was compelled by the holding in *Farrakhan I*, and this consistency between the court's decisions renders rehearing *en banc* unnecessary.

Second, although this case involves important issues, this Court has already declined to consider this matter *en banc* under Rule 35(a)(2). *Farrakhan*,

*Washington*, 359 F.3d 1116 (9th Cir. 2004). Moreover, the Supreme Court agreed and declined to grant certiorari. *Locke v. Farrakhan*, 543 U.S. 984 (2004). Here, after six years of additional litigation and substantial discovery, the legal question remains the same—whether Section 2 of the VRA can reach felon disfranchisement laws There is no reason for this Court to revisit the same question that it previously declined to reconsider *en banc*. In sum, neither of the conditions for rehearing *en banc* under Rule 35(a) favors consideration of this matter before the *en banc* court.

## ARGUMENT

### I. *EN BANC* CONSIDERATION IS UNWARRANTED UNDER RULE 35(A)(1) BECAUSE THE PANEL'S OPINION WAS CONSISTENT WITH PRIOR DECISIONS OF THIS CIRCUIT

There is no absence of "uniformity of the court's decisions" that favors rehearing *en banc* under Fed. R. App. P. 35(a)(1). The panel's decision was entirely consistent with *Farrakhan I*'s holding that a violation of Section 2 of the Voting Rights Act may be established by evidence showing that "social and historical conditions"—namely, discrimination in Washington's criminal justice system—"interact[]" with a voting qualification to result in the denial of the right to vote on account of race or color. 338 F.3d at 1012, 1014. The panel's decision is also consistent with *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997), which held that a "bare statistical

showing" of disparate impact is insufficient to state a claim under Section 2 of the VRA. Unlike the plaintiffs in *Salt River*, Plaintiffs in this case presented compelling, and notably, *uncontested* evidence of racial discrimination impacting the right to vote in Washington State.

### A. The Panel Correctly Determined that Summary Judgment Favor of Plaintiffs Was Required, Because Plaintiffs Presented Uncontroverted Evidence that Pervasive Racial Discrimination in Washington's Criminal Justice System Resulted in Denial of the Right to Vote on Account of Race

The panel's grant of summary judgment for Plaintiffs was based on the district court's conclusion that Plaintiffs submitted "compelling evidence of racial discrimination and bias in Washington's criminal justice system." *Farrakhan v. Gregoire*, No. CV-96-076-RHW, 2006 WL 1889273 at *6 (E.D.Wash. July 7, 2006). As the panel noted, Plaintiffs' evidence showed substantial racial disparities throughout Washington's criminal justice system "beyond what can be explained by non-racial means." *Farrakhan II*, 590 F.3d at 1009. Specifically, the panel noted that Plaintiffs' evidence showed disparities with respect to, *inter alia*:

- **Searches.** Minorities are much more likely to be subject to traffic stops searches than are whites, despite the fact that searches of whites more frequently led to the seizure of contraband.

- **Charging and Bail.** Whites who are arrested are less likely to have charges filed against them than are minorities, and are more likely to be released on their own recognizance. These disparities persist even after taking into account legally relevant factors such as seriousness of the offenses, offenders' criminal history, and ties to the community.

- **Length of Confinement.** Prosecutors recommend that, for the same crime, Blacks spend approximately *half of a day more* for each day a white defendant is recommended to be confined to prison. In addition, Blacks are 75% less likely than whites to be recommended for an alternative sentence.

- **Incarceration**. African Americans are 9 times more likely to be imprisoned than whites. More than one-half of this discrepancy cannot be explained by levels of criminal involvement, as Blacks are arrested for violent offenses approximately only 3.72 times as often as whites.

*Id.* at 1009-10. This evidence, which the district court found to be "compelling . . . admissible, relevant, and persuasive," was uncontested by Defendants, amounting to a concession that racial discrimination prevails throughout the state's criminal justice system. *Farrakhan*, 2006 WL 1889273 at *6 ("Significantly, Defendants d[id] not present any evidence to refute Plaintiffs' experts' conclusions.") [1]

Thus, the district court concluded that it "ha[d] no doubt that members of racial minorities have experienced discrimination in Washington's criminal justice system," *id.* at *9, and that such discrimination "'clearly hinder[s] the ability of racial minorities to participate effectively in the political process,'" *id.* at *6 (quoting *Farrakhan I*, 338 F.3d at 1020). Given that conclusion, the panel correctly held that the district court erred in denying summary judgment to

1 Indeed, at oral argument before the panel, counsel for Washington State argued that even if 15 percent of Blacks are disqualified from voting on account of race, 85 percent are not: "you still have … 85% of the members of the minority group at issue that have the ability to elect representatives of their choice." Tr. of Oral Argument at 13, *Farrakhan II*, 590 F.3d 989 (9th Cir. 2010).

plaintiffs, as "Section 2 of the VRA demands that such racial discrimination not spread to the ballot box." *Farrakhan II*, 590 F.3d at 1015.[2]

This ruling was consistent with, and indeed compelled by prior decisions of this Circuit. *Farrakhan I* held that a Section 2 "'totality of circumstances' inquiry requires courts to consider how a challenged voting practice *interacts with* external factors such as 'social and historical conditions' to result in denial of the right to vote on account of race or color." *Farrakhan I*, 338 F.3d at 1011-12 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)). In the felon disfranchisement context, "evidence of discrimination within the criminal justice system can be relevant to a Section 2 analysis." *Id.* at 1012.

Thus, under *Farrakhan I*, a court must "consider the way in which the disenfranchisement law interacts with racial bias in Washington's criminal justice system to deny minorities an equal opportunity to participate in the state's political process." *Id.* at 1014. Failing to consider such "external factors," the court noted, would "effectively read an intent requirement back into the VRA, in direct

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2 Notwithstanding the dissent's suggestion to the contrary, *Farrakhan II*, 590 F.3d at 1019 (McKeown, J., dissenting), the panel did not fail to view the evidence in the light most favorable to the nonmovants. Rather, the panel recognized that the district court's characterization of Plaintiffs' evidence was compelled by the fact that this evidence went unchallenged by Defendants, leaving no genuine dispute as to any material facts. *Farrakhan II*, 590 F.3d at 1014 (observing that defendants were "required to 'do more than simply show that there is some metaphysical doubt as to the material facts'") (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)).

contradiction of the clear command of the 1982 Amendments to Section 2 [of the VRA]." *Id*. at 1019. As Plaintiff's undisputed evidence here showed widespread and severe racial discrimination throughout Washington's criminal justice system, the panel correctly concluded that Washington's felon disfranchisement scheme imports this racial discrimination into the political process, resulting in the denial of the vote on the basis of race in violation of Section 2.

This result is also consistent with *Salt River*. There, in rejecting a challenge to a voter qualification based on real property ownership, the court held that, by itself, a "bare statistical showing" that a challenged voting requirement has a disparate impact on minorities is insufficient to state a claim under Section 2. *Salt River*, 109 F.3d at 595. Notably, while plaintiffs in *Salt River* did not claim that statistical differences in property-owning rates were attributable to racial discrimination, "the facts in *Salt River* … [a]re distinguishable from those present here." *Farrakhan*, 2006 WL 1889273 at *6 n.7. Plaintiffs in this case "vigorously assert the statistical disparity and disproportionality evident in Washington's criminal justice system arise from and result in discrimination, and they submit expert reports that substantiate this assertion." *Id.* Thus, Plaintiffs' evidence is not of "'statistical disparity alone' but rather speak[s] to a durable, sustained difference in treatment faced by minorities in Washington's criminal justice system – systemic disparities which cannot be explained by 'factors independent of race,'"

and, equally crucially, "the State has failed to refute that showing." *Farrakhan II*, 590 F.3d at 1012.

"*Salt River* simply held that there must be a causal connection between a voting requirement and a discriminatory result." *United States v. Blaine County*, 363 F.3d 897, 912 n.21 (9th Cir. 2004). Plaintiffs have sufficiently established such a causal connection here. *See Farrakhan I*, 338 F.3d at 1019 ("a causal connection may be shown where the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances."). Notably, although one member of the panel dissented from the decision to remand with instructions to grant summary judgment to Plaintiffs, the dissent did not question the panel's decision to reverse the district court's grant of summary judgment for Defendants, nor did the dissent assert that the panel's decision was inconsistent with *Farrakhan I* or *Salt River*. Rather, the dissent only argued that remand for further findings would be appropriate in light of recent changes in Washington law. *See Farrakhan II*, 590 F.3d at 1018 (McKeown, J., dissenting). Accordingly, no member of the panel found that the uniformity of this Circuit's decisions was disturbed, requiring this Court to rehear this matter *en banc* under Rule 35(a)(1).

### B. The Panel Correctly Determined that Plaintiffs Were Not Required to Submit Proof of Senate Factors that Are Not Relevant to Their Vote Denial Claim

Notwithstanding its determination that "there is discrimination in Washington's criminal justice system on account of race," and that this discrimination "'clearly hinder[s] the ability of racial minorities to participate effectively in the political process,'" *see Farrakhan*, 2006 WL 1889273, at *6 (quoting *Farrakhan I*, 338 F.3d at 1020), the district court nevertheless concluded that Washington's felon disfranchisement scheme does not violate Section 2 of the VRA, based on the fact that Plaintiffs had failed to submit evidence of certain "Senate Factors," such as the history of official discrimination in Washington. The panel correctly reversed the district court, holding that "not all of the Senate Factors were equally relevant, or even necessary" to sustain a Section 2 claim, but rather that particular factors will be of different relevance in different cases. *Farrakhan II*, 590 F.3d at 1004.

#### 1. Evidence Concerning Each Senate Factor is Unnecessary to Prove a Section 2 Violation.

As the panel observed, the Senate Report on the 1982 amendments to the Voting Rights Act included a list of nine "'typical factors' [or 'Senate Factors'] that courts might consider in determining whether, under the totality of the circumstances, a challenged voting practice 'results in' the denial or abridgement of the right to vote on account of race." *Farrakhan II*, 590 F.3d at 998. In setting

forth these particular factors, however, "Congress did not intend this list 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). As the court recognized in *Gomez v. City of Watsonville*, 863 F.2d 1407, 1412 (9th Cir. 1988), 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." Thus, "the range of factors that [are] relevant in any given case will vary depending on the nature of the claim and the facts of the case," *id.*

Here, the panel correctly ruled that Plaintiffs' undisputed and "compelling" evidence concerning Senate Factor 5—demonstrating severe racial discrimination throughout Washington's criminal justice system—was sufficient to establish a Section 2 violation, and that Plaintiffs were not required to establish the presence of other Senate Factors in order to prove their claim.

### 2. A History of Official Discrimination in the Area of Voting is Not a Prerequisite to a Section 2 Claim

The panel correctly ruled that "the district court erred in placing near-dispositive weight on Senate Factor 1 ([the] extent of any history of official discrimination in the state in the area of voting)." *Farrakhan II*, 590 F.3d at 1007 (internal quotation marks omitted). In granting summary judgment for Defendants, the district court held that the "remarkable absence of any history of official

discrimination in Washington" had the effect of "counterbalanc[ing] the contemporary effects that result from the day-to-day functioning of Washington's criminal justice system." *Farrakhan*, 2006 WL 1889273 at **8-9. In reversing the district court, the panel reasoned that although evidence of Factor 1 "may be *supportive* of a § 2 vote denial claim . . . proving Factor 1 is not necessary to succeed on such a challenge," *Farrakhan II*, 590 F.3d at 1007. Indeed, courts, including this one, have routinely found Section 2 violations without a showing of a history of discrimination, or without even considering a jurisdiction's history. *See Gomez*, 863 F.2d at 1419 ("even without such a showing, plaintiffs have clearly established a violation of Section 2"); *Clark v. Calhoun County*, 88 F.3d 1393, 1399 (5th Cir. 1996). *See also* Br. for Pls.-Appellants, *Farrakhan v. Gregoire*, 590 F.3d 989 (9th Cir. 2010) (No. 06-35669), at 31-32 (listing cases).

### 3. Certain Senate Factors Germane to a Vote Dilution Claim are Not Relevant to Plaintiffs' Claim of Vote Denial

The panel also correctly rejected the district court's analysis with respect to Senate Factors 7 (the extent to which members of minority groups have been elected to public office) and 8 (the responsiveness of elected officials to minority concerns). The district court recognized that not all Senate Factors are relevant to every Section 2 claim, *see Farrakhan*, 2006 WL 1889273 at *8 ("Admittedly, several of these factors are not relevant in a VRA vote denial claim"), and yet incorrectly ruled that the absence of evidence concerning Senate Factors 7 and 8

weighed against Plaintiffs' claim. The panel appropriately reversed that determination, ruling that these factors "simply ha[ve] no bearing on the question whether minorities are being denied to vote 'on account of race.'" *Farrakhan II*, 590 F.3d at 1006.

As the panel correctly explained, Senate Factors 7 and 8 are relevant to claims concerning minority vote *dilution*, but not to Plaintiffs' claim in this case, which is a claim for vote *denial*. As in this case, plaintiffs bringing a claim for vote denial allege that they have been denied the ability to cast ballots. This is in contrast to plaintiffs bringing a claim of vote dilution, who are permitted to vote but allege that the effectiveness of their votes has been minimized.[3] Thus, while a vote dilution claim relies on circumstantial evidence of minority voting power, such as whether minority candidates for office have been successful (Factor 7) or whether elected officials have been responsive to the concerns of minority communities (Factor 8), "[a] court does not need to rely on such circumstantial evidence . . . when there is direct evidence that an electoral process has the result of disproportionately denying minority votes." *Farrakhan II*, 590 F.3d at 1007

3 Although the dissent notes that academic literature on felon disfranchisement sometimes discusses the dilutive effects of such laws, *see Farrakhan II*, 590 F.3d at 1018-19 (McKeown, J., dissenting), a claim for vote dilution is not at issue on this appeal, and has not been pursued by Plaintiffs for the past decade of this litigation. *See Farrakhan v. Locke*, 987 F. Supp. 1304, 1313 (E.D.Wash. 1997) (dismissing Plaintiffs' vote dilution claim). Plaintiffs cannot be required to prove factors that are only relevant to a claim that has already been dismissed and which they no longer press.

n.27, 1008 (quoting Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 721 (2006)).[4]

### C. The Panel Correctly Determined that Recent Amendments to Washington's Felon Disfranchisement Laws Do Not Alter the Section 2 Analysis

As the panel noted, Washington State recently amended its felon disfranchisement laws to provide that "the right to vote is provisionally restored" upon release from physical custody and from "supervision" by the State Department of Corrections. Wash. Laws of 2009, ch. 325, HB 1517 § 1 ("HB 1517"). As an initial matter, and as the panel recognized, this change in law has no effect on five of the six Plaintiffs, who remain disfranchised, and whose claims are not mooted by the enactment of HB 1517. But more broadly, this change in law does not in any way alter the conclusion that the interaction of racial discrimination

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4 The district court's analysis rests on the misconception that Section 2 of the Voting Rights Act protects only the voting power of minority *groups*, rather than the right of *individual voters* to exercise the franchise free from racial discrimination. *See Farrakhan*, 2006 WL 1889273, at *9 ("If the denial or abridgement of *one citizen's* right to vote 'on account of race or color' established a violation of Section 2 of the VRA, this Court would find for Plaintiffs in this matter"). Contrary to the district court's suggestion, however, the denial of even a single person's right to vote on account of race would amount to a violation of Section 2. *See* 42 U.S.C. 1973(a) (prohibiting the "denial or abridgement of the right of *any citizen* of the United States to vote on account of race or color") (emphasis added); *cf. Shaw v. Hunt*, 517 U.S. 899, 917 (1996) (rejecting the argument "that a [Section 2] claim . . . belongs to the minority as a group and not to its individual members. It does not.").

in Washington's criminal justice system with its felon disfranchisement laws hinders the ability of minorities to participate in the political process.

Indeed, despite the dissents' characterization of this new law as a "game changer," *Farrakhan II*, 590 F.3d at 1017 (McKeown, J., dissenting), Defendants have not attempted to quantify the effect of this change in law, nor have they argued that, for purposes of analyzing Washington's felon disfranchisement laws under Section 2, there are material differences between felons who are currently serving their sentences and those who are no longer under the "supervision"[5] of the State. *See id.* at 996 n.9.

Thus, although HB 1517 may "provisionally" restore voting rights at an earlier date than had been possible under the previous regime, the panel correctly determined that the new law "does not protect minorities from being denied the

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5 The dissent overestimates the effect of this change in law, perhaps by mistakenly assuming that it provides for restoration of voting rights upon the end of incarceration. *Farrakhan II*, 590 F.3d at 1017 (McKeown, J., dissenting) ("we are left to consider the Voting Rights Act challenge of only those felons still serving their prison terms"). Revised Code of Washington 29A.08.520 (2009), however, clearly states that "the right to vote is provisionally restored as long as the person is not under the *authority* of the department of corrections" (emphasis added). Washington's felon disfranchisement laws, therefore, continue to have full effect on individuals who are no longer incarcerated but who remain under the authority of the department of corrections, such as individuals who are on parole or probation. Moreover, as the panel majority noted, the restoration effected by HB 1517 is "provisional" only, and does not entail permanent restoration of voting rights. *Farrakhan II*, 590 F.3d at 1016 n.31.

right to vote upon conviction by a criminal justice system that Plaintiffs have demonstrated is materially tainted by discrimination and bias." *Id.*

## II. THIS COURT HAS ALREADY REFUSED TO CONSIDER THIS CASE *EN BANC* UNDER RULE 35(A)(2)

Under Fed. R. App. P. 35(a)(2), rehearing *en banc* may be ordered for questions of exceptional importance. But while the question of whether the VRA is applicable to Washington State's felon disfranchisement laws is an important one, it was no less important six years ago when a majority of the active judges of this Circuit declined to reconsider *Farrakhan I.* *Farrakhan*, 359 F.3d 1116 (9th Cir. 2004). Moreover, the Supreme Court, in denying certiorari, permitted this decision to remain in place. *Locke v. Farrakhan*, 543 U.S. 984 (2004).

It would not make sense to revisit that decision today. *Farrakhan I* remanded this litigation to the district court "to make any requisite factual findings following an appropriate evidentiary hearing . . . and assess the totality of the circumstances, including Plaintiffs' evidence of racial bias in Washington's criminal justice system." *Farrakhan I*, 338 F.3d at 1020. Six more years of litigation ensued, including additional, extensive discovery. *See Farrakhan II*, 590 F.3d at 994. *En banc* consideration is always disfavored under Fed. R. App. P. 35(a) and is rarely granted in this Circuit. *See Carver v. Lehman*, 558 F.3d 869, 879 n.20 (9th Cir. 2009). This Court should not reconsider the legal premise

underlying the last six years of litigation in this case. Such a decision, among other things, would not be a good use of judicial resources.[6]

6 Notably, the dissent did not question the correctness of *Farrakhan I*'s holding. *Farrakhan II*, 590 F.3d at 1016 (McKeown, J., dissenting) ("I do not dispute the continuing validity of *Farrakhan I*"). As the panel in *Farrakhan I* observed, the plain text of Section 2 encompasses felon disfranchisement laws: "[f]elon disenfranchisement is a voting qualification, and Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA." *Farrakhan I*, 338 F.3d at 1016 (citing 42 U.S.C. § 1973). *See also Hayden v. Pataki*, 449 F.3d 305, 367-68 (2d Cir. 2006) (Sotomayor, J., dissenting) ("It is plain to anyone reading the Voting Rights Act that it applies to all 'voting qualification[s].' And it is equally plain that [the New York felon disfranchisement law] disqualifies a group of people from voting. These two propositions should constitute the entirety of out analysis."). Rehearing the issues presented in *Farrakhan I*, therefore, is unwarranted.

## CONCLUSION

For the foregoing reasons, and for the reasons stated in Plaintiffs' previous submissions to the Court, rehearing *en banc* should be denied.[7]

Dated this 5th day of March, 2010.

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[7] Should this Court order rehearing *en banc*, Plaintiffs respectfully request the opportunity to fully brief the issues for consideration before the *en banc* court, in accordance with Circuit Advisory Committee Note 3 to Circuit Rule 35-3.

**Form 11. Certificate of Compliance Pursuant to Circuit Rules 35-4 and 40-1**

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/s/Lawrence A. Weiser
Signature of Attorney or
Unrepresented Litigant

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I hereby certify that I electronically filed the foregoing 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 March 5, 2010.

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/s/ Lawrence A. Weiser

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