A-6881-03T5

NEW JERSEY STATE CONFERENCE – NAACP, THE LATINO LEADERSHIP ALLIANCE OF NEW JERSEY, EARL PRATHER, KAREEMAH TERRY, MICHAEL E. MACKASON, DANA THOMPSON, CHARLES THOMAS, ZENON QUILES, ROBERT PADILLA, ARMADO ORTIZ, CHRISTOPHER ORTIZ, COUNCILWOMAN PATRICIA PERKINS-AUGUSTE, COUNCILMAN CARLOS J. ALMA, on behalf of themselves and all individuals similarly situated, Plaintiffs/Appellants, v. PETER C. HARVEY, ATTORNEY GENERAL OF NEW JERSEY, in his official capacity, Defendant/Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-6881-03T5 CIVIL ACTION ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY UNION COUNTY, CHANCERY DIVISION **SAT BELOW** MIRIAM N. SPAN

BRIEF IN SUPPORT OF THE MOTION OF CERTAIN CRIMINOLOGISTS FOR LEAVE TO APPEAR AS AMICI CURIAE AND ON THE MERITS

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PRELIMINARY STATEMENT

This case raises the fundamental question whether the New Jersey statute stripping parolees and probationers of the right to vote is consistent with the Equal Protection guarantees in the New Jersey Constitution. Proposed amici curiae, prominent social scientists and criminologists from New Jersey and surrounding metropolitan areas, respectfully believe that it is not consistent with Equal Protection because there is no rational purpose supporting the disfranchisement of parolees and probationers under N.J.S.A. 19:4-1(8). Because the right to vote is regarded as perhaps the most fundamental of rights in a democratic society, any regulation that limits that right must be examined closely to ensure that it serves either a legitimate punitive purpose or a legitimate regulatory purpose. N.J.S.A. 19:4-1(8) serves neither.

Disfranchisement of probationers and parolees does not serve any legitimate goal of punishment, much less the rehabilitative goals of parole and probation that have been recognized by legislators, jurists, legal academicians, and correctional practitioners alike. While certainly the State has a legitimate interest in punishing felons, denying suffrage to probationers and parolees contradicts the purposes of punishment enumerated by the New Jersey Legislature: to both "promote the correction and rehabilitation of offenders" and "safeguard offenders against excessive, disproportionate or arbitrary punishment." N.J.S.A. 2C:1-2(b)(2),(4). It also violates the

retributive, "just deserts" rationale for criminal punishment, which rests on the tenet that punishment must be proportionate to the blameworthiness of the criminal and the severity of harm caused. Probationers have committed crimes of low severity and do not deserve to be ostracized from civic life; parolees, having already served sentences proportionate to the severity of their crimes, suffer gratuitous harm if prohibited from rejoining civil society. Perhaps more importantly, disfranchisement counteracts the rehabilitative purpose of parole and probation, and hinders the rehabilitative effect. It impedes rehabilitation because it dissociates felons from the rights and responsibilities of citizenship and places a barrier to their reintegration into a democratic society.

The trial court regarded disfranchisement as punishment, attempting to justify it as a punitive consequence of breaking the "social contract," as postulated by John Locke. This "social contract" rationale, while superficially attractive, does not comport with Locke's theories. First, examining the rights we accord under our Constitution, even to incarcerated felons, shows that the United States does not apply social contract theory under all circumstances. We do not exile all criminals from the community, nor do we strip them of the rights of free speech, free press, or the right to petition, all of which have more impact in helping to make the law than a single vote would. Furthermore, the idea that an offender has broken the social contract by committing a crime, while applicable upon

initial conviction, does not apply where the state explicitly endeavors to re-integrate the offender into social life.

Disfranchisement of parolees and probationers also does not serve any legitimate purpose of electoral regulation. While the initial motivation for felon disfranchisement was to preserve the purity of the ballot box, assuming that criminals' voting would foster fraud or corruption, that assumption is hopelessly antiquated and lacks empirical support. The rationale can apply to offenders convicted of electoral fraud, but cannot rationally be stretched to cover all other people convicted of felonies. There is no proof that voting by people who had been convicted of crimes unrelated to election fraud is any more subject to corruption than voting by those who have not been convicted.

Neither can such disfranchisement be justified as a longstanding legal principle that commands deference. In fact, the New Jersey Legislature enacted a statute abolishing disfranchisement of non-incarcerated felons when it adopted the Criminal Justice Code in 1978. Only a concern over a potential conflict with the Election Law resulted in its ill-considered repeal. Moreover, courts in other nations have invalidated sweeping felon disfranchisement as violating basic human rights.

The proposed amici curiae therefore urge this Court to strike down N.J.S.A. 19:4-1(8) as unnecessarily impinging on one of the most fundamental of democratic rights -- the right to vote - and violating the Equal Protection guarantees of the New Jersey Constitution.

PROCEDURAL HISTORY

Proposed amici adopt the procedural history set forth by the appellants in their brief.

STATEMENT OF FACTS

The plaintiff class in this case consists, in part, of parolees and probationers, otherwise qualified to vote, who have been deprived of that right by operation of N.J.S.A. 19:4-1(8) because of a conviction of an indictable offense. (Ja27.)

ARGUMENT

In this Equal Protection challenge to N.J.S.A. 19:4-1(8), which deprives those on parole and probation of the right to vote, this Court must determine, inter alia, whether there is a "public need for the restriction" at issue. Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985). A statute would satisfy a public need if it manifested either a legitimate punitive purpose or a legitimate regulatory purpose.

Here, disfranchisement of parolees and probationers serves no legitimate penological purpose because it does not satisfy any of the recognized goals of punishment. It also does not serve a regulatory purpose because depriving those on parole and probation of the right to vote, though touted to preserve the purity of the ballot box, does not actually prevent electoral fraud. The proposed amici request permission to advise this Court of the impact of laws disfranchising those on parole and probation and how such laws fail to fulfill any public need.

I. THIS COURT SHOULD GRANT LEAVE TO PARTICIPATE AS AMICI CURIAE TO THE CRIMINOLOGISTS WHOSE NAMES ARE APPENDED BECAUSE OF THE PUBLIC IMPORTANCE OF THE RELIEF SOUGHT: THE RIGHT OF SUFFRAGE.

The criminologists whose names appear in Appendix A of the attached motion hereby move pursuant to R. 1:13-9 for leave to participate as amici curiae. The role of amici curiae is to "assist in the resolution of an issue of public importance." R. 1:13-9. Such assistance may be rendered by "provid[ing] the court with information pertaining to matters of law about which the court may be in doubt," Keenan v. Board of Chosen Freeholders, 106 N.J. Super. 312, 316 (App. Div. 1969), or by advising the court "of certain facts or circumstances relating to a matter pending for determination." Casey v. Male, 63 N.J. Super. 255, 258 (Essex Co. Ct. 1960). The participation of amici curiae is particularly appropriate in cases with "broad implications," Taxpayers Ass'n of Weymouth Tp. V. Weymouth Tp., 80 N.J. 6, 17 (1976), or of "general public interest." County of Gloucester, Bd. Of Chosen Freeholders v. Pub. Employment Relations Comm'n, 107 N.J. Super. 150, 152 (App. Div. 1969), aff'd, 55 N.J. 333 (1970).

This matter is an appropriate one for the participation of amici curiae. The question of whether to continue to deny suffrage to those individuals on parole and probation directly affects the State's success in re-integrating these people into civic life. Moreover, the issue of disfranchising felons has garnered a good deal of public and media attention recently, with commentators noting that "[o]nce people have learned about

disenfranchisement, it has offended their sense of fairness and democracy." See Christina Bellantoni, Activists Seeking Rights for Felons, Wash. Times, Oct. 22, 2004, available at http://washingtontimes.com/metro/20041021-105220-1196r.htm (last visited Nov. 19, 2004). Furthermore, the issue implicates important state policies and is not capable of an easy determination, as seen by the United States Supreme Court having recently declined to resolve the split between the United States Circuit Courts of Appeal as to whether the Voting Rights Act of 1965 (42 U.S.C. § 1973) permits a challenge to state disfranchisement laws. See David Stout, Justices Let Prisoners Sue to Regain Right to Vote, N.Y. Times, Nov. 8, 2004, available at http://www.nytimes.com; see also Muntagim v. Coombe, 73 U.S.L.W. 3285 (2004), denying cert. to 366 F.3d 102 (2d Cir. 2004); Locke v. Farrakhan, 73 U.S.L.W. 3285 (2004), denying cert. to Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003).

The proposed amici are social scientists and criminologists who have studied and continue to study the impact of state laws and policies on criminal offenders. They are experts in community corrections, and some have served as government officials or officers in administering programs of probation or parole. They are familiar with, and have made important contributions to, the body of academic literature on this subject. Amici take an interest in this case because the legitimacy of N.J.S.A. 19:4-1(8), disfranchising people on probation and parole, depends upon the rational basis supporting

such a law as either an electoral regulation or a punitive measure. Because of their knowledge of the academic literature about probation, parole, the rehabilitation of criminal offenders, and the purposes of punishment; because of their knowledge of laws and policies affecting community corrections; because of their participation in scholarly and policy dialogue about these matters in New Jersey; and, in most cases, because of their status as concerned citizens of this State, amici have reasoned opinions on the issue of disenfranchisement of probationers and parolees and share an interest in bringing their views before the Court.

All the amici are scholars of criminal justice, conducting research or having experience as probation or parole officials, and are affiliated with local universities. Most are professors or research affiliates of New Jersey institutions of higher education, including Rutgers University, state universities such as Kean and Montclair, as well as county community colleges. Because criminal justice dialogue about New Jersey policies also includes scholars and practitioners from metropolitan areas economically and socially tied to New Jersey cities, some of the amici are from universities in the cities of New York and Philadelphia. Many of the amici have served in official capacities in the administration of community corrections, from parole officers to director of probation for the City of New York, or as directors of major research initiatives on prisoners' community re-entry. All are keenly aware of the

great challenge currently confronting community corrections as probation and parole officials strain to provide avenues to successful community re-entry for offenders who have been subjected to criminal sanctions.

In their amici curiae brief, these experts address the effect of the disenfranchisement law on regulation of the electoral process and the application of just punishment. Few issues are more important to the public interest than suffrage; thus, the conditions of R. 1:13-9 are amply satisfied here.

The participation of these experts as amici curiae will not prejudice any party. The motion for leave to participate as amici curiae is timely because this request to file an amicus brief will not delay the resolution of the appeal. Additionally, their input will assist the Court as it addresses the complex and important issues raised by the parties in this matter. Finally, should the Court grant the motion of the proposed amici, they respectfully request the opportunity to participate in oral argument.

II. SWEEPING DISFRANCHISEMENT OF FELONS CANNOT BE JUSTIFIED AS A PUNITIVE MEASURE BECAUSE IT DOES NOT SERVE ANY OF THE LEGITIMATE GOALS OF PUNISHMENT; AND IT IS PARTICULARLY DETRIMENTAL TO THE UNQUESTIONED REHABILITATIVE GOAL OF PROBATION AND PAROLE BECAUSE IT DENIES TO PAROLEES AND PROBATIONERS THE RIGHTS AND RESPONSIBILITIES OF CITIZENSHIP AND PARTICIPATION IN COMMUNITY LIFE SO NECESSARY TO REHABILITATION.

Many social scientists have expressed the view that the arguments supporting felon disfranchisement as a form of punishment are fundamentally flawed. See, e.g., Pamela S. Karlan, Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement, Stanford Law School, Public Law Working Paper No. 75, at 22-27 (2004), available at http://papers.ssrn.com/abstract=484543; Alec Ewald, Punishing at the Polls 29-31 (2003), available at http://www.demos-usa.org/pub109.cfm. Because of the unintended collateral consequence of the application of N.J.S.A. 19:4-1(8), New Jersey parolees and probationers are assumed to lose their right of suffrage because of the state interest in punishing them, yet none of the four recognized goals of punishment - neither deterrence, retribution, rehabilitation, nor incapacitation - are served by such disfranchisement. See Section II.A. infra.

In fact, disfranchisement hinders the goals of probation and parole because it dissociates the felon from the rights and responsibilities of citizenship, preventing the very rehabilitation and restoration that these programs are designed to achieve. See, e.g., ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of

Convicted Persons, at R-7, available at http://www.abanet.org/leadership/2003/journal/101a.pdf ("The criminal justice system aims at avoiding recidivism and promoting rehabilitation, yet collateral sanctions and discretionary barriers to reentry may . . . perpetuate [an offender's] alienation from the community.").

A. DISFRANCHISEMENT OF PAROLEES AND PROBATIONERS SERVES NONE OF THE FOUR LEGITIMATE GOALS OF PUNISHMENT - NEITHER RETRIBUTION, DETERRENCE, REHABILITATION, NOR INCAPACITATION - AND THUS VIOLATES N.J.S.A. 2C:1-2(b).

Disfranchisement of parolees and probationers cannot be justified as a punitive measure. It has long been established that punishment is, or should be, justified by some mixture of four penological goals – incapacitation, deterrence, rehabilitation, and retribution. See, e.g. Ewing v. California, 538 U.S. 11 (2003); State v. Roth, 95 N.J. 334, 345 (1984) (quoting State v. Ivan, 33 N.J. 197, 199 (1960)). The New Jersey Legislature has also recognized these goals in the New Jersey Code of Criminal Justice. N.J.S.A. 2C:1-2(b). In addition, that statute guarantees certain protections for offenders; namely, to make sentencing proportional, individualized, and to give notice of the types of sentences to be imposed, as follows:

> The general purposes of the provisions governing the sentencing of offenders are:
> (1) To prevent and condemn the commission of offenses;
> (2) To promote the correction and rehabilitation of offenders;
> (3) To insure the public safety by preventing the commission of offenses

> through the deterrent influence of sentences imposed and the confinement of offenders when required in the interest of public protection;
> (4) To safeguard offenders against excessive, disproportionate or arbitrary punishment;
> (5) To give fair warning of the nature of the sentences that may be imposed on conviction of an offense;
> (6) To differentiate among offenders with a view to a just individualization in their treatment;
> (7) To advance the use of generally accepted scientific methods and knowledge in sentencing offenders; and
> (8) To promote restitution to victims.

N.J.S.A. 2C:1-2(b). If one purpose of sentencing is to "advance . . . scientific methods and knowledge," 2C:1-2(b)(7), the amici respectfully submit that they have researched the methods of successful community corrections, and disfranchisement serves none of them. Further, none of the four goals of sentencing, and certainly none of the safeguards, listed in the statute are satisfied by disfranchisement of those on probation or parole.

1. Disfranchisement Does Not Serve to Incapacitate Because It Does Not Rationally Protect the Public from Electoral Fraud and the State May Not Constitutionally Deny Suffrage to Individuals Because of the Way They Might Vote.

Incapacitation is not a valid justification for parolee and probationer disfranchisement. Incapacitation, which is also termed as "restraint" or "isolation," comprises the notion that "society may protect itself from persons deemed dangerous because of their past criminal conduct by isolating these persons from society." 1 Wayne R. LaFave & Austin W. Scott,

Jr., Substantive Criminal Law § 1.5 (2d ed. 2003).

Incapacitation barely applies to the situation in which a person is on community supervision, either parole or probation. If anything, disfranchisement in this situation resembles a condition of probation or parole. In that context, incapacitation from participating in various stated community activities, such as limiting the right of association by requiring the released offender to refrain from associating with people with whom criminal activity previously had been conducted, obviously has a rational connection to incapacitation. But denying the right of suffrage does not. It incapacitates the offender from nothing except voting. This denial apparently springs from the fear that offenders, by voting, will somehow taint the electoral process. Disfranchisement would therefore be required to incapacitate the offender from doing so.

(a) Disfranchisement Does Not Logically Prevent Electoral Fraud.

The alleged purpose behind disfranchisement as a method of incapacitation is preventing electoral fraud. Preventing non-incarcerated felons from voting, though, would only make sense as incapacitation if either (1) the offender was convicted of an electoral fraud offense, or (2) the mere fact that the person had been convicted of a felony indicates that he or she is likely to commit electoral fraud or otherwise denigrate the electoral process. With regard to the first alternative, two New Jersey statutes, neither of which are being challenged in

this litigation, protect the public by preventing anyone who ever has been convicted of electoral fraud from voting. N.J.S.A. 19:4-1(6), 19:4-1(7).

The second alternative corresponds to the theory of maintaining "the purity of the ballot box," which is regarded by many New Jersey decisions as the initial rationale for disfranchising felons. In re Application of Marino, 23 N.J. Misc. 159, 162 (Co. Ct. of Comm. Pleas 1945); accord In re Application of Smith, 8 N.J. Super. 573, 574 (Co. Ct. 1950); McCann v. Superintendent of Elections of Hudson County, 303 N.J. Super. 371 (Ch. Div.), aff'd, 303 N.J. Super 352 (App. Div.), certif. denied, 149 N.J. 139 (1997). This justification is flawed for two reasons.

First, the fear exists that it is more likely that an offender would commit electoral offenses, simply because such people have a propensity to commit future crimes. This is a questionable proposition, at best. As succinctly written, in reference to a Tennessee law, "[c]rimes such as bigamy, destruction of a will, and breaking into an outhouse . . . simply have no correlation with the electoral process and do not logically indicate a greater propensity on the part of the [offender] to commit election crime." Mark E. Thompson, Comment: Don't Do The Crime If You Ever Intend To Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment, 33 Seton Hall L. Rev. 167, 191 (2002).

While the offense of breaking into an outhouse is not enumerated as a felony triggering disfranchisement in New Jersey, as it is in Tennessee, there are other felonies in New Jersey that will strip offenders of the right to vote that are just as unrelated to election fraud. See, e.g., N.J.S.A. 2C:21-30 (making the unlicensed practice of dentistry a felony); N.J.S.A. 2C:36-4 (advertising to promote sale of objects intended for use as drug paraphernalia); N.J.S.A. 2C:33-14.1 (vandalizing railroad warning signals). The Criminal Law Revision Commission, a commission authorized by the New Jersey Legislature and appointed by the Governor to draft a penal code for New Jersey in the 1960s and 1970s, recognized that to ban those who have been convicted of felonies from voting, without further justification, is based on nothing more than "an assumption of continuing dishonesty." 2 Final Report of the New Jersey Criminal Law Revision Commission: The New Jersey Penal Code: Commentary 363 (1971) [hereinafter Penal Code Commentary]. The Commission concluded that this "assumption of continuing dishonesty [was] unwarranted and self-defeating." Id. (emphasis added).

Furthermore, "the preemptive denial of the vote to curb potential fraud does not comport with the notion underlying American jurisprudence—that a person is innocent until proven guilty." Thompson, supra, 33 Seton Hall L. Rev. at 191 n.194. Without a showing of proof that a probationer or parolee has

been involved in election fraud, there is no reason to assume such involvement or future involvement.

Moreover, even if the fear that offenders are more likely to commit election fraud had some grounding in truth, blanket disfranchisement would be an excessive solution to the problem. See Note: The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and the "Purity of the Ballot Box", 102 Harv. L. Rev. 1300, 1303 (1989). Such a solution is comparable to enacting a law to prevent any ex-convict from entering a bank because of the possibility that he or she would rob it. There are certainly other less restrictive and less burdensome means at the Legislature's disposal to forestall vote fraud. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 353 (1972) ("[The state] has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared."); accord Richardson v. Ramirez, 418 U.S. 24, 80 (1974) (Marshall, J., dissenting).

(b) The State Cannot Prevent Individuals from Voting for Fear of How They Might Vote.

The fear might not necessarily be that offenders would commit an electoral offense, but rather that they would use their vote to achieve immoral ends. The lower court expressed a suggestion along these lines when it stated that a "possibility [for a legitimate rational goal of N.J.S.A. 19:4-1(8)] is that individuals can be better trusted to exercise their votes in a public serving manner once they have completed their sentences." (Ja53.) This view really sees disfranchisement "as a kind of

political quarantine, a way of preserving the health of the political body." Ewald, supra, at 25.

The flaw in this conception is that twentieth century jurisprudence decries any legislative attempt to prevent individuals from voting because of the way they might vote. Carrington v. Rash, 380 U.S. 89, 94 (1965) ("'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."); Romer v. Evans, 517 U.S. 620, 634 (1996). Romer v. Evans, in fact, expressly rejected the holding of a nineteenth century case, Davis v. Beason, 133 U.S. 333 (1890), which had concluded that advocates of polygamy could be disfranchised because of their support for an illegal practice. Romer, 517 U.S. at 634. As the Supreme Court of Canada succinctly noted, "[d]enial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of . . . democracy." Sauvé v. Canada, [2002] 3 S.C.R. 519, 550 (Canada)

The lower court erred, therefore, in quoting with approval a passage from a Second Circuit decision, which had rejected a challenge to New York's disfranchisement law and had justified disfranchisement by noting that it is not

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

Green v. Board of Elections, 380 F.2d 445, 451 (2d Cir. 1967), cert. denied, 389 U.S. 1048 (1968). First of all, since prosecutors and judges are not elected in New Jersey, this rationale is much less convincing as applied to New Jersey law than it was to New York law.

More importantly, though, the Green rationale flies in the face of Romer because it is viewpoint discrimination justifying disfranchisement based on the way that felons might vote. Justice Thurgood Marshall, in his dissent in Richardson v. Ramirez, noted the importance to the democratic process of not suppressing views hostile to those of the temporal majority through the expedient of disfranchisement, writing:

> The process of democracy is one of change. Our laws are not frozen into immutable form, they are constantly in the process of revision in response to the needs of a changing society. . . . The ballot is the democratic system's coin of the realm. To condition its exercise on support of the established order is to debase that currency beyond recognition.

Richardson, 418 U.S. at 82-83 (Marshall, J., dissenting).

Even the view that disfranchisement of parolees and probationers is merely a means to promote informed and conscientious voting, as opposed to deterring viewpoints hostile to society, is not supported by modern jurisprudence. The United States Supreme Court "has consistently rejected restrictions on the franchise as a reasonable means of promoting intelligent or responsible voting." Karlan, supra, at 8 (citing

Dunn v. Blumstein, 405 U.S. 330, 354-56 (1972); Kramer v. Union Free School District, 395 U.S. 621, 632 (1969)).

Other logical problems flow from the Green rationale as well. Notably,

> [n]o evidence suggests that [offenders] would base their votes solely, or even partially, on a candidate's positions on penal issues rather than other matters of policy and politics. Furthermore, even if [they] were to base their votes on matters of criminal justice, it does not follow that their positions on these matters necessarily would be more permissive than those of the population as a whole.

Note: The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and the "Purity of the Ballot Box", supra, 102 Harv. L. Rev. at 1302 (citations omitted).

In fact, empirical evidence suggests that not only do probationers and parolees hold positions that are not more permissive than the citizenry in general, but they will also not necessarily vote against incumbents or politicians with conservative views. See 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 (Mary Pattillo et al. eds., 2004) [hereinafter "Uggen & Manza, Lost Voices"]. In spite of some commentators' assumptions to the contrary, the political opinions of those on probation and parole actually vary, generally mirroring those of the public at large. Id.

Empirical evidence aside, however, the fact remains that, regardless of how non-incarcerated felons would vote if they were allowed to do so, the State cannot constitutionally withhold the franchise from them in order to prevent them from voting one way or the other. As the Supreme Court of Canada noted in its decision that all felons, incarcerated and non-incarcerated, have the right to vote:

> [T]he right to vote must be protected against those who have the capacity, and often the interest, to limit the franchise. Unpopular minorities may seek redress against an infringement of their rights in the courts. But like everybody else, they can only seek redress against a dismissal of their political point of view at the polls.

Sauvé, 3 S.C.R. at 546. In short, a political quarantine is not a legitimate State purpose, and cannot justify disfranchisement as incapacitation.

2. Deterrence Does Not Justify Parolee and Probationer Disfranchisement.

Deterrence also logically fails as a justification for stripping the parolee and probationer population of the right to vote. Deterrence is comprised of two concepts. General deterrence is defined as the idea that "the sufferings of the criminal for the crime he has committed are supposed to deter others from committing future crimes, lest they suffer the same unfortunate fate." LaFave & Scott, Substantive Criminal Law, supra, at § 1.5. Particular (or "specific") deterrence, also sometimes called prevention, "aims to deter the criminal himself (rather than to deter others) from committing further crimes, by

giving him an unpleasant experience he will not want to endure again." Id.

(a) Disfranchisement Does Not Promote General Deterrence Because Disfranchisement Is an Invisible Punishment.

General deterrence depends upon a punishment being widely known to those it hopes to deter, and cannot occur where a sanction exists only in obscurity. "Invisible punishment" is a term coined by the criminologist Jeremy Travis to describe, among other things, those criminal sanctions that operate to diminish "the rights and privileges of citizenship and legal residency in the United States." Jeremy Travis, Invisible Punishment: An Instrument of Social Exclusion in Invisible Punishment: The Collateral Consequences of Mass Imprisonment 15-16 (Marc Mauer & Meda Chesey-Lind eds., 2002). Such sanctions are invisible for three reasons.

First, it is impossible to gauge either the effectiveness or the impact of these sanctions and they "operate largely beyond public view." Id. at 16. Second, they are generally defined as "'disabilities' rather than punishments" and operate by law rather than by judicial sentencing decision. Id. They thus consistently evade review in sentencing policy debates by "legislators, criminal justice officials, and legal analysts." Id. Finally, "[u]nlike sentencing statutes, [these sanctions] are not typically considered by judiciary committees[,] . . . are often added as riders to other, major pieces of legislation, and therefore are given scant attention in the public debate

over the main event." Id. As is detailed in Section V of this brief, N.J.S.A. 19:4-1(8) has just this type of legislative history and was given far less consideration than the other punishments enumerated in the Criminal Justice Code contemporaneously considered. See Section V, infra.

It is obvious that if a punishment is invisible, it cannot operate as an effective deterrent because few are even aware of its existence. See Howard Itzkowitz & Lauren Oldak, Note: Restoring the Ex-Offender's Right To Vote: Background and Developments, 11 Am. Crim. L. Rev. 721, 735 (1973) ("It is . . . quite likely that the potential offender would not realize that his conviction would result in the loss of the right to vote because this punishment generally receives little attention and because its delineation at times has been so vague as to cause administrative confusion.") (citations omitted).

(b) Disfranchisement Does Not Promote Particular Deterrence Because Incarceration - Or the Threat of It - Would Overshadow Any Deterrent Effect that Disfranchisement During Probation or Parole Would Provide.

While an invisible punishment cannot act as a general deterrent, it still may theoretically specifically deter particular people. It is unlikely to do so, though. First, even after criminal conviction, most probationers and parolees themselves are probably unaware of their disfranchised status until they try to vote, since the disfranchisement statute is scarcely publicized. Additionally, unlike probation conditions, in which notification to the offender is statutorily guaranteed

by requiring the judge to supply a written copy of the conditions and the defendant to acknowledge his or her receipt of them in writing, N.J.S.A. 2C:45-1(f), no statute requires anyone to inform an offender that he or she will lose the right to vote upon conviction. Offenders can therefore experience no preventive deterrent effect. Specific deterrence of these parolees and probationers is speculative, at best.

Even if disfranchisement of offenders did act as a deterrent of recidivism, however, it is difficult to understand why stripping offenders of their right to vote during probation and parole would be more of a deterrent than disfranchising them during incarceration, an almost certain result should probation be violated. If the offender does not care about voting, neither period of disfranchisement would deter him or her from recidivism. If the offender does want to vote, he or she would avoid recidivism to prevent himself from losing the vote while in prison, as well as from the fear of serving a prison term. The disfranchisement of parolees and probationers cannot logically deter anyone from committing crimes to a greater extent than would disfranchisement during incarceration, or the threat of incarceration for those who received probation.

Empirical data also contradicts the conclusion that felon disfranchisement, of any kind, acts as a deterrent. States with disfranchisement provisions have a greater per capita crime rate than nearby states that do not disfranchise their convicted offenders. Itzkowitz & Oldak, supra, 11 Am. Crim. L. Rev. at

734 & n.96; see also Fed. Bureau of Investigation, Crime in the United States, tbl. 5 (2003) (reflecting, inter alia, the per capita crime rate of New Jersey, disfranchising parolees and probationers, at 2910.2 per 100,000 inhabitants, that of Pennsylvania, disfranchising only inmates, at only 2829.3, and that of Delaware, disfranchising all felons as well as ex-felons for five years following completion of their sentences, at a staggering 4042.4), available at http://www.fbi.gov/ucr/cius_03/xl/03tbl05.xls. This data is unsurprising in view of other studies showing that "lengthy prison sentences are not effective deterrents, while fear of arrest, conviction, and even the simple possibility of incarceration are." Itzkowitz & Oldak, supra, 11 Am. Crim. L. Rev. at 734. If lengthy prison sentences do not deter crime, then collateral consequences of conviction, such as disfranchisement, are also likely to be poor deterrents. Id.

Furthermore, disfranchisement runs a strong risk of sending the wrong kind of message to offenders. Rather than the desired deterrent message that crime does not pay, disfranchisement "sends the message that those who commit serious breaches are no longer valued as members of the community, but instead are temporary outcasts from our system of rights and democracy." Sauvé, 3 S.C.R. at 548. In other words, disfranchisement cannot deter offenders from committing crimes; it can only alienate them.

3. Retribution Is Not a Justification for Stripping Parolees and Probationers of the Right to Vote

Because Blanket Disfranchisement Renders Punishment Disproportionate.

Retribution is an important goal of punishment recognized in New Jersey law, but blanket disenfranchisement does not apply the retributive principle correctly. That is because retributive justice encompasses the concept of proportionality, and disenfranchisement is a gratuitous "add-on" to otherwise deserved punishment.

Retribution, as a theory of punishment, involves the imposition of punishment "because it is fitting and just that one who has caused harm to others should himself suffer for it." LaFave & Scott, Substantive Criminal Law, supra, at § 1.5. "The propensity for retribution is deeply ingrained in man's nature and can be traced as far back as the biblical concept of 'an eye for an eye, a tooth for a tooth'" Itzkowitz & Oldak, supra, 11 Am. Crim. L. Rev. at 735-36 (quoting Exodus 21:23-25). But, as any Biblical or legal scholar will be quick to point out, the concept of proportionality is clearly part of that retributive statement. Society may require an eye for an eye, but it may not demand an eye for a fingernail. See State v. Yarbough, 100 N.J. 627, 630 (1985), cert. denied 475 U.S. 1014 (1986) ("[S]entencing courts should be guided by the [Criminal Justice] Code's paramount sentencing goals that punishment fit the crime, not the criminal.").

Even Justice Scalia of the United States Supreme Court, who does not accept the concept of proportionality in conjunction with the other goals of punishment, recognizes that

"[p]roportionality is inherently a retributive concept, and perfect proportionality is the talionic [retaliatory] law." Harmelin v. Michigan, 501 U.S. 957, 989 (1991) (Scalia, J., concurring). As the Supreme Court of Canada recognized in its decision holding felon disfranchisement unconstitutional:

> Retribution in a criminal context . . . represents an objective, reasoned, and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct.

Sauvé, 3 S.C.R. at 552 (citation omitted). Professor Andrew von Hirsch, often called "the father of 'just deserts sentencing,'" succinctly sets out the tenets of retribution-based sentencing:

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

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

Blanket disfranchisement violates proportionality in two ways. First, it does not distinguish among felons as to the degree of culpability and severity of their crimes. Under New

Jersey law, the unlicensed practitioner of dentistry who is on probation, see N.J.S.A. 2C:21-30, is just as automatically stripped of his right to vote as the parolee who has been convicted of murder. As the Sauvé court noted, "[i]t is not only the violent felon who is told he is an unworthy outcast; a person imprisoned for a non-violent or negligent act, or a[] . person suffering from social displacement receives the same message. They are not targeted but they are caught all the same." Sauvé, 3 S.C.R. at 551-52.

Second, insofar as disenfranchisement is a collateral consequence of conviction, it adds extra suffering over and above that which would be deserved from the sentence judicially imposed for the crime convicted.

While there are certain restrictions that are always imposed upon prisoners in a sweeping fashion regardless of the severity of the prisoners' offenses, such restrictions are necessary incidents to incarceration. Ewald, Punishing at the Polls, supra, at 29. Depriving incarcerated felons of the right to assemble or to enjoy privacy are appropriate safeguards for protecting society. Id. Such a restriction may be regarded as regulatory, as the trial court held. But the deprivation of the right to vote is not such a safeguard, as discussed in Section III, infra. As noted by prominent social scientist Marc Mauer:

> [C]riminal convictions do not otherwise result in the loss of basic rights: convicted felons maintain the right to divorce, to own property, or file lawsuits. The only restrictions generally placed on

> these rights are ones that relate to security concerns within a prison.

Marc Mauer, Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration, 12 Fed. Sentencing Rep., Mar./Apr. 2000, at 248, 250. In the absence of such a regulatory need, the lack of proportionality in New Jersey's disfranchisement statute renders it unjustifiable as satisfying the retributive goal of punishment.

Moreover, the "[u]se of disenfranchisement as punishment for the sake of punishment can only exacerbate such hostility as exists between the criminal and society and, indeed, may lead to further injury to the community." Itzkowitz & Oldak, supra, 11 Am. Crim. L. Rev. at 736. Criminologists note that offenders accept punishment that they know they deserve; this is fundamental to "just deserts" retributive sentencing. But offenders become resentful and less amenable to rehabilitation when they perceive they are being punished too harshly. In the words of one parolee interviewed for a study of disenfranchisement's effects:

> I think that just getting back in the community and being a contributing member is difficult enough . . . and saying, "yeah, we don't value your vote either because you're a convicted felon" . . . But I, hopefully, have learned, have paid for that and would like to someday feel like a, quote, "normal citizen," a contributing member of society, and you know that's hard when every election you're constantly being reminded, "Oh yeah, that's right, I'm ashamed." . . . It's just like a little salt in the wound. You've already got that wound and it's trying to heal . . . but it's like it's still open

> enough so that you telling me that I'm still really bad because I can't [vote] is like making it sting again . . . haven't I paid enough yet?

Uggen & Manza, Lost Voices, supra, at 183.

Such a disproportionate response to felony conviction for parolees and probationers is particularly pernicious because the paramount purpose of both probation and parole is to facilitate re-entry into society. See Section II.B. infra. The very intent of parole and probation runs at cross purposes to the effects of the disfranchisement statute. In relation to the retributive purpose of punishment, such a purpose is served by the term of incarceration or the terms of probation that are deemed to comport with the severity of the offense and degree of blameworthiness of the offender. This purpose has already been satisfied by the time that parole or terms of probation have been imposed and served, and the rehabilitative purpose takes over at the stage of community release. See Section II.B. infra.

4. Stripping Parolees and Probationers of the Right To Vote Is Not Only Unjustified as Rehabilitation, but Hinders the Rehabilitative Effect of Parole and Probation.

Disfranchisement cannot serve any rehabilitative ends. The American Bar Association and numerous social scientists and criminologists have voiced their concerns 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. See ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, supra, at R-7; Jeremy Travis, Invisible Punishment: An Instrument of Social Exclusion, supra, at 26 ("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 Nonincarcerated Felons in the United States, 2 Perspectives on Politics 491, 502 (2004) ("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."), available at http://www.soc.umn.edu/~uggen/Manza_Uggen_POP_04.pdf [hereinafter "Manza & Uggen, Punishment and Democracy"]; Itzkowitz & Oldak, supra, 11 Am. Crim. L. Rev. at 732 ("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.").

These concerns are not new. In fact, when the Constitutional Convention of 1947 was considering amendments to New Jersey's Constitution, Mrs. Katzenbach, a member of the Committee on Rights, Privileges, Amendments and Miscellaneous Provisions inquired "as to the social rehabilitation of a criminal - a man or woman who is released from jail and is not

permitted to vote when he or she goes to the polls." 3 State of New Jersey Constitutional Convention of 1947, at 22. Her concern was left unanswered. Id.

Nor are these concerns merely academic conjecture. The parolee interviewed by Christopher Uggen and Jeff Manza makes it clear that disfranchisement is impacting real human beings in a tangible, oppressive way. Uggen & Manza, Lost Voices, supra, at 183 ("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.").

The lower court's novel theory supporting disfranchisement as a rehabilitative tool is severely flawed. Re-enfranchisement at the end of the parole or probation term cannot rationally serve as an incentive to complete probation or parole successfully because the re-enfranchisement is automatic. While providing incentives is, of course, an important part of the rehabilitative process, such incentives only work when the conduct being encouraged involves an active exertion on the part of one being encouraged and discretion on the part of the authorities providing the incentive. See, e.g., State v. Des Marets, 92 N.J. 62, 71 (1984) (praising, as a form of rehabilitation, "indeterminate sentencing in youth correctional facilities . . . [because it] allow[s] discretion to the custodial authorities to terminate a sentence if an offender is successfully rehabilitated, thus greatly increasing the incentive for rehabilitation"). There is little, if any,

rehabilitative effect in a process that simply encourages an offender to wait out his parole or probation term without any regard for how well or how earnestly the offender has attempted to rehabilitate himself or prepare himself for reentry into society.

Similarly, the lower court's claim that there is an educative purpose to disfranchisement is also flawed. N.J.S.A. 19:4-1(8) does not, as the lower court suggests, "serve[] an important expressive function that reaffirms the importance of respect for law and the community of law-abiding citizens . . . ." This proposition, as the Sauvé court determined, has it "exactly backwards." Sauvé, 3 S.C.R. at 544. As that court noted, "denying [felons] the right to vote is bad pedagogy. It misrepresents the nature of our rights and obligations under the law, and it communicates a message more likely to harm than to help respect for the law." Id. at 543.

The irony of disfranchisement is that the message it actually sends is a denial of "the basis of democratic legitimacy." Id. at 544. As the Sauvé Court stated:

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

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

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

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

B. THE PURPOSE OF PROBATION AND PAROLE HAS LONG BEEN RECOGNIZED AS REHABILITATIVE, AND THUS IS PARTICULARLY HARMED BY THE EFFECTS OF DISFRANCHISEMENT.

Even if one believed that some legitimate retributive or regulatory rationale were served by disfranchising those on parole and probation, such a rationale would be frustrated if it conflicted with the general purpose of probation and parole. See N.J.S.A. 2C:1-2(c) (giving deference to interpretations of statutory language in the Code of Criminal Justice that "further the general purposes" of the provisions governing sentencing). Although the disfranchisement statute is not a part of the Code, this rule of construction is both sensible and apt.

To the extent that N.J.S.A. 19:4-1(8) disfranchises those on parole and probation, it undercuts the general purpose of those programs - which is to rehabilitate and facilitate the re-entry of offenders into society. See, e.g., State v. Black, 153 N.J. 438, 447 (1998) ("[T]he general purpose of parole [is] rehabilitative rather than punitive in nature."); Adamo v. McCorkle, 13 N.J. 561, 563 (1953), cert. denied, 347 U.S. 928 (1954) ("The main hope [of probation] is that during the period of probation the violator will establish himself as a law-abiding and useful member of the public . . . ."). The courts have also recognized that the role of community corrections services, such as parole and probation officers, is to "act as guide and counselor to the [offender] in his efforts to achieve and maintain rehabilitation." State v. Davis, 67 N.J. 222, 226 (1975). Contrary to the views of the lower court, it is this

central difference between the purpose of parole and probation and the purpose of incarceration that justifies the distinction the plaintiffs make in challenging the felon disfranchisement statute.

The denial of suffrage is not, as the lower court asserts, "as much irrational in the custodial context as in the context of probation or parole." (Ja57.) Indeed, although the lower court accurately states that "[p]unishment and other purposes can be combined" (Ja57), such a combination should take into account whether the gains a statute might provide in a punitive context would outweigh the harms it might cause in a rehabilitative context. Because rehabilitation is so primary to probation and parole, any small punitive benefits achieved by denying the vote to those undergoing those sentences are far outbalanced by the consequent dissociation from society that disfranchisement causes.

1. The Purpose of Parole is Solely Rehabilitative Because the Punitive Elements of Sentencing Are Satisfied When the Individual Commences Parole.

The purpose of parole is almost solely rehabilitative. The New Jersey Supreme Court has reiterated this statement time after time. The presumption is "that the punitive aspects of an inmate's sentence have been satisfied by the time he or she becomes eligible for parole." State v. Black, 153 N.J. 438, 447 (1998); see also New Jersey Parole Board v. Byrne, 93 N.J. 192, 205 (1983); In re Parole Application of Trantino, 89 N.J. 347, 370 (1982).

The one limited exception to this general rule exists for those individuals who were sentenced prior to the passage of the Code of Criminal Justice in 1979 and are on parole now. Trantino, 89 N.J. at 368-70. Since the Code was enacted over twenty-five years ago, though, the number of parolees falling into that category is vanishingly small. Any parolees falling into that category, having likely spent over twenty years in prison, would almost certainly be thought to have completed the punitive aspects of their sentences by now.

Because of the almost total rehabilitative purpose associated with parole, any legitimate rationale for disfranchising parolees must help achieve that rehabilitative goal, or, at the very least, not frustrate it. N.J.S.A. 19:4-1(8), though, not only frustrates, but obstructs, rehabilitation by dissociating offenders from society and, by denying them the right to participate in the political process, makes full reintegration into society symbolically impossible and practically more difficult. See Section II.A.4 supra.

2. The Primary Purpose of Probation Is to Rehabilitate.

The purpose of probation, though less clear than the purpose of parole, is primarily to rehabilitate. Probation in New Jersey has been characterized as everything from "'a period of grace in order to aid . . . rehabilitation'" to being "essentially punitive in nature." State v. Ryan, 171 N.J. Super. 427, 440-41 (App. Div. 1979) (internal citations omitted), rev'd on other grounds, 86 N.J. 1 (1981), cert.

denied, 454 U.S. 880 (1981). It is punitive under a retributive "just deserts" rationale because it is a sentence proportionate to the severity of harm and blameworthiness of the offender. Nonetheless, probation is also intended to be simultaneously reformative. N.J.S.A. 2C 1-2 (b) lists several purposes of punishment, rehabilitation among them. Rehabilitation is a category of punishment, not an alternative to it, and the rehabilitative purpose prevails over the incapacitative purpose in some situations. Probation is one of those situations.

The language of the New Jersey Code of Criminal Justice emphasizes the difference between the goals of probation and incarceration. Under the Code, there is only a presumption of non-imprisonment, i.e. probation, when the crime committed is a first offense and where it is a crime of the third or fourth degree. N.J.S.A. 2C:44-1(e.) For an offender who has committed a graver offense to be sentenced to probation, the court must find "'truly extraordinary and unanticipated circumstances.'" State v. Roth, 95 N.J. 334, 358 (1984) (internal citations omitted). Therefore, probation is only imposed because of the criminal justice system's recognition that the probationer is not likely to offend again and that the crime committed was not among the more serious offenses. Implicit in this recognition is the fact that individuals on probation should be permitted a chance, not accorded the recidivist or those committing graver crimes, to reform - free from confinement.

While the New Jersey Supreme Court has stated that "probation has an inherent sting" and that the restrictions associated with probation are "realistically punitive in nature," In re Buehrer, 50 N.J. 501, 509 (1967), a careful reading of both Buehrer and more recent cases relying upon it reveals that punitive measures imposed as conditions of probation are only justified if they also further rehabilitation or constitute a reasonable administrative need. See id. (imposing probation with the rehabilitative "hope and intent to convince the[] defendants [who defied a court order] of the error of their thinking"); State v. Reyes, 207 N.J. Super. 126, 141 (App. Div.), certif. denied, 103 N.J. 499 (1986) (upholding drug program's rules prohibiting sexual contact between program participants as a reasonable administrative need of the program); State v. Krueger, 241 N.J. Super. 244, 257-58 (App. Div. 1990) (finding that probationary condition excluding defendant, a compulsive gambler, from casino hotels was reasonably related to his rehabilitation).

Here, the loss of suffrage serves neither a reasonable regulatory need, see Section III, infra, nor can it be justified as rehabilitative, see Section II.A.4 supra. It is therefore unreasonable to allow the continued disfranchisement of those on probation when, without exposing the rest of society to any realistic level of danger, the act of voting could help achieve the benefit to both the offender and the community of knitting the probationer back into community life.

III. DISFRANCHISEMENT CANNOT BE JUSTIFIED AS A REGULATION BECAUSE IT DOES NOT RATIONALLY RELATE TO MAINTAINING THE PURITY OF THE BALLOT BOX.

New Jersey courts have posited that the felon disfranchisement statute was not meant to be punitive, but rather regulatory in nature. In re Application of Marino, 23 N.J. Misc. at 161. ("The purpose . . . was not to invoke a punishment or penalty . . . but was, in accordance with the then viewpoint of the State of New Jersey, to maintain the purity of our elections by excluding those would-be voters whose status was deemed to be inimical thereto.") (emphasis added). Such a justification does not make sense today.

Disfranchisement of parolees and probationers cannot be heedlessly justified as a regulatory measure. Although viewing disfranchisement as a method to keep elections pure may have been in accord with nineteenth century judicial thought which saw "the ability to vote as 'purely a conventional right' which 'may be enlarged or restricted, granted or withheld, at pleasure, with or without fault,'" Karlan, supra, at 6, even the Marino court realized, by characterizing the rationale as a viewpoint belonging to the past, that such a cramped vision of the right to vote is drastically inconsistent with the view of the courts today, almost two centuries later.

The United States Supreme Court has described "'the right to vote freely' as 'the essence of a democratic society,' and declared that 'any restrictions on that right strike at the heart of representative government.'" Id. (quoting Reynolds v.

Sims, 377 U.S. 533, 555 (1964)). The New Jersey Supreme Court has used similarly compelling language. See, e.g., Gangemi v. Rosengard, 44 N.J. 166, 170 (1965) ("[T]he right to vote has taken its place among our great values. . . . It is the citizen's sword and shield. . . . It is the keystone of a truly democratic society.").

Moreover, to be a valid regulation, a sanction must bear a rational relationship to the goal of the regulation. See Doe v. Poritz, 142 N.J. 1, 62-63 (1995). The New Jersey Supreme Court made this quite clear by acknowledging the:

> common-sense rule that where a provision or sanction bears no rational relationship to the remedial goal and can only be explained as evidencing an intent to punish, it will be held to constitute punishment for constitutional purposes. . . . [T]he ultimate question is whether this statute, this sanction, is an impermissible use of government's power to punish, or whether it is an honest, rational exercise of government's power, aimed solely at effecting a remedy, its provisions explainable as addressed to that which is being remedied, its deterrent or punitive impact, if any, a necessary consequence of its remedial provisions.

Id.

The State, therefore, in order to justify the disfranchisement statute as a regulation, must show that the statute's effect somehow prevents electoral fraud or otherwise maintains the purity of the ballot box. As the United States Supreme Court noted, "[p]reservation of the 'purity of the ballot box' is a formidable-sounding state interest." Dunn v.

Blumstein, 405 U.S. 330, 345 (1972). The State has the burden, however, of showing a particular impurity feared and that the statute is necessary to prevent such an impurity. See id. at 345-46.

The amici do not question that maintaining the purity of the ballot box is a legitimate regulatory purpose, but rather wish to draw the Court's attention to the fact that the felon disfranchisement statute fails to establish a rational relationship to that purpose. Disfranchisement does not protect against electoral fraud because there is no evidence that parolees or probationers would commit electoral offenses at any greater rate than persons not under community supervision. See Section II.A.1(a) supra. Considering that they are indeed under state supervision, it is logical to conclude that they would commit electoral offenses even less often than other citizens would. If, by contrast, the goal of maintaining the purity of the ballot box is meant to be effected by any other kind of protection, such as securing the ballot box from counter-majoritarian viewpoints, such a purpose is constitutionally impermissible. See Section II.A.1(b) supra.

Therefore, stripping the right to vote from those on probation and parole does not safeguard the interests of society in any way. Any statute doing so results in, at best, an arbitrary exercise of power and, at worst, viewpoint discrimination that cannot be squared with contemporary jurisprudence.

IV. LOCKE'S SOCIAL CONTRACT THEORY DOES NOT JUSTIFY DENYING FUNDAMENTAL RIGHTS TO THE PAROLEE AND PROBATIONER POPULATION.

The lower court's reliance on the "social contract"[1] theory, developed by John Locke, and employed by the court in Green v. Board of Elections, is misplaced. Under the social contract theory, as accurately reflected in Judge Friendly's opinion,

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

Green v. Board of Elections, 380 F.2d 445, 451 (2d Cir. 1967) (quoting John Locke, An Essay Concerning the True Original, Extent and End of Civil Government in Two Treatises of Government, ch. 7, § 89, available at http://www.constitution.org/jl/2ndtreat.htm). To put it simply, "if you break the rules, you don't get to help make the rules." Ewald, supra, at 23. The lower court, however, did not apply Locke's theories correctly.

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[1] The terms "social compact" and "social contract" are used interchangeably by social scientists in referring to the theories of John Locke, Jean-Jacques Rousseau, and Thomas Hobbes. Modern philosophers who take their intellectual foundations from Locke and Rousseau, most notably the respected contemporary philosopher John Rawls, prefer "social contract theory." It is that term, therefore, that amici will use to refer to the doctrine, except when actually quoting notwithstanding the use of the term "social compact" by the lower court and the Green court.

A. FUNDAMENTAL RIGHTS ARE NOT ENTIRELY EXTINGUISHED BY A SOCIETAL OFFENSE, AND BLANKET APPLICATION OF SOCIAL CONTRACT THEORY IS IRRECONCILABLE WITH RECOGNIZED CONSTITUTIONAL RIGHTS OF OFFENDERS.

While social contract justifications for denying the right to suffrage may sound just and reasonable at first blush, an examination of the principles that we, in this nation, espouse shows that Americans do not apply this rule in all situations, nor do we wish to. We do not, for instance, limit an offender's right to freedom of speech or to the press or to petition, even while the offender is in custody. Granting these freedoms, however, can be as influential, if not more so, in affecting public policy and the creation of laws as the casting of one vote. As Alec Ewald notes, "[a] well-placed op-ed essay or letter to the editor—which [any offender, whether in custody or not,] may write—will influence an election much more than any single ballot." Ewald, supra, at 32. In spite of this fact, rights of free speech or to petition the government are viewed as being so fundamental that they cannot be taken away by the government absent a "'clear and present danger.'" Id. (internal citation omitted).

In order for us to truly adhere to Locke's social contract theory, offenders would have to be ejected from the community in a form of societal excommunication to prevent their interference with our social contract. Yet we do not do this. The Supreme Court of Canada succinctly epitomized both Canadian and American principles by noting that:

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

Sauvé, 3 S.C.R. at 551.

B. ANY RESTRICTION OF LIBERTY THAT SOCIAL CONTRACT THEORY MAY ALLOW IS SATISFIED BY A TERM OF INCARCERATION OR BY TERMS OF PROBATION, AND WHEN A PERSON IS RELEASED TO THE COMMUNITY, THAT PERSON HAS RE-ENTERED THE SOCIAL CONTRACT.

Even if the social contract theory were accepted, Judge Friendly's application of the theory to disfranchisement of offenders does not comport with Locke's teachings. First, "rationality and proportionality sharply limit the power to penalize ceded to the state by Locke's contracting individuals." Note: The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and the "Purity of the Ballot Box", supra, 102 Harv. L. Rev. at 1306; see also Locke, Two Treatises of Government, supra, at ch. 2 § 8 (noting that the power to punish

extends only "so far as calm reason and conscience dictate what is proportionate to [the] transgression"). As noted previously, though, blanket disfranchisement is not proportionate, see Section II.A.3 supra; thus Locke's theories cannot be applied to N.J.S.A. 19:4-1(8) ab initio.

A second objection exists because the description of a social contract implies that those who have broken the contract have chosen freely to do so. N.J.S.A. 19:4-1(8), however, strips the right to vote from those individuals who have committed crimes of lesser mental states. E.g. N.J.S.A. 2C:5-4(a) (liability for conspiracy, i.e. the act of another); N.J.S.A. 2C:11-4(b.)(2) (liability for manslaughter "committed in the heat of passion"). Thus, 19:4-1(8) penalizes even those who have not willfully broken the social contract.

Furthermore, when a person is released into the community, that person has re-entered the social contract. Social contract theory posits an original "state of nature" in which each individual human being lives as the "noble savage." See Leighton D. Armitage, The Social Contract (2004) (summarizing the ideas of Hobbes, Locke, and Rousseau), available at http://smccd.net/accounts/armitage/TSC.pdf. Eventually, people must come together to protect themselves against forces of nature and bad acts of other people, and to gain the benefits of collaboration in assuring the means of survival. Id. In the words of Jefferson's Declaration of Independence, which was heavily influenced by Locke's work, "governments are instituted

among men" so that people can organize their social endeavors in order to secure "life, liberty, and the pursuit of happiness." The Declaration of Independence para. 1 (U.S. 1776). If a person breaks the rules of this civil society, that person will be deemed to have broken the contract and may be removed from the society. Thus, imprisonment for transgressions is possible - though in Locke's time, banishment or incarceration in a local jail and not lengthy imprisonment would probably have been the punishment, since penitentiaries had not yet been invented. But Locke's requirement of proportionality would restrain this imprisonment/banishment so that it would apply only to the most severe offenses, and would end when it became disproportionately severe. At that point, the offender would re-enter the social contract.

Clearly, Locke's philosophy may be said to apply to policies about punishment, but the philosophy rejects permanent disfranchisement. Probationers, who never leave civil society because their transgressions are not so severe as to regard them as having broken the social contract, should never be disfranchised. Parolees, when they re-enter the community, should be re-enfranchised.

V. THE HISTORY OF THE FELON DISFRANCHISEMENT PROVISIONS MAKES CLEAR THAT THE HISTORICAL BASIS FOR DISFRANCHISING THOSE ON PAROLE AND PROBATION IS OBSOLETE AND THAT THE CURRENT STATE OF THE LAW WAS FOUNDED ON HASTY LEGISLATIVE COMPROMISE, THUS CONFIRMING THE LACK OF RATIONAL BASIS IN THE LAW.

The State cannot even justify disfranchisement of parolees and probationers as the product of long, unbroken tradition with which the courts should decline to tamper. Even a brief analysis of New Jersey's constitutional and legislative history shows that the provisions disfranchising those on parole and probation have been neither consistent nor unbroken. Nonetheless, disfranchisement of these individuals persists as an unfortunate relic of the past, in spite of the obsolescence of original purpose of the law stripping these people of the right to vote.

The evolution of both the constitutional and statutory provisions in New Jersey governing the rights of felons to vote shows that those provisions have become increasingly more permissive. Although those provisions have not kept pace with the times, the histories of the passage of successive constitutional and legislative enactments on this subject betray a growing awareness of the need to broaden the franchise, or, at least, not to restrict it arbitrarily. The Constitution of 1947, for instance, recognized the folly of placing the decisions about felons' suffrage in the constitution, which is difficult to amend, and instead vested the Legislature with the discretion to create laws restricting such right to suffrage if it saw fit. At the statutory level, the franchise was broadened

to the extent that New Jersey had enacted a statute enfranchising those felons on parole and probation in 1978, and it was only by hasty legislative compromise that the act was repealed before it could take effect.

A. THE DEVELOPMENT OF THE DISFRANCHISEMENT PROVISION IN THE CONSTITUTION INDICATES ONLY THE DESIRE TO LEAVE THE DECISIONS REGARDING SUCH DISFRANCHISEMENT TO THE DISCRETION OF THE LEGISLATURE.

A comparison of the provisions in the 1844 Constitution and the 1947 Constitution regarding the disfranchisement of those convicted of crimes betrays a startling distinction. Compare N.J. Const. of 1844, art. II, para. 1 with N.J. Const. of 1947, art. II, § 1, para. 7. The 1844 Constitution permanently disfranchised all convicted persons of certain enumerated crimes, without regard to legislative enactment, except for those persons who were pardoned or restored to the right of suffrage by law. N.J. Const. of 1844, art. II, para. 1; see also Marino, 23 N.J. Misc. at 162-63 (explaining the effect of art. II, para. 1). In contrast, the wording of the present Constitution says only that "[t]he Legislature may pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate." N.J. Const., art. 2, § 1, para. 7 (emphasis added).

Therefore, it overreaches to state, as the lower court did, that the drafters of the Constitution "in all likelihood specifically intended the exact sort of statute that is being challenged here." (Ja58.) Instead, the only conclusion that can be drawn in comparing the 1947 Constitution with the 1844

Constitution is that the drafters intended that the Legislature should have discretion to determine which felons may be disfranchised, for what period of time, and under what conditions. This motivation is confirmed in the debates of the 1947 Constitutional Convention, in which the Committee on Rights, Privileges, Amendments and Miscellaneous Provisions wrestled with the disfranchisement clause. 3 State of New Jersey Constitutional Convention of 1947, at 21-22 (reflecting, inter alia, Prof. Richard H. McCormick's comment that the proposed language would "throw[] the matter into the lap of the Legislature and . . . that he was inclined to trust them"). Therefore, in spite of the interpretive canon that sometimes allows the word "may" to be construed as mandatory language, the history of Article 2, paragraph 7, attests to a permissive construction of the word "may" in this context. See William N. Eskridge, Jr., et al., Cases and Materials on Legislation, Statutes, and the Creation of Public Policy 828-29 (3d ed. 2001) (noting that "may" should be construed as mandatory language only when such is the legislative intention).

Thus, Article 2, paragraph 7, as finally adopted, leaves open to the Legislature the discretion to disfranchise no convicted person at all. This was a discretion withheld for more than a century beforehand, and indicated at least an appreciation of the fact that times change and attitudes alter towards the right of suffrage. Article 2, paragraph 7 recognized that the Legislature is in a better position to

determine the conditions regulating the franchise, and that such conditions should not be set down, almost unalterably, in stone. This conclusion was no doubt affected by the historical fact that other portions of Article II, paragraph 1 of the 1844 Constitution were superseded twice by the United States Constitution in broadening the franchise to non-Caucasians and women. See Comment to Art. II, para. 1, Constitution of 1844 in N.J.S.A. Constitution of the State of New Jersey, Articles 4 to End and Prior Constitutions 613 (West 1971).

The question therefore remains not whether the current Article 2, section 1, paragraph 7 conflicts with the implied right to Equal Protection. It does not, since the former provision permits the Legislature to disfranchise no one. The pertinent question is whether N.J.S.A. 19:4-1(8) is an appropriate exercise of the discretion invested by the Constitution and whether it satisfies the other principles guaranteed by the Constitution.

B. LEGISLATIVE HISTORY SHOWS THAT NEW JERSEY LEGISLATORS ORIGINALLY INTENDED TO ENFRANCHISE PAROLEES AND PROBATIONERS IN 1978, HAVING DISCERNED THAT PAROLE AND PROBATION WERE CATEGORICALLY DISTINCT IN PURPOSE FROM INCARCERATION AND THAT FELON DISFRANCHISEMENT COULD SERVE NO REHABILITATIVE END.

In determining the breadth of a disfranchisement statute, the idea of removing the disability of the loss of suffrage from those on parole and probation is not new in New Jersey. Although the felon disfranchisement provisions in New Jersey have a long, checkered history, the classification of which crimes triggered disfranchisement, and which did not, came to be

seen in 1970 as "totally irrational and inconsistent." Stephens v. Yeomans, 327 F. Supp. 1182, 1187-88 (D.N.J. 1970) (tracing the history of New Jersey's disfranchisement statutes). As of 1970, the law permanently disfranchised only those felons convicted of a discrete set of crimes, listed originally in the statutes of 1799 and modified by the legislature only slightly following the adoption of the 1947 Constitution. Id. This list of crimes included piracy, a crime of doubtful prevalence in 1970, and, as pointed out by the court, included stealing but not receiving stolen property. Id. ("It is hard to understand why Bill Sikes should be ineligible for the franchise and Fagan eligible."). In Stephens v. Yeomans, a three-judge district court struck down the existing felon disfranchisement law as violative of equal protection. Id. at 1188.

This left New Jersey without any felon disfranchisement law, save for those convicted of election fraud. See id. Fortuitously, at that time, the Criminal Law Revision Commission was drafting its final report on a penal code for New Jersey. In examining the felon disfranchisement law, the Commission explained that

> The Commission believes the exclusion from the franchise of otherwise qualified citizens because of a past conviction of crime is contrary to the State's commitment to rehabilitation of the offender and is unjustified by any compelling State interest.

Penal Code Commentary, supra, at 363. The Commission drafted [illegible]ersion of N.J.S.A. 2C:51-3 which read, in pertinent part:

> Section 2C:51-3 VOTING AND JURY SERVICE
> Except as otherwise specifically provided by law, a person who is convicted of an offense shall be disqualified
> a. from voting in a primary or general election if and only so long as he is committed under a sentence of imprisonment . . . .

1 Final Report of the New Jersey Criminal Law Revision Commission: The New Jersey Penal Code: Report and Penal Code 174 (1971).

The Commission noted the basic distinction between those felons who are incarcerated and those on parole or probation by writing:

> Where an individual is actually incarcerated[,] numerous practical obstacles to his effective participation in the franchise justify excluding him during this period. . . . An individual on parole would be eligible to vote if other constitutional and legal requirements were met.

Penal Code Commentary, supra, at 363 (emphasis added). In explanation, the Commission stated:

> One of the most difficult tasks of modern society is to successfully reintegrate the offender into the free community upon his release from incarceration. Denying to convicted persons a place in the electoral or political processes seems more appropriate to the era of civil death, a practice repudiated by nearly every state today, than to the rehabilitative ideal.

Id. In its tentative draft published in 1970, the Commission added the language that "New Jersey is clearly committed to this principle [of rehabilitation]," and added, as support, citations to three New Jersey statutes designed to help rehabilitate

convicted offenders. New Jersey Criminal Law Revision Commission: Tentative Draft 838 (1970).

Taking note of the decision in Stephens, the Commission concluded that "the effect of the case[,] . . . to make the disenfranchisement statute ineffective and to make all persons eligible to vote without regard to a criminal record[,] . . . [is] the proper policy to pursue rather than to write a new disenfranchising statute." Penal Code Commentary at 365.

After the Commission issued its report in 1971, the proposed penal code was subjected to scrutiny by individuals and groups of varying interests. The Division of Criminal Justice in the Attorney General's office, the Essex County Prosecutor's Office, and the Public Defenders' Office all published reports detailing their response and criticism of the proposed Code. Of these three reports, the only one that referred at all to the felon disfranchisement provision was the report of the Attorney General's Office. Department of Law and Public Safety, Division of Criminal Justice, Report on the Proposed New Jersey Penal Code 52-53 (1973).

In that report, the Division of Criminal Justice noted that although the prison sentences recommended in the proposed code were satisfactory, they should not be reduced further because, citing the felon disfranchisement provision, "the social stigma and traditional disabilities associated with a criminal conviction are substantially lessened by the Code." Id. at 52. The report added that

> The elimination of disabilities associated with conviction appears to increase the likelihood that a man can "outgrow" his past by leading a law-abiding life. The effect is to encourage rehabilitation of the offender.

Id. at 53. The clear conclusion from this language is that the removal of the collateral consequences of conviction, such as felon disfranchisement, was designed to be part of the New Jersey Penal Code and to contribute to the ultimate goals of the Code. The retention of provisions disfranchising parolees and probationers thus hinders the intended effect of the Penal Code.

The proposed Penal Code was altered considerably in the course of the next seven years, though Section 2C:51-3 was not modified at all from the way the Commission had drafted it, and, eventually, the Penal Code was enacted into law in August 1978. 1978 N.J. Laws ch. 95. Thus, New Jersey had a law on its books enfranchising parolees and probationers, though it was not due to take effect, with the rest of the Penal Code, until September 1, 1979. Id.

In the interim between the decision in Stephens v. Yeomans and the passage of the New Jersey Penal Code, however, the New Jersey Legislature had independently examined the felon disfranchisement statute. 1971 N.J. Laws ch. 280. This statute introduced the language now codified in N.J.S.A. 19:4-1(8). There is scant legislative history on this act, but the introductory statement to the bill indicates that its intent was only to broaden the franchise, not to restrict it. The statement reads, in pertinent part:

> The purpose of this bill is to eliminate paragraphs (2) through (5) of R.S. 19:4-1, declared unconstitutional by Stephens v. Yeomans, 327 Fed. Supp. 1182, and to provide that any person convicted of a crime who has paid the penalty therefor shall be entitled to the right of franchise.

Id. (emphasis added).

Therefore, in August 1978, New Jersey had two conflicting statutes regarding felon disfranchisement on its books. Because of other, more pressing, concerns about the new penal code, a number of specific bills were proposed and passed to modify the penal code before it went into effect. See generally Cameron H. Allen, Legislative History of Amendments to the New Jersey Code of Criminal Justice Passed Prior to the Effective Date of the Code, 7 Crim. Just. Q. 41, 41-50 (1979). In April of 1979, a residuary bill, consisting of 148 sections, was proposed to amend and supplement the Penal Code to effect remaining changes and additions to the Code to eliminate problematic provisions. S. 3203, 1979 Leg., enacted as 1979 N.J. Laws, ch. 178. Among the many changes proposed by this bill, Section 2C:51-3 was amended to eliminate the careful language proposed initially by the Commission and to substitute a mere reference to the Election Law codified in N.J.S.A. 19:4-1. Id., § 106.

There is no indication in the legislative history of any hearing or debate on this substitution. Instead, the only explanation for this change is a comment in the Senate Judiciary Committee Statement on this bill which states:

> The amendment would remove the substantive language from the code and provide that [the disqualification of persons convicted of crimes from voting] be governed by the laws concerning elections . . . .

Sen. Jud. Comm. Statement to S. 3203 at 11 (June 18, 1979). This bill was enacted on August 29, 1979, a mere three days before the penal code was to go into effect. 1979 N.J. Laws, ch. 178.

The lack of any legislative statement regarding a perceived threat to public welfare by permitting parolees and probationers to vote is telling, as is the fact that the only recorded statement to explain the disfranchisement of parolees and probationers indicates that the Legislature was concerned with the prospect of conflicting provisions in the Penal Code and the Election Law rather than with any substantive effect. In short, the current disfranchisement statute under challenge today is the result of a legislative glitch. This lack of legislative deliberation suggests that the State can advance little, if any, rational basis in the State's disfranchising parolees and probationers, much less a compelling governmental interest in doing so.

VI. THE UNITED STATES IS THE LAST DEMOCRATIC NATION IN WHICH BLANKET DISFRANCHISEMENT OF NONINCARCERATED FELONS PERSISTS AND THE EXAMPLE OF OTHER NATIONS SHOWS THAT JUDICIAL ACTION IS APPROPRIATE TO DEFEND THE FUNDAMENTAL RIGHT TO VOTE.

The question of disfranchising individuals on parole and probation is too important to necessarily command deference to the legislature. Where a fundamental right is at stake, it is the role and the duty of the courts to examine the matter and to determine a remedy. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals."). In examining the felon disfranchisement statute in Canada, the Sauvé court noted:

> The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination. This is not a matter of substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by logic and common sense.

Sauvé, 3 S.C.R. at 535.

The plaintiffs in this case are not requesting, as the lower court implied, that this court should strike down N.J.S.A. 19:4-1(8) "because [judges] believe it is unwise." (Ja60.) Nor is this Court foreclosed from considering this case, as the State implied in oral argument (Tr. at 17:9-17.), just because the legislature has, is, or will be deliberating over a bill that could provide the requested relief. The plaintiffs are seeking redress from the Court because it is proper that the judiciary safeguard the rights of individuals.

The judiciary has taken an active role in other nations in striking down laws disfranchising felons. In Sauvé, the Supreme Court of Canada determined that the law denying the vote to incarcerated felons was not a reasonable limit to the right of every citizen to vote, as declared in Canada's Charter of Rights and Freedoms. Sauvé, 3 S.C.R. at 556-57. The Court's analysis in Sauvé, because of the limitation placed upon judicial review in Canada, was similar to an equal protection analysis in the United States. See Can. Const. pt. 1 (Canadian Charter of Rights and Freedoms), § 1. The government has only the burden to show that the objective of a challenged statute is valid, and "that it is rationally connected, causes minimal impairment, and is proportionate to the benefit achieved." Sauvé, 3 S.C.R. at 534-35. The Sauvé court determined that the Government had not met its burden to show a rational connection between disfranchisement of felons and the Government's "objectives of enhancing respect for the law and ensuring appropriate punishment." Id. at 553.

Last spring, the European Court of Human Rights, while giving deference to the "wide margin of appreciation" accorded to contracting states of the Council of Europe "in determining the conditions under which the right to vote was exercised," determined that the United Kingdom's blanket disfranchisement of incarcerated felons violated the Convention for the Protection of Human Rights and Fundamental Freedoms. Hirst v. The United Kingdom, [2004] ECHR 121 (Eur. Ct. H.R.), at ¶¶ 51-52. That

court determined that, while the legislature should be accorded deference to tailor disfranchisement "to particular offences or [to] offences of a particular gravity" or to vest discretion to disfranchise in a sentencing court, "an absolute bar on voting by any serving prisoner in any circumstances [does not] fall[] within an acceptable margin of appreciation." Id. at ¶ 51. The court also noted that it was improper for a contracting state to "rely on the margin of appreciation to justify restrictions on the right to vote which have not been the subject of considered debate in the legislature and which derive, essentially, from unquestioning and passive adherence to a historic tradition." Id. at ¶ 41.

The judiciary also took an active role in Israel in refusing to disfranchise Yigal Amir, who assassinated Yitzhak Rabin. See Laleh Ispahani, Felon Disfranchisement Policies in the United States and Other Democracies 3, available at http://www.fairelection.us/documents/Prepart42.pdf. The court decided that "disfranchisement would harm not Amir but the state of Israeli democracy itself: when the right to vote is taken away, 'the base of all fundamental rights is shaken . . . .'" Id. (quoting Hilla Alrai v. Minister of Interior, H.C. 2757/96, P.D. 50(2) 18 (Israel 1996)).

In short, in examining felon disfranchisement statutes around the world, the judiciary has taken an appropriately vigorous role in assuring that the legislative branch does not arbitrarily infringe the right to vote. The United States is

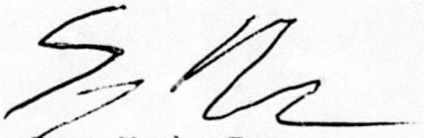
the only democratic nation that still "systematically disfranchises large numbers of non-incarcerated felons." Manza & Uggen, Punishment and Democracy, supra, at 501. And in the United States, fifteen states and the District of Columbia have ceased this practice. The Sentencing Project, Felon Disenfranchisement Laws in the United States 3, available at http://www.sentencingproject.org/pdfs/1046.pdf. New Jersey has always prided itself on being "in the forefront [among the states] in its recognition and development" of pathways "widening and strengthening the reformative process through socially enlightened movements." State v. Monahan, 15 N.J. 34, 45 (1954). This Court should validate that proud heritage and restore suffrage to those on probation and parole in recognition of the importance of the right to vote and the consequent bond with the community that participation in the political process brings.

CONCLUSION

The denial of suffrage to non-incarcerated felons has persisted out of inertia and a respect for an historical motivation that is no longer constitutionally permissible. It serves no rational regulatory or punitive purpose, and obstructs the rehabilitation and re-entry of parolees and probationers into society by promoting dissociation and alienation. The right to vote is precious and should not be arbitrarily suppressed.

For these reasons, and all the others mentioned above, the amici curiae request that the Court should reverse the decision below and remand the case for further proceedings.

Respectfully submitted,



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This brief on behalf of amici curiae was initially drafted by Derek Tarson, law clerk at the firm of Debevoise and Plimpton and a 2004 graduate of the Rutgers University School of Law, and Candace McCoy, Associate Professor of Criminal Justice at the School of Criminal Justice, Rutgers University - Newark and a member of the Ohio bar. Supported by the public interest mission of the firm of Debevoise and Plimpton LLP, it was subsequently reviewed and commented upon by all the amici curiae, who are speaking for themselves as individual scholars and not as representatives of their employer universities, and who now urge the Court to end the disenfranchisement of prisoners and parolees in New Jersey.