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NORTH CAROLINA

COUNTY OF WAKE

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

COMMUNITY SUCCESS INITIATIVE, *et al.*,

Plaintiffs,

v.

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, *et al.*,

Defendants.

ORDER ON AMENDED PRELIMINARY INJUNCTION

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

In this litigation, Plaintiffs seek a declaration that N.C.G.S. § 13-1, the North Carolina statute providing for the restoration of rights of citizenship—which includes the right to vote—for persons convicted of a crime, is facially unconstitutional and invalid under the North Carolina Constitution to the extent it prevents persons on probation, parole, or post-release supervision from voting in North Carolina elections. Plaintiffs also seek, in the alternative, injunctive relief. Specifically, Plaintiffs contend Section 13-1 of our General Statutes violates Article I, Sections 10, 11, 12, 14, and 19 of our Constitution.

Procedural History

Plaintiffs filed the initial complaint in this matter on November 20, 2019, and an amended complaint on December 3, 2019. Defendants filed answers to and motions to dismiss the amended complaint in January 2020; the motions to dismiss were subsequently withdrawn. On May 11, 2020, Plaintiffs filed a motion for summary judgment or, in the alternative, a preliminary injunction.

On June 17, 2020, this action was transferred to a three-judge panel of Superior Court, Wake County, pursuant to N.C.G.S. § 1-267.1 and N.C.G.S. § 1A-1, Rule 42(b)(4). On June 24, 2020, the Chief Justice of the Supreme Court of North Carolina, pursuant to N.C.G.S. § 1-267.1, assigned the undersigned three--judge panel to preside over the facial constitutional challenges raised in this litigation.

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

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

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

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

release supervision, who are not incarcerated, of the right to vote;
2. that N.C.G.S. § 13-1 violates the Equal Protection Clause of the North Carolina Constitution by depriving the African American community of substantially equal voting power; and
3. that N.C.G.S. § 13-1 violates the Free Elections Clause of the North Carolina Constitution.

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

Voting Qualifications for Persons Convicted of Felonies

Article VI, Section 2 of the North Carolina Constitution delineates certain qualifications, or disqualifications, affecting a person's ability to vote in our State. Relevant to this case is Article VI, Subsection 2(3), which dictates that "[n]o person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law." N.C. Const. art. VI, § 2(3).

Plaintiffs' action challenges the "manner prescribed by law" in which voting rights are automatically restored to persons convicted of felonies. The current iteration of the restoration of rights statute reads as follows:

> Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored upon the occurrence of any one of the following conditions:
>
> (1) The unconditional discharge of an inmate, of a probationer, or of a parolee by the agency of the State having jurisdiction of that person or of a defendant under a suspended sentence by the court.
> (2) The unconditional pardon of the offender.
> (3) The satisfaction by the offender of all conditions of a conditional pardon.
> (4) With regard to any person convicted of a crime against the United States, the unconditional discharge of such person by the agency of the United States having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.
> (5) With regard to any person convicted of a crime in another state, the unconditional discharge of such person by the agency of that state having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.

N.C.G.S. § 13-1. That the present-day version of the statute requires the *unconditional* discharge of a person convicted of a felony is of particular import in this case when considering 1) the history of how our State has provided for the restoration of rights of citizenship, and 2) what is required of a person convicted of a felony to ultimately obtain an unconditional discharge.

History of Restoration of Rights of Citizenship in North Carolina

The manner prescribed by law to restore the rights of citizenship for certain persons has a long and relevant history. In 1835, North Carolina amended its constitution to permit the enactment of general laws regulating the methods by which rights of citizenship—including the right to vote—are restored to persons convicted of "infamous crimes." Infamous crimes included offenses which warranted "infamous punishments." Thereafter in

1840, a general law was passed regulating the restoration of rights, including granting the courts unfettered discretion in restoring rights of citizenship.

After the civil war, North Carolina adopted a new constitution which allowed all men to vote, eliminated property-based voting limitations, and abolished slavery. Persons convicted of specific crimes were not expressly forbidden by the constitution from voting; however, a combination of constitutional amendments—including an amendment in 1875 that provided for the disenfranchisement of persons convicted of felonies and infamous crimes—and laws passed over the following decades maintained limitations on the restoration of rights for persons convicted of certain crimes, thereby continuing to deny such persons the ability to vote. Judicial discretion remained part of the process for restoring a person's rights of citizenship.

These limitations lasted until 1971, when the reference to infamous crimes was removed from the constitutional provision and voting rights were taken away from only persons convicted of felonies. Later, the statute was further amended to remove certain, express requirements that must be met by a person convicted of a felony to have their rights of citizenship restored.

Today, the restoration of rights under N.C.G.S. § 13--1 is automatic upon a person's "unconditional discharge" and is not expressly subject to a discretionary decision by a government official, e.g., a judge. But while the final decision to restore a person's rights of citizenship is not left to the discretion of a judge, there do remain a number of discretionary decisions, especially in sentencing, but also in whether to charge an individual, what offenses to charge, whether to reduce charges, and whether a plea offer is extended, that have a direct effect upon when a person's right to vote is restored, along with the qualifications and requirements that must ultimately be satisfied before a person convicted of a felony is permitted to vote.

Injunctive Relief

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

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

Plaintiffs' burden to show a likelihood of success on the merits of their claims is substantial because when a plaintiff challenges the facial constitutionality of a statute, the courts presume "that any act passed by the legislature is constitutional," and "will not strike it down if [it] can be upheld on any reasonable ground." *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 486 (2005) (quoting *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 281-82 (1998)); *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98, 111 (2018) (explaining that courts will not declare a law invalid unless it is determined to be "unconstitutional beyond a reasonable doubt"). Accordingly, "[a]n individual challenging the facial constitutionality of a legislative act 'must establish that no set of circumstances exists under which the [a]ct would be valid.'" *Thompson*, 349 N.C. at 491 (second alteration in original) (quoting *United States v. Salermo*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987)).

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

The Honorable John M. Dunlow dissents from this Order.

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

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

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

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

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

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

Lisa C. Bell, Superior Court Judge

Keith O. Gregory, Superior Court Judge

as a majority of this Three Judge Panel

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ORDER ON AMENDED PRELIMINARY INJUNCTION (DISSENT)

John Dunlow, dissenting.

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

John M. Dunlow, Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below, pursuant to the Court's July 15, 2020 Case Management Order, via e-mail transmission, addressed as follows:

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This the 27th day of August 2021.

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