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## SIDEBAR

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### DISREGARDING THE RESULTS: EXAMINING THE NINTH CIRCUIT’S HEIGHTENED SECTION 2 “INTENTIONAL DISCRIMINATION” STANDARD IN *FARRAKHAN V. GREGOIRE*

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“No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed . . . in a manner which results in a denial or abridgement of the right of any citizen . . . to vote on account of race . . . .”<sup>1</sup>

#### INTRODUCTION

Following the release in 1980 of a groundbreaking study,<sup>2</sup> Washington State officials asked themselves a hard question: Why did the state lead the nation in the disproportionate incarceration of African Americans? In response, the state’s legislature and supreme court commissioned their own studies on the impact of race in Washington’s criminal justice system.<sup>3</sup> The answers were inconclusive, but the disparities were—and still are—glaring, and for the past three decades, citizens in Washington have attempted to determine what factors drive the state’s stark racial disparities in its criminal justice system. Indeed, just this year, the Washington State Task Force on Race and the Criminal Justice System released a preliminary report on race and

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1. Voting Rights Act of 1965 § 2(a), 42 U.S.C. § 1973(a) (2006) (emphasis added).

2. Scott Christianson, Legal Implications of Racially Disproportionate Incarceration Rates, 16 *Crim. L. Bull.* 59 (1980).

3. Rodney L. Engen et al., Wash. State Minority & Justice Comm’n., *The Impact of Race and Ethnicity on Charging and Sentencing Processes for Drug Offenders in Three Counties of Washington State* (1999).

Washington's criminal justice system, which again grappled with this issue, finding that racial disparities "affect outcomes in the criminal justice system and matter in ways that are not fair, that do not advance legitimate public safety objectives, and that undermine public confidence in our criminal justice system."<sup>4</sup>

A case initiated by a handful of Washington's minority inmates, *Farrakhan v. Locke*,<sup>5</sup> offered perhaps the best opportunity to definitively answer the important questions raised by these studies. The case challenged the manner in which pervasive racial discrimination in Washington's criminal justice system led to the disproportionate denial of voting rights to racial minorities with felony convictions, violating section 2 of the Voting Rights Act of 1965 ("VRA"). As a result of this discrimination, an astonishing 24% of Black men<sup>6</sup> and 15% of Washington's Black population have been denied their voting rights.<sup>7</sup> The central legal argument in the case was that the State cannot condition the most fundamental democratic right—the right to vote—on the basis of results of a criminal justice system that the State itself has never disputed is tainted by racial bias.

In January 2010, the Ninth Circuit, in the first ruling of its kind, reversed the district court's ruling and granted summary judgment in favor of the plaintiffs.<sup>8</sup> However, in October 2010, the Ninth Circuit initiated its own rehearing en banc. It reversed its earlier rulings and announced a new standard imposing a nearly insurmountable "intentional discrimination" threshold for section 2 felon disenfranchisement litigation. This new standard, which was used to dispose of the *Farrakhan* plaintiffs' claims,<sup>9</sup> is inconsistent with the text, precedent, and legislative history of the VRA. Future plaintiffs have to show "at least": (1) that Washington's "criminal justice system was infected by intentional discrimination," or (2) that the state's "felon disenfranchisement law was enacted with such intent."<sup>10</sup>

This Article addresses the implications of this heightened section 2 "intentional discrimination" standard in the felon disenfranchisement context, and discusses how the en banc court, unlike each court before it, ignored the *compelling* and *unrefuted* evidence of racial discrimination in Washington's democratic processes and, in so doing, disregarded the well-established discriminatory results standard that has governed section 2 cases for nearly thirty years. Part I provides an overview of the *Farrakhan* litigation, focusing on each court's treatment of the plaintiffs' evidence of racial discrimination in

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4. Task Force on Race and the Criminal Justice System, A Preliminary Report on Race and Washington's Criminal Justice System 23(2011).

5. *Farrakhan v. Locke* (*Farrakhan I*), 987 F.Supp. 1304, 1307 (E.D. Wash. 1997), rev'd sub nom. *Farrakhan v. Gregoire* (*Farrakhan II*), 590 F.3d 989 (9th Cir. 2010).

6. Expert Report of Alec Ewald, Ph.D. at 427, *Farrakhan I*, 987 F.Supp. 1304 (E.D. Wash. 1997); Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* 8–9 (1998).

7. Christopher Uggen & Jeff Manza, Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States, 67 *Am. Soc. Rev.* 777, 797–98 (2002).

8. *Farrakhan II*, 590 F.3d 989 (9th Cir. 2010); *Farrakhan I*, 338 F.3d 1009 (9th Cir. 2003), cert. denied, 543 U.S. 984 (2004);.

9. *Farrakhan v. Gregoire* (*Farrakhan III*), 623 F.3d 990 (9th Cir. 2010).

10. *Id.* at 993 (emphasis added).

the criminal justice system. Part II outlines how the *Farrakhan III* court’s ruling improperly applied an intent standard in disregard of section 2’s statutory language, legislative history, and longstanding precedent. Part III analyzes the *Farrakhan III* decision and its implications for future felon disfranchisement claims under section 2.

### I. THE *FARRAKHAN V. GREGOIRE* LITIGATION

Moments after Muhammad Shabazz Farrakhan read the Second Circuit’s then recently-issued opinion in *Baker v. Pataki*<sup>11</sup> in the law library at Washington State Penitentiary, he conceived of a legal theory to restore his voting rights.<sup>12</sup> He leaned over to Al-Kareem Shadeed, Ramon Barrientes, Clifton Briceno, and Timothy Schaaf, all regular visitors to the prison’s law library, and shared the legal question that evenly divided the en banc *Baker* court: whether felon disfranchisement laws could be challenged under section 2 of the VRA as state voting qualifications that disproportionately denied the right to vote to racial minorities with felony convictions.<sup>13</sup> The inmates were particularly drawn to the reasoning of the five judges who concluded that section 2’s plain language unambiguously applied to claims challenging state felon disfranchisement laws.<sup>14</sup>

Mr. Farrakhan and his fellow inmates then began to investigate their claim. They first seized upon research concluding that the striking degree of racial disparities in Washington’s criminal justice system did not reflect the rate at which racial minorities actually participated in crime. They connected these findings to the fact that felony convictions automatically triggered the loss of voting rights under the Washington Constitution,<sup>15</sup> and set out to establish that Washington’s felon disfranchisement law actually imported the inequality from the criminal justice system into the state’s political process in violation of their voting rights.

Armed with these ideas, and using the *Baker* decision as a blueprint, Mr. Farrakhan and Mr. Shadeed (African Americans), Mr. Barrientes (Latino American), and Mr. Briceno and Mr. Schaaf (Native Americans) joined together as plaintiffs and filed a pro se lawsuit in federal district court, alleging that Washington’s felon disfranchisement law violated section 2 of the VRA because it carried forward the racial discrimination infecting the state’s criminal justice system into the exercise of the franchise.<sup>16</sup>

#### A. *The Farrakhan I Appeal and Judge Kozinski’s Dissent*

In its first ruling on summary judgment, the district court recognized that “[p]laintiffs’ evidence of discrimination in the criminal justice system, and the resulting disproportionate impact on minority voting power, [was]

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11. 85 F.3d 919 (2d Cir. 1996).

12. Interview with Muhammad Shabazz Farrakhan, in L.A., Cal. (Nov. 19, 2010).

13. *Baker*, 85 F.3d at 921–22, 935.

14. *Id.* at 943.

15. Wash. Const. art. VI, § 3.

16. University Legal Assistance at Gonzaga Law School (“ULA”) was appointed by the district court as counsel shortly after the filing. LDF later joined as cocounsel.

compelling.”<sup>17</sup> Nevertheless, it held that such evidence was not relevant to section 2’s “totality of the circumstances” analysis.<sup>18</sup> The district court concluded that the plaintiffs failed to establish a section 2 violation because there was no showing that the enactment of the disfranchisement provision “was motivated by racial animus, or that its operation *by itself* has a discriminatory effect.”<sup>19</sup>

On appeal, the *Farrakhan I* panel reversed, holding that (1) the district court had “misconstrued the causation requirement of a Section 2 analysis” and (2) evidence of racial discrimination in Washington’s criminal justice system was a relevant factor in identifying a section 2 violation.<sup>20</sup> The *Farrakhan I* court emphasized that “a Section 2 ‘totality of the circumstances’ inquiry requires courts to consider how a challenged voting practice *interacts with* external factors such as ‘social and historical’ conditions that result in the denial of the right to vote on account of race.”<sup>21</sup> Hence, it held that the district court should have considered “the way in which the disenfranchisement law interacts with racial bias in Washington’s criminal justice system to deny minorities an equal opportunity to participate in the state’s political process.”<sup>22</sup> Accordingly, the *Farrakhan I* court remanded the case for the district court to reevaluate the evidence in light of the proper standard.<sup>23</sup>

The State filed petitions for rehearing, which were denied.<sup>24</sup> In a scathing dissenting opinion on the denial of rehearing, Judge Kozinski, who would later preside over the *Farrakhan III* en banc court as Chief Judge of the Ninth Circuit, argued that the panel’s “questionable interpretation” of section 2 “misinterprets the evidence” and threatens the VRA itself.<sup>25</sup> Calling the decision “a dark day for the Voting Rights Act,”<sup>26</sup> Judge Kozinski explained that “plaintiffs never produced a shred of evidence of intentional discrimination in Washington’s criminal justice system,” which he said was a “fundamental flaw” to the plaintiffs’ claim because the VRA was “never intended to reach felon disenfranchisement laws.”<sup>27</sup> Instead, Judge Kozinski characterized the plaintiffs’ evidence as mere “statistical disparities,”<sup>28</sup> which the Ninth Circuit earlier held “were *not* enough to establish vote denial under section 2.”<sup>29</sup> Judge Kozinski concluded his dissenting opinion by laying the groundwork for what would later become the heightened section 2 intentional

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17. *Farrakhan v. Locke*, No. CS-96-76-RHW, 2000 U.S. Dist. LEXIS 22212, at \*14 (E.D. Wash. Dec. 1, 2000).

18. *Id.* at \*4.

19. *Id.* at \*9–\*10.

20. *Farrakhan I*, 338 F.3d 1009, 1016, 1020 (9th Cir. 2003).

21. *Id.* at 1011–12 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)).

22. *Id.* at 1014.

23. *Id.* at 1012.

24. *Farrakhan v. Washington*, 359 F.3d 1116, 1116 (9th Cir. 2004) (Kozinski, J., dissenting).

25. *Id.* at 1116–17.

26. *Id.*

27. *Id.* at 1117, 1120.

28. *Id.* at 1117.

29. *Id.* at 1118 (citing *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997)).

discrimination standard that would dispose of the plaintiffs’ claims six years later:

Intentional discrimination in the criminal justice system, if it interacts with a standard, practice or procedure with respect to voting, could amount to illegal vote denial on account of race . . . . To the extent the district court’s decision . . . was based on its misunderstanding of Section 2 and belief that evidence of intentional discrimination external to voting could never be taken into account, it was wrong. However, the result it reached was correct because, *even under the correct standard*, plaintiffs have not produced evidence of intentional discrimination . . . .<sup>30</sup>

#### B. *The Farrakhan II Appeal*

On remand, the district court once again found that the plaintiffs’ evidence showed that racial disparities existed at nearly *every* stage of Washington’s criminal justice system.<sup>31</sup> Significantly, the district court distinguished the plaintiffs’ evidence from the bare statistical disparities proffered by the plaintiffs in *Smith v. Salt River Project Agricultural Improvement & Power District*,<sup>32</sup> noting that the plaintiffs “submit[ed] expert reports that substantiate[d]” their assertion that “the statistical disparity and disproportionality evident in Washington’s criminal justice system *arise from and result in* discrimination” and that these expert reports were never disputed by defendants.<sup>33</sup> Notwithstanding the unrefuted and substantial character of the evidence before it, the district court still concluded that, under the totality of the circumstances, the plaintiffs’ evidence failed to demonstrate a section 2 violation because “the racial bias in the criminal justice system was ‘simply [one] relevant social and historical condition to be considered where appropriate.’”<sup>34</sup> It erroneously reasoned that “[o]ther factors, particularly Washington’s history, or lack thereof, of racial bias in its electoral process and in its decision to enact the felon disenfranchisement provisions, counterbalance the contemporary discriminatory effects that result from the day-to-day functioning of Washington’s criminal justice system.”<sup>35</sup> The district court concluded by noting that the “statutory language of subsection (a) of Section 2 of the VRA limits its application to those circumstances, the totality of which establish the existence of discrimination in voting on a broader scale.”<sup>36</sup>

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30. *Id.* at 1119 (emphasis added).

31. *Farrakhan v. Gregoire*, No. CV-96-076-RHW, 2006 U.S. Dist. LEXIS 45987, at \*19 n.7 (E.D. Wash. Jul. 7, 2006).

32. 109 F.3d 586 .

33. 2006 U.S. Dist. LEXIS 45987, at \*19 n.7 (emphasis added). Furthermore, the court noted that such evidence was unrefuted. *Id.* at \*18. Indeed, at oral argument before the panel, counsel for Washington State argued that even if 15% of the black population are disqualified from voting on account of race, 85% are not: “[Y]ou still have . . . 85% of the members of the minority group at issue that have the ability to elect representatives of their choice.” Transcript of Oral Argument at 13, *Farrakhan II*, 590 F.3d 989 (9th Cir. 2010).

34. *Farrakhan v. Gregoire*, 2006 U.S. Dist. LEXIS 45987, at \*20 (quoting *Farrakhan I*, 338 F.3d 1009, 1020 (9th Cir. 2003)).

35. *Id.* at \*29.

36. *Id.*

On appeal, the Ninth Circuit reversed. The *Farrakhan II* court, in a 2-1 ruling, weighed the plaintiffs' "uncontroverted" and "compelling" evidence and concluded that it was "bound by [the] *Farrakhan I* [court's] holding" that Washington's felon disfranchisement law violated section 2.<sup>37</sup> In issuing the decision, the *Farrakhan II* court noted that the plaintiffs' evidence comprised not only "statistical disparities" but "[spoke] to a durable, sustained difference in treatment faced by minorities in Washington's criminal justice system—systemic disparities which cannot be explained by 'factors independent of race.'"<sup>38</sup> Focusing on this evidence, the *Farrakhan II* court declared:

Before one who commits a criminal act becomes a felon . . . numerous other decisions must be made by State actors. Police departments decide where to spend resources, officers decide which individuals to search and arrest, prosecutors decide which individuals to charge (including whether to charge a felony or a misdemeanor), detain, and prosecute. If those decision points are infected with racial bias, resulting in some people becoming felons not just because they have committed a crime, but because of their race, then that felon status cannot, under section 2 of the VRA, disqualify felons from voting.<sup>39</sup>

### C. *The Farrakhan III Court's En Banc Review*

Four months after its own finding that Washington's felon disfranchisement law violated section 2, the Ninth Circuit decided sua sponte to rehear the case en banc.<sup>40</sup> At oral argument, the en banc panel focused on two questions: (1) whether the evidence in the record established intentional discrimination,<sup>41</sup> and (2) whether section 2 of the VRA applies to felon disfranchisement laws.<sup>42</sup>

Just three weeks after oral argument, the *Farrakhan III* court issued a seven-page per curiam opinion that not only reversed *Farrakhan I* and *II*, but also announced an unprecedented and nearly insurmountable "intentional discrimination" standard for section 2 litigation to dispose of the plaintiffs' claims.<sup>43</sup> The court began its discussion by questioning the very applicability of section 2 to felon disfranchisement laws. The court rooted its new-found skepticism on four facts: (1) three circuits had concluded felon disfranchisement laws cannot be challenged under section 2; (2) felon disfranchisement is affirmatively sanctioned by the Fourteenth Amendment of the U.S. Constitution (as explained in *Richardson v. Ramirez*<sup>44</sup>); (3) Congress

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37. 590 F.3d at 1009, 1016.

38. *Id.* at 1012.

39. *Id.* at 1014.

40. *Farrakhan v. Gregoire*, No. 06-35669 (9th Cir. April 28, 2010). A week later, the United States Supreme Court asked the Solicitor General to weigh in on whether it should grant certiorari in *Simmons v. Galvin*, an appeal filed February 1, 2010 after the Circuit Court of Appeals for the First Circuit rejected a similar challenge to Massachusetts' felon disfranchisement law.

41. Transcript of Oral Argument at 6-7, 50-52, 67, 76-79, *Farrakhan III*, 623 F.3d 990 (9th Cir. 2010).

42. *Id.* at 11-13, 22.

43. *Farrakhan III*, 623 F.3d 990, 992-93.

44. 418 U.S. 24 (1974).

was aware of felon disfranchisement laws in 1965 when it enacted the VRA and in 1982 when it amended the Act, but failed to indicate that these laws were “in any way suspect”; and (4) felon disfranchisement operates only after an individual has been found guilty, a determination “made by the criminal justice system, which has its own unique safeguards and remedies against arbitrary, invidious or mistaken conviction.”<sup>45</sup> In light of these four considerations, the court applied a new section 2 test in *Farrakhan III*, which, as described in further detail below, finds no support either in the text of the statute or from the intent of Congress.

The new test requires plaintiffs to show “at least”: (1) that Washington’s “criminal justice system [was] infected by intentional discrimination,” or (2) that the state’s “felon disfranchisement law was enacted with such intent.”<sup>46</sup> Furthermore, the court explained that its addition of the phrase “at least” was intentional, as it expressed no opinion whether either of these showings “would necessarily establish” that Washington’s law violated section 2.<sup>47</sup>

Having established this new heightened section 2 “intentional discrimination” standard, the court provided only a cursory review of the plaintiffs’ unrefuted and substantial evidence, which it characterized merely as “statistical evidence [of] racial disparities in Washington’s criminal justice system,”<sup>48</sup> and held that “[b]ecause plaintiffs presented no evidence of intentional discrimination in the operation of Washington’s criminal justice system,” they have failed to meet their burden under the VRA.<sup>49</sup> In so doing, the court affirmed the district court’s grant of summary judgment for the State.<sup>50</sup>

## II. THE RESULTS STANDARD FOR SECTION 2 CASES DISREGARDED

Though the court’s cursory opinion ignored it, the longstanding analysis in section 2 litigation was clear. The plain language of section 2, the congressional intent that governed its enactment, and established Supreme Court precedent should have guided the Ninth Circuit’s disposition of the plaintiffs’ claims in *Farrakhan III*, just as it did in *Farrakhan I* and *Farrakhan II*.

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45. *Farrakhan III*, 623 F.3d at 993.

46. *Id.* Five concurring judges declined to follow the majority’s new rule, four of whom “respectfully part[ed] company with the majority to the extent that it suggests that proof of discriminatory intent is required to establish a § 2 violation.” *Id.* at 996. The fifth, Judge Graber, noted that the district court’s decision could be upheld without disturbing the Ninth Circuit’s previous pronouncements in *Farrakhan I* regarding to the general applicability of section 2 to Washington’s felon disfranchisement law. *Id.* at 997. As Judge Graber stated: “Once we have resolved a preliminary and important point of law and the full court and the Supreme Court have declined to intervene, judicial prudence strongly suggests that we should not later disturb that ruling . . . in the very same case when doing so is entirely unnecessary.” *Id.* Thus, the apparent unanimity in the Ninth Circuit’s per curiam opinion may be due less to genuine agreement among the judges as to the applicability of section 2 to felon disfranchisement laws, and more to the fact that there were multiple grounds on which to affirm the decision of the district court.

47. *Id.* at 993–94.

48. *Id.* at 992.

49. *Id.* at 994.

50. *Id.*

### A. Section 2's Plain Language

The cardinal canon of statutory interpretation is that a statute must be interpreted according to its plain meaning.<sup>51</sup> This fundamental rule is simple and straightforward: “[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there,” and “[w]hen,” as here, “the words of a statute are unambiguous, then, this first canon is also the last: ‘[J]udicial inquiry is complete.’”<sup>52</sup>

Section 2 of the VRA states:

- a. No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed . . . in a manner which results in a denial or abridgment of the right of any citizen . . . to vote on account of race . . . as provided in subsection (b).
- 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 . . . are not equally open to participation by members of a class of citizens protected by subsection (a) . . .<sup>53</sup>

Subsection (a) is clear—all “voting qualification[s]” fall within its reach. Its protections apply, without limitation, to “any citizen.”<sup>54</sup> Thus, where a challenged law is a “voting qualification” under subsection (a), the only remaining question is whether it “results in a denial or abridgement of the right . . . to vote on account of race or color” under the “totality of the circumstances,” a factual inquiry, as provided under subsection (b).<sup>55</sup>

Here, the plaintiffs argued, and the defendants conceded, that Washington’s felon disfranchisement law violates section 2 because: (1) it is a “voting qualification” within the meaning of subsection (a); and (2) it imports racial discrimination from Washington’s criminal justice system into Washington’s political process in violation of subsection (b). Thus, as the *Farrakhan I* court ruled, no plausible reading of subsection 2(a)’s plain text would exempt Washington’s felon disfranchisement law from coverage as a “voting qualification.”<sup>56</sup>

Precisely because it would be nearly impossible to do so, the *Farrakhan III* court did not argue otherwise. In this sense, the court reaffirmed *Farrakhan I*’s holding that a challenge to Washington’s felon disfranchisement law may be cognizable under section 2. All that should have remained in the court’s analysis, then, was to determine whether Washington’s challenged law

51. *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

52. *Id.* at 253–54 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

53. 42 U.S.C. § 1973(a)–(b) (2006) (emphasis added).

54. *Id.*

55. *Id.*; see also *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986) (“[T]he Senate Report espouses a flexible, fact-intensive test for § 2 violations . . .”).

56. See *Farrakhan I*, 338 F.3d 1009, 1016 (9th Cir. 2003) (“Felon disenfranchisement is a voting qualification, and Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA.”); see also *Hayden v. Pataki*, 449 F.3d 305, 367–68 (2d Cir. 2006) (Sotomayor, J., dissenting) (“It is plain to anyone reading the [VRA] that it applies to all ‘voting qualification[s].’ And it is equally plain that [a felon-disfranchisement law] disqualifies . . . people from voting. . . . Section 2 of the Act by its unambiguous terms subjects felony disenfranchisement [laws] . . . to its coverage.”)

“results” in vote denial “on account of race.”

*B. The Court’s Disregard for Section 2’s Congressional History and Longstanding Precedent*

The *Farrakhan III* court, citing conflicting opinions from other circuits, concluded that “the rule announced in *Farrakhan I* sweeps too broadly.”<sup>57</sup> Reaching back into history, the court stated that while Congress was aware of the existence of felon disfranchisement laws when it originally enacted the VRA in 1965 and when it later reauthorized section 2 in 1982, it gave no indication that such laws were “in any way suspect.”<sup>58</sup> As explained in the previous section, the unambiguous language of the statute rendered this historical analysis unnecessary.

Mirroring the language of the Fifteenth Amendment, section 2 originally provided that “[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”<sup>59</sup> In 1980, a plurality of the Supreme Court, in *City of Mobile v. Bolden*, interpreted section 2 to require a showing of discriminatory intent, as was required for Fifteenth Amendment claims.<sup>60</sup>

In 1982 Congress amended section 2 to specifically overrule *Mobile*’s intent test, observing that “if an electoral system operates today to exclude blacks or Hispanics from a fair chance to participate, then the matter of what motives were in an official’s mind 100 years ago is of the most limited relevance.”<sup>61</sup> Congress expressly stated that its 1982 amendments to section 2 were designed “to make clear that proof of discriminatory intent is not required to establish a violation of Section 2.”<sup>62</sup> With this amendment, Congress restored section 2’s traditional “results” only test.

Indeed, the Ninth Circuit itself has cautioned even against *focusing too narrowly* on the history of official discrimination factor of section 2’s totality of the circumstances analysis, as such a focus runs the risk of “plac[ing] too much emphasis on the plaintiff’s ability to prove intentional discrimination.”<sup>63</sup> As discussed above, the *Farrakhan I* court rejected the district court’s “by itself” causation standard precisely because it “would effectively read an intent requirement back into the VRA, in direct contradiction of the clear command of the 1982 Amendments to Section 2.”<sup>64</sup>

57. *Farrakhan III*, 623 F.3d 990, 993 (9th Cir. 2010).

58. *Id.*

59. See The Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965).

60. 446 U.S. 55, 61–63 (1980) (holding section 2 “was intended to have an effect no different from that of the Fifteenth Amendment itself”).

61. S. Rep. No. 97-417, at 36 (1982).

62. S. Rep. No. 97-417, at 2.

63. *Gomez v. City of Watsonville*, 863 F.2d 1407, 1418 (9th Cir. 1988).

64. *Farrakhan I*, 338 F.3d 1009, 1019 (9th Cir. 2003). Indeed, as the Supreme Court recognized in *Chisom v. Roemer*, the “coverage provided by the 1982 Amendment [to section 2] is coextensive with the coverage provided by the Act prior to 1982.” 501 U.S. 380, 383–84 (1991). As enacted in 1965, the original section 2 tracked the Fifteenth Amendment’s prohibition on intentionally discriminatory voting laws, which, under *Hunter v. Underwood*, include

Though it found no ambiguity in the statute's language, the court nevertheless delved into its legislative history and announced a heightened standard for establishing a section 2 violation.

### C. Future Section 2 Felon Disfranchisement Litigation Under *Farrakhan III*

The *Farrakhan III* court's second option for establishing a section 2 violation provides nothing new—section 2 already prohibits voting qualifications with discriminatory intent. The Supreme Court has sustained a challenge to felon disfranchisement law under the Fourteenth Amendment on exactly this basis.<sup>65</sup> It is the first requirement, however, that is particularly striking and warrants further attention.

Notwithstanding that the Ninth Circuit—in *Farrakhan I* and in numerous other cases—explicitly acknowledged that *intent* is simply not required under section 2,<sup>66</sup> the court here adopted a new requirement contradicting settled law. Given how fundamentally at odds the court's new “intentional discrimination” formulation is with section 2's statutory text and legislative history, one might expect additional guidance from the court as to the basis for this development. Unfortunately, only two scarcely developed bases are proffered: (1) the affirmative sanction for felon disfranchisement laws in section 2 of the Fourteenth Amendment, and (2) the individual plaintiffs' criminal convictions, which resulted from a process with “its own unique safeguards and remedies against arbitrary, invidious or mistaken conviction.”<sup>67</sup> Upon closer inspection, however, neither justification ultimately provides the necessary support for the court's interpretation.

1. *Section 2 of the Fourteenth Amendment.* — Contrary to the court's suggestion, *Richardson v. Ramirez* and its *dicta* describing felon disfranchisement laws as having an “affirmative sanction” in section 2 of the Fourteenth Amendment, do not immunize Washington's discriminatory felon disfranchisement law from section 2's “results test” for at least three reasons.<sup>68</sup>

First, the Fourteenth Amendment does not “sanction” *racially discriminatory* disfranchisement laws. As the court categorically stated in *Hunter v. Underwood*:

[Section] 2 was not designed to permit the purposeful racial discrimination attending the enactment *and operation* of [Alabama's

intentionally discriminatory felon disfranchisement laws. Thus, just as the original section 2 prohibited intentionally discriminatory felon disfranchisement laws, there is no question that section 2's “results test” prohibits felon disfranchisement laws—like Washington State's—that creates discriminatory *results*.

65. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (“[Alabama's felon disfranchisement law's] original enactment was motivated by a desire to discriminate against blacks on account of race and . . . continues to this day to have that effect. As such, it violates equal protection . . .”).

66. See, e.g., *Old Person v. Brown*, 312 F.3d 1036, 1040 (9th Cir. 2002) (“In 1982, Congress amended section 2 of the Voting Rights Act to eliminate any intent requirement with respect to vote-dilution claims.”); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 557 (9th Cir. 1998) (noting Congress's statement that “intent test . . . placed an inordinately difficult burden of proof on plaintiffs and . . . asked the wrong question” (internal quotation marks and citation omitted)).

67. *Farrakhan III*, 623 F.3d 990, 993 (9th Cir. 2010).

68. 418 U.S. 24, 54 (1974).

felon disfranchisement law] which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez* . . . suggests the contrary.<sup>69</sup>

Thus, even if felon disfranchisement laws are generally permissible, the racially discriminatory result attendant to the operation of Washington’s felon disfranchisement law is not immune from congressional prohibition. In this sense, section 2 of the Fourteenth Amendment is no different from section 1 of the Thirteenth Amendment, which permits states to sentence prisoners to labor,<sup>70</sup> but which does not permit states to impose that penalty on a discriminatory basis, and has never been read as a limit on Congress’s enforcement power.<sup>71</sup>

Second, as the Ninth Circuit recently recognized in *Harvey v. Brewer*, section 2 of the Fourteenth Amendment places no independent limitations on Congress’s powers to regulate felon disfranchisement:

[T]he absence of a constitutional prohibition does not somehow bar a statutory one. Simply because the Fourteenth Amendment does not itself prohibit States from enacting a broad array of felon disfranchisement schemes does not mean that Congress cannot do so through legislation—provided, of course, that Congress has the authority to enact such a prohibition.<sup>72</sup>

Indeed, the Reconstruction-era Congress that drafted section 2 of the Fourteenth Amendment exercised just such authority, prohibiting certain types of felon disfranchisement. As the *Harvey* court recognized, section 2 of the Fourteenth Amendment permits states to disfranchise individuals for both statutory and common-law felonies.<sup>73</sup> But the same Congress that drafted the Fourteenth Amendment also prohibited the readmitted states from disfranchising individuals for *statutory* felonies,<sup>74</sup> demonstrating that section 2 of the Fourteenth Amendment does not somehow limit congressional authority to regulate felon disfranchisement committed by the state.

Third, even if, contrary to the Supreme Court’s holding in *Hunter*, section 2 of the Fourteenth Amendment limited Congress’s powers to enforce the Fourteenth Amendment, it would not also limit Congress’s enforcement powers under the *Fifteenth Amendment*. Although the Fourteenth Amendment only imposes a penalty of reduced representation for discriminatory voting practices, the Fifteenth Amendment expressly prohibits racial discrimination in voting categorically, and contains no exception for felon disfranchisement laws.<sup>75</sup> As a subsequent enactment, the Fifteenth Amendment is controlling

69. 471 U.S. at 233 (1985) (emphasis added).

70. U.S. Const. amend. XIII, § 1.

71. See *Gates v. Collier*, 501 F.2d 1291, 1299 (5th Cir. 1974) (“Undoubtedly the appellants’ policy of segregating inmates . . . is in violation of . . . the Fourteenth Amendment.”).

72. *Harvey v. Brewer*, 605 F.3d 1067, 1077 (9th Cir. 2010).

73. *Id.* at 1072–73, 1075.

74. The Reconstruction Act of March 2, 1867 set the conditions for the exclusion of *only* those citizens “disfranchised for . . . rebellion or for *felony at common law.*” ch. 153, 14 Stat. 428–29 (1867) (emphasis added). Thus, the Act prohibited disfranchisement for *statutory* felonies. *Harvey*, 605 F.3d at 1077.

75. Compare U.S. Const. amend. XIV, § 2 (indicating “when the right to vote . . . is denied to any of the male inhabitants of such State, . . . the basis of representation therein shall be

where there is any conflict with the Fourteenth.<sup>76</sup>

Indeed, the fact that the Reconstruction Congress expressly considered, but ultimately rejected, several proposals to include an exception for felon disfranchisement laws in the Fifteenth Amendment, demonstrates that such laws are not beyond the reach of Congress's Fifteenth Amendment enforcement powers.<sup>77</sup> The framers of the Reconstruction Amendments were "quite capable" of drafting exceptions for felon disfranchisement laws, and could have incorporated such an exception into the Fifteenth Amendment had they "intended to do so."<sup>78</sup>

Thus, neither the Fourteenth Amendment nor *Richardson* provides any basis for altering section 2's plain language and purpose to include an intent requirement.

2. *Washington State's Criminal Justice System Safeguards.* — The second reason relied upon by the court in support of its "intentional discrimination" standard is also unavailing. The court explained that it was "skeptical that felon disenfranchisement laws can be challenged under section 2 of the VRA" because the "criminal justice system . . . has its own unique safeguards and remedies against arbitrary, invidious or mistaken conviction."<sup>79</sup> This reasoning is flawed for at least two reasons.

First, while this notion may have some practical appeal, it ignores the purpose of the VRA, which is to provide an *additional* check on underlying electoral systems, regardless of how safeguarded they may appear in the abstract.

Second, notwithstanding that the plaintiffs' evidence proves that Washington's criminal justice processes are racially discriminatory, the state's system is, in theory, supposed to safeguard the accused from racial discrimination through various individual procedures, including federal habeas petitions. The court, however, conflates a challenge to Washington's authority to detain these individuals (not at issue here) and the plaintiffs' actual challenge, which seeks to remedy the injury caused by the state's disproportionate denial of the right to vote as a result of discrimination in the criminal justice system. The court's response to the latter challenge, by referencing protections of the former that may or may not exist, is simply inapposite.

In sum, neither of the court's purported bases for enacting an intent requirement, and thereby disposing of the plaintiffs' claim, is sound. Given the clear contrary congressional intent and longstanding judicial interpretation of the VRA, the court's opinion is an act of manifest judicial engineering.

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reduced"), with amend. XV, § 1 (stating "[t]he right of citizens of the United States to vote shall not be denied . . . on account of race, color, or previous condition of servitude").

76. See Brief for Constitutional Accountability Ctr. as Amici Curiae Supporting Respondents at 18, *Farrakhan III*, 623 F.3d 990 (9th Cir. 2010) (No. 06-35669) ("Section 2 of the Fourteenth Amendment does not limit Congress's power to enforce the Fifteenth Amendment . . .").

77. *Id.* at 19–23.

78. *Harvey*, 605 F.3d at 1077.

79. *Farrakhan III*, 623 F.3d at 993.

D. *Implications for Future Litigation in the Ninth Circuit*

Having established a new requirement that plaintiffs must demonstrate a “criminal justice system . . . infected by intentional discrimination,”<sup>80</sup> the court summarily concluded that the plaintiffs have “presented no evidence of *intentional* discrimination in the operation of Washington’s criminal justice system,”<sup>81</sup> and characterized the evidence as merely “present[ing] statistical evidence . . . [of] *racial disparities*.”<sup>82</sup> Reading the court’s opinion, one might think that the evidence presented in the *Farrakhan* cases hardly differed from the mere statistical disparities presented by the plaintiffs in *Salt River*.<sup>83</sup> However, the evidence proffered in each case was profoundly distinguishable.

In *Salt River*, African American plaintiffs challenged a land-ownership requirement for eligibility to vote in elections under section 2.<sup>84</sup> There, the plaintiffs relied entirely on statistical racial disparities showing that only “[40.1] percent of African-American heads-of-household owned their homes, while 60.3 percent of . . . white heads-of-household owned their homes.”<sup>85</sup> Significantly, the court noted that the plaintiffs stipulated to “the nonexistence of virtually every circumstance which might indicate that landowner-only voting results in racial discrimination,” leaving only a bare statistical showing of disparate impact to support their section 2 claim.<sup>86</sup> In other words, *Salt River* was a case in which “the observed difference[s] in rates of home ownership between non-Hispanic whites and African-Americans . . . [was] *better explained by other factors independent of race*” which “adequately rebutted any inference of racial bias that the [disparate impact] statistics might suggest.”<sup>87</sup>

In contrast, the district court in *Farrakhan I* found that the expert evidence proffered by the plaintiffs fully substantiated the assertion that “the statistical disparity and disproportionality evident in Washington’s criminal justice system *arise from and result in* discrimination.”<sup>88</sup> Furthermore, the defendants never disputed this evidence.<sup>89</sup>

Additionally, unlike in *Salt River*, the *Farrakhan* plaintiffs demonstrated that racial discrimination *caused* the disparities evident in Washington’s criminal justice system.<sup>90</sup> For example, the plaintiffs’ evidence showed racial discrimination in various forms:

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80. *Id.*

81. *Id.* at 994.

82. *Id.* at 992.

83. 109 F.3d 586 (9th Cir. 1997).

84. *Id.* at 588.

85. *Id.* at 589.

86. *Id.* at 595.

87. *Id.* at 591 (emphasis added). As *Farrakhan I* emphasized, the conclusion in *Salt River* that the disparity was not the result of racial discrimination was “dictated” by the joint stipulation in that case, particularly the plaintiffs’ concessions. *Farrakhan I*, 338 F.3d 1009, 1018 (9th Cir. 2003).

88. *Farrakhan v. Gregoire*, No.CV-96-076-RHW, 2006 U.S. Dist. LEXIS 45987, at \*17, \*19 (E.D. Wash. July 7, 2006).

89. *Id.* at \*18.

90. *Id.* at \*6-\*19.

- Prosecution: Prosecutors in King County, Washington’s largest and most racially diverse county, recommend that, for the same crime, Blacks serve 50% more time in prison than similarly situated Whites serve. This means that in the context of voting, prosecutors seek a disfranchisement multiplier for Blacks that is 50% longer than for similarly situated Whites.<sup>91</sup>
- Incarceration: A Black person in Washington is more than nine times more likely to be in prison than a White person in the state. However, the ratio of Black to White arrests for violent offenses (which pose the greatest threat to society and require the least amount of police discretion) is only 3.72 to 1. Thus, “substantially more than one half” of Washington’s racial disparities “cannot be explained by higher levels of criminal involvement as measured by violent crime arrest statistics.”<sup>92</sup>

On appeal, the *Farrakhan II* court found that these disparities “cannot be explained by factors independent of race,”<sup>93</sup> given the “compelling” nature of the evidence that remained undisputed. The court was simply not free to ignore these conclusions.<sup>94</sup> Consequently, the *Farrakhan II* court rightly held that these conclusions warranted a finding of liability because “some people becom[e] felons not just because they have committed a crime, but because of their race, then that felon status cannot, under § 2 of the VRA, disqualify felons from voting.”<sup>95</sup> Thus, as the plaintiffs argued, although felon disfranchisement laws may be permissible generally, *this particular* felon disfranchisement law violates section 2.

Finally, if a “compelling” showing of racially motivated disparate treatment permeating the criminal justice system is still insufficient to meet the court’s “intentional discrimination” standard, it is not clear what the court requires. By its nature, a showing of *systemic* discrimination is not one that can be demonstrated using individual cases but instead requires far more wide-reaching statistical evidence. What the court appears to be seeking then—based on the parallel it draws between the *intentional* discrimination in the criminal justice system and the discriminatory intent in the enactment of Washington’s felon disfranchisement law itself—is a series of smoking guns pointing to overt racial discrimination throughout the criminal justice system in the modern era. This is striking because even the Supreme Court found a single and focused instance of intentional discrimination sufficient in *Hunter v. Underwood*, and recognized that discrimination as extraordinary and a product of its time.<sup>96</sup>

Moreover, the “intentional discrimination” the court requires must be

91. Expert Report of Robert D. Crutchfield, Ph.D. at 30, *Farrakhan v. Gregoire*, 2006 U.S. Dist. LEXIS 45987.

92. *Farrakhan II*, 590 F.3d 989, 1009 (9th Cir. 2010).

93. *Id.* at 1012 (internal quotation marks omitted).

94. See *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 596 (9th Cir. 1997) (“It is not our prerogative to reweigh the evidence on which the district court based its factual findings.” (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573–74 (1985))).

95. *Farrakhan II*, 590 F.3d at 1014.

96. 471 U.S. 222, 233 (1985) (noting “original enactment” of a state statute disfranchising those convicted of certain crimes “was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect”).

frequent and pervasive enough to reach an inference of “infection” of the criminal justice *system*. Here, the plaintiffs’ evidence demonstrated that Washington’s felon disfranchisement law imports pervasive racial discrimination from the state’s criminal justice system into the political process. Yet, the *Farrakhan III* court found it insufficient. To require the plaintiffs to adduce even more evidence, particularly when the state has rebutted not one aspect of the current record, speaks to the impossible barrier the court has erected with this ruling. Moreover, there is at least a danger that lower courts may now use *Farrakhan III* to reintroduce the repudiated intent standard back into other section 2 challenges. Future courts should reject that invitation and instead follow the plain letter, spirit, and purpose of section 2.

### CONCLUSION

The *Farrakhan III* opinion claims to be a narrow one. As a practical matter, however, by reverting to the overt *intent* standard for section 2 challenges and disregarding the *resulting impact* a remarkable set of proven and undisputed facts have on the plaintiffs’ voting rights, the court not only trampled on the congressionally established results-focus standard governing section 2 cases, but it also effectively foreclosed any realistic possibility of relief for plaintiffs bringing felon disfranchisement challenges. In the end, the court allowed the racism permeating Washington’s criminal justice system to continue to contaminate and fundamentally undermine the state’s democratic processes.

The ironic and disheartening result of all this—beyond its unfortunate precedential impact—is that Washington’s disproportionately disfranchised racial minorities are left with only one hope for change: to rely on the same political process that has already cast them out.

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