Docket No. 01-35032

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MUHAMMAD SHABAZZ FARRAKHAN, et. al.,

Appellant,

-- against --

GARY LOCKE, et. al.,

Appellee.

Appeal from the United States District Court
for the Eastern District of Washington
The Honorable **Robert H. Whaley**, Judge Presiding

BRIEF OF APPELLANT

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QUESTIONS PRESENTED

I. WHETHER RACIALLY DISPARATE IMPACT FACTORS EXTRINSIC TO ELECTORAL PROCESSES ARE PROPERLY CONSIDERED WITHIN THE "TOTALITY OF CIRCUMSTANCES" ANALYSIS OF SECTION TWO OF THE VOTING RIGHTS ACT, WHERE THE FACTORS BEAR A CAUSAL RELATIONSHIP WITH A DISPARITY IN ELECTORAL ACCESS BY MINORITIES.

II. WHETHER THE CONSTITUTIONAL MINIMUM REQUIREMENTS FOR STANDING ARE MET WHEN CONVICTED FELONS BRING A VOTE DENIAL CHALLENGE UNDER SECTION TWO OF THE VOTING RIGHTS ACT TO A STATUTE THAT PROHIBITS THEM FROM REGISTERING AND VOTING.

BRIEF OF APPELLANTS

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STATEMENT OF JURISDICTION

The District Court has subject matter jurisdiction over this action under 42 U.S.C. § 1973 (The Voting Rights Act) and 28 U.S.C. § 1331 (federal question). Appellants' claim for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202, Rules 57 and 65 of the Federal Rules of Civil Procedure, and the general legal and equitable powers of the court.

Venue is proper under 28 U.S.C. § 1391(b), as a substantial part of the events giving rise to the claim occurred in this district. Jurisdiction is conferred on this court by 28 U.S.C. § 1291 (final decisions of district courts).

The District Court for the Eastern District of Washington entered an order denying appellants' motion for summary judgment on December 1, 2000. (Appellants' Excerpts of the Record [hereinafter "E.R."] 3.) This was a final judgment that disposed of all claims with respect to all parties. Appellants filed a timely notice of appeal on December 19, 2000. (E.R. 5.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are relevant to this case and set forth in the Appendices: Washington State Constitution Article VI, § 3; Washington Revised Code § 9.94A.220; 42 U.S.C. § 1973 (Section Two of the Voting Rights Act).

STATEMENT OF THE ISSUES

This action arises from appellants' pro se complaint filed in United States District Court for the Eastern District of Washington on February 2, 1996, alleging violation of their civil rights under 42 U.S.C. § 1983. (E.R. 1 at 2.) On December 1, 2000, the district court granted appellees' motion for summary judgment and denied appellants' motion for summary judgment. (E.R. 3.) Appellants filed a timely notice of appeal to the Ninth Circuit Court of Appeals to consider all issues raised by the record in this case. (E.R. 5.) The record raises two issues of law. These issues are: (1) whether racially disparate impact factors extrinsic to electoral processes are properly considered within the totality of circumstances analysis of § 2 of the Voting Rights Act, where the factors bear a causal relationship to a disparity in electoral access by minorities; and (2) whether the constitutional minimum requirements for standing are met when convicted felons bring a § 2 challenge to a statute that prohibits them from registering and voting.

STANDARD OF REVIEW

In determining whether felon disenfranchisement violates § 2 of the Voting Rights Act, the district court engaged in a fact-based and localized examination to "determine, based 'upon a searching practical evaluation of past and present reality,' . . . whether the political process is equally open to minority voters." Thornburg v. Gingles, 478 U.S. 30, 79 (1986) (citation omitted); see also E.R. 4 at

5. In review of the district court's holding Washington State's felon disenfranchisement scheme does not violate § 2, this court has the power "to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." Id.; see also Smith v. Salt River Agricultural Improvement & Power Dist., 109 F.3d 586, 591 (9th Cir. 1997). Therefore, this court reviews de novo the issues raised in this appeal. See id.

STATEMENT OF THE CASE

1. Background Facts

"Felon disenfranchisement" is a form of voting restriction that denies citizens convicted of felonies the right to register and vote. The practice of felon disenfranchisement is state law based; forty-eight states and the District of Columbia have disenfranchisement laws that deprive convicted offenders of the right to vote while in prison. Thirty-two states prohibit offenders from voting while on parole and twenty-nine of these states disenfranchise offenders on probation. Pursuant to Washington State Constitutional Article VI, § 3, Washington permanently disenfranchises offenders convicted prior to July 1, 1984. All offenders convicted after that date are also disenfranchised, and remain ineligible to vote by operation of Washington Revised Code § 9.94A.220 until they

successfully complete all enumerated and non-enumerated requirements of the statute.

The various state felon disenfranchisement provisions share one thing in common: No state deprives an offender of voting rights as a component of the offender's judgment and sentence. Rather, disenfranchisement itself is a collateral consequence of conviction, as an offender is automatically removed from the voter roles following entry of judgment and sentence. Thus, felon disenfranchisement acts as a "voting qualification," as it denies voting rights to a group of persons on the basis of a shared characteristic or status: a felony conviction.

Felon disenfranchisement laws have much in common with historical, racially discriminatory voting restrictions. At the close of the nineteenth century, Southern States employed a variety of voting restrictions in order to undermine the protections of the Thirteenth, Fourteenth, and Fifteenth Amendments and thereby bar a large proportion of the Black[1] population from voting. Though generally facially neutral with respect to race as a means to avoid direct legal challenge, these "Jim Crow" laws were designed to take advantage of differing social conditions between Blacks and Whites. Such voting qualifications included

[1] For ease of reference, this brief will use the terms for racial and ethnic categories used by the U.S. Census Bureau.

literacy tests, poll taxes, and residency requirements. These laws led to an overall decline in minority voting strength in Southern states.

One of the most insidious voting restrictions relied on by Southern states to discriminate were felon disenfranchisement laws. These laws, though also facially neutral with respect to race, were tailored to disenfranchise for only certain types of crimes. For example, South Carolina only disenfranchised criminals guilty of thievery, adultery, arson, wife-beating, housebreaking, and attempted rape--crimes Southern lawmakers believed Blacks more likely to commit than Whites. Other crimes like murder and fighting, to which Whites were believed as disposed to as Blacks, were omitted. These racist presumptions were founded on the irrational belief that criminal behavior by Blacks was to be taken for granted as a biological flaw.

Today, felon disenfranchisement policies continue to deprive minorities of equal access to electoral processes in disproportionate numbers. Washington State provides one of the more egregious examples of this effect. An analysis based on Department of Justice statistics estimates the total population of disenfranchised felons in Washington is approximately 151,500, or 3.7% of the total state population. (E.R. 2 at 25.) Of this number, it is estimated 69,500 are "ex-felons"; that is, they are no longer under any form of correctional supervision, yet have not had their voting rights restored. (E.R. 2 at 25.) It is further estimated that

approximately 16,700 of the total disenfranchised population is comprised of Black men, 24% of the total state Black population. (E.R. 2 at 25.) Additionally, Blacks make up a disproportionate share of the Washington State resident prison population at 22%, where they only represent about three percent of the general population. (E.R. 2 at 26.) The racial imbalance in the criminal justice system population, and consequently in the disenfranchised population, is primarily attributable to the differing treatment of minorities throughout the system. All of these factors combine to result in a substantial impact on minority participation in Washington electoral processes. In short, discrimination within Washington State's criminal justice system bears a direct, causal relationship with the racial effects of felon disenfranchisement. It is against this social and historical backdrop appellants bring this suit.

2. Procedural Facts

On February 2, 1996, appellants filed a pro se complaint alleging appellees deprived them of their voting rights in violation of 42 U.S.C. § 1983. (E.R. 1 at 2.) Appellants are Black, Hispanic, and Native American citizens who have been convicted of felonies in Washington State. (E.R. 4 at 1.) The operation of Article VI, § 3 of the Washington State Constitution deprives appellants of their voting rights because of their status as felons. (E.R. 4 at 1.) All appellants were convicted after July 1, 1984, and are therefore prohibited from registering and voting

pursuant to Washington Revised Code section 9.94A.220. (E.R. 4 at 1.) In their complaint, appellants claimed Article VI, § 3 and the laws implementing Article VI deprived them of their voting rights on the basis of race, thereby violating the First, Fourth, Fifth, Eighth, Fourteenth, and Fifteenth Amendments of the United States Constitution. (E.R. 1 at 2.) Appellants also claimed vote dilution and vote denial under Section Two of the Voting Rights Act of 1965 ("VRA") as amended, codified at 42 U.S.C. § 1973. (E.R. 1 at 2.) Defendants moved for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing appellants failed to state a claim upon which relief could be granted. (E.R. 1 at 1.) On November 13, 1997, the district court dismissed appellants' claim of vote dilution and all constitutional claims, while preserving appellants' vote denial claim under the VRA. (E.R. 1 at 1.) At that time, the court allowed appellants to proceed with their claim and gave them an opportunity to present evidence in order to determine whether the totality of circumstances would reveal a Section Two violation. (E.R. 1 at 11-12.)

Appellants filed an amended complaint containing only the VRA claim, arguing Article VI, § 3 and the laws implementing Article VI disproportionately deprives minorities in Washington State of the right to vote in violation of § 2 of the VRA. (E.R. 4 at 1.) Appellants further argued this impact on minority voting rights is caused primarily by race-based disparities within the criminal justice

system. (E.R. 4 at 2.) Appellants also claimed the statutory process for restoration of voting rights, RCW § 9.94A.220, violates § 2 as it prohibits a disproportionately-minority population from registering and voting. (E.R. 4 at 11-12.) Appellants moved for summary judgment on their VRA claim on August 1, 2000, and defendants filed a cross-motion for summary judgment and dismissal. (E.R. 4 at 1.) On December 1, 2000, the district court entered judgment in favor of defendants and dismissed appellants' complaint. (E.R. 3.) The court held that while appellants showed Article VI, § 3 disproportionately denied minorities access to voting in Washington State (E.R. 4 at 2, 6, 10), evidence of race-based disparities in the criminal justice system were not relevant under the totality of circumstances analysis necessary to prove the discriminatory results prohibited by § 2 of the VRA. (E.R. 4 at 2-3, 6, 9-11.) The court further found appellants lacked standing to challenge RCW 9.94A.220 under § 2, as no plaintiff had yet successfully completed the statutory requirements for restoration of voting rights. (E.R. 4 at 11-12.) Appellants subsequently filed this appeal. (E.R. 5.)

SUMMARY OF THE ARGUMENT

The population of citizens within Washington State carrying the status of "convicted felon" is disproportionately minority in composition when compared to the general population. As a consequence, Washington's felon disenfranchisement scheme, though facially neutral with respect to race, deprives a disproportionate

number of minorities of the right to register and vote. This effect is analogous to that of literacy tests and poll taxes once commonplace in the South, where these facially neutral voting qualifications prohibited those populations with the status of "illiterate" and "poor" from voting; populations that also happened to be disproportionately Black.

Washington State did not enact felon disenfranchisement with the specific intent to discriminate on the basis of race. (E.R. 4 at 7.) But the Voting Rights Act does not prohibit only those voting restrictions purposefully maintained to discriminate; it also prohibits those voting restrictions that result in discrimination. Appellants contend Washington's felon disenfranchisement scheme produces a discriminatory result, as it deprives a population that is disproportionately minority of the right to vote.

Appellants have presented evidence under § 2 of the VRA demonstrating disparate impact on minorities within the criminal justice system is the primary causal factor for the disproportionate denial of voting rights under felon disenfranchisement. (E.R. 2 at 17-24.) This evidence must be considered in light of the broadest possible reading of the VRA, as was intended by Congress. In doing so, the evidence presented by appellants is properly considered within the totality of circumstances analysis mandated by § 2(b) of the VRA. The result is the establishment of a causal relationship between the disparate impact on minorities

within the criminal justice system and the resulting disproportionate impact of felon disenfranchisement on minority political participation. Once this relationship is established, felon disenfranchisement is invalid under § 2 of the VRA.

Further, where appellants have standing to bring a claim against the statute that initially stripped them of their voting rights (Article VI, § 3 of the Washington State Constitution), they also have standing to challenge the statute that currently and prospectively denies them the ability to register and vote, RCW § 9.94A.220. By ensuring appellants will be unable to register and vote beyond their terms of incarceration, and perhaps indefinitely, this statute causes appellants to suffer an injury sufficient to meet the constitutional minimum for standing.

Felon disenfranchisement results in the denial of voting rights on account of race in Washington State. It does so in conjunction with disparate impacts on minorities within the criminal justice system. Therefore, felon disenfranchisement violates § 2 of the VRA and summary judgment in favor of appellees should be reversed.

ARGUMENT

I. RACIALLY DISPARATE IMPACTS WITHIN THE CRIMINAL JUSTICE SYSTEM BEARING A CAUSAL RELATIONSHIP TO RACIAL DISPARITIES IN ACCESS TO ELECTORAL PROCESSES IS RELEVANT EVIDENCE UNDER THE § 2 "TOTALITY OF CIRCUMSTANCES" ANALYSIS.

Appellants base their claim on § 2 of the Voting Rights Act of 1965, codified as amended at 42 U.S.C. § 1973. (E.R. 4 at 1-2.) The Act prohibits voting qualifications and practices that result in the denial of the right to vote, by providing in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . 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 [membership in language minority groups protected by § 1973(b)(f)(2)].
>
> (b) A violation . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State . . . are not equally open to participation by members of [protected racial and language minority groups] 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 (1994). The structure of § 2(a) sets forth two elements necessary to establish a § 2 violation: (1) a voting qualification, prerequisite to voting, or standard practice or procedure, (2) that results in a denial or abridgement of the right to vote on account of race or color. Chisom v. Roemer, 501 U.S. 380, 394 (1991). Section 2(b) mandates the use of a "totality of circumstances" inquiry to

prove the challenged practice results in discrimination on the basis of race under § 2(a).

In order for appellants to show Washington's felon disenfranchisement law violates § 2, they need only show how the qualification results in discriminatory denial of the right to vote on account of race;[2] discriminatory intent is unnecessary. Chisom, 501 U.S. at 383; see also Voinovich v. Quilter, 507 U.S. 146, 155 (1993) (holding the burden is on plaintiffs to demonstrate a § 2(a) voting qualification produces discriminatory results). Proving a discriminatory effect through the totality of circumstances analysis involves an inquiry into how the practice of felon disenfranchisement "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

The district court found appellants successfully showed Washington's felon disenfranchisement law results in the denial of voting rights on the basis of race under § 2(a). (E.R. 4 at 2, 6, 10.) However, the district court held the VRA could not be read broadly enough to encompass the evidence presented by appellants under the § 2(b) totality of circumstances analysis. (E.R. 4 at 4, 6.) This is an error of law and should be reversed.

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[2] The term "on account of race or color" was not intended by Congress to connote any required purpose of discrimination. See S. Rep. No. 97-417, at 27-28 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206.

A. The District Court Erred in Narrowly Construing the Scope of the VRA as Applied to Appellants' § 2 Claim.

Congress passed the civil rights legislation of the 1960s to effectuate the "great purpose" of eradicating the effects of a "distressing chapter" in the history of the United States. Hamm v. City of Rock Hill, 379 U.S. 306, 315 (1964). Congress sought to abolish all "badges and incidents of slavery," pursuant to its powers under the Enabling Clause of the Thirteenth Amendment. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968). "Badges and incidents of slavery" include "restrictions upon 'those fundamental rights which are the essence of civil freedom . . . .'" Id. at 441. Toward that end, Congress enacted the Voting Rights Act of 1965, as "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Reynolds v. Sims, 377 U.S. 533, 555 (1964).

Congress was particularly concerned with those facially neutral voting practices and procedures used in the South following Reconstruction to disproportionately deny the franchise to Blacks. Id. at 310-11. Those voting schemes included the use of felon disenfranchisement laws to deprive Blacks of voting rights. Hunter v. Underwood, 471 U.S. 222 (1985). The Court has interpreted the coverage of the VRA to be as broad as possible, in part by defining "voting" to include "all action necessary to make a vote effective," Allen v. State Board of Elections, 393 U.S. 544, 565-566 (1969), as a means "to banish the blight

of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

Congress expanded the scope of the VRA through subsequent amendments. In 1970, Congress amended the VRA to make literacy tests and durational residency requirements per se illegal, see 42 U.S.C. §§ 1973aa, 1973aa-1, thereby causing these voting devices to be invalid in every state, irrespective of whether any particular state had used these qualifications to discriminate on the basis of race. See Oregon v. Mitchell, 400 U.S. 112, 133 (1970). Despite the states' constitutional authority to define qualifications for its electors, see U.S. Const. art. 1, § 2; Gray v. Sanders, 372 U.S. 368 (1963), this far-reaching approach is within the constitutional powers of Congress. See Mitchell, 400 U.S. at 132. As the Court noted, "Congress has recognized that discrimination on account of color and racial origin is not confined to the South, but exists in various parts of the country . . . [and] decided that the way to solve the problems of racial discrimination is to deal with nationwide discrimination with nationwide legislation." Mitchell, 400 U.S. at 133-34.

In the years that followed until the VRA was amended again in 1982, the Court continued to interpret the VRA in the broad manner set out by Allen and Mitchell. See City of Rome v. United States, 446 U.S. 156 (1980); Dougherty

County Bd. of Ed. v. White, 439 U.S. 32 (1978); United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977); Richmond v. United States, 422 U.S. 358 (1975). The 1982 amendments expanded the Act further by adopting a "results" test, allowing plaintiffs to show a violation of § 2 even if plaintiffs are unable to show the challenged voting device was adopted or maintained with discriminatory intent.[3] See Thornburg v. Gingles, 478 U.S. 30, 44 (1986).

The district court's narrow, restricted reading of the VRA in the case at bar flouts the purpose and intent of the Act. The history of the VRA demonstrates the statute was enacted to encompass precisely the type of claim appellants present. Washington State's felon disenfranchisement scheme disproportionately denies minorities access to voting, and thereby results in the denial of voting rights on account of race. This result is demonstrably at odds with the VRA and the ends the Act was designed to achieve. Therefore, the district court should have liberally construed the VRA with respect to appellants' § 2 claim.

B. Invalidation of Felon Disenfranchisement Under § 2 Does Not Create an Equal Protection Problem.

A voting device that is enacted either to intentionally discriminate or results in discrimination on the basis of race is prohibited under § 2. Chisom, 501 U.S. at

[3] The amendment was a response to the Court's holding in Mobile v. Bolden, 446 U.S. 55 (1980), which required proof of discriminatory intent in order to establish a § 2 violation. Gingles, 478 U.S. at 43-44.

394. Though members of minority groups typically bring such challenges, a successful § 2 suit will invalidate the voting device at issue with respect to all citizens affected by it, regardless of race. See, e.g., Bush v. Vera, 517 U.S. 952 (1996); Growe v. Emison, 507 U.S. 25 (1993); Houston Lawyers Ass'n v. Attorney General of Texas, 501 U.S. 419 (1991). Bringing a § 2 challenge to a voting qualification implicates no constitutional conflict. As other circuits have found,

> Section 2 does not conflict with or contract any right protected by the Constitution, and nothing in the Constitution either explicitly or implicitly prohibits a results standard for voting rights violations. Under the test of M'Culloch, section 2 is "consist[ent] with the letter and spirit of the constitution", 17 U.S. (4 Whet.) at 421, and is clearly constitutional.

U.S. v. Marengo County Comm'n, 731 F.2d 1546, 1563 (11th Cir. 1984) (citing Accord Jones v. City of Lubbock, 727 F.2d 364, 372-75 (5th Cir. 1984); Major v. Treen, 574 F.Supp. 325, 342-49 (E.D. La. 1983)).

The district court held the invalidation of felon disenfranchisement under § 2 with respect to racial minorities would still allow the disenfranchisement of White felons, thus creating an Equal Protection problem. (E.R. 4 at 4.) This misapprehends the mechanics of a § 2 claim. Washington's felon disenfranchisement scheme violates § 2, as it results in the denial of voting rights on the basis of race. Therefore, despite the law's facial neutrality with respect to race, it is still invalid under § 2 and may not be enforced against any felon, regardless of race. Cf. Mississippi State Chapter, Operation PUSH v. Allain, 674

F.Supp. 1245 (N.D. Miss. 1987) (invalidating Mississippi voter registration processes as they led to discriminatory results under § 2(a), even though the processes impacted both poor Blacks and poor Whites); Hunter, 471 U.S. 222 (1985) (invalidating Alabama's felon disenfranchisement provision on equal protection grounds with respect to all felons, regardless of race, even though the statute was designed to discriminate against only Blacks on the basis of race).

Upon a showing felon disenfranchisement violates § 2, the Supremacy Clause obliges appellees to comply with Congress' constitutional exercise of power in enacting § 2 and discontinue enforcement of Washington's felon disenfranchisement scheme with respect to all felons. See Vera, 517 U.S. at 992 (O'Connor, J., concurring) ("[T]he States have a compelling interest in complying with the results test as this Court has interpreted it.") There is no Equal Protection conflict defeating this necessary result.

C. Congress Expressly Intended Evidence of Race Discrimination External to Electoral Processes Considered Within the Results Test of the Amended VRA.

A plaintiff showing a voting device statistically results in discrimination on the basis of race under § 2(a) must support this showing through a "totality of circumstances" inquiry.[4] See 42 U.S.C. § 1973(b); S. Rep. No. 97-417, at 28

[4] The development of the totality review was a direct response to the ingenuity demonstrated by state and local governments in restricting minority voting power. See McCain v. Lybrand, 465 U.S. 236, 243-246 (1984).

(1982), reprinted in 1982 U.S.C.C.A.N. 177, 205 [hereinafter S. Rep.]. Without this inquiry "courts would often be left to consider statistical and census data in an inappropriate contextual vacuum." Hall v. Holder, 955 F.2d 1563, 1568 n. 8 (11th Cir. 1992). In the totality review "a bare statistical showing of disproportionate impact on a racial minority does not satisfy the § 2 'results' inquiry. Instead, '[§ 2] plaintiffs must show a causal connection between the challenged voting practice and [a] prohibited discriminatory result.'" Smith v. Salt River Agricultural Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997) (quoting Ortiz v. City of Philadelphia Office of the City Comm'rs, 28 F.3d 306, 312 (3d Cir. 1994)).

The district court found appellants presented sufficient statistical evidence to support finding felon disenfranchisement results in a disproportionate impact on racial minorities in Washington State, consistent with the § 2(a) results test. (E.R. 4 at 2, 6, 10.) However, the court did not find appellants' evidence of discrimination in the criminal justice system to be a causal factor of the disparity within the totality of circumstances inquiry, holding such evidence of discrimination occurred outside of electoral processes and is therefore irrelevant under § 2. (E.R. 4 at 2-3, 6, 9-11.) This erroneously interprets the scope of the totality of circumstances analysis and is an error of law.

1. Appellants vote denial claim and evidence of discrimination in the criminal justice system is properly analyzed under the totality of circumstances test.

Under the amended § 2, most "results test" cases have been brought by plaintiffs claiming vote dilution rather than vote denial. See, e.g., Bush v. Vera, 517 U.S. 952 (1996); Holder v. Hall, 512 U.S. 874 (1994); Growe v. Emison, 507 U.S. 25 (1993); Voinovich v. Quilter, 507 U.S. 146 (1993); Houston Lawyers Assn. v. Attorney General of Texas, 501 U.S. 419 (1991); Chisom v. Roemer, 501 U.S. 380 (1991); Thornburg v. Gingles, 478 U.S. 30 (1986). In the case at bar, appellants present a facial challenge to Washington's felon disenfranchisement law, arguing not vote dilution, but vote denial. (E.R. 4 at 3.) Nevertheless, the § 2(a) results test, supported by the § 2(b) totality review, applies to appellants' claim.

When interpreting the applicability of a statute to a particular claim, the preferred starting point is the statute's plain language. See Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-54 (1992). Section 2(a) of the Act covers "voting qualification[s]," "prerequisite[s] to voting," or "standard[s], practice[s], or procedure[s]." Moreover, the right to be free from discrimination in voting under § 2 extends to "any citizen of the United States." See 42 U.S.C. § 1973.

Washington's felon disenfranchisement law is a voting qualification. See Fernandez v. Kiner, 673 P.2d 191 (Wash. 1983). Thus, it comes within the scope of § 2(a) as the type of voting device Congress was concerned about, "however it

might be denominated, that regulates citizens' access to the ballot--that is, any procedure that might erect a barrier to prevent the potential voter from casting his vote." Holder, 512 U.S. at 917 (Thomas, J., concurring in judgment). Appellants, though convicted felons, are citizens of the United States. Therefore, the results test of § 2(a) applies to appellants vote denial claims, and the totality of circumstances analysis under § 2(b) guides the court's determination under the results standard of § 2(a). See id. at 924 (finding that neither the § 2(a) results test nor the § 2(b) totality of circumstances analysis is "inherently tied to vote dilution claims").

Under this analysis, two questions must be answered in order to prove a § 2 violation. First, whether the evidence presented in the totality review is causally connected with the discriminatory results demonstrated under § 2(a). Second, whether that causally related evidence is properly considered within the totality analysis. Appellants primarily presented evidence showing disparate impact on minorities within the criminal justice system causes Washington State's felon disenfranchisement scheme to result in the disproportionate denial of minorities' right to vote. (E.R. 2 at 17-24.) The district court erroneously held the evidence was not causally related to the resultant disparity in electoral participation and such evidence should not be considered within the totality review.

a. The totality review necessary to establish a § 2 violation is flexible and comprehensive and allows consideration of evidence external to electoral processes.

Congress intended the § 2(b) totality of circumstances analysis be based upon the analytical framework of White v. Regester, 412 U.S. 755 (1973), where a violation of § 2 is demonstrated by objective factors that show the political process at issue is not equally open to participation by a particular minority group. See Gingles, 478 U.S. at 35; White, 412 U.S. at 766. Congress elaborated on the typical objective factors that may be probative of a § 2 violation in the Senate Judiciary Committee majority report accompanying the bill that amended § 2 to incorporate the results test. These factors are:

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.

> Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: 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; 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.

S. Rep. at 28-29; see also Gingles, 478 U.S. at 36-38.

Congress stressed this list was neither comprehensive nor exclusive and other relevant factors should be considered. S. Rep., at 29-30. The Senate Committee did not intend "any particular number of factors be proved, or that a majority of them point one way or the other." Id. at 29. Instead, "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the past and present reality," id. at 30, and on a "functional" view of the political process. Id. at 30, n. 120; see also Gingles, 478 U.S. at 45. Thus, the totality of circumstances analysis is a "flexible, fact-intensive test," Gingles, 478 U.S. at 46, and "cannot be applied mechanically and without regard to the nature of the claim." Voinovich, 507 U.S. at 158. The analysis is also very broad, as "the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." Johnson v. DeGrandy, 512 U.S. 997, 1011 (1994).

The enumerated Senate Report factors have limited applicability to appellants' vote denial claim, as they are most relevant to vote dilution claims.[5] See Gingles, 478 U.S. at 45. Many of the evidentiary factors set forth in the Senate Report are directly tied to electoral processes, like racial polarization in elections, or denial of access to candidate slating processes. S. Rep. at 37. However, some of the Senate Report factors implicate the presentation of evidence external to electoral processes, though causally related. One factor the Senate Report considered typical is "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." S. Rep. at 37. This particular factor, by necessity, calls for the consideration of non-electoral evidence within the totality review.

Accordingly, courts have consistently included factors external to electoral processes within the § 2(b) totality of circumstances analysis when such factors are relevant. Numerous cases illustrate this point. In DeGrandy, 512 U.S. at 1012, the Court weighed the Hispanic proportion of the general population under the totality review when considering a Florida legislative districting plan. Also found proper

[5] The district court recognized this and declined to mechanistically apply the enumerated factors. (E.R. 4 at 5 n. 4.)

under the totality review was "evidence of racial relations outside the immediate confines of voting behavior and . . . a history of discrimination against Hispanic voters continuing in society generally to the present day." Id. at 1013. The court in Windy Boy v. County of Big Horn, 647 F.Supp. 1002, 1016 (D. Mont. 1986), looked at a variety of disparities between Native Americans and Whites, including per capita income, life expectancy, unemployment, and telephone ownership within the totality review. The court held a causal link between lower socio-economic and educational status (non-electoral factors) and an inequality of access to political participation could be automatically inferred. Id. The court in Jordan v. City of Greenwood, Miss., 599 F.Supp. 397, 401 (N.D. Miss. 1984), made a similar holding. After examining Black socio-economic disadvantages in education, income, poverty status, employment, living conditions, and health under the totality review, the court held these disadvantages contributed to decrease Black political participation and effectiveness in the community. Id. The court relied on the Senate Report in stating "'plaintiffs need not prove any further causal nexus between the disparate socioeconomic status and the depressed level of political participation.'" Id. (quoting S. Rep. at 29 n. 114). The totality review in Johnson v. Halifax County, 594 F.Supp. 161, 167 (N.D. N.C. 1984) considered an ongoing failure by the county to desegregate the public school system and disparities in employment and earning potential between Blacks and Whites.

Finally, in Marengo County Comm'n, 731 F.2d at 1568, the Eleventh Circuit Court of Appeals held evidence of the county's ongoing resistance to desegregation in the school system and countywide discrimination in jury selection was relevant to the totality analysis.

Courts have also explicitly held evidence of discrimination outside of electoral factors should be considered when relevant. The Eleventh Circuit in Hall v. Holder, 955 F.2d at 1572-73, reversed a lower court that held non-electoral data is outside the scope of the Senate Report factors. The court of appeals held evidence presented by plaintiffs regarding segregation in all aspects of public life in the subject county, disproportionate effects of depressed socio-economic conditions on Blacks, and the presence of racially exclusive organizations, though external to electoral processes, properly fell within the totality review.[6] Id. In the Fifth Circuit, the court in McMillan v. Escambia County, Fla., 748 F.2d 1037, 1044 (5th Cir. 1984) announced "discrimination against minorities outside of the electoral system cannot be ignored in assessing that system."

In the case at bar, appellants presented evidence to the district court of a disparate impact on minorities within the Washington State criminal justice system. (E.R. 2 at 17-24.) As the above cases illustrate, non-electoral evidence,

[6] The Supreme Court eventually reversed the court of appeals, but did so on other grounds. See Holder v. Hall, 512 U.S. 874 (1994).

when probative and causally related to the particular vote denial claim, may be considered under the totality of circumstances analysis. If courts can consider discrimination in employment, income, education, and jury selection, the district court should have considered the racially disparate impacts within the criminal justice system, as it is causally related to appellants' claim. Though there has never been an opportunity for any court to consider the type of evidence advanced by appellants within a § 2 totality review, this is not a bar to its consideration. So long as the evidence is causally linked to the discriminatory result, the flexibility and broad scope of the totality review allows the evidence to be considered. The district court erred in its contrary holding.

b. Disparate impact evidence within the criminal justice system causally connects Washington's felon disenfranchisement law and the resulting racial disparity in electoral access.

Evidence presented within the totality of circumstances analysis must bear some causal connection with the resulting denial of voting rights. See Salt River, 109 F.3d at 595. An illustration of how this causal connection is established can be found in Mississippi State Chapter, Operation PUSH v. Allain, 674 F.Supp. 1245 (N.D. Miss. 1987), where plaintiffs successfully challenged Mississippi's dual registration requirement and prohibition on satellite and off-site voter registration under § 2.

The Allain plaintiffs argued the state's process for voter registration resulted in Blacks being disproportionately denied the right to vote. In presenting evidence to support the totality of circumstances inquiry, plaintiffs argued that substantial socio-economic disparities between Whites and Blacks in Mississippi contributed to inequality in access to voting registration. Id. at 1252. Specifically, plaintiffs presented evidence that socio-economic disadvantages caused Blacks to have less access to transportation (especially automobiles), making it harder for Blacks to travel to registration sites. Id. at 1253. Further, the unavailability of telephones in 30% of Black households in Mississippi made obtaining information about voting registration more difficult for Blacks than Whites. Id. Also, evidence showed Black workers in Mississippi worked predominately in blue-collar and service industries for an hourly wage, making it less likely Blacks could take time off from work to register to vote during regular office hours. Id. at 1256. The Allain court found "[t]he continued statutory prohibition on satellite registration and . . . the dual registration requirement have a disparate impact on the opportunities of black citizens to register to vote because of their socio-economic and occupational status." Id. at 1253 (emphasis added). Upon the court's finding of a § 2 violation, the Mississippi legislature was forced to reform registration procedures to avoid

the prohibited result.[7]

Where the Allain court considered socio-economic evidence external to the electoral practice itself within the totality review, the district court in the instant case declined to consider evidence presented by appellants of disparate racial impacts on minorities within the state criminal justice system. (E.R. 4 at 2-3, 6, 9-11.) Though the district court found appellants' evidence compelling, it held such evidence is not properly considered within the totality review. (E.R. 4 at 8.) This is error, as appellants' evidence is directly, causally linked to the racially discriminatory effects of felon disenfranchisement, much like the socio-economic disparities in Allain were directly, causally linked to the disparate effect of Mississippi's voter registration scheme.

Appellants' presented a wide-ranging inquiry into the disparate impact on minorities within Washington State's criminal justice system. (E.R. 2 at 17-24.) Of the total number of convictions by county superior courts for drug offenses statewide, almost 40% were for non-White offenders. While the Black population statewide is only about 3%, Blacks comprise 25% of all drug arrests. This disparity is most pronounced in King County, where Blacks represent 47% of all drug crime convictions in the county. A study of the King County Prosecutor's Office found

[7] Mississippi's remedial legislation was later found to have cured the § 2 violation. See Mississippi State Chapter, Operation PUSH, Inc. v. Mabus, 717 F.Supp. 1189 (N.D. Miss. 1989), aff'd 932 F.2d 400 (5th Cir. 1991).

Whites were least likely of all racial groups to be charged with a felony, even when adjusting for the possible effects of other offender characteristics and legally relevant factors. Statewide, non-White offenders receive, on average, longer sentences than Whites, and Blacks are most likely of all groups to be sent to prison. Blacks are also less likely than Whites to receive first-time offender waivers or alternative sentencing. Overall, it has been found the racial disparity in imprisonment is high (9:1) compared to the disparity in arrest (5:1). This suggests minorities are incarcerated, and therefore disenfranchised, at a far greater rate than similarly situated Whites. A 1994 study looking at incarceration rates in Washington found 1,392 per 100,000 Blacks were incarcerated compared to just 161 per 100,000 Whites. These numbers mean an individual Black man in Washington State is 8.65 times more likely to be incarcerated than an individual White man. These disparities are observed in the composition of Washington's prison population. During fiscal year 2000, the Black prison population in state prisons was 22.4%, a proportion nearly eight times greater than the general Black population in Washington State. The district court found this evidence "compelling," (E.R. 4 at 8) but erred in not considering it within the totality review.

Much like the socio-economic disadvantages facing Blacks in Allain, the disadvantages facing minorities in Washington State's criminal justice system in

the form of disparate impacts creates the causal link between the challenged qualification and the discriminatory effect. The disparate impact evidence produced by appellants establishes "but-for" causation; "but for" disparate impact within the criminal justice system, minority felons would not be disproportionately disenfranchised in Washington State. The district court recognized this, noting in the absence of disparate treatment within the criminal justice system, felon disenfranchisement would not likely result in disproportionate denial of voting rights of minorities. (E.R. 4 at 6.) When considering appellants' evidence in the totality analysis, they meet the requirement of Salt River: Appellants show, beyond mere statistical disparity, there are social and historical factors in the form of disparate impacts on minorities within the criminal justice system that result, through felon disenfranchisement, in a disproportionate number of minorities unable to register and vote in Washington.

2. The district court failed to consider other relevant evidence within the totality of circumstances analysis.

The Senate Report factors allow for consideration within the totality review "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." S. Rep. at 29. Though not as important a factor under the totality review, a tenuous explanation for an electoral policy may be circumstantial evidence the

system is either motivated by discriminatory purposes or produces a disparate result. See McMillan, 748 F.2d at 1045.

In the appellees' F.R.C.P. 12(b)(6) motion to dismiss, the motion was supported by argument that felon disenfranchisement meets important public policy objectives in Washington State. (E.R. 1 at 12.) The district court rejected these arguments in sustaining appellants' § 2 challenge. (E.R. 1 at 12-14.) Appellants further argued in their motion for summary judgment that felon disenfranchisement lacks any compelling public policy rationale. (E.R. 2 at 27-31.) The district court failed to weigh this argument in ruling on appellants' claim.

Though this factor does not weigh as heavily in the totality review as evidence of racially disparate impacts within the criminal justice system, consideration of this factor is important to the "comprehensive, not limited, canvassing of relevant facts," DeGrandy, 512 U.S. at 1011, under the totality review. Appellants argued felon disenfranchisement lacks any grounding in public policy or public safety considerations, and may cause more harm than good in its enforcement. (E.R. 2 at 27-31.) Appellees did not dispute appellants' argument in the summary judgment motion. Had the district court properly weighed this factor in the totality review, it would have enhanced appellants' claim of a § 2 violation.

D. The Vote Denial Claim in *City of Belle Glade* is Not Analogous to Appellants' Vote Denial Claim.

The district court supported its holding non-electoral factors are not relevant in the totality review by relying on the Eleventh Circuit's opinion in Burton v. City of Belle Glade, 178 F.3d 1175 (11th Cir. 1999). (E.R. 4 at 9-10.) The court's reasoning by analogy, comparing the Belle Glade vote denial claim to appellants' vote denial claim, fails to account for fundamental differences between these two cases.

The Belle Glade plaintiffs argued the city's decision not to annex a predominantly Black neighborhood while annexing a predominantly White neighborhood violated a number of statutory and constitutional provisions, including § 2 of the VRA. Id. at 1186. With respect to the § 2 vote denial claim, the court held plaintiffs failed to raise a genuine issue of material fact. Id. at 1198. In making this determination, the court did not even reach the question whether "failure to annex" constitutes a "standard, practice, or procedure" under § 2(a); the court assumed, arguendo, refusal to annex met this definition.[8] Id. at 1197 n. 22. Instead, the court merely looked to the totality of circumstances and held plaintiffs met none of the Senate Factors, thereby negating plaintiffs' claim. Id. at 1198. The court determined that, although plaintiffs presented evidence of housing

[8] This distinction alone is relevant, as it is settled appellants are challenging a voting qualification expressly encompassed by § 2.

segregation in the community, the court found "no evidence with respect to voting." Id.

The district court interpreted this holding to imply disparate impact evidence not related to voting is irrelevant in the totality review, even though the Eleventh Circuit did not explicitly say so. (E.R. 4 at 9-10.) This is an incorrect interpretation of the Belle Glade holding for two reasons.

First, the evidence presented by the Belle Glade plaintiffs cannot be understood to demonstrate the type of "but-for" causation established by appellants. The Belle Glade plaintiffs presented evidence of government-sponsored housing segregation that caused the failure to annex to result in vote denial. Belle Glade, 178 F.3d at 1183-84. However, plaintiffs failed to show that, in the absence of housing segregation, failure to annex would not deny voting rights. In fact, the evidence mitigated against reaching this conclusion, as formal segregation had been prohibited since 1977. Id. at 1183 n. 1. Thus, the Belle Glade plaintiffs could not claim "but for" housing segregation, minorities would not be denied the right to vote by operation of the challenged practice.

Second, and even more important, it cannot be inferred from the approach of the Eleventh Circuit in Belle Glade that non-electoral evidence is excluded from the totality review. To do so contradicts established precedent; the Eleventh Circuit explicitly stated in Hall v. Holder that all relevant evidence, including non-

electoral evidence, is properly included in the totality review. Hall v. Holder, 955 F.2d at 1572-73.

Belle Glade is a poor analogy for appellants' claim. A much better analogy can be found in Allain, where the voting device at issue was clearly a "standard, practice, or procedure" within the meaning of § 2(a). Further, like appellants' evidence of disparate impacts on minorities within the criminal justice system, the Allain plaintiffs presented disparate impact evidence outside of electoral processes (in the form of socio-economic disparities) that directly correlated with the resulting disparity in voting access, establishing "but-for" causation. Viewed in light of Allain rather than Belle Glade, appellants' evidence is highly relevant and should have been considered within the totality review.

II. APPELLANTS HAVE STANDING TO CHALLENGE WASHINGTON'S RESTORATION OF VOTING RIGHTS STATUTE AS IT RESULTS IN DISCRIMINATION ON ACCOUNT OF RACE IN VIOLATION OF § 2.

Appellants' § 2 vote denial claim against Washington's felon disenfranchisement scheme encompasses Washington's statute for the restoration of civil rights, Washington Revised Code § 9.94A.220. The statute provides:

> (1) When an offender has completed the requirements of the sentence, the secretary of the department or the secretary's designee shall notify the sentencing court, which shall discharge the offender and provide the offender with a certificate of discharge.
> (2) The discharge shall have the effect of restoring all civil rights lost by operation of law upon conviction, and the certificate of discharge shall so state.

RCW § 9.94A.220. Upon conviction, Article VI, § 3 deprives offenders of their voting rights; RCW § 9.94A.220 makes that deprivation permanent unless certain enumerated and non-enumerated obligations are fulfilled.[9] The statute effectively erects barriers to registration and voting by appellants. Until the statutory requirements are met, no appellant is able to register and vote. Therefore, RCW § 9.94A.220 is a "standard, practice, or procedure" within the meaning of § 2(a), which has been read expansively by the Court to encompass "any methods for conducting a part of the voting process that might . . . be used to interfere with a citizen's ability to vote . . . ." Holder, 512 U.S. at 918.

Appellants presented evidence to the district court showing the statutory process as applied is cumbersome, excessively complex, and places difficult burdens on offenders seeking restoration of voting rights. (E.R. 4 at 11-12.) Offenders are typically unaware their voting rights were revoked upon conviction, and upon release from incarceration they are generally uninformed as to their status as a voter. Washington's Secretary of State has no policy of either providing information to released felons about their status or ensuring elections officials are trained to answer questions regarding voter eligibility by ex-offenders. Often,

[9] Evidence presented by appellants to the district court showed the restoration procedure required offenders to comply with requirements not in the statute, and successful compliance with all terms under the process did not guarantee restoration of voting rights.

offenders serve out the remainder of their sentences outside of prison under supervision by corrections department officials. Many of these offenders are under "monetary only" supervision (i.e., the only remaining sentencing obligation is repayment of restitution and supervision fines). Thus, a substantial number of offenders who are productive members of the community are denied voting rights by operation of RCW § 9.94A.220 until they have repaid their monetary debt. Should the offender fail to fulfill his or her monetary obligation, which can often be quite substantial, the offender will be "terminated" from supervision after ten years. Even those offenders who successfully complete all terms of their sentences may still be denied restoration of their voting rights. Restoration is at the discretion of the sentencing court, and the court can refuse restoration should it find some reason to do so. For example, an offender with a lifetime no-contact order in Washington State will generally not have their voting rights restored, even upon sentence completion. This practice is contrary to the language of the statutory scheme that calls for the mandatory restoration of voting rights following sentence completion.

Appellants argued RCW § 9:94A.220, and the process as applied under the statute, causes a disproportionately-minority population to be prohibited from registering and voting, in violation of § 2. (E.R. 4 at 11-12.) The district court did not reach the merits of appellants' claim of vote denial. Instead, the court held

appellants did not have standing to bring the claim, as no appellant had successfully completed the requirements of the statute. (E.R. 4 at 12.)

A. Appellants Have Met the Elements Necessary to Establish the Constitutional Minimum For Standing.

Standing is a threshold jurisdictional question and must be addressed prior to and independent of the merits of appellants' claim. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102 (1998). The Supreme Court has established three elements necessary to meet the constitutional minimum of standing:

> First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations and footnote omitted).

The VRA provides all "aggrieved persons" standing to enforce their right to vote. See 42. U.S.C. § 1973a; see also Allen, 393 U.S. at 557. An "aggrieved person" is any person injured by an act of discrimination. See Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972). Appellants are "aggrieved persons" within the meaning of the Act. Washington's felon disenfranchisement scheme results in the denial of voting rights on account of race. The statute, RCW

§ 9.94A.220; is a part of this scheme and prevents appellants from registering and voting. Therefore, appellants are injured by a discriminatory act and are aggrieved persons under the VRA.

Appellants meet the first Lujan element where RCW § 9.94A.220 prohibits them from registering and voting, thereby causing an "injury in fact." The VRA vests in appellants the right to participate in electoral processes free from racial discrimination. The enforcement of RCW § 9.94A.220 deprives them of that right, making the injury concrete, particularized, and actual. A series of cases in the Eleventh Circuit demonstrates the following maxim with respect to standing in challenges to electoral processes: A party who has a personal interest in an electoral process that impacts the party's ability to exercise political power has standing to challenge or defend the process, as any injury resulting from the process is actual or prospective rather than unlawful in the abstract. See Dillard v. Baldwin County Commissioners, 225 F.3d 1271, 1277 (11th Cir. 2000); see also Clark v. Putnam County, 168 F.3d 458, 461 (11th Cir. 1999); Meek v. Metropolitan Dade County, Fla., 985 F.2d 1471, 1480 (11th Cir. 1993).

Appellants meet the second and third Lujan elements as well. The vote denial claim is against appellees' maintenance of a statue that results in the denial of voting rights on account of race, in violation of § 2. The injury (denial of voting rights on account of race) is fairly traceable to the actions of appellees in

maintaining felon disenfranchisement, thereby meeting the second element. Finding RCW § 9.94A.220 violates § 2 would necessarily prohibit appellees from continuing enforcement of the law. The removal of the barriers to registration and voting created by the statute would no longer be in place and appellants would thereafter be able to vote, meeting the third element. In summary, appellants have standing to seek redress for the injury caused them by this statute, which currently and prospectively denies them the ability to register and vote.

Whether Appellants have successfully completed the requirements of RCW § 9.94A.220 is not relevant to the issue of standing. The district court's error on this point becomes clear when RCW § 9.94A.220 is compared to an analogous voting restriction: the poll tax. Both are state-imposed prerequisites to voting that make a citizen's ability to register and vote conditioned upon the payment of a fee.[10] Poll taxes have been invalidated in federal elections, Harman v. Forssenius, 380 U.S. 528 (1965), state elections, Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966), and under the VRA. 42 U.S.C. § 1973h. If the district court's reasoning in the case at bar were applied to a challenge to the discriminatory effects of poll taxes, only those plaintiffs who successfully paid the poll tax would

[10] RCW 9.94A.220 makes registration and voting conditioned upon the payment of sentence-imposed costs and fees only for those offenders who have received such sentences. In the case of Appellant Farrakhan, RCW § 9.94A.220 prohibits him from voting only because he has not completed repayment of fines and fees; he has completed all other terms of his judgment and sentence.

have standing to bring a claim. This reasoning is incorrect and contradicts established precedent; the plaintiffs in Harper had standing to overturn poll taxes in state elections even though they did not pay the poll tax. In fact, the basis of their claim was their financial inability to pay the $1.50 per year poll tax. See Harper v. Virginia State Bd. of Elections, 240 F.Supp. 270, 271 (E.D. Va. 1964). In Harman, the Court rejected defendant State of Virginia's argument plaintiffs lacked standing because they had paid the poll tax. See Harman, 380 U.S. at 533 n. 6.

Relying on Harper and Harmon, the issue whether Appellants have paid the fees required by RCW § 9.94A.220 is not germane to the question of standing. So long as Appellants meet the Lujan elements, as they have, they have standing to bring their claim.

B. Appellants' Due Process Claim Against RCW § 9.94A.220 Should Be Revisited in Light of the Recent Supreme Court Ruling in *Bush v. Gore.*

The district court similarly dismissed on standing grounds appellants' claim the restoration of voting rights process pursuant to RCW § 9.94A.220 violates procedural due process. (E.R. 4 at 12; 1 at 18.) This decision should be reversed and remanded for consideration under the standard announced in Bush v. Gore, --- U.S. ---, 121 S.Ct. 525 (2000), a decision released twelve days after the district court's order in the case at bar.

In Bush, the Court held due process considerations attached to the procedures utilized by a state to ensure full and equal participation in the electoral

process. In this regard, the Court held a state, "[h]aving once granted the right to vote on equal terms, . . . may not, by later arbitrary and disparate treatment, value one person's vote over that of another." Bush, 121 S.Ct. at 530 (citing Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966)).

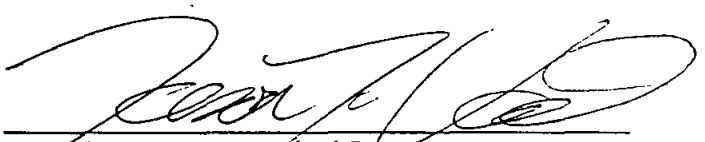
Appellants presented ample evidence showing offenders seeking to register and vote in Washington State face difficult and confusing barriers; these barriers do not exist for similarly-situated non-offenders. By enforcing a process for restoration of voting rights that is unnecessarily complex and non-uniform throughout the state, appellees effectively "value" an offender's vote less than a non-offender. This violates the equal protection standard of Bush, which requires a statewide electoral procedure exhibit uniform standards in order to give "at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." Id. at 532. The restoration process does not reflect these standards and therefore violates procedural due process.

CONCLUSION

The enforcement of Washington's felon disenfranchisement scheme has the effect of denying minorities the right to vote on account of race. When considered in light of a totality of circumstances analysis that includes racially disparate impact evidence within the criminal justice system, felon disenfranchisement is prohibited by § 2 of the Voting Rights Act. As appellants are minorities who are

currently and prospectively denied the right to vote by operation of RCW § 9.94A.220, appellants are injured in a manner establishing the constitutional minimum requirements for standing. For the reasons set forth herein, this court should reverse the holding of the district court and remand for further proceedings.

Respectfully submitted,



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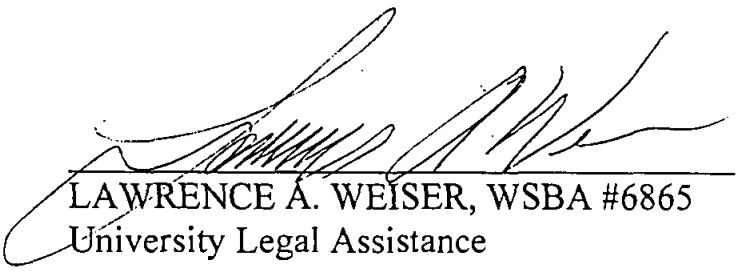

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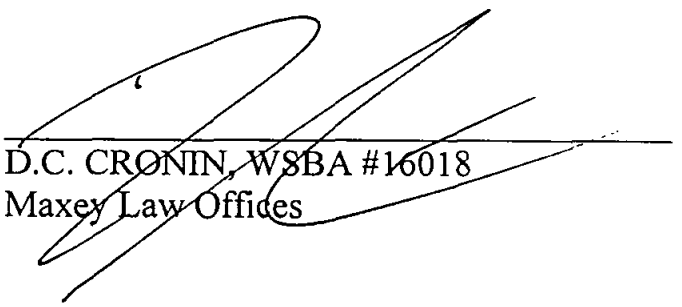

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APPENDIX A

WASHINGTON STATE CONSTITUTION
ARTICLE VI: ELECTIONS AND ELECTIVE RIGHTS

Section 3: Who Disqualified

All persons convicted of infamous crime unless restored to their civil rights and all persons while they are judicially declared mentally incompetent are excluded from the elective franchise.

APPENDIX B

REVISED CODE OF WASHINGTON
CHAPTER 9.94A: SENTENCING REFORM ACT OF 1981

9.94A.220: Discharge upon completion of sentence—Certificate of discharge—Obligations, counseling after discharge

(1) When an offender has completed the requirements of the sentence, the secretary of the department or the secretary's designee shall notify the sentencing court, which shall discharge the offender and provide the offender with a certificate of discharge.

(2) An offender who is not convicted of a violent offense or a sex offense and is sentenced to a term involving community supervision may be considered for a discharge of sentence by the sentencing court prior to the completion of community supervision, provided that the offender has completed at least one- half of the term of community supervision and has met all other sentence requirements.

(3) Except as provided in subsection (4) of this section, the discharge shall have the effect of restoring all civil rights lost by operation of law upon conviction, and the certificate of discharge shall so state. Nothing in this section prohibits the use of an offender's prior record for purposes of determining sentences for later offenses as provided in this chapter. Nothing in this section affects or prevents use of the offender's prior conviction in a later criminal prosecution either as an element of an offense or for impeachment purposes. A certificate of discharge is not based on a finding of rehabilitation.

(4) Unless otherwise ordered by the sentencing court, a certificate of discharge shall not terminate the offender's obligation to comply with an order issued under chapter 10.99 RCW that excludes or prohibits the offender from having contact with a specified person or coming within a set distance of any specified location that was contained in the judgment and sentence. An offender who violates such an order after a certificate of discharge has been issued shall be subject to prosecution according to the chapter under which the order was originally issued.

(5) Upon release from custody, the offender may apply to the department for counseling and help in adjusting to the community. This voluntary help may be provided for up to one year following the release from custody.

APPENDIX C

UNITED STATES CODE
TITLE 42: THE PUBLIC HEALTH AND WELFARE
CHAPTER 20—ELECTIVE FRANCHISE
SUBCHAPTER I-A—ENFORCEMENT OF VOTING RIGHTS

Section 1973: Denial or abridgment of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) 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.

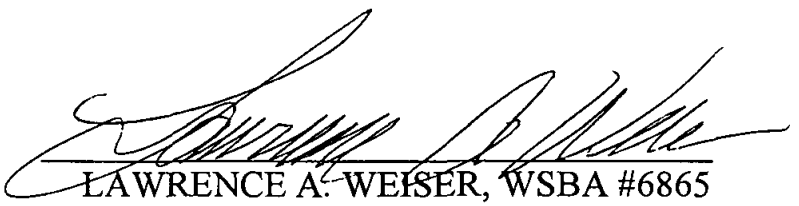
(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected 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.

CERTIFICATION OF COMPLIANCE
TO FED. R. APP. 32(a)(7)(C) AND
CIRCUIT RULE 32-1 FOR CASE NUMBER 01-35032

I CERTIFY THAT:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points, and contains 9,830 words.

DATED this 19th day of April, 2001



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