

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION TWO

Case No. A120220

LEGAL SERVICES FOR PRISONERS WITH CHILDREN, *et al.*,
Petitioners,

v.

DEBRA BOWEN, California Secretary of State, *et al.*,
Respondents.

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF
NORTHERN CALIFORNIA AND IMPACT FUND
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

STATEMENT OF INTEREST <i>AMICI CURIAE</i>	1
I. INTRODUCTION.....	2
II. THE FRAMERS OF THE FOURTEENTH AMENDMENT INTENDED TO PROTECT AFRICAN-AMERICAN VOTING RIGHTS BY LIMITING THE CRIMINAL DISENFRANCHISEMENT PROVISION TO COMMON LAW FELONIES	3
III. CALIFORNIA HAS EXPANDED THE SCOPE OF DISENFRANCHISING FELONIES BEYOND COMMON LAW FELONIES CONTRARY TO THE FRAMERS' INTENT	5
A. California Disenfranchises Individuals for Any Felony Offense.	5
B. California Has Enacted Scores of New Felonies Beyond Those Recognized At Common Law.....	6
IV. BY BROADENING THE CATEGORIES OF DISENFRANCHISING FELONIES, CALIFORNIA HAS DISPROPORTIONATELY DISENFRANCHISED AFRICAN AMERICANS.....	8
A. The Expansion of the Criminal Justice System Has Disproportionately Impacted African Americans.	9
1. The War on Drugs Targets and Disproportionately Impacts African Americans.	11
2. Three Strikes Laws Have Been Disproportionately Applied To African Americans.....	12
B. Broad Felony Disenfranchisement Has Disproportionately Impacted the Voting Rights of African Americans.	13
V. THE DISPROPORTIONATE DISENFRANCHISEMENT OF AFRICAN AMERICANS UNDERMINES THE ORIGINAL INTENT OF THE FOURTEENTH AMENDMENT.....	14
VI. CONCLUSION	16

TABLE OF AUTHORITIES

CALIFORNIA CASES

<i>League of Women Voters v. McPherson</i> , 145 Cal.App.4th 1469 (2006) . 1, 6	
<i>People v. Martin</i> , 168 Cal.App.3d 1111 (1985).....	6
<i>Ramirez v. Brown</i> , 9 Cal. 3d 199 (1973), <i>rev'd sub nom. Richardson v. Ramirez</i> , 418 U.S. 24 (1974)	4

FEDERAL CASES

<i>Jerome v. United States</i> , 318 U.S 101 (1943).....	6
<i>McPherson v. Blacker</i> , 146 U.S. 1 (1892)	3
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970).....	3
<i>Tennessee v. Garner</i> , 471 U.S. 1 (1984).....	6
<i>United States v. Bannon</i> , 156 U.S. 464 (1895)	6

INTERNATIONAL CASES

<i>Sauvé v. Canada</i> , [2002] 3 S.C.R. 519 (Can.), <i>available at</i> http://scc.lexum.umontreal.ca/en/2002/2002scc68/2002scc68.pdf	15
<i>Minister of Home Affairs v. Nat'l Inst. for Crime Prevention & the Reintegration of Offenders</i> , 2005 (3) SA 280 (CC) (S. Afr.), <i>available at</i> http://www.constitutionalcourt.org.za/Archimages/1333.PDF	15
European Court of Human Rights ruled that the United Kingdom's blanket disenfranchisement of individuals in prison violated the European Convention on Human Rights. <i>Hirst v. United Kingdom (No. 2)</i> , 681 Eur. Ct. H.R. (2005), <i>available at</i> http://www.worldlii.org/eu/cases/ECHR/2005/681.html	15

STATUTES

Arkansas Readmission Act, Act of June 22, 1868, ch. 69, 15 Stat. 71	4
California Penal Code § 17	6, 7
California Penal Code § 17(b).....	7
California Penal Code §§ 594(b)(1).....	7
California Penal Code §667.5 (c).....	7
Reconstruction Act of March 2, 1867 ch. 153, 14 Stat. 428	7

CONSTITUTIONAL PROVISIONS

California Constitution Art. II, § 4.....	5
United States Constitution Amendment XIV, § 2.....	3, 4

OTHER AUTHORITIES

ACLU, <i>Out of Step with the World: An Analysis of Felony Disfranchisement in the U.S. and Other Democracies</i> (May 2006), available at http://www.aclu.org/images/asset_upload_file825_25663.pdf	8, 15
Adult Operations & Adult Programs, Cal. Dep't. of Corr. And Rehab., <i>Facts and Figures, Fourth Quarter 2007</i> (2007), available at http://www.cdcr.ca.gov/Divisions_Boards/Adult_Operations/Facts_and_Figures.html	10
Alfred Blumstein, <i>Racial Disproportionality of U.S. Prison Populations Revisited</i> , 64 U. Colo. L. Rev. 743 (1993)	8
Autumn D. McCullogh, <i>Three Strikes and You're in (for Life): An Analysis of the California Three Strikes Law as Applied to Convictions for Misdemeanor Conduct</i> , 24 T. Jefferson L. Rev. 277 (2002).....	7
Bureau of Justice Statistics, U.S. Dep't. of Justice, <i>Corrections Statistics</i> , http://www.ojp.usdoj.gov/bjs/correct.htm	8

California Legislative Analyst's Office, <i>A Primer: Three Strikes – The Impact After More Than a Decade</i> (2005)	12
California Legislative Analyst's Office, <i>Judicial & Criminal Justice</i> (2008–09)	7
California Prisoners and Parolees, 2006 (2007), available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2006.pdf	14
<i>Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy</i> , 103 Yale L.J. 537 (1993)	3
Christopher H. Schmitt, <i>Plea Bargaining Favors Whites as Blacks, Hispanics Pay Price</i> , San Jose Mercury News, Dec. 8, 1991	10
Congressional Globe, Thirty-Ninth Congress, Second Session (1867)	15
Fredric Gey et al., Univ. of Cal. Latino Policy Inst., <i>California Latino Demographic Databook, 3rd Edition: 2004</i> , at 7–4 (Nov. 2004), available at http://socrates.berkeley.edu:7101/new_web/projects/latino3/Databook2004.pdf	14
Human Rights Watch, <i>Targeting Blacks: Drug Law Enforcement and Race in the United States</i> (2008), available at http://www.hrw.org/reports/2008/us0508/us0508webwcover.pdf	12
Jamie Fellner & Marc Mauer, Human Rights Watch & The Sentencing Project, <i>Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States</i> (1998), available at http://www.sentencingproject.org/tmp/File/FVR/fd_losingthevote.pdf	8, 11, 13
Joan Petersilia, Cal. Policy Research Ctr., <i>Understanding California Corrections</i> (2006)	7, 8
Marc Mauer & Ryan S. King, The Sentencing Project, <i>A 25-Year Quagmire: The War on Drugs and Its Impact on American Society</i> (2007)	11
Marc Mauer & Ryan S. King, <i>Uneven Justice: State Rates of Incarceration by Race and Ethnicity</i> (July 2007), available at	

<a href="http://www.sentencingproject.org/Admin/Documents/publications/rd_stat
eratesofinbyraceandethnicity.pdf">http://www.sentencingproject.org/Admin/Documents/publications/rd_stat eratesofinbyraceandethnicity.pdf	9
Marc Mauer, <i>Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities</i> , 5 Ohio St. J. Crim. L. 19 (2007)...	9
Mike Males et al., Ctr. On Juvenile & Criminal Justice, <i>Drug Use and Justice 2002: An Examination of California Drug Policy Enforcement</i> (Dec. 2002)	11
Scott Ehlers et al., Justice Policy Inst., <i>Still Striking Out: Ten Years of California's Three Strikes</i> 18 (2004), available at <a href="http://www.justicepolicy.org/images/upload/04-
03_REP_CASTillStrikingOut_AC.pdf">http://www.justicepolicy.org/images/upload/04- 03_REP_CASTillStrikingOut_AC.pdf	12, 13
Sentencing Project, <i>Felony Disenfranchisement Laws in the United States</i> 1, 3 (Aug. 2006), http://www.sentencingproject.org/pdfs/1046.pdf ...	5, 13
U.S. Census Bureau, U.S. Dep't of Commerce, <i>2006 American Community Survey</i> (2006), <a href="http://factfinder.census.gov/servlet/ACSSAFFacts?_event=&geo_id=04
000US06&_geoContext=01000US%7C04000US06&_street=&_county=
&_cityTown=&_state=04000US06&_zip=&_lang=en&_sse=on&Active
GeoDiv=geoSelect&_useEV=&pctxt=fph&pgsl=040&_submenuId=facts
heet_1&ds_name=null&_ci_nbr=null&qr_name=null&reg=null%3Anull
&_keyword=&_industry">http://factfinder.census.gov/servlet/ACSSAFFacts?_event=&geo_id=04 000US06&_geoContext=01000US%7C04000US06&_street=&_county= &_cityTown=&_state=04000US06&_zip=&_lang=en&_sse=on&Active GeoDiv=geoSelect&_useEV=&pctxt=fph&pgsl=040&_submenuId=facts heet_1&ds_name=null&_ci_nbr=null&qr_name=null&reg=null%3Anull &_keyword=&_industry	14
U.S. Census Bureau, U.S. Dep't of Commerce, <i>State & County QuickFacts</i> (2008), http://quickfacts.census.gov/qdf/states/06000.html	10
U.S. Census Bureau, U.S. Dep't of Commerce, <i>The Black Population 2000</i> (Aug. 2001), available at http://www.census.gov/prod/2001pubs/c2Kbr01-5.pdf	9
Vincent Schiraldi et al., <i>Young African Americans and the Criminal Justice System in California: Five Years Later</i> (1996), http://www.lindesmith.org/library/schiraldi2.cfm	10, 11
Walter L. Gordon, <i>California's Three Strikes Law: Tyranny of the Majority</i> , 20 Whittier L. Rev. 577, 619 (1999)	9

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Northern California is the regional affiliate of the American Civil Liberties Union (ACLU) a nonprofit, nonpartisan membership organization with more than 500,000 members. The ACLU defends the guarantees of individual liberty in state and federal Constitutions and civil rights laws. The ACLU is deeply concerned with protecting voting rights and with promoting racial equality. The ACLU of Northern California was co-counsel for petitioners in *League of Women Voters v. McPherson*, 145 Cal.App.4th 1469 (2006), which ruled that incarcerated felony probationers are eligible to vote in California.

Impact Fund is a nonprofit foundation that supports civil rights impact litigation through grants, technical support, amicus and direct representation. It is also a California State Bar Legal Services Trust Fund Support Center. It has supported a broad range of civil rights cases including voting, criminal justice and prisoner's rights actions. It has served as amicus in many cases in California appellate courts.

Amici's interest in this case is to contextualize the breadth and depth of disproportionate disenfranchisement that has occurred with the expansion of the criminal justice system generally, but particularly in California. This case challenges California's disenfranchisement of thousands of parolees who have been convicted of non-common law felonies. Petitioners argue that this disenfranchisement violates the Fourteenth Amendment to the United States Constitution, and have presented extensive scholarly evidence documenting the intent of the Framers of the Fourteenth Amendment to protect the franchise for African Americans against hostile state action. The ACLU of Northern California

and Impact Fund are filing this amicus brief to provide additional information to the Court regarding the disproportionate impact of disenfranchisement laws in California and the extent to which the Fourteenth Amendment's original intent has been undermined.

I. INTRODUCTION

Congress enacted Section 2 of the Fourteenth Amendment to protect the voting rights of former slaves against measures such as criminal disenfranchisement that threatened the exercise of those rights. The constitutional amendment, therefore, penalized states that denied African Americans the right to vote, except those individuals who participated in rebellion or "other crime"—the latter being defined as crimes that were felonies at common law.

Since that time, California and other states have enacted scores of new felony crimes, including many nonviolent felony crimes not contemplated under common law, such as drug offenses. Laws have also been enacted increasing sentences and lengthening the parole period for many crimes, including nonviolent felonies.

African Americans have borne the brunt of these laws. African Americans are severely overrepresented among the prison population in California and throughout the nation, and are disproportionately impacted by these non-common law, disenfranchising crimes. The result: An extraordinary number of African Americans are losing their right to vote—at significantly greater rates than whites—for extended periods of time for crimes that were not recognized as felonies at common law. In other words, the precise result that the Reconstruction Congress sought to prevent (namely, states instituting barriers to voting, such as broadly defined

crimes, resulting in the disproportionate disenfranchisement of African Americans) has come to pass in the ensuing years.

II. THE FRAMERS OF THE FOURTEENTH AMENDMENT INTENDED TO PROTECT AFRICAN-AMERICAN VOTING RIGHTS BY LIMITING THE CRIMINAL DISENFRANCHISEMENT PROVISION TO COMMON LAW FELONIES

Immediately following the Civil War, as Congress adopted the Reconstruction Amendments extending the rights of citizenship to newly-freed slaves, southern opposition to African-American suffrage led many states to enact poll taxes, literacy tests, and other barriers to keep blacks from exercising the right to vote. Andrew Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 Yale L.J. 537, 537 (1993). “[T]he most subtle method of excluding blacks from the franchise,” was “[c]riminal disenfranchisement—the denial of the vote to citizens convicted of crimes.” *Id.* at 538.

Spurred by concerns that measures such as criminal disenfranchisement could eviscerate gains secured by the Thirteenth Amendment’s abolition of slavery, Congress enacted Section 2 of the Fourteenth Amendment in June of 1866. *See McPherson v. Blacker*, 146 U.S. 1, 39 (1892) (stating that the “object” of Fourteenth Amendment was to “preserve equality of rights and to prevent discrimination”).

Section 2 penalized states that denied “or, in any way abridged” the right of male citizens to vote by reducing the basis used to determine the size of that state’s Congressional delegation. U.S. CONST. amend. XIV, § 2. The imposition of a penalty was designed to serve as a deterrent that would protect the voting rights of former slaves. *Oregon v. Mitchell*, 400 U.S. 112, 169 (1970). Congress provided only one, narrow exception to the

ban against curtailing the right to vote: Individuals who participated in “rebellion, or other crime,” could be disenfranchised. U.S. CONST. amend. XIV, § 2.

The meaning of “other crime” became clarified nine months later, in March 1867, when Congress passed the Reconstruction Act, which required the former Confederate States seeking readmission to the Union to ratify the Fourteenth Amendment and grant universal suffrage to all males regardless of race, color or previous condition of servitude. Act of March 2, 1867 ch. 153, 14 Stat. 428. Section 5 of the Act specified that the former confederate states would be permitted to disenfranchise persons only “for participation in the rebellion or for felony at common law.”¹ *Id.*; *Richardson v. Ramirez*, 418 U.S. 24, 49 (1974).

Congress subsequently adopted a series of statutes known as Enabling or Readmission Acts in 1868 and 1870, which granted the Confederate States readmission into the Union and representation in Congress. In these acts as well, Congress reiterated that criminal disenfranchisement was restricted to common law felonies. *See, e.g.*, Arkansas Readmission Act, Act of June 22, 1868, ch. 69, 15 Stat. 71 (stating disenfranchisement not permitted “except as a punishment for such crimes as are now felonies at common law”). Several former Confederate states were readmitted with this limitation. *Richardson*, 418 U.S. at 51–52.

¹ In the 19th century, felony “designat[e] such serious offenses as were formerly punishable by death, or by forfeiture of the lands or goods of the offender.” *United States v. Bannon*, 156 U.S. 464, 468 (1895).

III. CALIFORNIA HAS EXPANDED THE SCOPE OF DISENFRANCHISING FELONIES BEYOND COMMON LAW FELONIES CONTRARY TO THE FRAMERS' INTENT

The California Constitution disenfranchises individuals in state prison or on parole for the conviction of any felony offense. Since the passage of the Fourteenth Amendment, California has expanded its Penal Code to encompass a range of felony offenses and sentence enhancements not contemplated under common law. As a result, Californians are disenfranchised for extended periods of time for felony offenses not recognized at common law, contrary to the Framers' intent.

A. California Disenfranchises Individuals for Any Felony Offense.

California is one of forty eight states that deprive certain citizens of their right to vote through felony disenfranchisement laws. *See* Sentencing Project, *Felony Disenfranchisement Laws in the United States* 1, 3 (Aug. 2006), <http://www.sentencingproject.org/pdfs/1046.pdf> [hereinafter *Felony Disenfranchisement Laws*]. While California has incrementally expanded the ability of former offenders to participate in the democratic process, the state continues to deny the right to vote to individuals in state prison or on parole for *any* felony conviction.² Cal. Const. Art. II, § 4.

² The California Supreme Court struck down the state's lifetime disenfranchisement of felons as a violation of equal protection in 1973. *Ramirez v. Brown*, 9 Cal. 3d 199 (1973), *rev'd sub nom. Richardson v. Ramirez*, 418 U.S. 24 (1974). In response, the Legislature proposed and voters adopted a narrower felony disenfranchisement provision in 1974, Proposition 10 (which amended Article II, Section 3, which was in turn renumbered in 1976 to Article II, Section 4). Article II, Section 4 disenfranchises individuals "while...imprisoned or on parole for the conviction of a felony." In recent years, there was confusion about whether the word "imprisoned" within the meaning of Article II, Section 4 meant incarceration generally, either in county jail or in state prison, or was

B. California Has Enacted Scores of New Felonies Beyond Those Recognized At Common Law.

Since the passage of the Fourteenth Amendment, California, along with other states, has enacted scores of new felony crimes not contemplated under common law. *Tennessee v. Garner*, 471 U.S. 1, 14 (1984). “[W]hile in earlier times ‘the gulf between the felonies and the minor offences was broad and deep,’... today the distinction is minor and often arbitrary. Many crimes classified as misdemeanors, or nonexistent, at common law are now felonies.” *Id.* at 14 (internal citations omitted).

At common law, only “such serious offenses as were formerly punishable by death, or by forfeiture of the lands or goods of the offender” constituted felony offenses. *United States v. Bannan*, 156 U.S. 464, 468 (1895). This included the crimes of murder, manslaughter, rape, robbery, mayhem, burglary, arson, larceny, and prison break. *People v. Martin*, 168 Cal.App.3d 1111, 1116 n.4 (1985); *Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943).

Today, California’s Penal Code incorporates a much broader definition of felony: *any* “crime which is punishable with death *or by imprisonment in the state prison.*” Cal. Penal Code § 17 (2008) (emphasis added). By extending felonious behavior to any act “punishable...by imprisonment in the state prison,” California’s Penal Code goes far beyond

limited to incarceration in state prison. This issue was resolved in *League of Women Voters v. McPherson*, where this Court held that only persons who are serving a sentence in state prison or are on parole for a felony conviction are disenfranchised. 145 Cal.App.4th 1469, 1482–84 (2006).

the common law to include hundreds of new and different crimes—many of them nonviolent.³

At least five hundred felony offenses populate California's Penal Code. Autumn D. McCulloch, *Three Strikes and You're in (for Life): An Analysis of the California Three Strikes Law as Applied to Convictions for Misdemeanor Conduct*, 24 T. Jefferson L. Rev. 277, 282 (2002). This includes numerous nonviolent felony offenses such as vandalism of \$400 or more, marrying under false personation, embezzlement of public funds, and counterfeiting. See Cal. Penal Code §§ 594(b)(1), 528, 514, 478.

In addition, another 300 crimes may be treated as felonies or misdemeanors at the judge's discretion. Cal. Penal Code § 17. For these "wobbler" offenses, imposition of a sentence of imprisonment in the state prison automatically converts a misdemeanor to a felony. Cal. Penal Code § 17(b). Most of these "wobbler" crimes are property or drug offenses, such as forgery, petty theft with a prior theft, and drug possession. See Cal. Legislative Analyst's Office, *Judicial & Criminal Justice*, at D-112-13 (2008-09).

Moreover, between 1984 and 1991, the California Legislature enacted hundreds of crime bills that increased sentences and lengthened the parole period for many crimes, including nonviolent felonies. Joan Petersilia, Cal. Policy Research Ctr., *Understanding California Corrections* 5 (2006) [hereinafter *Understanding California Corrections*]. As a result, California disenfranchises individuals for nonviolent felony offenses not recognized at common law and has extended the incarceration and parole period during which individuals can be disenfranchised.

³ California's Penal Code also includes the traditional common law felonies within its purview. See, e.g., Cal. Penal Code § 667.5(c).

IV. BY BROADENING THE CATEGORIES OF DISENFRANCHISING FELONIES, CALIFORNIA HAS DISPROPORTIONATELY DISENFRANCHISED AFRICAN AMERICANS

The criminal justice system, nationally and locally, has expanded at an exponential rate in recent years. For almost a century after the passage of the Fourteenth Amendment, rates of conviction, sentencing and incarceration remained somewhat stable and generally in line with other industrialized nations. Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. Colo. L. Rev. 743 (1993); ACLU, *Out of Step with the World: An Analysis of Felony Disfranchisement in the U.S. and Other Democracies* 3 (May 2006), available at http://www.aclu.org/images/asset_upload_file825_25663.pdf [hereinafter *Out of Step with the World*]. However, by 1997, the United State's incarceration rate was more than seven times the rate in 1870, with the most significant increases occurring since the 1970s. Jamie Fellner & Marc Mauer, Human Rights Watch & The Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* 12 (1998), available at http://www.sentencingproject.org/tmp/File/FVR/fd_losingthevote.pdf [hereinafter *Losing the Vote*].

The U.S. Department of Justice estimated that over 7.2 million Americans were under some type of criminal supervision in 2006, including those in local jails, on probation and on parole. See Bureau of Justice Statistics, U.S. Dep't. of Justice, *Corrections Statistics*, <http://www.ojp.usdoj.gov/bjs/correct.htm> (last visited June 13, 2008). And there are now more than two million people behind bars in the United States, outpacing any other nation. *Out of Step with the World*, at 3.

California mirrors these national trends. It has the largest prison system in the nation—second only to the Federal Bureau of Prisons. *Understanding California Corrections*, at 1. Since the 1980s, the number of people incarcerated in California has increased from 22,000 to an all-time high of 168,350 in 2006, with projections suggesting that it will reach 180,000 by 2010. *Id.* at 6. As of 2006, one of every nine individuals incarcerated in state prisons nationwide were housed in California. *Id.* at 1. Many of these individuals are incarcerated for nonviolent offenses. *See* Walter L. Gordon, *California's Three Strikes Law: Tyranny of the Majority*, 20 Whittier L. Rev. 577, 619 (1999) (finding nearly sixty percent of California's prison inmates committed for nonviolent crimes).

A. The Expansion of the Criminal Justice System Has Disproportionately Impacted African Americans.

African Americans are severely overrepresented among the prison population. Nationally, African Americans are only thirteen percent of the U.S. population, but they are incarcerated at almost six times the rate of whites. *See* Marc Mauer & Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity* 3 (July 2007), available at http://www.sentencingproject.org/Admin/Documents/publications/rd_stateratesofincbyraceandethnicity.pdf; U.S. Census Bureau, U.S. Dep't of Commerce, *The Black Population 2000* (Aug. 2001), available at <http://www.census.gov/prod/2001pubs/c2Kbr01-5.pdf>. *See also* Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 Ohio St. J. Crim. L. 19, 22 (2007) (citing Patrick A. Langan, U.S. Dep't. of Justice, *Race of Prisoners Admitted to State and Federal Institutions, 1926-86*, at 5 (1991)) (noting that African Americans were only 21 percent of prison admissions in 1926; by 1986, this had doubled to 44 percent).

Similarly, in California, African Americans represent less than seven percent of the general population, but are more than a quarter of the state's prison population. U.S. Census Bureau, U.S. Dep't of Commerce, *State & County QuickFacts* (2008), <http://quickfacts.census.gov/qdf/states/06000.html>; Adult Operations & Adult Programs, Cal. Dep't. of Corr. And Rehab., *Facts and Figures, Fourth Quarter 2007* (2007), available at http://www.cdcr.ca.gov/Divisions_Boards/Adult_Operations/Facts_and_Figures.html. A *San Jose Mercury News* report analyzed 700,000 criminal cases in California in 1991 and found that African Americans are imprisoned at rates which exceed even their representation in the arrest population. Christopher H. Schmitt, *Plea Bargaining Favors Whites as Blacks, Hispanics Pay Price*, *San Jose Mercury News*, Dec. 8, 1991, at Front [hereinafter *Plea Bargaining Favors Whites*]; Vincent Schiraldi et al., *Young African Americans and the Criminal Justice System in California: Five Years Later* (1996), <http://www.lindesmith.org/library/schiraldi2.cfm> [hereinafter *Young African Americans*]. At every stage of criminal proceedings, African Americans fared worse than their white counterparts. *Plea Bargaining Favors Whites*, at Front.

Two criminal justice policies, in particular, have helped fuel this prison growth and the resulting disparities: The "War on Drugs" and "Three Strikes You're Out." The consequence being disenfranchisement of individuals for nonviolent felony offenses not recognized at common law, such as drug offenses, for an extended period of time—in some instances, a lifetime.⁴

⁴ Individuals who are sentenced to a 25-years-to-life prison sentence for a third-strike, nonviolent felony that was non-existent at common law may be disenfranchised for life.

1. The War on Drugs Targets and Disproportionately Impacts African Americans.

The “War on Drugs” was officially launched in 1982 as a response to the perceived problem of extensive drug abuse in the late 1970s. Marc Mauer & Ryan S. King, The Sentencing Project, *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society* 3 (2007). The result has been a significant escalation in arrests for drug abuse violations, accompanied by an exponential growth in the number of inmates sent to state and federal prison to serve drug sentences. *Id.* at 7. An individual arrested on a drug charge in 1992 was five times as likely to be sent to prison as in 1980. *Losing the Vote*, at 11 (citing Office of Justice Programs (DOJ/OJP), U.S. Dep’t of Justice, *Prisoners in 1994* (1995)).

During these same years, there was a 25-fold increase in the number of individuals sent to California prisons for drug offenses. Mike Males et al., Ctr. on Juvenile & Criminal Justice, *Drug Use and Justice 2002: An Examination of California Drug Policy Enforcement* 5 (Dec. 2002). “In 1980, only 279 Californians were sent to prison for drug possession offenses—compared to 12,749 in 1999, a population-adjusted increase of 2,244 percent.” *Id.* at 6. The California drug offender prison population as of 1996 was greater than the entire number of prisoners incarcerated in 1982. Vincent Schiraldi et al., *Young African Americans and the Criminal Justice System in California: Five Years Later* (1996).

African Americans have borne the brunt of these policies. For the first time in Californian history, the incarceration rates of African Americans grew as the rates for whites decreased. This was despite the fact that the majority of drug users continued to be white. Vincent Schiraldi et al., *Young African Americans and the Criminal Justice System in California: Five Years Later* (1996). In 2003, the rate of white male prison

admissions for drug offenses in California was about 44 per 100,000, while the rate for African-American males was 515 per 100,000. Human Rights Watch, *Targeting Blacks: Drug Law Enforcement and Race in the United States* 19 (2008), available at <http://www.hrw.org/reports/2008/us0508/us0508webwcover.pdf>.

2. Three Strikes Laws Have Been Disproportionately Applied To African Americans.

While the “War on Drugs” increased arrests and convictions for nonviolent crimes, the enactment of the “Three Strikes You’re Out” law in California in 1994 has dramatically extended the sentences for nonviolent crimes. Unlike every other state with a Three Strikes law, California imposes 25-years-to-life sentences for a third-strike, nonviolent felony offense. Scott Ehlers et al., Justice Policy Inst., *Still Striking Out: Ten Years of California’s Three Strikes* 18 (2004), available at http://www.justicepolicy.org/images/upload/04-03_REP_CASStillStrikingOut_AC.pdf [hereinafter *Still Striking Out*].

Today, one in four prisoners is serving a doubled or 25-years-to-life sentence under California’s Three Strikes law—the majority are there for nonviolent offenses. See *Still Striking Out*, at 3, 9; Cal. Legislative Analyst’s Office, *A Primer: Three Strikes – The Impact After More Than a Decade* 16 (2005). “As of September 2003, ...there were more third strikers serving 25-years-to-life for drug possession (672) than third strikers in prison for second-degree murder (62), assault with a deadly weapon (379), and rape (119) combined.” *Still Striking Out*, at 9 (emphasis in original). Petty theft, third-strike 25-years-to-life sentences skyrocketed from 2 in 1994 to 354 in September 2003. *Id.*

African Americans are incarcerated for third-strike life sentences at a rate 12 times more than whites. Scott Ehlers et al., Justice Policy Inst., *Still Striking Out*, at 11. Taking second and third strike sentences together, the African-American incarceration rate is over 10 times that of whites. *Id.*

B. Broad Felony Disenfranchisement Has Disproportionately Impacted the Voting Rights of African Americans.

The combination of this expanded definition of felony offenses, along with the exponential increase in incarceration for lengthy prison terms for conviction of such non-common law felony offenses, has led to a shocking degree of African-American voter disenfranchisement.

While racially neutral on their face, felony disenfranchisement laws have had a severe, racially-disparate impact. Of the over five million citizens denied the vote nationwide, 1.4 million are African American men. *See Felony Disenfranchisement Laws*, at 1. Thirteen percent of black men are barred from the ballot box—a rate seven times the national average. *See id.*

At the current rate and pattern of incarceration, it has been forecast that three in ten of the next generation of African American men nationwide will be disenfranchised at some point in their lifetime. *Losing the Vote*, at 2; *Felony Disenfranchisement Laws*, at 1. In states with the most restrictive laws, 40 percent of African American men may permanently lose their right to vote. *Losing the Vote*, at 2; *Felony Disenfranchisement Laws*, at 1.

California's expansive Penal Code has contributed to this disproportionate impact. Counting only those in prison and on parole for a felony conviction, over 293,000 Californians were prohibited from voting

as of January 2006, approximately 28 percent of whom (over 78,000) are African Americans. Cal. Dep't. of Corr. and Rehab., *California Prisoners and Parolees, 2006* (2007), available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2006.pdf. Yet African Americans are less than seven percent of California's total population and, as of 2000, were eight percent of the adult citizen population. See U.S. Census Bureau, U.S. Dep't of Commerce, *2006 American Community Survey* (2006), http://factfinder.census.gov/servlet/ACSSAFFacts?_event=&geo_id=04000US06&_geoContext=01000US%7C04000US06&_street=&_county=&_cityTown=&_state=04000US06&_zip=&_lang=en&_sse=on&ActiveGeoDiv=geoSelect&_useEV=&pctxt=fph&pgsl=040&_submenuId=factsheet_1&_s_name=null&_ci_nbr=null&qr_name=null®=null%3Anull&_keyword=&_industry [hereinafter *2006 American Community Survey*]; Fredric Gey et al., Univ. of Cal. Latino Policy Inst., *California Latino Demographic Databook, 3rd Edition: 2004*, at 7–4 (Nov. 2004), available at http://socrates.berkeley.edu:7101/new_web/projects/latino3/Databook2004.pdf. African Americans are disenfranchised at almost 10 times the rate of whites in this state. Cal. Dep't. of Corr. and Rehab., *California Prisoners and Parolees, 2006* (2006); *2006 American Community Survey*.

V. THE DISPROPORTIONATE DISENFRANCHISEMENT OF AFRICAN AMERICANS UNDERMINES THE ORIGINAL INTENT OF THE FOURTEENTH AMENDMENT

In the 1867 and 1868 debates, Congress was focused on extending and protecting the franchise for African Americans. In Senator Sherman's speech upon the purpose of the Fourteenth Amendment, he stated:

Our path has been towards enfranchisement and liberty. Let us not turn backwards in our course, but after providing all necessary safeguards for white and black, let us reconstruct

society in the rebel states upon the broad basis of universal suffrage.

Cong. Globe, 39th Cong., 2d Sess. 1563 (1867).

Yet, the current application of disenfranchisement laws to *any* felony conviction has led to the opposite result: African Americans losing the right to vote at significantly greater rates than whites—in some states, permanently. In other words, the precise result that the Reconstruction Congress sought to prevent (namely, states instituting barriers to voting, such as broadly defined crimes, resulting in the disproportionate disenfranchisement of African Americans) has come to pass in the ensuing years.

It is time to revisit this policy of exclusion and realize our commitment to the Fourteenth Amendment and its goal of full democratic inclusion.⁵

⁵ It should be noted that the United States is the only democratic nation that still disenfranchises large numbers of non-incarcerated citizens and among the few that disenfranchises the incarcerated. *See Out of Step with the World*, at 33. The supreme courts of Canada and South Africa recently struck down voting prohibitions for incarcerated persons. *Sauvé v. Canada*, [2002] 3 S.C.R. 519 (Can.), available at <http://scc.lexum.umontreal.ca/en/2002/2002scc68/2002scc68.pdf>; *Minister of Home Affairs v. Nat'l Inst. for Crime Prevention & the Reintegration of Offenders*, 2005 (3) SA 280 (CC) (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/1333.PDF>. And the European Court of Human Rights ruled that the United Kingdom's blanket disenfranchisement of individuals in prison violated the European Convention on Human Rights. *Hirst v. United Kingdom (No. 2)*, 681 Eur. Ct. H.R. (2005), available at <http://www.worldlii.org/eu/cases/ECHR/2005/681.html>.

VI. CONCLUSION

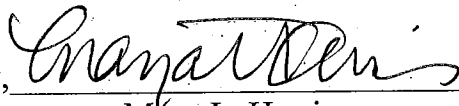
The Framers of the Fourteenth Amendment intended to protect African-American voting rights by limiting the criminal disenfranchisement provision to common law felonies. Since that time, California, along with other states, has expanded the scope of disenfranchising felonies beyond the common law, which has led to significant and disproportionate African-American voter disenfranchisement—undermining the original intent of the Fourteenth Amendment.

Dated: June 19, 2008

Respectfully submitted,

American Civil Liberties Union of
Northern California

Impact Fund

By, 
Maya L. Harris
Counsel for Amicus Curiae

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*Legal Services for Prisoners with Children, et al. v. Debra Bowen,
California Secretary of State, et al.*

No. A120220

I, Meghan Loisel, declare that I am a citizen of the United States, employed in the City and County of San Francisco; I am over the age of 18 years and not a party to the within action or cause; my business address is 39 Drumm Street, San Francisco, CA 94111.

On June 19, 2008, I served a copy of the attached:

**BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND THE
IMPACT FUND AS AMICI CURIAE IN SUPPORT OF
PETITIONERS**

On each of the following by placing true copies in a sealed envelope with postage thereon fully prepaid in our mail basket for pickup this day at San Francisco, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and
correct. Executed on June 19, 2008 at San Francisco, California.



Meghan Loisel