# 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 ROBERT H. WHALEY, JUDGE PRESIDING

## REPLY BRIEF OF PLAINTIFFS-APPELLANTS


LAWRENCE A. WEISER, ESQ.
IAN WHITNEY, LAW CLERK
UNIVERSITY LEGAL ASSISTANCE
AT GONZAGA LAW SCHOOL
721 North Cincinnati Street
Spokane, WA 99220-3528
509.323.5791

DANIELLE C. GRAY, ESQ.
Four Times Square
New York, NY 10036
212.735.3925

THEODORE SHAW, ESQ.
DIRECTOR-COUNSEL
NORMAN J. CHACHKIN, ESQ.
DEBO P. ADEGBILE, ESQ.
RYAN P. HAYGOOD, ESQ.
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, NY 10013-2897
212.965.2235

*Counsel for Plaintiffs-Appellants*

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## INTRODUCTION AND PRELIMINARY STATEMENT

Defendants' brief is not a response to this appeal; it is a petition for rehearing of this Court's 2003 decision in this case. Notwithstanding that a unanimous panel of this Court concluded, in this very litigation, that a challenge to Washington's felon disfranchisement scheme is cognizable under Section 2 of the Voting Rights Act and that Plaintiffs accordingly have standing to pursue their vote denial claim — a ruling that a majority of the active judges in this Circuit declined to reconsider, and which the United States Supreme Court decided not to review — Defendants nonetheless devote nearly two-thirds of their brief to arguing that *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003) (*Farrakhan I*), was wrongly decided and that this panel should "reexamine" that ruling. Of course, as Defendants undoubtedly are aware, three-judge panels "are bound by decisions of prior panels, unless an en banc decision, Supreme Court decision, or subsequent legislation undermines those decisions." *United States v. Washington*, 872 F.2d 874, 880 (9th Cir. 1989). Because not one of those limited circumstances is applicable here, Defendants' invitation for this panel to overturn the settled law of this Circuit is wholly without merit.

The portion of Defendants' brief that is arguably responsive to the issues presented in this appeal fares no better. Rather than offering any explanation as to why the factors considered by the District Court are relevant to a claim of vote

denial or how such factors can overcome a finding of "compelling evidence of racial discrimination . . . in Washington's criminal justice system" that "clearly hinder[s] the ability of racial minorities to participate effectively in the political process," *Farrakhan v. Gregoire*, No. CV-96-076-RHW, 2006 WL 1889273, at *6 (E.D. Wash. July 7, 2006), Defendants argue that affirmance is appropriate because the District Court's conclusion that the fifth Senate Factor favored Plaintiffs was wrong. Defendants do not dispute that the District Court, ruling on a summary judgment motion, had before it a substantial body of *undisputed* expert evidence (as well as a report from Washington's own Sentencing Guidelines Commission) detailing the stark, unwarranted racial disparities in Washington's criminal justice system — disparities that Plaintiffs' experts concluded were *not* "better explained by other factors independent of race" that might "adequately rebu[t] any inference of racial bias that the [disparate impact] statistics might suggest." *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 591 (9th Cir. 1997). Defendants' attempt on this appeal to offer a rebuttal to those expert conclusions — for the first time in this decade-long litigation — should not be countenanced.

## ARGUMENT

### I. A Three-Judge Panel Has No Authority to Reexamine *Farrakhan I*

The conclusion that this Court reached in *Farrakhan I* — that, among other things, the Voting Rights Act applies to felon disfranchisement laws and that Plaintiffs could proceed with their suit — is binding upon this panel. As this Court has ruled, "[o]nce a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court." *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). Accordingly, "a later three-judge panel considering a case that is controlled by the rule announced in an earlier panel's opinion *has no choice but to apply the earlier-adopted rule*; it may not any more disregard the earlier panel's opinion than it may disregard a ruling of the Supreme Court." *Id.* (emphasis added). This well-settled rule, which is essential to the sound administration of justice, has been repeatedly reaffirmed in this Circuit. *See Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc); *Irons v. Carey*, __ F.3d __, 2007 WL 656345, at *6 n.5 (9th Cir. Mar. 6, 2007); *Santamaria v. Horsley*, 110 F.3d 1352, 1355 (9th Cir. 1997); *United States v. Gay*, 967 F.2d 322, 327 (9th Cir. 1992); *United States v. Mandel*, 914 F.2d 1215, 1221 (9th Cir. 1990).

There are only three intervening events that justify departing from this rule: (1) an intervening Supreme Court decision that is closely on point; (2) an

intervening decision by an en banc panel of *this* Circuit; and (3) intervening legislation. *Hart*, 266 F.3d at 1171 & n.28; *Washington*, 872 F.2d at 880. None of those exceptions are applicable here. Instead, Defendants, in an argument entirely without merit, invite this Court to "reexamine its [previous] conclusion" in light of the decisions from the Second Circuit in *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) and the Eleventh Circuit in *Johnson v. Governor of the State of Florida*, 405 F.3d 1214 (11th Cir. 2005). (Defs.' Br. 10.) The decisions of those courts, however, neither are binding on this panel nor reflect the type of intervening *higher* authority that would permit this panel to simply disregard, as Defendants suggest, *Farrakhan I*. *See Gen. Constr. Co. v. Castro*, 401 F.3d 963, 975-76 (9th Cir. 2005) (rejecting argument that prior panel decision should be reconsidered in light of its "inconsist[ency] with the law in other circuits"), *cert. denied*, 126 S. Ct. 1023 (2006).

Defendants claim that their novel request is supported by exceptions to the law of the case doctrine, a doctrine that "ordinarily precludes a court from re-examining an issue previously decided by the same court, or a higher appellate court, in the same case." *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 833 (9th Cir. 1982); *see Kimball v. Callahan*, 590 F.2d 768, 771 (9th Cir. 1979) ("[U]nder the 'law of the case' doctrine one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior

appeal in the same case."). Relying on *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 787 (9th Cir. 2000), Defendants argue that this panel has discretion to reconsider *Farrakhan I* because "subsequent intervening authority of sister circuits reveals that this Court's conclusion was clearly erroneous and works a manifest injustice." (Defs.' Br. 11.)[1] This argument, once again, is fundamentally misplaced.

First, *Tahoe-Sierra* does not hold that *any* "intervening authority," much less out-of-circuit authority, provides grounds for departing from the law of the case. Indeed, it clearly states that the relevant authority must be "intervening *controlling*

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[1] Defendants, citing *Mendenhall v. National Transportation Safety Board*, 213 F.3d 464, 469 (9th Cir. 2000), suggest that appellate panels have limitless discretion to revisit their prior decisions. (Defs.' Br. 11.) As this Court, sitting *en banc*, explained, they do not:

> Certainly, law of the case is a discretionary doctrine. "The doctrine 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.'" That discretion, however, is not unfettered. "While courts have some discretion not to apply the doctrine of law of the case, that discretion is limited." The prior decision should be followed unless: "'(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial.'"

*Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (*en banc*) (internal citations omitted); *see also Tahoe-Sierra*, 216 F.3d at 787, *aff'd on other grounds*, 535 U.S. 302 (2002) (noting that court may depart from the law of the case only in "appropriate circumstances").

authority." 216 F.3d at 787 (emphasis added); *see Int'l Chem. Workers Union Council of the United Food & Commercial Workers Int'l v. NLRB*, 467 F.3d 742, 748 n.3 (9th Cir. 2006) (noting that decisions from other Courts of Appeals are "out-of-circuit authority, which are not binding on us").

Second, the unanimous panel decision in this case cannot be characterized as "clearly erroneous." While Defendants may vigorously disagree with its conclusion, it is one that three judges of this Court reached after careful deliberation and which a majority of the active judges of this Circuit did not deem worthy of reconsidering three years ago. *See Farrakhan v. Washington*, 359 F.3d 1116 (9th Cir. 2004). Moreover, the issue of whether the Voting Rights Act applies to felon disfranchisement has led to split decisions among every *en banc* panel to have considered the question. *See Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (*en banc*); *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (*en banc*), *cert. denied sub nom. Johnson v. Bush*, 126 S. Ct. 650; *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (*en banc*) (equally divided). Defendants' contention that this Court committed clear error in *Farrakhan I* is absurd.

Finally, Defendants' suggestion that this Court's recognition of a cognizable claim under the Voting Rights Act in these circumstances "works a manifest injustice," *see* Defs.' Br. 11, is also plainly overwrought. Defendants, not surprisingly, do not cite a single case where a court departed from the law of the

case doctrine in such circumstances — *i.e.*, where a court arguably erred in recognizing a cause of action or permitted a lawsuit to continue. No such case exists.

For these reasons, Defendants' defense of the judgment below on the ground that the Voting Rights Act does not apply to felon disfranchisement, *see* Defs.' Br. 10-27, must fail.[2]

## II. Plaintiffs Have Standing to Claim Race-Based Vote Denial Under Section 2 of the Voting Rights Act

Defendants argue that Plaintiffs lack standing to litigate this suit because "[n]o evidence was presented that showed racial bias in any aspect of the felony convictions that caused Plaintiffs here to be disenfranchised." (Defs.' Br. 27.) This argument is merely a variant of Defendants' primary argument for affirmance of the District Court's decision below: that people with felony convictions can never challenge felon disfranchisement laws under the Voting Rights Act. Defendants' argument fails because it was conclusively resolved in *Farrakhan I* and because it is plainly incorrect.

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[2] This reply, accordingly, does not respond to the merits of Defendants' argument, but rather incorporates by reference the briefs that Plaintiffs and their *amici* filed in this litigation in 2003. Because of the page limitations in this reply brief, Plaintiffs cannot fully respond to Defendants' lengthy argument in this filing.

As Defendants recognize, the question of standing is jurisdictional. (Defs.' Br. 28.) Because this Court must assure itself of jurisdiction in every case, the *Farrakhan I* decision thus stands for the proposition that Article III poses no bar to Plaintiffs' assertion of vote denial claims. Accordingly, for the same reason that *Farrakhan I* is binding as to the question of the applicability of the Voting Rights Act, *see supra* Part I, it is similarly binding on the issue of Plaintiffs' standing. [3]

In any event, it is clear that the requirements for Article III standing are satisfied in this case. Vote denial constitutes an injury in fact; that injury is traceable to Washington State's felon disfranchisement law; and invalidation of that law will redress that injury. The "irreducible constitutional minimum" of Article III requires no more, and Defendants' suggestion to the contrary is erroneous. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The essence of Defendants' argument, then, is not that Article III is not satisfied (which is perhaps why Defendants cite Article III cases without explaining why they are

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[3] Defendants argued in *Farrakhan I*, as they do here, that Plaintiffs could not state a claim under the VRA because "[t]hey do not, and could not at this stage, claim that their own convictions are the product of race. None of Plaintiffs ever alleged in their individual cases that any of them were arrested, tried, convicted, or sentenced as a result of race or in a racially discriminatory manner." Brief of Appellees, *Farrakhan v. Locke*, No. 01-35032, *available at* 2001 WL 34128004, at *16-17 (June 7, 2001). Accordingly, if the *Farrakhan I* panel believed that only people with felony convictions alleging discrimination in their convictions *(cont'd)*

implicated, *see* Defs.' Br. 28). Rather, Defendants seek to require people with felony convictions to prove *intentional* discrimination in order to state a claim under the Voting Rights Act — an approach that was expressly rejected by this Court in *Farrakhan I* and by decades of Supreme Court case law. Defendants, in support of their meritless position, cite to *McCleskey v. Kemp*, 481 U.S. 279 (1987), as the sole authority for their argument. The citation to *McCleskey*, however, serves only to expose the weakness of Defendants' argument.

In *McCleskey*, the Supreme Court considered the defendant's constitutional claim that Georgia's death penalty statute violated the Equal Protection clause — a claim that was ultimately rejected by the Court because the defendant did not satisfy his "burden of proving 'the existence of *purposeful* discrimination.'" *Id.* at 292 (emphasis added). *McCleskey* did not, however, involve a claim under the Voting Rights Act, which does not require a showing of intentional discrimination. *McCleskey* is thus inapposite.

In this case, Plaintiffs have not alleged racial discrimination in their own convictions for the simple reason that their claim is not one of purposeful discrimination under the Constitution, but one of discriminatory impact under the Voting Rights Act. By definition, such a claim does not involve an allegation of

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could raise a VRA challenge to Washington's law, it would not have held that Plaintiffs could proceed with this litigation.

discrimination in the individual plaintiff's case. Instead, it requires an allegation that "the discriminatory impact of a challenged voting practice is attributable to racial discrimination *in the surrounding social and historical circumstances*." *Farrakhan I*, 338 F.3d at 1019 (emphasis added).

As this Court previously recognized, "[p]ermitting a citizen, even a convicted felon, to challenge felon disenfranchisement laws that result in either the denial of the right to vote or vote dilution on account of race animates the right that every citizen has of protection against racially discriminatory voting practices." *Id.* at 1016. Nothing in *Farrakhan I*, or in Supreme Court jurisprudence more broadly, suggests that Plaintiffs' ability to challenge Washington State's felon disfranchisement law under the Voting Rights Act is in any way dependent on a showing of intentional discrimination in their individual felony convictions. Plaintiffs clearly have Article III standing to mount such a challenge.

## III. The District Court's Totality of the Circumstances Analysis Cannot Stand

In their opening brief, Plaintiffs demonstrated that the District Court placed near-dispositive weight on those Senate Factors that have extremely limited — if any — relevance to Plaintiffs' vote denial claim. In particular, Plaintiffs have explained in great detail why the District Court erred in concluding that certain factors — particularly, the history of official discrimination in areas of voting — could overcome the court's own finding of "compelling" evidence that racial

discrimination in Washington's criminal justice system "hinder[s] the ability of racial minorities to participate effectively in the political process." (*See* Plaintiffs' Br. 23-30, 37-46.) In response, Defendants argue that the evidence on the other Senate Factors favors them, but they fail to proffer any explanation as to *why* evidence of racially polarized voting, candidate slating processes, overt racial appeals in political campaigns, the electoral success of minority politicians, and responsiveness of non-minority politicians are in fact relevant to a claim of a denial of a racial minority group's right to vote. (*Cf.* Defs.' Br. 39-40.) Instead, Defendants simply conclude, without citing to any authority for their position, that these Senate Factors are relevant here because *all* of the factors listed in the Senate Report are *always* relevant, regardless of the nature of the claim at issue. As Plaintiffs have explained, however, such an approach to the totality of the circumstances analysis is at odds with the plain language, purpose and spirit of the Voting Rights Act, Congress's intent, *see* Senate Report at 28-30, and decades of Supreme Court and Ninth Circuit precedent, *see Thornburg v. Gingles*, 478 U.S. 30, 75 (1986); *Gomez v. City of Watsonville*, 863 F.2d 1407, 1412 (9th Cir. 1988).

Rather than offering a theory of how such evidence is relevant, if at all, to Plaintiffs' vote denial claim, Defendants attempt to (1) recharacterize Plaintiffs' evidence of racial discrimination in Washington State's criminal justice system, recognized by the District Court to be "compelling," as "limited evidence," and (2)

argue that the District Court erred in finding that Senate Factor Five favored Plaintiffs.

As to the first argument, the District Court did not, in fact, conclude that Plaintiffs' evidence was "limited." Rather, adopting a mechanical point-counting approach to the "totality of the circumstances" test, the District Court concluded that other Senate Factors that did not favor Plaintiffs outweighed the "compelling" evidence underlying the District Court's finding that Senate Factor Five favored Plaintiffs.

Defendants' second argument is equally unavailing. Defendants claim that the District Court committed "fatal error" by "disregarding well-established law that statistical disparity alone is inadequate to prove a claim under the VRA." (Defs.' Br. 33.) In fact, the District Court, in reaching its determination that Plaintiffs presented "compelling evidence of racial discrimination . . . in [the] criminal justice system" that "clearly hinder[s] the ability of racial minorities to participate in the political process," *Farrakhan v. Gregoire*, No. CV-96-076-RHW, 2006 WL 1889273, at *6 (E.D. Wash. July 7, 2006), did not merely rely upon bare evidence of statistical disparities. Rather, Plaintiffs offered *undisputed* expert evidence that the staggering racial disparities in Washington State's criminal justice system could not be explained by race-neutral factors: (1) the over-representation of racial minorities at every stage of Washington's criminal justice

system is not warranted by the extent to which racial minorities actually participate in crime; (2) racial profiling and racial disparity in charging and sentencing decisions persist even after race-neutral characteristics (offense seriousness, offenders' criminal histories, aggravating factors, etc.) are taken into account; and (3) the over-representation of Blacks and Latinos among drug-related arrests in Washington's most racially diverse city is not explicable by law enforcement organizational practices or the legal status of crack cocaine (as opposed to powder cocaine) in Washington. (*See* Pls.' Br. 9-16 (summarizing record of substantial and undisputed evidence before the District Court).) The District Court was thus correct to conclude that Plaintiffs' undisputed expert reports demonstrate that such disparities "are not explicable in race neutral terms."[4]

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[4] The District Court's conclusion was driven by the fact that "Plaintiffs vigorously assert[ed that] the statistical disparity and disproportionality evident in Washington's criminal justice system *arise from* and result in discrimination, and they submit[ted] expert reports that substantiate this assertion" — expert reports that were *never* disputed by Defendants. *See Farrakhan*, 2006 WL 1889273, at *6 (emphasis added). "As was the case in 2000, the facts in this matter are not in dispute." *Id.* at *2; *id.* at *6 ("Significantly, Defendants do not present any evidence to refute Plaintiffs' experts' conclusions."). Indeed, not only did Defendants fail to offer any expert opinions to rebut the findings of Plaintiffs' experts, but they also failed to set forth the specific facts that they believed would have established a genuine dispute on an issue of material fact precluding summary judgment for Plaintiffs, as is expressly required by Local Rule 56.1(b). Accordingly, the District Court did not inappropriately weigh evidence or make credibility determinations; it simply accepted the truth of *(cont'd)*

For this reason, the District Court's analysis, which distinguished Plaintiffs' evidence from that provided by the plaintiffs in *Smith v. Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586 (9th Cir. 1997), is entirely consistent with this Court's ruling in that case. In *Salt River*, the plaintiffs challenging a district's land ownership voting qualification offered a single type of evidence: statistical evidence that a disproportionate percentage of landowners in the district were White. All other potentially relevant facts to their Section 2 challenge were stipulated, such that the sole question for trial was the legal significance of that disparity. 109 F.3d at 590–91.

As this Court emphasized in *Farrakhan I*, that joint stipulation of facts included "plaintiffs' admission that there was no evidence of discrimination as measured by the Senate report factors and their stipulation to 'the nonexistence of virtually every circumstance which might indicate that landowner-only voting results in racial discrimination,' leaving only a bare statistical showing of disparate

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Plaintiffs' undisputed evidence, as it is entitled to do on summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

To oppose summary judgment, "Plaintiffs, of course, are not required to prove" that Section 2 has been violated; "they need only show a genuine dispute of material fact." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 559 (9th Cir. 1998). Accordingly, at best, the conclusory rebuttal that Defendants offer now (for the first time) to show that racial disparities in Washington's criminal justice system "are not attributable to race discrimination" (Defs.' Br. 37) does not

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impact to support their Section 2 claim." 338 F.3d at 1018 (quoting *Salt River*, 109 F.3d at 595). In other words, *Salt River* was a case in which "the observed difference[s] in rates of home ownership between non-Hispanic whites and African-Americans . . . [were] *better explained by other factors independent of race*" which "adequately rebutted any inference of racial bias that the [disparate impact] statistics might suggest." *Id*. at 1017 (quoting *Salt River*, 109 F.3d at 591).[5]

The record in this case, as the District Court recognized, is dramatically different. Unlike in *Salt River*, Plaintiffs here introduced substantial and undisputed evidence of the type that this Court in *Salt River* and *Farrakhan I* held would suffice to demonstrate causation.[6] Specifically, Plaintiffs demonstrated not only marked racial disparity in Washington State's criminal justice system, but also racial disparity *that could not be explained by race-neutral factors*. Professor

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demonstrate that summary judgment is proper; rather, it simply creates a genuine issue of material fact that warrants a trial.

[5] As *Farrakhan I* emphasized, the conclusion that the disparity was not the result of racial discrimination was "dictated" by the joint stipulation in that case, particularly Plaintiffs' concessions. *Farrakhan I*, 338 F.3d at 1018.

[6] Indeed, if Defendants' view of Plaintiffs' evidence as insufficient as a matter of law was correct — a view expressed by Judge Kozinski in his dissent from the denial of rehearing *en banc* in *Farrakhan I* — then the appropriate course for the *Farrakhan I* Court would have been to affirm the denial of summary

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Robert Crutchfield's expert report, for example, concluded that "there is credible evidence that there are significant racial disparities that are not fully warranted by racial or ethnic differences in illegal behavior." (E.R. 182.) Moreover, Professor Katherine Beckett's expert report, which found that the striking racial disparities in drug arrests in Seattle are difficult to explain "in race neutral terms," concluded that there is no race-neutral explanation for law enforcement's *focus* on crack cocaine, outdoor venues, and downtown drug areas. (E.R. 258–59, 266–70.) Thus, the District Court, "[v]iewing the evidence in a light most favorable to the non-movants" for summary judgment, correctly concluded that such discrimination "clearly hinder[s] the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic." *Farrakhan I*, 338 F.3d at 1020.

For their part, Defendants fundamentally misunderstand the type of evidence required to sustain a Section 2 challenge to felon disfranchisement laws. Defendants ignore that while evidence of disparate impact is not necessarily determinative of racial bias in Washington's criminal justice system, it is nevertheless relevant and important evidence that at a minimum raises an inference of racial discrimination. *See Washington v. Davis*, 426 U.S. 229, 242 (1976)

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judgment in that case. *See* 359 F.3d at 1117–18 (Kozinski, J., dissent from denial of rehearing and rehearing *en banc*).

("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) ("The impact of the official action . . . may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."). In noting Plaintiffs' undisputed evidence of disparate impact and the absence of race-neutral explanations, the District Court did not adopt "the burden-shifting framework of disparate impact employment discrimination suits." (Defs.' Br. 33.)[7] Instead, it followed decades of settled law by undertaking "a sensitive inquiry into such

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[7] Defendants are wrong to claim that Plaintiffs' experts "had not undertaken to identify and examine other variables that may have contributed to the disparity." (Defs.' Br. 35.) Professor Robert Crutchfield and Katherine Beckett both expressly considered the conceivable race-neutral causes of the stark disparities in Washington's criminal justice system — and rejected all of them in their reports. The District Court did not in any way require Defendants to offer a race-neutral explanation for the disparity, as would be expected under a traditional burden-shifting analysis. To the contrary, it simply found that Plaintiffs' evidence of a complete absence of such explanations was an undisputed fact. At the summary judgment stage, again, Plaintiffs were not required to *prove* discrimination in Washington's criminal justice system; they were simply expected to demonstrate the existence of a genuine issue of fact for trial. That the District Court concluded that there was no genuine issue because the evidence clearly favored Plaintiffs does not demonstrate an impermissible *(cont'd)*

circumstantial and direct evidence of intent as may be available," *Arlington Heights*, 429 U.S. at 266, including "proof of disproportionate impact," *Batson v. Kentucky*, 476 U.S. 79, 93 (1986). The importance and relevance of such evidence reflects "that under some circumstances proof of discriminatory impact 'may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.'" *Id*. (citation omitted).

Finally, it is Defendants, not the District Court, that have attempted to shift the burden of proof for Section 2 claims. The fifth Senate Factor calls for evaluation of "*the extent* to which members of the minority group *bear the effects* of discrimination" in the surrounding socio-economic environment, Senate Report at 28 (emphasis added); it does not call for an assessment of whether discriminatory social circumstances rise to the level of an equal protection violation. *Cf. League of United Latin American Citizens v. North East Indep. Sch. Dist.*, 126 S.Ct. 2594, 2622 (2006) (holding that redistricting plan violated Section 2 and factoring into totality of the circumstances analysis evidence of "intentional discrimination that *could give rise* to an equal protection violation" without deciding whether such evidence in fact constituted a constitutional violation)

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shift in the burden to demonstrate discriminatory intent, but an appropriate application of summary judgment principles.

(emphasis added). At bottom, Defendants' characterization of Plaintiffs' evidence as legally insufficient, once again, betrays an attempt to reintroduce a discriminatory intent requirement into Section 2 of the Voting Rights Act. That attempt was rejected in *Farrakhan I* and this Court should do so again.

Accordingly, the District Court did not err in concluding that Plaintiffs' undisputed evidence of stark racial disparities in Washington State's criminal justice system and the complete absence of race-neutral explanations for such disparities was compelling evidence of racial bias in Washington that clearly hinders the ability of racial minorities in Washington State to participate in the political process.

## CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and judgment should be entered in favor of Plaintiffs' claim that Washington State's felon disfranchisement scheme violates Section 2 of the Voting Rights Act.

Dated this 16th day of March, 2007.

Respectfully Submitted,

LAWRENCE A. WEISER, WSBA#: 6865
ANGELA GIANOLI, LEGAL INTERN
IAN WHITNEY, LAW CLERK
UNIVERSITY LEGAL ASSISTANCE
721 NORTH CINCINNATI STREET
P.O. BOX 3528
SPOKANE, WASHINGTON 99220-3528
509.323.5791
lweiser@lawschool.gonzaga.edu

RYAN P. HAYGOOD, ESQ.
THEODORE M. SHAW, ESQ.
*DIRECTOR-COUNSEL*
NORMAN J. CHACHKIN, ESQ.
DEBO P. ADEGBILE, ESQ.
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
99 HUDSON STREET, SUITE 1600
NEW YORK, NEW YORK 10013-2897
212.965.2235
rhaygood@naacpldf.org

DANIELLE C. GRAY, ESQ.
FOUR TIMES SQUARE
NEW YORK, NEW YORK 10036
212.735.3925
dangray@probonolaw.com

*Attorneys for Plaintiffs-Appellants*

**CERTIFICATION OF COMPLIANCE TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 06-35669**

I CERTIFY THAT:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached reply brief is proportionately spaced, has a typeface of 14 points, and contains 4,556 words.

DATED this 16th day of March, 2007

LAWRENCE A. WEISER, WSBA #6865
UNIVERSITY LEGAL ASSISTANCE