No. P21-340 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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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.

From Wake County
No. 19-CVS-15941

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PLAINTIFFS' OPPOSITION TO LEGISLATIVE DEFENDANTS' PETITION FOR WRIT OF SUPERSEDEAS, PETITION FOR WRIT OF CERTIORARI, AND MOTION FOR TEMPORARY STAY

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INTRODUCTION

Last fall, the trial court issued a preliminary injunction allowing people with felony convictions to register and vote if they were on some form of community supervision due to monetary obligations. When it surfaced during trial two weeks ago that the State Board of Elections had read that injunction too narrowly and thus denied the right to vote to people who *were* eligible to vote under the injunction, the State Board and Plaintiffs each identified severe problems with implementation of the original injunction, as clarified by the trial court. No party identified ***any*** feasible solution to implement the full scope of the trial court's original injunction without causing serious collateral damage, including potential criminal charges for an honest mistake of voting. Despite these challenges, the State Board stressed that any changes to its registration form and other forms and guidance needed to be finalized and executed ***by August 23*** in order to be used in the upcoming October municipal elections, in which voting begins soon.

Accordingly, on August 23, the trial court expanded its preliminary injunction to allow all individuals on felony probation, parole, or post-release supervision to register to vote immediately, in time for the October elections. The court's written order explains that this expanded injunction is necessary in light of the vast unavoidable problems with implementation of the original injunction. It further states that, after the recent trial, Plaintiffs are now likely to succeed on their broader claims challenging the disenfranchisement of all individuals living in the community on felony probation, parole, or post-release supervision.

Last Friday, August 27, the trial court ***unanimously*** denied Legislative Defendants' motion for a stay pending appeal. Judge Dunlow, who dissented from both the original and expanded injunctions, joined Judges Bell and Gregory in denying a stay. Four days later, at midnight last night, Legislative Defendants filed the instant petition for writ of supersedeas and motion for a temporary stay.

It should be denied. Even if Legislative Defendants were likely to prevail on appeal (and they are not), the equities and public interest simply foreclose a stay of the expanded injunction for purposes of the upcoming October municipal elections. The State Board has already implemented the expanded injunction by changing its registration form and other forms and guidance, and the August 23 deadline to make any further changes for the October elections came and went a week and a half ago. In reliance upon the trial court's expanded injunction, many people have already registered to vote using the new registration form, and registration drives are ongoing. Trying to reverse the implementation of the expanded injunction would throw the October elections into chaos. The State Board, county boards, poll workers, and voters would suddenly be faced with conflicting messages from courts, state agencies, and counties—issued just days apart—about who is and is not eligible to register and vote. And critically, the State Board still would be left without any feasible way to implement the trial court's original injunction. That is untenable and would profoundly damage the State's democratic process.

In contrast to the extreme harms from halting the expanded injunction now, no Defendant will experience any cognizable harm absent a stay, much less

sufficient harm to warrant a stay. And Legislative Defendants' merits arguments do not come close to establishing a sufficient likelihood of success.

Worst of all, Legislative Defendants' attempt to block the expanded injunction is entirely in service of a law that ***all parties agree*** is rooted in invidious racial discrimination against Black people. The 1877 statute that first used felony convictions to disenfranchise people, even after their release from incarceration, was spearheaded in the General Assembly by a former Confederate and avid Jim Crow supporter who once presided over a lynching of Black people. That 1877 legislation implemented an 1876 constitutional amendment that was accompanied by other amendments mandating racial segregation in public schools and banning interracial marriage. And before the State used "felonies" to disenfranchise people living in the community, in the late 1860s, white former Confederates did so through a widespread campaign of whipping Black men to systematically prevent them from voting "in advance" of the 15th Amendment, under the prior state law.

Today, the overwhelming and undisputed effect of this law is to disproportionately disenfranchise Black people by wide margins throughout the entire State. And while Legislative Defendants point to some changes in the 1970s that eased the process of rights restoration, none of those changes eliminated the original, racist scheme that Plaintiffs challenge, namely, the disenfranchisement of people living in the community—people working, raising children, and paying taxes.

This Court should deny a writ of supersedeas and a temporary stay.

FACTUAL AND PROCEDURAL BACKGROUND

A. Pre-Trial Proceedings and the Original Preliminary Injunction

Plaintiffs are the North Carolina NAACP, three local organizations that provide direct services to returning citizens, and four disenfranchised individuals. They brought this lawsuit in November 2019 challenging N.C.G.S. § 13-1's disenfranchisement of people on felony probation, parole, or post-release supervision under multiple provisions of the North Carolina Constitution. The operative Amended Complaint was filed in December 2019.

On September 4, 2020, the three-judge trial court granted partial summary judgment and a preliminary injunction. It held that § 13-1 violated the state constitution's Ban on Property Qualifications and the Equal Protection Clause's restriction on wealth-based classifications by "condition[ing] the restoration of the right to vote on the ability to make financial payments." Order on Motion for Summary Judgment ("MSJ Order") at 8; *see id.* at 11. "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." *Id.* at 9. The court explained that, although § 13-1 implements the constitutional provision providing for felony disenfranchisement, it cannot do so in a way that violates other provisions of North Carolina's constitution. *Id.* at 10.

The court's preliminary injunction accordingly barred the State Board and its 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." Order on Motion for Preliminary Injunction ("PI Order") at 10. The court observed that, absent a preliminary injunction, 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." *Id.* at 8.

The trial court declined to grant summary judgment or a preliminary injunction at that time on Plaintiffs' broader claims challenging § 13-1's disenfranchisement of all persons on felony probation, parole, or post-release supervision under the Equal Protection Clause and Free Elections Clause. The court found that Plaintiffs "put forward persuasive, historical evidence" about the discriminatory origins of this disenfranchisement scheme as well as its current "disparate impact" on "persons of color." PI Order at 9. But the court noted the "numerous state interests" Defendants had asserted as justifications for denying voting rights to people on felony probation, parole, or post-release supervision. *Id.* The court made clear it was not making any finding that any "facts or empirical evidence" supported those interests, but concluded that Defendants were entitled to offer such evidence at trial. *Id.*

No defendant appealed the trial court's order granting partial summary judgment or the preliminary injunction.

To implement the preliminary injunction, the State Board revised its voter-registration form and other forms and guidance to provide that a person may register and vote if their probation had been "extended" for failure to pay monetary

obligations. At that time, the State Board believed that the trial court's injunction did not cover anyone on an "initial" term of probation, parole, or post-release supervision. The State Board's revised forms and guidance limiting the injunction to people on "extended" probation were used in the November 2020 elections.

B. Trial Proceedings

Plaintiffs' remaining claims went to trial two weeks ago, on August 16. At trial, Plaintiffs' expert Dr. Vernon Burton testified about the explicitly racist origin of North Carolina's felony disenfranchisement regime. He explained that North Carolina for the first time disenfranchised everyone convicted of a felony in 1876 and for the first time required people convicted of a felony to wait for years after the end of their incarceration to regain their rights in 1877. And he provided uncontested testimony that those decisions were made for the express and acknowledged purpose of discriminating against and disenfranchising Black people. Legislative Defendants acknowledged as much in their closing argument:

> The plaintiffs here presented a lot of evidence; much of it, if not all of it, all of it, troubling and irrefutable. You can't -- I can't say anything about a newspaper report that says what it says. I can't say anything about the history that is in the -- in the archives. What I can say is that the evidence that Dr. Burton presented certainly demonstrates a shameful history of our state's use of laws, and with regard to voting in particular, to suppress the Black population. That I can't -- I can't contest that. We never tried to contest that.

8/19/2021 Rough Trial Tr. 18:11-21.

Legislative Defendants argued that the General Assembly in the early 1970s adopted changes to the law to make rights restoration easier procedurally, even though they did not repeal the aspect of the law that prevented people living in the

community on probation, parole, or post-release supervision from voting. In fact, all three Black legislators in the General Assembly in the early 1970s tried to repeal that aspect of the law, but failed. MSJ Order at 4.

Plaintiffs' expert Dr. Frank Baumgartner testified about the law's disparate impact on Black people today. He introduced uncontested evidence showing that, while 21% of the voting-age population is Black, 42% of the people disenfranchised due to probation or post-release supervision are Black. In comparison, Whites are 72% of the voting-age population, but only 52% of those disenfranchised. Statewide, the Black voting-age population is disenfranchised at a rate 2.76 times as high as the White population. In 19 counties, more than 2% of the entire Black voting-age population is disenfranchised due to probation or post-release supervision. In four counties, more than 3% of the Black voting-age population is disenfranchised. In one county, more than 5% of the Black voting-age population is disenfranchised. The county with the highest rate of White disenfranchisement is only 1.25%.

Finally, Plaintiffs' expert Dr. Traci Burch testified that people living in the community on felony probation, parole, or post-release supervision would vote in significant numbers if they were not disenfranchised because of this law.

Legislative Defendants put on no live witnesses at trial. They argued in closing that some of the 1970s amendments to N.C.G.S. § 13-1, such as eliminating a requirement to petition a court for restoration of voting rights, were beneficial to Black people. But they offered no evidence that the law's continued

disenfranchisement of people living in the community on probation, parole, or post-release supervision served any governmental interest whatsoever.

The State Board Defendants put on two witnesses—Karen Brinson Bell, the State Board's Executive Director, and Maggie Brewer, the Deputy Director of Community Supervision at the Department of Public Safety. Both witnesses testified principally about the procedures that their state agencies use to inform people with felony convictions about their voting rights. Director Bell testified that the State Board was not asserting that the disenfranchisement of people on probation, parole, or post-release supervision serves any government interest today.

C. The Expanded Preliminary Injunction

At trial, the State Board introduced the revised forms that it had issued last fall to implement the trial court's original preliminary injunction. On August 19, the court issued a clarifying ruling from the bench stating that the State Board's revised forms—which stated that only people whose probation had been "extended" could be eligible to vote—were significantly underinclusive and violated the court's original injunction. The court noted that there are many people in North Carolina with felony convictions whose original terms of probation were influenced by their fees or fines. On August 20, the State Board requested, and the court held, a hearing to discuss the Board's concerns about implementing the original injunction.

On August 21, the State Board filed a notice describing the "significant administrative challenges for the North Carolina Department of Public Safety (DPS) to be able to isolate those people on probation who are serving probation as a result of only monetary conditions (aside from the other regular conditions of

probation)." State Board Defs.' Notice at 2 (attached as Exhibit A). The Board stated that DPS "has no record of whether, putting aside the general conditions, these persons would not be serving probation but for the monetary obligations." *Id.* The Board suggested two possible "solutions": informing eligible voters that they were ineligible to vote under the State Board's records, but that the records might be wrong and that the voters could petition their county boards to establish their eligibility. The Board noted: "This proposal raises the concern that it places the onus on the voter to disprove their ineligibility, due to lack of confirming information available to the State Board. Such a system could have the unfortunate result of keeping people from voting who should vote under the Injunction." *Id.* at 3.

Alternatively, the Board suggested that it might be able to isolate people whose "probation terms include financial obligations and the regular conditions of probation only," but said that might not be "possible," and that the Board regarded that list as "overinclusive" anyway, potentially exposing people to prosecution for voting based on the Board's determination that they were eligible. *Id.* at 3-4.

The State Board stated that it needed clarity on the scope of the injunction no later than August 23, 2021, because after that date it would not be possible to change the forms and guidance for the upcoming municipal elections. *Id.* at 4-6.

In response, Plaintiffs urged the trial court to modify its preliminary injunction to allow all individuals on felony probation, parole, or post-release supervision to register and vote, in light of the inability to implement the original injunction as clarified. Legislative Defendants filed a response "agree[ing] that

there are problems with both of the potential administrative solutions proposed by the State Board," and proposed leaving in place the State Board's forms and guidance improperly narrowing relief to people on "extended" probation. Leg. Defs.' Resp. at 3. In other words, Legislative Defendants urged the court to allow the State Board to disenfranchise people in violation of the original injunction.

The State Board subsequently filed an amended brief, on August 22, detailing additional administrative problems with the original injunction and reiterating that it needed a final decision by August 23.

At an August 23 hearing, the trial court orally amended its preliminary injunction, with written opinion to follow, to enjoin the State Board and its agents from denying registration and voting to all individuals on felony probation, parole, or post-release supervision. On August 24, Legislative Defendants noticed an appeal and asked the trial court for a stay pending appeal.

In its August 27 written opinion, the court explained that Plaintiffs had "demonstrated a likelihood of success" not only on their claims regarding monetary obligations, but also "based on the claims that stood for trial," *i.e.*, the claims that disenfranchising all people on felony supervision constitutes invidious racial discrimination against Black people and violates the Free Elections Clause. Order on Am. Prelim. Injunction ("Amended PI Order") at 8. The court noted: "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." *Id.*

The court further noted that, in light of the State Board's submission, "[i]t is apparent to the Court that State Board Defendants may be unable to effectively identify individuals covered by the September 4, 2020, preliminary injunction." *Id.* The court noted that the State Board's suggested solutions were not feasible, because one would prevent eligible individuals from voting, while the other would require the Board to erroneously tell ineligible voters that they were eligible, exposing them to criminal prosecution. *Id.* at 8-9. Moreover, the court noted that neither of the State Board's proposals would address the 5,075 federal probationers who are ineligible to vote as a condition of their federal felony probation and as to whom the State Board has no information about the reasons for probation. *Id.* at 9. The court concluded that, absent an expansion of the injunction, Plaintiffs would suffer irreparable harm in the upcoming October municipal elections, and that the balance of the equities favored expanding the injunction. Judge Dunlow dissented.

Also on August 27, 2021, the court *unanimously* denied Legislative Defendants' request for a stay pending appeal. Judge Dunlow, who had dissented from expanding the preliminary injunction, joined the order denying any stay.

Since August 23, the State Board has revised its paper and online registration forms and other forms and guidance, announced to the public that all people on probation, parole, and post-release supervision can register and vote, and coordinated with other state agencies and county boards to ensure complete implementation of the expanded injunction. As explained in greater detail below, many North Carolinians have registered to vote in reliance on the expanded

injunction. The State Board has represented that a stay would not only result in "significant voter confusion," but that changing its forms and guidance at this late date would require re-coding of the State's election management system in a way that would imperil the operation of the upcoming municipal elections. *See* State Board Defs.' Resp. to Leg. Defs.' Mot. for Stay at 7.

ARGUMENT

All of the stay factors counsel strongly against any stay.

I. The Equities and the Public Interest Foreclose a Stay

As detailed below, Legislative Defendants are not likely to prevail on appeal, but even if they were, the equities and public interest categorically foreclose any stay of the expanded injunction. The State Board made clear that the deadline for making changes to its forms and guidance for the upcoming October elections was *August 23*. The State Board implemented the trial court's expanded injunction immediately *on August 23* by publishing revised forms and guidance allowing all people on felony probation, parole, or post-release supervision to register to vote *immediately*. The State Board has done substantial other work to implement the expanded injunction, including coordinating with multiple other state agencies and county boards of elections, and issuing multiple public announcements and notices. Any attempt to undo the State Board's comprehensive implementation of the expanded injunction now would cause chaos in the October elections. The State Board, county boards, poll workers, and voters would confront different versions of registration forms and other State Board forms and guidance providing conflicting

information about who may and may not register and vote. Such extreme disarray would profoundly damage North Carolina's democratic process.

Any stay of the expanded injunction at this stage would also cause devastating, immeasurable harm to Plaintiffs and thousands of affected individuals who have now been told for a week and a half that they may register and vote. Plaintiffs and many others have been working around the clock, across the State, to educate people about the expanded injunction and to help people get registered. *Many people on felony probation, parole, or post-release supervision have already registered in reliance upon the expanded injunction.* What would happen to those people if the expanded injunction is stayed now? The State Board has no way of identifying and contacting people who *are* eligible to vote under the original injunction but who are *not* eligible to vote under the expanded injunction. It is a certainty that, if the expanded injunction is stayed, people on felony supervision who are *eligible* to vote under the *original injunction* will not do so for fear that they will make a mistake and subject themselves to criminal prosecution.

A. The State Board Has Already Implemented the Expanded Injunction and It Is Too Late to Change the Rules for the October Elections

The State Board has already implemented the expanded injunction in ways that simply cannot be undone—at least not without throwing the upcoming October municipal elections into utter chaos.

On August 23, within hours of the trial court's expanded injunction, the State Board adopted new language for its forms and guidance to implement the expanded injunction. Specifically, under the new language on the State Board registration

form and other 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. The State Board has already changed its forms and guidance (both digital and paper) to include this language, and has been working for the past week and a half with multiple other state agencies and county boards of elections to ensure that this correct new language is included and used consistently, everywhere.

In addition to changing the forms and guidance, the State Board immediately issued multiple public statements announcing the expanded injunction and advising that all people on felony probation, parole, or post-release supervision may register and vote *immediately*. A State Board press release on August 23 stated that the trial "entered a preliminary injunction Monday to restore voting rights to all North Carolinians on felony probation, parole, or post-release supervision." It further explained that "[t]his means county boards of elections across North Carolina must immediately begin to permit such individuals to register to vote."[1]

Also on August 23, the State Board publicly released Numbered Memo 2021-06, titled "Restoration of Voting Rights for Felons on Community Supervision." It reiterated that the trial court "**entered a preliminary injunction requiring that any person on community supervision (including parole, probation, or post-release supervision) for a felony conviction be permitted to register and vote.**" It noted that "[t]he court indicated that the order was to take effect as of today, August 23, 2021."

[1] 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.

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 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 requiring individuals to state only, "I am not in jail or prison for a felony conviction." And the Memo enclosed a "Notice" for the public again reiterating: "**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.**"[2]

It is simply too late to try to undo the changes to State Board forms and guidance, and all of the State Board's other work implementing the expanded injunction, in time for the October municipal elections. From the beginning, the State Board made emphatically clear that any changes to its forms and guidance needed to be finalized and executed no later than Monday, August 23, in order to be used in the October elections. The State Board told the trial court, unequivocally, 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." 8/22/21 State Board Defs.' Request for Clarification at 7 (emphasis added). That deadline came and went a week and half ago.

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

As the State Board repeatedly explained to the trial court, including in an August 22 filing, "[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.").

It is far from clear how the State Board could even attempt to undo everything that has been done to implement the expanded injunction, if a stay were granted. Even if the registration form and other forms and guidance could be changes, there would be multiple versions of all of those forms and guidance, dated just days apart, providing conflicting information about who may register and vote. Even if the State Board were to issue new public announcement about a stay of the expanded injunction, those announcements would conflict with the extensive public information already released by the State Board, Plaintiffs, and many others to educate people on felony probation, parole, and post-release supervision that they may register to vote immediately and may vote in the October elections. County boards of elections would be confronted with differing versions of the registration form submitted by different people at different times this month and next, as well as conflicting public messages about who can register and vote. Poll workers in

October could not be expected to understand such back-and-forth court rulings about the voting rights of tens of thousands of North Carolinians.

The harm to this State's democratic process from a stay is palpable and overwhelmingly forecloses any stay.

B. Many People Have Already Registered to Vote in Reliance Upon the Trial Court's Expanded Preliminary Injunction

Since the Court's expanded injunction on August 23, 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 expanded injunction, and to help people get registered. By way of example:

- Dennis Gaddy of Community Success Initiative (CSI) has contacted at least 15 partner organizations to educate them about the expanded injunction and share the State Board's updated registration form. Through this outreach, an estimated 800 impacted people have been informed that they have the right to vote while on community supervision. Mr. Gaddy personally 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 Carolina state chapters of the A. Philip Randolph Institute, the Pamlico County Reentry Development Center, the Onslow County Democratic Women, and the Wake County Local Reentry Council. She has provided updated registration forms to roughly 70 to 80 people who visit Justice Served each day. Ms. Powell has spoken to hundreds of people in person and via social media to educate them about their right to vote while on community supervision for a felony conviction. On August 28th, Ms. Powell co-hosted a voter registration drive with the Mecklenburg Chapter of the NC Second Chance Alliance in Charlotte. Through their outreach they were able to educate a number of community members about their right to vote on community supervision, as well as help dozens of impacted people register to vo. She is planning a voter registration event on September 10 in

Raleigh at Justice Served 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 sent out text-message blasts to all residents in WAU housing facilities, all clients in their current caseload, and all employees (the majority of whom are directly impacted by the court's decision), informing them of their right to vote while on community supervision for a felony conviction. He has educated hundreds of other people via social media of their ability to vote while on community supervision. Mr. Purdie has personally helped four people register to vote already, and his staff members are continuously helping others register. He has contacted at least eight Community Corrections Judicial District Managers in eastern North Carolina to educate them about the expanded injunction as well. He has also educated numerous post-release supervision officers on the right to vote for people on community supervision. 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.

- The NC NAACP held a mass meeting on Tuesday, August 24, where all its branches were informed of the expanded injunction and what it means for people on community supervision for a felony conviction. President Spearman and the NC NAACP provided all branches with the updated registration form and other resources published by the State Board of Elections, as well as media coverage of the expanded injunction. The NC NAACP has also launched a voter registration and education campaign alongside the NC Second Chance Alliance to support outreach to those newly enfranchised, and branches have begun that outreach at the county level including in registration efforts over this past weekend.

- Community organizers and partnership organizations with the NC Second Chance Alliance have sent out more than 18,000 text-message notifications to people informing them that if they are currently on felony community supervision, they are now allowed to register and vote. NC Second Chance Alliance organizers have also started a statewide phone-banking campaign to inform North Carolinians of their right to vote on felony community supervision. Additionally, the Second Chance Alliance has sent a newsletter to over 4,000 people informing them of this voting-rights expansion.

- Other organizations and community organizers across the State—including re-entry providers such as Benevolence Farm, Buncombe County Reentry Council, Down Home NC, Center for Community Transitions, and LINC Inc., and non-profit democracy organizations such as You Can Vote, Black Voters Matter, and Democracy NC—have begun educating people on felony community supervision of their right to vote, and providing impacted people with the updated registration form and other State Board forms and guidance. This outreach has touched tens of thousands of North Carolinians.

- On August 28 and 29, a team of over 100 volunteers from Hope Springs for Field PAC knocked on 8,750 doors across North Carolina (in the Charlotte, Raleigh, Greensboro, Fayetteville and Asheville areas) to inform individuals on probation, parole or post-release supervision of their right to vote under the expanded injunction. In addition, 6,810 phone numbers were called informing North Carolina residents of this voting-rights expansion.

Make no mistake: Many people on felony probation, parole, and post-release supervision have already registered to vote using the State Board's updated registration form, in reliance on the trial court's expanded injunction. They are now registered to vote, and they have been told by the trial court and the State Board that they may vote in the upcoming October elections. It is too late to tell those people otherwise now—to tell them that they are disenfranchised again.

Beyond the extreme harm to people who have already registered to vote in reliance upon the expanded injunction, back-and-forth court rulings on the voting rights of this class of disproportionately Black people would do lasting—and perhaps permanent—harm to the community's faith in any later ruling in Plaintiffs' favor. People may never believe they are allowed to vote, even when they are.

This Court should not grant a stay that would cause such extreme harms to North Carolina's democratic process, to the administration of the upcoming October municipal elections, and to the people of this State.

C. A Stay Would Necessarily Disenfranchise People Who Are Eligible

Because the State Board cannot accurately implement the trial 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. Legislative Defendants do not (and cannot) at this late stage challenge the original injunction or the trial court's underlying judgment on Plaintiffs' wealth-based discrimination claims, which Legislative Defendants chose *not* to appeal last fall.

But it is entirely unclear *who* should be told that they are disenfranchised again if this Court stays the expanded injunction. The State Board will not be able to isolate, identify, and contact the group of people who are (1) on supervision from a felony conviction, (2) now registered to vote, but (3) are *not* entitled to vote under the original injunction that Legislative Defendants do not challenge. Conversely, it will not be able to isolate, identify, and contact the group of people who registered in reliance on the expanded injunction but *were* entitled to vote under the original injunction. Indeed, a major problem with the original injunction is that many people who the original injunction re-enfranchised would not realize that they were covered because general and special probation conditions often overlap. The group of people who felt safe to register under the clear, easily implemented terms of the

expanded injunction likely includes some people who were also eligible under the original injunction. Staying the expanded injunction will inevitably mean that those people will not vote for fear of criminal prosecution.

A stay of the expanded injunction would thus cause grave and irreparable harm by preventing *eligible* North Carolina voters from voting. That harm of disenfranchising eligible voters outweighs any harm to Legislative Defendants.

II. Defendants Will Experience No Cognizable Harm Absent a Stay

If the State Board implements the trial court's expanded injunction, all individuals covered by the court's original injunction will be permitted to register and vote in the upcoming October municipal elections, while avoiding the many severe problems in implementation identified by Plaintiffs and the State Board. There is no harm in that. Allowing this broader class of individuals to register and vote in the October elections is particularly harmless in light of the trial court's determination that, following the four-day trial, Plaintiffs are now likely to succeed on their broader claims that the disenfranchisement of all individuals on felony probation, parole, or post-release supervision constitutes invidious racial discrimination against Black people and violates the Free Elections Clause.

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 trial court's original injunction. But as the trial court explained, 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. *See infra* Section III.B. What's more, in light of the September 10 deadline for the parties to submit post-trial briefs below, the trial court will likely soon issue a final judgment deciding the merits of Plaintiffs' broader claims, which will moot the preliminary injunction. It is hard to see how allowing more people 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 harms to Plaintiffs and thousands of others from a stay.

III. Legislative Defendants Are Unlikely to Prevail on Appeal

Legislative Defendants make four main arguments for overturning the trial court's expanded injunction: first, they argue that Plaintiffs lack standing; second, they say that the trial court misunderstands North Carolina criminal sentencing and its own original injunction and that this Court should interpret the original injunction based on Legislative Defendants' understanding; third, they claim that the trial court had no basis to revisit its determination about Plaintiffs' likelihood of success on their broader claim in light of the four-day trial; and fourth, they contend that the trial court should have considered alternative remedies that were not presented to it and are unworkable anyway. They also offer a hodgepodge of other objections to the expanded injunction. None of their arguments has a substantial chance of carrying the day on appeal.[3]

[3] Legislative Defendants devote an entire section of their brief to arguing that this Court has jurisdiction over their appeal of the expanded injunction. Pet. at 14-15. Plaintiffs will address

A. Plaintiffs Have Standing to Bring this Lawsuit

Legislative Defendants argue, for the first time, that Plaintiffs lack standing to bring this case because "Legislative and State Board Defendants are not authorized to prosecute any convicted felons who might vote illegally," and thus "enjoining Defendants from enforcing § 13-1 would not redress Plaintiffs' alleged injury." Pet. at 16. Their theory seems to be that people prohibited by law from voting do not have standing to challenge the deprivation of their voting rights unless they are subject to criminal prosecution for voting illegally.

That is nonsensical. Plaintiffs are not challenging the statute that criminalizes voting before a person's rights are restored. Instead, Plaintiffs are challenging N.C.G.S. § 13-1's disenfranchisement of people living in the community on felony probation, parole, or post-release supervision. The State Board indisputably administers § 13-1, including by publishing the registration form and other forms and guidance that dictate who may register and vote in North Carolina elections—forms and guidance that previously excluded people on felony probation, parole, or post-release supervision. The trial court's expanded injunction allowing all individuals on felony probation, parole, or post-release supervision to register and vote thus *has already redressed* Plaintiffs' injuries. Legislative Defendants' standing argument is further belied by their contention that this Court should restore the original injunction focused on people with monetary obligations. It

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that issue if this appeal moves forward after this Court's disposes of Legislative Defendants' requests for a writ of supersedeas and a temporary stay. But even if the expanded preliminary injunction is immediately appealable, Legislative Defendants are unlikely to win on appeal.

makes no sense for Legislative Defendants to advocate an alternative form of injunction that they purportedly believe Plaintiffs lack standing even to request.

For similar reasons, Legislative Defendants are wrong that Plaintiffs "have not … challenged the laws that actually prevent certain felons from voting." Pet. at 16. Section 13-1 is the law that prevents people from registering and voting as long as they are on felony probation, parole, or post-release supervision. And as the trial court explained last fall and against last week, although § 13-1 implements the constitutional provision regarding felony disenfranchisement, it must comply with other provisions of the North Carolina Constitution.

B. The Trial Court Correctly Expanded its Original Injunction Based on the State Board's Inability to Implement that Injunction

Legislative Defendants argue that the "expansion was [not] necessary to effectuate the initial injunction's intent." Pet. at 19. This argument is premised on Legislative Defendants' incorrect and offensive view that they understand the trial court's original injunction and criminal sentencing better than the trial court.

First, Legislative Defendants argue that the expanded injunction "contradicts itself" by affording relief to a "broader" class of people than the trial court "intended" to cover through its original injunction. Pet. 20. That makes no sense. The trial court explained very clearly, both at the August 23 hearing and its in written order, that the broader relief in the expanded injunction was necessary precisely *because* there was no feasible way to implement the original injunction which had been intended to apply to a narrower category of people.

Second, Legislative Defendants purport to teach criminal sentencing to the Superior Court judges on the trial court panel. *See* Pet. at 20-21. Legislative Defendants' discussion of these issues is hard to follow, but they appear to be saying that the State Board's implementation of the original injunction last fall was correct because there is no one on an initial term of probation due to monetary obligations. But as the trial court explained very clearly during the trial, this is wrong, and it reflects Legislative Defendants' basic misunderstanding of how sentencing works. The trial court judges explained that they themselves and other superior court judges are often influenced by the amount of monetary conditions when setting *the length of a person's initial term of probation*. That is, if a person owes a lot of fees or costs, the trial court will often set a longer initial term of probation to ensure that the person can pay off those monetary obligations. So even Legislative Defendants' hypothetical person who "pay[s] off his monetary obligations on day one," Pet. at 20, would still remain on probation *because of* those monetary obligations.

In short, there *are* people on initial terms of felony probation due to monetary obligations, and that is why 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 people from registering and voting in November 2020. It is baffling that Legislative Defendants are asserting that this class of individuals does not exist.

Legislative Defendants also claim that the trial court and Plaintiffs have not identified a "single person who is on an initial term of probation solely because of

monetary obligations." Pet. at 21. If what Legislative Defendants mean is that the court and Plaintiffs had to identify a specific individual by name, this is wrong and they cite no authority for such a proposition. The whole problem is that the State Board and DPS lack records to identify these people. And again, Legislative Defendants' claim that the trial court has not "explained how such a person *could* exist," Pet. at 21, is also simply wrong—the trial court judges explained very clearly during the trial that they themselves had sentenced such people in this way.

Legislative Defendants also claim that the State Board's conceded inability to identify people on *federal* felony probation due to monetary obligations is irrelevant because the trial court "did not identify a person remaining on federal probation solely for monetary reasons or explain how that situation might arise." Pet. at 23. For starters, Legislative Defendants did not dispute below that there are federal probationers who are constitutionally eligible to vote under the original injunction but whom the State Board cannot identify. In any event, it is obvious how the "situation might arise": the federal law entitled "Conditions of Probation" requires federal courts to impose as conditions of probation that the defendant "make restitution" and "pay the [applicable] assessment." 18 U.S.C. § 3563(a), (a)(6). Further, "[i]f the court has imposed and ordered execution of a fine and placed the defendant on probation, payment of the fine or adherence to the court-established installment schedule shall be a condition of the probation." *Id.* § 3563(a).

Third, although not entirely clear, Legislative Defendants seem to deny that the original injunction was designed to cover all person with monetary obligations

and other regular conditions of probation (on either an initial or extended term). In other words, according to Legislative Defendants, the original injunction applied only to people who owe monetary obligations but have no other regular conditions of probation. That is wrong. The original injunction on its face applied to anyone whose "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." PI Order at 10 (emphasis added). Both the State Board and Plaintiffs that explained that implementation of that language would cause severe problems, and Legislative Defendants do not contend otherwise.

Given the State Board's inability to implement the original injunction, 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).

For example, after finding that a statute extending financial benefits to children of an unemployed "father" was unconstitutional, the Supreme Court did not hold that no one got benefits, but instead extended the statute to cover children of unemployed mothers as well. *Califano v. Westcott,* 443 U.S. 76, 80, 92-93 (1979) (affirming district court decision "ordering that 'father' be replaced by its gender neutral equivalent"); *accord, e.g., Frontiero v. Richardson,* 411 U.S. 677 (1973) (extending statute conferring discretionary benefit on men to confer that benefit on women as well). Similarly, after finding that a disability program and a food stamp program unlawfully excluded particular classes of individuals, the Supreme Court extended the programs to the wrongfully excluded classes. *Jimenez v. Weinberger,* 417 U.S. 628, 630-631 & n.2, 637-638 (1974); *Dep't of Agriculture v. Moreno,* 413 U.S. 528, 529-530, 538 (1973).

Faced with the choice between unconstitutionally *disenfranchising* people who were on some form of supervision as a consequence of monetary obligations—again, a constitutional conclusion that Legislative Defendants did not appeal and cannot appeal now—and enfranchising more people, it was perfectly lawful and appropriate for the trial court to choose enfranchisement.

C. The Trial Court Correctly Concluded that Plaintiffs Are Likely to Prevail on Their Broader Claims Based on the Full Trial Record

Legislative Defendants identify a "second rationale" for the expanded injunction, namely the trial court's observation that Plaintiffs are likely to succeed on the merits of the claims that recently went to trial. Pet. at 17-18. The claims that went to trial directly challenged the disenfranchisement of anyone living in the

community on probation, parole, or post-release supervision for any reason, meaning that if those claims succeed, the expanded injunction is proper on its own, not just as a consequence of the inability to implement the original injunction.

Legislative Defendants nonetheless purport not to understand this "second rationale," noting that at the time of the original injunction last fall, the trial court concluded that Plaintiffs had not yet established that N.C.G.S. § 13-1 facially violates the state constitution by disenfranchising anyone on felony supervision. Pet. at 18. Legislative Defendants then state that, in the expanded injunction, the court "inexplicably reversed itself." Pet. at 18.

But the explanation is obvious: the parties have now presented all their evidence at trial, and based on that evidence, the court concluded that Plaintiffs are likely to succeed. That is not a "reversal"; it is consistent with the ordinary course of litigation in which courts often deny summary judgment to one party but then rule for that party on the basis of the trial evidence. Legislative Defendants say the court was required to restrict itself to the "*preliminary-injunction record*," Pet. at 18 (emphasis original), by which they seem to mean the record as it stood a year ago. But they offer no reason or authority why this is so or why a court exercising equitable authority isn't entitled to take into account new facts and evidence.

Anyways, Plaintiffs specifically asked the court to expand the original injunction, relying, among other things, on facts and evidence presented at trial. Legislative Defendants never argued below that the trial court was barred from taking into account the trial evidence. And it was particularly appropriate for the

trial court to reevaluate the evidence given that the only reason it identified in fall 2020 for denying an injunction on Plaintiffs' broader claims was its view that the State Board and Legislative Defendants were entitled to introduce "facts or empirical evidence" at trial supporting the purported state interests in the broader disenfranchisement. PI Order at 9. As noted, no Defendant did so at trial.

D. Legislative Defendants Do Not Identify Any Viable Alternative Relief

Legislative Defendants offer a handful of purported alternative remedies to identify people with monetary obligations. They did not advance these below and they are impractical and insufficient in any event. None of these half-baked solutions obviated the need for the trial court to expand its injunction (and in any event, they are non-responsive to the trial court's observation that Plaintiffs were likely to succeed on the broader merits of their claims).

First, Legislative Defendants claim that "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." Pet. at 22. But as noted, the trial court explained that many people—included people the trial court judges had themselves sentenced—are on lengthier *initial* terms of probation because of monetary obligations even though their non-monetary conditions are *not* waived. Moreover, Legislative Defendants offer no suggestion or evidence that the State Board would be able to identify such people. Finally, Legislative Defendants did not identify this possibility to the trial court, so it cannot be a ground for appealing the injunction.

Legislative Defendants alternatively suggest that the trial 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 "relied on [DPS] data to ensure that those people are permitted to do so." Pet. at 22. But it is not clear that the State Board or DPS can identify these people, plus it would not include federal probationers, and the State Board has asserted that any such list would necessarily include people who were *not* covered by the original injunction, such as people who were sentenced to special conditions that are now incorrectly coded as regular conditions. *See* State Board Defs.' Am. Request for Clarification Regarding Implementation of Injunction at 5-6. Those people would then be told incorrectly by the State Board that they were eligible to vote, and would expose themselves to criminal prosecution by voting based on that misinformation. In any event, because Legislative Defendants did not propose this "narrower" solution to the trial court either, they cannot rely on the trial court's failure to adopt it as a basis for their appeal of the expanded injunction.

E. Legislative Defendants' Other Arguments Lack Merit

Legislative Defendants also argue that enjoining § 13-1 was improper because it "does not disenfranchise anyone; it provides paths to re-enfranchisement," and that if § 13-1 is enjoined, the trial court's only option is to eliminate any and all rights restoration for everyone with a felony conviction. Pet. at 16. They have waived this argument by failing to challenge the original injunction, to which this argument equally applies. Anyway, the argument is meritless. Courts all the time craft equitable remedies that include striking words

from a statute without striking the entire statute. On Legislative Defendants' theory, if § 13-1 literally stated that only men with felony convictions could have their rights restored, a court would be powerless to remedy the gender discrimination and would face the choice of leaving the discrimination in place or permanently disenfranchising all people with felony convictions. That is not the way courts' equitable remedial authority works.

Legislative Defendants also assert that the number of people who would be unconstitutionally disenfranchised if the original injunction were put back in place now is likely to be small. But they provide no evidence of this, and anyway it is irrelevant.

Finally, Legislative Defendants seem to assert that it is unconstitutional to craft an equitable remedy that is overinclusive. But the remedy is not overinclusive given the trial court's conclusion that Plaintiffs are now likely to succeed on the merits of their broader claims that went to trial. And given that failing to expand the original injunction would unconstitutionally disenfranchise voters who are on probation solely as a result of monetary conditions, it was well within the trial court's discretion to choose enfranchisement.

CONCLUSION

For the foregoing reasons, Legislative Defendants' petition for writs of supersedeas and certiorari and motion for a temporary stay should be denied.

Respectfully submitted this the 31st day of August 2021.

FORWARD JUSTICE

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N.C. R. App. P. 33(b) Certification: I certify that 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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Exhibit A

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.	**THE STATE BOARD DEFENDANTS' NOTICE REGARDING IMPLEMENTATION OF INJUNCTION AND MOTION FOR CLARIFICATION**

The North Carolina State Board of Elections and its members ("State Board Defendants") hereby provide notice of the State Board Defendants' further efforts to implement this Court's Injunction of September 4, 2020, pursuant to this Court's direction to the State Board Defendants on August 19, 2021, and to seek clarification or guidance on this Court's direction.

In light of the pressing elections-administration deadlines that the State Board is under, and as discussed in greater detail in Section III below, the State Board must implement any changes to language on the voter registration forms by Monday, August 23, 2021, if they are to take effect in time for this fall's municipal elections. Accordingly, to the extent any clarification of this Court's direction is warranted, the State Board respectfully requests that such clarification be provided by Monday, August 23, 2021.

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

Following this Court's oral ruling last Thursday to implement certain changes to the voter registration forms immediately, the State Board plans to update State Board forms and guidance regarding voting eligibility for people convicted of felonies with the following language:

> (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.

II. Practical Considerations Regarding Implementation

While the State Board Defendants stand ready to implement the Injunction as instructed by this Court on Thursday, they would like to raise for the Court's consideration certain practical considerations that will 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.

First, there are significant administrative challenges for the North Carolina Department of Public Safety (DPS) to be able to isolate those people on probation who are serving probation as a result of only monetary conditions (aside from the other regular conditions of probation). More broadly, the State Board is working with DPS to confirm whether DPS will be able to identify every person who is serving probation with only regular conditions and who have monetary obligations. But DPS, as a general matter, has no record of whether, putting aside the general conditions, these persons would not be serving probation but for the monetary obligations. The State Board understands that the judgment and administrative records and inputs into DPS's system do not account for this specific scenario.[1]

Accordingly, this presents administrative issues for the State Board in terms of informing a person as to whether State Board records indicate that they are permitted to register and vote.

[1] Separately, following this Court's injunction law fall, DPS was able to identify individuals on *extended* terms of supervision and who owe monetary obligations. Those individuals have been removed from the data used by the State Board to identify ineligible voters.

The State Board has identified two administrative solutions to this issue, both of which present concerns:

1. The State Board could rely on the current feed from DPS and inform people that, according to State Board records, they are not eligible to vote; inform such individuals in the notice that our information does not account for all people affected by the Court's order (namely, those on a non-extended term of supervision); and encourage those persons who *are* eligible under the terms of the Court's order to inform the county board of their eligibility so their registration and vote may be processed. The State Board would assist county boards who were alerted of this issue by communicating with DPS to determine if there was documentation of the person's eligibility—although, as discussed above, such documentation may not be available as a general matter. This proposal raises the concern that it places the onus on the voter to disprove their *in*eligibility, due to lack of confirming information available to the State Board. Such a system could have the unfortunate result of keeping people from voting who should vote under the Injunction.
2. Alternatively, the State Board could request that DPS remove from its feed of felons currently on supervision (and who are ineligible to vote) all persons whose probation terms include financial obligations and the regular conditions of probation only—again, this assumes that the State Board can confirm with DPS that it is possible to isolate this population in the data. This would allow any person covered by the Court's order to register and vote, without any prospect of an initial denial. But it would also be overinclusive, permitting people who are

not covered by the Court's injunction to register and vote (*i.e.*, people for whom the financial obligation is not the reason for being on their initial term of probation, setting aside the regular conditions). Such voters would not benefit from an administrative flagging that could prevent them from unknowingly violating election laws.

Accordingly, the State Board Defendants are in the unfortunate position of either permitting ineligible voters to vote or discouraging eligible voters from voting. They therefore would welcome the Court's guidance on carrying out the Injunction.

Second, the language the State Board has identified for implementing the Injunction requires the potential voter to ensure she is eligible by reviewing all the regular conditions of probation under N.C.G.S. § 15A-1343(b) and determine whether those are the only other conditions of her probation. This places the onus on the potential voter to compare the text of the statute to her probation order or her memory of her terms of probation to determine whether those "regular" conditions are the only ones that apply to her. Plaintiffs have raised the concern that requiring this type of analysis by the voter may chill a potential voter's ability to determine whether she is eligible.

III. Request for Clarification and/or Guidance

The State Defendants would appreciate the Court's guidance on which of the above two pathways most effectively implements the Court's injunction, or whether additional changes to the language on the voter registration forms need to be made.

Due to the administrative processes involved in conducting the upcoming elections, time is of the essence. Essentially, the State Board would need any further direction from this Court

by Monday, August 23, 2021, so that the State Board can properly implement the new language before the upcoming elections.

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

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

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 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, and it includes the relevant language regarding eligibility as a result of the Injunction. 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 form language to implement the Injunction was finalized, it took the State Board approximately a month to implement the changes to the forms in SEIMS following this Court's Injunction.

Accordingly, in addition to being required by the Court to initiate changes immediately, the State Board, as an administrative matter, must also 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, State Defendants respectfully provide notice to the Court of administrative challenges involved in the implementation of the Injunction and seek the Court's guidance, as soon as possible, on proper implementation of its Injunction.

This the 21st day of August, 2021.

JOSHUA H. STEIN
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This the 21st day of August, 2021.

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