Supreme Court No. 78598-8

SUPREME COURT
OF THE STATE OF WASHINGTON

DANIEL MADISON, BEVERLY DUBOIS,
AND DANIELLE GARNER,
Respondents,

v.

STATE OF WASHINGTON; CHRISTINE O. GREGOIRE, Governor;
and SAM REED, Secretary of State, in their official capacities,
Appellants.

BRIEF OF AMICI CURIAE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, THE SENTENCING PROJECT, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE DEFENDER ASSOCIATION'S RACIAL DISPARITY PROJECT, HATE FREE ZONE WASHINGTON, LATINA/O BAR ASSOCIATION OF WASHINGTON, LOREN MILLER BAR ASSOCIATION, AND SOUTH ASIAN BAR ASSOCIATION OF WASHINGTON IN SUPPORT OF RESPONDENTS

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I. INTEREST OF AMICI

Amici include national and state organizations that focus on civil rights and criminal justice, as well as minority bar associations in Washington. They share an interest in promoting inclusive and effective democracy. Amici support voting rights and generally disfavor qualifications, like felony disenfranchisement, that disproportionately exclude minorities from the polls. Amici are committed as well to the constitutional principles that prohibit states from conditioning the franchise on a potential voter's payment of any sum of money.

II. STATEMENT OF THE CASE

Amici adopt the Statement of the Case of Plaintiffs-Respondents.

III. SUMMARY OF ARGUMENT

The United States disenfranchises approximately 5.3 million people because they have criminal convictions. This constitutes by far the largest group of citizens denied the right to vote. Slightly more than a quarter (26 percent) are incarcerated; the rest are living in the community as probationers (25 percent), parolees (nine percent), or those no longer subject to correctional supervision but still barred from the polls (39 percent).[1]

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[1] Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* 4, 76-77 (2006).

Like criminal punishment itself, criminal disenfranchisement is grossly racially skewed. Whereas 2.42 percent of the general voting-age population has lost the vote on this basis, 8.25 percent of African Americans are disenfranchised. Nationwide, one in seven black men is denied the right to vote; the proportion reaches one in four in states with the highest disenfranchisement rates.[2]

The astonishing overall level of disenfranchisement results from an aggregation of the effects of widely varying state laws. The United States Supreme Court has held that the Fourteenth Amendment generally allows states to disenfranchise their citizens based on criminal convictions. *See Richardson v. Ramirez*, 418 U.S. 24 (1974). States may not, however, exercise this license in a manner that transgresses other constitutional principles, such as the prohibition on intentional race discrimination in the franchise. *Hunter v. Underwood*, 471 U.S. 222 (1985). The precise question presented in this case is whether, by demanding full payment of all legal financial obligations ("LFOs") before restoring the vote to a citizen with a felony conviction, Washington withholds this right on the impermissible basis of wealth. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) ("[A] State violates the Equal Protection Clause . . .

[2] *Id.* at 80, 250 tbl.A3.3, 253 tbl.A3.4.

whenever it makes the affluence of the voter or payment of any fee an electoral standard."). The parties' briefs directly address this question.

Amici focus instead on the fundamental unfairness of felony disenfranchisement in Washington. Washington's law is exceptionally harsh, even within the domestic spectrum, and the United States enforces some of the most restrictive felony disenfranchisement laws in the world. Washington's law also has a severe disproportionate impact on the state's minority communities. Felony disenfranchisement is tainted by racial oppression in this country, and the continuing disproportionate impact of the practice reflects this history.

IV. ARGUMENT

A. Washington's Felony Disenfranchisement Law Is Among the Harshest in the Nation and thus in the World.

In the patchwork of state laws establishing the voting rights of people with criminal convictions in this country, Washington's law stands out for disqualifying a large percentage of its electorate for an unusually long time. Washington is among a minority of states that extend disenfranchisement beyond the period of a person's incarceration, parole, probation, or other correctional supervision. In this regard, Washington's disenfranchisement provisions are restrictive, not only as compared to

those in other states, but also as compared to those of democratic countries around the world.

1. The national landscape

Criminal disenfranchisement laws vary widely in the United States.[3] Maine and Vermont do not withdraw the franchise based on criminal convictions; even prisoners may vote there.[4] Other state laws fall along a vector from less to more regressive: 12 states and the District of Columbia disenfranchise people only while they are incarcerated;[5] five states disenfranchise those who are incarcerated or on parole, but allow probationers to vote;[6] 17 states disenfranchise prisoners, parolees, and probationers;[7] and 14 states, including Washington, disenfranchise at least

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[3] The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (April 2006), http://sentencingproject.org/pdfs/1046.pdf.

[4] *Id. See also* Vt. Stat. Ann. tit. 28, § 807. Maine has no law depriving people with criminal convictions of the right to vote.

[5] *See* D.C. Code § 1-1001.02(7); D.C. Mun. Regs. tit. 3, § 500.3; Haw. Rev. Stat. § 831-2; Ill. Const. art. III, § 2; 10 Ill. Comp. Stat. 5/3-5; 730 Ill. Comp. Stat. 5/5-5-5; Ind. Const. art. II, § 8; Ind. Code § 3-7-13-4; Mass. Const. art. III (amended 2000); Mich. Const. art. II, § 2; Mich. Comp. Laws § 168.758b; Mont. Const. art. IV, § 2; N.H. Rev. Stat. Ann. § 607-A:2; N.D. Cent. Code §§ 12.1-33-01, -03; Ohio Rev. Code Ann. § 2961.01; Or. Rev. Stat. § 137.281; 25 Pa. Cons. Stat. §§ 2602(w), 3146.1; *United States v. Essig*, 10 F.3d 968 (3d Cir. 1993); *Ray v. Commonwealth of Pennsylvania,* 263 F. Supp. 630 (W.D. Pa. 1967); Utah Code Ann. §§ 20A-2-101 to -101.5.

[6] *See* Cal. Const. art. II, § 4; Colo. Const. art. VII, § 10; Colo. Rev. Stat. § 1-2-103; Conn. Gen. Stat. §§ 9-46 to -46a; N.Y. Elec. Law § 5-106; S.D. Codified Laws §§ 23A-27-35, 24-5-2, 24-15A-7.

[7] *See* Alaska Stat. §§ 15.05.030, 33.30.241; Ga. Const. art. II, § 1, ¶ III; Idaho Code Ann. § 18-310; Kan. Stat. Ann. § 21-4615; Iowa Exec. Order No. 42 (July 4, 2005) *available at* http://www.governor.state.ia.us/legal/41_45/EO_42.pdf ; La. Const. art. I, §§ 10, 20; La. Rev. Stat. Ann. § 18:2(8); Minn. Stat. § 609.165; Mo. Rev. Stat. § 115.133; N.J. Stat. Ann. §§ 2C:51-3(a), 19:4-1(8); N.M. Stat. § 31-13-1(A); N.C. Gen. Stat. § 13-1; Okla.

some people for at least some period after they have completed their correctional supervision on felony convictions.[8]

Within this last, most regressive group, there is additional variation. Some states impose waiting periods, following the completion of sentence, before a person may regain the franchise.[9] Others permanently disenfranchise only those who are convicted of certain offenses.[10] Three states permanently disenfranchise all people with felony convictions unless they receive individual, discretionary, executive clemency.[11] Nine, including Washington, explicitly condition the restoration of voting rights on an applicant's full payment of at least some

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Stat. tit. 26, § 4-101(1); R.I. Const. art. II, § 1; S.C. Code Ann. § 7-5-120; Tex. Elec. Code Ann. § 11.002(4); W. Va. Code § 3-1-3; *Osborne v. Kanawha County Court*, 69 S.E. 470 (W. Va. 1910); 55 Op. W. Va. Att'y. Gen. 3 (1972); Wis. Stat. §§ 6.03(1)(b), 304.078.

[8] *See* Ala. Const. art. VIII, § 177(b); Ala. Code. § 15-22-36.1; Ariz. Rev. Stat. Ann. §§ 13-904(A)(1)-905, -912; Ark. Const. art. III, §§ 1-2, *amended by* Ark. Const. amend. 51, § 11(4); Del. Const. art. V, § 2; Fla. Const. art. VI, § 4; Fla. Stat. § 944.292; Ky. Const. § 145; Md. Code Ann., Elec. Law § 3-102(b); Miss. Const. art. XII, § 241; Neb. Rev. Stat. § 29-112; Nev. Const. art. II, § 1; Nev. Rev. Stat. §§ 176A.850, 213.090, 213.155, 213.157; Tenn. Code Ann. §§ 40-20-112, 40-29-101, -105 to -106; Va. Const. art. II, § 1; RCWA § 9.94A.637(1), (4); Wyo. Stat. Ann. §§ 6-10-106, 7-13-105(b).

[9] *See, e.g.*, Del. Const. art. V, § 2 (five years after completion of sentence, but no restoration for specified offenses); Md. Code Ann., Elec. Law § 3-102(b), (c) (three years after completion of sentence on second felony conviction, but no restoration for repeat violent offenders); Neb. Rev. Stat. § 29-112 (two years after completion of sentence); Wyo. Stat. Ann. § 7-13-105 (five years after completion of sentence, but no restoration for repeat or violent offenders).

[10] *See, e.g.*, Ala. Const. art. VIII, § 177(b) ("felony involving moral turpitude"); Ala. Op. Att'y. Gen. 2005-092; Miss. Const. art. XII, § 241 ("murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy").

[11] *See* Fla. Const. art. VI, § 4; Fla. Stat. § 944.292; Ky. Const. § 145; Va. Const. art. II, § 1.

of the court-ordered costs associated with the conviction.[12] This system results in the permanent disenfranchisement of those individuals, like Plaintiff Beverly Dubois in this case, Dubois Decl. ¶¶ 6, 8, 9, who cannot afford monthly payments sufficient even to cover the interest that accrues on their debt, so that their total LFOs continue to increase even as they make the required payments.

Washington's law excludes from the polls more than 167,000 people, 3.61 percent of the voting-age population, because of their criminal records.[13] Only nine states disenfranchise their citizens at a higher rate.[14] Within its region, Washington is even more anomalous.

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[12] Indeed, in Washington (and Arkansas), the requirement of the full payment of all LFOs is the only legal provision that may extend disenfranchisement beyond the completion of correctional supervision. *See* RCWA § 9.94A.637; Ark. Const. amend. 51, § 11(d)(2)(A). *See also* Ala. Code § 15-22-36.1(a)(3); Ariz. Rev. Stat. Ann. § 13-912 (A)(2); Del. Code Ann. tit. 15, § 6102(b); Fla. R. Exec. Clem. 5.E, 9.A.3; Ky. Rev. Stat. Ann. § 196.045; Md. Code Ann., Elec. Law § 3-102(b)(1)(ii); Virginia Secretary of the Commonwealth, Restoration of Rights, http://www.commonwealth.virginia.gov/JudicialSystem/Clemency/restoration.cfm (last visited May 25, 2006). Other states may also require such payments as a condition of restoration of voting rights, but our research did not reveal other explicit requirements.

[13] Manza & Uggen, *supra* note 1, at 250 tbl.A3.3.

[14] *Id.* at 248-50 tbl.A3.3 (Alabama, Arizona, Delaware, Florida, Georgia, Kentucky, Mississippi, Virginia, and Wyoming). Iowa and Nebraska also had higher disenfranchisement rates based on these 2004 data, but Nebraska has since repealed permanent disenfranchisement in favor of a two-year waiting period after the completion of sentence, Neb. Rev. Stat. § 29-112, and Iowa's governor has since issued an executive order restoring the franchise to all immediately upon their completion of correctional supervision, Iowa Exec. Order No. 42 (July 4, 2005), *available at* http://www.governor.state.ia.us/legal/41_45/EO_42.pdf.

The disenfranchisement rate in Washington is seven times that in Oregon, three times that in California, and more than twice that in Idaho.[15]

2. The international landscape

Just as Washington's felony disenfranchisement law is restrictive within the United States, so the overall pattern of felony disenfranchisement in the United States places this country at odds with the world's modern democracies. The United States accounts for less than five percent of the world's population,[16] but almost half of those who cannot vote because of a criminal conviction.[17]

A recent study of international practices characterizes the debate in Europe as "over *which prisoners* should be barred from voting. In almost all cases, the debate stops at the prison walls."[18] While researchers differ over how to categorize certain laws, in most European nations, some or all prisoners are entitled to vote; in the remainder (mainly countries of the

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[15] Manza & Uggen, *supra* note 1, at 248-50 tbl.A3.3 (Oregon's rate is .52%, California's is 1.09%, and Idaho's is 1.75%).

[16] U.S. Census Bureau, *U.S. and World Population Clocks*, http://www.census.gov/main/www/popclock.html (last visited May 26, 2006).

[17] There are 5.3 million people disenfranchised in the United States, Manza & Uggen, *supra* note 1, at 76, and approximately seven million prisoners in the rest of the world, not all of whom are disenfranchised, *see* International Centre for Prison Studies, *Entire World—Prison Population Totals*, http://www.prisonstudies.org/ (follow "English" hyperlink; then follow "World Prison Brief" hyperlink; then follow "Highest to Lowest Rates" hyperlink; then select "Entire World" and "Prison population totals" from drop-down menus) (last visited May 25, 2006).

[18] Laleh Ispahani, American Civil Liberties Union, *Out of Step with the World: An Analysis of Felony Disenfranchisement in the U.S. and Other Democracies* 4 (2006), *available at* http://www.aclu.org/pdfs/votingrights/outofstep_20060525.pdf.

former Eastern Bloc), prisoners are barred from voting but are generally re-enfranchised upon release.[19]

The European Court of Human Rights and the high courts of Canada, Israel, and South Africa have issued important decisions on criminal disenfranchisement, sounding common themes.[20] In each case, the court recognized the fundamental importance of the franchise. "[T]he right to vote is not a privilege. . . . Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws which it promulgates." *Hirst*, slip op. ¶¶ 59, 62.[21] The Constitutional Court of South Africa noted its special duty to "respect[] and protect[]" the suffrage in a nation where "denial of the right to vote was used to entrench white supremacy and to marginalise the great majority of the people." *NICRO* 2004 (5) BCLR 445 (CC) ¶ 47. In Israel, so profound is the Supreme Court's commitment to protecting the franchise that it declined, in the absence of specific statutory

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[19] *Compare Hirst v. United Kingdom (No. 2)*, app. no 74025/01, slip op. ¶¶ 33-34 (ECHR Oct. 6, 2005), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=hirst&sessionid=7172581&skin=hudoc-en (cataloging the criminal disenfranchisement practices of member countries), *with* Ispahani, *supra* note 18, at 6 (same).

[20] *See Sauvé v. Canada*, [2002] S.C.R. 519; *Hirst*; HCJ 2757/96 *Alrai v. Minister of the Interior* [1996] lsrSC 50(2) 18; *Minister of Home Affairs v. National Institute of Crime Prevention and the Re-integration of Offenders (NICRO)* 2004 (5) BCLR 445 (CC) (S. Afr.).

[21] The principle of "universal and equal suffrage" derives in part from the International Covenant on Civil and Political Rights, art. 25, Dec. 16, 1966, 999 U.N.T.S. 171 (ratified by the United States in 1992).

authorization, to revoke the voting rights of the person convicted of assassinating Prime Minister Yitzhak Rabin. HCJ 2757/96 *Alrai* [1996] lsrSC 50(2) 18 ¶ 7.

The courts went on to consider and reject the governments' proffered justifications for the incursion on the right to vote. The Supreme Court of Canada concluded, for example, that disenfranchisement subverts rehabilitation: "[D]enying penitentiary inmates the right to vote is more likely to send messages that undermine respect for law and democracy than messages that enhance those values." *Sauvé*, [2002] 3 S.C.R. 519 ¶ 41. And the courts agreed that "general, automatic and indiscriminate" disenfranchisement of all prisoners, "irrespective of the length of their sentence [or] the nature or gravity of their offence," is too blunt an instrument to be defended as proportional punishment. *Hirst*, slip op. ¶ 82; *see also Sauvé*, [2002] 3 S.C.R. 519 ¶¶ 48, 51; *NICRO* 2004 (5) BCLR 445 (CC) ¶ 67. Thus, criminal disenfranchisement has met with great skepticism in the high courts of other mature democracies.

B. Felony Disenfranchisement Laws Are Tainted by the Same Racist History as Wealth Qualifications and Other Discredited Barriers to Voting.

Felony disenfranchisement laws in the United States are deeply rooted in the troubled history of American race relations. Criminal disenfranchisement dates back to colonial times; some states wrote the

restrictive provisions into their constitutions as early as the 18th century. These early laws followed European models and were generally limited to a few specific offenses.[22] By the end of the Civil War, however, lawmakers found new uses for felony disenfranchisement. The period following Reconstruction saw not only a surge in the number of states enacting such laws, but also an expansion of disqualifying crimes in already existing laws. These changes achieved their intended result: the removal of large segments of the African-American population from the democratic process for sustained periods, in some cases for life.[23]

The spread of felony disenfranchisement laws in the late 1800's was part of a larger backlash against the adoption of the Reconstruction Amendments.[24] Despite their newfound eligibility, many freedmen remained practically disenfranchised as a result of organized efforts to prevent them from voting. Violence and intimidation were rampant, especially early on. Over time, Southern Democrats sought to solidify their hold on the region by modifying voting laws in ways that would exclude African Americans from the polls without overtly violating the

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[22] Angela Behrens, Christopher Uggen & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 Am. J. Soc. 559, 563 (2003).

[23] *Id.* at 560-61; Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 Wis. L. Rev. 1045, 1087-88.

[24] Manza & Uggen, *supra* note 1, at 56-57; Behrens et al., *supra* note 22, at 560; Ewald, *supra* note 23, at 1087.

Fourteenth and Fifteenth Amendments.[25] The legal barriers employed—including literacy tests, residency requirements, grandfather clauses, and poll taxes—while race-neutral on their face, were designed to prevent African Americans from voting.[26]

Felony disenfranchisement laws were part of this effort to maintain white control over access to the polls. Between 1865 and 1900, 18 states adopted laws restricting the voting rights of criminal offenders. By 1900, 38 states had some type of felon voting restriction, most of which disenfranchised convicted felons until they received a pardon.[27]

At the same time, states expanded the criminal codes to punish offenses that they believed freedmen were most likely to commit, including vagrancy, petty larceny, miscegenation, bigamy, and receiving stolen goods.[28] Aggressive arrest and conviction efforts followed, motivated by the practice of "convict leasing" whereby former slaves were

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[25] Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 111 (2000); Ewald, *supra* note 23, at 1087.

[26] *See, e.g.*, *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (poll tax); *Guinn v. United States*, 238 U.S. 347 (1915) (grandfather clause). *See also* Keyssar, *supra* note 25, at 111-12; Behrens et al., *supra* note 22, at 563; Ewald, *supra* note 23, at 1087.

[27] Manza & Uggen, *supra* note 1, at 55, 238-39 tbl.A2.1 (A typo in the text indicates 28 states, but the table correctly lists 38.).

[28] Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* 593 (1988); Ewald, *supra* note 23, at 1088-89.

convicted of crimes and then leased out to work the plantations and factories from which they had ostensibly been freed.[29]

This mass incarceration produced not only re-enslavement, but also mass disenfranchisement, usually for life. Those state laws and constitutions that specified disqualifying crimes focused on the often petty offenses that white lawmakers associated with freedmen, leaving out more serious crimes, such as murder, then considered to be "white" crimes.[30] Thus felony disenfranchisement, though ancient in its origins, was pressed into the service of suppressing the political power of African Americans.[31]

C. Felony Disenfranchisement Laws and Wealth Qualifications Disproportionately Prevent Minorities from Voting.

The direct connection between America's discriminatory history and felony disenfranchisement is only part of the practice's racial dimension. Regardless of the racial animus behind a given state's felony disenfranchisement provision, the continuing disproportionate impact of the laws on minority communities cannot be disputed.

The racial make-up of our nation's prisons reflects this disparate impact. Nearly half of U.S. prison inmates are African-American, although blacks make up only 13 percent of the population. A

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[29] Foner, *supra* note 28, at 205; Marc Mauer, *Race to Incarcerate* 131-32 (2006).

[30] Manza & Uggen, *supra* note 1, at 43, 55; Ewald, *supra* note 23, at 1088-89.

[31] *See Hunter v. Underwood*, 471 U.S. 222 (1985).

combination of socio-economic factors, racial profiling, prosecutorial bias, and mandatory sentences contributes to this disparity. But no policy has contributed more than the "war on drugs," which has caused prison populations to skyrocket.[32] Arrests for drug felonies nearly tripled between 1980 and 2000. The number of inmates incarcerated for drug offenses at all levels has risen by more than 1,000 percent from 40,000 in 1980 to 453,000 by 1999.[33]

The disproportionate impact of drug policies on African Americans is dramatic. Between 1985 and 1995, there was a 707 percent increase in the number of African Americans imprisoned for felony drug offenses, compared to a 306 percent increase for whites.[34] Fifty-six percent of those incarcerated on felony drug charges are African-American, while African Americans constitute only 13 percent of monthly drug users. Whites make up only 19 percent of drug prisoners, but 74 percent of monthly users.[35]

Nationwide, as discrimination in the criminal justice system has infected the electorate through the operation of felony disenfranchisement laws, the number of disenfranchised African Americans has climbed

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[32] Mauer, *supra* note 29, at 137, 139, 158.

[33] Ryan S. King and Marc Mauer, *Distorted Priorities: Drug Offenders in State Prisons* 1 (2002), *available at* http://sentencingproject.org/pdfs/9038.pdf.

[34] Mauer, *supra* note 29, at 168 tbl.8-1.

[35] King & Mauer, *supra* note 33, at 11.

steadily. In 14 states, more than one in ten African Americans has lost the right to vote because of a felony conviction.[36] The impact on African-American men is even greater: 13 percent of African-American men are disenfranchised, a rate that is seven times the national average.[37]

1. Washington's felony disenfranchisement law disproportionately prevents minorities from voting.

The disproportionate impact of Washington's felony disenfranchisement law on minority populations is one of the worst in the country. Washington bars 17.22 percent of its African-American population from the polls. This is more than twice the national average. Only seven states disenfranchise a higher percentage of their African-American populations.[38] Washington also disenfranchises a higher proportion of Latinos than any of the other eight states for which data are

[36] Manza & Uggen, *supra* note 1, at 79.

[37] The Sentencing Project, *supra* note 3, at 1.

[38] Manza & Uggen, *supra* note 1, at 251-53 tbl.A3.4 (Arizona, Delaware, Florida, Kentucky, Rhode Island, Virginia, and Wyoming). Iowa and Nebraska had higher rates but both states liberalized their felony disenfranchisement laws in 2005, *see supra* note 14. Rhode Island is in the process of amending its constitution to allow people on probation or parole to vote. *See* H.R.J. Res. 6579, 2005 Gen. Assem., Jan. Sess. (R.I. 2005).

available.[39] More than 10 percent of Latino citizens of voting age are disenfranchised, compared with just over three percent of white citizens.[40]

Washington also stands alone among its neighbors. Its law disenfranchises African Americans at more than double the rate in California, nearly triple the rate in Idaho, and nearly quadruple the rate in Oregon.[41] Likewise, Washington's Latino disenfranchisement rate is almost four times California's.[42]

These disenfranchisement data reflect the racial and ethnic composition of Washington's prisons. "People of color are over-represented at every stage of Washington's criminal justice system, from arrest through sentencing and incarceration."[43] More than 19 percent of Washington state prisoners, but only 3.2 percent of the general population, are African-American; 9.8 percent of prisoners, but only 7.5 percent of the general population, are Latino; and 4.1 percent of prisoners, but only 1.6 percent of the general population, are Native American. Whites, in

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[39] MALDEF, *Diminished Voting Power in the Latino Community: The Impact of Felony Disenfranchisement Laws in Ten Targeted States* 6-13, 17 (2003), *available at* http://www.maldef.org/publications/pdf/FEB18-LatinoVotingRightsReport.pdf (Nebraska had a higher rate, but its law changed in 2005, *see supra* note 14.).

[40] *Id*. at 13.

[41] Manza & Uggen, *supra* note 1, at 251-53 tbl.A3.4.

[42] MALDEF, *supra* note 39, at 7, 13, 17.

[43] Washington State Sentencing Guidelines Commission, *Disproportionality and Disparity in Adult Felony Sentencing* 3 (2003), *available at* http://www.sgc.wa.gov/PUBS/Disproportionality/Adult_Disproportionalit_Report2003.pdf.

contrast, are underrepresented—they make up 63.3 percent of prisoners and 78.9 percent of the general population.[44]

The complexion of the prison population is not a simple reflection of differential participation in crime. For example, African Americans are disproportionately arrested for drug crimes in Seattle with no known racially neutral explanation.[45] Although the majority of those who deliver drugs in Seattle are white, 64 percent of those arrested for this crime are African-American, and only 17 percent are white.[46] Once arrested, members of minority groups are also more likely to be charged with crimes. In King County, after adjusting for various factors, including the type of offense, the seriousness of the offense, the offender's prior record, and the offender's age and sex, the odds of being charged for both personal and drug-related crimes are 15 percent higher for African Americans and 70 percent higher for Native Americans than for whites.[47]

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[44] U.S. Census Bureau, *State & County Quick Facts: Washington*, http://quickfacts.census.gov/qfd/states/53000.html (last visited May 26, 2006) (racial breakdowns based on 2000 census); Department of Corrections, State of Washington, *Department of Corrections Statistical Brochure* (Apr. 30, 2006), *available at* http://www.doc.wa.gov/BudgetAndResearch/ResearchData /DOCStatisticalBrochureApr06P282.pdf.

[45] Katherine Beckett, *Race and Drug Law Enforcement in Seattle* 86-87 (2004), *available at* http://www.defender.org/Beckett-20040503.pdf.

[46] *Id*. at 7, 45.

[47] Robert D. Crutchfield et al., Washington State Minority & Justice Commission, *Racial and Ethnic Desparities* [sic] *in the Prosecution of Felony Cases in King County* 32 (Nov. 20, 1995), *available at* http://www.courts.wa.gov/committee/pdf/November%201995%20Report.pdf.

Thus, disparate crime rates alone do not explain the racial and ethnic disproportion in felony convictions or disenfranchisement rates.

2. Washington's felony disenfranchisement law establishes an unconstitutional wealth qualification.

Washington's requirement that people with felony convictions pay off their LFOs before their voting rights can be restored has a similar disparate impact. Not only are minority populations disproportionately caught up in the criminal justice system, they are also more likely to be poor. The 2000 Census reveals that in Washington, individuals who identified themselves as black had a poverty rate of 18 percent; Latinos, 24 percent; and Native Americans, 23 percent, compared with nine percent of whites. The per capita 1999 income for African Americans was $17,748; for Latinos, $11,293; and for Native Americans, $13,618, compared with $24,674 for whites.[48] As a result of this economic divide, the requirement that people repay their LFOs before regaining the vote necessarily has a disparate impact on minorities.

Like felony disenfranchisement, wealth qualifications for voting have a long lineage but were repurposed in the Reconstruction era to

[48] U.S. Census Bureau, Washington Fact Sheet, http://www.census.gov (follow "Your Gateway to Census 2000" hyperlink, then follow "American FactFinder" hyperlink, then select "Washington" from the drop-down menu) (last visited May 26, 2006) .

restrict the rights of newly freed slaves.[49] In the wake of this history, the Twenty-Fourth Amendment made the poll tax illegal as to federal elections in 1964, and the Supreme Court declared it unconstitutional as to all other elections in 1966. *See Harper*, 383 U.S. at 666. In the modern era, wealth is simply an impermissible basis upon which to deny citizens the right to vote. *Id.*

The state responds to this bedrock principle by repeatedly insisting that people with felony convictions have *no* right to vote. *See* Br. of Appellants at 5, 6, 12, 20, 28.[50] The State asserts that because Washington could deny the vote entirely to people with felony convictions, distinctions within the class of "felons" are unreachable by the Equal Protection Clause. But this argument is wrong: In *Richardson v. Ramirez*, holding that the Fourteenth Amendment does not prohibit felony disenfranchisement "outright," the Supreme Court nevertheless remanded for consideration of the claim that county officials' haphazard enforcement of California's law violated the plaintiffs' right to equal protection in the exercise of the franchise. 418 U.S. at 55, 56. Later, in *Hunter v. Underwood*, the Supreme Court invalidated Alabama's felony

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[49] *See* Keyssar, *supra* note 25, at 111-13; J. Morgan Kousser, *Poll Tax*, *in International Encyclopedia of Elections* 208-09 (Richard Rose et al. eds., 2000).

[50] *But see Foster v. Sunnyside Valley Irrigation Dist.*, 102 Wn.2d 395, 404, 687 P.2d 841, 846 (1984) ("[T]he Washington constitution goes further to safeguard th[e] right [to vote] than does the federal constitution.").

disenfranchisement provision under the Equal Protection Clause on the ground that it was born of racial animus. 471 U.S. at 233.

These cases recognize the familiar tenet that even where the state may revoke a right entirely, it cannot allocate that right based on an arbitrary or impermissible distinction. *See, e.g., Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (although Federal Constitution does not require criminal appeal, state cannot deny effective appeal to "convicted defendants on account of their poverty."). Courts have recognized repeatedly that it is unjust to deny rights absolutely on the basis of wealth, even when these rights are not "fundamental." *See M.L.B. v. S.L.J.*, 519 U.S. 102, 120, 128 (1996) (Although "due process does not independently require that the State provide a right to appeal," state must provide transcript for indigent parental termination defendant.).[51] "The basic right to participate in political processes as voters . . . cannot be limited to those who can pay for a license." *Id.* at 124.

An analogy may best illustrate the rule that the right to vote may not be parceled out on the basis of a person's ability to pay. While

[51] *See also Mota v. State*, 114 Wn.2d 465, 474, 788 P.2d 538, 543 (1990) ("A higher level of scrutiny is applied to cases involving a deprivation of a liberty interest due to indigency."); *State v. Phelan*, 100 Wn.2d 508, 513, 671 P.2d 1212, 1215 (1983) (applying intermediate scrutiny where "important right" was denied on basis of wealth); *NICRO*, 2004 (5) BCLR 445 (CC) ¶ 43 (noting that prisoners who are in custody "due to their inability to pay the fines . . . should not lose the right to vote because of their poverty").

seventeen-year-olds enjoy no constitutionally protected "fundamental" right to vote, a state would violate the Constitution if it allowed only those seventeen-year-olds to vote who could pay a fee of $100. Whatever form they take,[52] whether freestanding or in conjunction with felony disenfranchisement laws, wealth qualifications are simply incompatible with modern democratic ideals.

V. CONCLUSION

For these reasons, amici respectfully request that this Court affirm the decision below.

Respectfully submitted, May 26, 2006

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[52] *See Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1369 (N.D. Ga. 2005) ("[R]equiring [voters without identification] to purchase a Photo ID card effectively places a cost on the right to vote. In that respect, the Photo ID requirement runs afoul of the Twenty-fourth Amendment [barring poll taxes in] federal elections.").