JEFFREY T. EVEN
CAROL A. MURPHY
Attorney General's Office
Solicitor General Division
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100
(360) 586-0728

DANIEL J. JUDGE
Attorney General's Office
Criminal Justice Division
P.O. Box 40116
Olympia, WA 98504-0116
(360) 586-1445

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

MUHAMMAD S. FARRAKHAN (aka ERNEST S. WALKER), et al., Plaintiffs, v. CHRISTINE O. GREGOIRE, et al., Defendants.	NO. CV-96-076-RHW DEFENDANTS' MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND DISMISSAL

I. STATEMENT OF THE CASE

The sole remaining claim in this case is the Plaintiffs' assertion that Washington's felon disenfranchisement law constitutes race-based vote denial in violation of the Voting Rights Act (VRA), 42 U.S.C. § 1973. Because there

are no issues of material fact remaining as to that sole claim, the Defendants are entitled to dismissal as a matter of law.

This Court previously dismissed Plaintiffs' constitutional and vote dilution claims. However, this Court allowed Plaintiffs to proceed under a vote denial theory. *Farrakhan v. Locke* (*Farrakhan* I), 987 F. Supp. 1304, 1312, 1313 (E.D. Wash. 1997). The operative complaint before this Court is the Plaintiffs' Fourth Amended Complaint, which alleged vote denial on account of race in violation of the VRA and also challenged Washington's procedures to restore civil rights to previously disenfranchised felons. Pls.' 4th Am. Compl. ¶¶ 31-37.

This Court, ruling on cross-motions for summary judgment after deciding that the VRA applies to felon disenfranchisement, found that the Plaintiffs failed to present a triable issue of fact as to whether the Plaintiffs were denied the right to vote on account of race under the VRA, and granted summary judgment for the Defendants. With regard to the Plaintiffs' challenge to the procedures to restore civil rights, this Court dismissed the claim based upon lack of standing because none of the Plaintiffs attempted to have their civil rights restored and because they failed to present any evidence of discrimination.

The Plaintiffs appealed to the Ninth Circuit Court of Appeals. The Court of Appeals affirmed this Court's holding that the VRA applies to felon

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Criminal Justice Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

disenfranchisement and reversed this Court's holding that the Plaintiffs failed to establish a claim for vote denial as a matter of law. *Farrakhan v. Washington* (*Farrakhan* II), 338 F.3d 1009 (9th Cir. 2003).[1] The Court of Appeals held that evaluation of an alleged violation of Section 2 of the VRA is determined by the totality of circumstances and requires consideration of factors external to the challenged voting mechanism itself. *Id.* at 1011-12. Because the Court of Appeals determined, based upon the wording of this Court's ruling granting summary judgment,[2] that evidence of discrimination was improperly disregarded, the case was remanded back to this Court to evaluate the totality of the circumstances, including evidence of racial bias in Washington's criminal justice system. *Farrakhan* II, 338 F.3d at 1020.[3]

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[1] The Court of Appeals for the Ninth Circuit also affirmed this Court's dismissal of the challenge to Washington's procedures to restore civil rights based upon the Plaintiffs' lack of standing. *Farrakhan* II, 338 F.3d at 1022. Additionally, the Court of Appeals concluded that the Plaintiffs failed to produce evidence that minorities are less able to meet the requirements for restoration. *Id.* at 1021-22.

[2] *Farrakhan* II, 338 F.3d at 1013 n.7.

[3] Although this Court is bound by the holding of the Court of Appeals, the Defendants' position remains that, in light of rulings in other circuits, the VRA does not apply to felon disenfranchisement. *See Farrakhan v.*

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Criminal Justice Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

II. QUESTIONS PRESENTED

Have Plaintiffs failed to show, based on the totality of circumstances, that article VI, section 3 of the Washington Constitution constitutes denial of their right to vote on account of race in violation of Section 2 of the VRA?

III. LEGAL STANDARD

Judgment in favor of the moving party is appropriate when, viewing the evidence and inferences arising therefrom in the light most favorable to the nonmoving party, there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Semegen v. Weidner*, 780 F.2d 727 (9th Cir. 1985).

Washington (*Farrakhan* III), 359 F.3d 1116 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986); *Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir. 2004); *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005). The Defendants also continue to assert that this Court lacks subject matter jurisdiction because Plaintiffs seek this Court's review of the state judgments and sentences that caused their disenfranchisement under Washington law. *See Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-83 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923); *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

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Criminal Justice Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). There is no requirement that the moving party negate elements of the non-movant's case. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990). Once the moving party has met its burden, the non-movant must then produce concrete evidence, without merely relying on allegations in the pleadings, that there remain genuine factual issues. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the moving party prevails and summary judgment is granted. *See Celotex Corp.*, 477 U.S. at 322 ("Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

IV. SUMMARY OF THE ARGUMENT

Plaintiffs fail to demonstrate that Washington's disenfranchisement law violates their rights under the Voting Rights Act. Consistent with the Court of Appeals' remand of this matter, the Plaintiffs must provide admissible evidence that Washington's facially neutral voting requirements interact with external factors to result in the denial of the right to vote on account of race. Statistics

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Criminal Justice Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

alone remain insufficient to establish a violation of Section 2 of the VRA. Furthermore, Washington's rich history of promoting voting rights belies Plaintiffs' claims that the totality of the circumstances warrants the return of their voting rights by this Court. The remaining claims in the Plaintiffs' Fourth Amended Complaint have been previously dismissed and, therefore, the Defendants are entitled to judgment as a matter of law.

V. ARGUMENT

BASED UPON THE TOTALITY OF CIRCUMSTANCES, THE PLAINTIFFS HAVE FAILED TO SHOW THAT WASHINGTON'S FELON DISENFRANCHISEMENT LAW CONSTITUTES DENIAL OF THE RIGHT TO VOTE ON ACCOUNT OF RACE.

1. The Plaintiffs Have The Burden To Show A Violation Of Section 2 Of The VRA Based Upon A Totality Of Circumstances.

Plaintiffs bring these claims under 42 U.S.C. §§ 1971 and 1973. Section 1971 protects the right to vote of "[a]ll citizens . . . who are otherwise qualified by law to vote." Section 1973(a) protects against "denial or abridgement of the right of any citizen of the United States to vote on account of race or color." Section 1973(b), which provides for a violation of subsection (a) based on the totality of the circumstances, protects "members of a class of citizens protected by subsection (a)." Throughout this case, the Defendants have asserted that the VRA was never intended to prohibit felon

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Criminal Justice Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

disenfranchisement, citing to the Congressional Record as well as case law. *See* Defs.' Mem. Supp. Mot. Summ. J. Dismissal (July 31, 2000).

A plaintiff establishes a violation of Section 2 of the VRA, "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 [protected] class . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. §1973(b). Typical factors that may be relevant in analyzing the totality of the circumstances include the following:

> (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 to otherwise 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;

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PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

> (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;
>
> (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.

Farrakhan II, 338 F.3d at 1015 (quoting S. Rep. No. 97-417, 97th Cong., 2d Sess. at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07).

This Court has already viewed the above factors in light of the evidence the Plaintiffs presented in 2000 and ruled that the evidence was insufficient. However, the Court of Appeals has directed that this Court "make any requisite factual findings following an appropriate evidentiary hearing, if necessary, and assess the totality of the circumstances, including Plaintiffs' evidence of racial bias in Washington's criminal justice system." *Farrakhan* II, 338 F.3d at 1020. The Court of Appeals did not direct that this Court hold a trial or evidentiary hearing. Rather, it identified the Plaintiffs' burden, and specifically stated, "[w]e . . . express no opinion on the merits of Plaintiffs' claim and leave that determination to the district court in the first instance." *Id.* at 1020. The Plaintiffs have not and cannot meet their burden to establish a violation of the VRA, and the Defendants are entitled to judgment as a matter of law.

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PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

2. The Plaintiffs Have Not Presented Evidence Showing That The History And Practices Surrounding Felon Disenfranchisement In Washington Reflect Racial Bias.

a. Historical basis for felon disenfranchisement in Washington.

With regard to the first four factors previously articulated as relevant in the totality of circumstances test, there is no evidence in Washington's history that its felon disenfranchisement law was a result of racial bias.

"Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Sandin v. Conner*, 515 U.S. 472, 485 (1995). The Constitution permits states to disenfranchise persons convicted of "participation in rebellion, or other crime". U.S. Const. Amend. XIV. Accordingly, a state may disenfranchise convicted felons. *Richardson v. Ramirez*, 418 U.S. 24, 55-56 (1974).

Throughout our country's history, felon disenfranchisement has been the norm; states allowing felons to vote have been the exception. Clearly, our country's legal traditions have not encompassed the right of felons to vote. *See Harmelin v. Michigan*, 501 U.S. 957, 982-83 (1991) (disenfranchisement is not an unusual punishment, but the consequence of certain criminal offenses, and the legislature, has discretion to extend that punishment to other offenses); *see also Romer v. Evans*, 517 U.S. 620, 634 (1996).

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Criminal Justice Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

Under the Washington Constitution, a person convicted of an "infamous crime" is ineligible to vote. Wash. Const. art. VI, §§ 1, 3. Washington laws further defines an "infamous crime" as "punishable by death in the state penitentiary or imprisonment in a state correctional facility". Wash. Rev. Code § 29A.04.079. Disenfranchised felons remain ineligible to vote until their civil rights are restored, typically through certificates of discharge under Wash. Rev. Code § 9.94A.637. *See* Wash. Rev. Code § 9.94A.637(4).

Throughout its history, the state of Washington has maintained laws that have disenfranchised convicted felons. *See State v. Collins*, 69 Wash. 268, 270-72 (1912); Territorial Law of 1866 (Rem. & Bal. Code § 4755). Additionally, Washington has provided for other limitations based on the lack of qualification to vote. *See, e.g.*, Wash. Const. art. III, § 25; Wash. Const. art. II, § 7; Wash. Rev. Code § 42.04.020; Wash. Rev. Code § 2.36.070; Wash. Rev. Code § 11.36.010.

There is no dispute that all Plaintiffs are or were disenfranchised because of their status as convicted felons.[4] There is also no dispute that the Plaintiffs have ever asserted racial bias as a cause of their felony convictions.

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[4] Because the Plaintiffs' valid felony convictions provide the basis for their disenfranchisement, the Defendants continue to assert that the Plaintiffs are not "otherwise qualified" under 42 U.S.C. § 1971.

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PO Box 40116
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b. Washington enjoys a rich history in which it has promoted voters' rights.

The record in this case belies any assertion by Plaintiffs that Washington's disenfranchisement law has had any significant impact on voting in the state as discussed in the factors outlined above. Despite attempts by the Defendants to obtain materials through discovery, the Plaintiffs have failed to produce evidence of racial bias in Washington's criminal justice system which results in denial of the right to vote on account of race. *See* Statement of Material Fact, Exhibit 2, Declaration of Carol A. Murphy.

The record in this case fails to demonstrate a history within the state of Washington of racial discrimination in voting. Neither Washington State nor any of its political subdivisions have ever been a "covered jurisdiction"[5] under the Voting Rights Act. The record does not demonstrate efforts within this state to use unusually large voter districts[6] or other tactics to enhance opportunities for discrimination against minority groups. The record does not demonstrate that African Americans, Native Americans, or Hispanics are hindered in their

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[5] *See* 42 U.S.C. §1973b(b) (referring to geographical areas that have used voting procedures or other devices found by the Attorney General to deny individuals access to voting based on race).

[6] *See* Wash. Rev. Code § 44.07D (describing voter districts by census blocks).

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Criminal Justice Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

ability to participate in the electoral process because of discrimination in employment, education, or health.

Washington's disenfranchisement laws date back to territorial days. *See* Territorial Law of 1866 (Rem. & Bal. Code § 4755). Washington's laws predate even the Civil War amendments. Plaintiffs' equal protection challenges against felon disenfranchisement have already been dismissed. There is no record that these laws were intended to disenfranchise African Americans, Native Americans, or Hispanics. There is no record that these statutes were devised as a pretext to racial discrimination. *Jones v. Edgar*, 3 F. Supp. 2d. 979, 981 (1998) (noting the absence of any "taint of historical rooted discrimination"). Instead, the record only demonstrates that Washington's disenfranchisement laws have been a permissible exercise of state power under Section 2 of the Fourteenth Amendment, validated by the United States Supreme Court in *Richardson* and further re-affirmed by Congress under the National Voter Registration Act. *See* 42 U.S.C. § 1973 gg-6(a)(3).

The record in this case demonstrates Washington's progressive historical record in the voting arena; Washington has not been hostile territory to members of minority groups. Defendants Statement of Material Fact in support of Motion for Summary Judgment Dismissal filed July 31, 2000, Exhibit 47, Affidavit of Dr. Quintard Taylor at 10.

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Criminal Justice Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

3. As A Matter Of Law, Plaintiffs' Evidence Of Racial Disparity Alone In Washington's Criminal Justice System Is Inadequate To Meet Their Burden To Show Discrimination "On Account Of Race" Under Section 2 Of The Voting Rights Act.

The Court of Appeals remanded Plaintiffs' Section 2 claim based on its belief that this Court had not considered circumstances external to Washington's felon disenfranchisement law itself - alleged racial discrimination in Washington's criminal justice system - in evaluating the "totality of the circumstances". Specifically, the Court of Appeals reads this Court's prior decision granting summary judgment to the Defendants on Plaintiffs' Section 2 claim as ignoring alleged race discrimination in Washington's criminal justice system. Defendants believe that this Court undertook the very inquiry that the Court of Appeals identifies and properly found the Plaintiffs' evidence—evidence of statistical disparity—legally inadequate. The Court's written decision simply is ambiguous in this respect.

Plaintiffs still have brought forward no evidence of discrimination "on account of race" in Washington's criminal justice system, despite discovery requests from the Defendants seeking such evidence. *See* Statement of Material Fact, Exhibit 2. Rather, Plaintiffs continue to rely only on statistical racial disparity. Such statistical disparity is inadequate as a matter of law to establish discrimination "on account of race" under section 2 of the VRA. This is clear from the Court of Appeals decision in this case, the decision in *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F. 3d 586 (9th Cir.

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Criminal Justice Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

1997), to which the Court of Appeals repeatedly refers, and the language and history of the Act.

The Court of Appeals' opinion in this case reaffirms that (1) to establish a Section 2 claim, Plaintiffs "must prove that the challenged voter qualification denies or abridges their right to vote *on account of race*", and that (2) factors external to the challenged voter qualification "can contribute to [its] . . . disparate impact when those factors involve *race discrimination*". *Farrakhan II*, 338 F.3d at 1019 (emphasis added). The Court of Appeals' opinion further explains that such external factors have a sufficient causal connection to the alleged discriminatory impact of the challenged voting practice when that discriminatory impact "is attributable to *racial discrimination* in the surrounding . . . circumstances". *Id*. In short, then, the Court of Appeals' decision holds that where a Section 2 claim is based on factors external to the challenged voting qualification, those factors must involve *discrimination on account of race*, and the alleged discriminatory impact of the voting qualification must be *attributable to such discrimination.*

The Court of Appeals refers to *Salt River* to explain how a plaintiff must prove alleged race discrimination based on external factors. In *Salt River*, the Court of Appeals rejected a Section 2 claim that a special purpose district's land ownership voting qualification resulted in discrimination on account of race based on statistical disparity in land ownership between minorities and non-

ATTORNEY GENERAL OF WASHINGTON
Criminal Justice Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

minorities. In *Salt River*, "we considered the external factors, but ultimately concluded that the statistics evidencing the disproportionate percentage of white landownership did not reflect racial discrimination and so failed to satisfy the 'on account of race' requirement of the results test". *Farrakhan II*, 338 F.3d at 1019. The *Salt River* plaintiffs' Section 2 claim failed because they had made "only a bare statistical showing of disparate impact[.]" *Id.* (citation omitted). As the Court of Appeals explained on appeal in the instant case, "*Salt River* made clear that 'a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the [Section] 2 "results" inquiry' because causation cannot be inferred from impact alone". *Id*.

Similarly, the *Salt River* Court cited with approval decisions of the Third, Fourth, Fifth, and Sixth Circuit Courts of Appeal as standing for "the principle that a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the Section 2 results inquiry". *Salt River*, 109 F.3d at 595. Notably, among the decisions *Salt River* cites with approval for this principle is *Wesley v. Collins*, 791 F.2d 1255 at 1262, which rejected a Section 2 challenge to Tennessee's felon disenfranchisement law resting primarily on the statistical difference between minority and white felony conviction rates.

In sum, just as race discrimination cannot be inferred from disproportionate racial impact alone when a voting requirement itself is alleged to discriminate on account of race, race discrimination cannot be inferred from

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Criminal Justice Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

disparate racial impact alone when the discrimination allegedly is attributable to external factors. *Salt River*, 109 F.3d at 595. Statistical disparity, without a showing that the disparity is caused by treatment on account of race would read out of Section 2, the requirement of unequal political opportunity on "account of race".

The only "evidence" submitted by the Plaintiffs are recent reports of expert witnesses that have reviewed others' research and developed limited conclusions. *See* Statement of Material Fact, Exhibit 2, Attachments B through F. Such evidence fails to show that a racially disproportionate rate of felony convictions or other statistical racial disparities are caused by discrimination based on race, rather than other causes. Such statistical disparity is insufficient as a matter of law to demonstrate discrimination "on account of race" under Section 2 of the VRA.[7] For these reasons, to the extent Plaintiffs' Section 2

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[7] Statistical disparity also has been rejected in habeas corpus claims. The federal courts have repeatedly denied racial discrimination claims by minority defendants in capital cases who have argued that they have been targeted because of their race and have sought to prove their allegations by use of statistical evidence of disparity. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 297-98 (1987) (recognizing the limited value of disparity studies because of the many variables associated with any case in which an accused is charged, tried, convicted, and sentenced).

ATTORNEY GENERAL OF WASHINGTON
Criminal Justice Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

claim is based on alleged discrimination in Washington's criminal justice system, it does not survive summary judgment.

4. While There Is No Evidence Of Racial Bias In Washington's Criminal Justice System Interacting With The Washington Criminal Justice System To Deny The Vote Based On Race, The Record Shows That Washington Supports Equal Access To The Justice System.

Washington's history shows responsiveness to the needs of racial minorities to participate in the political process, which relates to factors six through eight in analyzing the totality of the circumstances. *Farrakhan II*, 338 F.3d at 1015. There is no evidence in the record that political campaigns have been characterized by overt or subtle racial appeals. To the contrary, racial minority candidates have historically successfully been elected to public office. *See* Statement of Material Fact ¶¶ 17, 18. The Washington State Minority and Justice Commission, established in 1990 and continuously renewed since then, exists to prevent racial bias in the justice system. *See* Statement of Material Fact ¶¶ 19-22. There is no evidence of a lack of responsiveness on the part of elected officials to the particularized needs of the members of racial minority groups. The Plaintiffs have failed to come forward with evidence showing that, under a totality of the circumstances, the Plaintiffs were denied the right to vote on account of race. Rather, they have been denied the right to vote based upon a felon disenfranchisement law.

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ATTORNEY GENERAL OF WASHINGTON
Criminal Justice Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

The final factor articulated by the Court of Appeals 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." *Farrakhan II*, 338 F.3d at 1015. There is no evidence of a racial motive in Washington's felon disenfranchisement law. Racial bias played no part in the enactment of the article VI, section 3 of the Washington Constitution. 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. The implementation of the state's policy concerning sanctions for the failure to abide by criminal laws is valid unless it violates the Constitution or federal law. *See Johnson v. Arizona*, 462 F.2d 1352, 1353-54 (9th Cir. 1972)(rules of sentencing adopted by a state do not raise constitutional questions which may be reached by the federal habeas corpus proceedings); *Souch v. Schaivo*, 289 F.3d 616, 623 (9th Cir. 2002)(alleged state law errors in the application of a sentencing law are not reviewable in federal habeas proceedings). Washington's policy which results in felon disenfranchisement is a valid exercise of state powers. Even a 1965 Senate Report recognized that the language of the VRA "would not result in the proscription of frequent requirement of States and political subdivisions that an applicant for voting or

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Criminal Justice Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

registration for voting be free of conviction of a felony or mental disability." 1965 Senate Report reprinted in 1965 U.S.C.C.A.N., p. 2562.

VI. CONCLUSION

For all of the foregoing reasons, Defendants respectfully request this Court grant their Motion For Summary Judgment and dismiss Plaintiffs' remaining claim with prejudice.

RESPECTFULLY SUBMITTED this 13th day of December, 2005.

ROB MCKENNA
Attorney General

/s/ DANIEL J. JUDGE, WSBA #17392
/s/ JEFFREY T. EVEN, WSBA #20367
/s/ CAROL A. MURPHY, WSBA #21244
Attorneys for Defendants

ATTORNEY GENERAL OF WASHINGTON
Criminal Justice Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445