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EASTERN DISTRICT OF WASHINGTON

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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

MUHAMMAD S.  
FARRAKHAN, (aka ERNEST S.  
WALKER), et al.,  
Plaintiffs,

NO. CS-96-076-RHW

DEFENDANTS' RESPONSE  
TO PLAINTIFFS' MOTION  
FOR SUMMARY  
JUDGMENT

v.

GARY LOCKE, et al.,  
Defendants.

Defendants, by and through their attorneys, CHRISTINE O. GREGOIRE, Attorney General, and DANIEL J. JUDGE and JEFFREY T. EVEN, Assistant Attorneys General, submit the following Response to Plaintiffs' Motion for Summary Judgment.

**I. STATEMENT OF THE CASE**

This matter is before the Court on the parties' motions for summary judgment. Defendants refer the Court to their Statement of Material Facts submitted in support of their motion for summary judgment and their

DEFENDANTS' RESPONSE  
TO PLAINTIFFS' MOTION  
FOR SUMMARY  
JUDGMENT

1 counterstatement of facts, submitted with this memorandum. These facts will  
2 not be restated here. However, facts will be discussed in connection with the  
3 arguments set forth below. Defendants also refer the Court to their  
4 Memorandum in support of their motion for Summary Judgment.

5 In support of their motion for summary judgment, Plaintiffs present no  
6 facts demonstrating that their conviction and resulting disenfranchisement was  
7 based on race. Plaintiffs present nothing from their individual cases indicating  
8 that race was a relevant factor. In addition, Plaintiffs' proffered studies go no  
9 further. The evidence they submit in support of their motion for summary  
10 judgment is general in nature, pertaining to studies regarding disproportionality  
11 and alleged bias in the criminal justice system.

## 11 II. QUESTIONS PRESENTED

12 A. Do Plaintiffs fail to demonstrate that they have been denied the  
13 right to vote based on race?

14 B. Do Plaintiffs fail to support their claims with treaty provisions that  
15 are not self-executing and add nothing further to existing law in the United  
16 States?

17 C. Do Plaintiffs fail to demonstrate Washington's procedures for  
18 reinstatement them the right to vote based on race?

## 19 III. STANDARD OF REVIEW

20 Defendants refer the Court to their Standard of review submitted in their  
21 Memorandum in Support of Motion for Summary Judgment.  
22

IV. ARGUMENT

A. PLAINTIFFS FAIL TO DEMONSTRATE THEY LACK THE RIGHT TO VOTE BECAUSE OF RACE.<sup>1</sup>

1. Plaintiffs Lack Standing To Assert Their First and Second Causes of Action Because They Have not Suffered an Injury in Fact Because of Race.

Plaintiffs' claims fail because they assert no facts suggesting any personal harm to themselves. In order to bring a case before the Court, a plaintiff must present an actual case or controversy, stating "distinct and palpable" injuries to himself. Warth v. Seldin, 422 U.S. 490, 501 (1975). No matter how strongly a plaintiff may believe in the cause he espouses, and no matter how important he may believe it to be, "[w]ithout actual injury and redressability, there is no case or controversy under Article III of the federal constitution and no federal jurisdiction." Bell v. City of Kellogg, 922 F.2d 1418, 1422 (9th Cir. 1991). This is true because a court provides a forum for addressing a specific concrete dispute. "[F]ederal courts are not forums for hearing generalized grievances by taxpayers and citizens, and a party must assert his own rights, not those of others." Id.

Plaintiffs neither allege nor present any evidence demonstrating that they have been denied the vote based on race. Their reliance on statistical studies

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<sup>1</sup> Defendants dispute Plaintiffs' arguments that Wash. Const. Art. 6 § 3 is a voting qualification or prerequisite under the Voting Rights Act. Convicted felons do not have the right to vote. See Defendants' Memorandum in Support of Motion for Summary Judgment at pp. 15-20.

1 and general historical background information is insufficient. Their inability to  
2 vote (under Washington's felon disenfranchisement laws) alone does not confer  
3 standing. Plaintiffs' vote dilution theory has been dismissed; Plaintiffs do not  
4 assert a vote dilution theory in their Fourth Amended Complaint. Plaintiffs  
5 cannot assert the rights of others. Plaintiffs' allegations that they have been  
6 denied the right to vote based on general historical principles are conjectural  
7 and completely speculative. As such, Plaintiffs are unable to establish the  
8 necessary standing in order to make a claim in this Court.

9 Plaintiffs still must show an injury in fact. Here, Plaintiffs do not. It is  
10 not enough that Plaintiffs allege that they are disenfranchised felons in a state  
11 that convicts a disproportionate number of African-Americans, Hispanics, or  
12 Native Americans. They must show that their race had some relevance to their  
13 conviction and their resulting disenfranchisement. Plaintiffs argue that  
14 disproportionate felon disenfranchisement against a historical backdrop of  
15 racial discrimination without consideration of their own individual cases  
16 constitutes an abridgment of their right to vote based on race. Such an  
17 argument does not confer standing.

18 **2. Plaintiffs Mischaracterize Washington History in Their**  
19 **Arguments.**

20 This Court has already dismissed Plaintiffs' equal protection claims with  
21 prejudice. Plaintiffs allege no violation of equal protection in their complaint.  
22 Furthermore, Plaintiffs concede Washington's criminal disenfranchisement  
statute was not intended to disenfranchise against African-Americans.  
Plaintiffs also fail to demonstrate that Washington framers intended laws

1 regarding felon disenfranchisement to be discriminatory against Native  
2 Americans and Hispanics.

3 Plaintiffs fail to meet their burden by making conclusory allegations that  
4 the framers of the Washington Constitution intended to discriminate against  
5 Native Americans with the ratification of Wash. Const. Art. VI § 3. Although  
6 the State Constitutional Convention considered and rejected a measure that  
7 would have disenfranchised Chinese voters, nothing in the historical record  
8 indicates any intent to discriminate against racial groups under the felon  
9 disenfranchisement language of Art. VI § 3. Plaintiffs present no evidence that  
10 the constitutional convention or Legislature intended to discriminate against  
11 Native Americans or Hispanics.

12 Plaintiffs do not support their contentions by referring to language taken  
13 from the Washington Constitution, language that was adopted from the  
14 Fourteenth Amendment. Compare Wash. Const. Amendment 5 Art. 6 § 1  
15 (excluding Indians not taxed from the elective franchise) with U.S. Const. 14<sup>th</sup>  
16 Amend. § 2 (“Representatives shall be apportioned among the several states  
17 according to their respective numbers, counting the whole number of persons in  
18 each state, excluding Indians not taxed.”) (emphasis added). Furthermore,  
19 Plaintiffs present no circumstantial evidence that the racially neutral language  
20 of the adopted felon disenfranchisement laws was intended to disenfranchise  
21 Native Americans. Finally, as Defendants point out in their opening  
22 memorandum and statement of facts, Washington has repealed all language  
pertaining to voter qualifications as part of its comprehensive changes to voting  
laws following Secretary of State Kramer’s 1970 Study, except for Art VI § 3.

1 | See Wash. Const. Amendment 63 Art. 6 § 1 (ratified 1974); Defendants'  
2 | Exhibit 59, Declaration of Donald F. Whiting.

3 |       Rather than presenting any evidence of discriminatory intent behind the  
4 | State's disenfranchisement laws, Plaintiffs rely only on general wide-sweeping  
5 | theories that Native Americans are to Washington State what African-  
6 | Americans are to states like Alabama and Mississippi. Plaintiffs argue these  
7 | laws must have been directed against Native Americans in Washington because  
8 | of the greater population of Native Americans in Washington than African-  
9 | Americans. This argument fails for a number of reasons. No historical data  
10 | supports the Plaintiffs' conclusion that Washington's felon disenfranchisement  
11 | laws were directed against Native Americans. No historical data supports  
12 | Plaintiffs' supposition that Native Americans are to Washington State what  
13 | African-Americans are to Southern States. Although the historical record of  
14 | racial relations is not without blemish in Washington as in other states,  
15 | Washington was not a slave state; Washington was not a Jim Crow state.  
16 | Native Americans not taxed were already excluded from the elective franchise  
17 | under Washington's Constitution and the Fourteenth Amendment. Native  
18 | Americans resided in the United States as their own sovereign nations under  
19 | treaty. Plaintiffs present no data or research demonstrating intent that felon  
20 | disenfranchisement laws were directed toward Native Americans who were  
21 | taxed.

22 |       Plaintiffs also mischaracterize the history of felon disenfranchisement  
23 | laws. See Plaintiffs' Statement of Material Fact, ¶ 7. Contrary to Plaintiffs'  
24 | arguments, felon disenfranchisement dates further back than the Reconstruction  
25 | era. States have disenfranchised felons throughout our country's history, as

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recognized by the United States Supreme Court in Richardson v. Ramirez, 418 U.S. 24, 48, n. 14 (1974) (citing 29 states throughout the union that disenfranchised felons before adoption of the Fourteenth Amendment); see also, Barker v. People, 20 Johns. \*459 (NY Sup. Ct. 1823).

Plaintiffs also mischaracterize the testimony of Quintard Taylor, Phd., regarding Washington’s History. Dr. Taylor testifies that Washington “developed a reputation among the nation’s African-Americans as a ‘liberal’ state in terms of race issues affecting African-Americans.” Taylor Affidavit, ¶ 14 (Defendant’s Exhibit 47). Defendants’ rendition of Dr. Taylor’s testimony reflects only the exceptions, and not Dr. Taylor’s general conclusions. Additionally, Defendants’ erroneously intermix Dr. Taylor’s testimony regarding other Northwest states with his testimony regarding Washington, even though Dr. Taylor clearly distinguished Washington’s history from that of the other states in the region, and did so in a positive manner. Defendants’ Counterstatement of Material Facts, ¶ 16. Most significantly for the issues raised in this case, Dr. Taylor testified that in his opinion, there has never been any organized effort in Washington to disenfranchise African-Americans or to deny voting rights to African-Americans. Defendants’ Statement of Material Facts, ¶ 68. Indeed, African-Americans in this state have enjoyed significant electoral success. Id., at ¶¶ 69-71. A more complete discussion of the history of African-Americans in Washington is set forth in the Defendants’ Statement of Material Facts, at ¶¶ 63-71.

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1           **3. Plaintiffs Present Studies on Disproportionality Having no**  
2           **Relevance to Whether they Were Denied the Right to Vote**  
3           **Based on Race.**

4           Plaintiffs lack the right to vote because they were convicted of felonies.  
5           Nevertheless, Plaintiffs argue that disproportionate felon disenfranchisement  
6           against a historical backdrop of racial discrimination without consideration of  
7           their own individual cases constitutes an abridgment of their right to vote based  
8           on race. This argument fails. Plaintiffs' claims of vote dilution have been  
9           dismissed and are not re-submitted under Plaintiffs' Fourth Amended  
10          Complaint. Plaintiffs' only remaining claims are vote denial claims. Plaintiffs'  
11          claims of vote denial fail because the application of Washington's felon  
12          disenfranchisement laws did not result in a denial or abridgment of Plaintiffs  
13          Farrakhan, Shadeed, Barrientes, Price, Briceno, or Schaaf on account of race or  
14          color. See 42 U.S.C. § 1973(b).

15          Even though Plaintiffs claims of vote dilution have been dismissed and  
16          are not raised in Plaintiffs' Fourth Amended Complaint, Plaintiffs are not  
17          members of classes of citizens protected by § 1973(a), nor have Plaintiffs  
18          demonstrated they have less opportunity than other members of the electorate to  
19          participate in the political process, including consideration of the totality of the  
20          circumstances.

21          As Plaintiffs recognize, a mere showing of disproportionality is  
22          insufficient under the Voting Rights Act. See Plaintiffs' Memorandum at 10;  
          see 42 U.S.C. § 1973(b) ("Provided, that nothing in this section establishes a  
          right to have members of a protected class elected in numbers equal to their  
          proportion of the population."). Plaintiffs' fail to provide any evidence of a

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casual connection between their race and their conviction of a disenfranchising crime. Smith v. Salt River, 109 F.3d 586, 595 (9th Cir. 1997).

Plaintiffs could only satisfy the results test of § 1973 by proving that disenfranchisement has the effect of denying political opportunity based on race. 42 U.S.C. 1973(b). Plaintiffs fail to offer any such evidence, instead relying upon the inference that a statistical disparity might affect the overall voting pool. Defendants, however, have produced evidence that only one out of every five felony convictions results in the cancellation of a voter registration, showing that most felony convictions do not affect the political opportunities of each racial group. Defendants' Statement of Material Facts, ¶¶ 60-62.

The disproportionality studies Plaintiffs rely upon say very little about what happened in each individual case. These reports only provide numbers and percentages. In the evidentiary setting, statistical probabilities are not relevant to prove that an individual acted a certain way. See Fed. R. Evid. 404(b) (evidence of past acts not admissible to "prove the character of a person in order to show action in conformity therewith."). Here, Plaintiffs' statistical evidence says nothing about their own cases and how those probabilities were affected by factors caused by Plaintiffs. Statistical studies that fail to correct for salient factors, not attributable to the misconduct complained of, that may have caused the harm of which the plaintiff is complaining do not provide a rational basis for a judgment. Blue Cross and Blue Shield v. Marshfield Clinic, 152

1 F.3d 588, 593 (7th Cir. 1998) (and cases cited therein).<sup>2</sup> In order to be  
2 admissible under the Federal Rules of Evidence expert testimony must be  
3 helpful, requiring a valid scientific connection to the pertinent inquiry. Daubert  
4 v. Merrill Dow Pharmaceuticals, 509 U.S. 579, 591-92 (1993) (commenting  
5 that although expert testimony on the moon may be helpful in determining  
6 whether the night in question was dark, evidence of a full moon “will not assist  
7 the trier of fact in determining whether and individual . . . behaved irrationally  
8 on that night.”).

9 Plaintiffs’ assessment of the totality of the circumstances fails to take  
10 account of the actual cases that led to entry of their judgments and sentences.  
11 Plaintiffs’ arguments ignore the nature of their own offenses, whether there was  
12 any issue in their respective criminal proceedings, the quality of the evidence  
13 presented at trial, the sentence imposed, and discussion of any subsequent  
14 appeal. The law allows each defendant the means to challenge their criminal  
15 prosecutions (and the loss of rights that come with conviction) through Sixth  
16 Amendment and due process rights, including trial, appeal, and right to counsel,  
17 right appeal. The law also provides for review in post-sentence proceedings.  
18 See Wash. R. App. P. 16.14 (governing personal restraint proceedings); and 28  
19 U.S.C. § 2254 (governing habeas corpus proceedings).

20 As Defendants argued in their opening memorandum however, such  
21 review requires a review of their sentence and any further criminal procedure  
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<sup>2</sup> See Milwaukee Branch of the NAACP v. Thompson, 116 F.3d 1194  
(7th Cir. 1997) (cited in Blue Cross) (applying this rule in the context of a vote  
dilution challenge under §2 of the Voting Rights Act).

1 that followed, including appeals, collateral reviews, and even habeas corpus  
2 proceedings. Therefore, such review would be inappropriate because it would  
3 require that this Court review state court proceedings in violation of the  
4 Rooker-Feldman doctrine. See Defendants' Memorandum in Support of  
5 Motion for Summary Judgment at 6-11.

6 Other factors are not discussed by the Plaintiffs. For example, Plaintiffs  
7 cite no study (including nothing from Mauer) demonstrating the extent to which  
8 felony convictions actually caused names to be taken off the voter rolls. See  
9 Defendants' Statement of Material Fact, ¶¶ 60-62. Another factor involves  
10 whether the issue at hand has been perceived as a denial of the right to vote.  
11 Here, although 35 years have passed since enactment of the Voting Rights Act,  
12 felon disenfranchisement has not been perceived as a violation of the Act until  
13 only recently. See Defendants' Exhibit 65 (Mauer) at 24-25. Plaintiffs'  
14 arguments are novel arguments that have never been adopted or accepted by a  
15 court. Another factor is the state's responsiveness to the particularized needs  
16 of members of minority groups. For example, the Washington State Minority  
17 and Justice Commission requested the 1997 King County Bail Study by Dr.  
18 Bridges. His recommendations are under review by the Commission. Exhibit  
19 63, Declaration of Kato (Defendants'). Other examples include the State's  
20 efforts to expand vote registration and means of voting. See Defendants'  
21 Statement of Material Facts, ¶¶ 95-111.

22 Neither Dr. Bridges nor Mr. Mauer's studies shed any light on whether  
Plaintiffs were denied the vote based on race. Their studies have no relevance  
to Plaintiffs' cases. Defendants' Exhibit 64 (Bridges) at 90-91; Defendants'  
Exhibit 65 (Mauer) at 34-35. Dr. Bridges' 1997 study pertained to bail

1 practices in King County. Mr. Mauer's review did not include any analyses  
2 regarding the issues or arguments presented in certain cases or the details  
3 associated with any particular case such as the quality of proof presented or  
4 whether any issues were even contested. Defendants' Exhibit 65 (Mauer) at 61-  
5 62. Mr. Mauer's review regarding disenfranchisement is purely statistical,  
6 based on the numbers of individuals under judgment and sentence. Mr. Mauer  
7 identifies what he calls an incarceration rate (the number of convicted felons  
8 from a racial group per 100,000). However, there is no discussion or any  
9 indication of any scientific validity to such a study. Moreover, as plaintiffs  
10 recognize, Washington's incarceration rate actually declined between 1988 and  
11 1994 during a period marked by the "War on Drugs," criticized extensively by  
12 Plaintiffs. See Plaintiffs' Memorandum at 17-22.

13 Both Bridges and Mauer recognize that connection between  
14 disproportionality and felon disenfranchisement is a unique area of study, not  
15 yet undertaken in the sociological field. Defendants' Exhibit 64 (Bridges) at  
16 102-03; Defendants' Exhibit 65 (Mauer) at 25. Furthermore, Dr. Bridges was  
17 not recommending that Washington fling wide its prison doors. He makes no  
18 recommendations or studies regarding disenfranchisement. Instead, for  
19 example, Dr. Bridges recommended that Washington restrict judicial discretion  
20 at bail hearings and consider revisions to Wash. Crim Rule (CrR) 3.2. See  
21 Defendants' Exhibit 64 (Bridges) at 76-77; 87-88.

22 Although sociologists like Dr. Bridges might opine that laws are used by  
the majority to control "problem population," (Plaintiffs' Memorandum at 23),  
such a broad sweeping statement obviously provides little use in the legal  
profession especially since our business is the law. Such a broad sweeping

1 statement runs counter to the traditional presumptions of our legal system. For  
2 example, federal law presumes the honesty and integrity of adjudication.  
3 Withrow v. Larkin, 421 U.S. 35, 47 (1975). Federal courts presume that juries  
4 follow instructions. U.S. v. Olano, 507 U.S. 725, 740 (1993). Despite these  
5 presumptions, our legal system provides the means for fair adjudication of  
6 controversies and to prevent abuse of governmental authority. See, e.g., Wash.  
7 R. Prof. Con. 3.8 (governing special responsibilities of a prosecutor); Fed. R.  
8 Civ. P. 11 (prohibiting frivolous arguments). Here, Plaintiffs wish to brand the  
9 entire criminal justice system in Washington State as racially biased without  
10 presenting a single case through the plaintiffs in which bias has occurred.

11 Plaintiffs argue “[l]ike the racist criminal disenfranchisement laws of the  
12 South, disproportionate mandatory minimum sentencing for crack cocaine  
13 almost exclusively impacts Blacks.” Plaintiffs’ memorandum at 18 (citing State  
14 v. Russell, 477 NW 2d 886 (Minn. 1991). However, such arguments (brought  
15 under equal protection grounds) have been uniformly rejected in the federal  
16 courts. See, e.g., United States v. Lattimer, 974 F.2d 971, 975-976 (8th Cir.  
17 1992), cert. denied, 113 S. Ct. 1819 (1993). In Lattimer, the court found there  
18 was clearly no basis for concluding that these legal standards violated equal  
19 protection. This case does not involve the felon disenfranchisement laws of the  
20 South. This case does not involve felon disenfranchisement laws that “almost  
21 exclusively impact Blacks”. See Plaintiff’s Memorandum at 18. As the court  
22 reasoned in Lattimer, Plaintiffs’ challenges to the felon disenfranchisement  
laws on disproportionality grounds are appropriate for the executive and  
legislative branches of the state government, not the Federal Court. Lattimer,  
974 F.2d at 976.

1           **4. Plaintiffs Do Not Support Their Claims By Referencing**  
2           **International Treaty Law.**

3           Plaintiffs' claims alleged in their Fourth Amended Complaint are based  
4 exclusively on 42 U.S.C. §§ 1971 and 1973. Plaintiffs do not allege violations  
5 of International Law, nor have they in the previous complaints. Plaintiffs'  
6 claims of violation of the International Covenant on Civil and Political Rights  
7 (ICCPR) and the Convention on the Elimination of all forms of Racial  
8 Discrimination (CERD) are not properly before this Court.

9           Plaintiff's reliance upon the ICCPR is of no avail in any event. When the  
10 Senate gave its consent to the ICCPR, it did so only subject to the declaration  
11 that articles 1 through 27 of the Covenant are not self-executing. United States  
12 v. Duarte-Acero, 208 F.3d 1282, 1284 n. 8 (11th Cir. 2000) (quoting 138 Cong.  
13 Rec. S4781, S4783 (daily ed. Apr. 2, 1992)). As this court has previously ruled,  
14 "Where Congress has not enacted authorizing legislation, a treaty gives rise to a  
15 private right of action only if it is 'self-executing'; i.e., if it either expressly or  
16 impliedly creates a private right of action to enforce rights described in the  
17 treaty..." White v. Paulsen, 997 F. Supp. 1380, 1385 (E.D. Wash. 1998). No  
18 court that has reviewed the ICCPR has found it to be self-executing. Id. at  
19 1386. This court accordingly held that the ICCPR does not give rise to a  
20 private right of action. Id. at 1387. Accord, Igartua Del La Rosa v. United  
21 States, 32 F.3d 8, 10 n. 1 (1st Cir. 1994). The case cited by Plaintiffs includes  
22 no discussion of whether the ICCPR gives rise to a private of action, instead  
resolving the matter on other grounds. Duarte-Acero, 208 F.3d at 1286.

          Plaintiffs allegation fails on the merits as well. Plaintiffs refer to no  
decision that has adopted their reasoning. Plaintiffs argue that disproportionate

1 felon disenfranchisement constitutes a distinction based on race or color  
 2 regarding participation in elections. See Plaintiffs' Memorandum at 30-31  
 3 (citing CERD) (also not self-executing; Plaintiffs' tertiary materials tab 7).  
 4 Plaintiffs' argument fails not only under the Voting Rights Act, but also under  
 5 the treaties. None of these treaties preclude felon disenfranchisement.  
 6 Furthermore, our law does not prohibit disenfranchisement except in the context  
 7 of Hunter v. Underwood, 471 U.S. 222 (1985). Absent a constitutional  
 8 violation, there is no basis for finding it unlawful under the treaty. See Duarte-  
 9 Acero, 208 F.3d at 1286 (citing Blockberger v. United States, 284 U.S. 299,  
 10 304 (1932)).<sup>3</sup> To the contrary, the ICCPR allows disenfranchisement by  
 11 "applying objective and reasonable criteria proportionate to the offense." See  
 12 Plaintiffs' Memorandum at 30. Here, Plaintiffs make no showing that their  
 13 judgments and sentences are in any way invalidated or improper. Upon  
 14 completion of their judgments and sentences, Plaintiffs may seek reinstatement  
 15 of their civil rights under Washington law. RCW 9.94A.220.

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20 <sup>3</sup> See also, Boureslan v. Aramco, 857 F.2d 1014, 1028 n. 18 (5th Cir.  
 21 1988) (indicating that the CERD extends no protections that are not already  
 22 guaranteed under the United States Constitution).

1 **B. WASHINGTON'S PROCEDURES FOR REINSTATING CIVIL**  
 2 **RIGHTS DO NOT DENY PLAINTIFFS THEIR RIGHT TO VOTE**  
 3 **BASED ON RACE.<sup>4</sup>**

4 **1. Plaintiffs Lack Standing to Assert Their Third and Fourth**  
 5 **Causes of Action, Relating to Restoration of Civil Rights.**

6 Plaintiffs challenge the procedure for restoring the civil rights of  
 7 convicted felons, alleging that it is too difficult. Plaintiffs' Memorandum at 31-  
 8 40. Their Third Cause of Action alleges that if a good faith effort to pay his  
 9 legal financial obligations were legally sufficient, that Mr. Farrakhan would be  
 10 eligible for restoration of his civil rights. Plaintiffs contend that therefore he is  
 11 somehow being denied the right to vote based upon his previous condition of  
 12 servitude. Fourth Amended Complaint, ¶¶ 34-35. Their Fourth Cause of  
 13 Action alleges simply that the process for restoring civil rights is too  
 14 burdensome. *Id.* at ¶ 37. Plaintiffs lack standing to assert either claim, because  
 15 they have not completed the terms and conditions of their judgments and  
 16 sentences.<sup>5</sup>

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17 <sup>4</sup> Wash. Const. Art. 6 § 3 is not a voting practice or procedure under the  
 18 Voting Rights Act because convicted felons do not have the right to vote. *See*  
 19 Defendants' Memorandum in Support of Motion for Summary Judgment at pp.  
 20 15-20; 37-40.

21 <sup>5</sup> Plaintiffs nowhere mention § 1971 in their memorandum. They have  
 22 therefore abandoned any reliance upon that statute in their First, Third, and  
 Fourth causes of action. *Martinez v. Nygaard*, 831 F.2d 822, 825 n. 3 (9th Cir.  
 1987). Plaintiffs have also abandoned the allegation that Mr. Farrakhan has

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In 1997 Plaintiffs moved for leave to amend their complaint to allege that Plaintiff Farrakhan had been denied due process based on the argument that the process for restoration of civil rights was too burdensome. Farrakhan, 987 F. Supp. at 1314. This Court denied that motion “on the basis of lack of standing.” Id. at 1315. “Because Plaintiff Farrakhan is not yet eligible to seek reinstatement of his voting rights, his alleged injury is too speculative to support a cause of action challenging the constitutionality of the reinstatement provisions.” Id.

Nothing has changed. None of the plaintiffs have completed the terms and conditions of their judgments and sentences. Defendants’ Statement of Material Facts, ¶¶ 14-17 (Mr. Farrakhan); ¶ 21 (Mr. Shadeed); ¶ 31 (Mr. Price); ¶ 36 (Mr. Barrientes); ¶ 43 (Mr. Schaaf); ¶ 46 (Mr. Briceno). Plaintiffs lack standing to challenge a statute that does not apply to them. Davis v. Scherer, 488 U.S. 183, 189 n.7 (1984).

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made a “good faith effort” to pay his legal financial obligations, and that somehow such an effort can substitute for actually completing the terms and conditions of his judgment and sentence. Fourth Amended Complaint, ¶ 34. Their Memorandum makes no mention of this theory. Plaintiffs could not reasonably claim that Mr. Farrakhan has made a good faith effort in any event, since the record establishes that Mr. Farrakhan has paid a mere \$805 against an outstanding obligation that exceeds \$28,000. Defendant’s Exhibit 10 , Declaration of Sheila George.

1           **2. The Process for Restoring Civil Rights Does Not Pose a**  
2           **Significant Barrier to the Exercise of Voting Rights.**

3           **a. Reinstatement of Civil Rights in Washington is Not**  
4           **Difficult.**

5           Washington law provides a right to the reinstatement of civil rights only  
6           for offenders who have completed the requirements of their judgments and  
7           sentences. RCW 9.94A.220(1). State law requires the Department of  
8           Corrections to notify the sentencing court when an offender has completed all  
9           the terms of his or her judgment and sentence, and requires the sentencing court  
10          to issue a certificate of discharge if all terms have been satisfied. *Id.* DOC  
11          policy is the same. Defendants' Counterstatement of Material Facts, ¶¶ 62-63.  
12          The issuance of a certificate of discharge reinstates all civil rights, including the  
13          right to vote. RCW 9.94A.220(3).

14          Plaintiff's challenge to the procedures for issuance of a discharge  
15          therefore amounts to the mere suggestion that hypothetically these procedures  
16          might not be followed. Speculative worries are no substitute for actually  
17          proving harm to these Plaintiffs. An offender who has not completed the terms  
18          and conditions of his or her judgment and sentence has no right to a discharge.  
19          RCW 9.94A.220. An offender can nevertheless file a motion with the  
20          sentencing court requesting a discharge, the same way that all other motions are  
21          filed. Crim. R. 8.2. This includes the circumstance in which an offender's  
22          supervision by DOC is terminated due to the passage of time. Plaintiffs'  
23          Memorandum at 36-37.

24          Plaintiffs contend that requiring an offender to pay monthly supervision  
25          fees operates as an undue barrier to reinstatement of civil rights. Plaintiffs'

1 Memorandum at 37. Financial requirements are no less a part of their  
2 judgments and sentences than any other requirements. See Wash. Crim. R. 7.3.  
3 Costs of supervision are no less a result of their criminal convictions than any  
4 other legal financial obligation. RCW 72.11.010(1) (defining “legal financial  
5 obligations” as including all financial obligations assessed as a result of a  
6 felony conviction). The obligation to pay costs of supervision result directly  
7 from the conviction. RCW 9.94A.270.

8 Plaintiffs compare the payment of legal financial obligations to the  
9 imposition of a poll tax. They offer no argument, however, as to how  
10 compliance with a term of a duly imposed court order could be construed as a  
11 poll tax, suggesting no basis for relief. East Flatbush Election Comm. v.  
12 Cuomo, 643 F. Supp. 260, 266 (E.D. N.Y. 1986). A court ordered cost is not a  
13 poll tax. Black’s Law Dictionary 1471 (7<sup>th</sup> ed. 1999) (defining “poll tax” as a  
14 tax imposed on all people within a jurisdiction).

15 The necessity for submitting a new application for voter registration,  
16 once a certificate of discharge has been issued, also fails to impose a significant  
17 barrier to participation. One of the highest priorities of Defendant Munro,  
18 during his nearly twenty-year tenure as Secretary of State, has been to make  
19 voter registration easier, and to encourage broader participation in the electoral  
20 process by members of racial and ethnic minority groups. Defendants’  
21 Statement of Material Facts, ¶¶ 95-111.

22 **b. Plaintiffs Establish no Nexus Between Race and Reinstatement of Civil Rights.**

Even if Plaintiffs could establish that Washington’s procedures for  
reinstating civil rights and registering to vote were difficult, Plaintiffs must still

1 prove that this denies them the right to vote *based on race*. 42 U.S.C. §  
2 1973(a). Plaintiffs offer no argument in support of the notion that the  
3 procedures for reinstatement and registration are more difficult for members of  
4 racial and ethnic minorities than they are for others. Plaintiffs' Memorandum at  
5 31-40. This Court need not consider any issues that a party raises but does not  
6 argue. United States v. Vought, 69 F.3d 1498, 1501 (9th Cir. 1995).

7 The closest that Plaintiffs come to arguing a nexus between race and  
8 reinstatement procedures is their contention that statistical disparities in the  
9 criminal justice system link felony convictions to race. Plaintiffs'  
10 Memorandum at 31. This theory suggests nothing about the comparative  
11 difficulty, if any, that members of a racial or ethnic minority might have in  
12 seeking a certificate of discharge as compared to others. Plaintiffs fail to  
13 establish that their right to vote is denied based on race. 42 U.S.C. § 1973.

14 **c. Plaintiffs Fail to Establish any Denial of Due Process.**

15 Finally, Plaintiffs contend that they are somehow denied due process by  
16 Washington's process for restoring civil rights. Claiming that offenders who  
17 have completed the terms of their sentences have a property right in a certificate  
18 of discharge, they assert that they are denied procedural safeguards regarding  
19 that right. Plaintiff's Memorandum at 38-39. Plaintiffs' own formulation of  
20 this theory excludes them, however. Plaintiffs acknowledge that their right to  
21 due process in the issuance of a discharge arises only if they have completed all  
22 of the terms of their sentences. Id. at 38; see also RCW 9.94A.220. None of  
the Plaintiffs have done so, and so even under Plaintiffs' theory they have not  
yet acquired a due process right. See Greenholtz v. Inmates, 442 U.S. 1, 7-8

1 (1979) (due process right to parole hearing arises only if state law provides a  
2 right to parole).

3 Moreover, due process guarantees only an opportunity for notice and a  
4 hearing, not an assured outcome. Fagan v. Washington, 942 F.2d 1155, 1158  
5 (7th Cir. 1991). Since certificates of discharge are issued by the sentencing  
6 court, a hearing is assured if the offender merely asks for one. RCW  
7 9.94A.220; Crim.R. 8.2. No plaintiff claims to have asked for one, and therefore  
8 none has been denied.

8 **V. CONCLUSION**

9 For all of the foregoing reasons and for the reasons set forth in their  
10 memorandum in support of summary judgment, Defendants respectfully request  
11 that this Court grant their Motion for Summary Judgment, deny Plaintiffs'  
12 motion for summary judgment, and dismiss Plaintiffs' claim with prejudice.

13 RESPECTFULLY SUBMITTED this 10 day of August, 2000.

14 CHRISTINE O. GREGOIRE  
15 Attorney General



16 DANIEL J. JUDGE, WSBA #17392  
17 Assistant Attorney General  
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