NO. 06-35669

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MUHAMMAD SHABAZZ FARRAKHAN, et al.,

Plaintiffs-Appellants,

v.

CHRISTINE O. GREGOIRE, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON AT SPOKANE

No. CV 96-0076 RHW
The Honorable Robert H. Whaley
United States District Court Judge

STATE'S BRIEF IN SUPPORT OF REHEARING EN BANC

ROBERT M. MCKENNA
Attorney General

DANIEL J. JUDGE
WSBA # 17392
Senior Counsel
PO Box 40116
Olympia, WA 98504-0116
360-586-3594

JEFFREY T. EVEN, WSBA #20367
WILLIAM B. COLLINS, WSBA #785
Deputy Solicitors General
PO Box 40100
Olympia, WA 98504-0100
360-586-0728

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STATE'S BRIEF IN SUPPORT OF REHEARING EN BANC

Governor Christine O. Gregoire and the other appellees (the State) submit this brief pursuant to the Court's Order filed February 12, 2010, directing the parties to "file concurrent briefs setting forth their respective positions on whether this case should be, or should not be, reheard en banc." Order at 1. The Court should grant rehearing en banc because this case presents two questions of exceptional importance:

1. Washington law disenfranchises individuals while they are in state custody or under active supervision, based on a felony conviction. Is a claim that felon disenfranchisement discriminates on the basis of race or color cognizable under the Voting Rights Act (VRA), 42 U.S.C. § 1973?

2. A majority of the panel held that the appellants satisfied their burden to prove that Washington's felon disenfranchisement law violates the VRA by showing that, based on the totality of circumstances, the political process was not equally open to participation by members of the protected class. The panel majority relied solely on Senate Factor 5, the extent to which members of the minority group bear the effects of discrimination.

Are the other eight Senate Factors essentially irrelevant in assessing the totality of circumstances in a vote denial claim that felon disenfranchisement violates the VRA?

1. The Panel Decision That The Voting Rights Act, 42 U.S.C. § 1973, Applies To State Felon Disenfranchisement Laws Conflicts With The Decisions Of The First, Second, And Eleventh Circuits

The first reason this case presents questions of exceptional importance is that the panel decision conflicts with decisions of the First, Second, and Eleventh Circuits. This conflict represents the kind of exceptional circumstance that justifies rehearing en banc. Circuit Rule 35-1 explains: "When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for suggesting a rehearing en banc."

Such a conflict exists here. The first Ninth Circuit panel to hear this case held that "[p]laintiffs' claim of vote denial is cognizable under Section 2 of the VRA. Felon disenfranchisement is a voting qualification, and Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA. 42 U.S.C. § 1973." *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003) (*Farrakhan I*) (attached as

Attachment. B) The second panel concluded that it was bound by the prior panel's decision because "none of the exceptions to the law of the case doctrine applies. Therefore, *Farrakhan I* remains binding on this panel." *Farrakhan v. Gregoire*, 590 F.3d 989, 999 (9th Cir. 2010) (*Farrakhan II*) (attached as Attachment A).

This holding conflicts with decisions of the First, Second, and Eleventh Circuits, which hold that the Voting Rights Act does not apply to felon disenfranchisement statutes. *Simmons v. Galvin*, 575 F.3d 24, 26 (1st Cir. 2009) ("We think it clear from the language, history, and context of the VRA that Congress never intended § 2 to prohibit the states from disenfranchising currently incarcerated felons."); *Hayden v. Pataki*, 449 F.3d 305, 310 (2d Cir. 2006) (*en banc*) ("we hold that the Voting Rights Act does not encompass these felon disenfranchisement provisions"); *Johnson v. Governor of Florida*, 405 F.3d 1214, 1234 (11th Cir. 2005) (*en banc*), *cert. denied sub nom. Johnson v. Bush*, 546 U.S. 1015, 126 S. Ct. 650, 163 L. Ed. 2d 526 (2005) ("applying Section 2 of the Voting Rights Act to felon disenfranchisement provisions raises grave constitutional concerns [because it] would prohibit a practice that the Fourteenth Amendment permits Florida to maintain") (footnote omitted).

A petition for a writ of certiorari was filed in *Simmons* on February 1, 2010, No. 09-920.

The second Ninth Circuit panel acknowledged "cases from the Second and Eleventh Circuits, which held that the VRA does not apply to felon disenfranchisement laws. *See Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc); *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir.) (en banc), *cert. denied*, 546 U.S. 1015, 126 S. Ct. 650, 163 L. Ed. 2d 526 (2005)." *Farrahkan II*, 590 F.3d at 999. The panel also recognized that "the First Circuit has also held that the VRA does not apply to felon disenfranchisement laws. *See Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2009)." *Id.* at 1000 n.15.

In this case, the conflict is clear, and whether the VRA applies to felon disenfranchisement laws is a national issue that requires uniformity. Forty-eight states impose some form of voter disqualification on felons. Human Rights Watch, The Sentencing Project, *Felony Disenfranchisement Laws in the United States, available at* http://www.sentencingproject.org/pdfs/1046.pdf (last visited Mar. 4, 2010). The Court should grant rehearing en banc and reverse the panel decision.

2. The Second Panel Decision, Applying The VRA To Washington's Felon Disenfranchisement Law, Requires Rehearing En Banc

When Congress amended Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 in 1982, the Senate Report on the bill set out nine nonexclusive factors to be considered in determining whether a contested election practice, under the "totality of the circumstances reveal that the political processes leading to nomination or election are not equally open to participation by members of a protected class in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Thornburg v. Gingles*, 478 U.S. 30, 43, 106 S. Ct. 2752, 92 L. Ed. 2d. 25 (1986) (internal quotation marks and punctuation omitted). These factors were based on factors articulated by the Supreme Court in *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332, 37 L. Ed. 2d 314 (1973). *Gingles*, 478 U.S. at 44 n.8.

The district court found that the plaintiffs presented compelling evidence of Factor 5, discrimination in the criminal justice system, but concluded that they had failed to present evidence on any other of the Senate Factors. Based on this evidence, the district court concluded that under the totality of the

circumstances Washington's felon disenfranchisement law did not result in discrimination in the electoral process on account of race.

A majority of the second panel held that "given the strength of their Factor 5 showing, the district court erred in requiring them to prove Factors that had little if any relevance to their particular vote denial claim." *Farrakhan II*, 590 F.3d at 1004. The majority disregarded the other eight Senate Factors because the plaintiffs here brought a vote denial claim not a vote dilution claim. According to the majority, the primary question in a denial claim "is not whether a denial or abridgement occurs, but whether such denial is on account of race." *Farrakhan II*, 590 F.3d at 1006 (internal quotation marks omitted). Thus, "[i]n vote denial claims brought under the results test, the on account of element is proved by showing that a discriminatory impact … *is attributable to racial discrimination in the surrounding social and historical circumstances. Farrakhan I,* 338 F.3d at 1019." *Id.* (emphasis added) (footnote and internal quotation marks omitted).

a. The Second Panel Decision Is Inconsistent With *Farrakhan I, Salt River,* And The Decisions In Other Circuits

The majority's refusal to consider the other eight Factors because plaintiffs brought a vote denial case instead of a vote dilution case is

inconsistent with both *Smith v. Salt River Project Agriculture Improvement and Power District*, 109 F.3d 586 (9th Cir. 1997), and *Farrakhan I*, as well as the decisions of other circuits. A decision meets the standard for rehearing en banc if it conflicts with decisions in other circuits or if "en banc consideration is necessary to secure or maintain uniformity of the court's decisions[.]" FRAP 35(a)(1). Both are present with regard to the application of the VRA to a vote denial claim.

Salt River concerned "African-Americans who reside[d] within the boundaries of the [District] but [who did] not own real property within the District. [They] claim[ed] that the criterion of land ownership for eligibility to vote in District elections violate[d] Section 2 of the Voting Rights Act." *Salt River*, 109 F.3d at 588 (citation omitted). This claim was based on the fact that "only forty percent of African-American heads-of-household within the District own homes, compared with sixty percent of white heads-of-household." *Id*. Although *Salt River* was a vote denial case, the court did not limit its consideration of the Senate Factors. *Salt River* explained that 42 U.S.C. § 1973(b) "guides the courts in applying the results test, providing that a violation . . . is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State

or political subdivision are not equally open to participation by members of a protected class of citizens." *Salt River*, 109 F.3d at 594 (internal quotation marks omitted). The court ruled against the plaintiffs in *Salt River* because they "stipulated to the nonexistence of virtually every circumstance which might indicate that landowner-only voting results in racial discrimination." *Id.* at 595. The plaintiffs stipulated away the Senate Factors. The stipulation provided:

> 84. There is no evidence that the landowner voting system of the District was originally established and has been maintained with any intent to abridge or deny any person's right to vote on account of race.
>
> 85. There is no known history or incident of racial discrimination in District elections.
>
> 86. The issues in District elections have historically been concerned directly with matters of reliability and economy of water storage and distribution and planning, operation, and economy of District power functions which support District water reclamation functions....
>
> 89. There is no history or incident of campaigning by any candidate in any district election based on racial appeals or on covert or subtle racial grounds.
>
> 90. No data has been maintained by the Defendants or is known to exist as to the races of candidates for the Board and Council [or] members of the Board and Council.... There is no history or incident of racially polarized voting in District elections.

> 91. The District's past and present election practices do not include practices which have the effect of enhancing opportunity for racial discrimination in voting behavior....

Salt River, 109 F.3d at 595-96. Thus, *Salt River* considered the Senate Factors that the majority of the panel held were essentially irrelevant in a vote denial case.

Similarly, in *Farrakhan I*, there is nothing in the court's analysis that would limit the relevance of the Factors in a vote denial case. In *Farrakhan I*, the court explained that "under *Salt River* and consistent with both Congressional intent and well-established judicial precedent, a causal connection may be shown where the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances." *Farrakhan I*, 338 F.3d at 1019. And the court referred to "the Senate Report accompanying the 1982 Amendments [that] identified typical factors that may be relevant in analyzing whether a particular voting practice violates [the VRA.]" *Id.* (internal quotation marks omitted). *Farrakhan I* did not elevate Factor 5, racial discrimination in the criminal justice system to be the only relevant factor in a vote denial case involving felon disenfranchisement. Rather, it was just another factor to be considered. According to the court, "racial bias in the criminal justice system may very

well interact with voter disqualifications to create the kinds of barriers to political participation on account of race that are prohibited by Section 2, *rendering it simply another relevant social and historical condition to be considered where appropriate.*" *Id*. at 1020 (emphasis added). *Farrakhan I* remanded the case to the district court to conduct "a searching inquiry into all factors that bear on Plaintiffs' claim." *Id*.

The majority's approach is also inconsistent with decisions in other circuits considering claims of vote denial. In *Ortiz v. City of Philadelphia Office of City Commissioners Voter Registration Division*, 28 F.3d 306 (3d Cir. 1994), the court considered a law that provided that "registered voters who fail to vote for two years shall be purged from the registration rolls after being provided notice of the same." *Id.* at 307. The plaintiffs claimed that "the non-voting purge act had a disparate impact on minority voters" and thus violated the VRA. *Id.*

Ortiz affirmed the district court ruling that there was no violation of the VRA, after considering a number of the Senate Factors, not just Factor 5. The district court found Factor 5 weighed in favor of the plaintiffs because there were "disparities in the rates of educational attainment, home ownership, housing discrimination, health care coverage, employment, and income among

African-Americans and Latinos in comparison to the general population of the City of Philadelphia." *Id.* at 312 n.9. The district court "also found that minority voters in Philadelphia do not exercise their right to vote to the same extent as white voters, which in part may be attributable to discrimination and the overall socioeconomic status of minorities in Philadelphia." *Id.* But the district court found that other factors weighed against finding a violation of the VRA. The district court found that "there was no evidence of historical voting-related discrimination infringing upon the rights of Latinos or African-Americans to vote. There was no evidence of discrimination in the candidate slating process that denied minority candidates equal access to the political process. Nor was there evidence that minorities experience difficulty in electing representatives of their choice." *Id.* at 312 (citations omitted). The Third Circuit analyzed factors the majority held were irrelevant in a vote denial claim.

In *Burton v. City of Belle Glade*, 178 F.3d 1175, 1183 (11th Cir. 1999), African-American plaintiffs living outside the city brought an action under the VRA that alleged that "the City of Belle Glade unlawfully deprived them of their right to vote in failing to annex the Okeechobee Center into the City." In analyzing the claim the court explained that "[v]ote denial occurs when a state,

or here a municipality, employs a 'standard, practice, or procedure' that results in the denial of the right to vote on account of race." *Id.* at 1197-98. To prevail in this claim, the plaintiffs "must prove that, under the totality of the circumstances, the political processes are not equally open to participation by members of a protected class in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id*. at 1198 (internal quotation marks and punctuation omitted). To make this "determination, a court must assess the impact of the contested structure or practice on minority electoral opportunities on the basis of objective factors." *Id*. (internal quotation marks omitted). In concluding that there was no violation, the court reviewed a number of the Factors. The court found no evidence of

> a history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process[;]
>
> no evidence that Belle Glade uses or used any voting practices or procedures that may enhance the opportunity for discrimination against the minority group[;]
>
> no evidence in this record that the black citizens of Belle Glade bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process[; and]

> no evidence of any significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

Id. at 1198 (citations and internal quotation marks omitted). As in the other vote denial cases, *Burton* considered Factors that the majority deemed irrelevant in a vote denial case.

b. The Majorities' Reasoning Is Flawed Because The Senate Factors Are Equally Relevant To Both Vote Dilution Claims And Felon Disenfranchisement Claims

The majority disregarded eight of the Factors because plaintiffs brought a vote denial claim. However, felon disenfranchisement laws are analytically similar to laws alleged to dilute the vote of a protected class. Like such laws, felon disenfranchisement is not per se unconstitutional or a violation of the VRA. Indeed, "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment[.]" *Richardson v. Ramirez*, 418 U.S. 24, 54, 94 S. Ct. 2655, 41 L. Ed. 2d 551 (1974). Thus, just like a dilution case, the question in evaluating a felon disenfranchisement law "is whether 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." *Gingles*, 478 U.S. at 44 (internal quotation marks omitted). "In order to answer this question, a court must assess the impact of the contested

structure or practice on minority electoral opportunities on the basis of objective factors." *Id.* (internal quotation marks omitted). The objective factors are the Factors in the Senate Report, taken from *White v. Regester*, 412 U.S. 755. *Gingles*, 478 U.S. at 44-45.

In *White*, the court considered a challenge to multimember districts when used in combination with single-member districts. The plaintiffs claimed that this combination diluted the voting strength of racial and ethnic minorities. The court explained that "under our cases, multimember districts are not per se unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State." *White*, 412 U.S. at 765. Since multimember districts were not per se invalid, the question was how to determine whether the challenged multimember districts were improper. According to the Court, the "plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question-that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.* at 766. To satisfy this burden, the Supreme Court approved of the district

court's findings that later became the Factors in the Senate Report. *Id*. at 766-67.

Felon disenfranchisement is analytically like the multimember district in *White*. The distinction drawn by the majority between denial and dilution claims does not withstand analysis. According to the majority, "the Factors most relevant to a vote dilution claim are those that examine whether minorities have the capacity to be politically influential as a group, and, if so, whether their political influence has been weakened[.]" *Farrakhan II*, 590 F.3d at 1006. The majority stated that these factors include "whether the minority group is politically cohesive, whether the white majority votes in a bloc, whether voting is racially polarized, whether minorities have succeeded in being elected to public office, and whether elected officials have been responsive to the particularized needs of the minority group." *Id*.

These factors are just as relevant to determine whether felon disenfranchisement violates the VRA. On its face, there is nothing wrong with felon disenfranchisement. Plaintiffs in this case were not disenfranchised because of their race, but because they are convicted felons in custody. To determine whether a facially neutral felon disenfranchisement law violates the VRA "plaintiffs must prove that the challenged voter qualification denies or

abridges their right to vote on account of race, [and] the 1982 Amendments and subsequent case law make clear that factors outside the election system can contribute to a particular voting practice's disparate impact when those factors involve race discrimination." *Farrakhan I*, 338 F.3d at 1019. This "causal connection may be shown where the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances." *Id*.

If the plaintiffs in this case had proof of majority block voting, racially polarized voting, no success in electing minorities to office, or unresponsiveness to the needs of minority groups, it would establish the racial discrimination in the surrounding social and historical circumstances necessary to demonstrate a violation of the VRA. In that case, felon disenfranchisement, which is proper on its face, would violate the VRA because the discriminatory impact of the practice would be attributable to racial discrimination. The lack of proof in these areas compels the opposite conclusion.

Illustrative of the majority's error is its treatment of the 2009 amendment to Washington's felon disenfranchisement law. Prior to 2009, felons could regain the right to vote if they completed all the elements of their sentence, including the payment of legal financial obligations, and received either a

certificate of discharge from a court or a final order of discharge from the board of prison terms and paroles. Wash. Rev. Code § 9.94A.220 (1996); Wash. Rev. Code § 9.96.050 (1996). Under the 2009 amendment, all felons, who are no longer in custody or under active supervision, automatically regained the right to vote. Wash. Rev. Code § 29A.08.520 (2009). The State argued that this was positive evidence of Factor 1 (no history of official discrimination in voting), Factor 3 (no use of procedures that enhance the opportunity for discrimination against minority groups), and Factor 8 (lack of responsiveness on the part of elected leaders to the needs of minority groups). The majority rejected these arguments because "a mere decrease in the length of time for which the State's discriminatory criminal justice system deprives minorities of the right to vote does not change our determination that those Factors have little relevance to this case." *Farrakhan II*, 590 F.3d at 1015. The majority concluded that "no matter how well the amended law functions to restore at an earlier time the voting rights of felons who have emerged from incarceration, it does not protect minorities from being denied the right to vote upon conviction by a criminal justice system that Plaintiffs have demonstrated is materially tainted by discrimination and bias." *Id*. at 1016.

Thus, the majority refused to consider the 2009 amendment because it did not refute evidence of Factor 5. The problem with this analysis is that it ignores the surrounding social and historical circumstances. The "question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality, and on a functional view of the political process." *Gingles*, 478 U.S. at 45 (citation and internal quotation marks omitted). Even if there is bias in the criminal justice system under a "functional view of the political process" the fact that the State granted the vote to felons who are not in custody or under active supervision is powerful evidence that felon disenfranchisement does not result in discrimination in the electoral process on account of race.

The Court should grant rehearing en banc for the same reasons it granted rehearing en banc in *In re GlenFed, Inc. Securities Litigation*, 42 F.3d 1541 (9th Cir. 1994): "in order to determine whether the panel's [interpretation] is consistent with [the VRA], whether the panel's decision is consistent with circuit precedent, and whether we should embrace the Second Circuit's or any other circuit's approach." *Id.* at 1543.

3. If The Court Grants Rehearing En Banc, It Should Call For Supplemental Briefing And Hear Oral Argument

If the Court grants rehearing en banc, it should call for supplemental briefing. The first panel to hear this case held that "[p]laintiffs' claim of vote denial is cognizable under Section 2 of the VRA." *Farrakhan I*, 338 F.3d at 1016. However, the panel did not consider the arguments that led the First, Second, and Eleventh circuits to reach a contrary conclusion. The first panel's reasoning was limited to the observation that "[f]elon disenfranchisement is a voting qualification, and Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA. 42 U.S.C. § 1973." *Id*. This is not surprising because *Farrakhan* I was decided in 2003, and the contrary circuit court decisions came later. *Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2009); *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (*en banc*); *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005) (*en banc*). The only detailed analysis of this issue is found in the dissent from the denial of rehearing en banc of the first panel decision. *Farrakhan v. Washington*, 359 F.3d 1116 (9th Cir. 2004), Kozinski, Circuit Judge, with whom Judges O'Scannlain, Kleinfeld, Tallman, Bybee, Callahan and Bea, join, dissenting from denial of rehearing en banc. (Attached as Attachment C.)

Supplemental briefing would also assist the Court in deciding whether the majority of the second panel was correct in its conclusions that all but one of the Senate Factors are irrelevant in a vote denial claim.

RESPECTFULLY SUBMITTED this 5th day of March, 2010.

ROBERT M. MCKENNA
Attorney General

s/ Jeffrey T. Even
Jeffrey T. Even, WSBA #20367

s/ William B. Collins
William B. Collins, WSBA #785
Deputy Solicitors General
PO Box 40100
Olympia, WA 98504-0100
360-586-0728

s/ Daniel J. Judge
Daniel J. Judge, WSBA #17392
Senior Counsel
PO Box 40116
Olympia, WA 98504-0116
360-586-3594

Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 06-35669

I certify that:

☒ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Brief of Defendants-Appellees is:

- Proportionately spaced, has a typeface of 14 points or more and contains 4,124 words.

s/ Jeffrey T. Even
Jeffrey T. Even
Attorney for Defendants/Appellees

Dated: March 5, 2010.

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2010, 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.

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

Debo Adegbile
NAACP Legal Defense &
Education Fund, Inc.
99 Hudson Street, 16th Floor
New York, NY 10013
dadegbile@naacpldf.org

Lawrence Arthur Weiser
University Legal Assistance
721 North Cincinnati Street
Spokane, WA 99220
lweiser@lawschool.gonzaga.edu

Daniel John Judge
Senior Counsel
PO Box 40116
Olympia, WA 98504-0116
danielj@atg.wa.gov

Martina Vandenberg
Jenner & Block
1099 New York Ave. NW, Suite 900
Washington, DC 20001
mvandenberg@jenner.com

William Barton Patterson
Debevoise & Plimpton
919 Third Avenue
New York, NY 10022
wbpatterson@debevoise.com

Peter Anthony Danelo
Unit C-14
2021 1st Avenue
Seattle, WA 98121
peterdanelo@gmail.com

John Payton
NAACP Legal Defense &
Education Fund, Inc.
99 Hudson Street - 16th Floor
New York, NY 10013
jpayton@naacpldf.org

Ryan Haygood
NAACP Legal Defense &
Education Fund, Inc.
99 Hudson Street - 16th Floor
New York, NY 10013
ryahgood@naacpldf.org

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

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

EXECUTED this 5th day of March, 2010, at Olympia, WA.

s/ Jeffrey T. Even
Jeffrey T. Even