

**MERITS MEMORANDUM OF LAW IN SUPPORT OF PETITION
CHALLENGING FELONY DISENFRANCHISEMENT LAWS IN THE
UNITED STATES**

CASE NO. P-990-06

INTER-AMERICAN COMMISSION ON
HUMAN RIGHTS

ONE-HUNDRED EIGHTY-THIRD PERIOD OF SESSIONS

PETITIONER

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INTRODUCTION

When this Petition was filed sixteen years ago, approximately 5.3 million U.S. citizens were denied the right to vote because they had been convicted of a criminal felony.¹ Felony disenfranchisement has remained relatively unchanged since then. Today, 5.2 million U.S. citizens with criminal convictions, who otherwise would be eligible to vote, remains disenfranchised.

This demonstrates the U.S.'s failure to respond to resounding international criticism and pleas to abolish felony disenfranchisement laws and adhere to its international obligations. Indeed, this Commission is among the entities that have criticized U.S. felony disenfranchisement. In a 2018 Thematic Report, the Commission made clear that the U.S. should eliminate these onerous laws.²

There are only three jurisdictions in the U.S. where individuals convicted of a felony never lose the right to vote, including while they are incarcerated: Maine, Vermont, and the District of Columbia. Forty-eight states automatically disenfranchise people when they are incarcerated. Felony disenfranchisement laws strip individuals of their basic human right to participate in the democratic process, as guaranteed by Articles XX and XXXII of the American Declaration of the Rights and

¹ MARISA GUEVARA & DAN O'CONNOR, SENTENCING PROJECT, BARRIERS TO DEMOCRACY 1 (Marc Mauer ed., 2007), https://www.prisonpolicy.org/scans/sp/fd_PETITION_TO_IACHR_final_formatted.pdf.

² *Police Violence Against Afro-descendants in the United States*, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II doc. 156, *Recommendations* ¶ 11(a) (2018), <http://www.oas.org/en/iachr/reports/pdfs/PoliceUseOfForceAfrosUSA.pdf>.

Duties of Man (“American Declaration”).

Compounding the fundamental deprivation of rights, felony disenfranchisement laws in 48 out of the U.S.’s 50 states disproportionately impact communities of color, particularly Black citizens, in violation of Article II of the American Declaration. As a 2021 report by the Sentencing Project found:

Black Americans of voting age are nearly four times as likely to lose their voting rights than the rest of the adult population, with one of every 16 Black adults disenfranchised nationally. As of 2020, in seven states—Alabama; Florida; Kentucky; Mississippi; Tennessee; Virginia; Wyoming—more than one in seven Black adults are disenfranchised. In total, 1.8 million Black citizens are banned from voting. In 34 states, the Latinx population is disenfranchised at a higher rate than the general population.³

Felony disenfranchisement laws date back to the “Jim Crow” Era when laws were enacted to prevent newly-freed Black Americans from voting, despite the passage of the 13th, 14th, and 15th Amendments to the U.S. Constitution.⁴ This racial animus in the enacting of felony disenfranchisement laws, combined with the disparate impact the laws have on communities of color, violates Article II of the American Declaration.

³ Jean Chung, *Voting Rights in the Era of Mass Incarceration: A Primer*, SENTENCING PROJECT (July 28, 2021), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>. Although the rates of felony disenfranchisement between 2006 and 2021 appear stagnant, there was a sharp increase by 2016, when 6.1 million people were denied the right to vote. *Id.*

⁴ *Id.* (citing P. Holloway, ‘A chicken-stealer shall lose his vote’: Disenfranchisement for larceny in the South, 1874-1890, 75 J. OF S. HIST. 931, 931-962 (2009)).

Felony disenfranchisement laws also violate Articles I and XVII of the American Declaration because these laws impede rehabilitation of formerly incarcerated individuals. Disenfranchisement leads to isolation and makes re-incarceration more likely, whereas “civic participation has been linked with lower recidivism rates.”⁵

The United States is grappling with felony disenfranchisement, and doing so rather unsuccessfully. Even though there are advocates, legislators, and everyday citizens calling for reform, there is no indication that felony disenfranchisement laws will be overturned any time soon. State laws are inconsistent and range from very severe laws that permanently disenfranchise people after a criminal conviction (Alabama, Arizona, Iowa, Kentucky, Mississippi, Tennessee, Virginia, and Wyoming), to milder laws that disenfranchise only incarcerated people (Colorado, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah). Additionally, some states impose hurdles to re-enfranchisement that are, for all intents and purposes, insurmountable—such as getting a governmental pardon (Alabama), or repaying fines and fees without notifying individuals that they owe these monies or telling them how much they owe (Texas and Florida).

The U.S. Congress has been unwilling and unable to remedy felony disenfranchisement and has not been able to pass federal re-enfranchisement legislation that

⁵ *Id.*

would provide uniform national standards and procedures. For example, on January 19, 2022, the U.S. Senate voted against advancing the *Freedom to Vote: John R. Lewis Act*. That law, in part, sought to end felony disenfranchisement, albeit for only a small percentage of citizens—those who were no longer incarcerated—and only for federal elections.

Even if the *Freedom to Vote: John R. Lewis Act* had passed, it still would have violated the American Declaration, because incarcerated citizens would still be disenfranchised and the law would only apply to federal elections. Federal elections take place sporadically, every two and six years for members of Congress, and every four years for the office of the Presidency. Most elections in the U.S. occur at the state level where elections for state and local officials (like governors, mayors, judges, sheriffs and school board members) are held several times each year. In sum, by failing to enact even watered-down re-enfranchisement laws, Congress is continuing to allow states to enact and implement harsh and restrictive felony disenfranchisement laws.

Disenfranchised citizens therefore cannot seek relief from the federal legislature. Nor can they seek relief from courts to overturn felony disenfranchisement laws, as Petitioner attempted to do nearly twenty years ago. That is because the U.S. Supreme Court held in *Richardson v. Ramirez*, 418 U.S. 24 (1974), that states may

constitutionally disenfranchise individuals who have committed crimes. This practice is so entrenched in the American fabric that it has been referred to as “an American tradition.”⁶

There is no end in sight for these invidious felony disenfranchisement laws. For these reasons, Petitioner believes that it is time for the Commission to issue a strong ruling that the U.S. must take swift and comprehensive steps to comply with the American Declaration. U.S. states, legislatures, and policy makers need the Commission’s firm guidance to enact uniform universal legislation that comports with the American Declaration and re-enfranchises 5.2 million American citizens. This is the next logical step for the Commission, which, as part of its Thematic Review of the U.S. in 2018, stated very firmly that the U.S. should end felony disenfranchisement.⁷

Part I of the Discussion Section of this Memorandum of Law shows that felony disenfranchisement laws within the United States violate Article I, II, XVII, XX and XXXII of the American Declaration because these laws infringe on the right to vote, interfere with rehabilitating criminal offenders, and disproportionately impact

⁶ Editorial Bd., *Vote. That’s Just What They Don’t Want You to Do*, N.Y. TIMES (Mar. 10, 2018), <https://www.nytimes.com/2018/03/10/opinion/sunday/go-vote.html> (“Keeping people from voting has been an American tradition from the nation’s earliest days, when the franchise was restricted to white male landowners. It took a civil war, constitutional amendments, violently suppressed activism against discrimination and a federal act enforcing the guarantees of those amendments to extend this basic right to every adult . . . Today, only one group of Americans may be legally barred from voting—those with felony records, a cruel and pointless restriction that disproportionately silences people of color.”).

⁷ *Police Violence Against Afro-descendants in the United States*, *supra* note 2, at *Recommendations* ¶ 11(a).

communities of color.

Part II of the Discussion Section of this Memorandum of Law outlines over twenty years of support for Petitioner's argument, that felony disenfranchisement laws violate international law, by the following international bodies: United Nations Human Rights Committee, Committee on the Elimination on Racial Discrimination, several UN Special Rapporteurs, and the European Court of Human Rights.

Part III of the Discussion Section of this Memorandum of Law discusses in detail the need for the Commission to act because felony disenfranchisement is unlikely to end in the U.S. anytime soon. The U.S. Congress, the judiciary, and the states are not willing to eliminate it.

Lastly, the Appendix shows that felony disenfranchisement is prevalent throughout the Americas. Canada is the only nation in the Americas that allows incarcerated individuals to vote without restrictions. The Commission's findings and recommendations, therefore, have the potential to impact all of the Americas.

BRIEF PROCEDURAL HISTORY

- On January 6, 2004, the Rutgers Constitutional Litigation Clinic, now known as the Rutgers International Human Rights Clinic (“the Clinic”), filed a lawsuit challenging New Jersey’s felony disenfranchisement laws in the New Jersey state court system under the New Jersey Constitution.⁸ Later in 2004, the trial court denied the requested relief.⁹
- On November 2, 2005, the New Jersey Superior Court, Appellate Division affirmed the lower court’s decision.¹⁰ The Clinic appealed to the New Jersey Supreme Court, which, on March 16, 2006, refused to hear the appeal.¹¹ This means the Clinic lost. There was no further possible legal action to take.
- On September 13, 2006, having exhausted all judicial remedies, the Clinic timely filed this Petition with the Commission.¹² Originally, the Petitioners in this matter were national and New Jersey-based advocacy groups, political activists in New Jersey, local City Council members, and people who were disenfranchised by New Jersey’s laws. The Commission assigned the Petition case number P-990-06.
- In a letter dated May 5, 2009, the Commission informed the Clinic that it had notified the United States and that the U.S. Government had 60 days to respond to the Petition in accordance with Article 30 of the Commission’s Rules of Procedure.
- When the U.S. did not respond, in a letter dated January 14, 2010, the Clinic wrote to Dr. Santiago A. Canton, Executive Secretary of the Commission, requesting a hearing on the admissibility and/or the merits during the Commission’s 138th Period of Sessions in Washington, D.C.
- The U.S. Government finally responded by letter dated April 7, 2010. The U.S. Government argued that the Commission should decline to hear the case

⁸ *NAACP v. Harvey*, Docket No. UNN-C-4-04 (Ch. Div. 2004).

⁹ ORG. AM. STATES, REPORT ON THE 153RD SESSION OF THE IACHR 4 (2014).

¹⁰ *New Jersey State Conference-NAACP v. Harvey*, 381 N.J. Super. 155, 885 A.2d 445 (App. Div. 2005), *cert. denied*, 186 N.J. 363, 895 A.2d 450 (N.J. 2006).

¹¹ *New Jersey State Conference-NAACP v. Harvey*, 895 A.2d 450 (N.J. 2006) (denying review of 885 A.2d 445 (App. Div. 2005)).

¹² Petition P-990-06 (filed with the IACHR on September 13, 2006).

for “failure to exhaust domestic remedies” (specifically, remedies potentially available (1) in federal court and (2) under federal law).

- In response to this letter, the Clinic filed a lengthy brief with the Commission on November 15, 2010 that discussed extensively how the Clinic had indeed exhausted all available remedies.
- On April 11, 2011, after not hearing from the U.S. Government, the Clinic again wrote urging the Commission to admit the Petition and proceed to a hearing on the merits. The Clinic wrote approximately ten similar letters to the Commission between 2011 and 2017. In addition to those formal letters, from 2011 to 2017, Professor Penny Venetis of the Clinic personally raised this Petition with the Commission in multiple conversations.
- In a letter dated October 27, 2017, the Commission archived the Petition, citing Article 48(1)(b) of the American Convention on Human Rights and Article 42 of the Commission’s Rules of Procedure. The Commission did not notify Professor Venetis or the Clinic of this action.
- The Clinic learned of the archiving of the Petition in 2019. Between 2019 and 2021, the Clinic filed numerous briefs and letters to the Commission urging it to reinstate the Petition (pursuant to Rule 42) and expedite the Petition’s review. Professor Venetis also had an in-person meeting with the Commission in the summer of 2019 about reinstating the matter as well as several conference calls on the subject. The last brief that the Clinic sent to the Commission making those requests was on March 15, 2021.
- On March 18, 2021, the Clinic received a letter from the Commission informing that the Commission had reinstated the Petition and that it would review the Petition on its merits, in an expedited fashion. At this point, the Rutgers International Human Rights Clinic became the Petitioner.
- In October 2021, the Clinic filed a letter and accompanying memorandum of law with the Commission requesting a merits hearing for the Commission’s 182nd Periodic Session, scheduled for December 2021. Petitioner was not granted a hearing for that session but was advised in a telephone call with various members of the Commission to re-submit its request for a merits hearing in 2022.
- On January 19, Petitioner filed a letter with the Commission requesting a merits hearing for the 183rd Regular Period of Sessions on March 7-18, 2022.

FACTS

I. CURRENT SNAPSHOT OF FELONY DISENFRANCHISEMENT IN THE U.S.

1. National Overview: Felony Disenfranchisement Laws Exist in 48 States

In 2020, a presidential election year, 5.2 million Americans were denied the right to vote because of felony disenfranchisement laws.¹³ Only two states—Maine and Vermont—do not disenfranchise individuals with criminal convictions.¹⁴ The District of Columbia joined these two states in 2020, although it does not have voting power at the federal level.¹⁵ Every other state denies individuals their right to vote for at least the time during which while they are incarcerated for a felony criminal conviction, if not longer.

As the map and chart below show, felony disenfranchisement laws are not consistent throughout the U.S. and fall into three distinct categories. In eleven states, citizens who have been convicted of felonies either lose their right to vote permanently or have to overcome great hurdles to be able to regain the ability to vote (including, seeking a governor’s pardon, waiting for many years, and/or paying fines

¹³ Chung, *supra* note 3.

¹⁴ Washington D.C. and Puerto Rico also do not disenfranchise people with criminal convictions, but neither are states and both lack voting representation in Congress.

¹⁵ *DC Council Approves Voting in Prison Ahead of November Election*, SENTENCING PROJECT, (July 8, 2020), <https://www.sentencingproject.org/news/dc-council-approves-voting-prison-ahead-november-election/>.

and fees that they are not informed that they owe). The result is the disenfranchisement of 2.2 million people.¹⁶ Sixteen states disenfranchise a total of 1.6 million citizens after they serve their sentences, while they are on parole or probation.¹⁷ Twenty-one states disenfranchise people only when they are incarcerated, impacting 1.3 million citizens.¹⁸ In total, nearly 5.2 million Americans were disenfranchised in 2020 as a result of a felony conviction.¹⁹ The map²⁰ and chart²¹ below (Figures 1 and 2), created by The Sentencing Project, depict these three categories and how each U.S. state regulates felony disenfranchisement under its laws, as of 2021:

¹⁶ CHRISTOPHER UGGEN ET AL., SENTENCING PROJECT, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 8, FIG. 1 (2020), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>.

¹⁷ *Id.*

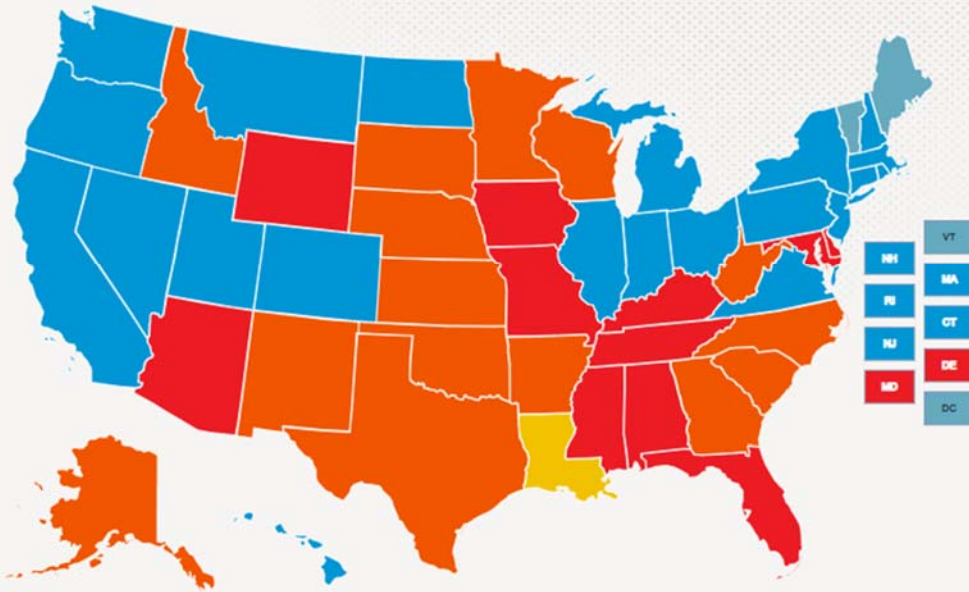
¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CTR. FOR JUSTICE (2022), <https://www.brennancenter.org/our-work/research-reports/criminal-disenfranchisement-laws-across-united-states>, (last updated Jan. 1, 2022).

²¹ Chung, *supra* note 3.

Criminal Disenfranchisement Laws Across the United States



Key:

- Permanent disenfranchisement for all people with felony convictions
- Permanent disenfranchisement for at least some people with criminal convictions
- Voting rights restored upon completion of sentence, including prison, parole, and probation
- Voting rights restored for those on probation or parole who have not been incarcerated during the last five years
- Voting rights restored automatically after release from prison
- No disenfranchisement for people with criminal convictions

Figure 1 -- Map of State Felony Disenfranchisement Laws

No restriction (4)	Prison (21)	Prison, parole & probation (16)	Prison, parole, probation & post-sentence – some or all (11)
Maine	California	Alaska	Alabama ⁴
Vermont	Colorado	Arkansas	Arizona ⁵
District of Columbia	Connecticut	Georgia	Delaware ⁶
Puerto Rico	Hawaii	Idaho	Florida ⁷
	Illinois	Kansas	Iowa ⁸
	Indiana	Louisiana ³	Kentucky ⁹
	Maryland	Minnesota	Mississippi ¹⁰
	Massachusetts	Missouri	Nebraska ¹¹
	Michigan	New Mexico	Tennessee ¹²
	Montana	North Carolina	Virginia ¹³
	Nevada	Oklahoma	Wyoming ¹⁴
	New Hampshire	South Carolina	
	New Jersey	South Dakota	
	New York	Texas	
	North Dakota	West Virginia	
	Ohio	Wisconsin	
	Oregon		
	Pennsylvania		
	Rhode Island		
	Utah		
	Washington ²		

Figure 2 -- Classification of State Felony Disenfranchisement Laws

Challenges to felony disenfranchisement, including Petitioner’s 2004 New Jersey lawsuit, have all failed because of *Richardson v. Ramirez*, a 1974 U.S. Supreme Court case which held that the 14th Amendment does not prohibit California (and, by implication, other states) from disenfranchising people who have been convicted of felonies. *Ramirez* has been criticized widely,²² but it is still valid law that continues to fuel the proliferation of onerous felony disenfranchisement laws.

²² Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1154 (2004). Many scholars believe that the case was wrongly decided because the Supreme Court did not take into account the legislative history of the 14th Amendment Equal Protection Clause, enacted after the Civil War. These scholars argue that when taken in its proper historical context, disenfranchisement is only authorized for crimes of rebellion and disloyalty, particularly treason. Indeed, draft iterations of the Equal Protection Clause explicitly limited disenfranchisement to white Confederates who had participated in the Civil War or crimes related to that rebellion. See Richard W. Bourne, *Richardson v. Ramirez: A Motion to Reconsider*, 42 VAL. U.L. REV. 1, 14-16 (2007). See also Jason Morgan-Foster, *Transitional Judicial Discourse and Felon Disenfranchisement: Re-Examining Richardson v. Ramirez*, 13 TULSA J. COMP. & INT’L L. 279, 289 (2005).

a. Disenfranchisement Laws Within States Are Constantly Changing, Causing Great Confusion and Instability

It is difficult for voters to keep track of who can and cannot vote in each state because the laws are constantly changing. For example, South Dakota made efforts to restore the franchise to people convicted of crimes in 2010, but, in 2012, it revoked voting rights for persons on felony probation.²³ This means that individuals convicted of a felony after 2012 cannot vote while they are incarcerated, on probation or parole, and/or if they owe outstanding fines and fees. Had they been convicted of the identical crimes before 2012, however, they would have regained their right to vote unconditionally upon release from prison.²⁴

Iowa's laws have similarly shifted several times in the past few years. Until recently, Iowa's felony disenfranchisement laws were among the most severe in the U.S.²⁵ Iowa permanently took voting rights away from citizens with felony convictions unless the state approved individualized rights restoration.²⁶ In 2005, Iowa

²³ Chung, *supra* note 3.

²⁴ *Felony Convictions*, S.D. SEC'Y OF ST., <https://sdsos.gov/elections-voting/voting/register-to-vote/felony-convictions.aspx> (last visited Sept. 24, 2021).

²⁵ *Brennan Center Applauds Iowa Governor's Restoration of Voting Rights*, BRENNAN CTR. FOR JUSTICE (June 17, 2005), <https://www.brennancenter.org/our-work/analysis-opinion/brennan-center-applauds-iowa-governors-restoration-voting-rights>.

²⁶ *Voting Rights Restoration Efforts in Iowa*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-iowa> (last updated August 5, 2020).

Governor Tom Vilsack issued an executive order²⁷ that restored voting rights to Iowans who had completed sentences for felony convictions after January 2005.²⁸ In 2011, Governor Terry Branstad reversed that executive order, permanently depriving citizens with past convictions from voting unless the government approved an individualized rights restoration application.²⁹ Between 2011 and 2014, only 64 citizens with felony convictions had their right to vote restored, even though approximately 14,500 people with felony convictions completed their sentences.³⁰ In August 2020, Iowa Governor Kim Reynolds issued an executive order³¹ restoring the voting rights of people with felony convictions who had served their sentences except people who had been convicted of certain crimes, such as homicide and sexual abuse. As Iowa's history demonstrates, this re-enfranchisement may only be temporary, as it can be overturned by subsequent governors.

Florida is another example of how laws related to disenfranchisement shift back and forth, sometimes within a short time span. In 2018, over 60% of Floridians voted to approve an amendment to the state constitution known as Amendment 4 or

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Bonnie Pitz, *Permanent Disenfranchisement Hurts Families and Communities*, DES MOINES REGISTER, <https://www.desmoinesregister.com/story/opinion/abetteriowa/2016/09/23/permanent-disenfranchisement-hurts-families-and-communities/90848580/>.

³¹ *Id.* See also *Voting Rights Restoration*, OFF. GOVERNOR IA, <https://governor.iowa.gov/services/voting-rights-restoration>.

the “Voting Amendment,” which re-enfranchised people with certain felony convictions who completed their sentences, including people on parole or probation. (Amendment 4 always excluded individuals with felony convictions for certain serious crimes, like murder and sexual assault.) When it passed, Amendment 4 re-enfranchised an estimated 1.4 million Floridians.

Unfortunately, roughly a year later, Florida Governor Ron DeSantis signed Senate Bill 7066 (SB 7066), which effectively overturned Amendment 4. SB 7066 requires individuals with felony convictions to pay all fees or fines imposed as part of their sentences before they can vote.³² Most Floridians with felony convictions do not know how much they owe, even if they could afford to pay the fines and fees.³³

Civil rights groups filed a lawsuit in federal court challenging SB 7066 but lost. The U.S. Supreme Court refused to intervene, leaving in place a federal appeals court ruling that supports Florida’s fine-collection requirement.³⁴ The ruling also makes clear that Florida is under no legal obligation to inform anyone about how much they owe in fines. As Daniel A. Smith, professor of political science at the University of Florida, said, “[SB 7066] is perpetuating the inequitable system in

³² Patricia Mazzei, ‘*Real Change*’: A Race Is On to Register Ex-Felons in Florida, N.Y. TIMES, (Oct. 4, 2020), <https://www.nytimes.com/2020/10/04/us/felons-florida-registration-vote.html>.

³³ *Id.*

³⁴ *McCoy v. Governor of Fla.*, No. 20-12003-AA, 2020 WL 4012843 (11th Cir. July 1, 2020), *aff’d sub nom.*, *Raysor v. DeSantis*, 140 S. Ct. 2600 (2020) (mem.).

Florida that rests on the backs of people who cannot afford to pay court fines and fees.”³⁵ “At least three-quarters of the roughly one million former individuals with felony convictions in Florida, at least three-quarters owe court debt, [and the population of individuals with felony convictions is] also disproportionately Black.”³⁶

b. States Impose Impossible Hurdles for Re-Enfranchisement

Like Florida, there are other states that purport to restore the franchise to some people with criminal convictions but impose hurdles that are nearly impossible to clear. Mississippi, for instance, only allows otherwise permanently disenfranchised people to vote if they are pardoned by the governor or their right to vote is restored by a two-thirds vote of both houses of the state legislature.³⁷ These are significant obstacles that are rarely overcome. Few people have the resources, education, or ability to prepare the legal documents needed to request pardons and petition the legislature. And it is highly unlikely that the legislature would make time in its busy schedule to consider these pardons (particularly during the COVID-19 pandemic). As such, Mississippi’s laws effectively permanently disenfranchise 10.6% of the state’s voting age population, the highest percentage in the nation.³⁸

³⁵ Mazzei, *supra* note 32.

³⁶ *Id.*

³⁷ *Mississippi Ex-Offender Voting Rights*, U.S. VOTE FOUN., <https://www.usvotefoundation.org/ex-off-voting-rights/Mississippi> (last visited Sept. 24, 2021).

³⁸ Bobby Harrison, *Mississippi Senate Killed 19 House Bills to Restore Voting Rights*, MS TODAY (Apr. 21, 2021), <https://mississippitoday.org/2021/04/21/house-efforts-to-restore-voting-rights-stymied-by-senate/>.

Similarly, in 2017, Alabama passed a law identifying crimes “of moral turpitude” that result in permanent disenfranchisement, absent a pardon.³⁹ These crimes encompass a wide range of offenses, some of which are heinous (child sexual assault) and others that are vague (like, endangering the water supply).⁴⁰

People who are convicted of committing some of the statutorily enumerated crimes can only have their voting rights restored after serving their sentences and receiving a “Certificate of Eligibility to Register to Vote” from the Bureau of Pardons and Paroles.⁴¹ They may only apply for this certificate if they have no pending criminal charges, and they pay all outstanding fines and fees, which, as mentioned above, can itself be a nearly insurmountable barrier.⁴² People who commit the more severe crimes “of moral turpitude” may only be re-enfranchised if they receive an actual pardon from the state,⁴³ which is incredibly difficult and rare. In Alabama,

³⁹ *Voting Rights Restoration*, ACLU AL, <https://www.aclualabama.org/en/voting-rights-restoration>.

⁴⁰ *Convicted of a Felony? You May Still be Able to Vote*, ALA. BUREAU OF PARDONS & PAROLES (2017), <https://pardons.alabama.gov/wp-content/uploads/Voting-Rights-Final-Version.pdf>.

⁴¹ Connor Sheets & Sarah Whites-Koditschek, *In Alabama, Some Felons are Wrongly Being Barred from Voting*, AL.COM (Oct. 30, 2020, 7:13 AM), <https://www.al.com/news/2020/10/in-alabama-some-felons-are-being-wrongly-barred-from-voting.html>.

⁴² *Id.*; see also MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RESOURCE CTR., WHO MUST PAY TO REGAIN THE VOTE? A 50 STATE SURVEY (2020), <https://ccresourcecenter.org/wp-content/uploads/2020/11/Who-Must-Pay.Nov.2020.update.pdf> (detailing state laws restricting voting rights restoration on the basis of payment of fines and fees and describing the harms of such laws).

⁴³ CONVICTED OF A FELONY?, *supra* note 40.

these harsh felony disenfranchisement laws silence more than 130,000 Black citizens.⁴⁴ Black individuals are 9.4% less likely to be able to pay back outstanding fines, fees, and restitution required to restore their right to vote.⁴⁵

c. Texas Is Criminally Prosecuting People Who Do Not Know That They Are Disenfranchised

In 2007, Texas Governor Rick Perry vetoed a bill requiring the state to notify citizens when they are eligible to be re-enfranchised. This single action has had serious consequences. The state is prosecuting and imprisoning people who believe that they can vote but cannot.

Crystal Mason, a Black woman and resident of Texas, attempted to cast her vote in the 2016 Presidential Election. Her name did not appear on the voting rolls at her polling place, so she completed a “provisional ballot.” Provisional ballots are exceptionally common in the U.S. In the 2016 presidential election alone, over 2.5 million people voted provisionally.⁴⁶ Indeed, provisional ballots are required by a federal law, the Help America Vote Act of 2002, and “ensure that voters are not excluded from the voting process due to an administrative error. They provide a

⁴⁴ *New Lawsuit Challenges Constitutionality of Alabama’s Felony Disenfranchisement Law*, CAMPAIGN LEGAL NEWS, (Sept. 26, 2016), <https://campaignlegal.org/press-releases/new-lawsuit-challenges-constitutionality-alabamas-felony-disenfranchisement-law>.

⁴⁵ Connor Sheets, *Too poor to vote: How Alabama’s ‘new poll tax’ bars thousands of people from voting*, AL.COM, (Mar. 6, 2019), https://www.al.com/news/2017/10/too_poor_to_vote_how_alabamas.html.

⁴⁶ Drew Desilver, *Most mail and provisions ballots got counted in past U.S. elections –but many did not*, PEW RESEARCH CTR. (Nov. 10, 2020), <https://www.pewresearch.org/fact-tank/2020/11/10/most-mail-and-provisional-ballots-got-counted-in-past-u-s-elections-but-many-did-not/>.

fail-safe mechanism for voters who arrive at the polls on Election Day and whose eligibility to vote is uncertain.”⁴⁷ Federal law requires that states allow people to vote provisionally, even if there are questions about their voter eligibility.⁴⁸

Even though provisional ballots are legal, and Texas election officials did not count Ms. Mason’s ballot, she was arrested for illegally voting after submitting her provisional ballot.⁴⁹ Ms. Mason claimed that she had no knowledge that she was legally barred from voting.⁵⁰ Nonetheless, Judge Ruben Gonzalez of Texas’s 432nd District Court sentenced her to five years in prison for illegally voting. In contrast, Judge Gonzalez sentenced a white Republican judge who pleaded guilty to intentional election fraud to only 5 years of probation.⁵¹

In March 2020, the story of 62-year-old Hervis Rogers, a Black man, went viral on social media because he was the last person in line at Texas Southern University to cast his vote in the “Super Tuesday” presidential primary elections.⁵² He

⁴⁷ *Provisional Ballots*, NAT’L CONF. OF STATE LEGISLATURES (2022), <https://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx>.

⁴⁸ *Id.*

⁴⁹ Christina Morales, *Her Ballot Didn’t Count. She Faces 5 Years in Prison for Casting It*, N.Y. TIMES (Apr. 3, 2021), <https://www.nytimes.com/2021/04/03/us/texas-provisional-ballot-appeal.html>.

⁵⁰ *Id.*

⁵¹ Steven Yoder, *Texas D.A. Who Sent Woman To Prison For Five Years For Voting Made Her Own Election Mistake*, APPEAL (Sept. 18, 2018), <https://theappeal.org/texas-da-who-sent-woman-to-prison-for-five-years-for-voting-made-her-own-election-mistake/>. See also Brad Reed, *White judge gets probation for election fraud in same Texas county that jailed black woman for voting*, RAW STORY, (Apr. 23, 2018), <https://www.rawstory.com/2018/04/white-judge-gets-probation-election-fraud-texas-county-jailed-black-woman-voting/>.

⁵² Jen Rice & Paul Debenedetto, *A Houston Man Is Arrested For Alleged Illegal Voting As Texas GOP Seeks Tighter Laws*, NPR (July 9, 2021), <https://www.npr.org/2021/07/09/1014686526/a-houston-man-is-arrested-for-alleged-illegal-voting-as-texas-gop-seeks-tighter->.

waited nearly six hours and finally cast his vote at 1 a.m.⁵³ In July 2021, Mr. Rogers was arrested and charged with illegally voting. Mr. Rogers has claimed that he had no idea that he was ineligible to vote. Although he was charged with a non-violent crime, his bail was set at a staggering \$100,000, a level usually reserved for crimes such as voluntary manslaughter, rape, robbery, arson, and kidnapping.⁵⁴

2. Felony Disenfranchisement Disproportionately Impacts People of Color, Silencing Their Political Voices and Weakening Their Political Power

Felony disenfranchisement impacts communities of color at disproportionate rates, silencing their political voices and weakening their overall political power. The U.S. has the highest rate of incarceration in the world.⁵⁵ The racial imbalance in U.S. prisons is striking. Black men are six times more likely to be incarcerated than white men, while Latino men are two-and-a-half times more likely to be incarcerated than white men.⁵⁶ One out of every three Black and one out of every six Latino boys will be sentenced to prison in their lifetime.⁵⁷ By contrast, one out of every *seventeen* white boys can expect to be sentenced to prison in their lifetime.⁵⁸

⁵³ Amy Gardner, *A Texas man was arrested on charges that he voted in the 2020 Democratic primary while on parole. He could face as much as 20 years in prison*, TEX. TRIBUTE (July 11, 2021), <https://www.texastribune.org/2021/07/11/texas-voter-arrested-parole/>.

⁵⁴ *Average Bail Amounts by Crime*, BAIL AGENT NETWORK, <https://www.bailagentnetwork.com/portfolio/average-bail-amounts-by-crime/>.

⁵⁵ *United States Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/US.html>.

⁵⁶ *Criminal Justice Facts*, SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/>.

⁵⁷ *Id.*

⁵⁸ *Id.*

Even though Black and Hispanic people make up 32% of the general U.S. population, they make up 56% of the U.S.’s incarcerated population.⁵⁹ More than 25% of Black men are jailed by the time they are in their mid-30s.⁶⁰ Latino men are imprisoned at half the rate of Black men, but they are still imprisoned at a rate almost three times higher than white men.⁶¹ If Black and Latino people were incarcerated at the same rates as white people, the United States’ incarcerated population would decline by nearly 40%.⁶²

Some states are worse than others. For example, in Iowa, “racial disparities ... in prisons are more extreme than almost anywhere else in the country, with Black Iowans imprisoned at a rate 11 times that of white Iowans.”⁶³ The 2010 census showed that although just 4% of Iowa’s population was Black at the time, 25% of incarcerated Iowans were Black.⁶⁴ Similarly, in Florida, even though only 16.9% of the population is Black, a staggering 40.9% of the prison population is Black. Approximately 900,000 Floridians who have completed their sentence remain disenfranchised.⁶⁵ Like Florida and Iowa, racial disparities abound in Texas’s criminal

⁵⁹ *Id.*

⁶⁰ Aaron Gottlieb & Kalen Flynn, *The Legacy of Slavery and Mass Incarceration: Evidence from Felony Case Outcomes*, 95 SOC. SERVICE REV. 3, 3 (2021).

⁶¹ *Criminal Justice Facts*, The Sentencing Project, <https://www.sentencingproject.org/criminal-justice-facts/>.

⁶² *Criminal Justice Fact Sheet*, NAACP, <https://naacp.org/resources/criminal-justice-fact-sheet>.

⁶³ Kate Payne, ‘It’s Akin To A Death’: Why Racial Disparities In Iowa’s Prisons Persist And the Toll They Take, IOWA PUBLIC RADIO (Dec. 18, 2020), <https://www.iowapublicradio.org/racial-justice/2020-12-18/its-akin-to-a-death-why-racial-disparities-in-iowas-prisons-persist-and-the-toll-they-take>.

⁶⁴ *Id.*

⁶⁵ UGGEN ET AL., *supra* note 16, at 4.

legal system. As of 2017, Black people constituted 13% of Texas state residents, but 27% of people in jail and 33% of people in prison.⁶⁶ Texas is second only to Florida in disenfranchising its citizens, with over 500,000 Texans deprived of their voting rights as of 2020.⁶⁷

Latinos are also disproportionately represented in prisons. For example, Latinos constituted 49% of New Mexico's population, but 60% of the state's prison population; 31% of Arizona's population, but 39% of the state's prison population; 16% of Connecticut's population, but 28% of the state's prison population; and 12% of Massachusetts' population, but 28% of the state's prison population.⁶⁸

The charts below demonstrate state rates of incarceration by race and ethnicity. Notably, the incarceration rate for whites are lower in all states when compared with incarceration rates for Black citizens. Black citizens are also more likely to be imprisoned than Latino citizens in all states, in proportion to their total respective populations. Latino citizens are more likely to be imprisoned than white citizens in at least 26 states.

⁶⁶ INCARCERATION TRENDS IN TEXAS, VERA INST. OF JUSTICE (2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-texas.pdf>.

⁶⁷ UGGEN ET AL., *supra* note 16, at 16.

⁶⁸ ASHLEY NELLIS, SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 20 (2021), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>.

Table 1. Imprisonment Rates by Race and Ethnicity, Ranked by Black Imprisonment Rates

State	Black	White	Latinx
Wisconsin	2742	230	475
Oklahoma	2395	511	480
Idaho	2387	502	673
Montana	2272	371	293
Arizona	2105	428	742
Iowa	2084	225	327
Alaska	1987	417	238
Oregon	1932	344	376
Vermont	1737	239	Not Provided
Nebraska	1733	195	395
Kansas	1661	265	362
South Dakota	1660	280	432
Delaware	1654	324	355
California	1623	175	353
Colorado	1603	236	518
Arkansas	1597	450	252
Texas	1547	452	471
Nevada	1543	379	319
Ohio	1530	273	312
Pennsylvania	1523	206	469
Connecticut	1512	156	579
Michigan	1479	230	Not Provided
Indiana	1443	320	243
Louisiana	1411	381	28
Florida	1411	340	227
Utah	1383	167	299
Kentucky	1370	466	188
West Virginia	1337	348	155
Wyoming	1337	381	525
Maine	1331	143	Not Provided
Missouri	1297	336	214
Virginia	1246	287	135
State Average	1240	261	349
New Mexico	1229	216	393
Washington	1195	222	287
Illinois	1166	156	223
Alabama	1132	421	Not Provided
Mississippi	1107	398	211
Minnesota	1023	105	186
New Jersey	1009	81	162
Georgia	1006	361	216
Tennessee	989	296	163
Hawaii	947	410	84
North Dakota	848	172	407
South Carolina	823	217	172
Rhode Island	821	131	239
North Carolina	810	209	194
New York	754	96	285
Maryland	746	141	123
New Hampshire	742	269	241
Massachusetts	466	63	260

Table 2. Rate of Black Imprisonment

State	Rate of Imprisonment
Wisconsin	1 in 36
Oklahoma	42
Idaho	42
Montana	44
Arizona	48
Iowa	48
Alaska	50
Oregon	52
Vermont	58
Nebraska	58
Kansas	60
South Dakota	60
Delaware	60
California	62
Colorado	62
Arkansas	63
Texas	65
Nevada	65
Ohio	65
Pennsylvania	66
Connecticut	66
Michigan	68
Indiana	69
Louisiana	71
Florida	71
Utah	72
Kentucky	73
West Virginia	75
Wyoming	75
Maine	75
Missouri	77
Virginia	80
State Average	81
New Mexico	81
Washington	84
Illinois	86
Alabama	88
Mississippi	90
Minnesota	98
New Jersey	99
Georgia	99
Tennessee	101
Hawaii	106
North Dakota	118
South Carolina	121
Rhode Island	122
North Carolina	123
New York	133
Maryland	134
New Hampshire	135
Massachusetts	214

Data Source: Carson, E. A. (2021). Prisoners in 2019. Bureau of Justice Statistics; U.S. Census Bureau (n.d.). Age, sex, race, and Hispanic-origin–6 race groups. (SC EST 2019-ALLDATA6).

Figure 3-- State Rate of Incarceration by Race and Ethnicity⁶⁹

⁶⁹ *Id.* at 7, tbls. 1 & 2.

In Figure 3, Table 1's rankings begin with states with the highest Black incarceration rate and move to the lowest rate. The states with the highest rate of Black incarceration are Wisconsin, Oklahoma, Idaho, Montana, and Arizona.

Wisconsin has the highest rate of incarceration for its Black residents with 2,742 per 100,000 Black residents in prison, followed by Oklahoma (2,395 per 100,000 Black residents), Idaho (2,387 per 100,000 Black residents), Montana (2,272 per 100,000 Black residents), and Arizona (2,105 per 100,000 Black residents). Of these five states, three also have a disproportionately high rate of incarceration for Latino residents. In Wisconsin, the incarceration rate for Latino residents is 475 per 100,000 Latino residents, compared to 230 per 100,000 white residents. In Idaho, the incarceration rate for Latino residents is 673 per 100,000 Latino residents, compared to 502 per 100,000 white residents. In Arizona, the incarceration rate for Latino residents is 742 per 100,000 Latino residents, compared to 428 per 100,000 white residents.

Figure 3, Table 2 analyzes the Table 1 data in a different way. It demonstrates how much higher the rate of imprisonment is for Black people. Table 2 shows the odds of imprisonment for Black residents in each state, given their overall population in the state. In Wisconsin, one in 36 Black residents is imprisoned; in Oklahoma and Idaho, one in 42 Black residents is imprisoned; in Montana, one in 44 Black residents is imprisoned; and in Arizona, one in 48 Black residents is imprisoned. On

average across the U.S., one in 81 Black residents is imprisoned. The lowest rate, in Massachusetts, is one in 214 Black residents. In comparison, the highest rate of imprisonment for white residents is one in 195 white residents (Oklahoma), while the lowest rate of imprisonment is one in 1,587 white residents (Massachusetts).

Tables 1 and 2 make clear that Black and Latino individuals are incarcerated at rates that are often astronomically higher than white individuals. On average in the United States, white residents are incarcerated at a rate of 261 per 100,000 white residents. In contrast, incarceration rates are 349 per 100,000 Latino residents, and 1,240 per 100,000 Black residents. In the most extreme instances, Black citizens are incarcerated at a rate that is twelve and a half times greater than for white citizens (in New Jersey) and Latinos are incarcerated at a rate that is four times greater than for white citizens (in Massachusetts).

Additionally, the above tables and their data claim to underestimate racial disparities in imprisonment rates because some states count much of the Latino population as white residents, which would inflate the rates of imprisonment for white residents and suppress the percentage share of Black and Latino residents.⁷⁰ Some states, such as Florida, may also undercount the number of imprisoned Latino residents.⁷¹ This would make incarceration disparities between white, Black, and Latino

⁷⁰ *Id.* at 8.

⁷¹ *Id.*

individuals even more pronounced.⁷²

The racial disparity in incarceration rates in the U.S. is highly relevant to the Commission's review of this Petition, and raises two critical points. First, it is impossible to evaluate whether U.S. felony disenfranchisement laws violate the American Declaration without also discussing race. The two are intertwined. Second, the disparate racial impact of felony disenfranchisement, in and of itself, is a separate human rights violation, because Black and Latino political voices are suppressed at disproportionately alarming rates. This dilutes the political voices of Black and Latino votes in ways that have significant impacts on individuals and their communities, and that infringe on rights guaranteed by the American Declaration.

⁷² *Id.* at 6-8.

DISCUSSION

I. DISENFRANCHISEMENT OF PEOPLE WHO HAVE BEEN CONVICTED OF FELONIES VIOLATES THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN, WITH WHICH THE U.S. MUST COMPLY

A. U.S. FELONY DISENFRANCHISEMENT LAWS VIOLATE ARTICLES XX AND XXXII OF THE AMERICAN DECLARATION

1. The Right to Vote is Fundamental and Absolute

Voting is a fundamental human right of every citizen in the Americas. Article XX of the American Declaration states that:

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

Article XX does not restrict the right to vote in any way, including for criminal convictions.

The Commission has found that political rights guarantee the validity of the other human rights embodied in international instruments.⁷³ In interpreting Article XX in voting rights cases, the Commission has embraced a broad view of suffrage.⁷⁴

⁷³ Report on the Situation of Human Rights in Paraguay, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.71, doc. 19 rev. 1, Ch. VII (A) (1987) [hereinafter *Human Rights in Paraguay*].

⁷⁴ In *Statehood Solidarity Committee v. United States*, the Commission stated that “[t]he participation of citizens in government . . . forms the basis and support of democracy, which cannot exist without it; for title to government rests with the people, the only body empowered to decide its own immediate and future destiny and to designate its legitimate representatives.” Case 11.204, Inter-Am. Comm’n H.R., Report No. 98/03, OEA/Ser.L/V/II.114 doc. 70 rev. 1 ¶ 85 (2003). The Commission also noted that “[n]either form of political life, nor institutional change, nor development planning or the control of those who exercise public power can be made without representative government. *Id.* Additionally, in the Report on the Situation of Human Rights in El Salvador, the Commission stated:

Indeed, the Commission has consistently underscored the importance the Inter-American system places on participatory democracy and on the right to vote as the central element of participatory democracy. This is also reflected in Article XXXII, which makes it “the duty of every person to vote in the popular elections of the country of which he is a national, when he is legally capable of doing so.”⁷⁵

The Commission has found that the exercise of political rights “implies participation by the population in the conduct of public affairs, either directly or through representatives elected in periodic and genuine elections featuring universal suffrage and secret ballot, to ensure the free expression of the electors’ will.”⁷⁶ Similarly, the Charter of the Organization of American States, a foundational document, provides that “solidarity of the American states and the high aims which are sought through it require the political organization of those states on the basis of the effective exercise of representative democracy.”⁷⁷ Article 3 of the Inter-American Democratic Charter also recognizes that an essential element of such representative democracy

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

Inter-Am. Comm’n H.R., OEA/Ser.L/II.85, doc. 28 rev., Ch. IX [A (1)] (1994).

⁷⁵ In the U.S. that legal age is 18, as authorized by the 26th Amendment to the U.S. Constitution.

⁷⁶ Andres Aylwin Azocar et al. v. Chile, Case 11.863, Inter-Am. Comm’n H.R., Report No. 137/99, OEA/Ser.L/V/II.106, doc. 3 rev. at 536 ¶ 40 (1999) (citing *Human Rights in Paraguay*, Inter-Am. Comm’n H.R., at Chapter VII (A)).

⁷⁷ Charter of the Organization of American States, art. 3(d), Apr. 30, 1948, 119 U.N.T.S. 3.

is “universal suffrage as an expression of the sovereignty of the people.”⁷⁸

When read together, Article XX and Article XXXII make clear that, within the Inter-American system, voting is a fundamental human right of every citizen of legal voting age which all OAS member states must honor.

2. This Commission has Already Found That Felony Disenfranchisement in the United States Violates Article XX of the American Declaration

This Commission has criticized U.S. felony disenfranchisement and has called upon the U.S. to end it. In 2018, this Commission published a Thematic Report on the discriminatory and violent nature of the U.S. criminal legal system,⁷⁹ after conducting public hearings, interviews, and investigations throughout the U.S.⁸⁰ The report, *Police Violence Against Afro-descendants in the United States*, recognizes structural racism in the criminal legal system⁸¹ and calls for the U.S. to end all policies that facilitate direct or indirect racial discrimination, including felony disenfranchisement.⁸²

The Thematic Report documents the negative impacts of mass incarceration

⁷⁸ Inter-American Democratic Charter, OAS doc. OEA/SerP/AG/Res.1 (2001), 40 I.L.M. 1289, art. 3 (2001).

⁷⁹ *Police Violence Against Afro-descendants in the United States*, *supra* note 2, at ¶ 20.

⁸⁰ *Id.* at ¶ 2; The report cites the Commission’s own country visit findings, that “the delegation was informed about problems of mass incarceration and voter disenfranchisement affecting African Americans because of convictions, which deeply limits the full exercise of the democratic and citizenship rights of these communities. Such convictions themselves are suspect because of structural racism.” Press Release, *IACHR Concludes Visit to Florida, Louisiana and Missouri, United States*, OAS (Oct. 16, 2015), http://www.oas.org/en/iachr/media_center/preleases/2015/118.asp.

⁸¹ *Police Violence Against Afro-descendants in the United States*, *supra* note 2, at ¶ 1.

⁸² *See id.* at ¶ 7, *Recommendations* ¶ 11(a).

and racial discrimination in the criminal legal system on the right to vote among marginalized groups.⁸³ The report also recognizes that the U.S.’s history of racial segregation infuses racial discrimination into the criminal legal system, including in felony disenfranchisement policies.⁸⁴ As such, the Commission has already highlighted the unacceptable effect of felony disenfranchisement laws “on access to civil and political rights like voting”⁸⁵ and found that felony disenfranchisement specifically harms predominantly Black communities in the U.S.⁸⁶

Relevant to this Petition, the Commission issued recommendations that the U.S. “[t]ake steps to reverse the impact of policies with racially disparate impacts,” including to:

Adopt appropriate measures at the federal or state level to ensure the restoration of voting rights to citizens who have fully served their criminal sentences and those who have been released on parole, particularly in light of the racially discriminatory impact of the policy of felony disenfranchisement.⁸⁷

This was not the first time that the Commission commented on felony disenfranchisement. In 2016, after the state of Virginia re-enfranchised some of its citi-

⁸³ *Id.* at ¶ 46.

⁸⁴ *Id.* at ¶ 65. *See also id.* at ¶ 61, n.86 (noting that, following the end of Reconstruction, southern states passed “Jim Crow” laws to maintain racial hierarchies to such a degree that all eleven former Confederate states adopted a voter disenfranchisement playbook, including felony disenfranchisement laws).

⁸⁵ *Id.* at ¶ 144.

⁸⁶ *Id.* at ¶ 145.

⁸⁷ *Id.* at *Recommendations* ¶ 11(a).

zens, the Commission issued a press release entitled “IACHR Welcomes the Restoration of Voting Rights for Former Felons in the United States,” stating that:

[T]he right to vote is an essential element of democracy. Specifically, Article XX of the American Declaration [e]stablishes the right to participate in popular elections as a fundamental right for every citizen who is of lawful capacity. Although this provision does not specifically pose restrictions on the right to vote, *the IACHR has indicated in numerous occasions that valid restrictions on this right, must be objective, reasonable and proportional. Additionally, in accordance with international law standards, when conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence.* In that regard, the Commission recommends the adoption of appropriate measures in other states to ensure the restoration of voting rights to citizens who have fully served their sentences and those who have been release[d] on parole.⁸⁸

The Commission’s recognition of Article XX’s “objective, reasonable and proportional” requirement means, at a minimum, that blanket disenfranchisement of people with criminal convictions is inconsistent with the American Declaration.

3. Case Law by Both the Inter-American Court of Human Rights and the European Court of Human Rights Makes Clear that Blanket Disenfranchisement for People Convicted of Crimes is a Violation of Human Rights Law, Even for Incarcerated Citizens

a. Incarcerated People are Entitled to Vote in the Americas

Through its 2016 press release and 2018 Thematic Report, the Commission

⁸⁸ Press Release, *IACHR Welcomes the Restoration of Voting Rights for Former Felons in the United States*, OAS (June 14, 2016), http://www.oas.org/en/iachr/media_center/PReleases/2016/077.asp.

has made clear that people who are on probation and parole should be fully enfranchised once they are released from prison. Human rights law, however, grants greater protection than that. Well-settled law from the Inter-American Court of Human Rights and the European Court of Human Rights makes clear that even people who are *currently incarcerated* should be permitted to vote.

In Advisory Opinion OC-28/21 issued in 2021, the Inter-American Court stated that Article 23 of the American Convention on Human Rights does not permit the blanket disenfranchisement of citizens even when someone is incarcerated.⁸⁹ The Convention's Article 23 is the closest thing to the American Declaration's Article XX. Indeed, the American Declaration's Article XX offers much broader protection than Article 23. While the American Convention's Article 23 allows for disenfranchisement in some instances,⁹⁰ Article XX of the American Declaration offers no instances whatsoever where disenfranchisement is appropriate. Regardless of this difference, the American Convention's Article 23(2) does not list "criminal

⁸⁹ Presidential Reelection Without Term Limits in the Context of the Inter-American Human Rights System (Arts. 1, 23, 24, and 32 American Convention on Human Rights, Art. XX American Declaration of the Rights and Duties of Man, Art. 3(d) of the Charter of the Organization of American States and of the Inter-American Democratic Charter), Advisory Opinion OC-28/21, Inter-Am. Ct. H.R. (ser. A) No. 28, ¶ 106 (June 7, 2021).

⁹⁰ Article 23 states in full that,

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

convictions” as an acceptable reason to prevent a class of citizens from voting.

Thus, according to the Inter-American Court, disenfranchisement must be meted out on a case-by-case basis by a competent court that takes into account each individual’s transgression.⁹¹ The types of crimes for which disenfranchisement is appropriate are very limited, however. For example, in 2014, in *Norín Catrimán, et al. v. Chile*, the Inter-American Court held that statutory permanent stripping of political rights, including the right to vote, even when someone was convicted of terrorism, could not stand.⁹²

These recent holdings by the Inter-American Court make clear that people who are incarcerated do not lose the right to vote unless there has been a specific finding, based on their particular crime that warrants suspending their fundamental right to vote. These holdings are not unique. They are supported by fifteen decisions issued by the European Court of Human Rights. Both the Inter-American Commission and the Inter-American Court are authorized to examine and rely upon the well-developed law of the European Court of Human Rights for guidance.⁹³

In 2005, *Hirst v. the United Kingdom* set the foundational precedent that a

⁹¹ Presidential Reelection Without Term Limits in the Context of the Inter-American Human Rights System, *supra* note 89.

⁹² *Norín Catrimán, et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 279 (May 29, 2014).

⁹³ *Andres Aylwin Azocar et al. v. Chile*, Inter-Am. Comm’n H.R., Report No. 137/99, OEA/Ser.L/V/II.106, doc. 3 rev. at 536 (1999).

“blanket ban” applied automatically to all individuals convicted of a crime, irrespective of the length of their sentence, nature or gravity of their offense, and the individual circumstances is a violation of Article 3 of Protocol No. 1 to the European Convention on Human Rights.⁹⁴ Article 3 of Protocol No. 1 states that “[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”⁹⁵ The rights guaranteed by Article 3 of Protocol No. 1 are quite similar to those enumerated in Article XX of the American Declaration, which states: “[e]very person having legal capacity is entitled . . . to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.”

In nine decisions issued after *Hirst*, the European Court of Human Rights has held that blanket *statutes* that ban incarcerated individuals from voting, and that do not consider the severity of offenses before disenfranchising citizens violate human rights law:

- *Frodl v. Austria*, App. No. 20201/04 (Apr. 8, 2010);
- *Greens & M.T. v. U.K.*, App. Nos. 60041/08 & 60054/08 (Nov. 4, 2011);
- *McLean & Cole v. U.K.*, App. Nos. 12626/13 & 2522/12 (Jun 26, 2013);

⁹⁴ *Hirst v. the United Kingdom* (No. 2), 681 Eur. Ct. H.R., ¶ 45 (2005).

⁹⁵ European Convention on Human Rights, art. 3 Protocol No. 1, Oct. 1, 1994.

- *Dunn & Others v. U.K.*, App. Nos. 7408/09, 566/10, 578/10 et al (May 13, 2014);
- *Firth & Others v. U.K.*, App. Nos. 47784/09, 47806/09, 47812/09, 47818/09, 47829/09, 49001/09, 49007/09, 49018/09, 49033/09 & 49036/09 (Dec. 15, 2014);
- *McHugh & Others v. U.K.*, App. Nos. 51987/08 & 1,014 others (Feb. 10, 2015);
- *Millbank & Others v. U.K.*, App. No. 44473/14 & others, (Jun 30, 2016);
- *Moohan & Gillon v. U.K.*, App. Nos. 22962/15 & 23345/15 (Jun 13, 2017);⁹⁶ and
- *Scoppola v. Italy* (No. 3), App. No. 126/05, ¶¶ 33-38, 99 (May 22, 2012).

The European Court of Human Rights similarly held in three opinions that blanket *constitutional provisions* that ban people from voting while incarcerated violate human rights law:

- *Anchugov & Gladkov v. Russia*, App. No. 11157/04, ¶ 85 (Sep. 17, 2013) (aff'd in *Isakov & others v. Russia*, App. No. 54446/07 & 23 others, ¶ 11 (Jul 4, 2017));
- *Kulinski & Sabev v. Bulgaria*, App. No. 63849/09, ¶ 41 (Jul. 21, 2016); and
- *Ramishvili v. Georgia*, App. No. 48099/08, ¶ 25 (May 31, 2018).

The same rule applies to disenfranchisement by law for individuals who have served

⁹⁶ In *Moohan*, the ECHR did not consider the merits of the case, but discussed the general principle articulated in its other ECHR cases that blanket disenfranchisement was impermissible.

part of their sentences who are on parole or probation.⁹⁷

b. Blanket Disenfranchisement After Criminal Convictions Violates the “Proportionality Test” Recognized and Adopted Throughout the World, Including by this Commission

The “proportionality test” requires that sentences must reflect the nature and severity of the crimes each person commits. That is why blanket disenfranchisement, without careful consideration by a sentencing judge, violates international law. The Commission, in its 2016 press release referred to the “proportionality test” first articulated in *Hirst*, stating: “the IACHR has indicated in numerous occasions that valid restrictions on this right [to vote], must be objective, reasonable and proportional.”⁹⁸

In *Hirst* and its progeny, discussed above, the European Court of Human Rights recognized that even though member states have a “legitimate aim” in “preventing crime and enhancing civic responsibility and respect for the rule of law,”⁹⁹ there must be proportionality—a rational connection between “the sanction and the

⁹⁷ *Söyler v. Turkey*, App. No. 29411/07, ¶¶ 36-47 (Sep. 17, 2013), aff’d in *Murat Vural v. Turkey*, App. No. 9540/07, ¶ 79 (Oct. 21, 2014). See specifically *Söyler*, at ¶ 38 (rejecting Turkey’s argument that “that the sole requirement of the element of “intent” in the commission of the offence is sufficient to lead it to conclude that the current legal framework adequately protects the rights in question”) (same analysis for the proportionality principle as developed in *Hirst*, *Frodl*, and *Scoppola*).

⁹⁸ *IACHR Welcomes the Restoration of Voting Rights for Former Felons in the United States*, *supra* note 88.

⁹⁹ *Scoppola v. Italy* (No. 3), App. No. 126/05, ¶ 90 (May 22, 2012).

conduct and circumstances of the applicant.”¹⁰⁰ A “severe measure of disenfranchisement must not be resorted to lightly” and “requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual.”¹⁰¹

To determine whether the restriction on voting for incarcerated individuals is proportional to the government’s legitimate aim and the offense committed, sentencing courts must consider specific factors about each offense and each individual. Member states may only restrict voting rights, by taking into account:

- (1) the nature and gravity of the offenses;
- (2) length of sentences; and
- (3) individual circumstances or conduct of the individual.¹⁰²

The Inter-American Court discussed the proportionality test in *Yatama v. Nicaragua*, drawing on *Hirst v. United Kingdom* (No. 2). In *Yatama*, the Inter-American Court held that prison sentences “should be established by law, non-discriminatory, based on reasonable criteria, respond to a useful and opportune purpose that makes it necessary to satisfy an urgent public interest, and be proportionate to this purpose.”¹⁰³ Furthermore, “[w]hen there are several options to achieve this end, the one

¹⁰⁰ *Söyler*, *supra* note 97, at ¶ 45 (citing *Hirst* (no. 2)).

¹⁰¹ *Id.* at ¶ 35 (citing *Hirst* (no. 2)).

¹⁰² *Scoppola*, at ¶¶ 83-109 (holding that Italy’s laws did not violate Article 3 of Protocol No. 1 because the law provided sentencing guidelines for a judge to use in determining the sentence and the loss of his voting rights stemmed from the length of sentence imposed by such guideline). The Court noted that “the circumstances in which the right to vote is forfeited may be detailed in the law, making its application conditional on such factors as the nature or the gravity of the offence committed.” *Id.* at 99.

¹⁰³ *Yatama v. Nicaragua*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 206 (June 23, 2005).

that is less restrictive of the protected right and more proportionate to the purpose sought should be chosen.”¹⁰⁴ This means that blanket felony disenfranchisement, on its face, violates international law because by definition, it is not proportional. It is a severely restrictive sentence that is applied universally for all felony crimes, regardless of the severity of the offense, or the circumstances surrounding each crime.

The High Court of Australia¹⁰⁵ and the Court of First Instance of the High Court in Hong Kong¹⁰⁶ have adopted the European Court of Human Right’s reasoning in eliminating felony disenfranchisement. At least 19 democratic nations allow incarcerated individuals to vote, even if they committed very serious crimes against the state.¹⁰⁷ These countries are Austria, Canada, Croatia, Czech Republic, Denmark, Finland, Ireland, Israel, Latvia, Lithuania, Macedonia, Norway, Serbia, Slovenia, Spain, South Africa, Sweden, Switzerland, and Ukraine.

Courts in these countries permit incarcerated individuals to vote, even when they have committed heinous crimes “against the State”. For example, in *Hila Alrai v. Minister of the Interior and Yigal Amir*, the Israeli government argued that Yigal Amir, who assassinated Prime Minister Yitzhak Rabin should be stripped of his right

¹⁰⁴ *Id.*

¹⁰⁵ *Roach v. Electoral Comm’r* [2007] 233 CLR 162 (Austl.) (finding that the general and automatic disenfranchisement ban for inmates was unconstitutional based on the implicit right to vote that a representative democracy requires).

¹⁰⁶ *Chan Kin Sum v. Secretary for Justice*, [2008] 2 H.K.L.R.D. 231 (C.F.I.) (holding that constitutional provisions that disenfranchise inmates in a general and automatic manner violate human rights).

¹⁰⁷ International Comparison of Felon Voting Laws, BRITANNICA, PROCON.ORG, <https://felonvoting.procon.org/international-comparison-of-felon-voting-laws/> (last updated July 20, 2021).

to vote while he was incarcerated.¹⁰⁸ The Israeli Supreme Court, however, denied the request, reasoning that “[w]ithout the right to vote, the infrastructure of all other fundamental rights would be damaged. Therefore, in a democratic system, the right to vote will be restricted only in extreme circumstances enacted clearly in law.”¹⁰⁹ Assassinating the Prime Minister did not satisfy the “extreme circumstances factor.” The Israeli Supreme Court refused to alter its practices and affirmed that the right to vote is limited by only two criteria: citizenship and attaining the age of 18.¹¹⁰

Based on this extensive body of law, on their face, felony disenfranchisement laws throughout the U.S. violate Articles XX and XXXII of the American Declaration because they are fixed statutory mandates that violate the proportionality test. U.S. felony disenfranchisement laws are blanket rules that apply to every person who is convicted of a felony, regardless of the nature of their crime or any individual circumstances. This is inconsistent with *Norín*, and *Hirst* and the other opinions discussed above, which categorically struck down blanket disenfranchisement laws.

Felony disenfranchisement laws also violate the American Declaration because they are not applied by a judge on a case-by-case basis, as first articulated in *Hirst* and discussed by this Commission in its 2016 press release. Courts within the U. S. do not conduct individual assessments to determine if disenfranchisement is

¹⁰⁸ HCJ 2757/96, 50(2) PD 18 (1996).

¹⁰⁹ *Id.* at 2.

¹¹⁰ *Id.*

an appropriate penalty for particular individuals. In many places in the U.S., someone convicted of forgery or tax crimes is disenfranchised in the same way as a serial killer. Sentencing judges in the U.S. do not even have a say in disenfranchising citizens. The disenfranchisement occurs automatically because of state statutes and constitutional provisions, over which the judge has no control, and which judges, generally, do not even reference when administering sentences.

Moreover, disenfranchisement in many states can become permanent simply because someone is poor. Alabama, Arizona, Arkansas, Connecticut, Florida, Georgia, Kansas, South Dakota Tennessee, and Texas do not permit re-enfranchisement unless people first pay off all court fines and fees.¹¹¹ This prolongs disenfranchisement, not because of the nature or severity of a particular crime, but rather because of financial instability. Like many other aspects of felony disenfranchisement, the inability to pay court fees and fines disproportionately impact people of color.¹¹²

¹¹¹ According to LOVE & SCHLUSSEL, *supra* note 42, at 5; Three states deny the vote indefinitely for any unpaid LFOs [legal financial obligations] related to a disqualifying conviction: Alabama, Arkansas, and Florida Five states deny the vote indefinitely for certain unpaid LFOs related to a disqualifying conviction: Arizona (restitution), Georgia (certain fines), Kansas (fines and certain restitution), Tennessee (restitution), and Texas (fines) Two states deny the vote indefinitely for certain types of convictions with unpaid LFOs: Connecticut (federal and out-of-state convictions) and South Dakota (convictions after June 30, 2012).

¹¹² Patricia Mazzei, *Florida Law Restricting Felon Voting is Unconstitutional, Judge Rules*, N.Y. TIMES, (May 24, 2020), <https://www.nytimes.com/2020/05/24/us/florida-felon-voting-court-judge-ruling.html>.

B. U.S. FELONY DISENFRANCHISEMENT LAWS VIOLATE ARTICLE II OF THE AMERICAN DECLARATION BECAUSE OF THEIR RACIST ORIGINS, AND BECAUSE THEY DISPROPORTIONATELY IMPACT THE RIGHTS OF BLACK AND LATINO VOTERS

Felony disenfranchisement is exacerbated by the racialized targeting of communities of color and disproportionately impact Black and Latino communities. This is not surprising, given that felony disenfranchisement is rooted in Jim Crow laws, passed after the Civil War.¹¹³ To circumvent the 15th Amendment to the U.S. Constitution, eleven states instituted felony disenfranchisement laws with the specific intent of disenfranchising formerly enslaved persons, who gained the right to vote when they became emancipated.¹¹⁴

Felony disenfranchisement laws’ racist origins and the disproportionate impact these laws have on Black and Latino communities run afoul of Article II of the American Declaration. Article II provides: “All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.” Article II bestows “the right of everyone to equal protection of the law without discrimination.”¹¹⁵ As the Commission has repeatedly highlighted, the right to equality before the law means that the

¹¹³ See, e.g., For the People Act, H. R. 1, 117th Cong. § 3(4)(D) (2020-20221).

¹¹⁴ *Police Violence Against Afro-descendants in the United States*, supra note 2, at ¶ 61, n.86 (following the end of Reconstruction, all eleven former Confederate states adopted a voter disenfranchisement playbook, passed “Jim Crow” laws to maintain racial hierarchies, including felony disenfranchisement laws).

¹¹⁵ BJORN STORMORKEN & LEO ZWAAK, HUMAN RIGHTS TERMINOLOGY IN INTERNATIONAL LAW: A THESAURUS, (1988).

application of any law should be equal for all, without discrimination.¹¹⁶

The Commission, in examining protections under the American Declaration, “must interpret and apply Article II and XX in the context of current circumstances and standards.”¹¹⁷ The Commission has interpreted these provisions to incorporate an “effects-based” standard. In jurisprudence relating to the rights of an individual detained at Guantánamo Bay, the Commission observed that:

States are required to ensure that their laws, policies and practices respect these rights; in particular, international human rights law not only prohibits policies and practices that are deliberately discriminatory, but also those which have a discriminatory effect, even when discriminatory intent cannot be shown.”¹¹⁸

The disparate impact that felony disenfranchisement has on U.S. communities of color, as indicated in the studies and charts discussed in the Facts Section above, easily meets this “effects-based” standard.

Indeed, this Commission already stated that felony disenfranchisement has “a racially discriminatory impact” on communities of color in its 2018 Thematic Report. Consequently, in that Thematic Report, it urged the U.S. to take steps to reverse these policies and “[a]dopt appropriate measures at the federal or state level to ensure

¹¹⁶ *William Andrews v. United States*, Case 11.139, Inter-Am. Comm’n H.R. N, Report N° 57/96, OEA/Ser.L/V/II.95, doc. 7 rev. at 570 ¶ 173 (1997).

¹¹⁷ *Statehood Solidarity Committee*, at ¶ 105.

¹¹⁸ Djamel Ameziane, Merits Report, OEA/Ser.L/V/II, Inter-Am. Comm’n. H.R., No. 39, ¶ 249 (April 22, 2020).

the restoration of voting rights to citizens who have fully served their criminal sentences and those who have been released on parole”¹¹⁹

As will be discussed in greater detail in Section II of the Discussion Section of this Memorandum of Law, other international bodies have reached the same conclusion, linking felony disenfranchisement with its disproportionate racial impact. Those bodies include: the International Convention on the Elimination of All Forms of Racial Discrimination Evaluation Committee (2001); UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (2012); Human Rights Committee (2014); UN Special Rapporteur on Extreme Poverty and Human Rights (2017); and most recently, in 2021, by the Working Group of Experts on People of African Descent.

Most relevant to this Memorandum of Law, in assessing issues of discrimination, the Commission has looked to evidence of racial profiling of minorities.¹²⁰ In *Jailton Neri Da Fonseca v. Brazil*, this Commission “consider[ed] it important” to begin its analysis of the merits by “highlight[ing] the context in which the facts occurred.”¹²¹ That context, the Commission noted, was a system of racialized over-policing of poor communities of color.¹²² In Brazil, the Commission observed that

¹¹⁹ *Police Violence Against Afro-descendants in the United States*, *supra* note 2, at *Recommendations* ¶ 11(a).

¹²⁰ *Jailton Neri Da Fonseca v. Brazil*, Case 11.634, Inter-Am. Comm’n H.R., Report No. 33/04, OEA/Ser.L/V/II.122 doc. 5 rev. 1, ¶ 35 (2004).

¹²¹ *Id.* at ¶ 35.

¹²² *Id.* at ¶¶ 35-38.

policing and prosecution disproportionately harmed “the Afro-Brazilian population [, which] was more likely to be suspected, harassed, prosecuted, and convicted than others.”¹²³ The Commission also closely analyzed disparate impact data that demonstrated that Afro-Brazilian communities were victims of racial profiling and over-policing.¹²⁴ Finally, the Commission observed that police in Brazil were more likely to use lethal force on persons of color, and that most murdered children ““were poor, male, and black or of mixed race.””¹²⁵ These same racialized dimensions of policing are also the root of felony disenfranchisement in the U.S.

1. Racial Profiling in Policing Leads to Felony Disenfranchisement

Racial profiling is “the discriminatory practice by law enforcement officials of targeting individuals for suspicion of crime based on the individual’s race, ethnicity, religion or national origin.”¹²⁶ Racial profiling is unconstitutional, and used as a pretense to harass and humiliate people of color.¹²⁷

In the U.S., a Black person is five times more likely to be stopped without just cause than a white person.¹²⁸ A 1996 study of the New Jersey Turnpike, which first

¹²³ *Id.* at ¶ 35.

¹²⁴ *Id.* at ¶¶ 35-36.

¹²⁵ *Id.* at ¶¶ 37-38.

¹²⁶ *Racial Profiling: Definition*, ACLU, <https://www.aclu.org/other/racial-profiling-definition>.

¹²⁷ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 589 (S.D.N.Y. 2013)(finding that New York’s “stop and frisk” policy resulted in Black residents “likely [being] targeted for stops based on a lesser degree of objectively founded suspicion than whites.”).

¹²⁸ *Criminal Justice Fact Sheet*, *supra* note 62.

led to the filing of this Petition, found that Black drivers were stopped at a higher rate than drivers of all other races.¹²⁹ Although Black people comprised 13.5% of all people on New Jersey’s roads, they made up 35% of all drivers that the police stopped over the period measured.¹³⁰ The study concluded that the drivers’ race influenced who the police pulled over.¹³¹

A similar 1996 study conducted on an interstate highway in Maryland found that while 17% of the drivers were Black, 72% of all stops made were of Black drivers.¹³² A 2016 study in Oakland, California found that although Black residents made up 28% of the city’s population, they accounted for 60% of all kinds of total police stops, including driving, walking and bicycling.¹³³ A 2018 study of racial profiling in North Carolina found that “young men of color are clearly targeted for aggressive treatment” by law enforcement.¹³⁴

Yet another study, conducted by the U.S. Department of Justice in 2015, established that race determined who police in Ferguson, Missouri chose to stop and search.¹³⁵ Among drivers pulled over between 2012 and 2014, 85% were Black even

¹²⁹ David A. Harris, *Racial Profiling: Past, Present, or Future?*, 34 CRIM. JUST. Justice 10, 11 (2020).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 12.

¹³³ Susan Nembhard & Lily Robin, *Racial and Ethnic Disparities Throughout Criminal Legal System: A Result of Racist Policies and Discretionary Practices*, URBAN INSTITUTE, 3 (Aug. 2021), <https://www.urban.org/sites/default/files/publication/104687/racial-and-ethnic-disparities-throughout-the-criminal-legal-system.pdf>.

¹³⁴ Harris, *supra* note 129, at 16.

¹³⁵ Jenée Desmond-Harris, *The 6 Most Damning Findings From the DOJ’s Report on Racism in the City of Ferguson*, VOX (Mar. 4, 2015, 3:00), <https://www.vox.com/2015/3/4/8149337/doj-ferguson-report-police-racism>.

though 67% of the population was Black, and “Black drivers were twice as likely to have their cars searched, but they were 26 percent less likely to have contraband.”¹³⁶

2. Felony Disenfranchisement is a Product of Over-Policing and Mass Incarceration, Both of Which Disproportionately Impact Communities of Color

As a result of being more likely to be stopped and scrutinized by the police, people of color are more likely than similarly-situated whites to be arrested or harmed, even for low-level offenses.¹³⁷ For example, Eric Garner, a Black man who died while crying out “I can’t breathe,” was asphyxiated by police who tried to arrest him for selling loose cigarettes outside of a Brooklyn bodega.¹³⁸ Similarly, George Floyd was murdered by a group of Minneapolis police officers after allegedly trying to use a counterfeit bill at a convenience store.¹³⁹

For low-level offenses such as marijuana possession, police arrest Black offenders at higher rates than they arrest white offenders.¹⁴⁰ Predominantly Black neighborhoods experience a higher rate of police-initiated conduct regardless of the

¹³⁶ Michael Levenson, *Pulled Over: What to Know About Deadly Police Traffic Stops*, N.Y. TIMES, (Oct. 31, 2021), <https://www.nytimes.com/2021/10/31/us/police-killings-traffic-stops-takeaways.html>.

¹³⁷ Rachael Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 318 (2016) (examining how “minority communities... disproportionately suffer the costs of arrests for minor offenses.”).

¹³⁸ Jonathan Allen, *New York Medical Examiner Testifies Chokehold Led to Eric Garner’s Death*, REUTERS, (May 15, 2019), <https://www.reuters.com/article/us-usa-police-garner/new-york-medical-examiner-testifies-chokehold-led-to-eric-garners-death-idUSKCN1SL12V>.

¹³⁹ Ray Sanchez & Eric Levenson, *Derek Chauvin sentenced to 22.5 years in death of George Floyd*, CNN, (June 25, 2021), <https://www.cnn.com/2021/06/25/us/derek-chauvin-sentencing-george-floyd/index.html>.

¹⁴⁰ Harry Levine, *The Scandal of Racist Marijuana Arrests—and What To Do About It*, THE NATION, (Oct. 30, 2013), <https://www.thenation.com/article/archive/scandal-racist-marijuana-arrests-and-what-do-about-it/>.

actual crime rates in those neighborhoods.¹⁴¹ Arrest data reported to the Federal Bureau of Investigations shows that in 800 jurisdictions, Black people were arrested at a rate five times greater than white people were in 2018.¹⁴² In 250 jurisdictions, Black people were 10 times more likely to be arrested than white people.¹⁴³

The disparate impact that the criminal legal system has on people of color is not a secret. It has been acknowledged time and again in the government reports cited above, as well as by U.S. courts.¹⁴⁴ As the Chief Judge of the Fourth Circuit Court of Appeals stated:

. . . [S]everal of the historically Black neighborhoods in West Baltimore have been shaped by decades of segregationist and exclusionary policy and policing.

. . .

[W]hile Sandtown remained under-resourced, it became over-policed. Under [Baltimore Police Department]’s ‘zero tolerance’ approach to policing, implemented during its ‘War on Drugs,’ the police prioritized “broken windows” strategies, ‘stop and frisk’ searches, and brutal physical confrontations. When Sandtown residents have requested a more

¹⁴¹ Nembhard & Robin, *supra* note 133, at 3.

¹⁴² Anagha Srikanth, *Black People 5 Times More Likely to Be Arrested Than Whites, According to New Analysis*, THE HILL, (June 11, 2020), <https://thehill.com/changing-america/respect/equality/502277-black-people-5-times-more-likely-to-be-arrested-than-whites>.

¹⁴³ *Id.*

¹⁴⁴ See e.g., *Commonwealth v. Buckley*, 478 Mass. 861, 871 (2018); *Leaders of a Beautiful Struggle v. Balt. Police Dep’t*, No. 20-1495, 2021 U.S. App. LEXIS 18868, at *36 (4th Cir. June 24, 2021); *State v. Ball*, 381 N.J. Super. 545, 560 (App. Div. 2005) (involving the legal basis for a racial profiling claim to suppress evidence in New Jersey); *Cisneros v. City of Klamath Falls*, No. 1:19-cv-00296-CL, 2020 U.S. Dist. LEXIS 250511, at *4 (D. Or. Sep. 1, 2020); *Floyd*, 959 F. Supp. 2d; *Ortega–Melendres v. Arpaio*, 836 F. Supp. 2d 959 (D. Ariz. 2011). See also, ELIZABETH DAVIS ET AL., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015 (U.S. DOJ Special Report, 2018); U.N. Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, 72nd Sess., Feb. 18 – Mar. 7, 2008, CERD/C/USA/CO/6 (May 8, 2008), ¶ 27 <https://undocs.org/CERD/C/USA/CO/6>.

supportive police presence in the neighborhood they have been re-buffed, while predominantly-White neighborhoods received those same services. Thus, residents report ‘that the legacy of racism in Baltimore is a defining feature of community life and is experienced through concentrated poverty, disinvestment, discrimination, and police profiling and abuse in Sandtown.’ In neighborhoods like Sandtown, trauma caused by policing has made a ‘transgenerational impact’ with ‘long-term consequences . . . [that] cannot be understated or ignored.’ This is the living and breathing history that should inform our understanding of the consequences of police practices that trample the Fourth Amendment’s protections.¹⁴⁵

3. Felony Disenfranchisement Laws Are Exacerbated by Prison Gerrymandering, Which Also Has a Disparate Impact on Black and Latino Voters

Felony disenfranchisement’s tentacles are invidious in many ways, including ways that are not immediately apparent. There is a direct line connecting racial profiling, over-policing of communities of color, felony disenfranchisement and “prison gerrymandering.” Felony disenfranchisement silences the political voices of communities of color. Prison gerrymandering contributes to that silencing while also amplifying the voices of predominantly white communities, often at the expense of Black and Latino communities.

The U.S. Constitution mandates that a census be conducted every ten years.¹⁴⁶

Census information determines the strength of representation that communities will

¹⁴⁵ *Leaders of a Beautiful Struggle v. Balt. Police Dep’t*, 979 F.3d 219, 246 at FN14 (4th Cir. 2020).

¹⁴⁶ *Our Censuses*, THE U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/censuses.html>; U.S. Const. art. I, § 2, cl 3 (“Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . Enumeration shall be made . . . within every subsequent Term of ten Years, in such Manner as they shall by Law direct”).

have in the U.S. House of Representatives.¹⁴⁷ In the U.S. House of Representatives, there are a fixed number of congressional seats—435.¹⁴⁸ Every decade, the 435-piece pie is divided up differently among states based on each state’s population, as determined by the most recent census information.¹⁴⁹

Shortly after each census, once a state learns how many congressional seats it will get, each state legislature allocates those seats to communities throughout the state by creating “Congressional Districts.” By law, each Congressional District *must* contain the same number of people.¹⁵⁰ This does not guarantee equal representation in the U.S. Congress, however. State legislatures use “gerrymandering” to concentrate the political power of certain groups of people, and diminish the political power of other people. In 2019, the U.S. Supreme Court held that gerrymandering was part of the fabric of the U.S., and that U.S. federal courts did not have the authority to hear cases related to political gerrymandering (and, by extension, to overturn political gerrymandering).¹⁵¹

“Prison gerrymandering” dilutes the political power of communities of color,

¹⁴⁷ *Why We Conduct the Decennial Census*, THE U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/decennial-census/about/why.html>.

¹⁴⁸ *Id.*

¹⁴⁹ *Proportional Representation*, U.S. HOUSE OF REPRESENTATIVES – OFFICE OF THE HISTORIAN, <https://history.house.gov/Institution/Origins-Development/Proportional-Representation/>.

¹⁵⁰ See generally, *Baker v. Carr*, 369 U.S. 186 (1962) (establishing the “one person, one vote” doctrine).

¹⁵¹ *Rucho v. Common Cause*, 588 U.S. ____, 139 S. Ct. 2484 (2019); (holding that political gerrymandering was a political question that was outside federal court jurisdiction, but affirming that federal courts could hear gerrymandering cases that alleged that the Equal Protection clause of the 14th Amendment was being infringed). In 2021, the Supreme Court gutted parts of the Voting Rights Act of 1964. See *Brnovich v. Democratic Nat’l Comm.*, 594 U.S. ____, 141 S. Ct. 2321 (2021). It has been much more difficult to challenge gerrymandering under the 14th Amendment.

in violation of Article II of the American Declaration. Prison gerrymandering is a form of gerrymandering called “cracking.” “Cracking” involves breaking up functioning communities into many small politically-insignificant parts, to dilute the political voice of those communities.¹⁵² Unfortunately, as discussed in detail in Section III (B) of the Discussion Section of this Memorandum of Law, because of recent Supreme Court case law, prison gerrymandering cannot be challenged as a constitutional violation solely because it has a “disparate impact,” on communities of color.¹⁵³

The “usual residence” rule, established by the Census Act of 1790,¹⁵⁴ states that an individual’s “residence” is where they live or sleep most of the time. For incarcerated individuals, the Census Bureau considers their prison address as their “usual residence,” and they are counted as if they actually lived in the county where the prisons are located, rather than in their own communities.

This harms communities of color in significant ways. Prisons are disproportionately composed of Black and Latino Americans who come from racially diverse, densely populated urban areas—before they are imprisoned.¹⁵⁵ Yet, prisons are typically located in rural areas, where white people make up a high percentage of the

¹⁵² See *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting) (defining gerrymandering “cracking”).

¹⁵³ See generally *Brnovich*, 141 S. Ct. 2321.

¹⁵⁴ Census Act of 1790, 1 Stat. 101.

¹⁵⁵ Marcelo Castillo & John Cromartie, *Racial and ethnic minorities made up about 22 percent of the rural population in 2018, compared to 43 percent in urban areas*, UNITED STATES DEPARTMENT OF AGRICULTURE – ECONOMIC RESEARCH SERVICE, <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=99538>. (“Rural

total population.¹⁵⁶ So, Black and Latino Americans who are incarcerated are counted by the census in a way that gives more political power in Congress to rural white people. Stripped of their political voices in their own communities because of felony disenfranchisement, incarcerated people of color become nothing more than bodies that are counted solely for the purpose of bolstering the voting power of rural communities, to which they have no connection and whose political interests can often conflict with their own.

Texas, which has some of the nation's most restrictive felony disenfranchisement laws in the country exemplifies how prison gerrymandering radically dilutes the political voices of Black and Latino communities. The majority of Texas's incarcerated persons come from the most populous counties in the state.¹⁵⁷ For example, in 2021, 15% of incarcerated people were convicted in Harris County and 9% percent were convicted in Dallas County.¹⁵⁸ Both of those counties are majority/minority counties (the majority of their populations are racial minorities). Harris County is 43.7% Latino and 20% Black.¹⁵⁹ Dallas County is 40.8% Latino and

America is less racially and ethnically diverse than the Nation's urban areas. In 2018, Whites accounted for 78.2% of the rural population compared to 57.3% of urban areas. While Hispanics were the fastest-growing segment of the rural population, they accounted for only 8.6% of rural areas, but 19.8% of urban areas. Blacks made up 7.8% of the rural and 13.1% of the urban population.”)

¹⁵⁶ *You've Heard About Gerrymandering. What Happens When It Involves Prisons?*, N.Y. TIMES (Apr. 11, 2021), <https://www.nytimes.com/2021/04/11/opinion/prison-gerrymandering-census.html>.

¹⁵⁷ JOAQUIN GONZALEZ ET AL., TEXAS CIVIL RIGHTS PROJECT, PRISON GERRYMANDERING REPORT 2021 4 (2021), https://txcivilrights.org/wp-content/uploads/2021/04/Prison_Gerrymandering_Report.pdf.

¹⁵⁸ *Id.*

¹⁵⁹ *QuickFacts: Harris County, Texas*, THE U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/harriscountytexas/PST045219>.

23.6% Black.¹⁶⁰ Yet, both Harris and Dallas counties each house less than 2% of Texas's prison population. This means that when people of color from Harris and Dallas Counties are incarcerated, they are imprisoned outside of those counties.

Incarcerated people in Texas serve their sentences in rural areas where prisons are located,¹⁶¹ where communities are predominantly white.¹⁶² For purposes of the census, incarcerated people are counted as living in these rural white areas, where prisons are located, rather than in their own communities. This effectively depletes the voting and political power of Black and brown residents of Harris and Dallas Counties, while strengthening the political power of people who live near rural prison areas.

Conversely, Anderson County, a rural district of Texas that is predominately white, contributes just 1% of Texas' prison population. Yet, Anderson County holds 10% of the overall state prison population, which is the largest portion for any Texas county.¹⁶³ So, Anderson County counts the Black and brown prison population as its own without having to answer their political concerns. The concerns of the prison population very likely do not align with Anderson County's residents. Indeed, even after absorbing prisoners of color into its prison system, Anderson County is still

¹⁶⁰ *QuickFacts: Dallas County, Texas*, U.S. Census Bureau, <https://www.census.gov/quickfacts/fact/table/dallascountytx/PST045219>.

¹⁶¹ *Incarceration Trends in Texas*, *supra* note 66, at 3.

¹⁶² *QuickFacts: Texas*, THE U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/TX>.

¹⁶³ GONZALEZ ET AL., *supra* note 157, at 5.

58.3% white.¹⁶⁴

Despite the growing public disapproval of prison gerrymandering, the Census Bureau continues to apply the usual residence rule to the U.S.'s prison population.¹⁶⁵ Only 11 out of 50 states have banned prison gerrymandering.¹⁶⁶

In sum, felony disenfranchisement violates Article II in significant ways. First, it silences the political voices of communities of color disproportionately. Second, felony disenfranchisement stems directly from racist Jim Crow laws, racial profiling and race-based over-policing, making it inherently suspect under Article II. Finally, prison gerrymandering, which is a direct consequence of police practices that disproportionately negatively impact communities of color, further silences Black and brown communities. Prison gerrymandering transfers the political voices of incarcerated people of color to the rural white communities that surround the prisons where they are incarcerated.

¹⁶⁴ *QuickFacts: Anderson County, Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/andersoncounty-texas> (last visited Dec. 15, 2021).

¹⁶⁵ In 2016, the Census Bureau requested public comment on its proposed residence criteria for the 2020 Census. 77,887 of those comments pertained to the incarcerated people. 77,863 of those comments suggested that incarcerated people should not be counted at their prison facility, but at their true homes or pre-incarceration address. Reasons for these suggestions ranged from false inflation of population and the violation of equal protection. Despite this, the Bureau responded that it would keep the rule. Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525 (Feb. 8, 2018) (to be codified at 15 C.F.R. chapter I).

¹⁶⁶ California, Colorado, Connecticut, Delaware, Illinois, Maryland, Nevada, New Jersey, New York, Virginia, and Washington have passed legislation to end prison-based gerrymandering within their states. Because legislation in Connecticut and Illinois has only recently been implemented, and the census is taken every 10 years, the impact of prison gerrymandering in these states can only be rectified by 2030. Sanya Mansoor & Madeleine Carlisle, *When Your Body Counts But Your Vote Does Not: How Prison Gerrymandering Distorts Political Representation*, TIME (July 1, 2021, 3:19 PM), <https://time.com/6077245/prison-gerrymandering-political-representation/>.

C. U.S. FELONY DISENFRANCHISEMENT LAWS VIOLATE ARTICLES I AND XVII OF THE AMERICAN DECLARATION BECAUSE THEY INHIBIT THE MEANINGFUL REHABILITATION OF FORMERLY INCARCERATED PERSONS

Articles I and XVII of the American Declaration, together with the American Declaration's preamble that guarantees the right to be treated with dignity,¹⁶⁷ guarantee formerly incarcerated persons the right to rehabilitation. This Commission has repeatedly emphasized the rehabilitative function of prison sentences and the importance of rehabilitation to the individual's reintegration back into society.¹⁶⁸ For example, the Commission has noted that "[t]he prison system is intended to serve several principal objectives . . . [t]he 'ultimate objective' being 'the rehabilitation of the offender and his or her reincorporation into society'; and "[t]he exercise of custodial authority carries with it special responsibility for ensuring that the deprivation of liberty serves its intended purpose, and does not result in the infringement of other basic rights."¹⁶⁹

The Commission has found that an individual's right to rehabilitation forms an integral component of the rights protected pursuant to Article 5 of the American

¹⁶⁷ See e.g., American Declaration at preamble (recognizing that: "The American peoples have acknowledged the dignity of the individual...").

¹⁶⁸ Report on the Situation of Human Rights in the Dominican Republic, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.104, doc. 49 rev. 1 Chapter VIII(I) (1999) (citing U.N. Standard Minimum Rule 65 to support this contention).

¹⁶⁹ Report on the Situation of Human Rights in Guatemala, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.111, doc. 21 rev. Chapter VIII (2001).

Convention, which, in subsection (6), specifically requires re-adaptation to be a goal of prison: “[p]unishments consisting of deprivation of liberty shall have as an essential aim the reform and social re-adaptation of the prisoners.” According to the Commission, Article 5 establishes the right of every person to have his or her “physical, mental, and moral integrity respected”¹⁷⁰ and guarantees that everyone deprived of liberty “shall be treated with respect for the inherent dignity of the human person.”¹⁷¹ Along with the bundle of rights protected by Article 5, the Commission has highlighted each individual’s right, following completion of a prison sentence, to “social re-adaptation,” “personal rehabilitation,” and “reintegration back into society.”¹⁷² Felony disenfranchisement violates this provision.

Felony voter disenfranchisement laws not only harm democracy, they have a harmful impact on each citizen who is disenfranchised. Voter disenfranchisement assigns a second-class status to people who have been convicted of crimes, which impedes reentry into society. When people leave prison disenfranchised, they are expected to fully re-integrate into society, but they cannot. Society obliges them to obey the law, without giving them the opportunity to influence the law with their

¹⁷⁰ *Id.* at Section A(2).

¹⁷¹ *Id.*

¹⁷² *See, e.g.*, Report on the Human Rights of Persons Deprived of Liberty in the Americas, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II. doc. 64 (31 December 2011) at para 605; *see also* Report on the Situation of Human Rights in Brazil, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.97, doc. 29 rev.1 Chapter IV (27) (1997).

vote.¹⁷³ This excludes and isolates them from their communities and the political process in general.¹⁷⁴ Samuel Guiles, who was incarcerated in New Jersey beginning at age 17 (before he could legally vote), and served 30 years behind bars, explains in his letter to the Commission: “I cannot tell you what it is to lose my right to vote because I have never possessed this right. I do know, however, all too well what it’s like being silenced and without agency; therefore, the inability to vote only ensures I remain in this state of voicelessness indefinitely.”¹⁷⁵

While successful re-entry is a result of many factors, such as employment and housing opportunities, studies have shown that the opportunity to be civically engaged through voting helps people develop positive connections to their communities, making successful re-entry more likely.¹⁷⁶ In one study among individuals who had been arrested previously, 27% of non-voters were re-arrested, compared with 12% of voters.¹⁷⁷ Although the study did not establish direct causation, it is clear that “voting appears to be part of a package of pro-social behavior that is linked to

¹⁷³ Erika Wood, *Restoring the Right to Vote*, BRENNAN CTR. FOR JUSTICE (2009), https://www.brennan-center.org/sites/default/files/2019-08/Report_Restoring-the-Right-to-Vote.pdf

¹⁷⁴ Victoria Shineman, *Restoring Rights, Restoring Trust: Evidence that Reversing Felon Disenfranchisement Penalties Increases Both Trust and Cooperation with Government*, UNIVERSITY OF PITTSBURGH, https://cpb-us-w2.wpmucdn.com/web.sas.upenn.edu/dist/7/538/files/2019/07/Shineman_RestoringRightsRestoringTrust_ESRA2019.pdf.

¹⁷⁵ Mr. Guile’s letter will be submitted as part of a separate Appendix to this Memorandum of Law in coming weeks, along with Declarations from other people who have been directly impacted by U.S. felony disenfranchisement.

¹⁷⁶ Marc Mauer, *Voting Behind Bars: An Argument for Voting by Prisoners*, HOW. L. JOURNAL, <https://www.sen-tencingproject.org/wp-content/uploads/2016/01/Voting-Behind-Bars-An-Argument-for-Voting-by-Prisoners.pdf>.

¹⁷⁷ Chung, *supra* note 3.

desistance from crime.”¹⁷⁸ Other studies have mirrored this data, concluding that there is a positive connection between voting and successful rehabilitation.¹⁷⁹

Further, corrections officials around the country now recognize that re-entry planning should begin, not on the day of release to the community, but ideally on the day of admission to prison.¹⁸⁰ Given the extreme isolation of incarcerated people from society, voting in prisons could help bridge the gap and keep incarcerated individuals connected to their communities.¹⁸¹

When people are given the power and opportunity to participate fully in society, they feel more ownership over the issues that impact them and what happens in their communities.¹⁸² Yraida Guanipa, who was incarcerated in Florida, explained that, when she was disenfranchised, she felt like “I ha[d] no voice to decide who is the person who is going to be making laws about my community, my children, every aspect of my life.”¹⁸³ Ronald Pierce, who was incarcerated for over ten years in New Jersey, states in his letter to the Commission: “When I found myself incarcerated, I

¹⁷⁸ *Id.*

¹⁷⁹ *Value to the Soul: People with criminal convictions on the power of the vote*, NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE, https://d3n8a8pro7vhmx.cloudfront.net/njisj/pages/1360/attachments/original/1570569487/Value_to_the_Soul_10-08-19_FIN_WEB.pdf?1570569487.

¹⁸⁰ Mauer, *supra* note 176.

¹⁸¹ *Id.*

¹⁸² *Our Voices, Our Votes: Felony Disenfranchisement and Reentry in Mississippi*, ADVANCEMENT PROJECT, <https://advancementproject.org/wp-content/uploads/2021/03/MS-Reentry-Report24.pdf>.

¹⁸³ Ms. Guanipa’s Declaration will be filed as a separate Appendix to this Memorandum of Law in coming weeks, along with letters and Declarations of other people who have been directly impacted by U.S. felony disenfranchisement.

recall sitting in my cell receiving a letter notifying me I was disenfranchised. I felt disconnected, not just from society and the community, but from my family.”¹⁸⁴ A person who sees themselves as part of a broader community is much less likely to act against that community.¹⁸⁵ That is why recidivism rates are lower for people who vote, than for people who are disenfranchised.¹⁸⁶

Disenfranchisement leads to generational and community harm as well. Guiles explained in his letter to the Commission: “my immediate family has lost the belief that their votes count and can make a difference in the democratic process, so they don’t vote. It is doubtful that I could motivate them to change their attitudes when I myself am excluded.”¹⁸⁷ Indeed, voting is as much a learned behavior as it is a habit.¹⁸⁸ If parents are disenfranchised, their children often do not have a model for civil engagement.¹⁸⁹ And since children are most likely to mirror the electoral participation of their parents, they may not become regular voters as a result of a parent’s disenfranchisement.¹⁹⁰

¹⁸⁴ Mr. Pierce’s letter will be submitted as part of a separate Appendix to this Memorandum of Law in coming weeks, along with Declarations from other people who have been directly impacted by U.S. felony disenfranchisement.

¹⁸⁵ *Value to the Soul: People with criminal convictions on the power of the vote*, NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE, https://d3n8a8pro7vnm.cloudfront.net/njisj/pages/1360/attachments/original/1570569487/Value_to_the_Soul_10-08-19_FIN_WEB.pdf?1570569487.

¹⁸⁶ Chung, *supra* note 3.

¹⁸⁷ Mr. Guile’s letter will be submitted as part of a separate Appendix to this Memorandum of Law in coming weeks, along with Declarations from other people who have been directly impacted by U.S. felony disenfranchisement.

¹⁸⁸ Emmett Sanders, *Full Human Beings An Argument for incarcerated voter enfranchisement*, PEOPLES POLICY PROJECT, <https://www.peoplespolicyproject.org/projects/prisoner-voting/>.

¹⁸⁹ *Id.*

¹⁹⁰ Erika Wood, *supra* note 173.

Because felony disenfranchisement isolates people, causes psychological harm, and keeps people from re-integrating into their communities after they complete their prison sentences, felony disenfranchisement violates Articles I and XVII of the American Convention.

II. FOR NEARLY TWENTY YEARS, THE INTERNATIONAL COMMUNITY HAS URGED THE UNITED STATES TO END FELONY DISENFRANCHISEMENT

In addition to this Commission, various international investigative bodies have expressed concern over felony disenfranchisement in the United States when evaluating whether the U.S. is complying with its obligations under the few human rights treaties that the U.S. has ratified. Those critiques have been extensive and consistent over the past 20 years. Petitioners believe that it is critical to present all those critiques to the Commission because they demonstrate that despite persistent calls for reform by the international community, felony disenfranchisement laws are still thriving in all but two states in the U.S.

A. THE UNITED NATIONS HUMAN RIGHTS COMMITTEE HAS URGED THE UNITED STATES. TO END FELONY DISENFRANCHISEMENT

The United Nations Human Rights Committee (“HRC”) has noted the unlawfulness of felony disenfranchisement practices since at least 2001. In its responses to Member States’ annual reports and periodic reports, the HRC has issued calls to

significantly reform and end felony disenfranchisement laws as part of the imperative for the U.S. to comply with its obligations under the International Covenant on Civil and Political Rights (“ICCPR”). Specifically, the HRC has consistently urged the United States to restore voting rights to formerly incarcerated individuals and to re-examine the disenfranchisement of incarcerated individuals, to ensure that any denial of voting rights complies with the reasonableness test of article 25 of the ICCPR. While the HRC’s decisions are not binding interpretations of the ICCPR, its decisions carry significant weight.¹⁹¹

In 2001, the HRC first expressed concern regarding laws that automatically disenfranchised *incarcerated* individuals in the context of the United Kingdom. It found these laws unjustifiable under the ICCPR.¹⁹² The HRC concluded that the UK “should reconsider its law depriving convicted prisoners of the right to vote.”¹⁹³

In 2006, the HRC criticized the U.S., stating that “[the] general deprivation of the right to vote for persons who have received a felony conviction, and in particular

¹⁹¹ Ahmadou Sadio Diallo (Rep. of Guinea v. Dem. Rep. of Congo), Judgment, 2010 I.C.J. Rep. 639, 664 (Nov. 30, 2010) (stating that the International Court of Justice “should ascribe great weight to the interpretations adopted by [the Human Rights Committee], in order “to achieve the necessary clarity and the essential consistency of international law.”).

¹⁹² The Committee stated that it “is concerned at the State party’s maintenance of an old law that convicted prisoners may not exercise their right to vote. The Committee fails to discern the justification for such a practice in modern times, considering that it amounts to an additional punishment and that it does not contribute towards the prisoner’s reformation and social rehabilitation, contrary to article 10, paragraph 3, in conjunction with article 25 of the Covenant. The State party should reconsider its law depriving convicted prisoners of the right to vote.” U.N. Human Rights Committee, *United Kingdom of Great Britain and Northern Ireland: Concluding Observations*, CCPR/CO/73/UK, ¶ 10 (2001), https://www.un.org/ga/search/viewm_doc.asp?symbol=CCPR/CO/73/UK.

¹⁹³ *Id.* at ¶ 11.

those who are no longer deprived of liberty, do[es] not meet the requirements of articles 25 or 26 of the Covenant, nor serve[] the rehabilitation goals of article 10(3).”¹⁹⁴ The Committee followed its conclusions with a recommendation that the U.S. take measures to ensure that states restore voting rights to parolees and probationers and reform laws that disenfranchise incarcerated citizens when these policies do not meet the reasonableness test of ICCPR article 25.¹⁹⁵

In 2014, in its Concluding Observations on the Fourth Periodic Report of the United States, the HRC noted that U.S. felony disenfranchisement laws disproportionately impact minorities.¹⁹⁶ In that report, the HRC “reiterate[d] concern about the persistence of state-level felon disenfranchisement laws,” and it again recommended that the U.S. restore the vote to incarcerated and formerly incarcerated individuals.¹⁹⁷ For 15 years, the HRC has urged the U.S. to address all state-level laws that automatically disenfranchise incarcerated and formerly incarcerated citizens and has made clear that it will continue to monitor this situation in the U.S.¹⁹⁸

¹⁹⁴ See U.N. Human Rights Committee, *Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant: Concluding Observations*, CCPR/C/USA/CO/3/Rev.1, at ¶ 35 (Dec. 18, 2006), <https://digitallibrary.un.org/record/589849?ln=en>.

¹⁹⁵ *Id.*

¹⁹⁶ U.N. Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the United States of America*, CCPR/C/USA/CO/4, ¶ 24 (Apr. 23, 2014), <https://www.refworld.org/docid/5374afcd4.html>.

¹⁹⁷ *Id.*

¹⁹⁸ See U.N. Human Rights Committee, *List of Issues Prior to Submission of the Fifth Periodic Report of the United States of America*, CCPR/C/USA/QPR/5, ¶ 27 (Apr. 18, 2019), <https://undocs.org/pdf?symbol=en/CCPR/C/USA/QPR/5>.

B. THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION HAS URGED THE U.S. TO END FELONY DISENFRANCHISEMENT

In 2001, a few years before this Petition was filed, the Committee that monitors state party implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”) expressed concern that felony disenfranchisement laws in the U.S. may violate article 5 of ICERD, due to “the right of everyone to vote on a non-discriminatory basis,” on account of the “disenfranchisement of a large segment of the ethnic minority population.”¹⁹⁹ The Committee recommended that the U.S. “take all appropriate measures . . . to ensure that” all citizens can enjoy article 5 rights without discrimination.²⁰⁰

Since 2001, the Committee has reiterated concerns about the discriminatory effects of felony disenfranchisement laws in the U.S.²⁰¹ In that context, in 2008, the Committee issued a stark recommendation:

that the State Party adopt all appropriate measures to ensure that the denial of voting rights is used only with regard to persons convicted of

¹⁹⁹ U.N. Committee on the Elimination of Racial Discrimination, *Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination, United States of America*, ¶ 397, A/56/18 (2001), <https://www.refworld.org/docid/3f52f3ad2.html>.

²⁰⁰ *Id.* at ¶ 398.

²⁰¹ *E.g.*, U.N. Committee on the Elimination of Racial Discrimination, *Summary Record of the 1476th Meeting*, ¶ 57, CERD/C/SR.1476 (May 22, 2003), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fSR.1476&Lang=en (documenting one Committee member’s stated concern that felony disenfranchisement laws had, by 2003, deprived more than a million African Americans of their voting rights and created a measurable in disenfranchisement between Black and White Americans).

the most serious crimes, and that the right to vote is in any case automatically restored after the completion of the criminal sentence.²⁰²

In 2014, the Committee again noted its concern and issued recommendations to restore voting rights to formerly incarcerated individuals and reconsider automatic disenfranchisement of incarcerated individuals.²⁰³

C. OTHER INTERNATIONAL BODIES AND HUMAN RIGHTS ACTORS HAVE NOTED THAT FELONY DISENFRANCHISEMENT LAWS HAVE A DISCRIMINATORY IMPACT ON MARGINALIZED COMMUNITIES

Several UN Special Rapporteurs have examined and spoken out against felony disenfranchisement. In 2017, the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association reported to the UN Human Rights Council about the inextricable links between the U.S.'s history of slavery, Jim Crow laws, and structural racism in the criminal legal system, focusing on political disenfranchisement policies (including felony disenfranchisement laws).²⁰⁴

In 2017, the UN Special Rapporteur on Extreme Poverty and Human Rights

²⁰² U.N. Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, ¶ 27, CERD/C/USA/CO/6 (May 8, 2008), <https://undocs.org/CERD/C/USA/CO/6>.

²⁰³ U.N. Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America*, ¶ 11, CERD/C/USA/CO/7-9 (Sept. 25, 2014), <https://undocs.org/CERD/C/USA/CO/7-9>.

²⁰⁴ *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association on his Follow-up Mission to the United States of America*, ¶ 13, A/HRC/35/28/Add.2 (June 12, 2017), <https://undocs.org/en/A/HRC/35/28/Add.2>. See also, U.N. Office of the High Commissioner, *Statement by the United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association at the Conclusion of his Visit to the United States of America*, (Jul. 27, 2016), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20317&LangID=E>.

also weighed in on the problematic human rights implications of felony disenfranchisement. After a country visit to the U.S., that Special Rapporteur found that felony disenfranchisement laws appear to be specifically targeted towards Black citizens, undermine the fundamental right to vote, and systematically disenfranchise whole groups of marginalized citizens.²⁰⁵

In 2012, the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance likewise submitted a report to the United States, commissioned by the Human Rights Council on voting rights and voting disenfranchisement in the United States.²⁰⁶ In this report to the U.S., the Special Rapporteur pointed out the historical content and discriminatory effects of felony disenfranchisement laws.²⁰⁷

Similarly, in 2021, the Working Group of Experts on People of African Descent, which also reports to the Human Rights Council, documented that structural racism in the U.S. and felony disenfranchisement are intertwined,²⁰⁸ just as this

²⁰⁵ Philip Alston, *Statement on Visit to the USA*, ¶ 18 (Dec. 15, 2017), <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22533&LangID=E>. This message was later incorporated into a report delivered to the Human Rights Council. *Report of the Special Rapporteur on Extreme Poverty and Human Rights on his Mission to the United States of America*, ¶¶ 19-20, A/HRC/38/33/Add.1 (May 4, 2018), <https://undocs.org/A/HRC/38/33/ADD.1>.

²⁰⁶ U.N. Office of the High Commissioner, *Mandates of the Independent Expert on Minority Issues and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, G/SO 214 (78-15) USA 3/2012 (Apr. 16, 2012), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=22760>.

²⁰⁷ *Id.* at 3.

²⁰⁸ See Human Rights Council, *Promotion and Protection of the Human Rights and Fundamental Freedoms of Africans and of People of African Descent Against Excessive Use of Force and Other Human Rights Violations by Law Enforcement Officers*, ¶ 32, A/HRC/47/CRP.1 (June 28, 2021) [hereinafter HRC 2021 Report], https://www.ohchr.org/Documents/Issues/Racism/A_HRC_47_CRP_1.pdf; Human Rights Council, *Report of the*

Memorandum of Law charges. That entity has forcefully recommended that the U.S. “ensure that all states repeal laws that restrict voting rights,” placing a particular emphasis on restoring voting rights to people who have completed their sentences.²⁰⁹

As the Working Group found:

With the racialization of poverty, disparate outcomes in terms of the enjoyment of economic and social rights are compounded by the insufficient meaningful participation and representation of people of African descent in decision making processes and in public life. This points to the structural racial inequalities people of African descent face in accessing power structures and influencing policies, with measures and practices that disproportionately impact their right to vote and participation in public life. With regard to the right to vote, in the United States, some people of African descent are disenfranchised through measures that affect them disproportionately, a trend that is currently expanding. These measures include provisions that deny individuals with felony convictions the right to vote.²¹⁰

Finally, the United States adopted the Organization for Security and Co-operation in Europe’s (“OSCE”) 1990 Copenhagen Document, which details specific commitments concerning the conduct of elections.²¹¹ The OSCE’s Office for Democratic Institutions and Human Rights (“ODIHR”) regularly reviews the U.S.’s protection of basic rights and freedoms set out in the Copenhagen Document. During

Working Group of Experts on People of African Descent: Visit to the United States of America, ¶¶ 47-48, 73, A/HRC/15/18 (Aug. 6, 2010), <https://undocs.org/en/A/HRC/15/18>.

²⁰⁹ Human Rights Council, *Report of the Working Group of Experts on People of African Descent on its Mission to the United States of America*, ¶ 114, A/HRC/33/61/Add.2 (Aug. 18, 2016), <https://digitallibrary.un.org/record/848570?ln=en#record-files-collapse-header>.

²¹⁰ HRC 2021 Report, *supra* note 208, at ¶ 32.

²¹¹ OSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (June 29, 1990), <https://www.osce.org/files/f/documents/9/c/14304.pdf>.

these reviews, the group has regularly critiqued the U.S.'s felony disenfranchisement laws as being at odds with the enumerated guarantees in the Copenhagen Document.²¹²

Within the Copenhagen Document's simple framework,²¹³ ODIHR found that the U.S.'s widespread disenfranchisement of people with criminal convictions "is at odds with the principle of universal suffrage and the commitment to ensure proportionality in the restriction of voting rights as enshrined in paragraphs 7.3 and 24 of the 1990 OSCE Copenhagen Document."²¹⁴

Like other human rights bodies and Special Rapporteurs, the ODIHR has noted the discriminatory effect of felony disenfranchisement laws, stating that "[t]he deprivation of the right to vote is a severe penalty and it should be proportionate to the underlying crime," and has recommended that the U.S. restore voting rights to formerly incarcerated individuals.²¹⁵

²¹² See, e.g., OSCE/ODIHR, *Needs Assessment Mission Report: United States of America General Elections 2012*, 5 (May. 17, 2012), <https://www.osce.org/files/f/documents/3/8/90650.pdf> (noting the growing number of disenfranchised formerly-incarcerated individuals and recognizing that the monitoring body has previously called for U.S. states to ease voting restrictions for incarcerated and formerly-incarcerated citizens).

²¹³ Article 7 requires that states "guarantee universal and equal suffrage to adult citizens," and article 24 incorporates the ICCPR's and the Universal Declaration of Human Rights' narrow scope under which enumerated rights can be restricted.

²¹⁴ OSCE/ODIHR, *Limited Election Observation Mission: United States of America – General Elections, 6 November 2012, Statement of Preliminary Findings and Conclusions*, 2 (Nov. 7, 2012), <http://www.osce.org/odihr/elections/96960>.

²¹⁵ *Id.* at 5.

III. INTERVENTION BY THE COMMISSION IS NECESSARY

A. THE U.S. CONGRESS HAS NOT BEEN ABLE TO PASS VOTING RIGHTS LEGISLATION THAT WOULD ELIMINATE FELONY DISENFRANCHISEMENT

Recently, members of the U.S. Congress have tried to pass voting rights bills that incorporate felony re-enfranchisement, to no avail. The proposed laws' legislative history demonstrates the U.S.'s consistent inability and unwillingness to end felony disenfranchisement.²¹⁶

In 2019, members of the U.S. House of Representatives introduced a comprehensive voting rights bill called the *For the People Act*, which contains limited felony re-enfranchisement provisions. Section 1402 of the *For the People Act* opens by stating, “[t]he right to vote is the most basic constitutive act of citizenship. Regaining the right to vote reintegrates individuals with criminal convictions into free society, helping to enhance public safety.”²¹⁷ Further, the *For the People Act* highlights the stark racial disparities evident in felony disenfranchisement laws. Section 3(4)(D) states:

Congress finds that felony disenfranchisement was one of the tools of intentional racial discrimination during the Jim Crow era. Congress further finds that current racial disparities in felony disenfranchisement are linked to this history of voter suppression, structural racism in the

²¹⁶ *Senate Democrats Fail to Advance Voting and Elections Bill Over GOP Opposition*, CBS NEWS (Oct. 21, 2021), <https://www.cbsnews.com/news/freedom-to-vote-act-voting-rights-fails-senate/>.

²¹⁷ *For the People Act*, *supra* note 113.

criminal justice system, and ongoing effects of historical discrimination.

The bill, however, only proposes a restoration of the right to vote in federal elections for people previously convicted of crimes, not for individuals currently serving a felony sentence.

Accordingly, in 2021, Democratic Congresswoman Cori Bush (MO-01) and Congressman Mondaire Jones (NY-17) proposed an amendment to the legislation to re-enfranchise people who are currently incarcerated. Congresswoman Bush discussed her proposed amendment, citing racial bias in the criminal legal system:

Madam Speaker, America does not love all of its people, and we see that. Right now, more than 5 million people are legally barred from participating in our elections as a result of criminal laws. That is, 1 in 44 Americans, 500,000 Latin[o] Americans, 1.2 million women, and 1 in 6 Black folks. Madam Speaker, this cannot continue. Disenfranchising our own citizens, it is not justice.²¹⁸

The amendment, however, did not pass and received 328 nay votes (out of 435 possible votes) from both Democrats and Republicans. Only by withdrawing the provision allowing incarcerated people to vote was the bill able to pass in the House of Representatives.

In 2021, the *Freedom to Vote Act* was introduced in the Senate.²¹⁹ The Senate recognized that felony disenfranchisement laws were enacted to prevent Black

²¹⁸ 999 CONG. REC. 114 (2021), <https://www.congress.gov/117/crec/2021/03/02/167/39/CREC-2021-03-02-pt1-PgH886-5.pdf>.

²¹⁹ Freedom to Vote Act, S. 2747, U.S. CONGRESS, <https://www.democracymodel.com/wp-content/uploads/2021/09/68440D88BF5EF1F90133FCB5AD2865D9.freedom-to-vote-act-text.pdf>.

Americans from voting, in the aftermath of the Civil War. Nonetheless, the Senate did not even put the *Freedom to Vote Act* to a vote.

Undaunted, on January 13, 2022, Democrats in the House of Representatives passed the *Freedom to Vote: John R. Lewis Act*.²²⁰ All Democrats voted in favor of the bill, and all House Republicans voted against it. This new law contains the same limited felony re-enfranchisement language as the *Freedom to Vote Act*. The *Freedom to Vote: John R. Lewis Act* was sent to the Senate on January 13, 2022.²²¹ On January 19, 2022, Republican members of the Senate blocked the *Freedom to Vote: John R. Lewis Act* from advancing.²²² So, eliminating any form of felony disenfranchisement has failed at the federal level.

Felony disenfranchisement is intimately connected to broader issues of voter suppression, which, as discussed in Sections I(B) and III(B) of the Discussion Section this Memorandum of Law, have proliferated since the U.S. Supreme Court decided *Shelby County v. Holder* and its progeny (which eliminated voting rights pro-

²²⁰ This new 2022 proposed law combined two proposed laws that previously had failed to pass: the 2021 Freedom to Vote Act and the 2019 bill the John R. Lewis Voting Rights Advancement Act; <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR5746EAS-RCP117-28.pdf>.

²²¹ Freedom to Vote Act: John R. Lewis Act, H.R. 5746, <https://www.congress.gov/bill/117th-congress/house-bill/5746?q=%7B%22search%22%3A%5B%22The+Freedom+to+Vote%3A+John+R.+Lewis+Act%22%2C%22The%22%2C%22Freedom%22%2C%22to%22%2C%22John%22%2C%22R.%22%2C%22Lewis%22%2C%22Act%22%5D%7D&s=2&r=1>.

²²² Carl Hulse, *After a day of debate, the voting rights bill is blocked in the Senate*, N.Y. TIMES, (Jan. 19, 2022), <https://www.nytimes.com/2022/01/19/us/politics/senate-voting-rights-filibuster.html>.

tections in place since the 1960s). Congress’s failure to pass the bill, which contained a felony disenfranchisement provision, demonstrates that the federal government will not be taking action to end felony disenfranchisement any time soon.

Black members of Congress are particularly angry that the *Freedom to Vote: John R. Lewis Act* failed to pass. In addition to limiting felony disenfranchisement, that law also contained other voting rights protections for people of color. As New Jersey’s Senator Cory Booker stated, “In the United States today, it is more difficult for the average African American to vote than the average white American. That is not rhetoric, that is fact.”²²³ After the Senate’s refusal to advance the *Freedom to Vote: John R. Lewis Act*, Representative Jamaal Bowman (D-NY 16th District) was arrested outside of the U.S. Capitol building while participating in a non-violent protest.²²⁴

Given the strong partisan opposition in the U.S. Congress to any voting rights reform, and that one party has the procedural tool to block legislation from advancing, the time is right for the Commission to issue a clear pronouncement that the

²²³ *What Happened in the Senate Battle for Voting Rights*, DEMOCRACY DOCKET, (Jan. 12, 2022), <https://www.democracydocket.com/alerts/what-happened-in-the-senate-battle-for-voting-rights/>.

²²⁴ Caroline Vakil, *Bowman arrested during voting rights protest at Capitol*, THE HILL, (Jan. 20, 2022), <https://thehill.com/homenews/house/590702-bowman-arrested-during-voting-rights-protest-at-capitol>. Members of the Congressional Black Caucus, who have been at the forefront of voting rights reform, have been arrested recently at similar non-violent protests aimed at protecting voting rights. In August 2021, Representative Al Green (D-TX 9th District) was arrested outside the Capitol and Supreme Court. Similarly, in July 2021, representatives Sheila Jackson Lee (D-TX 18th District), Hank Johnson (D-GA 4th District), and Joyce Beatty (D-OH 3rd District) (who chairs the Congressional Black Caucus) were also all arrested at separate protests outside the Capitol. *See also* Maanvi Singh, *Sheila Jackson Lee is third Black lawmaker to be arrested during voting rights protests*, THE GUARDIAN, (July 30, 2021), <https://www.theguardian.com/us-news/2021/jul/29/sheila-jackson-lee-arrested-voting-rights-protests>.

American Declaration prohibits felony disenfranchisement and the laws that enable it to continue. It is critical for the Commission to act because the only laws that, theoretically, can pass in the U.S., are laws that, on their face, violate the American Declaration. The proposed federal laws, discussed above, do not re-enfranchise incarcerated individuals, in violation of Articles XX and XXXII of the American Declaration.

Moreover, the partial re-enfranchisement proposed in the failed federal laws would only apply to *federal* elections. Those elections occur every two years for members of the House of Representatives; every six years for members of the Senate; and every four years for presidential elections. Most elections in the U.S. are state and local elections (school boards, mayors, governors, etc.). Every state holds elections for state and local officials multiple times each year. As such, the proposed (and failed) federal laws would not end felony disenfranchisement for the overwhelming majority of elections in the U.S, in violation of Articles XX and XXXII of the American Declaration (which require full enfranchisement).

B. SUPPORT FROM FEDERAL COURTS IN PROTECTING VOTING RIGHTS AND ELIMINATING FELONY DISENFRANCHISEMENT IS UNLIKELY

The *Voting Rights Act of 1965* (the “VRA”) was enacted during the height of the Civil Rights Era, to put an end to the violence and injustice that Black Americans faced when they attempted to vote, and to ensure that every American would have

access to the ballot. Within the past seven years, the U.S. Supreme Court has issued decisions that effectively gut critical provisions of the VRA. Three recent U.S. Supreme Court cases demonstrate this unfortunate phenomenon.

The 2013 decision *Shelby County v. Holder* held that state and local governments that had been identified as having a history of racial discrimination are no longer required to obtain federal government approval for their voting laws and procedures.²²⁵ As a result, “[o]ver the past decade, half the states in the nation have placed new, direct burdens on people’s right to vote, abetted by [the *Shelby County*] decision that struck down a key provision of the Voting Rights Act.”²²⁶ Indeed, the day after the *Shelby County* ruling, North Carolina lawmakers drafted a voter suppression bill that “target[ed] African Americans with almost surgical precision.”²²⁷

As a consequence of *Shelby County*, the Supreme Court, in a 5-4 decision, approved Ohio’s system of voter purges, in which a failure to vote in previous elections triggered a multistep process for removing a citizen from the state’s voter rolls.²²⁸ Similarly, in *Abbott v. Perez*, the Supreme Court approved the Texas Republican Party’s congressional redistricting plan, placing the burden on challengers

²²⁵ *Shelby County v. Holder*, 570 U.S. 529, 551 (2013).

²²⁶ Theodore R. Johnson, *The New Voter Suppression*, BRENNAN CENTER FOR JUSTICE (Jan. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/new-voter-suppression>.

²²⁷ *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

²²⁸ *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018).

of the new law to prove “discriminatory intent,” rather than just “discriminatory impact.” The Court held that “[t]he allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination.”²²⁹

While the full impact of these court decisions will not be known for decades, Desmond Ang, of the Kennedy School at Harvard University, conducted research that showed “counties that were freed from federal oversight [by *Shelby County*] saw minority voter turnout drop more sharply than it had in decades” in the 2016 presidential election.²³⁰ Similarly, NYU Law School’s Brennan Center for Justice found that “previously covered states [formerly monitored by the federal government] have purged voters off their rolls at a significantly higher rate than non-covered jurisdictions.”²³¹

The U.S. Supreme Court, in its 2021 decision *Brnovich v. Democratic National Committee*, made it even easier for states to enact laws that restrict voting. Two Arizona laws were challenged under Section 2 of the VRA, both of which restricted the means by which Arizona residents could vote in federal elections.²³²

²²⁹ *Abbott v. Perez, et al.*, 138 S. Ct. 2305, 2324 (2018), https://www.supremecourt.gov/opinions/17pdf/17-586_o7kq.pdf.

²³⁰ Desmond Ang, *Do 40-Year-Old Facts Still Matter? Long-Run Effects of Federal Oversight under the Voting Rights Act*, HKS FACULTY RESEARCH PAPER Series, RWP18-033, (October 2018), <https://www.hks.harvard.edu/publications/do-40-year-old-facts-still-matter-long-run-effects-federal-oversight-under-voting#citation>.

²³¹ Kevin Morris, Myrna Pérez, Jonathan Brater, Christopher Deluzio, *Purges: A Growing Threat to the Right to Vote*, BRENNAN CENTER FOR JUSTICE (July 20, 2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf.

²³² The first law requires Arizona residents who reside in counties that use an electoral precinct system to vote in their registered precinct if they choose to vote in person on Election Day, and one that makes it a felony for anyone other than a family or household member, election official, postal worker, or designated caregiver to collect another voter’s

Both laws apply equally to all citizens on their face, but will have a disproportionate impact on certain racial populations in their application.²³³ Richard Hasen, a voting rights expert and law professor at the University of California Irvine, believes that “it’s fair to say that all of the major paths to challenging voting rules in federal court have been severely cut back” as a result of the ruling.²³⁴

Both *Shelby County*²³⁵ and *Brnovich*²³⁶ set the stage for the dozens of laws that have been passed in the aftermath of the 2020 Presidential election that make it difficult for communities of color to vote.²³⁷ The Brennan Center reports that as of October 2021, 19 U.S. states have passed 33 laws that make it more difficult for U.S. citizens to vote in elections.²³⁸ As the Brennan Center explains, “the states that have enacted restrictive voting laws tend to be the ones in which voting is already relatively difficult,” meaning that “access to the right to vote increasingly depends on the state in which a voter happens to reside.”²³⁹

early ballot prior to or after completion – a practice known as “ballot-harvesting”; see Alison Durkee, *Supreme Court Upholds Arizona’s Restrictive Voting Laws*, FORBES (July 1, 2021), <https://www.forbes.com/sites/alison-durkee/2021/07/01/supreme-court-upholds-arizonas-restrictive-voting-laws/?sh=70d2ad705755>.

²³³ *Brnovich v. Democratic National Committee*, 135 HARV. L. REV. 481, (Nov. 10, 2021), <https://harvardlawreview.org/2021/11/brnovich-v-democratic-national-committee/>.

²³⁴ Nina Totenberg, *The Supreme Court Deals A New Blow To Voting Rights, Upholding Arizona Restrictions*, NPR (July 1, 2021), <https://www.npr.org/2021/07/01/998758022/the-supreme-court-upheld-upholds-arizona-measures-that-restrict-voting>.

²³⁵ 570 U.S. 529 (2013).

²³⁶ 594 U.S. __ (2021).

²³⁷ Katie Rogers, *‘Have you no shame?’ Biden frames voting rights as a moral reckoning*, N.Y. TIMES (July 13, 2021), <https://www.nytimes.com/2021/07/13/us/politics/biden-voting-philadelphia.html>.

²³⁸ *Voting Laws Roundup: October 2021*, BRENNAN CENTER FOR JUSTICE, (Oct. 4, 2021), <https://www.brennan-center.org/our-work/research-reports/voting-laws-roundup-october-2021>.

²³⁹ *Id.*

Finally, the 1974 case *Richardson v. Ramirez* that allows felony disenfranchisement laws to exist is still good law. Indeed, in the past decade the U.S. Supreme Court has consistently adopted a permissive stance when asked to decide the constitutionality of laws that make it more difficult to vote. Consequently, methods of remediating racially targeted voting restrictions through the U.S. court system, including a finding that felony disenfranchisement is unconstitutional, are certain to continue to fail. As such, legal avenues for challenging felony disenfranchisement continue to remain exhausted.

CONCLUSION

Since this Petition was filed 16 years ago, various international bodies, including this very Commission, have criticized the United States, urging it to eliminate felony disenfranchisement. Those bodies: the U.N. Human Rights Committee, the U.N. Committee on the Elimination of Racial Discrimination, the U.N. Human Rights Council's Working Group of Experts on People of African Descent, and the OSCE's Office for Democratic Institutions and Human Rights, have all pointed out that felony disenfranchisement in the U.S. has its roots in racial discrimination that permeates the U.S.'s criminal legal system.

It is no secret that racial profiling is endemic in the U.S.'s criminal legal system. That racial profiling leads to a disproportionate number of Black and Latino Americans and other people of color being stopped by law enforcement, arrested, convicted, and ultimately disenfranchised. This severely dilutes the political voice of people of color.

Although New Jersey and several other states have made progress in the past 16 years in allowing some people on probation and parole to vote, 48 out of 50 states still disenfranchise people who have been convicted of felonies, in some respect. These laws still violate the American Declaration of the Rights and Duties of Man.

There is no end in sight for felony disenfranchisement in the U.S. Indeed, the practice is sanctioned by the 1974 U.S. Supreme Court case *Richardson v. Ramirez*.

That is why it is critical for the Commission to find that the United States, in adhering to felony disenfranchisement, is violating the American Declaration of the Rights and Duties of Man.

Petitioner believes that an opinion in its favor, and recommendations to the U.S. to eliminate felony disenfranchisement, by the Commission will have great impact. Such actions can lead to significant systemic change in the United States and will serve as a catalyst for states to invalidate their unconscionable felony disenfranchisement laws. A favorable decision will also impact voters throughout the Americas, who are also barred from voting because of restrictive felony disenfranchisement laws in their countries (see Appendix).

RECOMMENDATIONS

This Memorandum of Law establishes that the United States is violating the human rights of its citizens. Specifically, felony disenfranchisement laws in place throughout the United States, which disproportionately impact Black and Latino citizens, and other people of color, violate Articles I, II, XX, XXXII, and XVII of the American Declaration of the Rights and Duties of Man. The United States has proven unable to end felony voter disenfranchisement through legislation or through the judicial process. Therefore, it is imperative for this Commission to issue guidelines and recommendations to ensure that the United States complies with its binding human rights obligations. Thus, the Petitioner asks that the Commission issue an

opinion granting the following relief:

1. Find that the United States is in violation of Articles I, II, XX, XXXII, and XVII of the American Declaration of the Rights and Duties of Man for continuing to allow felony disenfranchisement laws to exist and proliferate. Specifically, the following Articles are violated:
 - a. Articles XX and XXXII (because felony disenfranchisement laws infringe on the right to vote);
 - b. Article II (because of race discrimination and disparate impact on racial minorities);
 - c. Articles I and XVII (because of the harm caused by felony disenfranchisement statutes and because they impede re-integration and rehabilitation of persons who serve prison terms).
2. Recommend the following remedies:
 - a. Immediately re-enfranchise people who are on probation or parole.
 - b. End prosecutions, and offer expungement of convictions, for citizens who have been convicted and sentenced for inadvertently voting in prior elections while disenfranchised.
 - c. Dissolve state committees that determine which individuals should be re-enfranchised.

- d. Form a United States Re-enfranchisement Commission to draft and propose model, standardized state laws that abolish all blanket disenfranchisement of incarcerated individuals and citizens on probation and parole.
- e. In the alternative, this Commission should direct that the United States Re-enfranchisement Commission adopt the “proportionality test” first articulated by the European Court of Human Rights, and recognized by this Commission and the Inter-American Court of Human Rights. Under the “proportionality test,” only people who commit serious crimes against the State (such as treason and election fraud) can be disenfranchised as part of their criminal sentences. That disenfranchisement, however, ends, once the person completes their sentence.
- f. All reforms must be statutory. Adoption of reforms by any other method, including executive orders, is a temporary fix that can be undone after the election of a new governor.
- g. All new legislation should include:
 - i. Notification mechanisms to ensure people are aware of their newly-restored voting right, including: education

campaigns in prisons, and for the general public, announcements during election season and at all voter registration events;

- ii. Prohibition of conditions to voting, such as the repayment of fines and fees;
- iii. Allocating sufficient funds to ensure that incarcerated people can register to vote, and are provided with the equipment to actually vote;
- iv. Funding must provide for voting machines or vote by mail materials for all jails and prisons.

Respectfully submitted,

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APPENDIX

FELONY DISENFRANCHISEMENT (IN VARIOUS FORMS) IS PERVASIVE IN THE AMERICAS AND AT ODDS WITH INTERNATIONAL HUMAN RIGHTS LAW

Felony disenfranchisement laws are common throughout the Americas. As the list below demonstrates, however, few other nations' laws are as harsh as the U.S.'s. Petitioners present the list below to demonstrate that a ruling by this Commission that felony disenfranchisement violates the American Declaration could have a significant impact, not only in the U.S., but throughout the Americas.

A. IN THE AMERICAS, IT IS RARE FOR A NATION NOT TO DISENFRANCHISE

Canada is the only OAS Member State in which anyone with a criminal conviction, including individuals who are incarcerated, maintain their right to vote.²⁴⁰ Similarly, Puerto Rico, an unincorporated U.S. territory, also does not disenfranchise individuals, even when they are incarcerated for felony convictions.

B. PERMANENT DISENFRANCHISEMENT IS PERMITTED IN THREE COUNTRIES IN THE AMERICAS, IN ADDITION TO THE UNITED STATES

- The Dominican Republic limits this restriction to “cases of treason, espionage, conspiracy as well as for taking up arms and *for aiding or participating in attempts of deliberate damages against the interests of the*

²⁴⁰ Felony disenfranchisement was challenged in the 2002 case *Sauvé v Canada (Chief Electoral Officer)*. The Supreme Court of Canada held that the Canadian Charter of Rights and Freedoms grants “every citizen of Canada” the right to vote, without further qualifications. This case is referenced regularly by other nation’s high courts in deciding that incarcerated individuals have the right to vote in elections.

Republic.”²⁴¹ It is this last clause that is vague and could allow the state to order disenfranchisement for many offenses.

- In Haiti, it appears the only conviction that can result in permanent and automatic disenfranchisement is falsifying ballots counts.²⁴²
- In Paraguay, people declared “rebels” in “common criminal or military cases may not vote.” It is unclear under the Election Code if these individuals would ever regain this right.²⁴³

C. DISENFRANCHISEMENT IS PERMITTED BEFORE TRIAL AND CONVICTION, IN SEVEN COUNTRIES; THIS IS A MORE SEVERE PENALTY THAN IN THE UNITED STATES

Four nations suspend the voting rights of detained citizens while they are awaiting trial, as well as after they are convicted. This level of disenfranchisement is more severe than in the United States. Those countries are:

- Chile;²⁴⁴
- Honduras;²⁴⁵
- Mexico;²⁴⁶ and
- Uruguay²⁴⁷

In three other nations, in theory, pretrial detainees have the right to vote. Credible

²⁴¹ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA, art. 13 (emphasis added).

²⁴² Code pénal, art. 83 (Haiti).

²⁴³ Código electoral, Ley No. 834/1996 (2012) (Para.), art. 91(f).

²⁴⁴ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, art. 16(2). *See generally* Código Penal, art. 37 (“For legal purposes, all penalties for crimes are considered afflictive . . .”).

²⁴⁵ CONSTITUCIONES DE HONDURAS, art. 41 (1) (for commitment to prison decreed for a felony).

²⁴⁶ Código Penal Federal, art. 91 (d), Diario Oficial de la Federación 14-08-1931 últimas reformas DOF 01-06-2021 (Mex.) (while on trial for a crime that deserves physical punishment).

²⁴⁷ CONSTITUCIÓN DE LA REPÚBLICA ORIENTAL DEL URUGUAY, art. 80(2) (for being under indictment on a criminal charge which may result in imprisonment).

reports, however, indicate that mechanisms for casting a vote are rarely made accessible in detention facilities. These countries are:

- Brazil;
- Guatemala; and
- Peru.²⁴⁸

D. BLANKET DISENFRANCHISEMENT IS PERMITTED FOR INCARCERATED CITIZENS THROUGHOUT THE AMERICAS, IN VIOLATION OF THE “PROPORTIONALITY TEST”

Sixteen Member States, like the U.S., automatically disenfranchise anyone who is incarcerated. Unlike the U.S., in the countries listed below, disenfranchisement *only* lasts for the duration of incarceration. These nations are:

- Antigua and Barbuda,²⁴⁹
- Bahamas;²⁵⁰
- Barbados;²⁵¹
- Brazil;²⁵²
- Chile;²⁵³

²⁴⁸ THE RIGHT OF PRISONERS TO VOTE: GLOBAL OVERVIEW 3, PENAL REFORM INT’L (March 2016) https://cdn.penalreform.org/wp-content/uploads/2016/08/The-right-of-prisoners-to-vote_March-2016.pdf;

DIGNITY OF THE INDIVIDUAL: EVALUATION OF PRISONS IN THE OAS 25, 61, 86-87, INT’L CURE (Kim Pathways pubs. 2006), https://www.prisonlegalnews.org/media/publications/cure_dignity_of_the_individual_evaluation_us_prisons_jun_2006.pdf.

²⁴⁹ Representation of the People Act, 2010 (Act No. 6/2010) (Ant. & Barb.), art. 17(b).

²⁵⁰ Parliamentary Elections Act, 2020 (Act No. 39/2020) (Bah.), art. 10(2)(a).

²⁵¹ Representation of the People Act, 1 L.R.O 2007, art. 8(b) (Barb.).

²⁵² CONSTITUIÇÃO FEDERAL, art. 15(III) (Braz.) (“so long as the effects of a final non-appealable criminal conviction remain in force”).

²⁵³ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, art. 17(2) (“sentence to afflictive punishment”).

- Cuba;²⁵⁴
- Dominican Republic;²⁵⁵
- Ecuador;²⁵⁶
- El Salvador;²⁵⁷
- Guatemala;²⁵⁸
- Mexico;²⁵⁹
- Paraguay;²⁶⁰
- Saint Lucia;²⁶¹
- St. Vincent and the Grenadines;²⁶²
- Suriname;²⁶³ and
- Uruguay.²⁶⁴

Eight other OAS nations provide some exceptions to automatic blanket disenfranchisement for incarcerated individuals. Those exceptions, however, are minimal. So, the overall effect is complete disenfranchisement for incarcerated individuals.

²⁵⁴ Ley Electoral 1992 (No. 72/1992) (Cuba), art. 7(b) (People sanctioned to “deprivation of liberty” including during conditional liberty).

²⁵⁵ CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA, art. 24(1) (irrevocable condemnation to a criminal sentence, until that sentence is over).

²⁵⁶ CONSTITUCIÓN POLÍTICA, art. 64 (Ecuador) (final court judgment convicting a person and sentencing that person to incarceration, as long as it is in force).

²⁵⁷ REPÚBLICA DE EL SALVADOR CONSTITUCIONES, art. 74(1) (judicial decree of formal imprisonment).

²⁵⁸ Ley Electoral y de Partidos Políticos de 1985 (Decreto No. 1-85) (Decreto No.26-2016) (Guat.), art. 4 (by final conviction, handed down in criminal proceedings).

²⁵⁹ Código Penal Federal, art. 46 (Mex.).

²⁶⁰ Código Electoral Paraguayo, 2012 (Law No. 834/96), art. 91(e).

²⁶¹ Elections Act, 1979 (Act No. 45/2006) (St. Lucia), art. 13(b).

²⁶² Representation of the People Act, 1982 (Act no. 7/2009) (St. Vincent), art. 6(b).

²⁶³ GRONDWET VAN SURINAME, art. 58(b) (“people who are lawfully deprived of their liberty”).

²⁶⁴ CONSTITUCIÓN DE LA REPÚBLICA ORIENTAL DEL URUGUAY, art. 80(4).

These nations are:

- Argentina: anyone sentenced to deprivation of liberty for committing an intentional crime;²⁶⁵
- Belize: any sentence of imprisonment longer than twelve months;²⁶⁶
- Grenada: any sentence of imprisonment longer than twelve months, and election offenses;²⁶⁷
- Honduras: any felony;²⁶⁸
- Jamaica: any sentence of imprisonment longer than six months;²⁶⁹
- Nicaragua: any sentence of imprisonment longer than ten years;²⁷⁰
- Saint Kitts and Nevis: any sentence of imprisonment longer than twelve months;²⁷¹ and
- Trinidad and Tobago: any sentence of imprisonment longer than twelve months.²⁷²

E. BLANKET POST-INCARCERATION DISENFRANCHISEMENT (PAROLE AND PROBATION) IS PERMITTED IN THREE NATIONS OTHER THAN THE UNITED STATES

- Argentina’s voting disqualification laws are broad and difficult to pinpoint. They include, “those convicted of offenses provided for in the national and provincial laws of prohibited games” who cannot vote for three years, or six years in the case of recidivism.²⁷³ The restoration of voting rights requires a judicial decree of rehabilitation; so, rights are

²⁶⁵ Código Electoral Nacional, 1983 (Decreto No. 2135/2002) (Arg.), art. 3(e).

²⁶⁶ Representation of the People Act, 1978 (2000 rev. ed.) (Belize), art. 7(b).

²⁶⁷ Representation of the People Act, 1993 (Act No. 27/2016) (Gren.), art. 7(a).

²⁶⁸ CONSTITUCIONES DE HONDURAS, art. 41(1).

²⁶⁹ THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL, art. 37(2)(a).

²⁷⁰ Código Penal, 2007 (Ley No. 641/2007) (Nicar.), art. 66.

²⁷¹ National Assembly Elections Act, 1952 (SRO 28/2009) (St. Kitts & Nevis), art. 38(b).

²⁷² Representation of the People Act, 1967 (Act No. 51/2000) (Trin. & Tobago), art. 15(1)(b).

²⁷³ Código Electoral Nacional, 1983 (Decreto No. 2135/2002) (Arg.), art. 3 (m).

not necessarily automatically restored once someone has been disenfranchised.²⁷⁴

- Cuba allows judicial discretion to extend the deprivation of rights for a maximum of five years after incarceration.²⁷⁵ Although this is different than blanket post-incarceration disenfranchisement, the ability to use judicial discretion does not appear to be connected to any particular offense.
- In El Salvador, individuals must request “rehabilitation.” This means that rehabilitation is not presumed after the completion of a prison sentence. Moreover, the Código Penal requires citizens to satisfy certain civil consequences before their rights are restored.²⁷⁶

F. TEN OAS MEMBERS USE THE “PROPORTIONALITY TEST” BEFORE DISENFRANCHISING CITIZENS

Three countries in the Americas allow for disenfranchisement, but not as a blanket rule. Those countries adhere to the “proportionality test,” which requires courts to make individual assessments of each convicted person’s crimes and issue a sentence that is proportional to those offenses. Sentences given in these countries allow for disenfranchisement during and after incarceration.

- Panama applies the “proportionality test” to all offenses. Under its criminal code, judges must use their discretion to select penalties, on a case-by-case basis, including participating in elections, “according to the seriousness of the crime, the direct relation to the crime, or protecting victims of offense.”²⁷⁷
- In Costa Rica, the criminal codes state that “deprivation of active and passive political rights” is applied through judicial discretion. Articles

²⁷⁴ *Id.* at art. 5.

²⁷⁵ Ley Electoral 1992 (No. 72/1992) (Cuba), art. 37.2.

²⁷⁶ Código Penal de El Salvador, 1973 (Decreto No. 1030/1973), art. 109.

²⁷⁷ Código Penal de la República de Panamá, 2007 (Ley No. 14/2007), art. 68, (“según la gravedad o naturaleza del delito, tenga relación directa con el delito o contribuya a evitar el peligro para los derechos de las víctimas.”).

161 and 365 both state that judges are empowered to impose additional sanctions but are not required to do so.²⁷⁸ Judges can also extend the disenfranchisement of reoffenders for up to six years after sentencing.²⁷⁹

- Similarly, Venezuela requires judicial discretion to apply political disqualification, including voting rights.²⁸⁰ This disqualification is only an accessory penalty to a prison sentence, and only lasts for the duration of incarceration.

Seven Member States also apply the “proportionality test,” and suspend the right to vote for five to seven years, solely for election related offenses. That period of time is finite, and includes time spent incarcerated, on probation, or on parole. At the end of that time period, an individual is automatically re-enfranchised. These States are:

- Belize;
- Dominica;
- Grenada;
- Guyana;
- Jamaica;
- St. Lucia; and
- St. Vincent and the Grenadines.²⁸¹

²⁷⁸Código Penal, 2019 (Ley No. 4.573/2019) (Costa Rica), art. 161 (“Privación de los derechos políticos activos y pasivos.”).

²⁷⁹ *Id.* at art. 70.

²⁸⁰ Código Penal, 2000 (Ley No. 5494/2000) (Venez.), art. 13.

²⁸¹ Representation of the People Act, 1978 (2000 rev. ed.) (Belize), art. 7(b); House of Assembly (Elections) Act, 1951, 1 L.R.O. 1991 (Dominica), art. 61-62; Representation of the People Act, 1993 (Act No. 27/2016) (Gren.), part VII; CONSTITUTION OF THE CO-OPERATIVE REPUBLIC OF GUYANA, art. 159(4); Representation of the People Act, 1944 (Law No. 23/2011) (Jam.), art. 96; Elections Act, 1979 (Act No. 45/2006) (St. Lucia), art. 27(a); Representation of the People Act, 1982 (Act no. 7/2009) (St. Vincent) art. 23.

G. NINE NATIONS AUTOMATICALLY DISENFRANCHISE CITIZENS FOR CRIMES COMMITTED AGAINST THE STATE, AND FOR GROSS HUMAN RIGHTS VIOLATIONS

- Article 28, of the Bolivian Constitution suspends political rights, including the right to vote, after convictions for “taking up arms against the state, embezzlement of public funds, and acts of treason.”²⁸²
- Colombia’s criminal code lists over forty offenses that can result in disenfranchisement, all of which are considered “crimes committed against the state.” These crimes cover a wide range from embezzlement by appropriation²⁸³ to divulging public secrets²⁸⁴ and gross human rights violations (such as genocide²⁸⁵ and forced disappearance²⁸⁶).
- Article 19(15) of Chile’s Constitution specifies that people convicted of “infringing on the right of association” shall be disqualified from voting for five years, and that disenfranchisement years may double in cases of “reoffending.”²⁸⁷ Additionally, people convicted of terrorist-related conduct and crimes related to drug trafficking are not automatically re-enfranchised after serving their sentence. People convicted of these offenses must apply for rehabilitation after their sentence is complete, which would restore their right to vote.²⁸⁸
- In Perú, the suspension of voting rights, among other political rights, can be imposed as a principal penalty for six months to five years or as an accessory penalty for the same length as the principal penalty.²⁸⁹
- Similarly, in Guatemala, “crimes against public administration and administration of justice” result in loss of voting rights. The criminal code

²⁸² CONSTITUCIÓN POLÍTICA DEL ESTADO (Bol.), art. 28.

²⁸³ Código Penal, 2000 (Ley No. 599) (Colom.), art. 397.

²⁸⁴ *Id.* at art. 418.

²⁸⁵ *Id.* at art. 101.

²⁸⁶ *Id.* at art. 165.

²⁸⁷ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, art. 19(15).

²⁸⁸ *Id.* at art. 17(2)-(3); *see also* Código Penal, 2017 (Ley No. 18.556) (Chile), art. 42.

²⁸⁹ Código Penal, 1991 (Decreto No. 635/1991) (Perú), art. 39 (Accessory penalties “will be imposed . . . when the offense committed by the convicted person constitutes abuse of authority, office, profession, occupation, possession or violation of an inherent civil duty, commerce, industry, custody, guardianship, wardship or activity regulated by law.”).

sets a minimum of four years for disqualification rather than a maximum.²⁹⁰

- Title One of the Mexican Código Penal Federal, lists several “Delitos contra la seguridad de la Nación” or “crimes against the security of the nation.” Individuals convicted of a crime within this title, have their political rights, including the right to vote, suspended for up to ten years.²⁹¹ People convicted of “treason and espionage,” under Chapter I and II of the title, can be disenfranchised for up to for forty years.²⁹²

Colombia’s Penal Code provides over forty offenses of gross human rights violations and crimes committed against the state that disqualify a convicted person from exercising their public rights, including voting. Each of these enumerated offenses provides a specific length of time for which these rights are suspended. For example, the crime of genocide under Article 101 carries a penalty of imprisonment from ten to twenty years, but carries a penalty of disqualification from public functions for five to fifteen years.²⁹³ Whereas, divulging public secrets carries a penalty of one to three years imprisonment, but five years disqualification from exercising public rights, such as voting.²⁹⁴

²⁹⁰ Código Penal, Decreto No. 17-73) (Guat.), art. 58.

²⁹¹ Código Penal Federal, 1931-2021, DOF 12-11-2021 (Mex.), art. 143.

²⁹² *Id.*

²⁹³ Código Penal, 2000 (Ley No. 599) (Colom.), art. 101.

²⁹⁴ *Id.* at 418.