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

BRIEF OF PLAINTIFFS-APPELLANTS

LAWRENCE A. WEISER, ESQ.
ANGELA GIANOLI, LEGAL INTERN
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

RYAN P. HAYGOOD, ESQ.
THEODORE 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, NY 10013-2897
212.965.2235

Counsel for Plaintiffs-Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the University Legal Assistance at Gonzaga Law School and the NAACP Legal Defense & Educational Fund, Inc., by and through the undersigned counsel, make the following disclosures:

Counsel for Plaintiffs-Appellants are neither subsidiaries nor affiliates of a publicly owned corporation.

DATED this 1st day of December, 2006

LAWRENCE A. WEISER, WSBA #6865
UNIVERSITY LEGAL ASSISTANCE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Page

STATUTES

OTHER

INTRODUCTION AND PRELIMINARY STATEMENT

For the second time, the District Court in this action issued a ruling fundamentally at odds with the plain language, history and purpose of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 ("VRA"). Notwithstanding its finding of "compelling evidence of racial discrimination and bias 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 *11 (E.D. Wash. July 7, 2006) (quoting *Farrakhan v. Washington*, 338 F.3d 1009, 1020 (9th Cir. 2003)) (alteration in original), the District Court concluded that Washington's felon disfranchisement scheme does *not* violate Section 2. In so ruling, the District Court performed a contorted application of the totality of the circumstances inquiry that is unsupported by Section 2's text, legislative history and decades of case law (including this Court's decision in *Farrakhan I*) interpreting that provision.

In reaching its conclusion, the District Court found that other Senate Factors — principally, the absence in Washington of an official *history* of discrimination against racial minorities in the area of voting — trumped Plaintiffs' compelling evidence of *present day* official racial discrimination in the criminal justice system (and other areas). Not only did the District Court misjudge the relevancy of these factors to a claim of vote denial (as opposed to vote dilution), but it also failed to

recognize that this Court's remand would have been entirely unnecessary if such factors could overcome a finding that racial bias in the criminal justice system "clearly hinder[s] the ability of racial minorities" in Washington to vote. *Farrakhan v. Washington*, 338 F.3d 1009, 1020 (9th Cir. 2003) (*Farrakhan I*).

As the District Court found, Plaintiffs have shown that existing racial disparities at every stage of Washington State's criminal justice system, from arrest to charging to incarceration, are not reflective of or warranted by the extent to which racial minorities actually participate in crime. As a result of the interaction of racial discrimination in the criminal justice system with Washington State's felon disfranchisement scheme, Blacks, Latinos and Native Americans are disproportionately denied access to the one fundamental right that is preservative of all others. Plaintiffs' evidence demonstrates that the disproportionate denial of the right to vote to racial minorities is *caused by that interaction*, resulting in the disfranchisement of nearly one-quarter — an incredible 24% — of all Black men in Washington, and nearly 15% of the entire Black population in the State.

This result is precisely what Section 2 proscribes. Simply put, the District Court's totality of the circumstances analysis appears, from top to bottom, to rest on the fundamental misconception that, no matter how compelling, a Section 2 challenge against a felon disfranchisement law can never succeed. This Court rejected that reading of Section 2 in *Farrakhan I* and it should do so again. For

these reasons, and those set forth below, the District Court's ruling should be reversed.

STATEMENT OF JURISDICTION

The District Court has subject matter jurisdiction over this action under 42 U.S.C. § 1973 and 28 U.S.C. § 1331. Plaintiffs' claim for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202, Rules 57 and 65 of the Federal Rules of Civil Procedure, and the general legal and equitable powers of the Court.

Venue is proper under 28 U.S.C. § 1391(b), as a substantial part of the events giving rise to the claim occurred in the Eastern District of Washington. Jurisdiction is conferred on this Court by 28 U.S.C. § 1291.

The United States District Court for the Eastern District of Washington entered an order denying Plaintiffs' Motion for Summary Judgment on July 7, 2006. *Farrakhan*, 2006 WL 1889273. This final judgment disposed of all claims with respect to all parties. Plaintiffs filed a timely notice of appeal on August 4, 2006. Pls.' Notice of Appeal (Appellants' Excerpts of the Record [hereinafter "E.R."] (E.R. 653).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Washington State Constitution Article VI, § 3, Revised Code of Washington § 9.94A.637, and 42 U.S.C. § 1973 are the constitutional and statutory provisions relevant to this case.

STATEMENT OF THE ISSUES

(1) Did the District Court err in concluding that Washington's felon disfranchisement law does not violate Section 2, notwithstanding its finding of racial bias in Washington's criminal justice system and its conclusion that such discrimination clearly hinders the ability of racial minorities to participate in the political process?

(2) Did the District Court err, in conducting its totality of the circumstances analysis, by placing excessive weight on its finding that Washington does not have an official history of racial discrimination in the area of voting?

(3) Did the District Court err, in conducting its totality of the circumstances analysis, by considering irrelevant factors, such as the extent to which minority candidates have been elected in Washington and the level of responsiveness of Washington's officials to racial minority citizens?

(4) Did the District Court err, in conducting its totality of the circumstances analysis, by disregarding Plaintiffs' evidence concerning the tenuous

justifications for felon disfranchisement, and in finding that this factor favored the State?

(5) Did the District Court err in concluding that Section 2 does not protect individual voters?

STANDARD OF REVIEW

This Court reviews a district court's findings of fact, including its ultimate finding of whether racial minorities have an equal opportunity to participate in the political process, for clear error. *Old Person v. Cooney*, 230 F.3d 1113, 1119 (9th Cir. 2000). This Court "retain[s] the power, however, 'to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.'" *Id.* (quoting *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986)). Accordingly, where a district court's ultimate finding concerning Section 2 liability is based on "a misreading of the governing law," there is reversible error. *Johnson v. DeGrandy*, 512 U.S. 997, 1022 (1994).

STATEMENT OF FACTS

A. Procedural History

Plaintiffs Muhammad Shabazz Farrakhan (also known as Ernest Walker-Bey), Al-Kareem Shadeed, Marcus Price, Ramon Barrientes, Timothy Schaaf and

Clifton Briceno are citizens who are otherwise qualified to register to vote but for the operation of Article VI, § 3 of the Washington State Constitution and the Revised Code of Washington § 9.94A.637, the law implementing it. Plaintiffs Farrakhan, Price, Shadeed and Schaaf are Black; Plaintiff Barrientes is Latino; and Plaintiff Briceno is Native American. Plaintiffs filed this action *pro se* on February 2, 1996 in the Eastern District of Washington, challenging Washington's felon disfranchisement scheme under Section 2 of the Voting Rights Act and the United States Constitution and seeking both declaratory and injunctive relief. The District Court entertained Plaintiffs' claims of vote denial under the VRA, but dismissed their vote dilution claim and constitutional claims. *Farrakhan v. Locke*, 987 F. Supp. 1304, 1315 (E.D. Wash. 1997).

Although the District Court, in its 2000 ruling on cross-motions for summary judgment, recognized that "Plaintiffs' evidence of discrimination in the criminal justice system, and the resulting disproportionate impact on minority voting power, is compelling," it nevertheless held that evidence of discrimination in the criminal justice system was not relevant to Section 2's totality of the circumstances analysis. *Farrakhan v. Locke*, No. CS-96-76-RHW, 2000 U.S. Dist. LEXIS 22212, at *14 (E.D. Wash. Dec. 1, 2000) ("2000 Order"). Instead, focusing on Washington State's disfranchisement scheme *by itself*, the District Court concluded that there was no evidence that the enactment of the disfranchisement

provision "was motivated by racial animus, or that its operation *by itself* has a discriminatory effect," and, therefore, determined that Plaintiffs failed to establish a Section 2 violation. *Id.* at *9-10.

This Court reversed and remanded to the District Court, holding that the totality of the circumstances inquiry "requires the court to consider the way in which the disenfranchisement law interacts with racial bias in Washington's criminal justice system to deny minorities an equal opportunity to participate in the state's political process." *Farrakhan I,* 338 F.3d at 1014. In light of the District Court's finding that Plaintiffs' evidence was "compelling," the Court posited that, "had the district court properly interpreted the causation requirement under the totality of the circumstances test instead of applying its novel 'by itself' causation standard, the court might have reached a different conclusion." *Id.* at 1020. In addition to evidence of racial bias in Washington's criminal justice system, this Court noted that evidence that the State's policy justifications for the disfranchisement law were tenuous would be relevant in the totality of the circumstances inquiry. *Id.* at 1020 n.15. Accordingly, the Court reversed and remanded the case to the District Court to evaluate the record evidence in light of the proper analysis. *Id.* at 1012. The State's petitions for rehearing and rehearing *en banc* were denied. *Farrakhan v. Washington,* 359 F.3d 1116 (9th Cir.), *cert. denied sub nom. Locke v. Farrakhan*, 543 U.S. 984 (2004).

On remand, the District Court again found that Plaintiffs had set forth "compelling evidence of racial discrimination and bias in Washington's criminal justice system." *Farrakhan*, 2006 WL 1889273, at *6 (crediting conclusions drawn by Plaintiffs' experts as "admissible, relevant, and persuasive"). The District Court further found that "this discrimination 'clearly hinder[s] the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic.'" *Id.* at 646 (alteration in original) (quoting *Farrakhan I*, 338 F.3d at 1020).

Notwithstanding this finding, however, the District Court concluded that, under the totality of the circumstances, Plaintiffs failed to demonstrate a Section 2 violation. Though the District Court stated that it "ha[d] no doubt that members of racial minorities have experienced discrimination in Washington's criminal justice system," it held that "[o]ther factors, particularly Washington's history, or lack thereof, of racial bias in its electoral process and in its decision to enact the felon disenfranchisement provisions, counterbalance the contemporary discriminatory effects that result from the day-to-day functioning of Washington's criminal justice system." *Id.* at 650. Among those "other factors" apparently relied on by the District Court were several that it conceded were irrelevant to Plaintiffs' vote denial claim. *Id.* at 649. With respect to Plaintiffs' claim that the justifications for the policy were tenuous, the District Court concluded that this particular factor

favored the State, notwithstanding the absence of any articulated justification (by the State or the District Court) for the law. *Id.* at 650.

The District Court concluded by noting that, "[i]f the denial or abridgment of *one citizen's* right to vote 'on account of race or color' established a violation of Section 2 of the VRA, this Court would find for Plaintiffs in this matter." *Id.* It declined to do so, however, because it viewed the "statutory language of subsection (a) of Section 2 of the VRA" as "limit[ing] its application to those circumstances the totality of which establish the existence of discrimination in voting on a broader scale." *Id.*

B. Plaintiffs' Evidence of Racial Bias and Discrimination in Washington State's Criminal Justice System

In this litigation, Plaintiffs have produced a record of substantial — and undisputed — evidence regarding racial discrimination in Washington State's criminal justice system. As the State's own sentencing commission found, "[p]eople of color are over-represented at every stage of Washington's criminal justice system, from arrest through sentencing and incarceration." 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, E.R. 498. Indeed, for every year between 1996 and 2005, 19% to 22.9%

of the incarcerated population in Washington State was Black, even though Blacks comprise only 3% of the general population. *Id.* Native Americans, who constitute only 2% of the State population, represent nearly 4% of the prison population. *Id.* Collectively, though Blacks, Latinos and Native Americans constitute only 12% of Washington State's general population, they represent an incredible 36% of the State's prison population. *Id.*

Significantly, the over-representation of racial minorities at every stage of Washington State's criminal justice system is not warranted by the extent to which racial minorities actually participate in illegal behavior. Expert Report by Robert D. Crutchfield, Ph.D. (E.R. 179-255). Plaintiffs' evidence demonstrates that Blacks, Latinos and Native Americans are subjected to racial profiling in Washington State at rates that cannot be justified by differential involvement in crimes that are likely to lead to arrests. *Id.* at 182. Even after legally relevant variables such as offense seriousness and the number of violations are taken into account, racial minority drivers are significantly more likely to be searched by Washington State Police than White drivers during a routine traffic stop. *Id.* at 209. Specifically, Native Americans are more than twice as likely to be searched as Whites, Blacks are more than seventy percent more likely, and Latinos are more than fifty percent more likely to be searched than Whites. *Id.* at 204. Plaintiffs' evidence of racial profiling is significant because disparate police searches lead to

the racially disparate filing of felony charges, which in turn subjects racial minorities to Washington State's felon disfranchisement scheme at disproportionate rates. *Id.* at 213.

In addition to being subjected to racial profiling by Washington State Police, prosecutors subject racial minorities to discriminatory treatment, even where well-developed statutory standards are in place. *Id.* at 216-220. For example, in King County, Whites are less likely to have charges filed against them than racial minorities (60% of White cases filed compared to 65% of racial minority cases). *Id.* at 213. These significant charging disparities persist even after legally relevant characteristics (such as offense seriousness, offenders' criminal histories, and weapons charges) are taken into account. *Id.*

Moreover, bail is recommended for Blacks more often than Whites, who are released on their own recognizance more often than Blacks. *Id.* Racial disparities also exist in the recommended length of confinement even after legal factors have been considered. *Id.* at 214. Specifically, prosecutors recommend that, for the same crime, Blacks spend approximately *one half of a day* more for each day a White defendant is recommended to be confined to prison. *Id.* In addition, Blacks are 75% less likely than Whites to be recommended for an alternative sentence. *Id.*

Significant racial disparities also persist in the sentencing outcomes of felony cases in Washington's criminal justice system, even after legally relevant

factors — such as the seriousness of the offense, the criminal histories of offenders, and legislatively established aggravating factors (*e.g.*, the presence of a weapon in the commission of a crime) — are taken into account. *Id.* at 230. The statistical disparity between Blacks and Whites in Washington State prisons is 9.28 to 1. *Id.* at 194-195. That is, a Black person in Washington State is more than *nine times* more likely to be in prison than a White person in the State. *Id.* at 195. However, the ratio of Black to White arrests for violent offenses (requiring the least amount of police discretion) is only 3.72 to 1. *Id.* Thus, "*substantially more than one half* of Washington State's racial disproportionality cannot be explained by higher levels of criminal involvement as measured by violent crime arrest statistics." *Id.* (emphasis added). In sum, Washington cannot justify the disproportionate incarceration of Blacks compared to that of Whites "on the basis of higher violent crime involvement by the former." *Id.*

Racial discrimination in the criminal justice system in Washington's most racially diverse city, Seattle, is no less pervasive than it is in the State more broadly. In Seattle, the majority of *users* of marijuana and serious drugs such as heroin, methamphetamine, powder cocaine, crack cocaine and ecstasy are White. Expert Report by Katherine Beckett (E.R. 258, 264-65). In addition, the majority of those who *deliver* serious drugs in Seattle are White. *Id.* at 258. However, 52.2% of those arrested by the Seattle Police Department (SPD) for *possessing* serious drugs

and 64.2% of those arrested for *delivery* of serious drugs in Seattle from January 1999 through April 2001 were Black. *Id.*; *see also id.* at 265-66, 273-74.

The over-representation of Blacks and Latinos among drug possession arrestees and of Blacks among drug delivery arrestees is largely the result of the following three factors: (1) law enforcement's concentration on those enmeshed in the crack cocaine market (as opposed to those involved in the powder cocaine, methamphetamine and heroin markets); (2) law enforcement's concentration on outdoor drug venues (although this practice was not as important in numerical terms as the focus on crack users and dealers); and (3) the geographic focus on outdoor drug venues in the downtown area. *Id.* at 258. None of these organizational practices are explicable in race-neutral terms. *Id.* at 258-59.

First, the SPD's focus on crack offenders is not explicable in terms of the legal status of serious drugs, since each of these substances is classified by the State legislature at Level 8 of Washington State's felony sentencing grid. *Id.* at 259. Nor is the SPD's focus on the crack market a consequence of the frequency with which crack is exchanged or the degree to which the various drug markets are associated with violence or public health problems. *Id.* Second, the SPD's focus on outdoor drug venues is not explained by citizen complaints, organizational/personnel constraints, or volume productivity (*i.e.*, the amount of drugs or cash yielded per officer hour invested). *Id.* Finally, the SPD's geographic

focus on the downtown area is not explicable in terms of crime rates or complaints by citizens. *Id.*

In sum, Plaintiffs' evidence demonstrates that Blacks and Latinos are over-represented, and Whites under-represented, among Seattle's drug arrestees as compared with the best available evidence regarding the actual offender population. *Id.* Plaintiffs' evidence also demonstrates that the organizational practices that produce these disparities are not explicable in race-neutral terms. *Id.* at 258.

In addition to the racial discrimination that has infected every stage of Washington's criminal justice system, there is a history of discrimination against racial minorities in the State in the areas of employment, housing and education, which continues in the modern day. Plaintiffs submitted a report by Professor J. Morgan Kousser (E.R. 288-306), a renowned voting rights expert, who noted that substantial "anti-black employment discrimination" occurred even before 1940, a finding he found "shocking" in light of the "minuscule percentages of African-Americans in the state before the defense-related employment boom." *Id.* at 302 ¶ 24. He further examined discrimination in Washington's housing markets, and he chronicled various acts that have resulted in a discriminatory pattern: weak enforcement powers in the State agency charged with investigating housing and employment discrimination complaints; the refusal of a major newspaper to run ads for real estate brokers who sold homes to Blacks in "White" neighborhoods; a

state Supreme Court decision striking down a 1957 law against housing discrimination; the defeat of an open housing ordinance in Seattle; and the enforcement of racially restrictive covenants. *Id.* at 304-05 ¶ 28. "In 1960, 75 percent of Seattle's blacks lived in four census tracts in the Central District . . . ." *Id.* That disparity persists today, and in a manner that results in substantial school segregation. *See id*. Thus, Plaintiffs produced substantial evidence of discrimination in Washington State in areas other than the criminal justice system, which has contributed to existing socioeconomic disparities in Washington in the modern day. *See generally id.* at 301-06 ¶¶ 22-31. Not only does this history negatively impact the opportunities of racial minorities to participate in the political process, but it also makes navigating the State's voting rights restoration process especially difficult and, in some cases, impossible. *See id.* at 292-95 ¶¶ 4-13.

Finally, Plaintiffs produced expert evidence concerning unconscious bias, which explains that "structural" factors that cause racial differences in legal outcomes are sometimes better understood as policy choices, some of which are known to produce racially unequal outcomes. Beckett Report (E.R. 282-86). Plaintiffs also produced studies demonstrating that many people who do not harbor overt racial animus and do not intend to discriminate are nonetheless influenced by unconscious and widespread racial stereotypes. *Id.* at 286. These studies have

found that "implicit bias" shapes both perceptions of the severity of social problems such as drug use, crime and disorder and fuels support for more punitive responses to those problems. *Id.*

****

In sum, Plaintiffs presented substantial and undisputed evidence that the existing racial disparities at every stage of Washington State's criminal justice system are not warranted by the extent to which racial minorities participate in crime. As the District Court noted, the State has failed to "present any evidence to refute Plaintiffs' experts' conclusions" on the substantial evidence of racial discrimination in Washington's criminal justice system. *Farrakhan*, 2006 WL 1889273, at *6.

SUMMARY OF ARGUMENT

The Senate Report accompanying the 1982 amendments to the Voting Rights Act contains a non-exhaustive list of "typical factors" that courts may find relevant in analyzing whether, under the "totality of the circumstances," Section 2 has been violated. *See* S. Rep. No. 97-417, at 21, 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 ("Senate Report"). As this Court made clear in *Farrakhan I*, "Congress did not intend this list to be comprehensive or exclusive, nor did it intend that 'any particular number of factors be proved, or that a majority of them point one way or the other.'" 338 F.3d at 1015 (quoting Senate Report at 29).

Rather, Section 2 demands an "interactive and contextual totality of the circumstances analysis" that takes account of factors that are pertinent to the particular claim at hand. *Farrakhan I*, 338 F.3d at 1018; *see Thornburg v. Gingles*, 478 U.S. 30, 45 (1986).

The District Court's analysis in this case flouts these basic principles of adjudicating Section 2 claims. The District Court found "compelling" evidence of racial discrimination and bias in Washington's criminal justice system; that such discrimination could not be explained by race-neutral factors; and that "this discrimination '*clearly* hinder[s] the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic.'" *Farrakhan*, 2006 WL 1889273, at *6 (quoting *Farrakhan I*, 338 F.3d at 1020) (alteration in original) (emphasis added). Notwithstanding these findings, the District Court rejected Plaintiffs' claim based on its conclusion that other Senate Factors predominated in the totality of the circumstances inquiry. In reaching this conclusion, the District Court suggested that Section 2 requires Plaintiffs to demonstrate that a majority of the Senate Factors point in their favor. The text, legislative history, and decades of case law from the Supreme Court and this Court, however, make clear that such an interpretation of Section 2 is erroneous.

Indeed, *not one* of the circumstances identified by the District Court in its assessment of the Senate Factors diminishes the impact of Washington's felon

disfranchisement law on the State's racial minority citizens — *i.e.*, those circumstances do not alter the fact that Washington's law clearly denies those citizens the ability "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Because the particular Factors relied on by the District Court have little to no relevance to Plaintiffs' claim, the decision below is rife with legal errors that reflect the District Court's fundamental misconception about how to evaluate the totality of the circumstances in a vote *denial*, as opposed to vote *dilution*, case.

First, the District Court erred by attaching far too much weight to the first Senate Factor, which concerns evidence that a challenged jurisdiction has a history of official discrimination in the area of voting. That Factor is typically relied upon in vote dilution cases as circumstantial evidence of the challenged practice's discriminatory effect. In vote denial cases, like this one, its relevance is far more limited, as the discriminatory impact of the challenged practice is ordinarily manifest. Moreover, even if the first Senate Factor does have some relevance to Plaintiffs' vote denial claim, the absence of official electoral discrimination in Washington does not diminish Plaintiffs' compelling evidence that the State has violated Section 2. Under the District Court's view, because the State of Washington does not have a history of official discrimination in voting, it is

effectively immune from Section 2 liability. That interpretation of Section 2 is patently incorrect.

Second, the District Court erred by considering plainly inapposite Senate Factors. The District Court conceded that several of the Factors should not apply to Plaintiffs' claim, but apparently proceeded to consider them. Specifically, the District Court faulted Plaintiffs for not producing evidence concerning minority candidate electoral success and the level of responsiveness of the State to the needs of minority citizens. But the District Court failed to explain why either Factor — both of which concern the success and actions of aspiring and elected *politicians* — should be relevant to minority *voters*' claim that the franchise itself has been denied, not that its effectiveness has been diluted. The District Court's emphasis on responsiveness is particularly troubling in light of the explicit statement in the Senate Report that the Factor is of "limited relevance" and that, accordingly, "unresponsiveness is *not* an element of Plaintiffs' case." Senate Report at 29 n.116.

Third, the District Court erred by not fully considering those Senate Factors that are actually pertinent to Plaintiffs' claim. Although the District Court followed this Court's previous instruction to evaluate Plaintiffs' evidence of discrimination in Washington's criminal justice system, it gave little weight to its finding that Plaintiffs had established proof of what actually is the most probative evidence of vote denial in this case. Moreover, the District Court's finding that the

Senate Factor concerning the tenuousness of the policy's justification *favored the State* was clearly erroneous. At no point in this litigation has the State offered a justification for the policy, and Plaintiffs offered expert testimony explaining that there is in fact no legitimate rationale for disenfranchising people with felony convictions.

Finally, the District Court erred in holding that it could not rule for Plaintiffs because Section 2 does not protect individual voters. It is well settled that Section 2 protects individuals. Contrary to the District Court's holding, "the denial or abridgement of *one citizen's* right to vote 'on account of race or color'" does, in fact, violate Section 2 of the VRA. *Farrakhan*, 2006 WL 1889273, at *9. The District Court's decision thus rests on an erroneous view of the law and should be reversed.

In sum, Plaintiffs have demonstrated that Washington State's felon disfranchisement scheme interacts with social and historical circumstances — namely, racial discrimination and bias at every level of the State's criminal justice system — in a manner that shifts racial inequality into the political process. Section 2, by its plain language, clearly prohibits this result. The District Court's conclusion to the contrary rests on several individual errors and an overall refusal to adhere to this Court's mandate in *Farrakhan I* that Section 2 liability can attach upon a showing that racial bias in the criminal justice system interacts with

Washington State's felon disfranchisement law "to create the kinds of barriers to political participation on account of race that are prohibited by Section 2." 338 F.3d at 1020. As a result of the District Court's decision, a disproportionately large number of Black, Latino and Native American residents of the State of Washington are left without recourse to that "'fundamental political right'" that is "'preservative of other basic civil and political rights.'" *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (citation omitted). Nothing in the VRA or this Court's cases permits that result to stand.

ARGUMENT

The decision below rests on a fundamentally misconceived Section 2 analysis: the District Court sought to impose a framework that is appropriate for vote dilution claims challenging reapportionment decisions on the analytically distinct vote denial claim at issue in this case. In a vote dilution challenge to a districting scheme, the analysis requires an assessment of the effectiveness of racial minority votes that are cast. In other words, although individual voters have a statutory right to cast undiluted votes, courts can only determine whether votes have been diluted by examining whether, in the relevant geographic area, the individual belongs to a racial minority group that has an equal opportunity to elect representatives of choice and influence the political process. Accordingly, in those circumstances, courts must consider a number of factors to determine whether,

notwithstanding this access parity at the ballot box, existing districts are drawn in a manner that provides minority voters with "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).[1] In contrast to vote dilution challenges, vote denial challenges are much simpler — if individuals' access to the franchise has been denied or abridged on account of race, it is indisputable that those voters have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" in violation of Section 2. By failing to recognize this distinction between vote dilution and vote denial, the District Court improperly relied on Senate Factors that have little to no relevance to Plaintiffs' claim.

I. THE DISTRICT COURT ERRED BY PLACING EXCESSIVE WEIGHT ON THE ABSENCE OF A HISTORY OF DISCRIMINATION IN THE AREA OF VOTING IN WASHINGTON

The District Court's consideration of the totality of the circumstances rested almost entirely — if not exclusively — on its conclusion that the first Senate Factor (history of official voting discrimination) was not satisfied. The District Court's totality of the circumstances analysis began with text from its 2000 Order

---

[1] However, as explained below, the District Court's analysis would have been incorrect even if it were appropriate to apply the vote dilution framework to this case.

addressing that Factor, and repeated its prior conclusion that this Factor alone "strongly favors a finding that Washington's felon disenfranchisement law does not violate Section 2 of the VRA." *Farrakhan*, 2006 WL 1889273, at *7. Without conducting any further analysis, the District Court found that the "remarkable absence of any history of official discrimination in Washington factors heavily in the Court's totality of the circumstances analysis." *Id*. The near-dispositive weight placed on this Factor by the District Court was clear error.

A. Senate Factor One Has Limited Relevance to Plaintiffs' Vote Denial Claim

Contrary to the District Court's view, for the purposes of Section 2 liability, there is nothing "remarkable" about the "absence of any history of official discrimination" in Washington State — or in any other jurisdiction. To be sure, the VRA was enacted to respond to the "insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966). Yet the 97th Congress was equally concerned about ferreting out "voting discrimination *in any area of the country where it may occur*," and to that end enacted Section 2, which "broadly prohibits the use of voting rules to abridge exercise of the franchise on racial grounds." *Id.* at 316 (emphasis added). Indeed, Section 2 has been "consistently understood" to "combat different evils and,

accordingly, to impose very different duties upon the States" than other parts of the VRA. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997). Unlike Section 5, for example, which "is limited to particular covered jurisdictions" with a demonstrated history of official discrimination in voting, Section 2 "applies to all States," regardless of their pasts. *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003).

Plaintiffs do not, of course, contend that the history of official discrimination in the area of voting is irrelevant. In many Section 2 claims, evidence of such past discriminatory practices by the challenged jurisdiction is relevant as a means of determining whether "past discrimination [has] severely impair[ed] the present-day ability of minorities to participate on an equal footing in the political process." *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1568 (11th Cir. 1984). If a jurisdiction has a long history of official electoral discrimination, people of color may have registration and voting rates that are lower than those of their White counterparts. *See id.* at 1567 ("Past discrimination may cause blacks to register or vote in lower numbers than whites."). This would be relevant to a Section 2 vote dilution claim in which plaintiffs argue that a jurisdiction must create a majority-minority district in order to provide individual members of the minority group an equal opportunity to participate in the political process and elect

candidates of their choice.[2] Indeed, such evidence is particularly important in reapportionment cases, because "[w]hen the question . . . comes down to the reasonableness of drawing a series of district lines in one combination of places rather than another, judgments about inequality may become closer calls." *Johnson v. DeGrandy*, 512 U.S. 997, 1013 (1994); *see also United States v. Blaine County, Mont.*, 363 F.3d 897, 906 (9th Cir. 2004) (noting that Congress recognized that Section 2 vote dilution cases "are some of the most difficult to litigate because plaintiffs must usually present the testimony of a wide variety of witnesses — political scientists, historians, local politicians, lay witnesses — and sift through records going back more than a century").

---

[2] Evidence of past discrimination in voting may also be indicative of a present-day intent to discriminate against minority voters. *See Gomez v. City of Watsonville*, 863 F.2d 1407, 1418 (9th Cir. 1988) (explaining that the first Senate Factor is relevant to the "plaintiff's ability to prove intentional discrimination"); *Buckanaga v. Sisseton Indep. Sch. Dist.*, 804 F.2d 469, 474 (8th Cir. 1986) ("[A] history of discrimination against a minority is important evidence of both discriminatory intent and discriminatory results."); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1567 (11th Cir. 1984) ("A history of pervasive purposeful discrimination may provide strong circumstantial evidence that the present-day acts of elected officials are motivated by the same purpose, or by a desire to perpetuate the effects of that discrimination."). Although the 1982 Amendments to the VRA establish that plaintiffs need not prove intentional discrimination in order to succeed under Section 2, proof of intentional discrimination remains a valid ground upon which plaintiffs may rely to win such suits. *See Garza v. County of Los Angeles*, 918 F.2d 763, 766 (9th Cir. 1990).

But as one scholar has observed, "[a] court does not need to rely on such circumstantial evidence, however, when there is direct evidence that an electoral practice has the result of disproportionately denying minority votes" — as is the case here. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 721 (2006). That is because, for the most part, evidence of discriminatory effect is readily apparent in vote denial cases: racial minorities either are being disproportionately denied access to the ballot or they are not. *Cf. Goosby v. Town Bd.*, 180 F.3d 476, 500 (2d Cir. 1999) (Leval, J., concurring) (noting that compared to the more difficult challenge of determining whether Section 2 has been violated in a vote dilution case like *White v. Regester*, 412 U.S. 755 (1973), an "easy case" under Section 2 "might occur where established polling places are geographically inaccessible to a new settlement of voters in a protected class"). If such disproportionate denial occurs, it is indisputable that the minority group's "members 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).

Moreover, excessive emphasis on the first Senate Factor — particularly when the presence or absence of that Factor does not serve as circumstantial evidence of discriminatory effect — is at odds with Section 2's focus on discriminatory *results*. This Court has cautioned that focusing primarily on the

history of official discrimination in voting, to the exclusion of other enumerated or non-enumerated factors, runs the risk of "plac[ing] too much emphasis on the plaintiff's ability to prove intentional discrimination" — the precise risk that Section 2 was amended to avoid. *Gomez v. City of Watsonville*, 863 F.2d 1407, 1418 (9th Cir. 1988). Indeed, the first Senate Factor, like all of the Senate Factors, is only relevant to the extent that it sheds light on the question "whether, 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice.'" *Gingles*, 478 U.S. at 44 (quoting Senate Report at 28); *see also id.* at 44-45 (noting that the Senate Factors "typically may be relevant" to answering this ultimate question, and further noting that "the list of typical factors is neither comprehensive or exclusive.").

The District Court's treatment of the first Senate Factor in both its 2000 opinion, and the decision under review, demonstrates precisely the type of inappropriate emphasis on that Factor that contravenes the mandate of the Senate Report itself — as well as case law from the Supreme Court and this Court. In its 2000 opinion, the District Court evaluated the first Senate Factor in connection with its observation that "[t]he most striking thing about this case is that, although the disenfranchisement provision clearly has a disproportionate impact on racial minorities, there is no evidence that the provision's enactment was motivated by

racial animus, or that its operation *by itself* has a discriminatory effect." 2000 Order, 2000 U.S. Dist. LEXIS 22212, at *9-10. This Court rejected the District Court's "by itself" causation standard in part because it "would effectively read an intent requirement back into the VRA, in direct contradiction of the clear command of the 1982 Amendments to Section 2." *Farrakhan I*, 338 F.3d at 1019. Notwithstanding this Court's warning about improperly resurrecting the intent test, it appears that, once again, the District Court has endeavored to have Plaintiffs produce evidence of discriminatory intent behind the enactment of Washington's felon disfranchisement law. *Compare Farrakhan*, 2006 WL 1889273, at *9 ("Other factors, particularly Washington's history, or lack thereof, of racial bias in its electoral process *and in its decision to enact the felon disenfranchisement provisions*, counterbalance the contemporary discriminatory effects that result . . . .") (emphasis added), *with id.* at 648 ("'Plaintiffs have not offered any evidence of a [history of official discrimination in the area of voting] such as to lead the Court to conclude that the circumstances surrounding the disenfranchisement's provision *created an inference of discriminatory intent or a causal connection between the provision and the result*.'") (quoting 2000 Order, 2000 U.S. Dist. LEXIS 22212, at *10-11) (emphasis added). Such a requirement, however, is decidedly not the law.

In explaining its decision to overrule the intent test set forth in *Mobile v. Bolden*, 446 U.S. 55 (1980), the Senate Judiciary Committee observed that "if an electoral system operates today to exclude blacks or Hispanics from a fair chance to participate, then the matter of what motives were in an official's mind 100 years ago is of the most limited relevance. The standard under the Committee amendment is whether minorities have equal access to the process of electing their representatives." Senate Report at 36; *see Blaine*, 363 F.3d at 909 (recognizing this rationale as Congress's "principal justification for rejecting the intent test").

In this case, that Washington has a different *history* than another State when it comes to discriminating against minorities at the polls sheds little light on whether its felon disfranchisement law causes racial minorities, *in the modern day*, to 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 Congress's intent to have Section 2, unlike Section 5, apply nationwide, it is simply absurd to suggest that the fact that Washington does not have a history of official electoral discrimination can effectively trump the most compelling evidence of present-day racial bias. Because this is not a case in which the discriminatory effects of the challenged electoral practice are unclear or debatable, resort to the history of official discriminatory voting practices is not informative

under the totality of the circumstances.[3] Indeed, precisely because the discriminatory effects of Washington State's felon disfranchisement law could not be clearer, the controlling weight attached to the first Senate Factor by the District Court was clearly erroneous.

B. Courts Have Found Section 2 Violations in Cases Involving No History of Official Electoral Discrimination

It is not surprising, given the nation's dark history of excluding racial minorities from political participation, that courts conducting Section 2's totality of the circumstances analysis may frequently find that the first Senate Factor is satisfied. That fact, however, does not mean that jurisdictions like Washington without a history of official discrimination in voting are immune from Section 2 liability. Indeed, courts have frequently found that such jurisdictions have violated the VRA. *See generally* Ellen D. Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, Final Report of the Voting Rights Initiative*, 39 U. Mich. J.L. Reform 644, 676 n.174 (2006), *available at*

---

[3] Notably, the Supreme Court in *Gingles* observed that even in vote dilution cases, "other factors, such as the first Senate factor, 'are supportive of, but *not essential to*, a minority voter's claim.'" *Blaine*, 363 F.3d at 915 (quoting *Gingles*, 478 U.S. at 48 n.15); *see id.* (concluding that plaintiffs' Section 2 vote dilution claim could succeed even without a demonstration that the first Senate *(cont'd)*

http://sitemaker.umich.edu/votingrights/files/finalreport.pdf (last visited Nov. 29, 2006) (noting that courts have found Section 2 violations "without considering Senate Factor 1" or "after considering, but not finding, Factor 1" satisfied). Some courts have found a violation of Section 2 *without considering the first Senate Factor at all*. *See, e.g.*, *E. Jefferson Coal. for Leadership and Dev. v. Parish of Jefferson*, 926 F.2d 487, 494 (5th Cir. 1991); *Marks v. Stinson*, No. Civ. A. 93-6157, 1994 WL 146113, at *34 (E.D. Pa. Apr. 26, 1994); *Corbett v. Sullivan*, 202 F. Supp. 2d 972, 983-985 (E.D. Mo. 2002); *Bryant v. Lawrence County*, 814 F. Supp. 1346, 1354 (S.D. Miss. 1993); *Goodloe v. Madison County Bd. of Election Comm'rs*, 610 F. Supp. 240, 243 (S.D. Miss. 1985). And an even greater number have found Section 2 liability after considering, but not finding, the first Senate Factor satisfied. *See, e.g.*, *Clark v. Calhoun County*, 88 F.3d 1393, 1399 (5th Cir. 1996); *Gomez*, 863 F.2d at 1418-19; *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 313 (D. Mass. 2004); *Houston v. Lafayette County*, 20 F. Supp. 2d 996, 1003 (N.D. Miss. 1998); *Harper v. City of Chicago Heights*, Nos. 87 C 5112, 88 C 9800, 1997 WL 102543, at *8 (N.D. Ill. Mar. 5, 1997); *League of United Latin Am. Citizens v. N. E. Indep. Sch. Dist.*, 903 F. Supp. 1071, 1085 (W.D. Tex. 1995); *Ewing v. Monroe County*, 740 F. Supp. 417, 422 (N.D. Miss. 1990); *Gunn v.*

(cont'd from previous page)

Factor was satisfied). If the first Senate Factor is not essential to a vote dilution claim, then *a fortiori* it is not essential to a vote denial claim.

Chickasaw County, 705 F. Supp. 315, 320 (N.D. Miss. 1989); *Rybicki v. State Bd. of Elections of Ill.*, 574 F. Supp. 1147, 1151 (N.D. Ill. 1983), *supplemented by* 574 F. Supp. 1161 (N.D. Ill. 1983).

Simply put, it is neither novel nor "remarkable" to find a Section 2 violation notwithstanding the absence of a history of official electoral discrimination. Rather, these cases simply reflect courts giving the first Senate Factor its proper weight and relevance when considering the totality of the circumstances — exactly what the District Court failed to do here.

This Court has long recognized that the absence of historical official discrimination in the area of voting does not preclude a finding of Section 2 liability. In *Gomez*, Latino voters challenged the legality of Watsonville's at-large mayoral and city council elections. 863 F.2d at 1409. After finding each of the three *Gingles* preconditions satisfied, *id.* at 1413-1417, the Court turned to the totality of the circumstances inquiry, *id.* at 1417-1419. The opinion contains a lengthy discussion of the District Court's conclusion that the first and fifth Senate Factors — a "history of official discrimination" in the area of voting and "the extent to which the minority continues to bear the effects of discrimination in socioeconomic areas that hinder their ability to participate in the political process effectively" — were not present. *Id.* at 1417. Notably for purposes of this appeal, however, this Court in *Gomez* did not conclude that the plaintiffs satisfied their

burden of proving that the first and fifth Senate Factors weighed in their favor. *See id.* at 1419 (declining to take "judicial notice of the pervasive discrimination against Hispanics in California, including discrimination, committed by the state government, that has touched the ability of California Hispanics to participate in the electoral process"). Rather, the Court concluded that, "*even without such a showing*, plaintiffs have clearly established a violation of Section 2." *Id.* (emphasis added).

Other Circuits have similarly found Section 2 violations notwithstanding an absence of official discrimination that touches on the right to vote — even where, unlike here, the plaintiffs claim vote dilution. *See supra* at 30-31. For example, in *Rybicki v. State Bd. of Elections of Ill.*, in the wake of the newly-amended VRA, a three-judge panel found that a statewide redistricting plan could dilute Black voting strength, and thus required the state to resubmit an alternative plan. 574 F. Supp. at 1157-58. In reaching this conclusion, the Court noted that the "record . . . does not disclose a history of overt and systematic electoral discrimination" and that "there has been no systematic exclusion of blacks from, or denial of meaningful participation in, Chicago's and Illinois' political processes comparable to the history outlined in *White v. Regester*." *Id.* at 1151.

Clark v. Calhoun County offers the flip-side to *Rybicki*. In that case, also concerning a Section 2 challenge to a redistricting plan, the Fifth Circuit

recognized that the County had "concede[d], as it must, that Calhoun County[, Miss.] has a history of [voting-related] racial discrimination and that socioeconomic differences between white [sic] and blacks continue to exist in the County." 88 F.3d at 1399. Nonetheless, the court concluded that the district court appropriately "disregard[ed] the history of past discrimination and socioeconomic disparity" — *i.e.*, the first and fifth Senate Factors — in its totality of the circumstances analysis. *Id.* at 1399. Importantly, the plaintiffs' inability to show that these two Factors weighed in their favor, as well as the district court's finding that the County was responsive to Black citizens, did not preclude the Fifth Circuit from finding a Section 2 violation. *See id.* at 1402 (concluding that "this is not that 'unusual case' in which the three *Gingles* preconditions are satisfied but the totality of circumstances fail to show a Section 2 violation").

While *Rybicki* and *Clark* are illustrative of courts considering the first Senate Factor before disregarding the import of that factor in the totality of the circumstances analysis, a more recent case demonstrates that any assessment of the history of electoral discrimination is sometimes unnecessary, even in a vote dilution case. In *Black Political Task Force v. Galvin*, a three-judge panel concluded that the redistricting plan for the Massachusetts House of Representatives diluted the voting strength of Black voters in violation of Section 2. 300 F. Supp. 2d at 316. In an opinion for the court by Judge Selya, the panel made

clear that, in gauging the totality of the circumstances, it attached the most weight to a factor that was not enumerated in the Senate Report: the fact that "race [was] used as a tool to achieve incumbency protection." *Id.* at 313; *see also id.* at 313-314 ("[a]ttaching great importance" to the redistricting committee's decision to "sacrific[e] racial fairness to the voters on the altar of incumbency protection") (citing *Garza v. County of Los Angeles*, 918 F.2d 763, 778-79 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part)); *id.* at 315 (finding that the use of "race as a proxy in achieving incumbency protection . . . weighs heavily in the plaintiffs' favor in a consideration of the totality of the circumstances"). Indeed, the court found that the totality of the circumstances demonstrated a Section 2 violation notwithstanding that certain enumerated Senate Factors favored the State, such as the court's conclusion that "Massachusetts legislators are generally responsive to the particularized needs of minorities." *Id.* at 313; *see also id.* (noting electoral success of Blacks in State offices over the last twenty-five years, but concluding that this particular Senate Factor was "neutral[ized]" because such success has been largely limited to "heavily black districts"). Notably, the court concluded that the majority of the Senate Factors — including "the history of official discrimination at the polls in Boston" — did "not add substantially to [its] understanding of the totality of the circumstances," and thus made no attempt to weigh those factors in the balance. *Id.*

In short, the court undertook the exact inquiry into the relevancy of factors (including those not listed in the Senate Report) that a "practical evaluation" of a Section 2 claim requires. Far from placing primary emphasis on the first or any of the other Senate Factors, the panel opinion demonstrates careful consideration of the particular circumstances of that case — precisely what Section 2 demands.

****

Cases involving vote denial will often present circumstances in which consideration of the history of electoral discrimination will fail to "add substantially to [an] understanding of the totality of the circumstances." *Black Political Task Force*, 300 F. Supp. 2d at 313. It is doubtful, for example, that the presence or absence of a history of official discrimination in voting reveals much about whether the cancellation of absentee ballots from largely-minority neighborhoods violates Section 2. *See, e.g.*, *Marks*, 1994 WL 146113, at *34 (finding Section 2 violation in a case concerning county's ballot program without considering the first Senate Factor); *Goodloe*, 610 F. Supp. at 243 (finding that cancellation of absentee ballots violated Section 2 without considering first Senate Factor). As noted, *see supra* Part I.A, the discriminatory effect of electoral practices that bar individuals from casting a ballot — as opposed to electoral practices that abridge the ability of individuals to aggregate their votes in an effective manner — is generally manifest.

Such is the case here. Blacks, Latinos and Native Americans are disproportionately denied the right to vote as a collateral consequence of a felony conviction. The lack of an official history of discrimination at the polls in Washington State does not alter the present reality that, today, the State utilizes a voting qualification that interacts with racial discrimination in the criminal justice system to result in a denial of the right to vote to Plaintiffs on account of race.

II. THE DISTRICT COURT ERRED BY CONSIDERING IRRELEVANT SENATE FACTORS AND DISREGARDING RELEVANT SENATE FACTORS

The District Court's elevation of the first Senate Factor as a necessary prerequisite to a Section 2 vote denial challenge was in and of itself reversible error. The District Court's error, however, is part of a larger problem with the lower court's legal analysis, which failed to reflect a "practical evaluation" of the Senate Factors. Senate Report at 30. Such an evaluation necessarily requires courts reviewing Section 2 challenges to consider those factors that are relevant to the particular claim at hand and to disregard those factors that are not. As this Court made clear in *Gomez*:

> The [Senate] Report emphasized . . . that this list of factors was not a mandatory seven-pronged test; the list was only meant as a guide to illustrate some of the variables that should be considered by the court. As stated in the Report, "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." [Senate Report at 29]; *accord id.* at 29 n.118 . . . ("[T]he Committee [does not] intend [that these factors] be

> used as a mechanical 'point counting' device. The failure of plaintiff to establish any particular factor is not rebuttal evidence of [no violation].").
>
> The Senate Committee also noted that, while the basic "totality of the circumstances" test remains the same, *the range of factors that would be relevant in any given case will vary depending upon the nature of the claim and the facts of the case*. *See id.* at 28 . . . ("To establish a violation, plaintiffs could show a variety of factors, depending upon the kind of rule, practice, or procedure called into question."); *see also id.* at 30 . . . (noting that the proof sufficient to sustain a challenge based upon a series of events or episodes "would not necessarily involve the same factors" that would be relevant in a challenge to a permanent structural barrier).

863 F.2d at 1412 (emphasis added); *see also Farrakhan I*, 338 F.3d at 1015-1016.

The Supreme Court's decision in *Gingles* recognized that certain Senate Factors would be more probative of and relevant to particular Section 2 claims than others. The *Gingles* Court was explicit that the second and seventh Senate Factors — the "extent to which minority group members have been elected to public office in the jurisdiction" and the "extent to which voting in the elections of the state or political subdivision is racially polarized," *see* Senate Report at 29 — are "the most important Senate Report factors bearing on Section 2 [vote dilution] challenges to multimember districts." *Gingles*, 478 U.S. at 48 n.15. "If present," the Court stated, "the other factors . . . are supportive of, but *not essential to*, a minority voter's claim." *Id.* Emphasis on those two particular factors "effectuates the intent of Congress" by requiring plaintiffs to prove that they have been injured by an electoral practice. *Id.* ("[I]f difficulty in electing and white bloc voting are

not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates.").

Gingles thus illustrates that it is entirely consistent with Congressional intent for courts to isolate only a few, relevant factors when undertaking the totality of the circumstances inquiry. *Gingles* further recognized that the factors that are most probative of one type of Section 2 claim may be entirely different from the factors that are most probative of another type of Section 2 claim. *See id.* at 46 n.12 ("We note . . . that we have no occasion to consider whether the standards we apply to respondents' claim that multimember districts operate to dilute the vote of geographically cohesive minority groups, that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims . . . ."); *see also Gomez*, 863 F.2d at 1413.

The District Court's emphasis on clearly inapposite Senate Factors and its cursory rejection of the most pertinent Senate Factors to a vote denial claim is fundamentally at odds with the "interactive and contextual totality of the circumstances analysis" that Section 2 requires. *Farrakhan I*, 338 F.3d at 1018. The District Court treated the Senate Factors as a "mechanical 'point counting' device," rather than considering the "relevant factors in [this] particular case" — far short of the practical and functional inquiry that Congress intended. Senate

Report at 29 n.118; *see Gomez*, 863 F.2d at 1413 ("[R]ather than applying the factors in a mechanical fashion, courts must judge Section 2 claims based on a 'searching practical evaluation of the "past and present reality" and on a "functional" view of the political process.'") (quoting *Gingles*, 478 U.S. at 45).

A. The District Court Erroneously Considered Irrelevant Senate Factors

The District Court conceded that it considered Senate Factors that have no relevance to Plaintiffs' vote denial claim:

> It is Plaintiffs' burden to show the Senate factors weigh in their favor. Plaintiffs have not carried this burden in that they failed to present any substantial evidence regarding many of the other Senate factors, including those considering racial polarization of the vote, various voting mechanisms, candidate slating processes, or the use of racial appeals in political campaigns. *Admittedly, several of these factors are not relevant in a VRA vote denial claim.* Still, Plaintiffs have not presented any evidence on the extent to which minority group members have been elected to political office in Washington or the level of responsiveness elected officials have to the particularized needs of members of minority groups. These factors are certainly relevant to Plaintiffs' VRA claim. Plaintiffs' failure to produce any evidence to the contrary leads the Court to believe these factors favor Defendants' position.

Farrakhan, 2006 WL 1889273, at *8 (emphasis added).

The District Court's reasoning manifests the legal error that infects its opinion in several ways. For one thing, the District Court appears to have simultaneously credited Plaintiffs' argument that the Senate Factors concerning "racial polarization of the vote, various voting mechanisms, candidate slating

processing, or the use of racial appeals in political campaigns" are irrelevant to this case and the State's argument that Plaintiffs have "failed to present any substantial evidence regarding" those very factors. *Id.* The District Court simply cannot have it both ways under any proper reading of Section 2 precedent. Moreover, other portions of the opinion further suggest that the District Court credited irrelevant factors as part of its improper checklist approach to the totality of the circumstances inquiry. *See, e.g.*, *id.* at *7. ("Although the Court is not bound by the list of Senate factors, it finds relevance in factors other than numbers 5 and 9.") (citation omitted); *id.* at *9 ("Other factors . . . counterbalance the contemporary discriminatory effects that result from the day-to-day functioning of Washington's criminal justice system.").

For another thing, the two Senate Factors expressly identified by the District Court as relevant to Plaintiffs' vote denial claim are the most inapposite factors of them all: the extent to which minority group members have been elected to political office in Washington (Senate Factor 7) and the level of responsiveness elected officials have to the particularized needs of members of minority groups (Senate Factor 8). *Farrakhan*, 2006 WL 1889273, at *6-7.

With respect to the seventh Senate Factor, it is unclear what the success of minority *candidates* has to do with assessing a claim by minority *voters* that their vote has been denied. If Washington State enacted a literacy test or a passport

requirement as a condition for voting tomorrow, one could not seriously contend that the fact that it has previously elected Black candidates to office could somehow diminish the State's liability under Section 2. As the Supreme Court noted in *Gingles*, the seventh Senate Factor is most relevant to vote *dilution* claims. 478 U.S. at 50 n.15 (noting that the second and the seventh Senate Factors are "the most important Senate Report factors bearing on Section 2 challenges to multimember districts"); *see also Old Person v. Cooney*, 230 F.3d 1113, 1128 (9th Cir. 2000). The seventh Senate Factor's probative value in such cases simply reflects the nature of a vote dilution claim: "It is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability 'to elect.'" *Gingles*, 478 U.S. at 50 n.15 (quoting 42 U.S.C. § 1973(b)). In a vote *denial* claim, by contrast, there is no such need for Plaintiffs to rely on the seventh Senate Factor to prove their claim, as their contention is not that a particular practice is "responsible for minority voters' inability to elect its candidates," *id.* at 50, but rather that a particular practice denies minority voters their right to cast a ballot — for their candidate of choice or any other candidate. *See generally* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv. L. Rev. 1663, 1671-72 (2001) (distinguishing between "first generation" vote denial claims that "concerned direct, formal limitations (poll taxes, literacy

tests, and the like) on the ability of minorities to register and cast a ballot" and "second generation" vote dilution claims that arise when a jurisdiction attempts to "take advantage of [a racially polarized] voting pattern to undermine the ability of minority group members to affect the political process" and "elect a candidate of choice").

The District Court's emphasis on the eighth Senate Factor fares no better. Congress itself recognized the limited relevance of this Factor by specifically calling attention to its diminished importance. The Senate Report states that "[u]nresponsiveness is not an essential part of plaintiff's case," and thus "defendants' proof of some responsiveness would not negate plaintiff's showing by other, more objective factors enumerated here that minority voters nevertheless were shut out of equal access to the political process." Senate Report at 29 n.116. Indeed, this Court has cautioned against giving too much weight to this factor. *See Old Person*, 230 F.3d at 1129 n.14 (noting that District Court's "finding of responsiveness of elected officials [to Native American voters] may be of 'limited relevance'"); *see also Harvell v. Blytheville Sch. Dist. #5*, 71 F.3d 1382, 1390 (8th Cir. 1995) (en banc) ("Even accepting the [district court's] finding of responsiveness as not clearly erroneous, however, it is similarly insufficient to counter the other factors that censure this scheme."); *Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1213 n.15 (5th Cir. 1989) ("We also

note that a finding that city officials *are* responsive to the concerns of minority residents is not enough, by itself, to defeat a voting dilution claim.").[4]

There are several reasons why the eighth Senate Factor is of limited relevance. First, responsiveness, as Congress acknowledged, is a rather subjective factor. As the Fifth Circuit observed, "[r]esponsiveness, like many things, is a question of both kind and degree. While two cities may both be said to be responsive to minority needs, the two may vary greatly in approach and commitment." *Clark*, 88 F.3d at 1401. Because this factor often requires an assessment of "difficult qualitative judgments," *id.*, courts are appropriately reluctant to place great weight on this factor.

Second, like the seventh Senate Factor (minority candidate success), the responsiveness of elected officials bears little relevance to a claim that minority voters are being denied access to the polls. While the responsiveness factor may

---

[4] That courts are reluctant to place much emphasis on this factor is further evidenced by the lack of judicial decisions addressing this factor. A recent survey of 331 lawsuits addressing Section 2 claims since 1982 found only 107 lawsuits that addressed this factor — and only 20 (18.7%) of those that have found responsiveness lacking. *See* Ellen D. Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, Final Report of the Voting Rights Initiative*, 39 U. Mich. J.L. Reform 644, 655, 722 (2006), *available at* http://sitemaker.umich.edu/votingrights/files/finalreport.pdf (last visited Nov. 29, 2006). Indeed, this Court has found Section 2 violations without addressing this particular factor at all. *See Gomez*, 863 F.2d at 1417-1419.

bear upon whether or not minorities are able to participate in the political process and influence elections, and thus have some bearing on vote dilution challenges to redistricting plans, it is simply inapposite to the challenge in this case. That Washington's elected leaders may not have turned a cold shoulder to all of the needs and concerns of its racial minority citizens does not change the fact that the State utilizes a voting qualification with demonstrated discriminatory effects on the ability of Blacks, Latinos and Native Americans to participate in the selection of those leaders. *Cf. Gunn*, 705 F. Supp. at 322 ("A benevolent monarchy would be nonetheless non-democratic.").

Finally, to the extent the District Court considered the other plainly irrelevant Senate Factors (which it listed, but did not discuss), the decision cannot stand. The District Court apparently faulted Plaintiffs for failing to present evidence underlying the Senate Factors that address the "racial polarization of the vote, various voting mechanisms, candidate slating processes, or the use of racial appeals in political campaigns." *Farrakhan*, 2006 WL 1889273, at *8. The first and the last of those Senate Factors are most pertinent to demonstrating the existence of a racially polarized electorate, a factor that is certainly relevant to a dilution challenge to a redistricting plan, *see Gingles*, 478 U.S. at 50 n.15, but wholly inapposite to a claim that a practice operates to deny the vote to racial minorities. The Senate Factor that directs courts to make an inquiry into

minorities' access to the candidate slating process (which Washington State does not have) is also irrelevant, as that Factor is on its face only applicable "*if* there is a candidate slating process," Senate Report at 29 (emphasis added), and is probative only insofar as it may reflect on a challenge to the State's use of a similar mechanism. Similarly, the Senate Factor concerning the use of "unusually large election districts, majority vote requirements, anti-single shot provisions" and other such factors, *id.*, is plainly designed as circumstantial evidence concerning the State's present use of a similar electoral practice. But Plaintiffs do not challenge Washington's method of aggregating electoral votes; they challenge Washington's refusal to permit certain individuals to vote at all.

The District Court's consideration of Senate Factors that, though probative of vote dilution claims, cast no light on Plaintiffs' vote denial challenge was clear error. *See Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1263-65, 1268 (N.D. Miss. 1987) (finding that Mississippi's voter registration procedures violated the VRA, while explicitly disputing the relevance of the second, third, fourth, and sixth Senate Factors to plaintiffs' Section 2 challenge), *aff'd sub nom. Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400 (5th Cir. 1991).

B. The District Court's Disregard of the Tenuous Justifications Offered in Support of the Policy Was Clear Error

Under Section 2's totality of the circumstances inquiry, "the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *Johnson v. DeGrandy*, 512 U.S. 997, 1011 (1994). In this case, the District Court gave the two Factors that are undeniably relevant to Plaintiffs' claim the most cursory treatment in its totality of the circumstances analysis. The District Court provided no explanation for *why* "other factors" operated to "counterbalance" Plaintiffs' compelling evidence of racial discrimination in the criminal justice system under the fifth Senate Factor. And as discussed below, the District Court gave little consideration to the State's failure to even attempt to justify its felon disfranchisement policy. The District Court's abbreviated inquiry into those two Senate Factors is particularly surprising given that they are the *only* factors that this Court explicitly drew attention to in *Farrakhan I*. *See* 338 F.3d at 1019-20 & n.15 (discussing the fifth and ninth Senate Factors).

Although the District Court did consider the ninth Senate Factor — the tenuousness of the State's policy justification — its finding that the Factor favored the State was clearly erroneous. Plaintiffs presented expert testimony that concluded that "[a]utomatic disenfranchisement following a felony conviction is a tenuous policy." *See* Expert Report by Alec Ewald (E.R. 356). Additionally,

Plaintiffs noted that, in *Dillenburg v. Kramer*, this Court cast doubt on the rationality of felon disfranchisement. 469 F.2d 1222, 1224 (9th Cir. 1972) (noting that "[c]ourts have been hard pressed to define the state interest served by laws disenfranchising persons convicted of crimes"). Moreover, here the State failed to proffer any justification for its policy and made no attempt to counter Plaintiffs' expert testimony and arguments — an omission that did not go unnoticed by the District Court. *Farrakhan*, 2006 WL 1889273, at *8 ("As in *Dillenburg*, the State here does not explain why disenfranchisement of felons is 'necessary' to vindicate any identified state interest.").

Nonetheless, the District Court still found that this Factor favored the State and it offered two reasons for reaching that conclusion. First, the District Court emphasized that, "[u]nlike other state voting qualifications, the Constitution of the United States recognizes the states' power to disenfranchise felons." *Id.* (citing U.S. Const. amend. XIV, § 2 and *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974)). Second, the District Court attached great weight to the fact that all but two states currently have laws disenfranchising people with felon convictions, a fact that the District Court believed rendered its "ability to examine the tenuousness of Washington's felon disenfranchisement laws . . . extremely limited." *Id.* Neither argument is sound.

The District Court's first argument is unavailing. The Supreme Court held in *Richardson* that felon disfranchisement laws are generally constitutional, in part due to the fact that the Constitution itself recognizes the power of States to enact felon disfranchisement laws. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). But *Richardson* simply stands for the proposition that the presumption of unconstitutionality that attaches to most restrictions on the fundamental right to vote, *see Dunn v. Blumenstein*, 405 U.S. 330, 340 n.10 (1972), does not similarly apply to felony disfranchisement laws. *Richardson* does not stand for the proposition that the Constitution has shielded such laws from any and all legal challenges. States cannot, for example, purposefully disenfranchise people with felony convictions on the basis of their race. *Hunter v. Underwood*, 471 U.S. 222 (1985) (finding Alabama constitutional provision that disenfranchised persons convicted of crimes involving moral turpitude violated equal protection, as its original enactment was motivated by a desire to discriminate against Blacks). Similarly, States "may not disenfranchise criminals in a manner resulting in a racially discriminatory denial of the right to vote." *Johnson v. Bush*, 405 F.3d 1214, 1241 (11th Cir.) (en banc) (Wilson, J., concurring in part and dissenting in part), *cert. denied*, 126 S. Ct. 650 (2005). The District Court's argument to the contrary is an attempt to resuscitate the argument that this Court rejected in *Farrakhan*: that the VRA cannot apply to felon disfranchisement laws because

Section 2 of the Fourteenth Amendment explicitly acknowledges such laws. *See Farrakhan I*, 338 F.3d at 1016 ("Although states may deprive felons of the right to vote without violating the Fourteenth Amendment, when felon disenfranchisement results in denial of the right to vote or vote dilution on account of race or color, Section 2 affords disenfranchised felons the means to seek redress." (citation omitted)).[5]

The District Court's second argument is similarly misplaced. According to the District Court, the fact that the majority of the States have some form of felon disfranchisement law must mean that the policy has some rational justification. Poll taxes, for example, also have a long lineage in American history. The fact that such restrictions were commonplace in many parts of the country or date back to the nation's founding did not, however, prevent the Supreme Court from declaring them unconstitutional. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 669

---

[5] Indeed, the District Court conceded that, notwithstanding this Court's decision in *Farrakhan I*, it remained troubled by the application of the VRA to felon disfranchisement laws. *Farrakhan*, 2006 WL 1889273, at *2 ("The *Farrakhan II* dissent [by Judge Kozinski] raises questions regarding the constitutionality of applying the VRA to felon disenfranchisement laws, and these concerns are echoed and elaborated upon in recent *en banc* opinions issued by the Second and Eleventh Circuits. Considering these opinions, this Court continues to have concerns regarding the constitutionality of applying the VRA to Washington's felon disenfranchisement provisions." (citations omitted)). The District Court's heavy emphasis on the first Senate Factor further demonstrates the District *(cont'd)*

(1966) (finding that courts are "not shackled to the political theory of a particular era" and are not "confined to historic notions of equality" or "what was at a given time deemed to be the limits of fundamental rights"). Moreover, the District Court's reliance on the tradition of felon disfranchisement laws cannot be squared with the legislative history of the Voting Rights Act, which makes clear that "'[e]ven a *consistently applied* practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the [political] process.'" *Farrakhan I*, 338 F.3d at 1019 (quoting Senate Report at 29 n.117). Finally, to the extent that the existing practices in the states should be a factor in considering the tenuousness of the policy justification, it should not be a one-way ratchet: The *recent* trend in the States has been liberalization of felon disfranchisement laws, which suggests that States are reconsidering their historic rationales for these policies. *See generally* Developments in the Law, *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 Harv. L. Rev. 1939, 1942-49 (2002) (discussing liberalization trends in the States); The Sentencing Project, *Felony Disenfranchisement, available at* http://www.sentencingproject.org/pubs_05.cfm

---

(cont'd from previous page)

Court's conceptual difficulty with a results-based Section 2 challenge to a facially neutral felon disfranchisement law.

(last visited Nov. 26, 2006); Erik Eckholm, *States Are Growing More Lenient in Allowing Felons to Vote*, N.Y. Times, Oct. 12, 2006, at A18.

The District Court's rationales for its conclusion that the ninth Senate Factor "favors Defendants" are even more perplexing given its earlier opinion in this very case, which made clear that it considered *Dillenburg*'s rejection of the commonly-advanced justifications for felon disfranchisement laws to be binding and that it did not think *Richardson* "limited" its ability to consider policy justifications offered for the law. In its 1997 ruling on the State's motion to dismiss, the District Court rejected the State's argument, based on *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1985), that felon disfranchisement is justified based on "John Locke's social contract theory," which dictates that "those individuals who do not abide by society's rules cannot participate in their promulgation." *Farrakhan v. Locke*, 987 F. Supp. at 1312. The District Court rejected this "sanctity of the ballot box argument" and provided an analysis that differs dramatically from its assessment of the ninth Senate Factor in 2006:

> *Dillenburg* remains applicable . . . to the extent that the decision discusses the alleged justifications for felon disenfranchisement statutes. The panel in *Dillenburg* criticized the Locke's "purity of the ballot box" argument as overly academic and empirically unfounded. The decision also criticized Washington's law in particular, since it denies felons the right to vote based on the *possible* penalty for their offense, rather than their *actual* penalty or conduct. On the basis of *Dillenburg*, therefore, consideration of Washington's interest in disenfranchising felons is not conclusive as to whether the totality of the circumstances standard can be met.

Id. at 1312-13 (citation omitted) (footnote omitted). The District Court offers no explanation for its reversal on this issue and the State has failed to offer *any* additional arguments or evidence that justify a finding in its favor on this Senate Factor. The District Court's failure to meaningfully consider this Factor is especially surprising given this Court's remand with the view that the ninth Senate Factor — and the above-quoted rationale in particular — might factor into the District Court's totality of the circumstances analysis. *See Farrakhan I*, 338 F.3d at 1020 n.15 (noting that "Plaintiffs also presented evidence regarding the tenuous policy justifications" and that the District Court's ruling on the motion to dismiss "noted our criticism [in *Dillenburg*] of the underlying policy justifications for Washington's law").

Finally, even if *Dillenburg* is not binding on this Court, its observation that courts have searched in vain for rational justifications for felon disfranchisement laws remains true. Scholars have noted the difficulty of justifying such laws under any of the conventional theories of criminal punishment. *See* Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 Stan. L. Rev. 1147, 1166 (2004) ("Nor can disenfranchisement be explained as a realistic deterrent of criminal behavior. It seems unlikely that an individual who is not deterred by the prospect of imprisonment or fines or other restrictions on his liberty will be dissuaded by the

threat of losing his right to vote . . . .") (footnote omitted); Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 303 (2000) ("As a penal measure, disfranchisement did not seem to serve any of the four conventional purposes of punishment: there was no evidence that it deterred crimes; it was an ill-fitting form of retribution; it did not limit the capacity of criminals to commit further crimes; and it certainly did not further the cause of rehabilitation."). These arguments, however, were not confined to scholarly writings but were presented by Plaintiffs to the District Court. Plaintiffs' expert similarly found that Washington State's law could not be justified with respect to any plausible criminal punishment objective. *See* Ewald Report (E.R. 362-63). He also opined that the State's failure to assert a legitimate interest served by its law notwithstanding the law's demonstrated discriminatory effects is further evidence of its tenuousness. *Id.* at 371 (concluding that "[s]triking evidence of the policy's disproportionate racial impact intensifies the need to ask what practical objective the state's disenfranchisement law pursues"); *cf. League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2623 (2006) (concluding that the State's incumbency protection rationale for redistricting, "whatever its validity in the realm of politics, cannot justify the effect on Latino voters" and citing the Senate Factor of "whether 'the policy underlying' the State's action 'is tenuous'") (quoting *Gingles*, 478 U.S. at 45).

Moreover, the Supreme Court has made clear that the State has no legitimate interest in policing the *way* in which anyone votes. *See Carrington v. Rash*, 380 U.S. 89, 94 (1965) (holding that "'fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible"); *cf. Dunn*, 405 U.S. at 355, 56 ("'The fact that newly arrived [Tennesseans] may have a more national outlook than longtime residents, or even may retain a viewpoint characteristic of the region from which they have come, is a constitutionally impermissible reason for depriving them of their chance to influence the electoral vote of their new home state.'") (alteration in original) (citation omitted).

****

The District Court's decision to consider irrelevant Senate Factors was apparently guided by its belief that focusing on only a minority of the enumerated Senate Factors — *i.e.*, the fifth and ninth Factors, as Plaintiffs suggested — would render the totality of the circumstances inquiry incomplete. As demonstrated, however, that view is at odds with Congress's stated intent, *see* Senate Report at 28-30, this Court's precedents, *see Gomez*, 863 F.2d at 1412, and over 20 years of case law under the amended version of Section 2, *supra*, at 37-46. Indeed, the Supreme Court in *Gingles* not only recognized that a select number of the Senate Factors (the second and the seventh) would be particularly relevant to challenges to multi-member districts, but also that the *entire list* of Senate Factors was

particularly relevant to vote *dilution* claims. *See Gingles*, 478 U.S. at 45 ("While the enumerated factors will often be pertinent to certain types of Section 2 violations, *particularly to vote dilution claims*, other factors may also be relevant and may be considered") (emphasis added). That many of those enumerated factors are more probative in vote dilution cases than they are in vote denial cases is unsurprising given that the focus of the Congress that amended the VRA in 1982 was how to overrule *Mobile v. Bolden*, 446 U.S. 55 (1980), without providing minorities with a right to proportional representation. *See Gingles*, 478 U.S. at 43-46; *see generally* Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, *in* Minority Vote Dilution 145, 153-156 (Chandler Davidson ed., 1984).[6] That Congress chose to enumerate a list of factors dealing with the difficult, often "closer call," judgments about whether a minority group's vote has been diluted, *cf. DeGrandy*, 512 U.S. at 1013, does not mean that those factors must apply equally to all forms of voting discrimination prohibited by Section 2 — including vote denial.

---

[6] The Senate Factors "were derived from the analytical framework of *White v. Regester*, 412 U.S. 755 (1973), as defined and developed by the lower courts, in particular by the Fifth Circuit in *Zimmer v. McKeithen*, 485 F.2d 1297 (1973) (en banc)." *Gingles*, 478 U.S. at 36 n.4 (citing S. Rep. No. 417, at 28 n.113). Like *Gingles*, *White* and *Zimmer* both involved Section 2 challenges to at-large electoral schemes, and thus the factors outlined in those opinions were directed toward the particular concern about how to measure vote dilution.

III. THE DISTRICT COURT ERRED BY HOLDING THAT SECTION 2 DOES NOT PROTECT INDIVIDUAL VOTERS

Under Section 2 of the Voting Rights Act, "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision 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." 42 U.S.C. § 1973(a). The plain text of this provision protects the rights of individual citizens. Indeed, applying this plain text, the Supreme Court has held that Section 2 rights belong to individual voters, not groups. *See Shaw v. Hunt*, 517 U.S. 899, 917 (1996) ("To accept [appellees' argument] implies that [a Section 2] claim . . . belongs to the minority as a group and not to its individual members. It does not. *See* § 1973 ('the right of any citizen')."). Any other interpretation would not only contravene the text of the statute, it would not make sense. If a single Native American voter is told by elections officials that she may not register to vote because of her ethnicity, her right to vote has surely been denied on account of race or color in violation of Section 2 — regardless of whether other Native American experience the same discrimination or whether overall Native American registration rates are higher or lower than those of other groups.

The District Court, however, failed to recognize that Section 2 protects the rights of individual voters. The District Court stated: "If the denial or abridgement

of *one citizen's* right to vote 'on account of race or color' established a violation of Section 2 of the VRA, this Court would find for Plaintiffs in this matter." *Farrakhan*, 2006 WL 1889273, at *9. That should have been the end of the inquiry. As explained above, the text of Section 2 states in no uncertain terms that "the denial or abridgement of the right of any citizen . . . to vote on account of race or color" establishes a Section 2 violation, 42 U.S.C. § 1973(a), and Supreme Court precedent is equally clear that Section 2 protects the rights of individual citizens. The District Court, however, did not adhere to the plain text of Section 2 or the Supreme Court's interpretation of the statute. Rather, without explanation, the District Court concluded that "[t]he statutory language of subsection (a) of § 2 of the VRA limits its application to those circumstances the totality of which establish the existence of discrimination in voting on a broader scale." *Farrakhan*, 2006 WL 1889273, at *9. Contrary to the District Court's conclusion, nothing in the language of Section 2 "limits its application" to cases where plaintiffs demonstrate "discrimination in voting on a broader scale."[7]

---

[7] In fact, the denial or abridgement of one citizen's right to vote on account of race is sufficient to state a Section 2 violation. In this case, Plaintiffs have demonstrated not simply that "one citizen" or even a "few" have had their vote denied, but rather that entire groups of minority voters have been disproportionately denied the franchise based on discrimination in Washington State's criminal justice system.

The District Court's error on this issue is sufficient grounds to reverse the decision below, because the District Court explicitly stated that, if Section 2 protected individual citizens, it would have ruled for Plaintiffs. In other words, the District Court's ultimate finding concerning Section 2 liability was based on a "misreading of the governing law," and therefore, the decision must be reversed. *DeGrandy*, 512 U.S. at 1022.

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.

Dated this 1st day of December, 2006.

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

IAN WHITNEY, LAW CLERK
UNIVERSITY LEGAL ASSISTANCE
721 NORTH CINCINNATI STREET
P.O. BOX 3528
SPOKANE, WASHINGTON 99220-3528
509.323.5791
iwhitney@lawschool.gonzaga.edu

ANGELA GIANOLI, LEGAL INTERN
UNIVERSITY LEGAL ASSISTANCE
721 NORTH CINCINNATI STREET
P.O. BOX 3528
SPOKANE, WASHINGTON 99220-3528
509.323.5791
agianoli@lawschool.gonzaga.edu

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 opening brief is proportionately spaced, has a typeface of 14 points, and contains 13,993 words.

DATED this 1st day of December, 2006

LAWRENCE A. WEISER, WSBA #6865
UNIVERSITY LEGAL ASSISTANCE