No. 06-35669

United States Court of Appeals for the Ninth Circuit

MUHAMMAD SHABAZZ FARRAKHAN, A/K/A ERNEST S. WALKER-BEY; AL-KAREEM SHADEED; MARCUS PRICE; RAMON BARRIENTES; TIMOTHY SCHAAF; AND CLIFTON BRICENO,

Plaintiffs-Appellants,

— v. —

CHRISTINE O. GREGOIRE, GOVERNOR OF THE STATE OF WASHINGTON; SAM REED, SECRETARY OF STATE FOR THE STATE OF WASHINGTON; HAROLD W. CLARKE, DIRECTOR OF THE WASHINGTON STATE DEPARTMENT OF CORRECTIONS; AND THE STATE OF WASHINGTON,

Defendants-Appellees.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NO. CV-96-076-RHW THE HONORABLE ROBERT H. WHALEY, JUDGE PRESIDING

BRIEF SUBMITTED ON BEHALF OF LEADING CRIMINOLOGISTS

ALFRED BLUMSTEIN, JOHNNA CHRISTIAN, TODD R. CLEAR, CAVIT COOLEY, FRANCIS T. CULLEN, MALCOLM FEELEY, DAVID GARLAND, DAVID F. GREENBERG, M. KAY HARRIS, PHILIP HARRIS, MICHAEL ISRAEL, LAUREN KRIVO, JEFF MANZA, CANDACE MCCOY, ALAN MOBLEY, JOHN MOLLENKOPF, JOAN PETERSILIA, JAMES SHORT, JONATHAN SIMON, JEROME H. SKOLNICK, JEREMY TRAVIS, BRUCE WESTERN, AND DEANNA WILKINSON

AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL

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INTRODUCTION AND IDENTITY AND INTEREST OF THE *AMICI CURIAE*

This appeal addresses whether Article VI, Section 3 of the Washington State Constitution ("Article VI, Section 3"), which disenfranchises all persons convicted of an "infamous crime," violates the Voting Rights Act, 42 U.S.C. § 1973 ("VRA"). Section 2 of the VRA ("Section 2") proscribes any voting practice imposed by any state that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." § 1973(a). To determine whether a voting practice violates Section 2, courts are directed to look at the "totality of the circumstances" surrounding the practice. § 1973(b). The Senate Report accompanying the 1982 amendments to the Voting Rights Act listed non-exclusive factors to be considered by courts when determining the totality of the circumstances. S. Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07 ("Senate Report"). The ninth of these factors is "whether the policy underlying the state['s] . . . use of [the] . . . voting practice . . . is tenuous." *Id.* ("Ninth Senate Factor").

Here, the District Court determined that the policy underlying Washington's felon disenfranchisement law was not tenuous. The proposed *amici curiae* disagree with the District Court and argue herein that Washington State's policy is tenuous because there is no legitimate penal or regulatory state interest that justifies the Washington State felon disenfranchisement scheme.

A. IDENTITY OF THE PROPOSED *AMICI CURIAE*

The proposed *amici curiae* in this action, whose names, positions, and accomplishments are listed in Attachment A, are uniquely situated to opine on the tenuousness of the policy behind Washington's felon disenfranchisement scheme. They are all social scientists and criminologists who have studied and continue to study the impact of state laws and policies on criminal offenders. They are experts in community corrections, and some have served as government officials or officers in administering programs of probation or parole. These experts are familiar with, and have made important contributions to, the body of academic literature on community corrections. In addition, many of them have participated as *amici curiae* in other cases challenging disenfranchisement statutes in New Jersey, New York, and/or Colorado. Accordingly, these criminologists seek leave to appear as *amici curiae* because they have reasoned opinions on the issue of disenfranchisement of offenders, share an interest in bringing their views before the Court, and desire to assist the Court as it addresses the complex and important issues raised by the parties in this matter.

B. INTEREST OF THE PROPOSED *AMICI CURIAE*

The proposed *amici curiae* in this action contend that the Washington State policy underlying its felon disenfranchisement law is tenuous because disenfranchisement is not a valid tool for punishment of offenders. As set forth

more thoroughly below, while the State has a legitimate interest in punishing felons, disenfranchisement of offenders does not serve any of the well accepted purposes of punishment – retribution, deterrence, rehabilitation, or incapacitation – recognized by the Washington State Legislature. Wash. Rev. Code § 9.94A.010. Nor can Washington's law be justified as a regulatory measure because blanket disenfranchisement of offenders bears no rational relationship to electoral fraud. Similarly, felon disenfranchisement is not justified under Locke's social contract theory – that recommends withholding fundamental rights from those who have broken the law – because the United States Constitution does not permit any other fundamental rights of felons to be abridged absent a reasonable regulatory need, which does not exist here.

In considering whether the Ninth Senate Factor weighed in favor of the State or the Appellants, the District Court found that Appellees had failed to explain why felon disenfranchisement was "necessary to vindicate any identified state interest." (R. at 649.) Nevertheless, the District Court went on to conclude that the policy behind felon disenfranchisement was not tenuous because of the longstanding acceptance of such laws in this nation and the Constitutional recognition "of the states' power to disenfranchise felons." *Id.*

The proposed *amici curiae* contend that not only does felon disenfranchisement fail to be necessary to vindicate any state interest, but that

depriving offenders of the right to vote actually obstructs the state's interest in rehabilitating offenders. *See* Wash. Rev. Code § 9.94A.010 (declaring a purpose of sentencing to be to "[o]ffer the offender an opportunity to improve him or herself"); Wash. Rev. Code § 9.96A.010 ("The legislature declares that it is the policy of the state of Washington to encourage and contribute to the rehabilitation of felons and to assist them in the assumption of the responsibilities of citizenship . . .").

Moreover, the District Court erred in considering the longstanding use of felon disenfranchisement laws to mitigate the tenuousness of the policy underlying such laws. Indeed, if historical acceptance were permitted to weigh against the lack of legitimate state interest in a law, the VRA could support voter literacy tests, poll taxes, and a property requirement to exercise the vote, all of which had a long history of usage before they were discredited in this nation. *See Hayden v. Pataki*, 449 F.3d 305, 355 (2d Cir. 2006) (Parker, J., dissenting).

For these reasons, the leading criminologists and social scientists whose names appear on Attachment A desire to participate in this case as *amici curiae* and to have the opportunity to bring their views before this Court.

ARGUMENT

I. SWEEPING DISENFRANCHISEMENT OF FELONS CANNOT BE JUSTIFIED AS A PUNITIVE MEASURE BECAUSE IT DOES NOT SERVE ANY OF THE LEGITIMATE GOALS OF PUNISHMENT.

Felon disenfranchisement cannot be justified as a legitimate punitive measure. It has long been established that punishment is, or should be, justified by some mixture of four penological goals – incapacitation, deterrence, rehabilitation, and retribution. *See, e.g., Ewing v. California*, 538 U.S. 11 (2003). The State of Washington has also recognized these goals in various formulations. Wash. Rev. Code § 9.94A.010 (noting multiple purposes, including "[p]rotect[ing] the public," "[o]ffer[ing] the offender an opportunity to improve him or herself," and "[r]educ[ing] the risk of reoffending by offenders in the community"). In addition, the Revised Code of Washington guarantees certain protections for offenders. *See id.* (ensuring that sentencing is proportionate to the seriousness of the offense and commensurate with the punishment imposed on others committing similar offenses). Disenfranchising offenders serves neither the four goals of sentencing, nor the statutory safeguards.

A. Incapacitation or Prevention Is Not a Valid Justification for Felon Disenfranchisement Because the Public Is Not Harmed by Felons Voting.

Incapacitation is not a valid justification for felon disenfranchisement. Incapacitation, which is also termed "protection," "restraint," or "isolation," is the

principle that that "society may protect itself from persons deemed dangerous because of their past criminal conduct by isolating these persons from society." 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 1.5 (2d ed. 2003). In the context of disenfranchisement, this translates into the idea that offenders will taint the electoral process by voting, and that disenfranchisement is necessary to incapacitate the offender from doing so.

The possible rationales for disenfranchisement as incapacitation reduce to two basic arguments. The first is the concern that, because the individuals are criminals, they would commit electoral fraud. The second is the fear that they would use their votes to achieve immoral ends. Neither of these arguments, upon examination, offers a permissible reason to deprive offenders of the right to vote.

1. Disenfranchisement Does Not Logically Prevent Electoral Fraud.

The alleged justification for disenfranchisement as a method of incapacitation is that it prevents electoral fraud. Preventing a felon from voting, though, would only make sense as incapacitation if either (1) the offender were convicted of an electoral fraud offense, or (2) the mere fact that the person had been convicted of a felony indicates that he or she is likely to commit electoral fraud or otherwise denigrate the electoral process. With regard to the first alternative, the proposed *amici curiae* concede that there is a reasonable regulatory rationale in preventing those convicted of electoral offenses from voting.

However, in Washington State, many offenses that are directly related to the electoral process do not result in disenfranchisement. *See, e.g.*, Wash. Rev. Code § 29A.84.050 (tampering with registration form, absentee or provisional ballots); Wash. Rev. Code § 29A.84.120 (intentionally disenfranchising an eligible citizen or discriminating against a person eligible to vote by denying voter registration); Wash. Rev. Code § 29A.84.540 (unlawfully removing ballots from polling place); Wash. Rev. Code § 29A.84.640 (solicitation of bribe by voter).

The second alternative corresponds to the theory of maintaining "the purity of the ballot box." This justification is based either on the idea that an offender is more likely to commit electoral fraud, so disenfranchisement purifies the electoral process, or that an offender would use his or her vote for immoral purposes, so disenfranchisement purifies electoral results. Both of these justifications are flawed.

The fear that it is more likely that an offender would commit electoral offenses, because such people have a propensity to commit future crimes, is a questionable proposition, at best. As succinctly written, in reference to a Tennessee law, "[c]rimes such as bigamy, destruction of a will, and breaking into an outhouse . . . simply have no correlation with the electoral process and do not logically indicate a greater propensity on the part of the [offender] to commit election crime." Mark E. Thompson, *Comment: Don't Do The Crime If You Ever*

Intend To Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment, 33 Seton Hall L. Rev. 167, 191 (2002).

While the offense of breaking into an outhouse is not enumerated as a felony triggering disenfranchisement in Washington, as it is in Tennessee, there are other felonies in Washington – equally unrelated to election fraud – that strip offenders of the right to vote. *See, e.g.*, Wash. Rev. Code § 9A.64.010 (bigamy); Wash. Rev. Code § 9A.64.020 (incest); Wash. Rev. Code § 9A.49.020 (unlawful discharge of a laser in the first degree); Wash. Rev. Code § 9A.56.083 (theft of livestock for personal use).

Moreover, even if the fear that offenders are more likely to commit election fraud had some grounding in truth, blanket disenfranchisement would be an excessive solution to the problem. *See Note: The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and the "Purity of the Ballot Box,"* 102 Harv. L. Rev. 1300, 1303 (1989). Such a solution is comparable to enacting a law prohibiting offenders from using the postal service for fear they will commit mail fraud. The Legislature has less restrictive and less burdensome means at its disposal to forestall election fraud. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 353 (1972) ("[The state] has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared.").

2. The State Cannot Prevent Individuals from Voting for Fear of How They Might Vote.

Article VI, Section 3 also cannot be justified by the fear that offenders would use their votes to achieve immoral ends. The idea of disenfranchisement functioning as a quarantine to maintain the health of the body politic has long been abandoned. For forty years, the United States Supreme Court has decried any legislative attempt to prevent individuals from voting for fear of how they might vote. *Carrington v. Rash*, 380 U.S. 89, 94 (1965) ("'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."); *Romer v. Evans*, 517 U.S. 620, 634 (1996) (expressly rejecting the Mormon disenfranchisement case, *Davis v. Beason*, which had concluded that advocates of polygamy could be disenfranchised because of their support for an illegal practice).

Romer and *Carrington* thus make obsolete the reasoning of *Green v. Board of Elections* that:

> "it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases."

Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir. 1967). While this has persuaded many courts, *see, e.g.*, *Woodruff v. Wyoming*, 49 F. App'x 199, 203

(10th Cir. 2002); *Wesley v. Collins*, 791 F.2d 1255, 1261-62 (6th Cir. 1986); *Hayes v. Williams*, 341 F. Supp. 182, 189 (S.D. Tex. 1972), this Court has already rejected the reasoning of *Green*. *Dillenburg v. Kramer*, 469 F.2d 1222, 1224 (9th Cir. 1972). Such a rationale is nothing short of viewpoint discrimination, and is no longer constitutionally allowed.

Instead, *Carrington*, *Romer*, and their progeny recognize the vital importance to the democratic process of protecting views hostile to those of the temporal majority from suppression. "The ballot is the democratic system's coin of the realm. To condition its exercise on support of the established order is to debase that currency beyond recognition." *Richardson v. Ramirez*, 418 U.S. 24, 83 (1974) (Marshall, J., dissenting); *see also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."). Indeed, the Supreme Court of Canada, in its decision striking down the Canadian disenfranchisement statute, declared the principle, applicable equally to Canada and the United States, that "[d]enial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of . . . democracy." *Sauvé v. Canada*, [2002] 3 S.C.R. 519, 550 (Canada).

Even the view that felon disenfranchisement is merely a means to promote informed and conscientious voting, as opposed to deterring viewpoints hostile to society, is not supported by modern jurisprudence. The United States Supreme Court "has consistently rejected restrictions on the franchise as a reasonable means of promoting intelligent or responsible voting." Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, Stanford Law School, Public Law Working Paper No. 75, at 8 (2004), *available at* http://papers.ssrn.com/abstract=484543 (citing *Dunn*, 405 U.S. at 354-56; *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 632 (1969)).

The State cannot constitutionally withhold the franchise from felons to prevent them from voting one way or the other. *Carrington*, 38 U.S. at 94. This policy sustains the essence of democracy. While "[u]npopular minorities may seek redress against an infringement of their rights in the courts, . . . they can only seek redress against a dismissal of their political point of view at the polls." *Sauvé*, 3 S.C.R. at 546. In short, a political quarantine is not a legitimate State purpose.

B. Deterrence Does Not Justify Felon Disenfranchisement.

Deterrence also logically fails as a justification for stripping offenders of the right to vote. General deterrence is defined as the idea that "the sufferings of the criminal for the crime he has committed are supposed to deter others from committing future crimes, lest they suffer the same unfortunate fate." LaFave &

Scott, *supra*, at § 1.5. Particular (or "specific") deterrence "aims to deter the criminal himself (rather than to deter others) from committing further crimes, by giving him an unpleasant experience he will not want to endure again." *Id.*

There is no tenable argument that felon disenfranchisement laws serve any general deterrent purpose. General deterrence depends upon a punishment being widely known to those it hopes to deter. Felon disenfranchisement laws, however, operate outside the public's view and by law rather than by sentencing decision. Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in Invisible Punishment: The Collateral Consequences of Mass Imprisonment* 15-16 (Marc Mauer & Meda Chesey-Lind eds., 2002). Few potential offenders therefore know that they will lose the right to vote.

Even if one assumes that potential offenders do know they will lose their right to vote if convicted, disenfranchisement does not realistically serve as a general deterrent. Even though voting is an essential right in a democratic society, loss of that right pales in comparison to the many other consequences of criminal conviction, such as imprisonment, physical injury or death while in prison, and the prospect of economic ruin upon release due to employers' reluctance to hire individuals with criminal records. Potential disenfranchisement, like the potential disability of felons to serve on juries until their civil rights are restored, *see* Wash.

Rev. Code § 2.36.070(5), is unlikely to be included in the considerations made by an individual contemplating whether or not to commit a felony.

Similarly, felon disenfranchisement does not serve a specific deterrent purpose. Rather than sending the desired deterrent message that crime does not pay, disenfranchisement "sends the message that those who commit serious breaches are no longer valued as members of the community, but instead are temporary outcasts from our system of rights and democracy." *Sauvé*, 3 S.C.R. at 548. Rather than encouraging offenders not to reoffend, disenfranchisement alienates offenders with the message that they are valueless. Not only does this fail to prevent the offender from recidivism, but it obstructs the rehabilitation of the offender, thus impeding two of the recognized purposes of punishment.

C. Retribution Is Not a Justification for Stripping Felons of the Right to Vote Because Blanket Disenfranchisement Renders Punishment Disproportionate.

Blanket disenfranchisement does not properly apply the retributive principle. That is because retributive justice encompasses the concept of proportionality, and disenfranchisement is gratuitously added onto otherwise deserved punishment. Retribution, as a theory of punishment, involves the imposition of punishment "because it is fitting and just that one who has caused harm to others should himself suffer for it." LaFave & Scott, *supra*, at § 1.5.

"The propensity for retribution is deeply ingrained in man's nature and can be traced as far back as the biblical concept of 'an eye for an eye, a tooth for a tooth.'" Howard Itzkowitz & Lauren Oldak, *Note: Restoring the Ex-Offender's Right To Vote: Background and Developments*, 11 Am. Crim. L. Rev. 721, 735-36 (1973) (quoting *Exodus* 21:23-25). But the concept of proportionality is clearly part of that retributive statement. Society may require an eye for an eye, but it may not demand an eye for a fingernail. *See* Wash. Rev. Code § 9.94A.555 ("Punishments for criminal offenses should be proportionate to . . . the seriousness of the crime . . . ."); *see also Atkins v. Virginia*, 536 U.S. 304, 311 (2002) ("'[I]t is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'") (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

Professor Andrew von Hirsch, often called "the father of 'just deserts sentencing,'" succinctly sets out the tenets of retribution-based sentencing:

> *Severity of punishment should be commensurate with the seriousness of the wrong.* Only grave wrongs merit severe penalties; minor misdeeds deserve lenient punishments. Disproportionate penalties are undeserved – severe sanctions for minor wrongs or vice versa. This principle has variously been called a principle of "proportionality" or "just deserts" . . . the offender deserves punishment – but the question of *how much* . . . carries implications of degree of reprobation.

Andrew von Hirsch, *Doing Justice: The Principle of Commensurate Deserts, in Sentencing* 243, 246 (A. von Hirsch & S. Gross eds., 1981) (emphasis added).

Blanket disenfranchisement violates proportionality in two ways. First, it does not distinguish among felons as to the degree of culpability and severity of their crimes. Second, insofar as disenfranchisement is a collateral consequence of conviction, it adds extra suffering over and above that which would be deserved from the sentence judicially imposed for the crime convicted.

While there are certain restrictions that are always imposed upon prisoners in a sweeping fashion regardless of the severity of the prisoners' offenses, such restrictions are necessary incidents to incarceration. Alec Ewald, *Punishing at the Polls* 29 (2003), *available at* http://www.demos-usa.org/pub109.cfm. Depriving incarcerated felons of the right to assemble or to enjoy privacy are appropriate safeguards for protecting society, but depriving felons of the right to vote is not. *Id.* As noted by social scientist Marc Mauer:

> [C]riminal convictions do not otherwise result in the loss of basic rights: convicted felons maintain the right to divorce, to own property, or file lawsuits. The only restrictions generally placed on these rights are ones that relate to security concerns within a prison.

Marc Mauer, *Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration*, 12 Fed. Sentencing Rep., Mar./Apr. 2000, at 248, 250.

Moreover, the "[u]se of disenfranchisement as punishment for the sake of punishment can only exacerbate such hostility as exists between the criminal and society and, indeed, may lead to further injury to the community." Itzkowitz & Oldak, *supra*, at 736. Criminologists note that offenders accept punishment that they know they deserve; this is fundamental to "just deserts" retributive sentencing. But disproportionate punishment is not just and only fosters resentment. In the words of one parolee interviewed for a study of disenfranchisement's effects:

> I think that just getting back in the community and being a contributing member is difficult enough . . . But I, hopefully, have learned, have paid for that and would like to someday feel like a, quote, "normal citizen," . . . 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. . . . [H]aven't I paid enough yet?

Christopher Uggen & Jeff Manza, *Lost Voices: The Civic and Political Views of Disenfranchised Felons, in Imprisoning America: The Social Effects of Mass Incarceration* 183 (Mary Pattillo et al. eds., 2004).

D. Rehabilitation Is Not Served - And Is Actually Impeded - by Disenfranchisement.

Most importantly, disenfranchisement serves no rehabilitative ends. The American Bar Association, among others, has voiced concerns that not only does disenfranchisement fail to rehabilitate, but it operates as a barrier between the

offender and society and counteracts the rehabilitative goal of preparing the offender to re-enter society. *See ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, at R-7, *available at* http://www.abanet.org/leadership/2003/journal/101a.pdf ("The criminal justice system aims at avoiding recidivism and promoting rehabilitation, yet collateral sanctions and discretionary barriers to reentry may . . . perpetuate [an offender's] alienation from the community.").

Although some have argued that disenfranchisement serves an educative purpose by teaching offenders respect for the law, that argument is severely flawed. This proposition, as the *Sauvé* court determined, has it "exactly backwards." *Sauvé*, 3 S.C.R. at 544. As that court noted, "denying [felons] the right to vote is bad pedagogy. It misrepresents the nature of our rights and obligations under the law, and it communicates a message more likely to harm than to help respect for the law." *Id.* at 543. The message it actually sends is that "the basis of democratic legitimacy" may be arbitrarily denied. *Id.* at 544. As the *Sauvé* Court stated:

> It says that delegates elected by the citizens can then bar . . . citizens . . . from participating in future elections. But if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government's power flows.

Id. Disenfranchisement, quite simply, serves no rational rehabilitative or educative purpose.

Voting, however, does foster rehabilitation and successful community re-entry. Unquestionably, the goal of rehabilitation is "to return [the offender] to society so reformed that he will not desire or need to commit further crimes." LaFave & Scott, *supra*, at § 1.5. The right, and even the obligation, to vote is held out daily to members of our society as one of the privileges and proud duties of being an American. Disenfranchisement, therefore, signals to offenders that they are not truly the same as the rest of us, even while they are simultaneously being told that one of the aims of their sentence is to help them become full citizens. This double message surely would confuse and alienate any citizen.

The restoration of the right to vote, however, tells the offender that to become aware of political issues in the community and to participate in voting is a positive collective endeavor. *See Sauvé*, 3 S.C.R. at 547. This message has both the psychological and sociological effect of weaving the offender back into the community – the very goal of rehabilitation.

II. FELON DISENFRANCHISEMENT CANNOT BE JUSTIFIED AS A REGULATION BECAUSE IT DOES NOT RATIONALLY RELATE TO MAINTAINING ELECTORAL INTEGRITY.

While Washington courts have posited that the felon disfranchisement statute was not meant to be punitive, but rather regulatory in nature, *see, e.g.*, *Fernandez v. Kiner*, 673 P.2d 191, 193 (Wash. Ct. App. 1983), that idea is faulty because felon disenfranchisement laws do not rationally relate to the objective of maintaining electoral integrity. As described above, felon disenfranchisement laws do not prevent election fraud because the offenses that trigger disenfranchisement upon conviction are completely unrelated to election fraud, and offenses related to electoral misconduct do not result in disenfranchisement. *See* I.A.1 *supra.*

To be a valid regulation, a sanction must bear a rational relationship to the goal of the regulation. *See State v. Ward*, 869 P.2d 1062, 1068-69 (Wash. 1994) (noting, in determining whether a statute is regulatory, the importance of assessing both the effect of the statute and "'the rationality between the requirement and its purported non-punitive function'" (citation omitted)). The State, therefore, in order to justify the disfranchisement statute as a regulation, must show that the statute's effect somehow prevents electoral fraud or otherwise maintains the purity of the ballot box. The proposed *amici* do not question that maintaining the purity of the ballot box is a legitimate regulatory purpose, but rather wish to draw the

Court's attention to the fact that the felon disfranchisement statute fails to establish a rational relationship to that purpose.

As the United States Supreme Court noted, "[p]reservation of the 'purity of the ballot box' is a formidable-sounding state interest." *Dunn v. Blumstein*, 405 U.S. 330, 345 (1972). The State has the burden, however, of showing a particular impurity feared and that the statute is necessary to prevent such an impurity. *See id.* at 345-46. The State has not met that burden here.

III. LOCKE'S SOCIAL CONTRACT THEORY DOES NOT JUSTIFY DENYING FUNDAMENTAL RIGHTS TO OFFENDERS.

The State of Washington has asserted that the policy underlying Article VI, Section 3 is to limit "participation in the political process by those who have proven themselves unwilling to abide by the laws that result from that process." (Def.'s Answers to Pl.'s First Interrogs. attached as Exh. 1 to Tarson Decl. in Supp. of Mot. of Leading Criminologists for leave to file *amici curiae* Brief.) Although the District Court appeared to reject this rationale, finding that Appellees had not "identified [any] state interest" justifying felon disenfranchisement (R. at 649), the rationale appears to reflect the "social contract" theory developed by John Locke. This Court, however, has rejected the "social contract" theory in the equal protection context, *Dillenburg*, 469 F.2d at 1224-25, and any reliance upon this theory to justify felon disenfranchisement is misplaced.

Under the social contract theory,

> "[B]y entering into society[,] every man 'authorizes the society, or . . . the legislature thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own assistance (as to his own decrees) is due.' A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact."

Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir. 1967) (quoting John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government, in*

Two Treatises of Government, ch. 7, § 89). To put it simply, "if you break the rules, you don't get to help make the rules." Ewald, *supra*, at 23. This theory, however, is out of place in the context of felon disenfranchisement statutes.

A. Societal Offenses Do Not Extinguish Fundamental Rights and Blanket Application of Social Contract Theory Is Irreconcilable with Recognized Constitutional Rights of Offenders.

While social contract justifications for denying the right to suffrage may sound just and reasonable at first blush, they cannot withstand an examination of fundamental democratic principles and constitutional jurisprudence. The United States Supreme Court has recognized that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987) (collecting cases). Americans do not, for instance, limit an offender's right to freedom of speech or to the press or to petition, even while the offender is in custody. Granting these freedoms, however, can be as influential as voting, if not more so, in affecting public policy and the creation of laws. As Alec Ewald notes, "[a] well-placed op-ed essay or letter to the editor – which [any offender, whether in custody or not,] may write – will influence an election much more than any single ballot." Ewald, *supra*, at 32.

Locke's social contract theory would require stripping offenders of all such fundamental rights to prevent offenders' interference with our social contract. The United States Constitution and Americans' basic understanding of civil rights

accorded to all citizens cannot permit such wholesale dispossession. Thus, Locke's social contract theory cannot be fully applied to contemporary American society, and cannot justify disenfranchisement of offenders.

The Supreme Court of Canada succinctly epitomized both Canadian and American principles by noting that:

> The social compact requires the citizen to obey the laws created by the democratic process. But it does not follow that failure to do so nullifies the citizen's continued membership in the self-governing polity. Indeed the remedy of imprisonment for a term rather than permanent exile implies our acceptance of continued membership in the social order. Certain rights are justifiably limited for penal reasons, . . . [b]ut whether a right is justifiably limited cannot be determined by observing that an offender has . . . withdrawn from the social compact. Indeed, the right of the state to punish and the obligation of the criminal to accept punishment are tied to society's acceptance of the criminal as a person with rights and responsibilities.

Sauvé, 3 S.C.R. at 551.

B. The Social Contract Theory Demands a Degree of Proportionality and Rationality that Blanket Disenfranchisement Does Not Possess.

Even if the social contract theory were accepted, application of the theory to disenfranchisement of offenders does not comport with Locke's teachings. Locke wrote that the power to punish extends only "so far as calm reason and conscience dictate what is proportionate to [the] transgression." Locke, *supra*, at ch. 2 § 8. As noted previously, though, blanket disfranchisement is not proportionate, *see*

Section I.C *supra*. While "social contract" theory was instrumental in establishing the foundations of the American criminal justice system, it cannot properly be used as a justification for felon disenfranchisement. In the absence of a legitimate penological rationale, social contract theory cannot supply the missing link to justify the practice of stripping the right to vote from offenders.

IV. THE DISTRICT COURT ERRED IN FINDING THAT LONGSTANDING ACCEPTANCE AND CONSTITUTIONAL ACKNOWLEDGMENT OF FELON DISENFRANCHISEMENT LAWS MITIGATES THE TENUOUSNESS OF THE POLICY BEHIND THEM.

The District Court recognized that the VRA could potentially apply to Washington's felon disenfranchisement law because of the "compelling evidence of racial discrimination and bias in Washington's criminal justice system" (R. at 645) such that a disproportionate number of convicted felons are members of protected minority groups and are deprived of the right of suffrage under this law. The District Court also recognized that appellees had not "identified [any] state interest" justifying felon disenfranchisement. (R. at 649.) But, despite these findings, the District Court concluded that the Ninth Senate Factor favored the State. (R. at 650.) It rested this conclusion on the finding that policies behind Washington's felon disenfranchisement law could not be tenuous because of the longstanding use of such laws in this nation and the reference to such laws in the United States Constitution. *Id.* Neither of these facts is relevant to the inquiry of whether the policies are tenuous.

The tenuousness of a policy behind a law has nothing to do with how long the law has been in force. The Senate, in adopting the 1982 amendments to the VRA, noted that the Ninth Senate Factor is applicable "even [to] a consistently applied [voting] practice premised on a racially neutral policy." Senate Report at

29 n.117. Federal courts have also rejected consideration of how long a voting practice has been in effect when assessing the tenuousness of the policy underlying that practice. *See, e.g., United States v. Blaine County*, 363 F.3d 897, 914 (9th Cir. 2004) (finding policy underlying at-large elections to be tenuous despite its use in county elections since county was organized in 1895); *Goosby v. Town Bd. of Town of Hempstead*, 180 F.3d 476, 484, 495 (2d Cir. 1999) (same – despite use of at-large elections in town since the town's inception in 1907); *Williams v. Dallas*, 734 F. Supp. 1317, 1332, 1383-84 (N.D. Tex. 1990) (finding that the policy of having a specified number of at-large seats on the Dallas City Council to provide a "city-wide view" was tenuous despite its use since 1907). In fact, as noted by one jurist, the "very purpose of [Section 2] was to address long-standing, widely used devices that impacted minority voting." *Hayden*, 449 F.3d at 355 (Parker, J., dissenting). It is therefore odd to justify a voting practice as not tenuous for the purpose of analysis under the VRA simply because the practice has been employed for a long period of time.

Even outside the context of the VRA, courts have struck down long-standing practices when the policies underlying them are tenuous. *See, e.g., Hirst v. United Kingdom*, [2004] ECHR 121 (Eur. Ct. H.R.), at ¶ 41 (holding that the United Kingdom's blanket disenfranchisement of incarcerated felons violated the Convention for the Protection of Human Rights and Fundamental Freedoms

because laws denying suffrage could not be justified when they "derive, essentially, from unquestioning and passive adherence to a historic tradition"); *see also Lawrence v. Texas*, 539 U.S. 558, 579 (2003) ("[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.").

Similarly, the recognition in the United States Constitution that a particular voting practice exists does not mean that the policy behind that practice is not tenuous. The District Court relied on the Fourteenth Amendment's reference to denial of the right to vote "for participation in rebellion, or other crime," U.S. Const. amend. XIV, § 2, for its determination that Washington's felon disenfranchisement laws are not tenuous. (R. at 649-50.) However, the recognition that felon disenfranchisement exists does not sanction the practice. The Fourteenth Amendment does not sanction felon disenfranchisement any more than it sanctions denial of the right to vote based on race, which is another practice the Fourteenth Amendment acknowledges without proscribing. Likewise, the Constitution does not sanction felon enslavement even though the Thirteenth Amendment chose not to forbid the practice. U.S. Const. amend. XIII, § 1; *see also Hayden v. Pataki*, 449 F.3d 305, 349 (2d Cir. 2006) (Parker, J., dissenting) ("Declining to prohibit something is not the same as protecting it.").

The District Court also relied on the Supreme Court's holding in *Richardson v. Ramirez*, 418 U.S. 24 (1974), for the proposition that it could not examine the policies underlying felon disenfranchisement. (R. at 649-50.) However, nothing in *Richardson* supports the conclusion that felon disenfranchisement laws should be shielded from analysis under the Ninth Senate Factor for VRA purposes. *Richardson* did not address any VRA claims. It merely held that felon disenfranchisement laws are not *per se* unconstitutional. The Supreme Court subsequently made clear that, although felon disenfranchisement laws are not inherently unconstitutional, they may not be used in a racially discriminatory manner. *Hunter v. Underwood*, 471 U.S. 222 (1985). Therefore, the Supreme Court has not "read any special immunity for felon disenfranchisement into the Fourteenth Amendment." *Hayden*, 449 F.3d at 349 (Parker, J., dissenting).

Therefore, regardless of longstanding practice or constitutional acknowledgment, the determination whether the policy behind a voting practice is tenuous, for the purpose of an analysis under the Ninth Senate Factor, requires nothing more nor less than a searching inquiry into the state's interests in maintaining that practice. Because of the lack of legitimate penal or regulatory purpose in felon disenfranchisement laws, as well as the obstruction of the state's interest in rehabilitating its criminal offenders, the State of Washington cannot

maintain that the policies behind its felon disenfranchisement laws are anything but tenuous.

CONCLUSION

The denial of suffrage to felons has persisted out of inertia and a respect for an historical motivation that is no longer constitutionally permissible. It serves no rational purpose and it obstructs the rehabilitation of offenders into society by promoting dissociation and alienation. The District Court erred in considering the historical usage of felon disenfranchisement laws in this country when analyzing the tenuousness of the policy underlying Washington's felon disenfranchisement law. Such historical usage is irrelevant to an examination of the Ninth Senate Factor under the VRA's "totality of circumstances" test.

For these reasons, and all the others mentioned above, the proposed *amici curiae* request that this Court grant the Appellants' requested relief – reversing the District Court's judgment and directing that judgment should be entered in favor of Appellants' claim that Washington State's felon disenfranchisement scheme violates Section 2 of the Voting Rights Act.

Dated: New York, New York
December 9, 2006

Respectfully Submitted,

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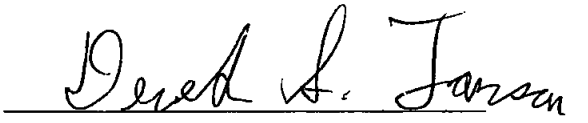
BY: 
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ATTACHMENT A

The list of leading criminologists who have signed on as proposed *amici curiae* are as follows:

Alfred Blumstein is a Professor and Former Dean, H. John Heinz III School of Public Policy and Management; Carnegie-Mellon University in Pittsburgh.

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Form 8. **Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number** No. 06-35669

(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant *and attached to the back of each copy of the brief*

I certify that: **(check appropriate option(s))**

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December 11, 2006
Date

Dirk A. Faus
Signature of Attorney or
Unrepresented Litigant

ATTORNEY'S CERTIFICATION OF SERVICE

I, Derek Tarson, am an attorney-at-law in the State of New York. I am associated with Debevoise & Plimpton LLP, attorneys for *amici curiae* Leading Criminologists.

On the 9th day of December, 2006, I caused to be served two (2) copies of the within Brief Submitted on Behalf of Leading Criminologists: Alfred Blumstein, Johnna Christian, Todd R. Clear, Cavit Cooley, Francis T. Cullen, Malcolm Feeley, David Garland, David F. Greenberg, M. Kay Harris, Philip Harris, Michael Israel, Lauren Krivo, Jeff Manza, Candace McCoy, Alan Mobley, John Mollenkopf, Joan Petersilia, James Short, Jonathan Simon, Jerome H. Skolnick, Jeremy Travis, Bruce Western, and Deanna Wilkinson as *Amici Curiae* in Support of Appellants and in Support of Reversal by Federal Express upon each of the counsel for the other parties to this action at the following addresses:

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I certify under the penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
December 9, 2006

Derek S. Tarson