

1 UNIVERSITY LEGAL ASSISTANCE
2 Larry A. Weiser, Attorney at Law
3 Jacob White, Legal Intern
4 Kristine Olmstead, Legal Intern
5 721 North Cincinnati Street
6 P.O. Box 3528
7 Spokane, Washington 99220
(Tel.) 509.323.5791
(Fax) 509.323.5805

Ryan P. Haygood, *Pro Hac Vice*
Theodore M. Shaw
Norman J. Chachkin
Debo P. Adegbile
NAACP Legal Defense
& Educational Fund, Inc.
99 Hudson Street, Suite 1600
New York, NY 10013-2897
(Tel.) 212.965.2235
(Fax) 212.226.7592

Attorneys for Plaintiffs

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

10 MUHAMMAD SHABAZZ)
11 FARRAKHAN, et al.,)
12)
13 Plaintiffs,)
14 v.)
15 CHRISTINE O. GREGOIRE, et al.,)
16 Defendants.)

No. CV-96-076-RHW

**REPLY BRIEF OF POINTS
AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY
JUDGMENT AND IN
OPPOSITION TO DEFENDANTS’
MOTION FOR SUMMARY
JUDGMENT**

17 **I. INTRODUCTION**

18 In the tenth year of this case, the Defendants still have not proffered a single race-
19 neutral explanation for the strikingly disproportionate rate at which, as a collateral
20 consequence of a felony conviction, Article 6 § 3 of the Washington State Constitution,
21 and the statute implementing it, disqualifies Blacks, Latinos and Native Americans from
22 voting. Although they expressly recognize that “Plaintiffs have shown a disparate
23 impact, mostly to Blacks,” Defendants’ Reply in Support of Motion for Summary
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1 Judgment and Response to Plaintiffs' Cross-Motion for Summary Judgment ("Defs.'
2 Rep. Br."), at 2, the Defendants, in a tortured exercise, attempt to heighten the standard
3 for proving vote denial under Section 2 of the Voting Rights Act so as to make
4 meaningless Plaintiffs' evidence of the staggering racial disparities in Washington State
5 that are, in fact, actionable under and violative of the Voting Rights Act. Defs.' Rep.
6 Br., at 2.
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9 Plaintiffs' evidence shows that the interaction of racial discrimination in the criminal
10 justice system with Washington State's "disenfranchisement provision clearly has a
11 disproportionate impact on racial minorities," and serves to disfranchise "racial
12 minorities . . . in numbers disproportionate to that of their white fellow citizens."
13 *Farrakhan v. Locke*, No. CS-96-076-RHW, Order Granting Defendants' Motion for
14 Summary Judgment, slip. op. at 3,6 (E.D. Wash. Dec. 1, 2000)[hereinafter Summ. Judg.
15 Order]. Plaintiffs' evidence demonstrates that the disproportionate denial of the right to
16 vote to racial minorities on account of race is *caused by that interaction*, which has
17 resulted in the disfranchisement of nearly one-quarter — an incredible 24% — of all
18 Black men in Washington State, and nearly 15% of the entire Black population in the
19 State. Consequently, race plays an impermissible role in the application of Washington
20 State's felon disfranchisement regime. This result is precisely what Section 2 of the
21 Voting Rights Act was enacted to proscribe.
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1 For their part, Defendants have failed to introduce *any* testimony — expert or
2 otherwise — to rebut the findings of Plaintiffs’ experts and the other evidence Plaintiffs
3 have put on the record. Defendants’ failure is especially important in light of the fact
4 that Plaintiffs have strengthened their previously developed record showing racial
5 discrimination in Washington State’s criminal justice system, which this Court
6 recognized as “compelling.” Summ. Judg. Order, at 8. Of equal significance,
7 Defendants have not, as is expressly required by Local Rule 56.1(b), separately set forth
8 the specific facts that they assert establish a genuine dispute on an issue of material fact
9 precluding summary judgment for Plaintiffs. As a result, Defendants accept each of
10 Plaintiffs’ material facts as true, and this Court may find no genuine issue of material
11 fact exists to preclude summary judgment for Plaintiffs.
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15 For these reasons, and those set forth below, Plaintiffs respectfully request that this
16 Court grant Plaintiffs’ Motion for Summary Judgment and deny Defendants’ Motion for
17 Summary Judgment.
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19 **II. SUMMARY JUDGMENT STANDARD**

20 In considering Plaintiffs’ Motion for Summary Judgment, this Court begins with the
21 recognition that on their Motion, Plaintiffs’ have the initial responsibility of informing
22 the Court of the basis for the belief that summary judgment is warranted. *Celotex Corp.*
23 *v. Catrett*, 477 U.S. 317, 323 (1986). This is accomplished through the presentation of
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1 facts whose materiality is determined through substantive law. *T.W. Elec. Serv., Inc. v.*
2 *Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Thus, if Defendants
3 dispute facts established by Plaintiffs' evidence only through conclusory assertions or if
4 the facts are clearly uncontroverted by Defendants, summary judgment is properly
5 granted for Plaintiffs, even in complex cases. *Carroll v. United Steelworkers of*
6 *America*, 498 F. Supp. 976 (D. Mass. 1980).
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9 In this case, there is no dispute on this record as to the facts material to Plaintiffs'
10 Motion, and, therefore, summary judgment is appropriate for the following reasons, *see*
11 Fed.R.Civ.P. 56(c). First, Defendants have not, as is required by Local Rule 56.1(b),
12 separately set forth the specific facts that they assert establish a genuine issue of
13 material fact precluding summary judgment for Plaintiffs. Under Local Rule 56.1(b):
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15 Any party opposing a motion for summary judgment must file with its responsive
16 memorandum a statement in the form prescribed in (a), setting forth the specific
17 facts which the opposing party asserts establishes a genuine issue of material fact
18 precluding summary judgment. Each fact must explicitly identify any fact(s)
19 asserted by the moving party which the opposing party disputes or clarifies.
Following the fact and record citation, the opposing party may briefly describe
any evidentiary reason the moving party's fact is disputed.

20 As a result, Defendants accept each of Plaintiffs' material facts as true, and this Court
21 may find no genuine issue of material fact exists to preclude summary judgment for
22 Plaintiffs. Second, Defendants have failed to introduce *any* testimony - expert or
23 otherwise - to rebut the findings of Plaintiffs' experts and the other evidence Plaintiffs
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1 have put on the record. Thus, Defendants' attempt to identify material facts that they
2 claim support their Motion for Summary Judgment and that are not in dispute fails.
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4 Finally, Defendants' Motion for Summary Judgment is based on an improper legal
5 theory under Section 2 of the Voting Rights Act.

6 **III. ARGUMENT**

7 **PLAINTIFFS ESTABLISH A VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT OF** 8 **1965 BY SHOWING THAT, BASED ON THE TOTALITY OF CIRCUMSTANCES, ARTICLE 6** 9 **§ 3 OF THE WASHINGTON STATE CONSTITUTION AND RCW § 9.94A.220 RESULT IN** 10 **DISCRIMINATION ON ACCOUNT OF RACE**

11 Defendants expressly recognize, as they must, that "Plaintiffs have shown a disparate
12 impact, mostly to Blacks," but assert that Plaintiffs do not satisfy their burden because
13 "causation based on race discrimination cannot be inferred from impact alone." Defs.'
14 Rep. Br., at 6. Although the Ninth Circuit in *Smith v. Salt River Project Agric.*
15 *Improvement & Power Dist.*, 109 F.3d 586 (9th Cir. 1997), held that "a bare statistical
16 showing of disparate impact on a racial minority does not satisfy the [Section] 2
17 'results' inquiry because causation cannot be inferred from impact alone," the
18 legislative history of the Voting Rights Act, along with the consistent judicial
19 interpretation of Section 2, clarify that "[e]ven a consistently applied practice premised
20 on a racially neutral policy would not negate a plaintiff's showing through other factors
21 that the challenged practice denies minorities fair access to the process." S.Rep. No. 97-
22 417 (1982), at 29 n.117, *reprinted in* 1982 U.S.C.C.A.N. 177 ("Senate Report").
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1 Therefore, “under *Salt River* and consistent with both Congressional intent and well-
2 established judicial precedent, a causal connection may be shown where the
3 discriminatory impact of a challenged voting practice is attributable to racial
4 discrimination in the surrounding social and historical circumstances.” *Farrakhan*, 338
5 F.3d at 1019.

6
7 Defendants nevertheless attempt improperly to heighten the Section 2 standard as
8 articulated by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), by
9 asserting that “Plaintiffs must show that the felon disenfranchisement law is the *cause* of
10 the inequality.” Defs.’ Rep. Br., at 3-4 (emphasis added). Under Defendants’ erroneous
11 Section 2 standard, racially discriminatory voting qualifications like poll taxes, *see U.S.*
12 *v. Alabama*, 252 F. Supp. 95 (1966), and literacy tests, *see Gaston Co. v. U.S.*, 288 F.
13 Supp. 678 (1968), would not be violative of the Voting Rights Act. In reality, Section 2
14 requires the Plaintiffs to make no such showing.

15
16 The Supreme Court in *Gingles* held that “[t]he essence of a § 2 claim is that a certain
17 electoral law, practice or structure *interacts with social and historical conditions* to
18 cause an inequality” in the voting of various racial minority groups. *Gingles*, 478 U.S.
19 at 47 (emphasis added). 42 U.S.C. § 1973. The Senate Report accompanying the 1982
20 amendments to the VRA identified “typical factors” (“Senate Factors”) that are relevant
21 in analyzing whether Section 2 has been violated. *See* Senate Report, at 28-29.

1 Congress did not intend this list to be comprehensive or exclusive, nor did Congress
2 intend that “any particular number of factors be proved, or that a majority of them point
3 one way or the other.” *Id.* at 29. Rather, in examining the totality of the circumstances
4 to determine whether a challenged voting practice results in vote denial or vote dilution
5 on account of race, courts must consider how the challenged practice “interacts with
6 social and historical conditions to cause an inequality in the opportunities enjoyed by
7 black and white voters to elect their preferred representatives.” *Gingles*, 478 U.S., at
8 47. The flexible totality of circumstances test allows the Senate Factors to be
9 considered factor by factor, applying only those factors that are relevant to a particular
10 case. *See Mississippi State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245 (N.D.
11 Miss. 1987).

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15 In this case, because the issue here is vote denial, only Senate Factors 5 and 9 are
16 relevant. Defendants, however, conflate *vote denial* with *vote dilution* under Section 2,
17 and suggest that “[o]f the nine articulated Senate Factors, there is no question that at
18 least six favor the Defendants.” Defs.’ Rep. Br., at 11. Defendants’ contention is
19 supported by neither Supreme Court precedent nor the prior ruling in this action by this
20 Court. *See Gingles*, 478 U.S. at 45 (Noting that the Senate Factors are “pertinent to
21 certain types of § 2 violations, particularly to vote dilution claims”); *Farrakhan*, 987 F.
22 Supp. at 1311 (“The Senate Report factors are mostly limited in relevance to claims for
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1 vote dilution”). Defendants nevertheless sow confusion by citing Senate Factors that are
2 not relevant to the instant case.

3
4 Defendants assert, with respect to Senate Factor 2, that Plaintiffs have not submitted
5 any evidence of racial polarization in any state election.” Defs.’ Rep. Br., at 12. As the
6 Supreme Court held in *Gingles*, the “purpose of inquiring into the existence of racially
7 polarized voting is twofold: to ascertain whether minority group members constitute a
8 politically cohesive unit and to determine whether whites vote sufficiently as a bloc
9 usually to defeat the minority’s preferred candidates.” *Gingles*, 478 U.S. at 56. “Thus,”
10 the Court continued, “the question whether a given district experiences legally
11 significant racially polarized voting requires discrete inquiries into *minority* and white
12 *voting practices*.” *Id.* (emphasis added).

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15 The Supreme Court’s presupposition that racial minorities possess an *ability* to vote
16 demonstrates that Senate Factor 2 is applicable in the vote dilution context, but not to
17 the instant case, where Plaintiffs cannot satisfy the first prong of the Court’s inquiry
18 because they do not possess the right to vote. *See Burton v. City of Belle Glade*, 178
19 F.3d 1175, 1188 n.8 & n.21 (11th Cir. 1999)(distinguishing between Voting Rights Act
20 vote dilution claims, which may only be brought by enfranchised members of an
21 adversely affected racial minority group, with Voting Rights Act vote denial claims,
22 which may only be brought by disfranchised racial minority group members); *see also*
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1 *Push*, 674 F. Supp. at 1264 (concluding that “whereas instances of racially polarized
2 voting are pertinent in challenges to electoral processes, voting behavior is not germane
3 to the challenged voter registration procedures at issue here.”).

4
5 Next, Defendants suggest, with respect to Senate Factors 3 and 4, that because “there
6 is no evidence of any of the voting practices referred to here being used in Washington”
7 that “those factors weigh in favor of finding that felon disenfranchisement is a
8 discriminatory practice and the VRA has not been violated.” Defs.’ Rep. Br., at 13.
9 Defendants’ argument fundamentally misunderstands the proper application of the
10 Senate Factors in a Section 2 analysis. To determine whether Washington State’s felon
11 disenfranchisement regime is violative of Section 2, this “court must assess the impact of
12 the contested structure or practice on minority electoral opportunities ‘on the basis of
13 objective’” and relevant factors. *Gingles*, 478 U.S. at 44. That Plaintiffs here do not
14 allege that Washington State has used, for example, unusually large election districts or
15 a candidate slating process to discriminate against racial minorities assists this Court in
16 determining that Senate Factors 3 and 4 are not relevant to this case, not, as Defendants
17 improperly suggest, that Section 2 has not been violated. *See Push*, 674 F. Supp. at
18 1264 (Holding that “[a]s with the factor of racially polarized voting, the court concludes
19 that voting practices [referenced in Senate Factor 3] are not relevant or germane to any
20 determination of the discriminatory impact of registration practices.”). Indeed,
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1 Defendants recognized as much with respect to Senate Factor 4, stating that “[b]ecause
2 there is no candidate slating process in Washington, that factor does not apply here.”
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4 *See Push*, 674 F. Supp. at 1264 (Holding that, with respect to Senate Factor 4, “[a]ny
5 candidate slating process is clearly beyond the scope of this court’s consideration of
6 Mississippi’s voter registration statutes.”).

7
8 Senate Factors 6, 7 and 8 are clearly inapplicable to the instant case, since each
9 Factor presupposes an ability to vote, which Plaintiffs plainly do not have. *See Push*,
10 674 F. Supp. at 1263 (“The relevant or dispositive [Senate] factors will vary from case
11 to case, depending on the nature of the statute or practice challenged.”). The Supreme
12 Court in *Gingles* considered Senate Factor 6 in the context of a vote dilution case, and
13 noted that white candidates had “encouraged *voting* along color lines by appealing to
14 racial prejudice.” *Gingles*, 478 U.S. at 39 (emphasis added); *see also Push*, 674 F.
15 Supp. at 1265 (Holding that “the court is of the opinion that racial appeals in campaigns
16 or elections bear little relevance to the State’s registration procedures.”). The plain
17 language of Senate Factors 7 and 8 clearly suggests that such Factors are not relevant to
18 the Section 2 inquiry here, since Plaintiffs are prohibited from voting in Washington
19 State, and are thus not directly represented by elected officials.

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21 Notwithstanding that only Senate Factors 5 and 9 are applicable to the instant case,
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23 Defendants assert that the remaining Senate Factors “for which the Plaintiffs have not
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1 attempted to introduce any evidence . . . favor a determination that Washington’s felon
2 disenfranchisement law does not deny Plaintiffs the right to vote based on race.” Defs.’
3 Rep. Br., at 14. Defendants’ crude application of inapplicable Senate Factors to this
4 case is unavailing. As discussed *supra*, Congress did not intend that any particular
5 number of Senate Factors be proved, nor that a majority of them point in one direction
6 or another, but required that this Court, in examining the totality of the circumstances to
7 determine whether Washington State’s felon disenfranchisement regime results in vote
8 denial on account of race, consider how that practice “interacts with social and historical
9 conditions to cause an inequality in the opportunities enjoyed by black and white voters
10 to elect their preferred representatives.” *Gingles*, 478 U.S. at 47.

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14 This Court will find, in looking at Senate Factors 5 and 9, the relevant Factors in this
15 case, that Plaintiffs’ evidence about each weighs in favor of Plaintiffs in the totality of
16 the circumstances analysis.

17
18 **1. Washington State’s Felon Disfranchisement Regime Interacts With**
19 **Racial Discrimination in the State’s Criminal Justice System to**
20 **Disproportionately Deny Plaintiffs an Equal Opportunity to**
21 **Participate in the State’s Political Process on Account of Race, in**
22 **Violation of Section 2 (SENATE FACTOR 5).**

23 Defendants attempt to minimize Plaintiffs’ unrefuted evidence by asserting that the
24 “Plaintiffs continue to rely ons [sic] a bare statistical showing that a disproportionate
25 number of racial minorities are felons” and that “Plaintiffs have submitted no evidence

1 that links bias in the criminal justice system to denial of the right to vote.” Defs.’ Rep.
2 Br., at 7-8.¹ Defendants’ conclusory statement, however, neither comports with the
3 earlier findings of this Court, nor rebuts Plaintiffs’ compelling evidence, which
4 demonstrates that the disproportionate disfranchisement of racial minorities in
5 Washington State cannot be explained on the basis of race-neutral factors.
6

7 Plaintiffs’ evidence provides a causal connection by showing that the racially
8 discriminatory impact of Washington State’s felon disfranchisement regime is
9 attributable to racial discrimination in the surrounding social and historical
10 circumstances, particularly in the State’s criminal justice system. *See Farrakhan*, 338
11 F.3d at 1019. As this Court recognized with respect to their previously developed
12 evidentiary record, the Plaintiffs’ “evidence of discrimination in the criminal justice
13 system, and the resulting disproportionate impact on minority voting power, is
14 compelling.” Summ. Judg. Order, at 8. Plaintiffs have, in fact, strengthened their
15 previously developed record of racial discrimination in Washington State’s criminal
16 justice system. Incredibly, Defendants have not dealt squarely with this issue in either
17 of their briefs, have not disputed Plaintiffs’ Statement of Material Facts (as discussed
18 *supra*), and have not proffered even one shred of evidence to rebut the uncontested
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24 ¹ Defendants assert that “there is no evidence in the record of voting ‘blocs’ losing their political voice
25 due to felon disenfranchisement.” Defs.’ Rep. Br., at 8. Such a showing is certainly, of course, not required
under Section 2, or, for that matter, under any other test about which Plaintiffs are aware.

1 findings of Plaintiffs' five expert witnesses or of the Plaintiffs' record more generally.
2 Instead, Defendants have made wholly conclusory and unsupported statements about
3 Plaintiffs' evidence that do not bring into question the veracity or reliability of such
4 evidence. As a result, the findings of Plaintiffs' expert witnesses, and Plaintiffs'
5 evidence more broadly, have not been disputed or refuted. Accordingly, Plaintiffs'
6 evidence under Senate Factor 5 weighs in favor in Plaintiffs in the totality of
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9 circumstances test.

10 **i. Significant Racial Disparities in the Criminal Justice System Are**
11 **Not Warranted By Racial Differences in Illegal Behavior.**
12 **(Robert Crutchfield, Ph.D.)**

13 Plaintiffs assert that “[t]here is no evidence in this record that any of the Plaintiffs, or
14 any prison inmate, did not commit a felony.” Defs.’ Rep. Br, at 8. Defendants’
15 assertion implies that Plaintiffs’ misconduct alone “prohibits them from claiming that
16 Washington’s felon disenfranchisement scheme operates so as to discriminate in the
17 allocation of votes on the basis of race,” an argument that was previously rejected by
18
19 this Court. *See Farrakhan*, 987 F. Supp. at 1313. As this Court previously held:

20 This was not a bar to the plaintiffs’ claims in *Hunter v. Underwood*, and should play
21 no role in the case at hand. Implicit in Plaintiffs’ complaint is the argument that,
22 had Plaintiffs Farrakhan, Shadeed, Price, Barrientes, Schaaf, and Briceno been
23 white, they would have been substantially less likely to have lost the right to vote.
24 Consequently, their claim is that race plays an impermissible role in the
25 application of Washington’s disenfranchisement scheme. The VRA provides

1 Plaintiffs an avenue for relief from this type of discrimination.

2 *Farrakhan*, 987 F. Supp. at 1313.

3
4 Indeed, as Plaintiffs' record makes clear, racial discrimination in Washington State's
5 criminal justice system plays an impermissible role in the application of the State's
6 felon disfranchisement scheme. Remarkably, Defendants do not dispute Plaintiffs'
7 evidence that the over-representation of racial minorities at every stage of Washington
8 State's criminal justice system is not warranted by the extent to which racial minorities
9 are involved in illegal behavior.² *See* Expert Report by Robert D. Crutchfield, Ph.D.
10 (Exhibit 2), at 236. Defendants do not dispute, for example, Plaintiffs' evidence
11 demonstrating that Blacks, Latinos and Native Americans are subjected to racial
12 profiling in Washington State at rates that cannot be justified by differential
13 involvement in crimes that are likely to lead to arrests. *Id.* at 244, 269.

14
15 Neither do Defendants dispute that, in addition to being subjected to racial profiling
16 by Washington State Police, prosecutors subject racial minorities to discriminatory
17 treatment, even where well-developed statutory standards are in place. *Id.* at 244, 270-
18 274. Specifically, Defendants do not dispute Plaintiffs' evidence that, in spite of the
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23 ² Defendants incorrectly state that "Professor Crutchfield performed no surveys or tests to
24 support his reviews for his report, and he has not attempted to undertake any studies in this area since
25 1999." Defs.' Rep. Br., at 8. In fact, Professor Crutchfield conducted research *after* 1999, culminating
in the Crutchfield (2004) study, which is referenced in his Expert Report.

1 presence of statutory standards designed to limit discretion by prosecutors, and even
2 after accounting for legally relevant characteristics, Black defendants are more likely
3 than Whites to have charges filed against them, less likely than Whites to be released on
4 their own recognizance, more likely than Whites to receive higher rates of confinement,
5 less likely than Whites to have their sentence converted to an alternative sentence, and
6 more likely than Whites to receive longer sentences. *Id.* at 272-273.
7

8 Defendants do not dispute Plaintiffs' evidence that significant racial disparities in the
9 sentencing outcomes of felony cases in the Washington State criminal justice system
10 persist, even after legally relevant factors, such as the seriousness of the offense, the
11 criminal histories of offenders, and legislatively established aggravating factors, such as
12 the presence of a weapon in the commission of a crime, were taken into account. *Id.* at
13 245, 288-289. Neither do Defendants dispute Plaintiffs' evidence that a Black person in
14 Washington State is more than *nine times* more likely to be in prison than a White
15 person in the State, notwithstanding the fact that Washington State cannot justify the
16 disproportionate incarceration of Blacks compared to that of Whites on the basis of
17 higher violent crime involvement by the former. *Id.*
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21 Finally, Defendants do not dispute the significance of the ultimate findings of
22 Plaintiffs' evidence of unwarranted racial disparities in Washington State's criminal
23 justice system, that racial discrimination disproportionately subjects racial minorities to
24

1 the State's felon disfranchisement scheme. *Id.* at 262.

2 **ii. Blacks and Latinos are Over-Represented, and Whites are**
 3 **Under-Represented, Among Seattle's Drug Arrestees as**
 4 **Compared with the Actual Offender Population.**
 5 **(Katherine Beckett, Ph.D.)**

6 Defendants do not dispute Plaintiffs' evidence that, in Seattle, the majority of *users*
 7 of marijuana and serious drugs, such as heroin, methamphetamine, powder cocaine,
 8 crack cocaine, and ecstasy, are White. Expert Report by Katherine Beckett (Exhibit 3),
 9 at 313, 319-320. Neither do Defendants dispute Plaintiffs' evidence that,
 10 notwithstanding this fact, Blacks and Latinos are over-represented, and Whites under-
 11 represented, among Seattle's drug arrestees as compared with the best available
 12 evidence regarding the actual offender population.³ *Id.* at 314-315. Moreover,
 13 Defendants do not dispute Plaintiffs' evidence that demonstrates that the organizational
 14 practices that produce these disparities are not explicable in race-neutral terms, but
 15 instead incorrectly assert that Professor Kathryn Beckett's "race-neutral hypotheses
 16 were limited to two theories." Defs.' Rep. Br., at 10.

17 In fact, Professor Beckett considered and rejected the following *five* race- neutral
 18 hypotheses, none of which are disputed by Defendants: that the Seattle Police
 19 Department's (1) focus on crack cocaine offenders is not a consequence of the degree to
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 24 ³ Defendants, in fact, concede that Professor Beckett's findings as detailed in her Expert Report
 25 are relevant to show racial discrimination. *See* Defs.' Rep. Br., at 9.

1 which the various drug markets are associated with violence; 2) focus on crack cocaine
2 offenders is not a function of the frequency with which crack cocaine is exchanged,
3 particularly outdoors; 3) focus on the crack cocaine market is not a consequence of the
4 degree to which the various drug markets are associated with public health concerns; 4)
5 focus on the downtown area is not a function of crime rates; and 5) geographic focus on
6 the downtown area is not explicable in terms complaints by citizens, organizational/
7 personnel constraints or volume productivity (i.e. the amount of drugs or cash yielded
8 per officer hour invested). *See* Katherine Beckett (Exhibit 3), at 314-315.

11 Finally, Defendants do not dispute the significance of the ultimate findings of
12 Plaintiffs' evidence that the over-representation of racial minorities among drug
13 possession and drug delivery arrestees logically leads to the racially disparate filing of
14 felony charges, which leads to the disparate disfranchisement of racial minorities in
15 Washington State.

17 **iii. Washington's History of Racial Discrimination in Education,
18 Employment and Housing Makes Navigating the State's Voter
19 Restoration Process Especially Difficult. (Morgan Kousser, Ph.D.)**

20 Defendants assert that "there is no issue remaining in this lawsuit related to the
21 restoration of the right to vote," and Professor Morgan Kousser's "opinion does not
22 assist this Court's analysis." Defs.' Rep. Br., at 15. In fact, Professor Kousser's
23 analysis makes clear that the difficulty of regaining the right to vote for racial minorities
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1 following a felony conviction operates as the functional equivalent of vote denial, and is
2 relevant under Senate Factor 5.

3
4 Specifically, Professor Kousser's Expert Report sets forth a history of discrimination
5 against racial minorities in Washington State in the areas of employment, housing and
6 education, which continues in the modern day not only to adversely impact the
7 opportunities of racial minorities, but also to make navigating the State's voting rights
8 restoration process especially difficult, and, in some cases, impossible. Expert Report
9 of J. Morgan Kousser (Exhibit 4), at 347-348, 356-361. Defendants do not dispute
10 Professor Kousser's findings, but instead conclude, with no rationale, that the
11 "restoration process . . . has no bearing on an issue in this case." Defs.' Rep. Br., at 14.
12

13
14 Defendants' conclusory statements, however, do not refute the truth of Plaintiffs'
15 evidence, that the process of regaining suffrage in Washington State is particularly
16 complicated, requiring considerable skills in negotiating two separate bureaucracies, and
17 the financial resources to retain an attorney who specializes in such matters. Expert
18 Report of J. Morgan Kousser (Exhibit 4), at 347. Neither do Defendants dispute
19 Plaintiffs' evidence that, since racial minorities are disproportionately convicted of
20 felonies, and are also more likely than Whites to be disadvantaged in education and
21 economic well-being, racial minorities are at a distinct disadvantage in restoring their
22 voting rights following a felony conviction. *Id.* at 347-350, 353-355.
23
24

1 Finally, Defendants do not dispute Plaintiffs' evidence that the educational
2 disadvantages of racial minority inmates in particular, together with the comparative
3 poverty of racial minorities in Washington State, make it especially difficult for racial
4 minority felons to navigate the State's complicated voting rights restorations
5 procedures. *Id.*

6
7 In sum, this Court can find that Plaintiffs' evidence under Senate Factor 5 weighs in
8 favor of Plaintiffs in the totality of the circumstances analysis.
9

10 **2. Defendants' Policy Justification (or Absence of A Justification)**
11 **Underlying Article 6 § 3 of the Washington State Constitution is**
12 **Tenuous (SENATE FACTOR 9).**

13 Defendants assert that, with respect to Senate Factor 9, the "basis for considering the
14 policy rationale for a state-imposed voter qualification is to determine whether the voter
15 qualification simply masquerades an attempt to exclude a class of voters based on race."
16 Defs.' Rep. Br., at 16. Not only do Defendants fail to provide *any* authority for this
17 proposition, but Defendants also fail to articulate *any* policy reasons underlying
18 Washington State's felon disfranchisement laws.
19

20 Defendants' recognition that "Plaintiffs have shown a disparate impact, mostly to
21 Blacks," Defs.' Rep. Br., at 6, intensifies the critical need for Defendants to identify
22 precisely what, if any, goal Washington State's felon scheme pursues. Defendants have
23 failed to do that here, and Plaintiffs' unrefuted evidence demonstrates that the policy
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1 reasons (or absence of such reasons) underlying Washington State’s felon
2 disfranchisement scheme are tenuous,⁴ in violation of Section 2 of the Voting Rights
3 Act. Expert Report by Alec Ewald (Exhibit 6), at 413.
4

5 In sum, Plaintiffs’ evidence under Senate Factor 9, like its evidence under Senate
6 Factor 5, weighs in favor of Plaintiffs in the totality of circumstances test.
7

8 **VI. CONCLUSION**

9 For all of the foregoing reasons, Plaintiffs respectfully request that this Court grant
10 Plaintiffs’ Motion for Summary Judgment and deny Defendants’ Motion for Summary
11 Judgment.
12

Dated: March 22, 2006.

13 /s/Larry A. Weiser, WSBA#: 6865
14 University Legal Assistance
15 721 North Cincinnati Street
16 Spokane, Washington 99220
17 (509)323-5791 Telephone
18 lweiser@lawschool.gonzaga.edu

/s/Ryan P. Haygood, Pro Hac Vice
Theodore M. Shaw, Director-Counsel
Norman J. Chachkin
Debo P. Adegbile
NAACP Legal Defense &
Educational Fund, Inc.
99 Hudson Street, Suite 1600
New York, NY 10013-2897
(Tel.) 212.965.2235
rhaygood@naacpldf.org

23 ⁴ As his Expert Report makes clear, Professor Ewald utilized the courts’ interpretation and definition of
24 “tenuous” in *United States v. Blaine County*, 363 F.3d 897 (9th Cir. 2004), and *Mississippi State Chapter,*
25 *Operation Push v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), and the plain definition of the word, to define
the term.

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

Jeffrey T. Even jeffe@atg.wa.gov

Dennis Cronin dcc99208@yahoo.com

Ryan P. Haygood rhaygood@naacpldf.org

Daniel J. Judge DanielJ@atg.wa.gov; CJD0lyEF@atg.wa.gov;

JudythL@atg.wa.gov

Carol A. Murphy CarolM@atg.wa.gov

/s/ Larry A. Weiser, WSBA#:6865

LARRY A. WESIER

University Legal Assistance

721 North Cincinnati Street

P.O. Box 3528

Spokane, Washington 99220

(509)323-5791 Telephone

(509)323-5805 Facsimile

lweiser@lawschool.gonzaga.edu