

SUPREME COURT NO. 15-1661  
POLK COUNTY CASE NO. EQCE077368

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**IN THE SUPREME COURT OF IOWA**

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**KELLI JO GRIFFIN,**  
Petitioner-Appellant,

**vs.**

**PAUL PATE, in his official capacities as the Secretary of State of  
Iowa, and DENISE FRAISE, in her official capacities as the County  
Auditor of Lee County, Iowa,**  
Respondents-Appellants.

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*APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY  
HONORABLE ARTHUR E. GAMBLE*

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**PROOF BRIEF\* OF AMICUS CURIAE**  
THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.  
**IN SUPPORT OF PETITIONER-APPELLANT**  
*\*CONDITIONALLY FILED*

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Christina A. Swarns  
Angel S. Harris  
Joshua A. Rosenthal  
NAACP Legal Defense &  
Educational Fund, Inc.  
40 Rector Street, 5th Floor  
New York, NY 10006  
(212) 965-2200  
(212) 226-7592 FAX  
cswarns@naacpldf.org  
aharris@naacpldf.org  
jrosenthal@naacpldf.org

---

Coty Montag  
NAACP Legal Defense &  
Educational Fund, Inc.  
1444 I Street, NW, 10th Floor  
Washington, DC 20005  
(202) 682-1300; (202) 682-1312 FAX  
cmontag@naacpldf.org

John B. Whiston  
Clinical Law Programs  
University of Iowa  
Iowa City, IA 52242-1113  
(319) 335-9023; (319) 353-5445 FAX  
Law-legal-clinic@uiowa.edu

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## **INTEREST OF *AMICUS CURIAE***

The NAACP Legal Defense and Educational Fund, Inc. (LDF), is a non-profit 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 African-Americans and other communities of color. LDF has worked for seventy-five years 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 felon disenfranchisement. Specifically, LDF has litigated cases challenging felon 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)), and Alabama (*Chapman v. Gooden*, 974 So.2d 972 (Ala. 2007) and *Glasgow v. Allen*, No. 08-cv-801 (M.D. Ala. 2008)).

LDF is also a founding member of the Right to Vote Campaign, a national collaborative of eight organizations challenging felon disenfranchisement laws through litigation, legislative action, and public education. Additionally, in 2015, LDF urged governors to change state laws to expand the franchise to people with felony convictions and pushed for the

passage of the Democracy Restoration Act, federal legislation that seeks to restore voting rights to previously incarcerated people in federal elections.

Given LDF's extensive experience advocating for fair and equal political participation, including by challenging felon disfranchisement laws, LDF submits this brief to provide historical context for the discrimination inherent in felon disfranchisement laws and to explain the present-day impact of such laws on the African-American community in Iowa.

## SUMMARY OF ARGUMENT

The right to vote has been described as “a fundamental political right . . . preservative of all rights,”<sup>1</sup> the “essence of a democratic society,”<sup>2</sup> and one of the “defining elements of citizenship.”<sup>3</sup> That said, the political franchise has never been made fully available to adults in this country. Initially, only propertied white men were allowed to vote.<sup>4</sup> However, as the franchise expanded to include racial minorities and women, felon disfranchisement laws emerged as a powerful and discriminatory formal barrier to ballot access.<sup>5</sup> Indeed, after the Civil War, felon disfranchisement laws were explicitly passed to weaken African-American voting strength.<sup>6</sup> And the successors of those laws remain on the books.<sup>7</sup>

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<sup>1</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>2</sup> *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

<sup>3</sup> See Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (1991) at 25-62 (discussing how the historical struggle for citizenship in the United States has transformed voting into an affirmation of citizenship).

<sup>4</sup> *Id.*

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

<sup>6</sup> Pippa Holloway, *Living in Infamy: Felon Disfranchisement and the History of American Citizenship* (2013) at 3.

<sup>7</sup> 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 Sociology 559, 564 (2003).

Today, most states have abandoned permanent felon disenfranchisement and, instead, restore voting rights to individuals who have completed their sentences.<sup>8</sup> But not Iowa. Iowa has one of the most restrictive felon disenfranchisement laws in the country: anyone convicted of a felony in Iowa is permanently barred from voting, unless their voting rights are restored by the Governor. The only other state with a similarly strict regime is Florida.<sup>9</sup>

African-American Iowans are disproportionately disenfranchised by the state's felon disenfranchisement law because structural racial discrimination distorts the state's criminal justice system. The racial disparities produced by the law's intersection with the state's criminal justice policies and practices conflict with Iowa's egalitarian history and the fact that ample evidence demonstrates that the expansion of voting rights leads to inclusive, safe communities and has widespread public support.

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<sup>8</sup> The Sentencing Project, *Felony Disenfranchisement: A Primer* (2015) at 1, available at [http://sentencingproject.org/doc/publications/fd\\_Felony%20Disenfranchisement%20Primer.pdf](http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf); see also Brennan Center for Justice, *Criminal Disenfranchisement Laws Across the United States*, available at [www.brennancenter.org/sites/default/files/publications/images/RTV\\_Map.pdf](http://www.brennancenter.org/sites/default/files/publications/images/RTV_Map.pdf).

<sup>9</sup> *Id.* at 1; Fla. Const. Art. VI, § 4(a) (“No person convicted of a felony, or adjudicated in this or any state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.”).

This Court should restore the voting rights of Iowans with felony convictions, without imposing undue additional burdens or discretionary procedures.

**I. FELON DISFRANCHISEMENT LAWS ARE INCONSISTENT WITH THE FUNDAMENTAL PRINCIPLE OF AN INCLUSIVE SOCIETY**

**A. Felon Disfranchisement Laws Are Rooted in Racial Discrimination.**

Although criminal disfranchisement in this country dates back to Colonial America,<sup>10</sup> most of the strictest felon disfranchisement laws were adopted in the late 19th century to bar the newly-freed African-American slaves from the right to vote.<sup>11</sup> After the Civil War, Reconstruction statutes and the Fourteenth and Fifteenth Amendments eliminated explicit racial restrictions on voting, formally granting suffrage to large, and sometimes

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<sup>10</sup> 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 disfranchisement from Ancient Greece to Colonial America to Reconstruction); see also Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (2006) at 53-54 (detailing pre-Civil War disfranchisement laws designed to exclude “undesirables” from participating in the political process).

<sup>11</sup> See Zaman, *supra* n. 10, at 272 (discussing the rise of disfranchisement laws during Reconstruction and the racial motivation for these laws); see generally NAACP LDF, *Free the Vote: Unlocking Democracy in the Cells and on the Streets*, available at <http://www.naacpldf.org/files/publications/Free%20the%20Vote.pdf>.

majority, African-American communities in the Southern states.<sup>12</sup> To secure and maintain their power, white elites adopted broad felon disfranchisement regimes, alongside such other voter qualifications such as literacy tests, poll taxes, and lengthy residency requirements, as a means of excluding these significant populations of African-Americans from the franchise.<sup>13</sup> Whether explicit or implicit, as detailed below, the racial animus underlying these laws was clear.

**1. The Racial Motive Underlying the Adoption of Criminal Disfranchisement Laws was Often Explicit.**

Explicit racial bias motivated many states' felon disfranchisement 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

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<sup>12</sup> Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (2000), at 92; Francis A. Walker, *Report of the Superintendent of the Ninth Census* (1872), at xvii (showing that African-Americans were a majority of the population in Mississippi and South Carolina).

<sup>13</sup> *Id.* at 111–12.



fraud.”<sup>14</sup> The convention significantly expanded the list of disfranchising crimes in the state to “any crime involving moral turpitude,” among others.<sup>15</sup> When, almost a century later, the U.S. Supreme Court declared Alabama’s expansive disfranchisement 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.”<sup>16</sup>

This sentiment was not limited to the Deep South: during the 1821 New York constitutional convention, which established a property requirement for African-American, but not white, voters and expressly provided for disfranchisement after conviction for “infamous crimes,” one delegate expressed his opposition to African-American suffrage as “derived not from the distinction of colour but resorted to as a rule of designation between those who understand the worth of the privilege and those who are degraded, dependent and unfit to exercise it.”<sup>17</sup>

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<sup>14</sup> 1 Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901 (1940), at 8-9, *as quoted in Hunter v. Underwood*, 471 U.S. 222, 229 (1985) & *Underwood v. Hunter*, 730 F.2d 614, 619 (11th Cir. 1984).

<sup>15</sup> *Hunter*, 471 U.S. at 226.

<sup>16</sup> *Id.* at 230.

<sup>17</sup> Holloway, *supra* n. 6, at 21, *quoting* A Report of the Debates and Proceedings of the Convention of the State of New York; Held at the

During the Jim Crow era, many states manipulated the categories of disfranchising crimes to maximize the racially disparate impact of their felon disfranchisement laws.<sup>18</sup> These changes were based on assumptions about the kinds of offenses that African-Americans were “more likely” to commit.<sup>19</sup> 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.”<sup>20</sup> In its expansive and explicitly racist disfranchisement 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 by African-Americans.<sup>21</sup> Likewise, in 1895, South

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Capitol, in the City of Albany, on the 28th Day of August, 1821 (New York: J. Seymour, 1821), at 101.

<sup>18</sup> *Id.* at 66; *see also* Zaman, *supra* n. 10, at 272 (noting that Southern states designed disfranchisement laws to apply specifically to crimes that they believed blacks were more prone to commit, such as thievery, adultery, arson, wife beating, housebreaking, and attempted rape).

<sup>19</sup> *Id.*

<sup>20</sup> Holloway, *supra* n. 6, at 156.

<sup>21</sup> *Hunter*, 471 U.S. at 226-27.

Carolina opted to disfranchise people convicted of larceny, but not those convicted of embezzlement, based on a belief that African-Americans were more likely to commit the former crime and whites more likely to commit the latter.<sup>22</sup> Similarly, the 1890 Mississippi constitutional convention disfranchised those convicted of crimes such as theft or burglary, but not robbery or murder, guided by the belief that African-Americans engaged in crime were more likely to commit less serious property offenses as opposed to the more “robust” crimes committed by whites.<sup>23</sup>

## **2. Statistical Analysis Ties Fear of African-American Criminality to the Adoption of Felon Disfranchisement Statutes.**

In other instances, the racial bias driving felon disfranchisement laws was implicit. For example, between 1850 and 2002, the likelihood of a state passing a law barring felons from the ballot box increased as the non-white proportion of the incarcerated population increased.<sup>24</sup>

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<sup>22</sup> Holloway, *supra* n. 6, at 87-88.

<sup>23</sup> See *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896) (characterizing African-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.”).

<sup>24</sup> Behrens, *supra* n. 7 at 596 .

The implicit racial biases undergirding felon disenfranchisement laws persisted, even as many states repealed their post-incarceration voting restrictions in the 20th century.<sup>25</sup> States with large populations of white prisoners eliminated voting restrictions before those with large populations of prisoners of color.<sup>26</sup> Indeed, a 2001 study found 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.

While these racially discriminatory felon disenfranchisement regimes date back to the founding of this country, these laws – and their biased impact – are by no means obsolete. Although “[o]ver the past 200 years, virtually all restrictions on the right to vote have melted away. . . . [o]nly felon status remains as a legal means to bar participation.”<sup>27</sup> And, as described below, these felon disenfranchisement laws continue to have significant deleterious effects on the voting power of African-Americans.

**B. Felon Disfranchisement Laws Weaken the Voting Power of African-American Communities.**

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<sup>25</sup> *Id.* at 564.

<sup>26</sup> *Id.* at 599.

<sup>27</sup> Manza, *Locked Out*, *supra* n. 10 at 221.

At the beginning of the twenty-first century, convicted felons were “the largest single group of American citizens barred by law from participating in elections.”<sup>28</sup> As of 2010, approximately 5.85 million potential voters, 2.5 percent of the voting-age population, were excluded from the polls because of a criminal conviction.<sup>29</sup> Almost half of these individuals had fully completed their sentence. While felon disenfranchisement laws have always been facially race-neutral, disparities throughout the criminal justice system have ensured that these laws produce an effect that is consistent with their historically racial-based intent.

Throughout the country, African-Americans are more likely to come into contact with law enforcement. The disparities arise in part from racial profiling and racial disparities in police stops, arrests, and searches.<sup>30</sup> For example, African-Americans represent 14 percent of regular illegal drug-users but almost 34 percent of drug-related arrests.<sup>31</sup> These policing disparities are not ameliorated by the court system: implicit biases and the

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<sup>28</sup> Keyssar, *supra* n. 10 at 308.

<sup>29</sup> Christopher Uggen, Sarah Shannon, and Jeff Manza, *The Sentencing Project, State Level Estimates of Felon Disenfranchisement in the United States, 2010* (2012), at 1.

<sup>30</sup> *See, e.g.*, Kate Antanovics & Brian G. Knight, *A New Look at Racial Profiling*, 91 R. of Econ. & Stat. 163, 177 (2009).

<sup>31</sup> Lawrence D. Bobo & Victor Thompson, *Racialized Mass Incarceration in Doing Race* (Markus & Moya, eds. 2010), at 333.

racially-biased exercise of discretion by prosecutors, judges, jurors, and even defense counsel<sup>32</sup> make it more likely that African-Americans will face harsher charges, convictions and sentences than similarly-situated white offenders.<sup>33</sup> As a result of these disparities, more than 2.2 million African-Americans are unable to vote due to disfranchisement laws.<sup>34</sup> This amounts to 7.66 percent – or one in 13 – of the total African-American voting-age population in the U.S, compared to 1.8 percent of the non-African-American population.<sup>35</sup>

The impact of restrictive criminal disfranchisement laws is not limited to the disproportionate exclusion of African-Americans with felony convictions from the franchise. Such laws also correlate with lower turnout among *non-disfranchised* African-Americans by eroding the ability of social

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<sup>32</sup> Because underlying economic disparities disfavor African-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 Williams, *The Effectiveness of Public Defenders in Four Florida Counties*, 41 J. of Crim. Justice 205 (2013).

<sup>33</sup> The Sentencing Project, Report of the Sentencing Project to the United Nations Human Rights Committee (2013) at 7-8, 9-12.

<sup>34</sup> Uggen, Shannon, and Manza, The Sentencing Project *supra* n. 29, at 1.

<sup>35</sup> Uggen, Shannon, and Manza, The Sentencing Project *supra* n. 29, at 1-2; Free the Vote, *supra* n. 11, at 3.

networks to facilitate political learning and information sharing.<sup>36</sup>

Specifically, the racially disparate impact of these laws deprives African-American communities of the collective power of the votes of disfranchised relatives and neighbors, and facilitates the development of a culture of political nonparticipation among community members who have the ability to vote.<sup>37</sup>

## **II. FELON DISFRANCHISEMENT DISPROPORTIONATELY LIMITS THE POLITICAL PARTICIPATION OF AFRICAN-AMERICAN IOWANS**

### **A. Iowa's Disfranchisement Regime is Inconsistent with the State's General Trend toward Protecting the Equality of All Residents.**

While the origins of Iowa's criminal disfranchisement evoke many of the above-described historical trends found throughout the United States, Iowa's disfranchisement history is at odds with its more general trend of promoting equality within the state.

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<sup>36</sup> 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.

<sup>37</sup> Bowers, *supra* n. 36, at 740–41.

Although Iowa was a “slave-free” territory under the terms of the Missouri Compromise, it explicitly denied African-Americans the right to vote. In 1839, Iowa’s “Act to Regulate Blacks and Mulattos” granted African-Americans only limited rights; in order to become a resident of the state, Iowa law required African-Americans to produce a certificate affirming their status as free individuals and to procure a \$500 bond as a guarantee of good behavior.<sup>38</sup> At the 1844 constitutional convention, the issue of racial equality, including in suffrage, was frequently debated.<sup>39</sup> Ultimately, both African-Americans and “persons declared infamous by act of the legislature” were excluded from the voting booth, while all white men in the state were granted full suffrage.<sup>40</sup> Iowa’s first explicit felon disfranchisement policy appeared in its 1846 constitution and barred “persons convicted of infamous crime” from voting. While this provision was facially race-neutral, the 1846 constitution contained several other explicitly racially discriminatory provisions. It completely excluded

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<sup>38</sup> See Iowa Antislavery Timeline *available at* <http://www.iowahistory.org/museum/ugrr-ia/iowa-antislavery-timeline.html>.

<sup>39</sup> Benjamin F. Shambaugh, *Fragments of the Debates of the Iowa Constitutional Conventions of 1844 and 1846*, 26, 33, 42–43, 54–56, 109, 155–56, 220–21 (1900).

<sup>40</sup> Iowa Const. of 1844, Art. III §§, 1, 5.



African-Americans from voting, serving as members of the Legislature, future census-taking and legislative apportionment, and militia service.<sup>41</sup>

When Iowa's constitution was amended in 1857, it reflected major strides toward racial equality in the state. The Article I, § 1, Natural Rights Clause changed the word "independent" to "equal": "All men are by nature free and *equal* and have certain unalienable rights . . . ." In addition, where Article I, § 6 had previously provided only for the uniform operation of laws, it was amended to add: "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." The 1857 constitution also ensured that African-Americans could be witnesses in court against whites and put the question of African-American suffrage on the ballot. But when Iowa voters approved the new Constitution, they rejected equal suffrage. And the 1857 constitution's commitment to racial equality was hardly all-encompassing; it retained the exclusion of African-Americans from voting, census and apportionment, and militia service.<sup>42</sup>

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<sup>41</sup> Richard Lord Acton & Priscilla Nassif Acton, A Legal History of African-Americans, in *Outside In* (2000, Silag, et al, eds.), at 66.

<sup>42</sup> See Honorable Mark S. Cady, *A Pioneer's Constitution*, 60 Drake L. Rev. 1333, 1140 (2012).

A decade later – in 1868 – Iowa became the first state outside New England to permit African-American men to vote and eliminated the restrictions on census and apportionment and militia service.<sup>43</sup> That year, the Iowa Supreme Court also began to invigorate the equality guarantees of the state’s constitution. In *Clark v. Bd. Of Dirs.*, this Court ruled that Susan Clark, a twelve-year old African-American girl, could not be denied admission to her neighborhood public school because of her race.<sup>44</sup> The court explained that its decision was based on “the [Iowa constitution’s] principle of equal rights to all, upon which our government is founded,” with the goal of forming “one harmonious *people* . . . stimulated with the common purpose to perpetuate and spread our free institutions.”<sup>45</sup>

Five years later, Emma Coger, an African-American woman, challenged her exclusion from dining accommodations on a steamboat.<sup>46</sup> The Iowa Supreme Court held that the Iowa constitutional principle of equality required African-American passengers to be given the same rights as white passengers:

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<sup>43</sup> Lisa N. Nealy, “Iowa” in *Black America: A State-by-State Historical Encyclopedia* at 271, 273 (Alton Hornsby, Jr., ed. 2011).

<sup>44</sup> *Clark v. Bd. of Dirs.*, 24 Iowa 266, 268 (Iowa 1868).

<sup>45</sup> *Id.* at 269, 276 (emphasis in original).

<sup>46</sup> *Coger v. Nw. Union Packet Co.*, 37 Iowa 145 (Iowa 1873).

The decision is planted on the broad and just ground of the equality of all men before the law, which is not limited by color, nationality, religion or condition in life. This principle of equality is announced and secured by the very first words of our State constitution which relate to the rights of the people, in language most comprehensive, and incapable of misconstruction, namely: “All men are, by nature, free and equal.” Art. 1, § 1. Upon it we rest our conclusion in this case.<sup>47</sup>

This decision guided future decisions by the court, particularly those dealing with the “absolute equality of all” persons under the law.

In 1875, the Iowa Supreme Court revisited the issue of school segregation. In *Smith v. Dir. Of Keokuk School District*, a school board excluded an African-American boy from the local high school and provided for his instruction in a separate building, arguing that the main high school building was full.<sup>48</sup> This Court held that the exclusionary action was racially motivated and that, if the boy had been white, he would have been permitted to attend the main high school.<sup>49</sup> This ruling made clear that Iowa would not tolerate covert discrimination or express racial classifications in interpreting the state’s constitutional guarantee of equality.

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<sup>47</sup> *Id.* at 154-55.

<sup>48</sup> *Smith v. Directors of Indep. Sch. Dist. of Keokuk*, 40 Iowa 518, 519 (1875).

<sup>49</sup> *Id.* at 519-20.

Iowa's trend toward equality that began in 1868 has generally persisted over time, as evidenced by the state Supreme Court's 2009 ruling in *Varnum v. Brien*, which made Iowa the fourth U.S. state to legalize same-sex marriage as a constitutional right.<sup>50</sup>

**B. Iowa Significantly Restricts the Restoration of Felon Voting Rights by Adhering to One of the Nation's Most Burdensome and Discretionary Processes.**

While, as described above, Iowa has often been ahead of the curve in promoting the equality of its residents, its felon disenfranchisement regime has generally endured over time. Iowa broadly guarantees the right to vote, but expressly disqualifies two classes of persons: those adjudged mentally incompetent to vote and those "convicted of any infamous crime."<sup>51</sup>

Yet, Iowa's long-standing disenfranchisement law enjoyed a brief respite about a decade ago. On July 4, 2005, then-Governor Tom Vilsack, by Executive Order ("EO") 42, provided automatic restoration of voting

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<sup>50</sup> *Varnum v. Brien*, 763 N.W.2d 862, 877 (Iowa 2009).

<sup>51</sup> Iowa Const. of 1857, Art. II, § 5. Iowa's definition of "infamous crime" has been ambiguous at best. While the Iowa Supreme Court had repeatedly interpreted "infamous crime" to be "any crime punishable by imprisonment in the penitentiary" until its ruling in *Chiodo v. Section 43.24 Panel* in 2014, the Iowa Code has defined the term to be limited to all felonies since 1994. *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 849, 852 (Iowa 2014). In *Chiodo*, the plurality noted that phrase has "vast implications and is not easy to articulate." *Id.* at 856.

rights to Iowans who had completed their felony prison sentences.<sup>52</sup> Prior to the enactment of the order, one out of every 22 adult residents in the state (or 4.65%) was disfranchised.<sup>53</sup> During the nearly six years that EO 42 was in effect, 115,210 citizens<sup>54</sup> regained their voting rights, and felon disfranchisement in the state was reduced by 81 percent.<sup>55</sup> By 2010, the number of disfranchised voting-age adults in the state had been reduced to 21,888 individuals.<sup>56</sup>

But this reprieve was short-lived. In January 2011, with EO 70, Governor Terry Branstad repealed EO 42 and ended Iowa’s automatic restoration of voting rights for people who completed their criminal sentences.<sup>57</sup> EO 70 asserted that the “act of filing an application for restoration of the rights of citizenship is an important and necessary aspect of an offender’s process of reintegration into society” and “the payment of restitution by an offender after having been completely discharged from

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<sup>52</sup> Iowa Exec. Order 42, *available at* <http://publications.iowa.gov/3762/1/EO42.pdf>.

<sup>53</sup> The Sentencing Project, *Iowa and Felony Disenfranchisement* (2005) at 2, *available at* [http://www.sentencingproject.org/doc/publications/fd\\_iowa.pdf](http://www.sentencingproject.org/doc/publications/fd_iowa.pdf).

<sup>54</sup> Uggen, Shannon, and Manza, The Sentencing Project *supra* n. 29, at 14.

<sup>55</sup> Nicole D. Porter, The Sentencing Project, *Expanding the Vote* (2010) at 12.

<sup>56</sup> Uggen, Shannon, and Manza, The Sentencing Project *supra* n. 29, at 16.

<sup>57</sup> Iowa Exec. Order 70, *available at* [https://governor.iowa.gov/sites/default/files/documents/Exec\\_Order\\_70.pdf](https://governor.iowa.gov/sites/default/files/documents/Exec_Order_70.pdf).

criminal sentence is an important component in determining if the restoration of voting rights is appropriate.”<sup>58</sup> Thus, today, all individuals convicted of a felony in Iowa are permanently barred from voting, unless they seek – and receive – restoration of their voting rights from the Governor.<sup>59</sup>

Iowa has one of the most restrictive laws governing the restoration of voting rights.<sup>60</sup> Pursuant to the process established by the Governor, Iowans seeking the restoration of their voting rights must complete an application and submit proof of payment of court costs, fines, restitution, and their current Iowa criminal history record. The application contains 29 questions and requires the applicant to detail any alimony or child support payments s/he has been ordered to make and whether or not the applicant has filed federal and state income tax returns for the previous four years.<sup>61</sup> In order to

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* However, those who had their rights restored pursuant to the issuance of EO 42 were not affected (“Nothing in this Order shall affect the restoration of the rights of citizenship granted prior to the date of this Order.”)

<sup>60</sup> The only other state with such a strict regime is Florida, *supra* n. 8; *see also* The Sentencing Project, *Iowa and Felony Disenfranchisement*. *supra* n. 53.

<sup>61</sup> Office of the Governor Terry Branstad, Application for Restoration of Citizenship Rights (*available at*

obtain information regarding the applicant’s criminal history and court costs, restitution, and fines, which must be submitted with the application, applicants must request information from several government agencies. This process is invasive and cumbersome, and requires time and money to complete – often scarce resources for individuals with prior felony convictions.<sup>62</sup>

The discretionary nature of the process also creates an unfair barrier for those seeking restoration. For example, applicants must respond to the following prompt: “Please state why you believe that you have demonstrated good citizenship such that your citizenship rights (right to vote and hold public office) might be restored by the Governor.”<sup>63</sup> There are no

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<https://governor.iowa.gov/documents/application-for-restoration-of-citizenship-rights>).

<sup>62</sup> Extensive research has shown that a felony conviction can have a substantial negative impact on future job prospects, therefore creating financial hardships and time constraints as individuals attempt to seek employment. Michelle N. Rodriguez, and Maurice Emsellem, *65 Million ‘Need Not Apply’: The Case for Reforming Criminal Background Checks for Employment*, New York: National Employment Law Project (March 2011), available at

[http://www.nelp.org/content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf); Binyamin Appelbaum, “Out of Trouble, but Criminal Records Keep Men Out of Work,” *New York Times* (Feb. 28, 2015), available at [http://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?\\_r=0](http://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?_r=0).

<sup>63</sup> Application for Restoration of Rights, *supra* n. 61.

standards or safeguards in place to guarantee that reviewers will not reject an application based on an “unsatisfactory” answer.

This potential abuse of discretion evokes the oft-cited, facially race-neutral purpose of felon disenfranchisement laws: to exclude “voices infected by an infamous disposition.”<sup>64</sup> But as the U.S. Supreme Court has held, differences of opinion may not be the basis for excluding any group or person from the franchise.<sup>65</sup> Conditioning access to the ballot on the perceived beliefs of the would-be voter serves as a judgment on the propriety of his thoughts and character based on the criminal conviction and raises serious viewpoint discrimination concerns.<sup>66</sup>

The burdensome nature of Governor Branstad’s application process has been evidenced in the meager number of individuals who have actually had their citizenship rights restored. Between 2011 and 2013, approximately 25,000 Iowans completed their sentences but only 40 regained their voting

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<sup>64</sup> *Chiodo*, 846 N.W.2d at 856. One of the most prevalent justifications for felon disenfranchisement laws assume that citizens with felony convictions have an unfavorable viewpoint that will be expressed through the ballot. Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint*, 65 Fla. L. Rev. 111, 129 (2013).

<sup>65</sup> *Dunn v. Blumstein*, 405 U.S. 330, 355 (1972).

<sup>66</sup> Nelson, *supra* n. 64, at 133.



rights.<sup>67</sup> Thus, although the state’s Constitution empowers the Governor to restore the citizenship rights of individuals with felony convictions,<sup>68</sup> these numbers indicate that this discretionary power is rarely utilized.

That said, there appears to be movement in Iowa toward expanding the franchise to individuals with felony convictions. In 2014, in *Chiodo v. Section 43.24 Panel*, a plurality of the Iowa Supreme Court indicated that the state’s “infamous crimes” voting disqualification does not apply to all felony offenders.<sup>69</sup> The court elected not to determine which specific felonies constitute “infamous crimes” – leaving it to future cases to make that determination<sup>70</sup> – but it held that the misdemeanor crime of “operating while intoxicated,” as a second offense, does not constitute an infamous crime.<sup>71</sup> The court’s ruling in *Chiodo*, while limited, indicates that the state has begun to recognize the overbreadth of its burdensome and restrictive felon disfranchisement regime.

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<sup>67</sup> See Ryan J. Foley, *Iowa Governor Restores More Felons’ Voting Rights*, *Washington Times* (Jan. 14, 2014), available at <http://www.washingtontimes.com/news/2014/jan/14/iowa-governor-restores-more-felons-voting-rights/?page=all>.

<sup>68</sup> Iowa Const. of 1857, Art. IV, § 16.

<sup>69</sup> 846 N.W.2d at 853 (“[I]f our founders intended the infamous crimes clause to mean all felony crimes, we must presume they would have used the word ‘felony’ instead of the phrase ‘infamous crimes.’”).

<sup>70</sup> *Id.* at 856-57.

<sup>71</sup> *Id.* at 857, 864.

**C. Iowa’s Disfranchisement Law Disproportionately Affects African-Americans.**

The racial discrimination in Iowa’s criminal justice system has infected the State’s political process, causing African-Americans to be disproportionately denied the right to vote by the state’s disfranchisement law and burdensome restoration protocols.

**1. African-American Iowans Are More Likely than Whites to Come into Contact with the Criminal Justice System**

African-Americans in Iowa are disproportionately arrested and imprisoned, as compared to whites. These statistics have prompted many in the justice system, including Chief Justice Cady, to call for Iowa to “lead the nation in finding solutions to end racial disparities.”<sup>72</sup>

A study released in the summer of 2014 by St. Ambrose University in Davenport showed that twenty-nine percent of motorists pulled over by police in 2013 were African-American, although African-Americans

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<sup>72</sup> Grant Rogers *Iowa chief justice targets racial disparities, security*, Des Moines Register, January 14, 2015, Although no thorough research has been done regarding whether African-Americans in the state are disproportionately arrested, prosecuted, and convicted of felonies as compared to whites, the incarceration figures cited herein suggest similar disparities.

comprise only ten percent of the city’s population.<sup>73</sup> St. Ambrose also did a review of stop, search, and arrest patterns from 2005 to 2012 for the Iowa City Police Department and concluded: “Univariate analysis showed consistent patterns – Iowa City officers disproportionately arrested and (consent) searched minority drivers.”<sup>74</sup> Similarly, an analysis of arrest records from 2011 and 2012 by USA TODAY and the Des Moines Register showed that law enforcement agencies in dozens of Iowa communities and counties arrested African-Americans at rates that were nearly 10 times that of people of other races.<sup>75</sup> Forty-one Iowa law enforcement jurisdictions arrested African-Americans at a higher rate than people of other races.<sup>76</sup>

As a result of these racial disparities in arrests, Iowa ranks among the worst in the nation for its ratio of African-Americans to whites in

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<sup>73</sup> Kathy A. Bolten, *Black Iowans feel profiled by police*, *The Des Moines Register*, available at <http://www.desmoinesregister.com/story/news/crime-and-courts/2015/08/16/black-iowa-racial-profiling-police/31787599/>.

<sup>74</sup> Chris Barnum et al, “Iowa City Police Traffic Study 2005, 2006, 2007, 2010, 2011 & 2012,” at 7-8, available at <http://www.iowa-city.org/weblink/0/doc/1481387/Electronic.aspx>.

<sup>75</sup> “Database: Arrest rates for blacks in Iowa,” available at <http://db.desmoinesregister.com/arrests-for-blacks-in-iowa>. The analysis included only agencies that reported a total of at least 200 arrests in 2011 and 2012 and had an African-American population of at least 500. The highest disparity was found in Bettendorf where African-Americans were arrested at 9.9 times the rate of people of other races.

<sup>76</sup> *Id.*

imprisonment. In 2014, African-Americans represented 3.4 percent of Iowa's population<sup>77</sup> but 26.2 percent of the state's prison population.<sup>78</sup> According to a report published by the University of Wisconsin-Milwaukee, in 2010, Iowa ranked number three in the nation for the over-incarceration of African-American men between the ages of 18 and 24. The study reported that 9.4 percent of African-American male Iowans were imprisoned in state prisons and local jails,<sup>79</sup> compared to 0.9 percent of white males in the same age group.<sup>80</sup> As of 2005, the rate of incarceration for African-American Iowans was 13.6 times higher than that of whites.<sup>81</sup>

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<sup>77</sup> United States Census Bureau, "State and County Quickfacts: Iowa," available at <http://quickfacts.census.gov/qfd/states/19000.html?cssp=SERP>.

<sup>78</sup> Holly M. Lyons, Iowa Legislative Services Agency, Memo to Iowa General Assembly re: Minority Impact Statements (Feb. 11, 2013), available at <https://www.legis.iowa.gov/docs/publications/FLL/25029.pdf>.

<sup>79</sup> John Pawasarat and Lois M. Quinn, *Wisconsin's Mass Incarceration of African American Males* (2013) at 2, available at <http://www4.uwm.edu/eti/2013/BlackImprisonment.pdf>.

<sup>80</sup> *Id.*

<sup>81</sup> Marc Mauer & Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity* 10 (2007), available at [http://www.sentencingproject.org/doc/publications/rd\\_stateratesofincbyraceandethnicity.pdf](http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf)

These data illustrate the consistent social science findings that African-American Iowans, whether juvenile<sup>82</sup> or adult, are disproportionately impacted by the criminal justice system.

## **2. African-American Iowans Are Disproportionately Disfranchised**

As a result of the racial disparities in Iowa’s criminal justice system, felon disenfranchisement disproportionately denies African-Americans access to the fundamental right to vote. Prior to EO 42, one in four (24.87%) African-American adults in Iowa was disenfranchised.<sup>83</sup> This was *more than triple* the national African-American disenfranchisement rate (7.48 percent), and gave Iowa – a state with a very small African-American population – the highest rate of African-American disenfranchisement in the nation. Under EO 42, 6.9 percent of African-American voting-age Iowans were disenfranchised by criminal convictions, a significant decrease from previous years.<sup>84</sup> However, without automatic restoration of voting rights, the disenfranchised

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<sup>82</sup> Community and Strategic Planning Project Advisory Committee, *Recommendations and Action Plan for Reducing Disproportionate Minority Contacts in Iowa’s Juvenile Justice System*, November 2014, at 1 of 97.

<sup>83</sup> The Sentencing Project, *Iowa and Felony Disenfranchisement*. *supra* n. 53 at 2.

<sup>84</sup> Uggen, Shannon, and Manza, *The Sentencing Project* *supra* n. 29, at 17.

proportion of the African-American electorate in Iowa is likely to return to pre-2005 levels.

Given that most African-American Iowans live in a handful of counties in the state, Iowa's disfranchisement law significantly impacts those communities. As of 2013, nearly three-fourths of Iowa's African-American population lived in Polk, Scott, Black Hawk, Linn and Johnson counties.<sup>85</sup> African-Americans make up more than ten percent of the population of the cities of Waterloo (in Black Hawk county) and Davenport (in Scott county).<sup>86</sup> Because African-Americans are disproportionately convicted of crimes and disproportionately disfranchised, communities with significant African-American populations have less political power and less ability to represent their interests to school boards, county commissions, and city councils.

### **III. RESTORATION OF FELON VOTING RIGHTS WOULD STRENGTHEN COMMUNITIES IN IOWA AND HAS WIDE PUBLIC SUPPORT**

#### **A. Expanding Voter Eligibility Leads to More Inclusive Communities by Increasing Civic Engagement and Decreasing Crime.**

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<sup>85</sup> The State Data Center of Iowa & The Iowa Commission on the Status of African Americans, *African Americans in Iowa: 2015* (2015) at 2.

<sup>86</sup> *Id.*

Our democracy and the communities within it are stronger and healthier when its members participate in the political process. Indeed, criminologists have found that a self-perception as a responsible citizen reduces the likelihood of committing crimes.<sup>87</sup> It is therefore important to ensure that individuals who have been convicted of crimes have the opportunity to take on 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.”<sup>88</sup> Through voting, along with other forms of civic participation, an individual with a conviction reinforces an identity as a responsible citizen, and reduces his/her 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 felons 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.”<sup>89</sup> The respondents believed

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<sup>87</sup> Christopher Uggen, Jeff Manza, and Angela Behrens, “Less than the average citizen: stigma, role transition and the civic reintegration of convicted felons” in *After Crime and Punishment*, at 258, 259–60 (Shadd Maruna & Russ Immarigeon, eds., 2004).

<sup>88</sup> *Id.* at 263.

<sup>89</sup> Zaman, *supra* n. 10, at 238.

that exercising the right to vote would be “empowering.”<sup>90</sup> In another study, one prisoner 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.”<sup>91</sup> 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?”<sup>92</sup> As these statements illustrate, disfranchisement leaves individuals feeling stigmatized and rejected, interfering with the ability of civic participation to restore the sense of citizenship.<sup>93</sup>

Restoration of voting rights for people with felony convictions is also a common sense public safety reform given the well-documented research demonstrating that participation in the political process *decreases* the likelihood of reoffending. In one study of individuals who had been arrested

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<sup>90</sup> *Id.*

<sup>91</sup> Uggen, Manza, and Behrens, *supra* n. 87, at, 275.

<sup>92</sup> *Id.* at 275-76.

<sup>93</sup> *Id.* at 277.



prior to an election, 27 percent of non-voters were re-arrested, compared to 12 percent of voters, a statistically significant difference.<sup>94</sup>

Conversely, felon disenfranchisement interferes with the successful reintegration of released prisoners into their home communities, making it more likely that they will commit new crimes. A released prisoner's inability to participate in the political process can increase the social distance between the former offender and the community, reaffirming feelings of alienation and isolation and impeding acceptance and respect of the social norms and rule of law.<sup>95</sup> This can lead to further criminal activity.<sup>96</sup>

**B. The Nationwide Momentum Against Disfranchisement Laws Supports Expansion of Felon Voting Rights in Iowa.**

In the last twenty years, states across the country have recognized the need to reduce and remove voting restrictions on people with criminal convictions. Indeed, on November 24, 2015, the Governor of Kentucky

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<sup>94</sup> Christopher Uggen and 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, and Melissa Thompson, Citizenship Democracy, and the Civic Reintegration of Criminal Offenders, 605 *The ANNALS of the American Academy of Political and Social Science* 281, 303-04 (2006) (discussing a second study with similar results).

<sup>95</sup> Mandeep K. Dhami, *Prisoner Disenfranchisement Policy: A Threat To Democracy?*, 5 Anal. Of Soc., Issues and Pub. Pol'y 235, 243 (2005).

<sup>96</sup> *Id.* (citing Howard Becker, *Outsiders: Studies in the sociology of deviance* (1963)).

issued an executive order restoring the voting rights of citizens convicted of most non-violent felony convictions. This decision will affect an estimated 140,000 citizens.<sup>97</sup> Virginia expanded its automatic restoration process to reach people convicted of more felonies,<sup>98</sup> and the Indiana Supreme Court defined “infamous crimes” to include only those crimes that “undermine the system of government established by our Constitution,” such as treason and voter fraud.<sup>99</sup> Even before these recent changes, “an estimated 800,000 persons . . . regained the right to vote” due to changes in various state disfranchisement laws.<sup>100</sup>

There is also widespread public support for the restoration of voting rights for former offenders. 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.<sup>101</sup>

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<sup>97</sup> Erik Eckholm, “Kentucky Governor Restores Voting Rights to Thousands of Felons,” *The New York Times*, (Nov. 24, 2015), available at [http://www.nytimes.com/2015/11/25/us/kentucky-governor-restores-voting-rights-to-thousands-of-felons.html?\\_r=0](http://www.nytimes.com/2015/11/25/us/kentucky-governor-restores-voting-rights-to-thousands-of-felons.html?_r=0).

<sup>98</sup> “Governor McAuliffe Announces Changes to Virginia’s Restoration of Rights Policy,” available at <https://governor.virginia.gov/newsroom/newsarticle?articleId=3880>.

<sup>99</sup> *Snyder v. King*, 958 N.E.2d 764, 782 (Ind. 2011).

<sup>100</sup> Porter, *supra* n. 55, at 2.

<sup>101</sup> Porter, *supra* n. 55, at 3; Brian Pinaire, Milton Heumann, and Laura Bilotta, *Barred from the Vote: Public Attitudes Towards the*

## CONCLUSION

While Iowa guarantees its citizens the right to vote, the franchise is unduly limited by an antiquated regime that disproportionately disfranchises African-Americans. Felon disfranchisement undermines “the tendency of [Iowa’s] institutions and policy of the government to organize into one harmonious *people*, with a common country and stimulated with the common purpose to perpetuate and spread our free institutions for the development, elevation and happiness of *mankind*.”<sup>102</sup> In order to enhance the voting strength of *all* of Iowa’s citizens, to promote inclusive communities, and to boost civic engagement, this Court should restore full voting rights – without undue burden or discretionary procedures – to Iowans with felony convictions.

Dated: December 8, 2015

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*Disfranchisements of Felons*, 30 Fordham Urb. L.J. 1519, 1540 (2003) (finding 81.7% approval for restoration of voting rights); Jeff Manza, Clem Brooks, and Christopher Uggen, *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 Public Opinion Quarterly 276, 281 (2004) (finding 80% approval).

<sup>102</sup> *Clark*, *supra* n. 44 at 276 (emphasis in original).

Respectfully submitted,

/s/ John B. Whiston

John B. Whiston AT0008383  
Clinical Law Programs  
University of Iowa  
College of Law  
Iowa City, IA 52242-1113  
(319) 335-9023; (319) 353-5445 FAX

/s/ Christina A. Swarns

Christina A. Swarns\*  
cswarns@naacpldf.org

/s/ Angel S. Harris

Angel S. Harris\*  
aharris@naacpldf.org

/s/ Joshua A. Rosenthal

Joshua A. Rosenthal\*  
jrosenthal@naacpldf.org  
NAACP Legal Defense &  
Educational Fund, Inc.  
40 Rector Street, 5th Floor  
New York, NY 10006  
(212) 965-2200; (212) 226-7592 FAX

/s/ Coty Montag

Coty Montag\*  
NAACP Legal Defense &  
Educational Fund, Inc.  
1444 I Street, NW, 10th Floor  
Washington, DC 20005  
(202) 682-1300; (202) 682-1312 FAX  
cmontag@naacpldf.org

\*Motion for Pro Hac Vice Admission Pending

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