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,

--- against ---

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

BRIEF OF THE COMMUNITY SERVICE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL OF THE JUDGMENT BELOW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Community Service Society, by and through the undersigned counsel, makes the following disclosures:

The Community Service Society is neither a subsidiary nor an affiliate of a publicly owned corporation and has not issued shares of stock.

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Juan Cartagena
Community Service Society

Dated: 11 June 2010
New York, New York

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Community Service Society ("CSS") is an independent, nonprofit organization that has been serving the poor by advocating for and providing direct services and material relief to low-income individuals and communities in New York for more than 160 years. Since 1987, CSS has represented various individuals as well as organizations seeking enforcement of constitutional and statutory provisions that protect the right to vote without undue discriminatory barriers. Realizing that participation in the political process is imperative to improving the quality of life in marginalized communities, CSS has devoted significant attention and resources to promote the civic engagement of the poor.

CSS has been active in addressing the adverse effects of felon disfranchisement on both the national and local levels. It has served as co-counsel to individual claimants in both constitutional and Voting Rights Act challenges to felon disfranchisement (such as, *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006), still pending), has provided support to similar litigation outside of New York, and has collaborated with numerous organizations on the broader issues affected by the laws that condition participation of the

franchise on the results of the criminal justice system. Currently, CSS sponsors a discussion forum called the Reentry Roundtable where advocates and organizers in the field of prisoner reentry share strategies and concerns regarding a range of issues, including civic engagement for this population. For these reasons, it has a unique interest in the outcome of this litigation.

ARGUMENT

I. WHERE THE STATE OF WASHINGTON HAS CONDITIONED THE EXERCISE OF THE FRANCHISE ON THE RESULTS OF A DISCRIMINATORY AND BIASED CRIMINAL JUSTICE SYSTEM, DENYING THE VOTE TO THOUSANDS OF RACIAL AND LANGUAGE MINORITIES IN THE STATE, IT VIOLATES THE VOTING RIGHTS ACT. THE DISTRICT COURT INCORRECTLY RULED OTHERWISE BECAUSE IT FAILED TO DISTINGUISH PROOF OF UNLAWFUL VOTE DENIAL FROM PROOF OF UNLAWFUL VOTE DILUTION, THUS COMMITING REVERSABLE ERROR.

Plaintiffs below have challenged Washington's felon disfranchisement law under Section 2[1] as an unlawful vote denial on account of race. Section 2, as amended in 1982, however, has been adjudicated in far more cases alleging unlawful vote dilution than in vote denial claims. Ellen D. Katz, et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, Final Report of the Voting Rights Initiative.*[2] The distinction is critical in understanding how the District Court concluded that voter disqualification in Washington State can be

[1] 42 U.S.C. § 1973 (hereafter "Section 2").

[2] 39 U. Mich. J.L. Reform 643, 656 (2006) available at http://sitemaker.umich.edu/votingrights/files/finalreport.pdf (last visited 5 December 2006). Even without counting redistricting and reapportionment vote dilution challenges in the litigation in the 1980s, a full 60% of all cases studied were vote dilution challenges to at-large elections; since 1990 nearly 76% of all Section 2 challenges were made to either at-large systems or redistricting/reapportionment plans. Id.

premised on a discriminatory criminal justice system and somehow, still survive a Section 2 challenge. *Amicus* respectfully submits that the District Court erred because it failed to appreciate this fundamental difference.

Vote dilution claims typically challenge institutional structures through which votes are aggregated. The choice between these structures directly affects the distribution of political power. Proofs in a vote dilution claim are substantially different than in a vote denial claim, however. For example, as the Supreme Court made clear in *Thornburg v. Gingles*[3] political cohesion within a protected minority group, is an indispensable element of proof in vote dilution claims – otherwise it matters little how voters are aggregated within the structures adopted. Thus, once allowed to vote, racial and language minorities can successfully lodge Section 2 claims alleging an unlawful dilution of their political strength relative to "other members of the electorate."[4]

Vote denial claims address laws, practices and procedures that directly exclude otherwise qualified voters from participating. By definition, vote denial affects the political power of the excluded group. Political cohesion within the protected group excluded is not critical in this context because irrespective of how a voter intends to associate politically, she is not allowed

[3] *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986).
[4] 42 U.S.C. § 1973(b).

to vote *at all*. And, as noted below, other evidence typically categorized under the enumerate factors that accompanied the passage of an amended Section 2 in 1982 (the "Senate Factors")[5] is similarly less probative, if not irrelevant. By automatically denying the vote to plaintiffs on account of race, a State is clearly denying the right to participate politically and elect candidates of choice irrespective of other circumstantial, and indeed, superfluous evidence that may also prove discrimination.

The District Court below made two critical findings that bear directly on Section 2's totality of circumstances analysis it subsequently engaged in: it held that plaintiffs' evidence demonstrated "compelling evidence of racial discrimination and bias in Washington's criminal justice system"[6] and it found that the discrimination in the criminal justice sphere of government activity interacted with voting in a "meaningful way."[7] At this point the District Court erroneously required that plaintiffs provide further evidence to demonstrate, using the Senate Factors, that they "have less opportunity than other members of the electorate to participate in the political process and to

[5] S. Rep. No. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 (hereafter "Senate Report").
[6] *Farrakhan v. Gregoire*, 2006 WL 1889273, at *6.
[7] Id.

elect representatives of their choice."[8] Where the State of Washington has conditioned the exercise of the franchise on the results of a discriminatory and biased criminal justice system, affecting thousands of racial and language minorities in the state, it commits unlawful vote denial. Moreover, under Secton 2, proof in a vote denial case is different than proof in a vote dilution Section 2 case. As noted below, the Voting Rights Act requires a flexible approach to address discrimination in voting and the unique circumstances present in the use of felon disfranchisement laws in a state that operates a discriminatory and biased criminal justice system.

A. Section 2 of the Voting Rights Act Is Broad Enough to Encompass the Unique Vote Denial Claims Presented in this Challenge to Washington's Felon Disfranchisement Law.

Section 2, as amended in 1982, is a broad remedial statute that permits a full review of all relevant evidence. Congress authorized this broad review when it suggested evidentiary factors in 1982, referred to as the Senate Factors, which serve as guidelines with no requirement to prove any specific or minimum number of factors. Rather than an exhaustive, hierarchical list, the factors are among those considered in order to establish a Section 2 violation. The 1982 amendment to Section 2 establishes this flexibility:

[8] 42 U.S.C. § 1973(b).

> "If as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice, there is a violation of this section. To establish a violation, plaintiffs could show a variety of factors, depending upon the kind of rule, practice, or procedure called into question."[9]

This expansive language is consistent with the objective of the 1982 Amendment of generally protecting the right to vote, regardless of the existence of intentional discrimination. In this Circuit, it is settled that the totality of the circumstances analysis applies equally to both vote denial and vote dilution claims. *Farrakhan v. Washington*.[10] What is not settled, however, is how to apply the test to discriminatory felon disfranchisement.

Case law clearly supports this view that the legislative history "indicates that Congress intended §2 to apply broadly." *Smith v. Salt River Project Agric. Improvement Power Dist.*[11] It is well established that "Congress intended for Section 2 to apply as broadly as possible," *Hayden v. Pataki*,[12] and that "there is no formula for aggregating the factors." *Buckanaga v. Sisseton Independent. School Dist.*[13] *See also, U.S. v. Marengo County Commission*.[14] The Courts have widely recognized that "[t]he Senate Report's 'list of typical factors is neither comprehensive nor

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[9] Senate Report at 28.
[10] 338 F.3d 1009, 1015, n. 11 (9th Cir. 2003).
[11] 109 F.3d 586, 593 (9th Cir. 1997).
[12] 449 F. 3d 305, 355 (2d Cir. 2006).
[13] 804 F.2d 469, 471 (8th Cir. 1986).
[14] 731 F.2d 1546, 1574 (11th Cir. 1984).

exclusive' and 'there is no requirement that a particular number of factors be proved, or that a majority of them point one way or the other'" *U.S. v. Blain County*,[15] and that "no court has ever determined how many of the factors must be present or in what combination" *Bone Shirt v. Hazeltine*.[16]

More to the point of this discussion, it has been held that "[t]o the extent that the enumerated factors are not factually relevant, they may be replaced or substituted by other, more meaningful factors." *Major v. Treen*.[17] *See also, Common Cause/Georgia v. Billups,*[18] (other factors besides the enumerated factors may also be relevant and considered). In this regard this Court noted that "[t]he legislative history accompanying the 1982 Amendments acknowledged that 'while these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative' of a Section 2 violation." *Farrakhan v. Washington.*[19] Finally, in *Gomez v. City of Watsonville*, this Court clearly noted that the Senate Factors were "meant as a guide to illustrate some of the variables that should be considered," and noted, as per the Senate Report, that the relevance of the factors would depend on the nature of the claim presented.[20]

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[15] 363 F.3d 897, 903 (9th Cir. 2004)(citing *Thornberg v. Gingles*, 478 U.S. 30, 45 (1986)).
[16] 2006 WL 2404139 (8th Cir. 2006) (Gruender, J., concurring).
[17] 574 F.Supp. 325, 350 (E.D. La. 1983).
[18] 406 F. Supp. 2d 1326, 1374 (N.D. Ga. 2005).
[19] 338 F.3d at 1019 (citing Senate Report at 29).
[20] 863 F.2d 1407, 1412 (9th Cir. 1988).

Instead of following the legislative history that accompanied the amendment to Section 2, or the considerable body of case law that provides for a flexible approach to Section 2 analysis, the District Court below erroneously engaged in a mechanical form of counting of Senate Factors, placed undue emphasis on the lack of historical, voter related discrimination (Factor One),[21] failed to fully assess the weight of its own finding of a discriminatory and biased criminal justice system (Factor Five)[22] and dismissed plaintiffs' showing regarding the tenuousness of the policy justification for the challenged practice (Factor Nine).[23] *Amicus* respectfully refers the Court to plaintiffs-appellants arguments in their appellate brief herein on Factors One and Nine and will not elaborate upon those arguments here.[24] Instead, as noted below, the District Court's failure to appropriately weigh the "compelling" evidence of a discriminatory criminal justice system under the unique circumstances of this case is a product of the court's failure

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[21] "[T]he extent of any history of official discrimination in the state or political subdivision that touched the right of members of the minority group to register, to vote, or otherwise participate in the political process." Senate Report at 28-29.
[22] "[T]he extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." Senate Report at 28-29. This Court has concluded that in a felon disfranchisement challenge, alleged discrimination in the criminal justice system is appropriately considered under this factor. *Farrakhan v. Washington*, 338 F.3d at 1020.
[23] "[W]hether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." Senate Report at 28-29.
[24] Brief of Plaintiffs-Appellants, 1 December 2006, pp. 22 to 37 and 47 to 56.

to distinguish between vote denial and vote dilution claims. That failure is reversible error.

B. Discriminatory Felon Disfranchisement That Results in Vote Denial on Account of Race Violates Section 2 Even in the Absence of Proof on All Senate Factors.

The application of the totality of circumstances test to vote denial claims under Section 2 examines how the challenged practice "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred candidates." *Thornburg v. Gingles*.[25] This Court has already held in this litigation that racial bias in the state's criminal justice system is a relevant factor in a felon disfranchisement challenge because it may "have the effect of shifting racial inequality from the surrounding social circumstances into the political process." *Farrakhan v. Washington*.[26] Equally important, this Court has also noted that racial bias and discrimination in a state's criminal justice system that contributes to criminal convictions "clearly hinder[s] the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic."[27]

[25] *Thornburg v. Gingles, supra*, 478 U.S. at 47, *accord*, *Farrakhan v. Washington*, *supra*, 338 F.3d at 1016.
[26] 338 F.3d at 1020.
[27] Id. at 1020.

Amicus respectfully submits, however, that based on the factual findings below regarding discrimination in the criminal justice system, in Washington State, under these circumstances, that phenomenon is not "simply another relevant social and historical condition" in the analysis;[28] indeed, it is the primary factor.

The record below establishes that bias and discrimination in Washington State's criminal justice system goes well beyond mere statistical disparities. The District Court accepted evidence regarding discriminatory "police practices, and practices in prosecutors' offices, and studies of court and sentencing practices"[29] and additional evidence regarding "the existence of racial discrimination in law enforcement."[30] Collectively, the District Court characterized the evidence of discrimination as "compelling" and "admissible, relevant and persuasive." *Farrakhan v. Gregoire*.[31] All of it led to the finding in this record that "there is discrimination in Washington's criminal justice system on account of race" and, equally important, that this

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[28] 338 F.3d at 1020.

[29] These findings came from the expert evidence provided by Prof. Robert Crutchfield. *Farrakhan v. Gregoire*, *supra*, 2006 WL 1889273 at *5.

[30] These findings came from the expert evidence provided by Prof. Katherine Beckett. *Farrakhan v. Gregoire, supra,* 2006 WL 1889273 at *5.

[31] *Farrakhan v. Gregoire, supra,* 2006 WL 1889273 at *6.

discrimination interacts with the State's felon disfranchisement law in a "meaningful way."[32]

In effect, and in reality, Washington State has conditioned the qualifications for the franchise on the operation of its own discriminatory and biased criminal justice system, and has excluded thousands of otherwise eligible African-American, Latino and Native American voters in the process. Contrary to the District Court's insistence,[33] under these circumstances, where disfranchisement, and consequently, exclusion from political participation, is automatic, it matters little whether racial and language minority voters in the State suffer from the debilitating effects of racially polarized voting, the existence of candidate slating, the scourge of racial appeals in voting, or even the lack of responsiveness of their elected officials. And yes, it matters little on this record, whether or not, racial and language minorities have achieved any level of parity in the number minority elected officials in the State since by definition, compared to white members of the electorate, they are denied the vote based on a biased and discriminatory criminal justice system that operates in a meaningful way to deny their political aspirations.

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[32] Id.

[33] *Farrakhan v. Gregoire, supra,* 2006 WL 1889273 at *7 (where the District Court counted off a number of Senate Factors which plaintiffs failed to prove, even when it observed the irrelevance, in some cases, of their application).

Indeed, to hold otherwise, to allow a State under the Voting Rights Act to exclude racial and language minority voters by relying on the operation of a voter qualification that is found to be compellingly discriminatory and biased because they have achieved a form of parity in the number of minority elected officials and somehow enjoy an "equal opportunity to elect candidates of choice" as per Section 2, renders vote denial claims meaningless under the Voting Rights Act. Such a result is contrary to the plain language of Section 2 and the decades of jurisprudence that have made it as successful in overcoming voter discrimination for the last four decades, as it is today.

Admittedly, the issue of felon disfranchisement presents unique and complex issues under Voting Rights Act and constitutional jurisprudence as demonstrated by the long history of this case and its parallels in the New York and Florida challenges.[34] However, at its core, felon disfranchisement cases raise one fundamental question as explained by Judge Feinberg in a previous *en banc* opinion from the Second Circuit:

> "While a State may choose to disfranchise some, all or none of its felons based on legitimate concerns, it may not do so based upon distinctions that have the effect, whether intentional or not, of disfranchising felons because of their race."[35]

[34] *Hayden v. Pataki*, 449 F.3d 305 (*en banc*); *Johnson v. Bush*, 405 F.3d 1214 (11th Cir.) (*en banc*), *cert. denied*, 126 S. Ct. 650 (2005).
[35] *Baker v. Pataki*, 85 F.3d 919, 937 (2d Cir. 1996) (*en banc*).

The record below contains sufficient proofs of how, at multiple levels, Washington State operates a criminal justice system that is racially discriminatory and biased – from law enforcement decisions, to prosecutorial practices, to sentencing. And all of it bodes ill for all Washington State residents because it signals a dysfunctional criminal justice system based on proofs that go beyond mere statistical disparities in sentencing outcomes. Given the breadth of the evidence in this case now, *amicus* respectfully submits that this showing goes well beyond bare statistics of disproportionate impact upon minority voters that are arguably found in other electoral practices identified by some members of this Court in the opinion dissenting from the denial of the petition for rehearing *en banc*.[36] In that dissent, the specter of non-voting purges, Internet voting, and Election-Tuesday voting all falling by the wayside in a Section 2 assault premised exclusively on racially disparate impacts were highlighted as likely scenarios should the plaintiffs prevail herein.[37] *Amicus* respectfully submits that the record below is far different now than when the dissent was authored, and that the breadth and depth of racial discrimination in the

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[36] *Farrakhan v. Washington*, 359 F.3d 1116 (9th Cir.), *cert. denied sub nom*, *Locke v. Farrakhan*, 543 U.S. 984 (2004).
[37] Id. at 1126.

court's findings should address these concerns. Unlike any of the scenarios painted above, this Court now has a District Court finding that in multiple areas – from arrests to sentencing – the evidence of racial discrimination and bias, tested through rigorous expert analysis, completely supports the lower court's finding that racial bias permeates Washington's criminal justice system. Moreover, it is the very State of Washington that operates, manages and established both arms of governmental activity implicated in felon disfranchisement. That is, unlike external factors outside the control of the State that produce racially disparate outcomes, in felon disfranchisement the State controls the electoral apparatus and the criminal justice system. By effectively delegating decision-making on who is disqualified from voting to its criminal courts, the State has merely implemented an internal shift in governmental responsibility over a quintessential area of government regulation: the franchise. With that responsibility comes accountability and in Washington State, electoral decision-making as it affects persons with felony convictions otherwise qualified to vote has been vested in an arm of government that produces racially biased results.

In all respects the record below proves plaintiffs' point that conditioning the franchise on the results of a criminal justice system that is broken effectively "shifting racial inequality from the surrounding social

circumstances into the political process."[38] This "persuasive"[39] proof of criminal justice discrimination answers the very hypothetical questions posed by Judge Parker in his dissent in *Hayden v. Pataki*:

> "Suppose, for example, they were able to demonstrate that the dramatically different incarceration rates for minorities and Whites in New York were largely driven by drug convictions and reflected the manner in which law enforcement resources were deployed in the 'war on drugs.' Suppose they showed that law enforcement officials (and task forces) concentrated resources on street-level users/dealers of heroin and crack cocaine in minority neighborhoods (because the problems were worse and arrests were easier in such areas) but, at the same time, devoted comparatively little attention to areas where Whites were abusing those same illegal drugs at the same rates (and powder cocaine at higher rates) [….] Neither showing is remotely beyond the realm of possibility in New York, and I believe this type of proof could constitute some evidence of a VRA violation."[40]

Plaintiffs below have answered virtually all of Judge Parker's questions in the affirmative as regards Washington State. For all the complex legal analysis that the courts have necessarily engaged in, the simple truth in Washington State is that African-American, Latino and Native American voters are denied the franchise because the State insists on conditioning voting on a criminal justice system that is biased and discriminates against them on account of race. Accordingly, the judgment of the District Court should be reversed.

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[38] 338 F.3d at 1020.

[39] *Farrakhan v. Gregoire, supra,* 2006 WL 1889273 at *6.

[40] *Hayden v. Pataki*, 449 F.3d 305, 345 (2d Cir. 2006) (*en banc*) (Parker, J., dissenting).

CONCLUSION

For all the reasons noted above, the Community Service Society, as *amicus curiae*, respectfully urges this Court to reverse the judgment of the District Court and enter a judgment in favor of the plaintiffs-appellants' claim that Washington State's felon disfranchisement law violates Section 2.

Dated: 11 June 2010
New York, New York

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE TO FED. R. APP. P. 32(a)(7)(C) and CIRCUIT RULE 32-1 FOR CASE NO. 06-35669

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, Juan Cartagena hereby certifies that the attached *amicus curiae* brief is proportionally spaced, has a typeface of 14 points, and, excluding the corporate disclosure statement, table of contents, table of authorities and this certification, contains 7,000 words or less.

Date: 11 June 2010
New York, New York

s/ Juan Cartagena
JUAN CARTAGENA
Community Service Society

CERTIFICATE OF SERVICE
U.S. Court of Appeals Docket Number(s): 06-35669

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 June 10, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registed CM/ECF users. I have mailed the foregoing document by First-Class mail, postage prepaid, to the following non-CM/ECF participants:
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Community Service Society

CERTIFICATE FOR BRIEF IN PAPER FORMAT
FOR CASE NO. 06-35669

I certify that this brief is identical to the version submitted electronically on 11 June 2010.

Date: 11 June 2010
New York, New York

s/ Juan Cartagena
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