

# 01-7260

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IN THE  
United States Court of Appeals  
FOR THE SECOND CIRCUIT

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JALIL ABDUL MUNTAQIM, a/k/a ANTHONY BOTTOM,  
*Plaintiff — Appellant,*

— v. —

PHILLIP COOMBE, ANTHONY ANNUCCI, LOUIS F. MANN,  
*Defendants — Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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**BRIEF OF THE CENTER FOR CONSTITUTIONAL RIGHTS, THE NATIONAL  
ALLIANCE OF FORMERLY INCARCERATED PERSONS, THE OSBORNE  
ASSOCIATION, THE COALITION FOR PAROLE RESTORATION, VOICE OF  
THE EX-OFFENDER, THE 11<sup>TH</sup> EPISCOPAL DISTRICT LAY  
ORGANIZATION, THE ORDINARY PEOPLE SOCIETY, THE CENTER FOR  
LAW AND JUSTICE, AND THE MALCOLM X CENTER, AS *AMICI CURIAE*  
SUPPORTING PLAINTIFF-APPELLANT JALIL ABDUL MUNTAQIM**

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## **CORPORATE DISCLOSURE STATEMENT**

**Pursuant to FRAP 26.1, *Amici Curiae* hereby certify that they have no parents corporations and that they have not issued and shares of stock to any publicly held company.**

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## STATEMENTS OF INTEREST OF AMICI CURIAE

The Center for Constitutional Rights (“CCR”) is a non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. CCR has historically been concerned about the right to vote, and has litigated voting rights cases in Mississippi, *Thornton v. City of Greenville*, *Browder v. Westbrook*, and *In re Malone*; in Tennessee, *Muhammad v. City of Memphis* and *Cousins v. Hamilton County*; and New York, *Goosby v. Town Board of Hempstead*, and *France v. Pataki*.

The National Alliance of Formerly Incarcerated Persons (NAFIP) is an alliance of individuals and organizations that have been adversely impacted by the felon disenfranchisement phenomenon in this country. NAFIP represents the fundamental principles of democracy and the historical trend towards total inclusion of all citizens in the political life of the country. NAFIP also represents the overwhelmingly Black and Latino communities from which most of the disenfranchised citizens come. The voting strength of these impacted communities, which are currently reeling from excessive unemployment, substandard education, housing, healthcare, is weakened by the disenfranchisement of each voter whose political voice is silenced following a felony conviction. So, too, is the ability of these communities to change their predicament through the electoral process.

The Osborne Association, Inc. (“Osborne”) is a nonprofit criminal justice organization located in New York that for over 75 years has provided services to people in prison, formerly incarcerated people, and their families. Osborne offers opportunities for individuals who have been in conflict with the law through programs that serve the

community by reducing crime and its human and economic costs. Osborne is one of the coalition members of the NYC Unlock the Block: Restore the Vote campaign and is interested in felony disenfranchisement because it greatly impacts people Osborne provide services to, their communities, society as a whole, and our ideas and ideals about democracy. Osborne believes that restoring the right to vote to people who have been released from prison signals, in part, that their debt to society has been paid and that society is committed to reintegrating them back into society by restoring this right, a right that has nothing to do with the crime(s) they have been convicted. In short, Osborne believes the right to vote is so fundamental to our society that it should not be denied to any citizen.

The Coalition for Parole Restoration (“CPR”) is a grassroots nonprofit organization located in New York that was created to inform, organize and bring to life all aspects of the prison-industrial complex as it affects our communities, families and people in prison. CPR is one of the coalition members of the NYC Unlock the Block: Restore the Vote campaign and is interested in felon disenfranchisement because it is one aspect of the prison-industrial complex that contributes to the disempowerment of communities of color. CPR believes that all forms of felon disenfranchisement should be done away with and that the right to vote is so fundamental to our society's democracy that to deny it to any American citizen is un-American.

Voice of the Ex-Offender (hereinafter V.O.T.E.) is a voting rights project targeting ex-felons in Louisiana. V.O.T.E. promotes the ballot box as a tool to empower ex-felons in their successful re-entry into the community. V.O.T.E. illustrates the impact of positive ex-felon participation, the positive connection between voting rights and

prisoner re-entry, and the related impact in the voting participation among lower income minority communities. V.O.T. E strives to influence systemic reform in other states, increase access to voter information and registration to citizens with former felony convictions, empower and educate citizens with former felony convictions to register and vote, and to track voting impact in precincts with ex-felon presence to determine secondary impact on minority voting.

The 11th Episcopal District Lay Organization is the teaching and training unit of the 11th Episcopal District - African Methodist Episcopal Church, one of the 20 Episcopal organizations worldwide. The organization not only deals with the history, discipline, and doctrine of the church, but with social issues of all people, regardless of race, color, creed or national origin, including voting education, registration, and voters' rights.

The Ordinary People Society (T.O.P.S.) is a nonprofit, faith-based organization that offers hope, without regard to race sex, creed, color or social status, to individuals and their families who suffer the effects of drug addiction, incarceration, homelessness, unemployment, hunger and illness, through comprehensive faith-based programs that provide a continuum of unconditional acceptance and care. T.O.P.S. provides rehabilitation to the repeat offenders while creating a program that target the youths before they reach the criminal justice system. The dispute before this Court is rooted in a long history of struggle against exclusion and in favor of the truest principle of democracy: universal enfranchisement. Nearly 4.7 million Americans nationwide are locked out of the electoral process because of various state felon disfranchisement statutes, and we, as formerly incarcerated persons and their family members, community-

based organizations, and advocates, are before this Court to challenge the existence of these anti-democratic laws.

The Center for Law and Justice, Inc., is a private, non-profit organization located in Albany, New York. The mission of the Center for Law and Justice is to promote the empowerment of individuals and communities to change social policy to insure fair and just criminal and juvenile justice systems. The Center accomplishes this mission by providing criminal justice and legal rights education, individual and group advocacy, and community organization, support and planning.

The Malcolm X center is located in Birmingham, Alabama, and is a member of the Alabama Alliance to Restore the Vote. After the passing of a bill in Alabama, the Malcolm X center worked to register ex-felons to vote for the first time. Many Center members have incarcerated relatives.

### **STATEMENT OF FACTS**

The appellant, an African-American serving a life sentence in the custody of the New York State Department of Correctional Services, challenges the New York State felon disenfranchisement statute, N.Y. ELEC. LAW § 5-106 (McKinney 2004), as a violation of the Voting Rights Act of 1965, 42 U.S.C. § 1973 and the State and Federal Constitution.

### **INTRODUCTION**

The Voting Rights Act of 1965, as amended, provides, in relevant part, that “no voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State... in a manner which results in a denial or abridgement of the right of any citizen... to vote on account of race or color.” 42 U.S.C. § 1973(a).

Amici submit that the New York State felon disenfranchisement law results in a disproportionate denial of the right to vote to incarcerated persons and parolees from African American and Hispanic communities, as well as an abridgement of the right to vote for these communities as a whole.

## **ARGUMENT**

### **I. FELONY DISENFRANCHISEMENT DISPROPORTIONATELY AFFECTS AFRICAN AMERICAN AND HISPANIC VOTERS**

The gross disparities at which African American and Hispanics are disenfranchised effectively depreciates the ability of these communities to participate in the political process. While African-Americans and Hispanics account for less than 30% of the adult population of New York State<sup>1</sup>, they account for nearly 80% of the state's prison population.<sup>2</sup> Of the 3,953,198 voting-age African-Americans and Latinos in New York State, 36,380 are in prison, or almost 1% of the voting-age population of these communities.<sup>3</sup> Social science estimates put the New York state parole population at roughly 57,850, more than 75% (46,638) of which are African American.<sup>4</sup> This leaves a total of at least 80,000 African Americans and Hispanics in prison or on parole; over 2% of the voting-age population of these communities is disenfranchised by Section 5-106.

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<sup>1</sup> See U.S. Census Bureau, Profile of General Demographic Characteristics: 2000, available at <http://www.census.gov/census2000/states/ny.html> (hereinafter "2000 Census"). The total population of New York State in the 2000 Census was 18,976,457, of which 3,014,385 (15.9%) were African-American and 2,867,583 (15.1%) were Hispanic.

<sup>2</sup> State of New York Department of Correctional Services, *HUB System: Profile of Inmate Population Under Custody on January 1, 2004* (2004) (hereinafter "Inmate Population"), at 7.

<sup>3</sup> *2002 Census*, supra note 1, and *Inmate Population*, supra note 2, at 7.

<sup>4</sup> Christopher Uggen and Jeff Manza, *Democratic Contradiction? Political Consequences of Felon Disenfranchisement in the United States*, 67 *Am. Sociological Review*, No. 6, p. 797-798 (2004) (hereinafter "Uggen & Manza, *Democratic Contradiction?*").

The authors did not separate out the Hispanic parole population, but even an extremely conservative estimate of 5% of the parole population (less than 2,900 people) being Hispanic would make the combined parolee population percentage of African-American and Hispanics at least as disparate as the New York State prison population.

The number of people impacted by Section 5-106 has been growing rapidly and steadily over the last few decades. From the 1920s to the 1970s the number of people incarcerated in the United States held at approximately 110 prisoners per 100,000 people.<sup>5</sup> By the mid-1970s an increasing emphasis on punitive criminal justice policies saw a marked increase in the prison population.<sup>6</sup> Those policies have continued to the present, and the prison population has continued to grow.<sup>7</sup> Today there are approximately 334 prisoners per 100,000 people in New York State – a four-fold increase from the mid-1970s.<sup>8</sup> The foregoing demonstrates a significant disparate impact on African-American and Latino communities.

**II. SECTION 5-106 ALIENATES THE DISENFRANCHISED INDIVIDUAL FROM THE COMMUNITY AND FURTHER COMPLICATES REHABILITATION AND REINTEGRATION.**

The political and social consequences for the disenfranchised individual are substantial, serving to further alienate the individual from civil society at the expense of democratic values and the overriding goal of rehabilitation of an offender. As one prisoner explained to social scientist Christopher Uggen:

I have no right to vote on the school referendums that will affect my children. I have no right to vote on how my taxes [are] going to be spent or used, which I have to pay whether I'm a felon or not, you know? So basically I've lost all voice or control over my government... I'm not saying give back gun rights or anything like that to people that definitely don't deserve them. But giving back voting rights is another way to make a person feel part of that community. How can you feel that you're giving back to a community that you're a part of when you're exiled from it by not being able to vote and have a voice in it?<sup>9</sup>

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<sup>5</sup> *Id.* at 781.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> 2002 Census, *supra* note 1, and *Inmate Population*, *supra* note 2, at 7.

<sup>9</sup> Christopher Uggen & Jeff Manza, *Lost Voices: The Civic and Political Views of Disenfranchised Felons*, in *Imprisoning America: The Social Effects of Mass Incarceration*, in CIVIL PENALTIES, SOCIAL CONSEQUENCES 183-84 (Mary Pattillo et al. eds., 2004).

Beyond the obvious political power it conveys, the franchise has powerful concomitant benefits for the individual. The great democratic theorist John Stuart Mill skillfully summed up the individual importance of an engagement in civics when he wrote:

To take an active interest in politics is, in modern times, the first thing which elevates the mind to large interests and contemplations; the first step out of the narrow bounds of individual and family selfishness, the first opening in the contracted round of daily occupations... The possession and the exercise of political, and among others of electoral, rights, is one of the chief instruments both of moral and of intellectual training for the popular mind.<sup>10</sup>

Disenfranchisement, however, strips felons and parolees of the most fundamental opportunity of political expression, further inhibiting their rehabilitation and re-integration into society. The American Bar Association and numerous social scientists and criminologists have voiced their concern that not only is disenfranchisement not rehabilitative, but that it operates as a barrier between the offender and society and counteracts the rehabilitative goal of preparing the offender to re-enter society.<sup>11</sup>

Other social scientists have found disenfranchisement further aggravates the political engagement problem by deterring other means of political expression.

Losing the right to vote does not prevent persons with a felony conviction from participating in other forms of civic engagement [including campaigning for issues or candidates, volunteer work for a political organizations, leafleting, organizing or participating in a protest, visiting with a policymakers, and writing a letters to the editor]..., but it appears to have this effect anyway, presumably

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<sup>10</sup> John Stuart Mill, *Thoughts on Parliamentary Reform* (1859), in *ESSAYS ON POLITICS AND SOCIETY* 322-23 (J. M. Robson ed. 1977).

<sup>11</sup> See *ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, at R-7, available at <http://www.abanet.org/leadership/2003/journal/101a.pdf>; See also Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15-16 (Marc Mauer & Meda Chesey-Lind eds., 2002). (“It is hard to discern rehabilitative goals in these punishments. In fact they place barriers to successful rehabilitation and reintegration.”); Howard Itzkowitz & Lauren Oldak, *Note: Restoring the Ex-Offender’s Right To Vote: Background and Developments*, 11 *AM. CRIM. L. REV.* 721, 732 (1973) (“The offender finds himself released from prison, ready to start life anew and yet at election time still subject to the humiliating implications of disenfranchisement, a factor that may lead to recidivism.”).

through the political alienation and distrust that it fosters in disenfranchised individuals.”<sup>12</sup>

In fact, some social scientists have postulated that “[d]enying voting rights to . . . felons living in their communities on probation and parole, undermines their capacity to connect with the political system and may thereby increase their risk of recidivism.”<sup>13</sup> A recent empirical study shows not only a relationship between voting and reduced recidivism among (unincarcerated) felons, but also a strong correlation among felons between voting rights and continued education, another factor strongly tied to rehabilitation and reducing recidivism.<sup>14</sup> Reducing recidivism among incarcerated persons, while not given much attention in the overall public discussion on recidivism, is also an important rehabilitative goal, as well as being essential to maintaining order in prison. The link between voting rights and reduced recidivism would logically apply to incarcerated persons as well as probationers and parolees.

While there are many restrictions on the fundamental rights which could aid in rehabilitation for incarcerated person, they generally reflect very legitimate penological interests. The right to assemble, the right to travel, and the right to privacy cannot logically be respected while still protecting society. However, incarcerated individuals retain fundamental rights that do not implicate penological interests, including the right to petition, access the courts, own property, and marry and divorce.<sup>15</sup>

The Supreme Court of Canada noted this anomaly in *Sauvé v. Canada*, [2002] 3. S.C.R. 519, holding that Canada could not restrict the right to vote to incarcerated persons:

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<sup>12</sup> Matthew Cardinale, *Triple-Decker Disenfranchisement: First-Person Accounts of Losing the Right to Vote Among Poor, Homeless Americans with a Felony Conviction*, at 5, available at <http://www.sentencingproject.org/pdfs/mcardinale.pdf>.

<sup>13</sup> Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSP. ON POL., No. 3 (2004), 491, 502.

<sup>14</sup> Jeff Manza & Christopher Uggen, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample* (2004), 36 COLUM. HUMAN RIGHTS L. REV. (forthcoming ) (manuscript at 13-16); available at: [http://www.soc.umn.edu/%7Euggen/Uggen\\_Manza\\_04\\_CHRLR2.pdf](http://www.soc.umn.edu/%7Euggen/Uggen_Manza_04_CHRLR2.pdf).

<sup>15</sup> Marc Mauer, *Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration*, 12 FED. SENTENCING REP., Nos. 1-2 (2000), 248, 250.

[T]he remedy of imprisonment for a term rather than permanent exile implies our acceptance of continued membership in the social order. Certain rights are justifiably limited for penal reasons, including aspects of the right to liberty, security of the person, mobility, and security against search and seizure. But whether a right is justifiably limited cannot be determined by observing that an offender has, by his or her actions, withdrawn from the social compact. Indeed, the right of the state to punish and the obligation of the criminal to accept punishment is tied to society's acceptance of the criminal as a person with rights and responsibilities.

*Id.* at p. 47.

These concerns are even more pronounced for parolees. Once released on parole an individual is again restored those fundamental rights that do not implicate the public safety, with the exception of the right to vote. While courts have recognized that the primary purpose of parole is the rehabilitation of the offender, *see, e.g., Gagnon v. Scarpelli*, 411 U.S. 778, 784-85 (1973), disenfranchisement stifles this objective.

Furthermore, the application of Section 5-106 to parolees and not probationers is arbitrary.<sup>16</sup> Both are under community supervision for the crime they have committed but are now in a stage of rehabilitation. Both may contribute to their families and communities through work, organizing, and lobbying. Both pay taxes. Yet only the probationer has the right to vote. This distinction becomes more problematic when the racial composition of probation and parole is considered. While statistics are not readily available on the racial composition of probation and parole in New York, nationally blacks and Hispanics make up 59% of the parole population but only 42% of the probation population – another indication that Section 5-106 works to the detriment of blacks and Hispanics.<sup>17</sup>

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<sup>16</sup> Parole is the release of a prisoner from imprisonment before the full sentence has been served, usually granted for good behavior on the condition that the parolee regularly report to a supervising official for a specific period. (913). Probation is a court imposed criminal sentence that releases a convicted person into the community instead of sending the criminal to jail or prison, subject to stated conditions. *See* Black's Law Dictionary, 913, 978 (7th ed. 2000).

<sup>17</sup> *See* U.S. D.O.J., *Probation and Parole in the United States, 2003*, and U.S. D.O.J., *Prisoners in 2003*.

### **III. SECTION 5-106 IMPROPERLY CREATES NEGATIVE CONSEQUENCES FOR THE COMMUNITIES THAT ARE DISPROPORTIONATELY IMPACTED BY FELONY DISENFRANCHISEMENT.**

The negative consequences of disenfranchisement upon felons, their families, and their communities, discussed here below, are becoming more acute because of the drastically increased number of felony convictions in New York (and nationally) in recent decades. This problem is exacerbated by the disproportionate number of African Americans and Hispanics convicted of felonies and the evidence that unlawful racial bias has had a direct impact on this disproportionality.<sup>18</sup>

One of the major consequences of felon disenfranchisement is that the political interests of the communities from which disenfranchised individuals come are more easily ignored, resulting in impermissible disproportionate power for all other segments of the population. Surely, public and legal policy should not be based on the maxim “To him who has shall be given, from him who doesn’t have shall be taken.” Yet this is precisely the effect of New York’s felony disenfranchisement law. Professor Debra Parkes, quoting legal scholar John Hart Ely, notes that “we cannot trust the ins to decide who stays out, and it is therefore incumbent on the courts to ensure not only that no one is denied the vote for no reason, but also that when there is a reason (as there will be) it had better be a convincing one.”<sup>19</sup>

The history of voting rights clearly illuminates the wisdom of this statement. As demonstrated by the elimination of barriers to the vote based on class, property, race, sex,

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<sup>18</sup> See, e.g., Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV., No. 2, 152-53 (2004).

<sup>19</sup> Debra Parkes, *Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 71, 94 (2003).

and age, the inexorable movement in democratic societies has been toward universal suffrage. In the United States particularly, the major remaining obstacle, for no sufficient legal or societal reason, is felon disenfranchisement. The result of felon disenfranchisement is that politicians ignore the concerns of African American and Hispanic communities to the extent that they are prohibited from voting:

Currently, there is little need for politicians to pay attention to criminal justice matters beyond being sensitive to their constituents' concerns about controlling the crime that they perceive as increasing. The conditions of prisons and the effect of harsh sentencing laws on prisons rarely figure in their strategic calculus. Prisoners are no politician's constituents. In the current climate, there is little to gain, and much to lose, if a politician is seen as being soft on crime. While extending the franchise to prisoners would not likely alter that equation radically, there is reason to believe that some politicians would take seriously their responsibility to visit their constituents in prison, to educate themselves about the issues that face prisoners, and perhaps to take an interest in less punitive criminal law reform.<sup>20</sup>

This politically biased isolation of felons introduces an impermissible distortion in a vital public policy debate. Because of this, a keenly interested and knowledgeable voice is removed from the discussion on such issues as defining what is criminal, what are proper investigative and prosecutorial standards, criminal court procedures, sentencing policy, prison conditions, alternatives to incarceration, and pre and post-release procedures for inmates, to name a few.

Parkes decisively rebuts the argument that prisoner bias disqualifies them from participation in such a debate.

It might be objected that prisoners have too large a stake in the criminal justice system to be neutral about the issues. However, it is the government that must be neutral about the content of its citizens' votes, not the voters themselves that must be neutral about the issues. Bias does not disqualify people from voting. Indeed voting is precisely about expressing biases, loyalties, commitments, and personal values. Excluding from the electorate those who have felt the sting of the

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<sup>20</sup> *Id.* at 92.

criminal law obviously skews the politics of criminal justice toward one side of the debate.”<sup>21</sup>

The Supreme Court agreed in *Carrington v. Rash*, 380 U.S. 89 (1965), where it struck down a Texas constitutional provision prohibiting military personnel who moved to the state during their tour of duty from voting as violative of the Equal Protection Clause. Rejecting the State’s rationale that the provision was aimed at “immunizing [the local community from] the concentrated balloting of military personnel,” *Id.* at 91, the Court stated that “‘fencing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.” *Id.* at 94 (quoting *Gray v. Sanders*, 372 U.S. 368 (1963)).

Indeed, this impermissible content based fear of allowing felons to vote at least partially explains the persistence of their disenfranchisement. In an extensive study, criminologists Manza and Uggen provided clear indication of the racial, and at times political, bias underlying felony disenfranchisement.

Although felon disenfranchisement laws are facially race-neutral, historical antecedents and contemporary disparities have created the widespread perception that race underlies the practice. The major period of the expansion of these laws occurred after the Civil War, in the context of the implementation of the 14th and 15th Amendments. Many of the state laws adopted during this time appeared to target crimes for which African Americans were especially likely to be convicted. In the South, in particular, felon voting bans must clearly be situated alongside other moves to disenfranchise black voters. The very high proportion of disenfranchised African Americans today potentially provides a red thread back to the origins of the state laws, while also serving as a painful reminder of the incomplete civil rights revolution and lingering race-based political inequalities...

In fact, our event-history analysis of the facts predicting the adoption of restrictive felon disenfranchisement measures by state government between 1850 and 2002 finds that states with larger proportions of nonwhites in their prison populations were more likely to pass restrictive laws, even after statistically controlling for the effects of time, region, economic competition between whites

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<sup>21</sup> *Id.* at 100.

and blacks, partisan control of government, and punitiveness. This research suggests a direct connection between racial politics and felon disenfranchisement, one that drew upon widespread stereotypes about the propensity of African-Americans to commit crimes.... According to our estimates, about 73 percent of the hypothetical felon voters who would have participated in these elections would have selected Democratic candidates.

By removing those with Democratic preferences from the pool of eligible voters, then, we can conclude that felon disenfranchisement has provided a small but clear advantage to Republican candidates in every presidential and senatorial election from 1972 to 2000.<sup>22</sup>

It is unrealistic to believe that states in the North were, or are, free from such bias in many areas, including felon disenfranchisement. In their study on the history of felon disenfranchisement laws nationally, Behren, Manza, and Uggen point out that the strong white backlash during Reconstruction was not limited to the South, and that New York's first felon disenfranchisement law was passed in 1867 –the middle of Reconstruction.<sup>23</sup>

Another manifestation of this bias is the effect of using the Census to distribute various federal assistance funds and to determine redistricting because prisoners are deemed to be residents of the places in which they are incarcerated. As prisons tend to be in rural areas, the effect of this practice is to favor the rural areas to the disadvantage of the heavily minority urban areas from which most prisoners come.<sup>24</sup>

The impact of felony disenfranchisement is not limited to an unjustified under-representation of input on criminal justice issues. As Manza and Uggen have shown, this imbalance has affected national and state elections, the results of which have enormous consequences for felons, their families, and communities for all public issues from foreign affairs, to tax policy, to the size, shape, and content of government programs, etc. While public policy and interpretation of the law can not solely depend on the perceptions of any one group, the fact that African Americans are more likely than whites

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<sup>22</sup> Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSP. ON POL., No. 3 (2004), 492-93, 497.

<sup>23</sup> Angela Behren, Jeff Manza & Christopher Uggen, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC., No. 3 (2003), 560, 565.

<sup>24</sup> This subject is more fully briefed in an amicus submitted herein by National Voting Rights Institute.

to think that the criminal justice system is generally unfair<sup>25</sup> is likely to result in anger, frustration, and reduced respect for authority.

#### **IV. FELONY DISENFRANCHISEMENT LAWS VIOLATE INTERNATIONAL LAW AND DEPART FROM A GROWING CONSENSUS AMONG DEMOCRACIES.**

The right to vote and the affirmative obligation of countries to protect that right is well recognized by international law. The Universal Declaration of Human Rights, the paramount international human rights statement adopted unanimously by the United Nations General Assembly in 1948, provides for universal and equal suffrage.<sup>26</sup> The right to vote is also protected in other treaties and declarations which have been ratified by the United States, such as the International Covenant on Civil and Political Rights<sup>27</sup> and the American Declaration of Human Rights and Duties of Man of the Organization of American States.<sup>28</sup> Moreover, a citizen's right to elect their political representatives is

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<sup>25</sup> Brian Pinaire, Milton Heumann & Laura Bilotta, *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 *FORDHAM URB. L.J.* 1519 (2003).

<sup>26</sup> Article 21 of the Universal Declaration of Human Rights (UDHR) states that, "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." Universal Declaration of Human Rights, art 21 GA Res 217 (III), UN GAOR, 3<sup>rd</sup> Sess., Supp. No. 14, UN Doc. A/810 (1948), available at <http://www.un.org/Overview/rights.html>.

<sup>27</sup> Article 25 of the International Covenant on Civil and Political Rights (ICCPR) provides:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

International Covenant on Civil and Political Rights, art. 25(b), Dec. 16, 1966, 999 U.N.T.S. 171, available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm).

<sup>28</sup> The American Declaration of Human Rights and Duties of Man of the Organization of American States provides that: "Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free." Article 20 of the American Declaration of Human Rights and Duties of Man, May 2, 1948, available at <http://www.cidh.org/Basicos/basic2.htm>.

guaranteed by the constitutions of 108 of 119 electoral democracies surveyed.<sup>29</sup> The right to vote is therefore a universally, internationally, recognized right which must be protected.

Under Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination, which was also ratified by the United States, the parties “undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone” to vote on a non-discriminatory basis.<sup>30</sup> The Convention’s United Nations monitoring body, the Committee on the Elimination of Racial Discrimination, issued Concluding Observations to the United States specifically noting its concern about felony disenfranchisement<sup>31</sup> and recommending that it “take all appropriate measures, including special measures according to article 2, paragraph 2, of the Convention, to ensure the right of everyone, without discrimination as to race, colour, or national or ethnic origin, to the enjoyment of the rights contained in article 5 of the Convention.”<sup>32</sup>

The United States, among democratic nations, is virtually alone in prohibiting incarcerated or formerly incarcerated persons from enfranchisement, and the judiciary has been instrumental in preserving this right worldwide. Indeed, courts in Canada,

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<sup>29</sup> The International Status of the Right to Vote, Alexander Kirshner, Democracy Coalition Project, November 2003, available at <http://www.fairvote.org/righttovote/Kirshner.htm>.

<sup>30</sup> Article 5(c) of the Convention on the Elimination of All Forms of Racial Discrimination, available at <http://www.ohchr.org/english/law/cerd.htm#art5>.

<sup>31</sup> “The Committee is concerned about the political disenfranchisement of a large segment of the ethnic minority population who are denied the right to vote by disenfranchising laws and practices based on the commission of more than a certain number of criminal offences, and also sometimes by preventing them from voting even after the completion of their sentences.” Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America, August 14, 2001, para. 397, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/001961f8a1ae7b29c1256aa9002ae228?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/001961f8a1ae7b29c1256aa9002ae228?Opendocument).

<sup>32</sup> *Id.* at para. 398. Article 2, paragraph 2 requires governments to take “special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.”

Europe, and Israel have recently been active in striking down voting prohibitions for incarcerated persons.

United States courts do not, and should not, interpret the law heedless of the changes in the values of the society from which they are a part. Increasingly the definition of the relevant “society” has been broadened to include persuasive international authorities.

Thus in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the Court noted:

The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.

*Ibid.* at 830-31. *See also Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (“the right petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest ... is somehow more legitimate or urgent”); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (noting the disapproval of the world community of executing ‘mentally retarded’ offender in holding the practice unconstitutional).

In 2002, in *Sauvé v. Canada*, [2002] 3 S.C.R. 519, the Supreme Court of Canada determined that the law denying the vote to incarcerated felons was not a reasonable limit on the right of every citizen to vote, as declared in Canada’s Charter of Rights and Freedoms. *Sauvé*, 3 S.C.R. at 556-57. The Court’s analysis in *Sauvé*, because of the limitation placed upon judicial review in Canada, was similar to an equal protection analysis in the United States. *See* Can. Const. pt. 1 (Canadian Charter of Rights and Freedoms), § 1. The government only has the burden to show that the objective of a challenged statute is valid, and “that it is rationally connected, causes minimal

impairment, and is proportionate to the benefit achieved.” *Sauvé*, 3 S.C.R. at 534-35.

The *Sauvé* court determined that the Government had not met its burden to show a rational connection between disfranchisement of felons and the Government’s “objectives of enhancing respect for the law and ensuring appropriate punishment.” *Ibid.* at 553.

Last spring, the European Court of Human Rights, while giving deference to the “wide margin of appreciation” accorded to contracting states of the Council of Europe “in determining the conditions under which the right to vote was exercised,” determined that the United Kingdom’s blanket disfranchisement of incarcerated felons violated the Convention for the Protection of Human Rights and Fundamental Freedoms. *Hirst v. The United Kingdom*, [2004] ECHR 121 (Eur. Ct. H.R.), at ¶¶ 51-52. That court determined that, while the legislature should be accorded deference to tailor disfranchisement “to particular offences or [to] offences of a particular gravity” or to vest discretion to disfranchise in a sentencing court, “an absolute bar on voting by any serving prisoner in any circumstances [does not] fall[] within an acceptable margin of appreciation.” *Ibid.* at ¶ 51. The court also noted that it was improper for a contracting state to “rely on the margin of appreciation to justify restrictions on the right to vote which have not been the subject of considered debate in the legislature and which derive, essentially, from unquestioning and passive adherence to a historic tradition.” *Ibid.* at ¶ 41. Although specifically addressing the United Kingdom voting restriction, the reasoning of the case

seems to invalidate disenfranchisement of incarcerated persons in all 45 signatories to the European Convention.<sup>33</sup>

The judiciary also took an active role in Israel in refusing to disfranchise Yigal Amir, who assassinated Yitzhak Rabin.<sup>34</sup> The court decided that “disfranchisement would harm not Amir but the state of Israeli democracy itself: when the right to vote is taken away, ‘the base of all fundamental rights is shaken . . . .’”<sup>35</sup>

In short, in examining felon disfranchisement statutes around the world, the judiciary has taken an appropriately vigorous role in assuring that the legislative branch does not arbitrarily infringe the right to vote. As other courts have done internationally, it is the duty of the U.S. courts to protect the rights of individuals against encroachment on their fundamental rights. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (“The province of the court is, solely, to determine the rights of individuals.”).

The United States is the only democratic nation that still “systematically disfranchises large numbers of non-incarcerated felons”<sup>36</sup> and among the few that disenfranchises incarcerated felons.<sup>37</sup> And in the United States, fifteen states and the

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<sup>33</sup> The European Convention on Human Rights of 1950, Nov. 4, 1950, 213 U.N.T.S. 221. The parties to the European Convention are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, San-Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom.

Eighteen of the ratifying countries give prisoners full voting rights, while 13 ban all prisoners from voting. The rest allow some categories of prisoners to vote. *See* Clare Dyer, *Prisoners Must Get Right To Vote*, *Says Court*, THE GUARDIAN (LONDON), March 31, 2004, at 5.

<sup>34</sup> *See* Laleh Ispahani, *Felon Disfranchisement Policies in the United States and Other Democracies*, at 3, available at <http://www.fairelection.us/documents/Prepart42.pdf>.

<sup>35</sup> *Id.* (quoting *Hilla Alrai v. Minister of Interior*, H.C. 2757/96, P.D. 50(2) 18 (Israel 1996)).

<sup>36</sup> Manza & Uggen, *Punishment and Democracy*, *supra* note 13, at 501.

<sup>37</sup> Countries, not all models of democracy, that continue to disenfranchise incarcerated felons include (and are unaffected by the recent E.C.H.R. ruling in *Hirst v. U.K.*) are Argentina, Angola, Bahamas, Barbados, Belarus, Botswana, Brazil, Cape Verde, Comoros, Equatorial Guinea, Egypt, Ecuador, Guatemala, Haiti, Honduras, India, Kazakhstan, Kenya, Madagascar, Malaysia, Micronesia, Moldova, Mongolia,

District of Columbia have ceased the practice of disenfranchising non-incarcerated felons while two allow incarcerated felons to vote.<sup>38</sup> In recognition of the great significance of the right to vote on our cherished principles of self-governance, which we share with other leading democracies, this Court should reinstate the right to vote to incarcerated felons and parolees and the consequent bond with the community that participation in the political process brings.

### CONCLUSION

For the forgoing reasons, *amici* respectfully request that this Court reverse the panel's grant of summary judgment.

Dated: New York, New York  
February 4, 2005

Respectfully Submitted,

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Mozambique, Nigeria, Palestinian Territories, Panama, Peru, St. Lucia, St. Vincent, Samon, Sao Tome, Senegal, Sierra Leone, Venezuela, Vietnam, Uganda, and Uruguay. See Brandon Rottinghaus, *Incarceration and Enfranchisement: International Practices, Impact and Recommendations for Reform*, International Foundation for Elections Systems, June-July 2003, available at: [http://www.ifes.org/research\\_comm/08\\_18\\_03\\_Manatt\\_Brandon\\_Rottinghaus.pdf](http://www.ifes.org/research_comm/08_18_03_Manatt_Brandon_Rottinghaus.pdf).

<sup>38</sup> The Sentencing Project, *Felon Disenfranchisement Laws in the United States*, at 3, available at <http://www.sentencingproject.org/pdfs/1046.pdf>.