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

MUHAMMAD SHABBAZ FARRAKHAN,
et. al.,

Plaintiffs,

v.

GARY LOCKE, et. al.,

Defendants.

CASE NO. CS-96-76-RHW

**PLAINTIFFS'
MEMORANDUM OF
POINTS AND
AUTHORITIES IN
SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT
(ORAL ARGUMENT
REQUESTED)**

I. PRELIMINARY STATEMENT

Throughout the course of the twentieth century, the United States saw the extension of suffrage to all of its citizens, regardless of race, gender, or social class, for the first time in history. Yet, upon entering the twenty-first century, one segment of the population is still denied the right to vote: convicted felons. Under criminal disenfranchisement laws, felons remain the last of America's citizens who are denied the most fundamental of liberties: "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Reynolds v. Sims, 377 U.S. 533, 555 (1964).

When felon disenfranchisement laws, such as Washington's Constitutional Article 6 § 3, are analyzed within the context of historical and social conditions, a continuous and

1 systematic pattern of discrimination against minorities, and, in particular, African-Americans,
2 emerges. Felon disenfranchisement laws do more than prohibit convicted criminal offenders
3 from voting; there is also a direct and causal connection between these laws and the denial
4 of voting rights to a substantial portion of the minority community. This establishes a
5 violation of Section 2 of the Voting Rights Act of 1965 which prohibits "denial or
6 abridgement of the right to vote on account of race or color through voting qualifications or
7 prerequisites." 42 U.S.C. § 1973 (1994). Thus, Washington's criminal disenfranchisement law
8 is invalid to the extent that the law discriminates against Plaintiffs on the basis of race.

9 II. STATEMENT OF THE CASE

10 Plaintiffs Muhammad Shabbaz Farrakhan, Al-Kareem Shadeed, and Marcus X. Price
11 are African Americans. Each has been convicted of felonies in Washington State. Plaintiff
12 Shadeed is currently incarcerated; Plaintiffs Farrakhan and Price have been released from
13 incarceration. Plaintiffs Timothy Schaaf and Clifton Briceno are American Indians. Plaintiff
14 Ramon Barrientes is a Mexican-American Hispanic, and each has been convicted of felonies
15 in Washington State and each is currently incarcerated. All Plaintiffs are denied the right to
16 vote in County, State, and Federal Elections by the operation of Washington State
17 Constitution Article 6 § 3. But for his felony conviction, each Plaintiff is otherwise qualified
18 to register to vote in Washington State.

19 On February 2, 1996, Plaintiffs filed a pro se complaint in the United States District
20 Court pursuant to 42 U.S.C. § 1983, alleging that Article 6 § 3 of the Washington State
21 Constitution and the laws implementing Article 6 deprived them of their voting rights under
22 the First, Fourth, Fifth, Eighth, Fourteenth, and Fifteenth Amendments of the United States
23 Constitution and under the Federal Voting Rights Act of 1965 (VRA) as amended, codified
24 at 42 U.S.C. § 1973. The court granted Plaintiffs' motion to assign counsel and allowed
25 Plaintiffs to amend their complaint to add Carl Maxey, a registered African American voter,
26 for purposes of standing under their vote dilution claim. Defendant moved to dismiss, and on
27 November 13, 1997, the District Court, Whaley, J., dismissed Plaintiffs' claims of vote
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1 dilution and all constitutional claims, while preserving Plaintiffs' claim that Washington
2 State's felon disenfranchisement law results in vote denial on the basis of race in violation of
3 the VRA. The court concluded the VRA, on its face, applies to Plaintiffs' claims, and granted
4 Plaintiffs the opportunity to show, through an inquiry into historical and social conditions,
5 Washington State's felon disenfranchisement scheme denies them the right to vote in a
6 discriminatory manner in violation of the VRA. Plaintiffs were then granted leave to amend
7 their complaint challenging Article 6 § 3 and RCW § 9.94A.220 as violative of Section 2 of
8 the VRA. As there are no material facts in dispute as to the effect or the process of
9 Washington's felon disenfranchisement scheme, Plaintiffs serve and file this motion for
10 Summary Judgment requesting this court grant Plaintiffs' Request for Relief contained in
11 Plaintiffs' Fourth Amended Complaint.

12 III. SUMMARY JUDGMENT STANDARD

13 In a motion for summary judgment, the burden is on the moving party to demonstrate
14 by a properly supported motion there is no genuine dispute as to any material fact and the
15 movant is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). Under Rules 56(a)
16 and (b), both Plaintiffs and Defendants may move for summary judgment. Under such cross-
17 motions, the court must consider each party's motion individually to determine if that party
18 has met the summary judgment standard. See 10A Charles Alan Wright, Arthur R. Miller &
19 Mary Kay Kane, Federal Practice and Procedure § 2720 (3d ed. 1998).

20 Plaintiffs in this case have the initial responsibility of informing the court of the basis
21 for the belief summary judgment is warranted. See Celotex Corp. v. Catrett, 477 U.S. 317,
22 323 (1986). This is accomplished through the presentation of facts whose materiality is
23 determined through substantive law. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,
24 809 F.2d 626, 630 (9th Cir. 1987). In the case at bar, discovery has generated no dispute as to
25 material facts; therefore, summary judgment is appropriate. Fed.R.Civ.P. 56(c). If opponents
26 dispute facts established by Plaintiffs' evidence only through conclusory assertions or if the
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1 facts are clearly uncontroverted by opponents, summary judgement is properly granted, even
2 in complex cases. Carroll v. United Steelworkers of America, 498 F.Supp. 976 (D. Ma. 1980).

3 **IV. STATEMENT OF THE ISSUE**

4 **Does Article 6 § 3 of the Washington State Constitution and RCW § 9.94A.220,**
5 **when acting with historical and social conditions, have a causal connection to the denial**
6 **of the right to vote of Plaintiffs, who are minorities, on account of race or color, in**
7 **violation of Section 2 of the Voting Rights Act?**

8 **V. SUMMARY OF THE ARGUMENT**

9 Plaintiffs assert Article 6 § 3 of the Washington State Constitution and the statutes
10 implementing it,¹ violate the Voting Rights Act of 1965. Article 6 § 3 denies citizens
11 convicted of a felony the right to vote. The VRA prohibits restrictions on the right to vote on
12 account of race through voting qualifications. Plaintiffs, who are minorities, argue the
13 operation of Article 6 Article 6 § 3, when considered in light of historical and social
14 conditions of discrimination against minorities, effectively denies them the elective franchise
15 on the basis of race. Plaintiffs do not claim that Article 6 § 3 was enacted or is enforced with
16 discriminatory intent, as this is not the standard under the VRA. Rather, Plaintiffs will
17 demonstrate the enforcement of Article 6 § 3 has a discriminatory effect. This is consistent
18 with the requirements under the 1982 amendments to VRA § 2 which mandates the
19 application of a “results test” for a showing of a VRA § 2 violation. The results test is
20 founded upon a “totality of the circumstances inquiry” to show a VRA § 2 violation In
21 making this inquiry, Plaintiffs make a number of showings.

22 Plaintiffs begin by demonstrating that criminal disenfranchisement statutes have been
23 historically enacted with the intentional purpose of denying the vote to minorities, particularly

24 _____
25 ¹ These are RCW § 29.01.080, RCW § 29.07.080, RCW § 29.07.260, and other
26 statutes and case law including Fernande v. Kiner, 36 Wash.App. 210 (1983), rev.
27 denied.

1 African Americans. While this practice has been formally discontinued, the continued
2 existence of criminal disenfranchisement laws is inexorably linked with racism, as would be
3 a continued use of poll taxes or literacy tests. The enactment of Washington State's felon
4 disenfranchisement provision, while not targeted at disenfranchising African Americans, was
5 accompanied by an intent to deny the vote to other segments of the state's minority
6 population, particularly Native Americans. Further, the absence of hostility at that time
7 toward African Americans is afforded little weight under the VRA § 2 analysis and Plaintiffs
8 are not required to show the law was enacted with the specific intent to deny the vote to
9 African Americans in order to establish a VRA § 2 violation.

10 Next, Plaintiffs demonstrate differential treatment of minorities within the criminal
11 justice system, both on a national scale and within Washington State, which arise from a
12 variety of social and policy factors. This disparate treatment results in an incarceration rate
13 for minorities in Washington vastly out of proportion with their representation in the general
14 population, and the consequence is that a large proportion of minorities in Washington are
15 denied the right to vote under Article 6 § 3. The effect of the operation of the felon
16 disenfranchisement law causes minorities to be denied the right to vote on the basis of race.

17 Plaintiffs conclude that the process for the restoration of the right to vote under RCW
18 § 9.94A.220, when, again, combined with historical and social conditions, acts as a barrier
19 to voting, disproportionately impacting minorities. In order to restore the franchise, convicted
20 criminal offenders face arbitrary and capricious policies imposed by the Secretary of State
21 and Department of Corrections, constituting impermissible standards, practices, or procedures
22 under VRA § 2. Further, these policies adopted by the state are constructed in a manner that
23 denies Plaintiffs procedural due process in violation of the Fourteenth Amendment. In short,
24 both the felon disenfranchisement law and the process for restoration of voting rights results
25 in the denial of the right to vote on the basis of race and thus violate Section 2 of the Voting
26 Rights Act.

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2 **VI. ARGUMENT**

3 **A. Article 6 § 3 of the Washington State Constitution, when considered in light of**
4 **historical and social conditions, constitutes a voting qualification or prerequisite**
5 **resulting in the abridgement of the right of Plaintiffs to vote on account of race or**
6 **color, a violation of Section 2 of the Voting Rights Act.**

7 *1. To Demonstrate a Violation of Section 2 of the Voting Rights Act, Plaintiffs Will*
8 *Show a Causal Link Between Washington's Felon Disenfranchisement Law and the*
9 *Denial of Plaintiffs' Right to Vote on the Basis of Race Through an Analysis of*
10 *Social and Historical Conditions.*

11 In response to the barriers to suffrage for blacks used in the South following
12 Reconstruction, Congress passed the Voting Rights Act in 1965. South Carolina v. Katzenbach,
13 383 U.S. 301, 315 (1966); Andrew L. Shapiro, Challenging Criminal Disenfranchisement Under
14 the Voting Rights Act: A New Strategy, 103 Yale L.J. 537, 538 (1993) [hereinafter A New
15 Strategy]. Upon enactment, the Act, which prohibits any “voting qualification or prerequisite
16 to voting, or standard, practice, or procedure” that denied or abridged the right to vote on the
17 basis of race or color, had a dramatic effect in the South. 42 U.S.C. § 1973. In just two years,
18 African-American voting registration increased from 19 to 52 percent in Alabama and from 7
19 to 60 percent in Mississippi. J. Morgan Kousser, Colorblind Injustice 55 (1999) [hereinafter
20 Colorblind Injustice].

21 Although the VRA was to be interpreted to provide “the broadest possible scope” as a
22 means of eliminating racial discrimination, Allen v. State Board of Elections, 393 U.S. 544, 567
23 (1969), the application of Section 2 was constrained to a significant degree by the Supreme
24 Court’s holding in City of Mobile, Alabama v. Bolden, 446 U.S. 55 (1980). The Court
25 determined a showing of racial discrimination had to be established by proof of discriminatory
26 intent, not merely the discriminatory effect of a particular statute. Bolden, 446 U.S. at 66-70.
27 Congress responded by amending Section 2 of the VRA in 1982, and explicitly repudiated
28 Bolden by rejecting the need to show discriminatory purpose in a Section 2 claim, thereby
requiring Plaintiffs only to “prove such intent, or, alternatively, [to] show that the challenged
system or practice, in the context of all the circumstances in the jurisdiction in question, results

1 in minorities being denied equal access to the political process.” Voting Rights Act Amendments
2 of 1982, Pub. L. No. 97-205, § 6(D), 1982 U.S.C.C.A.N. (96 Stat.) 177, 205 (to be codified at
3 42 U.S.C. § 1973). Plaintiffs are basing their claim on the Act, as amended, which provides, in
4 relevant part:

- 5 a. No voting qualification or prerequisite to voting or standard, practice, or procedure
6 shall be imposed or applied by any State . . . in a manner which results in a denial
7 or abridgement of the right . . . to vote on account of race or color, or [membership
8 in language minority groups protected by the Act].
9 b. A violation . . . is established if, based on the totality of the circumstances, it is
shown that . . . members [of protected racial and language minorities] have less
opportunity than other members of the electorate to participate in the political
process and to elect representatives of their choice.

10 42 U.S.C. § 1973 (1994).

11 Plaintiffs argue Washington’s felon disenfranchisement law is a voting qualification or
12 prerequisite, acting as a condition or test applied to regulate citizens’ access to the ballot. See
13 Holder v. Hall, 512 U.S. 874, 915 (1994). Under the amended VRA, “[P]laintiffs can prevail
14 under Section 2 by demonstrating that a challenged election practice has *resulted* in the denial
15 or abridgement of the right to vote based on color or race.” Chisom v. Roemer, 501 U.S. 380,
16 394 (1991) (emphasis added). The language of the statute was constructed to clarify this
17 standard; section (a) created the “results test,” eliminating the need to prove discriminatory
18 intent in order to establish a violation of the section, and section (b) mandates an inquiry into
19 “the totality of the circumstances” in application of the results test. Chisom, 501 U.S. at 395.

20 The creation of section (b) was motivated by Congress’ desire to return to the use of
21 objective standards. S. Rep. No. 97-417, 97th Cong., 2d Sess. 27 (1982), reprinted in 1982
22 U.S.C.C.A.N. (vol. 2) 177, 206; see also Terrazas v. Clements, 581 F.Supp 1329, 1344 (N.D.
23 Tex. 1984). The objective standards that establish a violation of VRA § 2 include a showing that
24 the political process at issue is not equally open to participation by a particular minority group,
25 White v. Regester, 412 U.S. 755, 766 (1973). Though this analysis should be a “flexible, fact-
26 intensive test,” Thornburg v. Gingles, 478 U.S. 30, 46 (1986), Congress laid out a number of
27 factors that may be relevant in many cases, though are typically only applied to districting cases.
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1 S. Rep. No. 97-417 at 28-29; see also Gingles, 478 U.S. at 44-45; Farrakhan v. Locke, 987
2 F.Supp. 1304, 1311 (E.D. Wash. 1997). These factors “cannot be applied mechanically and
3 without regard to the nature of the claim” Voinovich v. Quilter, 507 U.S. 146, 158 (1993), and
4 thus Plaintiffs are not required to prove the existence of the Senate Report factors, see White,
5 412 U.S. at 766-69. Many of the factors are not relevant to criminal disenfranchisement laws
6 which, acting as a barrier to voting, result in vote denial rather than vote dilution. See
7 Mississippi State Chapter, Operation PUSH v. Allain, 674 F.Supp. 1245, 1263-68 (N.D. Miss.
8 1987), aff’d, 932 F.2d 400 (5th Cir. 1991) (various factors irrelevant to challenged registration).

9 Under the “results test,” Plaintiffs are not required to show Article 6 § 3 was enacted with
10 a discriminatory purpose against any particular minority group in order to show a violation of
11 VRA § 2. See Major v. Treen, 574 F.Supp. 325, 354-55 (E.D. La. 1983) (finding of a violation
12 of Section 2 through the application of the results test did not necessitate an inquiry into the
13 intent behind a districting plan even though there was circumstantial evidence of purposeful
14 discrimination; the evidence instead became a factor in the “totality of circumstances”). If
15 Plaintiffs were required to do so, the scope of the VRA would be substantially curtailed. A VRA
16 § 2 claim could not be brought “by any minority citizen in the absence of an allegation that the
17 particular discriminatory practice had been intentionally imposed in the past in the particular
18 jurisdiction.” Baker v. Pataki, 85 F.3d 919, 937 (1996). This restriction has no foundation in law.
19 Id.

20 The Supreme Court has upheld the application of the Voting Rights Act nationwide
21 against literacy tests, even though these voting devices were only employed with a racially
22 discriminatory purpose within particular geographic areas. See Oregon v. Mitchell, 400 U.S.
23 112, 118 (1970) (Stewart, J., concurring in part and dissenting in part) (allowing a ban on
24 literacy tests nationwide even though there was no proof that every state in the country used
25 them to unfairly discriminate against blacks).

26 Further, an establishment or lack of demonstrable animus toward particular minority
27 groups in Washington State at the time of Article 6 § 3's enactment has limited relevance when
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1 proceeding under VRA § 2. The 1982 amendments to the VRA were motivated by a reliance
2 on subjective, rather than objective, considerations to establish a violation of VRA § 2. Placing
3 great weight on an absence of demonstrable animus would be contrary to congressional intent.
4 League of United Latin Am. Citizens v. Clements, 986 F.2d 728, 754 (5th Cir. 1993); see also
5 White, 412 U.S. at 766. Thus, a history of past discrimination against any particular minority
6 group through the use of criminal disenfranchisement laws within a particular jurisdiction is only
7 one of a list of factors to be weighed in determining whether a violation of Section 2 has
8 occurred. See Gingles, 478 U.S. at 36-37.

9 In the case at bar, the operation of Washington Article 6 § 3, by denying convicted felons
10 the right to vote, is a “standard, practice, or procedure” that results in the denial of the right to
11 vote on account of race. 42 U.S.C. § 1971(a)(1); 42 U.S.C. § 1973(a). As such, Washington’s
12 Article 6 § 3 falls within the language of VRA § 2, Farrakhan, 987 F.Supp. at 1308. To prevail,
13 Plaintiffs must show Washington’s felon disenfranchisement law is prohibited under the Voting
14 Rights Act as “any practice or procedure that, ‘interact[ing] with social and historical
15 conditions,’ impairs the ability of a protected class to elect its candidate of choice on an equal
16 basis with other voters.” Voinovich v. Quilter, 507 U.S. 146, 153 (1993) (quoting Gingles, at
17 47); see also Farrakhan, at 1312. In making this showing, “the ultimate conclusions about
18 equality or inequality of opportunity were intended by Congress to be judgments resting on
19 comprehensive, not limited, canvassing of relevant facts.” Johnson v. DeGrandy, 512 U.S. 997,
20 1011 (1994).

21 The relevant facts necessary to establish Washington’s criminal disenfranchisement law
22 results in the abridgement of Plaintiffs’ right to vote in violation of VRA § 2 are those which
23 establish a causal link between the enforcement of the felon disenfranchisement law and the
24 denial of the right to vote on the basis of race. Demonstration of a causal link is a necessary
25 “totality of the circumstances” inquiry to meet the results test of VRA § 2. See 42 U.S.C. §
26 1973; Farrakhan, at 1312. This causation is established by a showing of factors that demonstrate
27 the law operates with historical and social conditions to deny Plaintiffs access to voting rights
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1 on the basis of race. Farrakhan, 987 F.Supp. at 1312; see also Smith v. Salt River Project
 2 Agricultural Improvement and Power District, 109 F.3d 586, 595 (9th Cir. 1997) (holding that
 3 a voting device's disparate impact alone on a minority group does not satisfy a VRA § 2 inquiry;
 4 a causal connection must be shown between the voting device and a prohibited discriminatory
 5 result); Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986) (the disproportionate racial impact of
 6 a law is not a per se violation of the VRA, but rather directs the inquiry into historical, social and
 7 political factors). As such, Plaintiffs present the following salient historical and social factors
 8 that cause Washington's felon disenfranchisement law to result in the denial of Plaintiffs' right
 9 to vote in a racially discriminatory manner, thereby establishing a violation of Section 2 of the
 10 Voting Rights Act.

11
 12 2. *The History of Criminal Disenfranchisement Laws Demonstrates Such Laws Have*
 13 *Been Enacted For Racially Discriminatory Purposes, Carrying With Them the*
 14 *"Badges and Incidents of Slavery."*²

15 The first factor to be weighed under the "totality of circumstances inquiry" is "the extent
 16 of any history of official discrimination in the state or political subdivision that touched the right
 17 of the members of the minority group to register, to vote, or otherwise participate in the
 18 democratic process." S. Rep. 97-417 at 28. At the end of the Civil War, and upon the adoption
 19 of the Fourteenth and Fifteenth Amendments, Southern states passed legislation to grant suffrage
 20 to former slaves; however, within two decades, these laws were undermined by the enactment
 21 of a variety of laws designed by the white citizenry "to reassert their once unquestioned political
 22 supremacy." Underwood v. Hunter, 730 F.2d 614, 618 (1984), aff'd, 471 U.S. 222 (1985). These
 23 discriminatory laws utilized "devices that would subvert the guarantees of the fourteenth and

24 ² "[T]his Court recognized long ago that, whatever else they may have
 25 encompassed, the badges and incidents of slavery – its 'burdens and disabilities' –
 26 included restraints upon 'those fundamental rights which are the essence of civil
 27 freedom'" Jones v. Mayer Co., 392 U.S. 409, 441 (1967).

1 fifteenth amendments without directly provoking a legal challenge” and were ““tests that took
2 advantage of differing social conditions”” between blacks and whites. Hunter 730 F.2d at 619.
3 Voter registration by blacks was hindered by lengthened residency requirements, periodic voter
4 registration at centrally located places during work hours, or the requirement of highly detailed
5 information that would have to be vouched for by witnesses. Colorblind Injustice 34. “Secret
6 Ballot” laws acted as de facto literacy tests, since minorities who could not read would not be
7 allowed assistance in voting, and signature requirements acted to further disenfranchise illiterates.
8 Colorblind Injustice, at 34-35. The most insidious method of preventing blacks from voting was
9 the use of the poll tax, first adopted at the 1890 Mississippi Constitutional Convention.
10 Colorblind Injustice, at 35. The poll tax was considered “the most effective instrumentality of
11 Negro disenfranchisement” and was instituted in all eleven ex-Confederate states by 1908. Id.

12 Southern states also utilized criminal disenfranchisement statutes as another means by
13 which blacks could be denied access to the polls. A New Strategy, at 538. Southern states
14 modified criminal disenfranchisement laws to target blacks for vote denial. At the 1890
15 Constitutional Convention where poll taxes were instituted in Mississippi, the existing law, which
16 disenfranchised persons who were convicted of “any crime,” was replaced with a more narrowly-
17 tailored law “disenfranchising only those convicted of certain crimes, which blacks were
18 supposedly more likely than whites to commit.” A New Strategy, at 540. South Carolina’s
19 criminal disenfranchisement law provides an example: ““Among the disqualifying crimes were
20 those which [the Negro] was especially prone: thievery, adultery, arson, wife-beating,
21 housebreaking, and attempted rape. Such crimes as murder and fighting, to which the white man
22 was as disposed as the Negro, were significantly omitted from the list.”” A New Strategy, at 541
23 (quoting Francis B. Simpkins, Pitchfork Ben Tillman 297 (1944)). By focusing
24 disenfranchisement laws on crimes blacks were believed to be most disposed to committing,
25 deep racist beliefs were laid bare: ““Southern whites had long viewed criminal behavior as natural
26 to the Negro. They took his stealing for granted, as a biological flaw.”” Marc Mauer, Race To

1 Incarcerate 119 (1999) [hereinafter Race To Incarcerate]. (quoting David M. Oshinsky, Worse
2 Than Slavery 32 (1996)).

3 The effect of the various disenfranchisement schemes was astounding; while in 1867,
4 nearly 70% of eligible blacks were registered to vote, by 1892, only 6% were registered. A New
5 Strategy, at 538. South Carolina saw the black turnout at the 1884 presidential election drop by
6 50% from the 1880 election, and at the Alabama Constitutional Convention of 1901, the
7 enactment of a wife-beating provision to the criminal disenfranchisement law was thought to be
8 effective in disqualifying two-thirds of Black males from voting. Colorblind Injustice, at 35-36.

9 Over the next hundred years, the panoply of racially discriminatory laws designed to
10 prevent African Americans from voting have been stricken, from poll taxes to literacy tests. See
11 e.g. Katzenbach, 383 U.S. 301 (upholding the Voting Rights Act and its prohibition on literacy
12 tests); Harman v. Forssenius, 380 U.S. 528 (1966) (prohibiting poll taxes as a prerequisite to
13 voting in federal elections); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966)
14 (prohibiting poll taxes as a prerequisite to voting in state elections); Louisiana v. United States,
15 380 U.S. 145 (1965) (prohibiting understanding clauses); Lane v. Wilson, 307 U.S. 268 (1939)
16 (prohibiting grandfather clauses); Terry v. Adams, 345 U.S. 461 (1953) (prohibiting white
17 primaries). Criminal disenfranchisement laws remain the one glaring, anachronistic exception.
18 When examined *without* regard to social or historical conditions of racial discrimination, these
19 laws have been upheld as constitutional. See Green v. Board of Elections of the City of New
20 York, 380 F.2d 445 (2d Cir. 1967) (holding that the New York felon disenfranchisement law
21 does not violate Article I, § 10, Cl. 1, or the Eighth and Fourteenth Amendments of the U.S.
22 Constitution); Richardson v. Ramirez, 418 U.S. 24 (1974) (holding that the Fourteenth
23 Amendment permits the disenfranchisement of convicted felons); Shepherd v. Trevino, 575 F.2d
24 1110 (5th Cir. 1978) (holding that the prohibition of ex-felons from voting does not violate the
25 Fourteenth Amendment); Owens v. Barnes, 711 F.2d 25 (3d Cir. 1983) (holding that the
26 prohibition of incarcerated offenders from voting, while allowing released offenders to vote,
27 does not violate the Equal Protection Clause).

1 However, a showing criminal disenfranchisement was adopted on the basis of racial
2 animus has resulted in the striking of such laws. Hunter v. Underwood, 471 U.S. 222 (1985)
3 (holding that Alabama's criminal disenfranchisement law, enacted with discriminatory intent,
4 violates the Fourteenth Amendment). Southern states have since amended their criminal
5 disenfranchisement laws to make them more facially neutral and broader in application, but it
6 is unclear as to whether this "removes the discriminatory taint associated with the original
7 version" so long as the amendments were "adopted without the desire to discriminate against
8 blacks." Cotton v. Fordice, 157 F.3d 388, 391-92 (5th Cir. 1998), or "[e]ven if subsequent
9 amendments to the original statute were submitted to the Attorney General under the Voting
10 Rights Act and expressly or impliedly approved by him, it does not follow . . . that such action
11 insulates the statute from further inquiry as to a possible racially discriminatory purpose." Allen
12 v. Ellisor, 664 F.2d 391 (4th Cir. 1981) (Winter, J, concurring in part, dissenting in part); see also
13 Gingles, 478 U.S. at 69 (under VRA § 2's totality of the circumstances inquiry, Congress was
14 concerned not only with present discrimination, but with the vestiges of discrimination that may
15 interact with present political structures to perpetuate a historical lack of access to the political
16 system).

17 Plaintiffs contend criminal disenfranchisement statutes, once intentionally used to deny
18 millions of African Americans the right to vote, are indelibly stained with a history of prejudice
19 and racism that can never be removed, and the use of such laws to deny the vote to minorities
20 continues to this day. In Southern states like Alabama and Florida, for instance, 31% of all black
21 men are permanently disenfranchised under criminal disenfranchisement laws; in Mississippi
22 and Virginia, one quarter of the black male population is permanently disenfranchised. Jamie
23 Fellner and Marc Mauer, Human Rights Watch and The Sentencing Project, Losing the Vote:
24 The Impact of Felony Disenfranchisement Laws in the United States 8 (1998) [hereinafter
25 Losing the Vote]. As these rates are comparable to Washington State, which currently or
26 permanently disenfranchises one quarter of the black male population, Losing the Vote, at 8, it
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1 is clear to Plaintiffs the historical practice of using felon disenfranchisement laws to
2 disproportionately impact the black vote is alive and well in Washington State today.

3 An examination into the history behind the enactment of Article 6 § 3 provides a
4 perspective on this. While Washington State held its Constitutional Convention only one year
5 prior to Mississippi's infamous 1890 convention, it is clear Washington's criminal
6 disenfranchisement law was not designed to disenfranchise blacks specifically in the state at the
7 time. Taylor Depo. at 38. However, Dr. Quintard Taylor, Ph.D., a professor of history at the
8 University of Oregon in Eugene and an expert on the history of African Americans in the Pacific
9 Northwest, believes this is due to the unique racial situation in the Pacific Northwest at the time.
10 Unlike in the South where blacks were essentially the only non-white segment of the population,
11 there were a number of other groups of color present in the Pacific Northwest in the late
12 nineteenth century. Taylor Aff. at 7. Dr. Taylor explains that, in general, white racial attitudes
13 toward blacks are shaped by the perceptions about the danger or desirability of other groups of
14 color in the population; the theory is that white prejudice and fear is directed toward the largest
15 minority population. Taylor Aff. at 7. In the 1860s and 1870s, Native Americans were the largest
16 group of color in the Pacific Northwest; by the 1870s, the Chinese had become the largest
17 minority of color. Taylor Depo. at 81. This would explain why, at a time when Southern states
18 sought to disenfranchise blacks, the adoption of Article 6 by Washington in 1889 singled out
19 "Indians not taxed" to be denied the franchise, and the proposed language for Article 6 § 3
20 denied the vote to native-born Chinese. The Journal of the Washington State Constitutional
21 Convention 1889 634, 638 (Beverly Paulik Rosenow, ed., Book Publishing Co. 1962)
22 [hereinafter The Journal of the Washington State Constitutional Convention].

23 As further evidence of historical discrimination, Section 1 of Article 6 contained
24 provisions similar to those found in the voting qualifications used in the South, like lengthy
25 residency requirements and the requirement to "be able to read and speak the English language,"
26 a form of literacy test. The Journal of the Washington State Constitutional Convention, 633-4;
27 see also Clements, 986 F.2d at 747 (historical use of literacy tests is relevant evidence
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1 establishing a history of discrimination under the effects test of VRA § 2). Plaintiffs point to the
 2 source of the language contained in Article 6 § 3 as being suspect of carrying historical
 3 intentional discriminatory purposes from other regions of the country. Convention delegates
 4 relied heavily on examples provided by other States' constitutions to facilitate the swift passage
 5 of the proposed constitution and the language of Article 6 § 3 is practically a verbatim
 6 replication of Wisconsin's own Article 3 Section 2, one of the twenty-nine criminal
 7 disenfranchisement laws enacted prior to the adoption of the Fourteenth and Fifteenth
 8 Amendments.³ The Journal of the Washington State Constitutional Convention, v-vi, 638-9;
 9 Richardson, 418 U.S. at 48; see also Note, Restoration of the Civil Rights of Convicted
 10 Criminals, 1951 Wis. L. Rev. 378 (1951).

11 Overt discrimination against blacks in Washington is apparent from an historical inquiry.
 12 A general prejudice against blacks in the Pacific Northwest during the latter nineteenth century
 13 can be observed, from the anti-black laws enacted in the Oregon Territory during the 1840s and
 14 1850s, the imposition of school segregation in Oregon, Montana, and Idaho following the Civil
 15 War, and the anti-miscegenation laws of those same states and territories in the 1880s and 1890s.
 16 Taylor Aff. at 3. The four states of the Pacific Northwest where these laws were enacted
 17 represent a unit with a common history, geography, and economic development. Taylor Aff. at
 18 4. Washington's slowly growing black population did not face the same types of discriminatory
 19 laws. Taylor Aff. at 6. However, blacks in Washington were the target of white prejudice and
 20 fear, particularly after World War II when the black population became significant within the
 21 urban areas of the state. Taylor Depo. at 81; see also Anderson v. Pantages Theatre Co., 114
 22 Wash. 24 (1921) (a black man is denied access to the main floor of a theater); Randall v. Cowlitz
 23 Amusements, Inc., 194 Wash. 82 (1938) (a black man is forced to leave his theater seat because
 24 of his race); Browning v. Slenderella Sys., 54 Wash.2d 440 (1959) (a black woman is denied the
 25 use of a salon's services because of her race); In re Johnson, 71 Wash.2d 245 (1967) (a Spokane

26
 27 ³ The language of Article 6 Section 3 also contains the language of the 1866
 28 territorial law that it supplanted. State v. Collins, 69 Wash. 268, 270 (1912).

1 barber refused to cut the hair of a black Gonzaga University student because of his skin color);
2 Lewis v. Doll, 53 Wash.App. 203 (1989) (a young black man is denied service at a Yakima 7-
3 Eleven because of his race).

4 While Article 6 may not have been enacted to deny the vote specifically to African
5 Americans such as Plaintiffs Farrakhan, Price, and Shadeed, it was most certainly enacted to deny
6 the vote to Native Americans such as Plaintiffs Schaaf and Briceno. Native Americans were
7 singled out for disenfranchisement on the enactment of Article 6 whose original language denied
8 Indians the elective franchise, and it was not until 1984 that an initiative was passed to prohibit
9 the denial of rights based upon cultural heritage and origin.⁴ This belies a long history of
10 invidious discrimination against Native Americans in Washington State based on “negative and
11 stereotypical attitudes” which developed during the settlement of the state. Taylor Aff. at 8. See
12 State v. Mamlock, 58 Wash. 631, 632-33 (1910) (upholding the prohibition on the sale of liquor
13 to Indians as they are “not as highly civilized as the whites; that they are less subject to moral
14 restraint, [and] more liable to acquire an inordinate appetite for intoxicating liquors”); see also
15 Clements, 986 F.2d at 781 (affirming the district court’s taking judicial notice of a long history
16 of official discrimination against African Americans in Texas). As such, Article 6 of the
17 Washington State Constitution was enacted with the same intent to discriminate of the basis of
18 race as the disenfranchisement laws of the South during the same era. The fact that the white
19 hostility in Washington State was more patently directed towards Native Americans rather than
20 African Americans is purely the product of the racial demographics of the region at the time.
21 Plaintiffs argue Article 6 is inherently discriminatory because of the intent, the overriding
22 purpose, and the effect of its enactment: to preserve the franchise for white men to the exclusion
23 of all other groups.

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27 ⁴ Initiative 456, codified at RCW § 75.56.040.

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3. *Disparities Within the Criminal Justice System, Created by Historical and Social Factors both Nationally and in Washington State, Create a Causal Link Between Felon Disenfranchisement Laws and the Denial of Voting Access by Minorities.*

The irrational racist beliefs about blacks and the crimes they were “predisposed” to committing relied upon by Southern states in crafting criminal disenfranchisement laws to effectively deny the vote to blacks continued to perpetuate into the modern era. In the latter part of the 1960s, when crime and civil unrest was on the rise, “[A] 1969 poll reported that 81% of the public believed that law and order had broken down, with a majority blaming ‘Negros who start riots’” Race to Incarcerate at 52-53, (quoting M. Stanton Evans and Margaret Moore, The Lawbreakers 135 (1968)). Today, racist attitudes, along with a variety of other sociological factors, contribute to the differential treatment minority groups receive in the criminal justice system. See Ian F. Haney Lopez, Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination, 109 Yale L.J. 1717 (2000). Nowhere else is this more evident than in the so-called “War On Drugs.” See, e.g. George S. Bridges, Washington State Minority and Justice Commission, A Study on Racial and Ethnic Disparities in Superior Court Bail and Pre-Trial Detention Practices in Washington 10 (1997) [hereinafter Disparities in Superior Court] (in interviewing twenty justice officials in King County, it was found that many believed that the greatest impact of intensified drug enforcement and prosecution is on minority defendants) (Bridges Depo. Exhibit 2).

Drug arrest statistics show in cities across the nation, African Americans are arrested on drug charges at a rate four times that of whites. Sam Vincent Meddis, Is the War on Drugs Racist?, USA Today, July 23, 1993, at 6A. Roughly two-thirds of these arrests were for possession, not sales. David Zucchini, Racial Imbalance Seen in War on Drugs, Philadelphia Inquirer, November 1, 1992, at A1. FBI-provided data shows “in 1980, African Americans, who constitute 13% of the U.S. population, accounted for 21% of drug possession arrests nationally. This number rose to a high of 36% in 1992 before dropping to 33% in 1995. For juveniles, the figures are even more stark: although blacks represented 13% of juvenile drug possession arrests in 1980, this proportion climbed to 40% by 1991, before declining to 30% in 1995.” Race To

1 Incarcerate, at 145. Despite this dramatic increase in arrest rates, data provided by the Substance
2 Abuse and Mental Health Services (SAMHSA) of the Department of Health and Human Services
3 shows there was no corresponding rise in drug use by African Americans during this time frame.
4 Race To Incarcerate, at 145. This is the product of a “system [that] aggressively targets and
5 severely punishes a kind of drug trafficking that more blacks than whites engage in,” a system
6 whose “crusade against crack [cocaine] significantly increased racial disproportions that had been
7 largely stable entering the 1980s.” William J. Stuntz, Race, Class, and Drugs, 98 Colum. L. Rev.
8 1795, 1796 (1998).

9 The disparate impact of targeting African Americans for arrest and prosecution for drug
10 crimes has been compounded by the Sentencing Reform Act of 1984, 18 U.S.C. § 3551 et. seq.
11 (1994). Though facially neutral as to race, sex, national origin, creed, and socioeconomic status
12 of the offender, the adoption of federal mandatory minimum sentences has contributed greatly
13 to racial disparities in the federal system. Gerald W. Heaney, The Reality of Guidelines
14 Sentencing: No End to Disparity, 28 Am. Crim. L. Rev. 161, 203 (1991) [hereinafter No End to
15 Disparity]. Of those offenders sentenced following the enactment of the statute, 26.2% were
16 black, up from 22.3% before enactment; 26.3% were Hispanic, up from 8.5% before enactment;
17 and 44.5% were white, *down* from 66.3% before enactment. No End to Disparity, at 204. One
18 primary reason for this is the enhanced penalties for drug crimes. Under the guidelines, a ten-year
19 mandatory minimum sentence results from possession with intent to distribute 50 grams or more
20 of crack cocaine, giving it a value 100 times higher the equivalent weight of powder cocaine. 21
21 U.S.C. § 841(b)(1)(A) (1994). Like the racist criminal disenfranchisement laws of the South,
22 disproportionate mandatory minimum sentencing for crack cocaine almost exclusively impacts
23 blacks. See State v. Russell, 477 N.W.2d 886 (Minn. 1991) (After finding that 96.6% of crack
24 cocaine users are black and 79.6% of powder cocaine users are white, the state court invalidated,
25 on equal protection grounds, a state statute similar to 21 U.S.C. § 841(b)(1)(A) that gave crack
26 cocaine a higher sentencing value than powder cocaine).

27 Incarceration for drug crimes is contributing to the rising minority population in prison.
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1 In 1985, 16,600 African Americans were incarcerated for drug crimes, a population that grew to
2 134,000 by 1995; between 1990 and 1996, 82% of the increase in the African American inmate
3 population in federal prisons could be contributed to drug crimes. Losing the Vote, at 14.

4 This is further aggravated by the fact that mandatory minimum sentences for drug crimes
5 are longer for minorities than whites. Following the adoption of federal mandatory minimums,
6 the average sentences received by blacks, which were already longer than whites or Hispanics,
7 took a substantial leap. Average sentence terms for drug crimes increased by 22.9 months for
8 whites; 15.1 months for Hispanics; and 25.2 months for blacks. No End to Disparity, at 207.
9 “More than a third (36 percent) of all incarcerated drug offenders were low-level offenders,
10 characterized by limited criminal histories, the absence of violence in their offenses, and minimal
11 roles in the drug trade. This group of inmates constituted a fifth of the entire federal prison
12 population, representing a substantial financial investment.” Race To Incarcerate, at 75 (quoting
13 Department of Justice, An Analysis of Non-violent Drug Offenders with Minimal Criminal
14 Histories (1994). Given the racial bias inherent in the imposition of mandatory minimum drug
15 sentences, it’s no wonder “all twelve judicial circuits issued statements opposing mandatory
16 sentencing, and several prominent judges either resigned or refused to hear cases involving
17 mandatory drug charges.” Race To Incarcerate, at 74 (quoting United States Sentencing
18 Commission, Mandatory Minimum Penalties in the Federal Criminal Justice System (1991)).

19 Disparate treatment of minorities is a practice embedded in the criminal justice system
20 beyond the singling out of African Americans for drug arrests and prosecutions. Studies show
21 during pretrial negotiations, whites are more successful at having charges reduced than African
22 Americans and Hispanics. Alice E. Harvey, Ex-Felon Disenfranchisement and Its Influence on
23 the Black Vote: The Need For a Second Look, 142 U. Pa. L. Rev. 1145, 1158 (1994) [hereinafter
24 The Need For a Second Look]. A study by the RAND Corporation demonstrates 44% of
25 convicted African American felons are sent to prison, compared to 33% of convicted white
26 felons, and it found that African Americans and Hispanics are sentenced to prison in greater
27 numbers and serve longer terms than whites convicted of similar crimes. The Need For a Second
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1 Look, at 1158. Overall, African American men are incarcerated at a vastly disproportionate rate
2 to whites. In 1996, black men were 8.5 times more likely to be incarcerated than white men;
3 3,098 per 100,000 black men were confined in prison compared to 370 per 100,000 white men.
4 Losing the Vote, at 12-13. In the past ten years, the incarceration rate for black men increased at
5 a rate ten times that of whites, and today 28.5% of black men will be locked up at least once in
6 their lifetimes, six times more than whites. Losing the Vote, at 13.

7 The trend of disparate treatment of minorities in arrest, prosecution, sentencing, and
8 incarceration is national in scope, and is followed by Washington State. See United States v.
9 Armstrong, 517 U.S. 456, 469 (1996) (The Court utilized national data from the United States
10 Sentencing Commission, which demonstrated that over 90% of those sentenced in 1994 for crack
11 cocaine trafficking were black, to resolve a Ninth Circuit selective prosecution case). Differential
12 treatment of minorities within Washington State's criminal justice system is well documented.
13 In Washington State, non-white offenders receive, on average, longer sentences than whites, and
14 African Americans are, of all groups, the most likely to be sent to prison for all offenses. State
15 of Washington Sentencing Guidelines Commission, Statistical Summary of Adult Felony
16 Sentencing 1997 II-1, II-2 (1997). Among sentenced felons, a larger proportion of African
17 Americans, Hispanics, and Native American offenders are sent to prison than whites or Asians.
18 Id. Of those offenders eligible for First-Time Offender Waivers, whites are more likely than other
19 group to receive such a waiver, with African Americans and Hispanics least likely to receive the
20 waiver. Id. Of those offenders eligible to receive the Special Sex Offender Sentencing
21 Alternative, whites are more likely than any other group to receive the alternative, with African
22 Americans and Native Americans least likely to receive the alternative. Id.

23 Racial disparities in Washington State's criminal justice system begin in the juvenile
24 system. In examination of Washington's counties, African American youth are almost twice as
25 likely to be arrested, five times as likely to be referred to Juvenile Court, five times as likely to
26 be detained, three times as likely to be charged, two and one-half times as likely to be
27 adjudicated, eleven times as likely to be sentenced to confinement, and seven times as likely to
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1 be confined as white youth. George S. Bridges, Ph.D., et. al. Racial Disproportionality in the
2 Juvenile Justice System ix-xii (1993) [hereinafter Juvenile Justice System]. Further, African
3 American and Hispanic youth are significantly less likely to be diverted from prosecution than
4 white youth. Juvenile Justice System, at x. “[This] disproportionality in Washington’s counties
5 is neither caused by nor explained by a higher number of youth of color committing offenses,
6 getting arrested or cited and referred to juvenile court, and then being prosecuted and adjudicated
7 for their offenses.” Juvenile Justice System, at xii.

8 In the adult system, the “War on Drugs” under Washington’s determinate sentencing
9 scheme, the Sentencing Reform Act (SRA), combined with mandatory minimum sentencing,
10 discriminates against minorities at rates comparable to national numbers. Of the total number of
11 convictions by County Superior Courts for Drug Offenses statewide, almost 40% were for non-
12 white offenders; African Americans, who make up 3.5% of the state’s population, accounted for
13 25% of all drug arrests. Robert D. Crutchfield, Ph.D., et. al., Washington State Minority and
14 Justice Commission, Racial/Ethnic Disparities and Exceptional Sentences in Washington State
15 Table 3 (1993). The disparity is most pronounced in King County, where nearly half of all drug
16 crime convictions are for non-white offenders; African Americans represent an astounding 47%
17 of all drug crime convictions in the county. Id. In an examination of the King County
18 Prosecutor’s Office, it is found whites as a group are the least likely to be charged with a felony
19 (60%) compared to 65% of all minority offenders, a disparity that continues even when adjusting
20 for the possible effects of other offender characteristics and legally relevant factors. Robert D.
21 Crutchfield, Ph.D., et. al., Washington State Minority and Justice Commission, Racial and Ethnic
22 Disparities in the Prosecution of Felony Cases in King County 4 (1995). Overall, in King County
23 felony cases, “[t]here are . . . instances where racial and ethnic differences appear in the handling
24 of cases. How most of these differences might be explained with legally relevant factors is not
25 immediately apparent. . . . [W]e believe [these differences] are grounds for concern.” Id. at 5; see
26 also David L. Hood and Jon R. Harlan, Ethnic Disparities in Sentencing and the Washington
27 Sentencing Reform Act: The Case of Yakima County, Explorations in Ethnic Studies, January,

1 1991, at 43 (demonstrating that disparities against Hispanic defendants in Yakima County
2 persisted even after the enactment of SRA; for example, minorities receive more severe sentences
3 than whites, even when adjusting for seriousness of crime and criminal history).

4 Dr. George S. Bridges, Ph.D., a sociologist and criminologist, has studied Washington
5 State's treatment of minorities throughout the justice system as a member of the Washington
6 State Minority and Justice Commission. Bridges Depo. at 67-68. Dr. Bridges has authored a
7 number of studies on racial disparities in the criminal justice system in general, and in
8 Washington State specifically. See Bridges Depo. Exhibits 2-5. For example, in a 1997 study of
9 bail and pre-trial detention practices by Washington State Superior Courts, Dr. Bridges found
10 when comparing equally situated black and white defendants (same crime, same offense), black
11 defendants in Washington State are less likely to get released on their own recognizance and
12 more likely to have some amount of bail set than whites. Bridges Depo. at 15; Exhibit 2.

13 Dr. Bridges has sought to discover the sociological factors contributing to this disparity.
14 He has determined differential treatment is a factor of the relative size of the minority population
15 within a state. Dr. Bridges has found blacks will be disadvantaged by inequality in rates of
16 imprisonment in a state when three factors are present: (1) the black population, as a percentage
17 of the total state population, is low; (2) there is extreme economic inequality between blacks and
18 whites; and (3) blacks are concentrated in small numbers in urban areas. Bridges Depo. at 32. All
19 of these factors are found in Washington State. African Americans make up only 3.5% of the
20 state's population and have tended to concentrate as a group in Seattle, Tacoma, Vancouver, and,
21 to a lesser extent, Spokane. Taylor Depo. at 83. Dr. Bridges points out during World War II, half
22 of Washington's African American population was found in Seattle. Taylor Aff. at 7. The
23 resulting racial tensions led to race riots at the Seattle shipyards. Taylor Depo. at 84. In states
24 where blacks live primarily in urban areas in relatively small numbers, like King County in
25 Washington State, disparity in incarceration rates is high. Bridges Depo. at 39-40. Dr. Bridges
26 has found this occurs because under these conditions, the white rate of imprisonment is
27 decreasing rather than the black rate increasing. Bridges Depo. at 41.

1 Dr. Bridges interprets this finding as demonstrating states that have these characteristics
2 impose disproportionately less severe sentences on whites. Bridges Depo. at 41. This phenomena
3 is observed in a 1987 study conducted in part by Dr. Bridges of the treatment of minorities in the
4 counties of Washington State. Bridges Depo. Exhibit 4. The study found in the counties where
5 the relative percentage of nonwhite minorities was high, and where urban concentration of
6 nonwhite minorities is relatively high, harsher sentences were imposed on blacks (adjusting for
7 factors like crime rate, arrest rate, and other factors). Bridges Depo. at 43-44. Even though the
8 study is thirteen years old, Dr. Bridges believes these trends remain constant over time. Bridges
9 Depo. at 51.

10 In a 1986 study, Dr. Bridges found racial disparity in imprisonment in Washington is high
11 (9:1), while disparity in arrest is relatively lower (5:1). George S. Bridges, Ph.D., Institute for
12 Public Policy and Management, Racial and Ethnic Disparities in Imprisonment 8 (1986) (Bridges
13 Depo. Exhibit 5). This demonstrates minorities are incarcerated at a far greater rate in
14 Washington than similarly situated whites. Overall, Dr. Bridges estimates only about 30 to 40
15 percent of race disparities in imprisonment are caused by racial differences in criminal behavior.
16 The remaining estimated 60 to 70 percent is attributed to factors like higher rates of arrest, higher
17 rates of detention, lower rates of pre-trial release, and higher rates of prosecution. Bridges Depo.
18 at 36. All of these sociological factors which drive disparate incarceration rates for minorities,
19 when combined with Washington's felon disenfranchisement law, have the effect of denying
20 minorities like Plaintiffs the right to vote on the basis of race.

21 Dr. Bridges' analysis of the differential treatment of minorities within the criminal justice
22 system has led him to the bleak conclusion that "[l]aw is an institution that reacts to deviance
23 produced by structural conditions within communities. Law is also a tool used by the state to
24 control problem populations, especially in urban areas where those populations are perceived to
25 threaten public order and legal authority, independent of the crimes they commit, or the threats
26 that are actually realized. George S. Bridges, et. al., Crime, Social Structure and Criminal
27 Punishment: White and Non-White Rates of Imprisonment 356 (1987); see also Bridges Depo.

1 at 53. When the law is used in this manner, the result is the confinement of, and subsequent
 2 denial of the voting rights of, those “problem populations,” who are, as the history and social
 3 characteristics of Washington State demonstrate, overwhelmingly non-white.

4
 5 *4. Where Social and Historical Factors Interact Resulting in the Disparate Treatment*
 6 *of Minorities in the Criminal Justice System, the Imposition of Disenfranchisement*
 7 *Disproportionately Impacts Minorities, Violating Section 2 of the VRA.*

8 The disparate treatment of minorities within the criminal justice system directly translates
 9 into a disproportionate number of minorities incarcerated who are consequently denied the right
 10 to vote. Marc Mauer, Assistant Director of the Sentencing Project, a non-profit organization
 11 based in Washington, D.C., has studied racial disparities in the criminal justice system and its
 12 relationship to the voting rights of minorities in the United States. Mauer Depo. at 8, 11, 18. The
 13 results of Mr. Mauer’s research, based on state-by-state data provided by the Department of
 14 Justice’s Bureau of Justice Statistics (Mauer Depo. at 55), is startling. In the United States, an
 15 estimated 3.9 million citizens, or one in fifty adults, is currently or permanently denied the right
 16 to vote because of a felony conviction. Losing the Vote, at 2. Of those, 2.8 million are, in all
 17 other respects, productive members of society, having completed their sentences, or on probation
 18 or parole. Id. The great injustice of criminal disenfranchisement is that “an eighteen-year-old
 19 first-time offender who trades a guilty plea for a lenient nonprison sentence (as almost all first-
 20 timers do, whether or not they are guilty) may unwittingly sacrifice forever his right to vote.”
 21 Losing the Vote, at 5 (quoting Andrew L. Shapiro, The Disenfranchised, The American Prospect,
 22 Nov.-Dec. 1997, at 60-62).

23 A matter of particular concern within the context of the Voting Rights Act is the racial
 24 impact of disenfranchisement. Criminal disenfranchisement laws ensure thirteen percent of all
 25 African American men are denied the right to vote, a rate seven times the national average
 26 and represents 36% of the total disenfranchised population. Id. The effect on the African
 27 American vote is particularly egregious; in 1996, 4.6 million black men voted in the
 28 November election, compared to 1.4 million who could not because of disenfranchisement.
Losing the Vote, at 8.

1 Relying on Department of Justice Statistics, Mr. Mauer looked at the disenfranchised
2 population in Washington State and the racial composition thereof.⁵ Mauer Depo. 55-56. He
3 found the total population of disenfranchised felons in Washington is approximately 151,500,
4 or 3.7% of the total population. Losing the Vote, at 9. Of the total disenfranchised population,
5 12,500 are in prison, 68,900 are on probation, 600 are on parole, and it is estimated that 69,500
6 are ex-felons.⁶ Losing the Vote, at 10. When looking at the racial composition of disenfranchised
7 felons in Washington, 16,700 are African American men, or 24% of the total state African
8 American population. Losing the Vote, at 9.

9 This disparity in disenfranchisement rates is the direct result of disparate incarceration
10 rates for black men compared to white men in Washington. In a 1997 study, Mr. Mauer
11 compared Washington incarceration rates in 1988 and 1994. Mauer Depo. at 59. He found in
12 1988, 856 per 100,000 blacks were incarcerated compared to 88 per 100,000 whites. Mauer
13 Depo. at 59. In 1994, 1,392 per 100,000 blacks were incarcerated compared to 161 per 100,000
14 whites. Mauer Depo. at 60. These numbers demonstrate in 1988, an individual black man in
15 Washington State was 9.97 times more likely to be incarcerated than a white man; in 1994, an
16

17 ⁵ The data from the Department of Justice Statistics on Washington State is
18 derived from reports submitted to the Department from the Washington State
19 Department of Corrections on an annual, and, for certain reporting forms, semi-
20 annual basis. Smith Depo. I, at 35-36.

21 ⁶ This estimation of 69,500 is based on an analysis developed by Mr. Mauer as the
22 Department of Justice, as well as most states, does not keep data on ex-felons.
23 Mauer Depo. at 55-56. This population includes those offenders who were
24 convicted of felonies in Washington prior to 1984. Mauer Depo. at 56. Mr. Mauer
25 did not, however, attempt to determine how many ex-offenders had successfully
26 petitioned to have their rights restored. Mauer Depo. 54-55.
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1 individual black man was 8.65 times more likely to be incarcerated. Mauer Depo. at 59-60. Even
 2 though there was a slight decline during this time frame, Washington's ratio of incarceration of
 3 blacks to whites is still above the national average. Mauer Depo. at 63.

4 Relying on recent Washington Department of Corrections (DOC) data shows these trends
 5 in disparate incarceration rates remain consistent over time. According to reports prepared by Dr.
 6 Peggy Smith, a planning and research administrator for the DOC, during the first half of fiscal
 7 year 2000 (through December 31, 1999), the resident prison population, including those within
 8 the institution, pre-release, and work release, was 14,280 inmates, of which 71.1% were white,
 9 22.4% were black, 3.6% were Native American, and 2.3% were Asian.⁷ Declaration of Peggy
 10 Smith at 2; Smith Depo. I, Exhibit 4, Table 2A. The black prison population in Washington State
 11 remained virtually unchanged from fiscal year 1999's 22.7%. Smith Depo. I, Exhibit 3, Table 2A.
 12 This is reflected in the admission rate for minorities into the prison system. During the first half
 13 of fiscal year 2000, of the 3,319 persons admitted, 71.1% were white, 22.7% were black, 4.2%
 14 were Native American, and 1.7% were Asian. Smith Depo. I, Exhibit 4, Table 3D. Again, the
 15 black admission rate remained virtually unchanged from fiscal year 1999's 24%. Smith Depo.
 16 I, Exhibit 3, Table 3D. Overall, the admission and incarceration rate for minorities has remained
 17 consistent, albeit exceedingly disparate with the population in general, over the years, while the
 18 overall admission rate and resident population rate has steadily increased. Declaration of Peggy
 19 Smith at 2-3; Smith Depo. I, Exhibit 3, Charts 2-1 through 2-5 and Charts 3-1 through 3-5.

20 While Washington's prison system has an African American population proportion nearly
 21 six-and-a-half times that of the statewide African American population proportion, statistics for
 22 releases from Washington prisons tell an even more compelling story of disparate

23 ⁷ According to the 1990 Census, the population of Washington State was
 24 4,308,937, of which 149,801 (3.5%) were black, 77,627 (1.8%) were American
 25 Indian, and 214,570 (5%) were of Hispanic origin. Information Publications,
 26 Almanac of the 50 States 1999 380 (1999). Of those of Hispanic origin, 155,864
 27 (3.6%) were Mexican-American. Id.
 28

1 disenfranchisement. Offenders in Washington State may be released from incarceration without
 2 having fully completed their sentence; those who are released with remaining obligations under
 3 their sentence, including those owing only repayment of a monetary debt to the court, are deemed
 4 to be under Department of Corrections supervision and remain ineligible to have their civil rights
 5 restored. See RCW § 9.94A.220; Smith Depo. I at 22-24, 26-27. Upon completion of all terms
 6 of their sentences, offenders will receive a discharge that will then allow for the restoration of
 7 civil rights. RCW § 9.94A.220. However, DOC data shows when it comes to being discharged
 8 from any further obligations following incarceration, minorities in Washington State are once
 9 again at a disadvantage when it comes to voting.

10 The DOC tracks release type by race; of the categories of release, “discharge” is the only
 11 category in which offenders may be released not owing any further obligations under their
 12 sentences, though many may still owe monetary obligations. Smith Depo. II at 63. During the
 13 first half of fiscal year 2000, there were a total of 3,272 individuals released, and 1,110 received
 14 discharges. Smith Depo. I, Exhibit 4, Table 4B. Of those released, 2,305, or 70.4%, were white,
 15 and of those being discharged, 835, or 75.2%, were white. Smith Depo. I, Exhibit 4, Table 4B.
 16 In contrast, of those released, 782, or 23.9%, were black, while of those being discharged, only
 17 a mere 202, or 18.2%, were black. Smith Depo. I, Exhibit 4, Table 4B. These figures, combined
 18 with the figures for Native Americans, Asians, and Hispanics, demonstrate one clear fact: upon
 19 release from incarceration, white criminal offenders in Washington State are more likely to be
 20 discharged, and, consequently, be eligible for the possible restoration of their voting privileges.
 21 Minorities in Washington State, such as Plaintiffs, are less likely to be discharged and thereby
 22 continue to be denied the right to vote on the basis of color. Smith Depo. I, Exhibit 4, Table 4B.

23
 24 *5. Criminal Disenfranchisement Laws Lack a Compelling Public Policy Justification*
 25 *to Support Ongoing Discriminatory Effects on Minorities' Voting Rights, Which*
 26 *Have Been Resoundingly Rejected by the International Community.*

27 The practice of denying felons the right to vote dates back to ancient Rome and medieval
 28 Europe, where a sentence of “civil death” would be imposed upon infamous criminals, banishing
 them from the community where their crime was committed. Jesse Katz, Many Ex-Cons Get Life

1 – Without Voting Rights, Los Angeles Times, April 2, 2000, at A8. As modern public policy,
 2 criminal disenfranchisement laws like Washington’s that banish criminal offenders from the
 3 political community, historically have had at their foundation three policy bases for support. The
 4 first is John Locke’s concept of the social contract between those who govern and the governed.
 5 As Judge Friendly explained this social contract’s application to criminal disenfranchisement,
 6 “[A] man who breaks the laws he has authorized his agent to make for his governance could
 7 fairly have been thought to have abandoned the right to participate in further administering the
 8 compact.” Green, 380 F.2d at 451. However, this concept is inconsistent with Locke’s own
 9 requirement for the power of the state to penalize be rational and proportional. Note, The
 10 Disenfranchisement of Ex-Felons: Citizenship, Criminality, and ‘The Purity of the Ballot Box,’
 11 102 Harv. L. Rev. 1300, 1306 (1989) [hereinafter The Purity of the Ballot Box]. The practical
 12 effect of the enforcement of Article 6 § 3 is to permanently disenfranchise Plaintiffs for life. This
 13 form of punishment is “imposed equally on all felons without regard for the relative severity of
 14 their crimes, and is wholly disproportionate to a single violation.” Id. This lack of proportionality
 15 in the imposition of punishment in Washington’s criminal justice system and how it relates to
 16 the disparate treatment of minorities like Plaintiffs throughout the system can be understood
 17 through “[r]esearch . . . [which] suggests that a ‘society’s penal climate or its relative punitiveness
 18 is linked to its relative egalitarianism: the greater a society’s tolerance of inequality, the more
 19 extreme the scale of punishment utilized.” Race To Incarcerate, at 39 (quoting Warren Young
 20 and Bark Brown, “Cross-national Comparisons of Imprisonment,” in 17 Crime and Justice: A
 21 Review of Research, 41 (Michael Tonry, ed., University of Chicago Press, 1993)).

22 The second public policy basis for criminal disenfranchisement laws is the assertion
 23 offenders lack the moral fitness to participate in the electoral process. The argument is society
 24 has an interest in protecting the “honesty of the process” from offenders like Plaintiffs, because
 25 offenders are more likely than the average citizen to engage in voting fraud or vote for lax law
 26 enforcement, Steve Chapman, Give Ex-Convicts the Vote (visited April 2, 2000)
 27 <<http://slate.msn.com/Features/felvote/felvote.asp>>. This is “quasi-metaphysical invocation that
 28

1 the interest is preservation of the ‘purity of the ballot box.’” Dillenburg v. Kramer, 469 F.2d
 2 1222, 1224 (1972); see also Farrakhan at 1312-13. This rationale is overly exclusionary and there
 3 is no proof or basis for the state’s implicit assumption that Plaintiffs cannot make sound political
 4 decisions. See The Need For a Second Look, at 1172. Plaintiffs argue that using their past
 5 behavior to punish them prospectively for crimes (like voting fraud) they have not committed is
 6 inconsistent with a criminal justice system premised on requirement “society has the burden of
 7 proving guilt of a new crime beyond a reasonable doubt.” The Need For a Second Look, at 1173.

8 The third policy argument is the notion that criminal disenfranchisement laws act a means
 9 of deterring the commission of crime. This theory is highly suspect first because most potential
 10 offenders are unaware of the specific penalties associated with particular crimes, it is likely that
 11 they simply do not know that disenfranchisement accompanies conviction.⁸ The Need For a
 12 Second Look, at 1172. Rather than deter crime, disenfranchisement in fact acts to create
 13 conditions in which the commission of future crimes becomes more likely. By denying released
 14 offenders the right to vote, the process of rehabilitation is retarded by isolating the ex-offender
 15 from one of the most important functions in society (voting), thereby weakening the ex-
 16 offender’s ties to the community and branding the ex-offender with a stigma emphasizing his
 17 difference from “normal” citizens. The Need For a Second Look, at 1171.

18 Criminal disenfranchisement laws, lacking in a rational policy basis, remain not only the
 19 last barrier to suffrage in the United States, but in the world as well. No other democratic country
 20 on the planet is so restrictive as to deny convicted offenders the right to vote for life. Losing the
 21 Vote, at 18. Typically, those countries who disenfranchise criminal offenders tailor the

22 ⁸ As Justice Brennan noted in a case holding the penalty of loss of citizenship for
 23 desertion from the military during war is unconstitutional, “As a deterrent device
 24 this sanction [loss of citizenship] would appear of little effect, for the offender, if
 25 not deterred by the thought of the specific penalties of long imprisonment or even
 26 death, it is not very likely to be swayed from his course by the prospect of
 27 expatriation.” Trop v. Dulles, 356 U.S. 86, 112 (1958) (Brennan, J., concurring).
 28

1 disenfranchisement to the particular crime committed; for example, Finland and New Zealand
2 prohibit offenders from voting for several years after completion of sentence if convicted for
3 buying or selling votes or corrupt practices. Id. Many diverse countries, including the Czech
4 Republic, Denmark, France, Israel, Japan, Kenya, Netherlands, Norway, Peru, Poland, Romania,
5 Sweden, and Zimbabwe, allow inmates to vote; in fact, in Germany, prison authorities are obliged
6 by law to encourage prisoners to vote and work to facilitate voting procedures. Id. Under German
7 law, only those incarcerated for electoral crimes or crimes that undermine the “democratic order”
8 (i.e., treason) are prevented from voting, as well as those whose court-imposed sentence expressly
9 includes disenfranchisement. Id. Even in South Africa, a country long burdened with oppressive
10 institutional racism, repudiated criminal disenfranchisement in 1999, when the Constitutional
11 Court of South Africa unanimously ruled against a lower court decision that denied inmates the
12 right to vote, effectively making 146,000 South African prisoners eligible to register and vote.
13 Marc Mauer, The Sentencing Project, Regaining the Vote: An Assessment of Activity Relating
14 to Felon Disenfranchisement Laws 14 (1999).

15 With respect to the racially-discriminatory effects of criminal disenfranchisement laws,
16 the United States fails to meet its international obligations under the International Covenant on
17 Civil and Political Rights (ICCPR), which was ratified by the U.S. on June 9, 1992 and is binding
18 as the “supreme law of the land” concurrent with the United States Constitution. See United
19 States v. Duarte-Acero, 208 F.3d 1282, 1284 (2000). Under Article 25 of the ICCPR, citizens of
20 treaty nations have the right to vote that may not be subject to discrimination or face
21 “unreasonable restrictions” to voting on the basis of a number of categories, including race, sex,
22 and religion. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21
23 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into
24 force March 23, 1976, Art. 25. In reviewing adherence to the ICCPR, the U.N. Human Rights
25 Committee has stressed criminal disenfranchisement should occur, if at all, only by applying
26 objective and reasonable criteria proportionate to the offense and sentence. Losing the Vote, at
27 20-21. Furthermore, the Convention on the Elimination of All Forms of Racial Discrimination
28

1 (CERD), an international treaty designed to address race-based discrimination, was ratified by
 2 the U.S. on October 21, 1994. CERD requires all parties to the treaty to provide, without
 3 distinction to race, color, or national origin, the ability to participate in elections, by both voting
 4 in, and standing for, election. International Convention on the Elimination of All Forms of Racial
 5 Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969, Art. 5(c). A violation of CERD
 6 may be established by showing that a law or practice, which may be facially neutral as to race,
 7 has the purpose or effect on the basis of race, similar to the Voting Rights Act. Losing the Vote,
 8 at 22. On the basis of the mandates of these and other treaties, the prison reform group CURE
 9 has prepared a draft of a Universal Suffrage Resolution to be introduced in the General Assembly
 10 in the United Nations that calls for “domestic legislation . . . to effectively ensure [suffrage] for
 11 all disenfranchised persons of every status in life, including prisoners and ex-prisoners, in
 12 accordance with international human rights obligations and the general welfare of all peoples.”
 13 Memorandum from Marc Mauer and Patricia Allard, The Sentencing Project (July 24, 2000).

14 **B. Article 6 § 3 of the Washington State Constitution and RCW 9.94A.220, when**
 15 **examined in the context of the aforementioned historical and social conditions,**
 16 **constitutes a voting standard, practice, or procedure resulting in the abridgement**
 17 **of the right of Plaintiffs to vote on account of race or color, a violation of Section**
 18 **2 of the Voting Rights Act and Procedural Due Process.**

19 *1. The Process for the Restoration of Voting Rights in Washington Erects Barriers to*
 20 *Registration of Offenders Who Have Completed the Terms of Their Sentences.*

21 Having established social and historical conditions create a causal link between the
 22 operation of Washington’s felon disenfranchisement law and the denial of voting rights to
 23 Plaintiffs on account of their race, Plaintiffs further contend the procedure for the restoration of
 24 their voting rights through RCW § 9.94A.220, as applied, constitutes a prohibited “standard,
 25 practice, or procedure” under VRA § 2. As constructed, “standard, practice, or procedure” refers
 26 to “any methods for conducting a part of the voting process that might . . . be used to interfere
 27 with a citizen’s ability to vote . . .” Holder, 512 U.S. at 918. Contrary to the spirit and substance
 28 of RCW § 9.94A.220, successful completion of all terms of Plaintiffs sentences will not result
 in automatic restoration of voting rights. Rather, Plaintiffs’ ability to vote is premised on a

1 number of other factors, which falls under VRA § 2 which “covers all manner of registration
2 requirements,” Holder, 512 U.S. at 922, and is a violation of the Act, as the process does not
3 allow Plaintiffs as racial minorities to “register and vote without hindrance.” Bolden, 446 U.S.
4 at 65.

5 Under Washington’s felon disenfranchisement law, anyone convicted of an infamous
6 crime (felony), defined as any crime punishable by death or imprisonment, RCW § 29.01.080,
7 is denied the right to vote. The focus of the case at bar is on the statutory process in the State of
8 Washington for the restoration of a felon’s civil rights under the Sentencing Reform Act of 1984
9 (SRA), which requires a “certificate of discharge” be issued by the sentencing court for an
10 offender to have their civil rights restored following completion of the terms of the offender’s
11 sentence:

- 12 (1) When an offender has completed the requirements of the sentence, the secretary
13 of the department or the secretary’s designee shall notify the sentencing court,
14 which shall discharge the offender and provide the offender with a certificate of
15 discharge.
- 16 (2) The discharge shall have the effect of restoring all civil rights lost by operation
17 of law upon conviction, and the certificate of discharge shall so state.

18 RCW § 9.94A.220. The process guidelines outlined under the SRA are applicable to the
19 Plaintiffs in this case because, like the majority of felons currently incarcerated in Washington
20 state, the dates of the imposition of their sentences fell after the effective date of the SRA. Smith
21 Depo. I, Exhibit 3, Charts 3.1 - 3.6

22 A felony conviction results in automatic disenfranchisement. Federal courts send reports
23 of felony convictions weekly to the Secretary of State’s office, who then forwards the
24 information to the appropriate county; state courts report felony convictions directly to the county
25 auditor. Elliott Depo. at 19. The receipt of this report by the county triggers the removal of the
26 offender’s name from the voter roles, provided the individual was a registered voter. Elliott
27 Depo. at 19. Thus, a subsequent application for voter registration submitted by a person whose
28 registration has been canceled for any reason, including, but not limited to, a felony conviction,
is treated as a new application for voter registration and not as a reinstatement of a previous

1 registration. DOC's Response to Plaintiffs' First Set of Interrogatories, Fiala at 9. If a released
 2 offender wants to regain his ability to vote, he carries the burden of reapplying to vote; there is
 3 no automatic reinstatement of registration. Elliott Depo. at 24.

4 Released offenders face substantial ambiguity and confusion if they attempt to re-register
 5 to vote. The Secretary of State's Office, responsible for the development and printing of uniform
 6 voter registration forms statewide, has no formal program or method for informing released
 7 offenders of their ability (or inability) to register to vote. Elliot Depo. at 11. When voter
 8 registration forms are received by the appropriate county department of elections, they are
 9 reviewed only to ensure the required for items of information are filled out on the form: name,
 10 date of birth, address, and signature. Elliot Depo. at 18, 44. There is no requirement or process
 11 in place to verify whether any of the information provided by the applicant is valid. Elliot Depo.
 12 at 18-19. Thus, an offender who should otherwise be disenfranchised under Article 6 § 3 could
 13 conceivably register to vote under a different name or address. Elliot Depo. at 19. Nor is "not
 14 presently denied civil rights due to a felony conviction" clearly delineated in the qualifications
 15 to register in the informational portion of the voter registration form.⁹ Elliott Depo. at 14. The
 16 overall lack of information available to a convicted criminal offenders presents an impediment
 17 to their ability to vote because they may not understand that they need to re-register to vote (if
 18 they had been registered to vote prior to conviction). If they have been released from
 19 incarceration but not yet received a certificate of discharge, thereby having their civil rights
 20 restored, they may mistakenly attempt to register, opening themselves up to possible prosecution
 21 for making false declarations about qualifications to register to vote, a class C felony. RCW §

22
 23 ⁹ The uniform mail-in voter registration form states that, to register to vote in
 24 Washington, an applicant must be 1) a citizen of the United States; 2) a legal
 25 resident of Washington; and 3) at least 18 years old by election day. Elliott Depo.
 26 at 14. Information relevant to convicted felons was excluded to "simplify" the
 27 form, and was relegated to the "oath" portion above the signature Elliott Depo. at
 28 14, providing no guidance to released offenders as to their ability to register.

1 29.07.070.

2 Prior to receiving a certificate of discharge and the restoration of voting rights, an offender
3 may serve the remainder of his sentence outside of prison. Smith Depo. I at 22. The SRA
4 provides for the administration of post-incarceration supervision of offenders within the
5 community by the Washington State Department of Corrections (DOC). RCW § 9.94A.120. The
6 DOC implements its statutory responsibilities through internal departmental policies and
7 procedures documented in "Policy Directives," "Division Directives," and "Field Directives,"
8 which delineate the process used by the DOC to administer the supervision of released offenders.
9 See e.g. RFP 194-196, RFP 205-208, and RFP 5-12. Plaintiffs Farrakahn and Price have
10 completed their terms of incarceration and are now under community supervision until the
11 obligations under their sentences are met. Though full members of society in all other respects,
12 Plaintiffs Farrakahn and Price are not legally entitled to register to vote.

13 Upon being released from prison to post-incarceration supervision, offenders are assigned
14 a Community Corrections Officer (CCO), according to their places of residence or the location
15 of the sentencing court. Wallace Depo. at 9. It is a DOC policy CCO's are responsible for the
16 monitoring of Legal Financial Obligations and Cost of Supervision payments while an offender
17 is on work release or active supervision within the community. Reynolds Depo. at 8; Diffley
18 Depo. at 15. Referring to RFP 194, DOC Policy Directive 200.380, "Legal Financial Obligations
19 and Cost of Supervision." Policy Section. The CCO conducts an intake interview with the
20 released offender, at which time the conditions of the offenders' release are explained. Reynolds
21 Depo. at 9. At this meeting, the offender is given a DOC document titled, "Conditions,
22 Requirements, and Instructions." Reynolds Depo. at 9, referring to RFP 197. Within this
23 document, the offender is asked to sign under the statement:

24 Failure to abide by the conditions of your release can result in a Violation Report to the
25 Court/Indeterminate Sentencing Review Board or a bench warrant for your arrest. Your
26 case will be reviewed routinely for compliance. The Department of Corrections will
27 request a discharge based on your successful completion of court-ordered conditions and
28 payment of cost of supervision fees.

I have read or have had read to me the foregoing conditions and sentence requirements

1 which are applicable in my case. Each of these conditions/requirements have been
2 explained to me and I hereby agree to comply with them. (RFP 197, 199.)

3 Though the offender is asked to sign under the statement, the signature is only a formality; the
4 offender will still be held to the obligations within the document. Diffley Depo. at 19.

5 This document outlines instructions related to the period during which the offender
6 remains under the legal custody of the DOC. RFP 197-199. It lists the remaining legal financial
7 obligations of the offender and any other requirements such as community service. RFP 197. A
8 payment schedule is established for the offender to pay outstanding legal financial obligations.
9 RFP 197. The "Conditions, Requirements, and Instructions" document makes no mention of the
10 offender's inability to vote, the process for the restoration of civil rights, or how successful
11 completion will restore eligibility to register to vote. RFP 197-199. It does not explain the
12 meaning of the term "discharge." nor does it explain the associated process for obtaining a
13 discharge. RFP 197-199. It is left to the CCO to do this verbally; however, there is no explicit
14 policy directive that instructs the CCO to do this, and it is often not accomplished until after the
15 offender has received a discharge. Mr. Rick Diffley, a CCO, has stated he orally informs an
16 offender under his supervision who has complied with court and DOC requirements that the
17 offender will have their civil rights restored upon receipt of a certificate of discharge. Diffley
18 Depo. at 18. This practice does nothing to give offenders the knowledge that they need to assume
19 the burden of re-registering to vote, an impediment to access to the ballot box.

20 Plaintiff Muhammad S. Farrakhan has completed the terms of his court-imposed sentence
21 with the exception of the repayment of monies owing the court. Reynolds Depo. at 18. He is
22 currently under monetary supervision, the minimum level of supervision in the minimum
23 management unit (OMMU). Reynolds Depo. at 18; Wallace Depo. at 9. If, upon a yearly review
24 of the file, he is to be determined by the DOC to be in compliance with 50% of his payment
25 requirements, he will not have any further contact with the DOC between the time of his intake
26 and the ultimate disposition of the case. Wallace Depo. at 10.

27 The DOC handles the ultimate disposition of an offender's case in one of two different
28 ways, depending on whether a released offender has completed all terms under his sentence:

1 discharge or termination. The procedure used by the DOC to request an offender be released from
2 supervision by discharge or termination is delineated by DOC Division Directive DIR-771-F,
3 "SRA Termination/Discharge" RFP 205-208. The Directive states CCO's are to submit a
4 Request for Discharge to the court when all sentence requirements (including sex offender
5 registration and financial obligations) have been successfully completed. (*Id.*) If the offender has
6 completed all of the terms of his sentence, he must either initiate the process of discharge, or it
7 may be initiated by their CCO. Wallace Depo. at 12-13. The CCO will then submit a request to
8 the deputy prosecuting attorney in the jurisdiction where the offender was sentenced, who then
9 forwards it to the sentencing judge. Wallace Depo. at 14. The prosecutor has the discretion to
10 reject the request for discharge, which is done on occasion. Wallace Depo. at 14, 17. This
11 practice is contrary to the language of the statute regarding the restoration of civil rights which
12 mandates that an offender *shall* be granted a certificate of discharge upon notice to the
13 sentencing court by the DOC the offender has completed the requirements of the sentence. RCW
14 § 9.94A.220. Thus, convicted criminal offenders who have completed all terms of their sentences
15 and have had a request for discharge prepared by the DOC are not granted automatic restoration
16 of voting rights as the statute implicates. Rather, their ability to vote is dependent upon
17 permission of prosecuting attorneys and judges.

18 DOC Division Directive DIR-771-F instructs the CCO to submit a Request for
19 Termination to the Court if the sentence has expired and the sentencing requirements have not
20 been met. RFP 206. If ten years has passed since an offender has been released from incarceration
21 and the offender has only a minimal amount of money owing (in King County it is less than
22 \$500), the DOC's jurisdiction ends and the CCO will submit a request for termination to the
23 court of conviction that returns jurisdiction over the case to the court; at the granting of the
24 request, the DOC ceases supervision of the offender. Diffley Depo. at 10, 16-17; see also
25 Wallace Depo. at 25, 26-27. The act of termination ends the DOC's supervision of the case.
26 Wallace Depo. at 27. There is no further contact between the offender and the DOC after the
27 issuance of the Certificate of Termination. Wallace Depo. at 27. If, at some point beyond
28

1 termination, an offender wishes to repay his obligation and have his voting rights restored, he
2 faces even greater obstacles to registration than offenders still under supervision; a terminated
3 offender must have the knowledge and ability to petition the appropriate parties in the sentencing
4 court for a certificate of discharge. Wallace Depo. at 32-34.

5 Monthly supervision fees are assessed by the DOC for the period of community
6 supervision, community placement, community service, parole, supervision "from other states,"
7 and gross misdemeanor/misdemeanant supervision. RFP 194, DOC Policy Directive 200.380,
8 "Legal Financial Obligations and Cost of Supervision," Directives § V; Supervision Fees.
9 Offenders who remain under the supervision of the DOC are obligated to make monthly
10 payments towards these costs in order to qualify for receipt of a Certificate of Discharge.
11 Reynolds Depo. at 21. These "cost of supervision fees" are different than the legal financial
12 obligation imposed by the sentencing court to pay restitution, costs, fines and other assessments.
13 RCW § 9.94A.140, RCW § 9.94A 145, RCW § 9.94A 270; Reynolds Depo. at 19. The statute
14 allows for exemption or deferral from payment of these fees if the offender has insufficient
15 income due to lack of employment, has an employment handicap, is of an age that prevents
16 employment, has dependents that would make payment an undue hardship, if the offender is a
17 student, or other extenuating circumstances. RCW § 9.94A.270. In practice, however, these fees,
18 which are a standard twenty dollars per month, are assessed without regard to the offender's
19 capacity to pay, and require payment on a monthly basis. Reynolds Depo. at 20-22.

20 A certificate of discharge will not be granted to an offender if he fails to pay this fee,
21 regardless of the reason, even if he pays all of his legal financial obligations. DOC's Response
22 to Plaintiffs' First Set of Interrogatories, Diffley at 13. Contrary to the statute, there is no policy
23 of waiver of the payment of these fees. Reynolds Depo. at 21; Fiala Depo. at 23. If all sentencing
24 conditions are met by an offender, but the offender has not met full payment of supervision fees
25 to the Department, it is DOC policy that a recommendation of unsuccessful termination be made
26 to the Court 90 days prior to the end of the 10-year monetary supervision period. RFP 194, 196,
27 DOC Policy Directive 200.380, "Legal Financial Obligations and Cost of Supervision;"
28

1 Directives § VI, “Failure to Pay Cost of Supervision.

2 The effect of this policy is that any offender who has otherwise fulfilled all of his
3 sentencing conditions can still be terminated from supervision and be denied a restoration of his
4 civil rights. In short, making payment of fees beyond the court-imposed financial obligation a
5 prerequisite to voter registration, is analogous to the poll taxes utilized to prevent blacks from
6 registering to vote during the post-Reconstruction era.

7
8 *2. The Process for the Restoration of Voting Rights in Washington Violates the Requirements of Procedural Due Process Under the Fourteenth Amendment.*

9 A convicted criminal offender who has completed the terms of his sentence has a
10 statutorily-created right to the restoration of his civil rights. RCW § 9.94A.220. In practice, this
11 right is subject to the discretionary actions of the offender’s CCO and the prosecutor and judge
12 of the sentencing court. Wallace Depo. 12-14, 17. This right is further subject to the successful
13 payment of fees not included under the sentencing obligations. Reynolds Depo. at 19; DOC's
14 Response to Plaintiffs' First Set of Interrogatories, Diffley at 13. These practices offend
15 procedural due process protections afforded under the Fourteenth Amendment, which states “[n]o
16 State shall . . . deprive any person of life, liberty, or property, without due process of law,” U.S.
17 Const. amend XIV, § 1. This Clause provides heightened protection against government
18 interference with certain fundamental rights and liberty interests, Reno v. Flores, 507 U.S. 292,
19 301-302 (1993), “[t]he touchstone [of which] is protection of the individual against arbitrary
20 action of government.” Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

21 In a procedural due process analysis, the first question to ask is “whether the asserted
22 individual interests are encompassed within the Fourteenth Amendment’s protection of ‘life,
23 liberty or property.’” Ingraham v. Wright, 430 U.S. 651, 672 (1977). Offenders who have
24 completed the terms of their sentences have a property interest in the receipt of a certificate of
25 discharge, as a property interests are “created and their dimensions are defined by existing rules
26 or understandings that stem from an independent source such as state law.” Board of Regents of
27 State Colleges v. Roth, 408 U.S. 564, 577 (1972). The second step is to then decide what

1 procedures constitute “due process of law.” Ingraham, 430 U.S. at 672. This is accomplished
2 through the weighing of three factors:

3 “First, the private interest that will be affected by the official action; second, the risk
4 of an erroneous deprivation of such interest through the procedures used, and the
5 probable value, if any, of additional or substitute procedural safeguards; and finally,
6 the Government’s interest, including the function involved and the fiscal and
7 administrative burdens that the additional or substitute procedural requirement would
8 entail.”

9 Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

10 Applying these three factors to the process used to restore an offender’s voting rights in
11 Washington, it is clear the private interest affected (the ability to vote) is of fundamental
12 importance in an democratic society, See Reynolds, 377 U.S. at 555. Thus “[t]he extent to which
13 procedural due process must be afforded . . . is influenced by the extent to which he may be
14 ‘condemned to suffer grievous loss’ . . .” Goldberg v. Kelly, 397 U.S. 254, 262-263 (1970). As
15 to the second factor, there are no procedural safeguards or protections in place to ensure an
16 offender’s right to a certificate of discharge is not erroneously denied. The Court has consistently
17 determined that some form of hearing or notification is required before the state deprives an
18 individual of a property interest, see e.g. Goldberg, 397 U.S. at 266-271; see also Fuentes v.
19 Shevin, 407 U.S. 67, 96-97 (1972); Bell v. Burson, 402 U.S. 535, 540 (1971); North Georgia
20 Finishing, Inc. v. DiChem, Inc., 419 U.S. 601, 607 (1975). “The fundamental requisite of due
21 process of law is the opportunity to be heard,” Grannis v. Ordean, 234 U.S. 385, 394 (1914), and
22 as such, offenders should have, at a minimum, the ability to contest a denial of a certificate of
23 discharge through a formal process. This opportunity “must be tailored to the capacities and
24 circumstances of those who are to be heard.” Goldberg, 397 U.S. at 269-69. Finally, under the
25 third factor, the state’s interest would, in fact, be promoted by allowing offenders the ability to
26 challenge the denial of a certificate of discharge, because “[f]rom its founding the Nation’s basic
27 commitment has been to foster the dignity and well-being of all persons within its borders.”
28 Goldberg, 397 U.S. at 264-65. By affording offenders the opportunity to address decisions made
beyond their control regarding the property interest created by RCW § 9.94A.220 ensures the

1 objective of procedural due process, "to prevent government 'from abusing [its] power, or
2 employing it as an instrument of oppression,'" Collins v. Harker Heights, 503 U.S. 115, 126
3 (1992), is met.


4
5 **VII. CONCLUSION**

6 Washington State's felon disenfranchisement scheme, in concert with historical and social
7 conditions which establish a causal link between the law and the denial of the right of Plaintiffs
8 to vote on the basis of race, violates Section 2 of the Voting Rights Act. In addition, the
9 implementation of the scheme through RCW § 9.94A.220 creates barriers to the ballot box for
10 Plaintiffs as convicted offenders, again impermissible under VRA § 2. Felon disenfranchisement
11 also denies offenders their right to procedural due process under the Fourteenth Amendment.
12 Based on the undisputed material facts contained herein, Plaintiffs request this court to find in
13 favor of this motion for summary judgment and grant the relief requested.

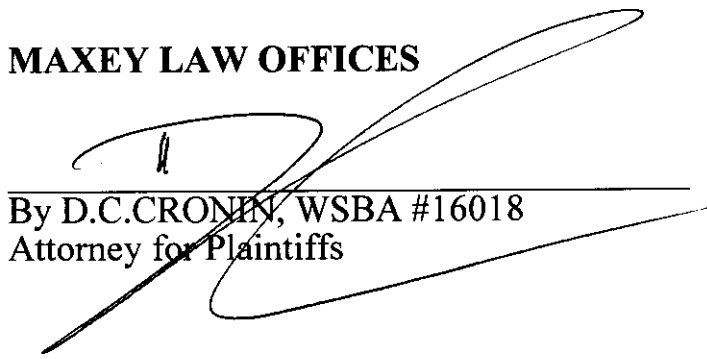
14 DATED this 31ST day of July, 2000

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