

**North Carolina A. Philip Randolph  
Institute and Action NC**

**v.**

**The North Carolina State Board of  
Elections, et al.**



# N.C.G.S. § 163-275(5)

Class I felony:

For any person convicted of a crime which excludes the person from the right of suffrage, to vote at any primary or election *without having been restored to the right of citizenship* in due course and by the method provided by law.

***Imposed strict-liability, felony-level criminal penalties on citizens who vote while on parole, probation, or post-release supervision for a felony conviction—even if they mistakenly believe they are eligible to vote***


# Strict Liability Voting Law

- NC General Assembly adopted its Strict Liability Voting Law in 1877, after it had been proposed during the 1875 constitutional convention where 30 amendments had been proposed to explicitly and/or deliberately reduce the political influence of Black citizens
- Criminal liability attached even without any intent or knowledge
- Other criminal offenses adopted in the 1877 law required intent

# Post-*Shelby County* & Uptick in the Criminalization of Voting

- 2013 - *Shelby County v. Holder* - nullified Section 5 of the VRA
- No more “preclearance” with DOJ, which has resulted in an overgoing stream of ambitious legislation, including in NC
- 2016 - Fourth Circuit - voided HB 589 on grounds that it evidenced clear discriminatory intent by targeting black voters "with almost surgical precision."
- 2017 - “felon audit” - 441 individuals with felony convictions suspected of casting an illegal ballot - 69% of whom were Black

## *Arrested, Jailed and Charged With a Felony. For Voting.*

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Whitney Brown and Keith Sellars are among those who voted in the 2016 election while on felony probation or parole and who are now being prosecuted. Travis Dove for The New York Times

## **The Alamance 12: Former inmates being prosecuted for voting**

Published 9:07 pm Monday, August 13, 2018

Politics

### **Ex-Charlotte mayor, a convicted felon, votes in violation of bond**

# Lawsuit filed Sep. 24, 2020

- **Plaintiffs:** North Carolina A. Phillip Randolph Institute *and* NC Action
- **Defendants:** North Carolina State Board of Elections, its members, *and* the 42 elected district attorneys of North Carolina
- Claims brought under 42 USC 1983
  - (1) Intentional Racial Discrimination - **Equal Protection** - 14th Amendment
  - (2) Void for Vagueness - **Due Process Clause** - 14th Amendment

# Equal Protection

- The “central purpose” of the Equal Protection Clause is to “prevent the States from purposefully discriminating between individuals on the basis of race.” *Shaw v. Reno*, 509 U.S. 630, 6421 (1993) (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)); U.S. Const. amend. XIV, § 1.
- A facially race-neutral policy may violate the Equal Protection Clause if, when “applied evenhandedly[,] [it] results in a racially disproportionate impact and was motivated by discriminatory intent.” *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 879 (4th Cir. 2023), *cert. denied*, 218 L. Ed. 2d 71 (Feb. 20, 2024)

# **“enacted with discriminatory intent”**

- (1) Challenger must show “that racial discrimination was a ‘substantial’ or ‘motivating’ factor” behind enactment of the law.
- (2) If challenger is successful, burden shifts to law’s defenders to demonstrate that the law would have been enacted without racial discrimination.



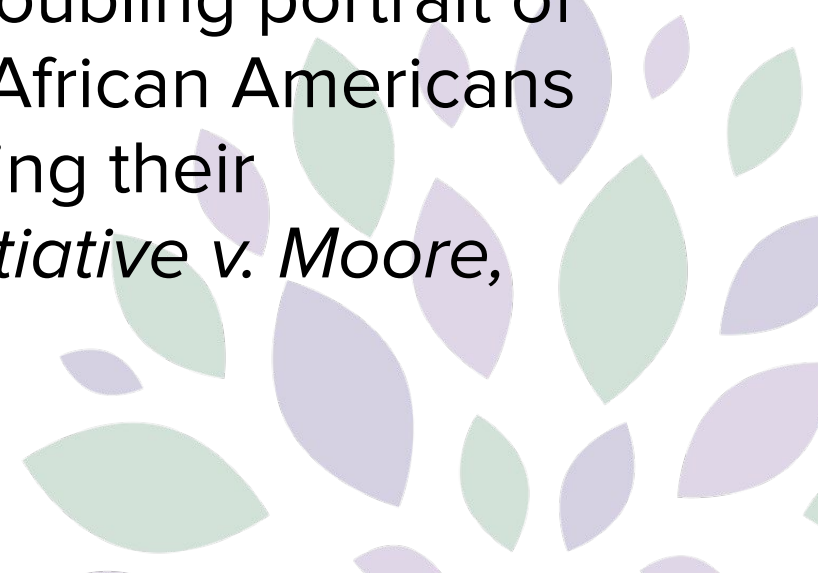


# Expert: James L. Leloudis, II

- Retained to assess whether there is a historical relationship between racial discrimination and North Carolina's strict liability voting law, NCGS 163-275(5)
- “[S]trict liability voter prosecution [was] an obvious instrument of choice in legislative efforts to obstruct black political participation in the post-war, Reconstruction era.”

# Equal Protection

- North Carolina's "long history of race discrimination generally and race-based vote suppression in particular" is undisputed. *N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 223 (4th Cir. 2016).
- North Carolina history offers a "profoundly troubling portrait of a legal system used time and again to deny African Americans a voice in government by banning or restricting their participation in elections." *Cnty. Success Initiative v. Moore*, 886 S.E.2d 16, 38 (N.C. 2023) ("CSI")



- While only 22% of North Carolina's citizens are Black, Black citizens represent 63.6% of all cases investigated for potential violations of the Strict Liability Voting Law between 2015-2022. The NCSBE's chief investigator acknowledged this disparity was "significant."
- Similarly, 56.3% of all cases referred for prosecution in 2015-2016 and 2018-2022 involved Black voters. In 2017, Black voters constituted 68% of the 441 cases investigated as a result of the 2016 general election audit, most of which were referred for potential prosecution.
- Black citizens are also overrepresented in the NCSBE's investigations compared to the overall percentage of Black inmates in state (50%) and federal (51%) prisons in North Carolina. Moreover, only about 40% of individuals on post-release supervision are Black.

Defendants, in an extraordinary and telling concession, “do not contest that the historical background from the original enactments of 1877 and 1899 are indefensible. Defendants further do not contest that the law currently impacts African-Americans at a higher rate than it does other citizens.” (ECF No. 94 at 10; *see also id.* at 2, 3, 8 (Defendants state that they “do not possess evidence to dispute Plaintiffs’ factual assertions” that (1) the Challenged Statute “was enacted with discriminatory intent in 1877,” (2) the Challenged Statute “was reenacted with discriminatory intent in 1899,” and (3) the Challenged Statute “has had a disproportionate effect on Black voters.”).) *See N. Carolina State Conf. of the NAACP v. Cooper*, 430 F. Supp. 3d 15, 28 (M.D.N.C. 2019), *rev’d sub nom. Raymond*, 981 F.3d 295 (“[R]are is the modern case in which the government has been candid about its discriminatory motives.”); *see also Cromartie*, 526 U.S. at 553 (“Outright admissions of impermissible racial motivation are infrequent.”); *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994) (acknowledging the shift away from “direct, over[t] impediments” toward “more sophisticated devices that dilute minority voting strength” (alteration in original)).

# State's Position

Defendants “do not contest that the historical background from the original enactments of 1877 and 1899 is indefensible” or that the Challenged Statute “currently has a disparate impact on Black North Carolinians.” Opening Br. at 38.

Instead, they argued that NC’s changes to its constitution in 1971, which included broadening the reach of the criminalizing statute to include felonies against the United States or another state, “purged the taint” of any discriminatory intent from the law’s origin.

(USDC labeled this the “indirect cleansing theory.”)

# Court rejects “cleansing argument”

“But those changes have no bearing on the discriminatory intent behind the Challenged Statute, which was *not* altered in 1971. ... Put plainly, there has been no *direct*, substantive change to the Challenged Statute itself since 1899. Having disposed of the Board’s lone defense of the Challenged Statute, **we are left with a statute which has remained essentially unchanged since the late nineteenth century.**”

# Due Process

- 163-275(5) does not provide adequate notice to prospective voters, and its inherent vagueness has resulted in inconsistent and racially-disproportionate enforcement
- When a criminal law imposes strict liability it may act as “a trap for those who act in good faith.” *Colautti v. Franklin*, 439 U.S. 379, 395 (1979); *Jones v. Governor of Fla.*, 975 F.3d 1016, 1047 (11th Cir. 2020) (rejecting a vagueness challenge to a law criminalizing voting by ineligible individuals with felony convictions because of the law’s scienter requirement).
- The Supreme Court has recognized that more precision is required in the context of constitutionally-protected rights because vague laws “inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.” *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

# Due Process

- Applied differently across the state
- Some DAs interpreted the statute to require some showing of knowledge; others prosecuted people without concern for intent
- Across the state, prosecutions under the statute disproportionately impacted Black North Carolinians – relative not only to NC's general population but also its incarcerated and formerly incarcerated populations



Plaintiffs' motion seeks a judgment as to liability on their claims that N.C.G.S. § 163-275(5) violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Plaintiffs respectfully request that this Court issue a declaratory judgment finding that Defendants' enforcement of N.C.G.S. § 163-275(5) violates the Equal Protection and Due Process Clauses and permanently enjoin Defendants, their agents, employees, successors, and all others acting in concert with them, from enforcing N.C.G.S. § 163-275(5).

**From:** [Cox, Paul](#)  
**To:** [Joshua Yost \(President Pro Tem's Office\)](#)  
**Subject:** Felony revision in 747  
**Date:** Saturday, June 17, 2023 10:48:29 AM

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Josh, I got your message. Yes, we do feel like this change to 275(5) in SB 747 should address the arguments and moot the case. No guarantees of course since judges can sometimes find funny ways around mootness, but we think this should moot the claims.

Thanks for the heads up on timing. I think we do have some additional items we've identified with administering the provisions in 747 which we'll work to get to y'all asap.

Paul Cox  
General Counsel  
NC State Board of Elections

THURSDAY, AUGUST 24, 2023

## Governor Cooper to Veto Election Bill that Makes it Harder to Vote and for Votes to Count

# **North Carolina Republicans override governor's vetoes of sweeping elections bills**

Gov. Roy Cooper, a Democrat, had said the bills would make it harder to vote and could lead to gridlock in election administration.

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# Civil rights, pro-democracy groups file lawsuit against youth voting restrictions

Oct 17, 2023 | NC Bills, News, Political Effectiveness, Youth Engagement

## Closing arguments made in federal case challenging NC same-day voter registration law

88.5 WFDD - Public Radio For The Piedmont | By [April Laissle](#)

Published October 24, 2025 at 4:38 PM EDT



# SB 747

- After summary judgment briefing was complete, the North Carolina General Assembly amended § 163-275(5) to include a scienter requirement effective January 1, 2024

For any person convicted of a crime which excludes the person from the right of suffrage, to vote in any primary or election *knowing the right of citizenship has not been restored* in due course and by the method provided by law.

# Court orders briefing on mootness

- DAs acknowledged that prosecutions under the pre-amended statute for pre-2024 conduct may continue despite SB 747
- DAs characterized the likelihood of continued prosecutions for pre-2024 conduct “a possibility” but not “a probability”; over 200 cases remained subject to review for potential prosecution by DAs across the state
- Plaintiffs argued that new prosecutions under the pre-amended law for pre-2024 conduct would generate publicity and voter confusion about the state of the law, leading prospective voters to second-guess their eligibility and avoid the ballot box altogether so as to not expose themselves to a perceived risk of prosecution.
- This would in turn “interfere with [Plaintiffs’] core mission to increase voter participation, particularly in the low-income and minority communities that [it] serve[s].”



# Plaintiffs' evidence supporting “chilling effect”

- “Recent prosecutions under [the pre-amended statute] have really frightened people who might otherwise have been willing to register to vote and cast a ballot.”
- “These prosecutions have had a huge chilling effect on the members of the communities we serve ... These individuals are terrified of doing something wrong by accident and then ending up facing charges for an honest mistake.”
- “When individuals are prosecuted for voting, it has a terrible ripple effect through the whole community. People would rather avoid voting entirely than risk criminal charges for a mistake.”

# **Voter confusion ⇒ “unwarranted drain on resources to educate”**

- Plaintiffs made a sufficient showing that they had “diverted substantial time and resources from its voter registration and get-out-the-vote activities to reassure eligible individuals that voting will not lead to criminal prosecution.”
- Fourth Circuit: “[I]t is unclear why the Board would challenge the district court’s injunction against the Challenged Statute’s enforcement if not to allow enforcement of that statute. So, we proceed with the understanding that without the district court’s injunction, prosecutions under the Challenged Statute would continue.”



# USDC rules in favor of plaintiffs

- **Rejects mootness argument**
- **Equal Protection:**
  - “The Challenged Statute was enacted with discriminatory intent, has not been cleansed of its discriminatory taint, and continues to disproportionately impact Black voters.”
- **Due Process:**
  - “Record evidence demonstrating this inconsistency in District Attorneys’ interpretation and enforcement of the Challenged Statute—that some believed that the Challenged Statute included a requirement of intent while others did not—compels the conclusion that the Challenged Statute permits a ‘standardless sweep’ that allows prosecutors to ‘pursue their personal predilections’ under the Challenged Statute. *Kolender*, 461 U.S. at 358 (quoting *Smith*, 415 U.S. at 575). The Court now reaches that conclusion.”

# Fourth Circuit argument

- Panel: James Wynn, Pamela Harris, DeAndrea G. Benjamin
- “Why are you here?”
- Court wonders why the State is taking steps to defend its ability to protect a Post-Reconstruction-era statute it concedes is intentionally discriminatory.
- General Assembly could have repealed it entirely (but it didn’t); State could have lived with USDC decision (but it appealed)
- Next steps: fees