

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

COUNTY OF WAKE

19-CV-15941

COMMUNITY SUCCESS INITIATIVE;)
 JUSTICE SERVED NC, INC.; WASH AWAY)
 UNEMPLOYMENT; NORTH CAROLINA)
 STATE CONFERENCE OF THE NAACP;)
 TIMOTHY LOCKLEAR; DRAKARUS JONES;)
 SUSAN MARION; HENRY HARRISON;)
 ASHLEY CAHOON; SHAKITA NORMAN,)
 Plaintiffs,)

v.)

TIMOTHY K. MOORE, IN HIS OFFICIAL)
 CAPACITY AS SPEAKER OF THE NORTH)
 CAROLINA HOUSE OF REPRESENTATIVES;)
 PHILIP E. BERGER, IN HIS OFFICIAL)
 CAPACITY AS PRESIDENT PRO TEMPORE)
 OF THE NORTH CAROLINA SENATE; THE)
 NORTH CAROLINA STATE BOARD OF)
 ELECTIONS; DAMON CIRCOSTA, IN HIS)
 OFFICIAL CAPACITY AS CHAIRMAN OF)
 THE NORTH CAROLINA STATE BOARD OF)
 ELECTIONS; STELLA ANDERSON, IN HER)
 OFFICIAL CAPACITY AS SECRETARY OF)
 THE NORTH CAROLINA STATE BOARD OF)
 ELECTIONS; KENNETH RAYMOND, IN HIS)
 OFFICIAL CAPACITY AS MEMBER OF THE)
 NORTH CAROLINA STATE BOARD OF)
 ELECTIONS; JEFF CARMON, IN HIS)
 OFFICIAL CAPACITY AS MEMBER OF THE)
 NORTH CAROLINA STATE BOARD OF)
 ELECTIONS; DAVID C. BLACK, IN HIS)
 OFFICIAL CAPACITY AS MEMBER OF THE)
 NORTH CAROLINA STATE BOARD OF)
 ELECTIONS,)
 Defendants.)

[PROPOSED]
BRIEF OF AMICI CURIAE,
NORTH CAROLINA JUSTICE
CENTER AND DOWN HOME NC

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ARGUMENT

North Carolina is one of twenty-one states that enforces felony disenfranchisement laws by making it a felony to register or vote while serving an active sentence, probation or parole for a felony conviction. National Conference of State Legislators, Felon Voting Rights, October 14, 2019, *available at* <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>. This legal scheme has long served to disenfranchise African-Americans from voting in North Carolina and across the United States, not only because it actively bars this population from voting but also because its enforcement, including prosecutions under N.C. Gen. Stat. §163-275(5), instills fear in eligible voters and discourages them from exercising their fundamental right to vote.

The anti-democratic effect of voter prosecutions is not academic. Neither the legal precedent nor the statistics can adequately convey the harrowing impact that has been visited on voters in the state of North Carolina and throughout the nation. A pervasive sense of fear and lack of clarity has been exacerbated by the prosecutions that have occurred across the state, chilling the voting activity of many members of society. To document the full impact of the chilling effect thus requires considering the issue through multiple lenses.

First, the personal experience of voters themselves reflect that certain people, primarily African-American voters are discouraged from attempting to exercise their fundamental right to vote because of the fear caused by the disenfranchisement laws and their enforcement. This includes those with no felony records. Second, this fear is rational given that the felony disenfranchisement laws are unduly harsh and punitive and their enforcement serves the goal of voter suppression rather than election integrity. Lastly, the chilling effect of felony

disenfranchisement laws and their enforcement reflected in individual's personal narratives is also borne out by the evidence. Felony disenfranchisement laws and their enforcement harm African-American communities and prevent the full participation of their eligible voters.

Accordingly, the Court should rule in favor of the plaintiffs in this matter.

I. The Personal Effect of Prosecutions on African-American North Carolinians.

A. Affected Voters

Before any prosecution under the felony disenfranchisement scheme becomes a data point, it is first a personal tragedy. People who have been prosecuted under N.C. Gen. Stat. § 163-275(5) are working to reintegrate into the community and support themselves and their families. Prosecution and conviction of these voters inhibits these positive actions. People who are prosecuted for voting when they thought they were eligible express feeling permanently excluded from the democratic process from that point onward, effectively extending any sentence they receive in perpetuity.

For example, Taranta Holman, a citizen of Alamance County who was prosecuted in 2017 for voting while on probation, was quoted in the news as stating: “[e]ven when I get this cleared up, I still won’t vote. That’s too much of a risk.” Jack Healy, *Arrested, Jailed, and Charged with a Felony. For Voting*, The New York Times (August 2, 2018), <https://www.nytimes.com/2018/08/02/us/arrested-voting-north-carolina.html>. Mr. Holman was one of the “Alamance 12,” a group of twelve North Carolinians in Alamance County who were prosecuted in 2018 for voting while on probation or parole in the 2016 election. Nine of the twelve are black. Mr. Holman was unaware¹ that he could not vote in the 2016 presidential

¹ The complexity of sentencing and lack of uniformity across probation offices in the state result in many people not getting the information they need once eligible to vote. *See* Division of Adult

election and went to the polls at the urging of his mother. *Id.* When his family told him about the warrant out for his arrest in the local newspaper, he thought it was a joke. Mr. Holman's resultant belief that voting is a "risk" reflects the harm inflicted by this type of prosecution and the longstanding effect of exclusion from civic society.

The fear instilled by felony disenfranchisement laws and the shadow that remains over a justice-involved person's life, is echoed in the story of Anthony Haith, another member of the Alamance 12. Mr. Haith's affidavit is appended hereto as Exhibit A. Mr. Haith was prosecuted in 2018 for voting in the 2016 election while on probation. Ex. A at paragraph 4. When he arrived at the polls and voted in 2016, he was directed to a polling station to fill out his ballot. Ex. A at paragraph 6. Mr. Haith stated, "No one told me that I could not vote." *Id.* When he was put on probation, Mr. Haith was informed of many things he was prohibited from doing, but voting was not one of them. Ex. A at paragraph 5. He was shocked when the police showed up to arrest him, stating, "I thought I was just exercising my right to vote and had no idea I was barred from doing so." Ex. A at paragraph 7. "Being prosecuted shook my faith in the process that people fought and died for me to be able to participate in." Ex. A at paragraph 8. Anthony remains fearful of voting until this day, recalling the feelings of standing before the judge and being treated "as if I had knowingly committed a grave wrong, no matter how much I told them that I was unaware of what I was doing." Ex. A at paragraph 10.

In a similar example, Lanisha Bratcher registered to vote in Hoke County during the March 2016 primary. Like Mr. Haith, nobody told her she could not vote when she was put on probation. Sam Levine, *A Black Woman Faces Prison Because of a Jim Crow-era Plan to*

Correction and Juvenile Justice, *Community Corrections Policy & Procedures*, North Carolina Department of Public Safety Division of Adult Correction and Juvenile Justice (April 2019), available at <https://files.nc.gov/ncdps/documents/files/Policy.pdf>.

'Protect White Voters', The Guardian (December 16, 2019, 6:00 PM), <https://www.theguardian.com/us-news/2019/dec/16/north-carolina-felony-vote-law-black-woman>. Later that year, she went to the polls after a dinner event put on by her church; she had no intention of “tricking anybody or being malicious in any kind of way” by voting. *Id.* Ms. Bratcher’s life was turned upside down by the felony voter conviction, and she ultimately ended up leaving her job, citing frustration at having to deal with the charges publicly, for something she never even intended to do. *Id.* She expressed apprehension at ever voting again, again demonstrating a feeling of permanent exclusion from this foundational right. *Id.* The legacy of felony disenfranchisement prosecutions aligns directly against the principles of democracy that the institution of voting purports to uphold

North Carolinians’ experiences of exclusion are echoed by the experiences of those prosecuted under similar laws in other states. For example, in Texas, Crystal Mason was arrested and charged with illegal voting in 2016 after casting a provisional ballot. Crystal Mason, *I was Arrested for Voting, but I won’t let the Government Intimidate Me*, The Washington Post (September 30, 2019, 5:26 PM), https://www.washingtonpost.com/opinions/i-was-arrested-for-voting-but-i-wont-let-the-government-intimidate-me/2019/09/30/7b6261b8-dfbf-11e9-8dc8-498eabc129a0_story.html. Ms. Mason was considered ineligible to vote because she was on federal supervised release for a previous tax fraud conviction. *Id.* Similar to the experiences of the North Carolina residents, no one had ever informed Ms. Mason that she could not vote. *Id.* Even though she was busy working to rebuild her life and support her children, she was targeted because of her past convictions and involvement with the justice system. *Id.* This type of targeting leads to the ostracization of justice-involved people and contributes to the

pervasive fear among their communities regarding voting, ultimately chilling both their vote and broader participation in the voting process.

B. Affected Voters' Rights Workers

The chilling effect of such prosecutions on African-American voters is felt throughout the communities where they take place.² Not only are the prosecuted voters themselves fearful of ever resuming voting after their prosecutions, but community members are also impacted by the prosecutions, subsequently becoming less likely to engage in the voting process.³ Community volunteers who have engaged in efforts to register people to vote recount their sadness and frustration with the impact of the fear caused by prosecutions on their work. These workers encounter people who have never been disqualified, or who are no longer disqualified, from voting who hold on to apprehension based on the pervasive fear of a felony conviction or jail time.

For example, Deborah Smith, a voter registration worker with volunteer experience, has seen the chilling effect of prosecutions in real time. Ms. Smith testified in an affidavit appended to this brief as Exhibit B. Not only has she worked and talked with people disenfranchised by the current law because they are still on probation or serving a sentence, she has also spoken to people eligible to vote who are fearful of doing so because of past convictions. Ex. B at

² For further discussion of the data on this issue, see *infra* Section II.B.

³ See *infra* Section II.B; see also NAACP Legal Defense and Educational Fund and The Sentencing Project, *Free the Vote: Unlocking Democracy in the Cells and on the Streets*, December 19, 2016, available at <https://www.sentencingproject.org/publications/4669/> (noting that “[f]elony disenfranchisement affects more than individual voters themselves—it diminishes the voting strength of entire communities of color, which are too often already plagued with concentrated poverty, substandard housing, limited access to healthcare services, failing public schools, and environmental hazards. As a result, people in these communities have even less of an opportunity to effect much-needed positive change through the political process”).

paragraph 4. Many people choose not to vote out of fear that there will be repercussions from the government because of their criminal record. Others are fearful based on prosecutions of fellow community members they have heard about, such as the Alamance 12. Ex. B at paragraph 5. To them, the risk of voting is not worth any risk of receiving another conviction or going to jail, even though they are now eligible. *Id.*

Ms. Smith has seen this fear when trying to register people to vote. Outside of the public library in Graham, North Carolina, she spoke to a man in his 60s about registering to vote. Ex. B at paragraph 8. He informed her that he had never voted because he thought he was ineligible because of a misdemeanor juvenile charge he received when he was 16 years old. *Id.* He said that his fear of voting was confirmed by the recent prosecution of the Alamance 12. *Id.* Ms. Smith tried her best to reassure the man that he was eligible to vote and to get him registered, but his fear was too entrenched and profound. *Id.* Fear of prosecution can effectively strip people of their fundamental right and prevent them from contributing to the civic process of this country.

Ms. Smith is even more discouraged when she talks to voters who have been prosecuted under the disenfranchisement laws. She vividly remembers how a member of the Alamance 12 had moved away from Alamance county right before he was charged with felony voting. Ex. B at paragraph 7. He moved to Wilmington with his family for a new job opportunity and to plant roots for a new beginning. *Id.* It was only shortly after he moved that he was charged for voting while on probation. *Id.* He subsequently lost his job. *Id.*

Ms. Smith's experiences are not an anomaly.⁴ Felony disenfranchisement laws have a profound effect on real people, and its impact is more than a number. Each individual affected

⁴ See "*Eligible Eight*" *Best Practice Responses, You Can Vote*, available at <https://static1.squarespace.com/static/5c6493eefb18207f45208219/t/5e136394e7b77f1995447be>

represents a loss to our democracy. Furthermore, each individual story must be understood in the overarching context of an enforcement scheme that effectively targets the African-American vote.

II. Enforcement of Felony Disenfranchisement Laws Suppress the African-American Vote.

Each story of a felony disenfranchisement prosecution occurs in a historical and societal context. First, the criminalization of voting while on probation and parole is disproportionately punitive, heightening the fear instilled by its enforcement, which is both racialized and politicized. Second, the study of voting patterns reveals that the enforcement of felony disenfranchisement laws not only harms individuals by separating them from the franchise, but it harms entire communities by diluting and deterring the eligible African-American vote. The negative effect of felony disenfranchisement laws and their enforcement on potential African American voters is clear.

A. Felony Disenfranchisement Laws Are Unduly Harsh and Their Application Has Racial and Political Components

The 1901 General Assembly's express purpose for allowing prosecution of people who vote while under felony supervision was to keep African Americans from voting.⁵ The law, both then and in its current form, provides that anyone serving a sentence for a felony conviction, in most cases entirely unrelated to elections or voting, is barred from voting in North Carolina. NC Gen.

8/1578328981359/The+Eligible+8+.pdf (highlighting eight common scenarios volunteers encounter when registering voters).

⁵ Criminal prosecutions as a tactic for voter suppression is consistent with our nation's history. The criminal legal system, which was built, honed and firmly established during the Jim Crow era is rife with racism. Historically the system has been used as a tool to preserve racial order and keep communities of color in an inferior socio-economic status. *See* Michael Wines, *How Charges of Voter Fraud Became a Political Strategy*, The New York Times (Oct. 21, 2016), available at <https://www.nytimes.com/2016/10/22/us/how-charges-of-voter-fraud-became-a-political-strategy.html>.

State §163-55(a)(2) (2017). Anyone who votes or attempts to vote while barred by the felony disenfranchisement law is subject to prosecution for a felony. *Id.*

In contrast, many people who engage in unlawful election behavior under North Carolina criminal laws are subject to prosecution at the misdemeanor level only, and, even if convicted, are not statutorily barred from voting in future elections. For example, such crimes as voter intimidation by a public official or interference with elections are classified as Class 2 misdemeanors. *See* N.C. Gen. Stat. § 163-273.

Since the days of early felony disenfranchisement laws in North Carolina criminal prosecutions for voting while on felony probation or parole have been used as a political tactic to discourage and legally prevent communities of color from voting.¹ *See, e.g.* PIPPA HOLLOWAY, *A History of Stolen Citizenship*, 12 *Origins: Current Events in Hist. Perspective* 9, -June 2019 at 13

Over the past few years, criminal prosecutions for alleged voter fraud have increased in the US. Sam Cleveland, *SLAPPING Down Discriminatory Voter Fraud Prosecutions*, 103 *MINN. L. REV.* (2019), available at <https://minnesotalawreview.org/2019/02/11/slapping-down-discriminatory-voter-fraud-prosecutions/>. To date, there have been criminal indictments for voting while felony supervision in at least 15 counties in North Carolina that stem from the 2016 general election. Bob Hall and Isela Gutierrez, *The Deceit of Voter Fraud*, Democracy North Carolina (2017), available at <https://democracync.org/wp-content/uploads/2017/05/FraudReport.pdf>. In 2016, then Alamance County District Attorney Pat Nadolski prosecuted twelve individuals for voting on felony probation, including Mr. Holman and Mr. Haith, to “maintain the integrity of the voting system.” Jack Healy, *Arrested, jailed and charged with a Felony, For Voting*, *The News & Observer* (Aug. 2, 2018), available at

<https://www.newsobserver.com/news/politics-government/article216009105.html>. While prosecutors cite to voter fraud or attacks on the integrity of the electoral system when they discuss prosecution, it is evident that most people who vote while on probation or parole do not do so with intent to sway elections or to break the law. In 2018, when Gaston County district attorney, Locke Bell, prosecuted twelve people who voted while disqualified in the 2016 election, he acknowledged that the individuals he was prosecuting were unaware they were not able to vote. Adam Lawson, *Gaston residents take pleas for illegal votes*, *Gaston Gazette* (July 26, 2019), available at <https://www.gastongazette.com/news/20190726/gaston-residents-take-pleas-for-illegal-votes>. He prosecuted them anyway, because “you’re not allowed to vote illegally.” Dashiell Coleman, *Prosecution possible in Gaston voting cases*, *Gaston Gazette* (Aug. 24, 2018), available at <https://www.gastongazette.com/news/20180824/prosecution-possible-in-gaston-voting-cases>. The accused, who were mostly African-American, and mostly Democrats,⁶ overwhelmingly maintained that they did not know they were disqualified from voting when they cast their vote. Since the statute that criminalizes voting while on felony probation has been interpreted as a strict liability statute, a felony conviction is possible even when the voter did not knowingly or intentionally violate the law.

The context of felony disenfranchisement prosecutions therefore renders them effective, not to preserve the integrity of elections, but rather to prevent communities of color from voting.

⁶ According to the 2018 State Board of Elections Report, 68% of the people who voted while on felony probation were African American and 66% were registered with the Democratic party. North Carolina State Board of Elections, *Post-Election Audit Report* (2017), available at https://s3.amazonaws.com/dl.ncsbe.gov/sboe/Post-Election%20Audit%20Report_2016%20General%20Election/Post-Election_Audit_Report.pdf.

B. Felony Disenfranchisement Laws Suppress the African-American Vote Beyond Those They Explicitly Disenfranchise.

The active enforcement of felony disenfranchisement laws—including criminal prosecution—not only suppresses the vote of those directly targeted, but suppresses the vote of fellow community members. In a national study, researchers concluded that “eligible African American voters who live in states where a greater percentage of the voting age African American population is barred from voting due to a felony conviction are less likely to vote.” Bridgett A. King and Laura Erickson, “Disenfranchising the Enfranchised: Exploring the Relationship Between Felony Disenfranchisement and African American Voter Turnout,” *JOURNAL OF BLACK STUDIES*, Vol. 47, No. 8, Nov. 2016, 799-821, Page 812, 815 (noting effect holds true even when controlling for socioeconomic status). The profundity of the effect is such that it reaches the behavior of voters with no felony record and who have never been justice-involved. *See* Aman McLeod, Ismail K. White, and Amelia R. Gavin, “The Locked Ballot Box: the Impact of State Criminal Disenfranchisement Laws on African American Voting Behavior and Implications for Reform,” 11 *VA. J. SOC. POL’Y & L.* 66, 80 (2003), *available at* http://polisci.osu.edu/sites/polisci.osu.edu/files/11_Va._J._Soc._Pol'y_%26_L._66,_%5B1%5D.pdf (concluding “the probability of voting declines at a greater rate for African Americans compared to Caucasian Americans, when they live in states with restrictive criminal disenfranchisement laws, *even for those who have never been convicted of a crime*”) (emphasis added); Melanie Bowers and Robert R. Preuhls, “Collateral Consequences of a Collateral Penalty: The Negative Effect of Felon Disenfranchisement Laws on the Political Participation of Nonfelons,” *SOCIAL SCIENCE QUARTERLY*, Vol. 90, Issue 3 at 738 (Sept. 2009).

CONCLUSION

Voter disenfranchisement laws in North Carolina explicitly suppress the vote of people on probation or parole, who are disproportionately African-American. Enforcement of these laws effectively broadens the suppression effect by instilling fear not only in the people prosecuted beyond the time they become eligible to vote, but by significantly impacting other community members who are impacted by the enforcement of the laws as well. Not only does the enforcement of felony disenfranchisement laws reduce Black communities' political clout by removing voters from the rolls, therefore, but it further penalizes those same communities by chilling *all* Black voters' participation in our democracy.⁷ For these reasons, the North Carolina Justice Center and Down Home NC urges the Court to rule in favor of the Plaintiff in this matter.

⁷ Pamela S. Karlan, "Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement," Research Paper No. 75 at 17, Stanford Public Law and Legal Theory Working Paper Series, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=484543 (last visited 13 July 2020) (; *see also* King and Erickson at 815-16 ("[T]he removal of the right to vote [] affects not only the political power of the individual but also the collective political power of [] communities.")).

NORTH CAROLINA JUSTICE CENTER



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