

**TO THE HONORABLE MEMBERS OF THE  
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,  
ORGANIZATION OF AMERICAN STATES**

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**PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS  
OF THE NEW JERSEY STATE CONFERENCE NAACP, THE LATINO  
LEADERSHIP ALLIANCE OF NEW JERSEY, COUNCILWOMAN PATRICIA  
PERKINS-AUGUSTE, COUNCILMAN CARLOS J. ALMA, STACEY KINDT,  
MICHAEL MACKASON, CHARLES THOMAS, AND DANA THOMPSON, BY  
THE UNITED STATES OF AMERICA  
AND THE STATE OF NEW JERSEY, WITH REQUEST FOR AN  
INVESTIGATION AND HEARING ON THE MERITS**

By the undersigned, appearing as counsel for the petitioners under the provisions of Article 23 of the Commission's Regulations, on behalf of above Petitioners including Non-Governmental Organizations Registered Under the Laws of the United States and United States citizens:

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Submitted: September 13, 2006

**PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS BY THE UNITED STATES OF AMERICA AND THE STATE OF NEW JERSEY, WITH REQUEST FOR AN INVESTIGATION AND HEARING ON THE MERITS**

**I.**

**INTRODUCTION**

Petitioners are citizens residing in New Jersey who were sentenced for committing crimes, and who are on parole and probation living in their communities throughout the State of New Jersey. Petitioners cannot vote because a New Jersey law disfranchises probationers and parolees. Petitioners seek review from this Commission in their efforts to restore their most fundamental of rights – the right to vote. This Petition is not merely about the right of individual offenders to cast a ballot; it is also about the right of the African-American and Latino communities to participate fully and effectively in the political process.

Because of acknowledged racial profiling and other discriminatory aspects of the criminal justice system in New Jersey and throughout the United States,<sup>1</sup> persons of color are investigated, arrested, prosecuted and convicted out of all proportion to their propensity to commit crime. Felon disfranchisement law thus disproportionately affects them. By disproportionately excluding from the electorate so many African Americans and Latinos, felon disfranchisement significantly dilutes the political power of those constituencies.

The scandalous nature of felon disfranchisement in the United States was highlighted in an editorial, which appeared in the *New York Times* on October 14, 2005:

The United States has the worst record in the democratic world when it comes to stripping convicted felons of the right to vote. Of the nearly five million people who were barred from participating in the last presidential election, for example,

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<sup>1</sup> See Point II. B.

most, if not all, would have been free to vote if they had been citizens of any one of dozens of other nations. Many of those nations cherish the franchise so deeply that they let inmates vote from their prison cells.

The individual disfranchised Petitioners are joined by others including the leading organizations of black and brown communities in New Jersey - the New Jersey State Conference of the NAACP and the Latino Leadership Alliance of New Jersey. They are also joined as Petitioners by two members of the City Council of Elizabeth, New Jersey, a major urban center with a large racial minority population.

Petitioners challenged New Jersey's practice of denying suffrage to convicted felons on parole and probation, alleging that the practice denied them Equal Protection of the Laws under the New Jersey Constitution because of its discriminatory and disparate impact on the African-American and Latino electorate in the State. Both trial and appellate courts dismissed the Complaint for failure to state a claim on which relief could be granted, and the New Jersey Supreme Court denied the petition for appeal to that court.

Petitioners, after exhausting all available judicial remedies at the domestic level, now bring their claims to this Honorable Commission. Petitioners' claims constitute violations of some of most fundamental rights protected under the American Declaration on the Rights and Duty of Man, including the right to vote (Article XX), the right to be free from racial discrimination (Article II) and the right to rehabilitation (Articles I and XVII), rights long recognized under international human rights law and explicitly protected by the Declaration.

Petitioners' situation is not isolated – 19 other U.S. states and the District of Columbia have disfranchisement policies that are less sweeping than New Jersey's; 19

have the exact same policies; and another 12 exclude even more categories of persons from the franchise than the State of New Jersey. Only two of the 50 U.S. states permit voting in prison, a practice embraced by at least 8 OAS states and nearly one-half of Europe's nations. Notably, those states, Maine and Vermont, are far more racially homogeneous than the rest of the country, and have larger Caucasian prison populations than the rest of the U.S.

Petitioners request, *inter alia*, that the State of New Jersey bring its disfranchisement law and policies into line with internationally recognized standards by amending its laws to permit post-incarceration voting; that all 35 U.S. states with any post-incarceration restrictions on voting be made to remove restrictions that fail to comport with international standards; and that the federal government enact comprehensive voting rights legislation which complies with international voting rights standards; specifically, legislation that would extend the right to vote to persons with federal felony convictions who have completed the incarcerative portion of their sentences. Finally, Petitioners ask that courts and public defenders be made to advise defendants who are pleading guilty and those being sentenced for disfranchising crimes if and when they will lose the right to vote, and the procedures for how they might gain restoration of that fundamental right.

## II.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### **A. The Law of Felon Disfranchisement in New Jersey**

New Jersey Statute 19:4-1(8) provides that:

No person shall have the right of suffrage . . . [w]ho is serving a sentence or is on parole or probation as the result of a conviction of any indictable offense under

the laws of this or another state or of the United States.

That statute was passed pursuant to Article 2, ¶7 of the Constitution of New Jersey,

which provides as follows:

The Legislature may pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate.<sup>2</sup>

**B. As a Consequence of Racial Profiling In the State of New Jersey, a Greatly Disproportionate Number of Members of the Minority Community Have Been Disfranchised**

The consequences of the disfranchisement law have been drastic for the African-American and Latino populations of New Jersey. The data is clear that African-Americans and Latinos are investigated, prosecuted, convicted, sentenced and thereby disfranchised at rates substantially greater than non-Hispanic white persons – and at rates greatly in excess of their propensity to commit crime.

The United States Census for the year 2000 reported that African-Americans constituted 13.6 percent of the New Jersey population and Hispanics approximately 13.3 percent. In contrast, African-Americans constitute more than 63 percent of the current prison population, more than 60 percent of persons on parole and approximately 37 percent of probationers; and Hispanics make up approximately 18 percent of the prison population, about 20 percent of parolees and more than 15 percent of those on probation. Collectively, African-Americans and Hispanics make up 81 percent of New Jersey's prison population, more than 75 percent of those on parole and more than 52 percent of probationers. In contrast, non-Hispanic whites constitute some 72.6 percent of the State's total population, but only 19 percent of prisoners and parolees, and 41 percent of those on

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<sup>2</sup> Plaintiffs had argued in the underlying New Jersey case that a law enacted pursuant to a constitutional delegation of authority, unlike a direct constitutional prohibition, was subject to Equal Protection analysis. But the New Jersey courts rejected that argument.

probation.

According to the Urban Institute of Justice, in 2002, 75 percent of prisoners being released from state prisons to New Jersey communities were either African-American (62 percent) or Hispanic (13 percent).<sup>3</sup>

From 1977 to 2002, the prison population in New Jersey quadrupled to more than 27,000. In 1980, 3,910 offenders were released from New Jersey prisons. In 2001, 14,849 offenders were released from New Jersey prisons.<sup>4</sup> From 1980 until 2002, the incarceration rate in New Jersey increased from 76 to 331 per 100,000 persons. In 2002, white males were incarcerated at a rate of 161 per 100,000 persons; African-American males were incarcerated at a rate of 2,117 per 100,000; and Hispanic males were incarcerated at a rate of 759 per 100,000 persons.<sup>5</sup>

As a consequence, New Jersey has raised its budget spending on the criminal justice system due to the high incarceration rates. In the fiscal year 1983, the state spent \$200 million and the budget expanded to \$1.1 billion in the fiscal year 2003.<sup>6</sup> According to the Urban Institute, approximately 70,000 offenders were expected to return from state prisons to New Jersey from 2002 to 2007. These offenders are 62 percent African-American. Nearly one-third, or 31 percent, of offenders returning to New Jersey after incarceration return to either Camden County or Essex County, which have the highest proportion of African-Americans in the State. This data, and its source is set forth in detail in an amicus brief filed in the New Jersey state courts by the New Jersey Institute

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<sup>3</sup> Travis, Keegan, Cadora, Solomon & Swartz, *A Portrait of Prisoner Reentry in New Jersey*, Urban Institute Justice Policy Center Research Report (2003). Precise figures in all these categories are difficult to come by because of discrepant accounting methods by the government agencies involved.

<sup>4</sup> *Id.* at 22.

<sup>5</sup> Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear, 2001*, <http://www.ojp.usdoj.gov/bjs>.

<sup>6</sup> Travis, *Prison Reentry*.

for Social Justice attached as Exhibit A.

Like most states in the United States, New Jersey's Department of Corrections monitors the parole system on a local level with district offices throughout the state. Probation is supervised on a county level and serves as an alternative to prison for some offenders. A probationer is assigned to a probation officer who monitors the probationers' community supervision and ensures that the probationer adheres to the specific rules of conduct established by the court. In 2004, there were 85,186 disfranchised felony probationers in New Jersey.<sup>7</sup> And in 2001, the State of New Jersey Administrative Office of the Courts reported that of the 69,559 persons on probation at that time, more than 52 percent were African-American or Hispanic and 41 percent were non-Hispanic whites.

Unlike a probationer, a parolee is an offender who is released on parole after serving a prison term. The offender is required to be supervised upon his/her return to the community as part of his conditional release. If the parolee violates his/her conditional release, the parolee may be sent back to prison depending on the court's discretion or the parole officer's discretion. In 2004, the New Jersey Department of Corrections oversaw 14,180 parolees,<sup>8</sup> whose racial composition reflected the population of the prisons from which they were released.

Unlike in 19 other states and the District of Columbia, ex-offenders on parole or probation in New Jersey may not vote. The vastly disproportionate extent to which racial minorities are under the supervision of the criminal justice system – and thus denied the right to vote – results in large measure from the well-acknowledged discriminatory

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<sup>7</sup> Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy*, 9 (2006), Table A3.3, at page 249.

<sup>8</sup> Travis, Prisoner Reentry.

application of the criminal laws. The wide latitude given to individual police officers, prosecutors, judges and juries to exercise discretion allows discriminatory animus and racial stereotypes to influence administration of the criminal laws of New Jersey to the detriment of African-Americans and Latinos.

In particular, African-Americans are substantially more likely to be stopped by the police while driving on New Jersey roads and highways than are whites - a disproportionate likelihood that has no other explanation than the conscious or unconscious decisions of police officers to especially target African-American motorists.<sup>9</sup> For example, statistics compiled by the New Jersey State Police between 1994 and 1998 show that four out of every ten stops made by State Police attached to the Moorestown and Cranbury stations involved a minority motorist.<sup>10</sup> Most significantly, the rate of traffic stops targeting minority motorists escalated substantially as police officers were allowed discretion as to whom to stop. The Radar Unit (which stops vehicles according to radar monitoring) issued 18 percent of its tickets to African-Americans, while the Patrol Unit (which exercises discretion in traffic stops) issued over 34 percent of its tickets to African-Americans. South of Exit 3 of the New Jersey Turnpike, the Radar unit issued 19.1 percent of its tickets to African-Americans, while the Patrol Unit issued 43.8 percent of its tickets to African-Americans. With the increase in discretion granted to police officers, the rate of traffic stops of African-Americans increased dramatically in comparison to stops based on neutral data such as radar readings. This demonstrates the prevalence of conscious or unconscious profiling in decisions by police about which persons to be subject to stops and investigations.

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<sup>9</sup> Interim Report of the New Jersey State Police Review Team Regarding Alternatives of Racial Profiling, April 20, 1999 (hereinafter "Veniero Report") at 26, available at [http://www.state.nj.us/lps/intm\\_419.pdf](http://www.state.nj.us/lps/intm_419.pdf)

<sup>10</sup> *Id.* at 33.

African-Americans and Hispanics are also substantially more likely to be subject to a consent search than whites. According to statistics compiled by the New Jersey State Police between 1994 and 1998, nearly eight out of every ten consent searches conducted by the New Jersey State Police from the Moorestown and Cranbury police stations involved minority motorists. A consent search is one where police officers ask permission to conduct a search. Such searches have been recently ruled unconstitutional by the New Jersey Supreme Court because they are inherently coercive.<sup>11</sup>

Similar race disparities exist throughout the New Jersey system, as officially acknowledged by the New Jersey courts, police and Attorney General's office:

(A) In *State v. Soto*, a New Jersey state court found that African American “defendants have proven at least a *de facto* policy on the part of the State Police out of the Moorestown Station of targeting blacks for investigation and arrest . . . . The statistical disparities and standard deviations revealed are stark indeed . . . . The utter failure of the [New Jersey] State Police hierarchy to monitor and control a crackdown program [...] or investigate the many claims of institutional discrimination manifests its indifference if not acceptance.”<sup>12</sup>

(B) The findings of the Court in *Soto* were acknowledged and expanded upon in the Veniero Report. That Report found:

(1) “[T]he underlying conditions that foster disparate treatment of minorities have existed for decades in New Jersey . . . and will not be changed overnight.”<sup>13</sup>

(2) “Despite these efforts and official policies to address the issue of racial

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<sup>11</sup> *State v. Steven J. Carty*, 170 N.J. 632, 790 A.2d 903 (2002).

<sup>12</sup> 324 N.J. Super. 66, 84-85 (Law Div., Gloucester County, 1996).

<sup>13</sup> Veniero Report at 112.

profiling, based upon the information that we reviewed, minority motorists have been treated differently than non-minority motorists during the course of traffic stops in the New Jersey Turnpike. For the reasons set out in this report we conclude that the problem of disparate treatment is real not imagined.”<sup>14</sup>

(3) “We are thus presented with data that suggest that minority motorists are disproportionately subject to searches (eight out of every ten consent searches conducted by troopers assigned to the Moorestown and Cranbury stations involved minority motorists).”<sup>15</sup>

(4) In the period from 1996 to 1998, the State Police from the Newark, Moorestown and Cranbury stations made a total of 2,871 arrests for “more serious offenses” (generally excluding traffic, including drunk driving arrests). Of these, 932 (32.5%) involved white persons; 1,772 (61.7%) involved black persons, and 167 (5.8%) involved persons of other races.<sup>16</sup> As the Report then noted: “The fact that the arrest rates for whites was comparatively low does not mean that white motorists are less likely to be transporting drugs, but that they were less likely to be suspected of being drug traffickers in the first place, and, thus, less likely to be subjected to probing investigative tactics designed to confirm suspicions of criminal activity such as, notably, being asked to consent to a search.”<sup>17</sup>

(5) Despite efforts by the State Police to curb racial profiling, the practice continued into the 21<sup>st</sup> Century, according to the testimony of New Jersey Attorney General John Farmer before the Senate Judiciary Committee on April 3,

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<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.* at 6-7.

<sup>16</sup> *Id.* at 36.

<sup>17</sup> *Id.* at 32.

2001 (“Farmer Testimony”). For example, Farmer testified that a study of Troop D in early 2001 showed that white drivers were subjected to consent searches 19 percent of the time, while blacks were at 53 percent and Hispanics at 25 percent. “Thus, blacks and Hispanics were subjected to consent searches at rates higher than their presence on the road and higher than their stop rates.”<sup>18</sup>

The *Soto* decision and New Jersey Racial Profiling Report acknowledged that the criminal justice system in New Jersey is racially biased. This racial bias is reflected starkly in the arrest and incarceration of drug offenders. Statistics show that police focus disproportionately on members of the minority community in making drug arrests. Drug arrests and convictions have had an especially disproportionate impact on African-Americans and Hispanics, even though African-Americans and Hispanics do not use illegal drugs any more frequently than whites. Figures indicate that in 1982, 12 percent of New Jersey’s prisoners were drug offenders, and 31 percent of the inmates were white. In 2001, 34 percent of the New Jersey prison population was drug offenders and only 18 percent of the prison population was white. The New Jersey Department of Corrections attributes this disparity to the impact of the 1986 Comprehensive Drug Reform Act. The Act led to targeting of inner-city neighborhoods where the population is overwhelmingly minority. Between 1986 and 1999, the rate at which African-Americans were incarcerated for drug offenses increased by 475 percent, while the rate at which whites were incarcerated for drug offenses increased by only 112 percent.

National research shows that whites and African-Americans use illegal drugs at similar rates. By disproportionately excluding from the electorate so many African Americans and Latinos, felon disfranchisement significantly dilutes the political power of

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<sup>18</sup> Farmer Testimony at 16.

those constituencies. According to the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), in 2002, 8.5 percent of whites, and 9.7 percent of African-Americans reported using illegal drugs in the preceding month, and 9.3 percent of whites, and 9.5 percent of African-Americans reported themselves to be dependent on an illicit substance. In New Jersey, a survey is conducted every three years by the New Jersey Division of Criminal Justice among high school students, leading to the publication of results under the title, "Drug and Alcohol Use Among New Jersey High School Students." Those reports have consistently found higher percentage rates of reported usage of illicit substances by white New Jersey high school students than by African American and Hispanic high school students. The 1999 report found that 46.7 percent of white high school students reported marijuana use compared to 40.1 percent of African American high school students, and 36.3 percent of Hispanic high school students. Similarly, 8.6 percent of white high school students reported cocaine use, compared to 2.4 percent of African American students and 6.4 percent of Hispanic students.<sup>19</sup>

Young people of color have particularly suffered from disparate incarceration for drug offenses. The rate of increase of imprisonment between 1986 and 1999 for African-American youth was 646 percent, compared to 186 percent for white youths. The result is that an entire generation of minority youths cannot participate in the democratic process. Moreover, it creates an underclass of disaffected and alienated

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<sup>19</sup> Although white and minority youths sell and use drugs at about the same rate, black youths are 25 times more likely to end up being incarcerated for drug-related crimes. In at least 15 states, remarkably, black males in general were imprisoned on drug charges at rates anywhere from 25 to 57 times those of white men, thereby making up, nationwide, fully 74 percent of those incarcerated for drug offenses. Elizabeth A. Hull, *The Disenfranchisement of Ex-Felons*, at 25 (2006) (citing "U.S. Incarceration Rates Reveal Striking Racial Disparities," Human Rights Watch World's Reporter, Feb. 27, 2002, <http://www.hrw.org/background/usa/race>).

citizens who may never participate in the voting process.

Although recent reforms and judicial supervision of State Police practices have no doubt ameliorated the discriminatory implementation of the laws, it will take generations to undo the impact the unequal and unjustified incarceration rates have imposed on the minority community.

### **C. Disfranchisement of Ex-Offenders Released From Prison Is a National Problem in The United States**

The disfranchisement of ex-offenders is not unique to the State of New Jersey. Currently, more than five million U.S. citizens are prohibited from voting because they have been convicted of a felony offense.<sup>1</sup> In nearly every state of the U.S., persons who are currently serving jail time for felony crimes are denied the right to vote.<sup>2</sup> In addition, over two million Americans who have already served their prison sentences continue to be disfranchised.<sup>3</sup> In Florida, Kentucky, and Virginia, ex-felons can never regain their right to vote.<sup>4</sup> People with felony convictions on parole cannot vote in thirty-six states, while felony probationers are denied the franchise in thirty-one states.<sup>5</sup> In several U.S. states, even the commission of a misdemeanor is a bar to voting.<sup>6</sup>

U.S. criminal disfranchisement policies stand in stark contrast to those of most other democratic nations, many of which allow prisoners to vote.<sup>7</sup> In fact, through its harsh felon disfranchisement laws, the United States “aligns itself with countries whose

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<sup>1</sup> The Sentencing Project, *Felony Disenfranchisement Laws in the United States*, 1, available at: <http://www.sentencingproject.org/pdfs/1046.pdf> (Aug. 2006).

<sup>2</sup> Maine and Vermont are the only two states that allow incarcerated felons to vote. *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 3.

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

<sup>6</sup> Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy*, 9 (2006).

<sup>7</sup> Elizabeth A. Hull, *The Disenfranchisement of Ex-Felons*, 81 (2006).

commitment to progressive values is less evident, such as Azerbaijan, Chechnya, Jordan, Libya, and Pakistan.”<sup>8</sup>

Furthermore, U.S. felon disenfranchisement laws have disproportionately and overwhelmingly impacted communities of color. Thirteen percent of all black males are currently deprived of the right to vote. This rate is “seven times the national average” rate of disenfranchisement.<sup>9</sup> Over the last twenty years, the “war on drugs” has further exacerbated this trend. Despite similar rates of drug use, young black males “are twenty-five times more likely” than young white males to serve time for drug-related offenses.<sup>10</sup> If current incarceration rates continue, “three in ten of the next generation of black men can expect to be disenfranchised at some point in their lifetime.”<sup>11</sup>

Although several states have recently passed laws to restore voting rights to ex-felons<sup>12</sup>, many of these initiatives require mandatory waiting periods of up to seven years and involve cumbersome and confusing application processes.<sup>13</sup> In many of these states, felons are never informed of their right to re-enfranchisement upon leaving prison.<sup>14</sup> In others, eligibility review is so understaffed and poorly administered that ex-felons have to wait years for a decision.<sup>15</sup> Worse still, while some states have moved in recent years to re-enfranchise ex-felons, probationers, and parolees, Utah and Massachusetts (through Constitutional Amendment) and Kansas (through legislation) have limited these groups’ voting rights.<sup>16</sup>

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<sup>8</sup> *Id.* at 81-82.

<sup>9</sup> *Felony Disenfranchisement Laws in the United States* at 1.

<sup>10</sup> *Hull* at 25.

<sup>11</sup> *Felony Disenfranchisement Laws in the United States* at 1.

<sup>12</sup> *Felony Disenfranchisement Laws in the United States* at 2.

<sup>13</sup> *Hull* at 152.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 153.

<sup>16</sup> *Felony Disenfranchisement Laws in the United States* at 2.

**D. Facts About the Petitioners**

The two lead Petitioners, the New Jersey State Conference of the NAACP and the Latino Leadership Alliance of New Jersey, represent their respective communities.

Petitioner NEW JERSEY STATE CONFERENCE NAACP (hereinafter New Jersey NAACP), is an unincorporated, nonprofit affiliate of the national NAACP. Keith Jones is the New Jersey NAACP president. The NAACP is a voluntary association committed to the improvement of the status of minority groups, the elimination of discriminatory practices and the achievement of civil rights. The NAACP, founded in 1909, seeks to ensure political, educational, social, and economic equality of minority group citizens in the United States. As the oldest and largest civil rights organization in the United States, the NAACP has a long history of involvement in protecting the voting rights of African Americans and challenging racial discrimination. The disfranchisement of ex-felons on parole and probation impacts particularly harshly on the voting rights of black men, who constitute a significantly disproportionate percentage of prison inmates and released prisoners in New Jersey. The New Jersey NAACP brings this action on behalf of its members who are released felons who want to register to vote but are unable to do so under the current law, and on behalf of the entire African American community of New Jersey, whose ability to participate equally in the political process and to elect to public office candidates of their choice is hampered by the impact of the law.

Petitioner LATINO LEADERSHIP ALLIANCE OF NEW JERSEY (hereinafter “LLA”) is a voluntary association whose purpose is to improve the status of Hispanic/Latino Americans, in part by working to end discriminatory practices. A part of its mission is the election of candidates, both Hispanic and non-Hispanic, with a

demonstrated track record of support for issues that matter to Hispanics. The LLA has local affiliation in Union County and throughout New Jersey.

Petitioner PATRICIA PERKINS-AUGUSTE is an African-American citizen of voting age actively involved in electoral and civic affairs in Union County, New Jersey. She is a member of the Elizabeth City Council. She has a strong interest in increasing voter registration and participation among African-Americans in Elizabeth, Union County, and New Jersey in order to advance and protect the ability of members of the African-American community to enjoy life, liberty, safety and happiness as promised by the Constitution of the State of New Jersey.

Petitioner CARLOS J. ALMA is an Hispanic citizen of voting age actively involved in electoral and civic affairs in Union County, New Jersey. He is currently in his fifth year as a member of the Elizabeth City Council. He has a strong interest in increasing voter registration and participation among Hispanics in Union County and New Jersey in order to advance and protect the ability of members of the Latino community to enjoy life, liberty, safety and happiness as promised by the Constitution of the State of New Jersey.

Petitioner MICHAEL MACKASON, is an African-American of lawful voting age, a citizen of the United States and a legal resident of New Jersey. He is currently on parole, and thus pursuant to N.J.S.A. 19:4-1(8), is not entitled to vote. Mr. Mackason has been on parole since his release from a rehabilitation center in 2002, and will remain on parole until 2008 with the possibility of early release. Mr. Mackason is a law-abiding citizen, employed as the Program Manager at Youth Build-Newark, an educational and trades program focusing on out-of-school youth. He is also a part-time computer literacy

instructor at Essex Community College and a board member of a local community development program. Mr. Mackason is seeking the right to vote because he would like to more fully participate in the political system. He wishes to address current and proposed legislation on issues that he believes need more vocal support than they presently receive. Re-enfranchisement would permit Mr. Mackason to share his support and dissent on issues that he feels strongly about through the voting process.

Petitioner DANA THOMPSON is an African-American of lawful voting age, a citizen of the United States, and a legal resident of New Jersey. Mr. Thompson was sentenced in 2001 to three concurrent sentences of 364 days and placed on three years probation. He was convicted of possession of a controlled dangerous substance and leaving the scene of an accident. Mr. Thompson's probation ended in 2005, making him recently eligible to vote pursuant to N.J.S.A. 19:4-1. He is gainfully employed as the sole proprietor of his own construction company in Piscataway. He is also a volunteer at the New Jersey Institute of Social Justice and "New Careers," a program providing job training to parolees in Essex County. Mr. Thompson also participates in Christian prison ministry. He is most interested in participating in the electoral process to support issues like incentives for start-up minority businesses, the rehabilitation of ex-offenders, local economic development initiatives, and the reform of the criminal justice system.

Petitioner CHARLES THOMAS is an African-American of lawful voting age, a citizen of the United States and a legal resident of the state of New Jersey. Mr. Thomas is currently serving parole and thus pursuant to N.J.S.A. 19:4-1 (8), is not entitled to vote. Mr. Thomas has been on parole from a life sentence since his release from both the Trenton and Rahway Prison in 2000. Mr. Thomas was 18 years old at the time of the

crime, and is on life-time parole. Thus, he was never eligible to vote, and, pursuant to his statue, he never will be. He is a law-abiding citizen, employed as a treatment coordinator for Volunteers of America, an organization based in Camden, N.J. Mr. Thomas seeks the right to vote because, as a homeowner, as a taxpayer, and as a member of the community, he believes in no taxation without representation. Re-enfranchisement would allow Mr. Thomas to share his opinion on issues about which he believes he should be concerned about as both a community member and father, such as how the local school is being managed.

Petitioner STACEY KINDT is an activist of lawful voting age, a citizen of the United States and a legal resident of New Jersey. She is currently on parole until December 27, 2007, and thus pursuant to N.J.S.A. 19:4-1(8), is not able to vote. She is a director at Redeem Her, an organization committed to helping woman who either are or have been imprisoned by changing the preconceptions that society has about women in prison in general, by providing positive role models to her sisters who are still incarcerated, and by providing a diversity of social services programs where the community and ex-offenders join together to meet the tangible, practical needs of incarcerated and recently-released women. Mrs. Kindt believes that disfranchisement inhibits women parolees to be reintegrated with society. She is actively involved in her community, but her inability to vote makes her feel that she is not good enough to be a member. Mrs. Kindt wants the right to vote to express her opinion on views such as political corruption and welfare reform. Exhibit D.

**E. Procedural History**

Petitioners' class complaint was filed on January 6, 2004 in the Superior Court of

New Jersey, Chancery Division, Union County, challenging New Jersey's practice of denying suffrage to convicted felons on parole and probation. The Complaint alleged that the practice denied Equal Protection of the Laws under the New Jersey Constitution because of its discriminatory and disparate impact on the African-American and Latino electorate in the State.

The Plaintiffs were the New Jersey State Conference/NAACP, the Latino Leadership Alliance of New Jersey, Elizabeth City Council members Patricia Perkins-Auguste and Carlos Alma, and ten New Jersey residents who at the time were on either parole or probation.

The trial court dismissed the Complaint for failure to state a claim on which relief could be granted, with a written opinion on July 12, 2004. The case was appealed. It was argued in the Appellate Division of the New Jersey Superior Court on September 27, 2005. The appeal was dismissed with a written opinion on November 2, 2005. Plaintiffs filed a timely Petition for Certification in the New Jersey Supreme Court on December 1, 2005. The Supreme Court denied the petition with an Order filed on March 16, 2006.

### **III.**

#### **ADMISSIBILITY**

##### **A. Petitioners Have Properly Exhausted Domestic Remedies.**

Article 31 of the Rules of Procedure of the Inter-American Commission on Human Rights ("Commission") sets forth as a prerequisite for admissibility that the "remedies of the domestic legal system have been pursued and exhausted in accordance with the

generally recognized principles of international law.”<sup>20</sup> Petitioners presented their claims that laws in the State of New Jersey denying suffrage to convicted felons on parole and probation violated Petitioners’ right to equal protection of the laws under the State Constitution because of its discriminatory and disparate impact on the African-American and Latino electorate in the State. On July 12, 2004, the Chancery Division of the Superior Court dismissed the claims. Petitioners filed a timely appeal of the decision and on November 2, 2005, the Appellate Division of the Superior Court delivered an opinion, dismissing the appeal on largely the same grounds as the trial court. Petitioners sought review of this decision by the Supreme Court for the State of New Jersey, the state’s highest appellate court. By Order filed March 16, 2006, the Supreme Court exercised its discretion not to review the lower court decisions. In denying review, the Supreme Court let the findings of the lower courts stand and ended the Petitioners’ ability to challenge their disfranchisement. According to the U.S. Supreme Court, the U.S. Constitution grants the states the right to deny the vote to people with felony convictions. *Richardson v. Ramirez*, 418 U.S. 24 (1974). Petitioners have thus exhausted their domestic individual remedies. They cannot seek review in any court within the United States – state or federal. Accordingly, this Commission has jurisdiction to review this Petition.

**B. Petitioners Have Filed This Petition Within Six Months From the Exhaustion of Domestic Remedies.**

Petitioners also meet the terms of Article 32(1) of the Commission’s Rules of Procedure, which require that petitions “are lodged within a period of six-months following the date on which the alleged victim has been notified of the decision that

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<sup>20</sup> Rules of Procedure of the Inter-American Commission on Human Rights, approved 4-8 Dec. 2000, amended 7-25 Oct., 2002 and 7-24 Oct., 2003, art. 31 [hereinafter *Rules of Procedure*].

exhausted the domestic remedies.”<sup>21</sup> As the six-month deadline on Petitioners state law constitutional claims will not expire until September 16, 2006 (six months after the State Supreme Court’s denial to review the case) this petition meets the timeliness requirements of Article 32(1).

**C. There Are No Parallel Proceedings Pending.**

Article 33 of the Rules of Procedure renders a petition inadmissible if its subject matter “is pending settlement pursuant to another procedure before an international governmental organization . . . or, . . . essentially duplicates a petition pending or already examined and settled by the Commission or by another international governmental organization . . . .”<sup>22</sup> The subject of this petition is not pending settlement and does not duplicate any other petition in any other international proceeding.

**D. The American Declaration of the Rights and Duties of Man Is Binding on the United States.**

As the United States is not a party to the Inter-American Convention on Human Rights (“American Convention”) it is the Charter of the Organization of American States (“OAS Charter”) and the American Declaration on the Rights and Duties of Man (“American Declaration”) that establish the human rights standards applicable in this case. Signatories to the OAS Charter are bound by its provisions,<sup>23</sup> and the General Assembly of the OAS has repeatedly recognized the American Declaration as a source of

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<sup>21</sup> *Rules of Procedure*, art. 32(1).

<sup>22</sup> *Rules of Procedure*, art. 33.

<sup>23</sup> Charter of the Organization of American States, 119 U.N.T.S. 3, *entered into force* December 13, 1951; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, *entered into force* Feb. 27, 1970; amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527, *entered into force* Nov. 16, 1988; amended by Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, *entered into force* September 25, 1997; amended by Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, *entered into force* January 29, 1996. *See also* I/A Comm. H.R., *James Terry Roach and Jay Pinkerton v. United States*, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87, ¶ 46.

international legal obligation for OAS member states including specifically the United States.<sup>24</sup> This principle has been affirmed by the Inter-American Court, which has found that that the “Declaration contains and defines the fundamental human rights referred to in the Charter,”<sup>25</sup> as well as the Commission, which recognizes the American Declaration as a “source of international obligations” for OAS member states.<sup>26</sup>

Moreover, the Commission’s Rules of Procedure establish that the Commission is the body empowered to supervise OAS member states’ compliance with the human rights norms contained in the OAS Charter and the American Declaration. Specifically, Article 23 of the Commission’s Rules provides that “[a]ny person . . . legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission . . . concerning alleged violations of a human right recognized in . . . the American Declaration of the Rights and Duties of Man,”<sup>27</sup> and Articles 49 and 50 of the Commission’s Rules confirm that such petitions may contain denunciations of alleged human rights violations by OAS member states that are not parties to the American Convention on Human Rights.<sup>28</sup> Likewise, Articles 18 and 20 of the Commission’s Statute specifically direct the Commission to receive, examine, and make recommendations concerning alleged human rights violations committed by any OAS member state, and “to pay particular attention” to the observance of certain key

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<sup>24</sup> See, e.g., OAS General Assembly Resolution 314 (VII-0/77) (June 22, 1977) (charging the Inter-American Commission with the preparation of a study to “set forth their obligation to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man).

<sup>25</sup> I/A Court H.R., *Advisory Opinion OC-10/89, July 14, 1989, “Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights,”* Ser. A N° 10, ¶43, 45.

<sup>26</sup> See e.g., Report No. 74/90, Case 9850, Hector Geronimo Lopez Aurelli (Argentina), Annual Report of the IACHR 1990, ¶. III.6 (quoting I/A Court H.R., *Advisory Opinion OC-10/89*, ¶ 45); see also *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, December 27, 2002, ¶ 163.

<sup>27</sup> *Rules of Procedure*, art. 23 (2000).

<sup>28</sup> *Rules of Procedure*, arts. 49, 50 (2000).

provisions of the American Declaration by states that are not party to the American Convention including significantly the right to life and the right to equality before law, protected by Articles I and II respectively.

Finally, the Commission itself has consistently asserted its general authority to “supervis[e] member states’ observance of human rights in the Hemisphere,” including those rights prescribed under the American Declaration, and specifically as against the United States.<sup>29</sup>

In sum, all OAS member states, including the United States, are legally bound by the provisions contained in the American Declaration. Here, Petitioners have alleged violations of the American Declaration and the Commission has the necessary authority to adjudicate them.

#### **E. The Interpretative Mandate of the Commission**

International tribunals, including the Inter-American Court and Commission, have repeatedly found that international human rights instruments must be interpreted in light of the evolving norms of human rights law expressed in the domestic, regional, and international contexts. Over thirty-five years ago, the International Court of Justice (ICJ) pronounced, “an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation.”<sup>30</sup>

More recently, the Inter-American Court, in considering the relationship between the American Declaration and the American Convention, referenced this ruling in its

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<sup>29</sup> Detainees in Guantánamo Bay, Cuba, Request for Precautionary Measures, Inter-Am. C.H.R. (March 13, 2002) at 2. *See also* I/A Comm. H.R., *James Terry Roach and Jay Pinkerton v. United States*, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87, ¶¶ 46-49 (affirming that, pursuant to the Commission’s statute, the Commission “is the organ of the OAS entrusted with the competence to promote the observance of and respect for human rights”).

<sup>30</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 21 June 1971.

finding that “to determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948.”<sup>31</sup> Again, in 1999, the Court reasserted the importance of maintaining an “evolutive interpretation” of international human rights instruments under the general rules of treaty interpretation established in the 1969 Vienna Convention.<sup>32</sup> Following this reasoning, the Court subsequently found that the U.N. Convention on the Rights of the Child, having been ratified by almost all OAS member states, reflects a broad international consensus (*opinio juris*) on the principles contained therein, and thus could be used to interpret not only the American Convention but also other treaties relevant to human rights in the Americas.<sup>33</sup>

The Commission has also consistently embraced this principle and specifically in relation to its interpretation of the American Declaration. For example, in the *Villareal* case, the Commission recently noted that “in interpreting and applying the American Declaration, it is necessary to consider its provisions in the context of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged.

Developments in the corpus of international human rights law relevant in interpreting and

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<sup>31</sup> I/A Court H.R., Advisory Opinion, *supra* note 159, ¶ 37.

<sup>32</sup> I/A Court H.R., *Advisory Opinion OC-16/99, October 1, 1999, “The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law,”* Ser. A No. 16, ¶¶ 114-15 (*citing, inter alia*, the decisions of the European Court of Human Rights in *Tryer v. United Kingdom* (1978), *Marckx v. Belgium* (1979), and *Louizidou v. Turkey* (1995)); *see also* I/A Court H.R., *Advisory Opinion OC-18/03, September 17, 2003, “Juridical Condition and Rights of the Undocumented Migrants,”* Ser. A No. 18, ¶ 120 (*citing* Advisory Opinion OC-16/99.).

<sup>33</sup> I/A Court H.R., *Advisory Opinion OC-17/2002, August 28, 2002, “Juridical Status and Human Rights of the Child,”* Ser. A No. 17, ¶¶ 29-30.

applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments.”<sup>34</sup> Adopting this approach the Commission has looked to numerous international and regional treaties as well as decisions of international bodies to interpret rights under the American Declaration.<sup>35</sup>

#### IV.

### **HUMAN RIGHTS VIOLATIONS & LEGAL ANALYSIS**

#### **A. New Jersey Felon Disfranchisement Law Violates Article XX of the American Declaration.**

Article XX of the American Declaration, as interpreted in light of universal and regional human rights law, as well as widespread state practice, establishes that individual Petitioners should be permitted to vote. As U.S. citizens with criminal convictions who have been judged fit to live in their communities (to complete the non-incarcerative portion of their sentences on parole or to serve their sentences on probation), they have a right to vote. As demonstrated further below, the State of New Jersey’s felon disfranchisement laws and policies violate this right. Those laws and

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<sup>34</sup> *Ramón Martínez Villareal v. United States*, Case 11.753, Report No. 52/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 821 (2002) ¶ 60 (citing *Garza v. United States*, Case Nº 12.243, Annual Report of the IACHR 2000, ¶¶ 88-89); see also *Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004), ¶¶ 86-88; *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 860 (2002), ¶¶ 96-97.

<sup>35</sup> See, e.g., IACHR, *Report On The Situation Of Human Rights Of Asylum Seekers Within The Canadian Refugee Determination System*, Country Report, OEA/Ser.L/V/II.106, Doc. 40 rev., Feb. 28, 2000, ¶¶ 28, 159, 165 (referencing the U. N. Convention on the Rights of the Child to interpret Canada’s responsibilities to asylum seekers under the American Declaration and the OAS Charter); *Maya Indigenous Community*, *supra* note 168, ¶¶ 112-120, 163, 174 (referencing the American Convention, jurisprudence of the Inter-American Court, and the United Nations Convention on the Elimination of Racial Discrimination (CERD) to interpret the rights to property, equality before the law, and judicial protection for indigenous peoples contained in the American Declaration); *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Report No. 54/01, Inter-Am. C.H.R., OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2001) (referring to the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará) in determining Brazil’s obligations under the American Declaration to effectively prosecute domestic violence-related crimes).

policies impose a blanket ban on individual Petitioners' rights to participate in popular elections, and thus impose restrictions that violate the American Declaration. The restrictions are neither legitimate nor proportional in view of the fundamental nature of the right of people of lawful capacity and age to vote in functioning democratic states.

**1. Article XX Establishes Petitioners' Right to Participate in Popular Elections**

Article XX of the American Declaration provides that:

Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.

Article XX makes clear that the right to vote is fundamental to every citizen who is of lawful capacity. Article XX poses no restrictions to voting. While Article XX does not specifically refer to the right to vote for citizens with criminal convictions, its plain and absolute language makes clear that citizens do not surrender the franchise when they are convicted. No case has previously been brought before the Commission concerning the disfranchisement of people with criminal convictions, perhaps because as discussed herein, felon disfranchisement on the scale it occurs in the U.S. is unique to the U.S.

The Commission has repeatedly cited the importance of respect for political rights as a guarantee of the validity of the other human rights embodied in international instruments.<sup>36</sup> Moreover, in interpreting Article XX in other voting rights cases, the Commission has embraced a broad view of suffrage. In these cases, the Commission has consistently underscored the importance placed by the Inter-American system on participatory democracy generally, and on the right to vote as an element of participatory

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<sup>36</sup> Report on the Situation of Human Rights in Paraguay, Inter-Am. C.H.R., OEA/Ser.L/V/II.71, Doc. 19 rev. 1, Chapter VII (A), 1987.

democracy specifically. Based on these findings, it is clear that felon disfranchisement violates Article XX.

For example, in *Statehood Solidarity Committee v. United States* (D.C. Voting Rights Case), the Commission noted that the right to vote protected by Article XX “. . . forms the basis and support of democracy, which cannot exist without it; for title to government rests with the people, the only body empowered to decide its own immediate and future destiny and to designate its legitimate representatives.” The Commission also noted that “[n]either form of political life, nor institutional change, nor development planning or the control of those who exercise public power can be made without representative government.”<sup>37</sup>

Similarly, in its Report on the Situation of Human Rights in El Salvador published in 1978, the Commission observed that:

The right to take part in the government and participate in honest, periodic, free elections by secret ballot is of fundamental importance for safeguarding [] human rights.... The reason for this lies in the fact that, as historical experience has shown governments derived from the will of the people, expressed in free elections, are those that provide the soundest guaranty that the basic human rights will be observed and protected.<sup>38</sup>

The Commission has also taken the position that the exercise of political rights “implies participation by the population in the conduct of public affairs, either directly or through representatives elected in periodic and genuine elections featuring universal suffrage and secret ballot, to ensure the free expression of the electors’ will.”<sup>39</sup>

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<sup>37</sup> *Statehood Solidarity Committee v. United States*, [hereinafter *D.C. Voting Rights Case*] Case 11.204, Inter-Am. C.H.R., Report No. 98/03, OEA/Ser.L/V/II.114 Doc. 70 rev. 1 ¶85 (2003).

<sup>38</sup> Report on the Situation of Human Rights in El Salvador, Inter-Am. C.H.R., OEA/Ser.L/II.85, Doc. 28 rev., Chapter IX [A(1)], (1994).

<sup>39</sup> Report on the Situation of Human Rights in Paraguay, Inter-Am. C.H.R., (1987), *supra* note 25, at Chapter VII (A), cited in *Andres Aylwin Azocar et al. v. Chile*, Case 11.863, Inter-Am. C.H.R., Report No. 137/99, OEA/Ser.L/V/II.106, doc. 3 rev. at 536 ¶ 40 (1999).

As the Commission is well aware, the Inter-American human rights instruments consider representative democracy as a more important mechanism for the protection of human rights than universal human rights instruments. For example, the Charter of the Organization of American States, the system's foundational document, provides that "solidarity of the American states and the high aims which are sought through it require the political organization of those states on the basis of the effective exercise of representative democracy."<sup>40</sup> And the Inter-American Democratic Charter recognizes that an essential element of such representative democracy is "universal suffrage as an expression of the sovereignty of the people."<sup>41</sup> By contrast, none of the United Nations' foundational human rights instruments goes this far.

Article XXXII of the American Declaration evidences the importance that the Inter-American system places on voting and participatory democracy. Article XXXII makes it "the *duty* of every person to vote in the popular elections of the country of which he is a national, when he is legally capable of doing so (emphasis added)."

When read in conjunction, it is clear that Article XX and Article XXXII are meant to ensure that every citizen in the Americas of lawful capacity be permitted to vote. Voting is a fundamental right that should not be stripped unnecessarily by any state. By preventing individual Petitioners (who have been deemed to be ready to integrate into their communities) from voting, the State of New Jersey is preventing them from being involved in the democratic process, as required by Article XX. Additionally, the State of

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<sup>40</sup> Charter of the Organization of American States, *supra* note 22, Article 3(d).

<sup>41</sup> Inter-American Democratic Charter, OAS Doc. OEA/SerP/AG/Res.1 (2001); 28th Spec. Sess., OAS Doc. OEA/Ser.P/AG/RES.1 (XXVIII-E/01) (OAS General Assembly) (Sept. 11, 2001), 40 I.L.M. 1289, art. 3 (2001).

New Jersey is also depriving them of their fundamental duty to vote, guaranteed by Article XXXII.

Consistent with its interpretive mandate, the Commission, in interpreting the rights protected by Article XX may look to analogous provisions of the American Convention on Human Rights (the “Convention”). That provision, Article 23, provides:

1. Every citizen shall enjoy the following rights and opportunities:
  - a. To take part in the conduct of public affairs, directly or through freely chosen representatives;
  - b. To vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
  - c. To have access, under general conditions of equality, to the public service of his country.
2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

Although subsection (2) permits member states to regulate the right to vote on the basis of “sentencing by a competent court in criminal proceedings” (indicating that member states may impose certain restrictions on the voting rights of people with criminal convictions), no such restriction appears in the Declaration’s equivalent. This Commission should refrain from interpreting Article XX to incorporate such a restriction for the following reasons. First and most importantly, it is the provisions of the Declaration, and not the Convention that are binding on the United States. Second, it is a long established principle of treaty interpretation that where two possible interpretations of a treaty provision are possible, one that is restrictive of rights and the other more protective, the interpretation that reflects the treaty’s object and purpose should be

adopted. Because the overall purpose of the Declaration is to protect the right to vote, restrictions on the right should not be lightly inferred.<sup>42</sup> And, finally, despite the apparently restrictive language of subsection 2, the Commission has repeatedly interpreted its provisions to require states parties to respect and ensure the overarching right to vote protected by subsection 1 of Article 23.<sup>43</sup> Incorporating a condition that permits member states a broad mandate to restrict the voting right of parolees and probationers would be incompatible with such an interpretation.

In sum, Article XX of the American Declaration protects the right of everyone to vote including persons, such as the individual Petitioners here who have been convicted of a criminal offense and released on parole, or are serving their criminal sentences on probation. Because New Jersey disfranchisement law imposes a blanket ban on such persons, it violates Article XX of the American Declaration.

## **2. Any Restrictions on the Right to Vote Protected by Article XX Must Be Objective, Reasonable and Proportional.**

Even if this Commission were to interpret Article XX to incorporate a restriction the equivalent of Article 23(2) of the American Convention, as the Commission has found, any restriction on the right to vote must be objective, reasonable and proportional. Additionally, the restriction must not have the effect of eviscerating the essence of the

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<sup>42</sup> See e.g., Vienna Convention on the Law of Treaties, art. 31, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force January 27, 1980 (treaty to be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose.”). The U.S. recognizes a similar interpretive principle in construing conflicting provisions of U.S. criminal statutes. See, e.g., *U.S. v. RLC*, 503 U.S. 291 (1992) (under so-called rule of lenity, the intended scope of an ambiguous criminal statute must be interpreted in favor of the accused).

<sup>43</sup> See e.g., *Mena v. Mexico*, Case 10.956, Inter-Am. C.H.R., Report No. 14/93 (1993) (reviewed alleged voting irregularities); *Andres Aylwin Azocar et al. v. Chile*, Inter-Am. C.H.R., (1999), (finding that the structure of the Chilean constitution denies the right to equality in voting without discrimination); and *D.C. Voting Rights Case*, Inter-Am. C.H.R., (2003) (finding a violation of the right to equal voting status for District of Columbia citizens).

fundamental right to vote. New Jersey disfranchisement law has precisely this impact on individual Petitioners' rights to vote. Accordingly, for this reason alone, New Jersey disfranchisement law violates Article XX. In interpreting Article 23, the Commission requires member states to demonstrate that any laws impinging on the right to vote comply with certain minimum standards or conditions that have the effect of preserving the essence of the right to vote. The Commission's role in evaluating the effectiveness of the right is to ensure that any differential treatment applied in relation to voting rights is both objective and reasonable.<sup>44</sup> Under this analysis, certain restrictions on voting rights are permissible. For example, member states may enact voting laws that draw distinctions between different situations so long as they are pursuing legitimate ends, and the classification is reasonably and fairly related to the ends pursued by the law in issue.<sup>45</sup> For example, it would not be discriminatory to impose, on the grounds of age or social status, limits on the legal capacity of minors or mentally incompetent persons who lack the capacity to protect their interests.<sup>46</sup>

And, as with other fundamental rights, restrictions or limitations upon the right to participate in government must be justified by the need for them in the framework of a democratic society, as demarcated by the means, their motives, reasonableness and proportionality. The Commission permits states a certain degree of autonomy in making

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<sup>44</sup> *D.C. Voting Rights Case*, Inter-Am. C.H.R., ¶89 (2003); *Andres Aylwin Azocar et al. v. Chile*, Case 11.863, Inter-Am. C.H.R., Report No. 137/99, OEA/Ser.L/V/II.106, doc. 3 rev. at 536 (1999), ¶¶ 99, 101.

<sup>45</sup> Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984), ¶57.

<sup>46</sup> *Id.* ¶56. For another example, the Commission found that with respect to granting naturalization, the granting state may legitimately determine whether and to what extent applicants for naturalization have complied with the conditions deemed to ensure an effective link between them and the value system and interests of the society to which they wish to belong, and it would not be discriminatory for a state to establish less stringent residency requirements for those foreigners seeking to acquire nationality who, viewed objectively, share much closer historical, cultural and spiritual bonds with that nation. *Id.* ¶¶ 58-60.

these determinations, but will find a violation of the right to vote where the essence and effectiveness of the right is eviscerated.<sup>47</sup>

Here, restrictions on the Petitioners' fundamental right to vote are applied in blanket fashion to one and all parolee and probationer, and thus not objectively. They are also not reasonable. It cannot be reasonable to disfranchise people who are trying to reintegrate into society, who possess a right to rehabilitation under the American Declaration (as more fully explained in Part IV.C). Finally, the policies are not in service of legitimate government ends, for two reasons. First, racial discrimination cannot be a legitimate governmental aim. Second, once the State of New Jersey determines that a person is no longer a threat to the community and releases them from incarceration, there has been a determination that these individuals can rejoin their communities. Prohibiting these parolees and probationers from voting frustrates the legitimate governmental goals of reintegration and reformation of offenders.

**3. The Right to Vote Protected by Article XX Should Be Interpreted in Light of Universal and Regional Human Rights Law Which Likewise Protect Parolees' and Probationers' Voting Rights.**

Universal and regional human rights laws also support a finding that Article XX protects individual Petitioners' rights to vote from the State of New Jersey's felon disfranchisement laws. As in the Inter-American system, treaties and other international instruments have been broadly interpreted to protect the franchise. Universal and regional human rights instruments (analogous to Declaration Article XX) have been specifically interpreted to prohibit felon disfranchisement. The Commission should look

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<sup>47</sup> *D.C. Voting Rights Case*, Inter-Am. C.H.R., ¶¶99, 101.

to these determinations to find that New Jersey's felon disfranchisement law violates Article XX.<sup>48</sup>

For example, the Universal Declaration of Human Rights provides broad suffrage protection in Articles 21(1 and 3),<sup>49</sup> and the International Covenant on Civil & Political Rights (ICCPR), ratified by the United States in 1995, provides for similar, albeit, more detailed protections in Article 25:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions:

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; ...<sup>50</sup>

In General Comment 25, the U.N. Human Rights Committee (HRC) considered application of Article 25 of the ICCPR specifically in relation to member state laws depriving citizens of their right to vote, requiring that “[t]he grounds for such deprivation [be] objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence.”<sup>51</sup>

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<sup>48</sup> Otherwise stated, they have been interpreted to prohibit laws that are unduly restrictive of the right, or unreasonable, disproportionate, lacking objectivity or which erode the essence of the right.

<sup>49</sup> “1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. ....3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.” Universal Declaration of Human Rights, GA Res. 217A(111), UN Doc. A/810 (1948), Article 21 (1, 3).

<sup>50</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

<sup>51</sup> Human Rights Committee, General Comment 25 (57), General Comments under article 40, ¶4, of the International Covenant on Civil and Political Rights, adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), ¶14, *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument)

In practice, the HRC has consistently required that member states limit the reach of criminal disenfranchisement laws. For example, in 2001 after evaluating the United Kingdom's disenfranchisement law, which barred all incarcerated prisoners from voting, in light of Article 25 of the ICCPR, the HRC concluded that it could not find justification for a general ban on voting by even *servicing prisoners* in modern times.<sup>52</sup> More recently, and of direct relevance to this case, in its 2006 Concluding Observations on the United States Country Report, after considering information provided by the United States and non-governmental organizations, the HRC found that U.S. disenfranchisement policies violate the ICCPR and called for the restoration of voting rights to U.S. citizens with criminal convictions upon their release from prison. As the HRC found:

general deprivation of the right [to] vote for persons who have received a felony conviction, and in particular those who are no longer deprived of liberty, do not meet the requirements of articles 25 or 26 of the Covenant, nor serves the rehabilitation goals of article 10 (3).

By definition, this would include persons on parole and probation such as the individual Petitioners here.<sup>53</sup>

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<sup>52</sup> In its post-review assessment of the United Kingdom in 2001, the HRC commented, with respect to the United Kingdom's blanket disenfranchisement provision banning all serving prisoners from voting: "The Committee is concerned at the State party's maintenance of an old law that convicted prisoners may not exercise their right to vote. The Committee fails to discern the justification for such a practice in modern times, considering that it amounts to an additional punishment and that it does not contribute towards the prisoner's reformation and social rehabilitation, contrary to article 10, paragraph 3, in conjunction with article 25 of the Covenant. The State party should reconsider its law depriving convicted prisoners of the right to vote." Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CCPR/CO/73/UK (2001), ¶10, available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/2153823041947eac1256afb00323ee7?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/2153823041947eac1256afb00323ee7?Opendocument)

<sup>53</sup> Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee (2006), ¶35, available at <http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.USA.CO.pdf> (If the Human Rights Committee's recommendations are implemented, 36 states would change their laws and nearly four million Americans would have their voting rights restored.)

Additionally, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which was ratified by the United States in 1994,<sup>54</sup> in a broad suffrage provision, also protects the voting rights of persons with criminal convictions while on parole and probation. Citing the general non-discrimination clause of Article 2,<sup>55</sup> Article 5(C) provides that “States Parties undertake to . . . guarantee the right of everyone . . . to equality before the law, notably in the enjoyment of the following rights: (c) Political rights, in particular the right to participate in elections — to vote and to stand for election — on the basis of universal and equal suffrage . . . .”<sup>56</sup>

Regional human rights laws guaranteeing voting rights likewise prohibit blanket disfranchisement laws and policies or those that are not objective, reasonable or proportionate to the state aim pursued by the restriction, or that unnecessarily impede upon the essence of the right. The most comprehensive and recent analysis of disfranchisement laws and their impact on the right to vote has been conducted by the European Court of Human Rights in *Hirst v. United Kingdom (Hirst No. 2)*.<sup>57</sup> In *Hirst No. 2*, the Court considered a U.K. law that banned prisoners from voting. John Hirst, a serving prisoner, invoked Article 3, Protocol 1 of the European Convention on Human Rights, which requires states parties “to hold free elections at reasonable intervals by

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<sup>54</sup> International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969.

<sup>55</sup> Article 2 requires governments to take “special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.” *Id.* Art. 2(2).

<sup>56</sup> *Id.* Art. 5(c). *See also, Basic Principles for the Treatment of Prisoners*, G.A. res. 45/111, annex, 45 U.N. GAOR Supp. (No. 49A) at 200, U.N. Doc. A/45/49 (1990), ¶5, which requires that except for those limitations which are demonstrably necessitated by imprisonment, the human rights and fundamental freedoms in the ICCPR are to be retained by all prisoners. *Basic Principles for the Treatment of Prisoners*, Dec. 14, 1990, G.A. Res. 111, U.N. GAOR, 45th Sess., Supp. No. 49A, at 200, U.N. Doc. A/45/49, *available at* [http://www.unhchr.ch/html/menu3/b/h\\_comp35.htm](http://www.unhchr.ch/html/menu3/b/h_comp35.htm).

<sup>57</sup> *Hirst v. United Kingdom (No.2)*, 681 Eur. Ct. H.R. (2005).

secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of their legislature.”<sup>58</sup>

At the outset, the Court made clear that casting the ballot is a right, not a privilege, and that the presumption in democratic states must be in favor of inclusion; “universal suffrage,” said the Court “has become the basic principle.”<sup>59</sup> Following a comprehensive review of all relevant national and international law and jurisprudence on voting rights,<sup>60</sup> the Court found that although states are accorded a margin of appreciation in giving recognition to this right, in enacting voting laws, states are constrained by the following fundamental principles: (1) the conditions they impose may not curtail Convention rights to such an extent as to impair their very essence; (2) the aim of the restrictive legislation must be legitimate; and (3) the means employed to achieve that aim may not be disproportionate.<sup>61</sup>

The Court conceded that commission of certain criminal offences, such as the serious abuse of a public position or conduct that threatens “to undermine the rule of law or democratic foundations,”<sup>62</sup> may indeed warrant disfranchisement, and agreed with the U.K. submission that crime prevention was a legitimate purpose for any disfranchisement law. However, because it barred all prisoners from voting during their incarceration, the

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<sup>58</sup> *Id.*, citing *Protocol to the European Convention on Human Rights* (also Convention for the Protection of Human Rights and Fundamental Freedoms), 213 U.N.T.S. 262, *entered into force* May 18, 1954, Art. 3. The African Convention on Human and Peoples’ Rights is also apposite, providing for a broad right to participation in Article 13: (1). Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. (2). Every citizen shall have the right of equal access to the public service of his country. (3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law. *African [Banjul] Charter on Human and Peoples’ Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986, Art. 13.

<sup>59</sup> *Id.* ¶59

<sup>60</sup> *Id.* ¶¶ 6, 9.

<sup>61</sup> *Id.* ¶62.

<sup>62</sup> *Id.* ¶ 77.

Court did not find the ban proportional.<sup>63</sup> In this regard, the Court found it significant that 48,000 prisoners were disfranchised by the measure. That number included a wide range of minor and major offenders. The Court also noted, disapprovingly, that English courts do not advise prisoners that disfranchisement followed as a consequence of imprisonment.<sup>64</sup> The Court held that the United Kingdom's "general, automatic and indiscriminate restriction on a vitally important convention right" fell outside "any acceptable margin of appreciation" and was "incompatible with Article 3, Protocol 1."<sup>65</sup>

Similarly, the European Commission for Democracy through Law (the Venice Commission)<sup>66</sup> also requires any ban on prisoner voting to be proportional, limited to serious offenses, and explicitly imposed by sentencing courts.<sup>67</sup> In its Report on the Abolition of Restrictions on the Right to Vote in General Elections,<sup>68</sup> which comprises both an aggregation and an evaluation of the European Court of Human Rights' voting rights jurisprudence, the Venice Commission concluded: "[t]he Court constantly

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<sup>63</sup> *Id.* ¶71.

<sup>64</sup> *Id.* ¶ 71. The court cited approvingly the Venice Commission's recommendation that withdrawal of political rights should only be carried out by express judicial decision, as "a strong safeguard against arbitrariness." *Id.*

<sup>65</sup> *Id.* ¶ 82. The ECHR judges split 12-5, with the dissenters arguing, *inter alia*, that courts should not assume legislative functions. *Id.* ¶ 6 (Wildhaber, J., dissenting).

<sup>66</sup> The Venice Commission, *available at*

[http://www.venice.coe.int/site/main/presentation\\_E.asp?MenuL=E](http://www.venice.coe.int/site/main/presentation_E.asp?MenuL=E). The United States has observer status at the Commission. *See* Members of the Venice Commission, Observer States, *available at*

[http://www.venice.coe.int/site/dynamics/N\\_members\\_ef.asp?L=E](http://www.venice.coe.int/site/dynamics/N_members_ef.asp?L=E).

<sup>67</sup> The Commission's Code of Good Practice in Electoral Matters (2002) states: "(i) provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions. (ii) It must be provided for by law. (iii) The proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them. (iv) The deprivation must be based on mental incapacity or a criminal conviction for a serious offense. (v) Furthermore, the withdrawal of political rights ... may only be imposed by express decision of a court of law." Code of Good Practice in Electoral Matters, Part I (1)(dd), *available at* [http://www.Venice.coe.int/docs/2002/cdl-el\(2002\)005-e.asp](http://www.Venice.coe.int/docs/2002/cdl-el(2002)005-e.asp), adopted at the Commission's 51st Plenary Session (5-6 July 2002) and submitted to the Parliamentary Assembly of the Council of Europe on November 6, 2002. Adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005).

<sup>68</sup> *Report on the Abolition of Restrictions on the Right to Vote in General Elections*, CDL-AD(2005)012, endorsed by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004) *available at* [http://www.venice.coe.int/docs/2005/CDL-AD\(2005\)012-e.asp](http://www.venice.coe.int/docs/2005/CDL-AD(2005)012-e.asp).

emphasizes that . . . there is room for inherent limitations . . . however measures of the state must not impair the very essence of the rights protected under Article 3 Protocol No. 1.”<sup>69</sup>

Universal and regional human rights laws therefore support an interpretation that the American Declaration’s Article XX prohibits felon disfranchisement as practiced in New Jersey. Universal and regional human rights laws also require that any suspension of the right to vote be based on “objective and reasonable” grounds, and be proportionate to the offense and the sentence imposed. Like the law barring all incarcerated prisoners from voting which was struck down in *Hirst No. 2*, the New Jersey law bars all imprisoned persons from voting, but it goes much further and also bars all people serving out the remainder of their sentences in their communities – while on parole or probation. The New Jersey law sweeps into its ambit a great variety of offenders, some guilty of relatively minor offenses such as criminal mischief, forgery, and theft,<sup>70</sup> and affects nearly 100,000 parolees and probationers. That number is more than twice the number considered too many by the Court in *Hirst No. 2*.

Moreover, New Jersey courts and corrections officials do not advise people pleading guilty or being sentenced that they will lose this fundamental right to vote until they have fully served all portions of their sentence, even if a portion of their sentence is served while living in their communities. Such practice is contrary to that recommended by the European Court in *Hirst No. 2* and actually practiced by many democratic nations.

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<sup>69</sup> *Id.* ¶ 82.

<sup>70</sup> In New Jersey, there are no felonies as in other U.S. states, only crimes and petty offenses. New Jersey Code of Criminal Justice, N.J.S. Section 1. Any “crime” such as those just mentioned, is indictable and thus causes loss of voting rights. “Criminal mischief” is defined as “purposely or knowingly damag[ing] tangible property of another.” N.J.S. 2(C), Section 17.

As discussed above, the essence of individual Petitioners' right to vote is thus seriously eroded by current New Jersey disfranchisement laws and accordingly violates Article XX.

**4. Article XX Should Be Interpreted in Light of State Practice Which Also Protects Parolee and Probationer Voting Rights.**

Recognizing the fundamental importance of universal suffrage in a functioning democracy, state practice too supports the position that there can be no blanket prohibitions on voting rights, and that when restrictions are imposed, they must be narrowly tailored to meet compelling state interests. First and most importantly, legislative and legal practice of OAS member states broadly supports voting by prisoners, parolees and probationers.

Available data on legislative restrictions on voting by people with criminal convictions in OAS states indicate that eight OAS member states permit some or all *prisoner* voting.<sup>71</sup> They are Belize, Canada, Costa Rica, Dominica, Jamaica, Paraguay, Saint Lucia, and Trinidad and Tobago. And, according to available research, 31 OAS states permit parolee and probationer voting. In addition to the aforementioned eight countries, the other 23 states are Antigua and Barbuda, Argentina, Bahamas, Barbados, Bolivia, Brazil, Columbia, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Mexico, Nicaragua, Panama, Peru, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Suriname and Venezuela.<sup>73</sup> This would

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<sup>71</sup> *Dignity of the Individual, Evaluation of Prisons in the OAS*, Citizens United for the Rehabilitation of Errants, Third International Conference June 2006, available at [http://www.curenational.org/new/image/oas\\_justice.pdf](http://www.curenational.org/new/image/oas_justice.pdf).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*; JEFF MANZA AND CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY, 9 (2006), Table A1.1, at page 235.

suggest that every OAS state except the United States, Cuba and Uruguay allow persons who have been released to vote, subject to certain restrictions in some cases.<sup>74</sup>

OAS member state jurisprudence also supports voting by prisoners, parolees and probationers. For example, in *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 (*Sauvé No. 2*), a prisoner successfully challenged and invalidated an electoral provision of the Canadian Electoral Act disfranchising all prisoners serving sentences of more than two years. The prisoner argued that the disfranchisement law infringed upon his rights under Article 3 of the Canadian Charter of Rights & Freedoms. Like Article XX of the American Declaration, Article 3 provides broad suffrage protection:

Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

The Supreme Court of Canada addressed whether the legislative provision at issue infringed this guarantee, and, if so, whether the infringement was justifiable under another section of the Charter. To be demonstrably justified, the Court wrote, the government would have to prove that its aims warranted the restriction on the franchise. The Canadian Supreme Court rejected all of the government's arguments justifying Canada's disfranchisement law. Specifically, the Court found that the government's arguments that the disfranchisement of prisoners serving sentences of over two years enhanced civic responsibility and respect for the rule of law, served as an additional punishment, and enhanced the general purposes of the criminal sanction, lacked merit.<sup>75</sup>

The Canadian Supreme Court disagreed, underscoring that the framers of the Charter

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<sup>74</sup> Chile bans voting for 10 years after release from prison. *Dignity of the Individual, Evaluation of Prisons in the OAS*, Citizens United for the Rehabilitation of Errants, Third International Conference June 2006, available at [http://www.curenational.org/new/image/oas\\_justice.pdf](http://www.curenational.org/new/image/oas_justice.pdf).

<sup>75</sup> *Sauvé No. 2*, at 921.

signaled the special importance of the right to vote by Article 3's "broad untrammelled language."<sup>76</sup>

With respect to the government's "rule of law" argument justification for denying prisoners the vote, the Court referred to "the variety of offences and offenders covered by the prohibition," and concluded that the policy could not communicate a clear lesson to the nation's citizens about respect for the rule of law.<sup>77</sup> The Court also implied that it was denial of the vote that was inconsistent with any concept of the rule of law: "Denying a citizen the right to vote denies the basis of democratic legitimacy ... 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 disfranchise the very citizens from whom the government's power flows."<sup>78</sup>

Responding to the government's second, "punishment" argument, the Canadian Supreme Court disagreed that the government could impose the total loss of a constitutional right on a particular class of people for a certain period of time. Punishment, according to the Court, could not be arbitrary and must serve a valid criminal law purpose. Disfranchisement served no valid purpose whatever. Further, the Court found that punishment for breaking the social contract, where it concerns constitutional rights, must be constitutionally constrained.<sup>79</sup>

Finally, the Court was wholly unconvinced by the government's "seriousness of the crime" argument. It pointed out that the only other reason the government had supplied to explain why it now limited the disqualification to those serving less than two

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<sup>76</sup> *Id.* ¶ 11.

<sup>77</sup> *Id.* ¶ 39.

<sup>78</sup> *Id.* ¶ 32.

<sup>79</sup> *Id.* ¶ 39.

years was “because it affects a smaller class than would a blanket disfranchisement.”<sup>80</sup>

The Court stated that the analysis as to “minimum impairment” of this right was not how *many* citizens were affected but whether the *right itself* was minimally impaired. In the context of this case, the Court explained that “[T]he question is *why* individuals in this class are singled out to have their rights restricted, and *how* their rights are limited.”<sup>81</sup>

The Court concluded that the effect of the provision was disproportionate to the harm the government sought to prevent.

In invalidating the disfranchisement law, the Supreme Court of Canada found that “[d]epriving at-risk individuals of their sense of collective identity and membership in the community is unlikely to instill a sense of responsibility and community identity, while the right to participate in voting helps teach democratic values and social responsibility.”<sup>82</sup> The deprivation of the right to vote, added the court, ran counter to the nation’s commitment to the inherent worth and dignity of every individual.<sup>83</sup>

Additionally, the practice of Council of Europe member states overwhelmingly supports a broad concept of the right to vote. European states generally bar only incarcerated prisoners from voting if they bar any at all. Seventeen European countries allow all prisoners to vote.<sup>84</sup> They are Albania, Austria, Croatia, the Czech Republic, Denmark, Finland, Germany, Iceland, Ireland, Lithuania, the Former Yugoslav Republic of Macedonia, Montenegro, the Netherlands, Serbia, Slovenia, Sweden, and Switzerland. Eleven European countries permit some prisoners to vote; other prisoners may be denied

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<sup>80</sup> *Id.* ¶ 55.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* ¶ 38.

<sup>83</sup> *Id.* ¶ 35.

<sup>84</sup> *Out of Step With the World: An Analysis of Felony Disfranchisement in the U.S. and Other Democracies* (“Out of Step”), ACLU (2006), at 6.

the franchise, generally only by explicit order of the sentencing court, as an additional aspect of their prison sentence,<sup>85</sup> and for serious crimes only.<sup>86</sup> These countries are: Belgium, Bosnia and Herzegovina, France, Greece, Italy, Luxembourg, Malta, Norway, Poland, Portugal and Romania. Legislation in these nations often makes clear that *courts* must impose the added penalty of disfranchisement in individual cases.<sup>87</sup> All but four of these nations disqualify prisoners convicted of sometimes specific but always serious offenses. These four states disqualify based on length of sentence, and are Belgium, Greece, Italy and Luxembourg.<sup>88</sup> Finally, twelve European countries disfranchise all prisoners.<sup>89</sup> These nations are Belarus, Bulgaria, Estonia, Hungary, Kosovo, Latvia, Moldova, Russia, Slovakia, Spain, the Ukraine and the United Kingdom. With two exceptions, the United Kingdom and Spain, these are all former Eastern Bloc states with limited histories of universal suffrage, constitutional rights, and independent courts.<sup>90</sup> And, it remains to be seen whether the very limited disfranchisement laws of these 12 countries will in fact survive, given the European Court of Human Rights' recent decision in *Hirst No. 2* striking down the United Kingdom's blanket disfranchisement.

The practice of other democratic nations likewise supports voting by prisoners, parolees and probationers. For example, the South African Constitutional Court concluded that prisoner disfranchisement was impermissible. In the first of two related

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<sup>85</sup> *Id.* at 6.

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

<sup>87</sup> *Id.* at 7. For example, the French Penal Code explicitly states: "No penalty may be enforced where the court has not expressly imposed it."

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

<sup>89</sup> *Id.* at 8.

<sup>90</sup> In the case of Spain, one authority advises that disfranchisement in Spain "rarely happens." *Hirst No. 2*, ¶ 9. See also *Out of Step*, at 8 n.39.

cases, *August and another v. Electoral Commission and others* (CCT 8/99 1999),<sup>91</sup> prisoners alleged that they had not been provided the means or mechanisms by which to vote from jail. Noting the historic importance of the franchise “both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood” and adding that “[t]he vote of each and every citizen is a badge of dignity and personhood,”<sup>92</sup> the Court flagged the issue as one the legislature should attend to. But, simultaneously, it ruled that the Electoral Commission, by not providing the means and mechanisms to allow prisoners to vote, had breached the prisoners’ right to vote.

The legislature responded, amending its laws to bar from voting those prisoners serving a sentence of imprisonment without the option of a fine.<sup>93</sup> Just after the amendment took effect, the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and two convicted prisoners serving sentences of imprisonment without the option of a fine filed *National Institution for Crime Prevention and the Reintegration of Offenders (NICRO), Erasmus and Schwagerl v Minister of Home Affairs* (CCT 03/04 2004), an urgent application in the High Court for an order declaring that the amendment violated the constitution.<sup>94</sup>

The Court struck down the new law. In doing so, it outright rejected the arguments proffered by the government as to the propriety of the legislation. The Court rejected the government’s argument that the *August* judgment had directed Parliament to

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<sup>91</sup> 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC), available at <http://www.constitutionalcourt.org.za/Archimages/1989.PDF>.

<sup>92</sup> *Id.* ¶ 17.

<sup>93</sup> Electoral Laws Amendment Act 34 of 2003, s. 8(2)(f).

<sup>94</sup> *Minister of Home Affairs v. Nicro*, CCT 03/04, available at <http://www.sentencingproject.org/pdfs/southafrica-decision.pdf>. at ¶ 83.

enact disfranchisement law.<sup>95</sup> The Court also rejected the argument that prisoners serving sentences without the option of a fine was commensurate with the seriousness of the offenses they had committed. The Court also rejected the argument that allowing these persons to retain the vote would make the government appear soft on crime.<sup>96</sup> Finally, the Court rejected the argument that the provision of special ballots for all prisoners and the transportation of the ballots was a costly logistical exercise. Special ballots themselves, it argued, involved an inherent risk of tampering and voter interference.<sup>97</sup>

The South African Constitutional Court, in striking down the law found the government's arguments failed for lack of any rationale underpinning its stated objectives.<sup>98</sup> The government, said the Court, failed "to place sufficient information before the Court to enable it to know exactly what purpose the disfranchisement was intended to serve."<sup>99</sup> The government's concern about appearing soft on crime drew a particularly sharp response. The state, the Court ruled, may not "disenfranchise prisoners in order to enhance its image," nor "deprive convicted prisoners of valuable rights that they retain in order to correct a public misconception as to its true attitude to crime and criminals."<sup>100</sup> And the Court refused to accept excuses concerning logistics and expense given the fact that there already existed mechanisms to register and facilitate voting by those prisoners who were awaiting trial or serving a sentence in lieu of a fine.

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<sup>95</sup> *Id.* ¶ 125.

<sup>96</sup> *Id.* ¶ 139.

<sup>97</sup> *Id.* ¶ 108.

<sup>98</sup> *Id.* ¶ 108.

<sup>99</sup> *Id.* ¶ 65.

<sup>100</sup> *Id.* ¶ 56.

For similar reasons to those detailed in the South African cases, in the case of *Alrai v. Minister of the Interior et al.*,<sup>101</sup> Israel's Supreme Court refused to disfranchise prisoner Yigal Amir, convicted of murdering Israeli Prime Minister Rabin. According to Article 5 of the 1958 Basic Law of the Knesset “[ev]ery Israeli national over the age of eighteen has the right to vote unless a court has deprived him of that right by virtue of any law....” Israeli courts are given oversight of the laws relating to disfranchisement. The right to vote is subsumed within the right of citizenship. The Minister of the Interior, however, holds the power to revoke the citizenship of “any person who has committed an act that contains an element of the breach of trust towards the State of Israel.”<sup>102</sup>

A third party had petitioned the Supreme Court of Israel to review the decision of the Minister of the Interior not to deprive Amir of his citizenship. Refusing to disfranchise Amir, the Israeli court called the right to vote “a prerequisite of democracy.” It cited the U.S. Supreme Court case *Trop v. Dulles*, 356 U.S. 86 (1958), for the proposition that:

citizenship is not a license that expires upon misbehavior ... [it] is not a weapon that the government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be...the civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.

*Trop*, at 92-102.

The Israeli Supreme Court agreed with the Minister of the Interior that revocation of citizenship, because it included the right to vote and to be elected, was a “drastic and extreme step.” The Court noted that society had rightly and in numerous forms – including in its judgment against Amir -expressed its revulsion at the murder. However,

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<sup>101</sup> HCJ 2757/06 *Alrai v. Minister of the Interior et al.* [1996] lsr SC 50(2) 18.

<sup>102</sup> Clause 11b of The Law of Citizenship 5712-952.

said the Court, that “contempt for this act” must be separated from “respect for his right.”<sup>103</sup> In specifically discussing the right to vote, the Court noted that the Knesset had the authority to pass laws restricting the right to vote but had not done so, continuing: “Although in Israel citizenship was not granted an honorary place as a Basic Law, there is no doubt that it is a basic right. Among other things, because it is the foundation of the right to vote for the Knesset, from which democracy flows.”<sup>104</sup> The Israeli justices ruled that “[w]ithout the right to elect, the foundation of all other basic rights is undermined ...” Thus, even in an embattled country under constant security threats, the Court treated criminal disenfranchisement law as a question of *democracy*.<sup>105</sup>

Legislative and legal practice of OAS and non-OAS member states also supports voting by prisoners, parolees and probationers. Several OAS member states, and nearly one-half of all European states, and many other democracies with similarly mixed populations as present in the U.S., permit *all incarcerated* prisoners to vote. Very few European states engage in any post-incarceration disenfranchisement, and when they do, it is only for the most serious offenses. Many New Jerseyans, like Petitioners, who are serving their sentences in their communities, have done no more than criminal mischief. Disfranchising anyone, let alone everyone, on parole or probation is far out of step with the practice of other democratic nations. Article XX should be read in the light of these practices to protect the voting rights of individual Petitioners and New Jersey disenfranchisement law should be found in violation of Article XX.

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<sup>103</sup> Hilla Alrai, ¶ 5.

<sup>104</sup> *Id.* ¶ 4.

<sup>105</sup> Interestingly, though it had not faced the question of whether Amir should be disenfranchised, the criminal court which initially sentenced Amir had also commented on the importance of elections to a democracy. That Court stated “those who treasure life do not change their leadership by an assassin’s bullets, and that the only way to do so is via free, democratic elections ... as is customary in a democratic state, this discussion must be conducted firmly, yet with mutual respect and tolerance ... especially when unpopular opinions are voiced by a minority ...” Crim C (TA.) *Israel v. Yigal Amir*, [1996].

Article XX of the American Declaration, as interpreted in light of universal and regional human rights laws on the right to vote as well as state practice in this area, embraces broad protections on the right. Any restriction on Article XX's right to vote must be legitimate and reasonable, as well as proportional to offense and sentence, and, most importantly, must not eviscerate the essence of this fundamental right. Felony disfranchisement, moreover, to comply with Article XX, in line with international law and widespread national practice, can only be imposed where the sentencing court explicitly incorporates disfranchisement as part of the sentence. Under these standards it is clear that the right of parolees and probationers, and in particular, the rights of the individual Petitioners here have been violated.

**B. New Jersey Felon Disfranchisement Law Violates Article II of the American Declaration because it Disproportionately Impacts the Rights of African American and Latino Voters.**

Under Article II of the American Declaration, universal human rights law, and state practice within and without OAS member states, any measure adopted by a state that is demonstrated to have a disparate impact on the rights of a specific group of individuals on grounds such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, constitutes discrimination. As discussed throughout this petition, the State of New Jersey's disfranchisement laws disproportionately affect New Jersey's Black and Hispanic citizens. Thus they are discriminatory in nature and in violation of one of the most fundamental human rights protections: the right to be free from discrimination on basis of race. Accordingly, New Jersey's felon disfranchisement law and policies violate not only

individual petitioners' right to vote but also their right to be free from discrimination on the basis of race as protected by Article II of the American Declaration.

**1. Article II Establishes An Effects-Based Standard for What Constitutes Prohibited Discriminatory Treatment.**

Article II provides: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." Article II has been defined as "the right of everyone to equal protection of the law without discrimination."<sup>106</sup> As the Commission has repeatedly highlighted, the right to equality before the law means not that the substantive provisions of the law will be the same for everyone, but that the application of the law should be equal for all without discrimination.<sup>107</sup>

In assessing whether a law is being applied in a discriminatory manner, the Commission examines the context in which alleged violations occur to determine if there is discrimination. The Commission, in examining protections under the American Declaration, "must interpret and apply Article[...] II in the context of current circumstances and standards."<sup>108</sup>

Where racially discriminatory treatment is alleged in cases before it, in assessing whether such discrimination is in fact present, the Commission has looked to evidence of racial profiling of minorities,<sup>109</sup> documented histories of minority populations being more

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<sup>106</sup> Bjorn Stormorken and Leo Zwaak, *Human Rights Terminology in International Law: A Thesaurus*, (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1988).

<sup>107</sup> *William Andrews v. United States*, Case 11.139, Inter-Am. C.H.R., Report N° 57/96, OEA/Ser.L/V/II.95, doc. 7 rev. at 570 ¶ 173 (1997).

<sup>108</sup> *D.C. Voting Rights Case*, Inter-Am. C.H.R., ¶ 105, 95.

<sup>109</sup> Jailton Neri da Fonseca, Report N° 33/04, Case 11.634, Brazil (2004), para. 35, available at *Jailton Neri Da Fonseca v. Brazil*, Case 11.634, Inter-Am. C.H.R., Report No. 33/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1, ¶ 35 (2004).

likely to be suspected, arrested, prosecuted, and convicted than others.<sup>110</sup> This is precisely the kind of data Petitioners adduce here. As discussed in Part II, there have been official findings by the State of New Jersey that African-American and Latino citizens are targeted for investigation because of their race. These unlawful investigations lead to the disproportionate conviction and disfranchisement of people of color throughout the State. Such discrimination violates Article II of the American Declaration.

Racial profiling that leads to disfranchisement of people of color as is present in the State of New Jersey also violates the American Convention. The American Convention provides in its corresponding non-discrimination provision, Article 1, which states parties undertake to respect the rights and freedoms recognized in the Convention, and to guarantee their full and free exercise by all persons subject to their jurisdiction, without any discrimination. Also relevant is Article 24 which provides that “All persons are equal before the law.... they are entitled, without discrimination, to equal protection of the law.” The Court has interpreted these provisions to incorporate an effects-based standard: In jurisprudence relating to the rights of undocumented migrants, the Court observed that “States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination.”<sup>111</sup> And, the disparate impact that felon disfranchisement has on communities of color in New Jersey meets this standard.

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<sup>110</sup> Id. ¶¶ 35-36.

<sup>111</sup> See e.g., *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion, OC-18/03, Inter-Am. Ct. H.R. (Ser. A) No. 18, at para. 103 (Sept. 17, 2003).

**2. Article II Should be Interpreted in Light of Universal and Regional Human Rights Laws Prohibiting Discrimination Which, Like Article II, Provide For An Effects-Based Standard For What Constitutes Racially Discriminatory Treatment.**

Universal and regional human rights laws, including the ICCPR and ICERD also protect against effects-based racially discriminatory treatment.

As the HRC elaborates in General Comment 18(37) on Article 26 of the ICCPR,<sup>112</sup> Article 26 “... prohibits discrimination in law or *in fact* in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof.”<sup>113</sup> (emphasis added).

Significantly, this year, the HRC specifically considered application of Article 26 in relation to U.S. felon disenfranchisement policies and expressed its concern that the widespread practice of denying voting rights to people with felony convictions in the United States violates Article 26 as it is disproportionately impacting the rights of minority groups and is counterproductive to efforts to reintegrate those re-entering society after prison.<sup>114</sup>

The ICERD also sanctions the use of an effects-based standard to determine whether discriminatory treatment is in evidence. Article 1 defines discrimination to mean “any distinction, exclusion, restriction or preference based on race, colour, descent or

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<sup>112</sup> Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

<sup>113</sup> Article 26 provides “ all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” International Covenant on Civil and Political Rights, *supra* note 36, at art. 26.

<sup>114</sup> Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee (2006), ¶35, available at <http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.USA.CO.pdf>

national ethnic origin which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms.”<sup>115</sup> (emphasis added). ICERD’s monitoring body, the Committee on the Elimination of Racial Discrimination, like the HRC, has raised concerns about U.S. felon disfranchisement policies and their incompatibility with Article 1. In Concluding Observations issued to the United States in 2001, the Committee highlighted its concern about “[t]he political disenfranchisement of a large segment of the ethnic minority population who are denied the right to vote by disenfranchising laws and practices ....”<sup>116</sup> The Committee called on the United States “take all appropriate measures ... to ensure the right of everyone, without discrimination as to race, colour, or national or ethnic origin, to the enjoyment of the rights contained in Article 5 [which provides for the right to political participation] of the Convention.”<sup>117</sup>

Significantly, in ratifying both the ICCPR and ICERD, the U.S. made no reservation to their non-discrimination provisions. In fact, the U.S. Government, when it appeared before the Committee in 2001, indicated a willingness to confront the issue of racial disproportion in felon disfranchisement. During the review process, one

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<sup>115</sup> International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969, at Art. 1 (1).

<sup>116</sup> Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, United States of America, U.N. Doc. A/56/18, ¶ 397 (2001), *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/001961f8a1ae7b29c1256aa9002ae228?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/001961f8a1ae7b29c1256aa9002ae228?Opendocument).

<sup>117</sup> *Id.* ¶ 398. Supreme Court Justice Ruth Bader Ginsburg, concurring in the affirmative-action case *Grutter v. Bollinger*, cited the ICERD to reveal international understandings of the issue: “The Court’s observation that race-conscious programs must have a logical end point ... accords with the international understanding of the office of affirmative action. [ICERD] ... endorses ‘special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms’ ... But such measures, the Convention instructs, ‘shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.’” *See Grutter v. Bollinger*, 539 U.S. 306, at 344. (2003). Justice Ginsburg went on to cite Art. 1(4) similarly providing for temporally limited affirmative action.

Committee member expressed his concern that millions of African-Americans were deprived of their voting rights for penal reasons and wanted to know what measures were being taken by the U.S. to end the disparities between blacks and whites in that respect. He also expressed concern by apparent double standards in decisions handed down by the U.S. Supreme Court, which resulted in establishment of unequal rights among different ethnic and racial groups. He asked the United States delegation whether steps were being taken to address this situation and, in particular, to require states to implement Article 2 (1) (c) of the Convention [requiring States Parties to “take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists”].<sup>118</sup> The U.S representative acknowledged that the issue was serious and assured the members of the Committee that it would be given very serious consideration.<sup>119</sup>

As demonstrated above, the HRC revisited this issue this year and specifically found that felony disfranchisement as practiced in the U.S. states violated the ICCPR’s race discrimination provisions. These findings are consistent with resolutions of other major human rights bodies, which support a prohibition on race discrimination in voting.<sup>120</sup>

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<sup>118</sup> U.N. CERD, 59th Sess., 1476th mtg. on Aug. 6 2001 at 3, U.N. Doc. CERD/C/SR.1476 (May 22, 2003), ¶ 57.

<sup>119</sup> *Id.*, ¶ 65.

<sup>120</sup> *See, eg.*, U.N. General Assembly resolutions, adopted each year since at least 1991. In Resolution 46/137, the U.N. affirmed that “the systematic denial or abridgement of the right to vote on grounds of race or colour is a gross violation of human rights and an affront to the conscience and dignity of mankind, and...the right to participate in the political system based on common and equal citizenship and universal franchise is essential for the exercise of the principle of periodic and genuine elections.” G.A. Res. 46/137, art. 6, U.N. Doc. A/RES/46/137 (Dec. 17, 1991). The General Assembly has reiterated this call for universal and equal non-discriminatory suffrage regularly since that time. The Human Rights Council has taken similar actions recently. Its predecessor body, the Commission on Human Rights, also adopted

### 3. Article II Should Be Interpreted In Light of State Practice Which Also Recognizes An Effects-Based Standard for What Constitutes Racially Discriminatory Treatment

Like Article II and international law, state practice too, recognizes an effects-based standard for assessing when racially discriminatory treatment occurs amongst the voting populace.

For instance, in Canada, a country with a large, heterogeneous, disproportionately minority prison population, race has been an explicit part of the disfranchisement debate. Canadian government statistics portray that although Aboriginal adults comprise about 3 percent of the Canadian population they account for 18 percent of the federal prison population, 20 percent of the provincial prison population, and 27 percent of the female prisoner population.<sup>121</sup> And, in one region, Saskatchewan, Aboriginals are incarcerated at 35 times the rate of non-Aboriginals, and constitute 77 percent of the total prison population.<sup>122</sup>

In *Sauvé No. 2*, these disparities were taken into consideration by the Court in striking down a felon disfranchisement statute. The Court discussed the effect of disfranchisement on the minority population in Canada, noting that the policy had a “disproportionate impact on Canada’s already disadvantaged Aboriginal population, whose over representation in prisons reflects a crisis in the Canadian criminal justice

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resolutions each year since 1999, which call for the right to “universal and equal suffrage” in periodic and free elections. *See, eg.*, “Promotion of the Right to Democracy,” U.N. Commission on Human Rights, Res. 1999/57, at 2(d), U.N. Doc. E/CN.4/RES/1999/57 (Apr. 27, 1999); “Strengthening of popular participation, equity, social justice and non-discrimination as essential foundations of democracy,” U.N. Commission on Human Rights, Res. 2005/29, at 9, U.N. Doc. E/CN.4/RES/2005/29 (Apr. 19, 2005).

<sup>121</sup> Prison Facts & Statistics: Statistics for 2003-2004, Adult Prison Population and Costs, [http://www.prisonjustice.ca/politics/facts\\_stats.html](http://www.prisonjustice.ca/politics/facts_stats.html) (last visited Sept. 12, 2006).

<sup>122</sup> *Id.*

system.”<sup>123</sup> Thus, the Canadian Supreme Court embraced a disparate impact analysis that linked race discrimination to disfranchisement.

In non-OAS member states with populations similar to those in Canada, such as, Australia, New Zealand, and South Africa, governmental bodies and high courts have undertaken similar analyses of disfranchisement law and policies and arrived at similar conclusions: they have invalidated felon disfranchisement laws and policies because they have a discriminatory impact on minority groups.

In Australia, for instance, statistics reveal that while indigenous Australians constitute only about 2 percent of the Australian population, they are 16 times more likely to be in prison than non-indigenous persons, thus, indigenous Australians comprised 20 percent of all Australian prisoners in 2003.<sup>124</sup> Legislators considered this disparity in briefing papers discussing disfranchisement in the context of Australia’s obligations under the ICERD; the paper concluded, “because of the disproportionate effect that prisoner disfranchisement has on indigenous Australians, it is arguable that such disfranchisement conflicts with Australia’s obligations under the Convention.”<sup>125</sup>

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<sup>123</sup> Additionally, Canadian elections authorities have also undertaken a number of initiatives since the 1990s to raise awareness among Aboriginal people of their right to participate in federal elections and referendums, and to make the electoral process more accessible to them.

<sup>124</sup> Jerome Davidson, *Inside Outcasts: Prisoners and the Right to Vote in Australia*, Laws and Bills Digest, Department of Parliamentary Services, Current Issues Brief No. 12 (May 24, 2004), at 2. Australia has a general population of 20,438,802, a prison population of 23,362, and a prison population per 100,000 of 117 (See also Australia’s Population – Census 2001 Results, ACARANDA ATLAS (5<sup>th</sup> ed. 2001), available at <http://www.jaconline.com.au/jacatlas5e/downloads/worksheets/JA5Wksheet0056.pdf#search=%222001%20australia%20census%22>).

<sup>125</sup> In an “Issues Brief for Parliament,” a section entitled “The Influence of International Instruments” traces Australian history and movements for reform concerning the vote. The brief also engages in an international law analysis, as part of which it notes that ICERD, to which Australia is a signatory, requires states to “rescind or nullify laws that have the effect of creating or perpetuating racial discrimination, or of strengthening racial division. Because of the disproportionate effect that prisoner disfranchisement has on indigenous Australians, it is arguable that such disfranchisement conflicts with Australia’s obligations under the Convention.” *Id* at 10. Australia has a general population of 20,438,802, a prison population of 23,362, and a prison population per 100,000 of 117. This brief also cites provisions of the ICCPR - not formally part of Australian domestic law - stating “it is at least arguable that international influences play

Similar conclusions were arrived at in a study conducted by the government of New Zealand, where Maoris comprise approximately 15 percent of the country's populace but over 50 percent of the prison population.<sup>126</sup> The official Electoral Commission, in seeking to remedy falling electoral participation by the Maori, concluded that: "The Maori population is growing, so the negative impact of Maori non-participation on the quality of New Zealand's democracy will compound quickly if things do not change . . ." The Commission added that they wanted "to help raise Maori participation in electoral matters . . . [and] particularly to influence those whose policies and programs can encourage greater Maori electoral participation."<sup>127</sup>

Finally, in South Africa, the estimated population is nearly 46 million, of which 79.4 percent is black, 9.3 percent is white, 8.8 percent is colored, and 2.5 percent is Indian/Asian.<sup>128</sup> In May 2001, its Africans comprised 77 percent of South Africa's prison population; of the rest, 20 percent were colored (mixed ancestry), 2 percent Asian, and 1 percent white.<sup>129</sup> In the *NICRO* decision, discussed above, that nation's highest court observed:

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an important part in the development of Australian constitutional law" and cites "the powerful influence [on Australian decisions] of the Covenant and the international standards it imports . . . the common law does not necessarily conform to international law but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights." *Id.* at 9 (internal citation omitted).

<sup>126</sup> Te Puni Kokiri: Maori in New Zealand - Maori Population, 2001 Census, <http://www.tpk.govt.nz/maori/population/default.asp> (last visited Sept. 12, 2006), and Corrections Department NZ – The Strategies, Department of Corrections, <http://www.corrections.govt.nz/public/news/icpa/strategies.html> (last visited Sept. 12, 2006).

<sup>127</sup> *Establishing a Maori Electoral Research Agenda*, HUI (November 26, 2004), [http://www.elections.org.nz/uploads/maori\\_electoral\\_research\\_hui\\_26\\_nov\\_04.doc](http://www.elections.org.nz/uploads/maori_electoral_research_hui_26_nov_04.doc). See also <http://www.elections.org.nz/maori-research-rfp-jan06.html> (last visited June 2006).

<sup>128</sup> Mid-Year Population Estimates, South Africa 2005, p. 1, Statistics South Africa, <http://www.statssa.gov.za/Publications/P0302/P03022005.pdf>.

<sup>129</sup> Amanda Dissel and Jody Kollapen, *Racism and Discrimination in the South African Penal System* (2002), Centre for the Study of Violence and Reconciliation, (2002), available at <http://www.csvr.org.za/papers/papadjk.htm>.

In light of our history where the denial of the vote was used to entrench white supremacy and to marginalize the great majority of the people of our country, it is for us a precious right, which must be vigilantly respected and protected.<sup>130</sup>

“[R]egardless of race,” the same court declared in the *August* case, the vote “of each and every citizen is a badge of dignity and personhood.”<sup>131</sup>

In sum, Article II of the American Declaration, in line with universal and regional human rights laws and widespread state practice in developed democratic states, recognizes an effects-based standard for the assessment of whether racially discriminatory treatment is evident. As demonstrated in detail throughout this petition, based upon this standard, statistics conclusively demonstrate that the State of New Jersey’s disfranchisement law and policies disproportionately impact the voting rights of the State’s African-American and Latino populace, including individual Petitioners. Accordingly, they violate Article II of the American Declaration.

**C. New Jersey Felon Disfranchisement Law Violates Petitioners’ Right to Rehabilitation Protected by Articles I and XVII of the American Declaration.**

Taken together, Articles I and XVII of the American Declaration together with the overarching right of everyone to be treated with dignity recognized and protected by the Declaration,<sup>132</sup> guarantee individual Petitioners a right to rehabilitation. This right has long been recognized under universal and regional human rights law and state practice. Inherent in the right to rehabilitation is the right to vote. Research and official

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<sup>130</sup> *Nicro*, CCT 03/04, at 47.

<sup>131</sup> *August*, ¶ 17, available at <http://www.constitutionalcourt.org.za/uhtbin/cgiisirs/vdGMzgHjnA/189490026/523/1472>. In the United Kingdom, as Parliament debates changing the law disfranchising all prison inmates, advocates have pointed out that “minority ethnic groups are disproportionately affected . . . due to their over-representation in the prison population, black men are 8 times as likely to be barred from voting than their white counterparts” where whites form 92 percent of the total population, and blacks 2.0 percent. *See, e.g.*, Marc Mauer & Tushar Kansal, “Barred for Life: Voting Rights Restoration in Permanent Disenfranchisement States,” The Sentencing Project (2005), available at <http://www.sentencingproject.org/pdfs/barredforlife.pdf>.

<sup>132</sup> *See e.g.*, American Declaration at preamble (recognizing that: “The American peoples have acknowledged the dignity of the individual...”).

pronouncements demonstrate that preservation of voting rights for those incarcerated or released on parole or probation may reduce recidivism and contribute to an offender's successful reintegration back into society. Moreover, awareness of political issues in the community and participating in voting is a positive pro-social endeavor, which has both the psychological and sociological effect of integrating the offender back into their communities. Participation in popular elections allows offenders to remain involved in community affairs that affect their families. As such New Jersey's law and policies disfranchising persons while on parole and probation constitute a violation of individual Petitioners' right to rehabilitation.

**1. The American Declaration Requires that Incarceration Serve a Rehabilitative Function: Preserving Voting Rights Achieves Such a Goal.**

The Commission has repeatedly emphasized the rehabilitative function of a prison sentence and the importance of rehabilitation to the individual's harmonious reintegration back into society.<sup>133</sup> For example, the Commission has noted that "[t]he prison system is intended to serve several principal objectives... [t]he "ultimate objective" being "the rehabilitation of the offender and his or her reincorporation into society;" and that, "[t]he exercise of custodial authority carries with it special responsibility for ensuring that the deprivation of liberty serves its intended purpose, and does not result in the infringement of other basic rights."<sup>134</sup>

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<sup>133</sup> Report on the Situation of Human Rights in the Dominican Republic, Inter-Am. C.H.R., OEA/Ser.L/V/II.104, Doc. 49 rev. 1 Chapter VIII(I) (1999), citing United Nations Standard Minimum Rule 65 to support this contention.

<sup>134</sup> Report on the Situation of Human Rights in Guatemala, Inter-Am. C.H.R., OEA/Ser.L/V/II.111, Doc. 21 rev. Chapter VIII (2001).

The Commission has found that an individual's right to rehabilitation forms an integral component of the rights protected pursuant to Article 5 of the American Convention, which, in subsection (6) specifically requires re-adaptation to be a goal of prison:

Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social re-adaptation of the prisoners.

According to the Commission, Article 5 establishes the right of every person to have his or her "physical, mental, and moral integrity respected"<sup>135</sup> and guarantees that everyone deprived of liberty "shall be treated with respect for the inherent dignity of the human person."<sup>136</sup> Included within the bundle of rights protected by Article 5 the Commission has highlighted the individual's right, following completion of sentence, to "social re-adaptation" and reintegration back into society.<sup>137</sup>

The right to rehabilitation recognized under Article 5, is similarly protected under Articles I and XVII of the American Declaration. Although Article I does not explicitly recognize a right to rehabilitation, it may be implied from the Commission and Inter-American Court's broad interpretation of the substance of the right to life protected under Article I. The Commission has repeatedly interpreted Article I to include similar protections to those rights protected under Article 5.<sup>138</sup> Thus, an individual's right to re-adaptation following incarceration, specifically protected by Article 5(6), should be read into Article I. The jurisprudence of the Inter-American Court supports such an

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<sup>135</sup> *Id.*, Section A(2).

<sup>136</sup> *Id.*

<sup>137</sup> Report on the Situation of Human Rights in Brazil, Inter-Am. C.H.R., OEA/Ser.L/V/II.97, Doc. 29 rev.1 Chapter IV(27) (1997).

<sup>138</sup> Report on Terrorism and Human Rights OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 October 2002, ¶ 155 (noting that while the American Declaration lacks a general provision on the right to humane treatment, the Commission has interpreted Article I as containing a prohibition similar to that of Article 5 of the American Convention) (citing Case 9437, Report N° 5/85, Juan Antonio Aguirre Ballesteros (Chile), Annual Report of the IACHR 1984-1985.)

interpretation. In the *Castillo Paez Case*, for instance, the Court noted that the protections encompassed by Article 5 -- and hence Article I -- are much broader in scope than mere protection from physical mistreatment. Rather, they extend to any act that is “clearly contrary to respect for the inherent dignity of the human person”<sup>139</sup> Similarly, in the *Street Children Case*, the Court reiterated that position, noting that: the right to life “includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence.”<sup>140</sup> This broad definition of the right to life should be read to include the guarantee of parolees and probationers’ right to rehabilitation.

Article XVII of the American Declaration, which specifically guarantees humane treatment for persons under custody, likewise may be interpreted to include a right of prisoners to rehabilitation. This right tracks closely the guarantee in the American Convention that persons deprived of liberty “shall be treated with respect for the inherent dignity of the human person,” which, in turn, and as noted above, is closely linked to the right under Article 5 (6) of the Convention to “re-adaptation.”

**2. Articles I and XVII of the American Declaration Should be Read in Light of Universal and Regional Human Rights Law Which Require that Incarceration Serve a Rehabilitative Function and Recognize that Preserving Voting Rights Achieves Such a Goal.**

Articles I and XVII should be interpreted in light of universal and regional human rights law both of which protect an individual’s right to rehabilitation and view preservation of their voting rights while serving a sentence as an integral part of that

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<sup>139</sup> Inter-Am. Ct. H. R., *Castillo Paez Case*, Judgment of Nov. 3, 1997 (Ser. C) No. 35, ¶¶ 63, 66.

<sup>140</sup> Inter-Am. Ct. H.R., *Villagran Morales et. al. Case (the "Street Children" Case)*, Judgment of Nov. 19, 1999 (Ser. C) No. 63, ¶ 144.

process. Importantly, the ICCPR incorporates an explicit provision guaranteeing an individual's right to "social rehabilitation" following a term of incarceration, and recognizing that such treatment arises out of the need to respect individual "dignity." Specifically, Article 10(3) provides: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person . . . The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."

The HRC has considered this provision in relation to deprivation of voting rights, and emphasized the importance of voting as rehabilitative and that restrictions thereon are counterproductive to rehabilitation. For example, in its Concluding Observations on the United Kingdom's Country Report, issued in 2001, the HRC commented, with respect to the United Kingdom's blanket disfranchisement provision banning all serving prisoners from voting that the measure "...amounts to an additional punishment and that it does not contribute towards the prisoner's reformation and social rehabilitation, contrary to article 10, paragraph 3, in conjunction with article 25 of the Covenant." The HRC called upon the U.K. to reconsider its law depriving convicted prisoners of the right to vote.<sup>141</sup>

The U.N. Basic Rules for the Treatment of Prisoners (Basic Rules)<sup>142</sup> and the U.N. Standard Minimum Rules for the Treatment of Prisoners (SMR)<sup>143</sup> also underscore the rehabilitative function of incarceration. For instance, the Basic Rules require states to provide "favorable conditions [] for the reintegration of the ex-prisoner into society under

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<sup>141</sup> Concluding Observations, United Kingdom of Great Britain and Northern Ireland, *supra*. note 41, ¶ 10.

<sup>142</sup> Basic Principles for the Treatment of Prisoners, Dec. 14, 1990, G.A. Res. 111, U.N. GAOR, 45th Sess., Supp. No. 49A, at 200, U.N. Doc. A/45/49, *available at* [http://www.unhcr.ch/html/menu3/b/h\\_comp35.htm](http://www.unhcr.ch/html/menu3/b/h_comp35.htm).

<sup>143</sup> Standard Minimum Rules for the Treatment of Prisoner, Aug. 30, 1955, E.S.C. res.663C, 24 U.N. Escor Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957) *available at* [http://www.unhcr.ch/html/menu3/b/h\\_comp34.htm](http://www.unhcr.ch/html/menu3/b/h_comp34.htm).

the best possible conditions.”<sup>144</sup> And, four SMRs set forth the appropriate restrictions on the rights of prisoners to participate in civil society and political life. SMR 57 declares that imprisonment should not hinder reintegration into society after prison, and should not inflict punishment beyond the deprivation of liberty. SMR 60 requires the minimization of those differences between prison life and life outside prison which fail to respect prisoners’ dignity as human beings, and SMR 61 elaborates:

The treatment of prisoners should emphasize not their exclusion from the community but their continuing part in it ... steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners.

And finally, SMR 65 provides:

The treatment of persons sentenced to imprisonment ... shall have as its purpose ... to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility.

Regional human rights laws and policies also recognize a right to rehabilitation and how preservation of voting rights furthers this goal. For example, in 1958, the Council of Europe’s Committee of Ministers – a decision-making body comprised of the foreign-affairs ministers of the member states, or their permanent diplomatic representatives – established the European Committee on Crime Problems, entrusting it with responsibility for overseeing and coordinating the Council’s crime prevention and control activities. This body’s recommendations urge states to foster prisoners’ connections with society, in order to increase inmates’ awareness of their stake in society

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<sup>144</sup> Basic Principles, Principle 5.

– recommendations that support the retention of voting rights by prisoners, parolees and probationers.<sup>145</sup>

**3. Articles I and XVII Should be Read in Light of State Practice Which Also Requires that Incarceration Serve a Rehabilitative Function and Recognizes that Preserving Voting Rights Achieves Such a Goal.**

The practice of OAS and non-OAS member states also supports prisoner retention or post-incarceration restoration of the right to vote on grounds that voting is rehabilitative. In *Sauvé No. 2*, for example, Canada’s highest court acknowledged that for a prisoner to be able to retain the right to vote sends the offender the message that becoming aware of political issues in the community and participating in voting is a positive pro-social endeavor: “To take an active interest in politics is, in modern times, the first thing which elevates the mind to large interests and contemplations; the first step out of the narrow bounds of individual and family selfishness...”<sup>146</sup> This message has both the psychological and sociological effect of weaving the offender back into the community -

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<sup>145</sup> *Recommendation No. R (87)3*, for example, sets forth standards to be applied by member states in the conditions of imprisonment: “64. Imprisonment is by the deprivation of liberty a punishment in itself. The conditions of imprisonment and the prison regimes shall not, therefore, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in this.” Council of Europe, Committee of Ministers, Recommendation 87(3) of the Committee to Member States on the European Prison Rules, adopted by the Committee on 12 February 1987 at the 404th Meeting of Ministers’ Deputies, available at <http://portal.coe.ge/downloads/European%20Prison%20Rules.pdf>. Similarly, *Recommendation No. R(2003)23*, focusing on long-term prisoners, urges prison administrators “2. to ensure that prisons are safe and secure places for these prisoners ... to counteract the damaging effects of life and long-term imprisonment ... to increase and improve the possibilities of these prisoners to be successfully resettled and to lead a law-abiding life following their release.” Council of Europe, Committee of Ministers, Recommendation Rec(2003)23 of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners (*Adopted by the Committee of Ministers on 9 October 2003 at the 855th meeting of the Ministers’ Deputies*), available at [http://www.prison.eu.org/article.php3?id\\_article=6715](http://www.prison.eu.org/article.php3?id_article=6715). And as general principles concerning the same subject, the committee emphasizes “individualization,” “normalization,” and “responsibility:” “3. Consideration should be given to the diversity of personal characteristics to be found among life sentence and long-term prisoners and account taken of them to make individual plans for the implementation of the sentence (individualization principle). 4. Prison life should be arranged so as to approximate as closely as possible to the realities of life in the community (normalization principle). 5. Prisoners should be given the opportunity to exercise personal responsibility in daily prison life (responsibility principle).” *Id.*

<sup>146</sup> See, eg., *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002, SCC 68.

the very goal of rehabilitation. In its concluding analysis, the *Sauvé No. 2* court specifically addressed the rehabilitative power of voting:

Denying prisoners the right to vote ... removes a route to social development and rehabilitation ... and it undermines the correctional law and policy directed towards rehabilitation and integration.

Importantly, the Court found that the deprivation of the right to vote ran counter to the nation's commitment to the inherent worth and dignity of every individual.<sup>147</sup>

This analysis linking the franchise to respect and dignity for everyone underpins the practice of many European nations that permit inmates to vote. In Europe, as noted *supra*, not only do many Council of Europe member states permit inmates to vote, but many senior correctional officials have publicly acknowledged that doing so is good policy – because it may increase public safety by enhancing the formative, rehabilitative effects of incarceration. Scotland's former Chief Inspector of Prisons, for example, has stated that inmates retain the right to vote in Scotland, because their loss of freedom should not deprive them of their “right to say something about the running of the country.”<sup>148</sup> The current Chief Inspector of the U.K.'s Prison Service also supports prison voting, expressing the view that voting rights prepare prisoners for resettlement.<sup>149</sup> His predecessor, Sir David Ramsbotham, maintains that it is a right of citizenship that is unrelated to prison sentences, saying that prisoners “remain citizens ... they've had their liberty removed, nothing else ... 62,000 of them are going to come out as citizens and one of the jobs of prisons is to make them better citizens. ...”<sup>150</sup> All citizens of the United

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<sup>147</sup> *Id.*, ¶ 59.

<sup>148</sup> Tanya Thompson, *Prisoner's Legal Fight to Vote May Open Floodgates*, THE SCOTSMAN, Nov. 1, 2004, available at <http://thescotsman.scotsman.com/index.cfm?id=1260252004>.

<sup>149</sup> Mauer & Kansal, “Barred for Life: Voting Rights Restoration in Permanent Disenfranchisement States,” 3.

<sup>150</sup> *Calls to give vote to prisoners*, BBC NEWS, Aug. 4, 2005, available at [http://news.bbc.co.uk/1/hi/uk\\_politics/4406585.stm](http://news.bbc.co.uk/1/hi/uk_politics/4406585.stm).

Kingdom have the vote by right — not moral authority. . . . Removing a citizen’s right is an additional punishment to the deprivation of liberty.”<sup>151</sup>

The views of these European officials, that preservation of voting rights serves a rehabilitative function, is supported by empirical research conducted here in the United States, by the written testimony of the individual Petitioners filed herewith, as well as by the findings of senior U.S. law enforcement and prison officials. For example, the American Bar Association and numerous social scientists and criminologists have also voiced the concern that not only is disfranchisement not rehabilitative, but that it operates as a barrier between the offender and society and counteracts the rehabilitative goal of preparing the offender to re-enter society.<sup>152</sup>

These concerns are not merely academic conjecture. Parolee interviews make it clear that disfranchisement impacts real human beings in a tangible, oppressive way. For example, in his affidavit, one of the individual Petitioners, Charles Thomas, states that disfranchisement makes him feel unworthy to be a member of his community. “It [disfranchisement] makes me feel as though what I think does not matter . . . When the government excludes an entire group of people, such as parolees or probationers, it

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<sup>151</sup> February 2004 - Barred from voting, Prison Reform Trust,

<http://www.prisonreformtrust.org.uk/subsection.asp?id=399> (last visited September 13, 2006).

<sup>152</sup> See, e.g., ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, American Bar Association (Aug. 2003), at R-7, available at <http://www.abanet.org/leadership/2003/journal/101a.pdf>; Jeremy Travis, *Invisible Punishment: the Collateral Consequences of Mass Imprisonment* 26, (Marc Mauer & Meda Chasey-Lind eds., The New Press 2002), available at [http://www.urban.org/UploadedPDF/1000557\\_invisible\\_punishment.pdf](http://www.urban.org/UploadedPDF/1000557_invisible_punishment.pdf) (“It is hard to discern rehabilitative goals in these punishments. In fact they place barriers to successful rehabilitation and reintegration.”); Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Non-incarcerated Felons in the United States*, 2 PERSPECTIVES ON POLITICS 491, 502 (2004), available at [http://www.soc.umn.edu/~uggen/Manza\\_Uggen\\_POP\\_04.pdf](http://www.soc.umn.edu/~uggen/Manza_Uggen_POP_04.pdf) (“Denying voting rights to...felons living in their communities on probation and parole, undermines their capacity to connect with the political system and may thereby increase their risk of recidivism.”); Howard Itzkowitz & Lauren Oldak, *Note: Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 A. Crim. L. Rev. 721, 732 (1973) (“The offender finds himself released from prison, ready to start life anew and yet at election time still subject to the humiliating implications of disenfranchisement, a factor that may lead to recidivism.”).

makes people believe that they are not worth anything to anybody.” Furthermore, he believes that as a senior treatment coordinator, it inhibits him to treat the people he helps effectively. “When juveniles I help see that I do not vote come voting day, then they believe it is not important. This happens with my own children and relatives. Therefore, being disfranchised inhibits my ability to effectively help others in my community or send a positive message as a father.” Exhibit C.

Petitioner Stacey Kindt believes that “the disfranchisement of parolees and probationers has inhibited my reintegration into society. Despite my community involvement, deep down, not being able to vote makes me feel that I am not good enough and that I will never be accepted by the community.” Exhibit D. Furthermore, she notes that women parolees need to be re-enfranchised in order to be successfully reintegrated into society. “We [women parolees] can only be re-integrated into society if society accepts us. Barring us from voting is the ultimate sign of rejection from the community that we so desperately want to be a part of. It prohibits us from contributing to our communities in a positive way.”<sup>153</sup>

Petitioner Dana Thompson stated in his affidavit that disfranchisement resulted in him feeling judged for his past while he attempted to reenter society from prison: “When I was on parole not being able to vote felt emotionally like I was still incarcerated. When I left prison I wanted my crimes to be behind me so that I could succeed and move on with my life. But I couldn’t completely do that because that judgment still existed.”

Exhibit B.

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<sup>153</sup> See also, Christopher Uggen & Jeff Manza, *Lost Voices: The Civic and Political Views of Disenfranchised Felons*, in *IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION* 165-204, 183 (Mary Patillo et. al. eds., Russell Sage Foundation, 2004), available at <http://www.socsci.umn.edu/%7Euggen/Sagechap8.pdf> (“You've already got that wound and it's trying to heal...[but] you telling me that I'm still really bad because I can't [vote] is like making it sting again.”).

Petitioner Michael Mackason states in his affidavit that disfranchisement inhibits his effectiveness in the community. “. . . Imagine a person such as myself at a local political meeting or campaign rally. When I feel compelled at such an event to ask whether the politician will make choices that are beneficial for people re-entering into society after prison, I am cast aside because I represent a body that has no vote. . . I cannot take part in political conversations in my community without feeling like an outsider. It is like being in prison all over again.” Additionally, Mackason states that disfranchisement leads to ex-felons’ feeling powerless to effect change through means other than violence: “I see this as a part of what leads to the violent behavior of many of the ex-offenders over high school age with whom I work. . . It gives them a sense of hopelessness and rebellion. . . Violence is a consequence of young people not having the opportunity to express themselves or to change their communities.” Exhibit A.

Voting, on the other hand, fosters rehabilitation and successful community re-entry. As noted, the goal of rehabilitation is “to return [the offender] to society so reformed that he will not desire or need to commit further crimes.”<sup>154</sup> The right, and even the obligation, to vote is held out daily to members of American society as one of the privileges and proud duties of being an American. Disfranchisement, therefore, signals to offenders that they are not truly the same as the rest of us, and that they are second-class citizens even though they are simultaneously being told that the aim of their probation or parole is to help them become whole again. This conflicting message serves to frustrate, confuse, and alienate offenders who want to participate in society in a positive and meaningful way.

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<sup>154</sup> Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Laws* § 1.5 (2d ed. 2003).

Research also demonstrates that offenders are less likely to re-offend if they vote. Among those who have been arrested, people who vote are only half as likely to be rearrested as those who do not; that is, voters recidivate one-half as often as non-voters. Restoring voting rights, therefore, is an important part of rehabilitation for those convicted of felonies. It gives such offenders a voice and a continuing stake in what happens in their communities.<sup>155</sup>

U.S. law enforcement officials and prison administrators also attest to the rehabilitative power of the vote, both for those incarcerated and those under supervision but living in their communities. In litigation before the United States Second Circuit Court of Appeals in which the issue was the disproportionate impact of New York's felon disenfranchisement statute on the state's incarcerated and paroled Blacks and Hispanics, a group of prominent law enforcement officials wrote in an *amicus* brief of the "vital importance that the right to vote has on the health and future of this nation." In their considered opinion, "[t]he restoration of paroled or incarcerated felons' right to vote does not impinge upon the effective investigation or prosecution of criminal matters by state law enforcement officials," and, more to the point here

to the extent that felon disenfranchisement laws are viewed as a punishment rather than as a means of voter qualification, these laws may, in fact, undermine the rehabilitative aims of incarceration and parole. Amici recognize that an important component of effective punishment is compelling incarcerated and paroled individuals to become law-abiding, productive citizens through rehabilitation... Thus law enforcement agencies spend substantial resources on programs pursuing a rehabilitative penological goal [citing examples of such programs]... The denial of the right to vote may, in fact, undermine these rehabilitative aims of punishment... To the extent that disenfranchisement distances the person from the community and serves no educational function, it

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<sup>155</sup> Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime & Arrest: Evidence from a Community Sample*, 36 Colum. Human Rights L. Rev. 193 (2004), available at [http://www.soc.umn.edu/%7Euggen/Uggen\\_Manza\\_04\\_CHRLR2.pdf](http://www.soc.umn.edu/%7Euggen/Uggen_Manza_04_CHRLR2.pdf).

weakens the impact of rehabilitative correctional programs and parole upon the individual's reintegration as a law-abiding member of the correctional facility or community.<sup>156</sup>

Wesley E. Andrenyak, the current Chief Advocate for the Maine Corrections Department, one of the two U.S. states in which all prisoners may vote, supports voting rights for inmates given its rehabilitative function. Calling voting "one of the basic rights granted citizens," Mr. Andrenyak testified to legislators considering stripping Maine inmates' of their right to vote:

One of the many goals of ... the Department of Corrections is to return a prisoner to the community a better person.... An integral part of this process is the ability for prisoners to become productive citizens in their community upon release. One of the basic entitlements and responsibilities regarding civil responsibility is to exercise one's ability to vote. ... While only a small number of prisoners traditionally have chosen to participate, the fact that they have this ability sends the message that the Department supports their successful return to the community as a productive citizen. While prisoners are serving sentences, regardless of the crime committed, it should not prohibit them from making personal choices in who will be representing them, their families and communities. ... This serves to keep the individual involved in current affairs, and connected to the community and his or her family during their sentence.<sup>157</sup>

Articles I and XVII of the American Declaration, interpreted in light of analogous provisions of the American Convention, universal and regional human rights law as well as state practice, recognize that individuals serving sentences, including those on parole or probation have a right to rehabilitation. Inherent in this right is their right to vote. Maintenance of voting rights while under sentence promotes rehabilitation, may reduce recidivism, and leads to a greater likelihood of offenders' successful re-entry into their communities. This is a fact long recognized under universal and regional human rights

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<sup>156</sup> *Muntaqim et al. v. Coombe et al.*, In Banc Brief of Amici Curiae Zachary W. Carter et al. In Support of Plaintiffs-Appellants and in Support of Reversal, 01-7260-cv/04-3886-pr (March 30, 2005) at 9-12.

<sup>157</sup> Testimony of Wesley E. Andrenyak, Chief Advocate, Maine Department of Corrections in opposition to LD 200 (on file with ACLU).

laws and one supported by state practice based upon research studies. The State of New Jersey's felon disfranchisement law and policies serve no rehabilitative function and accordingly violate individual Petitioners' right to rehabilitation protected under Articles I and XVII of the American Declaration.

V.

**CONCLUSION AND PETITION FOR RELIEF**

The facts stated above establish that the United States of America and the State of New Jersey have violated the rights of Petitioners under Articles I, II, XVII, and XX of the American Declaration. Individual Petitioners on parole and probation are disfranchised by the State of New Jersey's felon disfranchisement law. Additionally, the African-American and Latino communities of New Jersey are being denied equal protection of the laws because of the unjustified, disparate impact of the felon disfranchisement law on those communities which dilutes their political power. These laws thus violate Petitioners' right to vote, their right to be free from discrimination on the basis of race and their right to rehabilitation as protected by Articles I, II, XVII, and XX of the Declaration and other international human rights instruments.

Thus, the Petitioners ask that the Commission provide the following relief:

1. Declare this petition to be admissible;
2. Investigate, with hearings and witnesses as necessary, the facts alleged by Petitioners;
3. Declare the United States of America and the State of New Jersey in violation of Articles I, II, XVII, and XX of the American Declaration;
5. Recommend such remedies as the Commission considers adequate and

effective for the violation of individual Petitioners' fundamental human rights, including:

(a) Adoption by the United States and the State of New Jersey of measures ending felon disfranchisement, at least post-incarceration, in the State of New Jersey and throughout the country, in the states that still maintain felon disfranchisement laws that fail to comport with internationally recognized standards.

(b) Imposition of a requirement that courts and public defenders notify individuals pleading guilty to or being sentenced to a disfranchising offense when they will lose their right to vote and the procedures they should follow to restore their voting rights.

Dated: September 13, 2006

Respectfully submitted:

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