

FILED

NORTH CAROLINA

COUNTY OF WAKE

COMMUNITY SUCCESS INITIATIVE,

et al.,

Plaintiffs,

v.

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

Defendants.

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

FILE NO. 19 CVS 15941

2020 SEP -4 PM 4: 28

WAKE CO., C.S.C.

ORDER

This matter comes before the undersigned three-judge panel upon Plaintiff's motion for summary judgment or, in the alternative, a preliminary injunction.

In this litigation, Plaintiffs seek a declaration that N.C.G.S. § 13-1, the North Carolina statute providing for the restoration of rights of citizenship—which includes the right to vote—for persons convicted of a crime, is facially unconstitutional and invalid under the North Carolina Constitution to the extent it prevents persons on probation, parole, or post-release supervision from voting in North Carolina elections. Specifically, Plaintiffs contend Section 13-1 of our General Statutes violates Article I, Sections 10, 11, 12, 14, and 19 of our Constitution. Plaintiffs seek to enjoin Defendants, their agents, officers, and employees from 1) preventing North Carolina citizens released from incarceration or not sentenced to incarceration from registering to vote and voting due to a felony conviction, and 2) conditioning restoration of the ability to vote on payment of any financial obligation.

Procedural History

Plaintiffs filed their initial complaint in this matter on November 20, 2019, and an amended complaint on December 3, 2019. Defendants filed answers to and motions to dismiss the amended complaint in January 2020; the motions to dismiss were subsequently withdrawn. On May 11, 2020, Plaintiffs filed the present motion for summary judgment or, in the alternative, a preliminary injunction.

On June 17, 2020, this action was transferred to a three-judge panel of Superior Court, Wake County, pursuant to N.C.G.S. § 1-267.1 and N.C.G.S. § 1A-1, Rule 42(b)(4). On June 24, 2020, the Chief Justice of the Supreme Court of North Carolina, pursuant to N.C.G.S. § 1-267.1, assigned the undersigned three-judge panel to preside over the facial constitutional challenges raised in this litigation.

On August 19, 2020, Plaintiffs' motion was virtually heard by the undersigned three-judge panel via WebEx pursuant to the Chief Justice's orders regarding virtual hearings in light of the COVID-19 pandemic. The matter was thereafter taken under advisement.

Voting Qualifications for Individuals Convicted of Felonies

Article VI, Section 2 of the North Carolina Constitution delineates certain qualifications, or disqualifications, affecting a person's ability to vote in our State. Relevant to this case is Article VI, Subsection 2(3), which dictates that "[n]o person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, 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(3).

Plaintiffs' action challenges the "manner prescribed by law"—N.C.G.S. § 13-1—in which voting rights are automatically restored to individuals convicted of felonies. The current iteration of this statute reads as follows:

Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored upon the occurrence of any one of the following conditions:

- (1) The unconditional discharge of an inmate, of a probationer, or of a parolee by the agency of the State having jurisdiction of that person or of a defendant under a suspended sentence by the court.
- (2) The unconditional pardon of the offender.
- (3) The satisfaction by the offender of all conditions of a conditional pardon.
- (4) With regard to any person convicted of a crime against the United States, the unconditional discharge of such person by the agency of the United States having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.
- (5) With regard to any person convicted of a crime in another state, the unconditional discharge of such person by the agency of that state having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.

N.C.G.S. § 13-1.

Undisputed Material Facts Regarding the History of Restoration of Rights of Citizenship in North Carolina¹

The manner prescribed by law to restore the rights of citizenship for certain persons has a long and relevant history. In 1835, North Carolina amended its constitution to permit the enactment of general laws regulating the methods by which rights of citizenship—including the right to vote—are restored to persons convicted of "infamous crimes." Infamous crimes included offenses which warranted "infamous punishments." Thereafter in

¹ The Court does not make findings of fact on a motion for summary judgment; instead, to be "helpful to the parties and the courts," the Court should "articulate a summary of the material facts which [the Court] considers are not at issue and which justify entry of judgment." *Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 165 (1975).

1840, a general law was passed regulating the restoration of rights, including granting the courts unfettered discretion in restoring rights of citizenship.

After the civil war, North Carolina adopted a new constitution which allowed all men to vote, eliminated property-based voting limitations, and abolished slavery. Persons convicted of specific crimes were not expressly forbidden by the constitution from voting; however, a combination of constitutional amendments—including an amendment in 1875 that provided for the disenfranchisement of persons convicted of felonies and infamous crimes—and laws passed over the following decades maintained limitations on the restoration of rights for persons convicted of certain crimes, thereby continuing to deny such persons the ability to vote. Judicial discretion remained part of the process for restoring a person’s rights of citizenship.

These limitations lasted until 1971, when, as a result of the efforts of the only two African Americans in the legislature, the reference to infamous crimes was removed from the constitutional provision and voting rights were taken away from only persons convicted of felonies. In 1973, there were three African American legislators who again attempted to amend N.C.G.S. § 13-1 to automatically restore citizenship rights upon completion of an active sentence. They were unsuccessful, only succeeding in removing additional procedural barriers that disproportionately impacted African Americans and the poor.

Today, the restoration of rights under N.C.G.S. § 13-1 is automatic upon a person’s “unconditional discharge” and is not expressly subject to a discretionary decision by a government official, e.g., a judge. But while the final decision to restore a person’s rights of citizenship is not left to the discretion of a judge, there do remain a number of discretionary decisions, especially in sentencing, that have a direct effect upon when a person’s right to vote is restored, along with the qualifications and requirements that must ultimately be satisfied before a person convicted of a felony is permitted to vote. Importantly in this case,

one such group of decisions pertain to the assessment of monetary costs arising from a felony conviction, e.g., fees, fines, costs, restitution, and other debts.

In deliberating on Plaintiffs' claims, we found it appropriate and compelling to consider the legislative history of N.C.G.S. § 13-1. While Defendants predominantly urge us to consider only the history of N.C.G.S. § 13-1 from the 1971 and 1973 legislative sessions, this does not accurately reflect the legislative origination and evolution of North Carolina's restoration of rights statute, which we find necessary to rule on Plaintiffs' claims. Today, N.C.G.S. § 13-1 remains written almost exactly as it was after the 1973 amendments, which precludes the restoration of citizenship rights until the completion of the sentence, including any period of parole, post-release supervision or probation.

Summary Judgment

Plaintiffs contend the challenged statute violates rights guaranteed by five specific provisions of the Declaration of Rights in our Constitution: Article I, Sections 10, 11, 12, 14, and 19.

Article I, Section 10, declares that “[a]ll elections shall be free.” N.C. Const. art. I, § 10.

Article I, Section 11, declares 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.” N.C. Const. art. I, § 11.

Article I, Section 12, declares, in relevant part, that “[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances[.]” N.C. Const. art. I, § 12.

Article I, Section 14, declares, in relevant part, that “[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained[.]” N.C. Const. art. I, § 14.

Article I, Section 19, declares, in relevant part, that “[n]o person shall be denied the equal protection of the laws.” N.C. Const. art. I, § 19.

Applicable Legal Standards

On a motion for summary judgment, “[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C.G.S. § 1A-1, Rule 56(c) (2017). Moreover, “[s]ummary judgment, when appropriate, may be rendered against the moving party.” *Id.*

When, as here, the case is a declaratory judgment action challenging the facial constitutionality of a statute, the courts presume “that any act passed by the legislature is constitutional,” and “will not strike it down if [it] can be upheld on any reasonable ground.” *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 486 (2005) (quoting *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 281-82 (1998)); *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98, 111 (2018) (explaining that courts will not declare a law invalid unless it is determined to be “unconstitutional beyond a reasonable doubt”). Accordingly, “[a]n individual challenging the facial constitutionality of a legislative act ‘must establish that no set of circumstances exists under which the [a]ct would be valid.’” *Thompson*, 349 N.C. at 491 (second alteration in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987)).

However, while “North Carolina caselaw generally gives acts of the General Assembly great deference, such deference is not warranted when the burden shifts to a law’s defender after a challenger has shown the law to be the product of a racially discriminatory purpose or intent.” *Holmes v. Moore*, __ N.C. App. __, __, 840 S.E.2d 244, 256 (2020) (internal citation and quotation omitted) (citing *Arlington Heights v. Metropolitan*

Housing Corp., 429 U.S. 252, 265-6 (1977). When this burden shifts, “the general standard applied to facial constitutional challenges is also inapplicable because the *Arlington Heights* framework dictates the law’s defenders must instead ‘demonstrate that the law would have been enacted without’ the alleged discriminatory intent.” *Id.* at ___, 840 S.E.2d at 256-7 (quoting *Hunter v. Underwood*, 471 U.S. 222, 228 (1985)). “Discriminatory purpose ‘may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.’” *Id.* at ___, 840 S.E.2d at 255 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

Claim on Violation of the Free Elections Clause

Plaintiffs first contention is that N.C.G.S. § 13-1 violates the Free Elections Clause of the North Carolina Constitution. As to this contention, this majority of the three-judge panel concludes that there is a genuine issue of material fact and that neither Plaintiffs nor Defendants are entitled to judgment as a matter of law. The Motion for Summary Judgment is denied as to this claim.

Claim on Violation of the Equal Protection Clause

Plaintiffs’ second contention is that N.C.G.S. § 13-1 violates the Equal Protection Clause of the North Carolina Constitution by depriving all persons with felony convictions who are not incarcerated but are on probation, parole or post-release supervision with substantially equal voting power. The majority finds that as to this contention there is a genuine issue of material fact and neither Plaintiffs nor Defendants are entitled to judgment as a matter of law.

Plaintiffs’ next contend that N.C.G.S. § 13-1 violates the Equal Protection Clause in three separate ways. First, by depriving all persons with felony convictions subject to probation, parole or post-release supervision, who are not incarcerated, of the right to vote. Second, by depriving the African American Community of substantially equal voting power.

And third, by creating an impermissible class-based classification by conditioning the restoration of the right to vote on the ability to make financial payments. The panel was presented with extensive evidence on these contentions through the submission of expert reports. Plaintiffs offered, and the panel admitted, the reports of Dr. Frank Baumgartner, Dr. Orville Vernon Burton, and Dr. Traci Burch. Legislative Defendants offered the testimony of Dr. Keegan Callanan. The panel allowed the admission of Dr. Callanan's report over the objection of Plaintiffs, ruling by separate Order that the arguments raised by Plaintiffs would be considered in determining the weight to be given to Dr. Callanan's report. The majority concludes, for the purposes of this order, that Dr. Callanan's report was unpersuasive in rebutting the testimony of Plaintiffs' experts, was flawed in some of its analysis and, while Dr. Callanan is an expert in the broad field of political science, his experience and expertise in the particular issues before this panel are lacking. Therefore, the majority assigns no weight to the report.

As to the first and second bases for the alleged violation of the Equal Protection Clause, this majority of the three-judge panel concludes that there is a genuine issue of material fact and that neither Plaintiffs nor Defendants are entitled to judgment as a matter of law.

As to the third basis for the alleged violation of the Equal Protection Clause, that N.C.G.S. § 13-1 creates an impermissible class-based classification by conditioning the restoration of the right to vote on the ability to make financial payments, the majority of this three judge panel concludes that there is no genuine issue of material fact and Plaintiffs are entitled to judgment as a matter of law. In making this conclusion, we acknowledge that the United State Supreme Court has determined that the right to vote is a fundamental right. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 561-62, 84 S. Ct. 1362 (1964). We further acknowledge that while the United States Supreme Court has held that

wealth is not a “suspect classification” that calls for heightened scrutiny, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29, 93 S. Ct. 1278 (1973); *Ortwein v. Schwab*, 410 U.S. 656, 660, 93 S. Ct. 1172 (1973), it has further held that when a wealth classification is used to restrict the right to vote or in the administration of justice, it is subject to heightened scrutiny, not the rational basis review urged by Defendants in this case. *M.L.B. v. S.L.J.*, 519 U.S. 102, 124, 117 S. Ct. 555 (1996).

As Defendants correctly argue, the express words of N.C.G.S. § 13-1 do not in and of themselves create different classifications of persons convicted of felonies—all such persons remain disenfranchised until they have been “unconditionally discharged.” However, by requiring an unconditional discharge that includes payments of all monetary obligations imposed by the court, N.C.G.S. § 13-1 creates a wealth classification that punishes felons who are genuinely unable to comply with the financial terms of their judgment more harshly than those who are able to comply. By requiring payment of all monetary obligations, N.C.G.S. § 13-1 provides that individuals, otherwise similarly situated, may have their punishment alleviated or extended solely based on wealth.

We also note that, because of the judicial discretion built into the criminal laws, the amount of the financial burden, as well as the length of a probationary term, imposed by a judge varies from judge to judge, district to district, or division to division. The amount of restitution, if any is owed, is subject to the cooperation of a witness and the diligence of the prosecutor in obtaining a restitution amount sought. As noted above, this is not unlike the judicial discretion allowed when a felon was required to petition a court for restoration of citizenship rights, or the discretion of the character witnesses a petitioning felon was required to produce. Or, as testified by Senator Henry Michaux, “the whole statute is an impediment to having . . . rights restored depending on the psyche of the judge who is going to render that decision.” *Michaux Dep at 46:9-13*. Further, probation may be extended for

up to five years, then an additional three with the consent of the probationer, to allow time for the compliance with the financial obligation of restitution. The impact is that a person remains disenfranchised for up to eight years because he has been unable to pay—an impermissible and unconstitutional wealth-based restoration of citizenship rights, including the right to vote. Because we find Plaintiffs prevail as a matter of law on this issue, by separate order, we also grant Plaintiffs’ request for a preliminary injunction to alleviate irreparable harm.

Claim on Violation of the Right to Free Assembly and the Right to Free Speech

Plaintiffs’ third contention is that N.C.G.S. § 13-1 violates the Right of Free Assembly and Petition and the Right to Free Speech Clauses of the North Carolina Constitution. As to this contention, this three-judge panel concludes that there is no genuine issue of material fact and that Defendants are entitled to judgment as a matter of law. Summary Judgment is therefore granted in favor of Defendants as to this claim.

Claim on Violation of the Ban on Property Qualifications

Plaintiffs final contention is that N.C.G.S. § 13-1 violates the Constitutional ban on Property Qualification by conditioning restoration of the right to vote on having property (i.e. sufficient means to pay financial obligations imposed pursuant to a felony judgment.)

Section 13-1 of our General Statutes imposes upon a person convicted of a felony the requirement of an “unconditional discharge”—and, consequently, the inherent qualifications persons must meet to obtain such a discharge—to regain the right to vote. Even though N.C.G.S. § 13-1 was enacted due to Article VI, § 2(3), of our Constitution, this statute, like all enacted laws, must not run counter to a constitutional limitation or prohibition, including those guaranteed in the Declaration of Rights contained in Article I of our Constitution. Section 11 of Article I declares 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,” N.C. Const. art. I, § 11. Importantly, the “fundamental purpose” for which the Declaration of Rights was enacted is “to provide citizens with protection from the State’s encroachment upon these [enumerated] rights.” *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 290 (1992).

Article I, § 11, of our Constitution is clear: no property qualification shall affect the right to vote. Therefore, 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 on a property qualification. The requirement of an “unconditional discharge” imposed by N.C.G.S. § 13-1 does exactly that—the ability for a person convicted of a felony to vote is conditioned on whether that person possesses, at minimum, a monetary amount equal to any fees, fines, and debts assessed as a result of that person’s felony conviction.

As to this contention, this majority of the three-judge panel concludes that there is no genuine issue of material fact and that Plaintiffs are entitled to judgment as a matter of law. The Motion for Summary Judgment is granted in favor of Plaintiffs on this claim. Because we find Plaintiffs prevail as a matter of law on this issue, by separate order, we also grant Plaintiffs’ request for a preliminary injunction to alleviate irreparable harm.

Conclusion

Upon considering the pleadings, parties’ briefs and submitted materials, numerous amicus briefs, arguments, and the record established thus far, this majority of the three-judge panel determines that there is no genuine issue of material fact that N.C.G.S. § 13-1 violates the Equal Protection Clause of the North Carolina Constitution by creating an impermissible class-based classification by conditioning the restoration of the right to vote on the ability to make financial payment, and, therefore, concludes that Plaintiffs are entitled to judgment as a matter of law; that there is no genuine issue of material fact that


N.C.G.S. § 13-1 violates the Ban on Property Qualifications of the North Carolina Constitution and, therefore, concludes that Plaintiffs are entitled to judgment as a matter of law; that there is a genuine issue of material fact whether N.C.G.S. § 13-1 violates the Equal Protection Clause of the North Carolina Constitution in the other manners put forth by Plaintiffs, as discussed above, and neither party is entitled to judgment as a matter of law; that there is a genuine issue of material fact whether N.C.G.S. § 13-1 violates the Free Elections Clause of the North Carolina Constitution and neither party is entitled to judgment as a matter of law; and, that there is no genuine issue of material fact that N.C.G.S. § 13-1 does not violate the Right to Free Speech or Right of Assembly and Petition provisions of the North Carolina Constitution and, therefore concludes that Defendants are entitled to judgment as a matter of law.

The Honorable John M. Dunlow concurs in part and dissents in part from portions of this Order.


For the foregoing reasons, Plaintiffs' motion for summary judgment, or in the alternative a preliminary injunction, is GRANTED in part and DENIED in part as follows:

- I. Count 1 (Free Elections Clause) Summary Judgment is DENIED.
- II. Count 2 (Equal Protection Clause) Summary Judgment is GRANTED in part. Preliminary Injunction is GRANTED under separate order.
- III. Count 3 (Freedom of Speech and Assembly Clauses) is GRANTED in favor of Defendants.
- IV. Count 4 (Ban on Property Qualifications) is GRANTED. Preliminary Injunction is GRANTED under separate order.

SO ORDERED, this the 4 day of September, 2020.



Lisa C. Bell Superior Court Judge



Keith O. Gregory, Superior Court Judge

as a majority of this Three Judge Panel

NORTH CAROLINA
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COMMUNITY SUCCESS INITIATIVE,
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Plaintiffs,

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

Defendants.

**ORDER ON SUMMARY JUDGMENT
(DISSENT)**

Judge Dunlow concurring in part and dissenting in part.

Article VI, Section 2, Part 3 of the North Carolina Constitution provides:

(3) Disqualification of felon. No person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law.

Plaintiffs' complaint in this action does not challenge this North Carolina Constitutional provision denying convicted felons the right to vote. This particular provision has not been declared unconstitutional. In fact, this provision was previously challenged and found to be constitutional. Fincher v. Scott, 32 F. Supp. 117 (M.D.N.C., 1972), *aff'd* 411 U.S. 961, 93 S.Ct. 2151, 36 L.Ed.2d 681 (1973).

Plaintiffs' complaint here makes a facial challenge to N.C.G.S. § 13-1, the statute enacted by the legislature prescribing the manner by which a convicted felon's rights of citizenship (which includes the right to vote) are restored. That statute 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

In assessing Plaintiffs' facial challenge to this statute, this Court is bound to adhere to the principles of law previously enunciated by our appellate courts. Our Supreme Court has made it clear that, "[A] facial challenge to a legislative act is . . . the 'most difficult challenge to mount successfully.'" State v. Bryant, 359 N.C. 554, 564, 614 S.E.2d 479, 485 (2005) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Here, the plaintiff must show that, "there are no circumstances under which the statute might be constitutional." N.C. State Bd. Of Educ. v. State, 814 S.E.2d 67, 74 (2018) (citing *Beaufort Cty. Bd. Of Educ. v. Beaufort Cty. Bd. Of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009)). "The fact that [the challenged] statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." State v. Thompson, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) (quoting *Salerno*, 481 U.S. at 745).

In addition to the extremely high bar faced by plaintiffs' facial challenge to N.C.G.S. § 13-1, this Court is also required to presume this duly enacted North Carolina statute is constitutional. Wayne Cty. Citizens Ass'n for Better Tax Control v. Wayne Cty. Bd. Of Comm'rs, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991). This Court must give great deference to acts of the General Assembly, and this Court must not declare an act unconstitutional unless this Court determines that it is unconstitutional *beyond a reasonable doubt*. See *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004) and *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98, 111 (2018).

It is with these guiding principles of law in mind that we now turn to the application of those guidelines to the facts and circumstances of the present action.

The Plaintiffs, throughout their complaint, briefs, filings and arguments, complain of North Carolina's "disenfranchisement scheme", "disenfranchisement statute", and "disenfranchisement of citizens." The disenfranchisement of which Plaintiffs complain is in no way attributable to N.C.G.S. § 13-1. No reasonable reading of the plain language of N.C.G.S. § 13-1 could be interpreted to disenfranchise any person. Rather, the sole purpose of N.C.G.S. § 13-1 is to provide a mechanism whereby individuals who have been convicted of a felony offense may be re-enfranchised.

Plaintiffs' expert, Dr. Frank R. Baumgartner's, report provides little support for Plaintiffs' theory or a finding that N.C.G.S. § 13-1 has a disparate impact on one race as opposed to another. Dr. Baumgartner, submitted a 36 page report detailing his analysis as to, "five sets of issues related to the disenfranchisement of persons who are on probation or post-release supervision *following a felony conviction* in North Carolina state court." (emphasis added) *Dr. Frank R. Baumgartner, Expert Report on North Carolina's Disenfranchisement of Individuals on Probation and Post-Release Supervision, May 8, 2020, p.2.* (Hereinafter referred to as "Dr. Baumgartner's Report"). In his report, Dr. Baumgartner

finds, “the disenfranchisement of persons on probation and post-release supervision from a North Carolina state court conviction differentially affects different racial groups. Although Blacks comprise just 22 percent of the voting age population in North Carolina, they comprise 42 percent of persons disenfranchised while on probation or post-release supervision.” *Dr. Baumgartner’s Report*, p. 3-4. All of Dr. Baumgartner’s analysis is made on the impact of disenfranchisement resulting from a felony conviction and the provisions of Article VI, Section 2, Part 3 of the North Carolina Constitution. Dr. Baumgartner’s Report does not contain, and Plaintiffs have not otherwise offered, any expert analysis as to the number of persons re-enfranchised under the provisions of N.C.G.S. § 13-1, nor as to the racial demographics of persons re-enfranchised under the provisions of N.C.G.S. § 13-1.

This lack of evidence as to the effects of N.C.G.S. § 13-1 is particularly troubling in this case where the majority has found discriminatory intent to be a motivating factor in the enactment of N.C.G.S. § 13-1. As a result of that finding, which was based on Dr. Baumgartner’s analysis, the majority declined to accord any judicial deference to the act of the legislature in adopting N.C.G.S. § 13-1 and applied a strict scrutiny standard in reviewing the legislative act.

Our North Carolina Supreme Court has previously addressed the legislative intent associated with the adoption of Chapter 13 of the North Carolina General Statutes. In the case of State v. Currie, 284 NC 562, 202 S.E.2d 153 (1974), our Supreme Court, in reviewing the legislative history of N.C.G.S. § 13-1 thru 13-4, held, “It is obvious that the 1971 General Assembly in enacting Chapter 902 [now Chapter 13] intended to substantially relax the requirements necessary for a convicted felon to have his citizenship restored.” *Id.* at 565, 202 S.E.2d at 155. This holding by our Supreme Court mitigates against a finding by this panel that the General Assembly, in enacting N.C.G.S. § 13-1, acted with discriminatory intent.

This Judge, as does the majority, finds Dr. Baumgartner's Report to be thorough, credible, believable, and compelling. The fundamental flaw in Plaintiffs' case lies not in Dr. Baumgartner's analysis, but in the Plaintiffs' assertion (and burden to prove beyond a reasonable doubt) that the Legislature's enactment of N.C.G.S. § 13-1 is the cause of Dr. Baumgartner's findings.

The majority also finds the right to vote is a fundamental right, and, "when a wealth classification is used to restrict the right to vote or in the administration of justice, it is subject to heightened scrutiny, not the rational basis review urged by Defendants in this case." Our Supreme Court has held, "the right to vote, per se, is not a constitutionally protected right." White v. Pate, 308 N.C. 759, 768, 304 S.E. 2d 199, 205 (1983) (quoting Rivera-Rodriguez v. Popular Democratic Party, 457 U.S. 1, 9, 72 L.Ed. 2d 628, 635, 102 S.Ct. 2194 2199 (1982)). See also Comer v. Ammons, 135 N.C. App 531 (1999). Moreover, convicted felons, who have lost their voting rights, lack any fundamental interest to assert. See Johnson v. Bredesen, 624 F.3d 742 (2010).

N.C.G.S § 13-1 does not create a wealth classification. The only classes created by the challenged statute is convicted felons who have completed their sentence and convicted felons who have not completed their sentence. The challenged statute does not itself impose any fines, fees, or other costs on people convicted of felonies who are on probation, parole, or post-release supervision. The monetary obligations of which Plaintiffs complain are imposed by other provisions of North Carolina law that are not challenged by the Plaintiffs in this action.

CONCLUSION

There is no dispute that disenfranchisement (that is the subject of this action) is the result of a felony conviction. There is no dispute that the complained of disenfranchisement is mandated by Article VI, Section 2, Part 3 of the North Carolina Constitution. There is no dispute that Plaintiffs' complaint does not challenge Article VI, Section 2, Part 3 of the North

Carolina Constitution. Plaintiffs have failed to offer any evidence as to the impact of N.C.G.S. § 13-1 on the number of persons re-enfranchised under the statute's provisions, or as to the racial demographics of persons re-enfranchised under the statute's provisions. As such, this Court must accord great deference to the acts of the Legislature. Because the challenged statute does not affect a fundamental right, nor does it create an impermissible wealth-based classification, nor have the Plaintiffs shown a disparate impact on a suspect class resulting from the challenged statute, rational basis review is the appropriate standard to be applied in this facial challenge.

Count 1 (Free Elections Clause)

Judge Dunlow concurs in the result reached by the majority as to Count I (Free Elections Clause) in that Plaintiffs' Motion for Summary Judgment is DENIED. For the reasons specified hereinabove, Judge Dunlow would find there is no genuine issue of material fact and grant summary judgment in favor of the Defendants on this claim.

Count 2 (Equal Protections Clause)

Count 2 (a)

The majority finds there is a genuine issue of material fact as to whether N.C.G.S. § 13-1 violates the Equal Protection Clause of the North Carolina Constitution by depriving all persons with felony convictions who are not incarcerated but are on probation, parole or post-release supervision with substantially equal voting power. For the reasons specified hereinabove, Judge Dunlow would find there is no genuine issue of material fact and grant summary judgment in favor of the Defendants on this claim.

Count 2 (b)

The majority finds there is a genuine issue of material fact as to whether N.C.G.S. § 13-1 violates the Equal Protection Clause of the North Carolina Constitution by depriving the African American community of substantially equal voting power, and denies the

Plaintiffs' Motion for Summary Judgment. For the reasons specified hereinabove, Judge Dunlow would find there is no genuine issue of material fact and grant summary judgment in favor of the Defendants on this claim.

Count 2 (c)

The majority finds there is no genuine issue of material fact as to whether N.C.G.S. § 13-1 violates the Equal Protection Clause of the North Carolina Constitution by creating an impermissible class-based classification by conditioning the restoration of the right to vote on the ability to make financial payments and grants summary judgment in favor of the Plaintiffs. For the reasons specified hereinabove, Judge Dunlow would find there is no genuine issue of material fact and grant summary judgment in favor of the Defendants on this claim.

Count 3 (Freedom of Speech and Assembly Clauses)

Judge Dunlow concurs in the result reached by the majority as to Count III (Freedom of Speech and Assembly Clauses) in that Plaintiffs' Motion for Summary Judgment is DENIED. For the reasons specified hereinabove, Judge Dunlow would find there is no genuine issue of material fact and grant summary judgment in favor of the Defendants on this claim.

Count 4 (Ban on Property Qualifications)

The majority finds there is no genuine issue of material fact as to whether N.C.G.S. § 13-1 violates Article I, § 11 (Ban on Property Qualifications) of the North Carolina Constitution and grants summary judgment in favor of the Plaintiffs. For the reasons specified hereinabove, Judge Dunlow would find there is no genuine issue of material fact and grant summary judgment in favor of the Defendants on this claim.

This the 4th day of September, 2020.

Handwritten signature of John M. Dunlow in blue ink.

John M. Dunlow
Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below, pursuant to the Court's July 15, 2020 Case Management Order, via e-mail transmission, addressed as follows:

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This the 4th day of September 2020.



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Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.