

EXHIBIT A

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA
DOCKET NO. 2017-CA-1141

VOICE OF THE EX-OFFENDER, ET AL.,
Plaintiffs-Appellants,
versus
STATE OF LOUISIANA, ET AL.,
Defendants-Appellees

On Civil Appeal from the 19th Judicial Circuit,
Parish of East Baton Rouge, Section 22, State of Louisiana
Docket No. 649587
Honorable Judge Timothy Kelley, Presiding

**AMICI CURIAE BRIEF BY NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC., THE SENTENCING PROJECT, &
SOUTHERN POVERTY LAW CENTER
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

Sherrilyn A. Ifill
President & Director-Counsel
Janai S. Nelson
Samuel Spital
Leah C. Aden*
Counsel of Record
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
40 Rector St., 5th Floor
New York, NY 10006
Tel. (212) 965-2200
Fax. (212) 226-7592
Email: laden@naacpldf.org

Coty R. Montag
Ajmel Quereshi*
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
1444 I Street, NW 10th Floor
Washington, D.C. 20005
Tel. (202) 682-1300
Fax. (202) 682-1312
Email: aquereshi@naacpldf.org

**Motion to enroll pro hac vice pending*
Counsel for Proposed Amici Curiae

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INTEREST OF AMICI CURIAE¹

Amicus, the NAACP Legal Defense and Educational Fund, Inc. (LDF), is a non-profit, non-partisan legal organization founded in 1940, under the leadership of Thurgood Marshall, to achieve racial justice and ensure the full, fair, and free exercise of constitutional and statutory rights for Black Americans and other communities of color. LDF has worked for more than three-quarters of a century to secure, protect, and advance voting rights and combat threats to equal political participation. To this end, LDF has spearheaded litigation, legislation, education, and other advocacy to end felony disenfranchisement. Specifically, LDF has affirmatively litigated cases or served as an amicus party in cases challenging felony disenfranchisement laws in: New York (*Hayden v. Paterson*, 594 F.3d 150 (2d. Cir. 2010)); Washington (*Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (per curiam)); Alabama (*Chapman v. Gooden*, 974 So. 2d 972 (Ala. 2007) and *Glasgow v. Allen*, No. 08-cv-801 (M.D. Ala. 2008)); and Iowa (*Griffin v. Pate*, 884 N.W.2d 182 (Iowa 2016)).

LDF was also a founding member of the Right to Vote Campaign, a national collaborative of organizations challenging felony disenfranchisement laws through

¹ As indicated in Amici's accompanying motion for leave to file this brief, pursuant to Uniform Court of Appeal Rule 2-12.11, Amici affirm that they, in preparing this brief, reviewed the briefs of both parties in this case. Amici have endeavored to address issues raised by them without making redundant arguments, as well as to offer a unique perspective on the issues raised by this case that is not offered in the other parties' respective briefs.

litigation, legislative action, and public education. Additionally, in 2015 and 2016, LDF urged the governors of Maryland and California to change state laws, which they did in conjunction with the states' respective legislatures, to expand the franchise to people with felony convictions.² Over various legislative sessions, LDF also has pushed for the passage of the Democracy Restoration Act—federal legislation that seeks to restore voting rights to previously incarcerated people in federal elections.

Amicus, The Sentencing Project, founded in 1986, works for a fair and effective U.S. criminal justice system by promoting reforms in sentencing policy, addressing unjust racial disparities and practices, and advocating for alternatives to incarceration. Over two decades, The Sentencing Project has produced a series of reports and analyses that serve as the primary source of data on the scale and impact of felony disenfranchisement policies in the United States. The organization has produced policy reports, journal articles, and op-ed commentary that have received national attention. Staff of The Sentencing Project have been invited to testify on felony disenfranchisement before Congress and state legislative committees, and the organization was also a founding member of the national Right to Vote campaign.

² Letter from Sherrilyn A. Ifill, Pres. and Director-Counsel, LDF, to Gov. Larry Hogan of Md., NAACP LDF (Apr. 15, 2015), <http://bit.ly/2iI1Bja>; Letter from Leah C. Aden, Senior Counsel, LDF, to Hon. Edmund G. Brown, Jr., Gov. of Cal., NAACP LDF (Aug. 31, 2016), <http://bit.ly/2h6NhOB>.

Amicus, Southern Poverty Law Center (SPLC), is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. Since its founding in 1971, the SPLC has won numerous landmark legal victories on behalf of the exploited, the powerless, and the forgotten. In *Southern Christian Leadership Conference of Alabama v. Sessions*, 785 F. Supp 1469 (M.D. Ala. 1992), *aff'd*, 56 F.3d 1281 (11th Cir. 1995), the SPLC challenged Alabama's at-large election system, alleging that it was racially inspired, racially discriminatory, and that it denied racial minorities the opportunity to elect judicial candidates of their choice. More recently, SPLC joined the Fair Elections Legal Network in a suit against the State of Louisiana to enjoin enforcement of a statute that discriminated against naturalized citizens by subjecting them to heightened voter registration requirements. *VAYLA New Orleans v. Schedler*, 3:16-cv-00305 (M.D. La. May 4, 2016). Less than a month after the suit was filed, Governor Edwards repealed the law.

SPLC's Criminal Justice Reform Practice Group is dedicated to reversing mass incarceration and its devastating impact on individuals, families, and communities through litigation and legislative advocacy. SPLC is a founding member of Louisianans for Prison Alternatives, a statewide coalition that works to reform sentencing practices, increase alternatives to incarceration, and eliminate racial disparities in Louisiana's criminal justice system.

Given Amici’s extensive experience advocating for fair and equal political participation, including by challenging felony disenfranchisement laws, Amici submit this brief to: (1) provide historical context for the racial discrimination inherent in felony disfranchisement laws, including Louisiana’s;³ and (2) explain the present-day impact of such laws, including the law at issue here, on Louisiana, including on the Black community in the state.⁴

SUMMARY OF ARGUMENT

The right to vote is “a fundamental political right . . . preservative of all rights,”⁵ the “essence of a democratic society,”⁶ and one of the “defining elements of citizenship.”⁷ Indeed, “[o]ther rights, even the most basic, are illusory if the right

³ See, e.g., *United States v. Louisiana*, 225 F. Supp. 353, 362-381, 391-92 (E.D. La. 1963) (“determin[ing] the true reason for the interpretation test in its historical setting” before enjoining that race-neutral law as unconstitutional in purpose, operation, and effects), aff’d 380 U.S. 145 (1965).

⁴ Contrary to the position of Amicus Attorney General Landry, this Court may appropriately consider the important policy considerations presented by this case. Cf. Amicus Br. at 8. As this Court and the U.S. Supreme Court have acknowledged, such considerations are relevant in a variety of contexts. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (considering the policy implications of *de jure* segregation on public school students); *Bell v. Maryland*, 378 U.S. 226, 233-35 (1964) (explaining that relevant policy considerations weighed against upholding the convictions of 12 Black Americans who staged a “sit-in” at a restaurant that refused to serve them); *Charming Charlie, Inc. v. Perkins Rowe Assocs.*, L.L.C., 11-2254, p. 5-6 (La. App. 1 Cir. 7/10/12); 97 So. 3d 595, 598 (noting that policy considerations are relevant when determining whether to pierce the veil of a corporation); *In re Katrina Canal Breaches Litig.*, 10-1823, p. 7-8 (La. 5/10/11); 63 So. 3d 955, 960-61 (weighing public policy effects when deciding whether rights arising from a contract are assignable).

⁵ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

⁶ *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

⁷ See Judith N. Shklar, American Citizenship: The Quest for Inclusion 25-62 (Harv. U. Press 1991) (discussing how the historical struggle for citizenship in the United States has transformed voting into an affirmation of citizenship).

to vote is undermined.”⁸ Louisiana, in principle, agrees.⁹

That said, the political franchise has never been fully extended to *all* adults in this country. For far too long, only propertied white men in Louisiana and elsewhere were allowed to vote.¹⁰ However, as the franchise expanded to include individuals who are racial minorities and women, legislatures adopted purportedly race-neutral felony disenfranchisement laws as a powerful and discriminatory formal barrier to ballot access and the equal opportunity to elect one’s candidates of choice and participate equally in the political process.¹¹ After the Civil War, felony disenfranchisement laws were explicitly passed to weaken Black voting strength.¹² The successors of those laws remain on the books in Louisiana and elsewhere.¹³

⁸ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

⁹ *Adkins v. Huckabee*, 99-3605. p. 7 (La. 2/25/00); 755 So. 2d 206, 211 (The right to vote is fundamental to Louisiana citizens.); *see also Denham Springs Econ. Dev. Dist. v. All Taxpayers, Prop. Owners*, 04-1674 p. 14 (La. 2/4/05); 894 So. 2d 325, 335 (“[The right to vote] is paramount to our democratic process and attempts to circumvent that process must be curtailed.”). Indeed, as Appellants make clear, “Louisiana’s unique constitutional language confers stronger protection to the right to vote than its federal counterpart.” Appellants’ Reply Br. at 14.

¹⁰ Shklar, *supra* note 7 at 25-62.

¹¹ *Id.*; *see also Shaw v. Reno*, 509 U.S. 630, 640 (1993) (acknowledging that “[o]stensibly race-neutral devices such as literacy tests with ‘grandfather’ clauses and ‘good character’ provisos were devised to deprive black voters of the franchise”); *Lane v. Wilson*, 307 U.S. 268 (1939) (the U.S. Constitution “nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by [racial minorities] although the abstract right to vote may remain unrestricted as to race”); *Louisiana*, 225 F. Supp. at 355-56 (following the Supreme Court’s “demolishment of the white primary,” identifying the race-neutral interpretation test as a “sophisticated scheme to disfranchise [Black people]” and finding it racially discriminatory in purpose, operation, and effect).

¹² Pippa Holloway, *Living in Infamy: Felon Disenfranchisement and the History of American Citizenship* 3 (Oxford U. Press 2013).

¹³ Angela Behrens, Christopher Uggen, & Jeff Manza, *Ballot Manipulation and the “Menace of Negro Domination”: Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 Am. J. of Soc. 559, 564 (2003).

Today, most states, save for a very few, have abandoned permanent disenfranchisement for felony offenses and, instead, restore voting rights to individuals who have completed their sentences.¹⁴ Other states restore voting rights to individuals once they have completed incarceration. At issue in this lawsuit is Louisiana's policy of denying voting rights to more than 71,000 of its citizens, who are under community supervision, meaning on probation and parole, following a felony conviction.¹⁵ It is unsurprising that Louisiana's policy of barring people on probation and parole from voting has a drastic and significant impact on the state's citizenry. For almost two decades, Louisiana has been the top state incarcerator in our country; it imprisons a greater share of its citizens than any other state. In addition to having the country's highest incarceration rate, Louisiana's rate of correctional supervision (probation and parole) is 11 percent higher than the national average of the states.

Compounding matters, the state's felony disenfranchisement law disproportionately disenfranchises Black Louisianans. Although Black people account for 32 percent of the state population, they make up 63 percent of individuals who have lost voting rights because of a felony conviction. Black individuals also

¹⁴ *Felony Disenfranchisement: A Primer*, Sentencing Project (2016), at 1, <http://bit.ly/22i67i4>; see also *Criminal Disenfranchisement Laws Across the United States*, Brennan Center for Justice (last updated June 5, 2017), <http://bit.ly/2iTDS5tj>.

¹⁵ Appellants' Opening Br. at 7, 37; see also *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement*, Sentencing Project (2016) at 15-16, <http://bit.ly/2xLSS05>.

are disproportionately impacted among those disenfranchised while on probation and parole. This disparity is not happenstance, but is emblematic of disparities at every level of the Louisiana Criminal Justice System, from arrest to incarceration. Disparities persist even after taking differential involvement in crime for certain offenses into account. The racial disparities produced by the law's intersection with the state's criminal justice policies and practices conflict with ample evidence that demonstrates that the expansion of voting rights leads to inclusive, safer communities and has widespread public support.

For these and other reasons, this Court should restore the voting rights of the thousands of Louisianans with felony convictions who are on probation and parole.

ARGUMENT

I. FELONY DISENFRANCHISEMENT LAWS, INCLUDING LOUISIANA'S, ARE INCONSISTENT WITH THE FUNDAMENTAL PRINCIPLE OF AN INCLUSIVE SOCIETY.

A. Louisiana's Felony Disenfranchisement Law Is Rooted in Racial Discrimination.

Although criminal disenfranchisement in the United States dates back to Colonial America,¹⁶ most of the strictest felony disenfranchisement laws were adopted in the late 19th century to bar formerly enslaved Black people from exercising their right to vote.¹⁷ After the Civil War, Reconstruction statutes and the Fourteenth and Fifteenth Amendments to the U.S. Constitution eliminated explicit racial restrictions on voting, formally granting suffrage to large, and sometimes majority-Black communities in Southern states.¹⁸ To secure and maintain their power, white elites revised their felony disenfranchisement regimes, alongside other voter qualifications such as literacy tests, poll taxes, and lengthy residency

¹⁶ See generally Shadman Zaman, *Violence and Exclusion: Felon Disenfranchisement as a Badge of Slavery*, 46 Colum. Hum. Rts. L. Rev. 233, 262-74 (2015) (tracing the historical roots of disenfranchisement from Ancient Greece to Colonial America to Reconstruction); see also Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* 53-54 (Oxford U. Press 2006) (detailing pre-Civil War disenfranchisement laws designed to exclude “undesirables” from participating in the political process).

¹⁷ See Zaman, *supra* note 16 at 272 (discussing the rise of disenfranchisement laws during Reconstruction and the racially discriminatory motive for these laws); see generally *Free the Vote: Unlocking Democracy in the Cells and on the Streets*, NAACP LDF (2016), <http://bit.ly/2hRgV5U>.

¹⁸ Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 92 (Basic Books 2000); Francis A. Walker, *Report of the Superintendent of the Ninth Census* (1872), at xvii, <http://bit.ly/2z47USD> (showing that Black Americans were a majority of the population in Louisiana, Mississippi, and South Carolina).

requirements—now rendered illegal—as a means of excluding these significant populations of Black Americans from the franchise.¹⁹

The history of felony disenfranchisement in Louisiana took a similar path. The precedent began prior to the Civil War, when white men—the only eligible voters—were barred from voting if they committed one of four felonies, all of which actually related to the integrity of elections.²⁰ However, when the U.S. Constitution extended the right to vote to Black men after the war, Louisiana expanded its practice of felony disenfranchisement. The 1898 Louisiana Constitution disenfranchised *anyone* who committed *any* felony.²¹ The same practice continued under Louisiana’s 1921 Constitution.²² As described below, political leaders in Louisiana expanded the scope of felony disenfranchisement laws to maintain wealthy white power and control and reduce the political power of Black Americans and lower-class white individuals.²³ Whether explicit or implicit, as detailed below, the racial animus underlying Louisiana’s disenfranchisement law, like other disenfranchisement laws, was clear.

¹⁹ Keyssar, *supra* note 18 at 111–12.

²⁰ Appellants’ Opening Br. at 5-6, n.1; *see also* Appellants’ Reply Br. at 15 n.11 (citing La. Const. art. VI, § 4 (1812)).

²¹ Appellants’ Opening Br. at 5-6, n.1 (emphasis added) (citing La. Const. art. VI, § 4 (1812)).

²² *Id.* at 6 (citing La. Const. art. VIII, §6 (1921)).

²³ Holloway, *supra* note 12 at 92-93.

1. Explicit Racial Discrimination Motivated the Adoption of Louisiana's and Other States' Criminal Disenfranchisement Laws.

Explicit racial bias motivated many states' felony disenfranchisement laws.

The president of the 1901 Alabama constitutional convention proclaimed that the convention's goal, in light of the Fourteenth and Fifteenth Amendments, was "within the limits imposed by the Federal Constitution, to establish white supremacy in this State" and "if we would have white supremacy, we must establish it by law – not by force or fraud."²⁴ The convention significantly expanded the list of disenfranchising crimes in that state to "any crime involving moral turpitude," among others.²⁵ When, almost a century later, the U.S. Supreme Court declared Alabama's expansive disenfranchisement law unconstitutional, Alabama did not deny the racial intent of the law, arguing only that it was not unconstitutional because "the real purpose . . . was to disenfranchise poor whites as well as blacks."²⁶

Louisiana was just one of several states that followed a similar racially discriminatory stratagem in passing its felony disenfranchisement law.²⁷ "In the eighties and until 1898, [Black people] in Louisiana continued to vote and to have

²⁴ 1 Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901 at 8-9 (1940), as quoted in *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) & *Underwood v. Hunter*, 730 F.2d 614, 619 (11th Cir. 1984).

²⁵ *Hunter*, 471 U.S. at 226.

²⁶ *Id.* at 230.

²⁷ Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 Yale L.J. 537, 538 (1993).

their vote solicited by all parties. This is not surprising. In 1888[,] there were 127,923 [Black] voters and 126,884 white voters on the registration rolls in Louisiana; the population of the state was about fifty per cent [Black].”²⁸ The 1896 election

was the turning point that led directly to the disfranchisement of [Black people] in Louisiana. . . . It was a bitterly fought election. The main issue . . . was the problem of [Black] suffrage. Again[,] the [Black] vote was decisive in many parishes. Murphy J. Foster who ran on a ‘white supremacy’ platform, had his heaviest majority in parishes where the [Black] registration was the heaviest.²⁹

Promptly after Governor Foster prevailed, he requested that the Legislature call a constitutional convention.³⁰ Judge Thomas J. Semmes, Chairman of the Judiciary Committee of the Convention and a former president of the American Bar Association, described the purpose of the Convention: “We (meet) here to establish the supremacy of the white race, and the white race constitutes the Democratic party of this State.”³¹ The Convention of 1898 “interpreted its mandate from the ‘people’ to be to disfranchise as many [Black people] and as few whites as possible.”³² At the 1898 Constitutional Convention, delegates took direct aim at Black voters,

²⁸ *Louisiana*, 225 F. Supp. at 367-70.

²⁹ *Id.* at 369.

³⁰ *Id.* at 371.

³¹ *Id.*

³² *Id.*

enacting several provisions targeting Black voters, of which a policy of felony disenfranchisement law was one. In addition to a felony disenfranchisement law, Louisiana adopted the now illegal grandfather clause, as well as educational and property requirements.³³ After the Convention, Governor Foster stated:

*The white supremacy for which we have so long struggled at the cost of so much precious blood and treasure, is now crystallized into the Constitution as a fundamental part and parcel of that organic instrument, and that, too, by no subterfuge or other evasions. With this great principle thus firmly imbedded in the Constitution, and honestly enforced, there need be no longer any fear as to the honesty and purity of our future elections.*³⁴

To be sure, this sentiment was not limited to Deep South states like Louisiana, Alabama, or Mississippi: for example, during the 1821 New York constitutional convention, which established a property requirement for Black Americans, but not white Americans, voters expressly provided for disenfranchisement after conviction for “infamous crimes,” one delegate expressed his opposition to Black suffrage as “derived not from the distinction of colour but resorted to as a rule of designation

³³ *Louisiana*, 225 F. Supp. at 373.

³⁴ *Id.* at 374 (quoting La. Senate J. 1898, 33-35) (emphasis added). As a federal court has recognized, following the 1898 Convention, “[w]e are handicapped in studying the legislative history of the Constitution of 1921 because, at the request of . . . the former Governor . . . the Committee [on Suffrage and Elections] met in secrecy and no minutes were kept of any discussion or debate.” *Louisiana*, 225 F. Supp. 353 at 375-76. Notwithstanding, newspaper accounts confirm that disenfranchising Black Louisianans remained a central purpose of that Convention. *Id.* at 376.

between those who understand the worth of the privilege and those who are degraded, dependent and unfit to exercise it.”³⁵

During the decades-long Jim Crow era, many states, including Louisiana, manipulated the categories of disenfranchising crimes with a purpose of maximizing the racially disparate impact of their felony disenfranchisement laws.³⁶ These changes were based on assumptions about the kinds of offenses that Black Americans, disproportionately poor, were “more [likely]” to commit.³⁷ For example, in Kentucky, when the legislature recategorized poultry theft as a felony in 1904, newspapers declared that “there is no longer any necessity for imposing an educational qualification to deprive the negro of the right of suffrage.”³⁸ In its expansive and explicitly racist disenfranchisement scheme, Alabama included various minor non-felony offenses such as presenting a worthless check and petty larceny, but excluded more serious non-felony offenses such as second-degree manslaughter, assault on a police officer, mailing pornography, and aiding the escape of a misdemeanant, based on assumptions about crimes frequently committed

³⁵ Holloway, *supra* note 12 at 21, quoting *A Report of the Debates and Proceedings of the Convention of the State of New York; Held at the Capitol, in the City of Albany, on the 28th Day of August, 1821* (New York: J. Seymour, 1821), at 101.

³⁶ *Id.* at 66; *see also* Zaman, *supra* note 16 at 272 (explaining that Southern states designed disenfranchisement laws to apply specifically to crimes that they believed Black people were more prone to commit, such as thievery, adultery, arson, wife beating, housebreaking, and attempted rape).

³⁷ *Id.*

³⁸ Holloway, *supra* note 12 at 156.

by Black Americans.³⁹ Likewise, in 1895, South Carolina opted to disenfranchise people convicted of larceny, but not those convicted of embezzlement, based on a belief that Black Americans were more likely to commit the former crime and white people more likely to commit the latter.⁴⁰ Similarly, the 1890 Mississippi constitutional convention disenfranchised those convicted of crimes such as theft or burglary, but not robbery or murder, guided by the belief that Black Americans engaged in crime were more likely to commit less serious property offenses as opposed to the more “robust” crimes committed by white people.⁴¹ Louisiana, like many of its neighbors classified crimes involving moral turpitude as felonies, under the false and discriminatory belief that crimes such as domestic violence were more likely to be committed by Black individuals.⁴²

These strategies, among many others, had their intended effect—reducing Black political participation in Louisiana and elsewhere. Indeed, among eligible Black voters in Louisiana, registration went from 44 percent of the electorate after

³⁹ *Hunter*, 471 U.S. at 226-27.

⁴⁰ Holloway, *supra* note 12 at 87-88.

⁴¹ See *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896) (characterizing Black Americans as “careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites,” and explaining that the state constitutional convention, “[r]estrained by the federal constitution from discriminating against the negro race, . . . discriminated against its characteristics and the offenses to which its weaker members were prone.”)

⁴² Latasha L. McCrary, *Suffering from Past Evils: How Alabama’s 1901 Constitution Played a Hand in the 2008 Presidential Election*, 12 Berkeley J. Afr.-Am. L. & Pol’y 4, 9 nn.22 & 25 (2010).

the Civil War to 1 percent in 1920.⁴³

2. The Fear of Purported Criminality of Black People Has Also Led to the Adoption in Louisiana and Elsewhere of Felony Disenfranchisement Statutes.

In other instances, the racial bias driving felony disenfranchisement laws was implicit. For example, between 1850 and 2002, the likelihood of a state passing a law barring people with a felony conviction from the ballot box increased as the non-white proportion of the incarcerated population increased.⁴⁴

The implicit racial biases undergirding felony disenfranchisement laws persisted, even as many states repealed their post-incarceration voting restrictions in the 20th century.⁴⁵ States with large populations of white prisoners eliminated voting restrictions before those with large populations of prisoners of color.⁴⁶ It is no surprise today that Maine and Vermont, states with overwhelming white populations, allow people to vote while incarcerated.⁴⁷ Indeed, a 2001 study found

⁴³ Eli L. Levine, *Does the Social Contract Justify Felony Disenfranchisement?*, 1 Wash. U. Juris. Rev. 193, 199 n.40 (2009) (referencing Jason Schall, *The Consistency of Felon Disenfranchisement with Citizenship Theory*, 22 Harv. Blackletter L.J. 53, 59 (2006)), <http://bit.ly/2zZl1kS>.

⁴⁴ Behrens, *supra* note 13 at 596.

⁴⁵ *Id.* at 564.

⁴⁶ *Id.* at 599.

⁴⁷ *Felony Disenfranchisement: A Primer*, *supra* note 14; U.S. Census Bureau, *U.S. Census Quickfacts* (2016), <http://bit.ly/2ilC6OI> (reflecting that, as of the 2016 Census estimates, Maine and Vermont's respective white populations were approximately 95 percent of the total population). Moreover, Maine and Vermont's treatment of voting rights for incarcerated people is consistent with nearly half of European countries who allow *all* incarcerated people to vote. Laleh Ispahani, *Voting Rights and Human Rights: A Comparative Analysis of Criminal Disenfranchisement Laws in Criminal Disenfranchisement in an International Perspective* 25, 50-51 (Alec Ewald & Brandon Rottinghaus, eds., Cambridge U. Press 2009).

that the overrepresentation of non-white individuals in a state’s prison population increased the probability of strict state voter disenfranchisement laws by as much as 73 percent. States such as Louisiana, in which Black Americans are grossly overrepresented in the criminal system and, thus, among persons disenfranchised, have failed to take restorative action, including in their defense of the felony disenfranchisement regime in this case.⁴⁸

While these racially discriminatory felony disenfranchisement regimes date back to the founding of this country, as discussed above, these laws—and their biased impact—are by no means obsolete. As described below, these felony disenfranchisement laws continue to have significant deleterious effects on the voting power of Black Americans, including Louisiana’s Black citizens.

B. Felony Disenfranchisement Laws Weaken the Voting Power of Black Communities in Louisiana and Elsewhere.

At the beginning of the twenty-first century, individuals with felony convictions were “the largest single group of American citizens barred by law from participating in elections.”⁴⁹ As of 2016, an estimated 6.1 million potential voters, 2.5 percent of the voting-age population—1 in 40 adults—were excluded from the voting process because of a criminal conviction.⁵⁰ Three-quarters (77 percent) of

⁴⁸ In Louisiana, “African Americans are 32 percent of the state population but make up 60 percent of everyone who has lost voting rights.” Kwame Akosah, *Fighting for the Right to Vote in Louisiana*, Brennan Center for Justice (Mar. 13, 2017), <http://bit.ly/2zpK44d>.

⁴⁹ Keyssar, *supra* note 18 at 308.

⁵⁰ *6 Million Lost Voters*, *supra* note 15 at 3.

these individuals were *not* incarcerated, and were living in the community either under probation or parole supervision, or had fully completed their sentence.⁵¹

Louisiana is among the states that ban individuals under community supervision from voting. In 1974, Louisiana voters established the right to vote upon release from prison.⁵² A new constitutional provision “permitted only temporary suspension of the right to vote” for those “under an order of imprisonment.”⁵³ But, in 1976, just two years after voters ratified the 1974 Constitution, the Legislature defined “under order of imprisonment” in the Louisiana Election Code as “a sentence of confinement, whether or not suspended, whether or not the subject of the order has been placed on probation, with or without supervision, and whether or not the subject of the order has been paroled.”⁵⁴ Accordingly, today, Louisianans with felony convictions who are on probation and parole in their communities remain ineligible to vote for years—sometimes for the rest of their lives—*after* they have served their time in prison.

The impact from Louisiana’s disenfranchisement law is particularly stark. Under its current provision, Louisiana disenfranchises more than three percent of its citizens, or one out of every thirty-three adults, due to a felony conviction, a rate that

⁵¹ *Id.* at 6.

⁵² Appellants’ Opening Br. at 5-6.

⁵³ *Id.* (quoting La. Const. art. I, § 10(A)).

⁵⁴ *Id.* at 7 (citing La. R.S. 18:2(8)).

is 23 percent higher than the national average.⁵⁵ Black Louisianans are significantly disproportionately impacted; they are excluded at more than twice the rate of Louisianans generally.⁵⁶ And of those disenfranchised, more than 71,000, disproportionately Black individuals, are on parole and probation and living in their communities.⁵⁷

While felony disenfranchisement laws have always been facially race-neutral, as discussed above, disparate processing and decision-making throughout the criminal justice and judicial systems, including Louisiana's, continues today to ensure that these laws produce an effect that is consistent with their historically race-based intent, whether it is the stated intention of current policymakers.

Throughout our country, including in Louisiana, Black Americans are more likely to come into contact with law enforcement. The disparities arise in significant part from racial profiling and racial disparities in police stops, arrests, and searches.⁵⁸ For example, nationally, Black Americans represent 14 percent of regular illegal drug users, but almost 34 percent of drug-related arrests.⁵⁹ These policing disparities

⁵⁵ *Id.* at 7.

⁵⁶ *6 Million Lost Voters*, *supra* note 15, Compare Table 4, at 16, with Table 3, at 15 (stating that 6.27 percent of Black people in Louisiana are disenfranchised, as opposed to 3.04 percent of all Louisianans).

⁵⁷ Appellants' Opening Br. at 7; *see also* *6 Million Lost Voters*, *supra* note 15, at 15-16.

⁵⁸ *See, e.g.*, Kate Antonovics & Brian G. Knight, *A New Look at Racial Profiling: Evidence from the Boston Police Department*, 91 Rev. of Econ. & Stat. 163, 177 (2009).

⁵⁹ Lawrence D. Bobo & Victor Thompson, *Racialized Mass Incarceration: Poverty, Prejudice and Punishment in Doing Race: 21 Essays for the 21st Century*, 322, 333 (Markus & Moya, eds. Norton 2010).

are not ameliorated by the court system: implicit biases and the racially-biased exercise of discretion by prosecutors, judges, jurors, and even defense counsel⁶⁰ make it more likely that Black Americans will face harsher charges, convictions, and sentences than similarly-situated white offenders.⁶¹ As a result of these disparities, 1 in 13 Black Americans of voting age is disenfranchised because of a felony conviction, more than four times the rate of non-Black Americans.⁶² Put another way, more than 7.4 percent of the Black American adult population is disenfranchised compared to 1.8 percent of the non-Black population.⁶³

Like other states, the racial discrimination in Louisiana's criminal system has infected the State's political process, causing Black Louisianans to be disproportionately denied the right to vote by the state's disenfranchisement law. For almost two decades, Louisiana has been the top state incarcerator in our country, imprisoning a greater share of its residents than any other state.⁶⁴ In 2015, the state

⁶⁰ Because underlying economic disparities disfavor Black Americans, they are more likely to rely on the overburdened and underfunded public defense system and may receive a felony conviction due to inadequate representation. Marian R. Williams, *The Effectiveness of Public Defenders in Four Florida Counties*, 41 J. of Crim. Just. 205 (2013).

⁶¹ *Report of The Sentencing Project to the United Nations Human Rights Committee*, Sentencing Project (Aug. 2013) at 7-12, <http://bit.ly/2z6B7fS>.

⁶² *6 Million Lost Voters*, *supra* note 15 at 3; *Free the Vote*, *supra* note 17 at 3.

⁶³ *6 Million Lost Voters*, *supra* note 15 at 3.

⁶⁴ E. Ann Carson & Elizabeth Anderson, *Prisoners in 2015*, Bureau of Just. Stats., U.S. Dep't of Just. 8 (Dec. 2016), <http://bit.ly/2gULGI0> (noting that the imprisonment rate in the United States is 458 prisoners per 100,000 residents; "Maine had the lowest imprisonment rate at year end 2015 (132 per 100,000 residents of all ages)"; and "Louisiana had the highest imprisonment rate for persons of all ages in 2015 (776 per 100,000 state residents)"); see also *Reducing Incarceration for Technical Violations in Louisiana*, Pew Charitable Trusts (Oct. 2014) at 2, <http://bit.ly/2imsJOF> ("Louisiana has long had the highest incarceration rate of any state.").

incarcerated adults at a rate one-and-a-half times the national average, and five-and-a-half times higher than the state with the lowest incarceration rate.⁶⁵ In 2008, when the national average first approached 1 out of every 100 adults, Louisiana already incarcerated 1 out of every 55 adults.⁶⁶ In addition to having the country's highest incarceration rate, Louisiana's rate of correctional supervision (probation and parole) is 11 percent higher than the national average.⁶⁷ Critically, a disproportionate number of those under supervision for felonies in Louisiana have only ever been convicted of non-violent offenses and, thus, many of these individuals do not pose significant public safety risks to the public.⁶⁸

Similar to the national norm, Black Louisianans are also more likely than white Louisianans to come into contact with the criminal justice system even accounting for differential crime rates. “In New Orleans, for example, in the first quarter of 2016, black men in New Orleans were 50% more likely than white men to be arrested. Black women were 55% more likely than white women to be

⁶⁵ Carson & Anderson, *supra* note 64 at 8.

⁶⁶ *Reducing Incarceration*, *supra* note 64 at 2.

⁶⁷ *6 Million Lost Voters*, *supra* note 15 at 15.

⁶⁸ Daryl G. Purpera, *Evaluation of Strategies to Reduce Louisiana’s Incarceration Rate and Costs for Nonviolent Offenders*, La. Legis. Auditor, 1-2 (Aug. 31, 2016), <http://bit.ly/2z5ship> (stating that “Louisiana incarcerates a higher number of nonviolent offenders than the national average” and finding that 58.6 percent of “individuals incarcerated or under DOC supervision during fiscal years 2009 to 2015 [in Louisiana] . . . had nonviolent offenses *only*, meaning they had no violent convictions in their past”); see also Kevin Kane, *Louisiana Locks Up More Nonviolent Offenders Than Neighboring States Without Achieving Lower Crime Rates*, Pelican Institute (Aug. 25, 2016), <http://bit.ly/2z4GCcd> (“While crime rates in Louisiana, South Carolina, and Florida are nearly identical, Louisiana sends people to prison for nonviolent offense at twice the rate of South Carolina and three times the rate of Florida.”).

arrested.”⁶⁹ Louisiana is home to what has been described as America’s “arrest capital:”

In 2013, the Gretna police department made 6,566 adult arrests, or a little more than one for every three of Gretna’s roughly 18,000 residents (although arrests include non-residents). That’s about 14 times the arrest rate in the typical American town, according to a[n] . . . analysis [by Fusion television network] of FBI data. And in a city that is about a third African-American, two-thirds of those arrested in Gretna are black—an overall rate of roughly eight arrests for every nine black adults.⁷⁰

Nowhere are these disparities more transparent than enforcement of drug laws. For example, between January 2010 and 2015, 85 percent of people arrested by the New Orleans Police Department and 94 percent of people arrested for felony marijuana possession were Black individuals.⁷¹ This is true despite similar rates of marijuana use among Black individuals and white individuals.⁷²

These disparities continue once individuals are sentenced in Louisiana. In the state, the ACLU found that Black individuals were 23 times more likely than white individuals to be sentenced to life without parole for nonviolent crimes.⁷³ These and similar disparities persist no matter the type of facility being examined:

⁶⁹ *Indigent Defense in Louisiana: Mass Detention, Incarceration, & Conviction*, Lawyers’ Comm. for Civil Rights Under Law & Southern Poverty Law Ctr. (Feb. 2017), at 2.

⁷⁰ Mark Gimein, *Welcome to the Arrest Capital of the United States*, Naked Truth (June 22, 2016), <http://fusion.net/story/256788/gretna-louisiana-arrest-capital-america/>

⁷¹ *Indigent Defense in Louisiana*, *supra* note 69 at 2-3.

⁷² *Id.* at 3.

⁷³ *Racial Disparities in Sentencing: Hearing on Reports of Racism in the Justice System of the United States*, ACLU (Oct. 27, 2014), <http://bit.ly/2imORse>.

Although only about 33% of all Louisiana residents are black or African American alone, as of June 2016, 67.5% of the state’s adult correctional population (in state and local facilities, as well as transitional work programs) are black; 65.8% of the State’s Death Row is black; 73.7% of adults serving life sentences are black; 80% of “youthful offenders” in the state correctional system are black; and 80.1% of adults serving time as “habitual offenders” are black.⁷⁴

The impact of restrictive criminal disenfranchisement laws is not limited to the disproportionate exclusion of Black Americans with felony convictions from the franchise in Louisiana or elsewhere. The high rate of felony disenfranchisement in Black communities has a spillover effect that depresses voter participation to others in the community who are legally eligible to vote. Indeed, research shows that when parents are not politically engaged, their children are less likely to grow up and become voting adults.⁷⁵ Felony disenfranchisement laws also correlate with lower turnout among non-disenfranchised Black Americans by eroding the ability of social networks to facilitate political learning and information sharing.⁷⁶ And certainly, felony disenfranchisement laws prevent the very people, who likely have an interest in criminal justice reform and other political interests from voting for representatives who have the power to make and change policies. In sum, the racially disparate

⁷⁴ *Indigent Defense in Louisiana*, *supra* note 69 at 3-4.

⁷⁵ Eric Plutzer, *Becoming a Habitual Voter: Inertia, Resources, and Growth in Young Adulthood*, 96 Am. Pol. Sci. Rev. 1 (Mar. 2002), <http://bit.ly/2iSNdCM>.

⁷⁶ Aman McLeod, Ismail K. White, Amelia R. Gavin, *The Locked Ballot Box*, 11 Va. J. of Soc. Pol’y & the Law 66, 81 (2003); Melanie Bowers & Robert R. Preuhs, *Collateral Consequences of a Collateral Penalty*, 90 Soc. Sci. Q. 722, 724–26, 740–41 (2009).

impact of these laws deprives Black American communities of the collective power of the votes of disenfranchised relatives and neighbors, and facilitates the development of a culture of political nonparticipation among community members who have the ability to vote.⁷⁷

II. RESTORATION OF VOTING RIGHTS FOR PEOPLE WITH FELONY CONVICTIONS ON PROBATION AND PAROLE WOULD STRENGTHEN COMMUNITIES IN LOUISIANA AND HAS WIDE PUBLIC SUPPORT.

A. Expanding Voter Eligibility in Louisiana and Elsewhere Leads to More Inclusive Communities by Increasing Civic Engagement and Public Safety.

Our democracy and the communities within it are stronger and healthier when all of its members have the opportunity to participate equally in the political process and elect candidates of their choice. People with felony convictions are more than “felons” as Appellees and Amicus Attorney General Landry refer to them.⁷⁸ They are our family members, friends, neighbors, and fellow citizens.

Criminologists have found that a self-perception as a responsible citizen reduces the likelihood of committing a criminal offense.⁷⁹ Therefore, it is critically important to ensure that individuals with convictions have the opportunity to take on

⁷⁷ Bowers, *supra* note 76 at 740–41.

⁷⁸ See, e.g., Appellees’ Br. at 6; Amicus Br. at 4.

⁷⁹ Christopher Uggen, Jeff Manza, & Angela Behrens, *Less than the Average Citizen: Stigma, Role Transition and the Civic Reintegration of Convicted Felons in After Crime and Punishment: Ex-Offender Reintegration and Desistance from Crime*, 258, 259–60 (Shadd Maruna & Russ Immarigeon, eds., Willan Pub. 2004).

the roles of responsible citizens in all aspects of their lives: “a productive citizen at work, a responsible citizen at home and an active citizen in the community.”⁸⁰ Through voting, along with other forms of civic participation, an individual with a conviction record reinforces an identity as a responsible citizen, and reduces their likelihood of recidivism.

Studies show that current and formerly incarcerated individuals have a strong desire to fully rejoin and participate in their communities, including by voting. In a survey of people with felony convictions from New Jersey, Maryland, and Virginia, a majority said that they would vote if permitted to do so and viewed it as a sign that they had “paid their debt to society.”⁸¹ The respondents believed that exercising the right to vote would be “empowering.”⁸² In another study, one imprisoned person described a desire “to someday feel like a, quote, ‘normal citizen,’ a contributing member of society, and you know that’s hard when every election you’re constantly being reminded, ‘Oh yeah, that’s right, I’m ashamed’ . . . It’s just like a little salt in the wound.”⁸³ Another asked: “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?”⁸⁴ Gregory Finney, a 53-year old New Orleans resident,

⁸⁰ *Id.* at 263.

⁸¹ Zaman, *supra* note 16 at 238.

⁸² *Id.*

⁸³ Uggen, *supra* note 79 at 275.

⁸⁴ *Id.* at 275-76.

regularly works on local elections, but cannot vote because he will be on parole for the rest of his life due to a narcotics conviction. He described the irony as follows: “I can hold up a sign saying, ‘Vote for this candidate,’ but I can never vote myself[.]”⁸⁵ As these statements illustrate, disenfranchisement leaves individuals feeling stigmatized and rejected, interfering with their ability to participate in our representative democracy and to restore their sense of citizenship.⁸⁶

Restoration of voting rights for people with felony convictions also is a common sense public safety reform given research demonstrating that participation in the political process may contribute to reducing the likelihood of reoffending. In one study of individuals who had been arrested prior to an election, 27 percent of non-voters were re-arrested, compared to 12 percent of voters, a statistically significant difference.⁸⁷ The authors note that while it is difficult to quantify the particular impact of voting, “[v]oting appears to be part of a package of pro-social behavior that is linked to desistance from crime.”⁸⁸ Conversely, felony disenfranchisement interferes with the successful reintegration of people released

⁸⁵ Katy Reckdahl, *How Voting Laws Squelch Urban American’s Voice: Millions Have Been Denied the Right to Cast a Ballot After Getting Out of Prison, but now They’re Organizing a Return to the Polls*, NextCity (Sept. 5, 2016), <http://bit.ly/2zqWY28>.

⁸⁶ Uggen, *supra* note 79 at 277.

⁸⁷ Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 Colum. Hum. Rts. L. Rev. 193, 205, 209-10 (2004); see also, Christopher Uggen, Jeff Manza, & Melissa Thompson, *Citizenship Democracy, and the Civic Reintegration of Criminal Offenders*, 605 Annals Am. Acad. Pol. & Soc. Sci. 281, 303-04 (2006) (discussing a second study with similar results).

⁸⁸ Uggen, *supra* note 87 at 214.

from imprisonment into their home communities, which may contribute to higher rates of recidivism. The inability of a person released from prison to participate in the political process can increase the social distance between the formerly incarcerated individual and the community, reaffirming feelings of alienation and isolation and impeding acceptance and respect of the social norms and rule of law.⁸⁹ This can lead to further criminal involvement.⁹⁰

B. The Nationwide Momentum Against Disenfranchisement Laws Supports Expansion of Voting Rights for Individuals with Felony Convictions in Louisiana

In the last twenty years, 24 states have enacted policies designed to reduce the scale of felony disenfranchisement and/or to facilitate voter registration among persons with a prior felony conviction.⁹¹ Most relevant to the case at hand is the experience of several states that have recently extended voting rights to persons under community supervision. For example, in 2001, Connecticut eliminated the ban on voting by persons on felony probation; in 2006, Rhode Island voters approved a ballot measure to extend voting rights to persons on probation or parole; and in 2016, Maryland enacted legislation that also restored voting rights to persons under probation or parole supervision, impacting more than 44,000 people.⁹² Even before

⁸⁹ Mandeep K. Dhami, *Prisoner Disenfranchisement Policy: A Threat To Democracy?*, 5 Analyses of Soc. Issues and Pub. Pol'y 235, 243 (2005).

⁹⁰ *Id.* (citing Howard Becker, *Outsiders: Studies in the sociology of deviance* (London, UK: Free Press of Glencoe Collier-Macmillan 1963)).

⁹¹ *Felony Disenfranchisement: A Primer*, *supra* note 14 at 5.

⁹² *Id.* at 4.

these changes, “an estimated 800,000 persons . . . regained the right to vote” due to changes in various state disenfranchisement laws.⁹³

At the same time, racial minority plaintiffs and others continue to challenge in court and through the democratic process restrictions on voting rights for people with felony convictions. Plaintiffs in Alabama are challenging Alabama’s felony disenfranchisement law as violating the Voting Rights Act of 1965, citing the state’s reinstatement of a provision which bars individuals convicted of felonies involving “moral turpitude.”⁹⁴ The lawsuit highlights the relationship between the disenfranchisement provision and, as described *infra*, the state’s long history of laws targeting Black voters.⁹⁵ Plaintiffs in Florida have challenged, as unconstitutionally vague and arbitrary, the state’s practice of permanently disenfranchising individuals convicted of a felony unless they are personally reinstated by the governor.⁹⁶ This effort has been paired with a ballot initiative to amend the constitution to allow individuals to vote once they complete their sentence.⁹⁷ The effort will gain ballot access if it collects over 700,000 signatures.⁹⁸ Finally, plaintiffs in Mississippi have

⁹³ Nicole D. Porter, *Expanding the Vote: State Felony Disenfranchisement Reform*, Sentencing Project (2010) at 1-2, <http://bit.ly/2xLd81y>.

⁹⁴ Class-Action Complaint for Declaratory and Injunctive Relief at 41, *Thompson v. Alabama*, No. 2:16-cv-783 (M.D. Ala. Sept. 26, 2016), ECF No. 1, <http://bit.ly/2hxNQml>.

⁹⁵ *Id.* at 2.

⁹⁶ Class Action Complaint for Declaratory and Injunctive Relief at 57, *Hand v. Scott*, No. 4:17-cv-128 (N.D. Fla. Mar. 13, 2017), ECF No. 1, <http://bit.ly/2hyOOF8>.

⁹⁷ Olivia Paschal, *The latest challenges to the South’s felony disenfranchisement laws*, Facing South: A Voice for a Changing South (July 14, 2017), <http://bit.ly/2lG7XP4>.

⁹⁸ *Id.*

challenged the state’s lifetime ban on voting by individuals convicted of certain crimes, explaining the historical link between the provision and efforts to disenfranchise Black Americans, more generally.⁹⁹

Louisiana also has recently considered restoring voting rights to people with felony convictions. During its most recent legislative session, the Louisiana House of Representatives considered legislation that would have allowed individuals serving a term of probation or parole to vote.¹⁰⁰ Additionally, bipartisan members of the Louisiana Legislature recently examined the impact of the state’s criminal justice system, passing legislation that will reduce the prison population by ten percent and save the state an estimated \$78 million over the next ten years.¹⁰¹ This is consistent with a recognition that mass incarceration and disenfranchisement is bad for democracy and our economy. Indeed, studies have found “prisoner disenfranchisement to be concentrated in less democratized nations with high incarceration rates and low levels of economic development.”¹⁰²

⁹⁹ Complaint for Declaratory and Injunctive Relief at 1-2, *Harness v. Hosemann*, No. 3:16-cv-791 (S.D. Miss. Sept. 28, 2017), <http://bit.ly/2iZ4v1b>.

¹⁰⁰ H.B. 598, Reg. Sess., La. State Legis. (2016), <http://bit.ly/2zYhYcM>.

¹⁰¹ Julia O’Donoghue, *Louisiana Criminal Justice Reform: What You Need to Know About the Changes*, Times-Picayune (June 29, 2017), <http://bit.ly/2inILbb>.

¹⁰² Christopher Uggen, Mischelle Van Brakle, & Heather McLaughlin, *Punishment and Social Exclusion: National Differences in Prisoner Disenfranchisement*, in *Criminal Disenfranchisement in an International Perspective* 59, 59 (Alec Ewald & Brandon Rottinghaus, eds., Cambridge U. Press 2009).

These and related reforms, if undertaken, would be met with widespread public support in Louisiana, as they have elsewhere. Indeed, surveys report that 8 in 10 Americans support voting rights for persons who have completed their sentence and nearly two-thirds support voting rights for persons on probation or parole.¹⁰³

CONCLUSION

While federal and Louisiana laws guarantee citizens the right to vote, the franchise is unduly limited by an unjust regime that disproportionately disenfranchises Black Louisianans. To enhance the voting strength of all of Louisiana's citizens and communities and to promote inclusive and civically engaged communities, among other democracy-building benefits, this Court should enter a judgment that restores full voting rights to Louisianans with felony convictions who are on probation and parole in their communities.

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Respectfully submitted,

s/ Leah C. Aden

Sherrilyn A. Ifill (N.Y. Bar No. 2221422)
President & Director-Counsel
Janai S. Nelson (N.Y. Bar No. 2851301)

¹⁰³ Porter, *Expanding the Vote*, *supra* note 93 at 3; see also Brian Pinaire, Milton Heumann, and Laura Bilotta, *Barred from the Vote: Public Attitudes Towards the Disfranchisements of Felons*, 30 Fordham Urb. L. J. 1519, 1540 (2003) (finding 81.7 percent approval for restoration of voting rights); Jeff Manza, Clem Brooks, and Christopher Uggen, *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 Pub. Opinion Q. 275, 281 (2004) (finding 80 percent approval).

Samuel Spital (N.Y. Bar 4334595)
Leah C. Aden* (N.Y. Bar No. 4555207)
Counsel of Record
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, New York 10006
Telephone: 212.965.2200
Facsimile: 212.226.7592
E-Mail: laden@naacpldf.org

Coty R. Montag (D.C. Bar No. 498357)
Ajmel Quereshi* (D.C. Bar No. 1012205)
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
1444 I Street NW, 10th Floor
Washington, District of Columbia 20005
Telephone: 202.682.1300
Facsimile: 202.682.1312
E-Mail: aquereshi@naacpldf.org

**Motion to enroll pro hac vice pending*

Counsel for Proposed Amici Curiae