
NEW JERSEY STATE CONFERENCE - NAACP,) SUPERIOR COURT OF NEW JERSEY
THE LATINO LEADERSHIP ALLIANCE OF) UNION COUNTY
NEW JERSEY, EARL PRATHER, KAREEMAH) CHANCERY DIVISION
TERRY, MICHAEL E. MACKASON, DANA)
THOMPSON, CHARLES THOMAS, ZENON)
QUILES, ROBERT PADILLA, ARMADO ORTIZ,) DOCKET NO. UNN-C-4-04
CHRISTOPHER ORTIZ, COUNCILWOMAN)
PATRICIA PERKINS-AUGUSTE,) <u>CIVIL ACTION</u>
COUNCILMAN CARLOS J. ALMA, on)
behalf of themselves and all)
individuals similarly situated,)
)
Plaintiffs,)
)
v.)
)
PETER C. HARVEY, ATTORNEY)
GENERAL OF NEW JERSEY, in his)
official capacity,)
)
Defendant.)

**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION
TO DISMISS FOR FAILURE TO STATE A CLAIM**

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PRELIMINARY STATEMENT

The uncontested allegations of the Complaint dramatize the negative impact of felon disfranchisement on the ability of New Jersey's minority community¹ to influence political and governmental affairs in the State. Moreover, the political consequences of the law are not merely the neutral result of even-handed application of the law; they are, in fact, an artifact of the racially discriminatory application of the criminal justice system itself. The uncontested fact is that African-Americans and Hispanics are investigated, arrested, prosecuted and convicted in proportions that far exceed their propensity to commit crime as a consequence of well documented racial profiling and other discriminatory practices.

There are three fundamental flaws in Defendant's arguments in support of their motion to dismiss.

(1) This is not a case about economic regulation to which the Legislature is entitled to deference and a statute is subject only to rational-basis review. This is a case about legislation which negatively impacts on fundamental rights of a protected class and is thus subject to the strictest of scrutiny. There is no warrant in our laws for the Constitution to authorize the State Legislature to enact legislation denying the Equal Protection of the Laws.

(2) The legislation at issue not only has a disparate impact on the fundamental right of a protected class (the racial minority community in New Jersey) to be able to

¹ The Complaint identifies the minority community as African-Americans and Hispanics. ¶¶ 1 and 29. ¶ references are to the Amended Complaint.

participate fully and equally in the political process. It is the unchallenged allegation of the Complaint that the disparate impact is also, in large measure, an artifact of the discriminatory operation of the criminal justice system in New Jersey. In other words, the injury inflicted on the voting power of the minority community arises not because members of that community are more prone to commit crime, but rather because members of that community are the victims of racial profiling which makes them subject to investigation, arrest, prosecution and conviction out of proportion to their criminality.

(3) While Plaintiffs do not necessarily concede that the State has authority to deny voting rights to incarcerated felons (see *Sauve v. Canada*, [2002] 218 D.L.R. 4th 577) (holding by Canadian Supreme Court that the State may not disfranchise incarcerated inmates in custody for two or more years), Plaintiffs do assert that felons on parole and probation are easily distinguishable from those still confined. All modern penal theory agrees that once felons are released from custody, the societal interest in punishment of such persons has been superseded, and public policy changes to favor their rehabilitation and re-integration into society. Thus there is no longer any significant, let alone compelling, reason to deny them the right of franchise.

STATEMENT OF FACTS UPON WHICH THE PLAINTIFFS' CLAIMS ARE BASED

Plaintiffs' class complaint, filed January 6, 2004, challenges New Jersey's practice of denying suffrage to convicted persons on parole and probation as a violation of Equal Protection of the Laws under the New Jersey Constitution, because of its discriminatory and disparate impact on the African- American and Hispanic electorate in the state. This

brief is filed in opposition to the Defendant's Motion to Dismiss for failure to state a claim.

Disfranchisement is mandated by N.J.S.A. 19:4-1, which states in part: "No person shall have the right of suffrage. . . [w]ho is serving a sentence or is on parole or probation as the result of a conviction of any indictable offense under the laws of this or another state or the United States."

This case is brought on behalf of the New Jersey State Conference NAACP; the Latino Leadership Alliance of New Jersey (hereinafter "LLA"); two racial minority members of the Elizabeth City Council; and nine individuals on parole or probation. The Plaintiff class includes two subclasses: (1) African-American and Hispanic persons of lawful voting age currently on parole or probation in the state of New Jersey as a result of a conviction for an indictable offense and otherwise qualified to vote but for the provisions of N.J.S.A. 19:4-1; (2) African-American and Hispanic persons of lawful voting age, citizens of the United States and qualified to vote in New Jersey, but denied an equal opportunity to influence the political process in New Jersey because of the disproportionate disfranchisement of African-American and Hispanic persons on parole and probation. The NAACP is the oldest and largest civil rights organization in the United States, and has a long history of involvement in protecting the voting rights of African-Americans as well as challenging racial discrimination. The State Conference is concerned that the impact of the disfranchisement affects the entire African-American community in New Jersey in its ability to participate in the political process and to elect to

public office candidates of their choice. 3. The LLA is a voluntary organization that seeks to improve the status of Hispanic/Latino Americans, in part by working to end discriminatory practices. Part of the LLA's mission to work to elect both Hispanic and non-Hispanic candidates who have proven track records of support for issues that matter to Hispanics. 4. The LLA has similar concerns as the NAACP, namely, that the disproportionate disfranchisement of Hispanics harms not only the individuals themselves, but the larger Hispanic community as well.

Patricia Perkins-Auguste and Carlos J. Alma are racial minority members of the Elizabeth City Council. Councilwoman Perkins-Auguste is active in the promotion of voter registration and participation in the African-American community. 14. Councilman Alma focuses his interests on voter registration and participation in the Hispanic community. 15.

The reality of racial profiling plays a central role in the grossly disparate impact of the felon disfranchisement law for these two minority groups, which often vote as a bloc in New Jersey elections. See Page v. Bartels, 144 F.Supp. 2d 346, 358 (3-judge D.Ct., 2001). The resulting disfranchisement of African American and Hispanic electorate has a dramatic impact on the individuals involved, as well as on their respective communities. The allegations of the Complaint show that African-American and Hispanics are arrested, prosecuted, convicted, and sentenced to incarceration at substantially higher rates than non-Hispanic white persons. ¶20. Although African-Americans make up only 13.6 percent of New Jersey's overall population, they comprise 63 percent of the prison population, 60 percent of the parolee population and 37 percent

of the probationary population. ¶23. The data show a similar skew in the Hispanic population. While Hispanics are only 13.3 percent of the overall state population, they make up 18 percent of the prison population, 20 percent of the parolee population and 15 percent of the probationary population. ¶24. When the statistics are combined, the figures create a stark picture of the disparity between the minority percentage in the overall population of New Jersey and their representation in the incarcerated and post-incarcerated population. While white non-Hispanics represent 72.6 percent of the overall population, they make up only about 19 percent of the prison population, 19 percent of the parolee population, and 41 percent of the probationary population. ¶26. By contrast, African-American and Hispanics represent a mere 27.4 percent of the overall population, but they make up some 81 percent of the prison population,² more than 75 percent of the parolee population, and 52 percent of the probationary population. ¶¶25, 26.

The unchallenged facts also demonstrate that the racially disparate impact of felony disfranchisement does not result from the neutral application of the law. It is a consequence of the discriminatory application of the law and well documented racial profiling. This is starkly shown by the statistics dealing with traffic stops and drug arrests. One study that compared “radar” based tickets verses discretionary stops by state police showed that African-Americans received 19.1 percent of the radar tickets compared to 43.8 percent of tickets issued after discretionary stops. 34. In other

² Nearly all of those currently incarcerated will eventually be placed on parole as they complete their sentences.

words, when police were allowed to pick their targets, minority drivers were targeted more than twice as often as whites.

In State v. Soto, the court found a *de facto* police policy of targeting blacks for investigation and arrest. 324 N.J. Super., 66, 84 (Law Div., 1996). The findings of the court in Soto were expanded upon in the “Interim Report of the State Police Review team Regarding Allegations of Racial Profiling” issued by Attorney General Peter Veniero in 1999. _36(B). The conclusion was that despite the efforts and official policies to address the issue of racial profiling, “the problem of disparate treatment is real not imagined.” _36(B)(2). A resultant effect of such discriminatory traffic stops is arrests for possession of drugs. Figures for the Newark, Moorestown and Cranbury State Police districts for serious arrests (generally excluding traffic and drunk driving arrests), from a sampling of 2,871 cases, showed that only 32.5 percent were white non-Hispanic, while 61.7 percent were blacks. _36(B)(4). The conclusion of that study was that

the fact that the arrest rates for whites was comparatively low does not mean that white motorists are less likely to be transporting drugs, but that they are less likely to be suspected of being drug traffickers in the first place, and, thus, less likely to be subjected to probing investigative tactics designed to confirm suspicions of criminal activity such as , notably, being asked to consent to a search.

_36(B)(4).

State Attorney General John Farmer testified before the Legislature on April 3, 2001, that despite efforts by the State Police to curb racial profiling, the practice has continued into the 21st Century. _36©). Farmer testified that a study of Troop D showed that only 19 percent of consent searches involved white drivers, while 79 percent involved blacks and Hispanics. _36©). These searches and subsequent arrests for

transportation of drugs have coincided with the stepped up social policy of incarcerating drug offenders. In 1982, only 12 percent of the state's prison inmates were drug offenders, and 31 percent were white. _36©). By contrast, in 2001, 34 percent of those incarcerated in state prisons were drug offenders, of which only 18 percent were white. _37. The New Jersey Department of Corrections has attributed these disparate figures to the impact of the 1986 Comprehensive Drug Reform Act, which led to the targeting of inner city neighborhoods where the population is overwhelming minority. _37. The result of this policy has been a staggering 475 percent increase in the number of African Americans incarcerated for drug offenses, while the identical figures amongst the white population is only a 112 percent increase. _38.

Yet, national research shows that whites and African-Americans use illegal drugs at the similar rates. _40. In self- reporting studies, conducted by the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), 8.5 percent of whites and 9.7 percent of African-Americans reported using drugs the previous month. _40. Similar numbers of survey participants reported themselves to be dependent on illicit substances (9.3 percent of whites and 9.5 percent of African-Americans). _40. In New Jersey, a study entitled "Drug and Alcohol Use Among New Jersey High School Students" conducted every three years, showed in 1999 (the last year for which figures are available) that 46.7 percent of white high school students reported marijuana use, while 40.1 percent of African-Americans and 36.3 percent of Hispanic students reported using marijuana. _40. The same study showed

reported use of cocaine amongst students to be 8.6 percent for whites, 2.4 percent for African-Americans, and 6.4 percent for Hispanics. _40.

A consequence of the foregoing figures is that some 62 percent of those who are denied the right to vote pursuant to N.J.S.A. 19:4-1 are African-Americans and Hispanics. _28. These figures are made even more significant by the findings of a 3-Judge Federal District Court's in Page v. Bartels that "the African-American and Hispanic communities [in New Jersey] often vote as a bloc--a fact which may be considered in assessing the ability of either community to select candidates of its choice." 144 F.Supp. 2d at 358.

The electoral disadvantage suffered by the minority community as a consequence of this flawed system is palpable, and is a direct result of governmental action that is discriminatory. Its consequence is to significantly dilute the opportunity of the minority community to elect to public office candidates of their choice and to influence the governing process.

ARGUMENT

SUMMARY OF ARGUMENT

Because African-Americans and Hispanics are investigated, prosecuted, convicted and sentenced to incarceration at rates substantially greater than non-Hispanic white persons and at rates substantially greater than their propensity to commit crime – and are thereby disproportionately represented among parolees and probationers – New Jersey’s felon disfranchisement law disparately impacts the voting rights of African-American and Hispanics in violation of the principle of equal protection embodied in Article I ¶1 of the State Constitution.

As set forth in the foregoing Statement of Facts, some 62 percent of those disfranchised by the operation of the law are members of a minority community which often vote “as a bloc.” Page v. Bartels, 144 F.Supp. 2d at 358. By removing so many persons from the voter-registration rolls who might otherwise vote for the candidates favored by the minority community, the disfranchisement law substantially dilutes the vote of that community, depriving it of an equal right to participate in the electoral process and “to elect candidates of its choice.” Id.

Even where the racial disparity does not alter the outcome of an election, it weakens the power and influence of the African-American/Hispanic “bloc” of voters.

Public officials often respond to groups of voters that, while not numerous enough to determine the outcome of an election, are nonetheless a significant segment of the electorate.

The disproportionate disfranchisement of African-Americans and Hispanics, and the resulting impact upon the ability of New Jersey's minority community to participate in the political process and to elect candidates of its choice, is without compelling justification, and, hence, violates the New Jersey Constitution.

Although Article II, ¶7 of the New Jersey Constitution authorizes the State Legislature to deny the right to vote to persons convicted of crimes, that provision cannot sanction the denial of Equal Protection of the Laws, nor can it sanction the denial to the minority community of the right to equal participation in the political process. Just as the Constitution could not authorize the Legislature to pass a statute disfranchising only African-American and Hispanic felons, it cannot authorize legislation which has a similar effect. Cf. Hunter v. Underwood, 471 U.S. 222 (1985), holding the Alabama felon disfranchisement statute unconstitutional for intentionally discriminating against blacks despite an earlier ruling that Section 2 of the 14th Amendment authorized states to deny the right to vote to anyone convicted of crime. Richardson v. Ramirez, 418 U.S. 24 (1974).

POINT I

THE MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED MUST BE DENIED BECAUSE LAWS SUCH AS NEW JERSEY'S FELON DISFRANCHISEMENT LAW THAT INTERFERE WITH THE RIGHT OF THE MINORITY COMMUNITY

**TO VOTE AND PARTICIPATE EFFECTIVELY IN THE POLITICAL
PROCESS DENY EQUAL PROTECTION OF THE LAWS UNDER THE
NEW JERSEY CONSTITUTION.**

The right to Equal Protection of the Laws, based in Article I, ¶1³, has long been regarded as one of the most powerful and important principles of the New Jersey Constitution. See Greenberg v. Kimmelman, 99 N.J. 552, 567-68 (1985). In Right to Choose v. Byrne, the New Jersey Supreme Court explained the historical importance of the unique guarantees of individual rights under the 1947 New Jersey Constitution: “The state Bill of Rights,” wrote the Court, “which includes [Art. 1, ¶1] has been described as expressing ‘the social, political, and economic ideals of the present day in a broader way than ever before in American constitutional history.’” 91 N.J. 287, 303 (1982) (quoting Milmed, “The New Jersey Constitution of 1947”, reprinted in N.J.S.A. Const., Arts. I-III.)

Article I, ¶1 has been interpreted to offer a very broad standard of protection to the civil liberties of the citizens of this state. In particular, the New Jersey equal protection standard strongly protects against both government encroachment upon fundamental

³ N.J.S.A. Const. Art I, ¶1, states in relevant part:

All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

rights and discrimination against historically protected groups. See Planned Parenthood v. Farmer, 165 N.J. 609, 630-31 (2000); State v. Loftin, 157 N.J. 253, 298 (1999). New Jersey's felon disenfranchisement law, by its vastly disproportionate impact upon the voting power of the African-American and Hispanic communities, implicates both of these concerns.

By denying convicted felons serving parole or probation the opportunity to cast a ballot, New Jersey's felon disenfranchisement law encroaches upon one of the most fundamental rights protected by the New Jersey Constitution. Moreover, it encroaches upon the right to vote of **all** African-Americans and Hispanics in New Jersey, including those who have not committed a felony and are not serving parole or probation. That is because the right to vote is broader than the right to cast a ballot. It also includes the right of minorities to an effective political voice, including the equal opportunity to participate in the electoral process and to elect legislators of their choice. By diminishing the numbers of African-Americans and Hispanics who are eligible to register to vote, New Jersey's felon disenfranchisement law dilutes the political influence of the minority community. Because the law encroaches upon a fundamental right and disproportionately impacts a racial minority, it must face heightened scrutiny by the courts under New Jersey's rigorous equal protection standard. That standard, higher in New Jersey than under the federal Constitution, requires the government to meet a very high burden of proof in showing that there is a need for such a law.

A. NEW JERSEY'S FELON DISFRANCHISEMENT LAW ENCROACHES UPON THE FUNDAMENTAL RIGHT TO VOTE, AND IS, THEREFORE, SUBJECT TO HEIGHTENED SCRUTINY.

1. The right to vote is one of the most highly protected rights under the New Jersey Constitution.

The New Jersey Supreme Court has long recognized that the right to vote, guaranteed by Article II, ¶3 of the New Jersey Constitution,⁴ is one of the most fundamental and important rights in a democratic society. See Gangemi v. Berry, 25 N.J. 1, 12 (1957). After summarizing the long and arduous history of the development of voting rights in this country, Chief Justice Weintraub eloquently explained the importance of the right to vote in the following passage:

Thus, despite an impoverished beginning, the right to vote has taken its place among our great values. Indeed the fact that the voting franchise was hoarded so many years testifies to its exalted position in the real scheme of things. It is the citizen's sword and shield. "Other rights, even the most basic, are illusory if the right to vote is undermined." It is the keystone of a truly democratic society.

⁴ Article II, ¶3(a) of the New Jersey Constitution states:

Every citizen of the United States, of the age of 21 years, who shall have been a resident of this State 6 months and of the country in which he claims his vote 40 days, next before the election, shall be entitled to vote for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people[.]

Gangemi v. Rosengard, 44 N.J. 166, 170 (1965) (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)).

More recently, in New Jersey Democratic Party, Inc. v. Samson, the New Jersey Supreme Court again affirmed the principle that voting is a fundamental right of New Jersey citizens. 175 N.J. 178 (2002). There, the Court weighed the interests of New Jersey voters in having a fair choice between candidates on election day against a statute that imposed a deadline for placing a candidate's name on the ballot. Chief Justice Poritz, writing for a unanimous Court, stated that “[w]hen this court has before it a case concerning the New Jersey election laws, we are directed by principle and precedent to construe those laws so as to preserve the paramount right of the voters to exercise the franchise.” Id. at 190. The Chief Justice explained that the “fundamental right to exercise the franchise infuses our election statutes with purpose and meaning.” Id. at 186. In keeping with that purpose, the Court liberally construed the statutory deadline for ballot changes so that New Jersey citizens could have a meaningful opportunity to exercise this most fundamental right on election day. Id. at 199.

New Jersey's broad protection of the right to vote is further illustrated by a recent opinion in which the Appellate Division rejected a challenge to the right of persons involuntarily committed to mental institutions to vote. I/M/O Absentee Ballots Cast By Five Residents of Trenton Psychiatric Hospital, 331 N.J. Super. 31 (App. Div. 2000). Despite a State Constitutional provision that denies voting rights to “idiots” or the insane, the court found that a *per se* finding of incompetence for those committed to mental institutions was inconsistent with New Jersey's “overriding public policy in favor of

enfranchisement.” Id. at 35-36. The court went on to state that “[s]uch policy derives from the basic precept that the right to vote is quintessential to our democratic process.”

Id. at 36.

Thus, the right to vote is among the most important rights within the scheme of constitutional values which the courts have a special duty to protect from encroachment.

2. The right to vote includes not only the right to cast a ballot, but also the right of the minority community to an effective political voice.

Modern cases make it clear that the right to vote includes more than the right to cast a ballot. Instead, it encompasses the right of minority groups to an equal opportunity to have their voices heard and to elect candidates of their choice. See Thornburg v. Gingles, 478 U.S. 30, 47(1986). This is the essence of the vote-dilution cases which dominate modern voting-rights law.

Soon after the passage of the Voting Rights Act, the United States Supreme Court recognized that “Congress intended to adopt the concept of voting articulated in Reynolds v. Sims, 377 U.S. 533 (1964), and protect [African-Americans] against a dilution of their voting power.” Perkins v. Matthews, 400 U.S. 379, 390 (1971). Vote dilution has been broadly defined by the Court. In White v. Regester, the Court stated that a group is the victim of vote dilution when “its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.” 412 U.S. 755, 765-6 (1973).

The recognition in modern election law jurisprudence that the right to vote is a group right has been succinctly and eloquently explained by Stanford Law Professor Pamela Karlan, one of the nation's leading election law scholars,⁵ in a recent paper published on-line. P. Karlan, Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement, Stanford Law School, Public Law Working Paper No. 75 (available at <http://papers.ssrn.com/abstract=484543>)

[hereinafter "Karlan"]. [The article is appended to this brief in order to facilitate access.]

She writes:

Although fundamental rights are generally conceived of in individual terms, the right to vote is different. It has come to embody a nested constellation of concepts: participation (the ability to cast a ballot and have it counted); aggregation (the ability to join with like-minded voters to achieve the election of one's preferred candidates); and governance (the ability to pursue policy preferences within the process of representative decision making). In a variety of contexts, courts, legislatures, and the public have come to see that any right to genuinely meaningful political participation implicates groups of voters, rather than atomistic individuals. As Justice Powell succinctly observed: "The concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not."

Id. at 11 (quoting Davis v. Bandemer, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part)).

The collective nature of the right to vote was emphasized by our State Supreme Court in State v. Apportionment Commission, 125 N.J. 375 (1991). The case involved a challenge to the use of allegedly inaccurate census data in the reapportionment of the

⁵ Professor Karlan is co-author of the leading law school election law casebook: "The Law of Democracy," Foundation Press (2d Ed. 2002).

State Legislature. Although the Court said the record in that case was inadequate to sustain the plaintiffs' challenge, it noted its "profound concern that should there be any substantial undercount... it will be to the disadvantage of the already disadvantaged minority members of our community." Id. at 385. The Court went on to state that if the adjusted data revealed a material deviation from the raw data, thus diluting the voting power of minority communities in the state, the state and federal constitutions should be "invoked to remedy the wrong." Id.

As explained above, this concept of group representation not only underlies equal protection jurisprudence, but is also the fundamental principle of the federal Voting Rights Act, 42 U.S.C. §1973. Section 2 of the Act is violated whenever "the totality of the circumstances" reveals that "the political processes leading to nomination or election. . . are not equally open to participation of members of a [minority group]. . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. §1973(b).

Courts have recognized several ways in which minorities' voting power may be diluted. First, they may be denied an equal opportunity to elect candidates of their choice. For example, a minority group may be fragmented among a number of different election districts, and, lacking a majority in any individual election district, be unable to elect any candidates to represent them. See Voinovich v. Quilter, 507 U.S. 146, 153 (1993); Thornburg v. Gingles, 478 U.S. 30, 48-49 (1986). Vote dilution can also occur by "packing" minorities into a small number of districts with the effect of "wasting" their potential political power on a smaller number of candidates, resulting in fewer candidates

avored by minorities being elected. Id. In Johnson v. De Grandy, the Court, in referring to the same type of vote dilution that was discussed in Voinovich, held that “Section 2 [of the Voting Rights Act] prohibits either sort of line drawing where its result. . . impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters.” 512 U.S. 997, 1007 (1994) (quoting Thornburg, 478 U.S. at 47). In each of the cases, the courts have found vote dilution based on the effect of the practice on the minority community. See id.

Minorities’ voting power may also be diluted by diminishing their effective participation in the political process. In Georgia v. Ashcroft, the Court made clear that “the power to influence the political process is not limited to winning elections.” 123 S.Ct. 2498, 2512 (2002)(quoting Thornburg, 478 U.S. at 99). Also important is the opportunity to influence legislators even where the minority group is too few in number to elect the legislator of its choice. Id. Indeed, “influence districts,” where minorities are not the majority but nonetheless possess a significant concentration of numbers such that legislators will be attentive to their interests, can play an important role in ensuring minority voting power. Id.

When determining whether minority members of the community should be protected from discriminatory voting practices, the high Court has considered whether the minority group is “politically cohesive”- that is, whether its members have the tendency to vote in blocs for particular candidates. Thornburg v. Gingles, 478 U.S. 30, 50 (1986); see also Voinovich v. Quilter, 507 U.S. at 157; Bush v. Vera, 517 U.S. 952, 978 (1996). African-Americans and Hispanics in New Jersey constitute such a politically

cohesive group. See Page v. Bartels, 144 F. Supp. 2d 346, 358 (3d Cir. N.J. 2001)(“ . . .we so find that African-American and Hispanic communities [in New Jersey] often vote as a bloc- a fact which may be considered in assessing the ability of either community to elect the candidates of its choice.”)

As explained by the United States Supreme Court in Gingles, a case challenging multi-member legislative districts in North Carolina:

The essence of a [voting rights] claim is that certain electoral law, practice, or structure, interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by Black and white voters to elect their preferred representatives.

478 U.S. at 47. Given the fundamental importance of the right to vote in New Jersey and the strong commitment of this State to eliminating racial discrimination, the federal standard for group voting rights is entirely consistent with our State’s history and traditions. While the New Jersey Supreme Court has sometimes seen fit to articulate a more expansive view of civil rights than its federal counterpart,(e.g. Planned Parenthood v. Farmer, 165 N.J. 609 (2000)), it has never interpreted the State’s Constitution to provide a narrower vision of rights than the Federal Constitution.

Thus, the right to vote includes the right of minority groups to an effective political voice, including an equal opportunity to elect candidates of their choice and to influence the political process.

B. SINCE NEW JERSEY’S FELON DISFRANCHISEMENT LAW DISPROPORTIONATELY IMPACTS THE EXERCISE OF A FUNDAMENTAL RIGHT BY RACIAL MINORITIES, IT IS SUBJECT TO HEIGHTENED SCRUTINY.

1. The New Jersey Constitution provides the highest protection for the rights of minority groups.

The New Jersey Supreme Court has time after time reiterated that it will not tolerate racial discrimination in either the language or application of the laws of New Jersey. In considering the possibility of bias in capital sentencing, the Court affirmed New Jersey's strong policy against racial discrimination:

New Jersey's history and traditions would never countenance racial disparity in capital sentencing. As a people we are uniquely committed to the elimination of racial discrimination. All of our institutions reflect that commitment.

State v. Marshall, 130 N.J. 109, 207 (1992).

Just as the New Jersey Constitution provides greater protection to fundamental rights than the United States Constitution, the Court has also made clear that it is not bound by the limits set by the federal courts in fulfilling its historical commitment to ending racial discrimination. In State v. Loftin, a capital sentencing decision decided after Marshall, the Court specifically rejected the United States Supreme Court's view that "apparent disparities in sentencing are an inevitable part of our criminal justice system." Loftin, 157 N.J. at 298 (quoting McClesky v. Kemp, 481 U.S. 279, 312 (1987)). Instead, New Jersey's "history and traditions" of fighting against racial discrimination "in all its invidious forms," the Court explained, "provide a basis for the independent application of our constitution." Id. The Court held that racial disparity in the application of a law that threatened a right as fundamental as life was so repugnant that the Court considered it to be a threat to "the foundation of our system of law." Id. (quoting Marshall, 130 N.J. at 209). Four years ago, in State v. Feaster, the Court again

reaffirmed its commitment to the principle of the Marshall and Loftin decisions that racial disparity in capital sentencing is unacceptable. 165 N.J. 388, 419 (2000). Similarly, one must conclude that the “history and traditions” of New Jersey will not tolerate racial disparities in other fundamental rights, especially a right as fundamental as the right to vote.

New Jersey’s commitment to ending racial disparities is not limited to capital sentencing. In fact, in Marshall, the New Jersey Supreme Court imported its reasoning concerning New Jersey’s intolerance for racial discrimination from a housing discrimination case brought under New Jersey’s Law Against Discrimination (LAD) as well as Article 1, ¶1 of the State Constitution. Marshall, 130 N.J. at 207 (citing Jackson v. Concord Co., 54 N.J. 113 (1969)). The New Jersey Law Against Discrimination jurisprudence in New Jersey confirms that the state’s broad equal protection standard provides protection against discrimination far beyond the criminal context. See e.g. Peper v. Princeton University Bd. of Trustees, 77 N.J. 55 (1978). Significantly, in State v. Apportionment Commission, discussed supra, the New Jersey Supreme Court specifically warned that restrictions upon the voting rights of racial minorities would not be tolerated. 125 N.J. at 385.

In Peper v. Princeton, Justice Pashman recognized that claims of discrimination need not be based on deliberate acts to be unlawful. 77 N.J. at 81-82. In fact, even a facially neutral law or act of the government is considered to be unlawfully discriminatory if the law has a disparate impact on a protected group. Id. Justice Pashman explained the principle of disparate impact discrimination in the following passage:

Claims of disparate treatment may be distinguished from claims that stress “disparate impact.” The latter involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another. . . Proof of discriminatory motive, we have held, is not required under a disparate impact theory.

Id. Justice Pashman’s explanation of the disparate impact theory was cited by the Appellate Division in an employment discrimination case where the plaintiff claimed that her employer’s English-only policy had a disparate impact on Hispanic Americans. Rosario v. Cacace, 337 N.J. Super. 578, 586 (2001); see also Giammario v. Trenton Bd. Of Ed., 203 N.J. Super. 356, 361 (App. Div. 1985).

Disparate impact discrimination is a valid theory not only in employment discrimination cases. In fact, in all of the death penalty decisions where the issue of racial discrimination is considered, our courts have held that a significant statistical showing of racial disparity in sentencing would be enough to show an equal protection violation. See Marshall, 130 N.J. at 210; Loftin, 157 N.J. at 298-9. In none of these cases did the Court state or imply that a finding of unlawful discrimination would in any way hinge on a finding of deliberate or conscious discrimination. In fact, the decisions as to discrimination in these cases seem to turn on the substance and the reliability of the statistical data alone. Id. Further, the language in Apportionment Commission clearly implies that discrimination in the voting rights of minority citizens need not be deliberate to be unlawful. 125 N.J. at 385. The Court there stated that a finding of discrimination could be based on a “material deviation” in the census figures, not necessarily on a finding of deliberate discrimination by the government. Id.

Racial disparity may also depress voter turnout among African Americans and Hispanics that are registered to vote. A recent study has found the existence of a significant causal relationship between restrictive criminal disenfranchisement laws and decreased voter turnout rates among the non-disenfranchised. See Aman McLeod, Ismail K. White, & Amelia R. Gavin, The Locked Ballot Box: The Impact of State Criminal Disenfranchisement Laws of African American Voting Behavior and Implications for Reform, 11 Va. J. Soc. Pol’y & L 66, 80-81 (2003). The authors hypothesize that, “individuals with no criminal record who might be very likely to vote if they associated with people who voted, might be less likely to vote if those with whom they associate cannot participate in elections.” Id. at 72. Further, the study found that the impact of disenfranchisement laws on the probability of voting by the non-disfranchised is greater among African Americans than for whites. Id. at 72-73.

2. The disparate impact of the felon disenfranchisement law on minority voters in New Jersey is, in significant part, an artifact of discrimination in the criminal-justice system

This case involves much more than the disparate impact of a facially neutral law. The overtly discriminatory nature of felon disenfranchisement is dramatized by the recent explosion of incarceration for drug offenses, which are essentially victimless crimes, the prosecution of which is largely dependent upon pro-active police investigation.

The number of drug offenders in New Jersey's state prisons has been growing for two decades as a result of the War On Drugs. The racial disparity in this group is also large and consistent. These drug offenders will be the disfranchised parolees and probationers of tomorrow. The denial of the franchise to convicted felons on parole or probation in New Jersey does not simply affect a larger percentage of African-Americans and Hispanics, significantly impacting and diluting their communities' power at the polls, it also stems directly from institutional discrimination, historically and presently, in the criminal justice system of New Jersey.

The increasing use of incarceration for drug offenders, many of whom are arrested as a result of police encounters which disproportionately focus on members of the minority community, has had an especially disproportionate impact on African-Americans and Hispanics, even though African-Americans and Hispanics do not use illegal drugs any more frequently than whites. This disparate impact has only increased as the emphasis on drug prosecutions, specifically in urban areas, has increased. In 1982, 12 percent of the state's prisoners were drug offenders, and 31 percent of the inmates were white. However, in 2001, 34 percent of the state's prison population consisted of drug offenders and only 18 percent of the prison population was white, a ratio attributed by the New Jersey Department of Corrections to the impact of the 1986 Comprehensive Drug Reform Act which led to targeting of inner-city neighborhoods where the population is overwhelmingly minority. ¶37.

In fact, between 1986 and 1999, the rate at which African-Americans were incarcerated for drug offenses increased by 475 percent, while the rate at which whites

were incarcerated for drug offenses increased by only 112 percent. ¶38. This vast increase in the targeting of people of color and their neighborhoods for drug prosecution has been visible in its effects on young people, as the rate of increase of imprisonment between 1986 and 1999 for African-American youth was 646 percent, compared to 186 per cent for white youths. ¶39. These young people, while on parole and probation, are deprived of what is perhaps the most critical period in their entrance to the public arena of voting and politics; felon disfranchisement thus extends the dilution of voting power in African-American and Hispanic communities as the proportion of youth of color on parole and probation grows.

This vastly disparate impact exists despite the fact that national and state research show that whites and minorities use illegal drugs at similar rates. According to the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), in 2002, 8.5 percent of whites, and 9.7 percent of African-Americans reported using illegal drugs in the preceding month, and 9.3 percent of whites, and 9.5 percent of African-Americans reported themselves to be dependent on an illicit substance. ¶40. In New Jersey, a survey is conducted every three years by the New Jersey Division of Criminal Justice among high school students, leading to the publication of results under the title, “Drug and Alcohol Use Among New Jersey High School Students.” Id. The last such report, issued in 1999, indicates consistently higher percentage rates of reported usage of illicit substances by white New Jersey high school students than African-American and Hispanic high school students. For example, 46.7 percent of white high school students reported marijuana use, while

40.1 percent of African-American high school students and 36.3 percent of Hispanic high school students reported such use. And 8.6 percent of white high school students reported cocaine use, while 2.4 percent of African-American students and 6.4 percent of Hispanic students reported cocaine use. Id.

Drug prosecutions have thus had a vast and disparate effect upon the voting power of the African-American and Hispanic community in New Jersey as these offenders enter periods of parole or probation, returned to the community yet prohibited from fully participating in its functions. Moreover, the racially discriminatory impact of New Jersey's criminal justice system upon African-American and Hispanic communities is not limited to drug prosecutions.

Institutional discrimination in New Jersey's criminal justice system was proven recently in the litigation surrounding the racial profiling practiced by New Jersey State Police in highway traffic stops. The "racial profiling" scandal revealed the depths of institutionalized racism and targeting of minorities for criminal prosecution within one sector of the criminal justice system, the New Jersey State Police and its Highway Patrol. Indeed, the New Jersey State police, through racial profiling practices, targeted African-American motorists for searches and stops, specifically seeking drug seizures and prosecutions. _36. There was found to be "at least a *de facto* policy on the part of the State Police out of the Moorestown Station of targeting blacks for investigation and arrest ... The statistical disparities and standard deviations revealed are stark indeed.... The utter failure of the State Police hierarchy to monitor and control a crackdown program like DITU or investigate the many claims of institutional discrimination manifests it

indifference if not acceptance.” State v. Soto, *supra*, 324 N.J. Super. at 84-85. Indeed, the Soto court found that evidence presented showed that “the State Police hierarchy allowed, condoned, cultivated and tolerated discrimination” in its ranks. Id. at 78. Many defendants entered the criminal justice system solely or primarily because of the practice of racial profiling among the New Jersey State Police, a practice that was pursued as a common and continuous policy.

As acknowledged in Attorney General Peter Verniero’s “Interim Report of the New Jersey State Police Regarding Allegations of Racial Profiling” issued April 20, 1999, “[T]he underlying conditions that foster disparate treatment of minorities have existed for decades in New Jersey ... and will not be changed overnight.” _36 (B).⁶ As the Report then noted:

The fact that the arrest rates for whites was comparatively low does not mean that white motorists are less likely to be transporting drugs, but that they were less likely to be suspected of being drug traffickers in the first place, and, thus, less likely to be subjected to probing investigative tactics designed to confirm suspicions of criminal activity such as, notably, being asked to consent to a search.

Id.

In addition, despite efforts on the part of the State of New Jersey to address the problem of racial profiling, they have not been “changed overnight.” The problem has persisted into the Twenty-First Century, with African-American and Hispanic drivers continuing to be singled out for suspicion, stops, searches, and – perhaps- eventual prosecution. In 2001, Attorney General Farmer testified that African-American and

⁶The full report may be found at http://www.state.nj.us/lps/intm_419.pdf.

Hispanic motorists continued to be subjected to a disproportionately high number of the traffic stops conducted by State Police. ¶36©). The persistence of the racial profiling problem points to a reality that discrimination in the criminal justice system is not merely a problem of inadequate policy structures on the part of the New Jersey State Police, but rather indicative of stereotyping, racism and discrimination prevalent across society and reflected in the operation of the criminal justice system.

Racial profiling on the highways of New Jersey was aimed specifically at “rid[ding] New Jersey of the scourge of drugs.” Soto, 324 N.J. Super. at 74. Indeed, the number and percentage of drug offenders in New Jersey’s state prison system has skyrocketed, and with it the disparity of drug convictions for African-Americans and Hispanics compared to whites. While state and national surveys continue to indicate that whites, African-Americans and Hispanics use drugs at roughly equal rates, the rates of arrest, prosecution and conviction for drug use for African-Americans and Hispanics continue to greatly exceed those of whites. While whites use drugs, they are not targeted as a group for drug enforcement and prosecution, unlike African-Americans and Hispanics.

In similar cases in state and federal courts elsewhere in the country, courts have found that felon disenfranchisement is deeply related to discrimination inherent in the criminal justice system, and that there is a “nexus between disenfranchisement and racial bias in other areas.” Johnson v. Bush, 353 F. 3d 1287, 1306 (11th Cir. 2004). Thus, the criminal justice system cannot be separated from the process of felon disenfranchisement. In Farrakhan v. Washington, it was found that:

[t]o the extent that racial bias and discrimination in the criminal justice system contribute to the conviction of minorities . . . such discrimination

would clearly hinder the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic. Thus, racial bias in the criminal justice system may very well interact with voter disqualifications to create the kinds of barriers to political participation on account of race. . .

338 F. 3d 1009, 1020 (9th Cir. 2003).

⁷ On March 31, 2004, the European Court of Human Rights at Strasbourg held that the United Kingdom was in violation of the European Convention on Human Rights by denying the vote to incarcerated felons. Hirst v. United Kingdom (no. 2) press release available at: www.wchr.coe.int/Eng/Press/2004/mar/ChamberJudgmentHirstvUK3034.htm. The Constitutional Court of South Africa also held recently that incarcerated prisoners could not be automatically denied the right to vote. Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO), (March 2004), available at: <http://www.sentencingproject.org/pdfs/southafrica-decision.pdf>