

No. 06-35669

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MUHAMMED SHABAZZ FARRAKHAN,
A/K/A ERNEST S. WALKER-BEY; *et al.*,

Plaintiffs-Appellants,

versus

CHRISTINE O. GREGOIRE; *et al.*,

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

**BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL
RIGHTS, EQUAL JUSTICE SOCIETY,
LEGAL SERVICES FOR PRISONERS WITH CHILDREN, AND
AMERICAN PAROLE AND PROBATION ASSOCIATION
AS AMICI CURIAE IN SUPPORT OF
PLAINTIFFS-APPELLANTS ON REHEARING EN BANC**

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STATEMENT OF CORPORATE DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* the Lawyers' Committee for Civil Rights, Equal Justice Society, Legal Services for Prisoners with Children, and American Parole and Probation Association, by and through their undersigned counsel, state that they are non-profit organizations and therefore not publicly held corporations that issue stock.

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STATEMENT OF INTEREST

Amici curiae supporting this brief have first-hand experience in assisting current and former prisoners in various contexts and bring a direct perspective on how these individuals and their communities are affected by disenfranchisement. Although approaching the issue of felon disenfranchisement from different perspectives, *amici* agree that Washington's statute: (1) harms the rehabilitation and reentry of prisoners and formerly incarcerated individuals and (2) deprives minority communities of political power, thus undermining the political process as a whole. **Both parties have consented to the filing of this *amicus* brief.**

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("Lawyers' Committee") is a civil rights and legal services organization devoted to advancing the rights and economic opportunities of people of color, immigrants and refugees, with a special commitment to the African-American community. Throughout its history, the Lawyers' Committee has dedicated itself to ensuring access to the franchise, particularly for the most vulnerable individuals and groups in our society. The Lawyers' Committee has successfully litigated a number of challenges to discriminatory voting practices as violating the Voting Rights Act.

The Equal Justice Society ("EJS") is a national legal organization that promotes a vision of a society where race is no longer a barrier to opportunity. EJS's members and constituents are scholars, advocates, and citizens working to

advance civil rights and racial justice. To achieve its vision, EJS has long been active in a number of criminal justice and voting reform initiatives and cases. Washington State's disenfranchisement law epitomizes the type of racial barriers against which EJS fights.

Legal Services for Prisoners with Children ("LSPC") is a non-profit organization with a long history of combating the hurdles that prisoners, former prisoners, and their family members face every day. In the past decade, LSPC has undertaken voter registration drives in various minority communities that are hardest hit by disenfranchisement laws. LSPC has also litigated several cases aimed at clarifying and enforcing the right to vote for those in and out of prison. Through such programs, the LSPC has gained extensive knowledge of the kinds of harm that laws like Washington's create – not only for the individuals disenfranchised, but their families and communities as well.

The American Probation and Parole Association ("APPA") is an international non-profit, based in Lexington, Kentucky, which is composed of members from the United States, Canada, and other countries who work in probation, parole, and community-based corrections. Members of APPA supervise millions of Americans on probation or parole throughout the country (including Washington State) and its members see firsthand the barriers faced by those attempting to start their lives over after incarceration. APPA recognizes that the

right to vote is integral to successful rehabilitation and reintegration, and supports the restoration of voting rights after release from prison.

INTRODUCTION

The Court should reverse the District Court’s decision and affirm the Circuit Panel’s decision because Washington’s disenfranchisement law has a dramatic and discriminatory impact on the voting rights of minorities in violation of the Voting Rights Act of 1965 (“VRA”). Section 2 of the VRA reads in pertinent part:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied [. . .] in a manner which *results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race or color

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that . . . members [of protected minorities] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973 (emphasis added). Given this statutory mandate to consider the “totality of circumstances,” the Supreme Court has directed courts to carefully examine whether and how a challenged statute “*interacts with social and historical conditions* to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (emphasis added). In particular, the Court has held that the viability of a VRA claim may be assessed utilizing relevant factors including “the extent to which members of the minority group. . . bear the effects of past discrimination”

and whether “the policy underlying the State’s . . . use of the contested practice or structure is tenuous.” *Id.* at 44-45. The District Court here, however, failed to account for these and other factors, which collectively confirm the Voting Rights Act violation in this case.

Amici respectfully present this brief to provide this Court with further background on how the “surrounding social circumstances” interact with Washington’s disenfranchisement law to undermine the voting rights of the individuals directly affected and minority communities as a whole. Through years of firsthand experience, *amici* have seen how denying voting rights to current and former prisoners inevitably saps the political efficacy of the communities of which these individuals are a part.

Significantly, a host of research unequivocally shows that depriving prisoners of their voting rights seriously undermines successful reintegration and rehabilitation. Unsurprisingly, multiple studies have also shown, based on concrete statistical data, that disenfranchisement contributes to higher recidivism rates. Washington’s disenfranchisement law thus contributes to trapping affected minorities in a criminal justice system that has already been found in this case to be infected with systemic racial bias and discrimination. *See Farrakhan v. Gregoire*, No. CV-96-076-RHW, 2006 WL 1889273 at *6 (E.D. Wash. July 7, 2006) (finding that Plaintiffs had presented “compelling evidence of racial discrimination and bias

in Washington’s criminal justice system”). The result is a vicious cycle that perpetuates and compounds the loss of voting rights among the minority individuals who disproportionately bear the brunt of the Washington statute.

The harms wrought by Washington’s law are not limited to the individuals directly barred from the voting booth, however. As this Court has already noted, “almost a quarter of otherwise qualified African American men in Washington were disenfranchised” under the Washington statute. *Farrakhan v. Gregoire*, 590 F.3d 989, 1016 (9th Cir. 2010). But even those stark numbers do not tell the full story. As confirmed in multiple scientific studies, disenfranchisement creates strong rippling effects beyond the impacted prisoners because individuals deprived of their voting rights can greatly depress the voting rates of those around them.¹ In this way, the disproportionate impact of Washington’s disenfranchisement law on minority individuals is directly transferred to minority communities as a whole in the form of collective disengagement, that, in turn, robs these communities of their political voice. Compounding these problems further, disenfranchisement laws are enforced in uneven and confused ways, with even the responsible state agencies

¹ Aman McLeod, Ismail K. White, & Amelia R. Gavin, *The Locked Ballot Box: The Impact of State Criminal Disenfranchisement Laws on African American Voting Behavior and Implications for Reform*, 11 VA. J. SOC. POL’Y & L. 66, 74 (2003).

unable to consistently articulate state disenfranchisement standards correctly.² In turn, this leads to further impediments to voting that are felt disproportionately among minority communities.

Disenfranchisement laws thus have a cascading impact that starts with the affected prisoners and extends through their social circles and into their communities at large. As illustrated below, the end result is a weakening of the voting power of entire minority groups, such that the affected communities “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 42 U.S.C. § 1973(b). Given this background, *amici* respectfully submit that the Court should reverse the District Court’s opinion and find that Washington’s disenfranchisement statute violates the VRA.

ARGUMENT

I. THE IMPACT OF DISENFRANCHISEMENT ON THE REHABILITATION OF AFFECTED INDIVIDUALS AND ON THE BROADER COMMUNITY MUST BE CONSIDERED AS PART OF SECTION 2’S “TOTALITY OF CIRCUMSTANCES” INQUIRY

Under Section 2 of the Voting Rights Act, courts must consider “the totality of circumstances” in determining whether a challenged voting practice, policy or procedure results in members of a protected class having “less opportunity than

² See Maya Harris, ACLU, *Making Every Vote Count: Reforming Felony Disenfranchisement Policies and Practices in California* at 22 (Sept. 2008), available at http://www.aclunc.org/library/publications/asset_upload_file228_7648.pdf.

other members of the electorate to participate in the political process and to elect representatives of their choice.” 42 U.S.C. § 1973(b). Factors that courts may use to evaluate the totality of circumstances include “the extent to which members of the minority group. . . bear the effects of discrimination” and whether “the policy underlying the State’s . . . use of the contested practice or structure is tenuous.” *Thornburg*, 478 U.S. at 44-45.

As discussed in detail below, both of these factors weigh heavily in favor of a finding that Washington’s disenfranchisement statute here violates the VRA. The discriminatory effects of the law are significant as it both works *against* the successful rehabilitation of prisoners and creates a ripple effect that undermines the political power and cohesion of minority communities. Moreover, by stifling efforts at rehabilitation, the Washington statute will perpetuate the discriminatory effects of a criminal justice system that has already been found to be heavily biased against racial minorities. *See Farrakhan*, 590 F.3d at 1009 (noting District Court’s finding that it “has no doubt that members of racial minorities have experienced racial discrimination in Washington’s criminal justice system”).

- A. Disenfranchisement undermines the successful reintegration of prisoners and perpetuates the loss of voting rights among the racial minorities who are disproportionately impacted.**
- 1. Voting rights are an integral part of successfully rehabilitating prisoners and reintegrating them back into their communities.**

As the Supreme Court has observed, the right to vote is “a fundamental matter” at the core of citizenship because the “right to exercise the franchise ... is preservative of all other basic civil and political rights.” *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). The benefits of voting run far deeper than simply allowing individuals to cast ballots in elections; rather, the right to vote instills “[a] sense of political efficacy” that “has long been identified as an important factor stimulating participation in civic life” from a broader perspective.³

Voting thus aids in the successful reintegration of prisoners into society by giving individuals a voice in shaping their community and restoring their sense of citizenship and self-governance. As explained by the APPA in testimony before Congress, “having the right to vote and learning how to exercise that right sends a

³ Christopher Uggen & Jeff Manza, *Lost Voices: The Civic and Political Views of Disenfranchised Felons* at 9-10 (July 9, 2002). This paper was prepared for inclusion in *THE IMPACT OF INCARCERATION ON FAMILIES AND COMMUNITIES*, edited by Mary Pattillo, David Weiman, and Bruce Western, to be published by the Russell Sage Foundation; it is *available at* <http://www.socsci.umn.edu/~uggen/Sagechap8.pdf>.

message that [those who have repaid their debt to society] are welcomed back as integral and valuable members of their home communities.”⁴

The observations of the APPA, drawn from the direct experience of its law enforcement members, are echoed in the academic literature. For example, researchers have found that “[t]he reintegrative effects of voting may have broader implications,” as “participation in democratic rituals such as elections affirms membership in the larger community for individuals and groups.”⁵ Similarly, recent scholarship in this area indicates that:

People who are a part of the decision making process not only have a greater investment in the decisions, but a greater investment in society as well. . . . Those who participate in the democratic process have a greater investment in the resulting decisions, and more importantly, an investment in preserving that process. When the democratic process is perceived as fair and unbiased, the legitimacy of democratic authority is maintained and compliance with the law is more likely.⁶

The positive impacts of enfranchisement are best illustrated, though, by the experiences and words of the affected individuals themselves. For example:

⁴ Carl Wicklund, Executive Director of the American Probation and Parole Association, *Testimony* in support of H.R. 3335 before the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties, U.S. House of Representatives (Mar. 16, 2010). Wicklund’s *Testimony* is available at 2010 WLNR 5541315.

⁵ Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 195 (2004).

⁶ Holona L. Ochs, “Colorblind” Policy in Black and White: Racial Consequences of Disenfranchisement Policy, 34 THE POL’Y STUD. J. 81, 89 (2006) (internal citations omitted).

David Waller, a citizen of Maryland speaking on the day that a new law went into effect restoring his right to vote, explained: “According to the state of Maryland I was not a full citizen. In my eyes, I was not a full citizen. After finishing my sentence for things I had done in the past, I was denied the right to vote. And without it, I was not afforded all the rights and privileges of citizenship. Today all that changes. When I walk into the Board of Elections and hand in my signed voter registration, I will no longer be fragmented from society. I’ll be a father, grandfather, uncle, and friend who is able to give more of a hand in creating a better place to live, work, and go to school.”⁷

Given accounts like these, it is no wonder that academics and law enforcement officials alike have stressed the importance of voting rights as a critical aspect of successfully reintegrating prisoners into society.

Conversely, disenfranchisement laws like the Washington statute at issue actively undermine successful rehabilitation by sending a message to those affected that they are not full citizens and have no voice in their community. The following personal accounts illustrate starkly the sense of frustration and alienation that results from depriving people of their voting rights even after they have paid their debts to society:

- “After you go to prison – you do your time and they still take all your rights away.... You can’t get a job. You can’t vote. You can’t do nothing even 10 or 20 years later. You don’t feel like a citizen. You don’t even feel human.”⁸

⁷ Erika Wood, Brennan Ctr. for Justice, *Restoring the Right to Vote* at 8-9 (2d ed. 2009)(available at http://brennan.3cdn.net/5c8532e8134b233182_z5m6ibv1n.pdf).

⁸ Solomon Moore, *States Restore Voting Rights for Ex-Convicts, but Issue Remains Politically Sensitive*, N.Y. TIMES, Sept. 14, 2008, available at <http://query.nytimes.com/gst/fullpage.html?res=9F0DE2DD1330F937A2575AC0>

- “I think that just getting back in the community and being a contributing member is difficult enough And saying, ‘Yeah, we don’t value your vote either because you’re a convicted felon from how many years back,’ okay? But I, hopefully, have learned, have paid for that and *would like to someday feel like a, quote, ‘normal citizen,’ a contributing member of society*, and you know that’s hard when every election you’re constantly being reminded, ‘oh yeah, that’s right, I’m ashamed.’”⁹
- “I have no right to vote on the school referendums that will affect my children. I have no right to vote on how my taxes is going to be spent or used, which I have to pay whether I’m a felon or not, you know? So basically I’ve lost all voice or control over my government.”¹⁰
- “[N]ot being able to vote kind of says you don’t matter, and you’re not really a part of this community.”¹¹

Indeed, *amici* can attest (from the experiences of their clients and also their own members who have experienced these issues firsthand), that the disillusionment that stems from having no voice through voting is a direct and serious consequence of the disenfranchisement laws.

In evaluating the “totality of circumstances,” the Court should consider not only the voting restrictions imposed by the literal terms of the statute, but also its overall effects on prisoners and formers prisoners as illustrated by these personal

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⁹ Uggen & Manza, *Lost Voices*, *supra* note 3, at 17-18 (emphasis added).

¹⁰ *Id.* at 18.

¹¹ Christopher Uggen, Jeff Manza, & Angela Behrens, “*Less than the average citizen*”: *Stigma, Role Transition and the Civic Reintegration of Convicted Felons* in AFTER CRIME AND PUNISHMENT: PATHWAYS TO OFFENDER REINTEGRATION 258, 280 (2004), available at http://www.socsci.umn.edu/~uggen/Uggen_Manza_Behrens_CH_04.pdf.

accounts. By imposing an ongoing sense of disconnection and disillusionment with the political process, the Washington statute hinders the ability of racial minorities to participate in the political process far more dramatically than suggested by the terms of the statute on its face.

B. Upholding Washington’s disenfranchisement law would perpetuate a cycle of recidivism and undermine public safety.

Perhaps the most troubling result of enforcing the Washington statute is that it would directly contribute to a cycle of recidivism by trapping minorities in a criminal justice system that the trial court has already been found to be infected with systemic racial bias and discrimination. *See Farrakhan*, 2006 WL 1889273 at *6 (finding that Plaintiffs had presented “compelling evidence of racial discrimination and bias in Washington’s criminal justice system”).

The correlation between disenfranchisement and increased recidivism is not surprising, given the negative impact that disenfranchisement has on successful reintegration and overall civic participation, as noted above. The relationship between voting and rehabilitation (and between disenfranchisement and recidivism) has been recognized by jurists, researchers, and law enforcement officials alike. Indeed, Justice Brennan once declared:

It is perfectly obvious that [revocation of citizenship] constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast. I can think of no more certain way in which to make a man in whom, perhaps, rest the seeds of serious

antisocial behavior more likely to pursue further a career of unlawful activity than to place on him the stigma of the derelict, uncertain of many of his basic rights.

Trop v. Dulles, 356 U.S. 86, 111 (1958) (concurring); *See also United States v. K*, 160 F.Supp.2d 421, 434 (E.D.N.Y. 2001) (noting that “civil and employment disabilities” like disenfranchisement “frustrate[] the released felon’s attempt to integrate himself or herself back into society”).¹²

These intuitive observations of Justice Brennan have been echoed in the academic research of various voting rights experts. For example:

The intuitive link between civic participation and successful reentry thus should not be ignored by policymakers striving to reduce crime. Restoring the right to vote sends the message that people are welcomed back as integral members of their home communities. It invests them in our democracy while reminding them of the reciprocal responsibilities that citizens share. Shutting people out of the democratic process has the opposite effect: it stymies reintegration by treating people with conviction histories as a “pariah class.”¹³

Multiple researchers have confirmed these observations through statistical analyses that demonstrate strong correlations between voting and rehabilitation, and between disenfranchisement and recidivism. These researchers have found “consistent differences between voters and non-voters in rates of subsequent arrest,

¹² Cf. American Bar Association, *ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons* 35-36 (3rd ed. 2004), available at <http://www.abanet.org/crimjust/standards/collateralsanctionwithcommentary.pdf> (counting “deprivation of the right to vote” among the “collateral sanctions” that “should never be categorically imposed”).

¹³ Wood, *supra* note 7, at 11.

incarceration, and self-reported criminal behavior.”¹⁴ Most notably, sociologists in one study “revealed that persons who voted were *less than half as likely to be re-arrested after release from supervision as persons who did not vote.*”¹⁵ These researchers analyzed the voting behavior of certain groups in the 1996 election and the subsequent rates of crime and arrest in those same groups in the subsequent period of 1997-2000. These researchers found that between 1997 and 2000, 27 percent of nonvoters in the study were rearrested, compared with only 12 percent of people who voted.¹⁶ This correlation of voting with rehabilitation is unsurprising, “as the desire to vote is an affirmation of the institutions of American democracy and demonstrates support for the importance of political expression.”¹⁷ Disenfranchisement laws thus impose a direct impediment to effectively deterring and preventing recidivism.

Law enforcement officials overwhelmingly share this view. For example, Chief John F. Timoney of the Miami Police Department has stated, “[I]t is better to

¹⁴ Uggen & Manza, *Voting and Subsequent Crime and Arrest*, *supra* note 5, at 213. Though acknowledging that factors other than the “single behavioral act of casting a ballot” likely impact rehabilitation, these researchers point out that “the act of voting manifests the desire to participate as a law-abiding stakeholder in a larger society.” *Id.*

¹⁵ Ryan S. King, *The Sentencing Project, A Decade of Reform: Felony Disenfranchisement Policy in the United States* at 19 (Oct. 2006) (emphasis added), available at http://www.sentencingproject.org/doc/publications/fd_decade_reform.pdf.

¹⁶ *Id.* (emphasis added).

¹⁷ *Id.*

remove any obstacles that stand in the way of offenders resuming a full, healthy productive life . . . once you've cleared the four walls of the jail, your right to vote should be restored.”¹⁸ Moreover, the executive director of *amicus* APPA, an organization comprised of and representing probation and parole officers with direct insights on these issues, has testified before Congress that:

[F]ull civic participation and successful rehabilitation are intuitively linked. One of the greatest challenges facing those who are coming out of prison or jail is the transition from a focus on one's self as an individual that is central to the incarceration experience, to a focus on one's self as a member of a community that is the reality of life in our democratic society. While having strong family support and stable employment are critical to a person's successful transformation from prisoner to citizen, research has determined that one's identity as a responsible citizen – including volunteer work, community involvement *and voting* - plays a vital role.¹⁹

In fact, the APPA has endorsed federal legislation to restore voting rights in federal elections precisely because “disenfranchisement laws work against the successful re-entry of offenders.”²⁰ A national group of District Attorneys has also expressed similar concerns about the impact that disenfranchisement laws have on reintegration and rehabilitation.²¹

¹⁸ Wood, *supra* note 7, at 10.

¹⁹ Wicklund, *supra* note 4, at 3.

²⁰ The APPA Resolution is *available at* http://www.appa.net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_R esolution&wps_key=3c8f5612-9e1c-4f60-8e8b-1bf46c00138e.

²¹ See Robert M.A. Johnson, National District Attorneys Association, *Message from the President: Collateral Consequences* (May/June 2001), *available at* http://www.ndaa.org/ndaa/about/president_message_may_june_2001.html

II. WASHINGTON STATE'S DISENFRANCHISEMENT LAW HAS A BROAD NEGATIVE IMPACT ON THE VOTING POWER OF MINORITY COMMUNITIES

As noted in the Panel's decision, the District Court found not only "compelling evidence" of discrimination in the criminal justice system but that this discrimination "clearly hinders the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic."

Farrakhan, 590 F.3d at 995. This finding, on its own, shows that Washington's statute violates the Voting Rights Act. But the specific focus on the initial and "automatic" disenfranchisement of individuals actually *understates* the discriminatory impact of the Washington statute by failing to account for a number of additional factors that comprise the "totality of circumstances." These factors include (i) confusion in applying the disenfranchisement laws, which exacerbates the suppression of voting rights, and (ii) a cascading effect that flows from disenfranchised individuals to those around them, depressing voter turnout in entire minority communities.

A. Confusion about disenfranchisement laws results in denying the franchise to citizens who are eligible to vote.

Researchers have found that various difficulties in implementing and enforcing the disenfranchisement laws often lead to denial of voting rights, even

(arguing that "collateral consequences" of conviction like disenfranchisement risk creating a "subclass of citizens who...have no recourse but to continue to live outside the law").

for individuals who are eligible to vote. The 2000 election in Florida is a conspicuous example of this. In that election, individuals who were eligible to vote were incorrectly purged from voting rolls, simply because their names were similar to those of disenfranchisees:

[O]ne need not indulge in counterfactual hypotheticals or mathematical modeling to see how felon disenfranchisement laws distorted the 2000 election. Florida's law not only excluded hundreds of thousands of ex-offenders from the polls; [they] *disenfranchised significant numbers of eligible voters* as well due to a profoundly flawed purge process. The process was plagued by false positives. For example, individuals were removed because their names resembled those of convicted Felons, or despite the fact that their convictions did not trigger disenfranchisement under Florida law, or even though their voting rights had been restored.²²

Not surprisingly, these impacts are felt disproportionately in minority communities. In the case of Florida in 2000,

the purge removed 8,456 black voters from the rolls; after the election, of the 4,847 people who appealed, 2,430 were restored to the list as eligible voters. *In one large county, the supervisor of elections later estimated that fifteen percent of the people purged were in fact eligible to vote and a majority of those purged were African American.*²³

Moreover, academic research shows that the racial disparity in *initial* disenfranchisement is further magnified by problems with *restoring* the right to vote. Even where statutes nominally allow ex-offenders to regain their voting

²² Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1157-58 (2003) (emphasis added).

²³ *Id.* at 1158.

rights, the lack of clear information actively discourages and prevents affected individuals from doing so. Surveys of prisoners reflect widespread confusion on when and how they can regain their voting rights, with many assuming (wrongly) that they could *never* regain their voting rights even when the statute expressly permits it. One academic survey reported that:

Florida is not alone in struggling with unclear and potentially discriminatory clemency processes. In Ohio, a recent study conducted by the Prison Reform Advocacy Center revealed that although convicted felons are eligible to vote upon release from confinement, many are unaware of their right to vote while under community supervision, or are given misleading information by state authorities. . . . [T]he restoration processes for eligible voters in New York, Minnesota, and Idaho also were not implemented properly.²⁴

Indeed, even government officials often do not understand who can and cannot vote under disenfranchisement laws or how voting rights can be restored. For example, in a spring 2005 phone survey conducted by the ACLU, over 50 percent of Northern California county probation offices provided incorrect information when asked, “Can I vote if I am on probation?”²⁵ Despite outreach and dissemination of voting rights materials by local advocates, another survey in 2008 found that 13 percent of offices were still providing incorrect information.²⁶

²⁴ Daniel S. Goldman, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STANFORD L. REV. 611, 639 (2004).

²⁵ Harris, *supra* note 2, at 22.

²⁶ *Id.*

It is not hard to imagine the practical ramifications that stem from this sort of systemic confusion. For instance, in the 2004 elections in Washington, confusion about which individuals were eligible for re-enfranchisement, along with imprecise and inconsistently applied policies, led to many disenfranchised individuals being allowed to vote while other individuals who should have been permitted to vote were not.²⁷ Indeed, these systemic problems in implementing Washington's disenfranchisement statute prompted Washington State's Secretary of State, Sam Reed, to endorse the automatic restoration of voting rights when people are released from prison (directly contrary to the position now advocated by the State in this appeal).²⁸

As with the initial disenfranchisement process, the problems associated with *re-enfranchisement* are disproportionately felt in minority communities, exacerbating the discriminatory impact on voting rights. According to one study,

even when ex-offenders do regain their voting rights, disproportionately few African Americans are permitted to vote again. Of the approximately 8400 individuals whose voting rights were restored in Florida from 1997 through 2001, only 25% were black,

²⁷ *Scores of Felons Voted Illegally*, SEATTLE TIMES, Jan. 23, 2005, available at http://seattletimes.nwsourc.com/html/localnews/2002158407_felons23m.html.

²⁸ ACLU, *Legislature Reforms Voting Rights Restoration* (Apr. 22, 2009), available at <http://www.aclu.org/racial-justice-voting-rights/legislature-reforms-voting-rights-restoration>: "In Washington, automatic restoration is supported by a wide range of organizations, including the League of Women Voters of Washington, the Washington Association of Churches, the Washington State Bar Association, and Washington State NOW, as well as Secretary of State Sam Reed."

whereas more than half the prison population is black and nearly half of all people convicted of felonies in Florida are black.²⁹

These collateral impacts are part of the “totality of circumstances” showing that the discriminatory impact of the Washington statute persists long after former prisoners become technically eligible to have their voting rights restored and extends well beyond those current and former prisoners directly affected.

Moreover, these collateral effects lend further support to the Panel’s conclusion that the amendments to the Washington statute do not ameliorate its discriminatory effects or otherwise moot Plaintiffs’ claims. Even though Washington now allows formerly incarcerated persons to regain their voting rights in some circumstances, the literature and studies discussed above make abundantly clear that these superficial modifications to the system are unlikely to make a dent in the discriminatory impact of the statute because the effects of disenfranchisement are compounded even after re-enfranchisement. The recent amendments to the Washington statute thus cannot alleviate the disproportionate impact of disenfranchisement on minority populations.

B. Washington’s law disenfranchises a huge number of individuals.

As the Panel correctly noted, the cumulative impact of the disenfranchisement laws on minority communities is dramatic, with “over 17% of the entire adult black population of Washington disenfranchised” as of the date of

²⁹ Goldman, *supra* note 24, 638 (emphasis added).

the referenced study. *Farrakhan*, 590 F.3d at 1016. These findings are consistent with the general academic literature, which consistently shows stark disparities in the impact felt by minority communities. In one study of Atlanta neighborhoods, for instance, a predominantly African-American community had nearly *20 times* as many disenfranchised voters as a similar nearby predominantly white neighborhood.³⁰

This discriminatory impact of disenfranchisement is not limited to the African-American population in Washington State; Hispanic and Native American communities are also affected disproportionately. According to the 2003 report of the Washington State Sentencing Guidelines Commission, 36 percent of Washington prisoners are Hispanic, African-American, or Native American — a level grossly disproportionate to their overall populations in the state.³¹ Even these numbers, however, do not tell the full story of the discriminatory impact that results from the disenfranchisement laws, for the reasons discussed below.

³⁰ Ryan S. King & Marc Mauer, The Sentencing Project, *The Vanishing Black Electorate: Felony Disenfranchisement in Atlanta, Georgia* at 9-10 (Sept. 2004), available at http://www.sentencingproject.org/doc/publications/fd_vanishingblackelectorate.pdf.

³¹ Washington State Sentencing Guidelines Commission, *Disproportionality and Disparity in Adult Felony Sentencing* (2003), available at http://www.sgc.wa.gov/PUBS/Disproportionality/Adult_Disproportionality_Report2003.pdf.

C. Washington’s disenfranchisement law undermines political participation across entire minority communities and not just among disenfranchised prisoners.

In considering the “totality of circumstances,” the Court should look not only to the impact on individuals directly subject to the disenfranchisement statute, but to the real-world effect that disenfranchisement has on the communities of which these individuals are a part. Numerous studies have found that the impact of disenfranchisement is not merely confined to the current and former prisoners directly affected. Rather, the laws create cascading effects that “cast a permanent shadow over the poor minority communities where disenfranchised people typically live” by decreasing voting turnout and overall civic participation.³²

This occurs because voting and political participation are largely social activities; community norms and standards typically dictate who turns out to vote. From a very young age, “[p]eople are attentive to the behavior modeled by others and internalize norms readily, especially when those around them provide clear signals about what types of conduct are considered appropriate.”³³ Because of disenfranchisement laws, however, younger residents in many minority

³² Brent Staples, *How Denying the Vote to Ex-Offenders Undermines Democracy*, N.Y. TIMES, Sept. 17, 2004, at A1, available at http://www.nytimes.com/2004/09/17/opinion/17fri3.html?_r=1&scp=1&sq=how%20denying%20the%20vote%20to%20ex&st=cse.

³³ Alan S. Gerber et al., APSA, *Social Pressure and Voter Turnout: Evidence from a Large-Scale Field Experiment*, 102 AM. POLITICAL SCI. REV. 33, 33-34 (2008).

communities “grow up with the unfortunate example of neighbors, parents and grandparents who never vote and never engage in the political process, even superficially.”³⁴

Researchers have quantified the impact that this has on voting and found that each individual “decision to vote affects the turnout decision of at least four people on average in a ‘turnout cascade.’”³⁵ Where members of a community know that a number of others in their social network cannot vote, overall turnout is likely to decline because voting is no longer something that is expected in the community. In this way, even a small group of disenfranchisees can result in massive change in voting behavior at the community level, introducing a pervasive strain of voter malaise and depressing civic participation in communities that are already among the most “racially and economically segregated neighborhoods” in the country.³⁶

The “turnout cascade” effect has been well-documented across many demographics and in many situations, both in controlled studies and in the field.³⁷ Most importantly, it has been clearly documented in the context of felon disenfranchisement laws. At least two studies have examined the link between felon disenfranchisement laws and voter turnout. Both studies have found a direct

³⁴ Staples, *supra* note 32.

³⁵ James H. Fowler, *Turnout in a Small World*, in SOCIAL LOGIC OF POLITICS at 19 (2005), available at http://jhfowler.ucsd.edu/turnout_in_a_small_world.pdf.

³⁶ Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1275-76 (2004).

³⁷ Gerber et al., *supra* note 33, 40.

and statistically significant relationship between the severity of voter disenfranchisement laws and turnout among African-American *non-felons*.

One study (the “McLeod Study”) examined Federal Election Commission statistics and compared them with Census records to determine voter turnout.³⁸ The study controlled for variables like socioeconomic status, state voting laws, and a variety of other factors termed “political oppression” factors.³⁹ States examined in the study were then grouped according to the severity of their disenfranchisement laws based on how extensive the laws were (*i.e.*, whether they extended beyond incarceration, for example).⁴⁰ Results showed that severe disenfranchisement laws had the effect of depressing voter turnout overall among all groups studied and disproportionately decreased turnout among African-Americans compared to Caucasian voters.⁴¹ The probability that a non-disenfranchised African-American would vote in a state with severe disenfranchisement laws was a full 10 percent lower than in a state with less severe

³⁸ McLeod, et al. *supra* note 1, 74.

³⁹ *Id.* at 75-76.

⁴⁰ *Id.*

⁴¹ *Id.* at 77. Note that this effect was not merely the result of “the inclusion of disenfranchised people” in the sample. To protect against this possibility, the authors ran the statistics by gender (since African-American males are significantly more likely to be convicted of a crime than females) and found that the same interaction existed. *Id.* at 79-80, fn 43.

laws.⁴² This result occurred despite the fact that the probability of similarly situated whites across states remained “relatively unchanged.”⁴³

From this data, the McLeod Study concluded that disenfranchisement “laws disproportionately suppress turnout among non-disenfranchised African Americans.”⁴⁴ Given the rising disparity in conviction rates for African-Americans, this “racial disparity in voting participation...will only grow larger with time.”⁴⁵ The cascade effect, moreover, strongly suggests that even “individuals with no criminal record who might be very likely to vote...might be less likely to vote if those with whom they associate cannot participate in elections,” further compounding the harm.⁴⁶

A second study (the “Ochs Study”) replicated these results. The Ochs Study examined the relationship between severity of disenfranchisement laws and African-American political participation. Like the McLeod study, the Ochs Study found a significant correlation between severe disenfranchisement laws and decreased African-American political participation. Notably, the laws did not have the same effect on Caucasian turnout.

⁴² *Id.* at 79.

⁴³ *Id.*

⁴⁴ *Id.* at 67.

⁴⁵ *Id.* at 81.

⁴⁶ *Id.* at 72.

This study concluded that severe “[d]isenfranchisement policies have a significant independent effect on voting rights in the black community and do not have a similar effect on white voters...the ability of the black community to achieve adequate representation is substantially diminished as fewer and fewer blacks qualify for voter registration.”⁴⁷ Significantly, the Ochs Study used voter registration records to determine “political participation,” unlike the McLeod Study, which used voter turnout records. Disenfranchisement laws do not, then, merely decrease the probability that an African-American will turn out to vote. Rather, they also decrease the probability that an African-American will even take the preliminary step of registering to vote.

D. These cascading effects of the disenfranchisement laws deprive minority communities of political power and undermine the political process as a whole.

The direct and inevitable result of the cycle of disengagement fostered by disenfranchisement laws is the erosion of political power among minority communities. Numerous researchers and academics studying this issue have found that disenfranchisement laws like the Washington statute have a real and direct impact that extends beyond the individuals directly affected by undermining the political power of the larger communities of which they are a part. At the broadest level, “felon disenfranchisement and other collateral consequences of criminal

⁴⁷ Ochs, *supra* note 6, 88.

offenses have become instruments of ‘social exclusion’ ... that create a ‘permanent diminution in social status of convicted offenders, a distancing between ‘us’ and ‘them.’”⁴⁸ The following findings are representative of this extensive body of academic literature:

- Disenfranchisement laws “translate[] the denial of individuals felons’ voting rights into disenfranchisement of entire communities. Excluding such huge numbers of citizens from the electoral process substantially dilutes African American communities’ voting power.”⁴⁹
- “Thus, not only are criminal justice policies contributing to the disproportionate incarceration of African Americans, but imprisonment itself then reduces the collective political ability to influence these policies.”⁵⁰
- If “a significant segment of the community is denied the opportunity to participate in the political process, communities are subsequently denied the opportunity to vote individuals or parties into office that are favorably disposed to the needs and desires of the community.”⁵¹

The harm done to minority communities is not merely theoretical; recent studies suggest that “there is a real possibility that minorities are losing out due to low voter turnout.”⁵² Minority turnout in local elections is a statistically significant

⁴⁸ Goldman, *supra* note 24, 643.

⁴⁹ Roberts, *supra* note 36, 1292.

⁵⁰ Marc Mauer, The Sentencing Project, *The Crisis of the Young African American Male and the Criminal Justice System* at 13 (Apr. 1999). Mauer’s paper was prepared for the U.S. Commission on Civil Rights and is available at http://www.sentencingproject.org/doc/publications/rd_crisisoftheyoung.pdf.

⁵¹ S. David Mitchell, *Undermining Individual and Collective Citizenship: The Impact of Exclusion Laws on the African-American Community*, 34 *FORDHAM URB. L. J.* 833, 857 (2007).

⁵² Zoltan Hajnal & Jessica Trounstine, *Where Turnout Matters: The Consequences of Uneven Turnout in City Politics*, 67 *THE J. OF POL.* 515, 531 (2005). The Hajnal

predictor of diversity in local government bodies; reduced turnout works directly against electing diverse officials who are representative of the surrounding community.⁵³ Disenfranchisement exacerbates these problems, driving voter turnout even lower and causing “severe imbalances in participation...lead[ing] to even greater inequalities in political representation.”⁵⁴ In this way, disenfranchisement acts as a punishment on not only the individuals directly affected, but the community they reside in as well. Without a political voice, communities are left powerless to effect change or to control their political futures.

Moreover, the loss of minority votes skews the overall political discourse, damaging society and threatening the legitimacy of democratic decision-making as a whole. A “liberal democratic political system functions best when the views and preferences of all its members can be expressed.”⁵⁵ This is particularly true when members of the minority share particular views or experiences that diverge from the mainstream.⁵⁶

study examined turnout among Latinos, African-Americans, and Asian-Americans in ten different urban municipalities across the country to gauge the effects of minority turnout in local and national elections. The authors controlled for variables like socioeconomic status and education as well as region.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Debra Parkes, *Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 71, 95 (2003).

⁵⁶ *Id.* at 95.

By effectively removing key constituencies from the electoral equation, disenfranchisement robs the political process of significant perspectives that are needed to ensure legitimate policy outcomes. Losses like this are particularly problematic with respect to issues involving the criminal justice system, where the “legitimacy of criminal punishment...depends on the legitimacy of the process that produces and enforces the criminal law.”⁵⁷ Absent such legitimacy, democratic institutions face imminent threat of “the collapse of effective social order” as individuals begin to disregard the rules and norms established by governmental institutions.⁵⁸ In this way, disenfranchisement “touches all of us by altering the composition of the electorate in ways that may have an effect on the formation of public policy, and by perpetuating the symbolic and instrumental exclusion of millions of already marginalized members of society.”⁵⁹

CONCLUSION

As the State acknowledges, the relevant question in this case “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

⁵⁷ Karlan, *supra* note 22, 1169.

⁵⁸ Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 377 (2006).

⁵⁹ Parkes, *supra* note 55, 110.

choice.”⁶⁰ *Amici* submit that the circumstances here overwhelmingly establish a violation of the Voting Rights Act under this standard. As discussed above, the Washington statute’s discriminatory impact is measured not just by the loss of voting rights among those prisoners and former prisoners directly affected (as dramatic as those impacts are). Rather, the “totality of circumstances” shows that the discriminatory impact on current and former prisoners is directly transferred to the minority communities of which they are a part, ultimately depriving these communities of an equal opportunity “to participate in the political process.” For these reasons, *amici* respectfully request that this Court reverse the District Court’s judgment and affirm the Circuit Panel’s decision.

Dated: June 11, 2010

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⁶⁰ Defs.-Apps’ Br. in Support of Rehearing En Banc, *Farrakhan v. Gregoire*, No. 06-35669, Docket 75-1, at 13 (Mar. 5, 2010), citing *Thornburg*, 478 U.S. at 44.

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Federal Rule of Appellate Procedure 32(a)(7) and Ninth Circuit Rule 29-2(b), the Brief of Amicus Curiae is produced using at least 14-point Times New Roman type including footnotes and contains approximately 6,983 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS, EQUAL JUSTICE SOCIETY, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, AND AMERICAN PAROLE AND PROBATION ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS ON REHEARING EN BANC with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 11, 2010.

Participants in the case who are registered CM/ECF users will be serviced 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 first-class mail, postage prepaid on June 11, 2010, to the following non-CM/ECF participants:

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