

SUPREME COURT OF NORTH CAROLINA

COMMUNITY SUCCESS)	
INITIATIVE, et al.,)	
)	
<i>Plaintiffs,</i>)	
v.)	<u>From Wake County</u>
)	No. 19 CVS 15941
TIMOTHY K. MOORE, <i>in his</i>)	<u>From Court of Appeals</u>
<i>official capacity of Speaker of the</i>)	P22-153
<i>North Carolina House of</i>)	
<i>Representatives, et al.,</i>)	
)	
<i>Defendants.</i>)	
)	

REPLY OF LEGISLATIVE DEFENDANTS TO
BRIEFS OF AMICI CURIAE

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**REPLY OF LEGISLATIVE DEFENDANTS TO
BRIEFS OF AMICI CURIAE**

INTRODUCTION

The amicus briefs supporting Plaintiffs confirm that this case is a policy dispute disguised as a constitutional challenge. Plaintiffs and their supporters may fervently believe that felon voting rights *should* be restored upon the completion of a prison sentence (or immediately for felons sentenced to probation), but nothing in the North Carolina Constitution *demand*s that policy outcome. Indeed, amici supporting Plaintiffs uniformly repeat the fundamental error in Plaintiffs' suit. Like Plaintiffs, they fail to explain how the statute at issue, N.C.G.S. § 13-1, causes felon disenfranchisement. It does not. The North Carolina Constitution provides that “[n]o person adjudged guilty of a felony . . . shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law.” N.C. CONST. art. VI, § 2, cl. 3. Today, Section 13-1 is that re-enfranchisement law. And Plaintiffs are challenging only that law, not the constitutional provision that disenfranchises felons or the statute that criminalizes felon voting. Plaintiffs' amicus briefs are, therefore, fundamentally irrelevant. Several of these briefs barely mention Section 13-1 at all, focusing instead on the provisions that actually prevent convicted felons from voting—and illustrating that Plaintiffs have challenged the wrong law.

Plaintiffs' amici further undermine Plaintiffs' suit by underscoring that Section 13-1 was not passed with discriminatory motives and does not have a disparate racial impact. Indeed, the regime preferred by some amici and reflected in the Superior Court order would only *increase* any racial disparity in the pool of felons who remain ineligible to vote. The amicus briefs supporting Plaintiffs thus serve only to illustrate why Plaintiffs cannot prevail.

ARGUMENT

I. Section 13-1 Does Not Disenfranchise Anyone.

All amicus briefs supporting Plaintiffs aim their arguments at the common and historical practice of felon disenfranchisement, which occurs in North Carolina by virtue of Article VI, Section 2, Clause 3 of the North Carolina Constitution. The problem is that Plaintiffs *have not challenged that provision*. Instead, they have challenged the statute providing for felon re-enfranchisement, without which North Carolina’s felons would remain unable to vote. In a State where, as here, felon disenfranchisement must be taken as the constitutional baseline, Plaintiffs’ amici would presumably prefer that the State also have a law providing a path for felon re-enfranchisement. North Carolina does, and that is the law that Plaintiffs seek to enjoin.

In supporting Plaintiffs, therefore, amici repeat Plaintiffs’ fatal mistake. They oppose a condition (felon disenfranchisement) that the statute at issue (Section 13-1) does not cause. The Sentencing Project, for example, describes Section 13-1 as “extending the period of disenfranchisement.” Br. of *Amici Curiae* The Sentencing Project, the Lawyers’ Comm. For Civil Rights Under Law, and The Southern Poverty Law Center in Supp. of Plaintiffs at 2 (Aug. 17, 2022) (“Sentencing Proj. Br.”). Yet the North Carolina Constitution disenfranchises felons “*unless . . . restored to the rights of citizenship in the manner prescribed by law.*” N.C. CONST. art. VI, § 2, cl. 3 (emphasis added). Section 13-1 does not “extend” a condition that would be indefinite but for Section 13-1.

According to the Sentencing Project, however, a re-enfranchisement law that imposes *any* condition on felons serving their sentences outside of prison—including

those initially sentenced to probation—would be unconstitutional. That is simply not what the North Carolina Constitution says. Delegating the “manner” of felon re-enfranchisement to the General Assembly presupposes that the General Assembly may impose conditions. It is implausible that a constitution that both disenfranchises felons and delegates re-enfranchisement to the legislature actually *mandates* that the legislature pass a law that would effectively nullify the disenfranchisement provision for a large class of felons.

All Plaintiffs’ other amicus briefs similarly start on the wrong foot, mistaking Section 13-1 either for the constitution’s felon-disenfranchisement provision or for the statute that criminalizes voting by felons whose rights have not been restored in the manner provided by law—which is N.C.G.S. § 163-275(5), not Section 13-1, and which Plaintiffs also have not challenged here. *See* Amicus Br. of the Dist. of Columbia and the States of Cal., Conn., Del., Haw., Ill, Me., Md., Mass, Mich., Nev., N.J., N.Y., R.I., and Wash. in Supp. of Plaintiffs-Appellees at 3 (Aug. 17, 2022) (“States Br.”) (erroneously referring to Section 13-1 as “North Carolina’s felon disenfranchisement law”); Amicus Br. of Inst. for Innovation in Prosecution at John Jay College at 1 (Aug. 17, 2022) (“Inst. For Innovation Br.”) (similarly beginning: “North Carolina’s disenfranchisement statutes, which are being challenged herein”); Br. of Cato Inst. and Due Process Inst. as *Amici Curiae* in Supp. of Plaintiffs-Appellees at 3 (Aug. 17, 2022) (“Cato Br.”) (arguing that “disenfranchisement . . . cannot be justified”); Br. of *Amicus Curiae* for the N.C. Justice Ctr. and Down Home NC in Supp. of Plaintiffs-Appellees at 2 (Aug. 17, 2022) (“N.C. Justice Ctr. Br.”) (“This amicus brief will discuss

the explicit intent behind the current statute to disqualify from eligibility and suppress African American voters through prosecution of voting for persons on probation, parole, or post-release supervision.”). To the extent these briefs argue against felon disenfranchisement, as they largely do, they fight against the unchallenged disenfranchisement provision of the North Carolina Constitution, which must be taken as given in this case, and are therefore irrelevant.

This irrelevance is evident throughout the briefs. The Institute for Innovation in Prosecution asserts without any support that the State’s “premise” for felon disenfranchisement is that “withholding the right to vote from persons with criminal records facilitates their rehabilitation,” and then proceeds to attack that premise. Inst. for Innovation Br. at 1. But even if the Institute’s own premise were correct, none of its arguments apply to Section 13-1, which does not disenfranchise felons and which, indeed, the Institute barely mentions. *See id.* at 16. The North Carolina Justice Center does not even purport to address Section 13-1, citing it only once, in a footnote, for context about the State statute that criminalizes voting by felons whose rights have not yet been restored. *See* N.C. Justice Ctr. Br. at 3 n.3. That separate statute is the target of the Center’s brief and is not at issue here.

The Cato Institute’s brief argues that, “[b]y disenfranchising citizens convicted of *any* felony, at the same time that the roster of felonies has ballooned, North Carolina’s current regime” disenfranchises “even those convicted of relatively minor offenses.” Cato Br. at 8 (emphasis in original). But again, Section 13-1 does not disenfranchise felons, nor does it create any felony offenses. Similarly, if in fact “[t]he

costs of conviction and sentencing have increased” to problematic levels, *id.* at 14, the problem would be with the underlying penalties themselves, not Section 13-1. And Plaintiffs do not argue that their criminal sentences, including the attendant costs, were invalid.

Cato also agrees with the Superior Court that Section 13-1 “makes the ability to vote dependent upon a property qualification.” *Id.* at 18 (internal quotation marks omitted). That is simply not so. Until felons have their rights restored in the manner that the General Assembly provides, they have *no* right to vote under the State’s Constitution. Section 13-1 thus cannot violate the Property Qualifications Clause, which must be read in tandem with the constitution’s felon-disenfranchisement provision. Section 13-1’s requirements also do not constitute impermissible property qualifications in and of themselves. Cato likens Section 13-1 to a poll tax, but it offers no response to the point that North Carolina continued imposing a poll tax even after adopting the Property Qualifications Clause in 1868. *See* Leg. Defs.’ Opening Br. at 32–33 (July 18, 2022). Accordingly, regardless of whether “a \$1 million poll tax would . . . be a ‘property qualification’” under the North Carolina Constitution, Cato Br. at 17, it would be invalid under the State and Federal constitutional prohibitions on poll taxes, *see* N.C. CONST. art. V, § 1; U.S. CONST. amend. XXIV, § 1. And in any event, Section 13-1 is in no way akin to a poll tax. *See* Leg. Defs.’ Opening Br. at 28–29; Leg. Defs.’ Reply Br. at 19–20 (Sept. 9, 2022).

In short, Plaintiffs’ amici offer no arguments that apply to the statute that Plaintiffs have challenged. They thus offer Plaintiffs, and the Court, no assistance.

II. Section 13-1 Was Not Enacted With Racially Discriminatory Motives and Has No Racially Disparate Impact.

To succeed on the merits, Plaintiffs must show *both* discriminatory intent *and* discriminatory impact. See *Greater Birmingham Ministries v. Sec’y of State*, 992 F.3d 1299, 1321 (11th Cir. 2021). Plaintiffs can show neither. Section 13-1 is the product of a civil rights reform and the most fair and liberal system for re-enfranchising felons that North Carolina has ever had. The amicus briefs submitted in support of Plaintiffs only underscore the facts that (1) there is *no evidence* that its passage was the product of discriminatory motives and (2) there is likewise *no evidence* that disparities in outcomes for different races are traceable to Section 13-1 or that Section 13-1 does anything but *minimize* such disparities.

First, no amicus offers any direct evidence Section 13-1 was passed with discriminatory motives, and as Legislative Defendants have explained in their other briefs, the opposite is true. Section 13-1 was passed by civil rights leaders to *improve* the re-enfranchising process for everyone, African Americans included. Several States and the District of Columbia join an amicus brief attempting to show that there is “a clear and growing consensus among states toward facilitating restoration and expanding the franchise, a consensus with which North Carolina’s felon disenfranchisement system is out of step.” States Br. at 9. But what the States inadvertently show is that North Carolina—by virtue of the reforms brought about by Section 13-1 in the 1970s—was ahead of this trend. For instance, the states cite laws from Delaware, Florida, Iowa, Maryland, Nebraska, Nevada, New Mexico, Kentucky, and Wyoming, from the beginning of the 21st century to show that lifetime

bans on felon voting have become significantly less popular in recent decades, States Br. at 5, but even a cursory review of those laws show that several are less liberal than the regime that has been in place in North Carolina for the last 50 years. *See, e.g.*, L.B. 53, 99th Leg., 1st Sess. (Neb. 2005) (deferring re-enfranchisement for two years after completion of a sentence). Indeed, several of the amicus states themselves were *slower* than North Carolina to make restoration automatic upon completion of a felon’s sentence. *See* Christopher Uggen & Jeff Manza, *Summary of Changes to State Felon Disenfranchisement Law 1865-2003*, <https://bit.ly/3Liq99D> (last visited Sept. 16, 2022) (Connecticut (1975), New York (1976), Washington (1984), Delaware (2000), requiring a five-year-waiting period after completion of sentence). And when the States discuss features of their current laws that they believe are protective of the rights of felons, they omit to mention that North Carolina *shares* many of these features. For instance, the States note that “California, Illinois, New Jersey, New Mexico, New York, and Washington have enacted laws requiring state agencies to notify felons of the process for seeking restoration of voting rights or provide information about their voting rights prior to or upon release from incarceration.” States Br. at 7–8. But they do not mention that North Carolina *also* has passed a law to educate felons about their voting rights and how to register when their rights are restored. N.C.G.S. § 163-82.20A. And to the extent that the amicus states are more permissive, their practices do not denote a majority view, *see* Jean Chung, The Sentencing Project, *Voting Rights in the Era of Mass Incarceration: A Primer*, tbl. 1, *available at* <https://bit.ly/2mE9e6J> (July 28, 2021) (last visited Sept. 16, 2022), and

in some cases are the result of only very recent changes, *see Voting Rights Restoration Efforts in Connecticut*, Brennan Center for Justice, available at <https://bit.ly/3BPekVn> (June 23, 2021) (last visited Sept. 16, 2022) (“Prior to changing its law on June 23, 2021, Connecticut prohibited people with felony convictions from voting while they were in prison or on parole.”). In short, the “trend” identified by the States provides no reason to conclude that North Carolina’s law could be rooted in invidious discrimination, especially when it implemented so many of the features the States point to as hallmarks of modern and liberal state re-enfranchisement practices almost 50 years ago.

The amici similarly undermine any claim that Section 13-1 has a disproportionate impact on African Americans. The Sentencing Project claims, at the outset, that “North Carolina law disproportionately deprives Black North Carolinians of the right to vote and prolongs their disenfranchisement based on circumstances that are marked by persistent racial inequity.” Sentencing Proj. Br. at 2. But it fails to demonstrate that Section 13-1 is responsible for *any* of this “racial inequity”—even leaving aside the failure, highlighted above, to understand that Section 13-1 does not disenfranchise anyone.

At various points, the Sentencing Project blames racial disparities in disenfranchisement on the greater frequency of contact between African Americans and the police, *id.* at 8–9, the higher arrest rate for African Americans, *id.* at 9–10, unfairness in prosecutorial decisions, *id.* at 11–16, more and longer sentences of imprisonment for African Americans, *id.* at 17–18, fewer employment opportunities,

worse access to housing, and higher levels of poverty, *id.* at 19–25. Notably, what they *never* blame racial disparities on is the actual functioning of Section 13-1. Indeed, several of the things they cite reaffirm the fairness of Section 13-1 rather than prove any disparate impact. For instance, one of the major features of Section 13-1 that its sponsors wanted to implement is that it makes restoration of rights automatic on completion of sentencing. Throughout their brief, the Sentencing Project emphasizes that many of the features of the justice system that it identifies as unfair “are driven by discretionary decisions of criminal justice authorities that consistently demonstrate a racially discriminatory impact.” *Id.* at 3. Section 13-1 was intentionally insulated from exactly this sort of discrimination and cannot be ascribed any part in contributing to it.

There are two even more fundamental problems with the argument that Section 13-1 produces a problematic racial disparity, which the amicus briefs highlight. First, regardless of the percentage of individuals of each race disenfranchised, the fact remains that votes are not counted in percentages, but in raw numbers, and in raw numbers, thousands more white felons are disenfranchised under the existing system than African American felons. *See infra* at note 1. “[E]lections are often fought and won at the margins,” *Brnovich v. Dem. Nat’l Comm.*, 141 S. Ct. 2321 (2021) (Kagan, J., dissenting), and a “small group of voters” can be the difference between victory and defeat, *Chisom v. Roemer*, 501 U.S. 380, 397 n.24 (1991). That thousands more white than African American felons are disenfranchised strongly undercuts any claim that Section 13-1 has a disparate impact. Second, even

considering the rate of disenfranchisement as Plaintiffs and their amici suggest, the remedy they seek would make the rate *more unfavorable* to African Americans. The Sentencing Project claims in its brief that African Americans are more likely to be detained pre-trial, and “people who are detained awaiting trial are . . . more likely . . . to be sentenced to prison, and to receive longer sentences.” Sentencing Proj. Br. at 16. Assuming the Sentencing Project is right about those things, it would stand to reason that white felons are more likely to receive only probation as a sentence and African Americans are more likely to spend some time in prison, so that, in fact, eliminating disenfranchisement for felons only when they are not imprisoned would favor white felons. The numbers bear that out. The North Carolina Department of Public Safety makes statistics about prisoners and those on some form of community supervision publicly searchable, and as of July 31, 2022—the most recent date for which statistics are available—of the 29,941 imprisoned felons in the state of North Carolina, 12,525, or 42%, were white and 14,999, or 50%, were African American.¹ The relationship is reversed for felons on community supervision, however. Of 46,527 felons on some form of community supervision as of July 31, 2022, 24,073 were white (52%) and 19,418 were African American (42%).² This means that if the Sentencing Project’s

¹ To recreate this data, visit <https://webapps.doc.state.nc.us/apps/asqExt/ASQ>, click on “Start Generating Reports” and then select “I would like to know about Prison Population” with a date value of 7-31-2022. Select “Define Report” and add “Felon-Mis. Status” and “Race,” and select “Felon” on the next page to generate a report. The court may take judicial notice of these statistics because they are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” N.C.G.S. § 8C-1, Rule 201(b).

² To recreate these results, follow the same procedures outlined above but select “I would like to know about All Community Corrections Population” on the first

arguments were accepted, and felons were disenfranchised *only* while imprisoned, the disparity between white disenfranchisement and African American disenfranchisement would not only get worse as a percentage, but more African Americans would also be disenfranchised in real numbers. Of course, that is not only the result advocated for by the Sentencing Project; it also is the result sought by Plaintiffs and ordered by the Superior Court.

These statistics conclusively show that Section 13-1, in its current form, does not disparately harm African Americans even on Plaintiffs' conception of the case. Because the share of felons in prison who are African American is higher than the share of felons on community supervision who are African American, re-enfranchising the latter (as Plaintiffs seek to do) would *increase* the overall share of disenfranchised felons who are African American.

CONCLUSION

For the reasons explained here and in Legislative Defendants' other briefing, the Court should reverse the grants of summary and final judgment in favor of Plaintiffs and order judgment in favor of Defendants.

page. These percentages are consistent with the evidence submitted by Plaintiffs at trial. *See App. 1.*

Respectfully submitted this 19th day of September 2022.

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PX-004, Voting Age Pop. and Disenfranchised, by Race.....	App. 1

Table 2. Voting Age Population and Disenfranchised, by Race

Race	Population		Disenfranchised		Percent Disenfranchised
	N	%	N	%	
Black	1,763,154	21.51	21,827	42.43	1.24
White	5,917,432	72.19	26,550	51.61	0.45
Native American	136,552	1.67	1,042	2.03	0.76
Asian	232,556	2.83	213	0.41	0.09
Other / Unknown	146,940	1.79	1,809	3.52	1.23
Total	8,196,634	100.00	51,441	100.00	0.63