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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MUHAMMAD SHABAZZ FARRAKHAN, et al.,

Plaintiffs,

CHRISTINE O. GREGOIRE, et al.,

Defendants.

No. CV-96-076-RHW

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION AND PRELIMINARY STATEMENT

This case raises fundamental legal questions about the integrity of Washington State's democratic processes generally, and their discriminatory impact on its racial minority citizens in particular. Plaintiffs, who are Black, Latino and Native American, argue that Article 6 § 3 of the Washington State Constitution and the statute implementing it, constitute improper race-based vote denial in violation of Section 2 of the Voting Rights Act. Specifically, the

interaction of Article 6 § 3 of the Washington State Constitution with the criminal justice system, which is infected with racial discrimination, results in a disproportionate number of racial minorities being disfranchised following a felony conviction. As a result, racial minorities in Washington State cannot participate on equal terms in the State's political process.

Against the weight of Supreme Court precedent, Defendants attempt to heighten the Voting Rights Act standard by suggesting that Article 6 § 3 of the Washington State Constitution is not violative of Section 2 because "there is no evidence of racial motive in Washington's felon disenfranchisement law." Defendants' Memorandum of Authorities in Support of Motion for Summary Judgment and Dismissal ("Defs.' Br."), at 18. The Defendants pursue this meritless argument despite Section 2's plain language, which does not require a showing of intent.

Of equal importance, Defendants attempt to achieve a favorable disposition by omitting from their papers many important facts. Defendants have failed to proffer *any* expert testimony to rebut the findings of Plaintiffs' experts and the other evidence Plaintiffs have put on the record. In this case, Plaintiffs in fact have strengthened their previously developed record showing racial discrimination in Washington State's criminal justice system, which this Court recognized as "compelling." *Farrakhan v. Locke*, No. CS-96-076-RHW, Order Granting

Defendants' Motion for Summary Judgment, slip. op. at 8 (E.D. Wash. Dec. 1, 2000)[hereinafter Summ. Judg. Order]. Plaintiffs' evidence shows, first, that the existing racial disparities at every stage of Washington State's criminal justice system, from arrest through charging and incarceration, are not warranted by the extent to which racial minorities actually participate in crimes most likely to lead to prison sentences. Thus, while Blacks in Washington State are *three* times more likely than Whites to be arrested for violent crimes, they are *nine* times more likely to be incarcerated. Moreover, Plaintiffs' evidence shows that Blacks and Latinos are over-represented, and Whites are under-represented, among Seattle's drug arrestees, notwithstanding the fact that the majority of those in Seattle who use and deliver serious drugs are White.[1] Significantly, Plaintiffs' evidence demonstrates that these striking racial disparities are not explicable in race neutral terms.

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1 See *infra* at 18-21 for a discussion of the unwarranted over-representation of Blacks and Latinos among drug arrestees in Seattle. Seattle, which has the largest concentration of racial minorities, is Washington State's most racially diverse city. Blacks in Seattle (47,541 people) comprise 24.7% of Washington State's entire Black population, and Blacks in King County (93,875 people) represent 49.3% of the State's total Black population (190,267 people). U.S. Census Bureau, *Geographic Comparison Table*, *available at* http://factfinder.census.gov/servlet/GCTTable.html. In Seattle, Blacks comprise 8.4% of the population; Latinos represent 5.3% of the city's population (29,859 people); and Native Americans make up 1% of Seattle's population (5,634 people). U.S. Census Bureau, *State and County Quick Facts*, *available at* http://quickfacts.census.gov/qfd/states/53/5363000.html. Together, Blacks, Latinos and Native Americans comprise 14.7% percent of Seattle's population (82,816 people of the total population of 569,101). *Id.*

Plaintiffs' evidence further shows that the history of discrimination in Washington State in employment, housing and education places racial minority citizens at a considerable disadvantage in educational attainment and economic well being. For inmates generally, and racial minority inmates in particular, these disadvantages make it profoundly difficult to navigate Washington State's decentralized and intricate procedures for regaining the vote. Finally, Plaintiffs' evidence shows that any policy reasons (Defendants have failed to proffer *any* such reasons on the record) underlying Article 6 § 3 of the Washington State Constitution are tenuous.

Thus, Plaintiffs' evidence shows that the interaction of racial discrimination in the criminal justice system with Washington State's "disenfranchisement provision clearly has a disproportionate impact on racial minorities," and serves to disfranchise "racial minorities . . . in numbers disproportionate to that of their white fellow citizens." Summary Judg. Order, at 3, 6. Plaintiffs' evidence demonstrates that the disproportionate denial of the right to vote to racial minorities on account of race is *caused by that interaction*, which has resulted in the disfranchisement of nearly one-quarter — an incredible 24% — of all Black men in Washington State, and nearly 15% of the entire Black population in the State. This result, as Plaintiffs' evidence makes clear, is precisely what Section 2

of the Voting Rights Act was enacted to proscribe. For these reasons, and those set forth below, Defendants' Motion for Summary Judgment should be denied, and Plaintiffs' Motion for Summary Judgment should be granted.[2]

II. STATEMENT OF THE CASE

Plaintiffs Muhammad Shabazz Farrakhan, Al-Kareem Shadeed, Marcus Price, Ramon Barrientes, Timothy Schaaf and Clifton Briceno are citizens who are otherwise qualified to register to vote in Washington State but for the racially discriminatory operation of Article 6 § 3 of the Washington State Constitution and RCW § 9.94A.220, the law implementing it. Plaintiffs Farrakhan, Price, Shadeed and Schaaf are Black; Plaintiff Barrientes is Latino; and Plaintiff Briceno is Native American. Section 2 of the Voting Rights Act of 1965 protects "any citizen who is a member of a protected class of racial minorities." *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986).

Plaintiffs filed the instant action *pro se* on February 2, 1996, arguing that Article 6 § 3 of the Washington State Constitution ("Article 6 § 3 of the Washington State Constitution" or "Washington State's felon disfranchisement scheme") and the laws implementing Article 6 violate the Voting Rights Act of 1965, *codified at* 42 U.S.C. § 1973 ("Voting Rights Act" or "VRA") and the

2 Plaintiffs' Motion for Summary Judgment includes all exhibits, reports, and declarations previously filed with this Court on July 31, 2000, in addition to those filed with this Motion.

United States Constitution. This Court dismissed Plaintiffs' vote dilution and constitutional claims, but preserved Plaintiffs' claim that Washington State's felon disfranchisement scheme results in vote denial on the basis of race in violation of the Voting Rights Act. *Farrakhan v. Locke*, 987 F. Supp. 1304, 1312- 1313 (E.D. Wash. 1997). This Court concluded that the plain language of the VRA applies to felon disfranchisement, and granted Plaintiffs the opportunity to show, through an inquiry into historical and social conditions, that Washington State's felon disfranchisement scheme denies them the right to vote in violation of the Voting Rights Act. *Id.* The operative complaint before this Court is Plaintiffs' Fourth Amended Complaint, which alleges vote denial on account of race in violation of the Voting Rights Act of 1965 and also challenges Washington State's procedures for restoring voting rights to people with felony convictions. Pls.' Fourth Am. Compl., at ¶¶ 31-37.

Although this Court, ruling on cross-motions for summary judgment, recognized that Plaintiffs' "evidence of discrimination in the criminal justice system, and the resulting disproportionate impact on minority voting power, is compelling," it nevertheless held that evidence of discrimination in the criminal justice system was not relevant to Section 2's totality of circumstances analysis. Summ. Judg. Order, at 8-9. Instead, focusing on Washington State's disfranchisement scheme *itself*, this Court concluded that there was no evidence

that the enactment of the disfranchisement provision was "motivated by racial animus, or that its operation *by itself* has a discriminatory effect," and, therefore, determined that Plaintiffs failed to establish a Section 2 violation. *Id.* at 6-8.

In reversing this Court, the Ninth Circuit in *Farrakhan v. Washington*, 338 F.3d 1009, 1011-12 (9th Cir. 2003), held that because a Section 2 totality of the circumstances analysis requires courts to consider factors *external* to the challenged voting mechanism itself, evidence of discrimination within a criminal justice system can be relevant to a Section 2 analysis, and that a Section 2 violation may be established by showing that, based on the totality of the circumstances, the challenged voting practice results in discrimination "on account of" race. *Id.* Because the Ninth Circuit determined that Plaintiffs' compelling evidence racial discrimination in Washington State's criminal justice system was improperly disregarded, this matter was remanded back to this Court to evaluate the totality of the circumstances, including evidence of racial discrimination in Washington State's criminal justice system. *Id.* at 1020.

III. STATEMENT OF THE ISSUE

WHETHER, BASED ON THE TOTALITY OF CIRCUMSTANCES, ARTICLE 6 § 3 OF THE WASHINGTON STATE CONSTITUTION AND RCW § 9.94A.220, WHICH INTERACT WITH RACIAL BIAS IN WASHINGTON STATE'S CRIMINAL JUSTICE SYSTEM TO DISPROPORTIONATELY DENY THE RIGHT TO VOTE TO PLAINTIFFS, RESULTS IN DISCRIMINATION AGAINST PLAINTIFFS ON ACCOUNT OF RACE IN VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT OF 1965?

1 **IV. SUMMARY JUDGMENT STANDARD**

2 In a motion for summary judgment, the burden is on the moving party to
3
4 demonstrate by a properly supported motion there is no genuine dispute as to any
5 material fact and that the movant is entitled to a judgment as a matter of law.
6 Fed.R.Civ.P. 56(c). Under Rules 56(a) and (b), both plaintiffs and defendants may
7
8 move for summary judgment. Under such cross-motions, the court must consider
9 each party's motion individually to determine if that party has met the summary
10 judgment standard. 10A Charles Alan Wright, Arthur R. Miller & Mary Kay
11 Kane, *Federal Practice and Procedure* § 2720 (3d ed. 1998).
12
13 Thus, in considering Plaintiffs' Motion for Summary Judgment, this Court
14 begins with the recognition that on their Motion, Plaintiffs' have the initial
15 responsibility of informing the Court of the basis for the belief summary judgment
16 is warranted. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). This is
17
18 accomplished through the presentation of facts whose materiality is determined
19 through substantive law. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*,
20 809 F.2d 626, 630 (9th Cir. 1987). If Defendants dispute facts established by
21 Plaintiffs' evidence only through conclusory assertions or if the facts are clearly
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23 uncontroverted by Defendants, summary judgment is properly granted for
24 Plaintiffs, even in complex cases. *Carroll v. United Steelworkers of America*, 498
25 F. Supp. 976 (D. Mass. 1980).

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In the case at bar, Plaintiffs submit that there is no dispute on this record as to the facts material to Plaintiffs' Motion, and, therefore, summary judgment is appropriate for the following reasons. Fed.R.Civ.P. 56(c). First, Defendants have failed to designate any rebuttal experts to controvert the opinions in the reports of Plaintiffs' expert witnesses or the Plaintiffs' evidence more broadly. Thus, Defendants' attempt to identify material facts that they claim support their Motion for Summary Judgment and that are not in dispute fails. In addition to failing to present record evidence of facts that would support their Motion, Defendants have also based their Motion solely upon an erroneous legal theory, that Section 2 of the Voting Rights Act requires a showing of intentional discrimination.

V. ARGUMENT

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

Congress enacted the VRA for the broad remedial purpose of "rid[ding] the county of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). For this reason, the VRA should be interpreted in a manner that provides "the broadest possible scope in combating racial discrimination." *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969). In 1982, in response "to the increasing sophistication with which the states were denying racial minorities the right to vote," *Farrakhan*, 987 F. Supp. at 1308, and in response to the Supreme

Court's ruling in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which inserted an intent requirement into the VRA, Congress amended Section 2 of the VRA to relieve plaintiffs of the burden of proving discriminatory intent. *Chisom v. Roemer*, 501 U.S. 380, 394 (1991); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 557 (9th Cir. 1998)(noting Congress's statement that the "intent test" was "unnecessarily divisive in that it involved charges of racism on the part of individual officials or entire communities [and] placed an inordinately difficult burden of proof on the plaintiffs" and "asked the wrong question."). As amended, Section 2 of the VRA provides:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973. Plaintiffs can prevail under the amended Section 2 "by demonstrating that a challenged election practice has resulted in the denial or

1 abridgment of the right to vote based on color or race." *Chisom*, 501 U.S. at 394.
2 As Supreme Court explained, "[t]he essence of a Section 2 claim is that a certain
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4 electoral law, practice or structure interacts with social and historical conditions to
5 cause an inequality" in the voting of various racial minority groups. *Thornburg*,
6 478 U.S. at 47.
7
8 The Senate Report accompanying the 1982 amendments to the VRA
9 identified "typical factors" ("Senate Factors") that are relevant in analyzing
10 whether Section 2 has been violated.[3] Congress did not intend this list to be
11 comprehensive or exclusive, nor did Congress intend that "any particular number
12
13 of factors be proved, or that a majority of them point one way or the other." *Id.* at
14 29. Rather, in examining the totality of the circumstances to determine whether a
15 challenged voting practice results in vote denial or vote dilution on account of race,
16 courts must consider how the challenged practice "interacts with social and
17
18 historical conditions to cause an inequality in the opportunities enjoyed by black
19 and white voters to elect their preferred representatives." *Id.* at 47. Thus, whether
20 a particular practice results in a violation of Section 2 depends on the totality of
21 circumstances in which the practice operates.
22
23 The flexible totality of circumstances test allows the Senate Factors to be
24 considered factor by factor, applying only those factors that are relevant to a
25

3 The entire list of Senate Factors as contained in the Senate Report is set out

1 particular case. *See Mississippi State Chapter, Operation Push v. Allain*, 674 F.
2 Supp. 1245 (N.D. Miss. 1987)(holding that Mississippi's dual registration
3
4 requirement constituted vote denial in violation of Section 2 of the Voting Rights
5 Act after discarding as irrelevant five Senate Factors and finding that plaintiffs'
6 evidence about the remaining four Senate Factors weighed in plaintiffs' favor
7 under the totality of circumstances test).
8
9 In this case, because the issue here is vote denial, only Senate Factors 5 and
10 9 are relevant. In analyzing whether, under the totality of circumstances, Section 2
11 has been violated, Senate Factors 5 and 9 direct the Court to inquire into:
12
13 (5) The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; and
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15
16 (9) Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.
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18 In looking at Senate Factors 5 and 9, this Court will find that Plaintiffs'
19 evidence about each weighs in favor of Plaintiffs in the totality of the
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21 circumstances analysis.
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infra in Appendix A.

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1. Article 6 § 3 of the Washington State Constitution and RCW § 9.94A.220 Interact With Racial Discrimination in Washington State's Criminal Justice System to Disproportionately Deny Plaintiffs, Who Are Black, Latino and Native American, an Equal Opportunity to Participate in the State's Political Process on Account of Race, in Violation of Section 2 of the Voting Rights Act of 1965 (SENATE FACTOR 5).

Finding that evidence of racial discrimination in Washington State's criminal justice system is relevant to a Section 2 analysis, the Ninth Circuit held that, "[i]n fact, this kind of evidence is encompassed within the scope of factor (5), directing courts to consider 'the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health.'" *Farrakhan*, 338 F.3d at 1020. Senate Factor 5 "underscores Congress's intent to provide courts with a means of identifying practices that have the effect of shifting racial inequality from the surrounding circumstances into the political process." *Id.* To the extent that racial discrimination in Washington State's criminal justice system "contribute[s] to the conviction of minorities for 'infamous crimes,' such discrimination would clearly hinder the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic." *Id.* "Thus, racial bias in Washington State's criminal justice system may very well interact with voter disqualifications to create the kinds of barriers to political participation on account of race that are

1 prohibited by Section 2, rendering it simply another relevant social and historical
2 condition to be considered where appropriate." *Id.*
3
4 In this case, this Court recognized with respect to their previously developed
5 evidentiary record, that Plaintiffs' "evidence of discrimination in the criminal
6 justice system, and the resulting disproportionate impact on minority voting power,
7 is compelling." Summ. Judg. Order, at 8. Plaintiffs have, in fact, strengthened
8 their previously developed record of racial discrimination in Washington State's
9 criminal justice system. Incredibly, Defendants have failed to proffer even one
10 shred of evidence to rebut the testimony of Plaintiffs' five expert witnesses or of
11 the Plaintiffs' record more generally. Defendants have failed to update the
12 research and/or testimony of the previously retained experts, whom they shared
13 with Plaintiffs in 2000, and have failed to retain additional experts, with the
14 exception of Hugh Spitzer, whose testimony is irrelevant, since it focuses solely on
15 a question not at issue in this case.[4] *See* Plaintiffs' LR 56.1 Statement of Material
16 Facts (filed July 31, 2000), at No. 10 (Recognizing that "Washington's criminal
17 disenfranchisement law was not designed to disenfranchise blacks specifically in
18 the state at the time of its enactment in 1889."). As a result, the findings of
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24 4 Hugh Spitzer's report concludes that "there is no evidence that the drafters of Washington's constitution in 1889 had any racially discriminatory intent when
25 they included language barring voting rights from '[a]ll persons convicted of infamous crimes unless restored to their civil rights.'" Report Concerning Voting Rights of Felons in Washington's 1889 Constitution, at 1.

Plaintiffs' expert witnesses have not been disputed or refuted, and should be, at a minimum, construed in the light most favorable to Plaintiffs.

Defendants attempt to minimize Plaintiffs' unrefuted evidence by asserting that "Plaintiffs still have brought forward no evidence of discrimination 'on account of race' in Washington's criminal justice system," and that "Plaintiffs continue to rely only on statistical racial disparity." Defs.' Br. at 13. Defendants' argument, however, neither comports with the earlier findings of this Court, nor rebuts Plaintiffs' compelling evidence, making plain that the disproportionate disfranchisement of racial minorities in Washington State cannot be explained on the basis of race-neutral factors. Accordingly, Plaintiffs' evidence under Senate Factor 5 weighs in favor in Plaintiffs in the totality of circumstances test.

i. Plaintiffs' Evidence Demonstrates that the Existence of Significant Racial Disparities in Washington State's Criminal Justice System Are Not Warranted By Racial Differences in Illegal Behavior. (Expert Report by Professor Robert Crutchfield, Ph.D.)

"People of color are over-represented at every stage of Washington's criminal justice system, from arrest through sentencing and incarceration." Washington State Sentencing Guidelines Commission, *Disproportionality and Disparity in Adult Felony Sentencing* (2003), *available at* http://www.sgc.wa.gov/PUBS/Disproportionality/Adult_Disproportionalit_Report2003.pdf.; *see also* Anne L. Fiala Deposition (Exhibit 1). Indeed, for every year

between 1996 and 2005, 19% to 22.9% of the incarcerated population in Washington State was Black, even though Blacks only comprise 3% of the general population. *Id.* Latinos comprise 11% of the prison population, but just 7% of the State's general population. *Id.* Native Americans, who constitute only 2% of the State's population, represent nearly 4% of the prison population. *Id.* Collectively, though Blacks, Latinos, and Native Americans constitute only 12% of Washington State's general population, they represent an incredible 36% of the State's prison population. *Id.* On the other hand, Whites, who comprise 81% of Washington State's general population, are *underrepresented* in prison, where they make up 61% of that population. *Id.*

Significantly, the over-representation of racial minorities at every stage of Washington State's criminal justice system is not warranted by the extent to which racial minorities are involved in illegal behavior. Expert Report by Robert D. Crutchfield, Ph.D. (Exhibit 2), at 236. Plaintiffs' evidence demonstrates that Native Americans, Blacks and Latinos are subjected to racial profiling in Washington State at rates that cannot be justified by differential involvement in crimes that are likely to lead to arrests. *Id.* at 244, 269. Even after legally relevant variables, such as offense seriousness and the number of violations, are taken into account, racial minority drivers are significantly more likely to be searched by Washington State Police than White drivers during a routine traffic stop. *Id.* at

265. Specifically, Native Americans are more than twice as likely to be searched as Whites, Blacks are more than seventy percent more likely, and Latinos are more than fifty percent more likely to be searched than Whites. *Id.* at 263. Plaintiffs' evidence of racial profiling is significant because disparate police searches lead to the racially disparate filing of felony charges, which lead to disproportionately subjecting racial minorities to Washington State's felon disfranchisement scheme. *Id.* at 262.

In addition to being subjected to racial profiling by Washington State Police, prosecutors subject racial minorities to discriminatory treatment, even where well-developed statutory standards are in place. *Id.* at 244, 270-274. For example, in King County, *see supra* note 1, Whites are less likely to have charges filed against them than racial minorities (60% of White cases filed compared to 65% of racial minority cases). *Id.* at 271. These significant charging disparities persist even after legally relevant characteristics, such as offense seriousness, offenders' criminal histories, and weapons charges, are taken into account. *Id.*

Moreover, bail is recommended for Blacks more often than Whites, who are released on their own recognizance more often than Blacks. *Id.* Racial disparities also exist in the recommended length of confinement even after legal factors have been considered. *Id.* at 272. Specifically, prosecutors recommend that Blacks spend approximately *one half of a day more* for each day a White defendant is

1 recommended to be confined to prison. *Id.* In addition, Blacks are 75% less likely
2 than Whites to be recommended for an alternative sentence. *Id.* at 272-273.
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4 Thus, in spite of the presence of statutory standards designed to limit
5 discretion by prosecutors, and even after accounting for legally relevant
6 characteristics, Black defendants are more likely than Whites to have charges filed
7 against them, less likely than Whites to be released on their own recognizance,
8 more likely than Whites to receive higher rates of confinement, less likely than
9 Whites to have their sentence converted to an alternative sentence, and more likely
10 than Whites to receive longer sentences. *Id.*
11
12 Finally, significant racial disparities in the sentencing outcomes of felony
13 cases in the Washington State criminal justice system persist, even after legally
14 relevant factors, such as the seriousness of the offense, the criminal histories of
15 offenders, and legislatively established aggravating factors, such as the presence of
16 a weapon in the commission of a crime, were taken into account. *Id.* at 245, 288-
17 289. Racial disproportionality in Washington State prisons is 9.28 to 1. *Id.* at 253.
18 That is, a Black person in Washington State is more than *nine times* more likely to
19 be in prison than a White person in the State. *Id.* However, the ratio of Black to
20 White arrests for violent offenses (which require the least amount of police
21 discretion) is only 3.72 to 1. *Id.* Thus, "substantially more than one half of
22 Washington State's racial disproportionality cannot be explained by higher levels
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of criminal involvement as measured by violent crime arrest statistics." *Id.* In sum, Washington State cannot justify the disproportionate incarceration of Blacks compared to that of Whites on the basis of higher violent crime involvement by the former. *Id.*

ii. Plaintiffs' Evidence Demonstrates that Blacks and Latinos are Over-Represented, and are Whites Under-Represented, Among Seattle's Drug Arrestees as Compared with the Best Available Evidence Regarding the Actual Offender Population. (Expert Report of Professor Katherine Beckett, Ph.D.)

Racial discrimination in the criminal justice system in Washington State's most racially diverse city, Seattle, which has the largest concentration of racial minorities, is no less pervasive than it is in the State more broadly. In Seattle, the majority of *users* of marijuana and serious drugs,[5] such as heroin, methamphetamine, powder cocaine, crack cocaine, and ecstasy, are White. Expert Report by Katherine Beckett (Exhibit 3), at 313, 319-320.[6] In addition, the majority of those who *deliver* serious drugs in Seattle, with the possible exception of crack cocaine, are White. *Id.* Notwithstanding these facts, 52.2% of those arrested by the Seattle Police Department (SPD) for *possessing* serious drugs, and

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5 "Serious" drugs are the following controlled substances, which are classified by the state legislature at Level 8 or higher of Washington State's felony sentencing grid: heroin, powder cocaine, crack cocaine, methamphetamine, and ecstasy. Exhibit 3, at 326-327.

6 The evidence indicates that only crack cocaine *may* be used predominantly by Blacks. Exhibit 3, at 313, 319-321.

64.2% of those arrested for *delivery* of serious drugs in Seattle from January 1999 through April 2001 were Black. *Id.* at 313, 319-322, 328-329. As a result, Blacks are over-represented among drug possession and drug delivery arrestees as compared with the actual offender population. *Id.* at 313. Latinos are also over-represented among those arrested for drug possession, while Whites are under-represented among *both* drug possession and drug delivery arrestees. *Id.*

The over-representation of Blacks and Latinos among drug possession arrestees and of Blacks among drug delivery arrestees is largely the result of the following three factors: (1) Law enforcement's concentration on those entangled in the crack cocaine market (as opposed to those involved in the powder cocaine, methamphetamine, and heroin markets); (2) Law enforcement's concentration on outdoor drug venues (although this practice was not as important in numerical terms as the focus on crack users and dealers); and (3) The geographic focus on outdoor drug venues in the downtown area is an important cause of the over-representation of Blacks among drug delivery arrestees. *Id.* at 314-315. Significantly, none of these three organizational practices are explicable in race-neutral terms. *Id.*

First, the SPD's focus on crack offenders is not explicable in terms of the legal status of serious drugs, since each of these substances is classified by the State legislature at Level 8 of Washington State's felony sentencing grid. *Id.*

1 Neither is the SPD's focus on the crack market a consequence of the frequency
2 with which crack is exchanged or the degree to which the various drug markets are
3 associated with violence or public health problems. *Id.* Second, the SPD's focus
4 on outdoor drug venues is not explained by citizen complaints, organizational/
5 personnel constraints or volume productivity (i.e. the amount of drugs or cash
6 yielded per officer hour invested). *Id.* Finally, the SPD's geographic focus on the
7 downtown area is not explicable in terms of crime rates or complaints by citizens.
8 *Id.*

9 In sum, Plaintiffs' evidence demonstrates that Black and Latinos are over-
10 represented, and Whites under-represented, among Seattle's drug arrestees as
11 compared with the best available evidence regarding the actual offender
12 population. *Id.* Plaintiffs' evidence also demonstrates that the organizational
13 practices that produce these disparities are not explicable in race neutral terms. *Id.*
14 These findings have critical implications, since approximately 30% of all state
15 prisoners, 70% of all federal prisoners, and an unknown but likely significant
16 proportion of jail inmates, are incarcerated for drug offenses. *Id.* Moreover,
17 Seattle felony drug arrests constitute approximately 63% of all King County felony
18 drug arrests. *Id.* Plaintiffs' evidence that racial minorities are over-represented
19 among drug possession and drug delivery arrestees, and Whites are under-
20 represented, as compared with the actual offender population, is significant

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because disparate arrests logically lead to the racially disparate filing of felony charges, which lead to the disparate disfranchisement of racial minorities in Washington State.

iii. Plaintiffs' Evidence Demonstrates that Washington State's History of Racial Discrimination in the Areas of Education, Employment and Housing Negatively Impacts Racial Minorities in the Modern Day, and Makes Navigating the State's Cumbersome Voting Restoration Process Difficult, If Not Impossible. (Expert Report of Professor J. Morgan Kousser, Ph.D.)

In addition to the racial bias that has infected Washington State's criminal justice system, there is a history of discrimination against racial minorities in the State in the areas of employment, housing and education, which continues in the modern day not only to negatively impact the opportunities of racial minorities, but also makes navigating the State's voting rights restoration process especially difficult, and, in some cases, impossible. Expert Report of J. Morgan Kousser (Exhibit 4), at 347-348, 356-361.

In Washington State, the process of regaining suffrage is particularly complicated, requiring considerable skills in negotiating two separate bureaucracies, and the financial resources to retain an attorney who specializes in such matters. *Id.* at 347. Since racial minorities, as discussed above, are disproportionately convicted of felonies, and are also more likely than Whites to be

disadvantaged in education and economic well-being,[7] then racial minorities are at a distinct disadvantage in restoring their voting rights following a felony conviction. *Id.* at 347-350, 353-355; *see also* ACLU of Washington, *Voting Rights Restoration Statistics For Washington State*, *available at* http://www.aclu-wa.org/library_files/Voting%20Rights%20Stats.pdf (Noting that fewer than 70,000 Certificates of Discharge have been issued to individuals released from prison since 1988, notwithstanding that, since that time, nearly 300,000 individuals have been released from DOC supervision without a Certificate of Discharge).

In sum, the educational disadvantages of inmates in general, and racial minority inmates in particular, coupled with the comparative poverty of racial minorities in Washington State, make it especially difficult for racial minority felons to navigate Washington State's decentralized and intricate voting rights restorations procedures. *Id.*

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7 All five indices of well-being show that, compared to Whites, racial minorities are at a considerable disadvantage in Washington State. *See* Exhibit 4, at 353. Whites have much higher average incomes and are much less likely to be poor, their houses are worth more, and they are much more likely than racial minorities to own, rather than rent, their homes. *Id.* Moreover, virtually all Whites have access to automobiles, while more than one in six Blacks does not. *Id.*

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iv. Plaintiffs' Record Demonstrates that "Implicit Racial Bias" May Provide *An* Explanation for the Existence of Racial Discrimination in Washington State's Criminal Justice System.

Racial differences in legal outcomes and other institutional processes may not always reflect intentional, purposeful, conscious and willful racial discrimination. "Understanding the Role of Race in the Criminal Justice System: Structure, Discrimination, and 'Implicit bias,'" Exhibit 3, at 340. However, this should not lead to the conclusion that the processes by which racial differences are produced are race-neutral, for two reasons. *Id.* First, "structural" factors are sometimes better understood as policy choices, some of which are known to produce racially unequal outcomes. *Id.* Some analysts have conceptualized organizational practices that conform to this description as "institutional racism." *Id.* Second, a number of studies have found that many people who do not harbor overt racial animus and do not intend to discriminate are nonetheless influenced by unconscious and widespread racial stereotypes. *Id.* Studies have found that this kind of "implicit bias" shapes both perceptions of the severity of social problems such as drug use, crime, and disorder and fuels support for more punitive responses to those problems. *Id.*

In sum, this Court can find that Plaintiffs' evidence under Senate Factor 5 weighs in favor of Plaintiffs in the totality of the circumstances analysis, and this Court should grant Plaintiffs' Motion for Summary Judgment and deny

1 Defendant's Motion for Summary Judgment. Plaintiffs' unrefuted evidence
2 convincingly demonstrates that the existing racial disparities at every stage of
3 Washington State's criminal justice system are not warranted by the extent to
4 which racial minorities actually participate in crime. Moreover, Plaintiffs'
5 evidence shows that Blacks and Latinos are over-represented, and Whites are
6 under-represented, among Seattle's drug arrestees, notwithstanding the fact that the
7 majority of those in Seattle who use and deliver serious drugs are White.
8 Significantly, Plaintiffs' evidence demonstrates that these striking racial disparities
9 in Washington State are not explicable in race neutral terms. Further, Plaintiffs'
10 evidence shows that Washington State's history of racial discrimination in
11 employment, housing and education hinders the ability of racial minorities in
12 particular to navigate the State's complex voter restoration process, and can
13 effectively serve to disfranchise citizens permanently. The interaction of Article 6
14 § 3 of the Washington State Constitution with the racial discrimination in the
15 criminal justice system results in a disproportionate number of racial minorities
16 being disfranchised on account of race following a felony conviction. As a result,
17 racial minorities in Washington State are under-represented in the State's political
18 process, in violation of Section 2 of the Voting Rights Act.
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2. Defendants' Policy Reasons (or Absence of Such Reasons) Underlying Article 6 § 3 of the Washington State Constitution and RCW § 9.94A.220, which Disproportionately Deny Plaintiffs an Equal Opportunity to Participate in the State's Political Process on Account of Race, is Tenuous. (SENATE FACTOR 9)

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The final Senate factor is "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." Senate Report No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-207. Defendants suggest that the policy reasons (Defendants fail utterly to articulate any such policy reasons) underlying Article 6 § 3 of the Washington State Constitution are not tenuous because "there is no evidence of racial motive in Washington's felon disenfranchisement law," Defs.' Br. at 18, and because "racial bias played no part" in its enactment. *Id.* Instead, Defendants assert that the "constitutional framers and state Legislature merely decided as a matter of policy to limit participation in the political process by those who have proven that they are unwilling to abide by the laws created by that process." *Id.* Defendants' argument is without merit, and Plaintiffs' evidence shows that the policy reasons (or Defendants' failure to articulate such policy reasons) underlying Washington State's felon disfranchisement scheme are, in fact, tenuous, in violation of Section 2 of the Voting Rights Act.

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i. Defendants Have Failed to Articulate *Any* Policy Reason Underlying Article 6 § 3 of the Washington State Constitution. (Expert Report of Alec Ewald, Ph.D.)

To begin, Defendants failure to articulate *any* policy reasons underlying Article 6 § 3 of the Washington State Constitution suggests that the disfranchisement scheme is violative of Section 2. Expert Report by Alec Ewald (Exhibit 6), at 413. An inquiry into whether the policy reasons underlying Washington State's felon disfranchisement scheme are tenuous requires a consideration of the following types of questions: "Does the 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?" *Id.* Here, Defendants' conclusory statement that the constitutional framers and state Legislature "merely decided as a matter of policy to limit participation in the political process by those who have proven that they are unwilling to abide by the laws created by that process," Defs.' Br. at 18, fails to articulate how, if at all, Washington State's felon disfranchisement scheme bears any rational relationship to a legitimate state interest. *Id.* Defendants merely restate the policy itself, but fail to identify which interests, if any, it purports to serve.[8] *Id.* The phrase "limit participation in the

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8 Plaintiffs' attempt to secure a meaningful answer to this question through discovery was similarly unsuccessful. When asked whether "your office maintain[s] that an important governmental interest is served by disqualifying from voting those individuals convicted of felony offenses," Defendants gave this response:

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political process" is another way of saying "disfranchise." *Id.* And the phrase "those who have proven that they are unwilling to abide by the laws created by that process" is another way of describing "felons." *Id.* Defendants' response is not a conclusion based on premises, and is certainly not a clear statement of governmental interest, rational or otherwise. *Id.* Indeed:

> The State of Washington does not identify any specific problem its disenfranchisement policy is designed to address or rectify. In fact, evaluating how *good* the state's interest is — that is, whether the state's interest is rational, legitimate, important, or compelling — actually appears to be a secondary question. For I do not believe the state has yet identified any interest *at all* that it seeks to achieve with this policy. This strongly suggests that the policy is indeed tenuous.

Id. at 413.

Defendants' failure to proffer *any* policy reasons underlying Washington State's felon disfranchisement scheme is particularly fatal to their argument in view of the Ninth Circuit's ruling in *Dillenburg v. Kramer*, 469 F.2d 1222, 1224 (9th Cir. 1972), in which the Court viewed critically the alleged justifications for felon disfranchisement statutes, finding that "Courts have been hard pressed to

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> The legislature has determined that the disenfranchisement of felons who have not completed all terms and conditions of their judgments and sentences limits the participation in the political process by those who have proven themselves unwilling to abide by the laws that result from that process.

Defendant Sam Reed's Answers to Plaintiffs' Interrogatories and Requests for Production.

1 define the state interest served by laws disfranchising persons convicted of
2 crimes.”[9] In *Dillenburg,* the Ninth Circuit noted that the “[s]earch for modern
3 reasons to sustain the old governmental disenfranchisement prerogative has usually
4 ended with a general pronouncement that the state has an interest in preventing
5 persons who have been convicted of serious crimes from participating in the
6 electoral process” or “a quasi-metaphysical invocation that the interest is
7 preservation of the ‘purity of the ballot box.’” *Id.* But “[f]ew decisions have
8 penetrated the disenfranchisement classification to ascertain whether the offenses
9 that restrict or destroy voting rights have anything to do with the integrity of the
10 electoral process or whether there is any valid distinction between the class of
11 offenses that disenfranchise and the class of offenses that do not.” *Id.* “When the
12 facade of the classification has been pierced,” the Court concluded, “the
13 disenfranchising laws have fared ill.” *Id.* at 1224-25.

14 On the basis of *Dillenburg*, and in light of Defendants’ failure to proffer any
15 discussion of policy reasons underlying Washington State’s felon disfranchisement
16 scheme or the classifications contained therein, Article 6 § 3 of the Washington
17 State Constitution is violative of Section 2.

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9 Although recognizing that “*Dillenburg* is not good law to the extent that it suggests that the disenfranchisement of felons, on its face, cannot pass constitutional muster,” this Court opined that “*Dillenburg* remains applicable to the extent that the decision discusses the alleged justifications for felon disenfranchisement statutes.” *Farrakhan*, 987 F. Supp. at 1312.

In addition to the foregoing, the policy reasons (or Defendants' failure to articulate such policy reasons) underlying Article 6 § 3 of the Washington State Constitution are tenuous for the following, additional reasons:

ii. Striking Evidence of Article 6 § 3 of Washington State Constitution's Disproportionate Racial Impact Intensifies the Need for Defendants to Identify Which, If Any, Practical Objectives the Felon Disfranchisement Scheme Pursues.

In this case, this Court previously recognized that Washington State's "disenfranchisement provision clearly has a disproportionate impact on racial minorities," and that "racial minorities are clearly being disfranchised in numbers disproportionate to that of their white fellow citizens." Summ. Judg. Order, at 6. Specifically, as of 1998, nearly one-quarter of black men in Washington State — or 24% — were disfranchised. Exhibit 6, at 427-428. While 3.64% of Washington State's total voting-age population was disfranchised as of 2000, 14.33% of its African American population was disfranchised. *Id.* While Latinos comprise only 3.85% of Washington State's citizen voting age population, they constitute 9.89% of the disfranchised population. *Id.*

Moreover, Washington State's Sentencing Guidelines Commission recently found that "the over-representation of people of color is a system-wide problem within the criminal justice system." *Id.* at 427. The Commission found that

although African Americans made up just 3% of the state's adult population in 2002, they accounted for an incredible 21.3% of the state prison population. *Id.* Latinos only accounted for 7% of Washington State's general population, but comprised 11% of the prison population. *Id.* Native Americans were also over-represented in the prison population, sentenced at 1 ½ times their proportion in the population. *Id.*

The compelling evidence of the felon disfranchisement policy's disproportionate racial impact in Washington State intensifies the critical need for Defendants to identify which, if any, goals the scheme pursues. *Id.* Defendants have failed to demonstrate that Washington State's felon disfranchisement scheme fulfills any specific governmental purpose. *Id.* Neither have Defendants shown that Washington State's felon disfranchisement scheme is applied in a nondiscriminatory manner, or that it strengthens the character of Washington State's democracy. *Id.* Accordingly, the policy reasons (or absence of such reasons) underlying Washington State's felon disfranchisement scheme are tenuous, in violation of Section 2 of the VRA. *Id.*

iii. Washington State's Felon Disfranchisement Scheme Fails to Achieve Any of the Four Standard Purposes of Punishment: Incapacitation, Deterrence, Retribution and Rehabilitation.

It has long been established that punishment is or should be justified by some combination of the following four penological goals: incapacitation,

deterrence, retribution and rehabilitation. *See, e.g., Ewing v. California*, 538 U.S. 11 (2003). Washington State's felon disfranchisement scheme fails to meet each of these goals. Exhibit 6, at 417.

Incapacitation, which is guided by the notion that "society may protect itself from persons deemed dangerous because of their past criminal conduct by isolating these persons from society," 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 1.5 (2d ed. 2003), is not a plausible justification for Washington State's felon disfranchisement scheme, since the overwhelming majority of disfranchised offenders in Washington State were not convicted of breaking election laws. Exhibit 6, at 417.

Deterrence, as a practical matter, also fails as a justification for stripping offenders in Washington State of the right to vote, since it depends upon a punishment being widely known to those it aims to deter, and felon disfranchisement is widely regarded as an "invisible punishment." Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion in Invisible Punishment: The Collateral Consequences of Mass Imprisonment* 15-16 (Marc Mauer & Meda Chesey-Lind eds., 2002). Even after criminal conviction, most offenders are not likely aware of their disfranchised status since disfranchisement statutes are scarcely publicized. *See* Howard Itzkowitz & Lauren Oldak, *Note: Restoring the*

1 *Ex-Offender's Right To Vote: Background and Developments*, 11 Am. Crim. L.
2 Rev. 721, 735 (1993).
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4 Empirical data also shows that felon disfranchisement has no value as a
5 deterrent to crime. States with disfranchisement provisions have a greater per
6 capita crime rate than nearby states that do not disfranchise their convicted
7 offenders. Itzkowitz & Oldak, *supra*, 11 Am. Crim. L. Rev. at 734 & n.96; *see*
8 *also* Fed. Bureau of Investigation, *Crime in the United States*, tbl. 5 (2003)
9 (Reflecting, *inter alia*, the per capita crime rate of New Jersey, disfranchising
10 parolees and probationers, at 2910.2 per 100,000 inhabitants, that of Pennsylvania,
11 disfranchising only inmates, at only 2829.3 per 100,000, and that of Delaware,
12 disfranchising all felons as well as ex-felons for five years following completion of
13 their sentences, at a staggering 4042.4 per 100,000), *available at*
14 http://www.fbi.gov/ucr/cius_03/xl/03tbl05.xls. If lengthy prison sentences do not
15 deter crime, then collateral consequences of conviction, such as felon
16 disfranchisement, are also likely to be poor deterrents. Exhibit 6, at 417.
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18 Retribution, which involves the imposition of punishment "because it is
19 fitting and just that one who has caused harm to others should himself suffer for
20 it," *see* LaFave & Scott, *Substantive Criminal Law, supra,* at § 1.5, also fails as a
21 justification for Washington State's felon disfranchisement scheme. Exhibit 6, at
22 418. Washington State's blanket application of its felon disfranchisement scheme
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is vulnerable to proportionality criticisms, since it is imposed on such a broad range of offenders, bears no relationship to the security needs of the prison, and may not have any retributive effect at all on the many members of the offender population already estranged from political life. *Id.* The automatic, invisible way in which Washington State imposes disfranchisement adds to these criticisms. *Id.*

Most importantly, Washington State's felon disfranchisement scheme serves no rehabilitative ends. *Id.* The American Bar Association, along with numerous social scientists and criminologists, have expressed their belief that disfranchisement, rather than serving a rehabilitative purpose, actually undermines the goals of rehabilitation by dissociating offenders from the rights and responsibilities of citizenship and places a barrier to their reintegration into a democratic society. *See ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, *available at* http://www.abanet.org/leadership/2003/journal/101a.pdf.

Voting, however, is consistent with the goal of rehabilitation, which is "to return [the offender] to society so reformed that he will not desire or need to commit further crimes." LaFave & Scott, *Substantive Criminal Law, supra*, at § 1.5. The restoration of the right to vote has both the psychological and sociological effect of weaving an offender back into the community — the very goal of rehabilitation. Exhibit 6, at 417.

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iv. The Mere Antiquity of Washington State's Felon Disfranchisement Practice Does Not Exempt It From Violating Section 2 of the VRA.

Defendants' suggestion that Article 6 § 3 of the Washington State Constitution is not violative of Section 2 of the Voting Rights Act because, "throughout its history, the [S]tate of Washington has maintained laws that have disenfranchised convicted felons," Defs.' Br. at 10, is without merit. The mere antiquity of Washington State's felon disfranchisement practice cannot exempt it from running afoul of Section 2. Like poll taxes, *see Breedlove v. Suttles*, 302 U.S. 277 (1937), and literacy tests, *see Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959), longstanding voting qualifications that were once widely accepted can be abrogated either by the Constitution or statutory enforcement of it. *See generally Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669 (1966)(Court's are "not shackled to the political theory of a particular era" and are not "confined to historic notions of equality" or "what was at a given time deemed to be the limits of fundamental rights."); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (overruling prior precedent and prohibiting mentally handicapped offenders from receiving the death penalty by noting that "[a] claim that punishment is excessive is judged not by the standards that prevailed . . . when the Bill of Rights was adopted, but rather by those that currently prevail."). In this case, Washington State's long historical tradition of disfranchisement for crime alone does not render

the policy sound today. Exhibit 6, at 414. Instead, when assessing whether Washington State's felon disfranchisement scheme is sound or tenuous, Defendants should consider what problem, if any, the felon disfranchisement scheme is intended to address. *Id.* Defendants do not do that here, and their arguments are unpersuasive.

v. Difficulties in Accurately Administering Washington State's Felon Disfranchise Scheme Underscore the Tenuous Policy Justification Underlying the Law.

Difficulties of elections officials in administering Washington State's felon disfranchisement scheme underscores the tenuous nature of the (as yet unidentified) policy reasons underlying the scheme. Exhibit 6, at 422. The 2004-2005 Washington State gubernatorial recount made clear that the State's felon disfranchisement policy was not properly administered in that election, as ineligible felons were alleged to have voted in, and influenced the outcome of, the election. *Id.* The inconsistency with which Washington State's felon disfranchisement scheme has been enforced raises serious questions about the policy's purpose. *Id.*

In addition, state and local officials also poorly understand the restoration process in Washington State. In fact, the present system intended to restore voting rights to those eligible while preventing illegal votes is "so bewildering that almost

1 nobody negotiates it well" and "requir[es] a degree in government" to understand
2 the process. *Id*. at 422.
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4 To compound the problem, Washington State does not currently maintain
5 lists of voters ineligible because of felony convictions. *Id*.; *see also* Deposition of
6 Pamela Floyd, Nov. 17, 2005, (Exhibit 7) at 466, lns. 19-20 (Stating that the
7 Secretary of State cannot identify the number of people in Washington State who
8 are disqualified from voting because of a felony conviction, since the State does
9 not maintain such information). Even after implementing HAVA-mandated
10 reforms beginning in 2006, Washington State will have no way of knowing about
11 whether new arrivals to the state have felony convictions in their former state(s) of
12 residence. *Id*. HAVA-mandated changes in administration constitute a tacit
13 acknowledgment that the current procedures for administering the policy are
14 flawed. *Id*.
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16 In the absence of a national criminal database, Washington State cannot
17 enforce its disfranchisement law consistently, no matter how well it trains state and
18 local elections officials and administers its new statewide voter database. *Id*. at
19 423. Current gaps in enforcement undercut the state's argument for the sanction.
20 *Id.* If this policy were actually directed at rectifying any specific social problem,
21 Washington would have devoted more resources to administering this voting
22 restriction accurately, evenly, and comprehensively. *Id*.
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vi. Numerous Other Countries Have Determined That Felon Disfranchisement Laws Undermine the Basis of Democratic Legitimacy.

The *New York Times* recently editorialized that "[t]he United States has the worst record in the democratic world when it comes to stripping convicted felons of their voting rights." "Voting Rights, Human Rights," *New York Times,* Oct. 14, 2005, p. 24. Disfranchisement for a criminal conviction is not, however, the democratic norm abroad, where many democracies refuse to strip voting rights even from incarcerated offenders after concluding that such policies actually serve to undermine the democratic goals. Exhibit 6, at 424.

For example, prisoners retain the right to vote without any restrictions in at least eighteen European countries, and Courts in Canada, Israel, South Africa, and the European Court of Human Rights, have each struck down disfranchisement laws. *Id.* In a decision that affirmed the right of all citizens of its democracy to participate in the political process, the Supreme Court of Canada in *Suave v. Canada*, 2002 SCC 68 (2002), explained that:

> Denying felons the right to vote misrepresents the nature of our rights and obligations under the law and consequently undermines them . . . . In sum the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote . . . . The government gets this connection exactly backwards when it attempts to argue that depriving people of a voice in government teaches them to obey the law. The "educative message" that the government purports to send by disenfranchising inmates is both anti-democratic and internally self-contradictory. Denying a citizen the right to vote denies the basis of democratic legitimacy.

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2 *Id.* at 31-32.
3 These decisions support the conclusion that the policies underlying felon
4 disfranchisement are tenuous, since they are neither aimed at nor likely to
5 accomplish any specific objective, and actually serve to undermine the basis of
6 democratic legitimacy. Exhibit 6, at 424. Where, however, democratic countries
7 abroad disfranchise people convicted of an offense, they do so in narrow, targeted,
8 and public way. *Id.* at 425-426. In Germany, for example, disfranchisement never
9 occurs automatically, may only be applied by the sentencing judge for certain
10 serious infractions, and can last for only a limited time. *Id.* By contrast,
11 Washington State's disfranchisement policy is invisible, general, and automatic.
12 *Id.*
13 In sum, Plaintiffs' evidence under Senate Factor 9, like its evidence under
14 Senate Factor 5, weighs in favor of Plaintiffs in the totality of circumstances test.
15 Accordingly, Defendants' Motion for Summary Judgment should be denied, and
16 Plaintiffs' Motion for Summary Judgment should be granted.
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VI. <u>CONCLUSION</u>

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22 For all of the foregoing reasons, Plaintiffs respectfully request that this Court
23 grant Plaintiffs' Motion for Summary Judgment and deny Defendants' Motion for
24 Summary Judgment.
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1 Dated: January 27, 2006.

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3

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APPENDIX A

The Senate Report accompanying the 1982 amendments to the Voting Rights Act identified the following Senate Factors that are relevant in analyzing whether Section 2 has been violated:

(1) The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

(2) The extent to which voting in the elections of the state or political subdivision is racially polarized;

(3) The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

(4) If there is a candidate slating process, whether the members of the minority group have been denied access to that process;

(5) The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

(6) Whether political campaigns have been characterized by overt or subtle racial appeals;

(7) The extent to which members of the minority group have been elected to public office in the jurisdiction;

(8) Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and

(9) Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

See S. Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-207.