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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MUHAMMAD SHABAZZ FARRAKHAN, *et al*.,

Petitioners-Appellants,

v.

GARY LOCKE, *et al*.,

Respondents-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

No. CS-96-076-RHW
The Honorable Robert H. Whaley
United States District Court Judge

BRIEF OF APPELLEES

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I. STATEMENT OF JURISDICTION

Plaintiffs-Appellants appeal from an order that granted summary judgment in favor of Defendants-Appellees, and dismissed all claims. This is a final appealable order. See Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 623 (9th Cir. 1988). Plaintiffs' notice of appeal is timely; this Court has jurisdiction to review the District Court's Order of Summary Judgment and Dismissal. 28 U.S.C. § 1291. Although this Court has jurisdiction to review the orders and judgments of the District Court, it lacks subject matter jurisdiction over any review of the Plaintiffs' state court criminal convictions under the Rooker-Feldman doctrine. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482, 103 S. Ct. 1303, 1314, 75 L. Ed. 2d 206 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 416, 44 S. Ct. 149, 150, 68 L. Ed. 362 (1923).

II. QUESTIONS PRESENTED

1. Does felon disenfranchisement violate Section 2 of the Voting Rights Act?
2. Even if the Voting Rights Act protects the voting rights of felons, have Plaintiffs met their burden of proving that under the totality of the circumstances they have been denied the right to vote based on race?
3. Do Plaintiffs have standing to challenge, and have they stated a cause of action challenging, the procedure under which Washington reinstates the civil rights of convicted felons when none of the Plaintiffs qualify for reinstatement?

III. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Plaintiffs are all individuals convicted in Washington state courts of various felony offenses. Plaintiffs are all African-American, Hispanic, or Native American. In Washington, as in nearly all states, a collateral consequence of a felony conviction is that the convicted individual loses the right to vote until his or civil rights are restored. Wash. Const. art. VI, § 3. While none of the Plaintiffs have ever alleged that their individual convictions were in any way based on race (SER 49-71; 288-89)[1], they allege that they have been denied the right to vote as a result of their race, in violation of Section 2 of the Voting Rights Act. 42 U.S.C. § 1973.

Plaintiff Farrakhan was convicted of multiple counts of theft; he has also been convicted for unlawful issuance of a check and forgery. Plaintiffs Barrientes, Briceno, and Schaaf are convicted of murder. Plaintiff Price has been convicted of possession of a controlled substance. Plaintiff Shadeed has been sentenced to life imprisonment under the state's sentencing laws for repeat offenders. The detailed circumstances of their convictions, including any appellate and collateral challenges, were included in the Defendants' Statement of Material Facts before the District Court and were not challenged. SER 49-71; 288-89.

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[1] See Local Rule 56.1 (E.D. Wash.)(the court may assume the facts as stated in the Statement of Material Facts unless controverted). "ER" designated documents provided in Plaintiffs-Appellants' Excerpts of Record. "SER" designates documents provided in Defendants-Appellee's Supplemental Excerpts of Record. Documents not supplied in either the ER or SER are designated by "CR", which represents the number given the documents in the District Court file.

B. PROCEDURAL HISTORY

Plaintiffs' complaint originally alleged numerous constitutional violations, as well as claims under the Voting Rights Act (VRA) of both vote dilution and vote denial. In 1997, Defendants moved to dismiss, arguing that Plaintiffs had failed to state any claim upon which relief could be granted. The district court granted the motion in part and denied it in part. The court dismissed Plaintiffs' constitutional claims and Plaintiffs' claims under the VRA based on a vote dilution theory. However, the District Court allowed Plaintiffs to proceed under a vote denial theory. Farrakhan v. Locke, et al., 987 F.Supp. 1304, 1312-13 (E.D. Wash. 1997). Thereafter, Plaintiffs' filed a Fourth Amended Complaint alleging they are denied the right to vote based on their race, in violation of the Voting Rights Act. SER 34-36. Plaintiffs withdrew their constitutional claims and their vote dilution claims; the case proceeded solely based upon a vote denial claim under Section 2 of the VRA. Id.

Mr. Farrakhan also added claims pertaining to the process for reinstatement of civil rights. He alleged that the reinstatement process violated his rights under the Voting Rights Act and due process, contending that Washington's process for restoration of one's civil rights is "vague, unclear, and unduly burdensome." SER 35-36.

The parties informed the Court at the summary judgment hearing that there was no dispute of fact and that summary judgment was appropriate as a matter of law. SER 363-64. The District Court reviewed Plaintiffs' claims under the Voting Rights Act and concluded "that the totality of circumstances does not establish the

requisite causal link between Washington's felon disenfranchisement provision and reduced minority access to Washington's political process." ER Tab 4 at 5. The District Court examined and discussed a number of factors. For example, the Plaintiffs claimed discrimination in Washington's criminal justice system, not in Washington's system of voting. The District Court noted that "[p]laintiffs have not offered any evidence of a 'history of official discrimination in the state . . . that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process', such as to lead the Court to conclude that the circumstances surrounding the disenfranchisement's provision created an inference of discriminatory intent or a causal connection between the provision and the result." Id. at 6-7 (citation omitted) (quoting Thornburg v. Gingles, 478 U.S. 30, 36-37, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986)). The District Court properly held that Plaintiffs' evidence of disproportionality in the criminal justice system was insufficient to support their claim that they were denied the right to vote on account of race. ER Tab 4 at 8-9 (citing Smith v. Salt River Agricultural Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997)). Finally, the District Court determined that the Plaintiffs presented no evidence that Washington's criminal justice system was inherently flawed, as demonstrated by the complete absence of any proof that Plaintiffs' convictions were based on race. ER Tab 4 at 10-11.

The District Court also concluded that Plaintiffs lacked standing to challenge Washington's procedures for restoring civil rights because none of the Plaintiffs had met the qualifications to invoke that process. Alternatively, even if Plaintiffs

had standing, Plaintiffs' claims still failed because Plaintiffs presented "no evidence that the restoration process unduly impacts minorities because of race." ER Tab 4 at 12.

IV. STANDARD OF REVIEW

This Court reviews a district court's order granting a motion for summary judgment *de novo*. Cooper v. Dupnik, 963 F.2d 1220, 1223 (9th Cir. 1992). 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, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). Where there is a complete failure of proof concerning an essential element of the non-moving party's case, all other facts are rendered immaterial, and the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 324. The parties to this case have agreed that there are no factual disputes. SER 363-64.

V. SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's dismissal of Plaintiffs' claims.

The Voting Rights Act does not prevent states from disenfranchising convicted felons. It was not intended to do so. A right to vote by felony offenders has never been part of our nation's legal tradition. The right to vote protected by the Fourteenth Amendment does not extend to convicted felons under the express language of that same Amendment. Consequently, states may disenfranchise felons without running afoul of the Voting Rights Act. Although states are not permitted to purposefully discriminate against racial groups with their

disenfranchisement laws, there is no evidence of such intent in Washington legislative history. Therefore, Plaintiffs' claims fail.

Even if the Voting Rights Act addressed felon disenfranchisement, Plaintiffs fail to support their claim. They cannot demonstrate that under the totality of the circumstances they have been denied the right to vote on account of race. Plaintiffs' individual cases and Washington history belie their claims. Washington's history demonstrates a strong commitment to civil rights and voting rights. Plaintiffs have all been convicted under valid judgments and sentences in Washington State. No Plaintiff alleged that his conviction was caused by race. Furthermore, this Court cannot review each Plaintiff's state court proceedings. Plaintiffs fail to support their claims with anything other than allegations of statistical disproportionality, which are insufficient as a matter of law. They fail to demonstrate a causal link between their inability to vote and their race.

Finally, Washington's procedures for restoration of civil rights do not deny Plaintiffs the right to vote on account of race. They lack standing to make such a claim because no Plaintiff has completed the requirements of his judgment and sentence. Their claims against these procedures are speculative and only raise hypotheticals regarding what will occur when they complete their judgments and sentences. Even if they had standing, the totality of circumstances fails to support their claims. Adequate procedures provide for reinstatement under Washington law and state policy. Finally, Plaintiffs' reliance on the Supreme Court's unique decision in Bush v. Gore is misplaced, improperly raising an equal protection theory not presented in the District Court.

VI. ARGUMENT

A. FELON DISENFRANCHISEMENT DOES NOT VIOLATE THE VOTING RIGHTS ACT

1. The Right to Vote Protected by the Fourteenth Amendment and the Voting Rights Act Does Not Extend to Convicted Felons.

The Constitution permits states to disenfranchise persons convicted of "participation in rebellion, or other crimes." U.S. Const. amend. XIV. Accordingly, a state may disenfranchise convicted felons. Richardson v. Ramirez, 418 U.S. 24, 55-56, 94 S. Ct. 2655, 41 L. Ed. 2d 551 (1974); Franklin v. Murphy, 745 F.2d 1221, 1231 (9th Cir. 1984). The Supreme Court concluded, after an extensive review of state felon disenfranchisement laws, that Section 2 of the Fourteenth Amendment expressly allows states to deny the elective franchise to convicted felons, including those whom have completed their sentence and parole. Richardson, 418 U.S. at 55-56.

The VRA protects against "denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). The language of the statute protects voting rights. Courts throughout this country have concluded that the Constitutional right to vote does not extend to convicted felons, and states thus may disenfranchise them.

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 a right of felons to vote. See Harmelin v. Michigan, 501 U.S. 957, 982-83 (1991) (quoting Barker v. People, 20 Johns. *459 (NY Sup. Ct. 1823) ("'The disenfranchisement of a citizen,' he said,

'is not an unusual punishment; it was the consequence of treason, and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offenses.'"); see also, Romer v. Evans, 517 U.S. 620, 634, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) (referring to its holding in Richardson, allowing states to disenfranchise felons, as "unexceptionable" and citing Davis v. Beason, 133 U.S. 333 (1890)).

More recently, courts have continued to reject all claims that voting rights extend to convicted felons. One federal court, rejecting a challenge to Illinois' felon disenfranchisement provision, stated "[t]his court finds no decision from any court holding that the disenfranchisement of felons is invalid." Jones v. Edgar, 3 F.Supp. 2d 979, 980 (C.D. Ill 1998). A Pennsylvania court has recently upheld that state's disenfranchisement of incarcerated felons, finding it well within established norms as a "nonpenal exercise of the power to regulate the franchise." Mixon v. Pennsylvania, 759 A.2d 442, 448 (Pa. Commw. Ct. 2000). See also Fischer v. Governor, 749 A.2d. 321 (NH 2000) (upholding New Hampshire's felon disenfranchisement provision); Emery v. Montana, 580 P.2d 445 (Mont. 1978) (upholding Montana's provision); Fernandez v. Kiner, 36 Wn. App. 210, 673 P.2d 191 (1983), review denied, 101 Wn.2d 1003 (1984) (upholding Washington's disenfranchisement provision).

The Second Circuit discussed the rationale behind disenfranchisement as follows:

> The early exclusion of felons from the elective franchise by many states could well have rested on Locke's concept, so influential at the time, that by entering into society every man "authorizes the society . .

> . to make laws for him as the public good of the society shall require . . .." A man who breaks the law he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact. On a theoretical plane, it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.

Green v. Board of Elections of City of New York, 380 F.2d 445, 451 (2nd Cir. 1967), cert. denied, 389 U.S. 1048 (1968). See also Fischer, 749 A.2d. at 329-30.[2]

Since the VRA was enacted to enforce the Civil War Amendments, the Supreme Court has viewed it as simply a restatement of those Amendments. Chisom v. Roemer, 501 U.S. 380, 392, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991). As the Sixth Circuit has reasoned, "It is undisputed that a state may constitutionally disenfranchise convicted felons, . . . and that the right of felons to vote is not fundamental." Wesley v. Collins, 791 F.2d 1255, 1261 (6th Cir. 1986) (citing Richardson for the former proposition, and for the latter, Owens v. Barnes, 711 F.2d 25, 27, (3rd Cir.), cert. denied, 464 U.S. 963 (1983)).

2. The History and Purpose of the Voting Rights Act Demonstrate That It Was Not Intended to Prohibit Felon Disenfranchisement.

The Voting Rights Act of 1965 was "designed primarily to enforce the Fifteenth Amendment to the Constitution of the United States and . . . also

[2] The Plaintiffs do not allege that Washington's disenfranchisement law is in any way the product of intentional discrimination. This case is therefore unlike Hunter v. Underwood, 471 U.S. 222, 105 S. Ct. 916, 85 L. Ed. 2d 222 (1985). In that case, the Court concluded that the legislative history behind the Alabama disenfranchisement law demonstrated a purposeful effort to deny the right to vote to Blacks. Id. at 226-31. Based on this purposeful discrimination, to which there is no similarity in the record of this case, the Court struck down Alabama's disenfranchisement law based upon equal protection considerations, not upon the statutory basis of the VRA.

designed to enforce the Fourteenth Amendment and article I, section 4." House Report (Judiciary Committee) N. 439, 89th Cong., 1st Sess. (June 1, 1965) ("1965 House Report"), reprinted in 1965 U.S. Code Cong. 7 Admin News 2437 et seq. This Act was designed to address various exclusionary practices (i.e., literacy tests) in certain regions of the nation (referred to as covered areas) that were designed to prevent African-Americans from voting. The 1965 Act referred to such tests or devices as:

> any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

42 U.S.C. § 1973b[c].

As the District Court observed in its decision on Defendants' motion for dismissal, "Congress created the VRA to put an end to the [several southern] states' 'unremitting and ingenious defiance of the Constitution.'" Farrakhan, 987 F.Supp. at 1309 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966)). Outside covered areas, the 1965 Act barred application of tests or devices that had "been used . . . for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, . . ." 42 U.S.C. § 1973a[b] (emphasis added). Despite Congress' broader use of language to include situations where the "effect" was present, it was not the intent of Congress for the 1965 Act to apply to felony disenfranchisement, as evidenced in the 1965 Senate Report:

> The third type of test or device covered is any requirement of good moral character. This definition would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony or mental disability. It applies where lack of good moral character is defined in terms of conviction of lesser crimes.

1965 Senate Report, reprinted in 1965 U.S.C.C.A.N., p. 2562 (emphasis added). Thus, the VRA was not intended to extend voting rights to felons. Id.

A similar exemption was described in the 1965 House Report. See 1965 House Report, reprinted in 1965 U.S. House Code. Cong. & Admin. News at 2457 (the Act "does not proscribe a requirement of a State or any political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony or mental disability"). Similar statements were made on the floor of the Senate. See 111 Cong. Rec. 8366 (April 23, 1965) (statement of Sen. Joseph Tydings).

Since the passage of the VRA, Congress has re-affirmed its approval of the disenfranchisement of felons in the 1993 National Voter Registration Act by specifically listing the conviction of a felony as one of a limited group of reasons justifying the cancellation of a voter's registration. 42 U.S.C. § 1973gg-6(a)(3). Congress thereby explicitly approved of felon disenfranchisement within a statute enacted to remedy racial discrimination in voting, and did so even after the most recent amendments to the VRA.

Congress amended Section 2 of the Voting Rights Act in 1982 to legislatively overturn the Supreme Court's decision in City of Mobile v. Bolden, 446 U.S. 55, 100 S. Ct. 1450, 64 L. Ed. 2d 47 (1980) (requiring proof of discriminatory intent as prima facie evidence). See Voting Rights Act

Amendments of 1982, Senate Report (Judiciary Committee), No. 97-417 (May 1982) ("1982 Senate Report"), pp. 2, 18-19, reprinted in 1982 U.S.C.C.A.N., pp. 179, 195-96. The amended statutes prohibits, in addition to intentional discrimination, prerequisites to voting imposed "in a manner which results in a denial or abridgement of the right . . . to vote on account of race or color." 42 U.S.C. § 1973(a). It also added subsection (b) to that statute, explaining that a violation of subsection "is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State . . . are not equally open to participation by" racial minorities. 42 U.S.C. § 1973(b). These amendments therefore established the "results" test in its current form.

In making these amendments, Congress left the scope and coverage of the VRA unchanged. Chisom, 501 U.S. at 384. The earlier legislative history establishing that the Act does not prohibit felon disenfranchisement therefore remains. There is no indication in any record of legislative history that Congress intended that its 1982 amendments would be applied to incarcerated felons. See, e.g., 1982 Senate Report at 27, reprinted in 1982 U.S.C.C.A.N., p. 204; *Extension of the Voting Rights Act, Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives*, 97th Cong., 1st Sess. (May 6, 7, 13, 19, 20, 27, 28, June 3, 5, 12, 16, 17, 18, 23, 24, 25, and July 13, 1981) (1981 House Hearings); *Hearings Before the Subcommittee on the Constitution of the Committee of the Judiciary, United States Senate*, 97th

Cong., 2d Sess. (January 27, 28, February 1, 2, 4, 11, 12, 25, and March 1, 1982) (1982 Senate Hearings).

The history of the VRA therefore clearly demonstrates that it was never intended to extend the voting rights of convicted felons. Coupled with Congress' later action in the National Voter Registration Act of expressly permitting states to cancel the voter registrations of those who are convicted of felonies, the intent of Congress is clear. Congress did not intend to prohibit states from continuing their long practice of felon disenfranchisement.[3]

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[3] The same conclusion would follow from the application of the "plain statement rule." Federal courts apply the "plain statement rule" as a rule of statutory construction to limit the involvement of the federal courts in traditional state matters absent clear Congressional intent to the contrary:

> [I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'
>
> * * *
>
> This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.

Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991).

Here, there is no clear record of legislative history that demonstrates Congress' intent to make wholesale changes to the numerous state laws that disenfranchise convicted felons. Congress did not intend to prohibit state felon disenfranchisement absent violation of constitutional magnitude. To the contrary, the only available legislative record demonstrates that Congress did not intend to affect disenfranchisement statutes in 1965 when the VRA was originally passed into law. In 1982, there is no record of any legislative intent to make any changes, let alone wholesale changes, to state disenfranchisement statutes. In 1993, Congress clearly recognized the validity of felon disenfranchisement laws when it passed the National Voter Registration Act by specifically listing the conviction of a felony as one of a limited group of reasons justifying the cancellation of a voter's registration . 42 U.S.C. § 1973gg-6(a)(3).

B. EVEN IF THE VOTING RIGHTS ACT ADDRESSED FELON DISENFRANCHISEMENT, PLAINTIFFS HAVE FAILED TO PRODUCE EVIDENCE SUFFICIENT TO SUPPORT THEIR CLAIM

1. Statistical Disproportionality Standing Alone Does Not Establish a Voting Rights Act Claim.

Even if the VRA was intended to address the claim that convicted felons have been improperly denied the right to vote, Plaintiffs' challenge would fail under the established principles governing claims under Section 2. The Plaintiffs bear the burden of "demonstrating that a challenged election practice has resulted in the denial or abridgment of the right to vote based on color or race." Chisom, 501 U.S. at 394. A successful claimant must prove that the "totality of the circumstances" demonstrates that the challenged legislation "results" in unlawful discrimination. Wesley, 791 F.2d at 1259-60 (quoting 42 U.S.C. § 1973(b)).

At most, Plaintiffs show a statistical disparity involving the criminal justice system. This Court has previously explained that a mere statistical disparity is insufficient to satisfy the Section 2 "results" inquiry. Smith v. Salt River Agricultural Improvement & Power Dist., 109 F. 3d 586 (9th Cir. 1997). Other circuits have also held that a mere statistical disparity is insufficient to establish that any denial of voting rights is the result of race.[4]

[4] See Ortiz v. Philadelphia, 28 F.3d 306, 315 (3d Cir. 1994) (rejecting the contention that Pennsylvania's voter-purge statute violated Section 2 simply because more minority voters than whites were inactive voters); Irby v. Virginia State Bd. of Elections, 889 F.2d 1352, 1358-59 (4th Cir. 1989) (holding that Virginia's system for selecting school board members complied with Section 2); Salas v. Southwest Texas Junior College Dist., 964 F.2d 1542, 1556 (5th Cir. 1992) (rejecting challenge to at-large voting system based exclusively on a statistical difference between Hispanic and white voter turnout); Wesley, 791 F.2d at 1262 (rejecting challenge to Tennessee's felon disenfranchisement law that rested primarily on the statistical difference between minority and white felony-conviction rates).

In Salt River, plaintiffs challenged a local water district requirement that voters own real property within the boundaries of the district, citing evidence that proportionally fewer minority members owned property within the district. Id. at 589. The court reviewed decisions from other circuits rejecting claims based on statistical disproportionality and concluded that "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the Section 2 'results' inquiry." Id. at 595. As Plaintiffs concede, a mere showing of disproportionality is insufficient under the Voting Rights Act. Brief of Appellants at 18; see 42 U.S.C. § 1973(b). Nevertheless, Plaintiffs fail to present any evidence beyond mere disproportionality.

The District Court correctly interpreted this Court's decision in Smith v. Salt River by concluding that "there is no evidence that the provision's enactment was motivated by racial animus, or that its operation *by itself* has a discriminatory effect." ER Tab 4 at 6 (emphasis in original). Here, the District Court found no evidence of discrimination to support Plaintiffs' claims. Furthermore, the District Court properly recognized that Plaintiffs' claims (even if proved) were directed at Washington's criminal justice system, not any voting system in place in Washington. ER Tab 4 at 6 ("At most, this establishes a flaw with the criminal justice system, not with the disenfranchisement provision. Plaintiffs have failed to establish a claim for vote denial because the causal chain runs, if at all, to a factor outside of the challenged voting mechanism.").

Plaintiffs stress their disagreement with the District Court's analysis on these points, but that analysis is the product of their own failure to produce any evidence

beyond mere statistics. Plaintiffs failed to contest Defendants' factual evidence regarding the factors applicable to a "totality of the circumstances" analysis. SER 94-95; 288-89. The parties to Salt River entered into an extensive stipulation as to the facts, which the court characterized as a stipulation to "the nonexistence of virtually every circumstance which might indicate" a Section 2 violation. Salt River, 109 F.3d at 595. An examination of that stipulation, as recounted by this Court, reveals the absence of any evidence of similar circumstances in the present case, even though Plaintiffs were not constrained by any similar stipulation. Id. at 595-96.

The District Court's observation on this point rests solidly on the intensely incongruous nature of Plaintiffs' claim. Plaintiffs base their claim on the proposition that any statistical disparity in the treatment of minorities in the criminal justice system is the product of race. They do not, and could not at this stage, claim that their own convictions are the product of race.[5] None of the

[5] Plaintiffs would be barred under the Rooker-Feldman doctrine from using this action as a forum in which to collaterally attack the validity of their state court judgments and sentences. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 416, 44 S. Ct. 149, 68 L. Ed. 2d 362 (1923). That doctrine prohibits federal courts from engaging in an impermissible appellate review of a state court judgment when it considers arguments that are inextricably intertwined in the state court judgment. Feldman, 460 U.S. at 483 n. 16. Plaintiffs therefore could not, in this case, challenge the validity of their state court convictions based upon the theory that they were the products of racial discrimination. "Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state court judgment." Pennzoil Co.v. Texaco, Inc., 481 U.S. 1, 25, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987) (Marshall, J., concurring).

Res judicata and collateral estoppel principles would similarly bar a belated effort by Plaintiffs to challenge the validity of their state court convictions.

Plaintiffs ever alleged in their individual cases that any of them were arrested, tried, convicted, or sentenced as a result of race or in a racially discriminatory manner. SER 49-71; 288-89.

Plaintiffs' arguments in this case actually read more like vote dilution claims than vote denial claims. Although they are presently unable to vote, their arguments more strongly concern the effects of felon disenfranchisement on society in general than upon themselves as individuals. Therefore their claims more closely resemble the type of vote dilution claims the District Court dismissed, and they later withdrew (SER 34-36), than vote denial claims. Farrakhan, 987 F.Supp. at 1313. The Eleventh Circuit has even suggested that the "results" test of Section 2 doesn't apply to vote denial claims, but only to vote dilution claims. Burton v. City of Belle Glade, 178 F.3d 1175, 1196 (11th Cir. 1999) ("Section 1973(b) "has come to be known as the 'results test' because it seeks to measure the *effect* of vote dilution.") (footnote omitted; emphasis in original).[6]

Plaintiffs never alleged racial discrimination in their criminal proceedings, but this Court has recently reiterated that "claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that has never been litigated, because of a determination that it should have been advanced in an earlier suit." Feminist Women's Health Center v. Codispoti, 63 F.3d 863, 867 (9th Cir. 1995). Similarly, "collateral estoppel, or issue preclusion, prevents the relitigation of all issues of fact or law that were actually litigated and necessarily decided in a prior proceeding." Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir. 1988). Under either formulation, it is too late for Plaintiffs to challenge the validity of their convictions.

[6] See, e.g., Brief of Appellant at 24 (citing only vote dilution cases under the Senate factors).

The District Court properly compared Plaintiffs' claims in this case with Salt River's challenge to the district's requirement of land ownership in order to vote because Plaintiffs in this case failed to "show a causal connection between the challenged voting practice and [a] prohibited discriminatory result." Salt River, 109 F.3d at 595 (quoting Ortiz, 28 F.3d at 315)(internal quotes omitted). Just as the Salt River plaintiffs failed to establish a Section 2 claim by showing that fewer African-Americans owned real estate (and therefore fewer qualified to vote), these Plaintiffs fail to meet their burden merely by indicating a statistical disparity in the criminal justice system.

The Sixth Circuit in Wesley affirmed a decision by the District Court dismissing a challenge to felon disenfranchisement under the VRA for failure to state a claim upon which relief could be granted. Wesley, 791 F.2d at 1257. It therefore follows that in the view of that court, the fate of Plaintiffs' claim is not merely determined based on the sufficiency of the evidence in a particular case; as a matter of law no cause of action exists. Id. at 1260 (statistical disparities and evidence of past discrimination combined "cannot, in the manner of original sin, condemn action that is not in itself unlawful"). The court further reasoned that felon disenfranchisement "does not deny any citizen, *ab initio*, the equal opportunity to participate in the political process and elect candidates of their choice." Id. at 1262. Similarly, it does not disenfranchise individuals based upon an immutable racial characteristic. Id. The cause of disenfranchisement is not racial discrimination, but rather "their conscious decision to commit a criminal act for which they assume the risks of detection and punishment." Id.

In Ortiz, the Third Circuit rejected a challenge to Pennsylvania's statute purging voters who fail to vote for two years. Although the district court found that the purge statute disparately impacted African-American and Latino voters, the district court held that the purge statute did not violate Section 2. The Third Circuit affirmed. The court agreed with three other circuits that plaintiffs in Section 2 cases must "demonstrate a causal connection between the challenged electoral practice and the alleged discrimination that results in a denial or abridgment of the right to vote." Ortiz, 28 F.3d at 310.

This Court's analysis in Salt River is consistent with the manner in which statistical arguments are treated in other contexts. It is clearly recognized, beyond the VRA, that statistical disparities are insufficient to prove that racial discrimination is the cause of an alleged deprivation of rights. Examples include capital cases, in which the federal courts have repeatedly denied racial discrimination claims by minority defendants who have argued that they have been targeted because of their race and have sought to prove their allegations through use of statistical evidence of disparity in imposition of the death penalty. See, e.g. McClesky v. Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). It would certainly be anomalous if the Court were to conclude that Plaintiffs' arguments regarding statistical disparities are sufficient to gain them a right to vote (a right not guaranteed to convicted felons under the Constitution), even while similar evidence is insufficient to preclude an execution.[7]

[7] Plaintiffs' theory that the Voting Rights Act is violated because of a statistical a disparity sits uncomfortably beside the federal court's unwillingness to intervene in death penalty cases based on the same alleged disparity. In McClesky,

The federal courts in habeas cases are similarly unwilling to entertain arguments of selective prosecution based solely on statistical disparities. United States v. Armstrong, 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996).[8]

In the evidentiary setting, statistical probabilities are not relevant to prove that an individual acted a certain way. See Fed. R. Evid. 404(b) (evidence of past acts not admissible to "prove the character of a person in order to show action in conformity therewith."). Statistical studies that fail to correct for salient factors, not attributable to the misconduct complained of, that may have caused the harm of which the plaintiff is complaining do not provide a rational basis for a judgment. Blue Cross and Blue Shield of Wisconsin v. Marshfield Clinic, 152 F.3d 588, 593 (7th Cir. 1998); see also Milwaukee Branch of the NAACP v. Thompson, 116 F.3d

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the Supreme Court held that statistical evidence of racial disparities in imposition of the death penalty is insufficient to further a habeas claim under the Eighth or Fourteenth Amendments. Id, at 297-98. The Court held that the defendant must prove that the sentences in his or her case acted in a discriminatory manner, or that the state enacted or maintained the death penalty statute because of its racially discriminatory effect. Id. A number of Ninth Circuit cases have followed McClesky. See, e.g., Carriger v. Lewis, 971 F.2d 329 (9th Cir. 1992), cert. denied, 507 U.S. 992, 113 S. Ct. 1600 (1993); Richmond v. Lewis, 948 F.2d 1473 (9th Cir. 1992).

[8] In Armstrong, the Court considered whether criminal defendants could proceed upon criminal discovery under the theory that the prosecutors were racially selective in the cases they prosecuted. The defendants argued that disparate numbers of prosecutions against African-Americans for crack cocaine possession entitled them to review prosecutor files to further develop their theory. The Supreme Court reasoned that "[t]o establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." Armstrong, 517 U.S. at 465. The Court noted that this was the majority rule among the circuits. Id. at 469 (citing, e.g., United States v. Parham, 16 F.3d 844, 846-47 (8th Cir. 1994); United States v. Fares, 978 F.2d 52, 59-60 (2nd Cir. 1992); C.E. Carlson, Inc. v. S.E.C., 859 F.2d 1429, 1437-38 (10th Cir. 1988)).

1194 (7th Cir. 1997) (applying this rule in the context of a vote dilution challenge under Section 2 of the Voting Rights Act). The law is therefore well established, in cases arising in multiple contexts, that mere statistical evidence of a disparity is insufficient to prove that racial discrimination is the cause of that disparity.

The District Court properly determined it was bound by this Court's decision in Salt River that requires Section 2 plaintiffs to prove a causal connection based upon the totality of the circumstances, not simply disproportionality. ER Tab 4 at 8-9 (citing Hasbrouck v. Texaco, 663 F.2d 930, 933 (9th Cir. 1981)). Plaintiffs failed to prove anything more than disproportionality in this case. Furthermore, as the District Court recognized, any such proof would be directed at the criminal justice system in Washington. Here, the District Court found such proof to be completely lacking, not only in Plaintiffs' individual cases, but regarding the state as a whole. ER Tab 4 at 10-11.

2. Washington's History Demonstrates a Strong Commitment to Civil Rights and Voting Rights.

The Supreme Court has emphasized that judicial review of the totality of the circumstances, including history, requires "an intensely local appraisal of the design and impact of the contested electoral mechanisms." Thornburg v. Gingles, 478 U.S. 30, 79, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986). Plaintiffs are therefore wrong to suggest that the Court can consider the history of other states in assessing the "intensely local" circumstances under which the Washington law operates. Brief of Appellants at 14. Rather, the analysis must be "highly individualistic." Wesley, 791 F.2d at 1260; see also NAACP v. Fordice, ___ F.3d ___, 2001 WL

526662 at *4 (5th Cir. 2001). Washington's law does not rise or fall based upon actions taken in the Jim Crow South; Washington's law must be judged based only on Washington history.

Unlike many other states, Washington has a history supportive of civil rights. As the District Court found, "Plaintiffs have not offered any evidence of a 'history of official discrimination in the state . . . that touched on the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process.'" ER Tab 4 at 6 (quoting Thornburgh, 478 U.S. at 36-37). The court continued, "To the contrary, Washington has historically been very liberal in extending the franchise to racial minorities." Id. at 7.

Washington's civil rights history compares favorably with that of other states. In the trial court, Defendants-Appellees presented the testimony of University of Washington Professor Quintard Taylor, an expert in the history of African-Americans in the Pacific Northwest. SER 150. Dr. Taylor testified that Washington's history of race relations has been markedly more positive than that of other states. Washington developed a national reputation as a "liberal" state in terms of race relations affecting African-Americans. African-Americans historically viewed Washington as an area of economic opportunity that lacked many of the features of racial discrimination present elsewhere in the country. Even compared to other Northwest states, Washington's experience has been more positive. He testified that, unlike Oregon (which became a state 30 years earlier), Washington does not have a history of laws that were designed to discriminate against African-Americans. SER 152-59.

Dr. Taylor testified that Washington has never witnessed any organized efforts to disenfranchise African-Americans or deny voting rights to African-Americans based on race. He testified that throughout statehood, African-Americans have played key political roles. African-Americans voted in Washington beginning in 1870, prior to the adoption of the Fifteenth Amendment. William Owen Bush was elected from the Olympia area to Washington State's first legislature in 1890, the first of a series of African-Americans elected by predominantly White constituencies. There he sponsored, and the Legislature enacted, Washington's 1890 Civil Rights Act. SER 155-159. Washington has had no history of discriminatory practices in voting. Washington has not enacted Jim Crow laws or other forms of discrimination. Washington has never been a "covered state" under the Voting Rights Act.[9] SER 76, 77, 86, 288-89.

Secretary of State Ralph Munro[10] testified that one of his "top priorities in office [was] to encourage broader participation in the electoral system of this state, including participation by members of racial and ethnic minority groups." SER 248. Secretary Munro testified before Congress urging the enactment of the National Voter Registration Act. The measure called for registration at motor vehicle locations, registration by mail, and registration through certain state agencies (all of which were done to some extent in Washington already).

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

[10] Secretary Munro served as Washington's chief election officer for 20 years, beginning in 1981. SER 247. He left office in January 2001, and was succeeded by Secretary of State Sam S. Reed.

Secretary Munro testified that one of his reasons for supporting the passage of NVRA "is to reach out to members of under represented groups in this society and encourage them to participate in the democratic process." During Secretary Munro's tenure, Washington has expanded absentee ballot availability and voting by mail. Secretary Munro has sought to increase accessibility of polling places to the handicapped. Washington State provides voter registration materials in several different languages. The State Voters' Pamphlet is available in Spanish, Chinese, Braille, and cassette tape. Finally, Secretary Munro's administration included a minority outreach program. This program included work with various racial and ethnic communities as well as targeted media communication. The purpose of this program has been to facilitate voter registration and participation amongst these groups. SER 247-54.

Before Secretary Munro's tenure, the 1970 Washington State Legislature directed then-Secretary of State Ludlow Kramer to "conduct a study of the problems of minority voting in the State" and to report its findings to the Legislature. Assistant Secretary of State Donald F. Whiting,[11] Executive Director to the 1970 Council on Electoral Reform, testified to numerous efforts in Washington in the early 1970s to broaden access to the voting process. This included establishing the council, holding public hearings throughout the state, and offering recommendations to the Legislature. The commission's recommendations were directed at all voters, but were intended to promote minority voting. The recommendations were adopted by the Legislature and included centralization of

[11] Assistant Secretary Whiting also left office in January 2001.

the county voter registration record, removal of obsolete language regarding literacy tests, Native American voting, and citizenship, and the computerizing of voting records. SER 256-59.

Members of minority groups have enjoyed electoral success in Washington. The largely White Washington electorate has supported African-American candidates beginning with William Owen Bush's election to the Legislature and continuing through the careers of Ron Sims and Norm Rice, both of whom conducted well-supported statewide campaigns during the 1990's, receiving votes that far exceeded the size of the minority community. SER 158-59.[12]

Washington's disenfranchisement laws are not the product of the Jim Crow era of the Reconstruction South, nor do they represent any effort to evade anti-discrimination laws. They date back to territorial days. See Territorial Law of 1866 (Rem. & Bal. Code, § 4755); State v. Collins, 69 Wash. 268, 270-72, 124 P. 903 (1912). When first enacted they could not have been designed to disenfranchise racial minorities, since the laws predate the Civil War amendments. There is no record that these laws were intended to disenfranchise African-Americans, Native Americans, or Hispanics. There is no evidence that these

[12] Ron Sims, an African-American, is currently the King County Executive. Norm Rice, also an African-American, was formerly the mayor of Seattle. Other members of minority groups serve in prominent elective positions in Washington State. These individuals include Gary Locke, the nation's first Asian Governor. Charles Z. Smith serves on the Washington State Supreme Court, elected statewide, and is African-American. State Senator Rosa Franklin is an African-American member of the state Senate, representing a Tacoma district. State Representative John Lovick is an African-American State Representative elected from a district where African-Americans comprise a scant 1.2 percent of the population. SER 165-66.

statutes, or any others in Washington, were devised as a pretext for racial discrimination. Jones, 3 F.Supp. 2d. at 981 (noting the absence of any "taint of historically 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 Supreme Court in Richardson, and further re-affirmed by Congress under the National Voter Registration Act (NVRA). 42 U.S.C. § 1973gg-6(a)(3).

3. The Totality of Circumstances in this Case Weigh Heavily Against Plaintiffs' Claim.

Plaintiffs offer little more in support of their argument than the type of statistical disparity this Court has already found to be inadequate. Salt River, 109 F.3d at 595. As already indicated, Washington's favorable history of race relations in general and voting rights in particular demonstrate that in this state felon disenfranchisement does not operate within circumstances that support Plaintiff's Section 2 claim in any way. A further examination of the totality of the circumstances in which the Washington law operates reveals that the analysis weighs heavily in Washington's favor.

The Senate Judiciary Committee Report that accompanied the 1982 amendments to the VRA set forth eight non-exclusive factors that may be taken into account in determining whether a violation under Section 2 has occurred: (1) a history of official discrimination in the state; (2) racial polarization in elections; (3) use of districting, requirements, or provisions enhancing the opportunity to discriminate; (4) a candidate-slating process to which the minority group is denied

access; (5) an impact on minorities in public services preventing them from political participation; (6) overt or subtle racial appeals in political campaigns; (7) a lack of responsiveness by elected officials to minority groups; and (8) a tenuous policy supporting the state's "use of such voting qualification, prerequisite to voting, or standard, practice, or procedure." Farrakhan, 987 F.Supp. at 1311 (quoting S. Rep. No. 97-417, 97th Cong., 2d Sess. 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. (vol. 2) 177, 206-07).[13]

In light of the Senate factors, the record in this case fails to demonstrates that Plaintiffs' rights are violated under the Voting Rights Act. Washington enjoys a 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. Washington has little history of official discrimination. The record contains no evidence of racially polarized elections or the use of redistricting as a tool for discrimination. Washington has no history of denying minority candidates access to any slating process, but to the contrary, until recently, Washington has practiced the most wide open system for conducting primary elections. See California Democratic Party v. Jones, 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000) (holding unconstitutional a system of wide-open "blanket primary"

[13] These factors further demonstrate that Congress did not intend to prohibit felon disenfranchisement by its 1982 amendments to the Voting Rights Act. Rather, these factors demonstrate Congress' intent to broaden the scope of vote dilution claims, not in issue here. As the District Court recognized, these factors have little relevance to Plaintiffs' vote denial claim. ER Tab 1 at 11. Plaintiffs agreed. CR 135 at 7 (referring to the factors as "typically only applied to districting cases.").

pioneered by Washington). Plaintiffs offer no suggestion of any hindrance of participation in the electoral process by any minority groups due to any limitations on public services, such as employment, education, or health. The record does not demonstrate a lack of responsiveness by Washington officials to the needs of minority groups. SER 94-95; 288-89.

In response, Plaintiffs did not contest Defendants' facts of the favorable Washington minority voting history under the Senate factors. SER 94-95; SER 288-89; Local Rule 56.1 (E.D. Wash.).[14] Consequently, the District Court had no other factor to weigh in its "totality of the circumstances" analysis, apart from Plaintiffs' claims of disproportionality. Now, on appeal, Plaintiffs criticize the District Court for looking chiefly to Washington's criminal justice system when Plaintiffs presented no other discussion under the Senate factors. See, e.g., CR 135 at 8 ("Many of the factors are not relevant to criminal disenfranchisement laws which, acting as a barrier to voting, result in vote denial rather than vote dilution."). Plaintiffs gave nothing else for the Court to weigh under those factors. Consequently, Plaintiffs devoted their arguments to alleged disproportionality in the criminal justice system. See generally, CR 135. As a result, the record in this case weighs very heavily in favor of the state of Washington under these Senate factors because Defendants' facts were not disputed. A similar circumstance

[14] Plaintiffs' only dispute with Defendants' facts under the factors pertained to Plaintiffs' contention that Native Americans were specifically targeted as a group for vote denial upon enactment of Article 6 § 1 of the Washington State Constitution in 1889." SER 289. The District Court properly addressed this contention in its decision. ER Tab 4 at 7.

occurred in Salt River, 109 F.3d at 595 ("The district court's inquiry was somewhat constrained by the parties' joint stipulation of facts. . .").

The District Court also compared the present case to the analogous situation presented to the Eleventh Circuit in Burton v. City of Belle Glade, 178 F.3d 1175. The court there rejected a request under Section 2 to force the annexation of a non-contiguous neighborhood within the city, alleging that past discrimination resulted in housing segregation that prevented African-Americans from participation in city government unless they were annexed. The Court of Appeals found that evidence insufficient to establish any nexus to voting, even though other discrimination may have been proven. Id. at 1198.

The conclusion that the totality of circumstances weighs in Washington's favor becomes even more apparent upon consideration of two additional points. First, Plaintiffs' evidence of a statistical disparity in the criminal justice system fails to include any evidence that this disparity is attributable to any specific cause, such as racial discrimination. Second, Plaintiffs fail to show that felon disenfranchisement has any effect on the availability of political opportunity to minorities because they fail to show that it has any effect on the voting strength of minority groups. With regard to both of these points, Plaintiffs' arguments read more like their dismissed and abandoned vote dilution claims than a vote denial theory.

The studies upon which Plaintiffs rely as evidence of a statistical disparity in the criminal justice system do not conclude that racial discrimination is the cause of any disparity. The Washington State Minority and Justice Commission directed

Sociologist George Bridges, Ph.D. of the University of Washington, to conduct a survey regarding racial and ethnic dispositions in pretrial release decisions in King County, Washington. SER 211-230.[15] The report did not conclude that disparities in bail and pretrial detention decisions result from overt-prejudicial acts by court officials. Rather, it raised concerns involving the organization of the courts and the rules and guidelines established by the legislature and the courts. SER 206. The Commission also initiated a study to examine "the role of race and ethnicity in the case processing and sentencing of felony drug offenders in three counties in Washington State." SER 234. The report found that in the routine changes of pleas entered in superior court between initial filing and conviction "were driven largely by concerns about [scarce] resources" and were not related to race or ethnicity. SER 243. If anything, the study found that White offenders were less likely to have delivery charges dropped than either Hispanic or African-American offenders during the change of plea/plea bargaining process. SER 244. Neither study expressly concluded that any racial disparity was the result of discrimination.[16]

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[15] Dr. Bridges' study did not pertain to any of the six individually named Plaintiffs in this action. SER 330-31. His study was also limited to pretrial release procedures in King County, not other counties in Washington State. SER 219.

[16] The parties agree that any relationship between criminal convictions and race is a novel topic for discussion and study. See, e.g., SER 334 (Bridges deposition), 346-47 (Mauer deposition). Although the Supreme Court recognized the existence of such studies in relation to capital punishment cases in McClesky v. Kemp, 481 U.S. 279, the Court also noted their limited value because of the many variables associated with any case in which an accused is charged, tried, convicted, and sentenced. Here, Plaintiffs present nothing from their respective criminal records to indicate that race played any role in their convictions. In addition, they

Plaintiffs' witness, social worker Marc Mauer, identified what he termed an "incarceration rate" (the number of convicted felons from a racial group per 100,000). However, there is no discussion or any indication of any scientific validity to such a study. In any event, Mr. Mauer found that Washington's "incarceration rate" of African-Americans actually declined between 1988 and 1994 during a period marked by the "War on Drugs." See SER 358.

The impact of felon disenfranchisement upon minority, or for that matter majority, voting strength is far smaller than Plaintiffs maintain. Few felony convictions actually result in the removal of a voter from the registration rolls. Only approximately 20 percent of individuals convicted of felonies are actually registered to vote at the time of conviction. SER 118-19 (King County); 136 (Yakima County); 139 (Kitsap County); 142 (Thurston County); 145 (Snohomish County); 148 (Grant County). Plaintiffs' personal experiences are similar.[17]

This fact suggests that, under a "totality of the circumstances" analysis, Plaintiffs can show little impact upon the voting strength of minority groups. Plaintiffs must show that felon disenfranchisement prevents the state's electoral process from being "equally open to participation by members of [the group] in

make no connection between their cases and the statistical data regarding disproportionality.

[17] Plaintiffs Shadeed and Price have never registered to vote. SER 58, 61. Plaintiff Schaaf has never voted, although he registered in 1986. SER 66. That registration was cancelled for failure to vote. SER 137. Plaintiff Briceno cannot remember if he has ever registered to vote, SER 71, and the record is silent as to Plaintiff Barrientes. The sole exception is Plaintiff Farrakhan, who registered to vote after his release from prison even though he was not legally qualified, and even ran unsuccessfully for the state legislature. SER 55-56. Plaintiff Farrakhan did not vote in that election, however. Id.

that its members have less opportunity than other members of the electorate to participate in the political process . . . ." 42 U.S.C. § 1973(b). This necessarily requires that Plaintiffs show that felon disenfranchisement has a specific negative impact upon minority groups as such, and not merely upon the Plaintiffs as individuals. If convicted felons (of any racial background) do not participate in the process in the first place it is difficult to demonstrate a disparate impact upon the racial group.

The court should also note that although 35 years have passed since enactment of the Voting Rights Act, felon disenfranchisement has not been perceived as a violation of the Act, the issue having been raised only recently. When Congress enacted the VRA in 1965 its legislative history specifically cautioned against drawing the conclusion that it prohibited felon disenfranchisement. 1965 Senate Report, reprinted in 1965 U.S.C.C.A.N., p. 2562; 1965 House Report, reprinted in 1965 U.S. House Code. Cong. & Admin. News at 2457. Plaintiffs therefore ask this Court to depart from the long settled understanding that the VRA does not vest in convicted felons a right that the Fourteenth Amendment expressly denies them.

C. WASHINGTON'S PROCEDURES FOR REINSTATING CIVIL RIGHTS DO NOT DENY PLAINTIFFS A RIGHT TO VOTE BASED ON RACE

Washington law establishes a procedure under which the civil rights of a convicted felon are automatically restored upon the timely completion of all terms and conditions of his or her judgment and sentence. Wash. Rev. Code § 9.94A.220. The statute provides the sentencing court with a ministerial,

nondiscretionary duty to issue a certificate of discharge, which restores the offender's civil rights. Id. Plaintiffs challenge this process alleging that it is "cumbersome, excessively complex, and places difficult burdens on offenders seeking restoration of voting rights." Brief of Appellant at 35. This challenge must fail for two reasons. First, Plaintiffs lack standing to assert it. Second, Washington's process is not unduly burdensome.

1. Plaintiffs Lack Standing to Challenge Washington's Process for Restoration of Civil Rights.

Washington law provides for the restoration of civil rights upon the completion of all terms and conditions of an offender's judgment and sentence. Wash. Rev. Code § 9.94A.220. Under that statute, a convicted felon has a right to receive a certificate of discharge, restoring his or her civil rights, if, but only if, all of the terms and conditions of his or her judgment and sentence have been completed. State law requires the Department of Corrections ("DOC") to notify the sentencing court when an offender has completed all the terms of his or her judgment and sentence, and requires the sentencing court to issue a certificate of discharge if all terms have been satisfied. Id. DOC policy is the same. SER 301. The issuance of a certificate of discharge reinstates all civil rights, including the right to vote. Wash. Rev. Code § 9.94A.220(3).

The right to a discharge under that statute arises only if the offender has fully completed his or her sentence. Since none of the Plaintiffs have done so, none of them have standing to challenge the process for restoration of civil rights.

The District Court concluded that, "Plaintiffs have failed to establish standing to challenge the restoration scheme because none of the Plaintiffs have presented evidence (or even alleged) that they are eligible for restoration and have attempted to have their civil rights restored." ER Tab 4 at 12. Not only have Plaintiffs failed to present such evidence, they could not do so because none of them have completed the terms and conditions of their judgments and sentences. SER 54-55 (Mr. Farrakhan); 56 (Mr. Shadeed); 60 (Mr. Price); 61 (Mr. Barrientes); 66 (Mr. Schaaf); 67 (Mr. Briceno). Since the right to a discharge arises only upon the completion of all terms and conditions of a judgment and sentence, and because none of the Plaintiffs have done so, none of them have standing to challenge the process for restoration. Davis v. Scherer, 488 U.S. 183, 189 n.7 (1984) (parties do not have standing to challenge a statute that does not apply to them).

Plaintiffs' claim of harm from the restoration process is entirely conjectural. It amounts to the mere suggestion that hypothetically these procedures might not be followed if some day one of the Plaintiffs qualified for them. Speculative worries are no substitute for actually proving harm to these Plaintiffs. Plaintiffs lack standing to assert a challenge based upon hypothetical future facts. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

Plaintiffs argue that they have standing to challenge the restoration process on the theory that if the process were not there, they would not be barred from registering and voting. Brief of Appellants at 39. This is untrue. Plaintiffs are not

denied the right to vote because of the restoration process. They are denied the right to vote because they have not completed the terms and conditions of their judgments and sentences. A challenge to the *process* for restoring civil rights is not the same as establishing a *right* to a certificate of discharge in and of itself.

Plaintiffs' comparison of legal financial obligations to a poll tax also sheds no light on their claim to have standing to challenge the restoration process. A Plaintiff would clearly have standing to challenge a poll tax as a prerequisite to voting without regard to whether it was paid. Unlike the poll tax, Washington's process for restoring civil rights is not a barrier to Plaintiffs' right to vote because they do not qualify as a matter of law for the certificate of discharge that would emerge at the end of that process.[18]

2. Plaintiffs Have Failed to Offer Any Basis For Concluding that Washington's Restoration Process Denies the Right to Vote Based on Race.

The District Court concluded, in the alternative, that "[e]ven if the Plaintiffs had standing, the Court would still grant summary judgment to the Defendants because there is no evidence that the restoration process unduly impacts minorities

[18] Plaintiffs compare the payment of legal financial obligations to the imposition of a poll tax. They offer no argument, however, as to how compliance with a term of duly imposed court order could be construed as a poll tax, suggesting no basis for relief. East Flatbush Election Comm. v. Cuomo, 643 F. Supp. 260, 266 (E.D. N.Y. 1986). A court ordered cost is not a poll tax. Black's Law Dictionary, 1471 (7th ed. 1999) (defining "poll tax" as a tax imposed on all people within a jurisdiction). Mr. Farrakhan is the only Plaintiff for whom legal financial obligations remain his only outstanding sentence requirement. Mr. Farrakhan, however, owes his victims restitution of more than $28,000, against which he has paid only $805. SER 54-55. This obligation is every bit as much a part of his valid criminal judgment and sentence as any other component, including his period of incarceration.

because of race." ER Tab 4 at 12.[19] The District Court was correct because even if Plaintiffs could establish that Washington's procedures for reinstating civil rights and registering to vote were difficult, Plaintiffs must still prove that this denies them the right to vote *based on race.* 42 U.S.C. § 1973(a). Neither in the trial court nor on appeal have Plaintiffs offered any reason why they believe that Washington's restoration process is any more difficult for members of minority groups than for anybody else. Plaintiffs therefore have utterly failed to state any basis upon which the Court could find a violation of the Voting Rights Act, given that such a basis must show a denial of the right to vote based on race.

More fundamentally, Plaintiffs and their *amici* err in characterizing Washington's restoration process as difficult. State law provides offenders a vested right to a certificate of discharge upon completion of all the terms and conditions of their judgments and sentences. Wash. Rev. Code § 9.94A.220. The Department of Corrections has further simplified procedures by having developed form pleadings to be used when the Department requests the court to enter a certificate of discharge. Department Directive requires the community corrections officer to complete the reinstatement forms. SER 102-07. These forms are then submitted to the prosecutor, who then forwards the forms to the court for entry. In these cases, the parties are in agreement; the court would be entering the discharge by stipulation. SER 130.

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[19] Plaintiffs' statement on appeal that the Court did not reach the merits of Plaintiffs' claim is therefore untrue. Brief of Appellant at 36.

The Court should also decline Plaintiffs' invitation to remand this case for reconsideration of their arguments on the restoration process in light of Bush v. Gore, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000). Plaintiffs argue that Bush is relevant to this case because it stands for the proposition that having granted the right to vote, states "may not by later arbitrary and disparate treatment, value one person's vote over that of another." Brief of Appellants at 41 (quoting Bush, 121 S. Ct. at 530). Plaintiffs claim that Bush therefore gives rise to an equal protection claim, contrasting the voting rights of convicted felons with those of citizens who have not been convicted of felonies.

Felons and non-felons are not similarly situated. One group has been convicted of felonies while the other has not. The Constitution permits states to deny the right to vote based upon felony conviction. Richardson, 418 U.S. at 55-56. The Court in Bush v. Gore suggested nothing to change this proposition. Nothing in Bush v. Gore suggests any basis upon which Plaintiffs could challenge Washington's process for restoring civil rights, particularly when none of the Plaintiffs even qualify to have their civil rights restored.

Amicus, American Civil Liberties Union of Washington, contends that Bush v. Gore mandates remand on the basis of a non-uniform, county-by-county system for restoring civil rights. Brief of Amicus Curiae at 26. Both Washington law and the record in this case contradict the unsupported statement that the process varies from one county to another. The right of an offender to a certificate of discharge upon completing his or her sentence in its entirety is clearly stated in statute. Wash. Rev. Code § 9.94A.220. The record reflects that the Department of

Corrections implements this statute by a uniform statewide policy that includes informing convicted felons of the process for restoring their rights and of forwarding requests for certificates of discharge to the sentencing court. SER 102-12; 129-34.

The Supreme Court cautioned against reliance upon Bush v. Gore in addressing future election disputes, stating that the case is limited to its facts. The Court explained that, "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." Bush, 121 S. Ct. at 532. The factors making the case unique make Bush v. Gore inapposite to this case. See Sorchini v. Covina, ___ F.3d ___, slip op. at 2 n. 2 (9th Cir. 2001); but see Charfauros v. Bd. of Elections, ___ F.3d ___ (9th Cir. 2001) (citing Bush v. Gore in analysis of procedure used to challenge qualifications of registered voters in the Northern Mariana Islands).

Additionally, Plaintiffs did not present their equal protection argument to the District Court. Issues not raised before the District Court are generally not raised before the Court of Appeals. United States v. State of Oregon, 769 F.2d 1412 (9th Cir. 1985). There are three exceptions to this rule: "(1) 'to prevent a miscarriage of justice'; (2) 'a new issue arises while appeal is pending because of a change in the law'; and (3) 'when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed.'" Harden v. Roadway Package Systems, Inc., ___F.3d ___, 2001 WL 536845 (9th Cir. 2001) (quoting Bolker v. Commission of Internal Revenue, 760 F.2d 1039, 1042 (9th Cir. 1985)).

Here, the ACLU Amicus presents equal protection theories not presented to the District Court. They argue violation of the Equal Protection Clause as a result of alleged arbitrary enforcement of Washington's felon disenfranchisement law. See ACLU Amicus Brief at 21-27. This Court should not review the issues here because none of the exceptions are applicable. Plaintiffs fail to demonstrate a gross miscarriage of justice. As the District Court found, Plaintiffs have not met the requirements of their judgments and sentences; therefore, they lack standing. In addition, this issue does not prevent the Court from reviewing their other claims This case does not pertain to a new case while this matter was on appeal regardless of Plaintiffs' reliance on Bush v. Gore. Despite the novelty of the Bush opinion, Plaintiffs cite it for propositions they could have raised in the District Court, but did not. Finally, the issues they raise are not purely legal. The issue of the consistency on a county-by-county basis in the enforcement of felon disenfranchisement law is not a purely legal matter. Plaintiffs did not raise it in the District Court; they cannot do so now.

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VII. CONCLUSION

For the foregoing reasons, the Defendants-Appellees respectfully request that this Court affirm the decision of the District Court.

RESPECTFULLY SUBMITTED this 1st day of June, 2001.

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No. 01-35032 **Farrakhan v. Locke**

STATEMENT OF RELATED CASES

Respondents-Appellees are not aware of any case that may be deemed related to this case pursuant to Ninth Circuit Local Rule 28-2.6.

No. 01-35032 **Farrakhan v. Locke**

CERTIFICATE OF COMPLIANCE

I certify that

1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is

   X Proportionately spaced, has a typeface of 14 points or more and contains 11,258 words,

   or is

   _ Monospaced, has 10.5 or fewer characters per inch and contains _____ words.

DATE June 1, 2001

JEFFREY T. EVEN, WSBA #20367
DANIEL J. JUDGE, WSBA #17392
Assistant Attorneys General

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MUHAMMAD SHABBAZ FARRAKHAN (AKA ERNEST S. WALKER), et al.,

Petitioners-Appellants,

v.

GARY LOCKE, et al.,

Respondents-Appellees.

NO. 01-35032

DC No. CS-96-00076-RHW
Eastern District of Washington
(Spokane)

AFFIDAVIT OF SERVICE BY MAILING

STATE OF WASHINGTON)
) ss.
County of Thurston)

JUDY LONBORG, being first duly sworn upon oath, depose and say:

That I am a citizen of the United States over the age of eighteen and competent to be a witness herein.

That on the 4th day of June, 2001, I deposited in the United States mail, postage prepaid, and addressed as follows:

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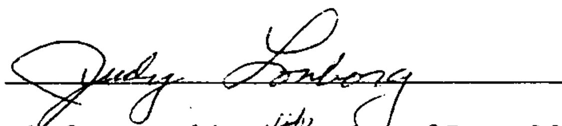
a copy of the following documents in the above-referenced cause: ***BRIEF OF APPELLEES; RESPONDENTS-APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD;*** and ***AFFIDAVIT OF SERVICE BY MAILING***.



SUBSCRIBED AND SWORN to before me this 4th day of June, 2001.

DARLENE JACOBS
NOTARY PUBLIC in and for the
State of Washington.
Commission expires: 02/28/01.