

STATE OF NORTH CAROLINA
WAKE COUNTY

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

2021 AUG 24, P 4: 36

COMMUNITY SURVIVAL
INITIATIVE, et al.

Plaintiffs,

v.

TIMOTHY K. MOORE, et al.,

Defendants.

MOTION FOR A STAY
PENDING APPEAL

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

RELEVANT BACKGROUND

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

CONCLUSION

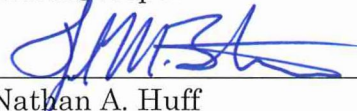
Legislative Defendants respectfully request that the Court stay its order of August 23 pending resolution of their appeal or alternatively until the Court reduces

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

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



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CERTIFICATE OF SERVICE

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

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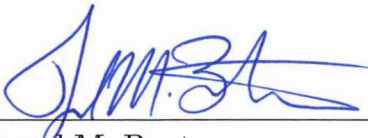
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This the 24th day of August, 2021.

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