SUPREME COURT
STATE OF LOUISIANA
No. _____

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

versus

STATE OF LOUISIANA, ET AL.,
Defendants-Appellees

No. 64,9587
19th Judicial Circuit
Parish of East Baton Rouge, Section 22, State of Louisiana
Honorable Judge Timothy Kelley

2017 CA 1141
Louisiana Court of Appeal, First Circuit

CIVIL PROCEEDING

APPLICATION OF PLAINTIFFS/APPELLANTS FOR WRIT OF CERTIORARI OR REVIEW

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SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET

NO.____________________

TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

TITLE

Voice of the Ex-Offender d/b/a/ Voice of the Experienced, et a

VS.

State of Louisiana, et al

Applicant: VOTE et al., Appellants

Have there been any other filings in this Court in this matter? ☐ Yes ☒ No

Are you seeking a Stay Order? No

Priority Treatment? No

If so you MUST complete & attach a Priority Form

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Pleading being filed: ☑ In proper person, ☐ In Forma Pauperis

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TYPE OF PLEADING

☑ Civil, ☐ Criminal, ☐ R.S. 46:1844 protection, ☐ Bar, ☐ Civil Juvenile, ☐ Criminal Juvenile, ☐ Other

☐ CINC, ☐ Termination, ☐ Surrender, ☐ Adoption, ☐ Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: ________ Docket No. ________

Judge/Commissioner/Hearing Officer: ________ Ruling Date: ________

DISTRICT COURT INFORMATION

Parish and Judicial District Court: 9th Judicial District Court, Parish of East Baton Rou Docket Number: 649,587

Judge and Section: Hon. Timothy E. Kelley Date of Ruling/Judgment: 3/28/17

APPELLATE COURT INFORMATION

Circuit: First Circuit Docket No. 2017 CA 1141 Action: Judgment Affirmed

Applicant in Appellate Court: VOTE et al Filing Date: June 13, 2017

Ruling Date: 4/13/18 Panel of Judges: Higginbotham, Holdridge and Penzato, partial dissent by J.Holdrid En Banc: ☐

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Ruling Date: 05/09/18 Panel of Judges: Higginbotham, Holdridge and Penzato, denied in part by J. Holdric En Banc: ☐

PRESENT STATUS

☐ Pre-Trial, Hearing/Trial Scheduled date: ________, ☐ Trial in Progress, ☐ Post Trial

Is there a stay now in effect? ____ Has this pleading been filed simultaneously in any other court? ____

If so, explain briefly ________

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties

6/7/18

DATE

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STATEMENT OF WRIT CONSIDERATIONS

MAY IT PLEASE THE COURT: This case of first impression seeks to end Louisiana's unconstitutional disenfranchisement of citizens on probation or parole following a felony conviction. Writ consideration under La. S. Ct. Rule X, § 1(a)(1), (2), (4) is appropriate here because the only questions presented are significant unresolved issues of Louisiana constitutional law, and because the Opinion below erroneously interpreted the state constitutional right at issue, failed to apply the proper standard of judicial review, and conflicts with existing law. Specifically, writ is merited for these reasons:

No previous case holds, as the First Circuit Court of Appeal now holds, that the 1974 Louisiana Constitution permits the blanket disenfranchisement of people on probation or parole following a felony conviction. If the Opinion is allowed to stand, tens of thousands of probationers and parolees will remain disenfranchised.[1] This is a materially unjust result, unimaginable to the framers and voters who in 1974 intended to dispose of the 1921 Constitution's racist and draconian felon disenfranchisement scheme by enshrining a right to vote upon release from prison in Article I, Section 10(A) of the 1974 Constitution. The Opinion below is an affront to the dignity of tens of thousands of Louisiana citizens and violates Louisiana law and policy favoring broad access to the franchise. Review by this Court is necessary to prevent this mass denial of the constitutional right to vote.

In resolving this significant issue of law for the first time, the Court of Appeal rendered an erroneous interpretation of "under an order of imprisonment" in Article I, Section 10(A) that is inconsistent with long-standing canons of constitutional construction. Most significantly, the Opinion finds the meaning of this phrase to be "clear" and "certain" though even the three learned judges on this First Circuit panel could not agree on the meaning. In a partial dissent, the Honorable Judge Holdridge rejects the majority's interpretation and argues for remand to the

[1] On May 31, 2018, HB 265 became Act 636. *See* https://www.legis.la.gov/Legis/BillInfo.aspx?s=18RS&b=HB265&sbi=y. HB 265 adds an exception to La. R.S. 18:102(A)(1) which restores voting rights to parolees and probationers who have not been incarcerated pursuant to their "orders of imprisonment" for five years. HB 265, however, has no bearing on the constitutional language in Article I, Section 10(A) at issue in this case. While a significant and hard-fought step forward, HB 265 is also only a partial restoration – tens of thousands of parolees and probationers are estimated to remain disenfranchised even after HB 265 goes into effect on March 1, 2019.

trial court on the meaning of "under an order of imprisonment" for people on probation under suspended sentences. The lack of unanimity underscores the clear need for review.

In addition to its failure to recognize that the constitutional phrase at issue is susceptible to different meanings, the Opinion fails to construe this ambiguity in the meaning of Section10(A) in favor of greater access to the fundamental right to vote, nor does it apply the presumption in favor of the "natural and popular" meaning of the phrase as understood by the drafters who wrote it and voters who adopted it in 1974. The Opinion's overly legalistic reading fails to properly construe the plain meaning of Section 10(A) and renders a construction that reads Section 10(A)'s unique language out of the Louisiana Constitution. This, along with other errors in construction as argued below, warrant review.

Additionally, review of the Opinion's treatment of strict scrutiny is merited. The Court of Appeal neglected to apply strict scrutiny as is required when a law infringes upon a fundamental constitutional right. Instead, the Court of Appeal surmised that even if strict scrutiny were to apply, "there is no question that the State has a compelling interest . . . in regulating convicted felons still under the State's supervision." Op. at 8-9. There are two major problems with this statement. First, the Court of Appeal fails to offer any analysis of this asserted state interest, and this absence, under any standard of review, is in error. Second, the Court of Appeal's suggestion that Appellants' status as parolees and probationers is a compelling interest that justifies the deprivation of their right to vote is an egregious error. In *State v. Draughter*, this Court relied on the status of parolees and probationers to justify a firearms regulation for those on probation and parole: "The possession of a firearm is inconsistent with that status and would subject the individuals tasked with their supervision to an untenable safety risk." 2013-0914 (La. 12/10/13), 130 So.3d 855, 867. The possession of the right to vote, however, is not inconsistent, especially here where there are no safety risks associated with the exercise of this right.

In fact, Louisiana's parole and probation officers – some of the very individuals that this Court sought to protect in *Draughter* – filed an *amicus curiae* brief for Appellants arguing that rights restoration has the opposite effect on public safety: voting is rehabilitative and makes Louisiana's communities *safer*.[2] The deprivation of the right to possess firearms and the

[2] Brief of the American Probation and Parole Association as *Amicus Curiae* in support of Plaintiffs-Appellants, filed on Jan. 12, 2018 ("APPA Brief") at 12-13, 15-16 (citing, *inter alia*,

deprivation of the right to vote cannot be justified by the same interest. *Draughter*'s use of status should be limited to its facts. Review is warranted to prevent the extension of *Draughter* and to properly assess the state interest in disenfranchising parolees and probationers.

Also warranting review is the Opinion's attempt to avoid strict scrutiny by casting the right to vote of people with felony convictions as impaired and "limited." The Opinion misstates that the Louisiana Constitution "limits the fundamental right to vote while convicted felons are under an order of imprisonment." Op. at 8. The Louisiana Constitution does no such thing; it only *permits* the limitation. This misstatement renders the Opinion in conflict with *Fox v. Mun. Democratic Exec. Comm*., in which the Second Circuit Court of Appeal held that Section 10(A)'s language "is *permissive* and *not self-operative*." 328 So.2d 171, 174 (La. App. 2 Cir. 1976) (emphasis in original). Similarly, the Opinion's reference to federal cases in its attempt to diminish the right to vote of people with felony convictions is in error. Because the Louisiana Constitution confers greater protection to the right to vote than its federal counterpart, the Opinion's reliance on federal precedent is inapposite.

Finally, the Opinion below erred in finding class certification to be moot. Writ should be granted under La. S. Ct. Rule X, § 1(a)(4) because this conflicts with longstanding Louisiana precedent favoring appeal of class certification decisions throughout the course of the litigation.

If the Opinion is not reviewed, tens of thousands will remain in a second tier of citizenship. Thousands more will join their ranks. The highest level of judicial review is needed to protect the fundamental right to vote. A misinterpretation of the Louisiana Constitution with such devastating consequences for Louisiana's democracy should compel this Court to grant a writ of review under La. S. Ct. Rule X, § 1(a)(1), (2), and (4).

STATEMENT OF THE CASE

The core issue presented is one of first impression and a pure question of law: whether La. R.S. 18:2(8) and La. R.S. 18:102(A)(1), which restrict the right to vote of parolees and probationers, violate Article I, Section 10(A) of Louisiana Constitution, which confers a right to vote that *may* be suspended in only two limited circumstances: (1) while a person is "interdicted

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Christopher Uggen and Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 Colum. Hum. Rts. L. Rev. 193, 213 (2004); Guy Padraic Hamilton-Smith and Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 Berkeley La Raza L.J. 407, 413 (2012)).

and judicially declared mentally incompetent;" or (2) while a person is "*under an order of imprisonment for conviction of a felony*." *See* La. Const. art. I, § 10(A) (1998) ("Section 10(A)")[3] (emphasis added); La. R.S. 18:2(8); La. R.S. 18:102(A)(1).

This case turns on the meaning of the phrase "under an order of imprisonment" in Section 10(A). If the Opinion was correct – which it is not – that parolees and probationers are "under an order of imprisonment," then Louisiana is permitted to suspend the right to vote of parolees and probationers. The burden then falls on Louisiana to justify that suspension by proving La. R.S. 18:2(8) and La. R.S. 18:102(A)(1) serve a compelling state interest and are narrowly tailored to achieve that interest, which it cannot do. But, if "under an order of imprisonment" is interpreted to include only those in prison, then La. R.S. 18:2(8) and La. R.S. 18:102(A)(1) directly conflict with Section 10(A) and should be stricken. Either way, Louisiana's policy of disenfranchising citizens on parole and probation is unconstitutional and should be enjoined.

I. Background

Section 10(A) of in the Declaration of Rights, enshrines Louisiana's constitutional right to vote, as follows:

> Section 10(A). Right to Vote. Every citizen of the state, upon reaching eighteen years of age, shall have 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). The Louisiana Constitution more strongly protects the right to vote than its federal counterpart, affirmatively guaranteeing the right to vote. *See, infra*, at 22.

A. The Expansion of the Louisiana Right to Vote

Voters ratified this robust protection for voting on April 20, 1974, as part of their adoption of the new 1974 state constitution, which broadened protection for individual civil and political rights as a whole.[4] The 1974 ratification catapulted Louisiana into a new era of expanded voting rights, particularly for those with prior convictions. Gone were the antidemocratic provisions of the past.[5] The 1921 Constitution permanently disenfranchised

[3] For clarity, VOTE's use of "Section 10(A)" encompasses "Section 10" and vice versa.
[4] Brief of Historians Walter C. Stern, et al. as *Amici Curiae* in support of Plaintiffs-Appellants, filed on Feb. 21, 2018 ("Historians' Brief") at 3, 7.
[5] The precedent for felon disenfranchisement in Louisiana begins prior to the Civil War when white men were barred from voting based on four distinct felonies, all of which have a rational relationship to elections: forgery, bribery, perjury, and high crimes and misdemeanors. *See* Bruce S. Reilly, *To Purify the Ballot: The Racial History of Felon Disenfranchisement in Louisiana*, 19

people with conviction histories unless pardoned "with express restoration of franchise" as well as "those actually confined in any public prison." La. Const. art. VIII, § 6 (1921). In contrast, the new Section 10 permitted, not mandated, only a temporary suspension of the right to vote while "under an order of imprisonment for conviction of a felony." La. Const. art. I, § 10 (1974).

Importantly, parolees and probationers were not considered by contemporary commentators to be "under an order of imprisonment." Professor Lee Hargrave, the preeminent constitutional scholar and consulting expert during the 1973 Constitutional Convention, explained in his 1974 law review article that Section 10's wording did not prevent parolees and probationers from voting:

> The word choice, 'under an order of imprisonment,' may seem unusual; 'imprisoned' would be simpler and more direct. The reason for the choice was to overcome an objection that an escapee would not be 'imprisoned' and thus not within the exception. *That 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*.

The Declaration of Rights of the Louisiana Constitution of 1974, 25 La. L. R. 1, 34-35 (1974) (emphasis added). Professor Hargrave contrasted Section 10 with Section 20, another new provision, which specifically references parolees and probationers where Section 10 does not, emphasizing again that Section 10 did not disenfranchise parolees and probationers:[6]

> The language in Section 10 contrasts with Section 20's deliberate use of 'termination of state and federal supervision following conviction for any offense,' where it was intended that completion of probation or parole requirements be met before full rights of citizenship are restored. Though the general expression used in Section 20, 'full rights of citizenship,' normally encompasses voting rights, the more specific provision in this article providing for return of the right to vote when one is no longer under an order of imprisonment will prevail.

Id. The earliest Attorney General opinion to address Section 10 also found its suspension of voting rights did not extend to parolees and probationers, declaring that "the clear import of Article I, Section 10 as borne out by the debates of the Constitutional Convention is that the right

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Loy. J. Pub. Int. L (2018) (pending publication) at 107-108, 111-112. After the Civil War, when citizenship was granted to African Americans, the 1868 Constitution extended disenfranchisement to people who committed *any* "crime punishable in the penitentiary." *See id.* at 115; La. Const. title VI, art. 99 (1868); *see also Amici Curiae* Brief of Louisiana Constitutional Law and History Scholars on behalf of Appellants, filed Dec. 7, 2017 ("Scholars' Brief") at 15-20; *Amici Curiae* Brief of NAACP Legal Defense and Education Fund, Inc., The Sentencing Project, and Southern Poverty Law Center in support of Appellants, filed Nov. 6, 2017 ("NAACP LDF, et al., Brief") at 8-23.

[6] Section 20 provides: "Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense." La. Const. art. I, § 20 (1974).

to vote may be denied only to those persons actually imprisoned." *See* La. Att'y Gen. Op. No. 75-131 (Mar. 7, 1975) (emphasis in original).

In the first and only other decision until now to address Section 10(A), the Second Circuit Court of Appeal also advanced an expansive view, holding that the fundamental right to vote could not be "automatically forfeited because a citizen is convicted of a felony:"

> Section 10 is one of the fundamental bill of rights guaranteeing every citizen that he 'shall have the right to register and vote. Unless this right is specifically suspended by legislative or other constitutional means (which has not been done in this case), it is not automatically forfeited because a citizen is convicted of a felony.

Fox, 328 So.2d at 174. The court in *Fox* determined Section 10(A)'s suspension to be *"...permissive* and not *self-operative,* meaning that it must be Implemented before it can operate to deprive one of his right to vote *..." Id.* at 174 (emphasis in the original).[7]

Historical records and surviving materials also confirm that the public understood Section 10(A) to restore the right to vote upon release from prison.[8] For example, a February 1974 newspaper guide published by the Public Affairs Research Council of Louisiana (PAR)—"regarded as the most influential and widely read policy analysis organization in Louisiana"—stated that "some of the principal additional rights in the proposed declaration of rights' included 'granting automatic voting and citizenship rights to former prisoners or other inmates *upon their release*, without having to await a pardon from the governor.'"[9]

B. The Contracting of the Louisiana Right to Vote

In 1976, two years after voters ratified the new Section 10, the Legislature began its attempts to contract the right to vote. It would take a total of seven years, during which "order of imprisonment" was unclear – even to the Legislature and the Attorney General – to create the policy of blanket disenfranchisement at issue in this case. The Legislature first passed Act 697, enacting La. R.S. 18:102(A)(1), which barred all those who are "under an order of imprisonment

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[7] Professor Hargrave agreed with the court in *Fox*, but argued also that the defendant in *Fox* was not "under an order of imprisonment" because his sentence had been suspended. *Public Law: Louisiana Constitutional Law*, 37 La. L. Rev. 480, 491 (1977).

[8] Historians' Brief at 18-25.

[9] *Id.* at 20, n. 32 (quoting Philosophies in the Proposed Constitution (Baton Rouge: Public Affairs Research Council of Louisiana, 1974), 1, in Folder 3, Box 14, Cecil Morgan Collection, Rare and Special Collections, Tulane Law Library)), Supplemental Appendix ("Supp. App."), Ex.1, pp. 1-2; *see also*, Supp. App., Ex.2 (Barbara Herman to Members of the Greater New Orleans Section of the National Council of Jewish Women, March 29, 1974, Folder 1, Box 99, National Council of Jewish Women, LARC) (describing the new constitution as "restor[ing] the rights of citizenship and voting after a convict has *served his time"*)(emphasis added)).

for conviction of a felony" from voting. Act 697 also included La. R.S. 18:2(2), defining "under an order of imprisonment" as follows: "[A] sentence of confinement, whether or not suspended, with or without supervision, and whether or not the subject of the order has been paroled."

In 1977, the Legislature passed Act 544 and added *probation* to La. R.S. 18:2(2):

> [A] sentence of confinement, whether or not suspended, whether or not the subject of the order has been placed on probation, with or without supervision, and whether or not the subject of the order has been paroled.

In 1979, the Legislature passed Act 299, amending and reenacting La. R.S. 18:102(A)(1) with language that added the statutory definition as follows: "under an order of imprisonment, *as defined in R.S. 18:2(2)*, for conviction of a felony."[10]

The Louisiana Attorney General has also attempted to contract Section 10(A). In a new and contradictory opinion issued in 1975, the Attorney General argued parolees remained "legally in custody of the institution," and therefore were "under an order of imprisonment." *See* La. Att'y Gen. Op. No. 75-131 (May 2, 1975) at 2. Professor Hargrave sharply criticized this opinion, arguing against use of the "fiction of legal custody:"

> The [Attorney General] opinion argues that a person on parole is in the 'legal custody' of the institution from which paroled and thus 'under an order of imprisonment.' If a person is released from prison, he is under no order of imprisonment; he is under an order of release. The fiction of 'legal custody' is not in any sense imprisonment.

Public Law: Louisiana Constitutional Law, 37 La. L. Rev. 480, 491 n.76 (1977).

As for probationers, however, the Attorney General opined that probationers under suspended sentences were *not* "under an order of imprisonment" because "the granting of probation by the judge amounts to a suspension of sentence. (Article 893, Code of Criminal Procedure)" and could vote. *Id.* at 1-2. By 1979, however, the Attorney General changed his position once again, sanctioning the broad disenfranchisement of both parolees and probationers based on the "fiction of legal custody."[11]

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[10] La. R.S. 18:2(2) was subsequently re-codified as La. R.S. 18:2(8) in order to appear in alphabetical order.

[11] *See* La. Atty. Gen. Op. No. 79-545 (May 19, 1979). As discussed, *infra*, however, the Attorney General later arrived at the conclusion that at least one class of probationers – those for whom the imposition of sentence has been suspended altogether – can vote even though they are in "legal custody," rendering the Opinion's reading unreasonable. *See, infra*, at 14, n. 21.

In 1998, voters amended Section 10, adding a new Section 10(B), which addressed the right of people with felony convictions to run for office.[12] The 1998 ballot language presented to voters did not address the wording of Section 10(A), nor did the ballot language address the issue of probationer and parolee voting.[13]

II. The Impact Today

In 1969, there were 4,611 probation cases and 2,129 parolees in Louisiana.[14] Today, approximately 71,000 people are on probation or parole, approximately twice the number of people who are incarcerated in Louisiana.[15] Even after HB 265's effective date, tens of thousands will still be denied the ballot. The impact is profound. African Americans are significantly disproportionately impacted, constituting 49.6 percent of probation, and 61.2 percent of paroled populations.[16] Parolees and probationers are living in communities across the state – working, paying taxes, raising families, grocery shopping, volunteering, and contributing to their communities – yet they have no voice in the political life of their communities. The representative plaintiffs reflect a diverse group of citizens – some of who completed their terms of imprisonment decades ago – including a veteran of the Vietnam War, a construction worker, a law school graduate, a college student, two deacons, a hospice volunteer, and a minister. R. 7-10.

III. The Litigation

On July 1, 2016, Plaintiffs/Appellants, Voice of the Experienced, a Louisiana-based nonprofit civic engagement organization founded and led by formerly incarcerated people and their families, along with eight directly impacted individuals, Checo Yancy, Randy Tucker, Dwight Anderson, Kenneth Johnson, Bruce Reilly, Huy Tran, Bill Vo, and Ashanti Witherspoon (collectively, "VOTE" or "Appellants"), filed this class action petition for declaratory and injunctive relief to strike La. R.S. 18:2(8) and La. R.S. 18:102(A)(1) as unconstitutional and to

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[12] This Court subsequently invalidated Section 10(B) in *Shepherd v. Schedler*, 2015-1750 (La. 01/27/16); 209 So. 3d 752, 759.
[13] The ballot language read: "To prohibit convicted felons from seeking or holding public office within fifteen years of completion of sentence and to provide for expressed restoration of that right by pardon. (Amends Article I, Section 10)." *Shepherd*, 209 So. 3d at 759.
[14] Pamela A. Prestridge, *Probation: A Comparative Study of Louisiana Law and the ABA Standards*, 33 La. L. Rev. 579, 583, n. 23 (1972) (internal citation omitted).
[15] Louisiana Department of Public Safety and Corrections, Corrections Services, Fact Sheet (Dec. 31, 2017): http://www.doc.la.gov/media/1/Briefing%20Book/Jan%2018/pandp.jan.18.pdf ("DOC 2017 Fact Sheet"); Sentencing Project, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement* (2016) at 15-16, goog.gl/mGjppi.
[16] *See* DOC 2017 Fact Sheet.

restore the constitutional right to vote to parolees and probationers. On July 29, 2016, after a round of exception briefing, the remaining Defendant/Appellee, Tom Schedler (the "Secretary"),[17] answered the petition. On September 29, 2016, the Secretary moved for summary judgment. On January 13, 2017, VOTE filed a cross-motion for summary judgment. On February 24, 2017, the parties filed their oppositions. On March 8, 2017, the Secretary replied to VOTE's opposition. The parties agreed that there are no material issues of fact in dispute and that issues in this case are questions of law regarding the constitutionality of La. R.S. 18:2(8) and La. R.S. 18:102(A)(1). Both parties have argued historical context, relying on transcripts and historical materials from and surrounding the 1973 Constitutional Convention.[18]

After a hearing on March 13, 2017, the Honorable Judge Tim Kelley rendered an oral judgment in open court, denying VOTE's motion for summary judgment. Lamenting that his ruling "does not seem fair," Judge Kelley ruled that "an order of imprisonment does not mean actually incarcerated . . . The plain words, plus the constitutional framer's history shows it does not." R. 332-334. He continued: "That order of imprisonment is always there; otherwise if they break their probation or parole, there is nothing put them in jail under . . . ." The trial judge declined to apply strict scrutiny. On March 28, 2017, he signed a final judgment without a written opinion and amended the judgment to include decretal language on August 23, 2017.

An appeal to the First Circuit followed. The appellate court granted leave to allow five *amicus curiae* briefs to be filed, four of which supported VOTE.[19] On February 27, 2018, the Court of Appeal held oral argument. On April 13, 2018, the majority of the panel issued an

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[17] Secretary of State Tom Schedler has since resigned. Kyle Ardoin is the current acting Louisiana Secretary of State.

[18] Those historical documents are publicly available documents setting forth legislative facts that a court may judicially notice at any stage and even *sua sponte*. *See, e.g.*, *State v. McHugh*, 630 So.2d 1259, 1268 (La. 1994) ("Our decision . . . is adequately based on . . . judicially noticed legislative facts used in interpreting law and deciding upon the constitutional validity, interpretation and application of statutes."); *Dunagin v. City of Oxford*, 718 F.2d 738, 748-49, n. 8 (5th Cir. 1983) (plurality)("The writings and studies of social science experts on legislative facts are often considered and cited by the Supreme Court with or without introduction into the record or even consideration by the trial court.").

[19] Four filed in support of VOTE: (1) NAACP LDF, et al. Brief, *supra,* at 5-6, n. 5; (2) the Scholars' Brief, Louisiana Constitutional Law and History Scholars, 17 constitutional law and history professors and representing all four of Louisiana's law schools, *supra,* at 5-6, n. 5; (3) the APPA Brief, on behalf of a national and international organization of parole and probation officers, with 700 members in Louisiana alone, *supra,* at 1, n. 2; and (4) the Historians' Brief, representing 13 historians with experience and expertise on issues relating to Louisiana and its constitutional history, *supra*, at 4, n. 4; and one filed in support of the Secretary by Jeff Landry, the Attorney General of Louisiana.

Opinion affirming the trial court. The majority rejected VOTE's plain reading, reasoning that it "would lead to absurd results, because it disregards that a person can be ***legally*** under an order of imprisonment without being physically in prison." Op. at 10 (double emphasis added). Relying on *Draughter*, 130 So.3d at 867, the majority asserted: "Convicted felons on parole and/or probation are still in a 'custodial' setting under an order of imprisonment, as they are still serving a portion of their criminal sentence." *Id.* at 8. The panel then resolved the conflict issue by noting that "Section 10 was amended after Section 20 was enacted, and the specific wording of Section 10(A) was not changed." *Id.* at 9, n. 4.

Finally, the panel placed the burden of proving unconstitutionality on VOTE and declined to apply strict scrutiny. *Id.* at 8. The panel surmised even if strict scrutiny applied, "there is no question that the State has a compelling interest in protecting the integrity of voter registration rolls and in regulating convicted felons still under the State's supervision." *Id.* at 8-9. It concluded: "Any further debate on this issue is a policy matter best left for the legislature . . . ." *Id.* at 9. The Opinion also concluded that consideration of class certification was moot. *Id.*

The Honorable Judge Guy Holdridge filed a partial dissent on three points. First, Judge Holdridge agreed with the majority as to parolees, but not as to people on probation under suspended sentences and would remand to the trial court for a full trial on a series of questions regarding whether and when they are "under an order of imprisonment." Op., partial dissent. Second, he included as his basis for the remand "the fact that a person's voting privilege is a fundamental right;" and finally, he placed the burden of proof on the State and not VOTE.

On April 27, 2018, VOTE moved for rehearing, which the panel denied on May 9, 2018, with Judge Holdridge again agreeing in part and dissenting in part. This Application followed.

ASSIGNMENTS OF ERRORS

I. The Court of Appeal erred in its construction of the Louisiana Constitution by failing (i) to accord the plain meaning to Section 10(A) as understood by a layperson; (ii) to properly address its interpretation's conflict with another provision of the Constitution; (iii) to find that Section 10(A)'s language is susceptible to different meanings; (iv) to construe any ambiguity in favor of the access to the right to vote; (v) to account for the historical circumstances around the adoption of Section 10(A) and to give effect to the intent of drafters and voters who understood

the plain meaning of Section 10(A); (vi) to adopt an approach to constitutional interpretation that protects the right to vote.

II. The Court of Appeal erred in its constitutional analysis by failing (i) to recognize the permissive nature of Section 10(A); (ii) to place the burden of proof on the Secretary to justify the legislative encroachment on the right to vote; (iii) to assert and apply strict scrutiny in its determination of the constitutionality of La. R.S. 18:2(8) and La. R.S. 18:102(A)(1); (iv) to find that the statutes cannot be justified by a legitimate, much less compelling, state interest; (v) to find that the statutes are overinclusive and not narrowly tailored; (vi) in asserting that the Legislature is the proper forum; and (vii) in referencing inapposite federal authority.

III. The Court of Appeal erred in determining that the question of class certification is moot.

SUMMARY OF THE ARGUMENT

I. This Court should grant a writ of review to correct the Opinion's erroneous interpretation of Section 10(A). To Appellants, the plain meaning of Section 10(A) is straightforward: a person who is "under an order of imprisonment" is in prison. The Louisiana Constitution thus permits the suspension of voting rights only while a person is incarcerated. Unlike the Opinion's overly legalistic reading, VOTE's plain reading is the layperson's understanding – the "natural and popular" meaning – which governs. VOTE's reading is consistent with Louisiana's criminal code. Parolees and probationers are under the *threat* of imprisonment, but they are not under "orders of imprisonment." Rather, they must take *affirmative steps* (volitional acts or omissions) and are entitled to a due process hearing and an additional court order to trigger the self-executing custodial sentence and a return to physical custody. VOTE's reading is also more protective of the constitutional right to vote and construes Section 10(A) as Section 20's exception, which is the only way to harmonize the two otherwise conflicting provisions.

But even if VOTE's plain reading is not the meaning, at the least, the words are ambiguous. The Opinion erred in failing to at least recognize this ambiguity. The fact that three learned First Circuit jurists could not agree on the meaning underscores this ambiguity as well as the unworkability of a reading that centers on how persons can be "*legally* under an order of imprisonment." Use of "legally" departs from and violates the plain words of Section 10(A). Judge Holdridge's partial dissent showcases both the unworkability and ambiguity of the

Opinion's interpretation: when exactly would a probationer's "order of imprisonment" begin or end if "legally" their sentence has been suspended?

Moreover, the Opinion's contention that parolees and probationers are somehow still in a "custodial setting" is in error. The Opinion also fails to resolve any ambiguity in favor of expanded access to the franchise, nor does the Opinion give effect to the intent of the drafters and voters who adopted Section 10(A) in 1974. Finally, the Opinion's reading also results in an impermissible redundancy between Section 20 and Section 10(A), which cannot be resolved in one footnote where the Court of Appeal suggests *sua sponte* that when Louisiana voters in 1998 decided to add a constitutional provision allowing people with felony convictions to run for office, they also somehow also decided that parolees and probationers could be disenfranchised under both Section 10(A) and Section 20. Review is necessary to properly construe Section 10(A) as Section 20's exception.

II. Review is also warranted on the Opinion's treatment of strict scrutiny. After ruling against VOTE on the meaning of Section 10(A), the Court of Appeal then failed to place the burden on the Secretary to justify La. R.S. 18:2(8) and La. R.S. 18:102(A)(1) under strict scrutiny as is required when a law denies or restricts a fundamental constitutional right. Instead, the Opinion dismissed strict scrutiny in one sentence: "[E]ven if we were to apply a strict scrutiny analysis . . . there is no question that the State has a compelling interest in protecting the integrity of voter registration rolls and in regulating convicted felons still under the State's supervision." *Id.* at 8-9. There are three issues with this dismissal. First, the Court of Appeal fails to offer any analysis whatsoever of those two purported state interests, which constitutes error. Second, the Opinion's suggestion that Appellants' status as parolees and probationers is a compelling interest that justifies the denial of their right to vote is an egregious error. Status alone cannot justify the deprivation of the right to vote as there are no public safety concerns, as there were in *Draughter's* examination of a firearms regulation for probationers and parolees. Indeed, the opposite is true here: voting makes Louisiana safer. *Draughter* should be limited to its facts. Finally, the Opinion fails to identify any evidence proffered by the Secretary to demonstrate how disenfranchising parolees and probationers affects the integrity of voting rolls.

There is no legitimate, much less compelling, reason for disfranchising Appellants. Even if a legitimate interest could be identified, a blanket voting ban against people under every

conceivable type of supervision is overinclusive. The Opinion also improperly excludes citizens with felony convictions from the Constitution's fundamental right to vote, for whom voting *may* be suspended. The Opinion's misstatement as to the permissive nature of Section 10(A) renders it in conflict with *Fox*. References to federal case law here, including *Richardson v. Ramirez*, 418 U.S. 24 (1974), is a red herring. Federal law is inapposite, because, *inter alia*, the Louisiana Constitution is more protective of the right to vote than its federal counterpart.

III. The court erred in determining that the question of class certification is moot. Writ should be granted because its determination is in conflict with longstanding Louisiana Supreme Court precedent favoring appeal of class certification decisions and review of class certification throughout the course of the litigation.

ARGUMENT

I. The Opinion's erroneous interpretation of Section 10(A) merits review.

A granting of writ is merited here because the First Circuit's interpretation of Section 10(A) is inconsistent with well-established canons of construction. The starting point for construction, of course, is "the language of the constitution itself." *Ocean Energy, Inc. v. Plaquemines Par. Gov't*, 04-0066 (La. 07/06/04); 880 So.2d 1, 7 (citations omitted). "Unequivocal constitutional provisions are not subject to judicial construction." *Id.* (citations omitted). Additionally, provisions should be read in context and as a whole, "with full meaning given to the express language throughout the Constitution." *Chehardy v. Democratic Exec. Comm*., 259 La. 45, 48, 249 So.2d 196, 198 (1971).

If the language is ambiguous, "determination of the intent of the provision becomes necessary." *In re Office of Chief Justice*, 2012-1342 (La. 10/16/12); 101 So.3d 9, 15. In ascertaining such intent, any doubt regarding the scope of the fundamental constitutional right should be resolved in favor of greater access to the right. *See, Title Research Corp. v. Rausch*, 450 So.2d 933, 936 (La. 1984) (the fundamental constitutional "right of the public to have access to the public records . . . must be construed liberally in favor of free and unrestricted access to the records"). Second, the intent of the voters who adopted the provision is paramount. *See Ocean Energy, Inc.*, 880 So.2d at 7. Finally, "the object sought to be accomplished . . . in light of the history of times" may be also considered. *Id.* (citation omitted). The Opinion's

misinterpretation of Section 10(A) runs contrary to these and other principles of interpretation and writ should be granted under La. S. Ct. Rule X, § 1(a)(2), and (4).

A. The Opinion errs by departing from Section 10(A)'s plain meaning.

1. A person who is "under an order of imprisonment" is in prison; the Opinion's overly legalistic interpretation violates this plain meaning.

In interpreting Section 10(A), the Opinion errs by rejecting the "natural and popular" meaning of "under an order of imprisonment" for an overly legalistic and technical definition. Op at 8-10. In Louisiana, there is a "presumption of constitutional interpretation in favor of the natural and popular meanings in which words are usually understood by the people who adopt them." *Ocean Energy, Inc.* 880 So. 2d at 8 (citations omitted); *see also Caddo-Shreveport Sales v. Office of Motor Vehicles ex rel. The Dep't of Pub. Safety & Corr*., 97-2233 (La. 04/14/98); 710 So.2d 776, 780. A layperson would understand an individual who is "under an order of imprisonment" as one who is incarcerated.[20] A layperson would not associate Section 10(A) with parolees or probationers because not a single word in five-word phrase "under an order of imprisonment" is synonymous with the suspension of sentence, supervision, parole or probation.

Instead of determining the lay understanding Section 10(A), the majority takes an overly legalistic approach, focusing on how a person "can *legally* be under an order of imprisonment without being physically in prison." Op. at 10 (double emphasis added). This expansion of the suspension of the right to vote to those who are "legally under an order of imprisonment" departs from the plain meaning and is unworkable. As Judge Holdridge correctly asks in his dissent:

> [U]nder a suspended sentence, does the 'order of imprisonment' begin when the sentence is imposed and the defendant is placed on probation or does the 'order of imprisonment' begin when the defendant's probation is revoked and the trial court sentences the defendant to a prison term for violating his probation.

[20] As argued and summarily ignored below, dictionary definitions support VOTE's interpretation and serve as important indicators of plain and generally understood meaning. An "order" is "a specific rule, regulation, or authoritative direction: command," Merriam-Webster's Online Dictionary (2018), https://www.merriam-webster.com/dictionary/order. It also means "a command of a court or judge." Dictionary.com (2018), http://www.dictionary.com/browse/order?s=t. "Suspend" is "to set aside or make temporarily inoperative." *Id.* "Imprisonment" is "the act of imprisoning or the state of being imprisoned: Confinement. Restraint." Webster's Third New International Dictionary of the English Language (1986). "Under" means "subject to the authority, direction, or supervision of" and "in accordance with." Dictionary.com (2018). Taken together, a layperson would likely understand the relevant portions of Section 10(A) to mean: every citizen of the state shall have the right to vote, except that this right may be temporarily set aside while a person is commanded or ordered by a court or judge to be in prison.

Op., partial dissent. After all, a person under a suspended sentence may not be "legally" under sentence as the execution of that sentence has been suspended pursuant to La. C.Cr.P. art. 893(A)(1)(a). Such a person may still be in the "legal custody" of the State and subject to the trial court's control, but "legally," an operative "order of imprisonment" may not exist.[21] Moreover, as Judge Holdridge again correctly points out, what happens if a probationer is sentenced to prison for violating the terms of their probation and this second "order of imprisonment" imposes less prison time than the original suspended sentence? Which "order" would govern on voting rights? The Opinion's expansion to include those "legally under an order of imprisonment" is wholly unworkable and merits review.

2. The Opinion's determination that parolees and probationers are "still in a 'custodial' setting" is baseless.

The Opinion also errs in relying on *Draughter*, 130 So.3d at 855 to support its conclusion that parolees and probationers are "still in a 'custodial' setting under order of imprisonment, as they are still serving a portion of a criminal sentence." *See* Op. at 8. *Draughter* provides no support for the proposition that people on probation or parole are somehow still in a "custodial' setting" *because* they are "still serving a portion of their criminal sentence." 130 So.3d at 855 (internal citations omitted). Indeed, parolees and probationers are in the opposite physical setting as "inmates in a custodial setting." Without *Draughter*, the Opinion's entire plain meaning analysis is unsupported by any legal authority, rendering it erroneous and subject to correction upon this Court's review.

3. Review is warranted to restore Section 10(A) to its plain meaning.

Review is necessary to restore the "natural and popular" meaning of the plain words of Section 10(A) – that the right to vote may be suspended only when a person is in prison. An "order of imprisonment" should not be equated with "criminal sentence," much less the definition set forth in La. R.S. 18:2(8). "Order of imprisonment" is not regularly used in

[21] Any expansion of Section 10(A) to include those in "legal custody" also violates the plain meaning, is self-contradictory, and unreasonable. After all, probationers sentenced to "simple probation," where the imposition of sentence has been suspended altogether are also in "legal custody." Their legal status is no different from other probationers and parolees. *See* La. C.Cr.P. art. 893(A)(1)(a); La. C.Cr. P. art. 895. Yet it appears they can vote. *See* La. Att'y Gen. Op. No. 1989-456 (Mar. 8, 1990). Moreover, as set forth above, Professor Hargrave argued strongly against use of the "fiction of legal custody." *See*, *supra*, at 9.

Louisiana criminal law – the term appears zero times in the Code of Criminal Procedure.[22] It should be understood as the self-executing custodial sentence where an individual is committed "not to a particular institution, but to the custody of [the DOC]." *State v. Bradley*, 99-364 (La. App. 3 Cir. 11/3/99); 746 So.2d 263, 267 (citations omitted).

VOTE's plain reading is consistent with Louisiana's criminal code. Parole and probation are alternatives to and legally distinct from incarceration. *See, e.g.,* La. R.S. 15:529.1(c) ("In computing the intervals of time . . . any period of *parole, probation, or incarceration* by a person in a penal institution . . . shall not be included) (emphasis added); *Parkerson v. Lynn*, 556 So.2d 91, 95 (La. App. 1 Cir. 1989). Accordingly, individuals placed on parole or probation in lieu of incarceration are not "under orders of imprisonment." Although they are under the *threat* of future imprisonment, they are not under self-executing custodial sentences. Rather, they must take *affirmative steps* (volitional acts or omissions) and are entitled to a due process hearing and an additional order to trigger the custodial sentence and a return to physical custody. *See* La. R.S. 15:574.7; La. R.S. 15:574.9; La. C.Cr. P. art. 900. This distinguishes their legal status from those who are incarcerated. *See Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (due process rights of parolees); *Gagnon v. Scarpelli*, 411 U.S. 778, (1973) (due process rights of probationers). Furthermore, parolees are under orders of the Parole Board, which are orders of freedom – new orders, overriding their "orders of imprisonment." If they were not under orders of the Parole Board, then the Parole Board would not have said authority, nor the authority to revoke parole orders. *See, supra*, at 7.

Parolees and probationers thus are distinguishable from prison escapees. Once apprehended by the authorities, escapees are automatically re-committed to physical custody; no additional affirmative steps, hearings or additional "orders" are needed.[23] To read otherwise has troubling implications.[24] Review thus is warranted to restore Section 10(A) to its plain words.

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[22] In contrast, the words "order of imprisonment" appear in at least ten Election Code provisions: La. R.S. 18:176; La. R.S. 18:104; La. R.S. 18:2; La. R.S. 18:102; La. R.S. 18:171; La. R.S. 18:171.1; La. R.S. 18:177; La. R.S. 18:177.1; La. R.S. 18:451; La. R.S. 18:461; La. R.S. 18:463; La. R.S. 18:1303. It also appears in the Trade and Commerce Code: La. R.S. 51:944.

[23] *See State v. Stramiello*, 392 So.2d 425, 427 (La. 1980) (distinguishing between the escapee's "present sentence and "any sentence he might receive for the pending charge of simple escape").

[24] Under the Opinion's interpretation, all people – not just parolees and probationers – are "subject to custodial supervision at any time." *See State ex rel. Talbert v. State*, 99-2899 (La. App. 1 Cir. 6/23/00), 814 So.2d 2, 4. Arguably then, anyone can be "under an order of imprisonment," which is an "absurd result." *See* Op. at 8-9.

B. The Opinion reads Section 10(A)'s unique language out of the Constitution.

In Louisiana, "courts should avoid a construction which would render any portion of the constitution meaningless." *Succession of Lauga,* 624 So.2d 1156, 1166 (La. 1993); *Kungys v. United States*, 485 U.S. 759, 778 (1988) ("It is a 'cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant.'"). Review is necessary address the glaring knot tied by the Opinion: there are now two differently worded provisions – Section 10(A) and Section 20 – permitting the disenfranchisement of the same class of persons.

Principles of construction require the interpretation of Section 10(A) as Section 20's exception, which harmonizes them. *See Arrata v. La. Stadium & Exposition Dist.,* 254 La. 579, 609-10, 225 So.2d 362, 372-73 (1969); *Perschall v. State*, 96-0322 (La. 7/1/97); 697 So.2d 240, 255. Section 20 is clearly the general provision. It wholly subsumes Section 10(A), the more specific provision governing the voting rights of people with felony convictions. Indeed, the relationship between the two – first identified over 40 years ago by Professor Lee Hargrave, is the textbook definition of conflict. *See, supra*, at 5. A writ of review is required to give effect to Section 10(A)'s "under an order of imprisonment" as a "meaningful variation" from Section 20 by construing Section 10(A) as Section 20's exception. *See Chehardy v. Democratic Exec. Comm.*, 259 La. 45, 48, 249 So.2d 196, 198 (1971); *Serv. Steel Warehouse Co., L.P. v. McDonnel Grp*., LLC, 2016 U.S. Dist. LEXIS 3032, at *15 (E.D. La. Jan. 11, 2016).

The Opinion concedes Section 10(A) is the more specific provision, but suggests – erroneously – that the people of Louisiana had a chance to change Section 10 in 1998, but left it alone, signaling that they could live with the redundancy. Op. at 9, n. 4. This inference based on voter inaction on Section 10(A), however, is not supported by the two cases cited in the Opinion. *See* Op. at 9 (citing *Malone v. Shyne*, 2006-2190 (La. 9/13/06), 937 So.2d 343; *State ex. rel. Moreau v. Castillo*, 2007-1865 (La. App. 1st Cir. 9/24/07), 971 So.2d 1081, 1083, writ denied, 2007-1900 (La. 9/28/07), 964 So.2d 349, cert. denied, 552 U.S. 1110, 128 S.Ct. 896, 169 L.Ed.2d 748 (2008)). Both cases only address Section 10(B). There is no mention of Section 10(A), the relevant provision in this action. *Malone* holds that Section 10(B) supersedes La. Const. art. IV, § 5(E) on the issue of holding public office. 937 So.2d at 352. Similarly, *Castillo* addresses only Section 10(B). 971 So.2d at 1083.

Moreover, even a cursory glance at the 1998 history of Section 10(A) demonstrates that the ballot language addressed Section 10(B) only. *See, supra,* at 7-8; *see also* La. Const. art. III, § 15(A) (barring dual objects). Voters were not even presented with any question regarding Section 10(A), much less whether probationers and parolees should be disenfranchised. This weighs heavily against the Court of Appeal's theory that when voters added a provision to allow people with felony convictions to run for office, they also somehow sanctioned the disenfranchisement of parolees and probationers. *See, e.g., Aaron v. SEC*, 446 U.S. 680, 694 n.11 (1980)(the failure of Congress to overturn an agency interpretation in legislation that "principally addressed" other matters "falls far short of providing a basis to support a construction of [of a statute] so clearly at odds with its plain meaning and legislative history") (citation omitted).

Notably, this inference based on voter inaction or implicit voter approval was not argued by the Secretary. The Court of Appeal put the history of Section 10(A) at issue by advancing this argument *sua sponte*. The question of whether voter inaction in 1998 can overcome the Section 20 and Section 10(A) conflict merits a granting of a writ of review.

C. Section 10(A) is susceptible of different meanings.

1. There *is* ambiguity.

The Opinion finds it "clear" that a person "'under an order of imprisonment' includes time spent on probation and parole." Op. at 10. The Opinion is "certain" of the meaning. *Id.* at 9. VOTE likewise contends that the plain meaning is unequivocal: a person who is "under an order of imprisonment" is in prison.

In the alternative, VOTE argues the meaning may be far from clear. Indeed, even the panel of learned judges from the First Circuit Court of Appeal could not agree on the meaning. Judge Holdridge included only parolees in his interpretation, and argued for remand for a full trial on questions related to probationers under suspended sentences. *See, supra*, 13-16; Op., partial dissent. An interpretation that includes only parolees could be deemed reasonable. Indeed, "[t]he U.S. Supreme Court has observed that 'parole is more akin to imprisonment than probation is to imprisonment." *Danielson v. Dennis*, 139 P.3d 688, 693 (Colo. 2006) (citing *Samson v. California*, 126 S. Ct. 2193, 2194 (2006)).

The Opinion thus errs in *not* finding that the Section 10(A) is "susceptible of different meanings." *See* La. Civ. Code § 10. The history of the provision demonstrates that the meaning

has been far from clear from inception. The Attorney General has issued multiple conflicting Opinions, and the Legislature had to pass three Acts to articulate a definition. *See, supra,* at 5-10.

The Opinion does state that its interpretation is "consistent with the purpose of the law," but it then fails to articulate that purpose. *See* Op. at 8. The Opinion also fails to apply long-standing canons of constitutional construction that apply when a court interprets ambiguous constitutional text. All of these errors warrant review.

2. The Opinion fails to consider the intent of the framers and voters and the historical context of Section 10(A).

"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." *Ocean Energy, Inc*., 880 So.2d at 7 (citation omitted). Voters' intent, however, is difficult to ascertain with precision. *Arrata*, 225 So.3d at 372-73. Courts thus revert to the "natural and popular meaning." *Ocean Energy,* 880 So.2d at 8. Courts consider what "the average person, upon reading the proposed amendment, had in mind." *La. Pub. Facilities Auth. v. All Taxpayers*, 2003-2738 (La. App. 1 Cir. 12/23/03); 868 So.2d 124, 136.

Like the layperson, the average voter in 1974 would have understood "under an order of imprisonment" as actual incarceration. The average voter would not have associated it, as Opinion did, with the overly legalistic and technical definition. Indeed, "surviving materials indicate that voters would have had almost no access to information suggesting that the constitution would prevent parolees from voting. Quite the contrary, available information either implicitly or explicitly stated that Section 10(A) enfranchised ex-offenders upon their release from prison."[25]

Likewise, historical records demonstrate that the Constitutional Convention of 1973 sought to establish a right to vote upon release from prison. Records from the Committee on the

[25] Historians' Brief at 18-25 (describing a selection of surviving historical materials); *see also* Supp. App., Ex. 3, Decision '74 . . . A Study of the Proposed Constitution, January 1974 (Shreveport: Louisiana League of Women Voters, 1974), 2; Supp. App., Ex. 4, Jack Wardlaw, "Bishops Hail CC-3 Work, Bill of Rights," States-Item 7 February 1974, in folder 22, box 55, Series II, Osborne Papers, ULL ("We are advised by counsel that the Bill of Rights certainly is the most advanced in the South and possibly the nation."); Supp. App., Ex. 5,"LEA Executive Council Endorses Constitution," Louisiana Weekly, 13 April 1974, p. 1, 3; Supp. App., Ex. 6, "9th Ward Voters League Endorses New Constitution," Louisiana Weekly, 20 April 1974, p. 2; Supp. App., Ex. 7, "We Endorse the New Constitution," Louisiana Weekly, 20 April 1974, section 2, p. 6.

Bill of Rights and Elections ("CBRE"), the committee that drafted Section 10(A) and was advised by Professor Hargrave, strongly reflect this sentiment. For example, the CBRE modeled its draft Section 10(A) after the Illinois Constitution, which a CBRE research staff memorandum described would "restore political rights as soon as the *convicted person is released from confinement*."[26] Another Convention committee noted that the CBRE "is considering a proposal which would restore the right to vote to a convict *upon release from the penitentiary*."[27] Months later, the CBRE considered this language to be a "repetition" of the language in proposed Section 10(A): "Every person who is a citizen . . . shall be entitled to register and vote . . . However, no person shall be permitted to exercise these rights *while confined to any jail or prison*."[28] Both the framers and voters' intent support VOTE's reading of the plain meaning.[29] The Opinion errs by entirely disregarding this intent as well as the historical context as a whole.[30]

3. The Opinion errors in failing to construe any ambiguity in favor of access to the right to vote.

The Opinion also errs in failing to apply the presumption in favor of the fundamental right to vote to resolve any ambiguity. The right to vote is fundamental in Louisiana. *See Adkins v. Huckabay*, 1999-3605, p. 7 (La. 2/25/00); 755 So.2d 206, 211 ("The right to vote is fundamental to Louisiana citizens."); *Denham Springs Econ. Dev. Dist. v. All Taxpayers, Prop. Owners*, 2004-1674, p. 14 (La. 2/4/05); 894 So.2d 325, 335; *Fox*, 328 So.2d at 174. It is well established that any doubt about the scope of a fundamental constitutional right is to be liberally construed, and any restrictions on such rights be narrowly construed. *See, e.g., Title Research*

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[26] Records of the Louisiana Constitutional Convention of 1973 ("CC73 Records"), Committee Documents, Vol. X, pp. 88-89.

[27] CC73 Records, Committee Documents, Vol. XIII, p. 329.

[28] CC73 Records, Committee Documents, Vol. X, pp. 19, 73.

[29] Groups such as Council for a New State Constitution, "representing over thirty religious and civic organizations from the greater New Orleans area," urged the 1973 Constitutional Convention to ensure that "the privileges of citizenship shall not be denied to any person because of prior criminal record, *excepting only those persons presently in . . . penitentiaries of the State*." Historians' Brief at 14-17 (citing Council for a New State Constitution Resolution, [n.d.], Folder 18, Box 6, Community Relations Council of Greater New Orleans Records, 1965-1982, Amistad Research Center); Supp. App., Ex. 8. Another group, Community Action for Corrections, wrote the Judiciary Committee, requesting that "rights be restored when a person is released from prison. *Specifically, we refer to the right to vote*." CC73 Records: Committee Documents, Vol. XI, p. 313.

[30] As the trial court referenced, Delegate Roy also made statements on the floor of the Convention during Day 44. *See, supra*, at 12. Arguably, however, Delegate Roy's statements pertain only to those on "probation or suspension" and not parolees. CC73 Records: Verbatim Transcripts, Vol. VII, pp. 1203-1204. Delegate "Woody" Jenkins statements should take into account his erroneous declaration that Section 10(A) disenfranchises misdemeanants. CC73 Records: Verbatim Transcripts, Vol. VII at 1689-90.

Corp., 450 So.2d at 936; *Block v. Fitts*, 250 So.2d 738 (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."); *In re Matter Under Investigation*, 2007-1853 (La. 07/01/09), 15 So.3d 972. The Opinion fails to apply this presumption to resolve any doubt about the meaning of Section 10(A), meriting review.

D. The Opinion errs by failing to adopt this Court's approach in *Crothers v. Jones,* which is protective of the fundamental right to vote.

The Opinion also fails to interpret Section 10(A) under the approach set forth in *Crothers v. Jones*, 239 La. 800, 822, 120 So.2d 248 (La. 1960), which protected Louisianans with criminal convictions from legislative attempts to narrow their access to the franchise. In strikingly similar factual circumstances, this Court in *Crothers* evaluated the constitutionality of a statute that expanded the scope of a disenfranchisement provision in the 1921 Constitution. *Id.* This Court invalidated the statute, stating: "We do not believe that it was within the province of the Legislature to *interpret* Section 6 . . . ." *Id.* at 823.[31] In *Crothers*, as here, the statutes at issue did more than define or clarify the terms in constitutional right to vote provision. There, as here, the Legislature altered the breadth of the constitutional right, which it cannot do by statute alone. The Opinion's failure to apply this more protective interpretative approach is in error.

II. Review is necessary to protect the fundamental constitutional right to vote of parolees and probationers with the highest level of judicial review.

The Opinion's failures regarding strict scrutiny warrant review under La. S. Ct. Rule X, § 1(a)(1), (2), and (4). Writ is appropriate to determine and apply the proper standard of review.

A. The Opinion's failure to apply strict scrutiny warrants review.

As an initial matter, the Opinion's placement of the "heavy burden" of proof on VOTE is in error. Op. at 7, 10. After ruling against VOTE on the meaning of Section 10(A), the Court of Appeal should have shifted the burden to the Secretary to justify La. R.S. 18:2(8) and La. R.S. 18:102(A)(1) under strict scrutiny. Its failure to do so warrants review.

1. Strict scrutiny is the applicable standard of review.

Louisiana courts apply strict scrutiny to statutory infringements on fundamental rights. *See Hondroulis v. Schumacher*, 553 So. 2d 398, 415 (La. 1989) (applying strict scrutiny to a

[31] The Court also noted this "pertinent observation" made by counsel: "In the first place the Act . . . is probably unconstitutional on its face in that it attempts to engraft upon Article 8 of the Constitution of Louisiana a new and additional restriction upon the right of franchise without benefit of an amendment to the Constitution itself." *Id.* at 823, n. 7.

regulation burdening the Louisiana right to privacy); *In re Warner,* 2005-1303 (La. 04/17/09); 21 So. 3d 218, 246 (applying strict scrutiny to a content-based regulation).

The Opinion acknowledges that voting is a fundamental right is Louisiana. Op. at 8. Indeed, it is. *See, supra,* at 20-21. As such, Louisiana courts have long recognized that restrictions on the fundamental right to vote should be subjected to strict scrutiny. *Louisiana Voter Registration/Educ. Crusade, Inc. v. Officer of Registrar of Voters for Orleans Par*., 511 So.2d 1190, 1191-92 (La. App. 4 Cir. 1987) (citing *Southland Corp. v. Corp. v. Collector of Rev. for Louisiana*, 321 So.2d 501 (La. 1975). In *Southland*, this Court resolved an equal protection claim without applying strict scrutiny, but nonetheless observed in dicta that "strict judicial scrutiny [is] required where legislative judgments interfere with such fundamental constitutional civil and political rights as race, sex, voter qualifications and the like." *Southland,* 321 So.2d at 505-506 (citations omitted) (emphasis added). The Fourth Circuit Court of Appeal later relied on *Southland* in recognizing that acts of a registrar of voters "*must* be subjected to strict scrutiny insofar as they affect the fundamental right to vote." *La. Voter Registration/Education Crusade, Inc.*, 511 So. 2d at 1194 (double emphasis added).

Louisiana thus is more protective of the right to vote than the federal constitution, which lacks an affirmative and explicit right to vote.[32] As such, the Opinion's reliance on federal cases, namely, *Richardson v. Ramirez,* 418 U.S. 24, 54 (1974), to resolve the issues in this case is also in error. *See* Op. at 8. The Opinion's reference to *Richardson* is a red herring. Because the majority in *Richardson* held that states may implement disenfranchisement schemes without running afoul of the federal equal protection clause, *Richardson*'s holding has no bearing here. *See id.* at 55-56. Louisiana's Constitution confers stronger protection to the right to vote than its federal counterpart. Other states have found their state constitutions similarly more protective of the right to vote and apply strict scrutiny. *See, e.g., Weinschenk v. State*, 203 S.W.3d 201, 211-212 (Mo. 2006) ("[d]ue to the more expansive and concrete protections of the right to vote under

[32] This Court in *Crothers* recognized the lack of a federal constitutional right to vote: "[t]he federal Constitution does not confer the right to vote upon any person, not even upon those who are citizens of the United States or of a state . . . ." 120 So. 2d at 816 (citation omitted). In contrast, this Court discussed the state's explicit grant of voting rights: "The state, in the exercise of its sovereignty, can confer the right to vote, can make an alien an elector; and electoral power, when thus bestowed and exercised, becomes one of the most important duties, and the highest and proudest privileges of citizenship." 120 So. 2d at 252.

the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart."); *Keller v. Smith*, 553 P.2d 1002, 1008 (Mont. 1976); *Applewhite v. Commonwealth*, 54 A.3d 1 (2012).

2. The Opinion's attempts to avoid strict scrutiny should be reviewed.

a. The right to vote of people with felony convictions is not "specifically limited" by the Louisiana Constitution.

The Opinion errs in excluding people with felony convictions from the protections of the Constitution's fundamental right to vote. The Opinion suggests that people with felony convictions have a right to vote that is somehow impaired by incorrectly stating that the "Louisiana Constitution specifically limits the fundamental right to vote while convicted felons are under an order of imprisonment." Op. at 8. The Louisiana Constitution does no such thing; it only *permits* the limitation. *See Fox*, 328 So.2d at 174 (Section 10(A) is "permissive" and not "self-operative."). The Louisiana Constitution does not *require* any limitation.

The right to vote is fundamental to all citizens in Louisiana irrespective of their records of prior convictions. *Fox*, 328 So.2d at 174 (right to vote is not "automatically forfeited" upon conviction); *see also Adkins v. Huckabay*, 33593 (La. App. 2 Cir. 12/23/99); 749 So.2d 900, 905, *rev on other grounds*, *Adkins v. Huckabay*, 99-3605 (La. 2/25/00); 755 So.2d 206 ("[R.S. La. 18:102] is not one which immediately suspends the right to vote subject to reinstatement by showing cause within a 21-day period"). The Opinion's misstatement as to nature of Section 10(A) is in error and in conflict with *Fox,* 328 So.2d at 174. Review thus is merited under La. S. Ct. Rule X, § 1(a)(1), (2), and (4).

B. Review is necessary to identify and apply the proper level of scrutiny to the fundamental right to vote.

1. There is no valid, much less compelling, state interest in disenfranchising parolees and probationers.

Not only does the Court of Appeal err in failing to apply strict scrutiny, it further errs in failing to assess the State's purported interest in La. R.S. 18:2(8) and La. R.S. 18:102(A)(1) under any constitutional standard. The Opinion surmises "even if we were to apply strict scrutiny, there is no question that the State has a compelling interest . . . in regulating convicted felons still under the State's supervision." Op. at 8-9. First, the Opinion does not offer any analysis, a single citation or any source in support of why the state proffered a compelling

interest that justifies the deprivation of the right to vote. The Opinion offers no explanation or analysis of why there is "no question" that the state's interests are even valid, much less compelling. The Court of Appeal's failure to offer any assessment of the proffered state interests belies its own statement purporting to apply strict scrutiny. Indeed, the abject absence of any assessment of the state interest, under any standard, is in error, meriting review.

Had the Court below undertaken this analysis, it would have shown that La. R.S. 18:2(8) and La. R.S. 18:102(A)(1) are not rationally related to a valid interest, much less narrowly tailored to a compelling state interest. The status of Appellants as parolees and probationers alone cannot serve as a compelling state interest that justifies the deprivation of the right to vote. In *Draughter*, this Court relied on this status to justify a gun regulation: "*The possession of a firearm is inconsistent with that status* and would subject the individuals tasked with their supervision to an untenable safety risk." *Draughter*, 130 So.3d at 867. But here, their status as probationers and parolees has no bearing on the right to vote as it does with the right to bear arms because voting does not invoke safety risks. Indeed, the opposite is true.[33] *Draughter*'s use of status should not be extended. *See State v. Eberhardt*, 2013-2306 (La. 07/01/14); 145 So. 3d 377, 381(citing *State in the Interest of J.M.*, 156 So.3d 1161, 860 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (stating that in the strict scrutiny analysis "context matters")).

The Opinion also asserts that the State may have a "compelling interest in protecting the integrity of voter registration rolls." Op. at 8-9. This statement is baseless. The Opinion fails to identify any evidence in the record showing that the Secretary has asserted or demonstrated any nexus between the deprivation of the right to vote for those on probation and parole and the Secretary's asserted interest. The Opinion does not reference evidence proffered by the Secretary about current problems with the integrity of voting rolls and how a blanket ban on parolee and probationer voting protects their integrity. Indeed, excluding tens of thousands of people from the voting rolls may actually undermine the integrity of the voting rolls.

2. Blanket disenfranchisement is overinclusive.

The Opinion also fails to acknowledge the second prong of the constitutional assessment, neglecting to even mention whether the challenged statutes are narrowly tailored to advance the

[33] *See, supra*, APPA Brief at *supra*, at 5-6, n. 5.

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State's interests. Barring all people under a "sentence of confinement," irrespective of supervision, suspension, parole or probation is not narrowly tailored and overinclusive.

The record shows that the Secretary has not attempted to meet its burden under any prong of any standard of judicial review. A writ is appropriate to properly apply the highest standard of judicial review to the State's denial of the right to vote to parolees and probationers.

C. The scope of a constitutional right and whether it survives strict scrutiny is are not matters best left for the Legislature.

The Opinion next punts to the Legislature: "Any further debate on the issue is a policy matter best left for the legislature, which has already made its intent clear on this matter when it enacted the implementing statutes, La. R.S. 18:2(8) and La. R.S. 102(A)(1)." Op. at 8-9. This is also in error. First, the intent of the Legislature is not at issue here. If anything, the intent of the Legislature illustrates the ambiguity of Section 10(A). The first issue here is scope of the grant of power given to the State to disenfranchise people "under order of imprisonment." The Legislature cannot determine this scope; it may only act within the scope. *Crothers,* 120 So.2d 248 (La. 1960). The second issue is the standard of judicial review. Review is necessary for the judicial branch of Louisiana to properly address both of the issues presented. *See Bourgeois v. A.P. Green Indus.,* Inc., 00-1528 n.8 (La. 04/03/01); 783 So. 2d 1251, 1258 ("Within the judicial department, this court is the final arbiter of the meaning of the state constitution and laws.").

III. Review is necessary to preserve class certification

The Court of Appeal erred in determining that the question of class certification is moot. Writ should be granted under La. S. Ct. Rule X, § 1(a)(1) and (4) because its determination is in conflict with longstanding Louisiana precedent that treats class certification issues liberally throughout the course of the litigation. To the extent that this court grants the writ in this case which results in a remand to the trial court, class certification issues should be preserved.

CONCLUSION

WHEREFORE, for the foregoing reasons, appellants respectfully pray that this Court grant a writ of certiorari or review pursuant to La. S. Ct. Rule X, § 1(a)(1), (2), and (4).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has 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 8th day of June, 2018.

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