No. TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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COMMUNITY SUCCESS INITIATIVE; JUSTICE SERVED NC, INC.; WASH AWAY UNEMPLOYMENT; NORTH CAROLINA STATE CONFERENCE OF THE NAACP; TIMOTHY LOCKLEAR; DRAKARUS JONES; SUSAN MARION; HENRY HARRISON; ASHLEY CAHOON; and SHAKITA NORMAN, *Plaintiffs*, v. TIMOTHY K. MOORE, *in his official capacity as Speaker of the North Carolina House of Representatives*; PHILIP E. BERGER, *in his official capacity as President Pro Tempore of the North Carolina Senate*; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, *in his official capacity as Chairman of the North Carolina State Board of Elections*; STELLA ANDERSON, *in her official capacity as Secretary of the North Carolina State Board of Elections*; KENNETH RAYMOND, *in his official capacity as member of the North Carolina State Board of Elections*; JEFF CARMON, *in his official capacity as member of the North Carolina State Board of Elections*; and DAVID C. BLACK, *in his official capacity as member of the North Carolina State Board of Elections*, *Defendants*.	From Wake County No. 19 CVS 15941

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PETITION FOR WRIT OF SUPERSEDEAS, PETITION FOR WRIT OF CERTIORARI, AND MOTION FOR TEMPORARY STAY

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PETITION FOR WRIT OF SUPERSEDEAS, PETITION FOR WRIT OF CERTIORARI, AND MOTION FOR TEMPORARY STAY

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TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Defendants Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, and Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate ("Legislative Defendants"), respectfully petition this Court to issue a temporary stay, a writ of supersedeas, and a writ of certiorari if necessary for appellate review.

INTRODUCTION

Alleging disenfranchisement, Plaintiffs have challenged a North Carolina statute that *re*-enfranchises convicted felons. A year ago, a three-judge panel for the Superior Court of Wake County preliminarily enjoined the application of this statute, N.C.G.S. § 13-1, to felons on probation, parole, or post-release supervision who have not yet attained an "unconditional discharge" due solely to outstanding monetary obligations arising from their convictions. The State Board of Elections thereafter instructed voters that they were eligible to vote if they were serving extended terms of probation and knew no reason why their terms had been extended other than for non-compliance with their monetary obligations. As will be explained, this interpretation, which the State Board crafted in conjunction with Plaintiffs, was the only sensible way to effectuate the injunction as written. But just days ago, and with municipal elections fast approaching, the court expanded this injunction to entitle *all* of the more than 55,000 convicted felons living in North Carolina under some form of "community supervision" to register and vote.

The purpose of this petition for a writ of supersedeas is to seek to return this litigation to the status quo that persisted for nearly a year under the original injunction. Although Legislative Defendants strongly disagree that § 13-1 should be enjoined whatsoever, the fact is that the State Board has for nearly a year instructed certain felons that they may vote despite lacking an "unconditional discharge" from their criminal sentences. The Superior Court has thrown these rules into disarray for no discernible reason. The expanded injunction contradicts the original logic of the injunction itself, which was to permit voting by convicted felons with solely monetary barriers to discharge—a population much smaller than 55,000, if it exists at all. Worse still, the expanded injunction is itself likely unconstitutional, since a vote from any one of these tens of thousands of undisputedly ineligible voters will dilute the votes of valid voters. And the expanded injunction contravenes the well-established equitable principle that courts should not change election laws on the eve of elections. To minimize inevitable damage to election integrity, Legislative Defendants request that this Court stay the order expanding the scope of the preliminary injunction and instruct the State Board to resume its prior implementation of that injunction until the Court can adjudicate this appeal. Legislative Defendants also request a temporary stay of the expansion order until the Court can rule on this petition.

This petition is properly filed because Legislative Defendants have noticed an appeal, *see* Not. of Appeal (Wake Cnty. Super. Ct. Aug. 24, 2021), Ex. A; Am. Not. of Appeal (Wake Cnty. Super. Ct. Aug. 30, 2021), Ex. B, and because Legislative Defendants sought a stay in the Superior Court, which the Superior Court denied.

The appeal is itself properly filed, but if the Court disagrees, Legislative Defendants hereby petition for a writ of certiorari. This writ is also warranted, and Legislative Defendants' petition for certiorari provides the Court an alternative basis to grant a writ of supersedeas.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. North Carolina's Provisions for Felon Disenfranchisement and Re-Enfranchisement

The North Carolina Constitution provides that

> 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.

N.C. CONST. art. VI, § 2, pt. 3. "[E]xcluding those who commit serious crimes from voting" is a "common practice," and the U.S. Supreme Court has held that "the Equal Protection Clause permits States to disenfranchise all felons for life, even after they have completed their sentences." *Jones v. Gov. of Fla.*, 975 F.3d 1016, 1025, 1029 (11th Cir. 2020) (en banc); *see Richardson v. Ramirez*, 418 U.S. 25, 56 (1974). Indeed, the Court has specifically held that North Carolina's disenfranchisement provision does not violate equal protection. *See Fincher v. Scott*, 352 F. Supp. 117 (M.D.N.C. 1972), *summarily aff'd* 411 U.S. 961 (1973).

North Carolina does not disenfranchise all felons for life. The statute at issue here, N.C.G.S. § 13-1, "automatically restore[s]" voting rights to convicted felons "upon the occurrence of any one of" several conditions, including "[t]he unconditional discharge of . . . a probationer[ ] or of a parolee by the agency of the State having

jurisdiction of that person" (or by the United States or another state as the case may be). § 13-1(1), (4)–(5). Although North Carolina long provided for re-enfranchisement in more limited circumstances, the current version of § 13-1 dates back to laws passed in 1971 and 1973. The North Carolina Supreme Court has already spoken to the intent of those laws: "It is obvious that the 1971 General Assembly . . . intended to substantially relax the requirements necessary for a convicted felon to have his citizenship restored," and "[t]hese requirements were further relaxed in 1973." *State v. Currie*, 284 N.C. 562, 565, 202 S.E.2d 153, 155 (1974).

This appeal turns on § 13-1's application to "probationer[s]" and "parolee[s]"—more specifically, to convicted felons serving terms of "post-release supervision" under § 15A-1368 *et seq*. or "probation" under § 15A-1341 *et seq*.[1] As the name implies, "post-release supervision" is "[t]he time for which a sentenced prisoner is released from prison before the termination of his maximum prison term." § 15A-1368(a)(1). This form of release is always "conditional and subject to revocation." § 15A-1368.3(a). The supervisee is "in the custody of the Division of Adult Correction and Juvenile Justice of the Department of Public Safety and Post-Release Supervision and Parole Commission," § 15A-1368(a)(2), and must comply with whatever conditions the Commission imposes, including the "Required Condition" that the supervisee "not commit another crime" while under supervision, § 15A-1368.4(b)–(e). Supervision is

[1] North Carolina eliminated parole with the Structured Sentencing Act, 1993 N.C. Laws ch. 538. For any convicted felons who might still be subject to parole, the relevant conditions are similar to those of probation and post-release supervision. *See* N.C.G.S. §§ 15A-1372, -1374.

time-limited, § 15A-1368.2(c), and ends "[w]hen a supervisee completes the period of post-release supervision," § 15A-1368.2(f).

Probation, by contrast, is imposed in lieu of a prison term for qualifying offenders. § 15A-1341(a). Probationers are subject to several "Regular Conditions," including the payment of "a supervision fee," "any fine ordered by the court," and any necessary "restitution or reparation." § 15A-1343(b)(6), (9). These conditions "apply to each defendant placed on supervised probation unless the presiding judge specifically exempts the defendant from one or more of the conditions in open court and in the judgment of the court." § 15A-1343(b).[2] The court may also impose various "Special Conditions," including that the probationer "[a]ttend . . . a facility providing rehabilitation" services, "[a]bstain from alcohol consumption and submit to continuous alcohol monitoring," and "[s]atisfy any other conditions . . . reasonably related to his rehabilitation." § 15A-1341(b1)(2), (2c), (10).

Probation is also time-limited, with a maximum term of five years. § 15A-1343.2(d). "[I]f warranted by the conduct of the defendant and the ends of justice," a court has discretion to "terminate a period of probation and discharge the defendant" early. § 15A-1342(b). But "probation remains conditional and subject to revocation during the period of probation imposed," § 15A-1342(a), meaning that the probationer can be imprisoned for violating his conditions of probation. Alternatively, the court may "extend the period of probation up to the maximum allowed." § 15A-1344(d), (f).

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[2] Criminal defendants placed on "unsupervised probation" are exempt from certain regular conditions, including the payment of a supervision fee. *See* N.C.G.S. § 15A-1343(b).

"[W]ith the consent of the defendant," the court may also extend probation for up to "three years beyond the original period" to "allo[w] the defendant to complete a program of restitution." § 15A-1342(a).

II. The Superior Court Preliminarily Enjoins Enforcement of § 13-1 Against Felons Still on Probation for "Solely" Monetary Reasons

Plaintiffs are four organizations and six convicted felons who either are or were on probation or post-release supervision. They brought this suit in November 2019, alleging that North Carolina's re-enfranchisement statute, N.C.G.S. § 13-1, violates several state constitutional provisions on its face. Plaintiffs thereafter moved for summary judgment and alternatively for a preliminary injunction, and the matter was assigned to a three-judge panel pursuant to N.C.G.S. § 1-267.1.

A divided panel entered summary judgment for Plaintiffs on their claims that § 13-1 creates a wealth-based classification in violation of the Equal Protection Clause, N.C. CONST. art. I, § 19, and imposes a property qualification on voting in violation of N.C. CONST. art. I, § 11. The reason for both holdings was essentially the same: in the panel majority's view, "the ability for a person convicted of a felony to vote is conditioned on whether that person" can pay "any fees, fines, and debts assessed as a result of that person's felony conviction" and can therefore obtain the unconditional discharge that § 13-1 requires. Order at 7, No. 19 CVS 15941 (Wake Cnty. Super. Ct. Sept. 4, 2020) ("SJ Order"), Ex. C; *accord id.* at 8–10. The panel majority further held, however, that factual issues precluded summary judgment on Plaintiffs' claim that § 13-1 violates the Free Elections Clause, N.C. CONST. art. I, § 10, and on Plaintiffs' other equal-protection theories—first that all convicted felons

on probation or supervised release must be permitted to vote, and second that § 13-1 deprives African Americans of "substantially equal voting power." SJ Order, Ex. C at 6, 7. The entire panel held that Defendants were entitled to summary judgment against Plaintiffs' claim that § 13-1 violates the freedoms of speech and assembly, N.C. CONST. art. I, §§ 12, 14.

The court simultaneously issued a "limit[ed]" preliminary injunction. Order on Inj. Relief at 9, No. 19 CVS 1591 (Wake Cnty. Super. Ct. Sept. 4, 2020) ("Original PI Order"), Ex. D. Consistent with its summary-judgment rulings, the panel majority enjoined Defendants from applying § 13-1 "to those persons convicted of a felony and currently precluded from exercising their fundamental right to vote *solely* as a result of them being subject to an assessment of fees, fines, or other debts arising from a felony conviction." *Id.* at 10 (emphasis added). Unable to "conclude that Plaintiffs have met their substantial burden to demonstrate beyond a reasonable doubt that [§] 13-1 facially violates" the North Carolina Constitution in other ways, the court did not enjoin its application to any other convicted felons on probation or post-release supervision. *Id.* at 9. Accordingly, the injunction language read in relevant part:

> Defendants . . . are hereby enjoined from preventing a person convicted of a felony from registering to vote and exercising their right to vote if that person's *only remaining barrier* to obtaining an "unconditional discharge," other than regular conditions of probation pursuant to N.C.G.S. § 15A-1343(b), is the payment of a monetary amount.
>
> Defendants . . . are hereby enjoined from preventing a person convicted of a felony from registering to vote and exercising their right to vote if that [person] has been discharged from probation, but owed a monetary amount upon the termination of their probation or if any monetary amount owed upon discharge from probatio[n] was reduced to a civil lien.

Id. at 10–11 (emphasis added).

Judge Dunlow dissented in part, observing that "[t]he disenfranchisement of which Plaintiffs complain is in no way attributable to N.C.G.S. § 13-1." SJ Order, Ex. C at 3. As he explained, § 13-1 "does not itself impose any fines, fees, or other costs on people convicted of felonies who are on probation, parole, or post-release supervision," and Plaintiffs do not challenge the statutes that impose those fees. *Id.* at 5. Plaintiffs therefore failed to meet the "extremely high bar" for a facial challenge, *id.* at 2–3, and Judge Dunlow would have granted summary judgment to Defendants on all claims. *See id.* at 6–7.

III. The State Board of Elections Implements the Original Injunction

The State Board Defendants set about implementing the original injunction in time for the 2020 elections. The State Board understood the original injunction to apply only to convicted felons whose terms of *probation* were *extended* due to a failure to make required payments, an understanding supported by the fact that post-release supervision and probation last for set time periods—and thus that someone serving his initially imposed term of post-release supervision or probation is not serving that term "solely" because he still has fees, fines, or other debts to pay. Original PI Order, Ex. D at 10.[3] This understanding was further supported by the court's summary-

[3] As the Attorney General has explained, the number of convicted felons on *post-release supervision* for whom non-payment of a required fee is the "only remaining barrier" to an unconditional discharge, Original PI Order, Ex. D at 10, is likely "a null set." Req. for Clarification Regarding Implementation of Inj. at 3, No. 19 CVS 15941 (Wake Cnty. Super. Ct. Aug. 22, 2021) ("SBE Clarification Req."), Ex. E; *see id.* at 3 n.1 ("[A] person who fails to pay an obligation while on post-release supervision does not have their supervision period extended. Instead, violating conditions of post-release supervision leads to *re-imprisonment* for a period up to the remainder of the prison term imposed at sentencing. [N.C.G.S.] § 15A-1368.3(c). If a

judgment rulings. *See* SJ Order, Ex. C at 9–10 (relying on the fact that "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" in finding that such "a person remains disenfranchised for up to eight years because he has been unable to pay").

The State Board therefore instructed voters that they could register to vote if they were "serving a term of extended probation, parole, or post-release supervision," "ha[d] outstanding fines, fees, or restitution as a result of their felony conviction," and "d[id] not know of another reason that their probation, parole, or post-release supervision was extended." Numbered Memo 2020-26, N.C. BD. OF ELECTIONS (Sept. 23, 2020), https://bit.ly/3DdOoBl. These instructions remained operative—and posted on the State Board's website—until last week. *See Who Can Register*, N.C. BD. OF ELECTIONS (as visited Aug. 23, 2021), Ex. J.

In the interim, Plaintiffs raised no issue with this interpretation of the preliminary injunction. In fact, the State Board indicated at trial that it had worked with Plaintiffs to craft this language. *See* Video of Trial Day 4 (Wake Cnty. Super. Ct. Aug. 19, 2021), https://vimeo.com/user15989103 (beginning at approximately the 51:00 minute mark; transcript forthcoming).[4]

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person is then re-released into post-release supervision, they serve the time remaining on their original supervision period. *Id.* § 15A-1368.3(c)(1)." (emphasis added; quotation marks omitted)).

[4] Plaintiffs purported to feel "chastise[d]" when Legislative Defendants raised this point in their original stay motion, responding that the interpretation was an "honest mistake" that "has resulted in constitutionally eligible voters . . . having their right to vote denied." Pls.' Opp'n to Leg. Defs.' Mot. for Stay at 3 n.1, No. 19 CVS

IV. The Superior Court Expands the Preliminary Injunction to All Felons Under Probation or Post-Release Supervision Regardless of Their Economic Circumstances

The Superior Court held trial on Plaintiffs' remaining Free Elections and Equal Protection claims from August 16 to August 19, 2021. During trial, the court ruled from the bench that the parties had misinterpreted the preliminary injunction, which the court had "intended" to cover any "individuals who are subject to post-release supervision, parole, or probation solely by virtue of continuing to owe monetary obligations." Order on Am. Prelim. Inj. at 7, No. 19 CVS 15941 (Wake Cnty. Super. Ct. Aug. 27, 2021) ("Expanded PI Order"), Ex. G. The Court thought that this class would include convicted felons, whether on initial or extended terms of post-release supervision, parole, or probation, with only monetary or other regular conditions. *See* Video of Trial Day 4, https://vimeo.com/user15989103 (beginning at approximately the 45:00 minute mark).

The State Board Defendants sought clarification, pointing out "significant administrative problems" with this intended injunction. SBE Clarification Req., Ex. E at 3. As the State Board has represented, the scope of potential beneficiaries is small to begin with: according to Department of Public Safety records, the population of people on felony probation with only financial obligations and regular conditions is at most 272 people. But the Department "cannot isolate" in its records who among those convicted felons "are on probation or post-release supervision only for monetary

15941 (Wake Cnty. Super. Ct. Aug. 25, 2021) ("Pls.' Stay Opp'n"), Ex. F. But Plaintiffs were still unable to identify who any such voters might be.

conditions." *Id.* at 4. The State Board Defendants therefore proposed "workaround[s]," the simplest being to allow voting by all the (relatively few) people who might be covered by the injunction. *Id.* at 4–5. No solution would have been perfect, and this one would have been overinclusive in two ways: first because it would "likely include people who are serving probation not *just* because of their monetary obligations," and second because conditions are coded as "regular" in the Department of Public Safety's data if they are so classified under current law even if they were classified as special conditions when imposed. *Id.* at 5–6.

Rather than work out how the State Board could best approximate the preliminary injunction's intent, the Superior Court simply expanded the injunction itself. In a conference with the parties on August 23, the court announced that *all* felons on post-release supervision or probation must be permitted to register and vote—an estimated population of more than 55,000. *See* Press Release, N.C. BD. OF ELECTIONS (Aug. 23, 2021), https://bit.ly/3DdeO6c.

Legislative Defendants immediately moved to stay this expanded injunction pending appeal, noting that (among other issues) the new order restored voting rights to tens of thousands of convicted felons who remained on probation or post-release supervision for reasons other than monetary obligations and who thus were not entitled to vote under the injunction's original logic. *See* Mot. for a Stay Pending Appeal at 4–5, No. 19 CVS 15941 (Wake Cnty. Super. Ct. Aug. 24, 2021), Ex. H. The court finally reduced its order to writing on August 27, maintaining that "it is necessary for equity and administrability of the intent of the September 4, 2020,

preliminary injunction to amend that injunction to include a broader class of individuals." Expanded PI Order, Ex. G at 10. The court also asserted—directly contradicting its original order without any reasoning or further development of the preliminary-injunction record—that "Plaintiffs have demonstrated a likelihood of success based on their remaining claims that stood for trial." *Id*. at 8. Judge Dunlow again dissented. *See id*. at 11.

V. The Superior Court Denies a Stay Pending Appeal

That same day, the panel denied Legislative Defendants' motion for a stay pending appeal. *See* Order, No. 19 CVS 15941 (Wake Cnty. Super. Ct. Aug. 27, 2021), Ex. I. But the State Board had been implementing the injunction even before then. Right after the court orally rendered the injunction, the State Board replaced the guidance on felon re-enfranchisement that had been in place for nearly a year—and for a presidential election—now instructing voters that "any person who is serving a felony sentence outside the custody of a jail or prison for a state or federal felony conviction is eligible to register and vote as of today." Numbered Memo 2021-06, N.C. BD. OF ELECTIONS (Aug. 23, 2021), https://bit.ly/3my9jsS. Plaintiffs have also detailed the "enormous efforts" that they and others have made to register felons suddenly released from any re-enfranchisement qualifications. *See* Pls.' Stay Opp'n, Ex. F at 9–10.

Multiple North Carolina counties will hold municipal elections as soon as October 5, 2021, with one-stop early voting beginning on September 16.

REASONS THE COURT SHOULD ISSUE A WRIT OF SUPERSEDEAS

The writ of supersedeas serves "to preserve the status quo pending the exercise of appellate jurisdiction," *Craver v. Craver*, 298 N.C. 231, 238, 258 S.E.2d 357, 362 (1979), and may issue "when an appeal has been taken, or a petition for . . . certiorari has been filed to obtain review of [a] judgment, order, or other determination" and "a stay order . . . has been sought by the applicant . . . by motion in the trial tribunal and such order . . . has been denied." N.C. R. APP. P. 23(a)(1). Legislative Defendants timely appealed the extended injunction after the Superior Court rendered it orally on August 23. Although that order was not yet reduced to writing, and was therefore without legal effect, *see, e.g.*, *West v. Marko*, 130 N.C. App. 751, 755–56, 504 S.E.2d 571, 573–74 (1998), Legislative Defendants were not required to await a written order to notice their appeal. *See State v. Mangum*, 270 N.C. App. 327, 330, 840 S.E.2d 862, 866 (2020). In any event, Legislative Defendants have concurrently filed an amended notice of appeal from the written version of the injunction order. Thus, "an appeal has been taken," N.C. R. APP. P. 23(a)(1), and for the reasons below it has been taken properly. Legislative Defendants have also "filed" a "petition for . . . certiorari," which provides a separate basis for their supersedeas petition (and which too is warranted for the reasons below). *Id*. And the Superior Court has denied Legislative Defendants' motion for a stay pending appeal. This petition for a writ of supersedeas is therefore properly before the Court.

Although supersedeas precedent is limited, it supports applying the familiar balancing test for temporary relief. The writ should issue where (1) the petitioner is

likely to succeed on the merits of the appeal, (2) irreparable injury will occur absent a stay, and (3) the balance of the equities favors preserving the status quo during the appeal. *See Abbott v. Town of Highlands*, 52 N.C. App. 69, 79, 277 S.E.2d 820, 827 (1981) (stay appropriate where "there [was] some likelihood that plaintiffs would have prevailed on appeal and thus have been irreparably injured"); *see also, e.g.*, *Home Indem. Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 113, 117–19, 493 S.E.2d 806, 809–11 (1997); *N. Iredell Neighbors for Rural Life v. Iredell Cnty.*, 196 N.C. App. 68, 79, 674 S.E.2d 436, 443 (2009). All three factors support preserving the status quo that existed before the Superior Court suddenly expanded its preliminary injunction.

I. Legislative Defendants Are Likely To Succeed on the Merits of this Appeal

a. This Appeal Is Proper

Although preliminary injunctions are not automatically appealable, *see A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983), appellate jurisdiction exists here for two related reasons: the extended preliminary injunction deprives Legislative Defendants of a "substantial right," *id.*; N.C.G.S. § 7A-27(b)(3)(a), and "restrain[s] the State . . . from enforcing the operation or execution of an act of the General Assembly," N.C.G.S. § 7A-27(b)(3)(f).

"The inquiry as to whether a substantial right is affected is two-part—the right itself must be substantial and the deprivation of that substantial right must potentially work injury to a party if not corrected before appeal from final judgment." *Jenkins ex rel. Hajeh v. Hearn Vascular Surgery, P.A.*, 217 N.C. App. 118, 125, 719 S.E.2d 151, 156 (2011) (cleaned up). A "substantial" right is an "interes[t] which a

person is entitled to have preserved and protected by law." *Royal Oak Concerned Citizens Ass'n v. Brunswick Cnty.*, 233 N.C. App. 145, 148, 756 S.E.2d 833, 835 (2014) (cleaned up). As Speaker of the House of Representatives and President Pro Tempore of the Senate, Legislative Defendants are entitled to protect the State's interest in the enforceability of § 13-1: they are the designated "agents of the State" in any case where "the validity or constitutionality of an act of the General Assembly . . . is the subject." N.C.G.S. § 120-32.6(b); *see also* § 1-72.2; N.C. R. CIV. P. 19(d).

This interest requires immediate review. The North Carolina Supreme Court and appellate courts have repeatedly held that an order preventing government parties from enforcing the law imperils a substantial right. *See Sandhill Amusements, Inc. v. Sheriff of Onslow Cnty.*, 236 N.C. App. 340, 360, 762 S.E.2d 666, 680 (2014) (Ervin, J., dissenting) (collecting cases), *rev'd for the reasons stated in the dissent*, 368 N.C. 91, 773 S.E.2d 55 (2015) (per curiam). The injury is particularly grave where, on the eve of an election, an order extends the vote to tens of thousands of people who are not eligible to vote under the logic of the order itself. The State's interest in lawful and orderly elections is at least as substantial as its interest in "fiscal stability" and other rights that have justified immediate appeal. *Dunn v. State*, 179 N.C. App. 753, 757, 635 S.E.2d 604, 606 (2006). That interest is lost every day that the extended preliminary injunction remains in effect. Thus, the injunction is

immediately appealable under N.C.G.S. § 7A-27(b)(3)(a), and for similar reasons is immediately appealable under § 7A-27(b)(3)(f).[5]

b. The Extended Preliminary Injunction Lacks Any Rationale

As an initial matter, the Superior Court lacked jurisdiction to enjoin § 13-1 because Plaintiffs lack standing.[6] The Legislative and State Board Defendants are not authorized to prosecute any convicted felons who might vote illegally; Plaintiffs have not sued any officials with that authority or challenged the laws that actually prevent certain felons from voting, *see* N.C. CONST. art. VI, § 2, pt. 3; N.C.G.S. § 163-275(5); and thus, enjoining Defendants from enforcing § 13-1 would not redress Plaintiffs' alleged injury. *See Breedlove v. Warren*, 249 N.C. App. 472, 477, 790 S.E.2d 893, 897 (2016). Even if the Superior Court had jurisdiction, it would still have lacked any basis to enjoin § 13-1. This provision does not disenfranchise anyone; it provides paths to *re*-enfranchisement. If this provision were invalid, then no "law" would "prescrib[e]" the "manner" by which voting rights "shall be . . . restored," N.C. CONST. art. VI, § 2, pt. 3, and felons on probation or post-release supervision *would be*

[5] This subsection applies "where the State or a political subdivision of the State is a party in the civil action." N.C.G.S. § 7A-27(b)(3)(f). Plaintiffs did not evade this subsection by not suing the State itself. As explained, Legislative Defendants are the agents of the State in this action. *See* §§ 1.72.2, 120-32.6(b); N.C. R. CIV. P. 19(d).

[6] That Defendants did not bring an interlocutory appeal from the original preliminary injunction does not preclude Legislative Defendants from raising these arguments against the new injunction. *See, e.g.*, *Dep't of Transp. v. Rowe*, 351 N.C. 172, 176–77, 521 S.E.2d 707, 710 (1999). And "[w]hether a party has standing to maintain an action implicates a court's subject matter jurisdiction and may be raised at any time, even on appeal." *Fort v. Cnty. of Cumberland*, 218 N.C. App. 401, 404, 721 S.E.2d 350, 353 (2012) (quotation marks omitted).

disenfranchised under the North Carolina Constitution. It thus makes no sense to invalidate § 13-1 on Plaintiffs' disenfranchisement theories. And the Court cannot rewrite § 13-1—as the Superior Court did by requiring the State to treat felons as "unconditionally discharged" when they are not—to make up for Plaintiffs' failure to challenge the laws that allegedly injure them. *See, e.g.*, *State v. Cobb*, 262 N.C. 262, 266, 136 S.E.2d 674, 677 (1964) ("When a court, in effect, constitutes itself a superlegislative body, and attempts to rewrite the law according to its predilections and notions of enlightened legislation, it destroys the separation of powers[.]").

To avoid compounding the risk of voter confusion that the Superior Court has created, at this time Legislative Defendants ask the Court to stay only the expanded injunction and allow the State Board to resume its prior implementation efforts. For if there is no basis for any injunction, there certainly is no basis for the expanded one. As the Superior Court recognized, "[t]he purpose of a preliminary injunction is ordinarily to preserve the *status quo*." Expanded PI Order, Ex. G at 6 (quoting *State ex rel. Edmisten v. Fayetteville Street Christian Sch.*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980)). Yet the expanded injunction does the opposite: it drastically changes the scope of the original, a misuse of equitable power that is especially damaging on the eve of an election.

The Superior Court offered two rationales for the expansion, first that it was necessary to effectuate the injunction's intent, and second that Plaintiffs were likely to succeed on the merits of their claims that had gone to trial. This second rationale is palpably inadequate. In its first injunction order, the court had explicitly said that

> the Court *cannot conclude* that Plaintiffs have met their substantial burden to demonstrate beyond a reasonable doubt that N.C.G.S. § 13-1 facially violates Article I, §§ 10, 12, 14 [of the North Carolina Constitution] by preventing persons convicted of a felony who have been released from incarceration, or were not subject to incarceration, from registering to vote and voting.

Original PI Order, Ex. D at 9 (emphasis added). The court therefore "limit[ed] the injunctive relief provided in this order to those issues on which" the court had found that "Plaintiffs prevail on their Motions for Summary Judgment," *i.e.*, their wealth-classification and property-requirement claims. *Id*.

In its new order, the court inexplicably reversed itself, now asserting that "Plaintiffs have demonstrated a likelihood of success based on their" Free Elections and other Equal Protection claims. Expanded PI Order, Ex. G at 8. Perhaps the court was presaging what it will hold on the trial record. But the court did not purport to change the above conclusion *on the preliminary-injunction record*. Indeed, the court offered no reasoning at all: it did not explain why Plaintiffs' other claims might have merit, let alone why Plaintiffs were likely to carry their burden on a facial challenge, which the court acknowledged is heavy. *See id*. at 7.

The only possible explanation is the court's statement that "there is no denying the insidious, discriminatory history surrounding voter disenfranchisement and efforts for voting rights restoration in North Carolina." *Id*. But this statement does not suffice to explain why the current version of § 13-1 was likely passed with discriminatory intent in violation of the Equal Protection Clause, particularly not in the face of the North Carolina Supreme Court's recognition that this provision was intended to "relax" the conditions for felon re-enfranchisement, *Currie*, 284 N.C. at

565, 202 S.E.2d at 155, or in the face of the General Assembly's authority not to offer convicted felons *any* path to re-enfranchisement, *see Ramirez*, 418 U.S. at 56. Nor did the court explain why this statement is even relevant to the Free Elections Clause, which principally requires that a voter be able to cast his ballot free of intimidation. *See, e.g.*, *Clark v. Meyland*, 261 N.C. 140, 143, 134 S.E.2d 168, 170 (1964). And again, if § 13-1 were wholly invalid, the result would not be that all felons on probation or post-release supervision may vote. To the contrary, the North Carolina Constitution would prohibit *any* convicted felon from voting until the General Assembly passed another re-enfranchisement law.

"An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Matter of E.S.*, 378 N.C. 8, 859 S.E.2d 185, 188 (2021) (cleaned up). The expanded injunction is not just "manifestly unsupported" by Plaintiffs' Free Elections and other Equal Protection claims. This remedy is expressly *contradicted* by the Superior Court's initial conclusion that the preliminary-injunction record does not establish a likelihood of succeed on these claims. And the court's sudden and unexplained about-face on that conclusion is devoid of any reasoning or explanation allowing it to even be assessed meaningfully, much less justified. The court's second rationale is therefore "so arbitrary" as to constitute an abuse of discretion and cannot support the expanded injunction.

That leaves the first rationale: that the expansion was necessary to effectuate the initial injunction's intent. This Court need not accept this finding. *See Town of*

Apex v. Rubin, 858 S.E.2d 364, 370 (N.C. App. 2021) ("Review of an order granting a preliminary injunction is . . . essentially *de novo*," and "an appellate court is not bound by the findings in the preliminary injunction order, but may review and weigh the evidence and find facts for itself." (cleaned up)). And the Court should not, because this rationale also contradicts itself. The Superior Court says in its new order, just as it said in its original order, that the preliminary injunction is intended to remove the "unconditional discharge" requirement from convicted felons "subject to post-release supervision, parole, or probation *solely* by virtue of continuing to owe monetary obligations." Expanded PI Order, Ex. G at 7 (emphasis added). Removing the requirement from *all* of the more than 55,000 felons on probation or post-release supervision is clearly broader than necessary to effectuate that intent.

The trial court's statements and actions appear to evince an understanding that any felon whose non-monetary conditions of probation are all regular conditions is prevented from voting solely by virtue of continuing to owe monetary obligations. But that is not so. As Legislative Defendants pointed out in their stay motion—and neither Plaintiffs nor the court refuted—a probationer could pay off his monetary obligations on day one of his probation but remain on probation until his term ends. That person would not be on probation *solely* because of monetary obligations. Yet he would be able to register and vote under the expanded injunction. At any rate, under the State Board's estimates, the vast majority of the felons covered by the expanded injunction are not subject to only monetary and other regular probation conditions.

That would be true even if ten times more people fell within the group than the State Board estimates (2,720 rather than 272).

Given its clear overbreadth, the expanded injunction creates more problems than it solves. As Legislative Defendants again pointed out in their stay motion—and as Plaintiffs and the court again did not refute—the expanded injunction itself is likely unconstitutional. The injunction requires State Board Defendants to allow the registrations and count the votes of thousands of convicted felons who are ineligible to vote under the laws of the State and the reasoning of the injunction, threatening the dilution of valid votes and the ability of the State's elections to reflect the will of eligible voters. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 208 (1962).

This manifest overbreadth is all the more problematic because neither Plaintiffs not the Superior Court have managed to identify a *single person* who is on an *initial* term of probation solely because of monetary obligations—in other words, a single person entitled to vote under the logic of the preliminary injunction who could not vote under the parties' original agreed interpretation. Nor have Plaintiffs or the Superior Court explained how such a person *could* exist under the laws of probation and post-release supervision outlined above. The Superior Court therefore enjoined § 13-1 wholesale to prevent its enforcement against a group that potentially includes no one.

Even if such a group did exist, better-tailored remedies are readily at hand. As Legislative Defendants read the probation laws, the only way someone might remain on an *initial* term of probation for solely monetary reasons is if the sentencing judge

waived all other regular conditions of probation in open court and in the judgment. *See* N.C.G.S. § 15A-1343(b). (As the Attorney General explained and neither Plaintiffs nor the Superior Court refuted, it does not seem possible for someone to remain on an initial term of *post-release supervision* for solely monetary reasons. *See supra* n.3.) Again, Plaintiffs have identified no such person and no evidence supports an injunction on their behalf. Assuming such people exist, however, the State Board could simply modify its instructions to permit registration by felons serving either (1) extended probation terms for solely monetary reasons or (2) initial terms with all non-monetary conditions waived. Alternatively, the Superior Court could have issued an injunction entitling all people with only monetary probation conditions and other probation conditions *currently* categorized as "regular" to register and vote, and State officials could then have relied on Department of Public Safety data to ensure that those people are permitted to do so.[7] While this theoretically may have encompassed

[7] The State Board represented that its "list" of eligible felon voters would also "include those individuals who are currently living in North Carolina but who are currently under community corrections resulting from a sentence from another state who are subject to conditions that are the same as any of North Carolina's regular conditions and who are subject to other monetary obligations like fines, fees, costs, and restitution." SBE Clarification Req. at 5 n.3.

Legislative Defendants also pointed out in their stay motion that the Superior Court could have enjoined prosecution of any voters on this list if it turned out that they were not entitled to vote under the logic of the original injunction. Plaintiffs responded that Legislative Defendants had waived this point by also pointing out that Plaintiffs have not challenged the statute that actually prohibits disenfranchised felons from voting. *See* N.C.G.S. § 163-275(5). That point makes any injunction inappropriate, *see supra* 16 (discussing Plaintiffs' lack of standing), but making the point did not preclude Legislative Defendants from offering an alternative solution to a problem that the expanded injunction newly created. In any event, the above shows that still more solutions are available.

more felons than strictly called for under the trial court's reasoning since some conditions currently categorized as regular have not always been so, it still would have been orders of magnitude less overbroad than the expanded injunction the trial court adopted. The existence of narrower remedies is yet another reason why Legislative Defendants' challenge to the expanded injunction is likely to succeed. Injunctive relief "should not be extended beyond the threatened injury." *Travenol Lab'ys, Inc. v. Turner*, 30 N.C. App. 686, 691, 228 S.E.2d 478, 483 (1976).

The Superior Court's concern that these solutions would not cover the 5,075 federal probationers in North Carolina, *see* Expanded PI Order at 8, does not justify the expanded injunction either. Once again, the court did not identify a person remaining on federal probation solely for monetary reasons or explain how that situation might arise. To the extent any federal probationers qualify for relief under the logic of the injunction, that population would still be relatively small, and the parties should have the opportunity to brief and/or discuss ways to identify those people and allow them to vote.

In response to Legislative Defendants' original stay motion, Plaintiffs asserted that some people are serving initial probation terms with solely monetary conditions, but like the Superior Court they offered no sign of who these people are or how that could be. They also contested that only 272 probationers are subject to only monetary and regular conditions to begin with, but they provided no figure of their own—and as explained above, the new injunction would remain overbroad even if the figure were much larger. Finally, they asserted that no more practical solution exists to

protect this undefined group, which again is inaccurate as explained above. The merits factor therefore weighs in favor of a stay.

c. The Equities Favor a Stay

"Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (cleaned up). The injury is exacerbated when an election law is enjoined on the eve of an election. "A State indisputably has a compelling interest in preserving the integrity of its election process," *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (quotation marks omitted), and "once the election occurs, there can be no do-over and no redress," *Holmes v. Moore*, 270 N.C. App. 7, 35, 840 S.E.2d 244, 266 (2020) (quotation marks omitted). That is not the only reason courts should avoid changing election rules on the eve of elections: "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4–5; *accord, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam).

This case is a stark example. For almost a year—a year that included a presidential election—the State Board of Elections published clear rules for felon re-enfranchisement pursuant to a preliminary injunction based on certain claims. Then, from the bench at a trial on other claims, the Superior Court ordered the State Board to adopt different rules. In an even more irregular move, after the State Board

indicated serious problems with these new rules, the court threw up its hands and enjoined § 13-1's application to any felons on probation or post-release supervision over a conference call. And now the State Board is instructing these convicted felons that they can register to vote, with Plaintiffs and others making "enormous efforts" to register them, Pls.' Stay Opp'n, Ex. F at 9, even though *no court in this State* has provided any reasoned explanation why convicted felons are entitled to vote if they remain on probation or post-release supervision for non-monetary reasons. The result will be either that unless or until the expanded injunction is stayed or dissolved, tens of thousands of felons will be eligible to vote in upcoming elections even though nothing establishes their eligibility to do so. Meanwhile, the expanded injunction is wholly unnecessary to ensure the vote to felons who could vote but for monetary obligations. The equitable factors (irreparable injury to the State and the public interest) thus weigh strongly in favor of staying the expanded injunction and permitting the State Board to resume its prior implementation.

In response to Legislative Defendants' original stay motion, Plaintiffs disputed that potential voting by tens of thousands of ineligible voters would injure the State or Legislative Defendants as agents of the State. It would. *See Purcell*, 549 U.S. at 4. And tellingly, Plaintiffs offered no answer to the injury suffered by all the eligible voters whose votes would be diluted. Plaintiffs also argued that, with elections upcoming, it is now too late to stay the expanded injunction. It is perverse to say that the Superior Court made Legislative Defendants' position the inequitable one by drastically expanding the scope of its injunction on the eve of an election. The *Purcell*

principle works the other way: an impending election was a reason *not* to force that change. "[W]hen a lower court intervenes and alters the election rules so close to the election date, . . . this Court, as appropriate, should correct that error." *Republican Nat'l Comm.*, 140 S. Ct. at 1207. In any event, the expanded injunction has existed in enforceable, written form for only a matter of days. The State Board has shown in that time that it can implement new orders with alacrity. And if the Court allows the State Board to return to the status quo as it existed before the expanded injunction, the State Board could notify people who registered under the expanded injunction if they are no longer eligible to vote and/or advise voters and election officials that any instructions or forms issued under the expanded injunction are inaccurate and that they should proceed accordingly. Alternatively, if the Court concludes that the equities weigh against staying the expanded injunction for the upcoming municipal elections, no equities would weigh against staying it for all future elections, and the Court should do so.

REASONS THE COURT SHOULD ISSUE A WRIT OF CERTIORARI

If the Court disagrees that the extended preliminary injunction is immediately appealable, it still should consider Legislative Defendant's supersedeas petition because Legislative Defendants have also petitioned for a writ of certiorari. *See* N.C. R. APP. P. 23(a)(1). That writ is warranted as well. "[C]ertiorari is appropriate to serve the expeditious administration of justice or some other exigent purpose." *Rubin*, 858 S.E.2d at 370 (quotation marks omitted); *see also* N.C. R. APP. P. 21(a)(1) (writ "may be issued in appropriate circumstances . . . to permit review of the judgments and

orders of trial tribunals . . . when no right of appeal from an interlocutory order exists"); *Reid v. Cole*, 187 N.C. App. 261, 263–64, 652 S.E.2d 718, 720 (2007) ("Even were we to conclude that the appeal did not affect a substantial right, the grant of certiorari is still appropriate here, where the administration of justice will best be served by granting defendants' petition.").

To obtain a writ of certiorari, "a party must demonstrate: (1) no appeal is provided at law; (2) a *prima facie* case of error below; and (3) merit to its petition." *House of Raeford Farms, Inc. v. City of Raeford*, 104 N.C. App. 280, 284, 408 S.E.2d 885, 888 (1991) (citations omitted). Assuming that Legislative Defendants have no appeal at law, they have at the very least made a *prima facie* case that the expanded injunction—which extends far beyond any logic the Superior Court provided or could provide based on the preliminary-injunction record—was in error. And the "expeditious administration of justice," under the exigency of upcoming elections, merits immediate review.

MOTION FOR TEMPORARY STAY

Pursuant to Rule 23(e) of the North Carolina Rules of Appellate Procedure, Legislative Defendants also respectfully move this Court to issue a temporary stay of the Superior Court's order of August 27, 2021 until the Court rules on the foregoing petition for a writ of supersedeas. In support of this Motion, Legislative Defendants incorporate and rely on the arguments presented in the foregoing petition.

CONCLUSION

Wherefore, petitioners respectfully pray that this Court issue its writ of supersedeas to the Superior Court of Wake County to stay the above-specified order pending issuance of the mandate of this Court following its review and determination of the appeal; that this Court issue its writ of certiorari if it determines that petitioners lack an appeal at law; that this Court temporarily stay enforcement of the above-specific order until such time as this Court can rule on this petition for a writ of supersedeas; and that the petitioners have such other relief as the Court might deem proper.

Respectfully submitted this 30th day of August, 2021.

COOPER & KIRK PLLC

By: /s/ Electronically Submitted
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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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ATTORNEYS FOR LEGISLATIVE DEFENDANTS TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives and PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate

VERIFICATION

The undersigned attorney for Legislative Defendants, after being duly sworn, says:

I have read the foregoing Petition for a Writ of Supersedeas, Petition for a Writ of Certiorari, and Motion for a Temporary Stay ("Petition") and, pursuant to Appellate Rule 21, I hereby certify that the material allegations and contents of the foregoing Petition are true to my knowledge, except those matters stated upon information and belief and, as to those matters, I believe them to be true.

I also hereby certify that the documents attached to this Petition are true and correct copies of the pleadings and other documents from the file in Wake County Superior Court and/or are documents of which this Court can take judicial notice.

Nicole Jo Moss

Wake County, North Carolina

Sworn to and subscribed before me this 30th day of August, 2021.

Cynthia Fabian Medina

Cynthia Fabian Medina
Notary's Printed Name, Notary Public

My Commission Expires: 05/03/2022

CYNTHIA FABIAN MEDINA NOTARY PUBLIC DURHAM COUNTY NORTH CAROLINA MY COMMISSION EXPIRES 05/03/2022

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 30th day of August, 2021, served a copy of the foregoing Petition for a Writ of Supersedeas, Petition for a Writ of Certiorari, and Motion for a Temporary Stay by electronic mail on the following parties at the following addresses:

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This the 30th day of August, 2021.

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No. TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

COMMUNITY SUCCESS INITIATIVE; JUSTICE SERVED NC, INC.; WASH AWAY UNEMPLOYMENT; NORTH CAROLINA STATE CONFERENCE OF THE NAACP; TIMOTHY LOCKLEAR; DRAKARUS JONES; SUSAN MARION; HENRY HARRISON; ASHLEY CAHOON; and SHAKITA NORMAN, *Plaintiffs*, v. TIMOTHY K. MOORE, *in his official capacity as Speaker of the North Carolina House of Representatives*; PHILIP E. BERGER, *in his official capacity as President Pro Tempore of the North Carolina Senate*; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, *in his official capacity as Chairman of the North Carolina State Board of Elections*; STELLA ANDERSON, *in her official capacity as Secretary of the North Carolina State Board of Elections*; KENNETH RAYMOND, *in his official capacity as member of the North Carolina State Board of Elections*; JEFF CARMON, *in his official capacity as member of the North Carolina State Board of Elections*; and DAVID C. BLACK, *in his official capacity as member of the North Carolina State Board of Elections*, *Defendants*.	From Wake County No. 19 CVS 15941

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EXHIBIT INDEX[1]

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[1] Materials available online are accessible through the links provided in the body of the Petition and in its Table of Authorities.

EXHIBIT A

STATE OF NORTH CAROLINA WAKE COUNTY	)	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION CASE NO. 19 CVS 15941
COMMUNITY SUCCESS INITIATIVE, et al., Plaintiffs, v. TIMOTHY K. MOORE, et al., Defendants.	)	NOTICE OF APPEAL

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Defendants Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, and Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate (the "Legislative Defendants"), by and through counsel, pursuant to Rule 3(a) of the North Carolina Rules of Appellate Procedure, do hereby notice their appeal to the Court of Appeals of North Carolina from the oral order of the three-judge panel composed of the Honorable Lisa C. Bell, Keith O. Gregory, and John M. Dunlow, announced and rendered on August 23, 2021 in the Superior Court, Wake County modifying and expanding the Preliminary Injunction originally entered on September 4, 2020.

Respectfully submitted, this the 24th day of August, 2021.

[Signatures on following page]

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Counsel for the Legislative Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Notice of Appeal was served on the parties to this action via U.S. Mail, first class, postage pre-paid to counsel at the following addresses:

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EXHIBIT B

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
	SUPERIOR COURT DIVISION
WAKE COUNTY	CASE NO. 19 CVS 15941

COMMUNITY SUCCESS INITIATIVE, et al.,

Plaintiffs,

v.

TIMOTHY K. MOORE, et al.,

Defendants.

AMENDED NOTICE OF APPEAL

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Defendants Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, and Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate (the "Legislative Defendants"), by and through counsel, pursuant to Rule 3(a) of the North Carolina Rules of Appellate Procedure, do hereby amend their Notice of Appeal to the Court of Appeals of North Carolina filed on August 24, 2021. Legislative Defendants noticed their appeal from the oral order of the three-judge panel composed of the Honorable Lisa C. Bell, Keith O. Gregory, and John M. Dunlow, announced and rendered on August 23, 2021 in the Superior Court, Wake County. That oral order was reduced to writing and entered on August 27, 2021. Accordingly, Legislative Defendants now hereby additionally notice their appeal to the Court of Appeals of North Carolina from the order entered by the three-judge panel on August 27, 2021 in the Superior Court, Wake County modifying the Preliminary Injunction entered on September 4, 2020.

Respectfully submitted, this the 30th day of August, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Notice of Appeal was served on the parties to this action via U.S. Mail, first class, postage pre-paid to counsel at the following addresses:

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EXHIBIT C

NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 19 CVS 15941

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.

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 Carolina[1]

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. Salermo*, 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 in 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

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 19 CVS 15941

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.

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.

19 CVS 15941

This the 4th day of September, 2020.

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.

EXHIBIT D

NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 19 CVS 15941

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.

ORDER ON INJUNCTIVE RELIEF

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 the 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.

Upon considering the pleadings, parties' and amici's briefs and submitted materials, arguments, pertinent case law, and the record established thus far, the Court finds and concludes, for the purposes of this Order, as follows:

Voting Qualifications for Persons 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" in which voting rights are automatically restored to persons convicted of felonies. The current iteration of the restoration of rights 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. That the present-day version of the statute requires the *unconditional* discharge of a person convicted of a felony is of particular import in this case when considering 1) the history of how our State has provided for the restoration of rights of citizenship, and 2) what is required of a person convicted of a felony to ultimately obtain an unconditional discharge.

History of Restoration of Rights of Citizenship in North Carolina

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 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 the reference to infamous crimes was removed from the constitutional provision and voting rights were taken away from only persons convicted of felonies. Later, the statute was further amended to remove certain, express requirements that must be met by a person convicted of a felony to have their rights of citizenship restored.

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.

Injunctive Relief

Plaintiffs have moved, in the alternative, for a preliminary injunction pending a resolution of this action on the merits. "The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *State ex rel. Edmisten v. Fayetteville Street Christian School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). A preliminary injunction is an "extraordinary remedy" and will issue "only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983) (emphasis in original); *see also* N.C.G.S. § 1A-1, Rule 65(b). When assessing the preliminary injunction factors, the trial judge "should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability." *Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).

Article VI, § 2(3), of our Constitution takes away the right to vote from persons convicted of felonies but does not command the manner in which the right to vote is restored, leaving it only to be in "the manner prescribed by law." Hence, it is the implementing legislation that determines whether a person convicted of a felony has met the requisite qualifications to exercise the fundamental right to vote. Plaintiffs in this case challenge the facial constitutionality of that implementing legislation, contending N.C.G.S.

§ 13-1 violates rights guaranteed by multiple provisions of the Declaration of Rights in Article I of our Constitution. Plaintiffs specifically contend that the statute unconstitutionally conditions the ability to vote on the possession and remittance of certain monetary amounts arising out of a person's felony conviction and that the statute unconstitutionally prevents persons convicted of a felony who have been released from incarceration, or were not sentenced to incarceration, from registering to vote and voting.

Plaintiffs' burden to show a likelihood of success on the merits of their claims is substantial because when a plaintiff challenges 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. Salermo*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987)).

Plaintiffs' Claims Relating to Persons Subject to Financial Obligations as a Result of a Felony Conviction

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

Article I, § 19, of our Constitution is equally clear that no person shall be denied the equal protection of the laws. Therefore, when legislation is enacted that restores the right to vote, thereby establishing terms upon which certain persons are able to exercise their right to vote, such legislation must not do so in a way that imposes unequal terms. The requirement of an "unconditional discharge" imposed by N.C.G.S. § 13-1 does exactly that—the terms upon which a person convicted of a felony is able to exercise the right to vote are not equal; the terms are instead dependent on that person's financial status and whether

that person has the ability to pay the fees, fines, and debts assessed as a result of the person's felony conviction.

In light of the above, the Court finds there is a substantial likelihood that Plaintiffs will prevail on the merits and show beyond a reasonable doubt that N.C.G.S. § 13-1 is in violation of Article I, §§ 11 and 19 of the North Carolina Constitution because, by requiring an "unconditional discharge," the statute makes the ability to vote by a person convicted of a felony dependent on a property qualification and imposes unequal terms on that person exercising the right to vote.

The loss to Plaintiffs' fundamental rights guaranteed by the North Carolina Constitution will undoubtedly be irreparable with voting set to commence in a matter of weeks for the upcoming 2020 general election. As discussed above, Plaintiffs have shown a likelihood of succeeding on the merits of their claims that N.C.G.S. § 13-1 violates multiple fundamental rights guaranteed by the North Carolina Constitution as those rights pertain to persons convicted of felonies and assessed fees, fines, and debts as a result of that conviction. As such, the Court finds that Plaintiffs are likely to sustain irreparable loss to their fundamental rights guaranteed by the North Carolina Constitution unless the injunction is issued, and likewise, issuance is necessary for the continued protection of Plaintiffs' fundamental rights guaranteed by the North Carolina Constitution during the course of the litigation until there has been a full and final adjudication of *all* claims asserted in Plaintiffs' amended complaint.

As to a balancing of the equities, after weighing the potential harm to Plaintiffs if the preliminary injunction is not issued against the potential harm to Defendants if injunctive relief is granted, the Court concludes the balance of the equities weighs in Plaintiffs' favor. Indeed, the harm alleged by Plaintiffs is both substantial and irreparable should an election pass by with Plaintiffs being precluded from exercising their

fundamental right to vote simply as a result of them being subject to an assessment of fees, fines, and debts arising from a felony conviction.

Plaintiffs' Claims Relating to Persons Released from, or Not Subject to, Incarceration as a Result of a Felony Conviction

Plaintiffs also contend N.C.G.S. § 13-1 impermissibly violates Article I, §§ 10, 12, 14, and 19 of our Constitution because the statute, by conditioning a restoration of the right to vote on an "unconditional discharge of an inmate, of a probationer, or of a parolee," precludes persons convicted of felonies who have been released from incarceration, or were not subject to incarceration, from registering to vote and voting.

Plaintiffs have put forward persuasive, historical evidence regarding the restoration of rights in our State for those persons convicted of felonies, particularly as it relates to the discretion left to government officials that ultimately determines when a person's rights are restored, as well as the disparate impact of that discretion on persons of lower wealth and persons of color. Defendants, however, have also put forward numerous state interests supporting the statute's requirement that rights be restored to persons convicted of felonies only upon and until such time as that person is unconditionally discharged, without regard to whether a person has been subject to incarceration.

Based upon the record thus far, while not making any findings whether the interests put forward by the state are supported by the facts or empirical evidence, the Court cannot conclude that Plaintiffs have met their substantial burden to demonstrate beyond a reasonable doubt that N.C.G.S. § 13-1 facially violates Article I, §§ 10, 12, 14, and 19 by preventing persons convicted of a felony who have been released from incarceration, or were not subject to incarceration, from registering to vote and voting. The Court therefore limits the injunctive relief provided in this order to those issues on which Plaintiffs prevail on their Motions for Summary Judgment.

Conclusion

Under these circumstances, the Court, in its discretion and after a careful balancing of the equities, concludes that the requested injunctive relief shall issue in regard to those persons convicted of a felony and currently precluded from exercising their fundamental right to vote solely as a result of them being subject to an assessment of fees, fines, or other debts arising from a felony conviction. The Court further concludes, in its discretion and after a careful balancing of the equities, that the requested injunctive relief shall not issue in regard to those persons convicted of a felony who have been released from incarceration, or were not subject to incarceration, but remain precluded from registering to vote and voting solely on account of that person not being incarcerated. The Court further concludes that security is required of Plaintiffs pursuant to Rule 65(c) of the North Carolina Rules of Civil Procedure to secure the payment of costs and damages in the event it is later determined this relief has been improvidently granted.

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

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

I. Plaintiffs' motion for a preliminary injunction regarding Plaintiffs' claims under Article I, §§ 11 and 19 for those persons convicted of a felony and, as a result, made subject to property qualifications is GRANTED.
   a. Defendants, their officers, agents, contractors, servants, employees, and attorneys, and any persons in active concert or participation with them who receive actual notice in any manner of this Order are hereby enjoined from preventing a person convicted of a felony from registering to vote and exercising their right to vote if that person's only remaining barrier to obtaining an "unconditional discharge," other than regular conditions of probation pursuant to N.C.G.S. § 15A-1343(b), is the payment of a monetary amount.

b. Defendants, their officers, agents, contractors, servants, employees, and attorneys, and any persons in active concert or participation with them who receive actual notice in any manner of this Order are hereby enjoined from preventing a person convicted of a felony from registering to vote and exercising their right to vote if that has been discharged from probation, but owed a monetary amount upon the termination of their probation or if any monetary amount owed upon discharge from probations was reduced to a civil lien.

c. References in this Order to "Defendants" encompasses all individuals and entities referenced in this paragraph.

II. Plaintiffs' motion for a preliminary injunction regarding Plaintiffs' claims under Article I, §§ 10, 12, 14, and 19 for those persons convicted of a felony but not subject to incarceration is DENIED.

III. This Preliminary Injunction shall continue in effect until there is a full determination of the merits of the claims in this action, unless otherwise expressly superseded by a subsequent order of the Court.

IV. Plaintiffs' bond in the amount of $1000 is sufficient and proper for the issuance of this 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

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 19 CVS 15941

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.

ORDER ON INJUNCTIVE RELIEF (DISSENT)

John Dunlow, dissenting.

For the reasons specified in my dissent to the majority's Order on summary judgment, I would find that Plaintiffs have not shown a likelihood of success on the merits of the case and deny injunctive relief.

This the 4th day of September, 2020.

John M. Dunlow

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.

EXHIBIT E

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 19 CVS 15941

COMMUNITY SUCCESS INITIATIVE, et al., Plaintiffs, v. TIMOTHY K. MOORE, et al., Defendants.	)	**REQUEST FOR CLARIFICATION REGARDING IMPLEMENTATION OF INJUNCTION**

The North Carolina State Board of Elections and its members (State Board Defendants), provide additional information to the Court on its efforts to implement the Court's injunction of September 4, 2020, pursuant to the Court's direction to the State Board Defendants on August 19, 2021, and seek additional clarification on the implementation of the Court's orders.

The State Defendants' goal is to implement, as soon as possible, the Court's injunction in the manner in which the Court intended. Since this Court's oral ruling on August 19, the State Board has worked diligently with the North Carolina Department of Public Safety, other shareholders within State government, and Plaintiffs to (1) change the language on voter registration forms that will inform voters of their rights to register and vote and (2) identify the group of people who this Court intended to cover with the injunction and ensure that they are able to register to vote and vote. In working to find solutions, the State Board has identified several pathways, concerns, and solutions to both changing the language and identifying the affected group. There is no perfect pathway. Accordingly, the State Board requests this Court's guidance and assistance with determining which pathway best effectuates this Court's injunction.

I. The State Board Defendants' Efforts to Implement this Court's Injunction

Following this Court's oral ruling on August 19 to implement certain changes to the voter registration forms immediately, on Friday, August 20, the State Board proposed incorporating this Court's comments into the language below:

> (a) you are not currently serving a felony sentence, including probation, post-release supervision, or parole; or (b) you are serving felony probation, post-release supervision, or parole with only fines, fees, costs, or restitution as conditions (besides the other regular conditions of probation in G.S. 15A-1343(b)) and you know of no other reason that you remain on supervision.

The Court indicated during the August 20 hearing that this language appears to align with this Court's orders. However, since that time, Plaintiffs have requested that the Court order modification of this language in two ways.

First, Plaintiffs requested that the word "besides" be modified to "in addition to other." Pls' Br. at 2. The State Defendants' proposed language however says "besides the other regular conditions" not just "besides the regular conditions." Therefore, the State Defendants' proposal captures Plaintiffs' concern. Moreover, the State Defendants urge the Court to accept the "besides" formulation because it should resolve any confusion for a person who, for example, is on an extended term of probation for violating a regular condition but also has outstanding financial obligations that are not responsible for the extension (and therefore is not covered by the injunction).

Second, Plaintiffs have requested that in addition to a reference to regular conditions of probation, the proposed language be modified to include "or the required condition of post-release supervision in G.S. 15A-1368.4(b)." Pls' Br. at 2. The State Defendants' proposed language incorporates directly this Court's order which enjoins the State from preventing a person convicted of a felony from exercising their right to vote "if that person's only remaining

barrier to obtaining an 'unconditional discharge,' other than regular conditions of probation pursuant to N.C.G.S. § 15A-1343(b), is the payment of a monetary amount." Sept. 4, 2020 Order, Part I-A. Moreover, the State Defendants do not believe that there are people who would fall into this category of post-release supervision—but is working to confirm this with DPS. [1] Given that it is unlikely for there to be people who fall into this category, the State Defendants believe that including language that applies to a null set in the voter registration form will only cause confusion for the person who is on post-release supervision and has to assess whether this injunction applies to them. Therefore, in the interest of clarity, the State Board requests that the Court not include language in the voter registration form that may not apply to anyone.

II. Administrative Considerations in the Implementation of this Court's Orders

While the State Defendants stand ready to implement the injunction clarified by this Court yesterday, the State Defendants would like to raise for the Court's consideration certain practicalities that might make implementation of the injunction in this manner difficult for both the State and individual voters who might be beneficiaries of this Court's actions.

There are significant administrative problems that raise questions about the manner in which the State Defendants can most effectively implement this Court's injunction.

DPS cannot distinguish those on probation solely because of monetary conditions and those people who are placed on probation for other regular conditions in addition to monetary

[1] Plaintiffs state that the State Board's counsel "asserted for the first time" that the "Court's injunction in fact doesn't cover anyone on post-release supervision." Pls' Br. at 2 n.2. This is wrong. *See* State Bd. Defs' Br. Opp'n Mot. for Summ. J 11 ("Likewise, a person who fails to pay an obligation while on post-release supervision does not have their supervision period extended. Instead, violating conditions of post-release supervision leads to re-imprisonment for a period up to the remainder of the prison term imposed at sentencing. *Id.* § 15A-1368.3(c). If a person is then re-released into post-release supervision, they serve the time remaining on their original supervision period. *Id.* § 15A-1368.3(c)(1).").

conditions, and, if the Court accepts Plaintiffs' proposal, to isolate those people who are on post-release supervision only for monetary conditions (in addition to the required condition of post-release supervision). The judgment and administrative records and inputs into DPS's system do not account for this specific scenario.

Because DPS cannot isolate only those voters who are on probation or post-release supervision only for monetary conditions, the State Board will have to implement some kind of workaround based on the information DPS does have available.

The first option, which the State Defendants previewed to the Court at the hearing on Friday could potentially be incongruous with what the State Defendants understand the Court's intention to be, by requiring a process of establishing the voter's eligibility to vote, due to the lack of information available to verify all voters who may be covered by the injunction. This first option requires no further information from DPS, but requires the State Board to inform all individuals on probation and post-release supervision that there may be a subsect of them who would be beneficiaries of the injunction of their eligibility and encourage them to petition their respective county boards for the ability to register and vote. As the State Defendants explained to the Court on Friday, this pathway is difficult to administer.

The second option requires DPS to identify for the State Board all people on probation whose terms include only monetary conditions along with the other regular conditions of probation.[2] The list that DPS provides will identify the people who have been coded in the

[2] And, if the Court accepts the Plaintiffs' proposal, all people on post-release supervision whose terms include only monetary obligations with the required conditions. Just as with the conditions of probation, DPS has been working quickly to determine whether it will be able to identify individuals who are on post-release supervision and who are subject to monetary conditions in addition to the required condition of post-release supervision in § 15A-1368.4(b), should this Court grant Plaintiffs' request for modification. DPS is continuing to work through

system as having any regular condition of probation listed in § 15A-1343(b) and monetary conditions (fines, fees, costs, or restitution).[3] The State Board would then inform county boards to not reject the registrations and ballots of individuals on this list.

This list will be over-inclusive in two ways.

First, it will likely include people who are serving probation not *just* because of their monetary obligations—and, accordingly, people whom this Court's injunction does not cover.

Second, the list may include some individuals who are subject to some special conditions because of the way in which sentencing laws have changed over the years. Over time, a number of conditions that used to be special conditions have been re-codified as regular conditions. For example, the regular condition of not using, possessing, or controlling any illegal drug or controlled substance only became a regular condition after December 1, 2009—until then, it was a special condition. Similarly, the regular condition of submitting to drug screening when instructed by the person's probation officer became a regular condition after December 1, 2011—until then, it was a special condition. Therefore, when DPS runs a search for anyone who is not coded with one of the special conditions, it will capture everyone who is subject to conditions that are *currently categorized* as regular conditions—regardless of whether the condition was a special condition at the time of that person's sentencing. This list then, may include people who were sentenced to a condition that was categorized as special at the time of sentencing (*e.g.*, drug screening) but is no longer categorized as special. These people will not

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the evening to try to confirm its capabilities by the time of the hearing tomorrow morning.

[3] This list will also include those individuals who are currently living in North Carolina but who are currently under community corrections resulting from a sentence from another state who are subject to conditions that are the same as any of North Carolina's regular conditions and who are subject to other monetary obligations like fines, fees, costs, and restitution.

be prevented from registering to vote and voting—even though the Court's injunction does not technically apply to them.

These two over-inclusive categories raise two very serious issues regarding elections administration. The State Board is the body responsible for certifying elections. If voters who do not fall within this Court's injunction are not restricted from registering to vote and voting, the State Board is concerned that, in the future, individuals will challenge election results in tight races on the basis that the races were decided by ineligible voters. The over-inclusive list will also make it more difficult for the State Board to determine the eligibility of voters and resolve voter challenges and other protests—without a clear indication of whether voters are properly covered by the injunction or not, the State Board will have no ability to resolve questions about voter eligibility.

In addition, these over-inclusive categories also raise a very serious issue for individuals who have monetary obligations and are serving probation or post-release supervision for reasons other than just those obligations. The State Board could not prevent them from registering and voting—even when this Court's injunction does not technically cover them.

As the State Defendants told this Court on Friday when it previewed these concerns, the State Defendants do not believe that they should take actions that could allow a person who is ineligible to register to vote and vote. Currently, individuals who are ineligible to register due to a State felony conviction are prevented from doing so by the State Board's automated registration check. The State Board is obligated to ensure that only eligible voters cast a ballot. Therefore, should the Court order the State Board to follow this approach, the State Defendants would urge the Court to incorporate into the remedy provisions a method for the State Board to properly identify the eligible voting population.

III. Timing Considerations in the Implementation of this Court's Orders

As discussed above, time is of the essence. Essentially, the State Board needs this Court's input by Monday, August 23, 2021, so that the State Board can properly implement the new language.

North Carolina will hold municipal elections in multiple counties on October 5, 2021. One-stop early voting begins for the October municipal elections on September 16, 2021, and the statutory voter registration deadline for that election is September 10, 2021.

North Carolina will hold municipal elections in multiple counties on November 2, 2021. One-stop early voting begins for the November municipal elections on October 14, 2021, and the statutory voter registration deadline October 8, 2021.

In order for the State Board to implement new language on the various forms used to conduct registration and the voting process, and for those updated forms to be used in the upcoming municipal elections, the State Board must initiate the process to update that language immediately. Administration of voter check in at voting sites is conducted largely conducted through electronic databases and information systems. In particular, the State and county boards of elections use the State Election Information Management System (SEIMS), which is a networked, computerized system that every election official and poll worker uses to conduct the voting process at the nearly 3,000 voting locations throughout this state.

To use one-stop early voting as an example, when a voter checks in to vote, a poll worker locates that person's information in SEIMS and, from the SEIMS system, the poll worker prints a One-Stop Application Form, which serves as the voter's affirmation that they are eligible to vote in the election. A sample of such a form was entered into evidence at trial as SDX-35. The form is prepopulated with the voter's information, drawing from the data in SEIMS.

The process of generating this form through SEIMS is the result of computer coding, which, in basic terms, is written into the SEIMS system and which instructs the system to generate all of the contents of the form in the exact way that form will appear when printed.

Changes to election administrative forms must be done well in advance of actual voting, because software developers must code those changes into the SEIMS system, test it (to ensure it operates as intended and does not create unintended consequences in the system), and implement the coding changes with a systemwide update. Generally, changes to the SEIMS system cannot be made while voting is occurring, because it runs the risk of interfering with the voting process which, again, is being conducted using the SEIMS system.

For comparison purposes, last fall, after the language was finalized it took the State Board approximately a month to implement the changes to forms in SEIMS following this Court's Injunction.

Accordingly, in addition to being ordered to initiate changes in time, as an administrative matter, the State Board must initiate the implementation of the Court's instructions immediately, in order for those changes to appear on voters' forms in the upcoming municipal elections.

Therefore, the State Defendants respectfully request guidance from the Court as soon as possible to determine how best to fully comply with this Court's orders.

This the 22nd day of August, 2021.

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EXHIBIT F

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

No. 19-cvs-15941

COMMUNITY SUCCESS INITIATIVE, et al.,

Plaintiffs,

v.

TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY OF SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, et al.,

Defendants.

PLAINTIFFS' OPPOSITION TO LEGISLATIVE DEFENDANTS' MOTION FOR A STAY PENDING APPEAL

Plaintiffs respectfully submit this opposition to Legislative Defendants' motion for a stay of the Court's expanded preliminary injunction pending appeal. In summary, each and every stay factor overwhelmingly counsels against any stay of the expanded injunction. First, Legislative Defendants' merits arguments are baseless and do not establish a sufficient likelihood of success. Second, no Defendant will experience any cognizable harm absent a stay. Third, any stay would cause immeasurable harm to Plaintiffs and many thousands of affected individuals who are currently entitled to register and vote under the Court's expanded injunction, tilting both the balance of equities and the public interest strongly against any stay. The Court should also deny Legislative Defendants' alternative request for a temporary stay pending a written order, which rests on the audacious assertion that this Court's oral ruling is legally inoperative today.

Any stay, however short, would wreak havoc on voters in the upcoming October elections and *re*-disenfranchise tens of thousands of North Carolinians, disproportionately Black people, who regained their voting rights on Monday and have already begun registering to vote.

I. Legislative Defendants Are Exceedingly Unlikely to Prevail in an Appeal

Legislative Defendants' merits arguments are baseless, and the Court's expanded injunction is correct. Legislative Defendants are far from sufficiently likely to win an appeal.

A. Legislative Defendants' Arguments Have No Merit

Legislative Defendants advance three arguments for overturning the Court's expanded injunction: first, they say that the Court misunderstands the Court's own original injunction as well as North Carolina criminal sentencing practices; second, they argue that the Court should have left in place a status quo that the Court has already found disenfranchises people in violation of both the North Carolina Constitution and the Court's original injunction; and third, Legislative Defendants now contend that the Court could have adopted an "immunity"-based approach that Legislative Defendants themselves told the Court was illegal and invalid just last weekend. None of those arguments has any substantial chance of carrying the day on appeal.

First, Legislative Defendants argue that they and their new private counsel understand the Court's original injunction and criminal sentencing better than the Court. According to Legislative Defendants, "the only felons permitted to vote under the logic of the injunction are those with monetary and other normal conditions of probation and whose terms of probation have been *extended* due to noncompliance with the monetary obligations … ." LDs' Mot. for Stay at 5 (emphasis in original); *see also id.* ("No felon during the *initial* period of probation, by contrast, is ineligible to vote solely because of failure to pay … ." (emphasis in original)). Under this view, the language on State Board forms and guidance from the November 2020 elections properly implemented the full scope of the Court's original injunction, and no change is needed. The Court said the opposite at trial last week—that is, there *are* people on initial terms of felony probation due to monetary obligations, and the State Board forms and guidance from last fall, which inserted a requirement that probation be "extended" to qualify under the Court's original

injunction, were inconsistent with that injunction by preventing those individuals from registering and voting in the November 2020 elections. It is baffling that Legislative Defendants are asserting that this class of individuals does not exist.[1]

Second, Legislative Defendants assert that the Court should have allowed the State Board to "continue implementing the injunction pursuant to the parties' original understanding"—in other words, left in place the same incorrect language on State Board forms and guidance from last fall. LDs' Mot. for Stay at 3. Under this approach, the State Board and county boards would continue preventing individuals covered by this Court's original injunction from registering and voting, in violation of both the state constitution and that injunction. As Plaintiffs explained last weekend, everyone should agree that this approach is unacceptable, for obvious reasons. It is particularly disturbing that leaders of state government would advocate denying voting rights to this class of individuals again, particularly when they are disproportionately African Americans.

Third, Legislative Defendants assert that if the Court were concerned that its injunction may inadvertently expose people to criminal prosecution for voting, the Court "could simply enjoin the State from prosecuting any of these … people if it turns out that some of them vote even though not entitled to do so under the logic of the injunction." LDs' Mot. for Stay at 6. This argument is waived. Just last weekend, Legislative Defendants told this Court the exact opposite—they asserted that any immunity-based approach "should also be rejected as it would

[1] Legislative Defendants chastise Plaintiffs for not objecting earlier to the language in the State Board forms and guidance limiting relief to people on "extended" probation. *See* LDs' Mot. for Stay at 3, 5. But when this language was proposed, Plaintiffs had to rely on representations of the State Board of Elections and the North Carolina Department of Justice regarding information not in Plaintiffs' possession or control. As Plaintiffs have stated already, the error in applying the injunction was an honest mistake on the State Board Defendants' part, but it was the Defendants' mistake, not Plaintiffs', and it has resulted in constitutionally eligible voters, in at least one election cycle, illegally having their right to vote denied by the state of North Carolina.

require the Court to enjoin the enforcement of a statute (N.C.G.S. 163-275(5)), the merits of which are not presently before it." LDs' Resp. to SBDs' Notice and Mot. for Clarification at 3. Even with Legislative Defendants' change of legal counsel yesterday, such flip-flopping—on an issue as weighty as potential felony criminal prosecution of disproportionately Black people for voting—is unacceptable. And Legislative Defendants' reversal has real consequences: If they were right the first time, any district attorney in the State could prosecute an affected individual for voting before their rights were in fact restored, and argue that any immunity ordered by this Court is legally invalid and inoperative. Through their inconsistent legal positions regarding a potential immunity over the last few days, Legislative Defendants have further exacerbated the fear that people will be prosecuted for voting, even if this Court were to order some form of immunity. Worse still, Legislative Defendants' newfound support for an immunity-based approach appears designed to cynically prolong the mass disenfranchisement of tens of thousands of disproportionately Black people by what they represent to be 272 people to vote.[2]

B. The Court's Expanded Injunction Is Correct

Contrary to Legislative Defendants' baseless arguments, the Court correctly expanded its preliminary injunction to cover all individuals on felony probation, parole, or post-release

[2] As noted at the August 23 hearing, Plaintiffs do not accept the State Board's assertion of the number of people statewide who are on felony probation with only monetary obligations and other regular conditions of probation. The State Board made the assertion for the first time in an email on Monday morning just minutes before the hearing began. Plaintiffs have no details about how the number was generated. The number present—272—would appear to indicate that more than 99.5% of felony probationers have special conditions of probation ordered against them, which is suspect on its face and also at odds with what members of the panel have described as their understanding of and practice in sentencing. At a minimum, the new assertion cannot be uncritically accepted, particularly given the State Board Defendants' prior misunderstanding with respect to people on initial terms of probation due to monetary obligations. The number also appears to ignore people on unsupervised probation, tens of thousands of people of post-release supervision, and 5,000-plus people on federal probation.

supervision. As a practical matter, there was no other viable solution. The language on State Board forms and guidance was inconsistent with the original injunction and denied voting rights to people covered by that injunction. Any attempt to identify the specific individuals covered by the full scope of the original injunction would have created severe problems in implementation. No workable, realistic solution was offered other than Plaintiffs' proposal to level up.

The Court's expanded injunction is fully consistent with settled law regarding courts' broad discretion to fashion equitable remedies, both generally and in the specific circumstances here. As a general matter, "[t]rial courts have broad discretion to fashion equitable remedies to protect innocent parties when injustice would otherwise result." *Kinlaw v. Harris,* 364 N.C. 528, 532-33, 702 S.E.2d 294, 297 (2010). "This discretion includes the power to 'grant, deny, limit, or shape' relief as necessary to achieve equitable results." *Id.* Exercising this broad equitable discretion, the standard response to a finding of unconstitutional discrimination is to "level up" by extending the right or benefit at issue to the entire previously excluded group, and in fact, "leveling down is impermissible where the withdrawal of a benefit would violate the constitution." *Donald J. Trump for President, Inc. v. Boockvar,* 502 F. Supp. 3d 899, 920 (M.D. Pa. 2020); *see* Pls.' Resp. to SDBs' Notice and Mot. for Clarification at 7-8 (collecting cases).

II. Defendants Will Experience No Cognizable Harm Absent a Stay

If the State Board implements the Court's expanded injunction, all individuals covered by the Court's original injunction will be permitted to register and vote in the October municipal elections, while avoiding the many severe problems in implementation identified by Plaintiffs and the State Board. There is no harm in that.

Legislative Defendants assert that they will suffer "extreme" prejudice from allowing this class of disproportionately Black people to vote because not all of them were covered by the

Court's original injunction. But as described above, there is no other workable solution to ensure that everyone covered by the original injunction is permitted to register and vote, and "leveling up" is a standard approach in circumstances like these. What's more, in light of the schedule this Court set for post-trial submissions, this Court will likely soon issue a final judgment deciding the merits of Plaintiffs' broader claims, which could moot the preliminary injunction. It is hard to see how allowing more disproportionately Black residents to vote in municipal elections this fall will cause Legislative Defendants "irreparable" harm. But even if the expansion of the preliminary injunction could be said to cause Legislative Defendants any irreparable harm (and it could not), that harm certainly does not outweigh the extreme harm to the Plaintiffs from a stay. *See infra*.

III. The Balance of Equities and Public Interest Overwhelmingly Refute any Stay

In contrast to the absence of any harm from denying a stay, granting a stay of the Court's expanded injunction would cause the gravest of irreparable harms to Plaintiffs and many thousands of other North Carolinians, disproportionately Black people. The balance of equities and the public interest therefore counsel powerfully against any stay of the expanded injunction.

A. A Stay Would Necessarily Disenfranchise People Who Are Entitled to Vote

Because the State Board cannot accurately implement this Court's original injunction, granting a stay of the expanded injunction would necessarily disenfranchise an unknown number of residents who have the constitutional right to vote under the original injunction. And Legislative Defendants do not (and cannot) at this late stage challenge the *merits* of the Court's original injunction or the Court's underlying judgment on Plaintiffs' wealth-based discrimination claims, which Legislative Defendants chose not to appeal last fall. A stay of the expanded injunction would necessarily cause grave and irreparable harm by preventing eligible North

Carolina voters from voting. That harm of denying eligible voters the right to vote clearly outweighs any harm to Legislative Defendants.

B. The State Board Has Already Implemented the Injunction

Within hours of the Court's ruling, the State Board—after consulting with Plaintiffs—adopted new language for its forms and guidance to implement the injunction. Specifically, under the new language on State Board forms and guidance, if a person can truthfully state, "I am not in prison or jail for a felony conviction," then the person can register and vote freely. We understand that the State Board has already changed its forms and guidance (both digital and paper) to include this language, and is working with multiple other state agencies to ensure that this correct new language is included everywhere.

In addition to changing the forms and guidance, the State Board has publicly announced the Court's ruling and informed people on felony probation, parole, or post-release supervision that they may register and vote immediately. On the afternoon of August 23, the State Board issued a press release stating that this Court "entered a preliminary injunction Monday to restore voting rights to all North Carolinians on felony probation, parole, or post-release supervision." The press release further explained that "[t]his means county boards of elections across North Carolina must **immediately** begin to permit such individuals to register to vote."[3]

Also on August 23, the State Board publicly released Numbered Memo 2021-06, titled "Restoration of Voting Rights for Felons on Community Supervision." The Memo reiterates that this Court "**entered a preliminary injunction requiring that any person on community supervision (including parole, probation, or post-release supervision) for a felony**

[3] NCSBOE, Statement of Ruling in Community Success Initiative v. Moore Case (Aug. 23, 2021), https://www.ncsbe.gov/news/press-releases/2021/08/23/statement-ruling-community-success-initiative-v-moore-case (emphasis added).

conviction be permitted to register and vote." It further noted that "[t]he court indicated that the order was to take effect as of today, August 23, 2021." The Memo stated that "[t]his order means that any person who is serving a felony sentence outside the custody of a jail or prison for a state or federal felony conviction is eligible to register and vote as of today." It also stated that "[a]n updated voter registration form is available on the State Board's website." The Memo included the relevant excerpt from the updated registration form which now requires individuals to state only, "I am not in jail or prison for a felony conviction." Lastly, the Memo enclosed a "Notice On The Restoration Of Voting Rights To Individuals On Probation, Parole, Or Post-Release Supervision For A Felony Conviction." This Notice once again reiterates: "**Due to a court order, anyone who is not in jail or prison for a felony conviction is now eligible to register and vote. This includes people on probation, parole, or post-release supervision.**"[4]

As a practical matter, it is too late to try to undo the changes to State Board forms and guidance for the upcoming October elections. At the hearing last Friday evening, the State Board's counsel explained that any changes to the State Board forms and guidance needed to be finalized and executed no later than Monday, August 23, in order to be used in the October elections. Reinforcing this deadline, the State Board explained in its request for clarification last weekend that "the State Board needs this Court's input **by Monday, August 23, 2021**, so that the State Board can properly implement the new language." SBDs' Request for Clarification at 7 (emphasis added). That deadline has come and gone.

As the State Board explained, "[o]ne-stop early voting begins for the October municipal elections on September 16, 2021, and the statutory voter registration deadline for that election is

[4] NCSBOE, Numbered Memo 2021-06 (Aug. 23, 2021), https://www.ncsbe.gov/about-elections/legal-resources/numbered-memos (emphasis in original).

September 10, 2021." *Id.* Accordingly, "[i]n order for the State Board to implement new language on the various forms used to conduct registration and the voting process, and for those updated forms to be used in the upcoming municipal elections, the State Board must initiate the process to update that language **immediately**." *Id.* (emphasis added); *see also id.* at 8 ("Accordingly, in addition to being ordered to initiate changes in time, as an administrative matter, the State Board must initiate the implementation of the Court's instructions immediately, in order for those changes to appear on voters' forms in the upcoming municipal elections.").

C. Plaintiffs and Other Interested Groups Have Already Undertaken Enormous Efforts to Educate Affected Individuals and Help Them Get Registered

Since the Court's ruling Monday morning, the Organizational Plaintiffs and numerous other organizations and individuals across the State have worked diligently to inform and educate affected individuals about their voting rights under the Court's expanded injunction, and to help those individuals get registered. By way of example:

- Dennis Gaddy of Community Success Initiative (CSI) has contacted at least 12 partner organizations to educate them about the expanded injunction and share the State Board's updated registration form. Through this outreach, an estimated 650 impacted people have been informed of their right to vote while on community supervision. Mr. Gaddy announced this ruling at CSI's Goal Setting Reentry Class to 15 impacted people, and he personally helped an affected individual register to vote.

- Diana Powell of Justice Served NC has contacted numerous partner organizations to educate them about the expanded injunction, including three North Carolins state chapters of the A. Philip Randolph Institute, the Pamlico County Reentry Development Center, and the Onslow County Democratic Women. She has provided updated registration forms to clients visiting Justice Served for regular programming as well as a COVID-19 testing initiative. Through Justice Served's regular programming and the COVID-19 testing opportunity, roughly 70-80 people visit Justice Served each day. Ms. Powell has spoken to hundreds of people in person and via social media to educate them of their right to vote while on community supervision for a felony conviction. She is planning a voter registration event on September 10, 2021 to continue the community education and to provide in-person opportunities for impacted people to register to vote.

- Corey Purdie of Wash Away Unemployment (WAU) has educated hundreds of people via social media of their ability to vote while on community supervision. He has sent out a text-message blast to all residents in WAU housing facilities informing them of their right to vote while on community supervision for a felony conviction, and he has personally helped four of them register to vote already. Mr. Purdie has contacted eight Community Corrections Judicial District Managers in eastern North Carolina to educate them about the expanded injunction as well. Mr. Purdie is currently planning a Voter Registration Drive in partnership with other members of the NC Second Chance Alliance to help impacted people on community supervision register to vote.

- Rev. Spearman held a statewide North Carolina NAACP meeting on Tuesday, August 24, 2021, where all branches were informed of the Court's expanded injunction and what it means for people on community supervision for a felony conviction. He provided all branches with the resources produced by the State Board. The North Carolina NAACP has also launched a voter registration and education campaign alongside NC Second Chance Alliance to support outreach to those newly enfranchised and branches have begun that outreach at the county level.

- Community organizers with the NC Second Chance Alliance have sent more than 12,000 text notifications to people informing them that if they are serving a felony community supervision sentence, they are now allowed to register and vote.

- Other organizations and community organizers across the State—too numerous to list here, but including Benevolence Farm, Buncombe County Reentry Council, Down Home NC, and LINC Inc.—have begun educating people on community supervision for a felony conviction of their right to vote and providing impacted individuals with the State Board's updated registration form.

For all these reasons, issuing a stay right now would cause enormous chaos, confusion, and harm to the public interest that clearly outweighs any harm Legislative Defendants assert.

IV. Legislative Defendants' Request for a Temporary Stay Should Also Be Denied

In the alternative, Legislative Defendants request a "temporary stay" until the Court issues its written order setting forth the oral injunction ruling. LDs' Mot. for Stay at 7. According to Legislative Defendants, such a temporary stay is warranted because the Court's injunction "currently has no legal effect," and the State Board's work this week to implement the injunction is therefore creating "voter confusion" and "election disruption," and also "potentially inducing violations of law." *Id.*; *see also id.* (likewise asserting that "until this Court's

announced injunction is filed in writing it has no legal force and effect and there therefore is no basis for registration and voting by otherwise disqualified felons"). This argument is irresponsible and wrong. The Court made very clear at the August 23 hearing that its order needed to be implemented immediately, starting the same day, notwithstanding that the written order would not be issued until later this week. It is stunning for the leaders of the General Assembly to argue that a state agency should have disregarded this Court's clear directive.

* * * * *

At trial last week, Legislative Defendants' then-counsel repeatedly stated that the violent white supremacist history of felony disenfranchisement in this State is "unfortunate." But it is not just "unfortunate." It is wrong, and it is wrong to keep doing it now. Anyone who sat through last week's trial saw and heard the ugly history—from the widespread whipping of Black men to systematically prevent them from voting "in advance" of the 15th Amendment, to the 1877 enactment of legislation spearheaded by a former Confederate and avid Jim Crow supporter who once presided over a lynching of Black people, to the attempt by three Black legislators in the early 1970s to eliminate this vestige of Jim Crow only to be stymied by their 167 White colleagues who insisted on preserving it. This Court should deny any stay.

Respectfully submitted this the 25th day of August 2021.

FORWARD JUSTICE

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EXHIBIT G

NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 19 CVS 15941

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.

ORDER ON AMENDED PRELIMINARY INJUNCTION

This matter comes before the undersigned three-judge panel upon State Board Defendant's Motion for Clarification filed on August 21, 2021.

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. Plaintiffs also seek, in the alternative, injunctive relief. Specifically, Plaintiffs contend Section 13-1 of our General Statutes violates Article I, Sections 10, 11, 12, 14, and 19 of our Constitution.

Procedural History

Plaintiffs filed the 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 a 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 September 4, 2020, a majority of the undersigned panel granted in part and denied in part Plaintiffs' motion for summary judgment, granted summary judgment in part to Defendants, and granted a preliminary injunction. The preliminary injunction was granted with respect to Plaintiff's claims under Article I, §§ 11 and 19 for those persons convicted of a felony and, as a result, made subject to property qualifications. Specifically, the preliminary injunction stated:

> a. Defendants, their officers, agents, contractors, servants, employees, and attorneys, and any persons in active concert or participation with them who receive actual notice in any manner of this Order are hereby enjoined from preventing a person convicted of a felony from registering to vote and exercising their right to vote if that person's only remaining barrier to obtaining an "unconditional discharge," other than regular conditions of probation pursuant to N.C.G.S. § 15A-1343(b), is the payment of a monetary amount.
>
> b. Defendants, their officers, agents, contractors, servants, employees, and attorneys, and any persons in active concert or participation with them who receive actual notice in any manner of this Order are hereby enjoined from preventing a person convicted of a felony from registering to vote and exercising their right to vote if that has been discharged from probation, but owed a monetary amount upon the termination of their probation or if any monetary amount owed upon discharge from probations was reduced to a civil lien.

The following three claims remained for trial following the preliminary injunction and summary judgment:

> 1. that N.C.G.S. § 13-1 violates the Equal Protection Clause of the North Carolina Constitution by depriving all persons with felony convictions subject to probation, parole, or post-

release supervision, who are not incarcerated, of the right to vote;
2. that 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
3. that N.C.G.S. § 13-1 violates the Free Elections Clause of the North Carolina Constitution.

Trial on these claims was held in Wake County before the three-judge panel on August 16, 2021 through August 19, 2021. On August 19, 2021, the panel issued a clarifying ruling from the bench pertaining to the language on the forms promulgated by the State Board of Elections regarding voter eligibility in light of the September 4, 2020, preliminary injunction. In response to this ruling, State Board Defendants filed a Motion for Clarification, citing concerns on the administrability of a requirement that they identify a smaller segment of the population of North Carolinians whose only barrier to completing the conditions of their probation is the payment of a monetary obligation. A conference was held on the matter via WebEx on August 20, 2021 and the panel announced an oral ruling via conference on WebEx on August 23, 2021.

Voting Qualifications for Persons 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" in which voting rights are automatically restored to persons convicted of felonies. The current iteration of the restoration of rights 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. That the present-day version of the statute requires the *unconditional* discharge of a person convicted of a felony is of particular import in this case when considering 1) the history of how our State has provided for the restoration of rights of citizenship, and 2) what is required of a person convicted of a felony to ultimately obtain an unconditional discharge.

History of Restoration of Rights of Citizenship in North Carolina

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

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 the reference to infamous crimes was removed from the constitutional provision and voting rights were taken away from only persons convicted of felonies. Later, the statute was further amended to remove certain, express requirements that must be met by a person convicted of a felony to have their rights of citizenship restored.

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, but also in whether to charge an individual, what offenses to charge, whether to reduce charges, and whether a plea offer is extended, 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.

Injunctive Relief

"The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *State ex rel. Edmisten v. Fayetteville Street Christian School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). A preliminary injunction is an "extraordinary remedy" and will issue "only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983) (emphasis in original); *see also* N.C.G.S. § 1A-1, Rule 65(b). When assessing the preliminary injunction factors, the trial judge "should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability." *Williams v. Greene,* 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).

Article VI, § 2(3), of our Constitution takes away the right to vote from persons convicted of felonies but does not command the manner in which the right to vote is restored, leaving it only to be in "the manner prescribed by law." Hence, it is the implementing legislation that determines whether a person convicted of a felony has met the requisite qualifications to exercise the fundamental right to vote. Plaintiffs in this case challenge the facial constitutionality of that implementing legislation, contending N.C.G.S. § 13-1 violates rights guaranteed by multiple provisions of the Declaration of Rights in Article I of our Constitution.

Plaintiffs' burden to show a likelihood of success on the merits of their claims is substantial because when a plaintiff challenges 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. Salermo*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987)).

In addition to the authority to grant and deny equitable relief, North Carolina trial courts have the power to shape that relief as a matter of discretion. *Roberts v. Madison County Realtors Ass'n*, 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996). It is the "unique role of the courts" to be able to "fashion equitable remedies" such as injunctions when it is necessary to "protect and promote the principles of equity." *Lankford v. Wright*, 347 N.C. 115, 120, 489 S.E.2d 604, 607 (1997).

Expanding the Scope of the September 4, 2020, Preliminary Injunction to a Wider Class of Individuals

The September 4, 2020, preliminary injunction was intended to allow those individuals who are subject to post-release supervision, parole, or probation solely by virtue of continuing to owe monetary obligations to register to vote. The language on State Board of Elections forms was changed to reflect the preliminary injunction; however, through no intentional fault of either party, this language does not adequately reflect the intent of the

preliminary injunction. The panel advised the parties of this on August 19, 2021, and indicated that an immediate change would need to be made to the forms to accurately reflect the preliminary injunction's intent and effect.

The panel met with the parties on August 20, 2021, upon concerns from State Board Defendants and Plaintiffs about implementation and administrability of the language as proposed by State Board Defendants. After a careful analysis of the issues presented, the Court has determined that a modification of the preliminary injunction to enjoin denial of voter registration for any convicted felon who is on community supervision, whether probation, post release supervision, or parole, is required.

Plaintiffs have demonstrated a likelihood of success based on their remaining claims that stood for trial, in addition to the likelihood of success on the merits of their claims as addressed in this Courts September 4, 2020, preliminary injunction. As acknowledged by Legislative Defendants at trial, there is no denying the insidious, discriminatory history surrounding voter disenfranchisement and efforts for voting rights restoration in North Carolina. As to a balancing of the equities, after weighing the potential harm to Plaintiffs if the preliminary injunction is not modified to include a broader class of individuals against the harm to Defendants if the injunction is modified, the Court concludes the balance of equities weighs in Plaintiffs' favor.

As an initial matter, the State Board Defendants represented to the Court that there was an immediate need for clarification and definitive language on State Board of Election forms in light up the upcoming municipal elections. There are several administrability challenges expressed by State Board Defendants that present a serious threat of harm to Plaintiffs and their clients. It is apparent to the Court that State Board Defendants may be unable to effectively identify individuals covered by the September 4, 2020, preliminary injunction. State Board Defendants asserted that it may be impossible for the North

Carolina Department of Safety (DPS) to be able to isolate individuals who are on post-release supervision, parole, or probation solely as the result of a monetary obligation. DPS has no mechanism for identifying whether individuals would not be serving probation but for those monetary obligations.

State Board Defendants presented the Court with two proposed avenues to implement the September 4, 2020, preliminary injunction. The first avenue would place the burden of disproving ineligibility on voters who may be eligible under the original injunction language. State Board Defendants admit this may result in preventing individuals who are eligible to vote from voting. The second proposal would involve DPS removing all individuals with monetary obligations as a term of their probation from their feed of supervision, thereby allowing all of those individuals to register and vote. However, that could lead to individuals who are not in fact covered by the September 4, 2020, preliminary injunction being erroneously told that they are eligible to vote. This could expose these individuals to criminal liability, as it is a Class I felony in North Carolina for a felon to vote without having had their voting rights restored. *See* N.C.G.S §163-275. Both of these solutions are untenable.

Further, neither of the proposals would address the 5,075 federal probationers who are not subject to conditions of probation under North Carolina law, but are ineligible to vote due to their felon status.

The harm alleged by Plaintiffs is both substantial and irreparable should yet another election pass by with Plaintiff's being precluded from their fundamental right to vote by virtue of them being on parole, probation, or post-release supervision as a result of a felony conviction. In addition, expanding the scope of the Courts prior preliminary injunction will ease the administrative burden on State Board Defendants.

Conclusion

Under these circumstances, the Court, in its discretion and after a careful balancing of the equities, concludes that it is necessary for equity and administrability of the intent of the September 4, 2020, preliminary injunction to amend that injunction to include a broader class of individuals. The Court further concludes that the security already submitted by Plaintiffs pursuant to Rule 65(c) of the North Carolina Rules of Civil Procedure to secure the payment of costs and damages in the event it is later determined this relief has been improvidently granted is sufficient and no further security is needed.

The Honorable John M. Dunlow dissents from this Order.

For the foregoing reasons, and in light of the need for clarification and clear administrability of the September 4, 2020, preliminary injunction, it is ORDERED that:

I. The September 4, 2020, Preliminary Injunction is modified to enjoin Defendants from denying voter registration to any convicted felon who is on community supervision, whether probation, post release supervision, or parole.

II. This ruling applies to persons convicted in both North Carolina state and federal courts and is effective immediately.

III. This Preliminary Injunction shall continue in effect until there is a full determination of the merits of the claims in this action, unless otherwise expressly superseded by a subsequent order of the Court.

IV. Plaintiffs' previously submitted bond in the amount of $1000 is sufficient and proper for the issuance of this Order.

SO ORDERED, this the 27th day of August, 2021.

Lisa C. Bell, Superior Court Judge

Keith O. Gregory, Superior Court Judge

as a majority of this Three Judge Panel

NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO. 19 CVS 15941
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.	**ORDER ON AMENDED PRELIMINARY INJUNCTION (DISSENT)**

John Dunlow, dissenting.

For the reasons specified in my dissent to the majority's September 4, 2020, Order on summary judgment and preliminary injunction, I would find that Plaintiffs have not shown a likelihood of success on the merits of the case and would not amend the preliminary injunction.

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 27th day of August 2021.

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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.

EXHIBIT H

STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 19 CVS 15941

COMMUNITY SUCCESS INITIATIVE, et al.,

Plaintiffs,

v.

TIMOTHY K. MOORE, et al.,

Defendants.

MOTION FOR A STAY PENDING APPEAL

Defendants Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, and Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate (collectively "Legislative Defendants"), respectfully move for a stay of the Court's order rendered August 23, 2021 pending resolution of the appeal that Legislative Defendants have noticed today. In the alternative, and at a minimum, all implementation of the order should be stayed until the order is reduced to writing.

RELEVANT BACKGROUND

The North Carolina Constitution provides that "[n]o person adjudged guilty of a felony . . . shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law." N.C. CONST. art. VI, § 2, pt. 3. That manner is prescribed by N.C.G.S. § 13-1, which provides in pertinent part that "[a]ny person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored upon . . . [t]he unconditional discharge

of . . . a probationer[] or of a parolee by the agency of the State having jurisdiction of that person."

On September 4, 2020, the Court concluded that § 13-1 likely violated two provisions of the North Carolina Constitution—the equal protection clause and the prohibition on voter property qualifications, N.C. CONST. art. I, §§ 11, 19—as applied to felons who remained on probation due to their inability to pay fees, fines, or other debts arising from their felony convictions. The Court therefore preliminarily enjoined Defendants from enforcing § 13-1 against "those persons convicted of a felony and currently precluded from exercising their fundamental right to vote *solely* as a result of them being subject to" such fees. Order on Inj. Relief 10 (Sept. 4, 2020) (emphasis added). More specifically, the Court preliminarily enjoined Defendants and their agents "from preventing a person convicted of a felony from registering to vote and exercising their right to vote if that person's only remaining barrier to obtaining an 'unconditional discharge,' other than regular conditions of probation pursuant to N.C.G.S. § 15A-1343(b), is the payment of a monetary amount." *Id.* The Court also enjoined Defendants and their agents "from preventing a person convicted of a felony from registering to vote and exercising their right to vote if that [person] has been discharged from probation, but owed a monetary amount upon the termination of their probation or if any monetary amount owed upon discharge from probation[ ] was reduced to a civil lien." *Id.* at 11.

The State Board of Elections interpreted this injunction to apply only to those felons whose probation had been *extended* because they had not yet paid the

necessary fines, fees, or restitution. On September 23, 2020, the Board therefore issued a Numbered Memo and accompanying notice instructing that

> Voters may now register to vote if all the following criteria apply: 1. The voter is serving a term of extended probation, parole, or post-release supervision; 2. The voter has outstanding fines, fees, or restitution as a result of their felony conviction; and 3. The voter does not know of another reason that their probation, parole, or post-release supervision was extended.

Numbered Memo 2020-26, N.C. BD. OF ELECTIONS (Sept. 23, 2020), https://bit.ly/3DdOoBl (emphasis in original). In the eleven-plus months since entry of the injunction, Plaintiffs have not raised an issue with this interpretation. Indeed, the State Board indicated at trial that Plaintiffs worked together with the State Board to craft this language.

At trial last week, however, the Court directed that the State Board must also allow felons on an initial term of probation, parole, or post-release conviction to register to vote if they are subject only to monetary conditions and the other regular conditions of probation in N.C.G.S. § 15A-1343(b). The State Board thereafter sought clarification, indicating that this interpretation would be difficult to administer and would likely include felons who remain on probation for reasons other than an inability to pay attendant fines. The State Board offered two potential workarounds, while Legislative Defendants proposed that the State Board be permitted to continue implementing the injunction pursuant to the parties' original understanding.

Instead, on Monday, August 23, 2021, the Court announced that as of that day, the preliminary injunction would be extended to require the State Board to register all felons on "community supervision." The State Board promptly proceeded to

implement this new injunction, indicating in a new Numbered Memo "that any person who is serving a felony sentence outside the custody of a jail or prison for a state or federal felony conviction is eligible to register and vote as of today." Numbered Memo 2021-06, N.C. BD. OF ELECTIONS (Aug. 23, 2021), https://bit.ly/3my9jsS. The Board estimates that this new injunction applies to more than 55,000 felons. *See* Press Release, N.C. Bd. of Elections, Statement on Ruling in *Community Success Initiative v. Moore* Case (Aug. 23, 2021), https://bit.ly/3DdeO6c.

ARGUMENT

"[I]n weighing whether to grant" a stay pending appeal, "the trial court should focus on the potential prejudice to the appellant." *Vizant Techs., LLC v. YRC Worldwide Inc.*, 2019 WL 995792, at *4 (N.C. Super. Ct. Mar. 1, 2019). The prejudice here is extreme: the Court's new order requires the State Board to allow registration of tens of thousands of convicted felons who state law does not permit to vote and who *should not be permitted to vote under the logic of the Court's preliminary injunction.* The Court held that Plaintiffs were likely to succeed on the merits only of their claims that § 13-1 creates an impermissible wealth-based classification and imposes an impermissible property qualification on voting. Under that logic, all that the State Board must do to effectuate the preliminary injunction is to allow felons to register to vote if they remain ineligible to vote only because of their failure to pay necessary fines.

Allowing *all* felons under any terms of release, by contrast, is manifestly overinclusive. Consider, for example, a wealthy person convicted of a felony who

receives a term of probation rather than incarceration, N.C.G.S. § 15A-1341(a), and who pays off his necessary fees and other penalties the first day of his term. Such a person could still have time left to serve on his probation, N.C.G.S. § 15A-1343.2(d), and thus would not be prevented from voting solely because of monetary conditions. Yet, he would be permitted to register and vote under the Court's new injunction. As the parties have agreed for nearly a year, the only felons permitted to vote under the logic of the injunction are those with monetary and other normal conditions of probation and whose terms of probation have been *extended* due to noncompliance with the monetary conditions—in other words, who cannot vote solely because of a failure to pay.[1] No felon during the *initial* period of probation, by contrast, is ineligible to vote solely because of failure to pay because payment *would not* make such a felon eligible to vote until that term of probation came to an end—and that is true regardless of whether the non-financial conditions of probation are limited to regular conditions or also include special conditions.

If the Court disagrees with this interpretation, there remain narrower ways to effectuate the logic of the injunction. The State Board has represented that, according to the Department of Public Safety, the population of people on felony probation with only financial obligations and regular conditions is at most 272 people. As the State Board indicated in seeking clarification, this list might be overinclusive because it might include felons who received special conditions of probation that, due to later

[1] As the State Board has informed the Court, felons on post-release supervision (as opposed to probation) who qualify for relief under the logic of the injunction is likely a "null set." *See* Request for Clarification Regarding Implementation of Inj. 3 (Aug. 22, 2021).

changes in law, are now categorized as regular conditions. If the Court is concerned about the logistics of controlling for this overinclusivity, it did not need to enjoin the State from enforcing § 13-1 wholesale. It could simply enjoin the State from prosecuting any of these 272 people if it turns out that some of them vote even though not entitled to do so under the logic of the injunction. And if the Court is concerned about other aspects of implementing the injunction, including the injunction's application to those under federal or out-of-state terms of probation, the Court should still stay its order so that the parties can negotiate and/or brief these issues—not simply allow tens of thousands of felons to register who are not entitled to vote.

Equitable considerations strongly support this course. Injunctive relief "should not be extended beyond the threatened injury," *Travenol Lab'ys, Inc. v. Turner*, 30 N.C. App. 686, 691, 228 S.E.2d 478, 483 (1976), especially not where the extension involves totally enjoining a long-standing state statute going to an issue as important as eligibility to vote. Furthermore, the State is likely to suffer irreparable harm absent a stay because one-stop early voting for the October 5, 2021 municipal elections begins on September 16, 2021, well before an appeal of the injunction could be resolved. Indeed, the Court's order itself likely is unconstitutional because it requires the State Defendants to allow the registrations and count the votes of thousands of felons who are ineligible to vote under the laws of the State and the reasoning of the preliminary injunction order, thereby threatening the dilution of votes of eligible voters and the ability of the State's elections to reflect the will of eligible voters.

At any rate, the Court should at least stay any implementation of its announced order until it has reduced that order to writing. "A judgment is not enforceable between the parties until it is entered," and it is not "entered" until "it is reduced to writing, signed by the judge, and filed with the clerk of court." *West v. Marko*, 130 N.C. App. 751, 755–56, 504 S.E.2d 571, 573–74 (1998) (quotation marks omitted). Indeed, the Court of Appeals has reversed a contempt order for violations of an injunction occurring after the injunction was announced but before it was reduced to writing because an injunction is not "in force" until it is entered in writing, and "a person cannot be held in contempt of an order that is not 'in force.' " *Onslow County v. Moore*, 129 N.C. App. 376, 388–89 (1998). The Court's orally announced order therefore currently has no legal effect, and the State Board's present implementation efforts run a serious risk of voter confusion and election disruption given the possibility of further developments in this litigation and changes to the rules on the ground once this Court issues its written order and the appeal proceeds. The State Board's implementation also potentially is inducing violations of law, because until this Court's announced injunction is filed in writing it has no legal force and effect and there therefore is no basis for registration and voting by otherwise disqualified felons. The Court at a minimum should stay implementation of an order that currently lacks effect.

CONCLUSION

Legislative Defendants respectfully request that the Court stay its order of August 23 pending resolution of their appeal or alternatively until the Court reduces

the order to writing. Plaintiffs oppose this motion. The State Board Defendants' position is as follows: "Following this Court's oral direction of August 23, and in line with the pressing administrative deadlines the State Board Defendants face, the State Board has already begun the work of modifying its internal systems and forms to bring them in compliance with this Court's oral order. The State Board Defendants defer to the Court's discretion on the Legislative Defendants' motion but request that the Court take into account the State Board's need for certainty about its communications to voters about their eligibility." As explained, this need for certainty supports granting the motion.

Respectfully submitted, this the 24th day of August, 2021.

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The undersigned hereby certifies that the foregoing Motion for a Stay was served on the parties to this action via e-mail to counsel at the following addresses:

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This the 24th day of August, 2021.

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EXHIBIT I

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO: 19 CVS 15941

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.

ORDER

This matter comes before the undersigned three-judge panel upon Legislative Defendants' Motion for a Stay Pending Appeal. After considering Legislative Defendants' Motion and the matters contained there, and having reviewed the submissions of the parties, the Court, in its discretion, hereby **DENIES** the Legislative Defendants' Motion.

This the 27th day of August, 2021.

Lisa C. Bell, Superior Court Judge

/s/ Keith O. Gregory
Keith O. Gregory, Superior Court Judge

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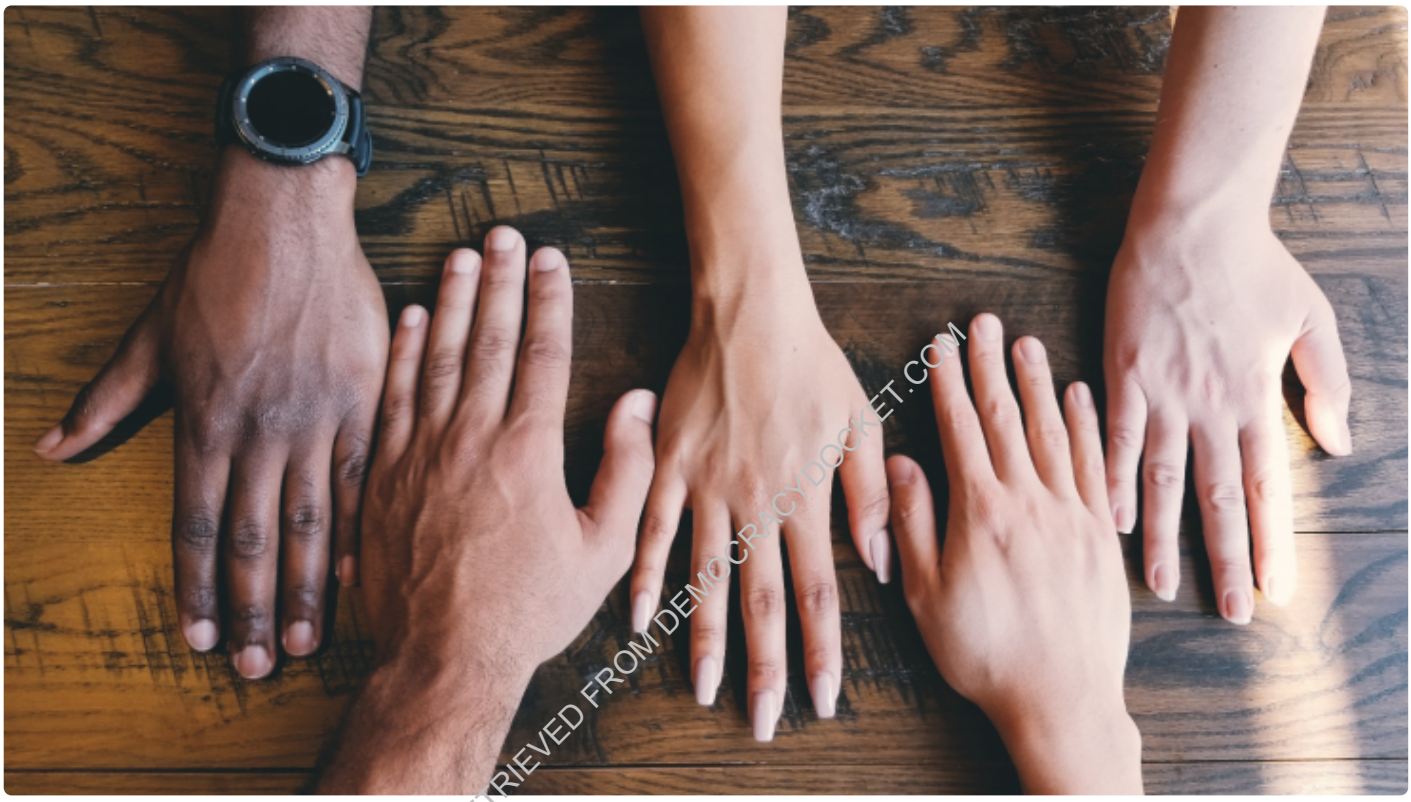
Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

EXHIBIT J

NORTH CAROLINA
STATE BOARD OF ELECTIONS

Who Can Register



Qualifications to Register to Vote

To register to vote in North Carolina, you must:

- Be a U.S. citizen.
    - See the USCIS website for citizenship information. (https://www.uscis.gov/forms/explore-my-options/proof-of-citizenship-for-us-citizens)
    - Citizenship documents are NOT required to register.

  Live in the county where you are registering, and have resided there for at least 30 days prior to the date of the election.

    - The federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) allows certain voters who are active duty military or their families as well as U.S. citizens abroad special rights that provide an expedited means to register and vote by mail-in ballot. Find more information on Military and Overseas Voting. (https://www.ncsbe.gov/voting/vote-mail/military-and-overseas-voting)

- Be at least 18 years old, or will be by the date of the general election.
    - 16- and 17-year-olds may preregister to vote. (/node/33)
    - 17-year-olds may vote in a primary election if they will be 18 at the time of the general election.
- Not be serving a sentence for a felony conviction, including probation, parole, or post-release supervision.
    - Note: By order of the court, you may now register and vote if you are serving an extended term of probation, post-release supervision, or parole, you have outstanding fines, fees, or restitution, and you do not know of another reason that your probation, post-release supervision, or parole was extended.
    - Once you have completed a felony sentence, including any probation, parole, or post-release supervision, or received a pardon, you are eligible to register and vote. No additional documentation is needed.
    - If you have been discharged from probation, you are eligible to register and vote, even if you still owe money or have a civil lien.

Note: An inactive voter is still a registered voter. A voter who is inactive status will be asked to confirm their addresses when they appear to vote. No special document is required.

Registering as a College Student

Find out where to register and how to register during the one-stop early voting period on Registering as a College Student. (/registering/who-can-register/registering-college-student)

Registering as a Person in the Criminal Justice System

To register to vote, you must not be currently serving a felony sentence, including any probation, post-release supervision, or parole. Find more information on Registering as a on in the Criminal System. (/registering/who-can-register/registering-person-criminal-ce-system)

Preregistering to Vote When You are 16 or 17 Years Old

Eligible voters who preregister will automatically be registered to vote when they turn 18 years old. Find more information on Preregistering to Vote When You are 16 or 17 Years Old. (/registering/who-can-register/preregistering-vote-when-you-are-16-or-17-years-old)

Learn how to register (/registering/how-register) →

Related Content

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Military and Overseas Voting (/voting/vote-mail/military-and-overseas-voting)
N.C.G.S. Chapter 163, Article 6: Qualifications of Voters. (https://www.ncleg.gov/EnactedLegislation/Statutes/html/ByArticle/Chapter_163/Article_6.html)
N.C.G.S. Chapter 163, Article 7A: Registration of Voters. (https://www.ncleg.gov/EnactedLegislation/Statutes/html/ByArticle/Chapter_163/Article_7A.html)
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https://www.ncsbe.gov/registering/who-can-register