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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