NO. 06-35669

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MUHAMMAD SHABAZZ FARRAKHAN, et al.,

Plaintiffs-Appellants,

v.

CHRISTINE O. GREGOIRE, et al.,

Defendants-Appellees.

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

No. CV-96-076-RHW
The Honorable Robert H. Whaley
United States District Court Judge

BRIEF OF DEFENDANTS-APPELLEES

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I. STATEMENT OF JURISDICTION

This timely appeal is from an order of the United States District Court for the Eastern District of Washington, dismissing the sole remaining claim on cross-motions for summary judgment, in a lawsuit brought under 42 U.S.C. § 1973. ER 653-55; ER 636-51. This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291 and § 1331.

II. STATEMENT OF ISSUES PRESENTED

1. The United States Constitution and the legislative history of the Voting Rights Act (VRA), 42 U.S.C. § 1973, and subsequent federal enactments demonstrate that Congress did not intend the VRA to apply to felon disenfranchisement laws. Is Washington's felon disenfranchisement law outside the purview of the VRA?

2. No Plaintiff has demonstrated that his felony conviction was in any way the product of race discrimination. Absent such a showing, do the Plaintiffs lack standing to claim that they have been denied the right to vote on account of race in violation of Section 2 of the VRA?

3. Plaintiffs' evidence of racial disparities in Washington's criminal justice system is extremely limited in subject, geography, and time, and demonstrates no discriminatory motive or intent. Is this evidence insufficient to show that "members of the minority group . . . bear the effects of

discrimination . . . which hinder their ability to participate effectively in the political process" under Factor 5 of the VRA's totality of the circumstances test?

4. Apart from Plaintiffs' meager evidence of race discrimination in Washington's criminal justice system, the totality of the circumstances strongly support the conclusion that Washington's felon disenfranchisement laws do not deny citizens the right to vote on account of race. Did the district court thus correctly conclude that Plaintiffs failed to make out a claim of race-based vote denial under the VRA?

III. STATEMENT OF THE CASE

This case is before this Court for a second time. In 1996, six individuals, Muhammad Shabazz Farrakhan, Al-Kareem Shadeed, Marcus Price, Ramon Barientes, Timothy Schaaf, and Clifton Briceno—all of whom were convicted of felonies—filed this action in the United States District Court for the Eastern District of Washington. SER 1-34. They alleged that Washington's felon disenfranchisement law violated the Voting Rights Act (VRA) and the United States Constitution. The claim underlying this litigation for over a decade is the assertion that certain racial minorities are disproportionately prosecuted and sentenced, resulting in disproportionate representation among felons disenfranchised under Washington law. Plaintiffs alleged that this disproportionate

representation satisfied the results test under Section 2 of the VRA, constituting denial of the right to vote on account of race.

The district court dismissed all claims except the claim of vote denial under the VRA. *Farrakhan v. Locke*, 987 F. Supp. 1304, 1312-13 (E.D. Wash. 1997). Later, the six Plaintiffs filed a fourth amended complaint, alleging that Washington's felon disenfranchisement law, including procedures to restore the right to vote to felons, constituted denial of the right to vote on account of race in violation of the VRA. SER 35-47.

The district court dismissed the Plaintiffs' vote denial claim on summary judgment after review of statistics, reports, and expert testimony provided to the court by the parties. On Plaintiffs' appeal, this Court remanded the matter to the district court to again consider the totality of circumstances, including factors external to the challenged voting mechanism, specifically alleged racial discrimination in Washington's criminal justice system. *Farrakhan v. Washington*, 338 F.3d 1009, 1011-12 (9th Cir. 2003). The State Defendants petitioned for rehearing en banc, which was denied. *Farrakhan v. Washington*, 359 F.3d 1116 (9th Cir. 2004). The State's Petition for Writ of Certiorari was also denied. *Locke v. Farrakhan*, 543 U.S. 984, 125 S. Ct. 477, 16 L. Ed. 2d 365 (2004).

On remand, the district court again considered statistics, reports, and expert testimony submitted by the parties, and again dismissed the Plaintiffs' sole

remaining claim on summary judgment. ER 636-51. Based on the totality of the circumstances, including the lack of any history of racial bias in Washington's electoral process or its decision to enact felon disenfranchisement, the court below concluded that Washington's felon disenfranchisement law does not deny the right to vote on account of race. ER 650.

The six Plaintiffs again appeal to this Court, claiming that the district court erred when, as directed by this Court, it applied the VRA's totality of the circumstances test and when it determined that Plaintiffs failed to meet their burden to show that they were denied the right to vote on account of race in violation of Section 2 of the VRA.

IV. STATEMENT OF FACTS

A. Plaintiffs' Background

Of the six felon Plaintiffs, four are Black, one is Latino, and one is Native American. Plaintiffs-Appellants Br. at 6. At the time that they filed this lawsuit, the Plaintiffs could not vote because they were convicted of felonies. Neither in the course of their criminal proceedings nor in their criminal appeals, did any of the six Plaintiffs prove or even claim that racial bias played a part in their individual felony convictions. SER 49. Nor is there evidence in the record that any other individual was convicted of a felony as a result of racial discrimination.

There is no evidence in this record of the voting history of the individual six Plaintiffs who filed this lawsuit or of the voting history or voting patterns of felons—either by race or generally. Further, there is no evidence in this record of the voting history or voting patterns of Blacks, Latinos, or Native Americans.

B. Washington's Felon Disenfranchisement Law

Felon disenfranchisement in Washington began before statehood. The felon disenfranchisement provision adopted by the constitutional convention dates back to 1866, when Washington was a Territory and the Fifteenth Amendment extending the vote to Blacks had not yet been adopted. *See* Territorial Law of 1866, Rem & Bal. Code § 4755 ("[n]o . . . persons convicted of an infamous crime, shall be entitled to the privilege of an elector.").[1] Washington's 1889 Constitution declared that a person convicted of an "infamous crime unless restored to their civil rights" is ineligible to vote. Wash. Const. art. VI, §§ 1, 3. The provision has been virtually unchanged as related to felon disenfranchisement since its enactment. The legislature has defined "infamous crime" as essentially a felony punishable by death or imprisonment (for a year or more). Wash. Rev. Code § 29A.04.079 (2006). It is undisputed that there is no indication, historically or legally, of any racially discriminatory intent associated with Washington's felon

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[1] Voting rights of Blacks in Washington were protected by the Territorial Sufferage Act of 1867, three years before ratification of the Fifteenth Amendment. SER 205.

disenfranchisement law. SER 327-28, 379. There is no history of official discrimination in Washington against Blacks, Latinos, and Native Americans related to the right to vote. SER 327-28, 497-503. Washington does not have a history of laws designed to discriminate against Blacks. SER 201-02. Throughout its statehood, Washington voters have elected members of classes protected by 42 U.S.C. § 1973(a) to various legislative, judicial, and executive positions. Washington's top local elected positions, including Governor, Supreme Court Justice, and County Executive, have been filled by members of such classes. SER 205.

Washington has been a leader among states in addressing racial inequality in criminal sentencing and other aspects of the criminal justice system. In 1987, the Washington State Minority and Justice Task Force was established by the Washington Supreme Court in response to legislation seeking to improve the treatment of racial and ethnic minorities in courts and the legal system throughout the state. SER 84-86, 229. In 1990, the Washington Supreme Court formed a permanent Minority and Justice Commission. SER 231, 325-26. As a result of the work of the Commission, educational programs have been developed and taught to court personnel for increasing diversity, cultural awareness, and mutual respect among those who deliver court services. SER 242-89.

There is no evidence in Washington of racially-polarized voting, any election procedures that discriminate on the basis of race, political campaigns characterized by racial appeals, or a lack of responsiveness by elected officials to particular needs of minority groups. ER 649; SER 47-48, 328.

C. Enactment Of The Voting Rights Act

Congress enacted the Voting Rights Act of 1965, recognizing that some states were using voting procedures that discriminated on account of race. The Act specifically barred insidious exclusionary practices designed to prevent Blacks from voting (such as requiring literacy, educational achievement, or good moral character) in certain regions referred to as covered areas. Outside covered areas, the 1965 Act barred tests or devices that had "been used . . . for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color". 42 U.S.C. § 1973a[b].

As amended in 1982, Section 2 of the VRA states:

> (a) No 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 abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a

> class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973. (Emphasis in original.)

V. SUMMARY OF THE ARGUMENT

For the second time in this case, and as directed by this Court, the district court has applied the "totality of the circumstances" test, including consideration of the "Senate Factors", and has ruled that Washington's felon disenfranchisement laws do not violate Section 2 of the Voting Rights Act. The district court's decision should be affirmed for four reasons.

First, as the state argued in the first appeal of this case, and as the Second and Eleventh Circuits subsequently have concluded, the VRA does not apply to felon disenfranchisement provisions. This conclusion alone provides a complete basis for affirming the decision of the district court, and this Court need not proceed to consider any further issues. Second, none of the Plaintiffs in this case have alleged, let alone demonstrated, that their felony convictions and attendant disenfranchisement resulted from racial bias or discrimination in Washington's criminal justice system. Accordingly, no Plaintiff has standing to assert a claim of vote denial under Section 2 of the VRA, similarly providing a complete basis upon

which this Court should affirm the decision of the district court. Third, there is no substantial evidence in the record that racial discrimination in Washington's criminal justice system has resulted in denial of the right to vote based on race. Apart from a mere statistical disparity, inadequate to make out a claim under the VRA, the only additional evidence of race discrimination in Washington's criminal justice system that the Plaintiffs have presented is extremely narrow in subject and very limited in time and geographic area. It is not linked to race-motivated discrimination and does not establish that "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [Section 2 of the VRA] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). As a matter of law, under Senate Factor 5 and the totality of the circumstances test, Plaintiffs' meager evidence fails to demonstrate that Washington's criminal justice system has hindered VRA protected groups' ability to participate effectively in the political process. ER 646. Fourth, even considering Plaintiffs' limited evidence relating to racial bias in Washington's criminal justice system, the district court correctly concluded that, based on the "totality of the circumstances" test of the VRA, Plaintiffs have failed to demonstrate that Washington disenfranchises felons based on race in violation of

the VRA. For all of these reasons, this Court should affirm the decision of the district court.

VI. ARGUMENT

A. The Voting Rights Act Does Not Apply To Felon Disenfranchisement Laws

1. The Court Should Reexamine The Applicability Of The Voting Rights Act To Washington's Felon Disenfranchisement Law

Two other federal circuits, both sitting *en banc* in cases decided after a panel of this Court issued its first opinion in this case, have concluded that the Voting Rights Act does not apply to felon disenfranchisement laws. *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc); *Johnson v. Governor of the State of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc), *cert. denied*, *Johnson v. Bush*, 126 S. Ct. 650, 163 L. Ed. 2d 526 (2005). For the reasons expressed in those opinions, and in the opinion dissenting from the denial of rehearing *en banc* by this Court,[2] this Court should reexamine its contrary conclusion. *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003). This Court should join the other federal circuits that have considered the matter and conclude that the Voting Rights Act does not apply to felon disenfranchisement.

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[2] *Farrakhan*, 359 F.3d 1116 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing *en banc*).

In the context of the first appeal in this case, this Court concluded that, "as a preliminary matter," the challenge to felon disenfranchisement "is cognizable under Section 2 of the VRA." *Farrakhan*, 338 F.3d at 1016. This Court should reexamine that conclusion in light of the subsequent decisions of the Second and Eleventh Circuits. As this Court has explained, "a panel of this court has discretion to depart from the law of the case established by the same panel, or another," where at least one of several possible circumstances arise. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 787 (9th Cir. 2000). Those circumstances include: "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Id.* (quoting *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (*en banc*)). "The law of the case doctrine is not dispositive, particularly when a court is reconsidering its own judgment, for the law of the case 'directs the court's discretion, it does not limit the tribunal's power.'" *Mendenhall v. Nat'l Transp. Safety Bd.*, 213 F.3d 464, 469 (9th Cir. 2000) (quoting *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983)).

The subsequent intervening authority of sister circuits reveals that this Court's conclusion was clearly erroneous and works a manifest injustice. The Second and Eleventh Circuits both decided, *en banc*, that Section 2 of the Voting

Rights Act does not extend to a cause of action challenging a state's law disenfranchising convicted felons, a conclusion that makes further consideration of other issues unnecessary. Both circuits did so after this Court issued its opinion, and so those decisions obviously were not before this Court for consideration. *Hayden*, 449 F.3d 305; *Johnson*, 405 F.3d 1214.

2. Congress Did Not Intend The Voting Rights Act To Apply To Felon Disenfranchisement Laws

Both the Second and Eleventh Circuits carefully examined the text and history of the Voting Rights Act, and both concluded that Congress did not intend that it apply to felon disenfranchisement laws. This included the history and context of both the original enactment of the Voting Rights Act in 1965 and its 1982 amendments. *Hayden*, 449 F.3d at 317-23; *Johnson*, 405 F.3d at 1232-35.

Congress made clear when it originally enacted the Voting Rights Act in 1965 that it did not prohibit felon disenfranchisement. Despite the VRA's otherwise broad remedial purpose, it is "indisputable that Congress did not explicitly consider felon disenfranchisement laws to be covered by the Act and, indeed, affirmatively stated that such laws were *not* implicated by provisions of the statute." *Hayden*, 449 F.3d at 318 (emphasis by the court). In the context of discussing Section 4 of the VRA, "the Senate Report reflects that legislators intended to *exempt* the voting restrictions on felons from the statute's coverage". *Johnson*, 405 F.3d at 1233 (emphasis by the court). The report explained that the

VRA "would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony or mental disability." S. Rep. No. 89-162, at 24 (1965) (*reprinted in* 1965 U.S.C.C.A.N. 2508, 2562 (joint views of Senators Dodd, Hart, Long, Kennedy, Bayh, Burdick, Tydings, Dirksen, Hruska, Fong, Scott and Javits)) (*quoted in Hayden*, 449 F.3d at 318; *Johnson*, 405 F.3d at 1233). The House Report explained the Act similarly, agreeing that the VRA was not designed to reach felon disenfranchisement. "This subsection does not proscribe a requirement of a State or any political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony or mental disability." H.R. Rep. No. 89-439, at 25-26 (1965) (*reprinted in* 1965 U.S.C.C.A.N. 2437, 2457 (1965) (*quoted in Hayden*, 449 F.3d at 318; *Johnson*, 405 F.3d at 1233). It was also emphasized on the floor of the Senate that the VRA "was not intended to prohibit 'a requirement that an applicant for voting or registration for voting be free of conviction of a felony or mental disability.'" *Hayden*, 449 F.3d at 318 (*quoting* 111 Cong. Rec. S8366 (daily ed. April 23, 1965) (statement of Senator Tydings)).[3]

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[3] The *Hayden* court prefaced its discussion of this legislative history by explaining its reasons for examining that history rather than relying strictly upon the statutory language. "We are not convinced that the use of broad language in the statute necessarily means that the statute is unambiguous with regard to its

Both the *Hayden* and *Johnson* courts accordingly concluded that the VRA was not intended to prohibit felon disenfranchisement. *Hayden*, 449 F.3d at 319 ("it is apparent to us that Congress's effort to highlight the exclusion of felon disenfranchisement laws from a VRA provision that otherwise would likely be read to invalidate such laws is indicative of its broader intention to exclude such laws from the reach of the statute"); *Johnson*, 405 F.3d at 1233 ("These reports indicate that neither house of Congress intended to include felon

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application to felon disenfranchisement laws." *Hayden*, 449 F.3d at 315. The court found "persuasive reasons to believe that Congress did not intend to include felon disenfranchisement provisions within the coverage of the Voting Rights Act, and we must therefore look beyond the plaint text of the statute in construing the reach of its provisions." *Id.* (citing *Watt v. Alaska*, 451 U.S. 259, 266, 101 S. Ct. 1673, 68 L. Ed. 2d 80 (1981)). Those reasons included:

> (1) the explicit approval given such laws in the Fourteenth Amendment; (2) the long history and continuing prevalence of felon disenfranchisement provisions throughout the United States; (3) the statements in the House and Senate Judiciary Committee Reports and on the Senate floor explicitly excluding felon disenfranchisement laws from provisions of the statute; (4) the absence of any affirmative consideration of felon disenfranchisement laws during either the 1965 passage of the Act or its 1982 revision; (5) the introduction thereafter of bills specifically intended to include felon disenfranchisement provisions within the VRA's coverage; (6) the enactment of a felon disenfranchisement statute for the District of Columbia by Congress soon after the passage of the Voting Rights Act; and (7) the subsequent passage of statutes designed to facilitate the removal of convicted felons from the voting rolls.

Id. at 315-16. For these reasons, the court concluded that Section 2 "was not intended to—and thus does not—encompass felon disenfranchisement provisions." *Id.* at 316.

disenfranchisement within the statute's scope"). The *Hayden* court, in fact, described the statement of congressional intent on this point as "emphatic." *Hayden*, 449 F.3d at 319; *see also Farrakhan*, 359 F.3d at 1120 (Kozinski, J., dissenting from denial of rehearing) (reciting the same legislative history relied upon by the *Hayden* and *Johnson* courts).[4]

Congressional intent on this point did not change when Congress amended the VRA in 1982. "Neither the plain text nor the legislative history of the 1982 amendment declares Congress's intent to extend the Voting Rights Act to felon disenfranchisement provisions." *Johnson*, 405 F.3d at 1234. Indeed, even though the 1982 Senate Report recited "many discriminatory techniques used by certain jurisdictions, [it] made no mention of felon disenfranchisement provisions." *Id.* The 1982 amendments were designed for a very different purpose—that of responding to the Supreme Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980), "in an attempt to clarify the standard for finding Section 2 violations." *Johnson*, 405 F.3d at 1233. It "follows that

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[4] An earlier decision by the Fifth Circuit supports the same conclusion. In 1965, shortly after the original enactment of the Voting Rights Act, that court entered an injunction against various voting practices employed at that time by the state of Louisiana, but specifically exempted from the injunction any effect upon felon disenfranchisement rules. *United States v. Ward*, 352 F.2d 329, 332 (5th Cir. 1965).

Congress did not have [felon disenfranchisement] in mind when the VRA section at issue took its present form in 1982." *Hayden*. 449 F.3d at 321.[5]

Other congressional actions further bolster the conclusion that Congress has never viewed the VRA as prohibiting felon disenfranchisement. If Congress did regard the Voting Rights Act as prohibiting felon disenfranchisement, it seems unlikely that Congress would enact other statutes recognizing, or even mandating, that very practice. In 1971 "Congress affirmatively enacted a felon disenfranchisement statute in the District of Columbia, over which it had plenary power" at the time. *Hayden*, 449 F.3d at 320 (citing Pub. L. No. 92-220, § 4, 85 Stat. 788, 788 (1971)). More recently, the National Voter Registration Act of 1993 (NVRA) explicitly provides for "criminal conviction" as one of a limited number of grounds upon which a state can legitimately cancel a person's voter registration. 42 U.S.C. § 1973gg-6(a)(3)(B). The NVRA also elicits the aid of federal prosecutors in support of the removal of felons from the voting rolls by requiring United States Attorneys to give written notice to state election officials when

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[5] When Congress again reauthorized the Voting Rights Act in 2006, it made no amendments to Section 2 and made no reference to felon disenfranchisement. Pub. Law No. 109-246, 120 Stat 577 (2006). This is true despite "the development of one of the most extensive legislative records in the Committee on the Judiciary's history." House Report 109-478 at 5, 2006 WL 1403199, *5 (2006). Neither the House Report nor the Senate Report made any mention of felon disenfranchisement. House Report 109-478 (2006); Senate Report 109-295 (2006).

felony convictions occur. 42 U.S.C. § 1973gg-6(g)(3). The Help America Vote Act of 2002 goes farther, expressly instructing states to coordinate their voter registration lists with records of felony conviction for the purpose of removing disenfranchised felons from the rolls. 42 U.S.C. § 15483(a)(2)(A)(ii)(I). "These bills further indicate that Congress itself continues to assume that the Voting Rights Act does not apply to felon disenfranchisement provisions." *Hayden*, 449 F.3d at 322; *see also Johnson*, 405 F.3d at 1234 n.39 (observing that the NVRA provisions "suggest[] that Congress did not intend to sweep felon disenfranchisement laws within the scope of the VRA").

The *Hayden* and *Johnson* courts further noted the extensive history of felon disenfranchisement, including its "ancient origin." *Hayden*, 449 F.3d at 316; *see also Johnson*, 405 F.3d at 1228 (referring to felon disenfranchisement as, "deeply rooted in this Nation's history"). Felon disenfranchisement laws were adopted in America from colonial times, and most states had such provisions when the Fourteenth Amendment was adopted in 1868. Today virtually every state, including every state in this circuit,[6] disenfranchises felons. *Hayden,* 449 F.3d at 316-17. Based on all of this "persuasive evidence," the court concluded "that Congress has never intended to extend the coverage of the Voting Rights Act to

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[6] *Farrakhan*, 359 F.3d at 1125 (Kozinski, J., dissenting from denial of rehearing) ("[E]very state in our circuit—indeed, every state in the country save Maine and Vermont—does not allow imprisoned felons to vote.").

felon disenfranchisement provisions, [and] we deem this one of the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *Hayden*, 449 F.3d at 322-23 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989)).

3. Constitutional Provisions And Principles Further Bolster The Conclusion That The Voting Rights Act Does Not Address Felon Disenfranchisement

Both the Second and Eleventh Circuits considered an additional principle of statutory construction in concluding that the Voting Rights Act does not extend to felon disenfranchisement. "The starting point for our analysis is the explicit approval given felon disenfranchisement provisions in the Constitution." *Hayden*, 449 F.3d at 316; *see also Johnson*, 405 F.3d at 1228-29. A "cardinal principle" of statutory construction, in all circuits, is that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988) (tracing this principle to Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy*, 2 Cranch. 64, 6 U.S. 64, 118, 2 L. Ed. 208 (1804)); *see also Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997) ("At the

core of *DeBartolo* lies the presumption that, if Congress means to push the constitutional envelope, it must do so explicitly").

The United States Constitution permits states to disenfranchise persons convicted of "participation in rebellion, or other crime." U.S. Const. amend. XIV. Based upon this explicit language in the Fourteenth Amendment,[7] our country's legal traditions and other authorities, the Supreme Court has concluded that states are expressly allowed to deny the elective franchise to felons. *Richardson v. Ramirez*, 418 U.S. 24, 55-56, 94 S. Ct. 2655, 41 L. Ed. 2d 551 (1974). *See also*, *Harmelin v. Michigan*, 501 U.S. 957, 982-83, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991).[8]

A construction of the Voting Rights Act that would place it at odds with the Fourteenth Amendment would raise serious constitutional concerns. *Johnson*, 405 F.3d at 1229; *Farrakhan*, 359 F.3d at 1121-22 (Kozinski, J., dissenting from denial

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[7] One *amicus* brief relies upon a decision of the Supreme Court of Canada for the proposition that felon disenfranchisement is impermissible in a democracy. *Amici* "Leading Criminologists" at 10-11 (citing *Suave v. Canada*, 3 S.C.R. 519, 550 (Canada 2002). Whatever merit that view may have under the law of another country, it has no application to the United States where the Fourteenth Amendment explicitly permits states to disenfranchise convicted felons.

[8] The historical pedigree of felon disenfranchisement is illustrated by the Supreme Court's quotation in *Harmelin* of an early nineteenth century decision: "'The disenfranchisement of a citizen . . . is not an unusual punishment; it was the consequence of treason, and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offences.'" *Harmelin*, 501 U.S. at 982-83 (quoting *Barker v. People*, 20 Johns. 457, 459 (N.Y. Sup. Ct. 1823)).

of rehearing). Because the Fourteenth Amendment expressly permits felon disenfranchisement, felons are not, *per se*, members of the class whose voting rights the Constitution protects. *Richardson*, 418 U.S. at 24; *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983) (citing *Richardson* for the proposition that convicted felons have no fundamental right to vote).[9]

"To be a valid exercise of Congress's enforcement power, 'there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Johnson*, 405 F.3d at 1230 (*quoting City of Boerne v. Flores*, 521 U.S. 507, 520, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997)). Congressional enforcement power of the Fourteenth and Fifteenth Amendments "arguably does not extend to prohibiting constitutionally protected practices." *Id.*

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[9] Since felon disenfranchisement is explicitly endorsed by the Fourteenth Amendment, state laws relating to disenfranchisement are presumptively constitutional. Courts have reached a different result only in the circumstance—very different from this case—in which the disenfranchisement is the product of intentional discrimination, as in *Hunter v. Underwood*, 471 U.S. 222, 105 S. Ct. 1916, 85 L. Ed. 2d 222 (1985). In that case, the Court concluded that the legislative history behind the Alabama disenfranchisement law demonstrated a purposeful attempt to deny the right to vote based on race. *Id.* at 226-31. The constitutional defect in such cases arises not from the fact that the state is disenfranchising felons, for that it clearly may do; the defect lies in the intentionally discriminatory nature of the law. "Only a narrow subset of [disenfranchisement laws]—those enacted with invidious, racially discriminatory purpose—is unconstitutional." *Farrakhan*, 359 F.3d at 1121 (Kozinski, J., dissenting from denial of rehearing *en banc*) (distinguishing *Hunter*); *see also Johnson*, 405 F.3d at 1223-27 (similarly limiting the application of *Hunter*); *Hayden*, 449 F.3d at 316 n.11 (same).

Additionally, "[f]or Congress to enact proper enforcement legislation, there must be a record of constitutional violations." *Id.*, 405 F.3d at 1231 (*citing Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 368, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 89, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000)). The Supreme Court, in the two cases cited in *Johnson*, concluded that the Americans With Disabilities Act and the Age Discrimination in Employment Act, respectively, could not be enforced against the states because Congress failed to support them with adequate findings of unconstitutional discrimination. *Garrett*, 531 U.S. at 374; *Kimel*, 528 U.S. at 91; *see also Oregon v. Mitchell*, 400 U.S. 112, 130, 91 S. Ct. 260, 27 L. Ed. 2d 272 (1970) (noting that in statutorily lowering the voting age to 18, Congress had made no findings that the requirement of attaining the age of 21 was used by the states to disenfranchise voters on account of race).

The Second Circuit addressed the same concern by relying upon the "clear statement rule". *Hayden*, 449 F.3d at 323. As established by the Supreme Court, the "clear statement rule" is a canon of interpretation that requires that Congress make its intent "unmistakably clear" when enacting a statute that would alter the usual constitutional balance between state and federal governments. *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991). "Accordingly, to the extent that the Voting Rights Act would affect this balance if

applied to felon disenfranchisement statutes, we must construe the statute not to encompass such provisions if it is *even unclear* whether Congress intended the Voting Rights Act to apply to such laws." *Hayden*, 449 F.3d at 323 (emphasis added). The Second Circuit concluded that the application of the Voting Rights Act to felon disenfranchisement would alter the usual balance between state and federal governments because the Fourteenth Amendment permits felon disenfranchisement. *Id.* at 326. "[E]xtending the coverage of the Voting Rights Act to these provisions would introduce a change in the federal balance not contemplated by the framers of the Fourteenth Amendment." *Id.* The court further concluded that the legislative history of the Voting Rights Act, recited above, "demonstrate[s] Congress's lack of intent to include felon disenfranchisement provisions in the coverage of the Voting Rights Act, and compel us to conclude that Congress unquestionably did not manifest an 'unmistakably clear' intent to include felon disenfranchisement laws under the VRA." *Id.* at 328. In the words of this Court, "if Congress means to push the constitutional envelope, it must do so explicitly." *Williams*, 115 F.3d at 662.

For these reasons, any construction of the Voting Rights Act that supports a claim based on felon disenfranchisement raises "grave constitutional concerns."

Johnson, 405 F.3d at 1232.[10] In contrast, the conclusion that the Voting Rights Act does not extend to felon disenfranchisement avoids these constitutional concerns and, as set forth more fully in the prior section, fully comports with congressional intent. This Court should, accordingly, reexamine the earlier decision of a panel of this Court, and adopt the construction that comports with legislative intent and avoids grave constitutional questions. This Court should conclude that the Voting Rights Act does not extend to felon disenfranchisement. This Court need not address any further issues presented by this case and should affirm the district court.

4. The Conclusion That Section 2 Of The Voting Rights Act Does Not Extend To Felon Disenfranchisement Does Not Eliminate Relief From Racial Discrimination

The absence of a basis for challenging felon disenfranchisement under Section 2 of the Voting Rights Act does not deprive actual victims of racial discrimination in the criminal justice system of any remedy. Other remedies are available that are better suited to the plight of an individual who experiences racial discrimination in the criminal justice system. These remedies include

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[10] The Supreme Court has cautioned that where, as here, a construction of the statute that does not raise constitutional concerns is fully consistent with legislative intent, courts should adopt that construction. *DeBartolo Corp.*, 485 U.S. at 575. This construction should be adopted based on the concern raised by a constitutional question, and does not require that the court conclude that the statute would be unconstitutional otherwise. *Johnson*, 405 F.3d at 1230 n.31.

(a) constitutional relief in the event that felon disenfranchisement was used as the means by which to accomplish intentional racial discrimination, (b) relief through appellate and habeas corpus proceedings where race infected the individual's criminal conviction, (c) federal civil rights actions, and (d) potentially the application of other federal election statutes.

Thus, if Plaintiffs had been able to prove that Washington engaged in intentional discrimination on the basis of race in adopting its felon disenfranchisement law, the Constitution would have provided them a remedy. *Hunter*, 471 U.S. at 226-31. Although the Fourteenth Amendment generally sanctions felon disenfranchisement, *Richardson*, 418 U.S. at 24, it does not sanction intentional discrimination based on race. *Hunter*, 471 U.S. at 233. Plaintiffs, of course, were unable to sustain such a claim in this case, and their equal protection challenge to the Washington law was dismissed at an early stage. *Farrakhan v. Locke*, 987 F. Supp. 1304, 1313-14 (E.D. Wash. 1997) (concluding that Plaintiffs failed to adequately state a claim for violation of the Fourteenth or Fifteenth Amendments because such a claim would require proof that discrimination was a motivating factor in the enactment of the facially neutral law).[11]

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[11] Washington's felon disenfranchisement law was originally enacted in 1866, well before the adoption of either the Fourteenth or Fifteenth Amendments.

Similarly, had Plaintiffs' complaint been that their own criminal convictions were the result of racial discrimination, they could have sought relief either in their original criminal proceedings (including appeals) or through collateral relief such as federal habeas corpus. 28 U.S.C. § 2254 (federal habeas corpus). As discussed more fully elsewhere in this brief, none of the Plaintiffs in this action have ever made such an allegation.[12]

See Washington State v. Collins, 69 Wash. 268, 270-71, 124 P. 903 (1912). This undercuts any notion that felon disenfranchisement was enacted as a subterfuge to deny the right to vote based on race. *Farrakhan*, 359 F.3d at 1122 (Kozinski, J., dissenting from denial of rehearing). Plaintiffs, in any event, have taken no appeal from the order dismissing their constitutional claims.

[12] Of course, the evidence that Plaintiffs have been able to muster in this case would not support a habeas corpus claim. Habeas petitioners must have standing to make claims of racial discrimination; they cannot simply cite studies inapplicable to them. *McCleskey v. Kemp*, 481 U.S. 279, 297-98, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (concluding that studies showing a statistical disparity were insufficient to support habeas relief); *see also Farrakhan*, 359 F.3d at 1117 (Kozinski, J., dissenting from denial of rehearing *en banc*) (noting the insufficiency of similar studies in the present case). Habeas petitioners must show clear proof of intentional discrimination in the decision to prosecute a crime, including the decision to seek the death penalty. *McCleskey*, 481 U.S. at 297. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *United States v. Armstrong*, 517 U.S. 456, 465, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996). In similar fashion, habeas petitioners claiming judicial bias must demonstrate actual bias on the part of the judge; bias is not presumed. *See, e.g., Withrow v. Larkin*, 421 U.S. 35, 47, 195 S. Ct. 1456, 43 L. Ed. 2d 712 (1975); *Paradis v. Arave*, 20 F.3d 950, 958 (9th Cir. 1994).

In the appropriate case, however, such remedies would be available and would avoid the incongruity inherent in the relief that Plaintiffs seek for themselves. Even if Plaintiffs could demonstrate that their felony convictions were the product of race discrimination (and they cannot), the relief they seek would not remedy the underlying wrong. The VRA would not release the Plaintiffs from prison or expunge their convictions. In fact, the "remedy" available under Section 2 of the VRA would ignore the underlying wrong; it would simply permit Plaintiffs to vote, while in some case, remaining in prison and remaining convicted felons. Where, as here, Plaintiffs *cannot* demonstrate that their individual felony convictions were the product of any race discrimination at all, it would be truly anomalous to provide to them a remedy under the VRA. Plaintiffs offer no conceptual framework to justify restoring a person's right to vote based on the idea that it was denied "on account of race" (42 U.S.C. § 1973), even in the absence of a basis for setting aside the person's underlying criminal conviction for the same reason. Where racial discrimination infecting a criminal conviction is the legal wrong, federal habeas and similar proceedings, not the VRA, provide a remedy appropriately tailored to the wrong that has been suffered.

Third, in the appropriate case, federal law offers civil relief from racial discrimination undertaken under color of state law. 42 U.S.C. § 1983; *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 391-92, 91 S. Ct. 1999, 29 L. Ed. 2d

619 (1971). Plaintiffs in this case raise no such theory, independent of their claim under the Voting Rights Act.

Finally, the Voting Rights Act is not the only statute in which Congress has provided remedies for racial discrimination related to voting. Even before the enactment of the Voting Rights Act, federal law guaranteed to all qualified voters the right to vote "without distinction of race, color, or previous condition of servitude" and provided a remedy for the enforcement of that right. 42 U.S.C. § 1971. In addition, federal law provides criminal sanctions against any election official who improperly denies any individual the right to register to vote or to vote, without regard to whether racial discrimination was involved. 42 U.S.C. § 1973gg-10.

B. The Plaintiffs Lack Standing To Claim Race Based Vote Denial Under Section 2 Of The Voting Rights Act

No evidence was presented that showed racial bias in any aspect of the felony convictions that caused the Plaintiffs here to be disenfranchised. Based on the uncontroverted facts, the Plaintiffs lack standing under article III. U.S. Const. art. III, § 2 ("[t]he judicial Power shall extend to . . . Cases . . . [and] Controversies . . ."). As in *Hayden*, 449 F.3d at 314 n.8, the Plaintiffs "do not

allege any discrimination in plaintiffs' particular convictions."[13] Nevertheless, the Plaintiffs seek to proceed on their claims of vote denial without any demonstrable showing that their convictions resulted from the discrimination of which they complain.

The question of standing is jurisdictional and may be raised at any time. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1126 (9th Cir. 2006). The standing requirement is necessary to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast v. Cohen*, 392 U.S. 83, 101, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968). In order for the standing requirement to be met, a plaintiff must not only suffer a distinct and palpable injury, but also a fairly traceable causal connection between the claimed injury and the challenged conduct. *Duke Power Co. v. Carolina Envtl. Study*, 438 U.S. 59, 72, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978). The Plaintiffs here lack standing to claim that they were denied the right to

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[13] The majority in *Hayden* recognized the Plaintiffs "did well not to make this claim, for such an assertion might have raised questions under the doctrine of *Heck v. Humphrey,* 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), which provides that '[i]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.' *Id.* at 486-87."

vote on account of race as none of the evidence in the record has any relevance to their felony convictions. *See McCleskey*, 481 U.S. at 292-93 (rejecting a capital defendant's challenge to his own sentence where he offered "no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence").

None of the limited evidence presented with respect to racial disparity or bias in Washington's criminal justice system, in certain stages of criminal proceedings in specific geographic areas, is linked to any of the Plaintiffs' convictions. Thus, the Plaintiffs lack standing to assert a federal statutory violation based upon those convictions and the loss of voting rights that automatically follows.

C. Based On The Totality Of The Circumstances Test That Applies To Claims Under Section 2, The District Court Correctly Concluded That Plaintiffs Flailed To Show That Washington's Felon Disenfranchisement Law Denies The Right To Vote Based On Race

1. The Totality Of The Circumstances Test Requires Consideration Of All Relevant Factors

The district court properly considered the totality of circumstances in this case, including factors that weigh in favor of the State. The totality of circumstances analysis comes from the VRA itself. Based on the totality of circumstances, plaintiff must show that the political processes are not equally open to participation by members of a protected class in that its members have less

opportunity than other members of the electorate to participate in the political process and elect representatives of their choice. 42 U.S.C. § 1973(b). This Court also has recognized that the totality of the circumstances approach applies to both vote denial and vote dilution claims. *Smith v. Salt River Project Agr. Imp. & Power Dist.*, 109 F.3d 586, 596 n.8 (9th Cir. 1997). As directed by the Court, the district court was entirely correct to apply the totality of circumstances test in deciding whether Plaintiffs' Section 2 claim survived summary judgment.

In applying the test, the court has discretion to consider a wide range of factors, conducting a practical evaluation of the past and present reality and a functional view of the political process. *Thornburg v. Gingles*, 478 U.S. 30, 46, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986). While the factors may vary from case to case, the test does not. And while proof of discriminatory intent is not required to meet the totality of the circumstances test, proof of a practice that results in discrimination on account of race is required. Moreover, statistical disparity alone cannot prove that a practice results in discrimination on account of race. *Chisom v. Roemer*, 501 U.S. 380, 394, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991), *Salt River* 109 F.3d at 594.

The district court here properly used the totality of the circumstances test, also known as the results test, in this Section 2 case. The purpose of totality of the circumstances test is to determine whether circumstances surrounding the

practice—the practice in this case being felon disenfranchisement—create an inference of discriminatory intent, or establish a causal connection between the practice and a discriminatory result. *Thornburg*, 478 U.S. at 36-37, 44-45. Although the VRA provides the test for determining whether a Section 2 claim is proven, case law has adopted a non-exclusive list of typical factors, taken from the Senate Report adopting the 1982 amendments to the VRA, that may be relevant in determining whether the totality of circumstances test is met:

> (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise participate in the democratic process;
>
> (2) the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> (6) whether political campaigns have been characterized by overt or subtle racial appeals;

(7) the extent to which members of the minority group have been elected to public office in the jurisdiction;

(8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

(9) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Farrakhan, 338 F.3d at 1015 (quoting S. Rep. No. 97-417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. (Vol. 2) 177, 206-07).

2. Plaintiffs' Evidence Of Racial Bias In Washington's Criminal Justice System Is Very Limited And, As A Matter of Law, Is Inadequate To Demonstrate That Even Senate Factor 5 Favors Plaintiffs' Claim

In concluding that Senate Factor 5 cuts in favor of Plaintiffs' claim, the district court relied on the testimony of two experts, Professor Crutchfield and Professor Beckett. ER 645. The district court correctly observed that the "experts cannot pinpoint evidence of discrimination in Washington's criminal justice system." ER 645. In addition, the district court correctly recognized that Beckett's report on racial disparities in drug arrests in Seattle was "limited in nature." ER 643.[14]

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[14] Plaintiffs incorrectly assert that the district court's treatment of this, and other, factors is reviewed for clear error, as if they were findings of fact. Plaintiffs-Appellants Br. at 5. This case is before this Court on review of the district court's

However, the district court then made several critical errors. First, the district court wrongly "extrapolate[d] Becketts' drug-arrest in Seattle-specific findings to Washington felony arrests and convictions generally." ER 644. There was no basis in law or in the evidence for the district court to do so. No evidence in the record supports the expansion of the expert's testimony simply to fit the allegations of the Plaintiffs in this case. The State presented deposition testimony of each of the experts showing severe limitations to the relevance of their reports to this case. SER 369-78; ER 258-59 (testimony of Beckett that her findings are limited to specific drug arrests in very limited geographic area); ER 423 (testimony of Beckett that every data source she utilized has limitations and biases).

Second, the district court compounded that fatal error by erroneously disregarding well-established law that statistical disparity alone is inadequate to prove a claim under the VRA, by adopting the burden-shifting framework of disparate impact employment discrimination suits. ER 645. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)

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order granting summary judgment. ER 636-51. This Court reviews such decisions *de novo*. *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004). The district court does not enter findings of fact in a summary judgment setting because its task is not to weigh the evidence. *Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1040 (9th Cir. 2005). Accordingly, Plaintiffs' statement that such findings are reviewed for "clear error" is inapplicable. Rather, the correct standard is that this Court's review is governed by the same standards used by the trial court in deciding a summary judgment motion. *Quest Comm'ns, Inc. v. Berkeley*, 433 F.3d 1253, 1256 (9th Cir. 2006).

(suggesting use of statistical evidence of employment policy and practice toward demonstrating pretext).[15]

Statistical disproportionality is not sufficient evidence of a violation of the Voting Rights Act. *Salt River*, 109 F.3d at 595. In *Salt River*, this Court rejected a Section 2 VRA claim alleging that a land ownership voting qualification resulted in discrimination on account of race. The evidence relied upon was an undisputed statistical disparity in land ownership between minorities and non-minorities. This Court considered expert reports in the case, but concluded that the evidence did not show that the reason or cause of the disproportionate percentage of non-minority landownership was racial discrimination. *Id.* at 595-96. Statistics are not enough; a causal connection between the voting practice and a discriminatory result is required. *Id.* at 595, citing *Ortiz v. City of Philadelphia Office of the City Comm'rs*, 28 F.3d 306, 315 (3rd Cir. 1994); *Irby v. Virginia State Bd. Of Elections*, 889 F.2d 1352, 1358-59 (4th Cir. 1989); *Salas v. Southwest Texas Jr. College Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992).; *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986). In *Wesley*, the Sixth Circuit rejected a Section 2 challenge to

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[15] Even if such an analytical approach were the correct approach under Section 2 of the VRA, Plaintiffs' claim fails on the record in this case. Like the vast majority of other states, Washington's felon disenfranchisement laws are supported by legitimate nondiscriminatory policy choices, and Plaintiffs have utterly failed to demonstrate that those policy justifications are a pretext for discrimination. Accordingly, Plaintiffs' arguments regarding the allegedly tenuous nature of the policy are inapplicable.

Tennessee's felon disenfranchisement law relying primarily on the statistical difference between minority and white felony conviction rates. *Wesley*, 791 F.2d at 1262.

It is important to point out that none of the Plaintiffs' experts conclude that any statistical disparity cited is a result of a racially discriminatory practice. ER 184-85, 259. The evidence is similar to the expert testimony in the *Salt River* case where demographic data was analyzed by experts and some found a statistically significant relationship, but had not undertaken to identify and examine other variables that may have contributed to the disparity. *Salt River*, 109 F.3d at 590.

Third, there is nothing in the record, not even statistics, connecting asserted discrimination in the criminal justice system to the standard upon which Senate Factor 5 turns. The last clause of Factor 5 requires a plaintiff to show that the effects of discrimination in areas other than voting hinder the ability of members of protected minority groups to participate effectively in the electoral process. Plaintiffs made no showing in this respect. Instead, without requiring Plaintiffs to produce any evidence connecting asserted bias in the criminal justice system to the ability of protected minorities to effectively participate in the political process, the district court simply adopted the Plaintiffs' *per se* theory—that any discrimination in Washington's criminal justice system hinders the ability of racial minorities to

participate effectively in the political process because disenfranchisement is automatic upon conviction. ER 646. This reflects a fundamental misapprehension of the Plaintiffs' burden of proof in a Section 2 claim.

The law in this Circuit is clear regarding the burden of proof: "Section 2 plaintiffs must show a causal connection between the challenged voting practice and [a] prohibited discriminatory result." *Salt River*, 109 F.3d at 595. The Plaintiffs did not make any attempt to meet their burden in this regard. It is undisputed that the Plaintiffs did not respond at all to the State's discovery request after this Court's remand of the matter, requesting any documents that purport to show that racial bias in Washington's criminal justice system denies racial minorities the opportunity to participate in the state's political process. SER 356, 365.

For each of these reasons, the district court erred as a matter of law in concluding that even one of the Senate Factors—Factor 5—provides support for Plaintiffs' claim.

In addition, in determining that Senate Factor 5 favored the Plaintiffs, the court below also concluded as a factual matter that Plaintiffs had shown more than statistical disparity demonstrating race discrimination in Washington's criminal justice system. The evidence offered by Plaintiffs actually falls far short of any such showing, and the district court erred in finding otherwise.

First, it is difficult to determine the experts' conclusions on which the district court relies, as the Crutchfield and Beckett reports do not explain the statistical disparity with any conclusion regarding causation. The district court does point to a single ambiguous statement by Beckett that she is unable to explain "in race-neutral terms" racial disparities in drug arrests in Seattle. ER 644. It is not evident how this conclusion is anything other than another way of saying that there was race-based statistical disparity in drug arrests in Seattle. Regardless, Beckett's ambiguous conclusion that the over-representation of minorities in Seattle drug arrests do not "appear to be explicable in race-neutral terms" is contradicted by the very reasons that she cites for the disparities—law enforcement concentration on (1) crack cocaine, (2) outdoor venues and (3) downtown drug areas. ER 266-70. In addition, the record contains expert testimony that many racial disparities in the criminal justice system are not attributable to race discrimination. For instance, George Bridges, in his report to the Washington State Minority and Justice Commission, indicated that disparities have complex causes and that disparities in charging and sentencing felony drug offenders are, for the most part, not attributable to race. SER 260-62; 265. Even Crutchfield offers many potential causes for the observed racial disparities in Washington's criminal justice system that do not involve a discriminatory motive. ER 240-43; SER 368-70, 400. And as noted, Beckett's conclusion that the over-representation of

minorities in Seattle drug arrests do not "appear to be explicable in race-neutral terms" is contradicted by the very reasons that she cites for the disparities. ER 266-70.

3. Even Fully Crediting Plaintiffs' Limited Evidence Of Racial Bias In Aspects Of Washington's Criminal Justice System, The Totality Of The Circumstances Test Strongly Supports The Conclusion That Washington's Felon Disenfranchisement Law Does Not Deny Individuals The Right To Vote On Account Of Race

a. Washington's Felon Disenfranchisement Law Readily Satisfies The Totality Of The Circumstances Test

The Plaintiffs rest upon the misconception that limited evidence of one Senate Factor is adequate to overcome opposing evidence or a lack of evidence of any other factor that is relevant to the totality of the circumstances. And because their evidence was lacking, they claim that the court found that "a Section 2 challenge against a felon disenfranchisement law can never succeed." Plaintiffs-Appellants Br. at 2. This is inaccurate. The court below did not suggest, as the Plaintiffs claim, that a plaintiff is required to demonstrate that a majority of the Senate Factors point in their favor. Plaintiffs-Appellants Br. at 17. Rather, the district court balanced the limited evidence presented by the Plaintiffs with the totality of relevant circumstances, and correctly ruled that the Plaintiffs had failed

in their burden to demonstrate that Washington's felon disenfranchisement law denies individuals the right to vote on account of race.[16]

No other Senate factor favors the Plaintiffs. There is no evidence of any history of official discrimination in Washington touching on the right of members of protected minority groups to participate in the political process (Factor 1); no evidence of racially polarized elections (Factor 2); no evidence of practices that enhance the opportunity for discrimination against protected minority groups

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[16] The felons also erroneously criticize the district court's observation that the denial of one citizen's right to vote does not make out a violation of Section 2 of the VRA. Plaintiffs-Appellants Br. at 57-58. The district court's observation simply reflects the language of the federal statute. Section 2 addresses only the application or imposition of a "voting qualification" or "prerequisite to voting" by government, or a government "standard, practice or procedure." The court's observation assumes the absence of such a measure. Section 2 is further confined to voting qualifications, prerequisites, standards, practices or procedures that, when considered under the "totality of the circumstances" result in "members [of protected racial minorities] having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their own choice." The district court thus correctly discerned that Section 2 of the VRA addresses voting laws and practices of state and local government, and requires a claimant to show something more than a single instance of discriminatory denial of the right to vote. Isolated individual instances of civil rights violations find remedies in other legal provisions, not Section 2. *See, e.g.*, 42 U.S.C. § 1983, 42 U.S.C. § 1971.

As the district court correctly points out, "[r]eading subsections (a) and (b) [of § 1973] together demonstrates that a claimant must show more than one instance of discriminatory denial or abridgment of the right to vote." ER 640. The district further recognized a Section 2 claim requires that "the claimant . . . prove, by a preponderance of the evidence, that the totality of the circumstances supports the conclusion that 'members' of protected minorities 'have less opportunity than other members of the electorate to participate in the political process an to elect representatives of their choice' on account of race." ER 640.

(Factor 3); no candidate slating process and, thus, no denial of access to that process (Factor 4); no evidence of political campaigns characterized by overt or subtle racial appeals (Factor 6); clear evidence of the election of members of minority groups to public office (Factor 7); no evidence of a lack of responsiveness by elected officials to particularized needs of protected minority groups (Factor 8); and no evidence that the policy underlying Washington's felon disenfranchisement law is tenuous to the state's legitimate interests in crafting its electoral systems (Factor 9).

In addition, as the Supreme Court recognized in *Thornburg*, this list of Senate Factors is "neither comprehensive nor exclusive." *Thornburg*, 478 U.S. at 45 (quoting U.S. Code Cong. & Admin. News 1982, pp. 29-30). Another highly relevant factor not discussed by Plaintiffs is that each of them is disenfranchised only because they voluntarily committed a felony. Felons are disenfranchised not "because of an immutable characteristic, such as race, but rather because of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment." *Wesley*, 791 F.2d at 1262.

The simple fact is that the voter fully controls whether he or she will forfeit the right to vote under Washington's felon disenfranchisement law. The voter need only refrain from committing a felony to retain his or her right to participate fully in the electoral process. *Id.* Washington disenfranchises only persons who

have been convicted of a felony. And Washington disenfranchises all persons who are convicted of committing a felony, regardless of their race. Where the voting qualification itself is fully within the voter's control, it makes little sense to treat the qualification as though it instead is the product of external factors. This factor, too, is properly part of the "totality of the circumstances" to be considered in evaluating whether Washington's law denies the vote "on account of race" and also strongly demonstrates that it does not.

b. No Authority Supports Ignoring Relevant Factors When Applying The Totality Of The Circumstances Test

Plaintiffs assert that the district court should have ignored certain of the Senate Factors because their claim is one of vote denial. Although Washington's felon disenfranchisement law certainly denies the right to vote to all felons, Plaintiffs' attempt to use that fact to limit the factors that should be considered by the court to determine whether a state law discriminates "on account of race" should be rejected. Such a limitation is contrary to the text of Section 2 of the VRA and the totality of circumstances test that it contains. That Plaintiffs' claim is premised on a state law explicitly denying the right to vote rather than on a law or practice that does not explicitly deny or dilute the right to vote, but has that effect, is no reason to change the analytical framework. In either case, the question is the same under Section 2 of the VRA—under the totality of the circumstances, does the law or practice deny the right to vote on account of race? Whether a claim is

based on vote denial or vote dilution, "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg*, 478 U.S. at 47.

And significantly, this Court has already rejected the argument that the Senate Factors only apply to a vote dilution claim. "To the contrary, the 'totality of the circumstances' test established in § 2(b) was initially applied only in 'vote denial' claims such as this." *Salt River*, 109 F.3d at 595 n.8.

The district court correctly concluded that the Plaintiffs did not present any evidence of several factors. ER 649. The Plaintiffs do not contest this conclusion; they merely argue that the totality of the circumstance in this case should be limited to only two factors. Plaintiffs simply are incorrect. As the Plaintiffs point out, when a court applies the totality of circumstances test and considers the Senate Factors, "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or another". *Gomez v. City of Watsonville,* 863 F.2d 1407, 1412 (9th Cir. 1988). But there is no "mechanical" use of the Senate Factors such as the Plaintiffs advocate here. *Id.* Where factors are relevant, "[n]o formula for aggregating the factors applies in every case." *United States v. Marengo Cy. Comm'n*, 731 F.2d 1546, 1574 (11th Cir. 1984), *cert*

denied and appeal dismissed, 105 S. Ct. 375 (1984). The district court appropriately considered and balanced the relevant factors.

c. The District Court Properly Determined That The Plaintiffs Did Not Show That Washington's Reason For Felon Disenfranchisement Is Tenuous

Plaintiffs and amici assert that the district court was incorrect when it determined that Plaintiffs failed to show that the policy reason for Washington's felon disenfranchisement law was tenuous. As discussed below, the district court's conclusion in this respect is well-founded. Moreover, like all of the Senate Factors, this factor is hardly determinative of a VRA claim.

The Plaintiffs and amici are incorrect when they assert that the State has the burden to justify the public policy choice underlying its felon disenfranchisement laws. State law is entitled to a strong presumption of validity, and Plaintiffs have suggested nothing that reasonably would lead one to believe that the VRA somehow reverses this fundamental rule or was intended to give the judiciary free reign to second-guess legitimate legislative policy choices. Moreover, the district court's finding that this factor favored the State must be affirmed for at least three reasons. First, the Washington constitutional convention and the state legislature can make a voting regulation for any policy reason as long as it is not a discriminatory or illegal policy reason. The State does not have a burden to further

justify its public policy choices. Rather, the Plaintiffs bear the burden of showing that Washington's policy is not legitimate.

Second, the Plaintiffs and amici are incorrect that the State has not explained the policy reason for felon disenfranchisement. The State's reason for felon disenfranchisement is the longstanding and wholly rational view that those who disobey the law by committing felonies should not be entitled to participate in making the law. *Johnson*, 405 F.3d at 1234-35 (felon disenfranchisement "is a policy decision" that the United States Constitution expressly gives to state governments, not the federal courts). Plaintiffs and amici would dismiss this explanation merely because they disagree with it. However, their strenuous disagreement with the policy does not make the policy tenuous.

Third, whether the State's qualification is based on tenuous policy reasons is an inquiry to inform whether the State's policy is a pretext for discrimination. That plainly is not the case in Washington. The Plaintiffs have provided no evidence whatsoever that Washington's felon disenfranchisement law is a sham designed to deny the right to vote based on race. Plaintiffs' assertion that felon disenfranchisement should not be Washington's public policy would be an appropriate argument to make to the Washington Legislature, but it is irrelevant to validity of Washington's law under the VRA.

VII. CONCLUSION

Based upon the arguments above, the State Defendants-Appellees respectfully request that this Court affirm the decision of the district court.

RESPECTFULLY SUBMITTED this 2nd day of February, 2007.

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

I certify that:

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

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