No. 331PA21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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.	From Wake County

BRIEF OF PLAINTIFFS-APPELLEES COMMUNITY SUCCESS INITIATIVE, ET AL.

INDEX

Page

TABLE OF CASES AND AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

No. 331PA21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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.	From Wake County

BRIEF OF PLAINTIFFS-APPELLEES COMMUNITY SUCCESS INITIATIVE, ET AL.

ISSUES PRESENTED

1. Whether the trial court correctly concluded that N.C.G.S. § 13-1's denial of the franchise to individuals living in North Carolina communities on felony probation, parole, or post-release supervision violates the North Carolina Constitution's Equal Protection Clause and Free Elections Clause.

2. Whether the trial court correctly concluded that § 13-1 conditions rights restoration on a person's ability to pay money in violation of the Constitution's Equal Protection Clause and Ban on Property Qualifications.

INTRODUCTION

In 1877, North Carolina's legislature passed a law that, for the first time in the State's history, denied the franchise to all North Carolinians convicted of felonies for years after they had completed their prison sentences and returned to live and work in their communities. Legislative Defendants conceded below—and overwhelming evidence demonstrated—that the intent of this law was to discriminate against African Americans and suppress African American political power by using felony-based disenfranchisement to evade the protections of the Fourteenth and Fifteenth Amendments.

Though the 1877 law has undergone some revisions, the intentionally racially discriminatory legislative policy—denying the franchise to people living in North Carolina communities on probation, parole, or post-release supervision ("felony supervision")—remains on the books today. This policy,

first adopted as part of a violent backlash against African American suffrage and political gains made during Reconstruction, is now codified at N.C.G.S. § 13-1. In the early 1970s, the only African American members of the General Assembly—two of them in 1971, and three in 1973—tried to amend § 13-1 to eliminate its denial of the franchise to people on felony supervision, but their White colleagues insisted on retaining this discriminatory part of the law.

The law continues to achieve its intended discriminatory effects today. Statewide, African Americans in North Carolina are disenfranchised at nearly three times the rate of the White population due to § 13-1's felony supervision rule. In one county, a full 5% of the African American voting-age population is denied the franchise due to felony supervision. Overall, § 13-1 denies the franchise to over 56,000 North Carolinians who live and work in North Carolina communities yet are denied any say in the laws that govern their lives. Furthermore, North Carolina elections under § 13-1 do not accurately reflect the will of the people where the vote margin in statewide and local elections is often less than the number of people who are disenfranchised in the state or respective local area as a result of the statute. This Court should affirm the trial court's conclusion that § 13-1's denial of the franchise to people on felony supervision violates both the North Carolina Constitution's Equal Protection Clause and its Free Elections Clause.

This Court also should affirm the trial court's conclusion, which has governed North Carolina elections since 2020, that § 13-1 independently violates the North Carolina Constitution's Equal Protection Clause and its Ban on Property Qualifications by conditioning the restoration of a person's voting rights on their ability to pay money. The law discriminates against poor and low wealth people, who are denied the right to vote solely due to their inability to pay court costs, fees, and restitution. In North Carolina, individuals commonly have their probation extended, which also extends their period of disenfranchisement, 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 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 denial of the right to vote, but in North Carolina, it is.

Legislative Defendants principally argue that § 13-1 is immune from constitutional review because Article VI, Section 2 of the Constitution prohibits people with felony convictions from voting until their rights are restored. The trial court properly rejected this nihilistic notion, which would equally immunize an implementing statute expressly stating that only White people's rights to vote may be restored. Nor was the trial court constrained to either uphold § 13-1 in its entirety or enjoin it in its entirety and eliminate voting-

rights restoration for all North Carolinians. Rather, the court properly struck solely the aspect of § 13-1 that violated the Constitution.

This Court should affirm the trial court's judgment.

STATEMENT OF THE CASE

Plaintiffs are the North Carolina NAACP, three local organizations that provide direct services to returning citizens, and four individual North Carolinians who are or were denied the ability to register and vote due to being on probation, parole, or post-release supervision from a felony conviction (collectively, "felony supervision"). They brought this lawsuit on 20 November 2019 challenging N.C.G.S. § 13-1's denial of the franchise to individuals on felony supervision under multiple provisions of the North Carolina Constitution. (R pp 5-38).[1] The operative Amended Complaint was filed on 3 December 2019. (R pp 47-87). A three-judge panel of the Superior Court was assigned to preside over the case pursuant to N.C.G.S. § 1-267.1(a1). (R pp 310-12).

On 4 September 2020, the trial court granted partial summary judgment and a preliminary injunction. (R pp 958-78); (R pp 979-91). The court held

[1] References to the panel's judgment of 28 March 2022 are given by reference to both the pages of printed record (R) and the paragraph number in the court's findings of fact ("FOF") and conclusions of law ("COL"). Other references are made to documents in the printed record (R) and Rule 9(d) exhibits (Ex.), the Appendix (App.) and the transcripts (Tr.).

that § 13-1 "condition[s] the restoration of the right to vote on the ability to make financial payments" in violation of the Equal Protection Clause's restriction on wealth-based classifications and the Ban on Property Qualifications. (R p 965); *see* (R pp 967-68). The court's preliminary injunction barred Defendants and their agents from "preventing a person convicted of a felony from registering to vote and exercising their right to vote if that person's only remaining barrier to obtaining an 'unconditional discharge,' other than regular conditions of probation pursuant to N.C.G.S. § 15A-1343(b), is the payment of a monetary amount." (R p 988). The court also granted partial summary judgment in favor of Defendants, dismissing Plaintiffs' claims under the Constitution's Free Speech and Assembly Clauses. (R p 969).

The trial court set Plaintiffs' broader claims—challenging § 13-1's disenfranchisement of all persons on felony supervision under the Equal Protection Clause and Free Elections Clause—for trial. The court found that Plaintiffs "put forward persuasive, historical evidence" about the discriminatory intent of the challenged law and its current "disparate impact" on "persons of color." (R p 987). But the court noted the "numerous state interests" that Defendants had asserted as justifications for denying voting rights to people on felony supervision. *Id.* The court made clear it was not making any finding that any "facts or empirical evidence" supported those

interests, but rather concluded that Defendants were entitled to offer such evidence at trial. *Id.*

No Defendant appealed or sought a stay of the trial court's grant of partial summary judgment or its preliminary injunction. People with felony convictions covered by that injunction thus have been permitted to register and vote in every election since then, starting with the November 2020 elections.

The trial court conducted a bench trial on Plaintiffs' remaining claims from 16 August to 19 August 2021.

On 23 August 2021, the trial court expanded its preliminary injunction to cover all individuals on felony supervision based on the court's determination that its original preliminary injunction had been interpreted too narrowly. *See* (R pp 1051-62). The Court of Appeals stayed the order expanding the preliminary injunction on 3 September 2021. On 10 September 2021, this Court ordered that "the status quo be preserved" pending Defendants' appeal of the expanded preliminary injunction "by maintaining the original preliminary injunction issued on 4 September 2020 as it was understood at the time and implemented for the November 2020 elections." This Court also ordered that the Court of Appeals stay "be implemented prospectively only, meaning that any person who registered to vote at a time when it was legal for that person to register under then-valid court orders as they were interpreted at the time, shall remain legally registered voters." This

Court directed that the State Board "shall not remove from the voter registration database any person legally registered under the expanded preliminary injunction between 23 August 2021 and 3 September 2021, and those persons are legally registered voters until further Order."

On 28 March 2022, the trial court issued its Final Judgment and Order. (R pp 1068-1138). Based on extensive factual findings, the court concluded that § 13-1's denial of the franchise to individuals on felony supervision discriminates against African Americans in intent and effect in violation of the Equal Protection Clause, and prevents elections from reflecting the will of the people in violation of the Free Elections Clause. (R pp 1123-30). The court also rejected Legislative Defendants' argument that Article VI, § 2, cl. 3 of the North Carolina Constitution forecloses Plaintiffs' claims. (R pp 1131-32). The court's permanent injunction bars Defendants and their agents "from preventing any person convicted of a felony from registering to vote or voting due to probation, parole, or post-release supervision." (R p 1132). The court further stated: "For the avoidance of doubt, under this injunction, if a person otherwise eligible to vote is not in jail or prison for a felony conviction, they may lawfully register and vote in North Carolina." (R p 1133).

Legislative Defendants appealed and asked the Court of Appeals to stay the trial court's Final Judgment and Order pending resolution of their appeal on the theory that they were likely to prevail on appeal. On 26 April 2022, the

Court of Appeals stayed the Final Judgment and Order only "for the upcoming elections on 17 May 2022 and 26 July 2022" based solely on the *Purcell* doctrine, but ordered the State Board "to take actions to implement the 'Final Judgment and Order' for subsequent elections." On 26 July 2022, the State Board publicly announced that "[s]tarting July 27, 2022, an individual serving a felony sentence who is not in jail or prison may register to vote and vote."[2]

On 6 May 2022, this Court granted Plaintiffs' petition for discretionary review prior to a determination by the Court of Appeals.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This appeal from the trial court's final judgment is before this Court based on the Court's grant of discretionary review under N.C.G.S. § 7A-31(b).

STATEMENT OF THE FACTS

The trial court correctly found the following facts based on the extensive evidence presented at trial.

A. The Discriminatory Intent of the Challenged Law

The trial court credited the testimony of Plaintiffs' expert Dr. Vernon Burton, a Professor of History at Clemson University, who described the history and intent behind North Carolina's felony disenfranchisement and

[2] North Carolina State Board of Elections, Press Release, *North Carolinians Serving Felony Sentences, Who Are Not in Jail or Prison, May Register to Vote Starting July 27* (July 26, 2022), https://bit.ly/3vF4qSt.

rights restoration provisions. (R p 1076, FOF ¶ 19). Based on Dr. Burton's conclusions, which the court accepted, the court found that § 13-1's denial of the franchise to people living in the community on felony supervision traces directly to a post-Civil War effort to suppress the political power of African Americans. (R pp 1077-91, FOF ¶¶ 20-55).

1. The 1800s

Between 1835 and 1868, North Carolina's Constitution forbade African Americans, both free and enslaved, from voting. (R p 1077, FOF ¶ 20). At that time, North Carolina did not have a disenfranchisement provision specific to felonies, but instead excluded "infamous" persons from suffrage. *Id.* (citing N.C. Const. art. I, § 4, pt. 4 (1776, amended in 1835) (authorizing the legislature to pass laws for restoration of rights to "infamous" persons)). Persons were deemed infamous if they either committed an infamous crime such as treason, or received an infamous punishment such as whipping. *Id.*

In 1868, at the Reconstruction Convention after the Civil War, North Carolina adopted a new Constitution. (R p 1077, FOF ¶ 21). It provided for universal male suffrage, eliminated property requirements to vote, and abolished slavery. *Id.* (citing N.C. Const. of 1868, art. I, § 33; *id.* art. VI, § 1). It did not contain a felony disenfranchisement provision. *Id.*

The 1868 Constitution, particularly its universal suffrage provision, provoked a violent backlash by White supremacists, called the Kirk Holden

War, in which the Ku Klux Klan murdered African American elected officials and White Republicans, and engaged in a campaign of fraud and violent intimidation of African American voters. (R pp 1077-78, FOF ¶ 22).

As part of this backlash against African American suffrage, White former Confederates in North Carolina engaged in a widespread campaign of convicting African Americans *en masse* of minor offenses like petty larceny and whipping them as the punishment to disenfranchise them "in advance" of the Fifteenth Amendment. (R pp 1078-79, FOF ¶ 23). Contemporary newspapers acknowledged that the "real motive" of this whipping campaign was to take advantage of North Carolina's law in existence at the time that disenfranchised anyone subject to a punishment of whipping. *Id.* The National Anti-Slavery Standard reported that "in all country towns the whipping of Negroes is being carried on extensively," that the "real motive … is to guard against their voting in the future, there being a law in North Carolina depriving those publicly whipped of the right to vote," and that "the practice was carried on upon such a scale at Raleigh that crowds gathered every day at the courthouse to see the Negroes whipped." *Id.* Harper's Weekly described "the public whipping of colored men as fast as they were convicted and sentenced to be whipped by the court," taking place "every day during about a month," and explained the purpose: "even if the suffrage were extended to colored men," those punished by a whipping "are disqualified in advance." *Id.*

Rep. Thaddeus Stevens described this vicious campaign on the floor of the U.S. House of Representatives, explaining that "in one county … they whipped *every adult male* negro whom they knew of. They were all convicted and sentenced at once, and [the Freedmen's Bureau official] ascertained by intermingling with the people that it was for the purpose of preventing these negroes from voting." (*Id.* (emphasis by trial court)).

In 1875, after regaining control of the General Assembly, White Democrats called a constitutional convention to amend the 1868 Constitution. (R p 1079, FOF ¶ 24). The overarching aim of the amendments was to instill White supremacy and disenfranchise African American voters. *Id.* The amendments, ratified in 1876, included provisions banning interracial marriage, requiring segregation in public schools, and stripping counties of the ability to elect their own local officials, including judges, giving that power instead to the General Assembly. *Id.* (citing Amend. XXV). The purpose of the latter amendment was to prevent African Americans from electing African American judges or judges likely to support equality. *Id.* (citing 1875 Amendments to the N.C. Const. of 1868, Amends. XXVI & XXX).

Key here, another 1876 constitutional amendment disenfranchised everyone "adjudged guilty of felony" and provided that such persons would be "restored to the rights of citizenship in a mode prescribed by law." 1875 Amendments to the N.C. Const. of 1868, Amend. XXIV. This was the first time

that North Carolina allowed for the disenfranchisement of all persons convicted of any felony. (R p 1080, FOF ¶ 25). This amendment remains largely unchanged in the current Constitution at Article VI, § 2, cl. 3.

In the very next legislative session, in 1877, the General Assembly enacted a law implementing this constitutional provision. (R p 1080, FOF ¶ 26). The 1877 law barred all people with felony convictions from voting unless their rights were restored "in the manner prescribed by law." *Id.* (citing 1876-77 Sess. Laws 519, Ch. 275, § 10).

For the "manner" of rights restoration, the 1877 law incorporated a preexisting statute from 1840 that had previously governed rights restoration for individuals convicted of only the most heinous crimes—treason and other "infamous" crimes. (R p 1080, FOF ¶ 27). The 1877 law extended the 1840 statute's onerous requirements for rights restoration to anyone convicted of any felony. *Id.* This meant that, for the first time, North Carolina denied the right to vote to individuals convicted of any felony even after they were released from incarceration and living in North Carolina communities. (R p 1080, FOF ¶ 28). Specifically, individuals could not petition for rights restoration until four years after their felony convictions, and they needed five "character" witnesses who had known them for at least the previous three years, meaning that no one could petition until at least three years after their release from prison. (R p 1081, FOF ¶ 29). Moreover, the law required rights-

restoration petitions to be posted on the courthouse door three months before a hearing; allowed anyone to oppose any petition; and gave judges unfettered discretion to deny rights restoration. *Id.* Until 1877, these requirements had applied only to people convicted of the most egregious crimes, like treason, but under the 1877 law, they for the first time applied to all felonies. *Id.*

The 1877 law also provided that people with felony convictions who voted before their rights were restored "shall be punished by a fine not exceeding one thousand dollars, or imprisonment at hard labor not exceeding two years, or both." (R pp 1081-82, FOF ¶ 30 (citing 1876-77 N.C. Sess. Laws., Ch. 275, § 62). Similarly, 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.

Legislative Defendants conceded at trial that the goal of the 1877 law, including its extension of the onerous 1840 rights-restoration regime to all felonies, was to discriminate against and disenfranchise African Americans. (R p 1082, FOF ¶ 31); (R p 1084 FOF ¶¶ 36-37). The committee that prepared the 1877 legislation was chaired by Colonel John Henderson, a former Confederate who later presided over a lynching of African Americans. (R p 1082, FOF ¶ 32). In enacting the legislation, White Democrats drew on the success of the whipping campaign, when they realized for the first time that they could use crime-based disenfranchisement to suppress African

American political power. *Id.* The disenfranchisement regime enacted in 1877 also capitalized on Black Codes that North Carolina had enacted in 1866, which allowed sheriffs to charge African Americans with crimes at their discretion, thus disenfranchising them. (R p 1083, FOF ¶ 33).

2. The Early 1970s

North Carolina's racially discriminatory decision in 1877 to disenfranchise people with felony convictions even after they are released from incarceration and living in North Carolina communities has remained unchanged to this day. (R p 1084, FOF ¶ 38).

Between 1897 and 1970, the General Assembly recodified the rights-restoration law at N.C.G.S. § 13-1 and made various small adjustments to the procedure that are not relevant here. (R pp 1084-85, FOF ¶¶ 39-40).

In the early 1970s, the only African American members of the General Assembly—two of them in 1972 and three in 1973—tried to amend § 13-1 to eliminate its denial of the franchise to people who had finished their prison sentence and were living in North Carolina communities. (R p 1085, FOF ¶ 41). As Senator Mickey Michaux explained, the African American legislators' priority was "automatic restoration applicable across the board—at the least, restoration of your citizenship rights after you completed imprisonment." *Id.*

In 1971, Reps. Joy Johnson and Henry Frye proposed a bill amending § 13-1 to eliminate the petition and witness requirements and to "automatically" restore voting rights to anyone convicted of a felony "upon full completion of his sentence." (R p 1086, FOF ¶ 42). During the legislative process, Rep. Frye made clear that this meant a "prison sentence." (R p 1088, FOF ¶ 46). Their proposal was rejected, however, and the bill was revised to retain § 13-1's denial of the franchise to people living in North Carolina communities. (R p 1086, FOF ¶ 42). It was amended to require the completion of "any period of probation or parole" and also that "two years have elapsed since release by the Department of Corrections, including probation or parole." *Id.* The amendments also deleted the word "automatically" and added a requirement to take an oath before a judge to obtain rights restoration. *Id.* Rep. Frye explained on the floor of the North Carolina House in July 1971 that "he preferred the bill's original provisions which called for automatic restoration of citizenship when a felon had finished his prison sentence, but he would go along with the amendment if necessary to get the bill passed." (R p 1086, FOF ¶ 43).

In 1973, the three African American legislators—Reps. Johnson, Frye, and then-Rep. Michaux—again attempted to reform § 13-1 but were unable to convince their White colleagues to restore voting rights for people living in the community after release from incarceration. (R p 1087, FOF ¶ 44). Instead,

the African American legislators were forced to settle for other changes to § 13-1 like eliminating the oath requirement and two-year waiting period. *Id.*

The trial court found it "clear and irrefutable" that the African American legislators' goal in 1971 and 1973 was to eliminate § 13-1's denial of the franchise to persons living in the community after release from incarceration, and that, in light of opposition by their 167 White colleagues, they were forced to compromise to achieve other goals, such as eliminating the petition, witness, and oath requirements. (R p 1087, FOF ¶ 45); *see* (R pp 1086-87, FOF ¶ 43); (R pp 1088-89, FOF ¶¶ 46-47). North Carolina legislators in the 1970s understood the racist origins and discriminatory effects of denying the franchise to persons on felony supervision. (R pp 1089, 1090-91, FOF ¶¶ 48-49, 54). And racism against African Americans remained rife in the General Assembly at that time, with White legislators openly holding racist views and using racial slurs to refer to Reps. Johnson, Frye, and Michaux. (R p 1090, FOF ¶ 52). No evidence reveals any race-neutral explanation for the General Assembly's decision in 1971 and 1973 to preserve, rather than eliminate, this element of the 1877 law. (R pp 1089-90, FOF ¶¶ 50-51).

The 1971 and 1973 revisions to § 13-1 accordingly carried forward the original, racist 1877 legislation's denial of the franchise to persons living in the community on felony supervision. (R p 1091, FOF ¶ 55).

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

> 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 § 13-1, people living in North Carolina communities cannot register or vote until they have been "unconditionally discharged" from felony probation, parole, or post-release supervision. The median duration of felony supervision in North Carolina state court is 30 months. (R p 1028).

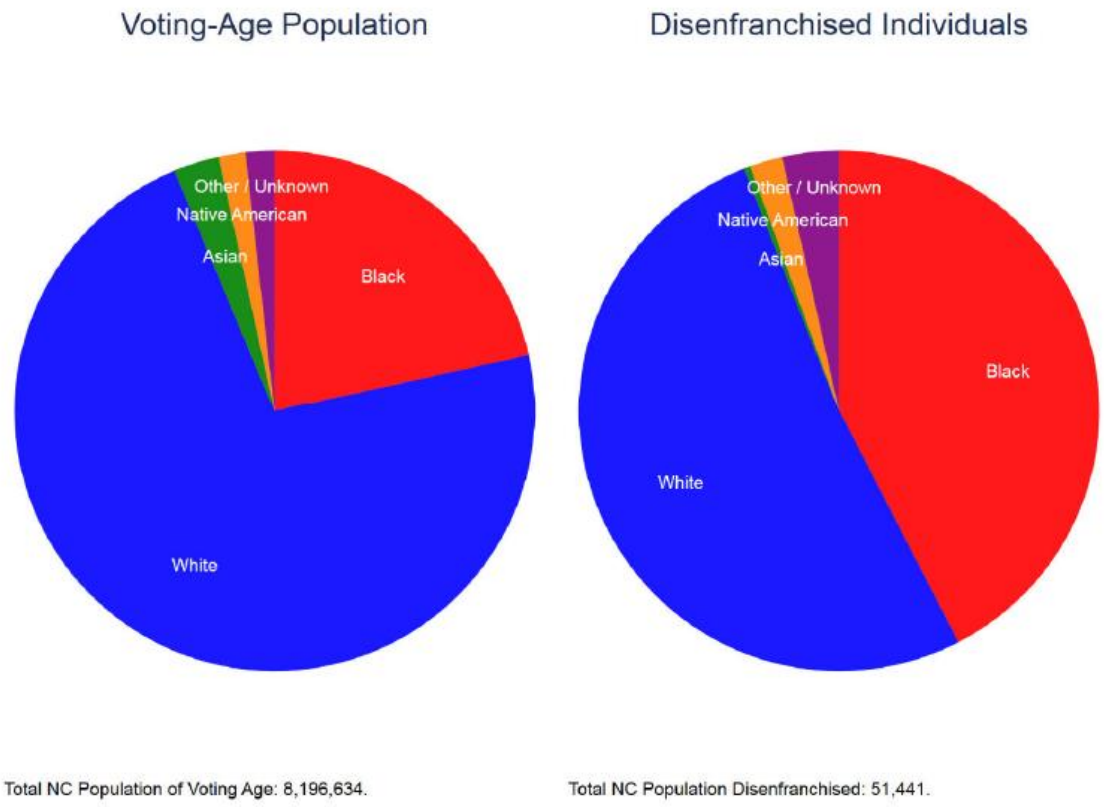
B. The Discriminatory Effects of the Challenged Law

The trial court credited the testimony of Plaintiffs' expert Dr. Frank Baumgartner, a Professor of Political Science at University of North Carolina at Chapel Hill, regarding the number of North Carolinians disenfranchised due to felony supervision and their racial demographics. (R pp 1091-92, FOF ¶ 56). Based on Dr. Baumgartner's conclusions, which the court accepted, the court found that North Carolina's denial of the franchise to people on felony supervision currently has an extreme disparate impact on African Americans throughout the entire State. (R pp 1096-97, FOF ¶ 69).

At least 56,516 persons in North Carolina are disenfranchised due to probation, parole, or post-release supervision from a felony conviction in North Carolina state or federal court. (R p 1092, FOF ¶ 57). In individual counties, the overall rate of disenfranchisement ranges from 0.25% to roughly 1.4% of the total voting-age population. (R p 1092, FOF ¶ 58).

African Americans are disproportionately disenfranchised due to felony supervision at both the statewide and county levels. (R pp 1093-94, FOF ¶ 61). Statewide, African Americans represent 21% of North Carolina's voting population, but over 42% of those disenfranchised due to felony supervision. *Id.* In comparison, White people comprise 72% of the voting-age population, but only 52% of those disenfranchised. *Id.* These numbers, depicted in the following charts, are the very definition of a racial disparity. *Id.*

Figure 1. Voting-Age Population and Number Disenfranchised, by Race.



Ex. 128, App. 1.[3]

In total, 1.24% of the entire African American voting-age population in North Carolina is disenfranchised due to felony supervision, whereas only 0.45% of the White voting-age population is disenfranchised. (R p 1094, FOF ¶ 62). The African American population is therefore disenfranchised at a rate 2.76 times as high as the rate of disenfranchisement of the White population. *Id.* If § 13-1 had no racially disparate impact, that ratio would be 1.0. *Id.* The trial court found that the statewide data, including the Black-White

[3] This and other figures from Dr. Baumgartner's expert report are reproduced in full size in the Appendix to this brief.

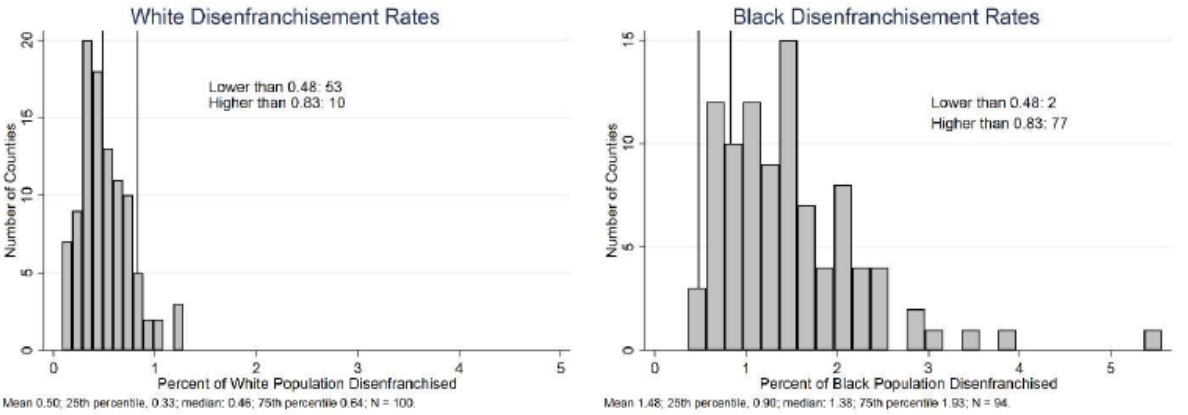
disenfranchisement ratio of 2.76, shows a very high degree of racial disparity in disenfranchisement. *Id.*; (R 1095, FOF ¶ 64).

Extreme racial disparities also exist at the county level. (R p 1095, FOF ¶ 65). Among the 84 counties with sufficient data to perform comparisons, African Americans are disenfranchised due to felony supervision at a higher rate than White people in every county. (R p 1096, FOF ¶ 68). There is not a single county where the White disenfranchisement rate is greater than the African American rate, and there are only two counties where the rates are close. *Id.* In 19 counties, more than 2% of the entire African American voting-age population is disenfranchised due to felony supervision. (R pp 1095-96, FOF ¶ 66). In four counties, more than 3% of the African American voting-age population is disenfranchised. *Id.* In one county, more than 5% of the African American voting-age population is disenfranchised. *Id.* In comparison, the highest rate of White disenfranchisement in any county is 1.25%. *Id.*

In 77 counties, the rate of African American disenfranchisement due to felony supervision is high (*i.e.*, more than 0.83% of the African American voting-age population), whereas there are only two counties where the rate of African American disenfranchisement is low (*i.e.*, less than 0.48% of the

African American voting-age population). (R p 1095, FOF ¶ 65).[4] In comparison, the rate of White disenfranchisement is high in only 10 counties, while the rate of White disenfranchisement is low in 53 counties. *Id.* These numbers, depicted in the graphs below, show the extreme racial disparity. *Id.*

Figure 4. White (a) and Black (b) Disenfranchisement Rates



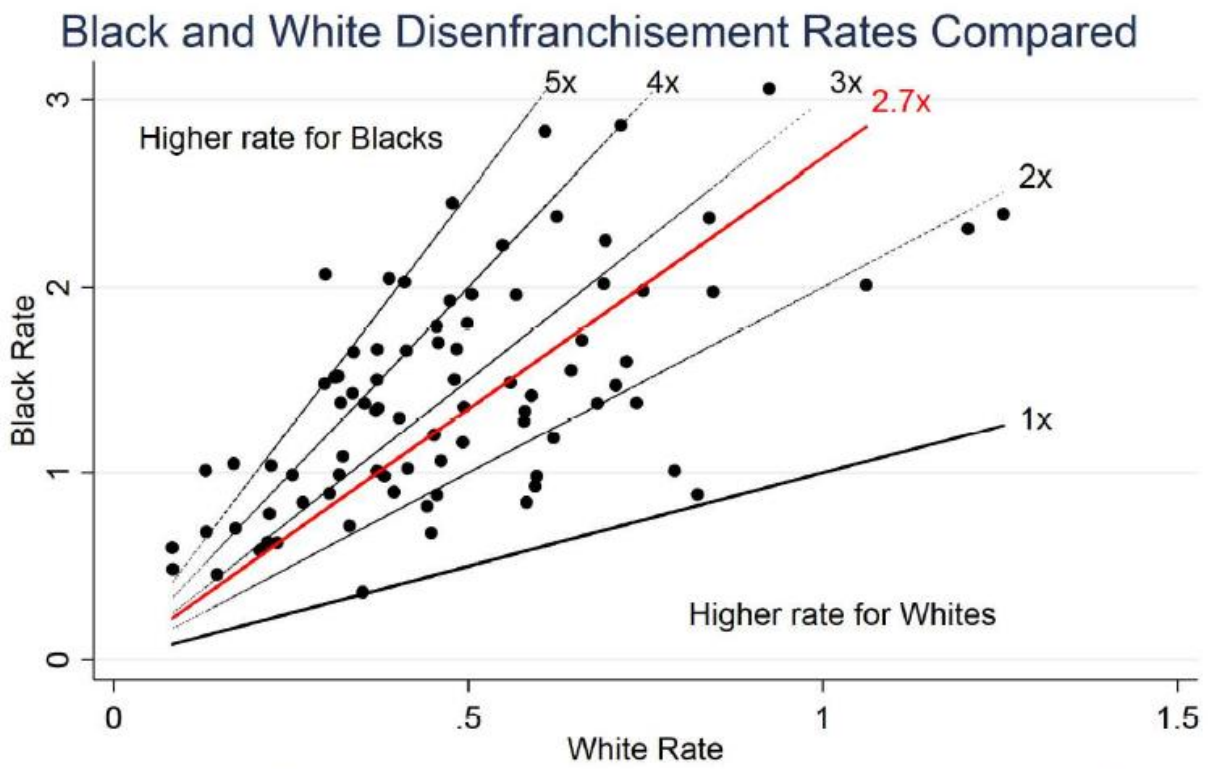
Ex. 132, App. 2.

In 44 counties, the percentage of the African American voting-age population that is denied the franchise due to felony supervision is at least three times greater than the comparable percentage of the White population. (R p 1096, FOF ¶ 67). In 24 counties, the African American disenfranchisement rate is at least four times greater than the White rate. (R pp 1095-96, FOF ¶ 66). In eight counties, the African American

[4] As Dr. Baumgartner explained, low, medium, and high rates of disenfranchisement at the county level are based on cutoffs at the 25th and 75th percentiles. Ex. 11.

disenfranchisement rate is at least five times greater than the White rate. *Id.* These numbers, depicted below, show the extreme racial disparity. *Id.*

Figure 6. White and Black Disenfranchisement Rates Compared



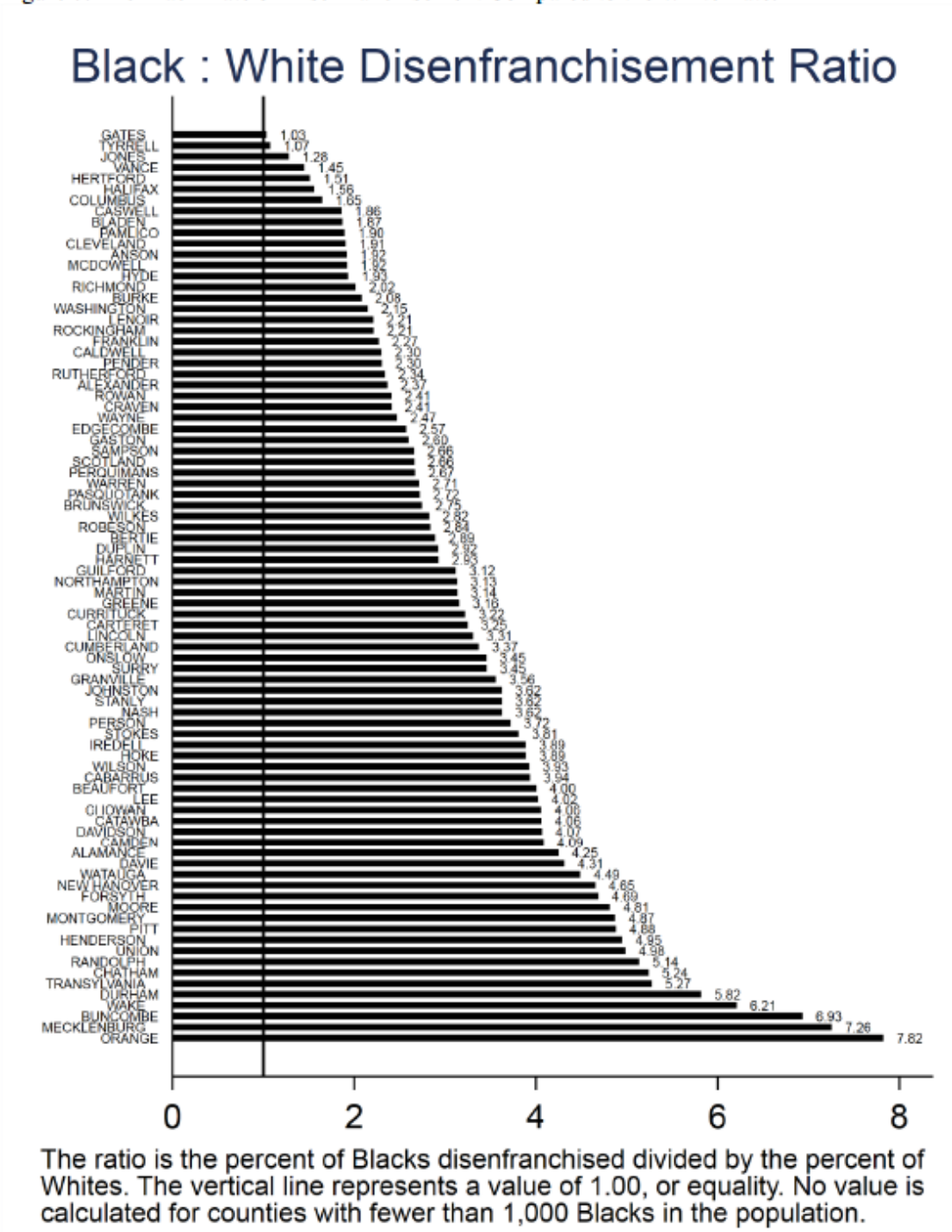
Excludes 16 counties with fewer than 1,000 Blacks in the population. Red line indicates the best fit regression line: Black rate = 2.7 * White rate; R^2=.87. Solid black line indicates an equal rate. Dotted lines show where the Black rate is twice, three times, four times, and five times the White rate.

Ex. 134, App. 3.

In Orange County, African Americans are disenfranchised at 7.82 times the rate of White people, meaning African Americans are disenfranchised at a 782% higher rate. (Ex. 135, App. 4). In Mecklenburg County, African Americans are disenfranchised at 7.26 times the rate of White people. *Id.* In Buncombe County, African Americans are disenfranchised at 6.93 times the rate of White people. *Id.* In Wake County, African Americans are

disenfranchised at 6.21 times the rate of White people. *Id.* In Durham County, African Americans are disenfranchised at 5.82 times the rate of White people. *Id.* These numbers, depicted below, show the extreme racial disparity.

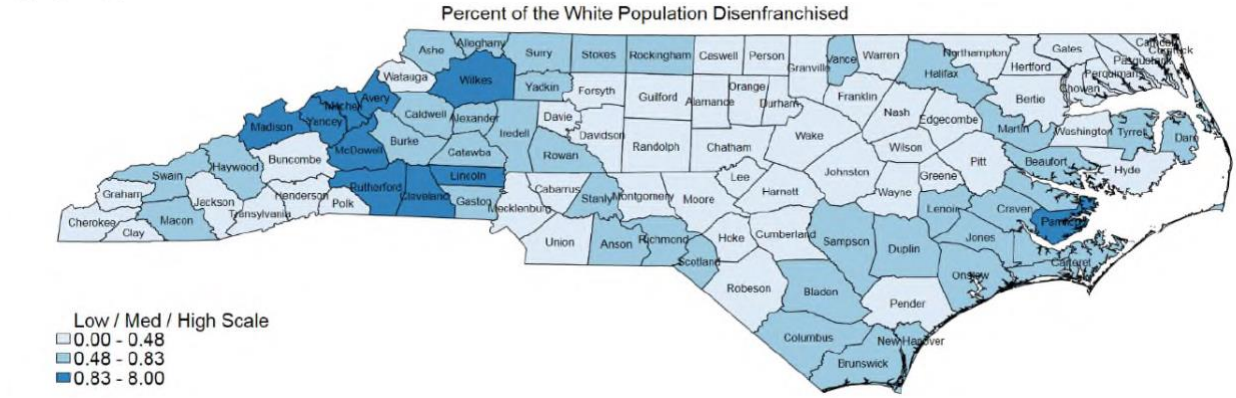
Figure 7. The Black Rate of Disenfranchisement Compared to the White Rate.



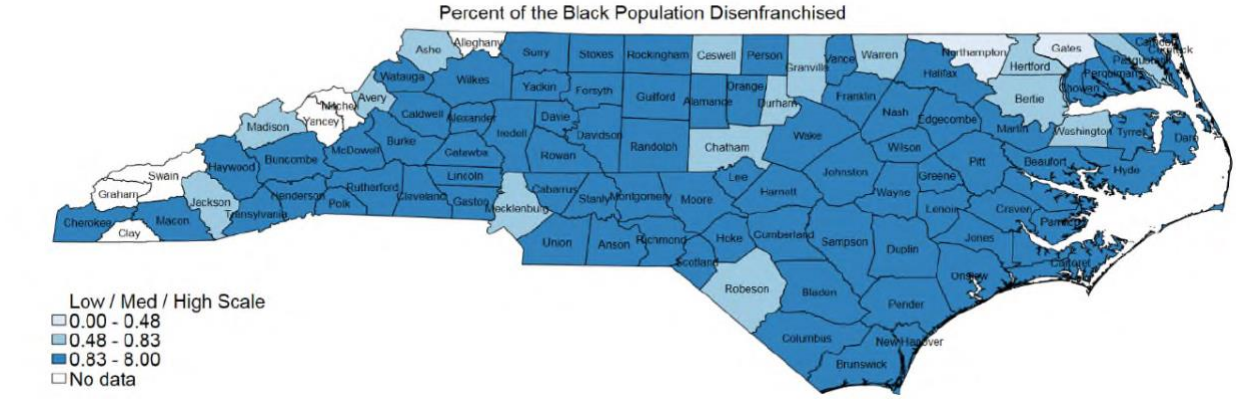
Ex. 135, App. 4; *see also* (8/18/21 Trial Tr. 59:5-63:24).

The color-coded maps below illustrate the extreme racial disparities in disenfranchisement at both the statewide and county levels. The first map shows the percentage of the White population that is disenfranchised in each county, with light, medium, and dark shading corresponding to low, medium, and high rates of disenfranchisement. (8/18/21 Trial Tr. 69:6-70:10). The second map shows the percentage of the African American population that is disenfranchised in each county, with the same shading system. (*Id.* at 70:19-71:22).

C. White



E. Black



Ex. 894-95, App. 5-6.

Legislative Defendants' expert Dr. Keegan Callanan opined that there is no racial disparity in disenfranchisement because "100% of felons of every race in North Carolina" are disenfranchised. (R p 1097, FOF ¶ 70). The trial court found that Dr. Keegan's opinions were entitled to "no weight" because they were "unpersuasive" and "flawed," and his expertise was "lacking." *Id.*

C. The Challenged Law's Potential to Impact Election Outcomes

Of the 56,000-plus North Carolinians on felony supervision, a substantial percentage would register and vote if they were not disenfranchised. (R p 1097, FOF ¶ 71). The trial court credited the testimony of Plaintiffs' expert Dr. Traci Burch, an Associate Professor of Political Science at Northwestern University, regarding the number of people on felony supervision who would register and vote in upcoming elections. Based on Dr. Burch's conclusions, the court found that at least 20% of those on felony supervision would vote in upcoming elections if they were not disenfranchised. (R pp 1098, 1103, FOF ¶¶ 72, 88-89). Certain subgroups of this class of voters—including women, African Americans, and older people—would vote at even higher rates. (R pp 1098-1104, FOF ¶¶ 73-95).

Given how close elections often are in North Carolina, the trial court found that disenfranchising such large numbers of would-be voters has the potential to affect election outcomes. (R p 1097, FOF ¶ 71). In 2018 alone,

there were 16 county elections where the margin of victory in the election was less than the number of people disenfranchised due to felony supervision in that county. (R pp 1101-02, FOF ¶ 85). The number of disenfranchised African Americans alone exceeds the vote margin in some recent county elections. (R p 1102, FOF ¶ 86). Likewise, in some recent statewide elections, including the 2016 Governor's race, the vote margin was less than the number of people disenfranchised statewide. (R p 1103, FOF ¶ 89).

D. The Requirement to Pay Court Costs, Fees, and Restitution

As noted, under § 13-1, people with felony convictions cannot vote until they are "unconditionally discharged" from probation, parole, or post-release supervision. And 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). Courts may extend probation to five years based on failure to pay these amounts, and may extend it for three more years "for the purpose of allowing the defendant to complete a program of restitution." *Id.* §§ 15A-1342(a), 15A-1344(a)(d).

The amounts at issue have increased by nearly 400% over the past two decades. (R p 67). Today, they include a "General Court of Justice Fee" of $154.50 plus additional fees for "Facilities" ($30), "telecommunications" ($4), "retirement and insurance benefits of … law enforcement officers" ($6.25),

"Pretrial Release Services" ($15), "arrest or personal service of criminal process" ($5), and "DNA" ($2). N.C.G.S. §§ 7A-304(a)(1)-(5), (9). Anyone who fails to pay within 40 days incurs a $50.00 late fee. *Id.* § 7A-304(a)(6). People also must pay "the costs of appointed counsel, public defender, or appellate defender to represent him in the case(s) for which he was placed on probation." *Id.* § 15A-1343(b)(10). And people on probation, parole, or post-release supervision must pay a monthly $40 "supervision fee." *Id.* § § 15A-1343(b)(6), (c1), 15A-1368.4(f), 15A-1374(c).

For people on felony probation in North Carolina, the median amounts owed are $573 in court costs, $340 in fees, and $1,400 in restitution. (R p 159). For people on parole or post-release supervision, the median amounts owed are $839 in court costs, $40 in fees, and $1,500 in restitution. *Id.*

E. Purported Justifications for the Challenged Law

During discovery, Defendants served interrogatory responses putting forward "numerous" possible state interests that § 13-1 might be thought to serve. (R p 1107, FOF ¶ 103). As noted, the trial court set Plaintiffs' claims for trial to allow Defendants to present evidence supporting those interests. But Defendants introduced no evidence at trial that § 13-1's disenfranchisement of people on felony supervision serves any of those interests or any other valid state interest. *Id.*; (R p 1109, FOF ¶¶ 107-08). The State Board's Executive Director testified that the State Board is not asserting

that such disenfranchisement serves any of the asserted state interests, and admitted that the State Board knows of no evidence that such disenfranchisement advances any of those interests. (R p 1108, FOF ¶ 105).

Based on Dr. Burch's testimony, which the trial court accepted and credited, the court found that § 13-1's disenfranchisement of people of felony supervision does not advance the state interests initially put forward by Defendants and instead causes only harm. (R p 1111, FOF ¶¶ 115-16). Such disenfranchisement does not promote voter registration and electoral participation—and may even decrease turnout—among people who have completed their felony supervision. (R pp 1112-13, FOF ¶¶ 117-21). Section 13-1's disenfranchisement of people of felony supervision has a stigmatizing effect and hinders their reintegration into society. (R p 1113, FOF ¶ 122). It reduces political opportunity and the equality of political representation across entire communities in North Carolina, especially in certain areas where felony disenfranchisement rates among young adults are as high as 18 to 20%. (R pp 1113-14, FOF ¶ 123). And it causes "rampant confusion among persons on felony supervision" as well as election administrators. (R pp 1114-18, FOF ¶¶ 125-36).

Section 13-1's disenfranchisement of people on felony supervision harms the organizational Plaintiffs and their members. (R pp 1118-21, FOF ¶¶ 135-39). It also harms the individual Plaintiffs, like Timmy Locklear and

Shakita Norman who testified at trial. (R pp 1121-22, FOF ¶¶ 140-42). At trial, Ms. Norman testified that she lives in Wake County, where she worked as an Assistant General Manager at Jiffy Lube, takes care of her five children, and pays her taxes. (R p 1122, FOF ¶ 142). But she testified that she could not vote because, due to a felony conviction in 2018, she has been stuck on "special probation" for nearly three years (as of the time of trial), even though she had no probation violations. *Id.* To complete her special probation, she needed to serve a total of 200 more days of "weekend jail." *Id.* But she had not been able to serve any weekend jail since March 2020 because the jails were closed due to the pandemic. *Id.* Ms. Norman also testified that she did not know when she would be able to complete her required weekend jail days, or when she would be off probation and able to vote again. *Id.* She testified that she voted in North Carolina elections before her conviction, and she would have voted in the 2020 elections if she were not disenfranchised. *Id.* She explained that she especially wanted to vote for school board because all of her children attend Wake County Public Schools. *Id.* When asked why she believes that people on felony supervision should have the right to vote, she testified:

> Well, most people that's like me, even though I'm on probation, I still pay taxes, I go to work every day, I take care of my family. I should -- I should be able to have that, to have that moment. I should be able to say something, and I want people that's in the future that's in the

> situation that I'm in to be able to have that voice and be able to say something and it gets heard.
> 8/17/21 Tr. at 398:20—399:01.

STANDARD OF REVIEW

The trial court's factual findings are reviewed for clear error, *State v. Reed*, 373 N.C. 498, 507 (2020), and its legal conclusions, including its grant of partial summary judgment, are reviewed de novo, *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332 (2019).

ARGUMENT

The trial court correctly concluded that N.C.G.S. 13-1's denial of the franchise to people on felony probation, parole, or post-release supervision discriminates against African Americans in intent and effect in violation of the North Carolina Constitution's Equal Protection Clause, and prevents North Carolina elections from reflecting the will of the people in violation of the Free Elections Clause. The court also correctly concluded that § 13-1 impermissibly conditions the right to vote on the ability to make financial payments in violation of the Equal Protection Clause's restriction on wealth-based classifications and the Constitution's Ban on Property Qualifications. The trial court correctly rejected Legislative Defendants' argument that Article VI, § 2, cl. 3 of the North Carolina Constitution forecloses Plaintiffs' claims. This Court should affirm the trial court's judgment.

I. SECTION 13-1'S DENIAL OF THE FRANCHISE TO PEOPLE ON FELONY SUPERVISION VIOLATES THE NORTH CAROLINA CONSTITUTION'S EQUAL PROTECTION CLAUSE

The Equal Protection Clause 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. This clause provides greater protection for voting rights than its federal counterpart. *Harper v. Hall*, 380 N.C. 317, 377, 868 S.E.2d 499, 542-43 (2022) (citing *Stephenson v. Bartlett*, 355 N.C. 354, 380-81 & n.6, 562 S.E.2d 377, 393-96 & n.6 (2002), and *Blankenship v. Bartlett*, 363 N.C. 518, 522-24, 681 S.E.2d 759, 763-66 (2009)). Under North Carolina's Equal Protection Clause, a government classification is subject to strict scrutiny if it "impermissibly interferes with the exercise of a fundamental right" or "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); *see Harper*, 380 N.C. at 377, 868 S.E.2d at 543; *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 746, 392 S.E.2d 352, 355 (1990).

The trial court held that § 13-1's denial of the franchise to people on felony supervision violates the Equal Protection Clause because it discriminates against African Americans in intent and effect, and because it deprives all people on felony supervision of the fundamental right to vote.

(R p 1123, COL ¶ 3). And as explained below, such disenfranchisement cannot satisfy any scrutiny, much less strict scrutiny.

A. Section 13-1 Impermissibly Discriminates Against African Americans in Intent and Effect

As Legislative Defendants acknowledge, a law enacted with racially discriminatory intent violates the Equal Protection Clause absent proof that the legislature would have enacted the law even without the discriminatory motivation. LD Br. 15-16 (citing *Holmes v. Moore*, 270 N.C. App. 7, 840 S.E.2d 244 (N.C. Ct. App. 2020)). "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." *Holmes*, 270 N.C. App. at 17, 840 S.E.2d at 255 (internal quotation marks omitted). In evaluating discriminatory intent, relevant factors include: (1) "the historical background of the challenged decision"; (2) "the specific sequence of events leading up to the challenged decision"; (3) "departures from normal procedural sequence"; (4) "the legislative history of the decision"; and (5) "the disproportionate impact of the official action—whether it bears more heavily on one race than another." *Id.* (bracketing and quotation marks omitted).

Here, the trial court found that: the 1877 version of § 13-1 originally denying the franchise to people under felony supervision living in the community was motivated by racism; that the passage of time did not purge §

13-1's racially discriminatory intent; that the General Assembly's decision in the early 1970s to preserve § 13-1's denial of the franchise to people living in the community was independently motivated by racism; and that there is no evidence indicating that § 13-1 would have been enacted without a racially discriminatory motive.

The trial court found that the history and intent of § 13-1's denial of the franchise to people living in the community are rooted in discrimination against African Americans. Legislative Defendants do not argue that the court's extensive factual findings regarding the law's racist origins are clearly erroneous. Nor could they. The original 1877 legislation using felony convictions to disenfranchise people living in the community was overtly racist. It was championed by a White supremacist with the goal of suppressing African American political power. It grew out of a vicious campaign of systematically whipping African American men to render them "infamous" and thus barred from voting in advance of the Fifteenth Amendment. Legislative Defendants conceded at trial that the proof of racist intent behind the 1877 legislation is "troubling and irrefutable." (R p 1084, FOF ¶ 36).[5]

---

[5] Legislative Defendants argue, citing a federal decision in *Abbott v. Perez*, 138 S. Ct. 2305 (2018), relating to redistricting laws, that the trial court was required to presume "good faith." Br. 16-17. But the court gave § 13-1 all the good faith it was due: it placed the burden on Plaintiffs to establish discriminatory intent under the factors outlined in *Holmes*. That is all that

Contrary to Legislative Defendants' arguments, the changes to § 13-1 in the 1970s did not eradicate, but rather perpetuated, the original law's discriminatory intent. To begin with, the trial court correctly rejected Legislative Defendants' argument that the only relevant "history" of § 13-1 is "from the 1971 and 1973 legislative sessions." (R p 962). As the court explained, looking only at the amendments to § 13-1 in early 1970s "does not accurately reflect the legislative origination and evolution of North Carolina's restoration of rights statute," which dates back to 1877. *Id.*

As the trial court found, what happened in the early 1970s did not purge § 13-1's racially discriminatory intent, for two reasons. *First*, the General Assembly knew that the original law was tainted by racism but chose to *preserve* its discriminatory disenfranchisement of people living in the community. And as the trial court explained, a legislature cannot purge a law of its racially discriminatory intent by *keeping* its racist provisions. (R p 1124, COL ¶ 6). In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Supreme Court struck down a felony disenfranchisement law originally intended to target

---

Abbott meant when it referred to a presumption of good faith; in *Abbott*, the U.S. Supreme Court said, a lower court erred in placing the burden on defendants to disprove discrimination. *Abbott*, 138 S. Ct. at 2324-27. The trial court did no such thing here. In any event, Legislative Defendants cannot now argue that the trial court needed to recite the words "good faith" when they themselves conceded at trial that Plaintiffs offered "irrefutable" proof of racism—the quintessential bad faith.

African Americans, explaining that changes to the law "occurring in the succeeding … years" since its enactment did not cleanse the original racist intent. 471 U.S. at 232-33; *see Ramos v. Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring) ("[W]here a legislature actually confronts a law's tawdry past in reenacting it[,] the new law may well be free of discriminatory taint," but "[t]hat cannot be said of the laws at issue here.").

Legislative Defendants' exclusive focus on 1971 and 1973 might have made sense if § 13-1's disenfranchisement of individuals living in North Carolina's communities *originated* in the 1970s, but of course it did not. Legislative Defendants also argue that the changes to § 13-1 in the 1970s improved the law by removing certain obstacles to rights restoration, but that is irrelevant. Plaintiffs are not challenging any of the improvements made to the law in the 1970s; they are challenging the law's disenfranchisement of people living in the community, which the General Assembly kept intact.

Second, the trial court found that the General Assembly's decision in the 1970s to preserve § 13-1's denial of the franchise to people living in the community was itself independently motivated by discriminatory intent. (R p 1124, COL ¶ 7); (R pp 1085-91, FOF ¶¶ 41-55). As the court explained, the racist origins of the felony disenfranchisement scheme, particularly the denial of the franchise to people living in the community, were well known in the

General Assembly in the 1970s. When the only African American legislators proposed amending the law to *eliminate* the disenfranchisement of people living in the community, their White colleagues refused and added the words "probation or parole" back in the legislation. The White legislators knew that this aspect of the law had a disparate impact on African Americans, yet they insisted on reinserting it without offering *any* race-neutral explanation. In sum, the African American legislators did not "champion" the current version of § 13-1, as Legislative Defendants assert. Instead, those legislators tried to eliminate the law's racially discriminatory disenfranchisement of people living in the community, but they were overruled by their White colleagues.

A challenged law's disparate impact on one race further signals discriminatory intent, and the trial court found that § 13-1's denial of the franchise to people on felony supervision has an extreme disparate impact on African Americans. Once again, Legislative Defendants do not argue that the court's extensive factual findings of discriminatory effects are clearly erroneous. Nor could they. By a host of mathematical and statistical measures, African Americans are disproportionately disenfranchised due to felony supervision by wide margins at both the statewide and county levels. Legislative Defendants quibble with one of those measures, namely that the statewide rate of African American disenfranchisement is 2.76 times as high as the rate of White disenfranchisement. LD Br. 19. But far from creating a

"distorted picture," *id.*, this statistic aligns with numerous others. African Americans comprise 21% of the voting-age population in North Carolina, but 42% of those disenfranchised due to felony supervision. In all 84 counties with sufficient data for comparison, the rate of African American disenfranchisement is higher than the rate of White disenfranchisement. In many counties, African Americans are disenfranchised at rates three, four, five, six, seven, or even eight times higher than White people. Any way you slice it, the disparate impact on African Americans is clear and undeniable.

These startling racial disparities in disenfranchisement have serious consequences for the political representation of African Americans. When so many African Americans cannot vote, African American communities are denied "substantially equal voting power" and the "the same representational influence or 'clout.'" *Stephenson*, 355 N.C. at 377-79, 562 S.E.2d at 393-94.

Legislative Defendants' argument (Br. 17-18) that the impact analysis question requires comparing the effect of the changes between 1971 and 1973 on African Americans is hard to follow. The aspect of § 13-1's disenfranchisement that Plaintiffs are challenging did not change between 1971 and 1973.

Lastly, the trial court found that "[t]here is no evidence to demonstrate that § 13-1 would have been enacted without a motivation impermissibly based

on race discrimination, and … that it would not have been." (R p 1125, COL ¶ 8). Legislative Defendants' arguments to the contrary on appeal (at 24) are underdeveloped and contradict the trial court's extensive, unchallenged factual findings regarding the racially discriminatory intent that motivated the law. Legislative Defendants repeat the argument that the 1971 and 1973 amendments to § 13-1 were "championed" by African American legislators, but again, the trial court found the opposite; African American legislators tried but failed to pass a bill that ended disenfranchisement of those on felony supervision. *Supra* at 4-17. Legislative Defendants argue without citation that a completion of supervision rule is "easily administrable," but evidence at trial showed the opposite. *Infra* at 55-56.

B. Section 13-1 Impermissibly Deprives Individuals on Felony Supervision of the Fundamental Right to Vote

If a statute infringes a fundamental right, strict scrutiny applies even if the affected group is not a suspect class and even if the statute was not enacted with racially discriminatory intent. *Harper*, 380 N.C. at 377, 868 S.E.2d at 543. The trial court found that § 13-1's denial of the franchise to people on felony supervision is subject to strict scrutiny because it infringes the "fundamental right" to "vote on equal terms." *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 393; *see* (R p 1126, COL ¶¶ 12, 14).

Section 13-1 denies this fundamental right to vote to the group of persons on felony supervision, relative to similarly situated people living in the same communities. "The right to vote is the right to participate in the decision-making process of government" among all persons "sharing an identity with the broader humane, economic, ideological, and political concerns of the human body politic." *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 13, 269 S.E.2d 142, 150 (1980). People on felony supervision share the same concerns as everyone else living in their communities. They are neighbors, friends, family members, and co-workers. They are subject to the same laws and pay the same taxes as everyone else living in their communities. They share in the State's "public burthens" and "feel an interest in its welfare." *Roberts v. Cannon,* 20 N.C. 398, 4 Dev. & Bat. (Orig. Ed.) 256, 260-61 (1839). Denying them the fundamental right to vote thus triggers strict scrutiny, and as explained below, this law cannot satisfy any scrutiny, much less strict scrutiny.

Legislative Defendants note (at 25) that federal courts have held that people convicted of felonies have no fundamental right to vote under the U.S. Constitution. But they ignore that North Carolina's Equal Protection Clause provides greater protection for voting rights than its federal counterpart. This Court should reaffirm that voting is a fundamental right under North Carolina law irrespective of federal law.

II. SECTION 13-1'S DENIAL OF THE FRANCHISE TO PEOPLE ON FELONY SUPERVISION VIOLATES THE NORTH CAROLINA CONSTITUTION'S FREE ELECTIONS CLAUSE

The Free Elections Clause of the North Carolina Constitution, which has no analogue in the federal constitution, declares that "[a]ll elections shall be free." N.C. Const., art. I, § 10. This Court has held that a statute violates the Free Elections Clause if it "prevents election outcomes from reflecting the will of the people." *Harper*, 380 N.C. at 376, 868 S.E.2d at 542.

The trial court correctly held that by excluding from the electorate over 56,000 North Carolinians living in communities across the State, § 13-1 "prevent[s] elections that ascertain the will of the people." (R p 1127, COL ¶ 16). The court further held that § 13-1's "denial of the franchise to people on felony supervision strikes at the core of the Free Elections Clause...because of its grossly disproportionate effect on African Americans." (R p 1127, COL ¶ 18). As the court explained, "[e]lections cannot faithfully ascertain the will of *all* of the people when the class of persons denied the franchise due to felony supervision is disproportionately African Americans by wide margins at both the statewide and county levels." *Id.* And the court held that North Carolina elections do not reflect the will of the people "when the vote margin in both statewide and local elections is regularly less than the number of people disenfranchised in the relevant geographic area." (R pp 1127, COL ¶ 19).

A. The Free Elections Clause Mandates That Elections in North Carolina Reflect the Will of the People

North Carolina's Free Elections Clause dates back to the 1776 Declaration of Rights and was derived from a provision in the 1689 English Bill of Rights that stated, "election of members of parliament ought to be free." *Harper*, 380 N.C. at 373, 868 S.E. 2d at 540 (quoting Bill of Rights 1689, 1 W. & M. c. 2 (Eng.)). This English provision "was adopted in response to the king's efforts to manipulate parliamentary elections by diluting the vote in different areas to attain 'electoral advantage,' leading to calls for a 'free and lawful parliament' by the participants of the Glorious Revolution of 1688." *Id.* (quoting 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)). Like similar clauses in other states' early constitutions, North Carolina's Free Elections Clause was "intended for th[e] purpose" of "end[ing] the dilution of the right of the people of [the State] to select representatives to govern their affairs, and to codify an explicit provision to establish the protections of the right of the people to fair and equal representation in the governance of their affairs." *Id.* (quoting *League of Women Voters v. Commonwealth*, 178 A.3d 737, 806-07 (Pa. 2018) (bracketing omitted)).

"The free elections clause … provides 'free elections' as the most fundamental democratic process by which the principle of popular sovereignty is applied, and the government 'derive[s]" its power from the people and is 'founded upon their will only.'" *Harper v. Hall,* 380 N.C. at 374, 868 S.E.2d at 541-42 (quoting N.C. Const., art. I, § 2). "Under popular sovereignty, the democratic theory of our Declaration of Rights, the 'political power' of the people which is 'vested in and derives from [them],' is channeled through the proper functioning of the democratic processes of our constitutional system to the people's representatives in government." *Id.* at 370-71, 868 S.E.2d at 538-39. (quoting same). "Only when those democratic processes function as provided by our constitution to channel the will of the people can government be said to be 'founded upon their will only.'" *Id.* (quoting same)

"[F]rom the earliest language, the framers evidenced an intent to enshrine a broad principle of 'free' elections, and this language is a direct application of the principle of popular sovereignty in [Article I,] section 2." *Harper v. Hall,* 380 N.C. at 376, 868 S.E.2d at 542. Changes to the wording of the Free Elections Clause since its original enactment in 1776 show that, "though those in power during the early history of our state may have viewed the free elections clause as a mere 'admonition' to adhere to the principle of popular sovereignty through elections, a modern view acknowledges this is a constitutional requirement." *Id.*

Based on the constitutional text and history, this Court has held that "elections are not free" under the Free Elections Clause when they "do not serve to effectively ascertain the will of the people." *Id.* As this 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 accordingly 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").

Thus, the Free Elections Clause protects not only the individual right of a voter to cast his or her ballot, but the *collective* right of the people to elections that accurately reflect their will. In other words, the Free Elections Clause guarantees a 'fundamental' right—to have elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people. *See Harper*, 380 N.C. at 382-83, 868 S.E.2d at 546 (holding that the challenged redistricting plans violate the Free Elections Clause, and that this clause "guarantees the central democratic process by which the people's political power is transferred to their representatives").

This Court has applied these principles to invalidate laws that unnecessarily restrict or burden the right to vote. In *Clark v. Meyland*, for instance, the 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. And in *Harper*, the Court held that partisan gerrymandering violates the Free Elections Clause because it "prevents election outcomes from reflecting the will of the people." 380 N.C. at 377, 868 S.E.2d at 543.

B. North Carolina Elections Do Not Reflect the Will of the People When Over 56,000 People Living in the Community Cannot Vote

Section § 13-1's denial of the franchise to people on felony supervision violates the Free Elections Clause by "prevent[ing] elections from reflecting the will of the people." *Harper*, 380 N.C. at 377, 868 S.E.2d at 543.

North Carolina's elections do not reflect the will of the people when such an enormous number of people living in communities across the State—over 56,000—are prohibited from voting. In at least nine counties, more than 1% of the entire voting-age population is disenfranchised due to felony supervision. Prohibiting such large segments of a community from voting for its elected leaders prevents elections that reflect the will of the people.

Section 13-1 strikes at the core of the Free Elections Clause, moreover, because of its grossly disproportionate effect on African Americans. Elections cannot reflect the will of *all* of the people when African Americans are disproportionately disenfranchised due to felony supervision by wide margins at both the statewide and county levels.

Nor do North Carolina elections reflect the will of the people when the vote margin in both statewide and local elections is regularly less than the number of people disenfranchised in the relevant geographic area. As the trial court explained, in the 2018 general elections alone, there were 16 elections at the county level where the number of persons disenfranchised due to felony supervision exceeded the vote margin in the election. This included elections for Board of Commissioners, Board of Education, and Sheriff, among other important elected offices. As individuals who work, raise children, and pay taxes, people on felony supervision have a strong interest in the outcome of these elections, as we all do. The trial court further found that a substantial percentage of the 56,000-plus persons on felony supervision—at least 20% of them or more—would register and vote if they were not disenfranchised. Elections do not reflect the will of the people when the disenfranchisement of such a large number of people has the clear potential to affect the outcome of numerous close elections.

Legislative Defendants argue that the Free Elections Clause categorically cannot apply here because people with felony convictions are "*constitutionally* precluded from participating" in elections. LD Br. 29. But as explained in more detail below, *infra* Section V, this Court rejected exactly that type of argument in *Stephenson*, and interpreted ostensibly competing North Carolina constitutional provisions to preserve equal voting rights for all, rather than to "deny" an entire category of voters "their right to substantially equal legislative representation." 355 N.C. at 377-78, 381-82, 562 S.E.2d at 392-96. In any event, art. VI, § 2 does not "constitutionally preclude[]" people with felony convictions from voting; to the contrary, it contemplates that they will regain the right to vote. Nothing in art. VI, § 2 suggests that the Free Elections Clause should not govern that process.

The re-adoption of the Free Elections Clause as part of the 1970 constitutional convention did not, as Legislative Defendants argue (at 31), somehow permanently insulate every voting related statute in effect in 1970 from constitutional review. And Legislative Defendants' argument (at 31) that the Free Elections Clause only applies to laws that constrain who someone votes for, rather than whether they can vote at all, is nonsensical.

In sum, § 13-1 prevents thousands of people living in North Carolina communities who would otherwise vote from casting ballots, preventing the

will of the people from prevailing in both local and statewide elections, and violating the Free Elections Clause.

III. SECTION 13-1 CONDITIONS RIGHTS RESTORATION ON THE ABILITY TO PAY IN VIOLATION OF THE EQUAL PROTECTION CLAUSE AND BAN ON PROPERTY QUALIFICATIONS

In granting partial summary judgment and a preliminary injunction, the trial court held that § 13-1 conditions rights restoration on a person's ability to make financial payments in violation of the Equal Protection Clause's restriction on wealth-based classifications and the Ban on Property Qualifications. Those holdings are correct and should be affirmed.

A. Section 13-1 Imposes an Impermissible Wealth-Based Classification in Violation of the Equal Protection Clause

Under Section 13-1, people with felony convictions cannot vote until they are "unconstitutionally discharged" from probation, parole, or post-release supervision, and 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), 15A-1374(b)(11a)-(11b), 15A-1368(e)(11)-(12). The amounts at issue have increased by nearly 400% over the past two decades (R p 67). Today, they include "General" fees and fees for "Facilities", "telecommunications," "retirement and insurance benefits of … law enforcement officers," "Pretrial Release Services," "arrest or personal service of criminal process," and "DNA," as well as late fees and costs of appointed

counsel of a public defender. For people on felony probation in North Carolina, the median amounts owed are $573 in court costs, $340 in fees, and $1,400 in restitution. (R p 159). For people on parole or post-release supervision, the median amounts owed are $839 in court costs, $40 in fees, and $1,500 in restitution. Section 13-1 therefore imposes a wealth-based classification that independently triggers strict scrutiny.

As the trial court explained, "when a wealth classification is used to restrict the right to vote or in the administration of justice, it subject to heightened scrutiny, not the rational basis review urged by Defendants in this case." (R p 966) (citing *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 (1996)). It is well-settled that the equal protection guarantee precludes a state from denying a person the right to vote "on account of his economic status," "a capricious or irrelevant factor." *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966). Equal protection thus "bars a system which excludes" from the franchise "those unable to pay a fee." *Id.* A state denies equal protection "whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Id.* at 666.

That is exactly what § 13-1 does. It 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 costs, fees, or

restitution, while similarly situated people who can afford to pay regain their right to vote. The former remain disenfranchised due to their lack of wealth.

The wealth-based classification imposed under § 13-1 is no small matter. Across all probationers, the median total amount owed in court fees, court costs, restitution, and supervision fees is $2,441. These financial obligations are prohibitive for many disenfranchised persons, and requiring people to pay them as a condition of regaining voting rights imposes a wealth-based classification that triggers strict scrutiny.

Legislative Defendants argue that the only distinction being drawn "is between felons who have completed the terms of their sentence, including financial terms, and those who have not." LD Br. 27 (citation omitted). This is exactly the constitutional problem. 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 financial means to pay will be re-enfranchised while the person without will remain barred from voting. 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.

B. Section 13-1 Violates the 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 v. Cannon*, 20 N.C. 398 (1839), 4 Dev. & Bat. (Orig. Ed.) at 260-61. It ensures that "all classes of the community shall be represented, and that every man shall 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). The term property "is in its most general sense," and "embraces everything which a man may have exclusive dominion over." *Wilson v. Bd. of Alderman of the City of Charlotte*, 74 N.C. 748, 756 (1876). 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). The plain text of the Ban on Property Qualifications encompasses all forms of "property," and applying the provision to include money accords with its original intent as well. Financial qualifications for voting exclude "classes of the community" from the franchise, the precise evil that the Ban on Property Qualifications sought to prevent. *Roberts*, 20 N.C. at 398, 4 Dev. & Bat. (Orig.Ed.) at 260-61

By disenfranchising people based on failure to pay court costs, fees, and restitution, § 13-1 violates the constitutional ban on property qualifications. Citing federal court decisions, Legislative Defendants argue that the requirement to pay monetary obligations is merely a "predicate for having [an individual's] rights *restored*, not a qualification for *exercising* their rights." LD Br. 32. This is semantics. If a person has satisfied all other conditions of supervision but cannot afford to pay outstanding court costs, fees, or restitution, they cannot vote because they cannot pay, full stop. As the trial 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).

Neither of the cases cited by Legislative Defendants interpret the North Carolina Constitution. *See Johnson v. Bredesen*, 624 F.3d 742, 751 (6th Cir. 2010) (involving a challenge under the 24th Amendment of the U.S. Constitution); *Harvey v. Brewer*, 605 F.3d 1067, 1080 (9th Cir. 2010) (same)

Contrary to Legislative Defendants' assertion, the connection between financial obligations and rights restoration under § 13-1 is hardly "attenuated." LD Br. 33. Section 13-1 on its face requires an "unconditional discharge" to regain voting rights, and North Carolina statutes require payment of court costs, fees and restitution as "conditions" of probation, parole and post-release supervision. N.C.G.S. §§ 15A-1343(b)(9), 15A-1374(b)(11a)-(11b), 15A-1368(e)(11)-(12). If a person cannot pay these amounts, they cannot satisfy this "condition" of supervision and therefore cannot obtain the "unconditional discharge" required to restore voting rights.

Nor is the requirement to pay hundreds or thousands of dollars in order to access the franchise a "usual burden of voting." LD Br. 33. It is an enormous financial barrier, prohibitive for many people on felony supervision, as only about half of released North Carolina prisoners are employed a year after their release. (Ex. 320). In *Harper*, the U.S. Supreme Court declared that voting rights cannot be made to depend on "whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all." 383 U.S. at 668. 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. Surely North Carolina cannot condition rights restoration on paying hundreds or thousands of dollars.

IV. THE CHALLENGED DISENFRANCHISEMENT SCHEME CANNOT SATISFY STRICT OR ANY SCRUTINY

For the reasons set forth above, § 13-1's denial of the franchise to people on felony supervision is subject to strict scrutiny under both the Equal Protection Clause and the Free Elections Clause. To satisfy strict scrutiny, Defendants must establish that the disenfranchisement scheme furthers a compelling government interest and is narrowly tailored to do so. *Northampton Cnty.*, 326 N.C. at 747. Defendants have never even attempted to argue that the challenged scheme can satisfy strict scrutiny, and the trial court held that it cannot. (R p 1129, COL ¶ 24). That is conclusive.

At a minimum, the trial court held, the challenged disenfranchisement scheme is subject to intermediate scrutiny. (R p 1129, COL ¶ 25). This Court has repeatedly applied intermediate scrutiny where the government's discretion to regulate in a particular field had to be balanced against other constitutional protections. In *King*, the Court recognized the deference owed to a school board's "judgments regarding the provision of alternative education," but held that "[r]ational basis review … does not adequately

protect student[s]" in light of the "state constitutional rights to equal educational access and a sound basic education." *King ex rel. Harvey-Barrow v. Beaufort Cty. Bd. of Educ.*, 364 N.C. 368, 372-77, 704 S.E.2d 259, 262-65 (2010). The Court applied intermediate scrutiny "to harmonize the rational basis test employed in school discipline cases with the strict scrutiny analysis that formed a part of this Court's constitutional holding in school funding cases." *Id.* The Court likewise applied intermediate scrutiny in *Blankenship* to balance the constitutional "province of the legislature" to create a "convenient number" of judicial districts with the separate equal protections right of North Carolinians to substantially equal voting power. 363 N.C. 523-27, 681 S.E.2d 763-76. Under intermediate scrutiny, the government must show that the challenged law "advance[s] important government interests" and is not more restrictive "than necessary to further those interests." *Id.* Defendants have failed to establish that § 13-1's disenfranchisement of people on felony supervision advances any "important" government interest, much less in an appropriately tailored manner.

Under any level of scrutiny, Defendants must show that the challenged law adequately serves sufficient state interests today, not just that the law served some state interest in the past. As the U.S. Supreme Court has explained, a "classification must substantially serve an important governmental interest *today*, for … new insights and societal understandings

can reveal unjustified inequality that once passed unnoticed and unchallenged." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (internal quotation marks omitted) (emphasis original). Defendants have not shown that § 13-1's disenfranchisement of people on felony supervision advances any valid state interest today, and thus this scheme is invalid under any level of constitutional scrutiny.

Defendants presented no evidence whatsoever—none—that denying the franchise to people on felony supervision serves any valid state interest. With respect to the possible state interests that Defendants identified in interrogatory responses, the State Board's Executive Director testified that the State Board is not asserting any of those interests to justify enforcing the challenged law today, and she admitted that the State Board has no evidence that denying the franchise to people on felony supervision advances any of those interests. (R pp 1108-1109, FOF ¶¶ 105 - 107). And the trial court found that § 13-1's denial of the franchise to people on felony supervision in fact does not advance any valid state interest. (R pp 1107-1111).

In their opening brief, Legislative Defendants assert that the challenged disenfranchisement scheme "is fully justified" because it is "easily administrable by the State and easily understood by the felons it impacts." LD Br. 24. But the trial court found the opposite in extensive factual findings that

Legislative Defendants ignore. Based on the testimony of the State Board's executive director, the trial court found that § 13-1's disenfranchisement of people on felony supervision "is very difficult to administer and leads to material errors and problems." (R p 1116, FOF ¶ 130). And the court found that "[t]here is rampant confusion among persons on felony supervision about their voting rights," in part because "DPS documents given to impacted individuals about their voting rights are unclear and can easily lead to confusion." (R p 1114-15, 1118-20, FOF ¶¶ 125, 136).

In contrast to the absence of any valid state interest, the trial court found that § 13-1's denial of the franchise to people on felony supervision causes substantial harms to affected individuals, their families, and their communities. It hinders reintegration, stigmatizes people, reduces electoral participation in neighborhoods with high concentrations of disenfranchisement, and diminishes the political power of African American communities. (R pp 113-14, FOF ¶¶ 122-23). And it further "harms individuals, families, and communities for years even after [the period of] supervision ends." (R p 1114, FOF ¶ 124).

In short, the mass disenfranchisement of people on felony supervision causes immense harm, and Defendants produced zero evidence that it serves any counterbalancing state interest. The scheme thus fails strict scrutiny or any other level of review.

V. PLAINTIFFS HAVE STANDING TO BRING THIS LAWSUIT AND THE TRIAL COURT ACTED WITHIN ITS AUTHORITY

Legislative Defendants argue that Plaintiffs lack standing to bring this lawsuit and that the trial court lacked authority to invalidate and enjoin § 13-1's disenfranchisement of individuals living in the community on felony supervision. Neither argument has merit.

A. Plaintiffs Have Standing to Bring this Lawsuit

Legislative Defendants first argue that Plaintiffs' injuries are not traceable to § 13-1 because "the loss of the right to vote is exclusively the work of the North Carolina Constitution." LD Br. 9. To the contrary, § 13-1 is the law that prevents people from registering and voting as long as they are on felony probation, parole, or post-release supervision. Under the plain and unambiguous terms of § 13-1, people with felony convictions cannot register and vote until they are "unconditionally discharged" from probation, parole, or post-release supervision. And as the trial court explained in rejecting Legislative Defendants' argument, although § 13-1 implements the constitutional provision on felony disenfranchisement, it must comply with other provisions of the North Carolina Constitution.

Article VI, § 2, cl. 3 of the Constitution authorizes the General Assembly to "prescribe[] by law" the "manner" of rights restoration, and legislation enacted by the General Assembly pursuant to this authority must comport

with all other provisions of the North Carolina Constitution. Because "all constitutional provisions must be read *in pari materia*," a constitutional provision "cannot be applied in isolation or in a manner that fails to comport with other requirements of the State Constitution." *Stephenson*, 355 N.C. at 377-78, 562 S.E.2d at 392, 394. Thus, in *Stephenson*, the Supreme Court declined to interpret the Constitution's "Whole County Provision" in a "strictly mechanical fashion" because doing so "would be inconsistent with other provisions of … the State Constitution." 355 N.C. at 377-78, 381-82, 562 S.E.2d at 392-96. "[T]o avoid internal textual conflict" with North Carolina's Equal Protection Clause, the Court interpreted the Whole County Provision in a manner that upheld "the principles of substantially equal voting power and substantially equal legislative representation arising from that same Constitution." *Id.*

The history of Article VI, § 2, cl. 3 confirms the need for implementing legislation. "A court should look to the history" in interpreting a constitutional provision, *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), and throughout its history Article VI, § 2, cl. 3 has *always* been accompanied by implementing legislation. The General Assembly enacted legislation providing for felony disenfranchisement and rights restoration in 1877, the very first legislative session after ratification of the 1876 constitutional amendment. At no point in

the 144 years since its adoption has Article VI, § 2, cl. 3 ever operated without implementing legislation.

In any event, implementing legislation *has* been enacted, and any statute enacted by the General Assembly must comport with all provisions of the North Carolina Constitution. *Stephenson* makes clear that implementing legislation authorized under one constitutional provision is subject to the normal legal standards and scrutiny that apply under other constitutional provisions. 355 N.C. at 389, 562 S.E.2d at 394 (applying strict scrutiny in equal protection challenge to redistricting legislation).

The consequences of Legislative Defendants' contrary view proves that it is incorrect. If Article VI, § 2, cl. 3 foreclosed judicial scrutiny of right-restoration legislation under other constitutional provisions, the General Assembly could enact a statute restoring voting rights only to White men with felony convictions, or only to landed gentry, or only to people convicted on a Tuesday. That cannot be correct.

Legislative Defendants also argue that Plaintiffs' injuries cannot be "redressed" by a favorable decision in this case. LD Br. 9. Their theory is that even after the trial court's injunction expressly authorizing persons on felony supervision to vote legally, those same individuals "remain[] disenfranchised under the North Carolina Constitution" and therefore can be criminally prosecuted for illegally registering and voting. *Id.* That is nonsensical. Given

that a court order permits these individuals to register and vote legally, they cannot be criminally prosecuted for registering and voting illegally. The trial court's permanent injunction expressly states that "if a person otherwise eligible to vote is not in jail or prison for a felony conviction, they may *lawfully* register and vote in North Carolina." (R p 1132 (emphasis added)). The Court of Appeals ordered the State Board to implement this injunction starting 27 July 2022, and the State Board has done so. Notably, under the logic of Legislative Defendants' argument, even if this Court affirms the trial court's final judgment that the disenfranchisement of individuals on felony supervision violates the state constitution, those individuals will still be subject to felony criminal prosecution for registering and voting illegally. Indeed, in largely affirming the Court of Appeals stay of the trial court's expanded preliminary injunction, this Court ordered that people on felony supervision who had registered to vote before that injunction was stayed "are legally registered voters." Legislative Defendants' theory of criminal prosecutions thus contradicts this Court's own prior order.

Legislative Defendants should stop advancing this troubling argument, which may have the unfortunate consequence of intimidating voters who are permitted to legally register and vote under the trial court's injunction.

B. The Trial Court Acted Within Its Authority

Legislative Defendants argue that the trial court's injunction improperly "rewrote" § 13-1 and exceeded the court's authority to remedy the constitutional violations. LD Br. 11. That too is incorrect.

The trial court invalidated and enjoined § 13-1's denial of the franchise to North Carolinians on probation, parole, or supervised release, and such relief was well within the court's power. "Trial courts have broad discretion to fashion equitable remedies to protect innocent parties when injustice would otherwise result." *Kinlaw v. Harris*, 364 N.C. 528, 532-33, 702 S.E.2d 294, 297 (2010). "This discretion includes the power to 'grant, deny, limit, or shape' relief as necessary to achieve equitable results." *Id.* Under these powers, courts can fashion injunctive relief to remedy a partially unconstitutional statute. A court may order that "the portion which is constitutional may stand while that which is unconstitutional is stricken out." *State v. Fredell*, 283 N.C. 242, 245, 195 S.E.2d 300, 302 (1973).

Legislative Defendants' argument that the only available remedy is to order the permanent disenfranchisement of all persons with felony convictions, or for the trial court to order a remedy that involves striking through specific words in the statute, contradicts decades of civil rights precedent. LD Br. 9-13. The U.S. Supreme Court's decisions finding gender-based equal protection violations, for example, have regularly ordered remedies that expand a statute

to cover an improperly excluded class, rather than enjoining the statute altogether. For example, after finding that a statute extending financial benefits to children of an unemployed "father" was unconstitutional, the Supreme Court did not hold that no one was entitled to benefits, but rather extended the statute to cover children of unemployed mothers as well. *Califano v. Westcott*, 443 U.S. 76, 80, 92-93 (1979) (affirming district court decision "ordering that 'father' be replaced by its gender-neutral equivalent"); *accord, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (extending statute conferring discretionary benefit on men to confer that benefit on women as well). Similarly, after finding that a disability program and a food stamp program unlawfully excluded particular classes of individuals, the Supreme Court extended the programs to the wrongfully excluded classes. *Jimenez v. Weinberger*, 417 U.S. 628, 630-631 & n.2, 637-638 (1974); *Dep't of Agriculture v. Moreno*, 413 U.S. 528, 529-530, 538 (1973). In none of these cases did the Court's ability to provide effective relief depend on whether such relief could be accomplished by striking through a particular word or phrase, as Defendants have suggested.

Likewise here, the trial court properly invalidated and enjoined only the unconstitutional portion of the statute that denied the franchise to people under felony supervision living in the community. Specifically, the court declared that "13-1's denial of the franchise to persons on felony probation,

parole, or post-release supervision violates the North Carolina Constitution's Equal Protection Clause and Free Elections Clause," and its injunction barred Defendants from preventing people from registering and voting due to felony probation, parole, or post-release supervision. (R pp 1132-33). All other aspects of § 13-1, which are unrelated to the denial of the franchise to people living in the community, remain operative. Thus, Legislative Defendants argument that the trial court somehow struck the entirety of § 13-1 is wrong and belies this Court's jurisprudence on the severability of unconstitutional portions of a statute.

In short, the trial had ample authority and discretion to remedy § 13-1's unconstitutional disenfranchisement of people living in the community.

CONCLUSION

The trial court's judgment should be affirmed.

Respectfully submitted this the 17th day of August 2022.

Forward Justice

Electronically submitted
/s/ Daryl Atkinson
Daryl Atkinson (NC Bar #39030)
P.O. Box 1932
Durham, NC 27702
daryl@forwardjustice.org

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

Whitley Carpenter (NC Bar #49657)
Kathleen F. Roblez (NC Bar #57039)
Ashley Mitchell (NC Bar #56889)
Caitlin Swain (NC Bar #57042)
P.O. Box 1932
Durham, NC 27702
wcarpenter@forwardjustice.org
kroblez@forwardjustice.org
amitchell@forwardjustice.org
cswain@forwardjustice.org

Arnold & Porter Kay Scholer LLP
R. Stanton Jones*
Elisabeth S. Theodore*
601 Massachusetts Avenue NW
Washington, DC 20001
Tel: (202) 942-5000
stanton.jones@arnoldporter.com
elisabeth.theodore@arnoldporter.com

Protect Democracy Project
Farbod K. Faraji*
2120 University Ave
Berkeley, CA 94704
(202) 579-4582
farbod.faraji@protectdemocracy.org

*Admitted pro hac vice
Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate procedure, counsel for Plaintiffs certifies that the foregoing brief was prepared using a 13-point proportionally spaced font with serifs.

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

CERTIFICATE OF SERVICE

Pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, I hereby certify that a copy of this document has been duly served upon the following counsel of record by email:

Nathan Huff
K&L Gates
430 Davis Drive, Suite 400
Morrisville, NC 27560
Nate.Huff@klgates.com

Nicole Moss
David H. Thompson
Peter A. Patterson
Joseph O. Masterman
William V. Bergstrom
Cooper & Kirk, PLLC
1523 New Hampshire Ave NW
Washington, DC 20036
nmoss@cooperkirk.com
dthompson@cooperkirk.com
ppatterson@cooperkirk.com
jmasterman@cooperkirk.com
wbergstrom@cooperkirk.com

Counsel for Legislative Defendants

Terence Steed
Mary Carla Babb
N.C. Department of Justice
114 W. Edenton St.
Raleigh, NC 27603
tsteed@ncdoj.gov

Counsel for State Board Defendants

This the 17th day of August 2022.

/s/ *Daryl Atkinson*
Daryl Atkinson
(N.C. State Bar No. 39030)

No. 331PA21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

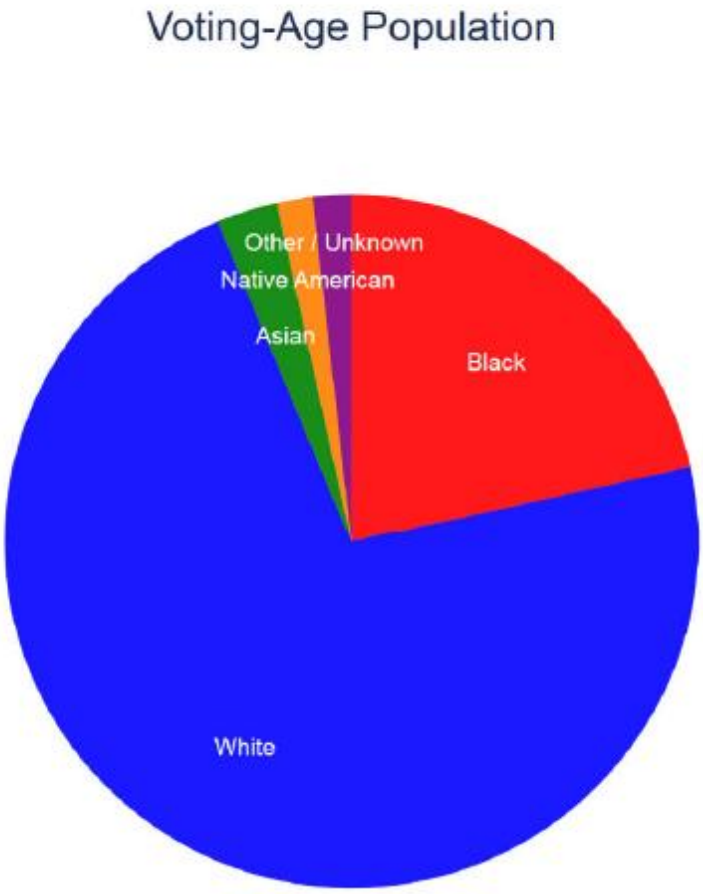
****

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.	From Wake County

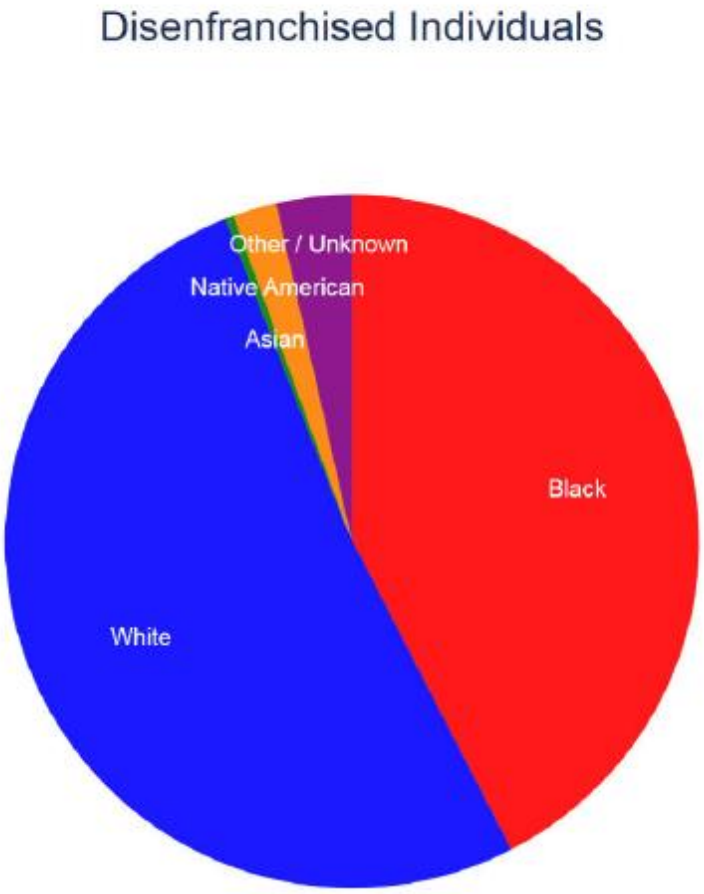
APPENDIX TO BRIEF OF PLAINTIFFS-APPELLEES COMMUNITY SUCCESS INITIATIVE, ET AL.

CONTENTS OF APPENDIX TO BRIEF OF PLAINTIFFS-APPELLEES

Figure 1. Voting-Age Population and Number Disenfranchised, by Race.

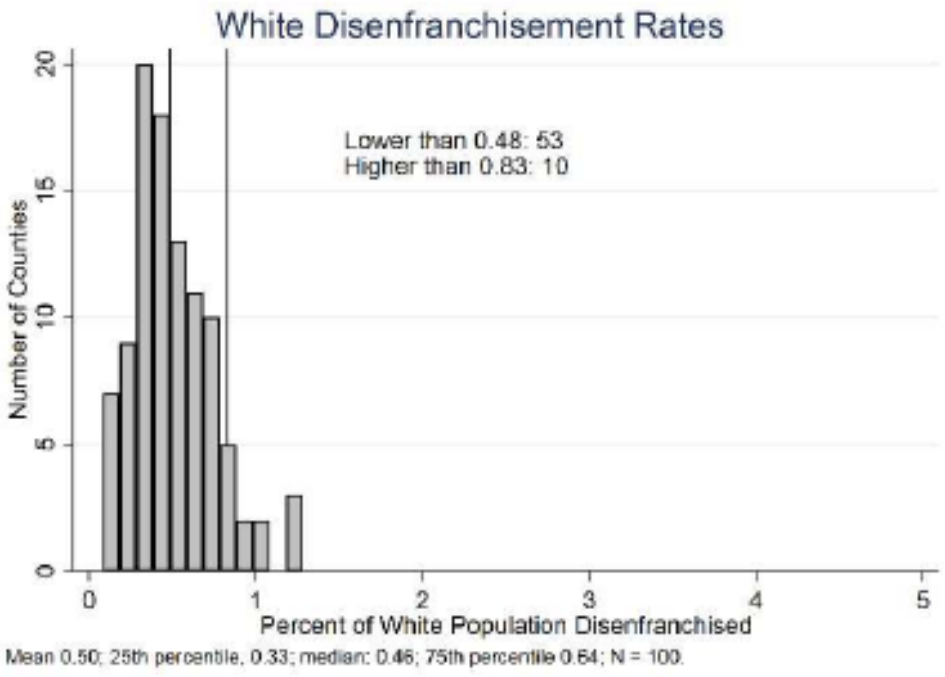


Total NC Population of Voting Age: 8,196,634.



Total NC Population Disenfranchised: 51,441.

Figure 4. White (a) and Black (b) Disenfranchisement Rates



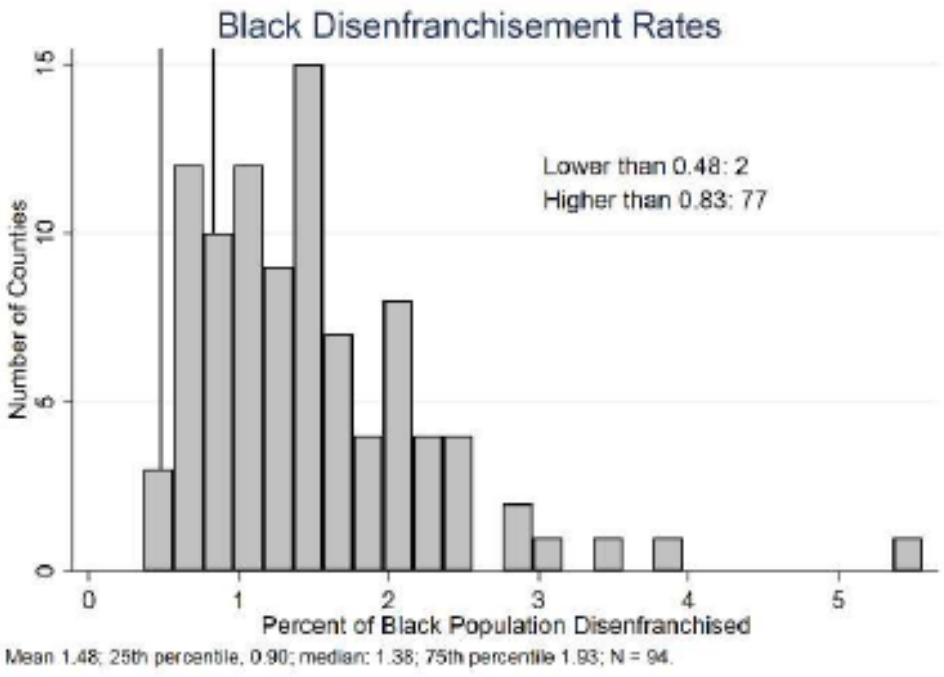
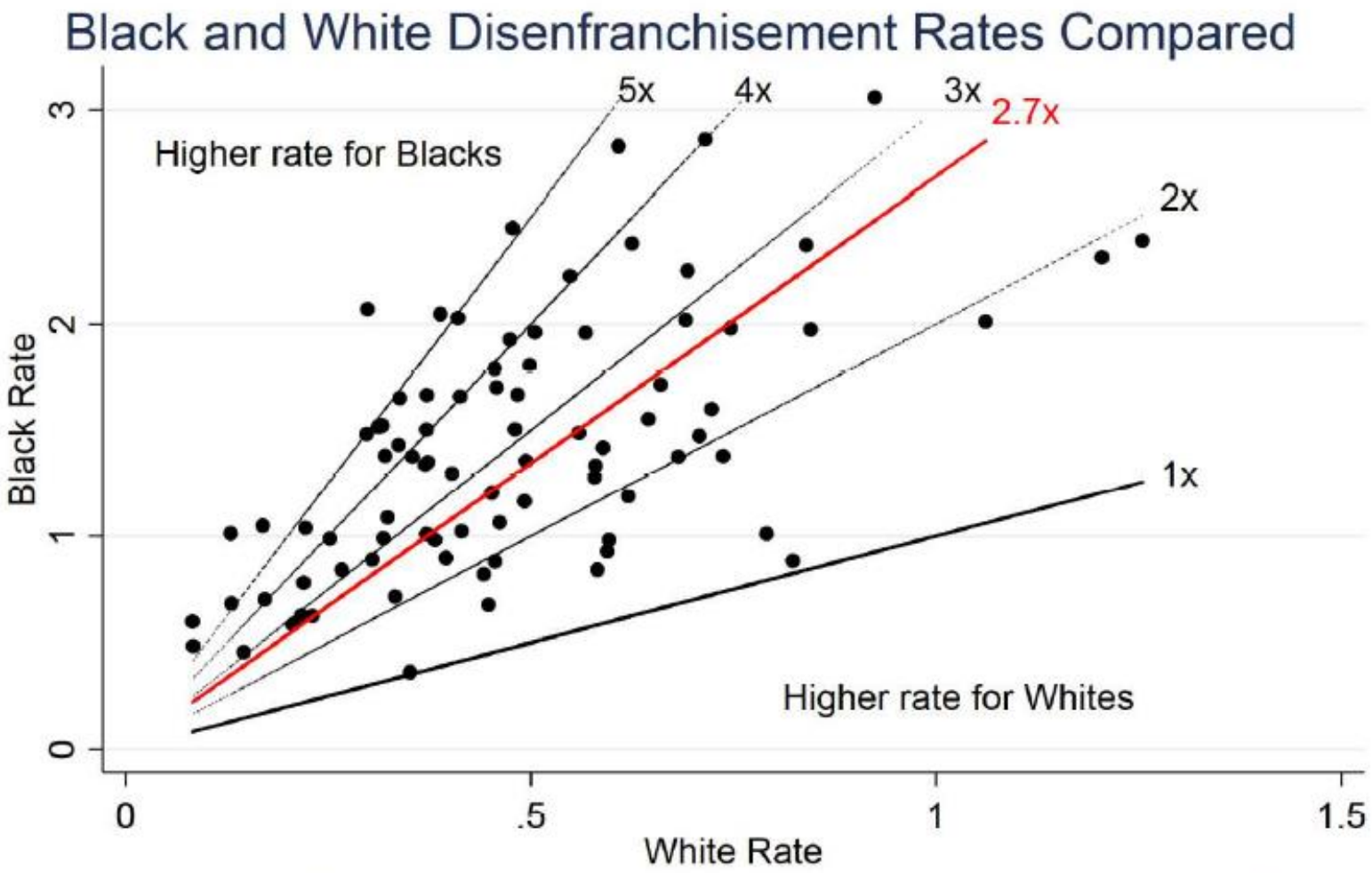
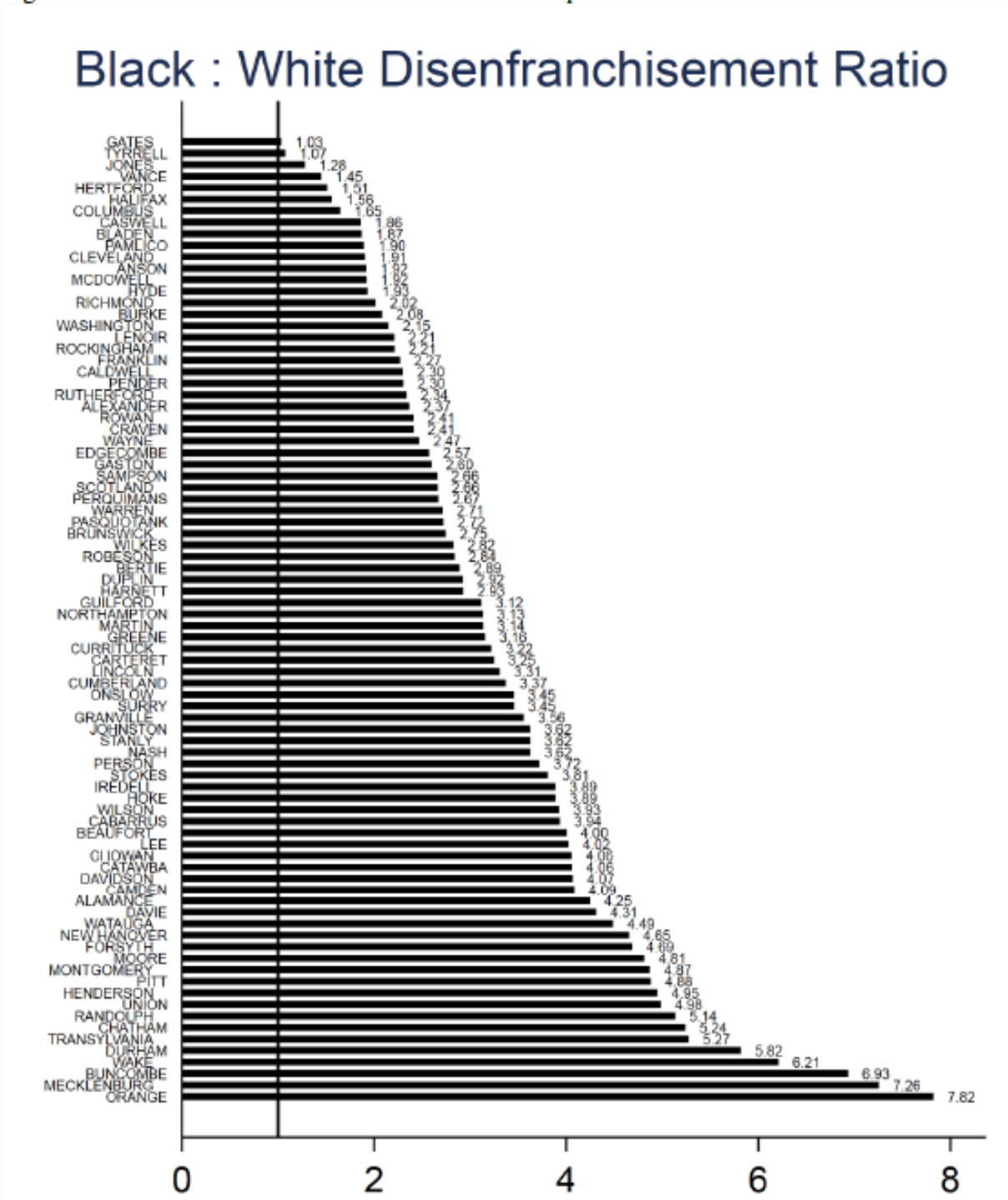


Figure 6. White and Black Disenfranchisement Rates Compared



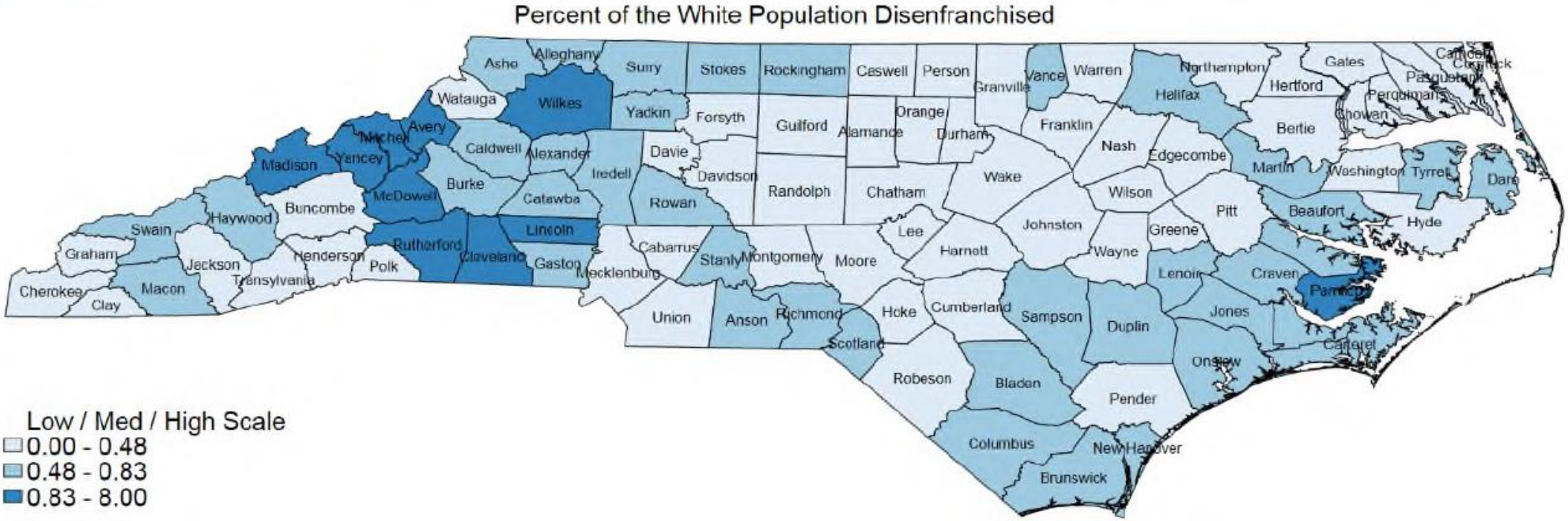
Excludes 16 counties with fewer than 1,000 Blacks in the population. Red line indicates the best fit regression line: Black rate = 2.7 * White rate; R^2=.87. Solid black line indicates an equal rate. Dotted lines show where the Black rate is twice, three times, four times, and five times the White rate.

Figure 7. The Black Rate of Disenfranchisement Compared to the White Rate.

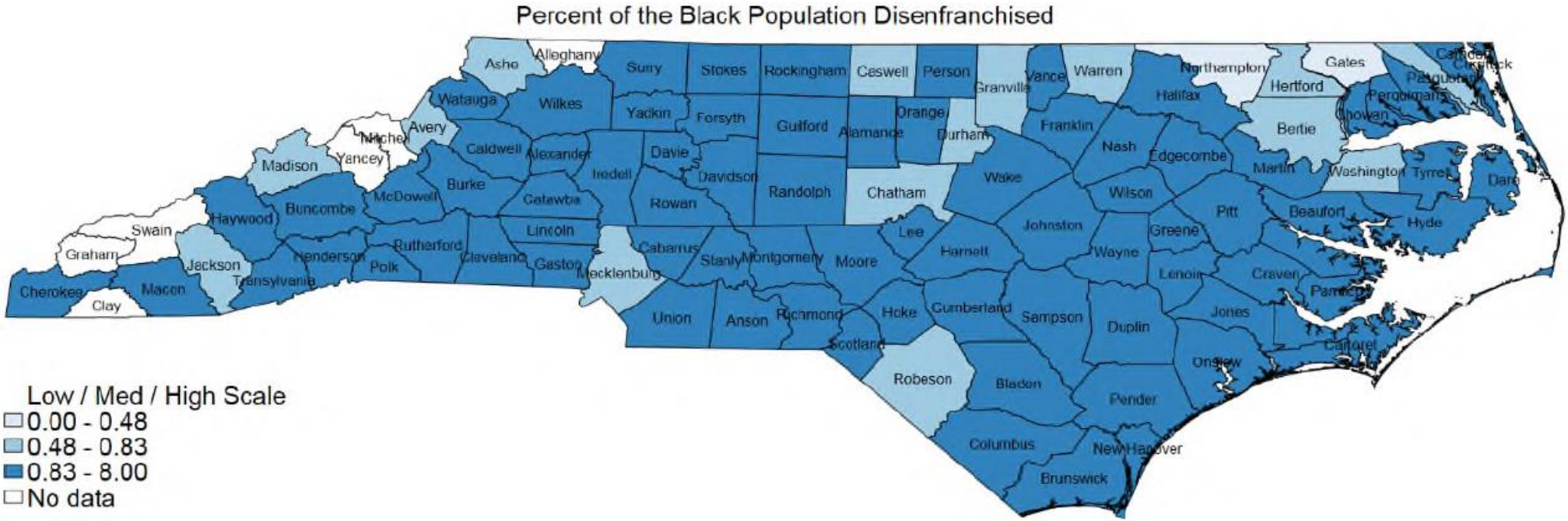


The ratio is the percent of Blacks disenfranchised divided by the percent of Whites. The vertical line represents a value of 1.00, or equality. No value is calculated for counties with fewer than 1,000 Blacks in the population.

C. White


Percent of the White Population Disenfranchised
Low / Med / High Scale
0.00 - 0.48
0.48 - 0.83
0.83 - 8.00
Ashe
Alleghany
Surry
Stokes
Rockingham
Caswell
Person
Granville
Vance
Warren
Northampton
Gates
Camden
Currituck
Halifax
Hertford
Pasquotank
Perquimans
Chowan
Watauga
Wilkes
Yadkin
Forsyth
Guilford
Alamance
Orange
Durham
Franklin
Bertie
Avery
Mitchell
Yancey
Madison
Caldwell
Alexander
Iredell
Davie
Davidson
Randolph
Chatham
Wake
Nash
Edgecombe
Martin
Washington
Tyrrell
Dare
Burke
McDowell
Catawba
Rowan
Wilson
Pitt
Beaufort
Hyde
Buncombe
Haywood
Swain
Graham
Jackson
Transylvania
Henderson
Rutherford
Cleveland
Lincoln
Gaston
Mecklenburg
Cabarrus
Stanly
Montgomery
Moore
Lee
Harnett
Johnston
Greene
Wayne
Lenoir
Craven
Pamlico
Jones
Cherokee
Clay
Macon
Polk
Union
Anson
Richmond
Hoke
Cumberland
Sampson
Duplin
Onslow
Carteret
Scotland
Robeson
Bladen
Pender
Columbus
New Hanover
Brunswick

E. Black


Percent of the Black Population Disenfranchised
Low / Med / High Scale
0.00 - 0.48
0.48 - 0.83
0.83 - 8.00
No data
Ashe
Alleghany
Surry
Stokes
Rockingham
Caswell
Person
Granville
Vance
Warren
Northampton
Gates
Hertford
Halifax
Wilkes
Watauga
Yadkin
Forsyth
Guilford
Alamance
Orange
Durham
Franklin
Bertie
Avery
Mitchell
Yancey
Madison
Caldwell
Alexander
Davie
Iredell
Davidson
Randolph
Chatham
Wake
Nash
Edgecombe
Martin
Washington
Tyrrell
Dare
Burke
McDowell
Catawba
Rowan
Wilson
Haywood
Buncombe
Swain
Graham
Lincoln
Cabarrus
Stanly
Montgomery
Moore
Lee
Johnston
Harnett
Greene
Pitt
Beaufort
Hyde
Rutherford
Henderson
Polk
Cleveland
Gaston
Mecklenburg
Wayne
Lenoir
Craven
Jackson
Transylvania
Cherokee
Clay
Macon
Union
Anson
Richmond
Scotland
Hoke
Cumberland
Sampson
Duplin
Jones
Onslow
Carteret
Robeson
Bladen
Pender
Columbus
New Hanover
Brunswick