
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE No. 19-60662

DENNIS HOPKINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED, ET AL.,

Plaintiffs-Appellees,

v.

SECRETARY OF STATE MICHAEL WATSON, IN HIS OFFICIAL CAPACITY,

Defendant-Appellant.

Consolidated With

CASE No. 19-60678

DENNIS HOPKINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
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v.

SECRETARY OF STATE MICHAEL WATSON, IN HIS OFFICIAL CAPACITY,

Defendants-Appellees/Cross-Appellee.

Appeal from the United States District Court for the
Southern District of Mississippi, No. 3:18-cv-188

En Banc Brief of Rutgers Law School International Human Rights Clinic
as *Amicus Curiae* in Support of Plaintiffs-Appellees

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. Pursuant to Federal Rule of Civil Procedure 29(a)(4)(E): (i) a party's counsel did not author the brief in whole or in part; (ii) a party or a party's counsel did not contribute money that was intended to fund preparing or submitting the brief; and (iii) no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund

preparing or submitting the brief. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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INTEREST OF *AMICUS*

The International Human Rights Clinic (“IHR Clinic”) has been part of the Rutgers Law School curriculum for decades. The IHR Clinic specializes in the intersection of constitutional law and international human rights law. The Rutgers Clinical Education Program is over 50 years old and is ranked among the top law school clinical programs in the country. It has often been listed as one of the top ten programs in the country. The IHR Clinic submits this *amicus curiae* brief in support of Plaintiff-Appellees’ argument that permanent felony disenfranchisement, in the state of Mississippi, violates the U.S. Constitution’s Eighth Amendment.

The IHR Clinic has been working on issues related to felony disenfranchisement for nearly twenty years. It brought its first lawsuit challenging felony disenfranchisement in New Jersey in 2004. As of 2019, individuals who are no longer incarcerated, and who are on probation and parole in New Jersey, are permitted to vote. The IHR Clinic is also a Petitioner in a matter pending before the Inter-American Commission on Human Rights, challenging felony disenfranchisement as a violation of human rights law.

This *amicus curiae* brief discusses how international law standards are in harmony with the U.S. Supreme Court’s interpretation of the Eighth Amendment’s “cruel and unusual punishment” clause. Looking to international

law standards for interpreting the Eighth Amendment is consistent with well-established U.S. Supreme Court precedent. Mississippi's permanent disenfranchisement laws are among the most severe in the world. Mississippi's lifetime blanket disenfranchisement violates the Eighth Amendment, and conflicts with many aspects of international law, as well as the laws of many countries around the world, including those of our neighbor, Canada.

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INTRODUCTION

Mississippi is an outlier in the United States, for the severity of its disenfranchisement laws. Indeed, Mississippi is now only one of two states that permanently disenfranchises people who were convicted of certain felonies.¹

Under Section 241 of the Mississippi Constitution, individuals who are convicted in Mississippi state courts of certain felonies lose the right to vote for the rest of their lives.² Those felonies are: murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy.³ The Mississippi Secretary of State is also required by statute to treat designated “common law crimes” that are not listed in Section 241, but rather, are identified by the Mississippi Attorney General, as crimes that lead to permanent disenfranchisement.⁴ Those crimes include: timber larceny, armed robbery, and larceny under a lease agreement.⁵ That means that crimes as minor as writing a bad check or stealing timber can lead to permanent disenfranchisement.⁶

¹ See also VA. CONST. art. II, § 1.

² MISS. CONST. art. XII, § 241.

³ *Id.*

⁴ See MISS. COD. § 23-15-151.

⁵ *Hopkins v. Sec’y of State Delbert Hosemann*, 76 F.4th 378, no. 1 (5th Cir.), reh’g en banc granted, opinion vacated sub nom. *Hopkins v. Hosemann*, 83 F.4th 312 (5th Cir. 2023).

⁶ MISS CODE ANN. §§ 97-17-59(2), 97-19-67(1)(d).

Mississippi's permanent felony disenfranchisement laws strip individuals of their basic human right to participate in the democratic process, as guaranteed by various human rights instruments that the United States is obligated to follow. Those instruments include the Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, and the American Declaration on the Rights and Duties of Man. Additionally, Mississippi's felony disenfranchisement laws are out of step with laws of all democratic nations around the world.

ARGUMENT

I. THE UNITED STATES IS OBLIGATED TO COMPLY WITH INTERNATIONAL TREATIES THAT IT HAS SIGNED

Article VI, Clause 2 of the U.S. Constitution states that treaties are the “supreme Law of the Land.”⁷ United States laws should never be construed to violate international law.⁸ Mississippi's permanent felony disenfranchisement laws violates numerous international treaties that the U.S. has signed and ratified, that the federal and state governments are constitutionally bound to enforce.

⁷ U.S. CONST. art. VI, cl. 2.

⁸ *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); *See also United States v. Thomas*, 893 F.2d 1066, 1069 (9th Cir. 1990) (stating that courts adhere to the *Charming Betsy* principle “out of respect for other nations”). Courts have used the *Charming Betsy* canon on several occasions to interpret Congressional intent. *See, e.g., Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

It is well settled, that once a country ratifies a human rights treaty, the country is obligated to enforce that treaty at every level of government. In 2010, the U.S. State Department's Legal Adviser, Harold Koh, charged with reporting to the United Nations on the United States' compliance with its obligations under international treaties, sent two letters to state officials reminding them of their obligation to comply with international treaties. In a May 3, 2010 letter sent to "State and Local Human Rights Commissions," Koh writes:

[T]he United States will be submitting to the United Nations (UN) in 2010 and 2011. These reports concern implementation of U.S. obligations under the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and International Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). ...

As you may be aware, implementation of U.S. human rights treaty obligations is carried out not only by the federal government, but also by state and local governments, through work such as that done by your commissions. ... Thus, we are reaching out to you for information on your programs and activities relevant to these three reports.⁹

Similarly, a January 20, 2010 memorandum that Koh sent to all state governors states, in pertinent part:

This electronic communication contains information on several human rights treaties to which the United States is party, and which are implemented through existing laws at all levels of government

⁹ Letter from Harold Hongju Koh, U.S. Legal Adviser, to State and Local Human Rights Commissions (May 3, 2010), <https://2009-2017.state.gov/documents/organization/223477.pdf>.

(federal, state, insular and local). To promote knowledge of these treaties in the United States, we would appreciate your forwarding this communication to your Attorney General's office, and to the departments and offices that deal with human rights, civil rights, housing, employment and related issues in your administration.

....

Because implementation of these treaties may be carried out by officials at all levels of government (federal, state, insular, and local) under existing laws applicable in their jurisdictions, we want to make sure that the substance of these treaties and their relevance to the United States is known to appropriate governmental officials and to members of the public.¹⁰

These communications state unequivocally that treaties must be enforced at every level of government, in every state, including Mississippi. That means that Mississippi is obligated to interpret its laws in conjunction with the international treaties that the U.S. has ratified.

¹⁰ Memorandum from Harold Hongju Koh, U.S. Legal Adviser, to State Governors (January 20, 2010), <http://www.state.gov/documents/organization/137291.pdf>.

A. PERMANENT FELONY DISENFRANCHISEMENT VIOLATES THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (“ICCPR”) was adopted by the U.N. General Assembly in 1966 and came into force in 1976.¹¹ The United States ratified the ICCPR in 1992. That means that the United States must adhere to the ICCPR’s mandates. Article 25 of the ICCPR states clearly that everyone of voting age may vote:

Every citizen shall have the right and the opportunity, . . . without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.¹²

The United Nations Human Rights Committee (“HRC”), which reviews countries’ adherence to the ICCPR, has notified the U.S. that, in order to comply with its obligations under the ICCPR, the U.S. should significantly reform and end felony disenfranchisement laws.¹³ Specifically, the HRC has consistently urged the U.S. to restore voting rights to formerly incarcerated individuals to ensure that any

¹¹ International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter *ICCPR*].

¹² *ICCPR*, *supra* note 11, at Art. 25.

¹³ General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4 of the ICCPR at 4, CCPR/C/21/Rev.1/Add.7, August 27, 1996, Annex V (1).

denial of voting rights complies with the “reasonableness” test of Article 25 of the ICCPR.¹⁴

In 2006, the HRC, referring to the U.S., stated that “[the] general deprivation of the right to vote for persons who have received a felony conviction, and in particular those who are no longer deprived of liberty, do[es] not meet the requirements of [article 25] of the Covenant. . . .”¹⁵ The Committee followed its conclusions with a recommendation that the U.S. take measures to ensure that states restore voting rights to disenfranchised individuals.¹⁶ The HRC’s decisions interpreting the ICCPR carry significant weight for international tribunals.¹⁷

In 2014, in its Concluding Observations on the Fourth Periodic Report of the United States, 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 formerly incarcerated individuals.¹⁸ In anticipation of its Fifth Periodic Review of the U.S. under the ICCPR, the HRC noted that for 15 years, the HRC has

¹⁴ 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>.

¹⁵ *Id.* at note 14.

¹⁶ *Id.*

¹⁷ Ahmadou Sadio Diallo (Rep. of Guinea v. Dem. Rep. of Congo), Judgment, 2010 I.C.J. Rep. 639, 664 (Nov. 30, 2010).

¹⁸ 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>.

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.¹⁹

Mississippi's constitution and statutory provisions, which permanently disenfranchise individuals, directly contravene Article 25 of the ICCPR, which Mississippi is obligated to follow.

B. PERMANENT DISENFRANCHISEMENT VIOLATES THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN, WITH WHICH THE U.S. MUST COMPLY

The American Declaration of Human Rights (“ADHR”), along with the American Convention and the Organization of American States Charter forms the basis of the Inter-American human rights system.²⁰ The American Declaration contains the authoritative catalogue of the Human Rights which all members of Organization of American States (“OAS”) are required to promote.²¹

The Inter-American Commission on Human Rights was established by the OAS in 1959 under the authority of the ADHR.²² It addresses human rights

¹⁹ 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://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/110/36/PDF/G1911036.pdf?OpenElement>.

²⁰ Joseph Diab, United States Ratification of the American Convention on Human Rights, 2 DUKE J. COMP. & INT'L L. 323, 325 (1992).

²¹ Thomas Buergenthal, The Revised OAS Charter and the Protection of Human Rights, 69 AM. J. INT'L L. 828, 829 (1975).

²² *Id.*

conditions and violations in the OAS's 35 Member States. Because the United States is a member of the OAS, the Inter-American Commission is able to hear cases concerning it. The role of the Commission is "to promote respect for human rights," which, for purposes of its statute, are defined as the rights "set forth in the American Declaration of the Rights and Duties of Man."²³ The American Declaration and the Inter-American Commission's statements and decisions delineate the U.S.'s obligations under international law.

1. The Right to Vote Under the American Declaration is Fundamental and Absolute

Voting is a fundamental human right of every citizen in the Americas. Article V 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.²⁴

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

The Inter-American Commission on Human Rights, whose jurisdiction that U.S. is subject to, has found that political rights guarantee the validity of the other

²³ Thomas Buergenthal, *The American Convention on Human Rights: Illusions and Hopes*, 21 *BUFF. L. REV.* 121, 132 (1971).

²⁴ 1 *Annals of the O.A.S.* 130 (1949) [hereinafter *American Declaration*].

human rights embodied in international instruments.²⁵ In interpreting Article XX in voting rights cases, the Commission has embraced a broad view of suffrage.²⁶ 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. Article XX makes 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 protect.

...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.²⁷

²⁵ 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).

²⁶ 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.”

²⁷ 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; see also Michael Wines, Virginia Rolls Back Voting Rights for Ex-Felons, Bucking Shaky Bipartisan Trend, THE NEW YORK TIMES, Apr. 6, 2023, <https://www.nytimes.com/2023/04/06/us/virginia-youngkin-voting-former-felons.html>.

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.

2. International Human Rights Tribunals Have Made Clear That Blanket Disenfranchisement for People Convicted of Crimes is a Violation of Human Rights Law

a. Blanket Disenfranchisement Violates International Law

In Advisory Opinion OC-28/21 issued in 2021, the Inter-American Court of Human Rights stated that Article 23 of the American Convention on Human Rights does not permit the blanket disenfranchisement of citizens.²⁸ According to the Inter-American Court of Human Rights, disenfranchisement must be meted out on a case-by-case basis by a competent court that takes into account each individual's transgression.²⁹ The types of crimes for which disenfranchisement is appropriate are very limited, however.³⁰

²⁸ 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).

²⁹ *Id.*

³⁰ 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).

In 2005, *Hirst v. the United Kingdom* set the foundational precedent that a “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 their individual circumstances, violates Article 3 of Protocol No. 1 to the European Convention on Human Rights.³¹ 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.”³² 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.”³³

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);

³¹ *Hirst v. the United Kingdom* (No. 2), 681 Eur. Ct. H.R., ¶ 45 (2005).

³² European Convention on Human Rights, art. 3 Protocol No. 1, Oct. 1, 1994.

³³ *American Declaration*, *supra* note 25, at art. XX.

- *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);
- *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);³⁴ and
- *Scoppola v. Italy* (No. 3), App. No. 126/05, ¶¶ 33-38, 99 (May 22, 2012).

The European Court of Human Rights (“ECHR”) similarly held in three opinions that blanket *constitutional provisions* that ban people from voting, even when they are 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).

³⁴ 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.

The same rules apply to disenfranchisement by law for individuals who have served part of their sentences, who are on parole or probation.³⁵

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

Blanket disenfranchisement violates international law because it is not proportional. The “proportionality test” requires that sentences must reflect the nature and severity of the crimes each person commits. 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.”³⁶

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,”³⁷ there must be proportionality—a rational connection between “the sanction and the conduct and circumstances of the applicant.”³⁸ A “severe

³⁵ *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 (same analysis for the proportionality principle as developed in *Hirst*, *Frodl*, and *Scoppola*).

³⁶ IACHR Welcomes the Restoration of Voting Rights for Former Felons in the United States, *supra* note 28.

³⁷ *Scoppola v. Italy* (No. 3), App. No. 126/05, ¶ 90 (May 22, 2012).

³⁸ *Söyler*, *supra* note 37, at ¶ 45 (citing *Hirst* (no. 2)).

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.”³⁹

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:

- (1) the nature and gravity of the offenses;
- (2) length of sentences; and
- (3) individual circumstances or conduct of the individual.⁴⁰

Drawing on *Hirst v. United Kingdom* (No. 2), in *Yatama v. Nicaragua*, 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.”⁴¹ Furthermore, “[w]hen there are several options to achieve this end, the one that is less restrictive of the protected right and more proportionate to the purpose sought should be chosen.”⁴²

³⁹ *Id.* at ¶ 35 (citing *Hirst (no. 2)*).

⁴⁰ *Scoppola*, at ¶¶ 83-109.

⁴¹ *Yatama v. Nicaragua*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 206 (June 23, 2005); *Hirst*, *supra* note 37.

⁴² *Id.*

Based on this extensive body of law, Mississippi's permanent felony disenfranchisement constitutional and statutory provisions violate Articles XX and XXXII of the American Declaration because they are fixed mandates that violate the proportionality test. Mississippi's felony disenfranchisement laws are blanket rules that automatically become part of a person's sentence, regardless of the circumstances surrounding the nature of each conviction. In Mississippi, someone convicted of writing a bad check is disenfranchised in the same way as a serial killer.⁴³ This is inconsistent with *Norin* and *Hirst* and the other opinions discussed above, which categorically struck down blanket disenfranchisement laws.⁴⁴

⁴³ MISS. COD. §§ 97-17-59(2), 23-15-151.

⁴⁴ *Norin*, *supra* note 30; *Hirst*, *supra* note 31.

II. U.S. SUPREME COURT CASES RECOGNIZE THAT THE EIGHTH AMENDMENT CONTAINS A PROPORTIONALITY REQUIREMENT, WHICH IS SIMILAR TO THE PROPORTIONALITY REQUIREMENT APPLIED IN INTERNATIONAL LAW

Requiring proportionality between punishments and the crimes to which they are assigned is not unique to international law. As early as 1910, the Supreme Court has held that, “[e]mbodied in the Constitution’s ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to [the] offense.”⁴⁵

In *Graham v. Florida*, the U.S. Supreme Court held that sentencing juvenile offenders to life without parole for non-homicide offenses violates the Eighth Amendment because the sentence is too extreme for crimes committed by minors who cannot process responsibility as their adult counterparts do.⁴⁶ Two years later, *Miller v. Alabama*, expanded this proportionality analysis.⁴⁷ The Court found that mandatory life without parole, for juveniles who had committed murder, violated the Eighth Amendment because:

...the mandatory penalty schemes at issue ... prevent the sentencer from taking account of these central considerations. By removing youth from the balance...these laws prohibit a sentencing authority

⁴⁵ *Graham v. Florida*, 560 U.S. 48, 59 (2010) (citing *Weems v. United States*, 217 U.S. 349 (1910)).

⁴⁶ *Id.*

⁴⁷ *Miller v. Alabama*, 567 U.S. 460 (2012).

from assessing whether the law’s harshest term of imprisonment proportionately punishes a juvenile offender.⁴⁸

State courts have also used proportionality to eliminate non-term-of-years punishments, such as lifetime sex offender registration for juveniles.⁴⁹ For example, the Colorado Supreme Court used the proportionality test to find that the disproportionality between “the magnitude of punishment inflicted through mandatory lifetime sex offender registration” and the “diminished culpability of juvenile offenders”⁵⁰ was unconstitutional.

As such, the proportionality analysis can properly be applied to invalidate Mississippi’s felony disenfranchisement for two reasons: disenfranchisement it is permanent, and permanent disenfranchisement eviscerates the very essence of citizenship. First, the proportionality test can be applied in this instance. *Graham* makes clear that proportionality analysis can be applied to evaluate non-capital cases.⁵¹ Because *Graham* extends the proportionality analysis to categorical rules that govern life without parole sentences, it can be expanded to other forms of punishment that share elements of permanent life sentences.⁵² Mississippi’s felony

⁴⁸ *Id.* at 474.

⁴⁹ *People In Int. of T.B.*, 2021 CO 59, 489 P.3d 752 (holding that mandatory lifetime sex offender registration for juveniles violates the Eighth Amendment).

⁵⁰ *Id.* at 771.

⁵¹ *See Graham*, 560 U.S. at 61.

⁵² *Id.*

disenfranchisement shares a key characteristic with life without parole sentences, in that it is a permanent removal from civic life and participatory democracy, even after someone has served their entire prison sentence.

Second, *Trop v. Dulles* makes clear that punishments that result in the “total destruction of the individual’s status in organized society” are cruel and unusual under the Eighth Amendment.⁵³ In *Trop*, the U.S. Supreme Court held that a sentence that de-naturalized a citizen was extremely harsh punishment that violated the Eighth Amendment.⁵⁴ The Supreme Court held, that, “[c]itizenship is not a license that expires upon misbehavior.”⁵⁵ The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and wellbeing of the Nation:

We believe...that use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. ... It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.⁵⁶

In *Trop*, the Supreme Court considered citizenship particularly important because it forms the basis of access to other rights. In losing citizenship, the

⁵³ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁵⁴ *Id.*

⁵⁵ *Id.* at 92.

⁵⁶ *Id.* at 101.

petitioner in *Trop* lost, “the right to have rights.”⁵⁷ Suffrage, like citizenship, is a fundamental building block of democratic rights. Without suffrage, a citizen has no say about important community issues that impact their lives, and their other constitutional and statutory rights. The U.S. Supreme Court has held that voting is the most fundamental right from which all other rights flow.⁵⁸ Because both voting and citizenship, according to the Supreme Court, are fundamental rights from which all other rights flow, punishment that eliminates those rights should be analyzed using the proportionality test.

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⁵⁷ *Id.* at 102.

⁵⁸ *Reynolds v. Sims*, 377 U.S. 533, 561, 562 (1964).

III. THE U.S. SUPREME COURT HAS LOOKED TO LAW FROM OTHER COUNTRIES TO INTERPRET THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENT CLAUSE

The U.S. Supreme Court has a long history of examining the law of other nations in its constitutional analysis of important social issues.⁵⁹ In particular, the U.S. Supreme Court has looked to international and comparative law to strike down sentences under the Eighth Amendment. Those sentences include the death penalty for juvenile offenders, life without parole for juvenile offenders, and revocation of citizenship for army desertion.

Trop v. Dulles is a clear example of the U.S. Supreme Court's reliance on international principles and comparative law in finding cruelty of a punishment under the Eighth Amendment.⁶⁰ The Court looked to the seriousness with which statelessness was treated by the global community, stating that "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."⁶¹ The Court cited "The United Nations' survey of the nationality laws of nations [revealing] that only two countries, the Philippines and

⁵⁹ Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006).

⁶⁰ *See Trop*, 356 U.S. at 102, 103.

⁶¹ *Id.* at 103.

Turkey, impose denationalization as a penalty for desertion.”⁶² Similarly, in *Roper v. Simmons*, the Supreme Court stated,

[o]ur determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.⁶³

In *Atkins v. Virginia*, the U.S. Supreme Court once again examined the legal consensus in other countries to find that the death penalty for people with mental disabilities violated the Eighth Amendment.⁶⁴ In its opinion, the Court referred to an *amicus* brief filed by the European Union, stating that, “within the world community, the imposition of the death penalty for crimes committed by mentally [disabled]. . . offenders is overwhelmingly disapproved.”⁶⁵ Similarly, in *Thompson v. Oklahoma*, the Supreme Court held that the execution of minors was cruel and unusual punishment, in part, because “it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed...by the leading members of the Western European community.”⁶⁶ Notably, in its decision, the

⁶² *Id.*

⁶³ *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

⁶⁴ *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁶⁵ *Id.* at n. 21.

⁶⁶ *Thompson v. Oklahoma*, 487 U.S. 815, 830, 831 (1988).

Court pointed out that juvenile executions were even prohibited by the Soviet Union, a totalitarian regime and former enemy of the United States.⁶⁷

Nations around the world, including the High Court of Australia⁶⁸ and the Court of First Instance of the High Court in Hong Kong⁶⁹ have adopted the proportionality test discussed in Section I(B)(2)(b) of this brief, and have held that blanket disenfranchisement based on criminal convictions is unlawful.⁷⁰ For example, Canada's Supreme Court invalidated legislation disenfranchising individuals, citing the Canadian Charter of Rights and Freedoms.⁷¹ The Court emphasized the fundamental nature of the right to vote, integral to democracy, and rejected blanket disenfranchisement as a violation of this right.⁷²

Similarly, the South African Constitutional Court, in *Minister of Home Affairs v. NICRO*, invalidated blanket disenfranchisement legislation, underscoring the

⁶⁷ *Id.* at 831; See also, *Enmund v. Florida*, 458 U.S. 782, no. 22 (1982).

⁶⁸ *Roach v. Electoral Comm'r* [2007] 233 CLR 162 (Austl.).

⁶⁹ *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).

⁷⁰ At least 19 democratic nations allow even incarcerated individuals to vote, even if they committed very serious crimes against the state: Austria, Canada, Croatia, Czech Republic, Denmark, Finland, Ireland, Israel, Latvia, Lithuania, Macedonia, Norway, Serbia, Slovenia, Spain, South Africa, Sweden, Switzerland, and Ukraine. International Comparison of Felon Voting Laws, BRITANNICA, PROCON.ORG, <https://felonvoting.procon.org/international-comparison-of-felon-voting-laws/> (last updated July 20, 2021).

⁷¹ See *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519 (Can.).

⁷² *Id.*

fundamental right to vote as enshrined in the South African Constitution.⁷³ In *NICRO*, the Court rejected the government's objectives of projecting a tough stance on crime and conserving resources as constitutionally insufficient grounds for disenfranchisement, highlighting the importance of universal suffrage.⁷⁴

This Court is authorized, by the U.S. Supreme Court, to review cases issued by other democratic nations around the world in making its determination about the constitutionality of Mississippi's permanent disenfranchisement of citizens.

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⁷³ *Minister of Home Affairs v. NICRO* 2005 (3) SA 280 (CC) at 296 para. 23 (S. Afr.).

⁷⁴ *Id.* at 296 para s. 45-56.

IV. MISSISSIPPI'S PERMANENT FELONY DISENFRANCHISEMENT VIOLATES CUSTOMARY INTERNATIONAL LAW

The Universal Declaration of Human Rights (“UDHR”) is the foundational document of international human rights law.⁷⁵ It has been referred to as humanity’s Magna Carta by Eleanor Roosevelt, who chaired the United Nations Commission on Human Rights that was critical to drafting the document.⁷⁶ The UDHR was adopted by the newly established United Nations in 1948, in response to the “barbarous acts which [...] outraged the conscience of mankind” during the Second World War.⁷⁷ Its adoption recognized human rights as the foundation for freedom, justice and peace.

Compliance with the UDHR is not only a matter of international obligation but is fundamental to the building of robust democracies and the nurturing of citizenship.⁷⁸ Dunja Mijatovic, the Commissioner for Human Rights of the Council

⁷⁵ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter *UDHR*]; See United Nation Human Rights Office of The High Commissioner, *International Human Rights Law*, U.N. <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law>.

⁷⁶ Anya Luscombe, Eleanor Roosevelt: A Crusading Spirit to Move Human Rights Forward, 36 *NETHERLANDS QUARTERLY OF HUMAN RIGHTS* 241 (2018).

⁷⁷ *UDHR*, *supra* note 79, at preamble.

⁷⁸ See generally Amnesty International, Human Rights are Universal, Indivisible and Interdependent, <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/#universal,indivisibleandinterdependent>.

of Europe, stated that “[b]y reinforcing our commitment to the UDHR, we are not preserving a relic of the past. We maintain and expand the building of the future.”⁷⁹

The UDHR has taken on the mantle of customary international law.⁸⁰

Customary international law is made up of rules that come from “a general practice accepted as law” and that exist independent of treaty law.⁸¹ According to the Statute of the International Court of Justice (“ICJ”), Article 38(1)(b), “international custom, as evidence of a general practice accepted as law” is a primary source of international law.⁸² U.S. courts have long held that customary international law is part of U.S. law.⁸³

Article 21(3) of the UDHR states, “The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine

⁷⁹ Dunja Mijatović, Europe 75 years after the Universal Declaration of Human Rights: A journey of progress, setbacks and persistence, COUNCIL OF EUROPE (Nov. 30, 2023), <https://www.coe.int/sk/web/commissioner/-/europe-75-years-after-the-universal-declaration-of-human-rights-a-journey-of-progress-setbacks-and-persistence>.

⁸⁰ See generally Jack Donnelly, *Universal Human Rights In Theory And Practice* (3rd ed. 2013).

⁸¹ *Customary International Humanitarian Law*, International Committee Of The Red Cross, (Oct. 9, 2010), <https://www.icrc.org/en/document/customary-international-humanitarian-law-0>.

⁸² International Court of Justice, Article 38(1)(b).

⁸³ See e.g. *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (“settled proposition that federal common law incorporates international law”), *In re Est. of Ferdinand E. Marcos Hum. Rts. Litig.*, 978 F.2d 493, 502 (9th Cir. 1992) (“It is . . . well settled that the law of nations is part of federal common law.”), and *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.20 (2d Cir. 1980) (“[I]nternational law has an existence in the federal courts independent of acts of Congress.”); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (AM. LAW INST. 1987).

elections which shall be by universal and equal suffrage.”⁸⁴ Article 21(1) and Article 19 of the UDHR are also relevant to suffrage as a universal human right. Article 21(1) guarantees everyone the “right to take part in the government of his country, directly or through freely chosen representatives.”⁸⁵ Articles 21(1) and 21(3), read together, make clear that every citizen has the right to participate in elections held in their country of citizenship.⁸⁶ Adding to that, Article 19 secures the right to express one’s opinions.⁸⁷ Casting a vote in elections is the ultimate form of expressing opinions on political matters.⁸⁸

These provisions recognize that the right to vote is a fundamental human right, integral to democratic governance. Mississippi’s felony disenfranchisement laws, contravene the customary international law requirement mandating participatory democracy through voting.

⁸⁴ *UDHR*, *supra* note 79, at art. 21(3).

⁸⁵ *Id.* at art. 21, 19.

⁸⁶ *Id.* at art. 21, 23.

⁸⁷ *Id.* at art. 19.

⁸⁸ Armand Derfner & J. Gerald Hebert, Voting is Speech, 34 *YALE L. & POL’Y REV.* 471 (2016).

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

Permanent felony disenfranchisement isolates people, causes psychological harm, and keeps people from re-integrating into their communities after they complete their prison sentences. That political and personal isolation violates international law.

Articles I and XVII of the American Declaration, together with the American Declaration's preamble that guarantees the right to be treated with dignity guarantee formerly incarcerated persons the right to rehabilitation.⁸⁹ The Inter-American Commission on Human Rights has repeatedly emphasized the rehabilitative function of prison sentences and the importance of rehabilitation to the individual's reintegration back into society.⁹⁰

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 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

⁸⁹ See e.g., *American Declaration* at preamble.

⁹⁰ 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 for the Treatment of Prisoners no. 65 to support this contention).

essential aim the reform and social readaptation 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”⁹¹ and guarantees that everyone deprived of liberty “shall be treated with respect for the inherent dignity of the human person.”⁹² 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 readaptation,” “personal rehabilitation,” and “reintegration back into society.”⁹³ Permanent felony disenfranchisement violates this provision.

Permanent felony voter disenfranchisement laws harm democracy. They erase the most vital right of citizenship. Voter disenfranchisement assigns a second-class status to people who have been convicted of certain classes of crimes, which impedes re-entry into society. Society obliges them to obey the law, without giving

⁹¹ *Id.* at Section A(2).

⁹² *Id.*

⁹³ *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).

them the opportunity to influence the law with their vote.⁹⁴ This excludes and isolates them from their communities and the political process in general.⁹⁵

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.⁹⁶ In one study of individuals who had been arrested previously, 27% of non-voters were re-arrested, compared with 12% of voters.⁹⁷ 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 desistance from crime.”⁹⁸ Other studies have mirrored this data, concluding that there is a positive connection between voting and successful rehabilitation.⁹⁹

⁹⁴ See generally Erika Wood, *Restoring the Right to Vote*, BRENNAN CTR. FOR JUSTICE (2009), https://www.brennancenter.org/sites/default/files/2019-08/Report_Restoring-the-Right-to-Vote.pdf.

⁹⁵ Victoria Shineman, *Restoring Rights, Restoring Trust: Evidence that Reversing Felon Disenfranchisement Penalties Increases Both Trust and Cooperation with Government*, UNIVERSITY OF PITTSBURGH (2018), https://cpb-us-w2.wpmucdn.com/web.sas.upenn.edu/dist/7/538/files/2019/07/Shineman_RestoringRightsRestoringTrust_ESRA2019.pdf.

⁹⁶ Marc Mauer, *Voting behind Bars: An Argument for Voting by Prisoners*, 54 HOWARD L.J. 549 (2011).

⁹⁷ Jean Chung, *Voting Rights in the Era of Mass Incarceration: A Primer*, SENTENCING PROJECT (July 28, 2021), <https://www.sentencingproject.org/app/uploads/2022/08/Voting-Rights-in-the-Era-of-Mass-Incarceration-A-Primer.pdf>.

⁹⁸ *Id.*

⁹⁹ *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.

CONCLUSION

For the reasons discussed above, this Court, sitting *en banc*, should affirm the panel's decision, and find that Mississippi's permanent disenfranchisement of its citizens who have committed felonies violates the Eighth Amendment.

Respectfully submitted,

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Dated: December 6, 2023

/s/ Jared G. LeBlanc

Jared G. LeBlanc

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I hereby certify that the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system in No. 19-60662 on December 6, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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