
No. 06-35669

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MUHAMMAD SHABAZZ FARRAKHAN, aka Ernest S. Walker;
AL-KAREEM SHADEED; MARCUS X. PRICE;
RAMON BARRIENTES; TIMOTHY SCHAAF; CLIFTON BRICENO,
Plaintiffs - Appellants,

v.

CHRISTINE O. GREGOIRE; SAM REED;
HAROLD W. CLARKE; STATE OF WASHINGTON,
Defendants - Appellees.

On Appeal from the United States District Court
for the Eastern District of Washington, Spokane
Honorable Robert H. Whaley, Senior District Judge

**MOTION OF PACIFIC LEGAL FOUNDATION AND
CENTER FOR EQUAL OPPORTUNITY FOR LEAVE TO FILE
BRIEF AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES
AND IN SUPPORT OF AFFIRMANCE**

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Pursuant to Federal Rule of Appellate Procedure 29(b) and Circuit Rule 29-2(b), Pacific Legal Foundation (PLF) and Center for Equal Opportunity (CEO) respectfully move this Court for leave to file the attached amicus curiae brief supporting the State of Washington and urging affirmance of the district court decision, *Farrakhan v. Locke*, No. CS-96-76-RHW, 2000 U.S. Dist. LEXIS 22212 (E.D. Wash. Dec. 1, 2000). Attorneys for the Solicitor General of the Washington Attorney Generals office and the NAACP Legal Defense & Education Fund were contacted to request their consent to the filing of an amicus curiae brief but there has been no response.

I

IDENTITY AND INTEREST OF PACIFIC LEGAL FOUNDATION AND CENTER FOR EQUAL OPPORTUNITY

Pacific Legal Foundation (PLF) was founded 37 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has extensive litigation experience in the area of group-based racial preferences and civil rights. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by the United States Supreme Court in the past three decades, including *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*,

539 U.S. 306 (2003); *Adarand Constructors v. Pena*, 515 U.S. 200 (1995); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

PLF submits this brief because it believes its public policy perspective and litigation experience in the area of equal protection and voting rights will provide an additional viewpoint with respect to the issues presented. PLF participated as amicus curiae in past Voting Rights Act cases such as *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504 (2009); *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen.*, 501 U.S. 419 (1991); and *City of Rome v. United States*, 446 U.S. 156 (1980).

The Center for Equal Opportunity (CEO) is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. CEO supports colorblind public policies and seeks to block the expansion of racial preferences and to prevent their use in, for instance, employment, education, and voting. CEO has participated as amicus curiae in numerous cases concerning equal protection and voting rights, such as *Ricci*, 129 S. Ct. 2658, *Holder*, 129 S. Ct. 2504; *Bartlett*, 129 S. Ct. 1231; *Parents Involved*, 127 S. Ct. 2738; *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Gratz*, 539 U.S. 244; and *Grutter*, 539 U.S. 306. Most notably,

CEO participated as amicus curiae in *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006), a case that determined Section 2 of the Voting Rights Act cannot be used to invalidate a state's felon disenfranchisement law. In addition, officials from CEO have testified before Congress regarding the Voting Rights Act and on the issue of felon disenfranchisement.

Amici contend that Section 2 of the Voting Rights Act does not authorize challenges to state felon disenfranchisement laws—laws that are expressly permitted by Section 2 of the Fourteenth Amendment. PLF, CEO, and their supporters have a substantial interest in ensuring that convicted felons are prevented from overturning the states' sovereign power to punish criminal offenders, or dissolving the states' primary responsibility for regulating the times, places, and manner of conducting elections.

II

WHY THIS MOTION SHOULD BE GRANTED

This case concerns a challenge to Washington's felon disenfranchisement law brought by convicted felons under Section 2 of the Voting Rights Act. Plaintiffs allege that as convicted felons and minorities they are being denied the right to vote, based upon race, by Washington's felon disenfranchisement provision. PLF and CEO move this Court for leave to file the attached amicus curiae brief to explain why Plaintiffs' claim must be rejected.

The authority of states to enact felon disenfranchisement laws is specifically set forth in the United States Constitution. Accordingly, all nine states in the Ninth Circuit and forty-eight states in the nation have such laws. But plaintiffs, who are convicted felons and minorities, urge this Court to strike down Washington's felon disenfranchisement law under Section 2 of the Voting Rights Act, because they claim they are being denied the right to vote based on race. The district court rejected Plaintiffs' vote denial claim, noting that Plaintiffs "presented no evidence that their own criminal prosecutions were the result of discriminatory animus, or that they were anything but race-neutral." *Farrakhan v. Locke*, 2000 U.S. Dist. LEXIS 22212, at *18. Plaintiffs argue that a disproportionate number of racial minorities are being disenfranchised following felony convictions. *Id.* at *3. However, the court concluded the Voting Rights Act provides no remedy for plaintiffs, because there is no "causal connection between the disenfranchisement provision" and denial of the right to vote based on race. *Id.* at *4.

The holding of the district court is consistent with the decisions of every other circuit that has already considered this issue and held that Section 2 cannot be used to challenge state felon disenfranchisement laws. Three circuits, including two *en banc*, specifically rejected Section 2 challenges to felon disenfranchisement. *Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2009); *Hayden*, 449 F.3d 305 (*en banc*); and *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (*en banc*). Two circuits

rejected similar claims on the pleadings without directly considering whether felon disenfranchisement statutes are immune from attack under Section 2. *Howard v. Gilmore*, No. 99-2285, 2000 U.S. App. LEXIS 2680, at *1 (4th Cir. Feb. 23, 2000) (per curiam); *Wesley v. Collins*, 791 F.2d 1255, 1259-61 (6th Cir. 1986) (treating claim as a dilution claim).

Analysis of the text, context, and legislative history of the Voting Rights Act leads to the conclusion that the decision of the district court should be affirmed. The Fourteenth Amendment explicitly permits states to adopt disenfranchisement statutes, which have long been accepted in the American legal system. *Johnson*, 405 F.3d at 1217. Many such laws were enacted long before African-Americans enjoyed suffrage, and they are not racially discriminatory. *Id.* at 1218, 1228 n.28; *Baker v. Pataki*, 85 F.3d 919, 928 (2d Cir. 1996). Felon disenfranchisement laws are beyond the reach of the Voting Rights Act because its legislative history clearly shows that the statute was not intended to cover felon disenfranchisement laws. *Hayden*, 449 F.3d at 326. If the Voting Rights Act is construed to encompass such laws, the Act would exceed Congress's enforcement powers of the Fifteenth Amendment under the "congruence and proportionality" test from *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), because there is a complete absence of congressional findings that felon disenfranchisement laws have been used to discriminate against minority voters. *Johnson*, 405 F.3d at 1231. Finally, even apart from the legislative history and lack

of congressional intent to outlaw felon disenfranchisement provisions, Plaintiffs cannot show a violation of Section 2 of the Voting Rights Act, because there is no evidence that each of them are victims of purposeful discrimination in Washington's criminal justice system. Even if Plaintiffs could make out a *prima facie* case, the state's strong interest in limiting the franchise to citizens who follow the law would rebut it.

Reversal of the district court's decision will jeopardize similar laws in all remaining eight states in this Court's jurisdiction, and result in the disruption of legitimate state electoral practices in the entire Western United States. Amici thus urge this Court to affirm the decision of the district court.

The procedural history of this case illustrates why Amici's participation would be beneficial. In *Farrakhan v. Locke*, 2000 U.S. Dist. LEXIS 22212, the district court granted motion for summary judgment in favor of Washington, rejecting Plaintiffs' argument that Section 2 applied to felon disenfranchisement laws. But in *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), *vacated, rehearing en banc granted*, *Farrakhan v. Gregoire*, 2010 U.S. App. LEXIS 8783 (9th Cir. Apr. 28, 2010), a panel from this Court reversed the district court, and held that Section 2 did permit convicted criminals to challenge state felon disenfranchisement laws. However the panel in *Farrakhan v. State of Washington* failed to explore the history of felon disenfranchisement laws, the language of the Fourteenth Amendment which expressly

authorizes states to disenfranchise felons, or congressional authority for enacting a law that allows felons to challenge state provisions expressly authorized by the Fourteenth Amendment. Had the panel decision not been vacated, it would have created a split among the circuits.

PLF and CEO believe their public policy and long-time litigation experience in the area of equal protection and voting rights will provide a helpful perspective to aid this Court in the resolution of this case by expounding upon the points missed by the panel in *Farrakhan v. State of Washington*.

For the above reasons, PLF and CEO request that this motion to file a brief amicus curiae be granted.

DATED: May 17, 2010.

Respectfully submitted,

SHARON L. BROWNE
RALPH W. KASARDA

By s/ Ralph W. Kasarda
RALPH W. KASARDA

Counsel for Amici Curiae
Pacific Legal Foundation and
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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

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

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s/ Ralph W. Kasarda
RALPH W. KASARDA