STATE OF WISCONSIN CIRCUIT COURT BRANCH 29 MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 10CF1101

MICHAEL S. HENDERSON,

Defendant.

STATE OF WISCONSIN'S BRIEF IN OPPOSITION TO MICHAEL S. HENDERSON'S MOTION TO DISMISS

BACKGROUND

The State files this brief in opposition to Michael S. Henderson's motion to dismiss the charges against him. Henderson is charged with two counts of election fraud: one for voting as a disqualified person; the other for providing false information to an election official (Complaint at 1).

Henderson, who according to his motion is African-American, is a convicted felon by virtue of an August 19, 2005 conviction for two counts of bail jumping (Complaint at 2). He was sentenced to consecutive terms of five years' probation on each count (Complaint at 2). He is scheduled to be discharged from probation no earlier than August 19, 2010 (Complaint at 2).

The Complaint alleges that at the start of his probationary term, Henderson received and signed a copy of the rules of community supervision, one of which states: "You shall not, as a convicted felon, and until you have successfully completed the terms and conditions of your sentence, vote in any federal, state or local election as outlined in Wisconsin Statutes s. 6.03(1)(b)" (Complaint at 2).

The Complaint further alleges that during the November 4, 2008 election, Henderson completed a Voter Registration Application in which he affirmed, among other things, that he is "not currently serving a sentence including probation or parole for a felony conviction" (Complaint at 3). Henderson also cast a ballot in the election (Complaint at 3).

In a brief that is long on rhetoric (58 single-spaced pages!) and short on law, Henderson claims that Wis. Const. art. III, § 2(4)(a) and Wis. Stat. § 6.03(1)(b) are unconstitutional and in violation of the federal Voting Rights Act.[1] The text of the challenged provisions is as follows:

▶ **Wis. Const. art. III, § 2(4)(a)**

SECTION 2. Laws may be enacted:

. . . .

(4) Excluding from the right of suffrage persons:
(a) Convicted of a felony, unless restored to civil rights.

▶ **Wis. Stat. § 6.03(1)(b)**

6.03. Disqualification of electors. **(1)** The following persons shall not be allowed to vote in any election and any attempt to vote shall be rejected:

. . . .

(b) Any person convicted of treason, felony or bribery, unless the person's right to vote is restored through a pardon or under s. 304.078(3).[2]

Under these provisions, felons are not entitled to vote until their civil rights have been restored by service of their sentence. Henderson claims these provisions violate the Fourteenth Amendment, the Fifteenth Amendment, the Twenty-Fourth Amendment, and the federal Voting Rights Act.

---

[1] Henderson also nominally challenges Wis. Stat. § 12.13(1)(a), the statute that criminalizes voting without "the necessary elector qualifications and residence requirements."

[2] Section 304.078(3) reads, in pertinent part: "If a person is disqualified from voting under s. 6.03(1)(b), his or her right to vote is restored when he or she completes the term of imprisonment or probation for the crime that led to the disqualification."

Henderson acknowledges that "legalistic argument[s] could be made" to defeat his claims, but "urges this Court to not accept such legalistic argument[s]" (Henderson Brief at 56). This court, one of law, is in the business of evaluating "legalistic arguments." By law, Henderson's claims fail.

I. WISCONSIN CONST. ART. III, § 2(4)(a) AND WIS. STAT. § 6.03(1)(B) ARE NOT UNCONSTITUTIONAL.

The constitutionality of a legislative enactment presents a question of law. *Ferdon v. Wisconsin Patients Comp. Fund*, 2005 WI 125, ¶ 58, 284 Wis. 2d 573, 701 N.W.2d 440. The court must presume the legislature acted within its constitutional limits. *Id.* ¶ 68. The challenger – here, Henderson – bears a heavy burden: courts resolve any doubts in favor of the constitutionality of the legislative enactment. *Id.* "A challenger must demonstrate that a statute is unconstitutional beyond a reasonable doubt." *Id.*

A. Wisconsin Const. art. III, § 2(4)(a) and Wis. Stat. § 6.03(1)(b) Do Not Violate Henderson's Fourteenth Amendment Equal Protection Rights.

The Fourteenth Amendment's Equal Protection Clause prohibits the government from treating similarly-situated people differently "based on certain invidious classifications." *In re Joseph E.G.*, 2001 WI App 29, ¶ 7, 240 Wis. 2d 481, 623 N.W.2d 137. Henderson's equal protection challenge rests on the following syllogism: (a) he is an African American man; (b) African American men are much more likely to be convicted of felonies than Caucasian men; (c) African American men therefore are much more likely to be denied the right to vote than Caucasian men; and (d) Wisconsin's felon disenfranchisement laws therefore violate his equal protection rights.

This argument is doomed by the very text of the Fourteenth Amendment. The Equal Protection Clause of the Fourteenth Amendment provides in pertinent part that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal

protection of the laws." U.S. Const. amend. XIV, § 1. The Fourteenth Amendment also provides that "when the right to vote at any election . . . is denied . . . or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced . . . ." *Id. § 2* (emphasis added).

In *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974), the Supreme Court interpreted the language in U.S. Const. § 2 of the Fourteenth Amendment to mean that states could exclude felons from voting without violating U.S. Const. amend XIV, § 1's Equal Protection Clause. The Court held that U.S. Const. amend XIV, § 1's Equal Protection Clause could not be interpreted as forbidding the disenfranchisement of felons because U.S. Const. amend. XIV, § 2 approves of this disenfranchisement by eliminating any electoral penalty for it. *Id.* at 54. ("[T]he exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment"). The Court reasoned "that § 1, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement." *Id.* at 55.

In light of *Richardson*'s holding, "a litigant bringing an equal protection challenge to a felon-disenfranchisement scheme must first face the formidable task of escaping *Richardson's* long shadow." *Harvey v. Brewer*, 605 F.3d 1067, 1073 (9th Cir. 2010). Henderson attempts to escape *Richardson* by citing a subsequent Supreme Court case, *Hunter v. Underwood*, 471 U.S. 222 (1985) (Henderson's Brief at 15). But *Hunter* offers no help to Henderson.

Hunter addressed a provision of the Alabama Constitution—Article VIII, § 182, of the Alabama Constitution of 1901—that disenfranchised persons convicted of "any crime . . . involving moral turpitude." *Id.* at 223. This provision, which applied primarily to misdemeanors, *id.* at 226-27, had been enacted with "a desire to discriminate against blacks on account of race and the section continues to this day to have that effect," *id.* at 233. The Court carved out one exception to the *Richardson* rule that states may constitutionally disenfranchise felons; namely, that states may not enact felon disenfranchisement laws that are *purposefully* racially discriminatory *See id.* at 233.

Of course, the law at issue in *Hunter*—which was enacted with an invidious, racially discriminatory purpose—was sui generis. It bears no resemblance to Wis. Const. art. III, § 2(4)(a) and Wis. Stat. § 6.03(1)(b). Moreover, *Hunter* does not detract from the core holding of *Richardson*: that, absent proof that a felon disenfranchisement law was enacted with the intent of disenfranchising racial minorities, states may constitutionally disenfranchise felons. *See Romer v. Evans*, 517 U.S. 620, 634 (1996) (describing principle that states may disenfranchise a convicted felon as "unexceptionable").

Henderson's equal protection challenge therefore gets off to a bad start. It is derailed by the very Constitutional amendment on which it relies and by United States Supreme Court precedent. Things only get worse as we work through Wisconsin's process for evaluating equal protection challenges to statutes.

> ¶ 12 Whether reviewing substantive due process or equal protection, the threshold question is whether a fundamental right is implicated or whether a suspect class is disadvantaged by the challenged legislation. If either is the case, the challenged legislation must survive strict scrutiny. . . . When neither a fundamental right has been interfered with nor a suspect class been disadvantaged as a result of the classification, "the legislative enactment 'must be sustained unless it is "patently arbitrary" and bears no rational relationship to a legitimate government interest.'"

State v. Smith, 2010 WI 16, ¶ 12, 323 Wis. 2d 377, 780 N.W.2d 90 (citations omitted).

Henderson suggests that this court should apply a strict scrutiny analysis because "the privilege and immunities clause [of the United States Constitution] provides a constitutional source for the right to vote" (Henderson's Brief at 18). The State submits, however, that this court should apply the lower level of scrutiny—the rational basis standard. The rational basis standard is appropriate when a law does not involve a suspect class[3] or a fundamental right.[4] *Ferdon*, 284 Wis. 2d 573, ¶¶ 61, 65.

Such is the case here. The relevant class created by Wis. Const. art. III, § 2(4)(a) and Wis. Stat. § 6.03(1)(b)—felons whose civil rights have not yet been restored by service of their sentence—is not a suspect class. *State v. Thomas*, 2004 WI App 115, ¶ 26, 274 Wis. 2d 513, 683 N.W.2d 497 ("[C]onvicted felons are not a suspect class.") Additionally, contrary to Henderson's assertions, felons "cannot complain about their loss of a fundamental right to vote because felon disenfranchisement is explicitly permitted under the terms of *Richardson*, 418 U.S. at 55, 94 S.Ct. 2655." *Harvey*, 605 F.3d at 1079. Without a suspect class or a fundamental right at issue, the rational basis test applies.

In analyzing whether a statutory classification meets the rational basis standard, the court is "'obligated to locate or, in the alternative, construct a rationale that might have influenced the legislative determination.'" *Ferdon*, 284 Wis. 2d 573, ¶ 74 (citation omitted). The point of the inquiry is "to determine whether the legislation has more than a speculative tendency as the means for furthering a valid legislative purpose." *Id.* ¶ 78. This standard "does not require the legislature to choose the best or wisest means to achieve its goals. Deference to the means

---

[3] Classifications based on race, alienage, or national origin are "suspect" because "[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985).

[4] A "fundamental right" is one that is "explicitly or implicitly protected by the Constitution." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

chosen is due even if the court believes the same goal could be achieved in a more effective manner." *Id.* ¶ 76.

Therefore, to determine Henderson's equal protection challenge, the court must decide whether the prohibition in Wis. Const. art. III, § 2(4)(a) and Wis. Stat. § 6.03(1)(b) against voting by felons whose civil rights have not yet been restored is rationally related to a valid legislative objective. The answer is yes.

A Wisconsin case dating back to 1863 sets forth one such valid objective; namely, the protection of the ballot box from individuals who have demonstrated criminally bad judgment.

> 2. Section 6, art. III., provides that "laws may be passed, excluding from the right of suffrage all persons who may have been convicted of bribery or larceny, or of any infamous crime," and also depriving every person who shall make or become interested in a bet or wager depending on the result of an election of the right to vote; and sec. 2 of the same article provides that "no person under guardianship, *non compos mentis*, or insane, shall be qualified to vote at any election, nor shall any person convicted of treason or felony be qualified to vote at any election, unless restored to civil rights. *It was not intended that the question whether traitors and felons should vote should be left to the promptings of their conscience and their blunted sense of right and wrong, nor yet that the only remedy in case they should vote should be that their votes should be rejected if it could be ascertained for whom they were cast. It was intended to give the legislature the power to protect the purity of the ballot box by penal enactments which could be severely and rigidly enforced, and that the laws regulating the right of suffrage should have a penal sanction which would compel obedience.* (1 Black. Com., 54, 56, 57.)

State ex rel. Chandler v. Main, 16 Wis. 398, 403-04 (Wis. 1863) (emphasis added).

It is not difficult to construct other rationales that might have influenced the legislature in enacting Wis. Const. art. III, § 2(4)(a) and Wis. Stat. § 6.03(1)(b). For example, Wisconsin has a legitimate interest in encouraging convicted felons to complete their entire sentences, including the payment of restitution, by withholding the restoration of voting rights from felons who have not completed their entire sentence. It is also reasonable for a state to determine that only those convicted felons who have fully served all their sentence are sufficiently rehabilitated to be entitled to vote.

"A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of

government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific." *Heller v. Doe*, 509 U.S. 312, 321 (1993) (internal quotations omitted). The legislature's requirement that felons may only vote when their civil rights have been restored by service of their sentence is backed by rational governmental objectives. It is therefore not vulnerable on equal protection grounds.

Henderson disagrees, arguing that Wis. Const. art. III, § 2(4)(a) and Wis. Stat. § 6.03(1)(b) *must* violate his equal protection rights because felon disenfranchisement laws disproportionately deny the right to vote to racial minorities. But "disparate impact—a law's *unintentionally* bearing harder on one group than another—is not a permissible basis for finding a denial of equal protection." *Smith v. Boyle*, 144 F.3d 1060, 1064 (7th Cir. 1998). Otherwise, any law that negatively impacts any group could be challenged on equal protection grounds. *See Washington v. Davis*, 426 U.S. 229, 242, 248 n.14 (1976) (finding that "we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another").

To quash on equal protection grounds a statute that is facially neutral but disproportionately affects one group of individuals, the challenger must prove "'the existence of *purposeful* discrimination'" motivating the governmental action which caused the complained-of injury. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (emphasis added) (citation omitted). "[D]iscriminatory purpose . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part *because of*, not merely *in spite of*, its adverse effects upon an identifiable group." *Id.* at 298 (internal quotations omitted) (emphasis added). "[W]ithout proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 207 (2008) (Scalia, J., concurring).

Henderson presents no evidence that the Wisconsin legislature enacted Wis. Const. art. III, § 2(4)(a) or Wis. Stat. § 6.03(1)(b) *because of* an anticipated discriminatory effect on racial minorities. Although he claims that Wisconsin's earliest legislative history shows signs of discrimination toward African Americans, there is no question that Wisconsin adopted male African American suffrage 161 years ago—in an 1849 suffrage referendum held as required by the state's new constitution, *see Gillespie v. Palmer*, 20 Wis. 544 (1866), before the ratification of either the Fourteenth Amendment (1868) or the Fifteenth Amendment (1870). Although Henderson alleges that racial disparities generally exist in federal and state criminal justice systems, he has no evidence to show that there has been a purposeful use of Wis. Const. art. III, § 2(4)(a) or Wis. Stat. § 6.03(1)(b) as a method to deprive minority groups of the right to vote.

His equal protection claim must therefore fail, notwithstanding any perception that the law is geared against him. *Cf. Ferdon*, 284 Wis. 2d 573, ¶ 71 (In an equal protection analysis, "'[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality'") (citation omitted).

B. Wisconsin Const. art. III, § 2(4)(a) and Wis. Stat. § 6.03(1)(b) Do Not Violate The Fifteenth Amendment.

The Fifteenth Amendment of the United States Constitution provides an individual may not be denied the right to vote "on account of race, color, or previous condition of servitude."[5] Henderson seems to argue that Wis. Const. Art. III, § 2(4)(a) and Wis. Stat. § 6.03(1)(b) violate the Fifteenth Amendment. (*See, e.g.,* Henderson's Brief at 16) (arguing that the Fifteenth Amendment "replaces [§ 2 of the Fourteenth Amendment] with a clean ban on any disenfranchisement based on race").

---

[5] The phrase "previous condition of servitude" does not refer to a prior prison term but to slavery and those forms of compulsory labor" akin to African slavery." *See United States v. Kozminski*, 487 U.S. 931, 942-43 (1988) (interpreting the phrase "involuntary servitude" in the context of the Thirteenth Amendment).

Of course, neither Wis. Const. art. III, § 2(4)(a) nor Wis. Stat. § 6.03(1)(b) disenfranchise anybody based on race; they disenfranchise individuals based on felony convictions. Moreover, as discussed above, the Supreme Court in *Richardson* held the Fourteenth Amendment, when read as a whole, allows states to disenfranchise felons without running afoul of the Equal Protection Clause of the Fourteenth Amendment. *Richardson*, 418 U.S. at 54-56. Thus, in order to agree with Henderson, this court would have to conclude that the same Constitution that authorizes felon disenfranchisement under the Fourteenth Amendment also prohibits disenfranchisement under the Fifteenth Amendment. Henderson gives no reason for this court to conclude that the drafters intended to put the Constitution at odds with itself.

C. Wisconsin Const. art. III, § 2(4)(a) and Wis. Stat. § 6.03(1)(b) Do Not Violate The Twenty-Fourth Amendment.

Henderson claims that requiring a felon to pay the costs, fees, and restitution imposed by a judgment of conviction violates the Twenty-Fourth Amendment (Henderson's Brief at 50-53). He is wrong.

The Twenty-Fourth Amendment provides:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

U.S. Const. amend. XXIV.

Justice Sandra Day O'Connor, sitting by designation on the Ninth Circuit, recently rejected the same argument that Henderson attempts:

> Plaintiffs' right to vote was not abridged because they failed to pay a poll tax; it was abridged because they were convicted of felonies. Having lost their right to vote, they now have no cognizable Twenty-Fourth Amendment claim until their voting rights are restored. That restoration of their voting rights requires them to pay all debts owed under their criminal sentences does not transform their criminal fines into poll taxes.

Harvey, 605 F.3d at 1080. Henderson presents no compelling reason to depart from this holding.

II. WISCONSIN CONST. ART. III, § 2(4)(a) AND WIS. STAT. § 6.03(1)(B) DO NOT VIOLATE THE FEDERAL VOTING RIGHTS ACT.

Henderson argues that Wis. Const. art. III, § 2(4)(a) and Wis. Stat. § 6.03(1)(b) run afoul of the federal Voting Rights Act ("VRA"). Section 2 of the VRA, 42 U.S.C. § 1973, reads:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

A VRA plaintiff does not have to prove the defendant's discriminatory intent. *See Chisom v. Roemer*, 501 U.S. 380, 383-84 (1981). Under section 2 of the VRA, "certain practices and procedures that *result* in the denial or abridgment of the right to vote are forbidden even though the absence of proof of discriminatory intent protects them from constitutional challenge." *Id.*

Henderson's VRA challenge fails, however, for at least three reasons. First, Henderson does not explain how his claim falls within the text of 42 U.S.C. § 1973, section 2(a). Wisconsin's felon disenfranchisement law does not "result[]" in disenfranchisement "on account of race or color"; it "results" in disenfranchisement on account of conviction for a felony. Thus, Henderson's VRA claim has no support within the text of 42 U.S.C. § 1973, section 2 at all. *See Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986) (noting that the Tennessee felon disenfranchisement law does not violate the VRA because the disproportionate impact on African Americans does not "'result' from the state's qualification of the right to vote on account of race or color," but "rather because of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment").

Second, Henderson's interpretation of the VRA creates a serious constitutional question because it puts the VRA at odds with § 2 of the Fourteenth Amendment. *See Johnson v. Governor of State of Florida*, 405 F.3d 1214, 1231-34 (11th Cir. 2005). Recall that the United States Supreme Court has held that a convicted felon may constitutionally be denied the right to vote. *Richardson*, 418 U.S. at 56. If the VRA excludes felon disenfranchisement claims such as Wis. Const. art. III, § 2(4)(a) and Wis. Stat. § 6.03(1)(b), the VRA "would prohibit a practice that the Fourteenth Amendment permits [states] to maintain." *Johnson,* 405 F.3d at 1234. Thus, the VRA would *alter* a constitutional right in an attempt to enforce it—a result that would exceed Congress's Section 5 enforcement power. *See* U.S. Const. amend XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment].") Such a constitutionally-questionable result is particularly troublesome given that the legislative history of the VRA indicates "that Congress never intended the Voting Rights Act to reach felon disenfranchisement provisions." *Johnson*, 405 F.3d at 1232.

Henderson does not even recognize the constitutional dilemma that his argument creates. For that reason alone, his VRA claim fails. *See Cemetery Servs., Inc. v. Wisconsin Dept. of Regulation & Licensing*, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998) ("For us to address undeveloped constitutional claims, we would have to analyze them, develop them, and then decide them. We cannot serve as both advocate and court.")

Third, Henderson fails to confront cases that hold that his claim is not even cognizable under the VRA. *See, e.g., Simmons v. Galvin*, 575 F.3d 24, 34-42 (1st Cir. 2009) (claim challenging Massachusetts constitutional amendment disenfranchising incarcerated felons was not cognizable under VRA; concluding that the VRA was not meant to proscribe the authority of states to disenfranchise imprisoned felons); *Hayden v. Pataki*, 449 F.3d 305, 314-28 (2d Cir. 2006) (concluding that the VRA "must be construed to not encompass prisoner disenfranchisement provisions like that of New York because (a) Congress did not intend the

[VRA] to cover such provisions; and (b) Congress made no clear statement of an intent to modify the federal balance by applying the [VRA] to these provisions"); *Johnson v. Governor. Of State of Florida.*, 405 F.3d 1214, 1230-34 (11th Cir. 2005) (reviewing a state lifetime felon disenfranchisement law and concluding that all felon disenfranchisement claims are excluded from the scope of § 2 of the VRA; noting that "Congress has expressed its intent to *exclude* felon disenfranchisement provisions from [VRA] scrutiny").

Henderson seizes on one case, *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), in support of his VRA claim (Henderson's Brief at 25-27). *Farrakhan* concluded, without any reasoning, that Congress had the constitutional authority to regulate state law felon disenfranchisement provisions, and that the VRA therefore covered the Washington statute at issue. *Id.* at 1016-20.

This court should be wary of following the *Farrakhan* case, as it is not the bellwether that Henderson makes it out to be. For starters, the case has a checkered history. Over a dissent by seven judges, the Ninth Circuit denied the state's petition for rehearing en banc in that case, *Farrakhan v. Washington*, 359 F.3d 1116 (9th Cir. 2004) (Kozinski, J., dissenting). On remand, judgment was entered for the state. *Farrakhan v. Gregoire*, No. CV-96-076-RHW, 2006 WL 1889273 (E.D. Wash. Jul. 7, 2006). The Ninth Circuit reversed this decision on remand, *Farrakhan v. Gregoire*, 590 F.3d 989 (9th Cir. 2010), but has now ordered that the case be reheard en banc, *Farrakhan v. Gregoire*, 603 F.3d 1072 (9th Cir. 2010). Given its continuing orbit through the court system, *Farrakhan* does not provide Henderson with particularly solid footing.

Moreover, the *Farrakhan* majority did *not* specifically address the constitutionality of its interpretation of the VRA (*see Farrakhan,* 338 F.3d at 1016)—an omission that greatly concerned the seven-member *Farrakhan* dissent. The dissent warned that the majority opinion makes the Ninth Circuit "an outlier in voting rights jurisprudence," because it "contradicts our

case law and the law of at least four other circuits" and "does so without so much as acknowledging congressional approval of felon disenfranchisement and without any consideration of the grave constitutional consequences of its actions." *Farrakhan*, 359 F.3d at 1126-27. *See also Johnson*, 405 F.3d at 1232 n.36 (noting that "the Ninth Circuit did not provide any reasoning for its finding" regarding the constitutionality of its interpretation of the VRA, and concluding that "thus that court's decision, which is only persuasive authority in our circuit, should not compel our analysis.")

Like the *Farrakhan* majority, Henderson ignores the constitutional problems that his interpretation of the VRA creates, and neither the State nor this court has any obligation to fill this huge gap in his argument. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (Court may decline to review arguments that are inadequately briefed.)

Finally, even if this court hitched its wagon to *Farrakhan* and sought evidence to test whether Wis. Const. art. III, § 2(4)(a) and Wis. Stat. § 6.03(1)(b) violate the VRA (note that it's unclear what that evidence would consist of given *Farrakhan*'s up-in-the-air status), the State is confident that Henderson's cut-and-pasted charts, anecdotes, quotations, and statistics would not satisfy his burden. If this court elects to take up Henderson's VRA claim on its merits, the State requests the opportunity to put on evidence of its own in support of these provisions.

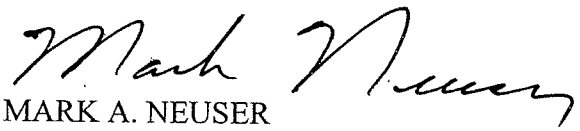
CONCLUSION

Henderson's Motion to Dismiss should be denied. His loosely strung together argument—that African Americans are convicted at disproportionate rates; which means that African Americans are disenfranchised at disproportionate rates; which means that Wis. Const. art. III, § 2(4)(a) and Wis. Stat. § 6.03(1)(b) must be illegal—collapses under its own weight. If Henderson is right, then virtually every criminal law must be struck down as discriminatory. Henderson's brief makes no attempt to make sense of this result, or otherwise grapple with the legal principles that stand squarely in the way of his requested relief.

Dated this 27th day of July, 2010.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General



MARK A. NEUSER
Assistant Attorney General
State Bar #1023791

Attorneys for Plaintiff

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7427
(608) 266-9594 (Fax)
neuserma@doj.state.wi.us