No. 331PA21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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| COMMUNITY SUCCESS INITIATIVE, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>TIMOTHY K. MOORE, in his official capacity of Speaker of the North Carolina House of Representatives, et al.,<br><br>Defendants. | From Wake County |

# BRIEF OF CATO INSTITUTE AND DUE PROCESS INSTITUTE AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES[1]

[1] No outside persons or entities wrote any part of this brief or contributed any money to support the brief's preparation. *See* N.C. R. App. P. 28(i)(2).

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# BRIEF OF CATO INSTITUTE AND DUE PROCESS INSTITUTE AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

## INTRODUCTION AND INTEREST OF AMICI

Amici are non-profit, non-partisan public-policy organizations with an enduring interest in criminal legal policy and the proper role of the criminal justice system in society.

The Cato Institute is dedicated to principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice, founded in 1999, focuses, *inter alia*, on the proper role of criminal sanctions in a free society, the scope of substantive criminal liability, and citizen participation in the criminal justice system. The Due Process Institute works to honor, preserve, and restore procedural fairness in the criminal justice system. Founded in 2018 and guided by a bipartisan Board of Directors, the Due Process Institute creates and supports achievable solutions for challenging criminal legal policy concerns through advocacy, litigation, and education.

Under North Carolina law, citizens convicted of any felony lose the right to vote, which can be restored only after being "unconditional[ly] discharge[d]" from probation, parole, and post-release supervision. N.C.G.S. § 13-1. Thus, before regaining voting rights, citizens must pay all court costs, fees, and restitution. Failure to pay those often substantial costs can result in lengthy extensions of probation or parole—and consequently continued deprivation of the franchise. *See id.* §§ 15A-1342(a), 15A-1344(d). As a three-judge panel of

the Superior Court properly recognized, this scheme cannot be squared with the requirements of the North Carolina Constitution. (R pp 968, 1123-33).

Amici, like Plaintiffs and the trial court, are concerned that this scheme harms citizens and taxpayers and is inconsistent with multiple provisions of the North Carolina Constitution. Criminal disenfranchisement was historically limited to those crimes considered particularly serious and violative of the basic social order. Today, by contrast, citizens can be deprived of the franchise even for substantively minor and technical violations. Whether or not ongoing disenfranchisement is justifiable when applied to the extraordinary crimes for which it was originally imposed, it certainly cannot be justified in its broad modern incarnation.

As disenfranchisement has become increasingly common, its impacts on ex-offenders, communities, and the democratic process have only grown. These detrimental effects are further compounded by North Carolina's ever-growing array of criminal fines and fees, which are expected to fund not only the justice system, but other aspects of government as well—and often trap criminal defendants in a cycle of debt and poverty. And because N.C.G.S. § 13-1 restores voting rights only after ex-offenders have paid all court costs, fines, and fees, voting rights will, in many cases, turn exclusively on a citizen's wealth.

This regime harms taxpayers and raise serious constitutional concerns under multiple provisions of the North Carolina Constitution—among them,

the Property Qualifications Clause. Amici thus respectfully submit this brief in support of Plaintiffs and request that the Court affirm the trial court's judgment.

## BACKGROUND

Amici adopt Plaintiffs' statement of the case.

## ARGUMENT

### I. DISENFRANCHISEMENT HAS EXPANDED FAR BEYOND ITS HISTORICAL ROOTS

Detailing the harms wrought by felon disenfranchisement requires situating the practice in historical context. (R pp 1077-91 (FoF ¶¶20-55)). That history reveals two key facts: That disenfranchisement was imposed as part of an extraordinary punishment intended to sever ties between an offender and the community; and that this severe punishment was reserved for only the most serious crimes. While the serious consequences of disenfranchisement remain, the historical limits do not.

A. Criminal disenfranchisement has its roots in the ancient common law concepts of "civil death" and the "attainder" laws of Medieval England. Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and their Removal: A Comparative Study*, 59 J. Crim. L. & Criminology 347, 351 (1968). Under these doctrines, one "incident[] consequent upon an attainder for treason or felony" was the "extinction of civil rights, more or less complete, which was denominated civil death. . . . whereby . . . the attainted person 'is

disabled to bring any action, for he is *extra legem positus*, and . . . he is in short regarded, as dead in law.'" *Avery v. Everett*, 18 N.E. 148, 150 (N.Y. 1888) (citations omitted). Under varying versions of the doctrine, felons "were prohibited from appearing in court, making speeches, attending assemblies, serving in the army, and voting," William Walton Liles, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 Ala. L. Rev. 615, 616 (2007), and would "lose all the benefits and protections that society could offer," Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 Berkeley La Raza L.J. 407, 409 (2012).

Because of their severity, these "early European penalties seem to have been limited to very serious crimes, and were implemented only upon judicial pronouncement in individual cases." Alec C. Ewald, "*Civil Death*": *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 Wis. L. Rev. 1045, 1061 (2002). And crucially, traditional English common law felonies were limited to a small, discrete group of crimes believed to be *malum in se*, such as murder, arson, robbery, and rape. *See* Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 Clev. St. L. Rev. 461, 464 (2009). As a practical matter, then, disenfranchisement would have been suffered only by those convicted of the most serious crimes. And even there disenfranchisement would necessarily

have been brief, since "with nearly all felonies punishable by death in 18th century England, the voting rights of convicted felons had not been a very live issue there." *Green v. Bd. of Elections of N.Y.*, 380 F.2d 445, 450 (2d Cir. 1967) (Friendly, J.).

B. Although the Founders abolished most aspects of civil death in the United States, disenfranchisement remained. Liles, 58 Ala. L. Rev. at 617. But here, too, loss of the franchise would have been suffered only for the most severe crimes. Reflecting that understanding, the Fourteenth Amendment to the U.S. Constitution permitted States to restrict their citizens' right to vote only "for participation in rebellion, or other crime." U.S. Const. amend. XIV, § 2. The Framers of that Amendment thus considered only wrongdoers who committed *serious* crimes, on par with "participation in rebellion," to be worthy of disenfranchisement. *See* Abigail M. Hinchcliff, Note, *The "Other" Side of* Richardson v. Ramirez*: A Textual Challenge to Felon Disenfranchisement*, 121 Yale L.J. 194, 229 (2011). Like rebellion, crimes such as murder and piracy were viewed as forms of insurrection against the established political order—and individuals who committed such crimes forfeited their place in society.[2]

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[2] Reconstruction-era legislators plainly assumed that disenfranchisement would apply only to these sorts of severe crimes. One congressman, for example, described the individuals facing disenfranchisement as "pirates, counterfeiters, [and] other criminals," and argued the Amendment would allow states to prevent these individuals from "land[ing] their piratical crafts and

Contemporary dictionaries confirm that understanding. At the Fourteenth Amendment's passage, the word "crime" had two distinct meanings: a technical meaning of "any" offense, and a common and popular meaning of a "grave" offense. *See* Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 Yale L.J. 1584, 1651-52 (2012). For example, Webster's Dictionary in 1854 defined "crime" as "[a]n act which violates a law, divine or human; . . . But *in a more common and restricted sense*, a crime denotes an offense, or violation of public law, of a deeper and more atrocious nature; a public wrong." Noah Webster, *American Dictionary of the English Language*, 283 (George and Charles Merriam 1854 ed.); *see also* 4 William Blackstone, *Commentaries on the Laws of England* *5 (noting that although "crime" can include "both crimes and misdemeanors," "in common usage[,] the word, 'crimes,' is made to denote such offenses as are of a deeper and more atrocious dye").

C. Today, disenfranchisement extends far beyond the few crimes to which it historically applied.[3] Indeed, there has been a massive expansion of

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com[ing] on shore to assist in the election of a President or members of Congress." Cong. Globe, 39th Cong., 1st Sess. 2535 (May 10, 1866) (Rep. Ephraim Eckley). Another described these individuals as "[m]urderers, robbers, house-burners, [and] counterfeiters." *Id.* at 3029 (June 8, 1866) (Sen. Reverdy Johnson).

[3] As the trial court explained in great detail, the scope of criminal disenfranchisement was expanded following the Civil War in an attempt to

criminal laws in a process frequently labeled the "overcriminalization" of America.[4] By disenfranchising citizens convicted of *any* felony, at the same time that the roster of felonies has ballooned, North Carolina's current regime vastly broadens the scope of disenfranchisement and ensures that even those convicted of relatively minor offenses nonetheless suffer this extraordinary consequence due to their convictions. *See* N.C.G.S. § 163-55(a)(2).

Many of the felonies triggering disenfranchisement in North Carolina today are trivial, purely technical, or merely *malum prohibitum*. For instance, the operation of a bingo game without a license is a felony. *Id.* § 14-309.5(b). So too is willful destruction of library books worth more than $50, *id.* § 14-398; placing "noxious" food "in a position of human accessibility" that might cause a person "mild physical discomfort without lasting effect," *id.* § 14-401.11; and failure by a director of a railroad company to turn over to her successor company records, *id.* § 14-253. Indeed, the single largest drivers of disenfranchisement in North Carolina are classic examples of merely *malum*

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prevent political participation by African Americans. (R pp 1077-84 (FoF ¶¶21-38)). It is against that backdrop that North Carolina came to impose disenfranchisement for any crime labeled a felony. *Id.*; *see* Re, 121 Yale L.J. at 1625-26, 1629.

[4] *See, e.g.,* John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, 5 Engage 23 (2004), https://fedsoc.org/commentary/publications/measuring-the-explosive-growth-of-federal-crime-legislation; Mike Chase, *How to Become a Federal Criminal: An Illustrated Handbook for the Aspiring Offender* (2019); Cato Inst., *Go Directly to Jail: The Criminalization of Almost Everything* (Gene Healy ed., 2004).

*prohibitum* offenses: non-trafficking drug offenses. *See* PX1 at 25, Table 5 (Baumgartner Report); (R p 1092 (FoF ¶56) (crediting Dr. Baumgartner's testimony and conclusion)). None of those crimes can plausibly be deemed an insurrection against the foundations of society on the scale of rebellion, piracy, or murder.

## II. DISENFRANCHISEMENT PREVENTS EX-OFFENDERS FROM FULLY REJOINING SOCIETY, HARMS COMMUNITIES, AND REDUCES PUBLIC SAFETY

As the scope of disenfranchisement has expanded, so too have its harmful effects. In keeping with its historical origins, disenfranchisement seeks to sever the relationship between ex-offenders and society. In the words of one early 20th Century scholar, the punishment "sunders completely every bond between society and the man who has incurred it; he has ceased to be a citizen, but cannot be looked upon as an alien, as he is without a country." Carl Ludwig von Bar, *A History of Continental Criminal Law*, *in* 6 *Continental Legal History Series* 272 (Thomas S. Bell et al. trans., 1916) (citation omitted). By applying the modern analogue to this extraordinary punishment to every offense labeled a felony, the current scheme prevents ex-offenders from fully rejoining society. As a result, "[d]enial of the franchise to persons on felony

supervision harms individuals, families, and communities for years even after such supervision ends." (R p 1114 (FoF ¶124)).

On the individual level, disenfranchisement implicitly informs the offender that "total rehabilitation is impossible." Hamilton-Smith & Vogel, 22 Berkeley La Raza L.J. at 413. That, in turn, increases the likelihood that he will choose to re-offend: "If one has no stake in his or her community, then one has little incentive to behave in a pro-social manner." *Id.* Empirical evidence backs up this common-sense proposition, with one studying finding that ex-offenders in states that permanently disenfranchise are nineteen percent more likely to be rearrested than those in states that restore the franchise post-release. *See id.* at 426. In short, "the scholarly literature concludes that felony disenfranchisement hinders the reintegration of people convicted of felonies into society." (R p 1113 (FoF ¶122)). Criminal disenfranchisement thus engenders the exact public safety problems that it purports to address.

Disenfranchisement's negative effects extend beyond the disenfranchised individual, to families and entire communities. Evidence suggests "that disenfranchisement of the head of a household discourages his or her entire family from civic participation." Erika Wood, Brennan Ctr. for Just., *Restoring the Right to Vote* 12 (2d ed. 2009).[5] And these effects extend

[5] https://www.brennancenter.org/sites/default/files/legacy/Democracy/Restoring%20the%20Right%20to%20Vote.pdf

into the surrounding community, because "voting is a social phenomenon." (R p 1113-14 (FoF ¶123)). Moreover, because ex-offenders are more likely to be poor and to live in low-income communities, the dampening effect of disenfranchised citizens on community voting is magnified by concentrations of ex-offenders. Politicians thus can safely ignore communities with high levels of felon disenfranchisement (such as those North Carolina neighborhoods with rates of disenfranchisement as high as 18 to 20 percent) and focus on areas with higher voter turnout, meaning that these communities "are less likely to be the subject of voter mobilization efforts by political parties, … and have less political power and political equality." *Id.* Such a result strikes at the heart of the democratic process.

Finally, by barring political participation by those who have previously violated any of a wide range of laws, felon disenfranchisement threatens to create a criminal code that does not reflect the views of a majority of citizens. There is no principled reason that citizens subject to prosecution for activities that are *malum prohibitum* should lack an equal say in determining whether those activities should continue to be punishable as felonies. For instance, there is no good reason that an individual previously convicted of running illegal bingo games, *see* N.C.G.S. § 14-309.5(b), should lack a say as to whether those games should continue to be prohibited in the future, while household poker remains legal. The same is true for citizens convicted of possessing

marijuana for personal consumption or a sawed-off shotgun, who might justifiably have views about whether the Legislative Defendants should continue to deem possession of those items a felony. By depriving ex-offenders of that voice, N.C.G.S. § 13-1 risks skewing the outcome of the democratic process. And this, in turn, directly interferes with citizens' rights under North Carolina's Free Elections Clause to elections that "ascertain, fairly and truthfully, the will of the people." *Common Cause v. Lewis,* No. 18 CVS 014001, 2019 WL 4569584, at *110 (N.C. Super. Ct. Sept. 3, 2019); (R p 1128-29 (FoL ¶¶21-23)).

## III. THE DETRIMENTAL EFFECTS OF DISENFRANCHISEMENT ARE COMPOUNDED BY "USER-FUNDED" CRIMINAL JUSTICE

Just as the harm inflicted by disenfranchisement has been increased through overcriminalization, it has also been compounded by the growth of so-called "user-funded" criminal justice—that is, the funding of the criminal justice system through the collection of fees from criminal defendants. This creates a deeply regressive form of taxation, threatening a vicious cycle of debt, poverty, and crime. And as recent scholarship has made clear, user-funded justice—both in North Carolina and across the nation—frequently leads to a *de facto* system of wealth-based disenfranchisement. *See* Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 Vand. L. Rev. 55 (2019).

The growth of fees and court costs in criminal cases stems from a deliberate policy choice to rely increasingly on the justice system as a source of public revenue. In 1986, the Conference of State Court Administrators noted the proliferation of "[f]ees and miscellaneous charges . . . as [a] method to meet demands for new programs without diminishing general tax revenues." *Standards Relating to Court Costs: Fees, Miscellaneous Charges and Surcharges and a National Survey of Practices* 4–5 (June 1986).[6] Nearly 30 years later, the Council of Economic Advisors observed that jurisdictions were pressured to transfer the burden of criminal-justice expenditures from taxpayers to defendants. Executive Office of the President, *Economic Perspectives on Incarceration and the Criminal Justice System* 34-54 (Apr. 2016).[7]

The resulting proliferation of fines and fees in North Carolina is dizzying. *See* N.C. Admin. Office of the Courts, Court Costs and Fees Chart (July 2022).[8] They range from a $154 "General Court of Justice Fee," to fees for "Facilities," "telecommunications," the "insurance benefits … of law enforcement officers," and service of process—and late fees if all these are not

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[6] https://ncsc.contentdm.oclc.org/digital/collection/ financial/id/81/

[7] https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf

[8] https://www.nccourts.gov/assets/documents/publications/Criminal-Costs-Chart-July-2022.pdf?VersionId=YbPYIOynRgwBZ86QCA4LgOoqL7LVlIoJ

promptly paid. *Id.* These costs are significant in amount as well as number: The costs of conviction and sentencing have increased by nearly 400% over the past two decades (R p 67), and the average probationer now owes nearly $2,500 in outstanding fees, court costs, restitution, and supervision fees (R p 159).

Such multiplying fees create a system in which those asked to fund the government are those who often are least able to pay. Indeed, one study found that about 36 percent of people arrested once in 2017, and 49 percent of those arrested multiple times, had individual incomes below $10,000 per year. Press Release, Alexi Jones & Wendy Sawyer, Prison Policy Initiative, *Arrest, Release, Repeat: How police and jails are misused to respond to social problems* (Aug. 2019).[9]

N.C.G.S. § 13-1 compounds those harms by tying the right to vote to a citizen's ability to pay this ever-mounting array of fines and fees. Under N.C.G.S. § 13-1(1), individuals convicted of felonies can regain the franchise only after they have been "unconditional[ly] discharged." Individuals still on probation thus remain disenfranchised. And if a probationer fails to pay the amount owed in costs and fees, courts may extend the term of probation first for five years—and then for three additional years to "allow[] the defendant to complete a program of restitution." N.C.G.S. § 15A-1342(a); *see id.* § 15A-

[9] https://www.prisonpolicy.org/reports/repeatarrests.html

1344(d). Failure to pay court costs or restitution can also result in revocation of post-release supervision, triggering a return to prison and the tolling of the supervised release period during that re-incarceration. *Id.* § 15A-1368.4(d), (f).

## IV. N.C.G.S. § 13-1 CANNOT BE SQUARED WITH THE PROPERTY QUALIFICATIONS CLAUSE

Taken as a whole, this scheme can disenfranchise citizens unable to pay the costs of their prosecution for years longer than citizens able to pay those ever-mounting costs. The trial court properly recognized that this result runs afoul of the plain text of the Property Qualifications Clause, which mandates that "no property qualification shall affect the right to vote or hold office." N.C. Const. art. I, § 11. As the court explained, the "requirement of an 'unconditional discharge' imposed by N.C.G.S. § 13-1" means that an ex-offender's voting rights are "conditioned on whether that person possesses, at a minimum, a monetary amount equal to any fees, fines, and debts assessed as a result of that person's felony conviction." (R p 968).

The Legislative Defendants take issue with this holding on multiple grounds. Each fails.

First, Defendants appears to believe that the Clause prohibits only voting restrictions based on *real estate*. LD Br. 32-33. But that is not what the Clause says, and Defendants point to no authority ever adopting such a narrow reading of the Clause's text. To the contrary, there is every reason to

believe that the original public meaning of a "property qualification" in 1868 extended to all sorts of wealth—just as it does today. And it is the original public meaning of the Clause's text that matters, not whether its enactors could have foreseen the precise property-based voting restrictions at issue here. *See, e.g.*, *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074–75 (2018) ("Take electronic transfers of paychecks. Maybe they weren't common in 1937, but we do not doubt they would qualify today as 'money remuneration' under the statute's original public meaning.").

"Money, of course, is a form of property." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979); *see McCullen v. Daughtry*, 190 N.C. 215, 129 S.E. 611, 613 (1925). And the framers of the Property Qualifications Clause did not enact text limiting the Clause only to *real* property. Quite the opposite—the text forbids *any* "property qualification" at all. *See* Joseph E. Worcester, *A Comprehensive Dictionary of the English Language* 348 (1860) (defining "Property" as "a possession" or "goods").[10] Indeed, one delegate to the 1868 constitutional convention confirmed what the text says: writing later in his capacity as a North Carolina Supreme Court Justice, the delegate stated that the term "property" in the Clause is used "[i]n its most general sense," and "embraces every thing which a man may have exclusive dominion over."

[10] https://hdl.handle.net/2027/hvd.32044086661030

*Wilson v. Bd. of Alderman of the City of Charlotte*, 74 N.C. 748, 756 (1876).[11] Plainly, that includes the several thousands of dollars necessary for many ex-offenders to regain the franchise.

Second, Defendants argue that while restoration of the franchise "does entail a monetary cost," "nothing in Section 13-1 requires a felon to *possess* any property." LD Br. 33 (emphasis added). But one must possess property before one can use it. In order to legally vote, ex-offenders must possess sufficient property to pay the (often very substantial) costs of their own imprisonment, parole, or probation. Nor does the nearly $2,500 in outstanding fees, court costs, and restitution owed by the average probationer (R p 159), bear any resemblance to the $3-$12 required to obtain a driver's license that was held to be among the "usual burdens of voting" in *Crawford v. Marion County Election Board*, 553 U.S. 181, 198 (2008). Indeed, the logic of Defendants' position appears to be that a $1 million poll tax would not be a "property qualification"—a proposition that refutes itself. *But see* LD Br. 33 (arguing that Property Qualifications Clause does not apply because "North Carolina continued to impose a poll tax" after the Clause's enactment).

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[11] *See also* C.C. Pool, *Speech Delivered at Constitutional Convention on the Question of Suffrage and Eligibility to Office* (Feb. 18, 1868), *in* 34 Wkly. N.C. Standard No. 8 (Feb. 26, 1868), https://chroniclingamerica.loc.gov/lccn/sn85042148/1868-02-26/ed-1/seq-4/

Nor does it matter that the property qualification embodied in N.C.G.S. § 13-1 "is a predicate for felons having their rights *restored*." LD Br. 32 (emphasis in original). As the Superior Court explained, "when legislation is enacted that restores the right to vote, thereby establishing qualifications which certain persons must meet to exercise their right to vote, such legislation must not do so in a way that makes the ability to vote dependent upon a property qualification," yet "§ 13-1 does exactly that." (R p 967).

Ultimately, application of the Property Qualifications Clause to N.C.G.S. § 13-1 is straightforward: An ex-offender who lacks the wealth necessary to pay the costs of his prosecution is barred from voting for years longer than an otherwise identical ex-offender who has sufficient property to pay those costs, contravening the core command that political rights not turn on wealth.

## CONCLUSION

Amici respectfully urge this Court to affirm the trial court's judgment.

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N.C. R. App. P. 33(b) Certification:
I certify that all of the attorneys listed
have authorized me to list their names on
this document as if they had personally
signed it.

## WORD COUNT CERTIFICATION

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, I hereby certify that the foregoing brief, which is prepared using a proportional font, is less than 3,750 words (excluding cover, indices, table of authorities, certificates of service, and this certificate of compliance) as reported by the word processing software.

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