RESPONSE OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REGARDING PETITION No. P-990-06: MICHAEL MACKASON ET AL.

The Government of the United States appreciates the opportunity to provide the following response to the Inter-American Commission on Human Rights ("Commission"), regarding the Petition of Michael Mackason and Others, No. P-990-06. The United States respectfully requests that the Commission declare the petition *inadmissible* for failure to exhaust domestic remedies.

I. FACTUAL BACKGROUND

Petitioners are, *inter alia*, convicted felons who are on parole or probation in the state of New Jersey, and civil society organizations representing communities of color. The individual petitioners claim they are unlawfully disenfranchised because a New Jersey statute prohibits felons, including parolees and probationers, from voting.[1] Petitioners further allege that because African-Americans and Latinos are disproportionately represented amongst the population of convicted felons, the practice of denying them suffrage amounts to racial discrimination.

Petitioners brought suit in New Jersey state court, claiming that the denial of suffrage violated their rights to equal protection under the state constitution, due to its discriminatory and disparate impact on African-Americans and Latinos. Critically, in bringing this action Petitioners elected to not pursue any claims under the federal Voting Rights Act ("VRA") and/or the United States Constitution or any other federal law. Petitioners' suit based entirely on state law was dismissed by the trial and appellate courts of New Jersey, and the New Jersey Supreme Court exercised its discretion not to review the lower court decisions.

Petitioners subsequently filed this petition with the Commission. The essence of Petitioners' claim is that the disenfranchisement of Mackason et al. violates the American Declaration on the Rights and Duties of Man, including the right to vote (Art. XX), the right to be free from racial discrimination (Art. II), and the right to rehabilitation (Arts. I, XVII).[2]

[1] N.J. Stat. 19:4-1(8).

[2] The American Declaration of the Rights and Duties of Man is a non-binding instrument that does not itself create rights or impose duties on OAS member states.

II. FAILURE TO EXHAUST DOMESTIC REMEDIES

The U.S. Government respectfully submits that the matter addressed by the petition is not admissible because it fails to meet established criteria for consideration, in particular the requirement for exhaustion of domestic remedies. There are federal court proceedings that are available in the United States to provide the petitioners the potential for appropriate relief if a violation has occurred. Article 31 of the Commission Rules of Procedure requires Petitioners to pursue and exhaust domestic remedies in accordance with generally recognized principles of international law. For the reasons explained below, the Petitioners have not exhausted their domestic remedies as required by Article 31. None of the exceptions to this rule apply. Accordingly, the petition should be dismissed.

Dismissing this petition would quintessentially advance the rationale underlying the exhaustion doctrine – to permit domestic claims to proceed and to run their course, thereby affording the State the opportunity to fashion an appropriate remedy under its domestic law. Thus, the customary international law doctrine of exhaustion of domestic remedies, which is incorporated into the rules of the Commission, compels the finding that the petition is not admissible and should be dismissed.

Court Proceedings in the United States. Petitioners argue that as a result of the New Jersey Supreme Court's decision not to review its case, they have exhausted their domestic remedies because "[t]hey cannot seek review in any court within the United States – state or federal." Petition at 20. In an additional submission filed with the Commission on June 25, 2009, Petitioners further contend that it would have been futile to raise any federal claims of unlawful discrimination in their lawsuit. Petitioners' Additional Information at 1-2. In support of this argument, Petitioners cite various federal appellate and U.S. Supreme Court cases, dating from 1976 to 2005, in which courts have upheld or declined to review the lawfulness of state felon disenfranchisement laws. *Id.* at 1-2 and n.2.

However, Petitioners' argument is fatally flawed because it fundamentally overlooks recent developments in federal voting rights jurisprudence. It is important to emphasize that this is not simply a minor omission, a result of excusable legal strategy, choosing strong arguments over weak ones, or a matter of dismissible legal arcana: <u>Petitioners have fundamentally misinterpreted the potential availability of federal remedies under the Voting Rights Act for claims of</u>

racial discrimination in felon disenfranchisement laws. Contrary to what Petitioners assert, there has been a division in the federal courts of appeals since 2003 on whether a challenge to state felon disenfranchisement laws, based on evidence of disparate racial impact, is cognizable under the VRA. See *Farrakhan v. Washington*, 338 F.3d 1009, 1012 (9th Cir. 2003) (with respect to Washington state's felon disenfranchisement law, "we hold that evidence of discrimination within the criminal justice system can be relevant to a [VRA] Section 2 analysis") (hereinafter "*Farrakhan I*").[3] Thus, Petitioners are fundamentally incorrect in asserting that U.S. courts have uniformly struck down federal claims of impermissible racial discrimination based on felon disenfranchisement. Indeed, on January 5, 2010, the U.S. Ninth Circuit Court of Appeals went even further by granting summary judgment in favor of the *Farrakhan* appellants, in part because of "compelling evidence of racial discrimination and bias in Washington's criminal justice system" – thus vindicating precisely the kind of claim that the Petitioners here are raising. See *Farrakhan v. Gregoire*, 590 F.3d 989 (9th Cir. 2010) (hereinafter "*Farrakhan II*"). In so ruling, the Ninth Circuit has created a division in the federal circuits, as this decision directly conflicts with contrary rulings issued by the First, Second, and Eleventh Circuit Courts of Appeals.[4]

Critically, the Third Circuit Court of Appeals, which includes the State of New Jersey where Petitioners reside, is one of the circuits that has not ruled on this issue. It was therefore incumbent on Petitioners to have raised a federal claim, for example under the VRA, in addition to their state law claims, in the New Jersey courts to fulfill Article 31's domestic exhaustion requirement. Contrary to Petitioners' assertion that raising such federal claims would have amounted to an exercise in futility, the *Farrakhan* decision and the possibility of U.S. Supreme Court review emphatically demonstrate that Petitioners have failed to meet this requirement. As a result, the Commission should find the petition inadmissible, since such claims should initially be adjudicated fully in the courts of the United States.[5]

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[3] Curiously, Petitioners take note of this case in their additional submission, but erroneously cite it for the proposition that federal courts of appeal have uniformly applied an intent-based theory of discrimination, thereby rendering futile any attempt to raise federal VRA claims. *See* Petitioners' Additional Information at 2, n.2.

[4] See, e.g., *Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2009); *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc); *Johnson v. Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc).

[5] It is also important to note that the U.S. Congress may take action to restore the federal voting rights of ex-felons, including those of parolees and probationers like the Petitioners. On March

As noted, the Ninth Circuit's recent ruling squarely conflicts with the decisions of three other courts of appeals. In *Farrakhan I*, the Ninth Circuit reversed a decision by the district court to grant summary judgment in favor of the State of Washington. The appeals court reasoned that pursuant to the U.S. Supreme Court's decision in *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986), VRA Section 2[6] claims must be analyzed under a "totality of the circumstances" inquiry, which requires courts to consider how a challenged voting practice interacts with external factors such as "social and historical conditions" to result in denial of the right to vote on account of race or color. *Farrakhan I*, 338 F.3d at 1011-12. In conducting this analysis, the court also cited a Senate report that accompanied the 1982 amendments to the VRA, identifying "typical factors" that may be relevant in determining whether Section 2 has been violated. The court found that one such factor – "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process" – was directly implicated by claims of racial discrimination in the criminal justice system, and therefore held that the "Plaintiffs' claim of vote denial [wa]s cognizable under Section 2 of the VRA." *Id.* at 1016. The court also noted that pursuant to *Richardson v. Ramirez*, 418 U.S. 24 (1974), "[a]lthough states may deprive felons of the right to vote without violating the Fourteenth Amendment, . . . when felon disenfranchisement results in denial of the right to vote or vote dilution on account of race or color, Section 2 affords disenfranchised

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16, 2010, hearings were held by the House Judiciary Committee on the Democracy Restoration Act, H.R. 3335, that would restore federal voting rights to individuals with prior criminal convictions who are now out of prison. *See also* "Ex-Offenders and the Vote," New York Times, Op-ed. at A26, March 22, 2010.

[6] Section 2 of the Voting Rights Act reads as follows:

(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) 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 or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) 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.

felons the means to seek redress."[7] *Id.* Accordingly, the court remanded the case back to the district court for further proceedings.

In *Farrakhan II*, decided seven years later, the Ninth Circuit again reversed the district court's second award of summary judgment to Washington State, and went a step further by granting summary judgment in favor of the same plaintiffs. The *Farrakhan II* court reasoned that having found the plaintiffs' VRA Section 2 claim cognizable in *Farrakhan I*, the prima facie case presented by the plaintiffs on remand sufficiently demonstrated that: (1) there are significant racial disparities in the operation of Washington's criminal justice system; (2) those disparities cannot be explained in race-neutral ways; and (3) under the state's felon disenfranchisement statute, such disparities in the criminal justice system lead to significant racial disparities in the qualification to vote. *Farrakhan II* at 133-34. In particular, the *Farrakhan II* court relied heavily on uncontroverted studies presented by experts in the state's criminal justice system that revealed "compelling" evidence of racial discrimination. Accordingly, the court struck down Washington's felon disenfranchisement law for violating the VRA.

To be sure, other federal appeals courts have decided this question differently, which substantially increases the likelihood that the U.S. Supreme Court will ultimately decide the matter. In *Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2009), for example, the First Circuit Court of Appeals held that a Massachusetts law barring currently incarcerated felons from voting did not violate Section 2 of the VRA or the Equal Protection Clause of the U.S. Constitution. The *Simmons* court reasoned that felon disenfranchisement is expressly mentioned in Section 2 of the Fourteenth Amendment, which reads in pertinent part: "[W]hen the right to vote at any election for the choice of electors for President and Vice President of the United States, [and] Representatives in Congress, . . . is denied to any of the male inhabitants of such State . . . or in any way abridged, *except for participation on rebellion, or other crime*, the basis of representation therein shall be reduced in proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." U.S. Const. Amend. XIV, § 2 (emphasis added). Accordingly, the First Circuit concluded that

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[7] The court also cited the earlier Sixth Circuit case of *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986) (engaging in a Section 2 analysis of Tennessee's felon disenfranchisement statute but ultimately holding that it did not violate the VRA), and the Second Circuit decision in *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (en banc) (evenly splitting 5-5 on whether felon disenfranchisement statutes could state a claim under the VRA), as prior examples of how closely divided the courts have been on this issue.

because the Constitution expressly granted states the authority to bar criminals from voting, this power could not be infringed by congressional statute.[8] And absent evidence of intentional racial discrimination on the part of Massachusetts in enacting its felon-disenfranchisement law, there was no equal protection violation. The *Simmons* court also looked at the legislative history of the VRA and concluded that "Congress has excepted from the reach of the VRA protections from vote denial for claims against a state which disenfranchises incarcerated felons." *Id.* at 41. As a result, the court held that "§ 2 of the VRA was not meant to create a cause of action against a state which disenfranchises its incarcerated felons." *Id.* at 36.

Likewise, in *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc), a narrowly divided en banc panel of the Second Circuit Court of Appeals held that New York State's felon disenfranchisement statute, which bars currently incarcerated offenders as well as parolees from voting, did not violate the VRA. Noting that a previous en banc panel of the Second Circuit had deadlocked on this very issue in an earlier case,[9] the court acknowledged at the outset "that this case poses a complex and difficult question that, absent Congressional clarification, will only be definitely resolved by the Supreme Court." *Id.* at 310. Nonetheless, the *Hayden* court went on to hold that the New York felon disenfranchisement statute fell outside of the VRA's provisions. The court reasoned that in enacting and amending the VRA, Congress did not expressly intend that it apply to such laws. Furthermore, citing the explicit grant of state authority to disenfranchise criminals in the Fourteenth Amendment, the Second Circuit concluded that application of the VRA to such statutes "would alter the constitutional balance between the States and the Federal Government." *Id.* At the very least, the court noted, Congress "did not clearly indicate that it intended the Voting Rights Act to alter the federal balance in this way." *Id.* Accordingly, over the dissent of five of the thirteen judges on the en banc panel, the Second Circuit ruled that "the Voting Rights Act must be construed to not encompass prisoner disenfranchisement provisions such as that of New York." *Id.* at 329.

Finally, in *Johnson v. Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc), the 11th Circuit Court of Appeals held that Florida's felon disenfranchisement law, which applies to both current and past criminal offenders, neither violates the

[8] At the same time, the court also acknowledged the existence of a circuit split on this issue. *See id.* at 31 (citing cases); *see also id.*at 46 & n.25 (Torruella, J., dissenting).

[9] *See Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (affirming District Court judgment after evenly dividing on the merits).

Equal Protection Clause nor falls afoul of the VRA.[10] Citing the same provision in the Fourteenth Amendment to the U.S. Constitution, the court reasoned that "interpreting Section 2 of the Voting Rights Act to deny Florida the discretion to disenfranchise felons raises serious constitutional problems because such an interpretation allows a congressional statute to override the text of the Constitution." *Id.* at 1229. After examining the legislative history of the VRA, and applying "a longstanding rule of statutory interpretation that federal courts should not construe a statute to create a constitutional question unless there is a clear statement of Congress endorsing this understanding," *id.*, the court concluded that "Congress never intended the Voting Rights Act to reach felon disenfranchisement provisions." *Id.* at 1232. As a result, the Eleventh Circuit denied the challenge to the Florida law.

In light of the Ninth Circuit's recent contrary decision in *Farrakhan II*, the division in the federal courts of appeals makes it more likely that the U.S. Supreme Court will ultimately decide the controversy, and cautions against Commission review at this time. Significantly, Rule 10 of the Rules of the Supreme Court of the United States, which lays out the factors governing its decisions to review cases, states in part:

> The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: (a) **a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;** has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. (Emphasis added.)

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[10] The *Johnson* court also noted the existence of a circuit split on this issue. *See id.* at 1227 ("As a threshold matter, this claim raises an important question of statutory interpretation, namely, whether Section 2 of the Voting Rights Act applies to Florida's felon disenfranchisement provision. The Circuits are split on this issue.") (citing cases); *id.* at 1232 n.36 (citing the Ninth Circuit's decision in *Farrakhan*).

Since the *Farrakhan II* decision has highlighted the division in the courts of appeals on this important issue, the case appears to fall squarely within the first category of the above considerations favoring Supreme Court review.

Furthermore, because the *Farrakhan II* case was only decided on January 5, 2010, it is unclear whether the Ninth Circuit may decide to review this case *en banc*. It is likewise unclear whether the State of Washington will seek review by the U.S. Supreme Court should *en banc* review be denied, or should an *en banc* panel uphold the current ruling. What is certain, however, is that there is a live possibility of further federal judicial review, including Supreme Court review, of this case and/or issue. *As a result, it would be highly premature for the Commission to act on this petition at this time, given that Petitioners' domestic remedies have clearly not been exhausted.*

Principles Underlying the Exhaustion Doctrine. It is beyond peradventure, therefore, that under the Commission's exhaustion requirement, this petition must be deemed inadmissible. The United States has an independent and impartial judicial system, based firmly on the rule of law, which is available to address the questions raised in the petition. Under the Commission's own procedures, the matter must be dismissed so that available domestic remedies may be pursued.

As the Commission is aware, the requirement of exhaustion of local remedies stems from customary international law, as a means of respecting State sovereignty. It ensures that the State where a human rights violation has allegedly occurred should have the opportunity to redress the allegation by its own means within the framework of its own domestic legal system. See Interhandel Case (Switzerland v. United States) [1959] I.C.J. 6, 26-27; Velasquez Rodriguez case, Judgment of July 29, 1988 (Inter-American Court). It is a sovereign right of a State conducting judicial proceedings to have its national system first be given the opportunity to determine the merits of a claim and decide the appropriate remedy.

> "As has been seen from ... the Interhandel judgment, the International Court of Justice qualifies the local remedies rule as a well established rule of international customary law. This represents a precedential recognition on the part of the ICJ of the local remedies rule as a custom covered by article 38(i)(b) of the Court's statute and is, in fact, the unanimous view of all writers and of many judgments and opinions given in the past four hundred years. So often has this statement been repeated over and over again that it has rightly been said about the duty to

exhaust local remedies, 'This requirement is both ancient and commonplace. It is so fundamental ... .'"

Haesler, The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals, pp. 18-19 (1968), quoting McNair, International Law Opinions, Vol. II, p. 312.

Further, as the Inter-American Court explained in Velasquez Rodriguez: "The rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction." Id. To paraphrase the Inter-American Court, international law looks to national law and national tribunals in the first instance. International tribunals were not intended to replace national adjudication.

The exhaustion requirement essentially demands that the claimant present his or her claims to an appropriate domestic court, support the claims with all relevant evidence *and legal arguments*, and take advantage of all procedures for appeal. Restatement of Foreign Relations Law (Third) section 713, reporter's note 5, and citations contained therein (emphasis added). Here, it was and is incumbent upon the petitioners to raise a central legal argument, based on federal law, in support of their claim in domestic court before bringing the claim to an international forum. Otherwise the claim is inadmissible in the international forum. *Petitioners' decision to limit their claim to state law in state court, and not raise any argument regarding the core right to vote under federal law, overlooks a fundamental and basic legal protection in the United States and does not and cannot fulfill the exhaustion requirement.* Starting with its seminal decision in 2003, the United States Court of Appeals for the Ninth Circuit has affirmed the merits of a claim seeking to invalidate a state statute disenfranchising felons on racial discrimination grounds. *The Ninth Circuit held the statute invalid under federal law. A federal court proceeding in the jurisdiction of the Court of Appeals for the Third Circuit, examining the New Jersey statute under federal law, was and may be an available and appropriate domestic forum in the United States which the Petitioners were required to exhaust, to submit their complaint and seek a remedy prior to invoking an international jurisdiction.*

Whether the petitioners will be able to present a meritorious claim within the Third Circuit, and if so, the precise relief to be allowed, has not yet been determined by the courts of the United States. In accordance with the IACHR's

procedures governing petitions, domestic processes must be afforded the opportunity to follow through the course of proceedings and decide the merits of claims and any appropriate and specific remedies.

III. CONCLUSION

For the above stated reasons, the United States respectfully requests that the Commission declare Petition No. P-990-06 inadmissible for failure to exhaust domestic remedies. Petitioners chose to ignore federal court and federal law in bringing a domestic claim. The existence of a significant federal circuit split on the question of a potential federal remedy under the Voting Rights Act illustrates the availability and viability of domestic forums. It was therefore incumbent on Petitioners to raise a federal law issue alongside their state law claims in the New Jersey courts, and in particular within the jurisdiction of the U.S. Third Circuit Court of Appeals, which has yet to rule on this matter. *Furthermore, given the real possibility of U.S. Supreme Court review to resolve the circuit split and to rule on the precise issue brought by Petitioners before the Commission, it would be premature for the Commission to act at this time.* The petition is, respectfully, inadmissible for failure to exhaust timely and available domestic remedies.