STATE OF NORTH CAROLINA

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COUNTY OF WAKE

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19-CVS-15941

WAKE CO., C.S.C.

BY

COMMUNITY SUCCESS INITIATIVE, *et al.*,
Plaintiffs,

v.

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, *et al.*,

Defendants.

BRIEF OF *AMICI CURIAE* THE SENTENCING PROJECT, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AND THE SOUTHERN POVERTY LAW CENTER IN SUPPORT OF PLAINTIFFS

INTRODUCTION[1]

North Carolina law disproportionately deprives Black North Carolinians of the right to vote and prolongs their disenfranchisement based on circumstances that are marked by persistent racial inequity and have no connection to the legitimate interests of the State. In extending the period of disenfranchisement not only through any period of incarceration, but also through a person's "unconditional discharge" from community supervision thereafter,[2] North Carolina law amplifies the hardship that the criminal justice system disproportionately visits upon Black Americans; exacerbates stark racial disparities in income, wealth, and economic opportunity; and unduly mutes the voices of Black North Carolinians in public affairs.

[1] No person or entity other than amici curiae, their members, or their counsel directly or indirectly wrote this brief or contributed money for its preparation.
[2] N.C. Gen. Stat. § 13-1.

The criminal justice system in North Carolina, as nationwide, disproportionately entraps Black Americans and subjects them to more severe outcomes at every stage of the process. These disparate outcomes go beyond what can be accounted for by racial disparities in criminal offending. Black Americans are more likely to be stopped by police, searched, arrested, subjected to more severe criminal charges, incarcerated pre-trial, receive higher bail amounts, and receive harsher sentences than whites. Not surprisingly, then, conviction-based voter disenfranchisement in North Carolina disproportionately impacts Black Americans. Of the more than 56,000 people currently barred from voting because they are still under post-conviction supervision, 42% are Black.[3] Yet Blacks account for only 22% of the state's total population.[4]

North Carolina also *extends* the period of voters' disenfranchisement based on circumstances that consistently disadvantage Black Americans. Some of these circumstances—such as the severity of criminal charges prosecutors choose, and sentence length—are driven by discretionary decisions of criminal justice authorities that consistently demonstrate a racially discriminatory impact, subjecting Black Americans to harsher results than white Americans. Other circumstances that prolong disenfranchisement, such as one's ability to pay down fines and fees or to find work after imprisonment, are based not on criminal justice outcomes but on access to income and wealth. Here, too, stark racial disparities radically disadvantage Black Americans. In North Carolina, the poverty and unemployment rates for Black Americans are more than double those for white Americans, and the average wealth of white households is over

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[3] Pl.'s Mot. and Br. in Supp. of Mot. Sum. J. or in the Alternative a Prelim. Inj., *Cmty. Success Initiative et al. v. Moore et al.*, No. 19-cv-15941, at 15–16 (N.C. Super. Ct., May 8, 2020) (citing Expert Report of Frank R. Baumgartner).

[4] *Id.*; *see* U.S. Census Bureau, *Quick Facts: North Carolina* (July 1, 2019), https://www.census.gov/quickfacts/fact/table/NC.

seven times that of Black Americans.[5] All of those circumstances impact one's ability to successfully complete community supervision and to timely obtain the "unconditional discharge" necessary for the reinstatement of voting rights. The impact of North Carolina's disenfranchisement law through the completion of community supervision is significant: of all the North Carolina potential voters who were disenfranchised in 2016 because of a felony conviction, over half, 57%, were on community supervision—either on probation or on supervised release after having completed their sentenced term of incarceration.[6]

"The right to vote is the right to participate in the decision-making process of government," and as such, it is "at the foundation of a constitutional republic."[7] Discriminating against a group of people by disproportionately depriving them of the opportunity to participate in republican governance not only contradicts American democratic principles, but has practical, measurable impacts deleterious to the health of the State and the lives of Black North Carolinians. It mutes the voices of Black North Carolinians in public affairs, which leads to the disproportionate imposition on low-income, minority communities of fines-and-fees ordinances, which itself, hinders Black economic advancement and fuels the growing wealth gap between Black and white Americans. More broadly, the muting of Black political power prevents Black North Carolinians from employing the political process to make meaningful changes in the systems that, like the criminal justice system, so often discriminate against them. In contrast, the

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[5] *See infra* p.16.

[6] *See* Christopher Uggen et al., *6 million lost voters: State-level estimates of felony disenfranchisement, 2016*, The Sentencing Project (Oct. 6. 2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/ (figures derived from Tables 3 and 4).

[7] *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 13, 269 S.E.2d 142, 150 (1980).

restoration of voting rights measurably correlates to increased participation in democratic society and the reduction of recidivism.

Though the North Carolina Constitution calls for the initial deprivation of voting rights upon conviction for a felony, extending the period of disenfranchisement based on circumstances that so consistently and disproportionately discriminate against long-oppressed and marginalized members of society serves only to continue that oppression and marginalization. Such discrimination violates the North Carolina Constitution, whose disenfranchisement provision must be read in harmony with its provisions guaranteeing the equal protection of the laws, free elections, freedom of speech and association, and the prohibition of property qualifications to vote, as Plaintiffs contend in their Complaint.[8] Given its roots in State-sanctioned racial subjugation and discrimination, as illustrated in the Plaintiffs' Complaint and Motion for Summary Judgment, the extension of disenfranchisement through probation and supervised release is unconstitutional.

ARGUMENT

I. Racial disparities inherent in the criminal justice system contribute to the disproportionate disenfranchisement of Blacks in North Carolina.

In North Carolina, as nationwide, discriminatory racial disparities permeate each stage of contact with the criminal justice system. These disparate outcomes go beyond what can be accounted for by racial disparities in criminal offending. Black Americans, especially Black men, are more likely to be stopped by police, searched by police, shot by police, arrested by

[8] *See N.C. State Bd. of Educ. v. State*, 255 N.C. App. 514, 529 (2017), *aff'd*, 371 N.C. 149 (2018) (affirming "the basic canon of constitutional construction to interpret separate provisions in harmony"); N.C. Const. art. I, §§ 19 (guaranteeing "the equal protection of the laws"), 10 ("All elections shall be free."), 12 (right of assembly), 14 (guaranteeing freedom of speech); 11 (providing that "no property qualification shall affect the right to vote or hold office").

police, charged by prosecutors with more severe crimes, incarcerated pretrial, receive higher bail amounts, have lower diversion rates, and receive harsher sentences than similarly situated white Americans.[9] These racial disparities accrue at each stage of the criminal justice system, from initial police encounters through sentencing, and continue beyond active incarceration to parole and release.[10]

Higher rates of geographically concentrated socioeconomic disadvantage—itself a result of centuries of racial discrimination—may contribute to higher rates of certain violent and property crimes among Black Americans.[11] But even this artifact of slavery and discrimination does not explain the disparate impacts of the criminal justice system on Black Americans.[12] There is a broad range of other factors that produce racially disparate outcomes that ultimately impact the voting rights of Black Americans and their ability to participate in the democratic process that is fundamental to the strength of North Carolina and American democracy.

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[9] *See* William Y. Chin, *Racial Cumulative Disadvantage: The Cumulative Effects of Racial Bias at Multiple Decision Points in the Criminal Justice System*, 6 Wake Forest J.L. & Pol'y 441, 442–46 (2016).

[10] *Id.* at 446.

[11] Ruth Peterson & Lauren Krivo, *Divergent Social Worlds: Neighborhood Crime and the Racial-Spatial Divide* 5 (reprint ed. 2012); Robert Sampson et al., *Social Anatomy of Racial and Ethnic Disparities in Violence*, 95 Am. J. Pub. Health 224, 231 (2005).

[12] *See* Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. Legis. & Pub. Pol'y 821, 826–27 (2013) ("For some offenses--like drug offenses, for example--disproportionate offending does not appear to be a significant factor. Since drug arrests and convictions account for such a high percentage of individuals in prisons and jails the role of disproportionate offending in the overall calculus of the racial disparity problem is, at best, uncertain."); Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. Colo. L. Rev. 743, 759–60 (1993).

A. Policing

The disparate and more negative impact of the criminal justice system on communities of color in North Carolina is evident even before arrest, in decisions about what laws to enforce, how to enforce them, where to enforce them, and whom they are enforced against. Drug enforcement practices, for example, disproportionately target Black North Carolinians, even though drug usage patterns do not differ substantially by race. In 2018, Blacks in North Carolina were 3.3 times as likely as whites to be arrested for marijuana possession.[13] That arrest rate mirrors the rate for Black Americans nationwide, where Blacks were 3.6 times as likely to be arrested for marijuana possession in 2018, even though rates of marijuana usage are similar for Blacks and whites.[14] Policing strategies that target lower-income neighborhoods necessarily result in more police contacts with people of color. The "War on Drugs," "Broken Windows" policing, and "Stop and Frisk," for example, all entail higher levels of police contact with Black Americans,[15] and increased police contact means more stops, more searches, and more arrests.

B. Stops and Arrests

As of 2018, Black North Carolinians were being arrested at 2.3 times the rate of whites.[16] Differential rates of criminal offending do not account for this disparity. Research on traffic

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[13] Ezekiel Edwards et al., Am. Civil Liberties Union, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* 5 (2020), https://www.aclu.org/sites/default/files/field_document/042020-marijuanareport.pdf. (figure derived from Table 7).

[14] *Id.* at 5.

[15] Nazgol Ghandnoosh, The Sentencing Project, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System* 3 (Feb. 3, 2015), https://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/.

[16] FBI, Crime Data Explorer, https://crime-data-explorer.fr.cloud.gov/explorer/state/north-carolina/arrest (showing 129,910 arrests of Blacks and 160,947 arrests of whites in 2018); U.S. Census Bureau, *Quick Facts: North Carolina* July 1, 2019)

stops and drug possession arrests in North Carolina indicates that differential enforcement contributes significantly. In their book *Suspect Citizens,* scholars Frank Baumgartner, Derek Epp, and Kelsey Shoub analyzed more than 20 million traffic stops in North Carolina from 2002 to 2016.[17] They found that Black drivers are about twice as likely as white drivers to be stopped on the highways.[18] Once pulled over, they are about twice as likely to be searched, even though police were *less likely* to find contraband on searched Black drivers than on white drivers.[19]

Another study found similar racial disparities in arrests for low-level drug offenses. When Charlotte-Mecklenburg police encounter someone possessing less than half an ounce of marijuana, officers have discretion either to make an arrest or to issue a citation. A *Charlotte Observer* review of police records found that in these situations police arrested Blacks nearly three times as often as whites.[20] Since 2012, the review found, racial disparities in such cases have increased even while arrests in such cases overall have declined.[21]

Because North Carolina law disenfranchises individuals not only for in-state felony convictions, but for other state and federal convictions as well, it is also important to consider nationwide racial disparities in the criminal justice system. In 2018, Black Americans comprised 27% of arrests for all crimes in the United States—double their share of the total population.[22]

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https://www.census.gov/quickfacts/fact/table/NC/ (showing that Blacks and non-Hispanic whites comprised 22.2% and 62.6% of the state's 10,488,084 residents).

[17] Frank R. Baumgartner et al., Suspect Citizens: What 20 Million Traffic Stops Tell Us about Policing and Race 31 (2018).

[18] *See id.* at 73.

[19] *See id.* at 161.

[20] Steve Harrison, *For Small Amounts of Marijuana, Blacks Are Far More Likely than Whites to go to Jail in Charlotte*, Charlotte Observer (Feb. 14, 2016, 5:25PM), https://www.charlotteobserver.com/news/local/crime/article60170981.html.

[21] *Id.*

[22] FBI, Uniform Crime Report, *Crime in the United States 2018*, Table 43 (2018), *available at* https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-43.

This disparity stems in part from the greater policing attention directed to people of color; nationwide, Blacks are almost three times more likely than whites to be stopped for investigatory police stops.[23]

C. Prosecution and Pretrial Detention

Prosecutors consistently make discretionary decisions that disproportionately disadvantage people of color. In North Carolina, prosecutors' "peremptory challenges are indeed a vehicle for veiled racial bias that results in juries less sympathetic to defendants of color."[24] By collecting statewide jury selection records, the Jury Sunshine Project found that in 2011, prosecutors removed twice as many potential Black jurors as white jurors.[25] White jurors were statistically more likely to return convictions, and for every peremptory challenge that a prosecutor used to strike a potential Black juror, the conviction rate for Black male defendants increased by 2-4%.[26] Similarly, a 2012 study conducted by Michigan State University law professors Catherine Grosso and Barbara O'Brien showed that North Carolina prosecutors were more than twice as likely to strike qualified Black potential jurors as whites in death penalty convictions between 1990 and 2010, even after accounting for other relevant juror characteristics (such as expressed reservations about the death penalty, economic hardships, and past run-ins with the law).[27]

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[23] Chin, *supra* note 9, at 443.
[24] Ronald Wright, *Yes, Jury Selection Is as Racist as You Think. Now We Have Proof*, N.Y. Times (Dec. 4, 2018), https://www.nytimes.com/2018/12/04/opinion/juries-racism-discrimination-prosecutors.html.
[25] *See* Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. Ill. L. Rev. 1407, 1410 (2018).
[26] *See id.* at 1430-31.
[27] *See* Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 97 Iowa L. Rev. 1531, 1554 (2012).

Racial discrimination in prosecutors' uses of peremptory strikes in North Carolina has been proven in the courtroom, as well. In *State v. Robinson*, the court found that "race was, in fact, a significant factor in the prosecution's use of peremptory strikes."[28] Among other evidence, the court's finding was based on comprehensive statistical studies examining prosecutors' uses of peremptory strikes in North Carolina and showing that race was a statistically significant factor in the use of such strikes, and on expert testimony concerning social psychology and the influence of race on perception, judgment, decision-making, and jury selection.[29]

Decisions of the North Carolina Supreme Court issued in just the last two months illustrate how prosecutions in North Carolina have been riddled with racial bias. In *State v. Ramseur*, the Court held that the capital defendant had produced sufficient evidence under the North Carolina Racial Justice Act (since repealed) to warrant an evidentiary hearing on whether racial bias had infected the defendant's sentence of death: the defendant had sufficiently forecast evidence tending to show that, in the relevant geographic areas, race was a significant factor in the prosecution's use of peremptory challenges, in the prosecution's decision to proceed capitally, and in the actual imposition of death sentences, at the time defendant's sentence was imposed.[30] In *State v. Burke*, the Court noted that the capital defendant had presented evidence that race was a significant factor in jury selection, sentencing, and capital charging decisions in the jurisdictions relevant to his trial and sentencing.[31] In *State v. Hobbs*, the Supreme Court

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[28] Order Granting Motion for Appropriate Relief, *State v. Robinson*, No. 91 CRS 23143, at 1 (N.C. Super. Ct. Apr. 20, 2012), *available at* https://www.aclu.org/legal-document/north-carolina-v-robinson-order (vacated by 368 N.C. 596 to afford State more time to review statistical data).
[29] *See id.* at 6-8.
[30] *State v. Ramseur*, 843 S.E.2d 106, 122 (N.C. 2020).
[31] *State v. Burke*, 843 S.E.2d 246, 248 (N.C. 2020).

recognized evidence of discrimination in prosecutors' pretextual explanations for striking black jurors; the prosecutor claimed to have stricken the jurors because of their experience with mental health professionals, yet the prosecutor had accepted at least three other white jurors with the same kind of experience.[32]

Even before cases go to trial, prosecutors' discretionary decisions on charging consistently discriminate against Blacks. Prosecutors are more likely to charge people of color than to charge whites with crimes that carry heavier sentences. A study examining federal charging decisions found a dramatic disparity disfavoring blacks in the severity of the charges that prosecutors decide to pursue and in the likelihood of facing charges with mandatory minimum sentences.[33] Federal prosecutors are twice as likely to charge Black Americans with offenses that carry a mandatory minimum sentence than similarly situated whites.[34] Similarly, state prosecutors are also more likely to charge Black rather than comparable white defendants under habitual offender laws.[35] All of these decisions impact racial disparities in the length of sentences, and in the related collateral discriminatory impacts of those sentences in the longer term, including on voting rights.

Policy decisions impacting the prosecution and defense of criminal defendants also have a racially discriminatory impact on Black Americans. Most jurisdictions inadequately fund their

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[32] *State v. Hobbs*, 841 S.E.2d 492, 502-03 (N.C. 2020)
[33] *See* Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. Pol. Econ. 1320, 1335-36 (2014), *available at* https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2413&context=articles.
[34] Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L.J. 2, 7, 28 (2013).
[35] Charles Crawford et al., *Race, Racial Threat, and Sentencing of Habitual Offenders*, 36 Criminology 481, 481 (1998).

indigent defense programs,[36] for example, and people of color make up a disproportionate share of public defender clients.[37] While there are many high-quality public defender offices, in far too many cases indigent individuals are represented by public defenders with excessively high caseloads, or by assigned counsel with limited experience in criminal defense.[38] A recent study by the National Center for State Courts concluded that most assistant public defenders in North Carolina had too many cases and lacked access to professional services such as investigators.[39] In 2011, the North Carolina General Assembly exacerbated the challenges of indigent defense by implementing a rate reduction for Private Assigned Counsel, from $75/hour to $55/hour for cases in District Court and $60/hour for most cases in Superior Court.[40]

Racial disparities are evident in pretrial detention as well. In 2015, 89% of North Carolina's almost 17,000 people in jail were being held pre-trial, and Blacks were incarcerated in

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[36] Eve Brensike Primus, *Defense Counsel and Public Defence*, in Reforming Criminal Justice: Pretrial and Trial Processes 121 (2017), *available at* https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1113&context=book_chapters.

[37] Caitlin Fenhagen, *The North Carolina Public Defender Committee on Racial Equity (NC PDCORE)The Founding of the Committee, its Mission and its Work Since 2011*, North Carolina Office of Indigent Defense Services 23, *available at* http://ncids.com/pd-core/wp-content/uploads/2013/06/The-North-Carolina-Public-Defender-Committee-on-Racial-Equity-NC-PDCORE-The-Founding-of-the-Committee-its-Mission-and-its-Work-Since-2011.pdf (citing address to the 2011 N.C. Public Defender Conference by James Williams, Chief Public Defender for Orange and Chatham Counties).

[38] Teresa Wiltz, *Public Defenders Fight Back Against Budget Cuts, Growing Caseloads*, Stateline (Nov. 21, 2017), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/11/21/public-defenders-fight-back-against-budget-cuts-growing-caseloads.

[39] *See* N.C. Comm'n on Indigent Def. Servs., *Annual Report: July 1, 2017-June 30, 2018* (Mar 15, 2019), *available at* https://www.ncleg.gov/documentsites/committees/JLOCJPS//Reports/FY%202018-19/IDS_2018_Annual_Report_2019_03_15.pdf.

[40] C. Colon Willoughby, *Low Pay for Court-Appointed Lawyers Shortchange Justice*, The News & Observer (June 11, 2019), https://www.newsobserver.com/opinion/article231428288.html.

jails at 3.2 times the rate of whites.[41] North Carolina's pretrial detention rate in 2015 was 10% above the U.S. rate of pretrial detention (229 per 100,000 versus 209 per 100,000, respectively).[42] High levels of pretrial detention and its concomitant racial disparity fuel further racial inequities in later stages of the criminal justice process. Pretrial detention has been shown to increase the odds of conviction, and people who are detained awaiting trial are also more likely to accept less favorable plea deals, to be sentenced to prison, and to receive longer sentences.[43]

D. Sentencing

North Carolina imprisons Blacks at 4.3 times the rate it imprisons whites.[44] In fact, North Carolina is one of twelve states where Black Americans make up more than half of the state prison population.[45] To a significant degree, the over-representation of Black Americans in prisons and jails is attributable to racial disparities in sentencing.

Black defendants in North Carolina are more likely to face stiff sentences upon conviction compared to white defendants in the same circumstances.[46] A study of sentencing outcomes in an urban North Carolina jurisdiction found that in 2000, whites with drug

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[41] *See* Vera Inst. of Justice, *Incarceration Trends: North Carolina*, http://trends.vera.org/rates/north-carolina (last visited July 22, 2020) (showing pretrial and total jail population counts and rates of jail incarceration by race).
[42] *See id.*
[43] *See* Ghandnoosh, *supra* note 15, at 17.
[44] Ashley Nellis, The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* 5 (2016), (https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf.
[45] U.S. Bureau of Justice Statistics, *Prisoners in 2018* 4-5 (Apr. 2020) (Table 2), https://www.bjs.gov/content/pub/pdf/p18.pdf.
[46] *See* Nazgol Ghandnoosh, *supra* note 15, at 30 n.4 (collecting sources); *see* Chin, *supra* note 9, at 445-46.

convictions received less severe punishment than both Blacks and Hispanics.[47] Given the limited research on sentencing disparities in North Carolina, it is helpful to consider studies from other jurisdictions as well, and these show persistent racial bias in discretionary sentencing. A study of over 77,000 federal sentences found that Black defendants receive substantially longer sentences, even after controlling for extensive criminological, demographic, and socioeconomic variables; that Black defendants are less likely to receive a non-prison term when that option is available; less likely to receive downward departures; more likely to receive upward adjustments; and when they do receive downward departures, receive smaller reductions than white defendants.[48] A study of sentences in Georgia between 1995 and 2002 showed that criminal sentences of Blacks were 4.25% longer than those of whites, even when controlling for other relevant factors, and that disparity in sentences even extended to skin color, with Blacks who have "medium" and "dark" complexions receiving sentences 4.8% longer than those for whites and "light complected" Blacks.[49]

E. Impact on Disenfranchisement

The racial disparities in policing, stops, arrests, charges, jury selection, access to counsel, pretrial detainment, sentencing and imprisonment necessarily contribute to the discriminatory disenfranchisement of Blacks under North Carolina's system of felony disenfranchisement. The disproportionate impacts on Blacks at every stage of the criminal justice system also disproportionately denies them the right to vote. And such disparities *extend* the period of

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[47] Pauline K. Brennan & Cassia Spohn, *Race/Ethnicity and Sentencing Outcomes among Drug Offenders in North Carolina*, 24 J. Contemp. Crim. Just. 371, 388 (2008).
[48] *See* David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & Econ. 285, 312 (2001).
[49] Am. Bar Found., *2014 Annual Report* 14 (2014), http://www.americanbarfoundation.org/uploads/cms/documents/2014_annual_report.pdf.

disenfranchisement for Blacks, as the racial inequities in charging and sentencing subject Blacks to disproportionately longer prison terms, lengthening the period of time before which, under Section 13-1, they can be eligible for the restoration of their voting rights.

II. Racial disparities in income, wealth, and economic opportunity impose higher barriers to re-enfranchisement for Blacks.

Black Americans on community supervision face greater challenges to successfully reentering society and satisfying the conditions of that supervision, which can prolong the period of disenfranchisement. The collateral consequences of a criminal conviction—consequences limiting employment opportunities, access to stable housing, skilled trade or professional licensing, and eligibility for social services—all fall more heavily on Blacks, as discussed below. These collateral consequences make it more difficult to satisfy common requirements of community supervision, such as the requirement to pay down court fines and fees, and to meet conditions such as finding stable employment that, as explained below, would reduce the period of supervision.

People with criminal records face a host of obstacles in reentering society. These include barriers to securing steady employment and housing, to accessing the social safety net and federal student aid, and to exercising the right to vote. "Poor people, people of color, and men are more likely to be involved in the criminal justice system and therefore to incur these direct and collateral costs [of criminal convictions]."[50] People of color—particularly Black men—are most exposed to the collateral consequences associated with a criminal record. In 2010, 8% of all adults in the United States had a felony conviction on their record; for Black adults the

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[50] Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 Am. J. Soc. 1753, 1760 (2010), http://faculty.washington.edu/kbeckett/articles/AJS.pdf.

percentage is nearly three times higher, at 23%.[51] Among Black men, the rate was one in three (33%).[52] In North Carolina, the percentage of Black adults with felony convictions was more than double the percentage for all adults—14% of Black adults had criminal convictions compared to only 6% for all adults.[53]

Nearly one-third of U.S. workers hold jobs that require an occupational license, a requirement which sometimes bars and often poses cumbersome obstacles for people with criminal records.[54] In sectors that do not require licensing, scholar Devah Pager's Milwaukee study found employers were 50% less likely to call back white job applicants with incarceration histories than comparable applicants without prison records.[55] Black job applicants, who are less likely to receive callbacks than white applicants to begin with, experience an even more pronounced discrimination related to a criminal record. As Pager's research has revealed, whites *with* criminal records received more favorable treatment than Blacks *without* criminal records.[56]

In addition to these collateral consequences, the persistent gap in economic power between whites and Black Americans imposes still greater difficulties on the ability of Black Americans to pay the monetary costs associated with their convictions, which is a common requirement of post-conviction supervision. A recent report by the Duke Law Center for Science

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[51] Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 Demography 1795, 1814 (2017).
[52] *Id.*
[53] *Id.* (attachment ESM 3).
[54] Sophie Quinton, *To Help Ex-Offenders Get Jobs, Some States Reconsider Licenses*, Stateline (Mar. 8, 2017), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/03/08/to-help-ex-offenders-get-jobs-some-states-reconsider-licenses.
[55] Devah Pager, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* 67 (2007).
[56] *Id.* at70.

and Justice shows that "[c]riminal debt falls disproportionately on Black and Latinx persons in North Carolina. In fact, the demographics of people who owe criminal debt are almost the reverse of that of the state as a whole."[57] Of the approximately 650,000 people who have been sanctioned by North Carolina courts for failure to pay court-imposed fines or fees, half are Black Americans, even though whites make up two-thirds of the population of the State.[58] North Carolina is not alone. Nationally, an estimated ten million people owe more than $50 billion in court-imposed criminal debt.[59] As in North Carolina, "[t]hese court-imposed debts fall disproportionately on minority and poor communities . . . ."[60]

And the communities of color on which these court fines and fees disproportionately fall "are often less able to pay them."[61] Black and Hispanic people in the United States have a lower average income and live in poverty at rates higher than whites.[62] The disparity is especially pronounced in North Carolina. North Carolina's poverty rate among whites was 10% in 2018, compared to 21% among Black Americans. The average income for Black Americans in North

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[57] William Crozier et al., Duke Law Ctr. for Sci. and Justice, *The Explosion of Unpaid Criminal Fines and Fees in North Carolina* 10 (April 22, 2020), https://sites.law.duke.edu/justsciencelab/wp-content/uploads/sites/5/2020/04/CSJ-Criminal-Fines-and-Fees-in-NC-v.7.pdf.

[58] *Id.*

[59] Campaign Legal Center & Georgetown Law Civil Rights Clinic, *Can't Pay, Can't Vote: A National Survey on the Modern Poll Tax* 19 (July 7, 2019), https://finesandfeesjusticecenter.org/articles/cant-pay-cant-vote-a-national-survey-on-the-modern-poll-tax/.

[60] *Id.*

[61] *Id. See also* Theresa Zhen, *(Color)blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. Rev. L. & Soc. Change 175, 194-196 (2019) (discussing studies showing that fees were significantly more likely to be imposed on Blacks than on whites and that Blacks suffer from heavier penalties than their white counterparts).

[62] Jonathan Oberman & Kendra Johnson, *The Never Ending Tale: Racism and Inequality in the Era of Broken Windows*, 37 Cardozo L. Rev. 1075, 1080 (2016).

Carolina is 63% that of white residents.[63] In the fourth quarter of 2019, the unemployment rate for Black workers in North Carolina (5.5%) was nearly double that for whites (2.9%).[64]

This disparity is even more pronounced when examining not just income, but wealth; that is, the sum of the market value of all assets held by each person living in a household. The University of North Carolina's Center on Poverty, Work, and Opportunity's analysis of surveys conducted between 2004 and 2006 in the state found that the median value of total wealth held by white households ($71,900) was *over seven times* the wealth of Black households ($9,500).[65] The Center concluded that "among the 33 states for which there are data available, North Carolina has the seventh largest wealth gap between white and non-white households and the ninth largest asset poverty rate."[66] These findings suggest that even when Black and white individuals have similar levels of legal debt, they have vastly different levels of income and wealth to pay it. As Abby Shafroth explains in her examination of *Criminal Justice Debt in the South*, the racial wealth gap compounds the disproportionate imposition of fines and fees: "Because black families have less wealth to draw upon than white families when hit with unexpected fines or fees, black families are more likely to be unable to pay the amounts assessed

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[63] *See* U.S. Census Bureau, Am. Cmty. Survey, *Mean Income in the Past 12 Months: North Carolina*, https://data.census.gov/cedsci/table?q=Income%20and%20Earnings&g=0400000US37&tid=ACSST1Y2018.S1902&vintage=2018 (last visited July 22, 2020) (filtered for North Carolina, showing estimated income of $34,813 for White residents and $21,933 for Black residents).

[64] Econ. Policy Inst., *State Unemployment by Race and Ethnicity: 2019 Quarter Report* (Mar. 2020) https://www.epi.org/indicators/state-unemployment-race-ethnicity/ (last visited July 22, 2020).

[65] Gene Nichol & Jeff Diebold, Univ. of N.C. Ctr. on Poverty, Work and Opportunity, *Racial Wealth Disparity in North Carolina* 5 (2010), https://www.zsr.org/sites/default/files/documents/Racial%20Wealth%20Disparity%20in%20NC.pdf.

[66] *Id.* at 1.

immediately, which may result in snowballing costs (e.g., interest, late payment fines, license suspension and reinstatement fees) or arrest or incarceration for nonpayment—which carry huge negative economic consequences."[67]

Put simply, as the Duke Law Center for Science and Justice observes, "poverty looks different for black and white families."[68] Beyond income, Black families have fewer assets and less wealth on which to draw in times of crisis. Whereas a white family just above the poverty line may have about $18,000 in wealth, a similarly situated Black family has closer to zero dollars in wealth, or even negative wealth.[69] "This lack of assets plays a tangible role in not only the advancement of Black people financially, but in how Black people might fare when confronted with a crisis or emergency."[70] One study in the *American Journal of Sociology* illustrates the impact of this wealth gap in the context of individuals on post-conviction supervision. Examining average legal debt in Washington State in relation to estimated annual earnings, the study found that formerly incarcerated white men had, by 2008, been assessed monetary sanctions roughly equivalent to their expected annual earnings. But for formerly incarcerated Black men, the average legal debt was equivalent to more than twice (222%) their expected earnings.[71]

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[67] Abby Shafroth, Nat'l Consumer Law Ctr., *Criminal Justice Debt in the South: A Primer for the Southern Partnership to Reduce Debt* 5 (Dec. 2018), https://www.nclc.org/images/pdf/criminal-justice/white-paper-criminal-justice-debt-in-the-south-dec2018.pdf.
[68] Crozier & Garrett, *supra* note 57, at 1617.
[69] *Id.*
[70] Zhen, *supra* note 61, at 197 (citing Melvin L. Oliver & Thomas M. Shapiro, Black Wealth, White Wealth: A New Perspective on Racial Inequality 94-99 (2006)).
[71] Harris, Evans & Beckett, *supra* note 50, at 1776.

The racial inequities in job opportunities, access to housing, financial resources, and imposition of court-imposed fines and fees means that formerly incarcerated Blacks will remain under supervision, without voting rights, for longer periods of time than whites. North Carolina law explicitly lists the payment of court costs, costs for appointed counsel, restitution, and other conviction-related financial obligations as "[a]ppropriate controlling conditions, violation of which may result in revocation of post-release supervision."[72] Nonpayment can result in revocation of supervision, re-imprisonment, and the extension of one's period of supervised release during the period of re-imprisonment, thereby lengthening the period of disenfranchisement for those on parole. For probationers, courts in North Carolina can extend the period of probation, and therefore the period of voter disenfranchisement, for nonpayment of court fines and fees.[73]

Furthermore, the inequitable challenges Blacks face finding employment make them far less likely to qualify for earned time credits that would reduce the period of their supervision and allow them to earn back their voting rights as quickly as those, like whites, with far better employment opportunities. North Carolina law allows supervisees to receive "earned time credit" for working "faithfully at suitable employment,"[74] and this earned time credit may reduce the supervisee's period of post-release supervision.[75] Black supervisees, who face far higher hurdles in finding employment than white supervisees, have far less access to such good time credit, and will remain longer on supervision, without the opportunity to restore their voting rights, simply because of this institutionalized economic inequity.

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[72] N.C. Gen. Stat. § 15A-1368.4(e)(3), (11), (12).
[73] *See id.* § 15A-1344(a), (d).
[74] *Id.* § 15A-1368.4(d)(1).
[75] *Id.* § 15A-1368.2(d).

Perhaps worst of all, the continued deprivation of voting rights for persons on post-conviction supervision furthers the continued suppression of Black American economic advancement by depriving Blacks of the political power needed to begin to address these structural inequities, and in particular to end the inequitable imposition of fines and fees on their communities. As Professor Beth Colgan explained in the *Duke Law Journal*, a study of traffic ticketing in North Carolina revealed that municipal reliance on revenue from traffic ticketing could be reduced with even marginal increases in a community's political participation.[76] That is, where elected officials could be held politically accountable for overly aggressive traffic ticketing, they were reticent to engage in revenue-generating practices in those communities.[77] It is not surprising then, as the United States Commission on Civil Rights reported in 2017, that municipalities tend to "target" their communities of color for the imposition of fines and fees to increase municipal revenues.[78] "Targeting means these municipalities exploit their poorest citizens by, among other means, using law enforcement as ticketing and collections agencies to increase municipal revenues as distinct from focusing on public safety and civil compliance."[79]

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[76] Beth A. Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 Duke L.J. 1529, 1553-54 (2020) (citing Thomas A. Garrett & Gary A. Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J.L. & Econ. 71, 72 (2009)).

[77] *Id.*

[78] U.S. Comm'n on Civil Rights, *Targeted Fines and Fees against Communities of Color: Civil Rights & Constitutional Implications* 72 (Sept. 2017), https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf ("The best available data reflects that municipal fee targeting tends to aggregate in communities of color and, to a lesser degree, in low-income communities."); *see* Colgan, *supra* note 76, at 1555 (noting that a recent study analyzing data on over nine thousand cities found that municipalities are more likely to rely on revenue from fines and fees as the percentage of Black residents increases); Patrick Liu, Ryan Nunn & Jay Shambaugh, Brookings Inst., *Nine Facts about Monetary Sanctions in the Criminal Justice System* 9 (March 2019), https://www.brookings.edu/wp-content/uploads/2019/03/BailFacts_20190314.pdf (finding that the jurisdictions that tend to collect higher revenues from fines and fees are those with higher shares of Black residents).

[79] *Id.*

There is, thus, a direct link between the disproportionate disenfranchisement of Black Americans and the disproportionate imposition of fines and fees in Black communities.

The disenfranchisement of individuals on community supervision feeds a malignant cycle of racial subjugation: it disproportionately deprives Black Americans of the right to vote for the period of their post-conviction supervision, which is subject to extension due to their existing economic disadvantage, barriers to finding employment and court-imposed fines and fees, which themselves are imposed disproportionately on communities of color and further suppress economic opportunities for Black Americans. The key to the door out of this cycle is the key that North Carolina's law withholds: the right to vote. Voting, the Constitution recognizes, is the principal means for citizens to seek "redress of grievances."[80] If that right to vote were restored sooner, upon release from incarceration, Black communities could gain the clout to elect representatives of their choice who would be responsive to their communities' needs, including in areas such as reducing the obstacles to their exercising their right to vote and closing the racial wealth gap. As University of North Carolina Professor Frank Baumgartner noted in his Expert Report submitted in support of the Plaintiffs' motion for summary judgment, there were 16 county-level elections in 2018 where the margin of victory was less than the number of individuals in that county who are currently disenfranchised because they are on supervised release; the 2016 gubernatorial election was decided by a margin of 10,263, well below the more than 56,000 individuals disenfranchised because they are on supervised release.[81]

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[80] N.C. Const. art. I § 9 ("For redress of grievances and for amending and strengthening the laws, elections shall be often held.").

[81] Expert Report of Frank R. Baumgartner, North Carolina's Disenfranchisement of Individuals on Probation and Post-Release Supervision, *Cmty. Success Initiative, et al. v. Moore, et al.*, No. 19-cv-15941, at 5 (N.C. Super. Ct. May 8, 2020).

Due to the racial disparities inherent in the criminal justice system and in the economic position of Black Americans, they are more likely to be disenfranchised, and disenfranchised for longer, by North Carolina's disenfranchisement system. And because that system contributes to the suppression of Black economic advancement and deprives Blacks of the political voice necessary to correct the inequities that perpetuate their economic disadvantage, North Carolina's system of disenfranchisement serves only to continue the subjugation of Blacks in North Carolina. It must therefore be declared unconstitutional.

III. Re-enfranchisement Reforms

Mindful of the racial disparities inherent in felony disenfranchisement schemes and of the inequity such systems perpetuate, there has been a wave of reform to felony disenfranchisement laws in the United States since 1997. Over the last two decades, 25 states have enacted a range of reforms, variously either eliminating categories of disenfranchisement or adopting practices to ease the rights-restoration process.[82] Specifically regarding the issues in this case, eight states have expanded the ability of persons on probation and/or parole supervision to vote – Colorado, Connecticut, Louisiana, Maryland, Nevada, New Jersey, New York, and Rhode Island. As a result, 20 states now allow all citizens who are not incarcerated to vote.[83]

These reforms reflect a recognition that access to the ballot box can improve the likelihood of successful reentry and decrease recidivism. While successful reentry is largely conditioned upon access to employment, housing, and other services,[84] a key additional

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[82] Jean Chung, The Sentencing Project, *Felony Disenfranchisement: A Primer* 4 (June 27, 2019), https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/.
[83] *Id.* at 5.
[84] Ryan Zhang et al., *Successful Reentry: A Community-Level Analysis*, The Harvard Univ. Inst. of Politics Crim. Justice Pol. Group (Dec. 2019), *available at* https://iop.harvard.edu/sites/default/files/sources/program/IOP_Policy_Program_2019_Reentry_Policy.pdf.

ingredient lies in developing positive connections to institutions in the community.[85] By encouraging formerly incarcerated individuals to become engaged in pro-social activities it is expected that they will then come to value the rewards of these connections more so than by engaging in anti-social behavior. In this regard, participation in the electoral process is clearly a strong means of connecting with the larger community and affirming one's commitment to that larger community.

Involvement in the electoral process appears to produce positive public safety benefits for the community as well. An assessment of this issue by Christopher Uggen and Jeff Manza finds that among people with prior arrests, there are "consistent differences between voters and non-voters in rates of subsequent arrest, incarceration, and self-reported criminal behavior,"[86] and that "[v]oting appears to be part of a package of pro-social behavior that is linked to desistance from crime."[87] Disenfranchisement, in contrast, can be viewed as one element of the growing scope of the collateral consequences of a criminal conviction that make it increasingly difficult for persons coming out of prison to rejoin the community in a productive manner.

Compared to other nations, felony disenfranchisement policy in the United States is far more extreme. Not only does the United States lead the world in its rate of incarceration, but it also maintains far greater restrictions on voting rights than in any other democratic nation. To the extent that there is debate about this issue in comparable nations, the only significant distinction

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[85] Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 Colum. Hum. Rts. L. Rev. 193 (2004).
[86] *Id.* at 213.
[87] *Id.* at 214.

in most nations is whether any restrictions at all should be placed on voting for people with felony convictions and if so, only to prohibit those in prison from voting.[88]

It is virtually unheard of for an individual convicted of a felony in the Western world to automatically lose the right to vote while under probation or parole supervision. The only exceptions to this are relatively trivial or very limited ones, such as the German provision of permitting a maximum five-year post-sentence loss of voting rights for offenses connected to voting fraud or misuse of the ballot box.[89] In 2003, only two persons in Germany were disenfranchised under these provisions.[90] In addition, Belgium grants judicial discretion to disenfranchise certain convicted individuals if this decision does not deprive them disproportionately of a fundamental right.[91]

The gap between U.S. policies and those of other nations can be seen through Constitutional Court decisions in several nations which have prohibited felony disenfranchisement across the board. While these decisions go beyond the issues in the current case, they are illustrative in documenting the extreme nature of policies such as those in North Carolina that disenfranchise individuals living under community supervision.

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[88] *See* Laleh Ispahani, *Voting Rights and Human Rights: A Comparative Analysis of Criminal Disenfranchisement Laws* in Criminal Disenfranchisement in an International Perspective 26 (Alec C. Ewald & Brandon Rottinghaus eds., 2009).

[89] Nora V. Demleitner, *U.S. Felon Disenfranchisement: Parting Ways with Western Europe* in Criminal Disenfranchisement, *supra* note 88, at 79, 86.

[90] *Id.*

[91] Alexander Horne & Isobel White, House of Commons Library, *Prisoners' voting rights (2005 to May 2015)* (February 11, 2015), https://commonslibrary.parliament.uk/research-briefings/sn01764/; Penal Reform International, The Right of Prisoners to Vote: A Global Overview (March 2016), https://cdn.penalreform.org/wp-content/uploads/2016/08/The-right-of-prisoners-to-vote_March-2016.pdf

In two rulings in 1993 and 2002, the Supreme Court of Canada upheld the importance of prisoner voting rights, arguing that "[d]enial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the Charter."[92] In South Africa, shortly after the dismantling of the apartheid government, the Constitutional Court also upheld the right of prisoners to vote in two separate cases.[93] And in Israel, the issue of prisoner voting rights arose in the case of Yigal Amir, the assassin of Prime Minister Yitzak Rabin, and clearly one of the most despised citizens in the country.[94] Yet the court upheld his right to vote as well, along with other incarcerated persons, in the case of *Alrai v. Minister of the Interior*,[95] declaring that we must separate "contempt for this act" from "respect for his right."[96] The right to vote is likewise central to the laws and values of North Carolina, and even more significant for those formerly incarcerated, living back in their communities and striving to become fully engaged citizens.

CONCLUSION

The proliferation of racial disparities in the criminal justice system has a profound impact on the lives of people of color. Behind each statistic lies a Black man or woman unjustifiably barred from the electoral process, with lasting effects for that individual's family and community and ultimately, the strength and legitimacy of our Democracy. Given the racial disparities that North Carolina's disenfranchisement law compounds—the broader sweep of the criminal justice system among Blacks, the more severe and negative outcomes they experience at every stage,

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[92] Sauvé v. Canada, [2002] 3 S.C.R. 519, para. 44 (Can.); Sauvé v. Canada, [1993] 2 S.C.R. 438 (Can.).
[93] Ispahani, *supra* note 88, at 48.
[94] *Id.* at 49.
[95] HCJ 2757/06 *Alrai v. Minister of the Interior* 50(2) PD 18 [1996] (Isr.)
[96] Ispahani, *supra* note 88, at 45.

and the economic disparities that the disenfranchisement law exacerbates and which tend to unjustly prolong the period of post-conviction supervision and disenfranchisement—the continued disenfranchisement of individuals who are not incarcerated cannot be squared with the requirements of the North Carolina Constitution. It is time for the elimination of such racially biased obstacles to democratic participation in North Carolina, and for the State's disenfranchisement law to be declared unconstitutional.

This the 24th day of July 2020.

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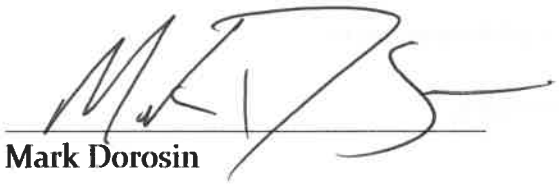

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