STATE OF NORTH CAROLINA COUNTY OF HOKE FILED 2019 OCT -8 A 11:52 STATE OF NORTH CAROLINA BY _____ v. LANISHA BRATCHER-BAIN, Defendant	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION Case No. 19 CRS 051171 **MOTION TO DISMISS UNDER THE 14TH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, § 19 OF THE N.C. CONSTITUTION**

NOW COMES Defendant Lanisha Bratcher, by and through counsel, and pursuant to N.C.G.S. § 15A-954(a)(1) moves this Court to dismiss the charge of voting while ineligible due to a criminal conviction under N.C.G.S. § 163-275(5) (2016), because the statute violates the Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and Article I, § 19 of the North Carolina Constitution and the Nondiscrimination Clause of Article I, § 19 of the North Carolina Constitution, in that the statute was enacted on the basis of racial animus with the specific purpose to suppress the votes of African Americans in North Carolina, and it continues to have a disparate impact on the basis of race.

Ms. Bratcher requests a hearing on this motion.

HISTORY OF THE CRIME OF VOTING

Under current North Carolina law, a person who "break[s] up by force or violence" the holding of an election or "intimidate[s] or oppose[s] any legally qualified voter" commits a mere misdemeanor. N.C.G.S. §§ 163A-1388(3), (6) (2018) However, a person who casts a single vote before being returned to full citizenship following a criminal conviction commits a felony subject to potential imprisonment

of up to two years. N.C.G.S. § 163A-1389(5) (2018). Our state criminal laws have maintained this backward distinction for over century, because our statutes criminalizing voting have been re-codified virtually unchanged since they were enacted by an openly racist legislature that came to power through voter intimidation and on promises to strip the vote from African Americans by all available means.

A. From 1868 to 1898: African-American Suffrage in Flux

Prior to the Civil War, North Carolina's Constitution did not expressly exclude those previously convicted of felonies from the right of suffrage. This State also had no poll tax, literacy test, or grandfather clause exempting white citizens from restrictions on the right to vote. The original post-war Constitution of 1868, drafted by elected delegates who included fifteen African Americans, similarly placed no such barriers on the franchise. Constitutional restrictions on the right to vote rose with White Supremacy and segregation.

In 1870, North Carolina's Conservative Party (which later became the Democratic party) "successfully undermined the fragile Republican coalition of freedmen and their white supporters" and took control of the General Assembly. Milton Ready, *A History of North Carolina* 259 (2005). In 1875, the General Assembly called another constitutional convention, which adopted thirty amendments that became effective on 1 January 1877. William S. Powell, *North Carolina through Four Centuries*, 404 (1989). Among other things, the new amendments "denied the vote to those guilty of certain crimes; implemented a one-

year residency requirement for voting; [and] required 'non-discriminatory racial segregation' in public schools." *Id.* at 405. The final amendment in the series added a new article to the State Constitution declaring that "[a]ll marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation inclusive, are hereby forever prohibited." The voters of North Carolina approved all of these amendments, which were submitted as a single ballot measure.[1]

Unlike in some Southern states, Democratic one-party rule did not continue uninterrupted in North Carolina after the end of Reconstruction. In 1894, Populists and Republicans joined forces "to forge an alliance that swept to an astonishing victory in North Carolina, taking over both houses of the legislature by substantial majorities." Ready, *supra*, 294. The new "fusion" legislature passed election laws "that set up voter registration lists along with oversight by election officials from both parties." *Id.* The General Assembly also returned local control to counties and cities, and thus "assured that eastern counties with a majority of blacks could elect sheriffs, appoint deputies, and supervise police affairs through county commissions and city councils." *Id.* In 1896, Daniel Russell, the Republican candidate, won the governor's race in a record turnout. As governor from 1897 to 1901, Russell "appointed more than three hundred black magistrates to office." Ready, *supra*, 296-97.

[1] The full text of all thirty amendments and the vote tally may be found at https://www.ncleg.gov/library/Documents/Amdts_1875.pdf (last accessed October 1, 2019).

In its 1898 party handbook, the Democratic Party – which had then lost two successive elections – estimated with alarm that roughly 120,000 of the state's 360,000 votes were cast by African Americans. State Democratic Executive Committee of North Carolina, *The Democratic Hand Book. 1898. (Democratic Hand Book)*[2] at 37. African Americans also experienced success as candidates, and "[b]etween 1868 and 1900, 101 African Americans had been elected to the general assembly, 26 to the senate and 76 to the lower house." Ready, *supra,* 308. The only African American in the 55th or 56th United States Congress was a North Carolinian – Representative George H. White, who represented the Second Congressional District. In response to the influence of African-American voters and candidates, the Democratic Handbook declared that it "has been in the past, and is to-day, the special mission of the Democratic Party to rescue the white people of the east from the curse of negro domination." *Democratic Hand Book* at 38. The book reflected the work of Democratic Party Chairman Furnifold M. Simmons, who "planned, launched, and conducted a vicious racist campaign the likes of which the state had never seen." Powell, *supra*, 433.

During the election campaign of 1898, Chairman Simmons sent "persuasive speakers into virtually every community in North Carolina to report on the 'evils of Negro domination'" and widely circulated a letter "calling upon whites to stand together in support of 'White Supremacy.'" *Id*. at 433-35. The White Supremacy campaign was bolstered by newspaper editorials and cartoons that painted a

[2] Available at http://docsouth.unc.edu/nc/dem1898/dem1898.html (last accessed September 17, 2019).

menacing picture of the threat of African American political influence. The message was direct. One cartoon, which was published three days before the election, depicted a "White Supremacy Plum" drawn above the words "We will Pluck It on the 8th."[3] The same cartoonist drew the following, entitled "A Vampire that Hovers Over North Carolina,"[4] which appeared in the *News & Observer* on September 27, 1898, to illustrate the perceived threat of African American suffrage:

The Vampire That Hovers Over North Carolina.

The 1898 party handbook identified rumored illegal voting by African Americans, including those who may have been ineligible due to prior criminal convictions, as a particular evil to be guarded against. In the eyes of the party, African Americans were easily able to engage in illegal voting because:

> They had not those qualities of easy identification which the white man possesses. There were of a roving disposition, moved from place to place, and could readily conceal their identity. For

[3] "A Fruit That We All Like," *UNC Libraries*, https://exhibits.lib.unc.edu/items/show/2246 (last accessed September 17, 2019).
[4] "A Vampire that Hovers Over North Carolina," *UNC Libraries*, https://exhibits.lib.unc.edu/items/show/2215 (last accessed September 17, 2019).

> the same reason it was easy to import them from other communities and **to register ex-convicts** and boys under twenty-one years of age. These facts, which made it easy for them, with little danger of detection, to register and vote at several different places, were taken advantage of by the unscrupulous Republican white bosses; and repeating and fraudulent registration were so common, that it became necessary, **in order to protect the white voters of the State against having their honest votes off-set by illegally and fraudulently registered negro votes**, to provide rigid safeguards against this class of frauds.

Democratic Hand Book at 84 (emphasis added). The handbook also claimed there were "instances, which have developed since the election, in many of the negro counties, where negro election officers have been shown to have persuaded negroes to register, **knowing them to have been ex-convicts** or under age, assuring them that their right to vote would be sustained by [the Republican-controlled] Board, if questioned." *Id.* at 86 (emphasis added). In response, the handbook promised that the Democratic election laws would be "framed to prevent fraudulent voting by men not entitled to vote." *Id.* at 92.

There was widespread voter intimidation in 1898. Both before and during the election, bands of armed white men known as Red Shirts rode on horseback through African American communities, particularly in southeastern North Carolina, to intimidate voters. Powell, *supra*, at 435-36. In one notable episode, Governor Russell was so intimidated by crowds of Red Shirts that he hid in a baggage car during a train stop in Laurinburg. H. Leon Prather, Sr., *The Red Shirt Movement in North Carolina 1988-1900,* 62 J. Negro Hist. 174, 179 (1977). The incident "serves only to underscore the legitimacy of the fear felt by African Americans were they,

against the wishes of the white community, either to exercise their franchise rights or to move into white residential areas." A. Leon Higgenbotham, Jr., *Shades of Freedom* 175 (1996).

The Morning Star of Wilmington reported on a November 1, 1898, Red Shirt gathering in Laurinburg – one week before the election – as follows:

> The white men of Richmond county showed their determination to rid themselves of negro rule by their grand rally today. A thousand men wearing red shirts gathered here from points as distant as Maxton and Gibson and paraded for ten miles through the negro precincts of the county. It was an object lesson which will have its good effect upon the negro, for it showed that the white men do not propose to longer endure the domination of the black race in this section.[5]

The article concluded by claiming that "[m]any negroes have taken their names from the registration list" and "[f]rom November 8th the white men will rule Richmond only." *Id*.

B. From 1898 to 1901: The Triumph of White Supremacy

On election day 1898, the Democrats elected 134 members to the General Assembly, capturing complete control. Powell, *supra*, 436. This overwhelming victory "was rightly interpreted as an ultimatum to curb the political power of the Negro." William Alexander Mabry, *'White Supremacy' and the North Carolina Suffrage Amendment*, 13 NORTH CAROLINA HISTORICAL REVIEW 1, 2 (1936). "After [Democratic] Governor [Charles B.] Aycock was inaugurated, he made clear that the state's primary governmental obligation was to disfranchise African Americans to

[5] "Richmond County. White Men Show Determination to Rid Themselves of Negro Rule," *UNC Libraries*, https://exhibits.lib.unc.edu/items/show/2161 (last accessed September 17, 2019).

assure white supremacy." Higgenbotham, *supra*, 175. The General Assembly soon changed the state constitution, restricted the right to vote, and defined several "infamous crimes" based on casting an illegal vote. The full panoply of restrictions would have to wait for further amendment of the State Constitution, but the Democratic Party fulfilled its promise to crack down on alleged illegal voting by African Americans almost immediately. In March of 1899, the new General Assembly enacted an election law that, among other things, made it a crime punishable by two years of hard labor for a person convicted of a crime that excludes the right of suffrage to cast a vote before returning to full citizenship. "An act to regulate elections," Ch. 507, § 72, 1899 N.C. Sess. Laws 658, 681.

In 1900, the General Assembly ratified a Suffrage Amendment to the state constitution that included the following restriction:

> No person who has been convicted, or who has confessed his guilt in open court upon indictment, of any crime, the punishment of which is now, or may hereafter be, imprisonment in the State's Prison, shall be permitted to vote, unless the said person shall be first restored to citizenship in the manner prescribed by law.

Ch. 2, § 2, 1900 N.C. Sess. Laws 54-55. The same amendment instituted both the literacy test and poll tax. The literacy test contained an exemption for the lineal descendants of any person who was eligible to vote on or prior to January 1, 1867 – thus exempting white citizens who could vote during the era of slavery. Ch. 2, § 4, 1900 N.C. Sess. Laws 55. In its final form, the Suffrage Amendment included a non-severability clause declaring that it was "presented and adopted as one indivisible plan for the regulation of the suffrage[.]" Ch. 2 § 5, 1900 N.C. Sess. Laws at 55.

The discriminatory purpose of these provisions was clear at the time. Before the final passage of the Suffrage Amendment, North Carolina's two Republican United States Senators unsuccessfully pursued a resolution that would have declared the grandfather clause provision a violation of the Fourteenth and Fifteenth Amendments "and of a fundamental principle of our republican form of government." 33 Cong. Rec. 671 (1900). Senator Money of Mississippi, who argued against the resolution, summarized the purpose of the Suffrage Amendment thus:

> Now, these gentlemen, having tried negro suffrage, having found that they were unable to preserve the progress of their State and its prosperity, to advance their civilization, have found, as they think, a peaceful and constitutional way, not amendable to objection, because tried by other States and not found objectionable by the court of the country, in order to establish themselves more firmly in their civil government, to bring the advantages and benefits of good government to them and their children.

33 Cong. Rec. 1165 (1900). Senator Morgan of Alabama, who also opposed the resolution, argued that "negro suffrage in the South" was "a thorn in the flesh and will irritate and rankle the body politic until it is removed as a factor in government." 33 Cong. Rec. 674 (1900). These arguments accurately conveyed that "the sole purpose of the amendment was to take away political power which had been given to the Negroes in 1868." Mabry, *supra,* 15.

The election of 1900 – in which both Aycock and the Suffrage Amendment were on the ballot – saw even greater violence and intimidation by Red Shirts than 1898. "To avoid violence, blacks as a body just did not vote." Prather, *supra*, at 182.

Charles B. Aycock won the largest majority ever given to a gubernatorial candidate, and the Suffrage Amendment passed. *Id.*

After passage of the Suffrage Amendment, the General Assembly enacted additional election laws to give it effect. On March 14, 1901, the General Assembly ratified "An act to provide for the holding of elections in North Carolina," Ch. 89, 1901 N.C. Sess. Laws 243-270. In addition to providing detailed regulations regarding the literacy test, poll tax, and other issues, the 1901 act defined several voting crimes, including this one:

> Sec. 71 If any person be challenged as being **convicted of any crime which excludes him from the right of suffrage**, he shall be required to answer any question in relation to such alleged conviction; but his answer to such questions shall not be used against him in any criminal prosecution, but **if any person so convicted shall vote at the election, without having been restored to the right of citizenship, he shall be guilty of an infamous crime**, and punished by a fine not exceeding one thousand dollars, or imprisoned at hard labor, not exceeding two years, or both.

Ch. 89, § 71, 1901 N.C. Sess. Laws at 265 (emphasis added). The act also made it an "infamous crime" to knowingly register in the wrong location or to "illegally vote" in any election. Ch. 89, §§ 15, 48, 70, 1901 N.C. Sess. Laws at 249, 260, 265. At the same time, the act made it only a misdemeanor to break up an election "by force and violence" or to "injure, threaten, oppress or attempt to intimidate any qualified voter of this State." Ch. 89, §§ 51-55, 1901 N.C. Sess. Laws at 161. This dichotomy, in which voter intimidation constitutes a misdemeanor while casting a vote improperly is prosecuted as felony, persists in North Carolina law today. *See* N.C. Gen. Stat. §§ 163A-1388(4)-(7) and 163A-1389(4)-(7) (2019).

The creation of the specific crime for voting while ineligible due to a criminal conviction was a change from prior North Carolina law. The only voting crime that existed in North Carolina before 1899 was a general crime of "knowingly and fraudulently" voting when not entitled to do so. Ch. 43, 1844-45 N.C. Sess. Laws 67-68. The punishment for that crime, which was in the court's discretion, was either a fine of ten to one hundred dollars, imprisonment for five to thirty days, or both. *Id*. If a judge of elections told a voter that he was eligible to vote, the decision had "the effect of securing the voter immunity from criminal liability," even if it was later determined that he did not have a right to vote. *State v. Pearson*, 97 N.C. 434, 436, 1 S.E. 914, 915 (1887). The 1901 elections law (1) created a specific, separate crime for voting after conviction of a felony, (2) omitted the language requiring that the act of illegal voting be knowing and fraudulent, and (3) increased the penalty so that a person could be placed in bondage and forced to work for two years as punishment for the crime.

C. From 1901 to 2019: Racist Criminalization of Voting Persists

Since its enactment in 1901, the only tweak to the language of the crime at issue in this case came in 1931, when the General Assembly passed "An act to make more effective the control of the state over corrupt practices in primaries and elections," Ch. 348, 1931 N.C. Sess. Laws 438-46. This 1931 law collected the felonies and misdemeanors from the 1901 election law, along with a few additional crimes, in the list format in which they appear in the General Statutes today. As in

the current statutes, the crime of voting while ineligible due to a prior criminal conviction was fifth in the list of felonies. The 1931 act declared it unlawful:

> (5) For any person, convicted of a crime which excludes him from the right of suffrage, to vote at any primary or election without having been restored to the right of citizenship in due course by the method provided by law[.]

Ch. 348, § 10(5), 1931 N.C. Sess. Laws at 444.

Though more succinctly worded and replacing the term "infamous crime" with "felony," the 1931 law made no changes to the elements of the crime and extended its reach to primaries. A contemporary survey of statutory changes noted that "[i]t would seem that most of these sections [dealing with felonies and misdemeanors] have been incorporated in the statute from C.S. 4185-4199," the sections of the Code that compiled the felonies and misdemeanors enacted in 1901. *A Survey of Statutory Changes in North Carolina in 1931*, 9 N.C. L. Rev. 347, 373 (1931). There is no indication that the 1931 recodification enacted during the height of Jim Crow was intended to alter or reverse the blatantly racist intent of the original law. Willliam Mabry, who wrote about the legacy of the Suffrage Amendment in 1936, noted that in his time "the barrier of public opinion still stands in the way of general participation of the Negroes in North Carolina politics." Mabry, *supra*, at 24.

From 1931 to the present, the General Assembly has not changed one syllable of the crime with which the State has now charged Ms. Bratcher. The crime has simply been moved around the General Statutes during successive re-codifications. In identifying Ms. Bratcher and others as potentially liable for criminal prosecution,

the State Board of Elections has taken the position that "felon voting is a strict liability offense, and thus a felon may be convicted of a crime even if he or she does not know that voting while serving an active sentence is wrongful." North Carolina State Board of Elections, *Post-Election Audit Report* (April 21, 2017)[6] at 3. In the investigative summary of Ms. Bratcher's alleged violation of the law, the State Board of Elections' Chief Investigator states that the Board will no longer conduct or provide interviews of those suspected of voting illegally before referring the cases to prosecutors.[7] The State's strict liability approach confirms that the State is attempting to enforce the same crime that was enacted in 1901 as part of a campaign to suppress the African-American vote in North Carolina. Along with the other surviving felonies from the 1901 law, the crime of voting before returning to full citizenship after a criminal conviction has become a Class I felony under Structured Sentencing. A conviction can result in as much as two years' imprisonment. *See* N.C.G.S. § 15A-1340.17 (2019).

D. Present Day: Pronounced Disparate Impact

The voter suppression efforts of the early 20th century succeeded. After George H. White ended his second term in 1901, North Carolina did not send another African American to Congress until 1992. By 1914, the political participation of 125,000 African Americans "effectively had been eliminated." Ready, *supra*, at 308. "Although voting slowly increased through the course of the

[6] The report is available through the State Board of Elections website at https://s3.amazonaws.com/dl.ncsbe.gov/sboe/Post-Election Audit Report_2016 General Election/Post-Election_Audit_Report.pdf

[7] *See* Affidavit of John Francis Carella in Support of Motion to Dismiss ("Carella Affidavit") at ¶ 2 and pages 4-6.

century, by 1948 still only 15% of North Carolina's blacks were registered to vote." A. Leon Higginbotham, Jr., Gregory A. Clark & Marcella David, *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1612 (1994). "From 1901 to 1992, the one constant in North Carolina congressional politics was the triumph of white supremacy." *Id.* at 1598.

The racist application of both voting restrictions and criminal laws grew in tandem. As the new era of Jim Crow and disfranchisement wore on, "chain gangs and convict labor, largely composed of blacks as well as poor whites, soon dotted the state's landscape." Ready, *supra*, at 308. Similar developments occurred throughout the South, as "vagrancy laws and other laws defining activities such as 'mischief' and 'insulting gestures' as crimes were enforced vigorously against blacks," leading to "an enormous market for convict leasing, in which prisoners were contracted out as laborers to the highest private bidder." Michelle Alexander, *The New Jim Crow*, 31 (2012). Since restrictions on the electoral franchise also made African Americans ineligible to serve as jurors, discrimination in suffrage reinforced discrimination in criminal cases. *See Williams v. Mississippi*, 170 U.S. 213, 42 L.Ed.2d 1012 (1898) (rejecting a constitutional challenged to Mississippi's suffrage laws based on their effect of removing African Americans from the jury pool in a criminal case). The new crime of voting while ineligible due to a prior criminal conviction, created as part of an indivisible plan to suppress the votes of African Americans, inevitably had a disparate impact in the era of Jim Crow.

The racially disparate impact of the law criminalizing voting by those who are ineligible due to prior criminal convictions persists to this day. In December 2016, North Carolina incarcerated 18,892 African Americans and 13,825 Whites within a total prison population of 35,697. Ann E. Carson, Ph.D., Bureau of Justice Statistics "Prisoners in 2016" (NCJ 251149) (January 2018).[8] African Americans were nearly 53% of the prison population in this state in 2016. In the same year, the American Community Survey found that African Americans comprised an estimated 21.5% of the total population of North Carolina.[9] Both in absolute numbers and relative to population, African Americans are more likely to be disfranchised as the result of felony convictions and thus more likely to unintentionally run afoul of § 163-275(5) (2016), which contains no express requirement of knowledge or fraudulent intent.

The racial disparities in our criminal justice system "are rooted in a history of oppression and discriminatory decision making that have deliberately targeted black people and helped create an inaccurate picture of crime that deceptively linked them with criminality." Elizabeth Hinton *et al.*, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Institute of Justice (May 2018). The disparities in North Carolina and elsewhere are related to the "disproportionate racial impact of certain laws and policies, as well as biased decision making by justice system actors." *Id.* at 11. For example, although African Americans are no more likely to be guilty of drug crimes, "black men have

[8] Available at https://www.bjs.gov/content/pub/pdf/p16.pdf (accessed September 24, 2019).
[9] *See* https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml (accessed September 24, 2019).

been admitted to state prison on drug charges at a rate that is more than thirteen times higher than white men." Alexander, *supra*, at 99-100. In regard to violent crime, the rates of crime committed by African Americans and Whites declined at a similar rate from 1993 to 2015 and converged over time. Rachel E. Morgan, *Race and Hispanic Origin of Victims and Offenders, 2012-15* (Bureau of Justice Statistics, 2017).[10] A felony targeting persons who cast a vote before returning to the full rights of citizenship after a criminal conviction will predictably exacerbate the racial disparities in punishment and incarceration.

The prosecution of Lanisha Bratcher in Hoke County remains true to the voting crime's original purpose of deterring and disfranchising African American voters. On a statewide basis, people identified as "Black" or "African American" in the voter registration records constituted 290 of the 411 persons listed in the State Board of Elections' 2016 Audit Report as having allegedly voted in violated of § 163-275(5) – 68.08% of the total (excluding the fifteen individuals who had no race designation).[11] By contrast, people identified as "White" comprised only 30.75% of the total. This stark disparity hits home in Hoke County, where the State has indicted four individuals for the alleged act of voting in the 2016 general election in violation of N.C.G.S. § 163-275(5). All four, as well as a fifth individual referred but

[10] Available at https://perma.cc/4XNR-3DKX (last accessed September 17, 2019).
[11] Counsel for Ms. Bratcher received the race data from the State Board of Elections and Ethics Enforcement on May 29, 2018. *See* Carella Affidavit at ¶¶ 3-6 and pages 7-14. Ms. Bratcher asks this court to take judicial notice of these public records under Rule 201. *See In re Peoples*, 296 N.C. 109, 143, 250 S.E.2d 890, 909 (1978) (taking judicial notice of records from the State Board of Elections).

not prosecuted, are African Americans.[12] In the year 2019, the law imposing a potential felony conviction for the act of voting while ineligible due to a criminal conviction functions exactly as the 1901 legislature intended: as a tool to punish, suppress and discourage voting by African Americans in North Carolina.

ARGUMENT

Section 163-275(5) (2016) is Unconstitutional Because it Invidiously Discriminates on the Basis of Race in Violation of the Equal Protection Clause of the Fourteenth Amendment and the Equal Protection and Nondiscrimination Clauses of Article I, § 19 of the North Carolina Constitution

The General Assembly of North Carolina enacted the crime of voting while ineligible due to a criminal conviction with the explicit purpose of discriminating against African-American voters and doing everything in its power to disfranchise those voters. There is no need to resort to inference to find the invidious discrimination at work here – it was openly proclaimed throughout the state. The General Assembly has not altered the substance of this crime since 1901, and since 1931 it has simply been moved *verbatim* through successive codifications of North Carolina law. This law continues to have the intended disparate impact on African-American voters, who constitute a majority of those who could be convicted under such a law, a large majority of those referred by the State Board of Elections and Ethics Enforcement for prosecution, and **all** of those now facing prosecution in Hoke County. Thus, the statute violates the Fourteenth Amendment of the United States Constitution and Article I, § 19 of the North Carolina Constitution. This Court

[12] Pursuant to Rule 201(b) of the North Carolina Rules of Evidence, Ms. Bratcher asks this Court to take judicial notice of the records in the three other cases pending in Hoke County for alleged violations of § 163-275(5) (2016). The file numbers are 19 CRS 051170, -73 & -74.

should rule the statute unconstitutional and dismiss the charges against Ms. Bratcher with prejudice.

A. Equal Protection Framework

In 1985, the United States Supreme Court considered an Equal Protection challenge to the provision of Alabama's constitution disfranchising those with criminal convictions. The Court held that the statute's challengers could establish a violation of the Fourteenth Amendment by showing that "racial discrimination was a substantial or motiving factor in the adoption" of the disfranchisement provision. *Hunter v. Underwood*, 471 U.S. 222, 225, 85 L.Ed.2d 222, 226 (1985). The Court struck down the state constitutional provision under the Equal Protection Clause of the Fourteenth Amendment after finding "that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." *Id.* at 233, 85 L.Ed.2d at 231. The rationale of *Hunter* applies full force to North Carolina's crime of voting while ineligible due to a criminal conviction. The statute violates Ms. Bratcher's right to equal protection of the law, and this Court should dismiss the charge.

The test applied by the U.S. Supreme Court in *Hunter* is a familiar one, requiring a discriminatory intent and a racially disparate impact. *Id*. at 227-28, 85 L.Ed.2d at 228 (citing *Arlington Heights v. Metropolitan Housing n Corp.*, 429 U.S. 252, 264-65, 50 L.Ed.2d 450, 464 (1977)). In addition to the direct evidence of a discriminatory purpose that is present in this case, "an invidious 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." *Washington v. Davis*, 426 U.S. 229, 242, 48 L. Ed. 2d 597, 608-609 (1976). The *Hunter* Court first looked at the history of the enactment of Alabama's disfranchisement provision, which came about after a constitutional convention filled with statements espousing the goal of White Supremacy. The Court easily found that the law was motivated by a racially discriminatory purpose. "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Id.* at 228, 85 L.Ed.2d at 228 (citing *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287, 50 L.Ed.2d 471, 484 (1977)). Since racial discrimination against African Americans was clearly a "but for" motive for the law, evidence of a parallel motive – such as the disfranchisement of poor whites – did not "render nugatory" the intent to discriminate against blacks. *Hunter*, 471 U.S. at 231-32, 85 L.Ed.2d at 230-31.

The same analysis governs this issue under the Equal Protection Clause of Article I, § 19 of the North Carolina Constitution, which "expressly incorporated" the principle of equal protection found in the Fourteenth Amendment of the United States Constitution. *S. S. Kresge Co. v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971); *see also Dobrowolska v. Wall*, 138 N.C. App. 1, 530 S.E.2d 590 (2000) (holding that plaintiff stated a claim for relief based on violation of their equal protection rights based on alleged arbitrary and capricious use of sovereign immunity by the City of Greensboro). The legal framework under state equal

protection law requires the same elements of a discriminatory intent and a disparate impact. *S.S. Kresge Co.*, 277 N.C. at 660-62, 178 S.E.2d at 385-87.

The Fourth Circuit Court of Appeals expounded on the required analysis in its decision striking down provisions in North Carolina's 2013 election law. When determining whether those defending a law that was substantially motived by racial discrimination have met their burden to show that it would have been enacted without the racially discriminatory motivation,

> courts must be mindful that "racial discrimination is not just another competing consideration." *Arlington Heights*, 429 U.S. at 265-66. For this reason, the judicial deference accorded to legislators when "balancing numerous competing considerations" is "no longer justified." *Id.* Instead, courts must scrutinize the legislature's actual non-racial motivations to determine whether they alone can justify the legislature's choices. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977); cf. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 728, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982) (describing "inquiry into the actual purposes underlying a statutory scheme" that classified based on gender (emphasis added) (internal quotation marks omitted)). If a court finds that a statute is unconstitutional, it can enjoin the law. *See*, *e.g.*, *Hunter*, 471 U.S. at 231; *Anderson v. Martin*, 375 U.S. 399, 404, 84 S. Ct. 454, 11 L. Ed. 2d 430 (1964).

N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 221 (4th Cir. 2016). Given the historical record surrounding the enactment of the law making voting while ineligible due to a prior criminal conviction a serious felony conviction of its own, the State cannot meet that burden in this case.

B. The Law Was Motivated By Racial Discrimination

The analysis has been made simple in this case by the fact that the law came into being only through the acts of an openly racist legislature bent on disfranchisement, and no subsequent General Assembly has altered the law. This Court "cannot pretend that we are reviewing an updated statute," when the General Assembly has simply re-enacted a law based on the policy preferences dating from 1901. *See Shelby County v. Holder*, 570 U.S. 529, 554, 186 L.Ed.2d 651, 671 (2013) (striking down the forty-year-old coverage formula in § 5 of the Voting Rights Act). North Carolina's law is distinct from that of Florida, where broad disfranchisement of those with criminal convictions had a long history prior to White Supremacy. *See Johnson v. Governor of Florida*, 405 F.3d 1214 (2005). It is also unlike Mississippi, where the provision dealing with disfranchisement due to criminal convictions had been reenacted more recently with substantive changes. *See Cotton v. Fordice*, 157 F.3d 388, 391-92 (1998) (holding that subsequent amendments to the state disfranchisement provision through a "deliberative process" that altered the covered crimes "superseded the previous provision and removed the discriminatory taint associated with the original version.")

The crime of voting before returning to full citizenship after a criminal conviction cannot be saved by § 2 of the Fourteenth Amendment, which allows a restriction of the franchise "for participation in rebellion, or other crime." *See Richardson v. Ramirez*, 418 U.S. 24, 41 L.Ed.2d 551 (1974) (upholding the California Constitution's disfranchisement provision for those with criminal

convictions). Although the Fourteenth Amendment permits some restrictions on the franchise, nothing in the text of the amendment authorizes states to create felony crimes for the act of voting. Even if § 2 were applicable to a criminal statute, it "was not designed to permit the purposeful racial discrimination attending the enactment and operation" of North Carolina's felony crime of voting while ineligible due to a criminal conviction. *Hunter*, 471 U.S. at 233, 85 L.Ed.2d at 232.

The clearest indication that the 1901 General Assembly's policy preferences have survived to this day may be the continued distinction between the misdemeanor and felony voting offenses. As set forth above, there was widespread and well-reported voter intimidation – including armed intimidation by Red Shirts – leading up to the Democrats' electoral victories in 1898 and 1900. With undoubted knowledge of these acts, the General Assembly chose to define the following misdemeanors:

> Sec. 51. Any person who, **by force and violence, shall break up or stay any election, by assaulting the officers thereof**, or depriving them of the ballot boxes, or by any other means, his aiders and abettors shall be guilty of a misdemeanor . . .
>
> Sec. 53. Any person who shall discharge from employment, withdraw patronage from, or otherwise **injure, threaten, oppress, or attempt to intimidate any qualified voter of this State** because of the vote such vote may or may not have cast in any election, shall be guilty of a misdemeanor.

Ch. 89, §§ 51, 53, 1901 N.C. Sess. Laws 261 (emphasis added). North Carolina's current statutes have retained these misdemeanors:

> (3) For any person to **break up by force or violence** to stay or interfere with the holding of any primary or election . . .

> (6) For any person, directly or indirectly, to discharge or threaten to discharge from employment, or **otherwise intimidate or oppose any legally qualified voter** on account of any vote such voter may case or consider or intend to cast, or not to cast, or which he may have failed to cast[.]

N.C.G.S. § 163A-1388(3), (6) (2019); § 163-274(3), (6) (2016) (emphasis added). At the same time, casting a single improper vote continues to constitute a felony subject to potential imprisonment. N.C.G.S. § 163A-1389(5), (7) (2019); §163-275(5), (7) (2016). This distinction was made by an openly racist legislature that came to power through violent voter intimidation and promises to suppress the African-American vote, and it has been preserved in current North Carolina law.

C. The Law Has A Disparate Impact on African Americans

The crime of voting before returning to the full rights of citizenship after a criminal conviction has always had a disparate impact on African-American citizens of this State. As set forth above, African Americans are both more at risk of prosecution and have disproportionately faced prosecution for this offense. In *Hunter*, the United States Supreme Court found a continued disparate impact of Alabama's disfranchisement provision based on a finding that African Americans were, in two Alabama counties, "at least 1.7 times as likely as whites to suffer disfranchisement" for relatively minor offenses. 471 U.S. at 227, 85 L.Ed.2d at 228. In Hoke County today, **only** African Americans are facing felony prosecution for allegedly voting in violation of § 163-275(5) (2016) in the 2016 general election. Statewide, over 68% of those referred for possible prosecution were African

Americans. *See* Carella Affidavit at ¶ 7 and pages 13-14 . The present day disparate impact of § 163-275(5) (2016) along racial lines is beyond question.

Finally, the State's professed "strict liability" approach to the law both ensures that more African Americans are likely to face prosecution (as every case in which a vote was cast by an ineligible individual may be referred to District Attorney) and divorces those prosecutions from any legitimate aim of punishing fraudulent conduct or deterring intentional voter fraud. Ms. Bratcher does not concede the State's strict liability interpretation, and the law's toxic racist origins and continued disparate impact justify dismissal of the charges regardless of whether the State will be required to show some fraudulent intent in this case. However, if this Court should conclude that the statute would pass constitutional muster if it can reasonably be interpreted to apply only to knowing and fraudulent conduct, then this Court must apply that interpretation of the law in the trial of this case and require the State to prove knowledge and fraudulent intent. *See State v. T.D.R.*, 347 N.C. 489, 498, 495 S.E.2d 700, 705 (1998) ("Where one of two reasonable constructions of a statute will raise a serious constitutional question, it is well settled that our courts should adopt the construction that avoids the constitutional question.") The correct and simplest course of action is for this Court to dismiss the charges under the Equal Protection Clauses of the United States and North Carolina Constitutions.

D. The Law Violates the Nondiscrimination Clause of the North Carolina Constitution

Immediately following its Equal Protection Clause, the North Carolina Constitution provides an additional prohibition on discrimination by the State:

> No 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 Nondiscrimination Clause, which was approved by voters in 1971, was "based on federal civil rights legislation." John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 68 (2nd ed., 2013). Like the analogous but more specific nondiscrimination language in Article I, § 26 of the North Carolina Constitution, the Nondiscrimination Clause "does more than protect individuals from unequal treatment." *State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987). Rather, like similarly worded provisions of the Civil Rights Act of 1964, it prevents practices that invidiously discriminate on the basis of race even in the absence of a specific intent to discriminate. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849 (1971) (enforcing Title VII of the Civil Rights Act of 1964).

Neither the North Carolina Supreme Court nor the Court of Appeals have squarely addressed the interpretation of the Nondiscrimination Clause in Article I, § 19. However, "[t]he best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (quoting *State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944)). The words "subjected to discrimination by the State" focus

on the effect of the discriminatory action on the person, and not the subjective intent of any state actor. The prosecutions in Hoke County demonstrate the most extreme possible disparate impact, in which 100% of those facing felony charges for voting are African Americans. Thus, should this Court find that the discriminatory intent of N.C.G.S. § 163-275(5) (2016) has not been established by the abundant historical record, Ms. Bratcher respectfully asks this Court to find the statute unconstitutional on the alternative basis that its current disparate impact – both statewide and in Hoke County specifically – renders it unconstitutional under the Nondiscrimination Clause of Article I, § 19 of the North Carolina Constitution.

CONCLUSION

In this case, the State has charged Lanisha Bratcher, an African-American citizen of North Carolina, with a single alleged crime – the act of casting a vote in 2016 while ineligible to do so because her probation had not expired and she had thus not returned to the full rights of citizenship. The statute at issue, N.C.G.S. § 163-275(5) (2016), was enacted for the express purpose of disfranchising African-American voters, and continues to have a disparate impact on African-American voters both statewide and in Hoke County. The racially motivated adoption of this law renders it unconstitutional under the Fourteenth Amendment and Article I, § 19 of the North Carolina Constitution. Ms. Bratcher respectfully asks this Court to rule the statute unconstitutional and dismiss the charges with prejudice.

This, the 8th day of October, 2019.

By: J. F. Carella

John F. Carella
N.C. State Bar No. 42729
P.O. Box 3509
Durham, NC 27702-3509
Telephone: (919) 371-6047
Email: john.f.carella@protonmail.com

Counsel for Defendant
Lanisha Bratcher

Certificate of Service

I hereby certify that a copy of the foregoing motion has been served upon the State via first class mail addressed to Chief Deputy Assistant District Attorney Michael K. Hardin, Hoke County Annex Building, P.O. Box 668, Raeford, North Carolina, 28376.

This the 8th day of October, 2019.

J. F. Carella

John F. Carella