COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA
DOCKET NO. 2017-CA-1141

VOICE OF THE EX-OFFENDER, ET AL.,
Plaintiffs-Appellants,

Versus

STATE OF LOUISIANA, ET AL.,
Defendants-Appellees

On Appeal from the 19th Judicial Circuit,
Parish of East Baton Rouge, Section 22, State of Louisiana
Docket No. 64,9587
Honorable Judge Timothy Kelley, Presiding
CIVIL PROCEEDING

AMICI CURIAE BRIEF OF

LOUISIANA CONSTITUTIONAL LAW AND HISTORY SCHOLARS

ON BEHALF OF APPELLANTS

Andrea Armstrong (#32997)
Johanna Kalb (*pro hac vice* pending)
Loyola University New Orleans
College of Law
7214 St. Charles Avenue
New Orleans, LA 70118
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

INTEREST OF AMICI 6

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. COURTS SHOULD PROTECT THE RIGHT TO VOTE BECAUSE THE RIGHT TO VOTE IS FUNDAMENTAL TO OUR DEMOCRACY AND EQUAL TREATMENT OF MINORITIES 7

A. Voting is a fundamental constitutional right in Louisiana 7

B. Voting is fundamental to our representative democracy 7

II. BECAUSE VOTING IS A FUNDAMENTAL RIGHT, THIS COURT SHOULD RESOLVE ANY DOUBT ABOUT ITS SCOPE IN FAVOR OF PROTECTING ACCESS TO THE FRANCHISE 8

A. When considering restrictions on fundamental rights, courts resolve ambiguity against the loss of the right 8

B. Applying these well-established principles of constitutional interpretation, this Court should interpret the constitutional right to vote broadly to include persons on probation and parole 13

C. This Court should interpret the constitutional protection of the right to vote broadly because of the state's history of denying full access to this fundamental right 15

CONCLUSION 20

TABLE OF AUTHORITIES

Louisiana Constitutional Provisions

La Const. title III art. 14 (1864) 15

La. Const. art. 188 (1879) 16

La. Const. art. 197 (1898) 17

La. Const. art. I § 10(A) (1974) 18

La. Const. art. II, § 8 (1812) 15

La. Const. art. VIII, § 1 (1921) 10, 18

La. Const. art. VIII, § 6. (1921) 10, 17

La. Const. title II art. 10 (1852) 15

La. Const. title II art. 8 (1845) 15

La. Const. title VI art. 118 (1868) 16

La. Const. title VI art. 98 (1868) 16

Cases

Adkins v. Huckabay, 199-3605 (La. 2/25/00); 755 So. 2d 206 8

Barr v. Engler, 165 So.2d 28 (La. Ct. App. 1964) 15

Block v. Fitts, 259 La. 555; 250 So.2d 738 (La. 1971) 9

Chehardy v. Democratic Exec. Comm. for Jefferson Par., 259 La. 45, 249 So.2d 196 (La. 1971) 14

Chiodo v. Section 43.24 Panel, 846 N.W.2d 845 (Iowa 2014) 12

Crothers v. Jones, 239 La. 800, 120 So.2d 248 (La. 1960) 9, 10, 11, 14

Denham Springs Econ. Dev. Dist. v. All Taxpayers, 2004-1674, (La. 2/4/05); 894 So.2d 325 7

Everett v. Goldman, 359 So.2d 1256 (La. 1978) 7

First Commerce Title Co. v. Martin, 38,903 (La. App. 2 Cir. 11/17/04); 887 So. 2d 716, 720, *writ denied*, 2004-3133 (La. 3/11/05) 9

Fox v. Mun. Democratic Exec. Comm., 328 So.2d 171 (La. Ct. App. 1976) 7

Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) 8

Harris v. City of Houston, 151 F.3d 186 (5th Cir. 1998) 8

In re School Committee of Town of Johnston, 33 A. 369 (R.I. 1895) 12

La. Voter Registration/Educ. Crusade, Inc. v. Office of Registrar of Voters, 511 So. 2d 1190 (La. Ct. App. 1987), *writ denied*, 512 So. 2d 854 (La. 1987) 7, 14

League of Women Voters v. McPherson, 52 Cal. Rptr. 3d 585 (Ct. App. 2006) 11

Ocean Energy, Inc. v. Plaquemines Par. Gov't, 2004-0066 (La. 7/6/04); 880 So.2d 1 ..... 8, 9

Othus v. Kozer, 248 P. 146 (Or. 1926) 12

Rosamond v. Alexander, 2003-235 (La. App. 3 Cir. 2/28/03); 846 So.2d 829 14

Shambach v. Bickhart, 845 A.2d 793 (Pa. 2004) 12

Silberstein v. Prince, 149 N.W. 653 (Minn. 1914) 13

State ex rel. Carpenter v. Barber, 198 So. 49 (Fla. 1940) 12

State v. Brenan, 1999-2291 (La. 5/16/00); 772 So. 2d 64 15

State v. Malone, 2008-2253 (La. 12/1/09); 25 So.3d 113 8

State v. Schirmer, 93-2631 (La. 11/30/94); 646 So.2d 890 8

State v. Webb, 2013-1681 (La. 5/7/14); 144 So.3d 971 14

Title Research Corp. v. Rausch, 450 So.2d 933 (La. 1984) 9

Toney v. White, 348 F.Supp.188 (W.D.La. 1972) 18

United States v. State of La., 225 F. Supp. 353 (E.D. La. 1963), *aff'd sub nom., Louisiana v. United States*, 380 U.S. 145 (1965) 16

United States v. State of La., 265 F. Supp. 703 (E.D.La. 1966) *aff'd sub nom., Louisiana v. United States*, 386 U.S. 270 (1967) 18

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 7

Statutes

La. Stat. Ann. § 15:572.1 (1940) 9

Treatises, Books, and Law Review Articles

Charles M. Vincent, *Black Constitution Makers: The Constitution of 1868*, *in* IN SEARCH OF FUNDAMENTAL LAW 69 (Warren Billings & Edward F. Haas eds., 1993) 16

James M. Le Blanc, *Louisiana Department of Public Safety and Corrections: Corrections Services Fact Sheet* 122-23 (Dec. 31, 2015) 19

Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89 (2014) 11

Kathryn Page, *A Child Born of Liberty: The Constitution of 1864*, *in* IN SEARCH OF FUNDAMENTAL LAW 52 (Warren Billings & Edward F. Haas eds., 1993) 15, 17

M. Isabel Medina, *The Missing and Misplaced History in* Shelby County, Alabama v. Holder - *Through the Lens of the Louisiana Experience with Jim Crow and Voting Rights in the 1890s*, 33 Miss. C. L. Rev. 201 (2014) 19

Mathew Schott, *A Legal Monstrosity? The Constitution of 1921*, *in* IN SEARCH OF FUNDAMENTAL LAW 124 (Warren Billings & Edward F. Haas eds., 1993) 18

Michael Lanza, *Little More Than a Family Matter: The Constitution of 1898, in* IN SEARCH OF FUNDAMENTAL LAW 93 (Warren Billings & Edward F. Haas eds., 1993).....16, 17

OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA 9 (New Orleans, H.J. Hearsey 1898) 17

W. Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1 (1974) 13

W. Lee Hargrave, THE LOUISIANA CONSTITUTION (G. Alan Tarr ed., 2011).....17

INTEREST OF AMICI

Amici are seventeen Louisiana professors* who regularly engage in teaching and scholarship related to constitutional law, criminal law, and/or Louisiana history.

1. Prof. Raymond Diamond, Louisiana State University
2. Prof. Paul Baier, Louisiana State University
3. Prof. Michael Bradford Coenan, Louisiana State University
4. Prof. Ken Levy, Louisiana State University
5. Prof. Ashley Howard, Loyola University New Orleans
6. Prof. Isabel Medina, Loyola University New Orleans, College of Law
7. Prof. Karen Sokol, Loyola University New Orleans, College of Law
8. Prof. Jeanne Woods, Loyola University New Orleans, College of Law
9. Prof. Laura Rosanne Adderley, Tulane University
10. Prof. Nghana T. Lewis, Tulane University
11. Prof. Robert Westley, Tulane University Law School
12. Prof. Keith Werhan, Tulane University Law School
13. Prof. Herbert Larson, Tulane University Law School
14. Prof. Jancy Hoeffel, Tulane University Law School
15. Prof. Angela Bell, Southern University Law Center
16. Prof. Kelly Carmena, Southern University Law Center
17. Prof. Willmai Rivera-Perez, Southern University Law Center

Amici include scholars at each of the four law schools in the state of Louisiana. Their interest in this litigation is to offer their views regarding the theory of constitutional interpretation that is applied when interpreting a limit on the fundamental right to vote.

SUMMARY OF ARGUMENT

The right to vote is a uniquely precious and constitutive of all other rights. Louisiana courts have described the right to vote as both fundamental and sacred. Because of its paramount significance in our democratic system of governance, courts in Louisiana and in other states construe any uncertainties about the scope of

---

* Title and school affiliation are provided solely for purposes of identification. All signatories are participating in their personal capacity.

[1] The Secretary of State argues that *Crothers* is irrelevant because this provision of the 1921 Constitution was self-executing. *See* Brief for Appellants at 28. This is incorrect. The question

the right to vote in favor of increased access to the franchise. Applying these principles, *amici* respectfully request that this court construe the state constitutional right to vote broadly in favor of allowing all eligible Louisiana citizens to vote.

ARGUMENT

I. COURTS SHOULD PROTECT THE RIGHT TO VOTE BECAUSE THE RIGHT TO VOTE IS FUNDAMENTAL TO OUR DEMOCRACY AND EQUAL TREATMENT OF MINORITIES

A. Voting is a fundamental constitutional right in Louisiana

Louisiana has long recognized that the right to vote is fundamental. *See Everett v. Goldman,* 359 So.2d 1256, 1266 (La. 1978) ("[f]undamental rights include such rights as free speech, voting, interstate travel and other fundamental liberties."); *Denham Springs Econ. Dev. Dist. v. All Taxpayers*, 2004-1674, p. 14 (La. 2/4/05); 894 So.2d 325, 335 ("This fundamental right of a citizen [to vote] is paramount to our democratic process . . . ."); *Fox v. Mun. Democratic Exec. Comm.*, 328 So.2d 171, 174 (La. Ct. App. 1976) ("We . . . hold [that] Article I, Section 10 of Louisiana Constitution of 1974 is one of the fundamental bill of rights guaranteeing every citizen that he 'shall have the right to register and vote.'"); *La. Voter Registration/Educ. Crusade, Inc. v. Office of Registrar of Voters*, 511 So. 2d 1190, 1194 (La. Ct. App. 1987), *writ denied*, 512 So. 2d 854 (La. 1987) (describing the right to vote as "sacred.").

B. Voting is fundamental to our representative democracy

The right to vote is fundamental because it is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "'No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live. Other rights, even the most

basic, are illusory if the right to vote is undermined.'" *State v. Schirmer*, 93-2631, p. 12, n.14 (La. 11/30/94); 646 So.2d 890, 898 n.14 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). Voting rights are fundamental because their practice is essential to self-government. *Adkins v. Huckabay*, 199-3605, p. 7 (La. 2/25/00); 755 So. 2d 206, 211 ("The right of qualified citizens of Louisiana to vote and to have their votes counted, inherent in our republican form of government and the democratic process, is a fundamental and constitutionally protected right."); *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966) ("'[T]he right of suffrage is a fundamental matter in a free and democratic society.'"). Unnecessary restrictions on the right to vote "'strike at the heart of representative government.'" *Harris v. City of Houston*, 151 F.3d 186, 195 n.6 (5th Cir. 1998) (quoting *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964)).

II. BECAUSE VOTING IS A FUNDAMENTAL RIGHT, THIS COURT SHOULD RESOLVE ANY DOUBT ABOUT ITS SCOPE IN FAVOR OF PROTECTING ACCESS TO THE FRANCHISE

A. When considering restrictions on fundamental rights, courts resolve ambiguity against the loss of the right

Because the right to vote is fundamental and essential to the functioning of our democratic society, Louisiana courts must interpret it broadly and resolve any doubt about the scope against the loss of the right. When construing a constitutional right, Louisiana courts, consistent with civilian principles, look first to the text. *See State v. Malone*, 2008-2253, p. 3 (La. 12/1/09); 25 So.3d 113, 126 ("[B]ecause of Louisiana's civilian tradition, our court must begin every legal analysis by examining primary sources of law, consisting of legislation (constitution, codes, and statutes) and custom."). "Unequivocal constitutional provisions are not subject to judicial construction and should be applied by giving words their generally understood meaning." *Ocean Energy, Inc. v. Plaquemines Par. Gov't*, 2004-0066, p. 7 (La. 7/6/04); 880 So.2d 1, 7 (citing *Cajun Elec. Power*

Co-op., Inc. v. La. Pub. Serv. Comm'n, 544 So.2d 362, 363 (La. 1989)). If the constitutional language is subject to more than one reasonable interpretation, it is necessary to determine the intent of the provision. *Id.* (citing *E. Baton Rouge Par. Sch. Bd. v. Foster*, 2002-2799, p. 16 (6/6/03); 851 So.2d 985, 996). "When construing an ambiguous constitutional provision, a court should ascertain and give effect to the intent of both the framers of the provision and of the people who adopted it; however, in the case of an apparent conflict, it is the intent of the voting population that controls." *Id.* (citing *E. Baton Rouge Par. Sch. Bd.*, 2002-2799, p. 17; 851 So. 2d at 996).

Where, however, the intent of the drafters and voters are uncertain, Louisiana courts, pursuant to longstanding principles of constitutional interpretation, resolve any ambiguity in favor of preserving the full scope of the fundamental right. *See, e.g., Title Research Corp. v. Rausch*, 450 So.2d 933, 936 (La. 1984) ("Whenever there is doubt as to whether the public has the right of access to certain records, the doubt must be resolved in favor of the public's right to see. To allow otherwise would be an improper and arbitrary restriction on the public's constitutional rights."); *First Commerce Title Co. v. Martin*, 38,903, p. 7 (La. App. 2 Cir. 11/17/04); 887 So. 2d 716, 720, *writ denied*, 2004-3133 (La. 3/11/05); 896 So. 2d 66 (acknowledging the "jurisprudence recognizing the right of the public to have access to public records as a fundamental right, with any doubt being resolved in favor of the fundamental right."); *Block v. Fitts*, 259 La. 555, 558; 250 So.2d 738, 739 (La. 1971) ("[A] litigant's right to a jury trial is fundamental, and if doubt exist, it should be resolved against a loss of the right.").

The Louisiana Supreme Court followed this approach in *Crothers v. Jones*, a case involving the interpretation of the disenfranchisement provision of the Louisiana Constitution of 1921. 239 La. 800, 120 So.2d 248 (La. 1960). The

Constitution of 1921 provided the right to vote to every Louisiana citizen who met specified qualifications based on age, duration of residence, and character and literacy. La. Const. art. VIII, § 1 (1921). Article VIII, Section 6, then clarified that: "Those who have been convicted of any crime which may be punishable by imprisonment in the penitentiary, and not afterwards pardoned with express restoration of franchise. . . ." could not vote or hold office. La. Const. art. VIII, § 6 (1921).

Following an electoral loss, Brenham Crothers, the defeated candidate, filed suit challenging the eligibility of his opponent, Howard Jones, who had previously been convicted of a felony in federal court in Arkansas. *Crothers*, 239 La. at 804, 120 So.2d at 249. Among the many issues raised in the case was whether the constitutional use of the term "penitentiary" was meant to include only the Louisiana penitentiary or any state or federal prison. *Id.* at 820. The attorney general endorsed the former construction, *id.* at 819, while the legislature adopted the latter in the form of an implementing statute, *id.* at 822, which provided that "No person who has been convicted of any crime, *either in any of the court of Louisiana or in the any of the courts of the United States*, which may be punishable by imprisonment in the penitentiary . . . shall be permitted to register, vote, or hold office . . . in the state of Louisiana." La. Stat. Ann. § 15:572.1 (1940) (emphasis added).

The Louisiana Supreme Court rejected the legislature's attempt to adopt a clarifying definition that would have narrowed the right to vote. *Crothers*, 239 La. at 823, 120 So.2d at 256. The Court explained: "We do not believe that it was within the province of the Legislature to interpret Section 6 of Article VIII . . . by

adding thereto the words 'either in any of the Courts of Louisiana or in any of the Courts of the United States' following the phrase 'convicted of any crime.'" *Id.*[1]

In choosing to interpret its state constitution with the view towards protecting the fundamental right to vote, the Louisiana Supreme Court has adopted a theory of constitutional construction that has been endorsed by other state courts.[2] In *League of Women Voters v. McPherson*, a California court of appeals considered the scope of a constitutional provision delegating to the legislature the ability to "provide for the disqualification of electors while . . . imprisoned or on parole for the conviction of a felony." 52 Cal. Rptr. 3d 585, 587 (Ct. App. 2006). In rejecting the Attorney General's assertion that this exclusion extended not only to persons incarcerated in state prisons, but also to felons confined in a local jail as a condition or probation, the court explained that:

> in the absence of any clear intent by the Legislature or the voters, we apply the principle that "'[t]he exercise of the franchise is one of the most important functions of good citizenship, and no construction of an election law should be indulged that would disenfranchise any voter if the law is reasonably susceptible of any other meaning.'"

Id. at 594 (quoting *Otsuka v. Hite*, 414 P.2d 412, 417 (Cal. 1966)).

Similarly, in *Chiodo v. Section 43.24 Panel*, the Supreme Court of Iowa considered whether a conviction for the aggravated misdemeanor of "operating while intoxicated" constituted an "infamous crime" which disqualified a person

---

[1] The Secretary of State argues that *Crothers* is irrelevant because this provision of the 1921 Constitution was self-executing. *See* Brief for Appellants at 28. This is incorrect. The question of whether a constitutional provision is self-executing is relevant only to whether the legislature is required to pass implementing legislation to effectuate it. *See State v. Gibson*, 2012-1145, p. 12 (La. 1/29/13); 107 So. 3d 574 , 582 ("A constitutional provision is self-executing when it can be given effect without the aid of legislation, and there is nothing to indicate that legislation is intended to make it operative."). The determination that a provision is non-self-executing does not give the state legislature permission to amend the constitution by statute. In this case, as in *Crothers*, the state is attempting, through legislation, to expand the constitutional exclusion on the right to vote. Therefore, the court's reasoning in *Crothers* is relevant to the disposition of this case.

[2] *See generally* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89 (2014) (describing the primary importance of state constitutions in protecting the fundamental right to vote).

from holding office under article II, section 5 of the Iowa constitution. 846 N.W.2d 845, 848 (Iowa 2014). After noting that "[v]oting is a fundamental right in Iowa," *id.* at 848, the court then turned to examine the constitutional limits on this right, ultimately concluding, in a plurality opinion, that a crime is "infamous" only if it is one "that reveals that voters who commit the crime would tend to undermine the process of democratic governance through elections." *Id.* at 856. In reaching this conclusion, the court considered and rejected the legislature's definition of "infamous crime" as extending to any felon, noting that "[t]he legislature may not add to or subtract from the voter qualifications under the constitution." *Id.* at 852. *See also Keller v. Smith*, 553 P.2d 1002, 1008 (Mont. 1976) (holding that public policy required construing a provision of the Montana Constitution with a view toward protecting the right to vote); *In re School Committee of Town of Johnston*, 33 A. 369, 370 (R.I. 1895) ("The right to vote should not be curtailed, except by the clear provisions of the constitution; and, where the limitation is not clear, the constitution should be liberally construed. . . .").

The same principle also has been applied regularly to the interpretation of statutes that could be construed as limiting the right to vote. *See, e.g., Othus v. Kozer*, 248 P. 146, 149 (Or. 1926) ("The great constitutional privilege of a citizen [to exercise his sovereign right to vote] should not be taken away by a narrow or technical construction..."); *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004) ("[A]lthough election laws must be strictly construed to prevent fraud, they 'ordinarily will be construed liberally in favor of the right to vote.'") (citation omitted); *State ex rel. Carpenter v. Barber*, 198 So. 49, 51 (Fla. 1940). ("[C]ourts, in construing statutes related to elections, hold that the same should receive a liberal construction in favor of the citizen whose right to vote they tend to restrict and in so doing to prevent disenfranchisement of legal voters . . . .); *Silberstein v.*

Prince, 149 N.W. 653, 654 (Minn. 1914) ("Indeed, it is a rule of universal application that all statutes tending to limit the citizen in the exercise of his right of suffrage must be construed liberally in his favor."). Thus, in applying these principles to the present case, this court would be adopting well-established rules of textual construction.

B. Applying these well-established principles of constitutional interpretation, this Court should interpret the constitutional right to vote broadly to include persons on probation and parole

Because this case turns on the meaning of the constitutional language "under order of imprisonment," this Court should, consistent with the jurisprudence of the Louisiana Supreme Court, resolve those disputes in favor of increased access to the fundamental right to vote.

Appellants have offered compelling evidence that both the common meaning and the dictionary definition of the words "under order of imprisonment" refer to people who are actually incarcerated. *See* Brief for Appellants at 12-16. The State has contested this interpretation. If the Court concludes that the constitutional language is ambiguous, then, as set forth previously, it must consider the intent of the provision's drafters and of the people who adopted it. Both parties have offered evidence from the Louisiana constitutional convention to support their respective positions. Appellants point to the statement of Professor W. Lee Hargrave, who served as the Convention's Coordinator of Legal Research and who directed research for the relevant Convention committee, explaining "[t]that the choice of words does not prevent a person on probation or parole from voting since such a person is not under an order of imprisonment." W. Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 34 (1974). In addition, appellants demonstrate that the materials from the Committee on the Bill of Rights and Elections, which drafted Section 10(A), support the

conclusion that the Committee did not intend for the provision to disenfranchise persons on parole and probation. *See* Brief for Appellants at 23-27. The State counters with the statement of Delegate Chris Roy, who indicated during debate over the provision his belief that the wording of Article I, § 10 was intended to include persons on probation or parole."[3] In face of this dispute, the State asks this court, as in *Crothers*, *supra*, to allow the legislature to define the meaning of the constitutional provision "under order of imprisonment" by adding clarifying language, the effect of which has been to strip the right to vote from an additional 70,000 citizens of Louisiana.

Not only would the State's proposal improperly cede interpretation of the Constitution to the legislature, contrary to the guidance of the Louisiana Supreme Court, *see Chehardy v. Democratic Exec. Comm. for Jefferson Par.*, 259 La. 45, 49, 249 So.2d 196, 198 (La. 1971) ("[A]ppellants' reliance upon the Code of Civil Procedure for the interpretation of legislation as controlling of the court's interpretation of the Constitution is inappropriate"),[4] it would do so to reach an outcome inconsistent with well-established principles of constitutional interpretation. Rather, given the dispute about the proper scope of the constitutional language, the court should interpret the right to vote broadly, recognizing that if it decides in error, the people of Louisiana retain the power to

---

[3] When asked about the wording of Article I, § 10, Roy said: "Let me tell you what we have attempted to say. That while you are under an order of imprisonment even if you are on probation or suspension for the conviction of a felony you may not vote, ..." Brief for Appellee at 13.

[4] For the same reason, the Third Circuit's decision in *Rosamond v. Alexander*, 2003-235 (La. App. 3 Cir. 2/28/03); 846 So.2d 829, was decided in error. That court adopted the legislature's definition of the phrase "under order of imprisonment" finding it to be "reasonable." *Id.* at 4, 830. In addition to in relying on the legislature's definition rather than conducting its own constitutional analysis, the court also applied the wrong standard to reviewing a legislative restriction on a fundamental right. It is well-established that in these circumstances, Louisiana courts apply strict scrutiny. *See supra, La. Voter Registration/Educ. Crusade, Inc.*, 511 So. 2d at 1194 (La. Ct. App. 1987), *writ denied*, 512 So. 2d 854 (La. 1987) (citing *Southland Corp. v. Collector of Revenue for La.*, 321 So.2d 501, 506 (La. 1975)) (recognizing that restrictions on the right to vote receive strict scrutiny); *State v. Webb*, 2013-1681, p. 8 (La. 5/7/14); 144 So.3d 971, 978 ("Laws restricting fundamental rights are subject to strict scrutiny because they are considered to be so essential to the structure of our society . . . .").

clarify the constitutional language through established amendment procedures. *See Barr v. Engler*, 165 So.2d 28, 33 (La. Ct. App. 1964) ("A correction of the error, if there be one . . .is not a function of this Court but one of legislative process by constitutional amendment.").[5]

C. This Court should interpret the constitutional protection of the right to vote broadly because of the state's history of denying full access to this fundamental right

Historically, Louisiana constitutions have restricted the right to vote as part of broader efforts to deny racial minorities equal treatment and participation in our representative democracy. The Louisiana Constitutions of 1812, 1845, 1852, 1861 and 1864 all limited the right to vote to "white males." La. Const. art. II, § 8 (1812), La. Const. title II art. 8 (1845), La. Const. title II art. 10 (1852), La Const. title III art. 14 (1864). The Louisiana Constitution of 1864 is particularly notable of the intent to deprive racial minorities specifically of the right to vote. The 1864 Constitution, though not recognized by the U.S. Congress, simultaneously abolished slavery, adopting verbatim the text of the Thirteenth Amendment to the U.S. Constitution, while also limiting voting eligibility to "White males." La Const. title III art. 14 (1864) (see also Kathryn Page, *A Child Born of Liberty: The Constitution of 1864*, *in* IN SEARCH OF FUNDAMENTAL LAW 52, 58 (Warren Billings & Edward F. Haas eds., 1993) (noting the 1864 Constitutional Convention also overwhelmingly passed a resolution prohibiting "any act [by the legislature] authorizing free negroes to vote.")). In so doing, the 1864 Constitutional

[5] For this reason, the Court should also reject the Attorney General's suggestion that this provision of the Louisiana Constitution should be guided by the voting rights jurisprudence of the U.S. Supreme Court. *See* Brief of Amicus Curiae Louisiana Attorney General at 9-10. The Louisiana Constitution, unlike the federal Constitution, explicitly and affirmatively protects the right to vote. Louisiana courts have previously acknowledged the importance of according greater protection under the state constitution in those "instances in which [Louisiana] citizens have chosen a higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution." *State v. Brenan*, 1999-2291, p. 9 (La. 5/16/00); 772 So. 2d 64, 71 (discussing the scope of the state right to privacy). Given the choice by Louisiana voters to offer explicit protection to the right to vote, the federal voting rights jurisprudence is inapposite.

Convention explicitly rejected a proposal by President Lincoln to extend suffrage to wealthy African-Americans. Charles M. Vincent, *Black Constitution Makers: The Constitution of 1868*, *in* IN SEARCH OF FUNDAMENTAL LAW 69, 71 (Warren Billings & Edward F. Haas eds., 1993).

After the Civil War, Louisiana constitutions continued to disenfranchise racial minorities through less racially explicit methods. The 1868 Constitution, the product of a bi-racial constitutional convention, was the first to eliminate explicit racial eligibility requirements. La. Const. title VI art. 98 (1868) ("Qualified elector is male 21 years or older"). But it also introduced, for the first time in a Louisiana constitution, a poll tax. *See* La. Const. title VI art. 118 (1868) (providing for a poll tax). In later constitutional conventions, a poll tax was recognized as the "surest and safest way to eliminate the black vote." Michael Lanza, *Little More Than a Family Matter: The Constitution of 1898*, *in* IN SEARCH OF FUNDAMENTAL LAW 93, 102 (Warren Billings & Edward F. Haas eds., 1993).

The 1879 Constitution, for the first time, explicitly recognized that the right to vote was not contingent on "race or color." La. Const. art. 188 (1879). During this brief period in the 1880s and 1890s, African-Americans voted and held electoral office. *United States v. State of La.*, 225 F. Supp. 353, 365-69 (E.D. La. 1963), *aff'd sub nom.*, *Louisiana v. United States*, 380 U.S. 145 (1965). That brief window ended however with the 1898 Constitution, which introduced new and significant barriers designed to dis-enfranchise African-Americans.

While the Louisiana Constitution of 1898 did not explicitly limit the right to vote by race, it introduced several new eligibility criteria to "eliminate from the electorate the mass of corrupt and illiterate voters who have during the last quarter of a century degraded our politics." OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA 9 (New Orleans,

H.J. Hearsey 1898). First, the 1898 constitution required proof that eligible voters be able to read and write. La. Const. art. 197 (1898). The constitution provided alternative methods of qualification if a person could not read and write, which were designed to allow illiterate White males to retain their franchise. *Id.* The first exception required proof of ownership of property valued at three hundred dollars or more. *Id.* The second exception applied to males who could prove residency for the past five years and were either a) eligible to vote before Jan. 1, 1867 (i.e. before racial eligibility was eliminated); or b) the son or grandson of a person eligible to vote before January 1, 1867; or c) was naturalized before January 1, 1898. *Id.* Thus it was technically possible for African-Americans to register to vote, but they had to either be literate or own property valued at $300, both of which were exceedingly rare at the time for former slaves. *See also* Kathryn Page, *A Child Born of Liberty: The Constitution of 1864, in* IN SEARCH OF FUNDAMENTAL LAW 52, 58 (Warren Billings & Edward F. Haas eds., 1993) (noting antebellum laws had prohibited education of slaves); Michael Lanza, *Little More Than a Family Matter: The Constitution of 1898, in* IN SEARCH OF FUNDAMENTAL LAW 93, 100 (Warren Billings & Edward F. Haas eds., 1993) (noting "all of these provisions were meant to snare blacks, who were presumed to be mostly illiterate, propertyless, and transient."). The new requirements had their intended effect: Black voter registration plummeted from approximately 130,000 in 1897 to 5320 in 1900. W. Lee Hargrave, THE LOUISIANA CONSTITUTION 15 (G. Alan Tarr ed., 2011).

The 1921 Constitution erected additional barriers along implicit racial lines by requiring voters to be of "good character" and understand the "duties and obligations of citizenship." La. Const. art. VIII, § 1 (1921). Prof. Lee Hargrave characterized these new provisions as "subtler ways of limiting black suffrage.". W. Lee Hargrave, THE LOUISIANA CONSTITUTION 18 (G. Alan Tarr ed., 2011). A

person was not of "good character" if they had been convicted of any felony and certain misdemeanors, were the parent to an "illegitimate child," or other undefined acts. . La. Const. art. VIII, § 1 (1921). In addition, the 1921 Constitution retained the literacy requirement but now also required any voter to "prove their identity." *Id.* Moreover, any potential voter had to be able to understand and interpret any provision of the Constitution. *Id.* The Constitution also had a "grandfather clause" that provided eligibility to anyone who had been eligible to vote on November 8, 1860. *Id.* The constitutional restrictions were part of a broader legislative effort to restrict Black voting through providing broader powers to local registrars to determine voter eligibility. Mathew Schott, *A Legal Monstrosity? The Constitution of 1921*, *in* IN SEARCH OF FUNDAMENTAL LAW 124, 135 (Warren Billings & Edward F. Haas eds., 1993). Over the next half-century, federal courts found these additional barriers to voting prohibited under constitutional and statutory law. *See e.g. United States v. State of La.*, 265 F. Supp. 703, 708 (E.D.La. 1966) *aff'd sub nom.*, *Louisiana v. United States*, 386 U.S. 270 (1967) (suspending provisions of Article VIII, Sections 2 and 18 of the Constitution of Louisiana); *Toney v. White*, 348 F.Supp.188 (W.D.La. 1972) (discussing injunctions required to register Black voters).

The 1974 Louisiana Constitution represented a significant break with past history and recognizes voting as a fundamental right. Article I, § 10(A) provides that every citizen 18 years and older has "the right to register and vote, except that this right may be suspended while a person is interdicted and judicially declared mentally incompetent or is under an order of imprisonment for conviction of a felony." La. Const. art. I § 10(A) (1974). Prior constitutions did not suspend the right to vote but instead declared individuals ineligible to vote entirely by restricting eligibility. The 1974 Constitution instead recognizes that the right is possessed by all, but instead may be temporarily suspended in certain instances,

namely mental incompetence or actual imprisonment. The choice to suspend the right, instead of eliminating the right, underscores the fundamental nature of the right to vote.

The fundamental nature of the right to vote would also support contemporary explanations of limiting "order of imprisonment" to actual incarceration following conviction. Louisiana State University Professor and Coordinator of Legal Research for the constitutional convention W. Lee Hargrave described the narrow intent of the convention in adopting the limitations to Art. I § 10. In his law review article, "The Declaration of Rights of the Louisiana Constitution of 1974," Prof. Hargrave explains that the limitation by "order of imprisonment" "does not prevent a person on probation or parole from voting." 35 La. L. Rev. 1, 34 (1974).

The legislature's attempt to define "under order of imprisonment to exclude people who are on probation or parole is reminiscent of historical efforts to limit the exercise of the franchise by race. "For every effort to give effect to the ability of black voters to exercise the franchise, there were equally forceful efforts to resist and oppose black franchise and integration." M. Isabel Medina, *The Missing and Misplaced History in Shelby County, Alabama v. Holder - Through the Lens of the Louisiana Experience with Jim Crow and Voting Rights in the 1890s*, 33 Miss. C. L. Rev. 201, 215 (2014). African-Americans are the single largest racial group of the 70,000 people currently on probation or parole, constituting 49.8% of probation, 60% of good time parole, and 60% of paroled populations respectively. James M. Le Blanc, *Louisiana Department of Public Safety and Corrections: Corrections Services Fact Sheet* 122-23 (Dec. 31, 2015), http://doc.louisiana.gov/media/1/Briefing%20Book/Jan%202016/4a.u.-.p.p-jan.16.pdf. Given the explicit and implicit attempts to disenfranchise minorities in

prior Louisiana constitutions, this court should be skeptical of legislative attempts to subvert the intentions of the 1974 Constitution.

CONCLUSION

WHEREFORE, for the foregoing reasons, amici urge this court to protect the constitutional right to vote for the non-incarcerated, including probationers and parolees, and reverse the trial court's ruling below and remand for proceedings.

Respectfully submitted,

Andrea Armstrong (#32997)
Loyola University New Orleans
College of Law
7214 St. Charles Avenue
New Orleans, LA 70118
armstron@loyno.edu

Johanna Kalb (*pro hac vice* pending)
Loyola University New Orleans
College of Law
7214 St. Charles Avenue
New Orleans, LA 70118
jkalb@loyno.edu

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing has this date been served upon all counsel of record via facsimile, electronic mail, and/or placing a copy of same in the U.S. Mail, postage prepaid and addressed this 7th day of December, 2017.

Andrea Craig Armstrong (#32997)
Johanna Kalb (*pro hac vice* pending)
LOYOLA UNIVERSITY NEW ORLEANS
COLLEGE OF LAW
7214 St. Charles Avenue
New Orleans, LA 70118
Counsel for Amici Curiae, Louisiana

William P. Quigley (#7769)
LOYOLA UNIVERSITY NEW ORLEANS
COLLEGE OF LAW
7214 St. Charles Avenue
New Orleans, LA 70118
Phone: (504) 710-3074
Fax: (504) 861-5440
quigley77@gmail.com
Counsel for Plaintiffs/Appellants

Ilona Maria Prieto (#29729)
VOICE OF THE EX-OFFENDER
2022 St. Bernard Avenue
New Orleans, LA 70116
Phone: (321) 444-5940
ilona@vote-nola.org
Counsel for Plaintiffs/Appellants

Anna Lellelid (#35204)
LOUISIANA COMMUNITY LAW OFFICE
2415 Bienville Street
New Orleans, LA 70119
Phone: (504) 224-9670
alellelid.law@gmail.com
Counsel for Plaintiffs/Appellants

Denise D. Lieberman, Esq.*
Donita Judge, Esq.*

Jennifer Lai-Peterson, Esq.*
Andrew R. Hairston, Esq. (#37151)
ADVANCEMENT PROJECT
1220 L Street NW, Suite 850
Washington, DC 20005
Phone: (202) 728-9557
Fax: (202) 727-9558
dlieberman@advancementproject.org
djudge@advancementproject.org
jlai-peterson@advancementproject.org
ahairston@advancementproject.org
Counsel for Plaintiffs/Appellants

Ronald Wilson (#13575)
BLAKE JONES LAW FIRM, L.L.C.
701 Poydras Street, Suite 4100
New Orleans, LA 70139
Phone: (504) 525-4361
Fax: (504) 525-4380
Cabra2@aol.com
Counsel for Plaintiffs/Appellants

Lani B. Durio
Merietta Spencer Norton
Counsel for Tom Schedler, Secretary of State
8585 Archives Avenue
Baton Rouge, LA 70809
Counsel for Defendant/Appellee

Celia R. Cangelosi,
5551 Corporate Blvd, Suite 101
Baton Rouge, LA 70808
225-231-1453 phone
225-231-1456 fax
celiacan@bellsouth.net
Counsel for Defendant/Appellee

Jeffrey M. Wale
Assistant Attorney General
Louisiana Department of Justice, Civil Division
PO Box 94005
Baton Rouge, LA 70804
Counsel for Amicus Curiae Attorney General