No. 06-35669

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MUHAMMED S. FARRAKHAN
(A/K/A ERNEST S. WALKER), *et al.*,

Appellants,

v.

CHRISTINE O. GREGOIRE, *et al.*,

Appellees.

On Appeal from the United States District Court
for the Eastern District of Washington
No. CV-96-076-RHW

BRIEF OF *AMICI CURIAE* THE NATIONAL BLACK POLICE ASSOCIATION, THE NATIONAL LATINO OFFICERS ASSOCIATION, AND FORMER LAW-ENFORCEMENT OFFICIALS ZACHARY W. CARTER, VERONICA COLEMAN-DAVIS, JAMES P. CONNELLY, SCOTT LASSAR, KATE PFLAUMER, LYLE QUASIM, CHASE RIVELAND, AND NORM STAMPER IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL

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STATEMENT OF CORPORATE DISCLOSURE

Pursuant to Fed. R. App. P. 26.1, *amici curiae* the National Black Police Association and the National Latino Officers Association, by and through their undersigned counsel, state that they are non-profit 501(c)(3) organizations and therefore not publicly held corporations that issue stock.

December 11, 2006

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INTEREST OF *AMICI CURIAE*

Amici curiae are professional law-enforcement associations and individual former law-enforcement officials who share an interest in the invalidation of felon disenfranchisement laws that disproportionately deny minority citizens the right to vote. *Amici* submit (1) that the Voting Rights Act permits and indeed requires reviewing courts to give serious consideration to whether the policy justifications for a voting practice are tenuous, and (2) that the State of Washington serves no legitimate penal interest by disenfranchising otherwise qualified citizens who have been convicted of a felony — including tens of thousands of African-American, Latino, and Native American citizens.

Amicus The National Black Police Association (NBPA) and *amicus* The National Latino Officers Association of America (NLOA) together represent more than 45,000 uniformed and civilian law-enforcement officers and employees at the city, state, and federal level. NBPA and NLOA are dedicated to promoting effective law enforcement and to building stronger bonds between minority law-enforcement officers and the communities they serve. The individual *amici* — Zachary W. Carter, Veronica Coleman-Davis, James P. Connelly, Scott Lassar, Kate Pflaumer, Lyle Quasim, Chase Riveland, and Norm Stamper — are prominent former state and federal law-enforcement officials, including five former United States Attorneys, a former Secretary of Washington's Department of

Social and Health Services, a former Secretary of Washington's Department of Corrections, and a former Seattle Police Chief.*

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this appeal is whether Article VI, § 3, of the Washington State Constitution and its implementing statute, RCW § 9.94A.220, which deny the right to vote to all persons convicted of an "infamous crime," constitute improper race-based vote denial in violation of Section 2 of the Voting Rights Act of 1965 (the "VRA").[1] Washington's felon disenfranchisement scheme affects approximately 3.6% of the State's adult population, totaling more than 167,000 people — tens of thousands of whom have served their sentences, including not only imprisonment but also probation and parole.[2] Significantly, for purposes of analysis under the VRA, Washington's constitutional provision and statute have an enormously disproportionate impact on the voting opportunities of racial minorities. They currently disenfranchise almost *one-quarter* of otherwise qualified black male voters, and more than 17% of the entire adult black population in the State.[3]

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* A more complete description of each *amicus* can be found at Appendix A.

[1] Pub. L. No. 89-110, 79 Stat. 437, *as amended*, Pub. L. No. 97-205, 96 Stat. 134 (1982), 42 U.S.C. § 1973.

[2] JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 250 (2006); JAMIE FELLNER & MARC MAUER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 9-10 (1998).

[3] MANZA & UGGEN, *supra* note 2, at 253; FELLNER & MAUER, *supra* note 2, at 10.

Section 2 of the VRA prohibits all state practices that deny or abridge the right to vote on account of race or color. Congress amended Section 2 in 1982 precisely to free voting-rights plaintiffs from having to prove discriminatory intent when challenging a voting qualification or practice that has discriminatory effects. That the Congress allowed plaintiffs to prevail absent any evidence of discriminatory intent, however, does not render irrelevant a State's asserted interest in a voting qualification or practice challenged under Section 2. Rather, the plain text of amended Section 2 instructs courts to consider "the totality of circumstances,"[4] and the Senate Report accompanying the 1982 amendments listed, as one potentially probative circumstance, "whether the policy underlying the [State's] use of [the challenged practice] is tenuous."[5] The "tenuousness" factor prevents States from defending discriminatory voting practices by pointing to some seemingly race-neutral policy that is in fact flimsy when compared to the loss of the franchise.

In this litigation to date, Appellees have not asserted *any* justification, penal or otherwise, for Washington's felon disenfranchisement scheme.[6] That fact alone renders the practice tenuous at best and should conclude the inquiry. Moreover, as

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[4] 42 U.S.C. § 1973(b).

[5] S. Rep. No. 97-417, at 29 (1982) [hereinafter "S. Rep."], *reprinted in* 1982 U.S.C.C.A.N. 177, 207, *and quoted in Thornburg v. Gingles*, 478 U.S. 30, 37 (1986), *and Johnson v. De Grandy*, 512 U.S. 997, 1010 n.9 (1994).

[6] Joint Appendix ("J.A.") at 649.

this brief shows, even assuming that the State did or might now attempt to offer an explanation based on its penal interests, it would be unconvincing for two reasons. *First*, historically, felon disenfranchisement laws have never been justified as a means for advancing a State's penal goals. *Second*, disenfranchising those convicted of a felony does not materially serve the traditional, legitimate penal interests of prevention, deterrence, or retribution — and it positively *disserves* the goal of rehabilitating ex-offenders.

Although the District Court purported to consider the tenuousness factor, it failed to analyze that factor properly. Instead, the District Court concluded that, the long-standing existence of felon disenfranchisement laws rendered the court's ability "to examine the tenuousness of Washington's felon disenfranchisement laws extremely limited."[7] That conclusion directly contravenes this Court's prior rulings in this case, *Farrakhan v. Washington*,[8] which noted that the "totality of circumstances" test ought to include consideration of "evidence of the tenuous policy justifications for Washington's felon disenfranchisement law,"[9] and in

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[7] *Id.* at 650.

[8] 338 F.3d 1009 (9th Cir. 2003) ("*Farrakhan I*"), *reh'g en banc denied*, 359 F.3d 1116 (9th Cir.), *cert. denied*, 125 S. Ct. 477 (2004).

[9] *Id.* at 1013-14; *see also id.* at 1015 (quoting the Senate Report on "tenuous" state policies); *id.* at 1020 n.15 (discussing Appellants' evidence of tenuousness).

Dillenburg v. Kramer,[10] which found no legitimate state interest supporting Washington's felon disenfranchisement scheme.[11]

For these reasons, and the reasons set forth in greater detail below, this Court should reverse the District Court's judgment.

ARGUMENT

I. Under Section 2 of the Voting Rights Act, Reviewing Courts Must Scrutinize Any "Voting Qualification" that Denies Minority Citizens Equal Access to the Ballot To Assess Whether It Is Justified by a Significant, Non-Tenuous State Interest.

Section 2 of the VRA prohibits States from implementing any "*voting qualification* or prerequisite to voting or standard, practice, or procedure . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language-minority group.[12] As amended in 1982, Section 2 focuses on results and requires no proof of discriminatory intent.[13] In evaluating whether a given practice violates Section 2, courts must inquire whether, "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State . . . are not equally open to participation by members of a [protected] class of citizens . . . in that its members have less opportunity than other members of the

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[10] 469 F.2d 1222 (9th Cir. 1972).
[11] *Id.* at 1225.
[12] 42 U.S.C. § 1973(a) (emphasis added).
[13] *See Chisom v. Roemer*, 501 U.S. 380, 383-84 (1991).

electorate to participate in the political process and to elect representatives of their choice."[14]

The Supreme Court has identified several objective factors that, under Section 2's "totality of circumstances" test, may support a claim of vote dilution or vote denial.[15] These factors (known as the "Senate factors") were derived from the Senate Report that accompanied the 1982 amendments to Section 2. They include: (1) a history of official discrimination touching on the right to vote, (2) racially polarized voting, (3) practices that may enhance the opportunity for discrimination, (4) whether minorities have been denied access to a candidate slating process, if one exists, (5) whether members of minority groups bear the effects of past discrimination, (6) racial appeals in campaigns, (7) the extent to which members of minority groups have been elected to public office, (8) lack of responsiveness by elected officials to minority interests, and — most significantly here — (9) whether "the policy underlying the State's . . . use of the contested practice or structure is tenuous."[16] Given *amici*'s experience in law enforcement, we focus our discussion on the last factor — the tenuousness of the State's purported law-enforcement interest in disenfranchising persons with felony convictions.

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[14] 42 U.S.C. § 1973(b).

[15] *See, e.g.*, *De Grandy*, 512 U.S. at 1010-11 & n.9 (citing S. Rep. at 28-29); *Gingles*, 478 U.S. at 44-45 (same).

[16] *Gingles*, 478 U.S. at 45.

This inquiry into whether the State's interest is tenuous plays a key role under Section 2's "totality of circumstances" test, especially when there is little or no direct evidence of intentional discrimination. The greater the disparate impact the challenged voting practice has on a protected group, the greater is the State's burden to justify that practice. Where a practice has a racially disparate impact, an inquiry into the State's interest may "show whether a state's policy [is] pre-textual,"[17] "indicate that the policy is unfair,"[18] or serve as "circumstantial evidence that the system is motivated by discriminatory purposes and has a discriminatory result."[19]

The District Court here erroneously concluded that it was "extremely limited" in its ability to "question the wisdom" of a state legislature's policy choices under Section 2's tenuousness inquiry.[20] Section 2 does not call upon courts to second-guess legislative decisions and then invalidate laws based upon that judgment alone. Rather, it requires courts — as one part of the "totality of circumstances" test — to give serious consideration to whether the alleged policy justifications of a challenged practice are tenuous, and then to balance its conclusion on that score against the other Senate factors. Contrary to the District

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[17] *Cousin v. McWherter*, 46 F.3d 568, 576 (6th Cir. 1995).
[18] *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984).
[19] *McMillan v. Escambia County*, 748 F.2d 1037, 1045 (5th Cir. 1984).
[20] J.A. at 650 (citing *Johnson v. Governor of Florida*, 405 F.3d 1214, 1228 (11th Cir.) (*en banc*), *cert. denied*, 126 S. Ct. 650 (2005)).

Court's conclusion otherwise, there is nothing inappropriate or unseemly about such an inquiry. This kind of searching examination is not only permitted, but required by Section 2, particularly to evaluate seemingly race-neutral voting practices or qualifications that may significantly impede a protected group's electoral opportunities.[21]

Thus, for example, redistricting plans enacted in good faith and for nondiscriminatory purposes are routinely invalidated under Section 2 because they dilute minority voting strength.[22] Courts are perfectly capable of engaging in such balancing in felon disenfranchisement cases as well.[23] Indeed, as this Court stated in *Farrakhan*: "'Even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the [political] process.'"[24] The tenuousness factor is necessary and critical to ensure that the alleged state interest served (if any) by the challenged voting qualification or practice is not frivolous when compared with the seriousness of denying otherwise qualified citizens the right to vote.

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[21] *See* S. Rep. at 29 n.117, *reprinted in* 1982 U.S.C.C.A.N. at 207 n.117.
[22] *See, e.g., Clark v. Calhoun County*, 88 F.3d 1393, 1401 (5th Cir. 1996) (finding a § 2 violation in a redistricting plan despite upholding the district court's finding that "attempting to maintain districts with equal road mileage is nontenuous").
[23] *Farrakhan I*, 338 F.3d at 1020 & n.15.
[24] *Id.* at 1019 (quoting S. Rep. at 29 n.117).

II. States, Including Washington, Have Struggled To Identify Any Legitimate Interests To Justify Felon Disenfranchisement Schemes.

A. Historically, Felon Disenfranchisement Schemes Have Had the Purpose and Effect of Discriminating Against Minorities — The Very Evils that Congress Intended To Target in the Voting Rights Act.

Although Appellants' arguments do not rest on an allegation of intentional discrimination, it is important to recognize that the practice of felon disenfranchisement in the United States has a deeply discriminatory history. Both during and after Reconstruction, a number of States enacted or amended disenfranchisement schemes to diminish the electoral strength of the newly freed slaves.[25] These laws, if not explicit in their racial goals, often singled out crimes for which blacks were more likely to be convicted than whites, with little regard to the severity of the crime or its possible relation to the franchise.[26] Little thought was given to other possible policy justifications for these racially motivated laws.

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[25] *See Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (describing the "movement that swept the post-Reconstruction South to disenfranchise blacks"); *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998) ("[Felon disenfranchisement statutes were] enacted in an era when southern states discriminated against blacks by disenfranchising convicts for crimes that, it was thought, were committed primarily by blacks."); *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896) (tracing devices, including criminal disenfranchisement, added to the 1890 Mississippi Constitution to "obstruct the exercise of the franchise by the negro race"); *see also* Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 537-42 (1993).

[26] *See, e.g.*, MANZA & UGGEN, *supra* note 2, at 43, 55 (2006); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 593 (1988);

Congress addressed the evils of felon disenfranchisement laws that were motivated by racial discrimination or that have a substantial racially discriminatory impact when it passed the Voting Rights Act. Indeed, in *Richardson v. Ramirez,*[27] the Supreme Court had all but invited Congress to do so. The *Richardson* Court rejected a nonracial equal-protection challenge to a felon disenfranchisement law based on the affirmative sanction for disenfranchisement that appears in the Fourteenth Amendment's Penalty Clause.[28] The Court sympathized with plaintiffs' claims that felon disenfranchisement's historic rationales were "outmoded" and that "rehabilitating the ex-felon [requires] that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term."[29] But those arguments, the Court explained, would best be directed to "the legislative forum which may properly weigh and balance them."[30]

Exercising its enforcement power under the Fifteenth Amendment, Congress accepted the *Richardson* Court's invitation in 1982 when it amended the Voting Rights Act. Congress concluded that a "voting *qualification* or prerequisite to voting or [voting] standard, practice, or procedure"[31] — terms that surely

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Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1088-89.

[27] 418 U.S. 24 (1974).

[28] *See id.* at 54-55.

[29] *Id.* at 55.

[30] *Id.*

[31] 42 U.S.C. § 1973(a) (emphasis added).

encompass felon disenfranchisement laws generally and the Washington scheme in particular — is presumptively illegal if it disparately impacts minority citizens and is maintained for tenuous reasons. Indeed, the 1982 report laying out the "Senate factors" expressly instructed courts to consider the very tenuousness of state policies that the *Richardson* Court's opinion had highlighted.

B. Felon Disenfranchisement Schemes Have Never Been Justified as a Means for Advancing Any State's Penal Interests, Including Washington's.

The history of felon disenfranchisement schemes also reveals that, at the time of their enactment, they were never justified as a component of a law-enforcement program. In fact, *amici* are unaware of any State enacting a felon disenfranchisement law based on a considered judgment that the law was needed to advance the State's penal objectives. Washington is no exception. Indeed, the District Court found that "the State here does not explain why disenfranchisement of felons is 'necessary' to vindicate any identified State interest."[32]

The disconnect between law-enforcement goals and felon disenfranchisement has deep roots. In ancient times, felon disenfranchisement was part of a system of ostracism or banishment, beginning with the ancient Roman notion of "infamia," a pronouncement of moral censure imposed on citizens who

[32] J.A. at 649.

committed immoral or criminal acts.[33] In the Middle Ages, Germanic tribes employed the practice of "outlawry" to expel an offender from the community, causing him to be deprived both of civil rights and of society's protection. The outlaw's property was confiscated, and he could be killed with impunity by anyone.[34] Following the Middle Ages, in continental Europe, outlawry was transformed by statutory enactment into "civil death," which terminated the offender's legal existence. Dishonor and incapacity often were imposed on the offender's descendants, as well.[35]

In England, the method of imposing civil disabilities under the common law was called "attainder." Upon conviction for a felony, the offender was pronounced "attainted" and was subjected to numerous penalties, including forfeiture (the confiscation of chattel and other goods) and "corruption of the blood," which left the attainted person unable to inherit or devise real property and escheated all his property to the lord of the estate. The offender also lost his civil rights, including the right to vote, as well as the rights to bring suit and to appear as a witness in court.[36] These penalties were "based on the fiction that the criminal's act was

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[33] *See* Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments,* 11 AM. CRIM. L. REV. 721, 721-22 (1973).

[34] *See id.* at 722-23.

[35] *See id.* at 723 & n.15.

[36] *See id.* at 724.

evidence that he and his entire family were corrupt and therefore unworthy of being feudal tenants."[37]

In America, of course, corruption of blood was banned by the Constitution (except under limited circumstances related to treason),[38] and American common law has firmly rejected the notion of "civil death."[39] As explained above, felon disenfranchisement in America generally is more a product of racially discriminatory legislation during and after Reconstruction. But neither in our history nor in Europe's has felon disenfranchisement been justified as a means for advancing penal interests.

III. Felon Disenfranchisement Schemes Are Not Entitled to *Sui Generis* Treatment as Part of the Criminal Process, Because Disenfranchising All Persons Convicted of a Felony Does Not Materially Advance Any Legitimate Penal Interest.

Among respected authorities on criminal justice, there is a growing consensus against the disenfranchisement of those convicted of a felony, particularly beyond the period of their sentence and post-release supervision. The American Bar Association and the American Law Institute (ALI) have long opposed such disenfranchisement because the "stigma of exclusion . . . deter[s]

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[37] Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box,"* 102 HARV. L. REV. 1300, 1302 (1989) (citation and internal quotation marks omitted).

[38] *See* U.S. CONST. art. III, § 3, cl. 2.

[39] *See* Itzkowitz & Oldak, *supra* note 33, at 725.

rehabilitation and increase[s] the likelihood of recidivism."[40] The ALI's Model Penal Code prohibits disenfranchisement that continues after "a sentence of imprisonment" has ended.[41]

More recently, the American Correctional Association has adopted a resolution opposing disenfranchisement after "completion of the offender's sentence including community supervision" because it "work[s] against the successful reentry [into the community] of offenders as responsible, productive citizens."[42] Similarly, the National Conference of Commissioners on Uniform State Laws issued a recommendation in October 2006 that upon "release from any term of imprisonment, a person convicted of an offense shall not be denied the right to vote based on that conviction."[43] And a recent president of the National

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[40] Andrew L. Shapiro, *The Disenfranchised,* THE AMERICAN PROSPECT at 60 (Nov.-Dec. 1997); *see* American Bar Association, *Standards for Criminal Justice 23-8.4: Voting Rights* (2d ed. 1983).

[41] MODEL PENAL CODE § 306.3 (2001). Similarly, the United Nations Human Rights Committee, which reviews adherence to the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a signatory, has rejected the automatic imposition of lifetime disenfranchisement. *See* General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4 of the ICCPR, CCPR/C/21/Rev.1/Add.7, Aug. 27, 1996, Annex V(1), *quoted in* FELLNER & MAUER, *supra* note 2, at 21.

[42] American Correctional Association, Resolution on the Restoration of Voting Rights (Jan. 14, 2004), *available at* http://www.aca.org/government/policyresolution/view.aspID=62.

[43] Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Collateral Sanctions and Disqualifications Act 31-32 (discussion draft Sept. 18, 2006) (later became the Oct. 2006 draft), *available at* http://www.law.upenn.edu/bll/ulc/ucsada/2006octdraft.pdf.

District Attorneys Association likewise has voiced concern about creating a "subclass of citizens who, even after doing what they were ordered to do by a judge, are . . . disenfranchised from the vote and continually labeled as criminals. To no one's surprise, they may believe they have no recourse but to continue to live outside the law."[44]

Despite the overwhelming confluence of (1) this growing consensus in the law-enforcement and correctional community, (2) the conspicuous absence of any plausible explanation by the State for its felon disenfranchisement scheme, (3) the skepticism expressed by this Court in *Dillenburg* about the existence of any convincing state interest that would justify disenfranchising persons convicted of a felony, and (4) the uncontested report and testimony of Appellants' expert witness expressing the same point,[45] the District Court somehow concluded that the tenuousness factor "favors the [State]."[46] The District Court's conclusion is especially perplexing in light of its prior opinion in this same case,[47] where it observed that *Dillenburg*'s skepticism of any legitimate interest behind Washington's felon disenfranchisement scheme is instructive "to the extent that the

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[44] Robert M. A. Johnson, *Message from the President — Collateral Consequences*, National District Attorneys Association (May/June 2001), *available at* http://www.ndaa.org/ndaa/about/president_message_ may_june_ 2001.html.
[45] J.A. at 354-73.
[46] J.A. at 650.
[47] *Farrakhan v. Locke*, 987 F. Supp. 1304 (E.D. Wash. 1997).

decision discusses the alleged justifications for felon disenfranchisement statutes."[48]

Even if Appellees were to attempt at this stage to advance the notion that Washington's felon disenfranchisement scheme somehow advances the State's penal interest, they would be unsuccessful. As *amici* show below, the exclusion of a citizen from the political community does not materially advance any accepted goal of the criminal-justice system, such as prevention, deterrence, or retribution. And any exclusion from voting beyond the period of a criminal sentence gravely disserves the State's interest in rehabilitating the offender and reintegrating him into civil society.

A. Incapacitation/Prevention

The incapacitation rationale for punishment is that a person who has committed a crime is likely to do so again and that punishment is therefore necessary to prevent him from breaking the law again. Typically, this punishment takes the form of physically incarcerating the offender. As applied to felon disenfranchisement schemes, however, the incapacitation justification is unpersuasive.

States like Washington that maintain such laws have been hard pressed to identify evidence that persons convicted of felons are prone to commit offenses

[48] *Id.* at 1312.

affecting the integrity of elections. Notably, Washington has not limited its ban on voting to those felons who have previously committed election-related offenses.[49] Extended disenfranchisement of felons based on the kind of punishment for which a person would have qualified (without regard to the kind of crime committed) would be a wildly overbroad response to this concern.[50]

States have also attempted to articulate a rationale of "preventing persons who have been convicted of serious crimes from participating in the electoral process" on the basis that they are unlikely to exercise the right to vote responsibly.[51] The theory apparently is that they will vote against pro-law-enforcement candidates and initiatives. But this asserted concern about "the purity of the ballot box" surely is not a valid basis for disenfranchisement. In the States that allow persons convicted of a felony to vote, there is no evidence that they vote in bloc, let alone in a socially disruptive manner.

Moreover, excluding a group from the electorate based on predictions about how they would vote is flatly unconstitutional. In *Carrington v. Rash*,[52] the Supreme Court considered Texas's constitutional provision prohibiting military personnel who moved to Texas from voting. Texas claimed a "legitimate interest

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[49] *See* Itzkowitz & Oldak, *supra* note 33, at 738-39 (possibility that election offense may be committed by class of ex-criminals is negligible).
[50] *See also Dillenburg*, 469 F.2d at 1224-25.
[51] *Id.* at 1224.
[52] 380 U.S. 89 (1965).

in immunizing its elections from the concentrated balloting of military personnel, whose collective voice may overwhelm a small local civilian community."[53] The Court struck down the law:

> "Fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. "[T]he exercise of . . . rights so vital to the maintenance of democratic institutions" cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.[54]

Indeed, the Voting Rights Act pointedly prohibits States from conditioning the right to vote on any demonstration of knowledge, aptitude, or character.[55]

B. Deterrence

Perhaps the most commonly asserted goal of punishment is to deter future criminal conduct, whether by the particular offender (specific deterrence) or by others (general deterrence). There is, however, no basis whatsoever to conclude that disenfranchising persons who have been convicted of a felony serves to deter them from committing new crimes, or to deter others from committing felonies and joining their ranks. So unlikely is this goal of punishment to justify the practice

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[53] *Id.* at 93.

[54] *Id.* at 94 (citation omitted).

[55] *See Oregon v. Mitchell*, 400 U.S. 112, 144-45 & n.9 (1970) (upholding the VRA provision that bars States from requiring voters to pass tests of "good moral character" or of "knowledge of any particular subject"); *see also Dillenburg*, 469 F.2d at 1224 (deriding "purity of the ballot box" as a "quasi-metaphysical invocation").

that *amici* is unaware of any State that has attempted to assert deterrence as a penal justification for its felon disenfranchisement laws.

Rather, deterrence flows from the other penal consequences of a felony conviction, including a lengthy term of incarceration (by definition, a felony carries a potential prison sentence of more than a year) and significant fines. As one commentator observed: "It seems unlikely that an individual who is not deterred by the prospect of imprisonment or fines or other restrictions on his liberty will be dissuaded by the threat of losing his right to vote, even if he were aware that permanent disenfranchisement is a collateral consequence of a criminal conviction."[56]

C. Retribution

Punishment may also be justified as a form of moral desert. The ancient notion of "civil death" — in which the offender was stripped of his civil rights — was understood in part as such a form of retribution. During ancient times, apart from losing the franchise, an offender was stripped of his chattel and other goods, deemed unfit to marry or to inherit property, and forbidden to possess or divide his estate for his heirs.[57]

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[56] Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1166 (2004).
[57] *See* Itzkowitz & Oldak, *supra* note 33, at 723, 736.

We live in a very different era. For one thing, the Constitution imposes limits on retributive punishment, such as the Eighth Amendment's prohibitions on "excessive fines" and "cruel and unusual" punishments.[58] More generally, the law-enforcement community and society at large now recognize that a punishment can be morally justified as retribution only if it is reasonably proportionate in severity and duration to the crime in question.[59] Today, no one could seriously assert, for example, that stripping all persons convicted of a felony of the right to marry or to inherit property would be a justifiable form of retribution.

In the context of the right to vote, *amici* believe that blanket disenfranchisement for all those who have committed any crime punishable by death or imprisonment in a state correctional facility — as Washington defines "infamous crime" — is unjustifiably broad. As the *Dillenburg* Court recognized, this definition includes a large number of crimes ranging in severity and kind that "do not follow any perceivable pattern."[60] At the same time, the severity of the punishment of disenfranchisement is undeniable. Laws mandating the denial of voting rights to persons convicted of a felony destroy that citizen's most direct

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[58] U.S. CONST. amend. VIII.

[59] The penological principle of proportionality holds that "the severity of the criminal sanction should be limited by the seriousness of the offense and the relevant attributes of the offender." Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 35 (Marc Mauer & Meda Chesney-Lind eds., 2002).

[60] 469 F.2d at 1225.

form of participation in the central process of self-government and render people with felony convictions invisible to elected officials. As one court has put it, disenfranchisement saddles one segment of the population with

> the harshest civil sanction imposed by a democratic society. When brought beneath its axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box . . . , the disinherited must sit idly by while others elect his civic leaders and while others choose the fiscal and governmental policies which will govern him and his family.[61]

The weakness of the retribution justification is especially poignant for those persons convicted of a felony who may have had a significantly reduced sentence, may be under court supervision, or may have already served their criminal sentences and are seeking to reintegrate into society. To deny them the right to vote is to disregard the assessment of blameworthiness that the prosecutor and the sentencing judge or jury made after careful review of the individual's circumstances.[62] Such exclusion instead appears more akin to the types of denunciatory "shaming" and branding of offenders that have long been discredited as archaic. By modern standards, a collateral consequence of that sort "runs

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[61] *McLaughlin v. City of Canton*, 947 F. Supp. 954, 971 (S.D. Miss. 1995).
[62] Karlan, *supra* note 56, at 1167.

counter to the adage that 'after the sentence is served, the offender has paid his or her debt to society.'"[63]

Washington's felon disenfranchisement scheme is unjustifiably disproportionate for another reason. At common law, and at the time the Reconstruction Amendments were ratified, relatively few offenses were deemed felonies, mostly involving violence or forceful invasions of property. Today, however, federal and state felony statutes apply to a broad range of activity, including countless regulatory violations, as reflected in the exponentially increasing number of Washingtonians to whom the State's disenfranchisement law applies. Categorical disenfranchisement lumps together crimes of vastly different gravity and fails to acknowledge that not all "infamous crimes" are equally serious, as shown by the wide range of possible criminal sentences for the offenses that fall within that description.[64]

The overly broad felon disenfranchisement scheme here sweeps far beyond the original retributive logic of denying the franchise to those who may have committed a crime serious enough to warrant the denial of such an important aspect of citizenship. *Amici* therefore submit that, under Voting Rights Act analysis, the State's retributive interest in this penalty is tenuous at best.

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[63] Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 160 (1999) (citation and internal quotation marks omitted).

[64] *See Dillenburg*, 469 F.2d at 1224-25.

D. Rehabilitation

The fourth and final goal of punishment is to rehabilitate the offender and reintegrate him into mainstream society. No State has an interest in creating an underclass of citizens who are blocked or inhibited by virtue of their prior offenses from contributing productively to their Nation, their polity, and their communities. But as *amici* know from their experiences in law enforcement and corrections, reintegrating an offender into civil society is a daunting challenge under the best of circumstances.[65]

Denying the right to vote only adds an additional barrier to successful reintegration, particularly where (as in Washington today) this denial falls disproportionately on members of a racial minority group. As a past president of the American Society of Criminology recently observed, "denying large segments of the minority population the right to vote is likely to cause further alienation. Disillusionment with the political process also erodes citizens' feelings of engagement and makes them less willing to participate in local political activities and to exert informal social control in their community."[66] The State's interest in

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[65] *See* Joan Petersilia, *When Prisoners Return to the Community: Political, Economic, and Social Consequences*, in NATIONAL INSTITUTE OF JUSTICE'S SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY 5 (2000).

[66] *Id.*; *see also United States v. K*, 160 F. Supp. 2d 421, 434 (E.D.N.Y. 2001) (reviewing the literature demonstrating that felon disenfranchisement laws have "frustrated the released felon's attempt to integrate himself or herself into society" and "serve to further estrange released offenders from mainstream society").

rehabilitation would be far better served by restoring the voting rights to those who have been denied the franchise based on their past actions than by continuing to disenfranchise all those convicted of a felony.

* * *

In this case, Section 2 required the District Court to take a serious and probing look at the interest motivating the challenged voting practice. Washington should have borne a substantial burden of justification. Instead, the District Court shirked its duty to scrutinize any possible interest Washington had to maintain its felon disenfranchisement scheme — despite recognizing that the State had offered no justification whatsoever. The statistics set out at the start of this brief, and others identified by Appellants, demonstrate that Washington's disenfranchisement scheme for those convicted of a felony lopsidedly bars African-American and other minority citizens from the voting booth. Appellants have further demonstrated that other "Senate factors" heavily favor their claim of illegal vote denial.[67] These facts, combined with the clearly tenuous connection between Washington's felon disenfranchisement scheme and any possible underlying State interest, should render the State's practice invalid under Section 2.

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[67] J.A. at 642-46.

CONCLUSION

For the reasons cited above, *amici curiae* respectfully ask this Court to reverse the District Court's judgment.

Respectfully submitted,

December 11, 2006

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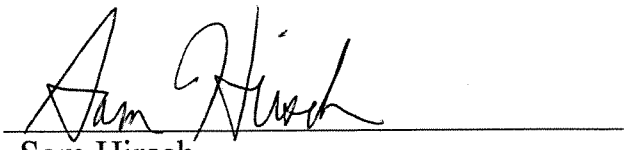
CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because it contains 5,514 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman font.

Dated: December 11, 2006



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CERTIFICATE OF SERVICE

I hereby certify that I have filed the original and 15 copies of the foregoing *Brief of* Amici Curiae *the National Black Police Association, the National Latino Officers Association, and Former Law-Enforcement Officials Zachary W. Carter, Veronica Coleman-Davis, James P. Connelly, Scott Lassar, Kate Pflaumer, Lyle Quasim, Chase Riveland, and Norm Stamper In Support Of Appellants And In Support Of Reversal* by UPS to this Court, Office of the Clerk, U.S. Court of Appeals, 95 Seventh Street, San Francisco, California. I have also served 2 copies of the same by UPS on the following counsel:

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Appendix A
Interests of the *Amici Curiae*

Zachary W. Carter served as United States Attorney for the Eastern District of New York between 1993 and 1999.

Veronica Coleman-Davis served as United States Attorney for the Western District of Tennessee between 1993 and 2001.

James P. Connelly served as United States Attorney for the Eastern District of Washington from 1993 to 1999.

Scott Lassar served as United States Attorney for the Northern District of Illinois between 1997 and 2001.

Kate Pflaumer served as United States Attorney for the Western District of Washington from 1993 to 2001.

Lyle Quasim was Washington's Secretary of Department of Social and Health Services from 1995 to 2000, and served on the Washington Council on Crime and Delinquency.

Chase Riveland was Washington's Secretary of Corrections from 1986 to 1997 and Executive Director of Colorado's Department of Corrections from 1983 until 1986; he currently serves as Special Master in *Valdivia v. Schwarzenegger*, Civ. No. S-94-671 LKK/GGH (E.D. Cal.).

Norm Stamper served as Seattle's Chief of Police from 1994 to 2000 and was a San Diego police officer from 1966 until 1994.

National Black Police Association, which represents approximately 35,000 individual members and more than 140 chapters, is a nationwide organization of African American Police Associations dedicated to the promotion of justice, fairness, and effectiveness of law enforcement.

National Latino Officers Association of America is a fraternal and advocacy organization with a membership of 10,000 uniformed and civilian employees, predominantly within city and state law-enforcement agencies, that is dedicated to creating strong bonds between the Latino community and other law-enforcement agencies.