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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' RESPONSIVE  
MEMORANDUM OF  
POINTS AND AUTHORITIES  
IN OPPOSITION TO  
DEFENDANTS' MOTION  
FOR SUMMARY  
JUDGMENT  
(ORAL ARGUMENT  
REQUESTED)

I. PRELIMINARY STATEMENT

In response to Defendants' Motion to Dismiss, Plaintiffs quoted Chief Judge Newman of the Second Circuit Court of Appeals in considering a Voting Rights Act (VRA) challenge to New York's felon disenfranchisement law. Chief Judge Newman stated, "[w]hen a state makes a distinction among felons concerning their eligibility to vote that has the effect of denying blacks the right to vote to a much greater extent than whites, a case challenging the distinction can be viewed as mainly a case about felons or mainly a case about race." Baker v. Pataki, 85 F.3d 919, 941 (1996) (emphasis added); Pls.' Mem. of Authorities in Opp'n to Defs.' Mot. to Dismiss at 1-2. This court agreed with that sentiment and allowed Plaintiffs to proceed with their claim that Article 6 § 3 of the Washington State

1 Constitution is invalid to the extent it discriminates on the basis of race. See Farrakhan v.  
2 Locke, 987 F.Supp. 1304, 1314 (1997).

3 Baker resulted in a 5-5 split because five judges on the Court of Appeals saw criminal  
4 disenfranchisement as primarily an issue of felons and five judges saw it as an issue about  
5 race. Baker, 85 F.3d at 941. It is apparent from their Motion for Summary Judgment  
6 Defendants seek to make this a case about felons. The issue is presented by Defendants  
7 focusing on the six Plaintiffs, the crimes they committed, and the permissible exercise of  
8 state power in punishing felons by fencing them out of the franchise. Thus, the same  
9 fundamental difference in approach that evenly divided the ten judges in Baker divides  
10 Plaintiffs and Defendants today. Notwithstanding Defendants' arguments to the contrary,  
11 the case at bar is purely a challenge to the racially discriminatory effect of the operation of  
12 Article 6 § 3 pursuant to Section 2 of the VRA, and is therefore, by definition, a case only  
13 about race.

## 14 II. QUESTIONS PRESENTED

- 15 **A. Is the State Action of Disenfranchising Felons Under Article 6 § 3 Separate and**  
16 **Distinct From the Entry of Individual Judgments and Sentences Against Felons?**
- 17 **B. As Plaintiffs Are Not Attacking Their Valid State Court Judgments and**  
18 **Sentences, Do Defendants' Challenge to Subject Matter Jurisdiction and**  
19 **Arguments of Claim and Issue Preclusion Fail?**
- 20 **C. May Plaintiffs Bring a VRA § 2 Claim Even If They Lack the Underlying Right**  
21 **to Vote?**
- 22 **D. Did Congress Intend the Voting Rights Act, As Amended, To Encompass Voting**  
23 **Restrictions Resulting In the Denial of the Vote On the Basis of Race, Such As**  
24 **Article 6 § 3 of the Washington State Constitution?**
- 25 **E. Are Statistical Disparities, When Coupled With Historical and Social Factors In**  
26 **a "Totality of Circumstances" Inquiry, Sufficient to Establish a Violation of VRA**  
27 **§ 2?**
- 28 **F. Is a History of Advancement of Minority Voting Rights in Washington Irrelevant**  
**In Light of a Lack of Official Concern About the Voting Rights of Former and**  
**Current Offenders, a Population With Disproportionate Minority**  
**Representation?**
- G. Do Defendants' Admissions Support Plaintiffs' Argument the Process For**  
**Restoration of Voting Rights in Washington Are Unduly Burdensome For**  
**Offenders, a Population With Disproportionate Minority Representation?**

1 **III. ARGUMENT**

2 **A. The State Action of Disenfranchising Felons Under Article 6 § 3 is Separate and**  
3 **Distinct From the Entry of Individual Judgments and Sentences Against Felons.**

4 Defendants assert “[a]n offender is disenfranchised when the judgment and sentence  
5 is entered.” Defs.’ Mem. of Authorities in Supp. of Mot. for Summ. J. and Dismissal at 6  
6 [hereinafter Defs.’ Mem.]. As such, Defendants allege Plaintiffs are effectually challenging  
7 their judgments and sentences by challenging the operation of Article 6 § 3. Defs.’ Mem.  
8 at 15, 39. It is upon this faulty premise Defendants raise their claims in support of Summary  
9 Judgment.

10 There is no legal foundation to support the proposition disenfranchisement occurs as  
11 a part of the entry of judgment and sentence. In fact, the record supports the contrary.  
12 Disenfranchisement is an administrative function conducted by a county auditor pursuant  
13 to Article 6 § 3’s prohibition on voting by persons convicted of a felony. See RCW §  
14 29.10.097. Felons lose the right to vote subsequent to the entry of judgment and sentence  
15 when a county auditor removes the offender’s name from the county’s voting roles after  
16 receiving the names of persons from that county convicted of felonies. Pls.’ Statement of  
17 Material Facts ¶ 43, 44; RCW § 29.10.097; see also Defs.’ Statement of Material Facts ¶  
18 115, 116, Ex. 63 (Decl. of David Elliott) ¶ 8. The nature of the crimes committed have no  
19 bearing or relevance on county auditors’ revocation of voting rights pursuant to their  
20 statutory duty. Defs.’ Statement of Material Facts ¶ 115. Thus, disenfranchisement is not  
21 an aspect of an offender’s judgment or sentence. It is a collateral result of an offender  
22 becoming a member of a class of citizens to be denied the franchise, as defined by Article  
23 6 § 3.<sup>1</sup>

24 \_\_\_\_\_  
25 <sup>1</sup> It is also helpful to note the felon disenfranchisement restriction at issue is found  
26 in the Washington State Constitution under the heading “Elections and Elective  
27 Rights.” The statutes implementing this restriction are found in Section 29 of the  
28 RCW (“Elections”) and not Sections 9 or 9A, the criminal section of the RCW.

1 There is a distinct and substantial difference between “judgment and sentence” and  
2 “disenfranchisement.” A judgment and sentence is imposed as punishment for criminal  
3 activity on the basis of the specific actions of the offender. Felon disenfranchisement is a  
4 voting restriction and is imposed on all felons indiscriminately on the basis of their status  
5 as felons. As it defines a felon by his status as a member of a group and not by his specific  
6 crime, judgment, or sentence, Article 6 § 3 is a voting restriction akin to a durational  
7 residence requirement, prohibiting voter registration by persons who have a characteristic  
8 or status that causes them to fall within a particular class of persons. See Dunn v. Blumstein,  
9 405 U.S. 330 (1972) (evaluating Tennessee’s durational residence laws as they deprive a  
10 class of persons with a particular status (i.e., “new” state residents) from registering to vote).  
11 In understanding the clear distinction between state action directed at an individual on the  
12 basis of “status” as opposed to state action directed at an individual on the basis of  
13 behaviors, examples from Equal Protection Clause cases are helpful. See Romer v. Evans,  
14 517 U.S. 620 (1996) (holding that a state constitutional provision denying homosexuals  
15 protection against discrimination is unconstitutional because it targets all homosexuals as  
16 members of a class rather than targeting homosexual behavior).

17 Voting rights case law bears out this distinction. In Hunter v. Underwood, 471 U.S.  
18 222 (1985), appellees were convicted of presenting worthless checks. Id. at 224. The Boards  
19 of Registrars for Montgomery and Jefferson Counties in Alabama subsequently blocked  
20 appellees from the voter roles pursuant to Article 8 § 182 of the Alabama Constitution that  
21 disenfranchises anyone “convicted of, among other offenses, ‘any crime . . . involving moral  
22 turpitude.’” Id. at 223. Appellees challenged the provision on Equal Protection grounds, and  
23 the Court of Appeals found that the provision had been adopted with discriminatory intent  
24 and invalidated the constitutional provision. Id. at 224-225. The Supreme Court agreed with  
25 the Court of Appeals’ reasoning and upheld the ruling, even though appellees’  
26 disenfranchisement had been a collateral result of their commission of crimes. Id. at 233.  
27 Clearly, the Supreme Court saw the appellees’ Equal Protection attack on the Alabama  
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1 constitutional provision as a challenge of a voting restriction, not a challenge of appellees'  
2 valid convictions.

3 This distinction is further clarified by Dillenburg v. Kramer, 469 F.2d 1222 (9<sup>th</sup> Cir.  
4 1972). The appellant attempted to register to vote while on parole but "was thwarted solely  
5 because he is disenfranchised under [Article 6 § 3 and RCW § 29.01.080]." Id. at 1223. The  
6 court, in its attempt to define the state interest served by disenfranchisement, determined  
7 "[t]he temptation to identify the interest as state concern for additional punishment has been  
8 resisted because the characterization creates its own constitutional difficulties." Id. at 1224.  
9 If disenfranchisement cannot be classified as a part of criminal punishment, it cannot, by  
10 definition, be classified as a part of judgment and sentencing.

11 The disenfranchisement of Plaintiffs was a separate state action from the imposition  
12 of Plaintiffs' judgments and sentences and is only collaterally related to their individual  
13 convictions. The loss of the right to vote was not the direct result of Plaintiffs' judgments  
14 and sentences; it was the direct result of Plaintiffs becoming members of a group with a  
15 particular status defined by Article 6 § 3. Therefore, Plaintiffs are not challenging their  
16 individual judgments and sentences. Plaintiffs are challenging Article 6 § 3's revocation of  
17 their voting rights on the basis of their status as felons, which has the effect of denying them  
18 the right to vote on the basis of race. Pls.' Fourth Am. Compl. ¶ 15.

19 **B. Defendants' Challenges to Subject Matter Jurisdiction Under the Rooker-Feldman**  
20 **Doctrine and Arguments of Claim and Issue Preclusion Fail As Plaintiffs Are Not**  
**Attacking Their Valid State Court Judgments and Sentences.**

21 Defendants argue Plaintiffs may not bring a VRA challenge to Article 6 § 3 because  
22 it implicates a challenge to Plaintiffs' individual judgments and sentences and therefore this  
23 court lacks subject matter jurisdiction pursuant to the Rooker-Feldman doctrine and under  
24 the concepts of res judicata and collateral estoppel. See Defs.' Mem. at 6-15. As it is  
25 established Plaintiffs' loss of voting rights resulted from Article 6 § 3, a voting classification  
26 that is collateral to Plaintiffs' judgments and sentences, these arguments fail.

27 In advancing the Rooker-Feldman doctrine, Defendants claim the operation of Article  
28

1 6 § 3 is “inextricably intertwined with the state court’s decision.” District of Columbia  
2 Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983); Rooker v. Fidelity Trust Co., 263  
3 U.S. 413, 416 (1923). To use Defendants’ own enumerated test for Rooker-Feldman  
4 applicability, “[i]n order to determine whether a claim is inextricably intertwined with a  
5 state court claim, the federal court must analyze whether the relief requested in the federal  
6 action would effectively reverse the state court decision or void its ruling.” Defs.’ Mem. at  
7 7-8 (citing Bechtold v. City of Rosemount, 104 F.3d 1062, 1065 (8<sup>th</sup> Cir. 1997)).

8 In the instant case, Plaintiffs are asking for this court to declare Article 6 § 3 violative  
9 of the VRA and enjoin Defendants from enforcing Article 6 § 3. Pls.’ Fourth Am. Compl.  
10 X. As disenfranchisement is collateral to the entry of Plaintiffs’ judgments and sentences,  
11 granting the relief requested will have no effect on any state court decisions. The judgments  
12 and sentences imposed on Plaintiffs will stand irrespective of an injunction against Article  
13 6 § 3. See Defs.’ Statement of Material Fact in Supp. of Motion For Summ. J. and Dismissal  
14 ¶¶ 6, 8, 10, 21, 27, 36, 41, 43, 46. All Plaintiffs would be obligated to serve their terms of  
15 incarceration, perform all hours of community service, pay all legal financial obligations,  
16 and meet all other terms of their sentences and judgments.

17 Further, “[t]he fundamental and appropriate question to ask is whether the injury  
18 alleged by the federal plaintiff resulted from the state court judgment itself or is distinct  
19 from that judgment,” Young v. Murphy, 90 F.3d 1225, 1230 (7<sup>th</sup> Cir. 1996). Invalidating the  
20 Article 6 § 3 voting restriction, which is distinct from judgment and sentencing schemes,  
21 has no bearing on any state court decisions with respect to Plaintiffs’ sentencing obligations,  
22 nor will it overturn their felony convictions. The voting restriction at issue can in no way  
23 be characterized as “inextricably intertwined” with Plaintiffs’ judgments and sentences.  
24 Therefore, the Rooker-Feldman doctrine cannot be used here to challenge subject matter  
25 jurisdiction.

26 Additionally, Rooker-Feldman is inapplicable because, in order for the doctrine to  
27 apply, claimants must have had reasonable opportunity to bring forth their claims in state  
28

1 court. Wood v. Orange County, 715 F.2d 1543, 1547 (11<sup>th</sup> Cir. 1983). Plaintiffs lacked this  
2 opportunity, since they could not have presented a VRA § 2 claim against their  
3 disenfranchisement during their criminal trials. Disenfranchisement is not a part of judgment  
4 and sentencing and thus such a claim would have been irrelevant to the criminal court. This  
5 lack of opportunity demonstrates their claim is not inextricably intertwined with their  
6 judgments and sentences. See Powell v. Powell, 80 F.3d 464, 467 (11<sup>th</sup> Cir. 1996). Finally,  
7 if a claim attacks a state rule or procedure in general, as is Plaintiffs' challenge to Article  
8 6 § 3, it is not deemed to be inextricably intertwined with the state court judgment. Feldman,  
9 460 U.S. at 487. Thus, this court maintains jurisdiction over this action under 28 U.S.C. §§  
10 1331 and 1343 (1) (3) and (4); and 42 U.S.C. §§ 1971, 1973, and 1983. Plaintiffs' request  
11 for declaratory relief is authorized by 28 U.S.C. § 2201.

12 For the same reasons, Defendants' argument that Plaintiffs are barred by res judicata  
13 and collateral estoppel also fails. For res judicata to apply, it must be shown Plaintiffs had  
14 the opportunity to litigate VRA actions against Article 6 § 3 during their criminal trials. See  
15 Migra v. Warren City School Dist. Bd. Of Ed., 465 U.S. 75, 77 n.1 (1984). As stated above,  
16 such actions would have been irrelevant to the criminal court as disenfranchisement is not  
17 a component of the judgment and sentence. It is a voting restriction effectuated by county  
18 auditors. As the definition of collateral estoppel clearly states, Plaintiffs would have to be  
19 seeking relitigation of issues of fact and law from their individual convictions. Robi v. Five  
20 Platters, Inc., 838 F.2d 318, 322 (9<sup>th</sup> Cir. 1988). Plaintiffs herein do not challenge any  
21 aspects of their individual trials, convictions, judgments, or sentences. They are challenging  
22 a voting qualification that denies them the ability to register and vote because of their status  
23 as members of a class of citizens, which thereby has the effect of denying them the right to  
24 vote on the basis of race. See Pls.' Fourth Am. Compl. ¶ 15.

### 25 **C. Plaintiffs Are Not Barred By Their Loss Of the Right To Vote From Bringing a** 26 **Claim Under the Voting Rights Act**

27 Defendants argue that Plaintiffs may not bring a claim under the VRA because the  
28 VRA does not "aid an individual who lacks the underlying right to vote." Defs.' Mem. at

1 16. Therefore, “[b]efore Plaintiffs may bring this action under [the VRA], they must have  
2 the underlying right to vote.” Defs.’ Mem. at 19-20. This reasoning fails to recognize the  
3 plain meaning of the Voting Rights Act.

4 The language of VRA § 2 clearly demonstrates the statute exists to address “political  
5 processes leading to nomination or election in the State or political subdivision [that] are  
6 not equally open to participation by member of a class of citizens protected by subsection  
7 (a). . . .” 42 U.S.C. § 1973 (b). Plaintiffs, as minorities, are a class protected by subsection  
8 (a). See 42 U.S.C. § 1973 (a). But for their classification as felons and the operation of  
9 Article 6 § 3 of the Washington State Constitution, Plaintiffs are eligible to register to vote  
10 in the State of Washington. Therefore, Article 6 § 3 prevents participation in Washington  
11 State political processes and is covered by VRA § 2.

12 To claim the VRA’s purpose is only to secure political participation of minorities  
13 already registered to vote ignores the original purpose of the Act “as a remedial provision  
14 directed specifically at eradicating **discriminatory practices that restricted blacks’ ability**  
15 **to register and vote** in the segregated South.” Holder v. Hall, 512 U.S. 874, 892-3 (1994)  
16 (emphasis added). Article 6 § 3 restricts the ability of Plaintiffs to register and vote in  
17 Washington. Defendants promote a narrow reading of the VRA as applying only to  
18 minorities already registered to vote. Defs.’ Mem. at 16. Such a narrow reading is  
19 contradictory to the purpose of the Act and runs counter to Congress’ intent to use the Act  
20 to provide the widest possible protection to the franchise of American citizens. See U.S. v.  
21 Lewis, 514 F.Supp. 169 (M.D. Pa. 1981). Plaintiffs lack the underlying right to vote because  
22 of the operation of the statute they are challenging; to say that they cannot challenge the  
23 statute because they are not registered as a result of the statute is circular reasoning.

24 **D. Defendants Misread the Legislative History and Congressional Intent Behind the**  
25 **1982 Amendments to the VRA, Which Ensures All Voting Devices That Produce**  
**Discriminatory Effects Fall Within VRA § 2.**

26 The Voting Rights Act of 1965 was designed by Congress to banish racial  
27 discrimination in voting. South Carolina v. Katzenbach, 383 U.S. 301 (1966). Contrary to  
28

1 Defendants' assertion, the 1965 Act did not bar the application of tests or devices that have  
 2 the **effect** of denying the vote on account of race or color; it only barred those tests or  
 3 devices used for the **purpose** of denying the vote on account of race or color. Defs.' Mem.  
 4 at 20-21. Since the 1965 Act only prohibited tests or devices that were enacted with the  
 5 intent to discriminate on the basis of race, the Court held that the 1965 Act provided no  
 6 protections beyond those afforded by the Fifteenth Amendment.<sup>2</sup> Mobile v. Bolden, 446  
 7 U.S. 55, 60-61 (1980). It was not until 1982 that Congress amended VRA § 2 by adding the  
 8 words "in a manner which results in a denial or abridgement of," thereby greatly expanding  
 9 the scope of tests or devices implicated under the VRA. See 42 U.S.C.A. § 1973 (West  
 10 1994). This enlargement of the power of VRA § 2 was within Congress' enforcement power  
 11 under the Fifteenth Amendment and does not encroach on areas reserved to the states by the  
 12 Constitution. Jordan v. Winter, 604 F.Supp. 807 (N.D. Miss.), aff'd 469 U.S. 1002 (1984);  
 13 U.S. v. Louisiana, 265 F.Supp. 703 (E.D. La.), aff'd 386 U.S. 270 (1967).

14 Defendant argues Congress did not intend for criminal disenfranchisement statutes  
 15 to fall within the amended 1982 Act, though there is no evidence in the legislative history  
 16 to support this proposition. Defs.' Mem. at 22. Instead, Defendants would have this court  
 17 rely on the legislative history of the original 1965 Act and the 1993 National Voter  
 18 Registration Act, both of which seem to indicate that Congress recognized the validity of  
 19 criminal disenfranchisement schemes enacted by the states. Defs.' Mem. at 21.

20 First, Plaintiffs agree state governments may create constitutionally-valid voting  
 21 qualifications that exclude convicted felons, see Richardson v. Ramirez, 418 U.S. 24, 55-56  
 22 (1974), and that there is a long history of the use of felon disenfranchisement laws in the  
 23 United States. See Defs.' Mem. at 16-19. Therefore, it is not surprising to Plaintiffs that  
 24 Congress recognizes this practice occurring among the states. Plaintiffs are not challenging

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25  
 26 <sup>2</sup> "The right of citizens of the United States to vote shall not be denied or abridged  
 27 by the United States or by any State on account of race, color, or previous  
 28 condition of servitude." U.S. Const. amend XV.

1 this practice under VRA § 2. Plaintiffs are instead challenging the proscribed effect of  
2 Washington's felon disenfranchisement law as applied to minorities. Thus, the fact that  
3 Congress recognizes states' practices of disenfranchising felons has no bearing on whether  
4 Congress intends to prohibit racially discriminatory effects in voting practices.

5 Second, Congress' silence on felon disenfranchisement laws in the 1982 amendments  
6 does not indicate an intent to exclude felons from VRA § 2 coverage. Defs.' Mem. at 22.  
7 To the contrary, this silence is positive evidence that Congress intended the opposite. See  
8 Chisom v. Roemer, 501 U.S. 380, 395-96 (1991) (holding that Congress' failure to mention  
9 a category of voting claims in VRA § 2's legislative history demonstrates Congress did not  
10 intend to exclude the category from VRA § 2's coverage); see also R.E. Dietz Corp. v.  
11 United States, 939 F.2d 1, 7 (2d Cir. 1991) (refusing to "foreclose the application of [a  
12 statute] to circumstances that fall squarely within its meaning" but that are not mentioned  
13 in the legislative history). Even the dissent in Chisom would disagree with Defendants'  
14 interpretation, as they stated the Court would "apply the statute, not the legislative history,  
15 and certainly not the absence of legislative history." Chisom, 501 U.S. at 406 (Scalia, J.,  
16 dissenting).

17 Further, the lack of legislative history indicating Congress sought to carve an  
18 exception out of the broad coverage afforded by the 1982 amendments for felon  
19 disenfranchisement is indicative of Congress' desire to encompass all voting practices that  
20 have a discriminatory result, including felon disenfranchisement. Defs.' Mem. at 22. This  
21 interpretation is consistent with the Senate Report accompanying the 1982 amendments that  
22 characterized VRA § 2 as a "general prohibition against voting discrimination nationwide."  
23 S. Rep. No. 417, 97<sup>th</sup> Cong., 2d Sess., 9, 15 (1982), reprinted in 1982 U.S.C.C.A.N. 177,  
24 186, 192.<sup>3</sup> The courts have applied this interpretation of the VRA to challenges of a wide  
25 range of voting "tests or devices" since the 1982 amendments, thereby contradicting

26 \_\_\_\_\_  
27 <sup>3</sup> The 1982 Senate Report also indicates this intent is apparent in the original 1965  
28 enactment of the VRA. See S.Rep. 417, at 5-6, 1982 U.S.C.C.A.N. 177, 182-83.

1 Defendants' contention that an exception from the VRA's coverage for felon  
2 disenfranchisement is supported. See, e.g., Thornburg v. Gingles, 478 U.S. 30 (1986) (multi-  
3 member districts); Mississippi State Chapter, Operation PUSH, Inc. v. Mabus, 932 F.2d 400  
4 (5<sup>th</sup> Cir. 1991) (dual registration system and prohibition on satellite registration); United  
5 States v. Marengo County Commission, 731 F.2d 1546, 1570 (11<sup>th</sup> Cir.1984) (failure of  
6 board of registration to visit rural areas), cert. denied, 469 U.S. 976 (1984); Harris v.  
7 Siegelman, 695 F.Supp. 517, 527-29 (M.D. Ala. 1988) (appointing only white poll officials,  
8 intimidation of minorities at polls, limitation on time allowed in voting booth, requiring  
9 voters seeking assistance to swear oath of inability to write in English); Roberts v. Wasmser,  
10 679 F.Supp. 1513, 1529-32 (E.D. Mo. 1987) (failure to manually count non-computer  
11 readable ballots), rev'd on other grounds, 883 F.2d 617 (8<sup>th</sup> Cir. 1987); Goodloe v. Madison  
12 County Board of Election Commissioners, 610 F.Supp. 2450, 243 (S.D. Miss. 1985)  
13 (invalidation of absentee ballots); Brown v. Dean, 555 F.Supp. 502, 505-06 (D.R.I. 1982)  
14 (location of polling place). In summary, both the clear intent of Congress and subsequent  
15 judicial history demonstrate the 1982 amendments to the VRA were designed to encompass  
16 all forms of tests or devices that produce a racially discriminatory effect, irrespective of the  
17 otherwise valid nature of the test or device.

18 Finally, a finding VRA § 2 does not encompass felon disenfranchisement laws is  
19 contrary to well-established principles of statutory construction. The plain and unambiguous  
20 language of VRA § 2 proscribes, without exception, all voting qualifications, standards,  
21 practices, and procedures that "result[] in a denial or abridgement of the right of **any citizen**  
22 **of the United States** to vote on account of race or color. . . ." 42 U.S.C. § 1973 (a)  
23 (emphasis added). This clear language provides no exception for felon disenfranchisement.  
24 Plaintiffs, though convicted felons, remain citizens. Article 6 § 3, which denies citizens the  
25 right to register and vote, falls squarely within VRA § 2.

26 For the foregoing reasons, Defendants' argument that Congress did not intend VRA  
27 § 2 to cover felon disenfranchisement is baseless and unsupported.

1 “[I]n the absence of a ‘clearly expressed legislative intention to the contrary,’  
 2 the language of the statute itself ‘must ordinarily be regarded as conclusive.’”  
 3 United States v. James, 478 U.S. 597, 606 (1986) (quoting Consumer Product  
 4 Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). Unless  
 exceptional circumstances dictate otherwise, “[w]hen we find the terms of a  
 statute unambiguous, judicial inquiry is complete.” Rubin v. United States, 449  
 U.S. 424, 430 (1981).

5 Burlington N. R.R. Co. v. Oklahoma Tax Commission, 481 U.S. 454, 461 (1987); see also  
 6 Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994) (“we do not resort to legislative  
 7 history to cloud a statutory text that is clear”). Article 6 § 3 operates within the context of  
 8 social and historical conditions to have the effect of racially discriminatory vote denial.  
 9 Thus, it is a prohibited test or device under VRA § 2 and is invalid only insofar as it acts to  
 10 deny access to voting on the basis of race.

11 **E. Defendants Fail To Demonstrate Plaintiffs’ Showing of Social and Historical**  
 12 **Factors Are Insufficient To Establish a Causal Link Between the Operation of**  
**Article 6 § 3 and Observed Discriminatory Effects On Minorities.**

13 *1. Plaintiffs Agree a Showing of Disproportionate Effects Alone Is Not Dispositive*  
 14 *Evidence of a VRA § 2 Violation*

15 Defendants present a number of cases that stand for the proposition that  
 16 disproportionate impact on minorities alone is an insufficient basis to bring a claim against  
 17 a voting device under VRA § 2. Defs.’ Mem. at 24. Plaintiffs concur; case law demonstrates  
 18 that a successful VRA § 2 claim must present more than mere statistical disproportionality  
 19 in challenging the effect of a voting device. See Smith v. Salt River Project Agricultural  
 20 Improvement and Power District, 109 F.3d 586, 595 (9<sup>th</sup> Cir. 1997) (holding that a voting  
 21 device’s disparate impact alone does not satisfy a VRA § 2 inquiry; a causal connection  
 22 must be shown between the voting device and prohibited discriminatory result); Wesley v.  
 23 Collins, 791 F.2d 1255, 1261 (6<sup>th</sup> Cir. 1986) (the disproportionate racial impact of a law is  
 24 not a per se violation of the VRA, but rather directs the inquiry into historical, social, and  
 25 political factors). This court has explicitly requested Plaintiffs in this action show more than  
 26 mere disproportionate impact on minorities, predicated upon an analysis of the interaction  
 27 of Article 6 § 3 with social and historical conditions. Farrakhan, 987 F.Supp. at 1312.

1 Plaintiffs have accomplished this in extensive detail. Plaintiffs have shown criminal  
2 disenfranchisement laws have been enacted historically with the explicit intent to negatively  
3 impact the ability of blacks to register and vote. Pls.' Mem. at 10-13. In Washington State,  
4 groups of color, including Asians and Native Americans, faced open hostility directed  
5 against their ability to exercise the franchise at the founding of the State. Pls.' Mem. at 14.  
6 The original Washington State Constitution restricted the vote through the use of literacy  
7 tests, residency requirements, and by excluding specific groups including Native Americans  
8 from registering to vote. Pls.' Mem. at 14-15. A contributing factor to this phenomena was  
9 the importation by constitutional convention delegates of many electoral qualifications from  
10 other state constitutions, established prior to the enactment of the Civil War Amendments.  
11 Pls.' Mem. at 15. Finally, Plaintiffs indicate that the history of Washington State and the  
12 Pacific Northwest has seen the imposition of other racially-directed laws and countless acts  
13 of discrimination based on racial animus, some of which may be found in state case law.  
14 Pls.' Mem. at 15-16.

15 Plaintiffs further demonstrate minorities receive disparate treatment within the  
16 criminal justice system, both nationally and statewide. Pls.' Mem. 17-22. This disparate  
17 treatment is driven not only by the differentials in arrest, pre-trial practices, prosecution, and  
18 conviction, but by complex sociological factors as well. Pls.' Mem. at 22-24. This  
19 differential treatment, compounded by historical racial discrimination, has led to a  
20 statistically-disparate number of minorities convicted of felonies, both nationally and  
21 statewide, thereby resulting in a disparate number of minorities in Washington classified as  
22 a group by Article 6 § 3 to be denied the right to vote. Pls.' Mem. at 24-27. Plaintiffs  
23 conclude by demonstrating felon disenfranchisement laws, such as Article 6 § 3, are not  
24 only anomalous as racially-motivated voting qualifications held over from Reconstruction  
25 and based upon irrational public policy suppositions, but exist alone in the United States,  
26 rejected by all other democratic nations globally. Pls.' Mem. 27-31.

1 These preceding points compose the social and historical factors that create the  
2 totality of the circumstances inquiry under VRA § 2. 42 U.S.C. § 1973 (b). This inquiry  
3 establishes the causal link between felon disenfranchisement in Washington and the denial  
4 of voting on the basis of race, thereby meeting the results test of 42 U.S.C. § 1973 (a)  
5 through a showing that extends far beyond mere statistical disproportionality.

6 *2. The Cases Cited By Defendants Are Clearly Distinguishable From the Action At Bar*

7 Defendants rely on Salt River to support their argument disproportionality alone is  
8 not grounds for a VRA § 2 claim. Defs.' Mem. at 24-25. The court in Salt River was  
9 considering a vote dilution, not vote denial, claim and therefore correctly applied the seven  
10 Senate factors. Salt River, 109 F.3d at 595. As the parties to the action had stipulated away  
11 all showings of exigent historical and social factors, the Salt River court was forced to  
12 decide the case on the seven Senate factors, providing no weight to the bare showing of  
13 statistical disproportionality. Id. at 596.

14 In the case at bar, Plaintiffs assert Article 6 § 3, which classifies them as to their status  
15 as felons, acts to deny, not dilute, their vote on the basis of race. Pls.' Fourth Am. Compl.  
16 V-VIII. Therefore, the Senate factors are not necessarily relevant to Plaintiffs claim. See  
17 Voinovich v. Quilter, 507 U.S. 146, 158 (1993); Thornburg v. Gingles, 478 U.S. 30, 44-45  
18 (1996). But the primary difference between Salt River and the instant case is Plaintiffs have  
19 supplemented their showing of statistical disparities with the broad range of social and  
20 historical factors to establish a causal connection between Article 6 § 3 and denial of the  
21 vote on the basis of race, as outlined above. The parties in Salt River stipulated away all  
22 of these factors, and that court was unable to consider any factors similar to those presented  
23 by Plaintiffs in this action. Salt River, 109 F.3d at 595 ("The district court's inquiry was  
24 somewhat constrained by the parties' joint stipulation of facts; Appellants effectively  
25 stipulated to the nonexistence of virtually every circumstance which might indicate [the  
26 voting device] results in racial discrimination").

27 Defendants continue their argument by citing to a number of cases to demonstrate  
28

1 Plaintiffs' allegations of disproportionality are insufficient to sustain a VRA § 2 action  
2 against Article 6 § 3. Defendants present these cases premised on the theory  
3 disenfranchisement of felons in Washington State is not a voting restriction but a  
4 component of criminal punishment. No such case holds thus, and the decision of the  
5 Supreme Court in Hunter contradicts this approach. Therefore, the cases relied upon by  
6 Defendants are easily distinguishable from the instant case.

7 Defendants cite to McClesky v. Kemp, 481 U.S. 279 (1987). In McClesky, plaintiffs  
8 attacked the Georgia death sentencing scheme on the basis of racial disproportionality in  
9 the imposition of the death sentence based on a study conducted by Professors David C.  
10 Baldus, Charles Pulaski, and George Woodworth (the "Baldus Study"). McClesky, at 286.  
11 This is distinguishable from the case at bar because Plaintiffs are not attacking  
12 disproportionality in the imposition of their sentences and judgments under VRA § 2. They  
13 are challenging the disparate effect of the operation of the Article 6 § 3 voting restriction.  
14 Additional cases cited by Defendants regarding judicial bias are similarly distinguishable.  
15 Plaintiffs do not argue there was actual bias in their judgments and sentences. They argue  
16 classification by their status as felons results in vote denial on the basis of race. Finally,  
17 Defendants present United States v. Armstrong, 517 U.S. 456 (1996). Defendants in  
18 Armstrong presented a study showing disparities in prosecution for crack cocaine compared  
19 to powder cocaine to demonstrate defendants were selectively prosecuted. Again,  
20 Armstrong turned on bias in adjudication; Plaintiffs do not bring this challenge against their  
21 adjudications. They bring it against a voting device that, based upon their status, denies  
22 them the vote in a racially discriminatory manner. While Plaintiffs present substantial  
23 documentation that the criminal justice system produces disparate, negative effects on  
24 minorities as compared to whites, they do so as a part of establishing the totality of  
25 circumstances supporting the VRA § 2 results test, not as a direct challenge to their own  
26 valid judgments and sentences.

27 Finally, Defendants argue the court's reasoning in Wesley v. Collins is persuasive and  
28

1 should be applied here. The Wesley court based its holding on the same misunderstanding  
2 of the distinction between disenfranchisement as a voting restriction and a valid criminal  
3 judgment and sentence, so it is not surprising that Defendants would advance it here. The  
4 Wesley trial court demonstrated this fundamental misinterpretation when it stated:

5 [f]elons are not disenfranchised based on any immutable characteristic, such  
6 as race, but on their conscious decision to commit an act for which they  
7 assume the risks of detection and punishment. The law presumes that all men  
8 know its sanctions. Accordingly, the performance of a felonious act carries  
9 with it the perpetrator's decision to risk disenfranchisement in pursuit of the  
10 fruits of his misdeed.

11 Wesley v. Collins, 605 F.Supp. 802, 813 (1985). This reasoning is faulty.<sup>4</sup> Wesley stands  
12 for the proposition that a device resulting in vote denial on the basis of race against citizens  
13 who are classified as felons cannot be invalidated under VRA § 2 because the restriction  
14 flows from individual actions. If this were true, a literacy test could not be invalidated under  
15 VRA § 2 because the resultant vote denial flows from individuals choosing not to learn to  
16 read. Similarly, a districting plan could not be challenged under VRA § 2 because the  
17 resultant vote dilution flows from individuals choosing to live in particular areas.

18 The Wesley rationale is clearly erroneous and directly contradicts the approach of the  
19 Supreme Court in Hunter. Had the Court adopted Wesley's reasoning, appellees in Hunter  
20 could not have invalidated Article 8 § 182 of the Alabama Constitution, no matter how  
21 discriminatory the purpose behind its enactment, because their disenfranchisement under  
22 the statute would have been indistinguishable from their convictions for crimes of "moral  
23 turpitude." To presume Wesley is correct is to presume any legal restriction that is imposed  
24 on citizens classified as felons will stand, irrespective of any demonstrable racially

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25 <sup>4</sup> Other cases cited by Defendants provide no support for the Wesley decision. The  
26 holding in Jones v. Edgar, 3 F.Supp.2d 979 (C.D. Ill. 1998), accepted the incorrect  
27 Wesley interpretation without analysis. Fischer v. Governor, 749 A.2d 321 (N.H.  
28 2000) is irrelevant to this action because the VRA was not a basis for that action  
against felon disenfranchisement.

1 discriminatory purpose or effect of the restriction.

2 In summary, Defendants erroneously characterize felon disenfranchisement as a  
3 criminal sanction indistinguishable from a judgment or sentence. Thus, Defendants fail to  
4 present a compelling rationale or legal foundation to reject Plaintiffs' VRA § 2 challenge  
5 to Article 6 § 3.

6 *3. The Voting Rights Act Does Not Require Plaintiffs To Show the Challenged Voting*  
7 *Device Affects Election Outcomes*

8 Defendants allege, without citation to authority, in order to establish the totality of  
9 circumstances test under 42 U.S.C. § 1973 (b), Plaintiffs are required to demonstrate "an  
10 actual effect on election results." Defs.' Mem. at 30 n.5. This assertion is contrary to the  
11 plain language of the statute that states:

12 [a] violation . . . is established if, based on the totality of circumstances, it is  
13 shown that the political processes leading to nomination or election in the  
14 State or political subdivision are **not equally open** to participation by  
[minorities] in that [minorities] have **less opportunity** than other members of  
the electorate to participate in the political process . . . .

15 42 U.S.C. § 1973 (b) (emphasis added). Clearly, VRA § 2 seeks to protect equality of  
16 access to electoral processes by minorities, and abridgement of this right to access is a  
17 violation of the Act. The outcomes of electoral processes are not relevant factors to be  
18 considered in establishing a violation of VRA § 2.

19 Defendants attempt to support their claim by pointing to the low percentage of felons  
20 who have their voting rights revoked by the operation of Article 6 § 3. Defs.' Mem. at 35.  
21 They also indicate that Plaintiffs were either unregistered to vote at the time of their  
22 convictions, or did not participate in the voting process. Defs.' Mem. at 36. Defendants  
23 claim this demonstrates felon disenfranchisement does not "dramatically change[] the  
24 landscape of registered voters." Defs.' Mem. at 35. Whether Article 6 § 3 has a substantial  
25 effect on total numbers of voter registration or on the outcomes of elections has no bearing  
26 on Plaintiffs' claim. The determinative factor in analyzing a claim of vote denial is whether  
27 political processes are not equally open to participation by minorities because of less  
28 opportunity than other members of the electorate to participate in the political process.

1 Houston v. Lafayette County, 841 F.Supp. 751 (N.D. Miss. 1993). The VRA only requires  
 2 that a state provide equality of voting opportunity, not guarantee equality of electoral  
 3 success. Smith v. Brunswick County, Va., Bd. Of Sup'rs, 984 F.2d 1393 (4<sup>th</sup> Cir. 1993).  
 4 Defendants fail in their duty to provide equality of access to electoral processes by  
 5 minorities through the enforcement of Article 6 § 3, as it has the effect of denying  
 6 minorities voting rights on the basis of race. Whether the absence of the Article 6 § 3  
 7 voting restriction would have any substantial effect on voter participation or election  
 8 outcomes is not relevant, especially as these factors may be influenced by a variety of  
 9 circumstances unrelated to Plaintiffs' claim.

10 **F. The History of Minority Voting in Washington Has No Bearing on Minority Felon**  
 11 **Voting Participation.**

12 Defendants state “[t]he record in this case fails to demonstrate a history within the  
 13 State of Washington of racial discrimination in voting.” Defs.’ Mem. at 30. Defendants then  
 14 present numerous examples from what they characterize as “Washington’s progressive  
 15 historical record in the voting arena . . . .” Defs.’ Mem. at 32.

16 This posture fails to recognize that Native Americans were specifically singled out  
 17 to be denied the franchise upon the enactment of Article 6 § 1 in 1889. Pls.’ LR 56.1  
 18 Statement of Material Facts ¶ 9. This constitutional restriction was maintained until the  
 19 Article was amended in 1974. See RCWA Wash. Const. Art. 6 § 1 (West 1988). Thus, it  
 20 cannot be said that “[t]he record does not demonstrate denial of . . . Native Americans . . .  
 21 to a candidate-slating process.” Defs.’ Mem. at 31.

22 Further, there is significant anecdotal evidence presented by Defendants that  
 23 Washington State has endeavored to ensure access to voting by minority groups. Defs.’  
 24 Mem. at 33-34. These examples are puzzling when contrasted with the failure by both the  
 25 Secretary of State and Department of Corrections to provide for any program or  
 26 documentation that would assist released offenders in registering to vote. Pls.’ LR 56.1  
 27 Statement of Material Facts ¶¶ 47, 56. This occurs in spite of Defendants’ recognition the  
 28 felon population in Washington State, both incarcerated and outside prison, is comprised

1 of minorities in proportions far in excess of their representation in the general population.  
 2 Defs.' Statement of Material Fact in Supp. of Mot. for Summ. J. and Dismissal, ¶¶ 72, 74,  
 3 75. This apparent contradiction between these approaches of access to voting rights by  
 4 minorities in Washington leads to this logical conclusion: Washington State is only  
 5 concerned about equality of access to political process by minorities who have not been  
 6 convicted of felonies.

7 **G. Defendants' Argument Supports Plaintiffs' Claim That the Process For Restoring**  
 8 **Voting Rights to Felons Results in Barriers to Voter Registration by Minorities**

9 Plaintiffs have challenged the process for reinstatement of civil rights in Washington  
 10 as being "vague, unclear, and unduly burdensome." Pls.' Fourth Am. Compl. ¶ 37.  
 11 Defendants have presented no argument that contradicts this. To the contrary, Defendants  
 12 underscore Plaintiffs' position. Defendants state it is not unduly burdensome for Plaintiffs  
 13 to file a legal action to reinstate their voting rights through the court system. Defs.' Mem.  
 14 at 40. They imply Plaintiffs can easily "go to the county law library . . . file, mail, or  
 15 otherwise serve documents in support of their motion pertaining to reinstatement." Defs.'  
 16 Mem. at 39 n.10. This action must be brought in accordance with various Washington State  
 17 Court Rules, which must be understood by released offenders in order to effectively file the  
 18 "simple" motion. Defs.' Mem. at 39. It strains credulity to insist that felons, having  
 19 completed the terms of their sentences, be savvy enough to navigate the court system in  
 20 order to reinstate their voting rights, and that this requirement is not "unduly burdensome."

21 It is likewise unpersuasive to argue the petition process for voting rights reinstatement  
 22 through the court system is preferable to the automatic process implicated, though not  
 23 practiced, through RCW § 9.94A.220. See Pls.' Mem. at 36. By maintaining a process for  
 24 reinstatement that is blatantly burdensome as well as being vague and unclear to released  
 25 offenders, Defendants offend VRA § 2's prohibition of standards, practices, or procedures  
 26 "that might . . . be used to interfere with a citizen's ability to vote. . . ." Holder v. Hall, 512  
 27 U.S. 874, 918 (1994).

**IV. CONCLUSION**

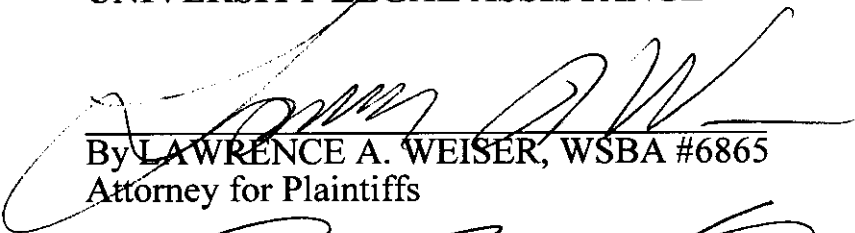
For all the foregoing reasons, Plaintiffs respectfully request this court deny Defendants' Motion for Summary Judgment and grant Plaintiffs' Motion for Summary Judgment. To classify citizens in a manner that results in less opportunity and unequal access to voting by minorities not only violates the protections afforded by the Voting Rights Act, it also offends the foundation upon which our democratic system exists.

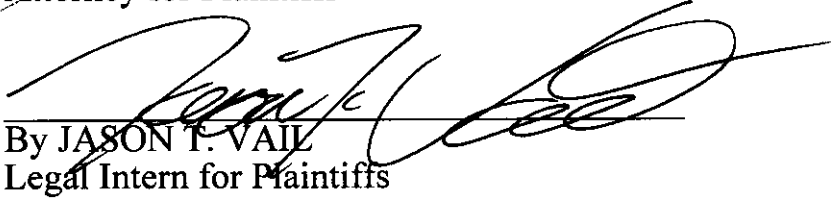
Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.

The Federalist No. 57, at 385 (James Madison) (Cooke ed., 1961).

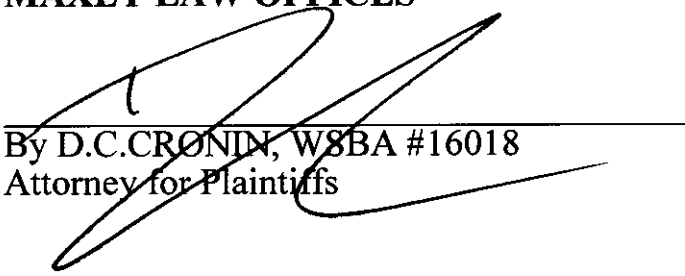
DATED this 11<sup>th</sup> day of August, 2000

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