

FACTUAL BACKGROUND

On August 19, 2021, during trial on the remaining claims in this matter, the Court informed all parties that the current language on State Board documents regarding who is eligible to vote following a felony conviction under the Court's prior preliminary injunction order was incorrect and required immediate correction. Following the oral ruling on August 19, on Friday, August 20, the State Board proposed corrected language and raised significant administrative concerns with implementing that language. In response, the Court scheduled a second hearing on the issue for Monday, August 23. In the interim, the State Board Defendants further detailed the administrative concerns, mainly in precisely identifying the class of people to whom the Court's injunction applied, and explained how implementation of the court's instruction appeared to require one of two pathways, both of which would posed significant drawbacks that would benefit from the Court's clarification and guidance before being implemented.

At the August 23 hearing, the Court directed a grant of an injunction to require the State Board Defendants to ensure that all persons serving felony community supervision could register to vote and vote. In order to implement this, the Court directed the State Board to refrain from refusing registration to any person on community supervision. The Court expressly directed the State Board to immediately implement the expanded injunction starting that day and not to wait for a written order from the Court.

Accordingly, the State Board Defendants worked diligently that day to draft and implement new language to appear on State Board forms and notices regarding eligibility to vote following a felony conviction. The State Board, along with other state agencies, immediately began work behind the scenes to implement the Court's directive as well.

ARGUMENT

I. Equitable Considerations to Staying the Preliminary Injunction

In considering Legislative Defendants' motion to stay, the State Board Defendants urge the Court to take into account several equitable considerations, particularly as to the actions the State Board Defendants have already taken to comply with this Court's directive and its interests in safeguarding the integrity of elections in this State.

A. Administrative Steps Taken by the State Board to Implement This Court's Directive

As the State Board Defendants have repeatedly exhorted, time is of the essence in making any changes to the administrative processes involved in conducting the upcoming elections in the fall. The State Board Defendants previously informed the Court that it would need guidance about how to properly implement the preliminary injunction in this case by August 23, 2021 so that the State Board could make the necessary changes to voter registration forms. It is now August 25. Since this Court's directive on August 23 to immediately implement the injunction, and consistent with the State Board's assurances to the Court, the State Board has been working expeditiously to implement the Court's directive.

Immediately following the hearing, on August 23, the State Board Defendants formulated new language to appear on its voter registration forms. That same day, the State Board updated its online voting registration forms to reflect this new language.¹

¹ https://s3.amazonaws.com/dl.ncsbe.gov/Voter_Registration/NCVoterRegForm_06W.pdf;
Spanish version:
https://s3.amazonaws.com/dl.ncsbe.gov/Voter_Registration/NCVoterRegForm_09W.pdf

The evening of August 23, State Board staff issued a written directive to all county boards of elections, in the form of Numbered Memo 2021-06,² informing them of this Court’s direction and instructing them how to begin implementation, the steps that would follow, and to desist from denying registration to those on community supervision. State Board staff and county board staff engaged in numerous conversations to clarify how to implement this Court’s directive and the State Board staff issued further instructions.

Also on August 23, the State Board issued a press release to the public announcing that all persons on community supervision are now eligible to vote.³

Also on August 23, and on an ongoing basis since then, the State Board has updated content on its public website. At least 6 separate webpages have undergone changes to reflect the Court’s directive and how it is being implemented by the State Board.

On August 25, State Board staff conducted the agency’s bi-weekly teleconference that is provided to the 100 county board of elections directors and other staff at which the implementation of this injunction was a primary topic and several answers were provided to address county staff’s questions to help them with implementation.

On August 25, the State Board provided the North Carolina Department of Public Safety (NCDPS) with an updated version of the “Notice of Restoration of Voting Rights” to be provided to individuals on community supervision. It will now be provided at their initial

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https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2021/Numbered%20Memo%202021-06_Court%20Order%20re%20Felon%20Voting%20Rights.pdf.

³ <https://www.ncsbe.gov/news/press-releases/2021/08/23/statement-ruling-community-success-initiative-v-moore-case>.

interaction with probation and parole officers rather than when their supervision comes to an end.

Immediately following the hearing, the State Board staff started coordinating with NCDPS staff regarding the necessary updates to the felon data steam that the State Board uses to identify those who are eligible to vote, which is used for maintaining the official voter registration list for the State. NCDPS staff are still working to remove all persons on community supervision. This will allow the State Board to automatically process registrations by those on community supervision without manual interventions by county board staff.

Since this Court's directive, the State Board has also been updating numerous other forms and public-facing documents, while also taking steps to implement changes into its Statewide Election Information Management System (SEIMS). It is also working with the Department of Health and Human Services and the Division of Motor Vehicles, to update voter registration forms and practices at those agencies, which both have a role in voter registration under federal law.

These changes are a sampling of the continuous and ongoing efforts undertaken by the State Board to carry out this Court's directive. Interruption or reversal of this process would result in delayed implementation, retractions of public communications regarding voting eligibility, reinstruction of staff, and voter confusion.

B. Administrative Challenges That Would Arise if a Stay Were Issued

As a threshold matter, if a stay were issued, depending on its specific terms, the State Board would need to immediately reverse the efforts described in Part I above to at least remove all updates and information about the Court's directive and make any adjustments to these forms, system updates, and voter communications.

As the State Board has informed the Court, the State Board must continue implementing these changes expeditiously or it may not be prepared to do so in time for the upcoming elections. As an example of the work going into this process, the State Board currently has more than 40 items that need to be updated following this Court's directive. These items must be first be updated by staff and reviewed by counsel. Some forms will then be made available to county boards of elections. Others must next be incorporated by information technology staff and coded into SEIMS. These items are being addressed on an ongoing basis by staff. In order to fully implement this Court's injunction in time for the upcoming elections, this process needs to continue unimpeded.

If the Court were to grant the Legislative Defendants' request to stay *any* implementation of its directive pending a written order (Leg. Defs.' Mot. at 7), the State Board would be at risk of not being able to complete these preparations before the elections this fall. 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.

As things stand today, the State Board anticipates that any delay to implementation would prevent needed updates to SEIMS ahead of the municipal elections. Administration of voter check-in at voting sites is largely conducted through electronic databases and information systems. 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 a SEIMS application and, from the same application,

the poll worker prints a One-Stop Application, on which the voter attests that they are eligible to vote in the election. This form will include the relevant language regarding eligibility as a result of this Court's directive. 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 SEIMS, 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.

As a point of reference, the State Board Defendants note that last fall, it took the State Board approximately a month to implement the changes to forms in SEIMS following this Court's injunction. Early voting for the October election starts 22 days from today.

Importantly, if this Court enters a stay directing the State Board to reverse implementation, all persons within the class covered by the expanded injunction who attempted to register to vote since Monday would be sent letters notifying them that their registration was going to be denied. This would result in significant voter confusion.

Moreover, if this Court were to issue a stay that required reversal of these changes and/or a halt to all implementation preparations, and ultimately, this Court's injunction were upheld and all people on community supervision were permitted to vote, the State Board would likely be unable to implement most of these changes in time for the municipal elections.

C. Other Equitable Considerations

Legislative Defendants argue that equitable considerations require a stay in this matter because the State Board Defendants' implementation of this Court's oral directive has "no legal force and effect" and would potentially "induc[e] violations of law." Leg. Defs.' Mot. at 7. The Court's oral directive to the State Board Defendants was to *immediately* ensure that people who are on community supervision are not rejected from registering to vote or from voting. The State Board Defendants have complied with that instruction. Therefore, they are not "inducing violations of the law," but rather implementing this Court's directive.

It has also been suggested that the State Board's compliance with this Court's directive threatens vote dilution and election integrity. *Id.* at 6. While the State Board Defendants take no position on the stay motion, the Legislative Defendants have failed to establish any risk of vote dilution at this time.

If a court were to later reverse this Court's injunction, actions taken to register voters covered by that injunction are remediable. Indeed, counsel for Legislative Defendants contacted counsel for the State Board Defendants to inquire about whether it would be possible to reverse any registrations accepted in the event the injunction is stricken or stayed in later proceedings. In response, the State Board Defendants assured Legislative Defendants that it would be complicated, but technically feasible, to identify those who had registered following this Court's injunction and cancel their registrations, should a court order the State Board Defendants to do so. *See* Exhibit A (appended). Therefore, absent a stay, even a later reversal of this Court's injunction on appeal should not prejudice the State.

CONCLUSION

Accordingly, State Board Defendants respectfully request that the Court consider these administrative challenges and the potential for voter confusion, as it reaches its decision on this motion.

Respectfully submitted this the 25th day of August, 2021.

JOSHUA H. STEIN
Attorney General

/s/ Paul M. Cox
Paul M. Cox
Special Deputy Attorney General
N.C. State Bar No. 49146
Email: pcox@ncdoj.gov

Terence Steed
Special Deputy Attorney General
N.C. State Bar No. 52809
tsteed@ncdoj.gov

N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
Phone: (919) 716-0185

Counsel for the State Board Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the forgoing document was served on the parties to this action via email and was addressed to the following counsel:

FORWARD JUSTICE
400 Main Street, Suite 203
Durham, NC 27701
Telephone: (984) 260-6602
Daryl Atkinson
daryl@forwardjustice.org
Caitlin Swain
cswain@forwardjustice.org
Whitley Carpenter
wcarpenter@forwardjustice.org
Kathleen Roblez
kroblez@forwardjustice.org
Ashley Mitchell
amitchell@forwardjustice.org

ARNOLD & PORTER KAYE
SCHOLER LLP
601 Massachusetts Avenue NW
Washington, DC 20001
Telephone: (202) 942-5000
Elisabeth Theodore*
elisabeth.theodore@arnoldporter.com
R. Stanton Jones*
stanton.jones@arnoldporter.com

PROTECT DEMOCRACY PROJECT
2120 University Avenue
Berkeley, CA 94704
Telephone: (858) 361-6867
Farbod K. Faraji*
farbod.faraji@protectdemocracy.org

Counsel for Plaintiffs

PHELPS DUNBAR
4141 Parklake Avenue, Suite 530
Raleigh, NC 27612
Telephone: 919-789-5300
Jared M. Butner
jared.butner@phelps.com
Nathan A. Huff
nathan.huff@phelps.com

COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
Telephone: 202-220-9600
Nicole Jo Moss
nmoss@cooperkirk.com

Counsel for Legislative Defendants

This the 25th day of August, 2021.

/s/ Paul M. Cox
Paul M. Cox
Special Deputy Attorney General

From: Cox, Paul
Sent: Tuesday, August 24, 2021 9:41 AM
To: Pete Patterson
Cc: David Thompson; Nicole Moss
Subject: RE: felons case

Hi Pete, I was able to get further information from SBE about your inquiry. Although it would not be without complication, if SBE were ordered by a court, it would be technically feasible for SBE to identify everyone who was able to register as a result of the trial court's ruling yesterday, based on the data SBE is able to access from DPS and federal authorities, along with SBE's own registration data. So there would be no need to do any new or separate procedure to accomplish what you're seeking. I hope this helps you address the issue you've raised.

On a separate issue, when I came into the office this morning, I noticed a voicemail from your clients asking to speak about yesterday's hearing. I think the call came in around 3pm but I didn't notice it until this morning, unfortunately. I was working away from my desk in the afternoon. If there's any further information your client needs, I'm happy to confer with you all about that.

Best regards,

Paul

From: Pete Patterson <ppatterson@cooperkirk.com>
Sent: Monday, August 23, 2021 5:46 PM
To: Cox, Paul <pcox@ncdoj.gov>
Cc: David Thompson <dthompson@cooperkirk.com>; Nicole Moss <nmoos@cooperkirk.com>
Subject: felons case

Paul,

We will be representing the leaders of the General Assembly moving forward in the felon voting case. We are preparing to seek immediate appellate relief from the expansion of the preliminary injunction announced earlier today. A primary concern we have is the ability to reverse any registrations accepted due to the expansion of the PI in the event that expansion is reversed. To that end, we would consider foregoing immediate writ of supersedeas relief if you could add a check box to the registration form for registrants in that category. We could work with you on exactly what the language would be, but the individuals we have in mind are those who have been convicted of a felony and are serving a term of probation, post-release supervision, or parole that has not been extended or has been extended for a reason other than outstanding monetary obligations. Please let us know if this is something that you are interested in discussing, or if there are any ways short of something like this that would allow any registrations ultimately found to be improper to be reversed. Thanks,

Pete

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