STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

No. 19-cv-15941

COMMUNITY SUCCESS INITIATIVE, et al.,

Plaintiffs,

v.

TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY OF SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, et al.,

Defendants.

PLAINTIFFS' MOTION AND BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions, Statutes, and Rules

Other Authorities

INTRODUCTION

The North Carolina Constitution guarantees the right to vote to every person who shares "in the public burthens and ha[s] had a residence in the State long enough to learn its true policy, and to feel an interest in its welfare." *Roberts v. Cannon*, 20 N.C. 398, 4 Dev. & Bat. (Orig. Ed.) 256, 260-61 (1839). For every member of the community who shares "humane, economic, ideological, and political concerns," the right to vote "is at the foundation of a constitutional republic." *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 13, 269 S.E.2d 142, 150 (1980).

But North Carolina law fails to live up to this foundational guarantee. The General Assembly has stripped the right to vote from nearly 60,000 members of North Carolina's communities because they are on probation, parole, or post-release supervision from a felony conviction. These North Carolinians are neighbors, co-workers, family members, taxpayers, and participants in civic groups. Like all other citizens, their lives are governed by the laws enacted and enforced by elected officials, but they are denied the fundamental right to participate in choosing their representatives. This mass disenfranchisement of tens of thousands of members of North Carolina's communities serves no compelling government interest and infringes upon the fundamental right to free and fair elections.

Worse yet, this disenfranchisement is the product of an explicitly racist effort after the Civil War to suppress the political power of African Americans. The law continues to have its intended effect to this day. Although African Americans constitute 21.51% of the voting-age population in North Carolina, they represent 42.43% of the people disenfranchised while on probation, parole, or post-release supervision. In *every county* across the State for which sufficient data is available, the law disenfranchises the African American population at a higher rate than the white population. In 19 different counties, more than 2% of the African American

voting-age population is disenfranchised under this law by virtue of being on probation, parole, or post-release supervision. This disenfranchisement severely and disproportionately suppresses the political power of African American communities across the state.

The law also discriminates against poor and low wealth people, who may be denied the right to vote based solely on their inability to pay court costs, fees, and restitution. Individuals often have their probation extended for failure to pay financial obligations, and the amounts owed are staggering. The average person on felony probation in North Carolina owes more than $2,400 in total fees, costs, and restitution. A substantial percentage of probationers cannot afford to pay such amounts, prolonging their disenfranchisement. In no democracy should lack of wealth be a basis for denying a citizen the right to vote, but in North Carolina, it is.

As the North Carolina Court of Appeals recently made clear in the analogous context of the General Assembly's voter ID laws, even though the North Carolina Constitution delegates authority to the General Assembly to regulate rights restoration for people with a felony conviction, the General Assembly must exercise that authority consistent with other constitutional limitations. The General Assembly's decision to disenfranchise people living in North Carolina communities violates multiple other provisions of the North Carolina Constitution. First, it violates the constitutional guarantee that "all elections shall be free," which mandates that elections "freely and honestly . . . ascertain . . . the will of the people." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *109-12 (N.C. Super. Sep. 03, 2019). Elections do not ascertain the will of the people when large segments of society—a grossly disproportionate number of whom are African American—cannot vote. In 2018 alone, there were 16 county-level elections where the vote margin was less than the number of persons disenfranchised in the county due to probation, parole, or post-release supervision.

Second, disenfranchising persons living in North Carolina communities violates North Carolina's Equal Protection Clause, which affords broader protections than its federal counterpart and protects "the fundamental right of each North Carolinian to substantially equal voting power." *Stephenson v. Bartlett*, 355 N.C. 354, 379, 562 S.E.2d 377, 394 (N.C. 2002). North Carolina's felony disenfranchisement scheme deprives all people on probation, parole and post-release supervision of "substantially equal voting power" relative to their neighbors, and it discriminates in particular against African Americans and poor persons. The law also violates this State's free speech and assembly guarantees. "Voting for the candidate of one's choice" is a "core means of political expression protected by the North Carolina Constitution's Freedom of Speech and Freedom of Assembly Clauses." *Common Cause*, 2019 WL 4569584, at *119. Probation and post-release disenfranchisement constitutes an outright ban on such core political expression. Lastly, the requirement that people pay money to ensure they regain access to the franchise violates the constitutional Ban on Property Qualifications.

There are no material facts that can be genuinely disputed, and the law is clear. This Court should grant summary judgment and permanently enjoin enforcement of N.C.G.S. § 13-1 with respect to persons living in North Carolina communities on probation, parole, or post-release supervision. In the alternative, given the irreparable harm that will result if Plaintiffs and tens of thousands of North Carolinians are denied the right to vote in another election, this Court should enter a preliminary injunction.

BACKGROUND

A. North Carolina's Felony Disenfranchisement Scheme

1. Felony Disenfranchisement Has Long Been Used in North Carolina to Suppress the Political Power of African Americans

Before the Civil War, North Carolina excluded "infamous" persons from suffrage. Infamy could result either "from the commission of an infamous crime," such as treason, bribery, or perjury, "or from the receipt of an infamous punishment such as whipping," which could be inflicted for crimes like petty larceny. *See* Expert Report of Dr. Vernon Burton ("Burton Report") at 11 (quoting Pippa Holloway, *Living in Infamy: Felon Disenfranchisement and the History of American Citizenship* 6, 34, 91 (2014)). North Carolina amended its constitution in 1835 to provide that the General Assembly "shall have power to pass general laws regulating" the "restor[ation] to the rights of citizenship any person convicted of an infamous crime." N.C. Const. Art. I, Sec. 4, pt. 4 (1776, amended in 1835). The General Assembly first exercised this power in 1840, requiring persons convicted of infamous crimes to seek rights restoration in the courts, which had unfettered discretion to grant or deny it. *See* Ch. 36, 1840 N.C. Sess. Laws 68. African Americans could not vote in North Carolina during this period. Burton Report at 12-15.

In the period after the Civil War, when federal law required North Carolina to extend the franchise to African Americans, the State's disenfranchisement of persons convicted of certain crimes became a powerful tool of race-based political suppression. Former white rebels in North Carolina began an extensive campaign of whipping African Americans for minor offenses like petty larceny, because whipping was an "infamous" punishment that triggered disenfranchisement. *Id.* at 19-22 (citing Steven F. Miller et al., *Between Emancipation and Enfranchisement: Law and the Political Mobilization of Black Southerners, 1865-1867*, 70 Chi.-Kent L. Rev. 1059, 1074 (1995)). Contemporary sources acknowledged that the "real motive"

for these whippings was to disqualify large numbers of African Americans from the franchise without violating the "letter of the [federal] civil rights act [of 1866]." *Id.* at 20. In one county in North Carolina, "every adult male negro" was whipped. *Id.* *Harper's Weekly* described a scene outside a courthouse in Raleigh where a crowd of 500 people watched public whippings of African Americans "every day," noting that "this sentence of whipping" operates to "disqualif[y] in advance" African Americans from the franchise. *Id.* at 20-21 (quoting *Whipping and Selling American Citizens*, Harper's Weekly (Jan. 12, 1867)).

North Carolina adopted a new constitution after the Civil War as a condition of rejoining the Union. *See* N.C. Const. of 1868; John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1781 (1992). Congress, then in the hands of the "Radical Republicans," called a North Carolina Constitutional Convention in 1868. Reconstruction legislation required that delegates to the convention include both white and black citizens. Orth, *supra*, at 1777. Fifteen of the 120 delegates to the 1868 Convention were black. *Id.*

The Constitution enacted at the 1868 Convention provided for universal male suffrage, eliminated property requirements to vote, and abolished slavery. *See* N.C. Const. of 1868, Art. I, § 33; *id.* art. VI, § 1. Like its predecessor, the 1868 Constitution did not expressly disenfranchise persons convicted of certain crimes. *See id.* Art. VI. In the years that followed, African Americans achieved some success in municipal, state legislative, and even congressional elections. *See, e.g.*, William Mabry, *White Supremacy and the North Carolina Suffrage Amendment*, 13 N.C. Hist. Rev. 1 (1936).

But the 1868 Constitution's suffrage provisions were short-lived. Reacting to Reconstruction, the Conservative Party in North Carolina (soon rebranded as Democrats) regained control of North Carolina's General Assembly using intimidation, violence, and fraud.

Burton Report at 24-26; Orth, *supra*, at 1781. They immediately sought to replace the "hated" 1868 Constitution and took particular aim at its suffrage provisions. Orth, *supra*, at 1781; Burton Report at 24-29.

In 1875, a flurry of amendments were added to the North Carolina Constitution to erode the civil rights of African Americans. Two of the amendments required segregation in public schools and banned interracial marriage, respectively. *See* 1875 Amendments to the N.C. Const. of 1868, Amends. XXVI & XXX. And another amendment stripped counties of the ability to elect their own local officials, including judges, giving that power instead to the Conservative-controlled General Assembly. *See id.* Amend. XXV. "The purpose of this amendment, as was well understood, was to block control of local government in the eastern counties by blacks who were in the majority there." Orth, *supra*, at 1783; Burton Report at 31.

The 1875 amendments also codified disenfranchisement for *all felonies* in the state constitution for the first time. *See* 1875 Amendments to the N.C. Const. of 1868, Amend. XXIV. In the pre-Civil War era, when only whites could vote, disenfranchisement for crimes had been limited to persons who committed "infamous" crimes or received "infamous" punishments. Now that African Americans could vote, the 1875 Amendment expanded disenfranchisement to all persons convicted of a felony. The text of the original 1875 amendment largely mirrors the analogous provision in North Carolina's current constitution. It provided:

> [N]o person who, upon conviction or confession in open Court, shall be adjudged guilty of felony, or of any other crime infamous by the laws of this state, and hereafter committed, shall be deemed an elector, unless such person shall be restored to the rights of citizenship in a mode prescribed by law.

1875 Amendments to the N.C. Const. of 1868, Amend. XXIV.

In 1877, the General Assembly enacted a statute to enforce felony-based disenfranchisement. It provided that "persons who, upon conviction or confession in open court, shall have been adjudged guilty of felony or other crime infamous by the laws of this state," "shall not be allowed to register to vote . . . unless they shall have been legally restored to the rights of citizenship in the manner prescribed by law." Ch. 275, § 10, 1876 N.C. Sess. Laws. At the time, the "manner prescribed by law" was the existing statute that allowed persons convicted of "infamous" crimes to seek rights restoration in the courts. Ch. 36, 1840 N.C. Sess. Laws 68. Under this statute, a person had to wait four years from the date of their conviction to file the petition seeking rights restoration, and there was also a mandatory three-month waiting period between the filing of the petition and the hearing. *Id.* It was then left to the unfettered discretion of the judge to restore a person's right to vote. *Id.*

North Carolina's new laws providing for felony-based disenfranchisement and depriving localities of the ability to elect their own judges worked hand-in-hand to enforce white supremacy. Burton Report at 31. "The change in the composition of the judiciary . . . and the expanded disenfranchisement provision, added up to an increase in the number of Democratic judges" able to deprive African Americans of the right to vote. Holloway, *supra*, at 62; *see Notes from the Capital*, N.Y. Times, Oct. 11, 1875, at 5 (the "evident purpose" of these changes was "to prevent colored men and poor white men from exercising the right of suffrage").

What's more, in the same 1877 legislation that denied persons convicted of felonies the ability to register to vote, the General Assembly enacted harsh new penalties for voting before one's rights were restored. Ch. 275, § 62, 1876 N.C. Sess. Laws. The legislation provided that a person who voted before having their rights restored after a felony conviction "shall be punished by a fine not exceeding one thousand dollars, or imprisonment at hard labor not exceeding two

years, or both." *Id.* These penalties carry through to this day. Under current North Carolina law, illegally voting while on probation, parole, or post-release supervision is a felony that carries a maximum sentence of two years in prison. N.C.G.S. §§ 163-275, 15A-1340.17.

These expanded felony disenfranchisement efforts were an intentional effort to disenfranchise African-American voters. Burton Report at 24-37. At the time, it was well-recognized that the provisions would target African Americans. Burton Report at 29-37. Contemporary conservative sources and politicians stated that "the great majority of the criminals are negroes" and declared that "all Negroes are natural born thieves." *Id.* at 31, 33-34. The principal proponents of felony disenfranchisement in North Carolina were well-known racists who were involved in lynching and other efforts to maintain Jim Crow. *Id.* at 35-36. Other Democrats used coded language, like asserting that felony disenfranchisement was needed to ensure the "purity of the ballot box," signaling to all that their efforts targeted African American voters. *Id.* at 25, 29-31. Republicans and African Americans strenuously but unsuccessfully opposed the new felony disenfranchisement provisions. *Id.* at 32-35. Every African American representative voted against it. *Id.* at 35.

As many historians have recognized, "disenfranchisement for prior criminal convictions was among the first strategies employed to block African American suffrage in North Carolina." *Id.* at 22 (quoting Holloway, *supra*, at 34). As plaintiffs' expert historian Dr. Vernon Burton concludes, the felony disenfranchisement efforts in the 1875 constitution marked the beginning of a systematic effort to "restore white Supremacy" and undermine the voting rights of black North Carolinians. *Id.* at 37.

2. The General Assembly Has Chosen to Prolong Disenfranchisement Through Probation, Parole, and Post-Release Supervision

As described, since the 1875 constitutional amendments that were adopted for overtly racist reasons, the North Carolina Constitution has delegated responsibility to the General Assembly to enact laws regarding the disenfranchisement of persons with felony convictions. In carrying out that delegation, the same General Assembly that pushed the 1875 constitutional amendments established a regime that prolonged disenfranchisement even after individuals with felony convictions had completed their term of incarceration and returned to living in communities across the State. *Supra* at pp. 6-8.

Then, in 1898 when Democrats regained control of the General Assembly, they enacted a series of laws designed to further exclude African Americans from voting, including a poll tax and a literacy test with a "grandfather clause" exception for white voters. Burton Report at 41. They also re-enacted the criminal provisions that punished any person who voted while ineligible due to a felony conviction with a fine or two years of hard labor. Ch. 507, § 72, 1899 N.C. Sess. Laws 658, 681. The passage of these provisions marked the culmination of a violent and explicitly racist election campaign by white Democrats that included a two-day rampage in Wilmington, where white Democrats murdered African Americans and took over by force municipal government positions that blacks and Republicans had held. Burton Report at 40-41.

With African Americans effectively prevented from voting through these other means, the General Assembly acted to slightly soften the felony disenfranchisement statute. In 1899, the General Assembly amended the statute to allow petitions for re-enfranchisement in cases which "the judgment of the court pronounced does not include imprisonment anywhere, and pardon has been granted by the governor." Ch. 44, § 1, 1899 N.C. Sess. Laws 139. This legislation was aimed at restoring the rights of the Mayor of Burlington and its board of commissioners, who

had been convicted of the felony of disinterring a body, but had been pardoned. Burton Report at 42-44. The 1899 legislation also eliminated the 4-year waiting period following completion of a prison sentence, and subsequent 1905 legislation eliminated the requirement of a pardon from the governor for faster restoration of rights for individuals who had been sentenced to no prison time. Ch. 547, §§ 1-2, 1905 N.C. Sess. Laws 553-554. Throughout this entire period, however, the General Assembly retained the requirement that individuals seeking restoration of rights were to petition individually before a (white) judge and secure ten acceptable witnesses who could testify on their behalf. Burton Report at 45. As Dr. Burton concludes, it is no coincidence that white Democrats in the legislature were willing to soften certain restrictions on restoration of rights only after they had disenfranchised African Americans by other means. *Id.* at 42-45.

North Carolina's felony disenfranchisement provisions were largely unchanged until 1971. As part of a broader reworking of North Carolina's Constitution, the felony disenfranchisement provision was amended to remove the reference to "infamous" crimes, and thus the constitutional provision now allows for disenfranchisement only in the case of felony convictions. N.C. Const., Art. VI, § 2, cl. 3. The General Assembly then amended its felony disenfranchisement statutes in 1971 and again in 1973. The statutory revisions were initially sponsored by three African American representatives to the General Assembly—the first three to serve in the General Assembly since Reconstruction. Burton Report at 51, 60; *see* Decl. of Daniel F. Jacobson ("Jacobson Decl.") Ex. K, Aff. of Henry M. Michaux Jr. ("Michaux Aff.") ¶¶ 7-9, 15. As Representative Michaux explains in the attached affidavit, these three representatives—himself, Joy Johnson, and Henry Frye—were the only African American representatives in an 170-person General Assembly, and they faced racism from members of both parties. Ex. K (Michaux Aff.) ¶ 10. Michaux, Johnson, and Frye were working with the

North Carolina chapter of the NAACP, which had identified automatic restoration of rights for those previously convicted of a felony as a civil rights priority. *Id.* ¶ 12. It was well-known in the legislature during this period that the existing felony disenfranchisement had been adopted in the post-Reconstruction era as an effort to discriminate against and disenfranchise African Americans, and that the operation of the law in the 1970s continued to discriminate against African Americans and had a "major impact" on African American voter registration. *Id.* ¶ 15.

Michaux, Johnson, and Frye sought automatic restoration of voting rights for all persons convicted of felonies immediately upon the completion of their prison sentence, without any need to petition before a judge or to pay the fines and fees associated with probation or supervised release. *Id.* ¶¶ 15-16; Burton Report at 50-56, 59-60; *see also* Ex. L (original proposed bill in 1971). But they were only partially successful. Ex. K (Michaux Aff.) ¶¶ 16-19. The legislation that ultimately passed in 1973 removed the requirement to petition a court for rights restoration, but maintained the policy of disenfranchising persons even after their release from incarceration. Their "aim was a total reinstatement of rights," but they were not able to convince the legislature to fully undo the racist felony disenfranchisement provisions. *Id.* ¶ 16. As Rep. Michaux explains, they achieved a "step forward," but their efforts "did not solve the original problem: the law was designed to suppress African American voting power and it had created a perverse incentive to criminalize and charge African Americans differently to achieve that aim." *Id.* ¶ 17. The amendments made the system "somewhat less discriminatory," but did not fully erase the "bitter pill of the original," "racially motivated" disenfranchisement. *Id.* ¶ 18.

The General Assembly's refusal to amend the statute to allow automatic restoration upon release from incarceration came as other efforts by white supremacists to suppress the African American vote grew less efficacious. By that time, federal law prohibited poll taxes and literacy

tests, and by 1960 a third of eligible African Americans in North Carolina were registered to vote, as opposed to just 5% in 1940. Burton Report at 48. Many of the opponents of automatic voting-rights restoration were segregationists who opposed the Civil Rights Movement and the Voting Rights Act and who expressly linked felony disenfranchisement laws with other racist tools like literacy tests. *Id.* at 48-51. Opponents of automatic restoration were also proponents of the "law and order" campaigns that were emerging in the 1960s and 1970s. *Id.* at 56-60. "Law and order" was a dog whistle for many North Carolinians and part of a broader effort aimed at resisting integration and other civil rights efforts. *Id.* at 56.

The current felony disenfranchisement statute, last amended in 2013, provides as follows:

> Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored upon the occurrence of any one of the following conditions:
>
> (1) The unconditional discharge of an inmate, of a probationer, or of a parolee by the agency of the State having jurisdiction of that person or of a defendant under a suspended sentence by the court.
>
> (2) The unconditional pardon of the offender.
>
> (3) The satisfaction by the offender of all conditions of a conditional pardon.
>
> (4) With regard to any person convicted of a crime against the United States, the unconditional discharge of such person by the agency of the United States having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.
>
> (5) With regard to any person convicted of a crime in another state, the unconditional discharge of such person by the agency of that state having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.

N.C.G.S. § 13-1. Under this law, North Carolinians who have been released from incarceration—or who were never incarcerated—cannot vote until they have been "unconditionally discharged" from probation, parole, or post-release supervision.

N.C.G.S. § 13-1 thus disenfranchises individuals for lengthy periods of times after they have been released from incarceration and returned to society. Of the currently disenfranchised North Carolinians on probation, the median length of probation imposed in their original sentence is 30 months. *See* Expert Report of Frank R. Baumgartner ("Baumgartner Report") at 23. And of the currently disenfranchised North Carolinians on post-release supervision, the median duration of post-release supervision in their original sentence is nine months. *Id*.

3. N.C.G.S. § 13-1 Conditions the Right to Vote on the Payment of Court Costs, Fees, and Restitution

People with felony convictions must pay court costs, fees, and restitution as "conditions" of probation, parole, and post-release supervision. N.C.G.S. §§ 15A-1343(b)(9) (probation), 15A-1374(b)(11a)-(11b) (parole), 15A-1368(e)(11)-(12) (post-release supervision). These costs can be sizeable and have increased by nearly 400% over the past two decades in North Carolina. *See* Expert Report of Dr. Traci Burch ("Burch Report") at 23. In 1999, a North Carolinian charged with a felony would face a total of $106 in possible court fines and fees, but today "$106 would barely cover two-thirds of the General Court of Justice fee in district court." *Id.*

Notwithstanding that the overwhelming majority of criminal defendants in North Carolina are indigent, the General Assembly has imposed a wide array of court costs on those who are convicted or plead guilty in Superior Court, which has jurisdiction over all felony cases. These costs include a "General Court of Justice Fee" of $154 plus additional fees for "Facilities" ($30), "telecommunications" ($4), "retirement and insurance benefits of . . . law enforcement officers" ($6.25), "supplemental pension benefits of sheriffs" ($1.25), "services, staffing, and operations of the Criminal Justice Education and Standards Commission" ($2), "Pretrial Release Services" ($15), "arrest or personal service of criminal process" ($5), and "DNA" ($2).

N.C.G.S. § 7A-304(a)(1)-(13). People unable to pay these fees "within 40 days of the date specified in the court's judgment" must also pay a late fee of $50.00. *Id.* § 7A-304(a)(6).

Among all persons currently on felony probation in North Carolina who owed court costs as part of their original sentence, the median amount owed in court costs is $573. Baumgartner Report at 22. For probationers who owed fees as part of their sentence, the median amount owed in fees is $340. *Id.* And the median amount of restitution owed by probationers with restitution obligations is $1,400. *Id.* For persons on parole or post-release supervision, the corresponding median amounts owed is $40 in fees, $839 in court costs, and $1,500 in restitution. *Id.*

Probation, parole, and post-release supervision also impose additional costs. Each requires payment of a monthly $40 "supervision fee." N.C.G.S. § 15A-1343(b)(6), (c1) (probation); *id.* § 15A-1374(c) (parole); *id.* § 15A-1368.4(f) (post-release supervision). These fees add up. The average person on probation will owe $1,198 in total supervision fees, and the average person on parole or post-release supervision will owe $356 in supervision fees. Baumgartner Report at 22. On top of that, people must also "[p]ay the State of North Carolina for the costs of appointed counsel, public defender, or appellate defender to represent him in the case(s) for which he was placed on probation." N.C.G.S. § 15A-1343(b)(10).

For probationers, failure to pay the amount owed in court costs, fees, and restitution empowers a court to extend the term of probation—and thus the denial of the right to vote. *Id.* § 15A-1344(a), (d). Courts may extend probation up until a total of five years for failure to pay these amounts. *Id.* § 15A-1342(a). A court may also extend probation for an additional three years, even if that extends beyond the total five-year probationary period, "for the purpose of allowing the defendant to complete a program of restitution." *Id.* § 15A-1342(a). Defendants have no mechanism to appeal these extension orders when they are issued, and people have

remained on probation—and disenfranchised—for years in error. *See State v. Hoskins*, 242 N.C. App. 168, 775 S.E.2d 15 (2015) (finding, after the defendant had completed eight years on probation, that the trial court lacked jurisdiction to enter the three-year extension).[1]

Notwithstanding high rates of indigence among individuals convicted of felonies and the failure of courts to assess ability to pay, people are regularly subjected to extended periods of probation for failing to pay court fines. Burch Report at 22-34. The result is that people remain disenfranchised based on nothing other than their inability to pay court costs and restitution.

4. N.C.G.S. § 13-1 Currently Disenfranchises More than 56,516 Individuals Living in North Carolina Communities, a Grossly Disproportionate Number of Whom Are African American

Based on data produced by the North Carolina Department of Public Safety in this case, N.C.G.S. § 13-1 currently disenfranchises 51,441 persons who are on probation, parole, or post-release supervision following a conviction in North Carolina state court. Baumgartner Report at 5. Of those persons, 40,832 are on probation and 12,376 are on parole or post-release supervision (some are on both probation and post-release supervision). *Id.* In addition, according to the most recent federal government data, there are 5,075 persons on some form of community supervision from a conviction in federal court in North Carolina. *Id.* at 6. Thus, N.C.G.S. § 13-1 currently disenfranchises more than 56,516 people in total. *Id.* This figure does not include the unknown number of persons living in North Carolina who are disenfranchised because they are on community supervision from a conviction in another state's courts. *Id.*

The policy of disenfranchising people living in North Carolina communities disproportionately harms people of color. Although African Americans represent 21.51% of the

[1] For persons on post-release supervision, failure to pay court courts or restitution can result in revocation of post-release supervision, for which the individual can be sent back to prison and the supervised release period is tolled during such re-incarceration. N.C.G.S. § 15A-1368.4(d) & (f).

voting population in North Carolina, they represent 42.43% of the people disenfranchised while on probation, parole, or post-release supervision. *Id.* at 7. In *every county* across the State for which sufficient data is available, the disenfranchisement rate of the African American population is higher than that of the white population, with African Americans being disenfranchised 2.75 times the rate of whites statewide. *Id.* at 14-15. More than 1.24% of the total African American voting-age population in North Carolina is disenfranchised as a result of being on probation, parole, or post-release supervision. *Id.* at 7. In 19 different counties, more than 2% of the African American voting-age population is disenfranchised on these bases. *Id.* at 4, 34-35. African American men, in particular, comprise a disproportionate percentage of those disenfranchised. Black men make up 9.2% of the North Carolina voting-age population, but comprise 36.6% of non-incarcerated persons who are disenfranchised. *See id*. at 7.

B. Procedural History

Plaintiffs filed their Complaint in this action on November 20, 2019 and filed a motion to set an expedited case schedule that same day. On December 3, 2019, Plaintiffs filed an Amended Complaint, and State Board Defendants and Legislative Defendants filed their Answers on January 16, 2020 and January 21, 2020, respectively. Both sets of Defendants initially filed motions to dismiss the Amended Complaint, but they withdrew those motions on January 28, 2020. In turn, Plaintiffs agreed to a continuance of a hearing that Plaintiffs had calendared for February 4, 2020 on Plaintiffs' motion to set an expedited case schedule, as the parties all agreed that the case was ripe and fit for appointment of a three-judge panel.

Plaintiffs are six individuals and four organizations directly impacted by N.C.G.S. § 13-1's disenfranchisement of persons living in North Carolina communities on probation, parole, or post-release supervision. Plaintiffs Timothy Locklear, Drakarus Jones, Susan Marion, Henry

Harrison, Ashley Cahoon, and Shakita Norman are North Carolina residents currently or previously on probation or post-release supervised from a felony conviction. For those still under supervision, each would be eligible to vote, and would exercise their right to vote, if not for the disenfranchisement law. *See* Ex. A, Aff. of Timothy Locklear ¶¶ 10-11; *id.*, Ex. B, Aff. of Susan Marion ¶¶ 11-15; *id.*, Ex. D, Aff. of Shakita Norman ¶¶ 11-15. Each of these Plaintiffs could not vote in North Carolina's March 2020 primaries and will be precluded from voting in future elections until the conclusion of their probation or post-release supervision. *See id.*; *see also* Ex. C, Aff. of Henry Harrison ¶¶ 12-14.

As a consequence of N.C.G.S. § 13-1, the four organizational Plaintiffs must divert scarce resources away from other critical work toward helping North Carolinians with felony convictions comply with the law and re-register when allowed. The fundamental missions of Plaintiffs Community Success Initiative, Justice Served N.C., Inc., and Wash Away Unemployment are to ensure that persons entangled in the criminal justice system can reintegrate into society. *See* Ex. E, Aff. of Dennis Gaddy ¶ 8; Ex. F, Aff. of Diana Powell ¶ 6; Ex. G, Aff. of Corey Purdie ¶ 9. The current law frustrates that mission by raising barriers to rehabilitation and reintegration. Ex. E ¶ 19; Ex. F ¶ 23; Ex. G ¶ 16. Plaintiff North Carolina State Conference of the NAACP ("NC NAACP") is dedicated to the advancement and improvement of the political, civil, social, and economic status of racial minorities in North Carolina. Ex. H, Aff. of Anthony Spearman ¶ 8. The current law frustrates that mission by disproportionately burdening African Americans. *Id.* ¶ 29. N.C.G.S. § 13-1 also disenfranchises some of the North Carolina NAACP's members. *Id.*

LEGAL STANDARDS

Summary judgment is appropriate if "there is no genuine issue as to any material fact and [the movant] is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c).

A preliminary injunction should issue if (1) the plaintiff can "show likelihood of success on the merits of his case," (2) the plaintiff "is likely to sustain irreparable loss unless the injunction is issued," and (3) a "balancing of the equities" supports injunctive relief. *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 227, 393 S.E.2d 854, 856-57 (1990); *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983).

ARGUMENT

The material facts are undisputed, and Plaintiffs are entitled to judgment as a matter of law that N.C.G.S. § 13-1's disenfranchisement of North Carolinians on probation, parole, or post-release supervision violates multiple provisions of the North Carolina Constitution. Alternatively, the Court should enter a preliminary injunction again enforcement of the law against such persons pending final resolution of this action.

I. The North Carolina Constitution's Felony Disenfranchisement Clause Does Not Immunize the General Assembly's Rights Restoration Statutes from Compliance With Other Constitutional Guarantees

Article VI, § 2, cl. 3 of the North Carolina Constitution provides that "no person adjudged guilty of a felony . . . shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law." This provision delegates authority to the General Assembly to "prescribe[] by law" the contours of disenfranchisement, but it does not give the General Assembly unfettered discretion in enacting a disenfranchisement scheme. Rather, in carrying out this delegation, the General Assembly must comply with all other

provisions of the state constitution, including the Free Elections Clause, the Equal Protection Clause, the Free Speech and Assembly Clauses, and the Ban on Property Qualifications.

The understanding that Article VI, § 2, cl. 3 does not immunize North Carolina felony disenfranchisement statutes from constitutional review follows from the "basic canon of constitutional construction . . . [that] separate provisions" of the North Carolina Constitution must be interpreted "in harmony." *N.C. State Bd. of Educ. v. State*, 255 N.C. App. 514, 529, 805 S.E.2d 518, 527 (2017), *aff'd*, 371 N.C. 149, 814 S.E.2d 54 (2018). As the North Carolina Supreme Court explained over 80 years ago, "[r]econciliation is a postulate of constitutional as well as of statutory construction." *Sessions v. Columbus Cty.*, 214 N.C. 634, 200 S.E. 418, 420 (1939); *see also Stephenson v. Bartlett*, 355 N.C. 354, 382, 562 S.E.2d 377, 396 (2002) (holding that one provision of the North Carolina Constitution relating to elections, the Whole County Provision, "must also be reconciled with other legal requirements of the State Constitution").

Thus, while Article VI, § 2, cl. 3 may authorize the General Assembly to adopt *some* form of felony disenfranchisement, it does not empower the General Assembly to enact any disenfranchisement scheme it wishes. For example, the General Assembly could not pass a statute providing that only people of a certain race, sex, or religion may regain their voting rights following a felony conviction. Or "[s]uppose [the General Assembly] adopted a statute automatically restoring the right to vote for felons with a net worth of $100,000 or more but not for other felons." *Jones v. DeSantis*, 410 F. Supp. 3d 1284, 1302 (N.D. Fla. 2019), *aff'd* 950 F.3d 795 (11th Cir. 2020). Nobody would seriously defend the constitutionality of such legislation. Nor could the General Assembly adopt wholly arbitrary requirements such as height or weight thresholds for restoration of voting rights.

The recent Court of Appeals decision in *Holmes v. Moore*, 840 S.E.2d 244 (N.C. Ct. App. 2020), recognized as much and forecloses any argument that Article VI, § 2, cl. 3 precludes Plaintiffs' claims here. *Holmes* concerned the State's voter ID requirements. Analogous to the situation here, North Carolina's Constitution provides that "[v]oters offering to vote in person shall present photographic identification before voting," and explicitly authorizes the General Assembly to enact implementing legislation. N.C. Const., art. VI, §§ 2(4), 3(2). In defending the implementing legislation, Legislative Defendants and State Board Defendants argued that the law should be upheld because it was "crafted and enacted to fulfill our Constitution's newly added mandate that North Carolinians must present ID before voting." *Holmes*, 840 S.E.2d at 265. The Court of Appeals rejected this "proffered justification." *Id.* "Although the General Assembly certainly had a duty, and thus a proper justification, to enact some form of a voter-ID law, . . . this mandate alone [could not] justify the legislature's choices when it drafted and enacted S.B. 824 specifically." *Id.* (internal quotation marks omitted). The Court of Appeals held that, notwithstanding the Constitution's voter ID provisions, any implementing legislation must comply with North Carolina's Equal Protection Clause, and the plaintiffs established a strong likelihood that the legislation did not because of its discriminatory intent. *Id.*

In reconciling constitutional provisions like the voter ID provision or the felony disenfranchisement provision with other state constitutional guarantees, this Court must be guided by the principle that provisions of the North Carolina Constitution relating to elections "should be liberally construed . . . to promote a fair election or expression of th[e] popular will." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *109 (N.C. Super. Sep. 03, 2019) (quoting *McDonald v. Morrow*, 119 N.C. 666, 673, 26 S.E. 132, 134 (1896)). "[T]he North Carolina Supreme Court has directed that in construing provisions of the Constitution,

[courts] should keep in mind that this is a government of the people, in which the will of the people—the majority—legally expressed, must govern." *Id.* (quoting *State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 428, 26 S.E. 638, 638 (1897)).

The North Carolina Supreme Court applied this principle in reconciling competing constitutional provisions in *Stephenson*. There, the Court held that the North Carolina Constitution's "Whole County Provision" for state legislative redistricting should not be accorded a literal meaning that would conflict with other constitutional voting-rights protections. *See Stephenson*, 355 N.C. at 382, 562 S.E.2d at 396. "[A]n application of the [Whole County Provision] that abrogates the equal right to vote, a fundamental right under the State Constitution, must be avoided in order to uphold the principles of substantially equal voting power and substantially equal legislative representation arising from that same Constitution." *Id.* The same principle applies here: Article VI, § 2, cl. 3 must be interpreted in a manner consistent with the North Carolina Constitution's commitment—embodied in the Free Elections Clause, the Equal Protection Clause, the Free Speech and Assembly Clauses, and the Ban on Property Qualifications—to free and fair elections in which members of North Carolina's communities have substantially equal voting power and the will of the people prevails.

II. N.C.G.S. § 13-1's Disenfranchisement of Individuals Living in North Carolina Communities Violates the Free Elections Clause

N.C.G.S. § 13-1's disenfranchisement of persons living in North Carolina communities violates the Free Election Clause's mandate that elections in North Carolina faithfully ascertain the will of the people. Elections do not faithfully ascertain the will of the people when more than 56,500 citizens living and working in North Carolina communities cannot vote. And this disenfranchisement strikes at the heart of the Free Elections Clause because it disproportionately strips the right to vote from discrete racial and social classes. The law disenfranchises greater

than 2% of the African American voting-age population in at least 19 counties, and it targets poor persons of all races. The disenfranchisement of persons living in the community under N.C.G.S. § 13-1 is so widespread that, in a staggering number of elections, it may actually turn the outcome of the elections. In the 2018 general elections, for example, there were 16 county-level elections where the vote margin was smaller than the number of persons disenfranchised in the county due to probation, parole, or post-release supervision. Because N.C.G.S. § 13-1 interferes with the fundamental right of North Carolinians to vote in free elections, strict scrutiny applies. Defendants have advanced no compelling interest to which the law is narrowly tailored for indiscriminately removing all persons on probation, parole, or post-release supervision from the electorate that expresses the community's collective will at the ballot box.

A. The Free Elections Clause Mandates That Elections in North Carolina Ascertain the Will of the People, and Precludes Laws That Unduly Interfere with That Mandate

The North Carolina Constitution's Free Elections Clause declares that "[a]ll elections shall be free." N.C. Const., art. I, § 10. This clause, which has no federal counterpart, dates back to the North Carolina Declaration of Rights of 1776. *See Common Cause*, 2019 WL 4569584, at *111. The framers of the Declaration of Rights modeled it on a provision in the 1689 English Bill of Rights stating that "election of members of parliament ought to be free." *Id.* (quoting Bill of Rights 1689, 1 W. & M. c. 2 (Eng.)); *see* Orth, *supra*, at 1797-98.

The English Bill of Rights provision responded to the king's efforts to manipulate parliamentary elections by manipulating the composition of the electorate. J.R. Jones, *The Revolution of 1688 in England 148* (1972); George H. Jones, *Convergent Forces: Immediate Causes of the Revolution of 1688 in England* 75-78 (1990). Those efforts led to a revolution, and after dethroning the king, the revolutionaries called for a "free and lawful parliament" as a

critical reform. Grey S. De Krey, *Restoration and Revolution in Britain: A Political History of the Era of Charles II and the Glorious Revolution* 241, 247-48, 250 (2007). They enacted the free elections clause to this end. *See id.*; *Common Cause*, 2019 WL 4569584, at *111.

In the United States, many states enacted free elections clauses modeled on the English Bill of Rights provisions. For instance, Pennsylvania adopted its free elections clause in 1776. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 806-07 (Pa. 2018). As the Pennsylvania Supreme Court has explained, Pennsylvania's free elections clause reflected "a desire to secure access to the election process by all people with an interest in the communities in which they lived—universal suffrage—by prohibiting exclusion from the election process of those without property or financial means." *Id.* at 807.[2]

North Carolina adopted its Free Elections Clause in 1776, and since then has "broadened and strengthened" the clause to reinforce its principal purpose of preserving the popular sovereignty of North Carolinians. *Common Cause*, 2019 WL 4569584, at *111. The original 1776 clause stated that "elections of members, to serve as Representatives in the General Assembly, ought to be free." N.C. Declaration of Rights, VI (1776). The 1868 Constitution, which expanded African American political rights after the Civil War, revised the clause to state that "[*a*]*ll* elections ought to be free." N.C. Const. art. I, § 10 (1868). The 1971 Constitution revised the clause again to state that "[a]ll elections *shall* be free." N.C. Const. art. I, § 10. "This change was intended to 'make [it] clear' that the Free Elections Clause and the other rights secured to the people by the Declaration of Rights 'are commands and not mere admonitions' to

[2] Other states with free elections clauses in their constitutions include Arizona, Arkansas, Colorado, Delaware, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, New Mexico, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, and Virginia.

proper conduct on the part of the government." *Common Cause*, 2019 WL 4569584, at *111 (quoting *N.C. State Bar v. DuMont*, 304 N.C. 627, 635, 639, 286 S.E.2d 89, 97 (1982)).

Given this text and history, "the meaning of the Free Elections Clause is that elections must be conducted freely and honestly to ascertain, fairly and truthfully, the will of the people." *Common Cause*, 2019 WL 4569584, at *110; *accord Harper v. Lewis*, 19 CVS 12667, Order on Inj. Relief at 7 (N.C. Super. Oct. 28, 2019). As the Supreme Court explained 145 years ago, "[o]ur government is founded on the will of the people," and [t]heir will is expressed by the ballot." *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 220 (1875)). A "free" election, therefore, must reflect to the greatest extent possible the will of *all* people living in North Carolina communities. *Id.* at 222-23 (the franchise belongs to "every" resident, as "government affects his business, trade, market, health, comfort, pleasure, taxes, property and person").

North Carolina courts have applied this principle to invalidate laws that unnecessarily restrict or burden the right to vote. In *Clark v. Meyland*, for instance, the Supreme Court struck down a law that required primary voters to take an oath to support their party's nominees. 261 N.C. 140, 141, 134 S.E.2d 168, 169 (1964). By unduly conditioning voters' "right to participate in [a] primary," the law "violate[d] the constitutional provision that elections shall be free." *Id.* at 143, 134 S.E.2d at 170. In *Common Cause* and *Harper*, three-judge Superior Court panels held that partisan gerrymandering violates the Free Elections Clause because it "deprive[s] North Carolina citizens of the right to vote . . . in elections that are conducted freely and honestly to ascertain, fairly and truthfully, the will of the people." *Common Cause*, 2019 WL 4569584, at *112; *Harper v. Lewis*, Order on Inj. Relief at 6-7. The panels emphasized that the right to free elections that "ascertain . . . the will of the people" is "a fundamental right of the citizens

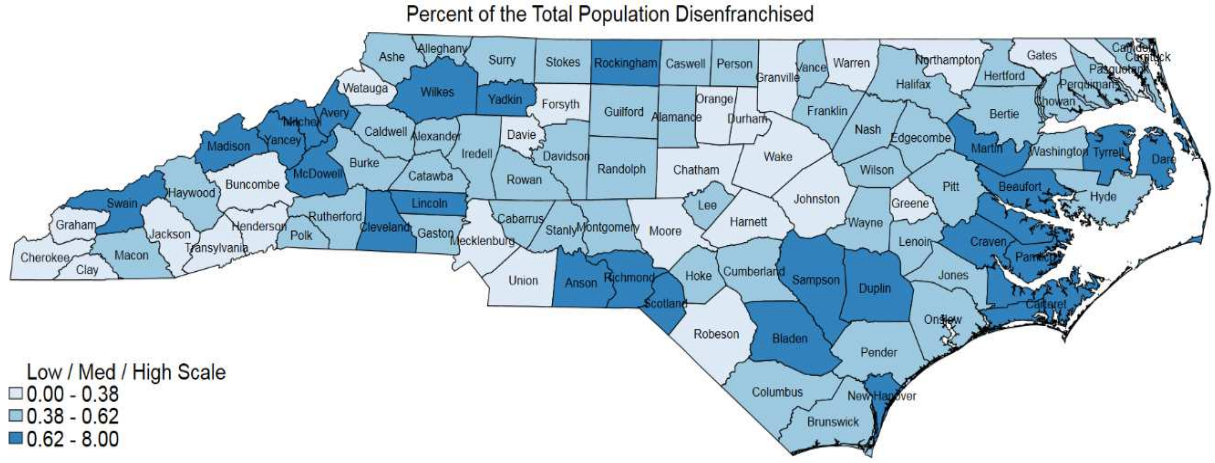
enshrined in our Constitution's Declaration of Rights, a compelling governmental interest, and a cornerstone of our democratic form of government." *Common Cause*, 2019 WL 4569584, at *2.

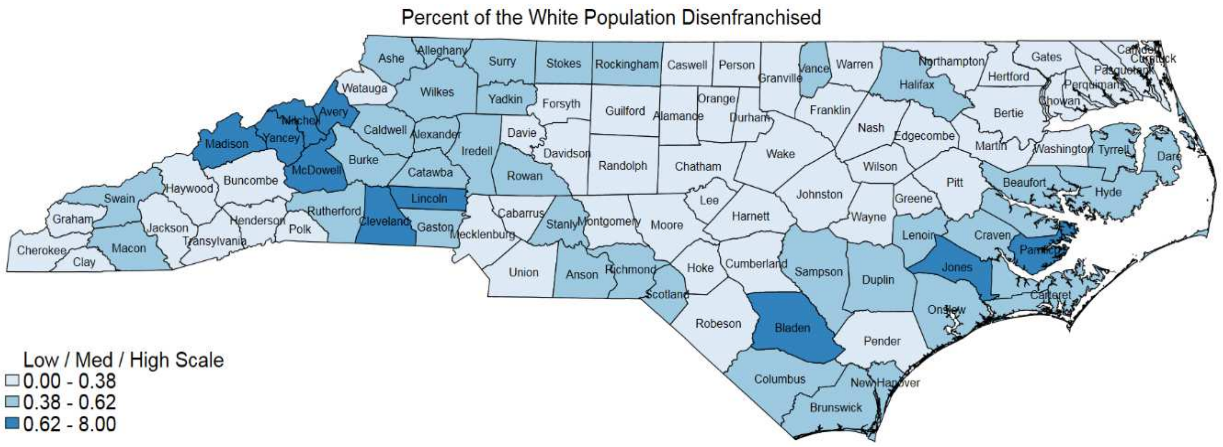
B. N.C.G.S. § 13-1's Disenfranchisement of Individuals Living in North Carolina Communities Infringes Upon the Guarantee of Free Elections That Reflect the Will of the People

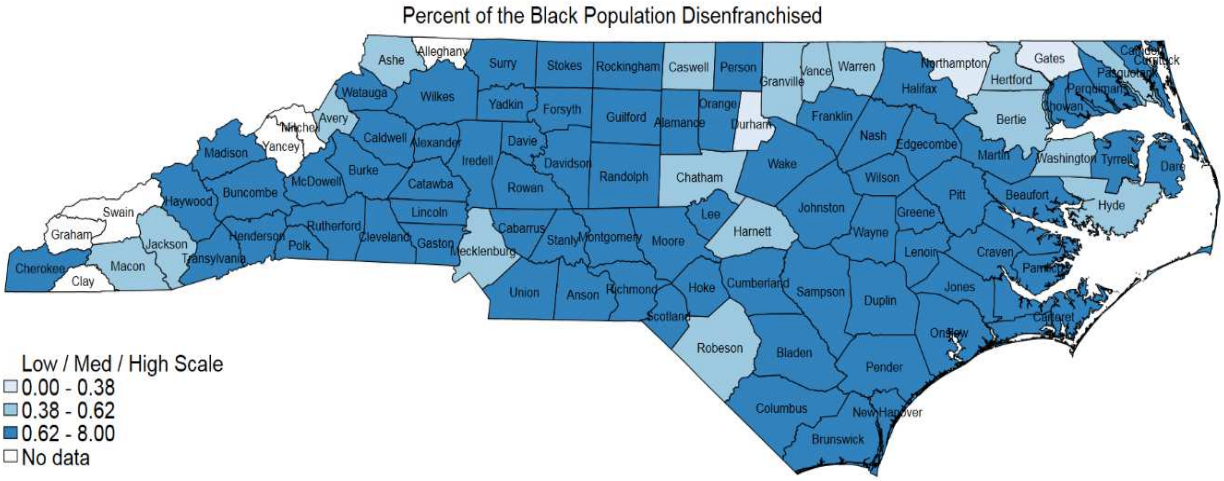
Just like the invalidated statutes in the above cases, N.C.G.S. § 13-1 violates the Free Elections Clause by preventing elections that "ascertain, faithfully and truthfully, the will of the people." *Common Cause*, 2019 WL 4569584, at *2. The statute denies the right to vote to more than 56,516 of "the people" living in North Carolina communities who are on some form of probation, parole, or post-release supervision. *See* Baumgartner Report at 6. In at least nine counties—Cleveland, McDowell, Pamlico, Beaufort, Madison, Sampson, Duplin, Lincoln, and Scotland Counties—more than 1% of the total voting-age population is disenfranchised by virtue of being on probation, parole, or post-release supervision from a state court conviction. *Id.* at 10, 34-35. Elections do not faithfully or truthfully ascertain the will of the people when such large segments of a community cannot vote on its elected leaders.

This disenfranchisement scheme strikes at the core of the Free Elections Clause, moreover, because of its grossly disproportionate effects on two sets of citizens: racial minorities and poor persons. Interpreting Pennsylvania's analogous clause, the Pennsylvania Supreme Court has explained that free election clauses enacted at the founding were designed "to secure access to the election process by all people with an interest in the communities in which they lived," "no matter their financial situation or social class." *League of Women Voters*, 178 A.3d at 807. But contrary to this intent, N.C.G.S. § 13-1's ban falls disproportionately on historically disadvantaged racial and social classes.

With respect to the disparate racial impact, N.C.G.S. § 13-1 disenfranchises a grossly disproportionate number of African Americans living in North Carolina communities. In *every county* in North Carolina for which there is sufficient data to perform comparisons, the law disenfranchises a greater percentage of the African American voting-age population than the white voting-age population. Baumgartner Report at 14-15. The maps below show these glaring disparities, as well as the high rates of disenfranchisement of African Americans across the State. The first map depicts the percentage of the total voting-age population that is disenfranchised in each county by virtue of being on probation, parole, or post-release supervision from a North Carolina state court conviction; the second map shows the percentage of the white voting-age population in each county disenfranchised on these bases; and the third map shows the corresponding percentage of the African American voting-age population disenfranchised:







Baumgartner Report at 18-19.

Statewide, more than 1.24% of the total African American voting-age population is disenfranchised by virtue of being on probation, parole, or post-release supervision. Baumgartner Report at 8-9. In 19 different counties, the disenfranchisement rate is greater than 2% of the African American voting-age population. *Id.* at 4, 34-35. In Dare County, the law disenfranchises greater than 5% of the total African American voting-age population. *Id.* Elections cannot "ascertain, faithfully and truthfully, the will of the people" when such large and disproportionate percentages of one race are barred from voting. *Common Cause*, 2019 WL 4569584, at *2

N.C.G.S. § 13-1 also reduces access to the franchise for poor persons of all races. Under North Carolina law, probation may be extended for failure to pay courts costs, fees, or restitution. And many disenfranchised individuals lack the financial means to make the payments they owe. Burch Report at 32-34. Across all disenfranchised individuals in North Carolina who are on probation, the average amount owed in fines, fees, and restitution is $2,441. Baumgartner Report at 22. Many North Carolinians therefore just do not have the money necessary to regain the franchise. Burch Report at 32-34. Elections cannot be considered "free" when a large number of citizens are denied the ability to cast a ballot for no reason other than their lack of financial resources.

The large number of disenfranchised persons across the state, and the disproportionate disenfranchisement of discrete racial and socioeconomic classes, prevent elections from being free regardless of whether it swings any particular election, but the disenfranchisement may actually be outcome-determinative with alarming frequency. In the 2018 general elections alone, there were 16 elections at the county level where the number of persons disenfranchised while on probation, parole, or post-release supervision exceeds the vote margin in the election. Baumgartner Report 27. For example, the vote margin in the Beaufort County Board of Commissioners race was just 63 votes, but 457 persons living in Beaufort County are disenfranchised. *Id.* The Lee County Board of Education election was decided by a mere 78 votes, with 332 people being disenfranchised in Lee County because they are probation, parole, or post-release supervision. *Id.* The Alleghany County Board of Commissioners race came down to just six votes, and over ten times that many Alleghany County residents are disenfranchised. *Id.* There can be no assurance that these elections accurately ascertained the will of the people.

Voter registration and turnout data reveals that a substantial percentage of persons disenfranchised while living in North Carolina communities would vote if their rights were restored. Of the persons currently on probation, parole, or post-release supervision from a state court felony conviction, 38.5% were registered to vote at some point prior to their conviction. Burch Report at 4, 9. Moreover, among persons who previously had been disenfranchised but had their rights restored before the 2016 general election, at least 27.69% voted in the 2016 general election. *Id.* at 17. And this turnout figure would be higher if not for the confusion that exists under current law among persons with felony convictions about when their voting rights are restored. *See, e.g.*, Ex. F ¶¶ 20-21. Regardless, it is clear that N.C.G.S. § 13-1 has the effect of prevents many thousands of individuals living in North Carolina communities who would otherwise vote from casting their ballots, potentially preventing the will of the people from prevailing in elections that affect every aspect of daily life.

C. N.C.G.S. § 13-1's Disenfranchisement of Individuals Living in North Carolina Communities Cannot Satisfy Strict Scrutiny

Because the right to free elections is a "fundamental right of North Carolina citizens," *Common Cause*, 2019 WL 4569584, at *2, the abridgment of that right under N.C.G.S. § 13-1 triggers strict scrutiny. *See Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990). That is so regardless of the General Assembly's intent in passing the law. When statutes implicate state constitutional provisions concerning the right to vote, "it is the effect of the act, and not the intention of the Legislature, which renders it void." *Von Bokkelen*, 73 N.C. at 225-26. The effect of N.C.G.S. § 13-1 is to disenfranchise more than 56,516 North Carolinians, a grossly disproportionate number of whom are African Americans.

In any event, strict scrutiny would apply here even if the General Assembly's intent were relevant in evaluating a Free Elections Clause claim. On the most basic level, it is undisputed

that the General Assembly intended to disenfranchise all 56,516 persons in North Carolina who are on probation, parole, or other supervision; the disenfranchisement is no accident. Moreover, the history of North Carolina's felony disenfranchisement scheme, culminating in N.C.G.S. § 13-1 today, reflects an intentional effort to target African Americans and poor persons. *See supra* at pp. 4-12; Burton Report at 2-3; Ex. K (Michaux Aff.). In manipulating the electorate by disenfranchising groups of voters perceived as undesirable, N.C.G.S. § 13-1 resembles the very English laws that were the impetus for North Carolina's original free elections clause.

Defendants therefore must show that the disenfranchisement of individuals on probation, parole, or post-release supervision under N.C.G.S. § 13-1 furthers a compelling government interest and that N.C.G.S. § 13-1 is narrowly tailored to advance that interest. *Common Cause*, 2019 WL 4569584, at *2; *Northampton Cnty.*, 326 N.C. at 747.

1. Defendants Have Not Identified Any Compelling Government Interest That the Challenged Scheme Is Narrowly Tailored to Advance

Given the fundamental importance of the franchise, it is hard to conceive of a "compelling" justification for disenfranchising large numbers of people who live in communities across the State. The North Carolina Supreme Court has held that "[t]he right to vote is the right to participate in the decision-making process of government" among all those in the "body politic" who "shar[e] an identity" and "humane, economic, ideological, and political concerns." *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 13, 269 S.E.2d 142, 150 (1980). This right of all members of the community to participate in deciding who will set policy in government, and for the will of the majority of members of the community to prevail, "is at the foundation of a constitutional republic." *Id.*; *see also Roberts v. Cannon*, 20 N.C. 398, 4 Dev. & Bat. (Orig. Ed.) 256, 260-61 (1839) (explaining that the North Carolina Constitution embodies the principle that "all classes of the community should be represented, and that every man should be entitled

to a vote who . . . ha[s] participated in the public burthens and have had a residence in the State long enough to learn its true policy, and to feel an interest in its welfare").

Defendants have offered no "compelling" interest for removing persons on probation, parole, or other supervision from the community of persons that has the right to choose its elected leaders in government. They do not assert that people on probation, parole, or post-release supervision are somehow not part of the same community as their neighbors who are eligible to vote. They do not dispute that persons on probation, parole, or post-release supervision "shar[e] . . . economic, ideological, and political concerns" with other members of the community. *Texfi Indus.*, 301 N.C. at 13, 269 S.E.2d at 150. And Defendants do not deny that the identity of elected officials profoundly affects the lives of disenfranchised persons in exactly the same ways it affects their neighbors.

Defendants instead offer a scattershot of other interests purportedly justifying the disenfranchisement scheme, none of which are sufficiently compelling or narrowly tailored to justify stripping the right to vote from tens of thousands of North Carolinians who live and work in the community subject to its laws.

Legislative Defendants and State Board Defendants both assert that the challenged scheme serves the interest of "implementing" the "constitutional mandate" in Article VI, § 2, cl. 3. *See* Ex. I, State Bd. Defs.' Am. Interrog. Resp. at 4; Ex. J., Legislative Defs.' First Supp. Interrogatory Responses at 4. But as described, *Holmes* squarely rejected the proposition that a constitutional "mandate" to enact implementing legislation on a particular subject alone is a sufficient interest to uphold that legislation. Just like in *Holmes*, "[a]lthough the General Assembly certainly had a duty, and thus a proper justification, to enact some form of" felony disenfranchisement laws, "this mandate alone cannot justify the legislature's choices when it

drafted and enacted [N.C.G.S. § 13-1]." *Holmes*, 840 S.E.2d at 265 (internal quotation marks omitted). Were it otherwise—if the existence of Article VI, § 2, cl. 3 allowed the General Assembly to enact any disenfranchisement scheme it pleased—the General Assembly could tie rights restoration to an individual's race, wealth, sex, religion, or even height. Put bluntly, "[a]n official who adopts a constitutional theory that would approve such a statute needs a new constitutional theory." *Jones*, 410 F. Supp. 3d at 1302.

Defendants also assert that N.C.G.S. § 13-1's scheme "[s]implif[ies] the administrative process for the restoration of rights of citizenship of felons who have served their full sentences." Ex. I at 4; Ex. J at 4. State Board Defendants similarly assert that the law "avoid[s] confusion among North Carolinians convicted of felonies as to when their rights are restored." Ex. I at 5. But a desire to simplify the administrative process is not, by itself, a compelling interest that can justify the denial of a fundamental right. "[A] statute will not be upheld merely because it serves the purpose of administrative convenience." *Smith v. Keator*, 21 N.C. App. 102, 108, 203 S.E.2d 411, 417 (1974) (citing *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) ("[W]hen we enter the realm of strict judicial scrutiny, there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality."). And in any event, tying rights restoration to the "unconditional discharge" of an individual's probation, parole, or post-release supervision creates rather than avoids confusion. As Diana Powell, CEO and Executive Director of Plaintiff Justice Served explains in her affidavit, she "regularly speak[s] with people who are confused as to whether or not they are eligible to vote after having been convicted of a crime." Ex. F ¶ 20. Some individuals "are unsure of whether or not they are on misdemeanor probation or felony probation," and others "are unsure if their probation has been extended due to an inability to pay court costs, fees, fines or restitution." *Id.*; *accord* Ex. G ¶ 23 (Purdie aff.)

A simple rule to avoid any confusion would be that if a person lives in the community, he or she can vote just like his or her neighbors. *See* Burch Report at 37-39.

Defendants contend that disenfranchising individuals until they complete their probation, parole, or post-release supervision helps "promot[e]" the "voter registration and electoral participation" of such individuals. Ex. I at 4-5; Ex. J at 4. That is nonsensical. Prohibiting people from voting—in many cases for years—directly *prevents* voter registration and electoral participation for the duration of the disenfranchisement. And the confusion caused by the disenfranchisement of non-incarcerated persons, coupled with the criminal penalties that exist for voting before one's rights are restored, causes many people to "remain incredibly fearful of casting a ballot even *after* their voting rights have been restored." Ex. F ¶ 21 (Powell aff.) (emphasis added); *see id.* ("Many of our clients have expressed to me that they are afraid to be prosecuted for inadvertently voting before they have completed their full probation or post-release sentence, including paying all of the associated fines and fees."); Ex. G ¶ 23 (Purdie aff.) ("Some participants have expressed to me that they have a fear of voting and getting arrested for doing so."); Jack Healy, *Arrested, Jailed and Charged With a Felony. For Voting.*, N.Y. Times, Aug. 2, 2018.

Legislative Defendants further claim that N.C.G.S. § 13-1's scheme serves an interest in "withholding the restoration of voting rights from felons who have not completed their entire sentence," and in "requiring felons to complete all conditions of probation, parole, and post-trial supervision." Ex. J at 5. State Board Defendants assert a similar interest. Ex. I at 5. But this is tautological: Defendants assert that requiring people to complete the terms of their probation, parole, or post-release supervision before they can vote serves an interest in requiring those people to complete the terms of their probation, parole, or post-release supervision before they

can vote. Moreover, any abstract interest in making people wait until they have "completed their entire sentence" is not sufficiently compelling to justify denying the fundamental right to vote to tens of thousands of North Carolinians who live in communities across this State. That is especially so when "completing" probation can be tied to wealth, rather than to conditions that the individual can control. And to the extent Defendants are arguing that withholding the franchise encourages completion of post-release and probationary terms, they have offered no evidence whatsoever to substantiate such a claim, and there is no empirical evidence to support such a claim in any of the scholarly literature. Burch Report at 22-34. Nor would such an interest be compelling.

In a similar vein, Defendants contend that the challenged scheme serves to "withhold[] the restoration of voting rights from felons who do not abide by court orders." Ex. J at 5; *see* Ex. I at 5 (similarly stating that the law "encourag[es] compliance with court orders"). Defendants have set forth no empirical or other evidence that the prospect of disenfranchisement results in high rates of compliance with court orders, and there is no such evidence in the scholarly literature. *See* Burch Report at 32. Moreover, the statute "withhold[s]" the right to vote from every individual on probation, parole, and post-release supervision, regardless of whether they have violated a court order.

Legislative Defendants contend that N.C.G.S. § 13-1 promotes an interest in "requiring felons to pay full restitution to their victims so that their victims are made as whole as possible." Ex. J at 4-5. This does not salvage the law for several reasons. First, the law indiscriminately disenfranchises all persons on probation, parole, or post-release supervision, and not just persons who owe restitution. Roughly 68% of probationers currently disenfranchised under N.C.G.S. § 13-1 did *not* owe any restitution as part of their sentence. Baumgartner Report at 23-24.

Second, even for those individuals who owe restitution, the requirement to pay it before regaining their voting rights does not serve any interest for the large percentage of these individuals who simply cannot afford to pay the amount owed. *See id.* at 22; Burch Report at 22-34. For the many disenfranchised persons "who genuinely cannot pay, and who offer no immediate prospects of being able to do so," disenfranchisement "erects a barrier without delivering any money at all." *Jones v. Governor of Fla.*, 950 F.3d 795, 811 (11th Cir. 2020) (internal quotation marks omitted). "The State cannot draw blood from a stone." *Id.* at 827. Even if N.C.G.S. § 13-1 were narrowly tailored to disenfranchise only those who could pay but refuse, speculation about incentivizing people to pay restitution is not sufficiently compelling to justify denying the fundamental right to vote.

Finally, State Board Defendants assert that the revisions to N.C.G.S. § 13-1 in the 1970s, which made rights restoration automatic upon the completion of probation, parole, and other supervision, served to "[e]liminat[e] or lessen[] the effect of the prior law's discretionary determinations as to whether a North Carolinian convicted of felonies deserves to have his or her rights restored." Ex. I at 4. To be sure, removing the requirement that individuals had to petition a court to have their rights restored was a worthy and important measure accomplished by civil rights leaders of the time. But improving some parts of a discriminatory, unconstitutional policy does not supply cover to other unconstitutional parts of the policy that remain in place. Indeed, as Rep. Michaux confirms, despite the best efforts of the civil rights leaders, the 1970s revisions were a compromise that did not fully cure the discriminatory intent and effects of the prior law. Ex. K ¶¶ 14-20 (Michaux Aff.). Prior disenfranchisement laws may have been worse than today's, but that is not a compelling interest for the *continued* requirement that individuals complete probation, parole, or post-release supervision before regaining their voting rights.

2. The State's Compelling Interest Is in Restoring Voting Rights

Not only does the challenged disenfranchisement scheme fail to advance any compelling government interest, it causes extensive harms beyond the disenfranchisement of people living in the community. The government's real interest is in re-enfranchising people, not disenfranchising them. The General Assembly itself has declared by statute that one of the primary purposes of sentencing a person convicted of a crime is "to assist the offender toward rehabilitation and restoration to the community as a lawful citizen." N.C.G.S. § 15A-1340.12.

Collateral consequences of felony convictions, such as disenfranchisement of persons living under community supervision, ensure that while these individuals must still uphold the duties of citizenship, "their conviction status effectively denies their rights to participate in social life." Burch Report at 40 (citation omitted). "The stigmas attached to their legal standing … impacts their standing as citizens, their political participation, and their community involvement." *Id.* at 41 (citation omitted). Because the ability to vote is an important marker of community standing and belonging, the deprivation of voting rights through felony disenfranchisement hinders the reintegration of people with felony convictions. *Id.* Such disenfranchisement deprives the individual "of his civic personality and social dignity," demonstrating society's "indifference to his interests" and sending messages of political and social exclusion that undermine efforts to reintegrate. *Id.* at 41-42; *see* Ex. E ¶ 6 (Gaddy aff.) ("The inability to participate in the democratic process made me feel as if I was not a citizen.").

Studies also show that "felony disenfranchisement increases recidivism." Burch Report at 42. One study found, based on analysis of data from the Bureau of Justice Statistics, that people convicted of felonies in states that permanently disenfranchise people with such convictions are ten percent more likely to reoffend in three years than people with felony

convictions in states that do not permanently disenfranchise such persons, even after accounting for individual criminal background and other characteristics. *Id.*

Disenfranchising citizens who are not incarcerated (or who were never incarcerated) harms not only the individuals who are disenfranchised themselves, but also their families and communities. Burch Report at 42-45. In North Carolina (and elsewhere), individuals with felony convictions are tightly concentrated geographically: state prisoners are removed from a small number of block groups (a census category corresponding to roughly 1,000 people, on average) in the state, and the community supervised population also lives in a disproportionately small number of block groups in the state. *Id.* at 43. This geographic concentration has dramatic effects on neighborhood-level disenfranchisement. *Id.* In 2008, within the largest five North Carolina block groups for young adult community supervision, roughly 1 of every 5 people aged 18-34 was living under community supervision and disenfranchised due to N.C.G.S. § 13-1. *Id.*

Living in high-conviction, high-disenfranchisement neighborhoods affects individuals in many ways, even if they are not convicted and disenfranchised themselves. Burch Report at 43. Voter turnout may decrease through several mechanisms. First, because "children and newcomers learn the community's participatory values as they observe ample instances of engagement among their family members and peers," neighborhoods that have fewer voters as role models fail to transmit norms of participation effectively even to enfranchised residents and future voters. *Id.* at 43-44. Second, spouses of people convicted of felonies also lose the participatory effects of having a partner that votes. *Id.* at 44. Disenfranchisement ripples throughout households and across generations.

There are other political ripple effects as well. In communities with disenfranchisement laws, convictions reduce the number of voters, which reduces the political power of a

community. This reduction happens not just by removing the disenfranchised individuals from the voter rolls, but through other mechanisms as well. Concentrated disenfranchisement also damages the formal and informal mechanisms of voter mobilization. Burch Report at 44. Political parties tend to concentrate their efforts in places where mobilization is more effective and often fail to mobilize communities with low socioeconomic status members. *Id.* They tend to contact people who have voted before, especially those who have voted in primaries. *Id.* Going door-to-door may yield contact with fewer voters in high-conviction, high-disenfranchisement neighborhoods, even though this technique is most effective for mobilization. *Id.* at 44-45. There are fewer voters available to serve as discussion partners in such neighborhoods, a factor that also reduces turnout. *Id.* at 45.

In short, Defendants have not advanced and cannot advance any compelling government interest to which N.C.G.S. § 13-1 is narrowly tailored that justifies removing all persons on probation, parole, or post-release supervision from the body politic that can vote for this State's elected leaders. Because the statute unduly and without justification subverts the will of the people, it violates the Free Elections Clause.

III. N.C.G.S. § 13-1's Disenfranchisement of Individuals Living in North Carolina Communities Violates North Carolina's Equal Protection Clause

N.C.G.S. § 13-1's disenfranchisement of persons living in North Carolina communities also violates North Carolina's Equal Protection Clause, which provides broader protection for voting rights than its federal counterpart. Strict scrutiny applies under Article I, § 19 because, in multiple different ways, N.C.G.S. § 13-1 denies a class of North Carolinians of "substantially equal voting power." The law denies equal voting power (or any voting power) to all persons on probation, parole, or post-release supervision, treating them differently from all other persons living in the community, and from the subset of the community convicted of a felony but who

have completed their period of supervision. The law independently triggers strict scrutiny under Article I, § 19 because it has the intent and effect of depriving substantially equal voting power to African Americans. The statute dates back to a post-Civil War effort to deny political power to African Americans, and it continues to work as intended. Statewide, African Americans are disenfranchised at 2.7 times the rate as whites, and in a number of counties, the disenfranchisement rate of African Americans is over six times that of whites. Finally, the law's requirement that people on probation pay financial obligations to ensure they regain access to the franchise is an impermissible wealth-based classification for the many people who simply cannot afford to pay these enormous debts. As with the Free Elections Clause, Defendants cannot meet their burden to show that these classifications satisfy strict scrutiny.

A. North Carolina's Equal Protection Clause Provides Greater Protection for Voting Rights Than its Federal Counterpart

The Equal Protection Clause of the North Carolina Constitution guarantees that "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const., art. I, § 19. It is well-established that "North Carolina's Equal Protection Clause provides greater protection for voting rights than federal equal protection provisions." *Common Cause*, 2019 WL 4569584, at *113 (citing *Stephenson v. Bartlett*, 355 N.C. 354, 377-81 & n.6, 562 S.E.2d 377, 393-96 & n.6 (2002); *Blankenship v. Bartlett*, 363 N.C. 518, 522-28, 681 S.E.2d 759, 763-66 (2009)). In particular, North Carolina's Equal Protection Clause expansively protects "the fundamental right of each North Carolinian to *substantially equal voting power*." *Stephenson*, 355 N.C. at 379, 562 S.E.2d at 394 (emphasis added). "It is well settled in this State that the right to vote on equal terms is a fundamental right." *Id.* at 378, 562 S.E.2d at 393 (internal quotation marks omitted).

North Carolina courts have repeatedly applied this broader protection for voting rights to strike down election laws under Article I, § 19 regardless of whether they violated federal equal protection. In *Stephenson*, the Supreme Court held that the use of single-member and multi-member districts in a redistricting plan violated Article I, § 19—even though such a scheme did not violate the U.S. Constitution. 355 N.C. at 377-81 & n.6, 562 S.E.2d at 393-95 & n.6. The Court held that, because the "classification of voters" between single- and multi-member districts created a "distinction among similarly situated citizens" with respect to voting rights, it "necessarily implicate[d]" the "fundamental right under the State Constitution" to "substantially equal voting power and substantially equal legislative representation," triggering strict scrutiny. *Id.* at 377-78, 382, 562 S.E.2d at 393-94, 396. Addressing contrary federal precedent, the Court explained that it is "beyond dispute that [the North Carolina Supreme Court] has the authority to construe the State Constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision." *Id.* at 381 n.6, 562 S.E.2d at 395 n.6 (alterations and internal quotation marks omitted).

In *Blankenship*, the Supreme Court held that Article I, § 19 mandates one-person, one-vote in judicial elections, even though "the federal courts have articulated that the 'one-person, one-vote' standard is inapplicable to state judicial elections" under the U.S. Constitution. 363 N.C. at 522-24, 681 S.E.2d at 762-64. The Court stressed that "[t]he right to vote on equal terms in representative elections . . . is a fundamental right" under the North Carolina Constitution and thus "triggers heightened scrutiny." *Id.* And in *Common Cause*, the three-judge Superior Court panel held that extreme partisan gerrymandering violates Article I, § 19 by "denying equal voting power" to "similarly situated citizens," even though the U.S. Supreme Court has declined

to hold that partisan gerrymandering violates federal equal protection guarantees. 2019 WL 4569584, at *113-18.

B. N.C.G.S. § 13-1's Disenfranchisement of Individuals Living in North Carolina Communities Triggers Strict Scrutiny Under Article I, § 19

Under Article I, § 19, strict scrutiny applies where either: (1) a "classification impermissibly interferes with the exercise of a fundamental right," or (2) a statute "operates to the peculiar disadvantage of a suspect class." *Stephenson*, 355 N.C. at 377, 562 S.E.2d at 393 (internal quotation marks omitted); *accord Northampton Cnty.*, 326 N.C. at 746, 392 S.E.2d at 355. Thus, if a statute interferes with the exercise of a fundamental right—such as the right to "substantially equal voting power"—for an identifiable group of people, strict scrutiny applies even if the affected group is not a suspect class. *Stephenson*, 355 N.C. at 379, 562 S.E.2d at 394; *accord Northampton County*, 326 N.C. at 747, 392 S.E.2d at 356.

N.C.G.S. § 13-1 deprives a group of North Carolinians of substantially equal voting power, and thus triggers strict scrutiny under Article I, § 19, in four independent ways. First, the statute creates a class of people living in North Carolina communities who, unlike all of their neighbors, have no voting power. Second, the law provides for differential treatment within the set of persons who have a felony conviction and live in North Carolina communities, allowing those who have completed their probation, parole, or other supervision to vote but denying the right to vote to those who have not. Third, the statute has the intent and effect of discriminating against African Americans, depriving the African American community of substantially equal voting power. In this respect, the statute also triggers strict scrutiny because it "operates to the peculiar disadvantage of a suspect class." *Stephenson*, 355 N.C. at 377, 562 S.E.2d at 393 (internal quotation marks omitted). Fourth, in conditioning the right to vote on the ability to pay fines, fees, and restitution, the statute creates an impermissible wealth-based classification.

1. The Law Denies Substantially Equal Voting Power to Individuals Living in North Carolina Communities on Probation, Parole, or Post-Release Supervision

On its face, N.C.G.S. § 13-1 creates a class of persons living in North Carolina communities who are treated differently from virtually everyone else with respect to their right to vote. Voting-age persons who are on probation, parole, or post-release supervision following a felony conviction are denied the right to vote, unlike their neighbors not on probation, parole, or post-release supervision. These two groups send their kids to the same schools, work in the same offices, pay the same taxes, and can attend the same political rallies and demonstrations, but only one group can vote.

N.C.G.S. § 13-1 deprives this class of people of substantially equal voting power. They have no "voting power" at all, even though they are "affected [by] and directly interested in" who wins office the same as "those who are permitted to vote." *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (striking down statute that "contain[ed] a classification which excludes otherwise qualified voters who [were] substantially and directly interested in the [election outcome]"). Because N.C.G.S. § 13-1 facially creates a distinction among citizens that "implicates" the "fundamental right under the State Constitution" to "substantially equal voting power," it triggers strict scrutiny under Art. I, § 19. *Stephenson*, 355 N.C. at 377-78, 382, 562 S.E.2d at 393-94, 396; *see also Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969) ("[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.").

2. The Law Provides for Unequal Voting Power Among Individuals with Felony Convictions Living in North Carolina Communities

N.C.G.S. § 13-1 also discriminates within the subset of persons living in North Carolina communities who have prior felony convictions. People with felony convictions who have completed their probation, parole, or post-release supervision can vote, but those who have not are denied any voting power. These two groups are "similarly situated." *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 393-94. The people in both groups have felony convictions, have been deemed by the State safe to return to society, and live and work amongst their communities. The denial of substantially equal voting power to one of these two similarly situated groups of North Carolinians triggers strict scrutiny under *Stephenson*. *See id.*

3. The Law Deprives African Americans Living in North Carolina Communities of Substantially Equal Voting Power

N.C.G.S. § 13-1 independently is subject to strict scrutiny because the statute has the intent and effect of discriminating against African Americans. A plaintiff bringing a race discrimination claim under Art. I, § 19 "need not show that discriminatory purpose was the sole or even a primary motive for the legislation, just that it was a motivating factor." *Holmes*, 840 S.E.2d at 254-55 (internal quotation marks omitted). "Discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Id.* (internal quotation marks omitted).

As detailed in the export report of Dr. Vernon Burton, one of the nation's foremost historians on southern voting rights, North Carolina's felony disenfranchisement scheme was designed largely to target African Americans, and that intent carries through to this day. *See supra* at pp. 4-12 (recounting history). The 1875 and 1877 provisions allowing broad-based felony disenfranchisement were adopted as part of an explicitly racist campaign to reverse the

gains of Reconstruction and to deny the franchise to African Americans. Burton Report at 24-45; *supra* at pp. 5-8. The effort was "a calculated and deliberate attempt to disenfranchise black voters in the face of the Fifteenth Amendment." Burton Report at 35. That intent was well-recognized at the time. *Id.* at 24-45. And while in the 1970s the efforts of North Carolina's first African American representatives since Reconstruction led to procedural reforms to facilitate the re-enfranchisement process for eligible persons, those representatives were unable to obtain changes to the law that would fully purge it of its racist origins and effect. Ex. K ¶¶ 14-20 (Michaux Aff.). Those racist origins and effects were well known at the time. *Id.* The civil rights leaders thus sought to provide for automatic restoration upon release from incarceration as opposed to completion of probation, parole, and post-release supervision and payment of all fines and fees. But those efforts were stymied, including by the same politicians who opposed integration and who opposed the Voting Rights Act. *Id.*; *see* Burton Report at 49-51.

To this day, the scheme to suppress the political power of African Americans through felony disenfranchisement laws has worked as intended. There is no genuine dispute that the continued disenfranchisement of individuals following their release from incarceration has a "disproportionate impact" on African Americans in North Carolina. *Holmes*, 840 S.E.2d at 255 (internal quotation marks omitted). As the below chart demonstrates, African Americans comprise 21.51% of the voting-age population in North Carolina, but 42.43% of those who are disenfranchised while on probation, parole, or post-release supervision.

This grossly disparate impact exists not just statewide, but in virtually every county across the state. As mentioned, in every county across the state for which there is sufficient data to perform comparisons, N.C.G.S § 13-1's disenfranchisement of non-incarcerated persons strips the right to vote from a greater percentage of the African American voting-age population than the white voting-age population. Baumgartner Report at 14-15. In 44 counties, the disenfranchisement rate of African Americans is over three times greater than it is for whites. *Id.* at 16. In Durham County, the disenfranchisement rate of African Americans is 5.82 times that of whites, in Wake County it is 6.21, in Buncombe County it is 6.93, in Mecklenburg County it is an astonishing 7.26, and topping the list is Orange County, where the disenfranchisement rate for African Americans is 7.82 times greater than for whites. *Id.*

These startling disparities have serious consequences for the political representation of African Americans and their communities. African American communities do not have

"substantially equal voting power" and the "the same representational influence or 'clout'" when so many members of their community cannot vote. *Stephenson*, 355 N.C. at 377-79, 562 S.E.2d at 393-94.

4. The Law Denies Substantially Equal Voting Power Based on Wealth

Strict scrutiny independently applies because the law creates a wealth-based classification for voting. As "conditions of probation," a defendant must "[p]ay the costs of court, any fine ordered by the court, and make restitution." N.C.G.S. § 15A-1343(b)(9). Failing to pay authorizes a multi-year extension of the term of probation—and thus a multi-year extension of the denial of the right to vote. *Id.* § 15A-1342(a), 1344(a), (d). N.C.G.S. § 13-1 thus denies the right to vote to people who have otherwise completed the terms of their probation, parole, or post-release supervision but cannot afford to pay their court fines, fees, or restitution, while similarly situated people who *can* afford to pay regain their right to vote.

It is well-settled that equal protection precludes a state from denying a person the right to vote "on account of his economic status." *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966). That principle "bars a system which excludes" from the franchise "those unable to pay a fee." *Id.* As the Eleventh Circuit recently explained in enjoining a Florida statute that disenfranchised people with felony convictions until they repaid fines and fees, "the basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license." *Jones*, 950 F.3d at 817. A state denies equal protection "whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Harper*, 383 U.S. at 666.

That is exactly what N.C.G.S. § 13-1 does. "[S]imilarly situated felons who have otherwise completed their sentences except for the payment of [fines, fees, and restitution] … are treated differently on account of their inability to pay." *Jones*, 950 F.3d at 820. Two North

Carolinians could be convicted of the same crime, receive the same sentence, and each complete all other terms of their probation, but the person "with money in the bank will be re-enfranchised," and the person "who can't [pay] will continue to be barred." *Id.* Accordingly, the law denies "substantially equal voting power" to similarly situated persons based only on their financial means, triggering strict scrutiny. *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 393-94.

Strict scrutiny separately applies because "disenfranchisement is a continuing form of punishment," and "heightened scrutiny is triggered when the State alleviates punishment for some, but mandates that it continue for others, based solely on account of wealth." *Jones*, 950 F.3d at 819-20. "[T]he state may not treat criminal defendants more harshly on account of their poverty." *Id.* at 818. And "[c]ontinued disenfranchisement is indisputably punitive in nature." *Id.* at 819. North Carolina thus "has implemented a wealth classification that punishes those genuinely unable to pay fees, fines, and restitution more harshly than those able to pay—that is, it punishes more harshly solely on account of wealth—and it does so by withholding access to the franchise." *Id.* 817. "Felons who are unable to pay (and who have no reasoned prospect of being able to pay) will remain barred from voting, repeatedly and indefinitely, while for those who can pay, the punishment will immediately come to an end." *Id.* at 820.

The wealth classification imposed under N.C.G.S. § 13-1 is no small matter. Across all probationers, the median total amount owed in fees, court costs, restitution, and supervision fees is $2,441. Baumgartner Report at 22. These financial obligations are prohibitive for a substantial percentage of disenfranchised persons. Only about half of people released from North Carolina prisons are employed a year after their release. Burch Report at 32.

N.C.G.S. § 13-1's disparate effects based on wealth are irrefutable, and Plaintiffs need not show discriminatory intent to succeed on this equal protection claim. "The Supreme Court

has squarely held that [the] intent requirement" applicable to race discrimination claims "is not applicable in wealth discrimination cases." *Jones*, 950 F.3d at 828 (citing *M.L.B. v. S.L.J.*, 519 U.S. 102, 126 (1996)). But in any event, N.C.G.S. § 13-1 traces its roots in part to a deliberate attempt to prevent poor persons from voting. Burton Report at 3, 34.

C. N.C.G.S. § 13-1's Disenfranchisement of Individuals Living in North Carolina Communities Cannot Pass Strict Scrutiny Under Article I, § 19

For the same reasons described in relation to the Free Election Clause, N.C.G.S. § 13-1's disenfranchisement of individuals living in North Carolina communities cannot pass strict scrutiny for purposes of Plaintiffs' equal protection claims. Defendants have not identified any compelling government interest to which the statute is narrowly tailored that justifies categorically denying voting power to all persons living in North Carolina communities while on probation, parole, or post-release supervision. *See supra* at pp. 29-34. There is never a compelling state interest (or any interest) in intentionally discriminating against citizens on the basis of race, particularly in the realm of voting rights. *See* N.C. Const. art. I, § 19 ("[no] person be subjected to discrimination by the State because of race"). Nor could there be any compelling state interest (or any interest) in discriminating against citizens on the basis of wealth in the realm of punishment or voting rights. *Harper*, 383 U.S. at 668; *Jones*, 950 F.3d at 810-11.

IV. N.C.G.S. § 13-1's Disenfranchisement of Individuals Living in North Carolina Communities Violates North Carolina's Freedom of Speech and Assembly Clauses

N.C.G.S. § 13-1 independently must be struck down because it violates North Carolina Freedom of Speech and Association Clauses. Article I, §§ 12, 14. Voting is a form of core political speech protected under the North Carolina Constitution, and N.C.G.S. § 13-1 constitutes a direct ban on such speech by persons on probation, parole, or post-release supervision. N.C.G.S. § 13-1 likewise precludes such persons from associating with a political party. The

statute is no different from a law that banned persons on probation, parole, or post-release supervision from leafleting, donating money to a political campaign, or giving a speech about policy issues in the public park. Such laws unquestionably would be stuck down, and N.C.G.S. § 13-1 must be as well.

A. Irrespective of Federal Law, Voting Is a Form of Protected Speech and Association Under the North Carolina Constitution

"North Carolina Constitution's Free Speech Clause provides broader rights than does federal law." *Common Cause*, 2019 WL 4569584, at *118 (citing *Corum v. Univ. of N..C through Bd. of Governors*, 330 N.C. 761, 782, 413 S.E.2d 276, 290 (1992); *Evans v. Cowan*, 122 N.C. App. 181, 183-84, 468 S.E.2d 575, 577-78, *aff'd*, 477 S.E.2d 926 (N.C. 1996)). "The words 'shall never be restrained' are a direct personal guarantee of each citizen's right of freedom of speech." *Corum*, 330 N.C. at 781, 413 S.E.2d at 289. Thus, while "both the North Carolina Constitution and the United States Constitution contain similar provisions," this State's courts "are not bound by the opinions of the federal courts" on matters concerning free speech and association. *Evans*, 122 N.C. App. at 183-84, 468 S.E.2d at 577.

Of relevance here, "[v]oting for the candidate of one's choice and associating with the political party of one's choice are core means of political expression protected by the North Carolina Constitution's Freedom of Speech and Freedom of Assembly Clauses." *Common Cause*, 2019 WL 4569584, at *119. "Voting provides citizens a direct means of expressing support for a candidate and his views." *Id.* As the North Carolina Supreme Court explained in *Van Bokkelen*, the people "express[]" their will "by the ballot." 73 N.C. at 220.

"[T]he Freedom of Assembly Clause independently protects [individuals'] voting and their association with [a political party]." *Common Cause*, 2019 WL 4569584, at *120. "Just as voting is a form of protected expression, banding together with likeminded citizens in a political

party is a form of protected association." *Id.* And like North Carolina's Free Speech Clause, the Freedom of Assembly Clause differs from the First Amendment and provides the people with the explicit power to "instruct their representatives." N.C. Const. Art. I, § 12. "[F]or elections to express the popular will, the right to assemble and consult for the common good must be guaranteed." John V. Orth, The North Carolina State Constitution 48 (1995).

B. N.C.G.S. § 13-1's Disenfranchisement of Individuals Living in North Carolina Communities Violates Article I, §§ 12 and 14

People living in North Carolina communities while on probation, parole, or post-release supervision have the same free speech rights under Article I, § 14 as all other North Carolinians. They have the right to attend a protest, to hand out fliers on issues of public importance, or to phone bank on behalf of their preferred candidates. But N.C.G.S. § 13-1 bans these individuals from expressing their views at the ballot box, denying them the right to engage in core protected speech. *Common Cause*, 2019 WL 4569584, at *119. Such disenfranchisement directly censors core political speech, which occupies "such a high status" that it deserves "the fullest and most urgent" protection. *Winborne*, 136 N.C. App. at 198, 523 S.E.2d at 153 (internal quotation marks omitted); *see also Lewis v. Rapp*, 220 N.C. App. 299, 305, 725 S.E.2d 597, 602 (2012) ("Political speech regarding a public election lies at the core of matters of public concern" entitled to constitutional protection (internal quotation marks omitted)).

Because voting is a form of core political expression, N.C.G.S. § 13-1 is no different from a statute banning persons on probation, parole, or post-release supervision from speaking their views in the town square. Nobody would seriously dispute that such a statute is unconstitutional. *See Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (invalidating statute barring sex offenders from all social media as violating the First Amendment). Nor is there any doubt that a statute banning persons on probation, parole, or post-release supervision

from making political donations would be struck down on free speech grounds. And if such a statute would trigger strict scrutiny, *a fortiori* N.C.G.S. § 13-1 must as well. Donating money to a candidate cannot receive greater free speech protections than voting for that same candidate.

N.C.G.S. § 13-1 also severely burdens the right of political association of persons on probation, parole, or post-release supervision. On the most basic level, such persons are precluded from registering to vote, and are thereby inhibited from becoming members of the North Carolina Democratic Party or North Carolina Republican Party. *See Common Cause*, 2019 WL 4569584, at *76 (explaining that "[t]he NCDP]s members include every registered Democratic voter in North Carolina"). "[B]anding together with likeminded citizens in a political party is a form of protected association," *id.* at *120, and inhibiting persons from registering with a political party interferes with the right to association. Moreover, in preventing people living in North Carolina communities from voting, N.C.G.S. § 13-1 burdens the ability of such persons to *effectively* associate with others who share the same political and policy views. *See id.* at *122. It hampers the ability of all such persons to elect public officials who share their policy preferences and will translate those preferences into legislation.

Because N.C.G.S. § 13-1 burdens—or outright bans—tens of thousands of people living in North Carolina communities from engaging in core political speech and association protected under Article I, §§ 12 14, the statute is subject to strict scrutiny. *State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 840 (1993) (restrictions on political speech are subject to strict scrutiny); *accord Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 298, 749 S.E.2d 429, 436 (2012). For the reasons explained above, Defendants cannot satisfy strict scrutiny.

V. N.C.G.S. § 13-1's Conditioning the Right to Vote on Financial Payments Violates the North Carolina Constitution's Ban on Property Qualifications

Article I, § 11 of the North Carolina Constitution provides that, "[a]s political rights and privileges are not dependent upon or modified by property, no property qualification shall affect the right to vote or hold office." This clause establishes that, "[u]nder North Carolina law, property interests alone cannot establish voting rights." *Texfi Indus., Inc. v. City of Fayetteville*, 44 N.C. App. 268, 273, 261 S.E.2d 21, 25 (1979), *aff'd*, 301 N.C. 1, 269 S.E.2d 142 (1980).

The framers of North Carolina's Constitution deemed the ban on property qualifications for voting "essential in the establishment of a more democratic form of government." *Roberts*, 20 N.C. 398, 4 Dev. & Bat. (Orig.Ed.) at 260-61. It ensures that "all classes of the community should be represented, and that every man should be entitled to a vote who should possess a sufficient degree of independence and legal discretion, and who should have participated in the public burthens and have had a residence in the State long enough to learn its true policy, and to feel an interest in its welfare." *Id.*

"Money, of course, is a form of property." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979); *see also McCullen v. Daughtry*, 190 N.C. 215, 129 S.E. 611, 613 (1925) (similar). Across various constitutional provisions, money and other financial assets are treated as "property." *See, e.g.*, *DeBruhl v. Mecklenburg Cty. Sheriff's Office*, 259 N.C. App. 50, 56, 815 S.E.2d 1, 5 (2018) (due process clause); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 613-14 (2013) (takings clause). There is no basis for defining "property" under North Carolina's ban on property qualifications any differently. The plain text of the provision encompasses all forms of "property," and applying the provision to include money accords with its original intent as well. Financial qualifications exclude "classes of the community" from the

franchise, the precise evil that the ban on property qualifications sought to prevent. *Roberts*, 20 N.C. 398, 4 Dev. & Bat. (Orig.Ed.) at 260-61.

By disenfranchising people based on failure to pay court costs, fees, and restitution, N.C.G.S. § 13-1 violates the constitutional ban on property qualifications. A person may have otherwise completed all terms of their probation, but the probation and accompanying disenfranchisement may be extended solely because the person does not have enough money to pay all of their obligations. In other words, the statute's requirement that a person receive an "unconditional discharge" from probation effectively requires that a person own a particular amount of money—equal to the total amount they owe in costs, fees, and restitution—in order to ensure they will regain their voting rights. The statute thus directly makes "political rights and privileges . . . dependent upon . . . property," in violation of Article I, § 11.

A property qualification of any degree is unconstitutional, but the onerous and frequently prohibitive nature of the property qualifications under N.C.G.S. § 13-1 bears emphasis. As described, the median total amount of financial obligations that probationers owe is $2,441. Baumgartner Report at 22. There can be no genuine dispute that numerous North Carolinians simply do not have enough money to pay their court costs, fees, and restitution, and thus do not have enough money to ensure that they can regain their right to vote.

VI. If Necessary, the Equities Strongly Favor a Preliminary Injunction

While Plaintiffs have established that they are entitled to summary judgment as a matter of law, this Court alternatively should issue a preliminary injunction. Plaintiffs are, at a minimum, likely to succeed on the merits, and the equities strongly support an injunction to ensure that tens of thousands of North Carolinians are not wrongly disenfranchised in November.

A. Plaintiffs Are Likely to Succeed on the Merits

For the reasons explained above, plaintiffs are likely to succeed on their challenge to N.C.G.S. § 13-1's disenfranchisement of persons living in North Carolina communities.

B. Plaintiffs Will Suffer Irreparable Harm Absent an Injunction

Absent a preliminary injunction, Plaintiffs are "likely to sustain irreparable loss." *Triangle Leasing*, 327 N.C. at 227, 393 S.E.2d at 856. "Courts routinely deem restrictions on fundamental voting rights irreparable injury." *Holmes*, 840 S.E.2d at 266 (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)). "[D]iscriminatory voting procedures in particular are the kind of serious violation of the Constitution for which courts have granted immediate relief." *Id.* (quoting *League of Women Voters of N.C.*, 769 F.3d at 247) (alterations omitted). "The need for immediate relief is especially important" in the context of voting rights because "once the election occurs, there can be no do-over and no redress." *Id.* (quoting *League of Women Voters of N.C.*, 769 F.3d at 247). "The injury to these voters is real and completely irreparable if nothing is done to enjoin the law." *Id.* (quoting *League of Women Voters of N.C.*, 769 F.3d at 247) (alterations omitted).

In recent years, numerous courts in North Carolina have applied this principle to preliminarily enjoin laws that restricted access to the franchise or otherwise threatened to impede free and fair elections. *See, e.g.*, *Holmes*, 840 S.E.2d 244 (entering preliminary injunction against voter ID law); *N.C. State Conf. of NAACP v. Cooper*, 2019 WL 7372980 (M.D.N.C. Dec. 31, 2019) (same); *Harper*, 19 CVS 12667, Order on Inj. Relief (entering preliminary injunction against use of gerrymandered congressional districts); *Action NC v. Strach*, 216 F. Supp. 3d 597 (M.D.N.C. 2016) (granting preliminary injunction regarding voter registration procedures); *Poindexter v. Strach*, 324 F. Supp. 3d 625 (E.D.N.C. 2018) (preliminarily enjoining North

Carolina statute removing third party candidates from ballot); *N.C. State Conf. of the NAACP v. N.C. State Bd. of Elections*, 2016 WL 6581284 (M.D.N.C. Nov. 4, 2016) (granting preliminary injunction against purging of voters from voter registration lists); *City of Greensboro v. Guilford Cty. Bd. of Elections*, 120 F. Supp. 3d 479 (M.D.N.C. 2015) (issuing preliminary injunction against law restructuring Greensboro city elections).

Failing to enjoin N.C.G.S. § 13-1 will cause irreparable harm just like the laws in all of the above cases. Unless enjoined, N.C.G.S. § 13-1 will prevent more than 56,500 individuals living in North Carolina communities from voting in the November 2020 general election, which will feature contests for President, U.S. Senate, and the entire Council of State. "The injury to these voters is real and completely irreparable if nothing is done to enjoin the law." *Holmes*, 840 S.E.2d at 266 (internal quotation marks omitted). These voters will have forever lost the opportunity—and their right—to vote on the elected leaders who will decide life-and-death matters over the next few years, such as access to healthcare, school funding, environmental regulations, and countless other critically important issues.

Indeed, Plaintiffs in this case have articulated the acute harms they and other members of the community will suffer absent an injunction. For instance, Plaintiff Shakita Norman is a single mother who "would like to be able to effect change in the community," and particularly to improve its public schools for her children, but N.C.G.S. § 13-1 "prevents [her] voice from being heard." Ex. D ¶ 11. Plaintiff Susan Marion, who was convicted of a drug offense after losing her home and car in Hurricane Florence, explains that if she were able to vote, she would "feel that [she] would be able to voice [her] opinion instead of feeling strangled." Ex. B ¶ 13. Corey Purdie from Plaintiff Wash Away Unemployment similarly attests that the individuals he serves "feel silenced, voiceless, and powerless by their inability to vote." Ex. G ¶ 18.

"Disenfranchisement prevents justice-involved individuals from advocating for themselves, their families, and their communities in the most direct way possible: participation in the democratic process." *Id.* ¶ 16.

The harms that will be incurred without an injunction are not limited to the individuals who are disenfranchised, but extend to their surrounding communities. African American communities in particular will suffer harms from the continued enforcement of N.C.G.S. § 13-1 given the grossly disproportionate impact of the law on African Americans in North Carolina. As Rev. Dr. T. Anthony Spearman of the North Carolina State Conference of the NAACP explains in the attached affidavit, "[w]hile voting is a personal, individual right, its collective impact is of course far greater." Ex. H ¶ 29. "[H]arsh and unfair probation and post-release felony disenfranchisement laws . . . are responsible for racial disparities in democratic participation and representation in [North Carolina]." *Id.* ¶ 12. A preliminary or permanent injunction is necessary to prevent the harms that North Carolina's African American communities have suffered for far too long from felony disenfranchisement.

C. The Balance of Equities Strongly Favors a Preliminary Injunction

Finally, "a careful balancing of the equities," *A.E.P. Indus.*, 308 N.C. at 400, 302 S.E.2d at 759, weighs decidedly in favor of a preliminary injunction. "[T]he public interest . . . favors permitting as many qualified voters to vote as possible." *Holmes*, 840 S.E.2d at 266 (internal quotation marks omitted). "[F]avoring enfranchisement . . . is always in the public interest." *Action NC*, 216 F. Supp. 3d at 648 (internal quotation marks omitted). That maxim follows from the bedrock principle that "[f]air and honest elections are to prevail in this state." *McDonald*, 119 N.C. at 673, 26 S.E. at 134. Plaintiffs seek to vindicate not only their own interest, but the paramount public interest in ensuring that North Carolina's 2020 elections reveal, "fairly and

truthfully, the will of the people." *Common Cause*, 2019 WL 4569584, at 2. An injunction prohibiting the enforcement of N.C.G.S. § 13-1 against persons on probation, parole, or post-release supervision is necessary to fulfill that mandate.

Corey Purdie of Wash Away Unemployment best explains the import of striking down N.C.G.S. § 13-1: "give people hope and they will want to contribute; give people a voice and they will speak; give people their rights and they will exercise them." Ex. G ¶ 24.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court enter summary judgment declaring N.C.G.S. § 13-1 unconstitutional to the extent it prevents persons on probation, parole, or post-release supervision from voting in North Carolina elections, and enjoin enforcement of N.C.G.S. § 13-1 against persons on probation, parole, or post-release supervision for the November 2020 and all future elections.

Respectfully submitted this the 8th day of May, 2020.

FORWARD JUSTICE

/s/ Daryl Atkinson
Daryl Atkinson (NC Bar # 39030)
Whitley Carpenter (NC Bar # 49657)
400 W Main St., Suite 203
Durham, NC 27701
daryl@forwardjustice.org

Counsel for Plaintiffs

ARNOLD & PORTER KAYE SCHOLER LLP

R. Stanton Jones*
Elisabeth S. Theodore*
Daniel F. Jacobson*
Graham White*
601 Massachusetts Ave. NW
Washington, DC 20001-3743
(202) 942-5000
stanton.jones@arnoldporter.com

PROTECT DEMOCRACY PROJECT

Farbod K. Faraji*
77 Pearl Street
Middletown, CT 06459
(202) 579-4582
farbod.faraji@protectdemocracy.org

Aditi Juneja**
115 Broadway, 5th Floor, NY, NY 10006
(202) 308-0163
Aditi.juneja@protectdemocracy.org

Counsel for Plaintiffs

* Admitted pro hac vice

** Pro hac vice forthcoming

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing to counsel for Defendants via *e-mail*, addressed to the following persons at the following addresses which are the last addresses known to me:

Brian D. Rabinovitz
114 W. Edenton St.
Raleigh, NC 27603
BRabinovitz@ncdoj.gov

Counsel for Legislative Defendants

Paul M. Cox
Olga Vysotskaya
114 W. Edenton St.
Raleigh, NC 27603
pcox@ncdoj.gov
OVysotskaya@ncdoj.gov

Counsel for State Board Defendants

This the 8th day of May, 2020.

/s/Daryl Atkinson
Daryl Atkinson (NC Bar # 39030)