No. 06-35669

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MUHAMMED S. 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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
No. CV-96-076-RHW

BRIEF OF *AMICI CURIAE* NATIONAL BLACK POLICE ASSOCIATION, NATIONAL LATINO OFFICERS ASSOCIATION, AMERICAN PROBATION AND PAROLE ASSOCIATION, AND FORMER LAW-ENFORCEMENT OFFICIALS IN SUPPORT OF APPELLANTS AND AFFIRMANCE OF THE PANEL DECISION.

Lawrence S. Lustberg
Jennifer B. Condon
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102
(973) 596-4489

STATEMENT OF CORPORATE DISCLOSURE

Pursuant to Fed. R. App. P. 26.1, *amici curiae* the National Black Police Association, National Latino Officers Association, and American Probation and Parole Association, by and through their undersigned counsel, state that they are non-profit 501(c)(3) organizations and therefore not publicly held corporations that issue stock.

June 11, 2010

/s Lawrence S. Lustberg

Lawrence S. Lustberg
GIBBONS P.C.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes and Regulations

Other Authorities

INTEREST OF *AMICI CURIAE*

Amici curiae are professional law-enforcement associations and former law-enforcement officials who are united in their belief that disenfranchising otherwise qualified citizens who have been convicted of a felony—including tens of thousands of African-American, Latino, and Native American citizens—is inconsistent with strong state law enforcement. *Amici* National Black Police Association (NBPA) and National Latino Officers Association of America (NLOA), which together represent more than 45,000 local, state and federal law-enforcement officers and employees, work to promote effective law enforcement practices and to build stronger bonds between minority law-enforcement officers and the communities which they serve. The American Probation and Parole Association is an association actively involved with probation, parole and community-based corrections. Individual *amici*—Zachary W. Carter, Veronica Coleman-Davis, Scott Lassar, Kate Pflaumer, Chase Riveland, and Norm Stamper—are prominent former state and federal law-enforcement officials, including four former United States Attorneys, a former Secretary of Washington's Department of Corrections, and a former Seattle Police Chief.[*]

Throughout their careers, *amici* have sought to employ the most effective law enforcement strategies to reduce crime and keep their communities safer. At

[*] A more complete description of each *amicus* can be found at Appendix A.

the same time, as officers of the law, *amici* have remained committed to vigorous enforcement of federal civil rights protections, including the Voting Rights Act of 1965, 42 U.S.C. § 1971, *et seq*. ("VRA"). Through years of experience, *amici* know well that both can be accomplished simultaneously. *Amici* thus write to explain why remedying the discriminatory denial of voting rights resulting from Washington's felon disenfranchisement law would in no way undermine the State's law enforcement interest in reducing crime and promoting public safety. Nor would application of the VRA to Washington's disenfranchisement law impede traditional law enforcement practices and innovative strategies utilized by police officers, prosecutors and correctional officers to achieve those goals. Thus, enforcing the VRA would not disturb the delicate balance of state and federal power.

Amici agree with Appellants and the decision of a panel of this Court that the "compelling" showing of racial bias in Washington's criminal justice system and the automatic disenfranchisement of persons convicted of felonies pursuant to that system warrant a remedy under the VRA. Because remedying the discriminatory denial of voting rights pursuant to Washington's felon disenfranchisement law

would in no way interfere with state law enforcement interests, *amici* respectfully urge the Court to affirm the panel decision.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This matter is before the Court for rehearing *en banc*, after a panel of this Court held, on January 5, 2010, that Washington's denial of the right to vote to convicted felons under Article VI, § 3, of the Washington State Constitution and its implementing statute, RCW § 29A.08.520, was "on account of race or color" and thus violated Section 2 of the Voting Rights Act of 1965 ("VRA").[2] *Farrakhan v. Gregoire*, 590 F.3d 989, 1009-11 (9th Cir. 2010). The panel concluded that because automatic disenfranchisement results when individuals are convicted of felonies through Washington's criminal justice system, unrebutted evidence that the state's criminal justice system was infected with racial bias established a discriminatory denial of voting rights in violation of Section 2 of the VRA. *Id.* at 1010-11. The panel therefore reversed the district court's grant of summary judgment to Defendants, concluding that in light of that unrebutted evidence, "the district court should not have required Plaintiffs to produce additional circumstantial evidence" of discriminatory vote denial to establish a Section 2 violation. *Id*. at 1011.

---

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), counsel for the parties have consented to *amici* appearing in this matter and to the filing of this brief.

[2] Pub. L. No. 89-110, 79 Stat. 437, *as amended*, Pub. L. No. 97-205, 96 Stat. 134 (1982) (codified as amended at 42 U.S.C. § 1973).

In requiring additional circumstantial evidence of discriminatory vote denial, the district court had focused on several factors set forth in the Senate Report accompanying the 1982 amendments to Section 2, which factors, the Supreme Court has recognized, may, under Section 2's "totality of circumstances" test, support a finding of discriminatory vote denial in violation of the VRA. *See, e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 1010-11 & n.9 (1994) (citing S. Rep. No. 97-417, pp. 28-29 (1982)); *Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986) (same).[3] Although recognizing that "evidence of racial bias in Washington's criminal justice system is compelling," the district court concluded that it was "simply one factor in the totality of the circumstances that the Court must consider when evaluating Plaintiffs' [Section] 2 claim." *Farrakhan v. Gregoire*, No. CV-96-076, 2006 WL 1889273, at *9 (E.D. Wash. Jul. 7, 2006). The district court reasoned that several of the Senate Factors, including Senate Factor 9—whether "the policy underlying the State's . . . use of the contested practice or structure is tenuous"—favored the Defendants' position. *Id.* at *8. The district court reached that result

[3] Those "Senate Factors" include: "(1) a history of official discrimination touching on the right to vote, (2) racially polarized voting, (3) practices that may enhance the opportunity for discrimination, (4) whether minorities have been denied access to a candidate slating process, if one exists, (5) whether members of minority groups bear the effects of past discrimination, (6) racial appeals in campaigns, (7) the extent to which members of minority groups have been elected to public office, (8) lack of responsiveness by elected officials to minority interests," and — most significantly here — (9) whether "the policy underlying the State's . . . use of the contested practice or structure is tenuous." *Gingles*, 478 U.S. at 45.

even though it acknowledged that the State did "not explain why disenfranchisement of felons is 'necessary' to vindicate any identified state interest." *See id.* at *8.

On appeal, a panel of this Court reversed, concluding that the lack of evidence supporting the Senate Factors to which the district court pointed was "without legal significance because proof relating to th[ose] factors is not necessary to establish a vote denial claim." *Farrakhan*, 590 F.3d at 1007. While the court noted that the tenuousness of the state's policy justification "could support Plaintiffs' vote denial claim circumstantially," it was not a prerequisite for finding a Section 2 violation. *Id.* at 1009. The panel concluded that the district court had erred in finding that Factor 9 "favors the defendants' position;" according to the panel, where Plaintiffs had proven that "the denial of their right to vote was 'on account of' race, it did not matter whether the state's policy reasons were tenuous—a [Section] 2 violation had been established." *Id.*

On April 28, 2010, a majority of this Court ordered that this case be reheard *en banc* pursuant to Circuit Rule 35-3. On May 28, 2010, this Court extended the deadline for filing of *amicus* briefs supporting the position of Plaintiffs-Appellants until June 11, 2010.[4] *Amici* now file this instant brief to respectfully urge the Court to affirm the panel's decision.

Amici agree with the conclusion of the panel that Plaintiffs have established a Section 2 violation based upon the evidence of discrimination in Washington's criminal justice system and the automatic impact of that discrimination in terms of the disenfranchisement of minority voters with felony convictions. They write to explain, however, that even if the *en banc* Court of Appeals concludes that more was required to establish a Section 2 violation, specifically that the state's policy justification for felon disenfranchisement "is tenuous," the Court should in no way presume that felon disenfranchisement serves the State's interest in strong and effective law enforcement. The State has never attempted to offer an explanation for its felony disenfranchisement law[5]—a fact that should, in itself, render any belated justification for Washington's felony disenfranchisement scheme "tenuous." But, even more importantly, because, as demonstrated below, remedying the denial of voting rights based upon racial discrimination is consistent with ensuring strong and effective state law enforcement practices, this Court should reject any claim that law enforcement interests justify Washington's felony disenfranchisement scheme, affirm the panel's conclusion, and provide a remedy under Section 2 of the VRA.

[5] To date, Appellees have not asserted *any* justification, penal or otherwise, for Washington's felon disenfranchisement scheme. Joint Appendix ("J.A.") at 649. Indeed, the district court found that "the State here does not explain why disenfranchisement of felons is 'necessary' to vindicate any identified State interest." *Farrakan*, 2006 WL 1889273, at *8.

ARGUMENT

I. ENFORCING SECTION 2 OF THE VRA TO REMEDY WASHINGTON'S DISCRIMINATORY DENIAL OF VOTING RIGHTS IS CONSISTENT WITH STRONG AND EFFECTIVE STATE LAW ENFORCEMENT.

A. Enforcing the VRA is Consistent with Law Enforcement's Overarching Goals of Crime Reduction and Public Safety.

Controlling serious crime, maintaining order and public safety, and safeguarding civil liberties have long been recognized as the fundamental goals of law enforcement. *See* Michael S. Scott, *Progress in American Policing? Reviewing the National Reviews*, 34 Law & Social Inquiry 171, 174 (2008) [hereinafter *Progress in American Policing*] (citing President's Comm'n on Law Enforcement & Admin. of Justice, *The Challenge of Crime in a Free Society* (1967)).[6] Even as the focus and tasks of law enforcement have evolved over time, "controlling serious crime [has] remain[ed] the first priority of policing." *See* Nat'l Research Council, *Fairness and Effectiveness in Policing: The Evidence*, 85 (Wesley Skogan & Kathleen Frydl, eds., 2004) [hereinafter *Fairness and Effectiveness in Policing*]. Because restoration of voting rights would not undermine these overarching law enforcement goals, enforcing the VRA to remedy discriminatory vote denial in Washington is fully consistent with strong and effective state law enforcement.

[6] *available at* www.ncjrs.gov/pdffiles1/nij/42.pdf.

Specifically, evidence and experience show that felon disenfranchisement neither helps to control crime, nor promotes public safety. While *amici* recognize that criminal punishment can deter future criminal conduct, whether by the particular offender (specific deterrence) or by others (general deterrence), there is no evidence that disenfranchising persons who have been convicted of felonies serves to further deter them from reoffending, or to deter others from committing felonies. Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 Stan. L. Rev. 1147, 1166 (2004) (arguing "that an individual who is not deterred by the prospect of imprisonment or fines or other restrictions on his liberty" is unlikely to "be dissuaded by the threat of losing his right to vote, even if he were aware that permanent disenfranchisement is a collateral consequence of a criminal conviction"). To the extent criminal activity can be deterred, it is through the threat of incarceration and significant fines, and not exclusion from political participation. *See* Jeff Manza & Christopher Uggen, Locked out: Felon Disenfranchisement and American Democracy 36, 133 (Oxford University Press 2006) [hereinafter *Locked Out*].

Additionally, unlike incarceration, felon disenfranchisement is not justified by law enforcement's interest in incapacitating offenders as a means of protecting the community, since disenfranchisement "only affects a narrow range of

activities" and therefore logically, cannot "prevent people from committing crimes unrelated to voting." Manza & Uggen, *Locked Out, supra*, at 36. In fact, research suggests that offenders who retain the right to vote may be less likely to re-offend. *Id. at* 133 (discussing research indicating lower recidivism rates among voters); *see also* Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime & Arrest: Evidence from a Community Sample*, 36 Colum. Hum. Rts. L. Rev. 193, 214 (2004) ("Voting appears to be part of a package of pro-social behavior that is linked to desistance from crime.") [hereinafter *Voting and Subsequent Crime*].

In addition to deterrence and incapacitation, a related component of effective law enforcement and crime reduction is the rehabilitation of incarcerated and paroled individuals so that they may become law-abiding, productive citizens likely to refrain from further criminal activity. Research suggests that for persons released from prison, reintegration into the community is a critical factor in avoiding recidivism. *See* Anthony A. Braga, *et al.*, *Controlling Violent Offenders Released to the Community: An Evaluation of the Boston Reentry Initiative* (2008). And evidence and experience have shown that, far from encouraging rehabilitation as a means of crime reduction, felon disenfranchisement only adds an additional barrier to successful reintegration into society. Joan Petersilia, *When Prisoners Return to the Community: Political, Economic, and Social Consequences*, in Nat'l Inst. of Justice's Sentencing & Corr. Issues for the 21st Century 5 (2000).

Moreover, where, as in Washington, denial of the right to vote disproportionately affects members of racial minority groups, persons affected by felon disenfranchisement are susceptible to even further "alienation" and "disillusionment with the political process" and thus further obstacles to community reintegration and rehabilitation. *Id.* at 5. This consequence of felon disenfranchisement is particularly counterproductive from a law enforcement perspective, given the evidence that political education and electoral participation can play an important role in integrating ex-offenders into the community, thereby reducing the risk of recidivism. Uggen & Manza, *Voting and Subsequent Crime*, *supra*, at 215 (analyzing empirical evidence and concluding that when "felons begin to vote and participate as citizens in their communities, it seems likely that many will bring their behavior into line with the expectations of the citizen role, avoiding further contact with the criminal justice system").

For all of these reasons, the American Bar Association and the American Law Institute have long opposed felon disenfranchisement, recognizing that the "stigma of exclusion . . . deter[s] rehabilitation and increase[s] the likelihood of recidivism." Andrew L. Shapiro, *The Disenfranchised*, The American Prospect at Nov. 1, 1997, at 60 (stating that these "mainstream groups . . . came out against disenfranchisement decades ago"); *see also* ABA, Standards for Criminal Justice 23-8.4: Voting Rights (2d ed. 1983); ABA Criminal Justice Standards on Collateral

Sanctions and Discretionary Disqualification of Convicted Persons (2003);[7] Model Penal Code § 306.3 (2001) (prohibiting disenfranchisement that continues after "a sentence of imprisonment" has ended). Many law enforcement experts likewise agree that the goal of rehabilitation is not served by felon disenfranchisement. *See* Am. Corr. Ass'n, Resolution on the Restoration of Voting Rights (Jan. 14, 2004) (opposing disenfranchisement after "completion of the offender's sentence including community supervision" because it "work[s] against the successful reentry [into the community] of offenders as responsible, productive citizens");[8] Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Collateral Sanctions and Disqualifications Act § 3 (2006 draft) (recommending that upon "release from any term of imprisonment, a person convicted of an offense shall not be denied the right to vote based on that conviction").[9] Thus, the President of the National District Attorneys Association has voiced a specific concern about creating a "subclass of citizens . . . disenfranchised from the vote and continually labeled as criminals . . . . [who] may believe they have no recourse but to continue to live outside the law." Robert M. A. Johnson, *Message from the President — Collateral Consequences*, National District Attorneys Association (May/June 2001).[10]

---

[7] *available at* http://www.abanet.org/leadership/2003/journal/101a.pdf.
[8] *available at* http://www.aca.org/government/ policyresolution/view.aspID=62.
[9] *available at* http://www.law.upenn.edu/bll/ulc/ucsada/ 2006octdraft.pdf.
[10] *available at* http://www.ndaa.org/ndaa/about/president_message_ may_june_ 2001.html.

In light of the evidence that felon disenfranchisement does little to achieve the primary goals of law enforcement by reducing crime or protecting the community, it is not surprising that historic justifications for felony disenfranchisement have never rested on a law enforcement rationale. Indeed, as numerous courts have recognized, the practice of felon disenfranchisement in the United States, both during and after Reconstruction, was actually motivated not by law enforcement concerns but by a desire to diminish the electoral strength of newly freed slaves. *See Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (noting "movement that swept the post-Reconstruction South to disenfranchise blacks"); *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998) ("[Felon disenfranchisement statutes were] enacted in an era when southern states discriminated against blacks by disenfranchising convicts for crimes that, it was thought, were committed primarily by blacks."); *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896) (describing how disenfranchisement was added to the 1890 Mississippi Constitution in order to "obstruct the exercise of the franchise by the negro race"); *see also* Manza & Uggen, *Locked Out*, *supra*, at 41-69. These laws often singled out crimes for which blacks were more likely to be convicted than whites, with little regard to the severity of the crime or its possible relation to the franchise. *See* Eric Foner, Reconstruction: America's Unfinished Revolution 1863-1877 593 (1988); Alec C. Ewald, "*Civil Death:*" *The Ideological Paradox of Criminal Disenfranchisement*

Law in the United States, 2002 Wis. L. Rev. 1045, 1089-90 (2002). Law enforcement was never the rationale for these laws.

In sum, disenfranchisement does not serve the fundamental goals of law enforcement—controlling crime and maintaining order and public safety—and may even undermine important law enforcement interests such as offender rehabilitation. Thus, this Court should not presume what even the State has not contended: that Washington's interest in strong state law enforcement provides a non-tenuous justification for its "use of the contested practice" under Senate Factor 9. Accordingly, enforcing the VRA to remedy the discriminatory denial of voting rights caused by Washington's felony disenfranchisement scheme is fully consistent with strong and effective state law enforcement.

B. Remedying Washington's Discriminatory Denial of Voting Rights Would in No Way Impede State Law Enforcement Practices and Strategies.

Applying the VRA to Washington's disenfranchisement law is not only consistent with the overarching goals of law enforcement; it would also in no way interfere with the actual strategies and methods utilized by police officers and prosecutors in furtherance of those goals. Even as demands upon law enforcement officers have changed and innovative strategies for combating crime have developed, enforcing the law remains the "primary and distinctive method of the police" in reducing crime and protecting the public. *Fairness and Effectiveness in*

Policing, *supra*, at 85. Indeed, conventional law enforcement strategies, such as patrols, traffic stops, field interrogations, arrests, the collection and cataloging of criminal evidence, still "predominate" in the work of police officers. Scott, *Progress in American Policing*, *supra*, at 177-78. None of these traditional methods utilized by law enforcement officers to enforce the criminal law and promote public safety would be impeded whatsoever by enforcing Section 2 of the VRA and restoring voting rights to persons convicted of felonies.

Significantly, the experience of dozens of states, which have in recent years expanded access to voting rights for persons with felony convictions is instructive. Having reconsidered the "wisdom" of felon disenfranchisement laws "in meeting legitimate correctional objectives," these states represent a "momentum toward reform." *See* The Sentencing Project, *Felony Disenfranchisement Laws in the United States*, at 1 (March 2010)[11] ([hereinafter *Felony Disenfranchisement Laws*]. Specifically, "since 1997, 19 states have amended felon disenfranchisement policies in an effort to reduce their restrictiveness and expand voter eligibility." Ryan S. King, The Sentencing Project, *Expanding the Vote: State Felony Disenfranchisement Reform, 1997-2008* (Sept. 2008).[12] But there is no evidence to suggest that reforms in those states have in any way frustrated the efforts of law

[11] *available at* http://www.sentencingproject.org/pdfs/1046.pdf.
[12] *available at* http://www.sentencingproject.org/doc/publications/fd_statedisenfranchisement.pdf.

enforcement officials to enforce the criminal law through traditional methods or to carry out public safety functions. Indeed, if they had, there would likely not be any "momentum toward reform." *Felony Disenfranchisement Laws*, *supra*, at 1.

Moreover, in Maine and Vermont, for example, where individuals retain the right to vote in both prison and on parole, law enforcement officials continue to effectively investigate and prosecute criminal activity. *See* Marc Mauer, *Felon Disenfranchisement: A Policy Whose Time Has Passed?* 31 Human Rights (2004 A.B.A. Sec. Ind. Rts. & Resp.)[13] This experience suggests that applying the VRA to Washington's disenfranchisement law and restoring the right to vote for individuals in prison and parole, would not in any way hinder the efforts of Washington's law enforcement officials to vigorously investigate and prosecute crimes and to perform all of the traditional functions of policing.

Nor would enforcing the VRA with respect to Washington's discriminatory denial of voting rights undermine innovative law enforcement techniques that have emerged over the last several decades. Indeed, disenfranchisement may actually interfere with such innovation. Many states have adopted new strategies to prevent crime and promote safer communities, adopting community policing and rehabilitative prison programs, as well as creating specialized crime prevention units, designed to "focus their efforts on problems important to their organization

[13] *available at* http://www.abanet.org/irr/hr/winter04/felon.html.

and to gain special knowledge and expertise." *See Fairness and Effectiveness in Policing*, *supra*, at 77, 82. State attorneys general and district attorneys' offices have developed similar specialized prosecution teams. For example, in Washington, the State Attorney General has adopted a statewide plan called Operation Allied Against Meth, that aims to investigate and prosecute Methamphetamine-related crimes through specialized prosecution, use of SWAT Teams, and education and community outreach. *See* Washington State Office of the Attorney General, http://www.atg.wa.gov/AlliedAgainstMeth/default.aspx (last visited June 10, 2010). Restoration of the right to vote for persons with felony convictions would have no effect on the ability of law enforcement to continue this and other similarly vital and innovative law enforcement efforts.

Moreover, felon disenfranchisement may actually impede innovation in law enforcement strategies that are designed to combat offenses that have been difficult to prevent using traditional police tactics. Community policing programs, for example, have emerged as an effective means of addressing gang-related and gun-related violence. *See* Geoffrey P. Alpert & Alex R. Piquero, Community Policing: Contemporary Readings (2000). Researchers have described community policing as "arguably the most important development in policing in the past quarter century." *See Fairness and Effectiveness in Policing*, *supra*, at 85; *see also* Arlen M. Rosenthal, *et al.*, *Community Policing: 1997 National Survey Update of Police*

and Sheriffs' Departments (April 2001) (noting that 86 percent of law enforcement executives find that community policing is a highly effective means of providing police services). Because developing a cooperative relationship with the local community is a key component of these programs, which depend upon members of the public to assist "the police by reporting crimes promptly when they occur and cooperating as witnesses," *see Fairness and Effectiveness in Policing*, *supra*, at 89, the alienation and marginalization of communities, which results from felon disenfranchisement laws, may actually undermine these efforts.

Specifically, the collective experiences of *amici*, confirmed by social science data, suggest that community members are more willing to assist legal authorities when they feel that those authorities are delivering outcomes fairly with respect to people and groups. *See* Austin Sarat, *Studying American Legal Culture*, 11 Law & Soc. Rev. 427, 434 (1997); Tom R. Tyler, *et al.*, Social Justice in a Diverse World (1997). To the extent that felon disenfranchisement in Washington engenders unfair and impermissible racial disparities in voting, minority groups may feel alienated from the community and unwilling to assist law enforcement officials, to the detriment of community policing programs.

In sum, enforcing Section 2 of the VRA to eradicate racially discriminatory disenfranchisement would not interfere with either the traditional methods or the innovative strategies that police, prosecutors, and corrections officials employ to

enforce the criminal law and promote public safety. Rather, expanding voting rights in historically disenfranchised communities would likely facilitate even stronger and more effective law enforcement activities. Thus, because state law enforcement interests are not served by Washington's discriminatory felon disenfranchisement scheme, this Court should not presume, with respect to Senate Factor 9, that the State has an adequate policy justification for the practice.

II. BECAUSE ENFORCING SECTION 2 OF THE VRA DOES NOT INTERFERE WITH TRADITIONAL STATE LAW ENFORCEMENT PREROGATIVES, FEDERALISM CONCERNS ARE NOT IMPLICATED.

Amici recognize that the sensitive relationship between federal and state criminal jurisdiction may be threatened where the federal government directly interferes with or inserts itself into core areas of a state's law enforcement activity. *See United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) ("Under our federal system, the States possess primary authority for defining and enforcing the criminal law."). Here, however, those concerns are not implicated because, as described above, enforcing Section 2 of the VRA to remedy the discriminatory denial of voting rights wrought by felon disenfranchisement would not intrude upon Washington's authority to execute its core law enforcement functions, and thus would not upset the delicate balance between federal and state power.

Indeed, as Washington courts have recognized, felon disenfranchisement is "a nonpenal exercise of the power to regulate the franchise," *see State v. Schmidt*,

23 P.3d 462 (Wash. 2001). Moreover, because the purpose of the specific felon disenfranchisement at issue here, RCW § 29A.08.520, "is to designate a reasonable ground of eligibility for voting," *Fernandez v. Kiner*, 673 P.2d 191, 193 (Wash. App. 1983), it is codified in the elections portions of Washington's civil code, wholly separate and apart from the State's criminal code. *Compare* with Title 9A RCW (criminal code). Thus, applying the VRA to Washington's felony disenfranchisement scheme doe not interfere with an area of traditional state penal authority or law enforcement activity.

Significantly, the cases in which the Supreme Court has found that federalism principles precluded enforcement of Congressional enactments in areas touching upon state criminal matters stand in stark contrast to this matter. In those cases, Congress had directly legislated in areas of traditional state criminal law. For example, in *United States v. Emmons*, 410 U.S. 396, 397, 411-12 (1973), the Court concluded that the federal Hobbs Act, which made it unlawful to obstruct, delay, or affect "commerce or the movement of any article or commodity in commerce, by robbery or extortion," could not be used to punish individuals for damage caused to utility company property during a union strike. The Court declined to conclude that "Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes" because doing so would

constitute "an unprecedented incursion into the criminal jurisdiction of the States." *Id.* at 411.

Similarly, *United States v. Lopez*, involved a Congressional enactment in an area of traditional state criminal law—the possession of a firearm in a local school zone. 514 U.S. at 551. In invalidating that federal law under the Commerce Clause, the Court reasoned that "[w]hen Congress criminalizes conduct already denounced as criminal by the states, 'it effects a change in the sensitive relation between federal and state criminal jurisdiction.'" *Id.* at 561 n.3 (quoting *Emmons*, 410 U.S. at 411-412); *see also United States v. Bass*, 404 U.S. 336, 349 (1971) (noting that the law in question would upset the federal state balance because "the broad construction urged by the Government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources"). In contrast to those cases where Congress had potentially usurped state law powers by infringing upon core law enforcement concerns,[14] here, enforcing Section 2 of the VRA would not, in any way, intrude

[14] The Courts have also been concerned about federalism in the context of state criminal law with respect to *Younger* Abstention and federal habeas jurisdiction. *See, e.g.*, *Younger v. Harris*, 401 U.S. 37, 43-45 (1971) (holding that federal courts may not interfere with ongoing state criminal proceedings in the absence of special circumstances); *Coleman v. Thompson*, 501 U.S. 722, 726 (1991); *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) ("[T]he doctrines of procedural default and abuse of the writ are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to

upon Washington State's authority to execute its core law enforcement functions, as set forth above.

Moreover, by remedying the discriminatory denial of voting rights pursuant to the VRA, the federal government acts in an area of unquestionable federal concern and pursuant to indisputable federal constitutional authority. *See Johnson v. Governor of Fla.*, 405 F.3d 1214, 1250 (11th Cir. 2005) (Barkett, J., dissenting) (rejecting claims that enforcing the VRA poses federalism concerns because the "Fourteenth and Fifteenth Amendments altered the constitutional balance between the two sovereigns—not the Voting Rights Act, which merely enforces the guarantees of those amendments"); *see also Hayden v. Pataki*, 449 F.3d 305, 358 (2d Cir. 2006) (Parker, J., dissenting) (reasoning that enforcing the VRA did not upset the balance in federal and state power given that a "seismic shift" had already taken place with the creation of the Fourteenth and Fifteenth Amendments, which "clearly altered the federal-state balance in an attempt to address a truly compelling national interest-namely, reducing racial discrimination perpetuated by the states").

---

vindicate the State's interest in the finality of its criminal judgments."). In both areas, the inquiry has been whether or not it is appropriate for the federal courts to interfere with state criminal proceedings or the finality of state criminal judgments, a direct intrusion into the State's core law enforcement activities. In this case, to the contrary, enforcing Section 2 of the VRA does not interfere with law enforcement activities and does not deprive the State of its core means of defining and enforcing the criminal law.

Because remedying discriminatory vote denial in Washington through application of the VRA would neither undermine law enforcement purposes or interests, nor hinder effective law enforcement activity, enforcing the VRA in this instance would not intrude upon local state concerns and would preserve the careful balance between state and federal power. Accordingly, federalism concerns are not implicated by this case and the Court should affirm the panel's decision, finding compelling evidence of discriminatory vote denial in violation of Section 2 of the VRA.

CONCLUSION

For the reasons set forth above, the restoration of voting rights that would result from application of the VRA to Washington's discriminatory disenfranchisement scheme is fully consistent with strong and effective state law enforcement and this Court should reject the notion that Washington's discriminatory felony disenfranchisement scheme is justified by a nontenuous, law enforcement justification. Accordingly, *amici* respectfully submit that this Court should affirm the panel's decision finding that Washington's felony disenfranchisement law violates section 2 of the VRA.

Respectfully submitted,

Dated: June 11, 2010

s/ Lawrence S. Lustberg
Lawrence S. Lustberg
Jennifer B. Condon
GIBBONS, P.C.
One Gateway Center
Newark, NJ 07102-5310
tel. (973) 596-4489
fax (973) 639-6353

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because it contains 4,979 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

Dated: June 11, 2010

/s/Lawrence S. Lustberg

Lawrence S. Lustberg
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that June 11, 2010, I electronically filed the foregoing *Brief of amici curiae the National Black Police Association, the National Latino Officers Association, American Probation and Parole Association, and former law-enforcement officials*, in support of appellants and in support of affirmance with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate cm/ecf system. 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 registered CM/ECF users. I have mailed the foregoing documents by federal express to the following non-CM/ECF participants:

Juan Cartagena
Community Service Society
105 East 22nd Street
New York, NY 10010

I further certify that I will comply with 9th Cir. R. 29-2(d) and file 20 paper copies of this brief within 3 days of electronic filing.

/s/ Jennifer B. Condon
Jennifer B. Condon

Counsel for Amici Curiae

Appendix A
Interests of the *Amici Curiae*

Zachary W. Carter served as United States Attorney for the Eastern District of New York between 1993 and 1999.

Veronica Coleman-Davis served as United States Attorney for the Western District of Tennessee between 1993 and 2001.

Scott Lassar served as United States Attorney for the Northern District of Illinois between 1997 and 2001.

Kate Pflaumer served as United States Attorney for the Western District of Washington from 1993 to 2001.

Chase Riveland was Washington's Secretary of Corrections from 1986 to 1997 and Executive Director of Colorado's Department of Corrections from 1983 until 1986; he currently serves as Special Master in *Valdivia v. Schwarzenegger*, Civ. No. S-94-671 LKK/GGH (E.D. Cal.).

Norm Stamper served as Seattle's Chief of Police from 1994 to 2000 and was a San Diego police officer from 1966 until 1994.

American Probation and Parole Association is an international association composed of members from the United States, Canada and other countries actively involved with probation, parole and community-based corrections, in both adult and juvenile sectors.

National Black Police Association, which represents approximately 35,000 individual members and more than 140 chapters, is a nationwide organization of African American Police Associations dedicated to the promotion of justice, fairness, and effectiveness of law enforcement.

National Latino Officers Association of America is a fraternal and advocacy organization with a membership of 10,000 uniformed and civilian employees, predominantly within city and state law-enforcement agencies, that is dedicated to creating strong bonds between the Latino community and other law-enforcement agencies.