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

11 MUHAMMAD SHABAZZ  
FARRAKHAN (aka ERNEST S.  
12 WALKER), et al.,

13 Plaintiffs,

14 v.

15 CHRISTINE O. GREGOIRE, et  
al.,

16 Defendants.

NO. CS-96-076-RHW

DEFENDANTS' REPLY IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT AND  
RESPONSE TO PLAINTIFFS'  
CROSS-MOTION FOR  
SUMMARY JUDGMENT

17  
18 **I. INTRODUCTION**

19 In order for the Plaintiffs to prevail in their cross-motion for summary  
20 judgment, this Court would have to find that the Plaintiffs met their burden of  
21 proof as a matter of law that Washington's entire criminal justice system is  
22 infected with racial discrimination specifically against Plaintiffs who are Black,  
23 Latino, and Native American, and that, because of that bias, Washington's felon  
24 disenfranchisement law causes persons of those racial minorities to be denied the  
25 right to vote in violation of Section 2 of the Voting Rights Act (VRA). Plaintiffs  
26 assert that a law that had no discriminatory purpose and no discriminatory effect

1 at the time of implementation, denies the right to vote based on race solely  
2 because a statistically disproportionate number of racial minorities are felons and  
3 therefore are unable to vote because of their felon status.<sup>1</sup> As a matter of law, the  
4 Plaintiffs' remaining claim should be dismissed.

5 There is no evidence to suggest that the Plaintiffs did not commit felonies  
6 or that race played any part in their felony convictions. The Plaintiffs claim to  
7 have strengthened their previously developed record allegedly showing racial  
8 discrimination in Washington's criminal justice system, but they have only  
9 presented more statistics. "[A] bare statistical showing of disproportionate  
10 impact on a racial minority does not satisfy" Plaintiffs' burden. *Farrakhan v.*  
11 *Washington*, 338 F.3d 1009, 1019 (9th Cir. 2003) (emphasis in original). The  
12 Plaintiffs also claim that discrimination in employment, housing, and education  
13 makes it difficult for felons of minority races to regain the right to vote. Not only  
14 are these statistics irrelevant, but there is no claim remaining in this case  
15 regarding restoration of the right to vote.<sup>2</sup>

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16  
17 <sup>1</sup> Plaintiffs cannot demonstrate a denial of equal opportunity to participate  
18 in the electoral process without asserting that the Plaintiffs' felony convictions  
19 are invalid. However, they make no such assertion here. Not only do the  
20 Plaintiffs concede that their felony convictions are valid, but any challenge to  
21 those convictions cannot be made in this action. *Heck v. Humphrey*, 512 U.S.  
22 477, 486-87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).

23 <sup>2</sup> The Ninth Circuit Court of Appeals has previously concluded in this case  
24 that the Plaintiffs failed to produce evidence that minorities are less able to meet  
25 the requirements for restoration. *Farrakhan v. Washington*, 338 F.3d 1009,  
26 1021-22 (9th Cir. 2003).

1 The Ninth Circuit's remand of this case to this Court was based upon the  
2 assumption that this Court disregarded evidence of race discrimination when it  
3 determined that Washington's felon disenfranchisement law did not violate  
4 Section 2 of the VRA. *See Farrakhan*, 338 F.3d at 1020. This Court is now  
5 charged with the same inquiry as before, to determine whether the Plaintiffs have  
6 met their burden, as a matter of law, to show that Washington's felon  
7 disenfranchisement law constitutes abridgement of the right to vote based on  
8 race. Because this record still contains no evidence linking the statistics cited by  
9 the Plaintiffs to unequal treatment related to voting, summary judgment should  
10 be granted to the Defendants.

## 11 II. PLAINTIFFS' BURDEN OF PROOF

12 As the Plaintiffs previously represented to this Court at the first hearing on  
13 summary judgment, the Plaintiffs assert that they are entitled to judgment as a  
14 matter of law based upon the record before this Court. The Defendants assert  
15 that they are entitled to judgment as a matter of law because the Plaintiffs have  
16 not met their burden.

17 In cross-motions for summary judgment, each summary judgment motion  
18 must be considered with all reasonable inferences favoring the non-moving party.  
19 *Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104, 1117 (9th Cir. 2001). In order to  
20 obtain summary judgment in the Plaintiffs' favor, the inferences from the  
21 evidence viewed in favor of the Defendants must show that they proved a  
22 violation of 42 U.S.C. § 1973. Fed. R. Civ. P. 56(c). The Plaintiffs bear the  
23 burden of coming forth with evidence "demonstrating that a challenged election  
24 practice has resulted in the denial or abridgment of the right to vote based on  
25 color or race." *Chisom v. Roemer*, 501 U.S. 380, 394, 111 S. Ct. 2354, 115 L.  
26 Ed. 2d 348 (1991). Further, the Plaintiffs must show that the felon

1 disenfranchisement law is the cause of the inequality. *Thornburg v. Gingles*, 478  
2 U.S. 30, 47, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986). With so many gaps in the  
3 evidence presented by the Plaintiffs, they are not entitled to judgment as a matter  
4 of law. Even giving the benefit of all reasonable inferences, Plaintiffs' evidence  
5 fails to show denial of the right to vote based on race.

6 In an attempt to meet their burden, the Plaintiffs have submitted the  
7 testimony of five academic professionals, very similar to the testimony provided  
8 to this Court at the prior summary judgment motion. It is undisputed that no  
9 research or survey was performed by any of the Plaintiffs' witnesses for the  
10 purpose of assisting this Court with a question presented here. Rather, the  
11 witnesses offer their opinions and comment on sociological and statistical studies  
12 performed for various purposes, including publication in academic journals. *See*  
13 *Defs.' Supplemental Statement of Material Fact ("Supp'l Statement")* attached  
14 hereto.

15 Fed. R. Evid. 702 allows that a witness qualified by expertise may testify  
16 under certain circumstances:

17 If scientific, technical, or other specialized knowledge will  
18 assist the trier of fact to understand the evidence or to determine a  
19 fact in issue, a witness qualified as an expert by knowledge, skill,  
20 experience, training, or education, may testify thereto in the form of  
21 an opinion or otherwise, if (1) the testimony is based upon sufficient  
22 facts or data, (2) the testimony is the product of reliable principles  
23 and methods, and (3) the witness has applied the principles and  
24 methods reliably to the facts of the case.

25 Even if the methodology utilized by a witness qualifies under Fed. R. Evid. 702,  
26 the testimony of the witness may still be disregarded if it does not assist in  
determining a fact at issue. "This condition goes primarily to relevance. Expert  
testimony which does not relate to any issue in the case is not relevant and, ergo,  
non-helpful." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591, 113 S.

1 Ct. 2786, 125 L. Ed. 2d 469 (1993) (internal quotes omitted). The limited  
 2 testimony of the five academic professionals presented by the Plaintiffs do not  
 3 assist this Court in reaching a legal conclusion as to whether the Plaintiffs have  
 4 proven, as a matter of law, that Washington's felon disenfranchisement law  
 5 constitutes vote denial based on race.

### 6 III. ARGUMENT

#### 7 **A. Based Upon A Totality Of The Circumstances, Washington's Felon 8 Disenfranchisement Law Does Not Interact With Racial Bias To Deny 9 The Plaintiffs The Right To Vote In Such A Way As To Violate 10 Section 2 Of The VRA**

11 While it is true that felons in Washington are denied the right to vote, and  
 12 Plaintiffs are felons, it does not follow that evidence of any racial bias in society  
 13 converts the denial of the right to vote based on felony conviction to a  
 14 discriminatory practice in violation of Section 2 of the VRA. Causation still  
 15 must be proven. The Court of Appeals remanded the case to this Court to  
 16 evaluate, once again, whether Washington's felon disenfranchisement law  
 17 violates Section 2 of the VRA by considering the totality of circumstances,  
 18 including factors external to the voting mechanism itself. *Farrakhan*, 338 F.3d at  
 19 1011-12.

20 Vote denial does not equate with vote denial on account of race based only  
 21 on a showing of statistical disparity. *Smith v. Salt River Project Agric.  
 22 Improvement & Power Dist.*, 109 F.3d 586 (9th Cir. 1997). The totality of  
 23 circumstances (or "results") test is clearly stated in the VRA:

24 [B]ased on the totality of circumstances, [the plaintiff shows] that  
 25 the political processes leading to nomination or election in the State  
 26 or political subdivision are not equally open to participation by  
 members of a [protected] class . . . in that its members have less  
 opportunity than other members of the electorate to participate in the  
 political process and to elect representatives of their choice.

42 U.S.C. § 1973(b).

1 The evidence presented by the Plaintiffs, in their first summary judgment  
2 motion as well as their recent submission, does not show that Blacks, Latinos,  
3 and Native Americans have less opportunity than other members of the electorate  
4 to participate in the political process in Washington and to elect representatives  
5 of their choice *on account of race or color*. The last italicized phrase is critical to  
6 the causal requirement in 42 U.S.C. § 1973(a). The question before the Court is  
7 one of causation. Felons of all races lose their right to vote, not because of race,  
8 but because of a decision to violate the law. *Wesley v. Collins*, 791 F.2d 1255,  
9 1262 (6th Cir. 1986).

10 The Senate Factors,<sup>3</sup> cited by both parties, this Court, and the Court of  
11 Appeals, are merely a non-exclusive list of considerations which may bear on the  
12 above totality of circumstances test. In proving that members of the protected  
13 class have less opportunity to participate in the political process than other  
14 members of the electorate, statistical disparity alone is insufficient. *Salt River*,  
15 109 F.3d 586. “[A] procedure only fails section 2’s test if, given the totality of  
16 circumstances, it prevents minorities from participating effectively in the political  
17 process or electing candidates of their choice.” *United States v. Blaine County*,  
18 363 F.3d 897, 906 (9th Cir. 2004). Plaintiffs have shown a disparate impact,  
19 mostly to Blacks, but the Court of Appeals has ruled that such a showing does  
20 not satisfy the Plaintiffs’ burden “because causation [based on race  
21 discrimination] cannot be inferred from impact alone”. *Farrakhan*, 338 F.3d at  
22 1019. *See also Blaine County*, 363 F.3d at 912 n.21 (2004) (“*Salt River* simply  
23 held that there must be a causal connection between a voting requirement and a  
24 discriminatory result.”).

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25  
26 <sup>3</sup> *Farrakhan*, 338 F.3d at 1015.

1 The Plaintiffs have not attempted to show that felon disenfranchisement  
2 has affected the political opportunity of racial minorities based upon reduced  
3 voting strength or even reduced voter registration. There is no evidence in the  
4 record concerning the impact of the removal of minority voters from the  
5 registration rolls based upon felony convictions. The record does not show that  
6 the Plaintiffs themselves voted prior to their felony convictions. Several  
7 jurisdictions have rejected Section 2 claims based upon the failure of plaintiffs to  
8 present adequate evidence. *See, e.g., Salt River*, 109 F.3d at 595-96; *Wesley*, 791  
9 F.2d at 1262; *Salas v. Sw. Texas Junior Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir.  
10 1992).

11 **B. The Plaintiffs Have Failed To Show That Washington's**  
12 **Disenfranchisement Law Interacts With Racial Bias To Deny The**  
13 **Plaintiffs The Right To Vote In Violation Of Section 2 Of The VRA**

14 Citing to this Court's prior ruling describing certain evidence as  
15 "compelling" while ruling in favor of the Defendants, the Plaintiffs continue to  
16 rely on a bare statistical showing that a disproportionate number of racial  
17 minorities are felons. While the limited numbers presented by the Plaintiffs have  
18 not been contested with opposing expert testimony and reports, the Court's  
19 inquiry does not end there. The limitations inherent in the evidence presented by  
20 the Plaintiffs point out the complete failure to link tidbits of statistics, such as  
21 drug arrests in one city, with unequal political opportunity. *See Supp'l*  
22 *Statement*.

23 The Court of Appeals was very clear in its remand of this case that the  
24 Plaintiffs must show that racial bias in Washington's criminal justice system  
25 interacts with the felon disenfranchisement law to result in a discriminatory  
26 practice that denies Plaintiffs the right to vote on account of race. *Farrakhan*,  
338 F.3d at 1019-20. The Plaintiffs have submitted no evidence that links bias in

1 the overall criminal justice system to denial of the right to vote. There is no  
 2 evidence in the record of voting “blocs” losing their political voice due to felon  
 3 disenfranchisement. Several of the expert submissions of the Plaintiffs do not  
 4 pertain to the criminal justice system in Washington at all. *See* Supp’l Statement.

5 **1. Racial Disparities Among Convicted Felons Is Not Sufficient To**  
 6 **Show Plaintiffs Were Denied The Right To Vote Based On Race**

7 There is no evidence in this record that any of the Plaintiffs, or any prison  
 8 inmate, did not commit a felony. The Plaintiffs assert that the report of Robert  
 9 Crutchfield, a professor of sociology, demonstrates that “Native Americans,  
 10 Blacks, and Latinos are subjected to racial profiling in Washington State at rates  
 11 that cannot be justified by differential involvement in crimes that are likely to  
 12 lead to arrests.” Pls.’ Mem. Of Points & Authorities in Support of Mot. Summ. J.  
 13 (“Pls.’ Mem.”) at 16. Prof. Crutchfield’s work on this case was limited to  
 14 reviewing and commenting on race and ethnicity studies in the United States.  
 15 *See* Supp’l Statement at 1.

16 Statistical disparities regarding police activity and criminal sentencing did  
 17 not address felon status. *Id.* at 2. Professor Crutchfield performed no surveys or  
 18 tests to support his reviews for his report, and he has not attempted to undertake  
 19 any studies in this area since 1999. *Id.* at 3. Most of the research referenced  
 20 existed at the time of the prior summary judgment motion, and was referenced in  
 21 that record and contested by the Defendants. *Id.*; Defs.’ Resp. to Pls.’ Mot.  
 22 Summ. J. (and accompanying documentation, filed Aug. 10, 2000) (“Defs.’  
 23 Aug. 10, 2000, Response”).

24 With the many variables that Prof. Crutchfield’s review did not consider  
 25 (socio-economic status, the competency of criminal defense counsel, etc.), it is  
 26 not surprising that he acknowledges that some studies have drawn conclusions

1 inconsistent with his. Defs.’ Aug. 10, 2000, Response at 2-3. Further, Prof.  
 2 Crutchfield testified that studies attempting to explain racial differences in the  
 3 criminal justice system are limited and require further study. *Id.* at 3.

4 **2. Limited Statistics Regarding Seattle Drug Arrests Are**  
 5 **Insufficient To Show Plaintiffs Were Denied The Right To Vote**  
 6 **Based On Race**

7 Plaintiffs cite to very specific statistics gathered by Katherine Beckett for  
 8 the purpose of testifying in consolidated criminal cases in Seattle in which the  
 9 Defendants were charged with drug crimes.<sup>4</sup> Defs.’ Aug. 10, 2000, Response at  
 10 3-4. While the statistics may have been relevant to the racial profiling defense in  
 11 that case, the applicability to this case is negligible.<sup>5</sup>

12 \_\_\_\_\_  
 13 <sup>4</sup> Prof. Beckett’s “report” did not include any research done for this case,  
 14 but instead details research that she performed for public defenders representing a  
 15 group of defendants in a consolidated criminal case in which the public defenders  
 16 made the argument that their clients were the victims of racial profiling. *See*  
 17 Defs.’ Supplemental Statement of Material Fact (“Supp’l Statement”) at 4.

18 <sup>5</sup> The United States Supreme Court, in *United States v. Armstrong*, 517 U.S.  
 19 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996), required that criminal  
 20 defendants, who relied on disparate numbers of prosecutions against African-  
 21 Americans for crack cocaine possession in their attempt to show that prosecutors  
 22 were racially selective, “must show that similarly situated individuals of a  
 23 different race were not prosecuted.” 517 U.S at 465. If that is the proper  
 24 evidentiary standard in determining whether particular convictions are based  
 25 upon race, it follows that an even higher standard should apply to find an entire  
 26 criminal justice system racially discriminatory.

1 Her conclusions were basically that Blacks and Latinos are over-  
2 represented among Seattle's drug arrestees. Prof. Beckett gathered no  
3 information on felony convictions or voting status. Defs.' Aug. 10, 2000,  
4 Response at 4. Not only are Prof. Beckett's findings limited to drug arrests in  
5 Seattle, but her report begins with citations to studies that have found reasons  
6 other than race to support the disparities – which she then attempts to rebut.  
7 Defs.' Aug. 10, 2000, Response at 4. Prof. Beckett asserts that the disparities in  
8 drug arrests are not explicable in “race-neutral” terms, but she testified that every  
9 data source she referred to has limitations and biases, and her race-neutral  
10 hypotheses were limited to two theories. *Id.* at 5. The limited observations of  
11 Prof. Beckett do not show that the Plaintiffs were denied the right to vote based  
12 upon race.

13 **3. Plaintiffs' Assertion Of The Existence Of “Implicit Bias” Does**  
14 **Not Show That Plaintiffs Were Denied The Right To Vote On**  
15 **Account Of Race**

16 Plaintiffs assert that racial differences in legal outcomes and other  
17 institutional processes may be the result of unintentional discrimination. Pls.'  
18 Mem. at 24. This generalized assertion is based upon the testimony of Anthony  
19 Greenwald, a professor of psychology. *Id.* Prof. Greenwald did not submit a  
20 report for this case, but Plaintiffs submitted to this Court a draft law review  
21 article regarding the application of his “Implicit Association Test”. *See* Supp'l  
22 Statement at 7.

23 Prof. Greenwald testified that he did not perform any research for this case,  
24 or even formally analyze prior research, and did not provide any opinions. *Id.*  
25 There is no indication that the references in Plaintiffs' memorandum to “implicit  
26 racial bias” have any relation to felon disenfranchisement, the criminal justice  
system in Washington, or the political process in Washington. *See* Supp'l

1 Statement at 7-8. The totality of circumstances test requires “an intensely local  
 2 appraisal of the design and impact of the contested electoral mechanisms.”  
 3 *Thornburg v. Gingles*, 478 U.S. at 79. In short, the introduction of Prof.  
 4 Greenwald’s Implicit Association Test into the record in this case does not show  
 5 that the Plaintiffs were denied the right to vote on account of race because of  
 6 felon disenfranchisement in Washington.

7 **C. The Weight Of The Senate Factors Relevant In Determining Whether**  
 8 **Section 2 Has Been Violated Favor The Defendants**

9 Although the test that the Plaintiffs must meet to prove their claim of vote  
 10 denial based on race is contained in 42 U.S.C. § 1973, the Senate Factors may be  
 11 relevant in determining whether felon disenfranchisement violates the VRA.<sup>6</sup>  
 12 The Defendants’ Statement of Material Facts in Support of Motion for Summary  
 13 Judgment and Dismissal, filed December 13, 2005, contained supported factual  
 14 statements regarding application of the Senate Factors. This Court may assume  
 15 those facts not challenged by the Plaintiffs. Local Rule 56.1 (E.D. Wash.).

16 **1. The Factors Ignored By The Plaintiffs Favor The Defendants**

17 Of the nine articulated Senate Factors, there is no question that at least six  
 18 favor the Defendants. The Plaintiffs claim that “because the issue here is vote  
 19 denial, only Senate Factors 5 and 9 are relevant” in considering the totality of  
 20 circumstances. Pls.’ Mem. at 12. However, they offer no reason to ignore the  
 21 many factors that favor the Defendants. The basis for Plaintiffs’ isolation of  
 22 factors five and nine is that their claim is one of vote denial, but they offer no

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23  
 24 <sup>6</sup> The Defendants assert that the factors “may” apply because it appears  
 25 that Congress did not intend felon disenfranchisement to be analyzed as a  
 26 potential violation of the VRA. *See, e.g.*, 42 U.S.C. § 1973gg-6(a)(3)(B).

1 authority for the proposition that the other factors do not address vote denial  
2 claims.

3 The first factor is “the extent of any history of official discrimination in the  
4 state or political subdivision that touched the right of the members of the  
5 minority group to register, to vote, or otherwise to participate in the democratic  
6 process”. *Farrakhan*, 338 F.3d at 1015 (quoting S. Rep. No. 97-417, at 28-29  
7 (1982), *reprinted in* 1982 U.S.C.C.A.N 177, 206-07). The Plaintiffs have not  
8 cited to one instance of official discrimination touching on the right to vote.  
9 Even Plaintiffs’ own witness testified that he could not find evidence of voting  
10 discrimination in Washington. *See* Supp’l Statement at 5. Evidence in this  
11 record shows that there is no history of official discrimination in Washington  
12 against Blacks, Latinos, and Native Americans touching on the right to vote or  
13 otherwise participate in the democratic process. *See* Ex. 1, Murphy Decl.,  
14 Attach. F (Spitzer Report). *See also* Defs.’ Statement Material of Fact Supp. of  
15 Mot. Summ. J. Dismissal (filed July 31, 2000), Ex. 47 (Quintard Taylor Aff.).  
16 Moreover, this record shows affirmative efforts of Washington officials to  
17 increase involvement by persons of racial minorities in the political process. *See*  
18 Defs.’ Statement Material Fact in Supp. Mot. Summ. J. Dismissal (filed July 31,  
19 2000), Ex. 58 (Ralph Munro Aff.). Therefore, the undisputed evidence shows  
20 that the first factor favors the Defendants’ position.

21 The second factor is “the extent to which voting in the elections of the state  
22 or political subdivision is racially polarized”. *Farrakhan*, 338 F. 3d at 1015.  
23 The Plaintiffs have not submitted any evidence of racial polarization in any state  
24 election. The third factor is “the extent to which the state or political subdivision  
25 has used unusually large election districts, majority vote requirements, anti-single  
26 shot provisions, or other voting practices or procedures that may enhance the

1 opportunity for discrimination against the minority group”. *Farrakhan*, 338  
2 F. 3d at 1015. There is no evidence of any of the voting practices referred to here  
3 being used in Washington. The fact that the practices or effects referred to in  
4 factors two and three do not exist in Washington indicates that those factors  
5 weigh in favor of finding that felon disenfranchisement is not a discriminatory  
6 practice and the VRA has not been violated.

7 The fourth factor is “if there is a candidate slating process, whether the  
8 members of the minority group have been denied access to that process”. *Id.*  
9 Because there is no candidate slating process in Washington, that factor does not  
10 apply here.

11 The sixth factor is “whether political campaigns have been characterized  
12 by overt or subtle racial appeals”. *Id.* Once again, there is no evidence  
13 whatsoever that racial appeals have played a role in any political campaign.

14 The seventh factor is “the extent to which members of the minority group  
15 have been elected to public office in the jurisdiction”. *Id.* The only evidence in  
16 the record on this point shows that members of minority groups have been  
17 elected to public office in Washington. *See* Defs.’ Statement of Material Fact  
18 Supp. Mot. for Summ. J. Dismissal (filed July 31, 2000), Ex. 47 (Quintard Taylor  
19 Aff.) The Plaintiffs have not submitted contrary evidence, nor have they asserted  
20 that minority groups are unable to elect candidates of their choice.

21 The eighth factor is “whether there is a significant lack of responsiveness  
22 on the part of elected officials to the particularized needs of the members of the  
23 minority group”. *Farrakhan*, 338 F. 3d at 1015. Again, not only is there no  
24 showing of a lack of responsiveness by elected officials to the needs of members  
25 of the minority group, but state officials have actively worked toward increasing  
26 the involvement of racial minorities in the political process. *See* Defs.’ Statement

1 of Material Fact Supp. Mot. Summ. J. Dismissal (filed July 31, 2000), Ex. 58  
2 (Ralph Munro Aff.).

3 The Senate Factors ignored in the Plaintiffs' memorandum, and for which  
4 the Plaintiffs have not attempted to introduce any evidence, favor a determination  
5 that Washington's felon disenfranchisement law does not deny Plaintiffs the right  
6 to vote based on race. The Plaintiffs did provide evidence that purports to show  
7 that the fifth and ninth Senate Factors show that felon disenfranchisement is a  
8 discriminatory practice. The testimony offered by the Plaintiffs falls short.

9 **2. The Fifth Senate Factor, As Applied To The Only Remaining**  
10 **Claim of Vote Denial, Favors The Defendants**

11 The fifth Senate Factor is "the extent to which members of the minority  
12 group in the state or political subdivision bear the effects of discrimination in  
13 such areas as education, employment and health, which hinder their ability to  
14 participate effectively in the political process". In an attempt to show that  
15 application of the fifth Senate Factor to Washington's felon disenfranchisement  
16 law indicates a discriminatory practice in violation of Section 2, the Plaintiffs  
17 attached a report of a "voting rights" expert, Morgan Kousser, who simply  
18 opined that educational and economic factors make it difficult for minority felons  
19 to regain their right to vote. Pls.' Statement of Material Facts Support Mot.  
20 Summ. J., Ex. 4. The only remaining claim in this lawsuit is vote denial on the  
21 basis of Washington's felon disenfranchisement law. The Plaintiffs' prior claim  
22 challenging the vote restoration process has been dismissed. *Farrakhan*, 338  
23 F.3d at 1022.

24 Prof. Kousser's cursory look at the restoration process, based solely on  
25 information provided to him from Plaintiffs' counsel, has no bearing on an issue  
26 in this case. *See* Supp'1 Statement at 5-6. Prof. Kousser, a professor of history

1 and social science, performed no original research or surveys for his report. *Id.*  
2 In his deposition, Prof. Kousser testified that he had conducted no independent  
3 research regarding the restoration process, and had never spoken with anyone  
4 who had been through the process. *See* Supp’l Statement at 5-6. The only basis  
5 for Prof. Kousser’s conclusion that one would have to hire an attorney to have the  
6 right to vote restored was based his understanding of the complexity of the  
7 process. *See id.* at 6. He made no attempt to determine how many felons get “re-  
8 enfranchised”. *Id.*

9 Prof. Kousser’s expert opinions are limited to the process of felons  
10 restoring their right to vote, and he draws no conclusion that members of the  
11 minority groups at issue in this case bear the effects of discrimination in  
12 education, employment, and health, *which hinders* their ability to participate  
13 effectively in the political process. There is no issue remaining in this lawsuit  
14 related to the restoration of the right to vote, and thus his opinion does not assist  
15 this Court’s analysis. There is no evidence in the record regarding the numbers  
16 of members of minority groups who participated in the political process prior to  
17 their felony convictions. Finally, Prof. Kousser had no opinion as to whether any  
18 aspect of the criminal justice system in the state of Washington is discriminatory.  
19 Supp’l Statement at 50.

### 20 **3. The Ninth Senate Factor, To The Extent It Applies To Felon** 21 **Disenfranchisement, Favors The Defendants**

22 The ninth Senate Factor is “whether the policy underlying the state or  
23 political subdivision’s use of such voting qualification, prerequisite to voting, or  
24 standard, practice or procedure is tenuous.” *Farrakhan*, 338 F.3d at 1015. It  
25 appears from the very wording of this factor that it was intended to apply to tests,  
26 payments, or other obstacles to voting that may have the indirect effect of

1 excluding protected classes of voters. Because Washington's felon  
 2 disenfranchisement law is directly intended to exclude felons from voting, the  
 3 reasoning applicable to an indirect method does not apply.

4 The basis for considering the policy rationale for a state-imposed voter  
 5 qualification is to determine whether the voter qualification simply masquerades  
 6 an attempt to exclude a class of voters based on race. In the case of  
 7 Washington's felon disenfranchisement law, the exclusion of a non-protected  
 8 class of voters – felons – is direct and intentional. The constitutional framers and  
 9 the Washington Legislature have decided as a matter of policy to exclude felons  
 10 from voting as a consequence for their criminal behavior based upon the long-  
 11 standing principle that those who break the law lose the right to make the law.<sup>7</sup>

12 Plaintiffs charge that Washington's policy of felon disenfranchisement is  
 13 "tenuous" based upon a definition of that term offered by Alec Ewald, a visiting  
 14 professor of political science at Union College in Schenectady, New York. Prof.  
 15 Ewald's report, prepared at the request of the Plaintiffs, describes the definition  
 16 of "tenuous" two ways. First, he states:

17 An inquiry into whether a challenged policy and its  
 18 justifications are "tenuous" should pose simple questions: Does the  
 19 policy aim to improve or correct a specific social problem? Does it  
 plausibly link means and ends? Does the state clearly articulate the  
 policy's aim and purpose?

20 Pls.' Mot. Summ. J., Ex. 6 (Ewald Report at 3). The definition is restated in the  
 21 report as follows: "[t]he practice should survive only if the state can demonstrate  
 22 that fulfills [sic] a specific, important governmental purpose; can demonstrate

23 \_\_\_\_\_  
 24 <sup>7</sup> Even one of the Plaintiffs' witnesses, Morgan Kousser, testified that there  
 25 are good policy reasons on both sides of the felon disenfranchisement issue. *See*  
 26 *Supp'l Statement at 7.*

1 that it implements the policy in a non-discriminatory manner; and can  
2 demonstrate *how* it will strengthen the democratic character of our society.” Pls.’  
3 Mot. Summ. J., Ex. 6 (Ewald Report at 19). There are no citations in the report  
4 showing the source for these definitions of tenuous. Prof. Ewald stated in his  
5 deposition that he came up with those phrases utilizing unidentified cases and  
6 articles. *See* Supp’l Statement at 9-10. There is no indication that Congress  
7 intended the meaning of tenuous espoused by Prof. Ewald.

8 That the Plaintiffs simply disagree with that policy does not make the  
9 policy tenuous. The word “tenuous” refers to the thin or flimsy relationship  
10 between the voter qualification (such as a literacy test or fee) and the proffered  
11 policy justification. In the case of an intentional exclusion, the statement of the  
12 exclusion is straightforward and requires no further explanation. Although Prof.  
13 Ewald may disagree with the policy decisions of the Washington constitutional  
14 framers and Legislature (Wash. Const. art. VI, § 3), a policy disagreement does  
15 not make a law discriminatory or in violation of the VRA.<sup>8</sup> Prof. Ewald erects  
16 and then discredits various policy justifications that were never articulated or  
17 relied upon by the Defendants in this case to buttress his view that the policy  
18 behind felon disenfranchisement is tenuous. *See* Pls.’ Mot. Summ. J., Ex. 6  
19 (Ewald Report at 4-14). These views have no bearing on the current issue before  
20 the Court.

21  
22  
23 <sup>8</sup> Prof. Ewald seems to opine that felon disenfranchisement became a ruse  
24 for race discrimination over time as changes in society occurred. There is no  
25 authority that this factor was intended to insert policy reasons not stated at the  
26 time the provision was enacted based upon societal changes.

1 The Plaintiffs cite to *Dillenburg v. Kramer*, 469 F.2d 1222 (9th Cir. 1972),  
2 to support their claim that the policy justifications for felon disenfranchisement  
3 are invalid. That is not a holding in *Dillenburg* – which was a challenge to  
4 Washington’s felon disenfranchisement law based upon equal protection, not the  
5 VRA. In dicta, the court questioned the state interest served, but also recognized  
6 that other courts previously recognized the general pronouncement that a state  
7 has an interest in preventing persons who have been convicted of serious crimes  
8 from participating in the electoral process. *Dillenburg*, 469 F.2d at 1224 (citing,  
9 e.g., *Green v. Bd. of Elections of City of New York*, 380 F.2d 445, 451 (2nd Cir.  
10 1967)).

11 Rulings in other countries striking felon disenfranchisement similarly have  
12 no application here. The fact that felons in other countries retain the right to vote  
13 is irrelevant since our constitution permits states to disenfranchise based upon  
14 “participation in rebellion, or other crime”. U.S. Const. amend. XIV.  
15 Additionally, our highest court has ruled that felon disenfranchisement does not  
16 violate a felon’s constitutional rights. *Richardson v. Ramirez*, 418 U.S. 24, 55-  
17 56, 94 S. Ct. 2655, 41 L. Ed. 2d 551 (1974).

18 Although political scientists and philosophers could certainly disagree as to  
19 whether felon disenfranchisement is good policy, courts have certainly  
20 recognized that it represents a permissible and valid policy decision by state  
21 legislatures. *Green*, 380 F.2d at 451. As the Court of Appeals for the Eleventh  
22 Circuit recently stated in a case challenging felon disenfranchisement as violative  
23 of Section 2 of the VRA: “Federal courts cannot question the wisdom of this  
24 policy choice.” *Johnson v. Bush*, 405 F.3d 1214, 1235 (11th Cir. 2005).

1           Considering all of the Senate Factors that could apply, their application  
2 here does not support a finding that Washington's felon disenfranchisement law  
3 denies minorities the right to vote based on race. The evidence presented here is  
4 a sharp contrast to that presented in the recent case of *United States v. Blaine*  
5 *County*, 363 F.3d 897 (9th Cir. 2004). In *Blaine County*, a VRA challenge to a  
6 Montana county's at-large voting system for electing county commissioners, the  
7 evidence showed that American Indians constituted 45.2 percent of the county  
8 population, with 80 percent geographically concentrated on the Fort Belknap  
9 Reservation. Despite this, no American Indian was ever elected to the Blaine  
10 County Commission under the at-large voting system which elected  
11 commissioners by a majority of the entire county – which included over 4,638  
12 square miles. *Blaine County*, 363 F.3d at 900. The trial court determined that the  
13 practice violated Section 2 of the VRA after finding that American Indian voters  
14 were sufficiently geographically compact and politically cohesive to elect a  
15 commissioner of their choice, but that Blaine County's white residents voted as a  
16 bloc to prevent American Indians from electing their preferred candidates. *Id.* at  
17 900-901.

18           The Court's analysis of the totality of local circumstances in *Blaine County*  
19 was based on a factual record that included the following: (1) there was a history  
20 of official discrimination against American Indians; (2) evidence of racially  
21 polarized voting; (3) voting procedures that enhanced the opportunities for  
22 discrimination against American Indians; (4) depressed socio-economic  
23 conditions for American Indians; and (5) a tenuous justification for the at-large  
24 voting system. *Id.* at 901. Such a factual record does not exist in this case.

1 **IV. CONCLUSION**

2 Based upon the foregoing, the Defendants respectfully request that this  
3 Court deny Plaintiffs' motion for summary judgment and grant summary  
4 judgment dismissal of the remaining claim to the Defendants.

5 RESPECTFULLY SUBMITTED this 1st day of March, 2006.

6 **ROB MCKENNA**  
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8 s/Carol A. Murphy  
9 **DANIEL J. JUDGE, WSBA #17392**  
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