No. P22-153 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 19 CVS 15941

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PLAINTIFFS' OPPOSITION TO LEGISLATIVE DEFENDANTS' PETITION FOR WRIT OF SUPERSEDEAS

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INDEX

TABLE OF CASES AND AUTHORITIES..... IV

INTRODUCTION 2

PROCEDURAL BACKGROUND 5

STATEMENT OF FACTS 9

I. THE HISTORY AND INTENT OF N.C.G.S. 13-1 ARE ROOTED IN RACIAL DISCRIMINATION AGAINST AFRICAN AMERICAN PEOPLE AND SUPPRESSION OF AFRICAN AMERICAN POLITICAL POWER. 9

a. The 1800s 9

b. The 1970s 13

II. CURRENTLY OVER 56,000 INDIVIDUALS LIVING IN NORTH CAROLINA COMMUNITIES ARE DENIED THE RIGHT TO VOTE DUE TO N.C.G.S. 13-1, A DISPROPORTIONATE NUMBER OF WHOM ARE AFRICAN AMERICAN. 15

III. N.C.G.S. 13-1 DENIES THE FRANCHISE TO PERSONS ON COMMUNITY SUPERVISION WHO WOULD OTHERWISE REGISTER AND VOTE AND LIKELY AFFECTS THE OUTCOME OF ELECTIONS. 17

IV. N.C.G.S. 13-1 DOES NOT SERVE ANY LEGITIMATE STATE INTEREST AND CAUSES SUBSTANTIAL HARM..... 19

REASONS THE COURT SHOULD DENY LEGISLATIVE DEFENDANTS' MOTION FOR A WRIT OF SUPERSEDEAS 21

I. DEFENDANTS ARE HIGHLY UNLIKELY TO SUCCEED ON THE MERITS OF THEIR APPEAL. 21

II. PLAINTIFFS HAVE STANDING TO BRING THIS LAWSUIT AND THE TRIAL COURT ACTED WITHIN ITS AUTHORITY. 22

III. SECTION 13-1'S DENIAL OF THE FRANCHISE TO INDIVIDUALS CURRENTLY ON FELONY COMMUNITY SUPERVISION DISCRIMINATES AGAINST AFRICAN AMERICANS IN INTENT AND EFFECT AND DENIES THEM SUBSTANTIALLY EQUAL VOTING POWER IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE NORTH CAROLINA CONSTITUTION..... 29

a. The Law Has the Impermissible Intent and Effect of Disproportionately Denying the Franchise to African Americans..... 29

b. The Law Impermissibly Denies Substantially Equal Voting Power to Similarly Situated Groups. *34*

IV. SECTION 13-1'S DENIAL OF THE FRANCHISE TO INDIVIDUALS CURRENTLY ON FELONY COMMUNITY SUPERVISION VIOLATES THE FREE ELECTIONS CLAUSE OF THE NORTH CAROLINA CONSTITUTION..... 37

V. THE DEFENDANTS WILL NOT FACE IRREPARABLE HARM IF THE MOTION TO STAY IS DENIED. 39

VI. THE EQUITIES AND THE PUBLIC INTEREST FORECLOSE A STAY. . 42

CONCLUSION..... 43

TABLE OF CASES AND AUTHORITIES

Cases

Blankenship v. Bartlett, 363 N.C. at 527, 681 S.E.2d 759 (2009)…….35
Chatham, LLC v. Rutherford Elec. Mbrshp. Corp., No. 14-CVS-711, 2014 NCBC LEXIS 35 21
Community Success Initiative v. Moore, No. 19-cvs-15941 (Wake Cty. Super. Ct. (2022))……..…….2, passim
Common Cause v. Lewis, No. 18-cvs-014001 (Wake Cty. Super. Ct. (2019)). 37
Harper v. Hall, No. 413PA21, 2022 N.C. LEXIS 166 ..... ……37
Holmes v. Moore, 840 S.E.2d 244, 265-67 (N.C. Ct. App. 2020)…….. 26, passim
Hunter v. Underwood, 471 U.S. 222, 227 (1985) 31
King ex rel. Harvey-Barrow v. Beaufort County Board of Education, 364 N.C. 368, 704 S.E.2d 259 (2010) 35
N.C. State Bd. of Educ. v. State, 255 N.C. App. 514, 529, 805 S.E.2d 518, 527 (2017), *aff'd*, 371 N.C. 149, 814 S.E.2d 54 (2018), ... 27
North Carolina State Conference of NAACP v. McCrory, 831 F.3d 204, 221 (4th Cir. 2016)) 33
Ramos v. Louisiana, 140 S. Ct. 1390, 1410 (2020) 33
State v. Fredell, 283 N.C. 242, 245, 195 S.E.2d 300, 302 (1973). 27
State v. Hilton, 271 N.C. App. 505, 845 S.E.2d 81 (2020)..... 28
State v. Campbell, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) 23
State v. Hennis, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). 23
Stephenson v. Bartlett, 355 N.C. 354, 371, 562 S.E.2d 377, 389 (2002) ..... 25, passim
Town of Midland v. Harrell, 2022-NCCOA-167, 2022 N.C. App. LEXIS 185 (N.C. March 15, 2022). 23

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977). 29

Statutes

N.C.G.S. § 1-267.1 5
N.C.G.S. § 13-1 ..... 2, passim
N.C.G.S. § 14-208.40B(c) 28
N.C.G.S. § 1A-1, Rule 42(b)(4). 5
N.C.G.S. § 1A-1, Rule 65(d) 23
N.C.G.S. § 163-275 12
N.C.G.S. § 15A-1340.17 12

Constitutional Provisions

N.C. Const. art. I, § 19 6
N.C. Const. art. I, § 11 6
N.C. Const. art. I, § 10 37
N.C. Const. art. II, § 3(3). 2
N.C. Const. art. VI, § 2(4). 26
N.C. Const. art. VI, § 3(2) 26

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PLAINTIFFS' OPPOSITION TO LEGISLATIVE DEFENDANTS' PETITION FOR WRIT OF SUPERSEDEAS

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TO THE HONORABLE CHIEF JUDGE AND ASSOCIATE JUDGES OF THE NORTH CAROLINA COURT OF APPEALS:

Pursuant to Appellate Rule 23(d), Community Success Initiative, Wash Away Unemployment, Justice Served NC Inc., the North Carolina State Conference of the NAACP, Susan Marion, Henry Harrison, Timothy Locklear and Shakita Norman

("Plaintiffs") hereby respond to Legislative Defendants' petition for writ of supersedeas seeking a stay pending appeal of the Superior Court's 28 March 2022 Final Judgment and Order in the above-captioned case.

INTRODUCTION

On 28 March 2022, the Superior Court issued its Final Judgement and Order in *Community Success Initiative v. Moore* which allows all individuals living in the community on felony probation, parole, or post-release supervision to register to vote immediately in North Carolina and enjoins Defendants and their agents "from preventing any person convicted of a felony from registering to vote or voting due to probation, parole, or post-release supervision." (Mar. 28, 2022 Order ("Ord.") p. 64, ¶ 2, attached to Legislative Defs.' Pet. as Ex. 17). In its lengthy order supported by substantial witness and documentary evidence presented over the course of a four-day trial, the Superior Court majority found that N.C.G.S. § 13-1's denial of the franchise to persons on felony probation, parole, or post-release supervision violates both the Equal Protection and the Free Elections Clauses of the North Carolina Constitution. On 30 March 2022, Legislative Defendants filed a Motion for a Stay Pending Appeal and a Notice of Appeal with the Superior Court. The trial court denied Legislative Defendants' Motion for a Stay Pending Appeal on 1 April 2022, and Legislative Defendants then filed a Petition for Writ of Supersedeas and Motion for Temporary Stay in this Court. On 5 April 2022, the Motion for Temporary Stay was granted, and this Court ordered that the State Board Defendants hold voter registration applications from individuals on community supervision until further

order of the Court. For the following reasons, Legislative Defendants' Petition for Writ of Supersedeas should be denied.

First, the equities and public interest at stake here weigh overwhelmingly against a continued stay of the Superior Court's Final Order for purposes of the upcoming North Carolina primary elections, and for the quickly approaching subsequent 2022 elections. The results would profoundly damage the State's democratic process by denying the franchise to over 56,000 North Carolina residents — disproportionately African Americans — as well as cause unnecessary confusion and fear amongst the public at large and within the state's administrative agencies seeking to ensure compliance with the law. In contrast, no Defendant will experience any cognizable harm absent a stay, much less "irreparable harm" to warrant a stay. The State Board Defendants stressed to this Court that while "time is of the essence," implementation of the injunction for the 17 May 2022 Primary elections, for subsequent municipal and primary elections in July, and for the November General, is both feasible and already in process. In their most recent filing with the Supreme Court, the State Board once again stated that they "stand ready to continue their efforts in implementing the Superior Court's 28 March 2022 Order as expeditiously as possible…" and detailed the administrative steps they have "already put in place" to comply with this order (State Board Defendants' Response to Plaintiffs' Petition for Discretionary Review and Motion to Suspend the Appellate Rules, No. 331P21, April 13, 2022, at p 3) (attached hereto as Exhibit A). The feasibility is evident also from the guidance of this Court in its Order granting temporary stay, where it

directed that impacted registration applications be held until further order. (Order Granting Temporary Stay, No. P22-153 (Apr. 5, 2022)). In contrast, any *further* action halting the Superior Court's order imposes enormous risks to the rights of Plaintiffs and the many thousands of North Carolinians who immediately gained the right to register and vote by Final Order of the trial court.

Second, Legislative Defendants' merits arguments do not come close to showing a likelihood of success on appeal. Legislative Defendants' request for supersedeas is in service of a law that is *all parties agree* is rooted in racial discrimination against Black people and the suppression of Black political power. As no party disputes, prior to the 1876 felony disenfranchisement constitutional amendment, and the attendant 1877 implementing legislation, people in North Carolina were disenfranchised for infamous crimes or infamous punishments such as "whipping." White former Confederates engaged in a widespread campaign of whipping Black men to systematically prevent them from voting "in advance" of the 15th Amendment, under the prior state law. After the 1876 amendment was ratified, the 1877 implementing legislation was spearheaded in the General Assembly by a former Confederate and avid Jim Crow supporter who once presided over a mass lynching of Black people.

Legislative Defendants point to procedural changes that occurred in the 1970s, however, none of those changes purged or sever the connection to the original racist intent of the 1870s legislation that Plaintiffs now challenge, namely, N.C.G.S. § 13-1's denial of the right to vote to people after their incarceration. As the extensive

record at trial demonstrated, the denial of the franchise to individuals on community supervision effectuated in the current version of §13-1 continues to carry over and reflect the same racist goals of the original 19th century enactment. (Ord. p. 23, ¶ 55).

The racial intent of the law explains the overwhelmingly disproportionate racial impacts that persist today in this state. The uncontested evidence at trial showed that the effect of N.C.G.S. § 13-1 is to disproportionately deny the franchise to Black people by wide margins throughout the state — North Carolinians working, raising children, and paying taxes in their communities. Moreover, the trial court found that 13-1 denied the franchise to thousands of people who would otherwise register and vote, and whose votes would likely affect the outcomes of numerous close elections, without any legitimate present-day state interests.

This Court should deny Legislative Defendants' request for a writ of supersedeas.

PROCEDURAL BACKGROUND

Plaintiffs the North Carolina NAACP, three local organizations that provide direct services to returning citizens, and four impacted individuals, filed their initial complaint as well as a motion to set an expedited case schedule on 20 November 2019. The operative Amended Complaint was filed 3 December 2019. Defendants filed answers and motions to dismiss the amended complaint in January 2020; the motions to dismiss were subsequently withdrawn.

On 11 May 2020, Plaintiffs filed a motion for summary judgment or, in the alternative, a preliminary injunction. On 17 June 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). Thereafter, the three-judge panel comprised of the Honorable Lisa C. Bell, the Honorable Keith O. Gregory, and the Honorable John M. Dunlow, set an expedited schedule for briefing and a hearing on the Motion. Plaintiffs received support from five different sets of amici spanning a wide ideological spectrum, with amici ranging from the Cato Institute to the John Jay Institute to a consortium of Attorney Generals from four states and the District of Columbia. On 19 August 2020, the panel presided over a full-day hearing on the Motion.

On 4 September 2020, Plaintiffs' Motion for Summary Judgment and Preliminary Injunction was granted in part and denied in part by the Superior Court. A majority of the three-judge panel granted Plaintiffs' Motion for Summary Judgment on their claims that 13-1 violates Article I, §§ 11 and 19 of the North Carolina Constitution (the Equal Protection Clause and the Ban on Property Qualifications) with respect to persons who had been convicted of a felony and had their right to vote conditioned on the payment of legal financial obligations. Pursuant to this order, the Court entered a preliminary injunction that required State Board Defendants to allow individuals to register to vote whose "only remaining barrier to an unconditional discharge" was the payment of a monetary amount; or who had been discharged but still owed a monetary amount upon the termination of their community supervision. The Superior Court granted summary judgment to Defendants on Plaintiffs' claims that 13-1 violates the constitutional rights to Free

Assembly and Freedom of Speech. No defendant appealed the trial court's order granting partial summary judgment or the preliminary injunction, until Legislative Defendants filed their appeal on 24 August 2021, nearly a year later.

Following the preliminary injunction and summary judgment order, the following three claims remained for trial:

1. 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. 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. N.C.G.S. § 13-1 violates the Free Elections Clause of the North Carolina Constitution.

Trial on these issues was held in person in Wake County before the three-judge panel on 16 August through 19 August 2021. On 19 August 2021, the panel provided a clarifying ruling from the bench pertaining to the language used on forms promulgated by the State Board of Elections regarding voter eligibility in light of the 4 September 2020 preliminary injunction.

On 23 August 2021, the panel orally issued an amended preliminary injunction — expanding the injunction entered on 4 September 2020 — to enjoin Defendants from denying voter registration to any person convicted of a felony who is on

community supervision, whether probation, post-release supervision, or parole. The amended written preliminary injunction order was issued on 27 August 2021. The Superior Court unanimously denied Legislative Defendants' Motion for a Stay of this order. This Court granted a Writ of Supersedeas on 3 September 2021. On 10 September 2021, the North Carolina Supreme Court ruled that the original injunction from September 2020 should be maintained pending further order, but that anyone who registered during the time the expanded injunction was in effect must remain a validly registered voter. (Sept. 10, 2022, N.C. Sup. Ct. Order, No. 331P21-1, attached to Legislative Defs.' Pet. As Ex. 22, Ex. A).

On 28 March 2022, the Superior Court entered a final judgment in the Plaintiffs' favor, with a majority of the panel finding that N.C.G.S. § 13-1's denial of the franchise to individuals on probation, parole and supervised release violates both the Free Elections and the Equal Protection Clauses.[1] On 30 March, 2022, the Legislative Defendants filed a Motion to Stay the Court's order, and a Notice of Appeal. Plaintiffs opposed the Motion to Stay, whereas the State Board Defendants took no position on the motion. On 1 April 2022, the Superior Court denied Legislative Defendants' Motion for a Stay of this order. That same day, Legislative Defendants

[1] Legislative Defendants made bold accusations against the trial court by asserting that "the Superior Court's opinion appears designed to tie the State Board's and this Courts hands" without providing any supporting evidence. LD Br. at 9. Their meritless accusation against the court insinuates that despite being bound by ethical obligations of fairness and impartiality, the Superior Court circumvented their duties and obligations, and intended to control the administration of the looming election. Immediately following this statement, Legislative Defendants admitted that the Court did leave the State Board with "more than the approximate amount of time the Board previously indicated it would need." *Id.*

filed a Petition for a Writ of Supersedeas and Motion for Temporary Stay with the Court of Appeals.

On 5 April 2022, this Court granted Legislative Defendants' Motion for Temporary Stay of the Wake County Superior Court's order, pending this Court's ruling on the petition for writ of supersedeas. This Court further directed that the State Board of Elections "not order the denial of felon voter registration applications received pursuant to the 'Final Judgment and Order' but shall order such applications to be held and not acted on until further order of this Court." The State Board Defendants filed their response to the Petition for Writ of Supersedeas on 6 April 2022, indicating that they take no position on the Legislative Defendants' request.

STATEMENT OF FACTS

The panel majority made the following extensive findings of fact based on the evidence presented at trial, all of which support the trial court's ruling that N.C.G.S. § 13-1's denial of the franchise to persons on felony probation, parole, or post-release supervision violates the North Carolina Constitution's Equal Protection Clause and Free Elections Clause.

I. The History and Intent of N.C.G.S. 13-1 Are Rooted in Racial Discrimination Against African American People and Suppression of African American Political Power.

a. The 1800s

Section 13-1 of the North Carolina General Statutes' denial of the franchise to people with criminal convictions even if they are not incarcerated traces directly to an effort after the Civil War to suppress the political power of African Americans.

Between 1835 and 1868, North Carolina's Constitution forbade African Americans, including free African Americans, from voting. (March 28, 2022 Final Order and Judgment ("Ord.") p 9, ¶ 20). At that time, North Carolina did not have a disenfranchisement provision specific to felons, instead, it excluded "infamous" persons from suffrage. (*Id.*). To be deemed infamous, one either committed an infamous crime, such as treason, or received an infamous punishment, such as whipping. (*Id.*).

In 1868, after the Civil War, North Carolina adopted a new Constitution as a condition of rejoining the Union. This 1868 Constitution provided for universal male suffrage, eliminated property requirements to vote, and abolished slavery. Approximately 15 of 120 delegates to the 1868 Convention were African American, and others were prominent advocates for equality. The 1868 Constitution did not contain a felony disenfranchisement provision. (Ord. p 9, ¶ 21). The 1868 Constitution provoked a violent backlash by White supremacists, called the Kirk Holden War, where the Ku Klux Klan murdered African American elected officials and White Republicans, and engaged in a campaign of fraud and violent intimidation of African American voters. (*Id.* at ¶ 22).

In retaliation to African American Suffrage, White former Confederates in North Carolina engaged in a widespread campaign of convicting African Americans en masse of minor offenses like petty larceny and whipping them as the punishment, with the express goal of disenfranchising them "in advance" of the Fifteenth Amendment. (*Id.* at ¶ 23).

Contemporary newspaper sources acknowledged that the "real motive" for these whippings was to "take advantage of North Carolina's law in existence at the time that any subject to a punishment of whipping would be disenfranchised. (Ord. p 10, ¶ 23). For instance, a January 1867 article in the National Anti-Slavery Standard explained that "in all country towns the whipping of Negroes is being carried on extensively," that the "real motive … is to guard against their voting in the future, there being a law in North Carolina depriving those publicly whipped of the right to vote," and that "the practice was carried on upon such a scale at Raleigh that crowds gathered every day at the courthouse to see the Negroes whipped." (*Id*).

As a consequence of their campaign to disenfranchise African American men, White Democrats regained control of the General Assembly in 1870 and, by 1875, further gains enabled them to call a constitutional convention to amend the 1868 Constitution. The "overarching aim" of those amendments was to "instill White supremacy and particularly to disenfranchise African-American voters." (Ord. p 11, ¶ 24).

The amendments were ratified in 1876 and included provisions banning interracial marriage and requiring segregation in public schools. (*Id*). Another amendment stripped counties of the ability to elect their own local officials, including judges, giving that power instead to the General Assembly. (*Id*). The purpose of this amendment was to prevent African Americans from electing African American judges, or judges who were likely to support equality. (*Id*). Notably, the 1876 constitutional amendments also disenfranchised everyone "adjudged guilty of felony." (Ord. p 12, ¶ 25). The amendment further provided that such persons would be "restored to the rights of citizenship in a mode prescribed by law." (*Id*). This was the first time in North Carolina's history that the State allowed for the

disenfranchisement of all persons convicted of any type of felony. (*Id*). In the very next session of the General Assembly, in 1877, the General Assembly enacted implementing legislation to govern felony disenfranchisement in North Carolina. (Ord. p 12, ¶ 26). There were three particularly noteworthy aspects of the 1877 statutory scheme that were ushered into law.

First, the General Assembly chose broadly to disenfranchise those convicted of all felonies, and not just the most serious or election-specific crimes. (Ord. p 12, ¶ 26). The 1877 law did not just deny the franchise to all people with felony convictions, it also continued that disenfranchisement even after those individuals were released from incarceration and living in North Carolina communities. (Id. at ¶ 28). Second, the General Assembly made it a crime for people with felony convictions to vote before their rights were restored. The penalty for voting before one's rights were restored included a fine of up to one thousand dollars, imprisonment at hard labor for up to two years or both. (Ord. p 13, ¶ 30). Under current North Carolina law, "illegally voting while on probation, parole, or post-release supervision is a felony that carries a maximum sentence of two years in prison." N.C.G.S. §§ 163-275, 15A-1340.17. Third, the 1877 statutory scheme required people to wait four years from the date of conviction before they could apply to have their rights restored, a legislative policy enacted for the purpose of denying the franchise to people convicted of any felony for a period of time after they were no longer incarcerated. (Ord. p 13, ¶ 29). That policy also carries through to this day in section 13-1.

The goal of the felony disenfranchisement regime established in 1876 and 1877 was to discriminate against and disenfranchise African American people. (Ord. p 14, ¶ 31). Defendants have not disputed that conclusion in this case. In fact, Legislative Defendants

conceded at trial that the goal of the 1870s legislative enactments was to discriminate against African Americans. (Ord. p 16, ¶ 36). Critically, "North Carolina's policy decision in 1877 to deny the franchise to people with felony convictions even after they are released from incarceration has remained unchanged to this day." (*Id.* at ¶ 38).

b. The 1970s

In the early 1970s, the only African American members of North Carolina's General Assembly—two of them in 1972 and three in 1973 – sought to amend 13-1 to eliminate its denial of the right to vote to people who had finished their prison sentence. (Ord. p 17, ¶ 41). In 1971, Reps. Joy Johnson and Henry Frye set out to amend N.C.G.S § 13-1 to eliminate the petition and witness requirement and to "automatically" restore citizenship rights to individuals convicted of a felony "upon full completion of [their] sentence." (Ord. p 18, ¶ 42). However, their proposed bill was rejected. Their bill was instead revised to retain section 13-1's denial of the franchise to people living in North Carolina's communities. The original 1971 bill was amended in committee to specifically require the completion of "probation or parole" - words that never appeared in the original bill - before the restoration of voting rights; and then amended again to require "two years [to] have elapsed since release by the Department of Corrections, including probation or parole." (*Id*).

The amendments went one step further by removing the word "automatically" from the legislation and requiring individuals to take an oath before a judge before their rights could be restored. (*Id*). The 1971 revisions to Section 13-1 passed as amended, thereby requiring people to wait two years from the date of the completion of their probation or parole, and to go before a judge and take an oath before their rights could be restored. (*Id*). In July

1971, Representative Frye made clear in a speech on the House floor that the intent of the original bill had been to re-enfranchise people once they were no longer incarcerated. He explained that "he preferred the bill's original provisions which called for automatic restoration of citizenship when a felon had finished his prison sentence, but he would go along with the amendment if necessary to get the bill passed." (Id. at ¶ 43).

In 1973, Senator Mickey Michaux joined the General Assembly, and worked with Representatives Johnson and Frye to again amend N.C.G.S § 13-1. These three African American legislators were able to convince their 167 White colleagues to amend the law to eliminate the oath requirement and the two-year waiting period, but they were not able to achieve automatic restoration of voting rights upon release from incarceration. (Ord. p 19, ¶ 44). The trial court accepted Senator Michaux's testimony that the goal of the three African American legislators was "a total reinstatement of rights, but we had to compromise to reinstate citizenship voting rights only after completion of a sentence of parole or probation." (*Id*). The goal of the African American legislators and the NC NAACP in the 1970s was clear: to eliminate Section 13-1's denial of the franchise to individuals on community supervision, and to instead have disenfranchisement end at the conclusion of "prison" or "imprisonment." (*Id* at ¶ 45). Thus, as in 1971, the 1973 legislation removed procedural obstacles to re-enfranchisement, but was ultimately a compromise, as it fell short of the African American legislators' goal of limiting disenfranchisement to those incarcerated. (*Id*).

As a result, the trial court found that the policy of discriminating against individuals on community supervision carried over. (*Id*). It was well known in the 1970s that the historical motivations for denial of the franchise to individuals on community supervision in the post-

reconstruction era had been to deny voting rights to African Americans. Most notably, the superior court noted that Defendants did not introduce any evidence at trial disputing that the legislators in the 1970s understood the laws' racist origins and discriminatory effects. (Ord. p 21, ¶ 48). Defendants also did not present any evidence of a race-neutral motivation for the legislature's decision in the 1970s to continue to disenfranchise individuals on community supervision. (*Id.* at ¶ 50).

Ultimately, the 1971 and 1973 versions of 13-1 carried over three elements of the original 1877 legislation: (a) the disenfranchisement of all people with any felony conviction; (b) the criminal penalty for voting before a person's rights are restored; and (c) denial of the franchise to individuals on community supervision. (Ord. p 23, ¶ 55).

II. Currently Over 56,000 Individuals Living in North Carolina Communities are Denied the Right to Vote due to N.C.G.S. 13-1, a Disproportionate Number of Whom Are African American.

The trial court found undisputed evidence that roughly 56,516 individuals living in North Carolina communities under felony community supervision are denied the right to vote due to 13-1. Specifically, the statute denies the right to vote to (i) 51,441 people who are on probation, parole, or post-release supervision following a conviction in a North Carolina state court —40,832 are on probation and 12,376 are on parole or post-release supervision, with some persons being on both probation and post-release supervision simultaneously; and (ii) 5,075 people who are on community supervision from a conviction in a North Carolina federal court. (Ord. p 24, ¶ 57).

The policy of denying the franchise to people living in North Carolina communities under felony supervision disproportionately harms people of color at both the statewide and

county levels. At the state level, more than 1.24% of the total African American voting-age population across the entire State is disenfranchised as a result of being on felony community supervision. (Ord. p 26, ¶ 62). Although African Americans represent 21% of the voting age population in North Carolina, they constitute 42% of the people denied the franchise while on probation, parole, or post-release supervision. (Ord. p 25, ¶ 61). In comparison, White people comprise 72% of the voting-age population, but only 52% of those denied the franchise. (*Id*). These numbers are the very definition of a racial disparity. (*Id.*). In every county across the State for which sufficient data is available to perform comparisons – in some 84 counties - the percentage of the African American voting age population that is disenfranchised by being on felony community supervision is higher than the percentage of the White voting age population that is disenfranchised on this basis. (Ord. p 28, ¶ 68). In 19 different counties, more than 2% of the African American voting-age population is disenfranchised on this basis. (Ord. p 27, ¶ 66). In 4 counties, more than 3% of the African American voting-age population are denied the franchise. (*Id*). In one county, more than 5% of the African American voting-age population are denied the franchise. In comparison, the highest rate of White disenfranchisement in any county in North Carolina is 1.25%. (*Id*). In 44 counties, the percentage of the African American voting-age population that is denied the franchise due to probation, parole, or post-release supervision from a felony conviction in North Carolina state court is more than three times greater than the comparable percentage of the White population. (Ord. p 28, ¶ 67).

Accordingly, North Carolina's denial of the franchise to persons on felony probation, parole, or post-release supervision has an extreme disparate impact on African American people at both the statewide and the county levels. (Ord. p 28, ¶ 69).

III. N.C.G.S. 13-1 Denies the Franchise to Persons on Community Supervision Who Would Otherwise Register and Vote and Likely Affects the Outcome of Elections.

The disenfranchisement of people on felony community supervision under section 13-1 is so widespread that it can change the outcome of elections. Of the 56,000-plus people denied the franchise due to felony supervision, a substantial percentage of them—thousands of people—would register and vote if they were not denied the franchise. Given how close elections often are in North Carolina, excluding such large numbers of would-be voters from the electorate has the potential to affect election outcomes.

The trial court credited and accepted Plaintiffs' expert Dr. Traci Burch's testimony and conclusions. Dr. Burch analyzed voter turnout and registration for persons denied the franchise in North Carolina due to felony community supervision. (Ord. p 30, ¶ 72). The trial court accepted Dr. Burch's conclusion that 13-1 prevents thousands of people living in North Carolina communities from voting who would vote if not for the disenfranchisement. (*Id.* at ¶ 73). The court found it would be reasonable to expect that at least 38.5% of this population under felony supervision would register to vote, and that at least 20% of them would vote in upcoming elections if they were not denied the franchise due to section 13-1. Many subgroups, including older voters, African American voters, and women voters, may vote at rates higher than 30%. (*Id*). Of the 372,422 eligible North Carolina voters who had completed their felony

probation, parole, or post-release supervision at the time of the 2016 general election, 103,130 or 27.69% voted in the 2016 general election. (Ord. p 33, ¶ 84).

To evaluate whether the denial of the franchise to persons on community supervision may affect election outcomes in North Carolina, the court credited and accepted the testimony and conclusions of Plaintiffs' expert Dr. Baumgartner, who analyzed recent statewide and county elections in which the vote margin in the election was less than the number of disenfranchised persons in the relevant geographic area. (Ord. p 37, ¶ 96). In the 2018 general elections alone, there were 16 county-level elections where the vote margin was smaller than the number of persons disenfranchised in the county by virtue of being on felony community supervision from a North Carolina state court conviction. (*Id.* at ¶ 97). For instance, the Allegheny County Board of Commissions race was decided by only 6 votes, whereas 68 people in Allegheny County are denied the franchise due to felony supervision—more than eleven times the vote margin. (*Id*). The Ashe County Board of Education race was decided by only 16 votes, whereas 125 people in Ashe County are denied the franchise due to felony supervision—nearly eight times the vote margin. (*Id*). The Beaufort County Board of Commissioners race was decided by only 63 votes, whereas 457 people in Beaufort County are denied the franchise due to felony supervision—more than seven times the vote margin. (*Id*).

The trial court further found that the number of African Americans denied the franchise due to being on felony supervision exceeds the vote margin in some elections. (*Id.* at ¶ 98). For instance, the number of African Americans denied the franchise in Beaufort County (235) exceeds the vote margin in the Beaufort County Board of Commissioners race (63). (*Id*).

The number of African Americans denied the franchise in Columbus County (143) exceeds the vote margin in the Columbus County Sheriff's race (43). (*Id*). The number of African Americans denied the franchise in Lee County (152) exceeds the vote margin in the Lee County Board of Education race (78). (*Id*).

In addition to county-level elections, there are statewide races where the vote margin in the election was less than the number of people denied the franchise due to being on community supervision statewide. (Ord. p 38, ¶ 101). For instance, the 2016 Governor's race was decided by just over 10,000 votes, far less than the 56,000-plus people denied the franchise statewide. (*Id*). In 2020, two prominent statewide races were decided by vote margins that are only a fraction of the number of persons denied the franchise statewide. (*Id*). There are also many 2018 state House and Senate races that had a vote margin of less than 100 votes. (Ord. p 39, ¶ 102).

IV. N.C.G.S. 13-1 Does Not Serve Any Legitimate State Interest and Causes Substantial Harm.

As the Superior Court noted in its September 2020 order, Defendants initially put forward "numerous" possible state interests that section 13-1 might be thought to serve. (Ord. p 39, ¶ 103). At that time, the Superior Court denied summary judgment and a preliminary injunction on Plaintiffs' broader claims concerning the denial of the franchise to all persons on felony supervision, noting that Defendants should have the opportunity to offer "facts or empirical evidence" supporting those purported state interests. (*Id*).

At trial in August 2021, the Court found that Defendants failed to introduce any evidence supporting the view that the denial of the franchise to people on felony community supervision, due to 13-1, serves any valid state interest today. (Ord. p 40, ¶ 104). More specifically, the trial court found that the State Board Defendants did not introduce facts or empirical evidence at trial supporting any assertion that section 13-1's denial of the franchise to persons on felony supervision serves any legitimate governmental interest. (Ord. p 41, ¶ 107). The Legislative Defendants also did not introduce facts or empirical evidence at trial supporting any assertion that section 13-1's denial of the franchise to people on felony supervision serves any legitimate governmental interest. (*Id.* at ¶ 108).

The trial court accepted and credited evidence that the denial of the franchise causes serious harm to individuals and communities, and in fact undermines important state interests including several of the interests initially put forward by Defendants. (Ord. p 43, ¶ 115). For instance, the court found that the scholarly literature does not support the claim that section 13-1 "eliminat[es] burdens" in ways that "promote the voter registration and electoral participation of people who completed their sentences", two of the purported government interests asserted by the Defendants. In fact, section 13-1 may even decrease turnout. (Ord. p 44, ¶ 117). For example, turnout among people aged 18-29 who had been convicted but completed supervision by 2016 (13.01%) was several percentage points lower than turnout of people in 2016 who were later convicted of their first felony (15.7%). (*Id.* at ¶ 118). In other words, the experience of being denied the franchise decreases turnout among an otherwise similarly situated population. (*Id*).

The trial court found that the continued denial of the franchise to persons on community supervision has a stigmatizing effect, and the scholarly literature concludes that felony disenfranchisement hinders the reintegration of people convicted of felonies into society. (Ord. p 45, ¶ 122). Denial of the franchise to people on felony supervision reduces political opportunity and the quality of representation across entire communities in North Carolina. In sum, the denial of the franchise to persons on felony supervision harms individuals, families, and communities for years even after such supervision ends. (*Id.* at ¶ 123).

REASONS THE COURT SHOULD DENY LEGISLATIVE DEFENDANTS' MOTION FOR A WRIT OF SUPERSEDEAS

LEGAL STANDARD

In order to obtain a stay from this Court pending appeal, the Legislative Defendants bear the burden of demonstrating both that (1) they are likely to succeed on the merits in this case; and (2) they would suffer irreparable harm absent a stay. *See, e.g., 130 of Chatham, LLC v. Rutherford Elec. Mbrshp. Corp.*, No. 14-CVS-711, 2014 NCBC LEXIS 35 at *9 (Ruth. Cty. Super. Ct. July 31, 2014). For the foregoing reasons, Legislative Defendants are unlikely to succeed on the merits, and have failed to demonstrate that they would suffer irreparable harm without a stay of the Superior Court's Final Order.

I. Defendants Are Highly Unlikely to Succeed on the Merits of Their Appeal.

Legislative Defendants make two main arguments for overturning the trial court's final order: first, they argue that Plaintiffs lack standing and the trial court lacked the power to "re-write" the law; second, they say that the trial court was wrong

in concluding that N.C.G.S. § 13-1 violates the Equal Protection and the Free Elections Clauses. Neither one of their arguments has a likely chance of prevailing on appeal.

II. Plaintiffs Have Standing to Bring this Lawsuit and The Trial Court Acted Within Its Authority.

Legislative Defendants argue that Plaintiffs have not been injured by the statute they challenge. Currently, over 56,000 people on felony community supervision are denied the right to vote due to §13-1. Plaintiffs are challenging N.C.G.S. § 13-1's denial of the voting franchise to 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 exclude people living in the community on felony probation, parole, or post-release supervision. The trial court's final order, declaring that N.C.G.S. § 13-1's denial of the franchise to persons on felony probation, parole, or post-release supervision is unconstitutional, had already begun to redress Plaintiffs' injuries by allowing all individuals on felony probation, parole, or post-release supervision to register and vote, during the period preceding the temporary stay issued by this court. Legislative Defendants' standing argument is further belied by their contention that this Court should restore the original injunction focused on people with monetary obligations. (April 1, 2022, Legislative Defs.' Pet. for writ of super. and Mot. for temp. stay ("LD Br.") at 2, n. 2). It makes no sense for Legislative Defendants to advocate

an alternative form of injunction that they purportedly believe Plaintiffs lack standing even to request. (*Id*).

Legislative Defendants also argue that by ordering the injunction, the Superior Court abused its discretion. (*Id.* at 11). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (*citing State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). This Court has stated, "when we review the evidence in injunction cases, 'there is a presumption that the judgment entered below is correct, and the burden is upon [the] appellant to assign and show error.'" *Town of Midland v. Harrell,* 2022-NCCOA-167, 2022 N.C. App. LEXIS 185 (N.C. March 15, 2022). Rule 65(d) provides: "Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained[.]" N.C.G.S. § 1A-1, Rule 65(d) (2021).

Here, at the conclusion of a four-day trial, with hundreds of exhibits, and numerous expert and lay witnesses, the trial court acted within its authority to issue the Final Judgment and Order. Moreover, the trial court appropriately exercised its discretion and rendered the judgment by making extensive findings of facts and well-reasoned conclusions of law, in a 65-page detailed decision that resulted in an injunction that complied with requirements of Rule 65.

Defendants further argue that Plaintiffs lack standing because Plaintiffs' injury cannot be "redressed by a favorable decision" within the power of the Superior Court. Defendants argue that Article VI, § 2, cl. 3 of the North Carolina Constitution is a self-executing provision that operates alone to deny the franchise to all persons with felony convictions, and that N.C.G.S. § 13-1 merely restores people's rights. (LD Br. pp. 11-15). They state that a judgement declaring §13-1 as unconstitutional actually hurts Plaintiffs because it results in people serving felony sentences outside of prison remaining disenfranchised forever because the court has enjoined the "manner prescribed by law" for re-enfranchisement. They also argue that another effect of the Court's order is that individuals on community supervision would be subject to criminal prosecution under 163-275(5) if they attempt to register to vote (*Id.* at 13). They are wrong on both counts.

After felony disenfranchisement was added to the North Carolina Constitution in 1876, implementing legislation was immediately passed in the very next legislative session in 1877. (Ord. p. 12, ¶ 26). Thus, the historical record belies the argument by Legislative Defendants that the felony disenfranchisement constitutional provision was ever intended to act alone and be self-executing without implementing legislation. Moreover, section 13-1 is the law that effectively 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, although N.C.G.S. § 13-1 implements the constitutional provision regarding felony disenfranchisement, it must comply with other provisions of the North Carolina Constitution.

Article VI, Section 2, clause 3 of the North Carolina Constitution reflects a delegation of authority to the General Assembly to "prescribe[] by law" the contours of felony disenfranchisement, and legislation enacted by the General Assembly pursuant to this delegation must comport with all other provisions of the North Carolina Constitution. The history of Article VI and the maxim that constitutional provisions must be interpreted in harmony conclusively establish this interpretation. For Article VI, § 2, cl. 3 to be "reconciled with other state constitutional guarantees," (*see Stephenson v. Bartlett*, 355 N.C. 354, 371, 562 S.E.2d 377, 389 (2002)), it must be interpreted as a delegation of authority to the General Assembly to enact a legislative scheme that complies with the rest of the Constitution. Because "all constitutional provisions must be read *in pari materia*," it is a bedrock principle in North Carolina that a constitutional provision "cannot be applied in isolation or in a manner that fails to comport with other requirements of the State Constitution." *Stephenson*, 355 N.C. at 377-78, 562 S.E.2d at 392, 394.

Here, interpreting Article VI, § 2, cl. 3 as a self-executing provision that would impose across-the-board lifetime disenfranchisement absent implementing legislation would be incompatible with other provisions of the Constitution, including the Free Elections, the Equal Protection, Freedom of Speech and Freedom of Assembly Clauses. It would disenfranchise for life millions upon millions of North Carolinians, a grossly disproportionate number of whom are African Americans.

Stephenson v. Bartlett and *Holmes v. Moore* are on point. In *Stephenson*, the Supreme Court interpreted the Constitution's "Whole County Provision," which

states that "[n]o county shall be divided in the formation of a ... district." N.C. Const., art. II, § 3(3). The Court declined to interpret this constitutional provision in a "strictly mechanical fashion" because doing so "would be inconsistent with other provisions of ... the State Constitution." *Stephenson* 355 N.C. at 377-78, 381-82, 562 S.E.2d at 392-96. "[T]o avoid internal textual conflict" with North Carolina's Equal Protection Clause, the Court interpreted the Whole County Provision in a manner that upheld "the principles of substantially equal voting power and substantially equal legislative representation arising from that same Constitution." *Id.* (*see also Jenkins v. State Bd. of Elecs.*, 180 N.C. 169, 104 S.E. 346, 349 (1920) ("A constitution should not receive a technical construction, as if it were an ordinary instrument or statute. It should be interpreted so as to carry out the general principles of the government and not defeat them.")).

In *Holmes*, the Court of Appeals interpreted the constitutional provision stating that "[v]oters offering to vote in person shall present photographic identification before voting." N.C. Const. art. VI, §§ 2(4), 3(2). The Court of Appeals rejected Defendants' argument that this constitutional provision foreclosed challenges to the General Assembly's implementing legislation brought under other constitutional provisions, and the Court of Appeals held that the implementing legislation violated the Equal Protection Clause. *Holmes v. Moore*, 840 S.E.2d 244, 265-67 (N.C. Ct. App. 2020). As a result of the injunction against the legislation, North Carolinians were not required to show photo identification before voting in 2020 and beyond, even though the Constitution currently states that "voters ... shall

present photographic identification before voting." *Id.* The voter ID constitutional provision is like Article VI, § 2, cl. 3—both require implementing legislation.

Here, the history of Article VI confirms this interpretation. "A court should look to the history" in interpreting a constitutional provision, *N.C. State Bd. of Educ. v. State*, 255 N.C. App. 514, 529, 805 S.E.2d 518, 527 (2017), *aff'd*, 371 N.C. 149, 814 S.E.2d 54 (2018), and throughout its history Article VI, § 2, cl. 3 has *always* been accompanied by implementing legislation.

As explained above, the General Assembly enacted a statutory scheme providing for felony disenfranchisement and rights restoration in 1877, in the very first legislative session after ratification of the 1876 constitutional amendment. At no point in the 144 years since its adoption has Article VI, § 2, cl. 3 ever operated by its own force without implementing legislation. In any event, implementing legislation *has* been enacted, and there can be no dispute that any statute enacted by the General Assembly must comport with all provisions of the North Carolina Constitution. *Stephenson* and *Holmes* make clear that implementing legislation authorized under one constitutional provision is subject to the normal legal standards and scrutiny that apply under other constitutional provisions. In both cases, the courts applied the normal tests for evaluating whether legislation enacted by the General Assembly violated North Carolina's Equal Protection Clause. *Stephenson*, 355 N.C. at 389, 562 S.E.2d at 394 (applying strict scrutiny where redistricting deprived a group of citizens of "substantially equal voting power"); *Holmes*, 840 S.E.2d at 255 (evaluating whether race was a "motivating factor" in implementing legislation).

The Court acted within its lawful authority to strike the portion of the statute that was unconstitutional. The Court may order that "the portion which is constitutional may stand while that which is unconstitutional is stricken out." *State v. Fredell*, 283 N.C. 242, 245, 195 S.E.2d 300, 302 (1973). The Court of Appeals recently exercised such remedial authority in *State v. Hilton*, a case analogous to this one. There, plaintiffs challenged a statute providing that, if certain conditions are met, "the court shall order the offender to enroll in satellite-based monitoring *for life*." N.C.G.S. § 14-208.40B(c) (emphasis added). The Court of Appeals held that it is permissible to impose satellite-based monitoring during a person's post-release supervision, but that monitoring after such supervision "is no longer reasonable." *State v. Hilton*, 271 N.C. App. 505, 845 S.E.2d 81 (2020). The Court of Appeals enjoined the "for life" language and found it severable, holding that the monitoring requirement could instead be enforced for a shorter duration. *Id.* at 2. Echoing Defendants' arguments here, the *Hilton* dissent objected that "the majority does not merely strike through 'for life' but also adds a wholly different temporal frame, 'so long as the offender is on post-release supervision or some equivalent, to the statute in question." *Id.* at 16 (Brook, J., concurring in part and dissenting in part). The dissent accused the majority of improperly "rewriting the statute," *Id.*, but the majority rejected this concern.

Here, just like the *Hilton* Court, the Superior Court acted within its lawful authority and properly ruled on the unconstitutional portion of the statute. More specifically, the Superior Court ordered "13-1's denial of the franchise to persons on

felony probation, parole, or post-release supervision violates the North Carolina Constitution's Equal Protection Clause and Free Elections Clause". (Ord. p 64, ¶ 1). Hence, all other parts of §13-1, which are unrelated to the denial of the right to vote to people under felony community supervision, remain operative. Thus, Legislative Defendants argument that the trial court struck the entirety of 13-1 is wrong and belies this Court's jurisprudence on the severability of unconstitutional portions of a statute.

III. Section 13-1's Denial of the Franchise to Individuals Currently on Felony Community Supervision Discriminates against African Americans in Intent and Effect and Denies Them Substantially Equal Voting Power in violation of the Equal Protection Clause of the North Carolina Constitution.

a. The Law Has the Impermissible Intent and Effect of Disproportionately Denying the Franchise to African Americans.

Legislative Defendants argue that §13-1 "makes no distinction between felons based on race, sex or any other suspect or quasi-suspect class" on its face, thus it has no discriminatory effect. (LD Br. at 18). This argument is fatally flawed by limiting analysis to facial neutrality rather than assessing disparate impact of the statute. As the Superior Court recognized, *Arlington Heights* is the appropriate framework to consider an alleged violation of the Equal Protection Clause. (Ord. p 5, ¶ 8). Under that framework, "[w]hen considering whether discriminatory intent motivates a facially neutral law, a court must undertake a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Holmes*, 840 S.E.2d

at 254 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). "Challengers need not show that discriminatory purpose was the 'sole' or even a 'primary' motive for the legislation, just that it was 'a motivating factor.'" *Id.* at 254-55 (quoting same) (*see also* Ord. p 6, ¶ 10). "Discriminatory purpose 'may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.'" *Id.* at 255 (quoting same). The non-exhaustive list of factors for a Court to consider under *Arlington Heights* include: (1) "the historical background of the challenged [policy]"; (2) "the specific sequence of events leading up to the challenged [policy]"; (3) "departures from normal procedural sequence"; (4) "the legislative history of the decision"; and (5) "of course, the disproportionate impact of the official action—whether it bears more heavily on one race than another." *Id.* (citation and internal quotation marks omitted) (*see also* Ord. p 6, ¶ 9).

Starting with the final factor, the law here disproportionately denies the franchise to African Americans in the extreme. African Americans comprise 21.51% of the voting-age population in North Carolina, but 42.43% of those disenfranchised while on community supervision. In comparison, White people comprise 72% of the voting-age population, but only 52% of those denied the franchise. (Ord. p 25-26 ¶ 61). Defendants contend the only distinction made by 13-1 "is between felons who have completed their sentences and felons who have not," and therefore "draws no arbitrary lines" (LD Br. at 18).

Defendants argue that Plaintiffs have failed to show any disparate impact here because "Plaintiffs did not even attempt to show that as a practical matter 13-1 re-enfranchises felons of different races at a different rate." (LD Br. at 20). Under this circular analysis, no facially race-neutral law could *ever* have a racially disparate impact. That is not how disparate impact analysis works. *See Holmes*, 840 S.E.2d at 262. Here, the General Assembly has enacted a law disenfranchising people on community supervision, and that law disproportionately disenfranchises African Americans. That is quintessential disparate impact. *See, e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 227 (1985) (describing disparate impact of facially neutral felony disenfranchisement law). In addition, Defendants' argument that the Superior Court held "without explanation" that 13-1 "has a demonstrably disproportionate and disparate impact" is belied by the Court's 65 -page opinion, which included several pages on the manner in which this law disproportionately impacts African Americans in North Carolina crediting extensive expert analyses. (Ord. pp. 25-29).

The Superior Court correctly found that other *Arlington Heights* factors confirm that the challenged law's history and intent are rooted in racial discrimination. First, the "historical background" of this law centers on violent White supremacy and a racist aim to prevent African Americans from voting. There is no dispute that this law is part of an extensive "historical pattern of laws" targeting African Americans' voting rights. *Holmes*, 840 S.E.2d at 257. (*see also* Ord. pp 8-22). In fact, even the Legislative Defendants acknowledged at trial that "there is no denying the insidious, discriminatory history surrounding voter disenfranchisement

and efforts for voting rights restoration in North Carolina." (Ord. p 16, ¶ 37). Seeking to paper over this law's grounding in White supremacy, Legislative Defendants contend that the legislative changes in 1971 and 1973 reflect an intent to "liberalize North Carolina's re-enfranchisement laws." (LD Br. at 4). While the changes that were made to 13-1 in the 1970s were spearheaded by the only 3 African American legislators at the time, the Legislative Defendants fail to acknowledge Senator Michaux's testimony, properly credited by the trial court, that the goal of the three African American legislators was "a total reinstatement of rights, but we had to compromise to reinstate citizenship voting rights only after completion of a sentence of parole or probation." (Ord. p 19, ¶ 44). Legislative Defendants also failed to acknowledge the evidence put forth at trial that white Legislators used racial slurs to refer to Reps. Johnson, Frye and Michaux. (Ord. p 22, ¶ 52). History did not begin in the 1970s, and "[t]he current version of 13-1 continues to carry over and reflect the same racist goals that drove the original 19th century enactment." (Ord. p 23, ¶ 55).

Second, "the specific sequence of events leading up to the challenged [policy]" includes the racist expansion of criminal disenfranchisement to prevent African Americans from voting after the Civil War. This White supremacist campaign began with the systematic whipping of African Americans in the 1860s to render them "infamous" and thus unable to vote. Then came the enactment of a constitutional amendment expanding disenfranchisement to all felonies. Such disenfranchisement was then implemented via enactment of legislation in 1877; and three key elements of this original 1877 policy were carried forward to the 1970's revisions to section 13-

1, including the disenfranchisement of all people with any felony conviction, the criminal penalty for voting before a person's voting rights are restored, and the denial of the franchise to persons living in the community after release from any term of incarceration. (Ord. p 23, ¶ 55). The current version of section 13-1 continues to carry over and reflect the same racist goals of the original 19th century enactment. (*Id.*)

Finally, the "legislative history" reinforces the law's discriminatory intent. Defendants analyze the statutory scheme as if it was first adopted in 1971. (*See* LD Br. at 4-6). It was not. The legislative history is that proud proponents of Jim Crow led the 1877 enactment of the statutory scheme that carries forward to this day in critical respects, including by prolonging disenfranchisement for non-incarcerated individuals. As explained in detail above, African American legislators who led the 1970s amendments wanted to eliminate this aspect of the statutory scheme, but they were unable to. *See supra* pp. 13-15. Just as with the felony disenfranchisement law in *Hunter v. Underwood*, changes to the statute "occurring in the succeeding ... years" since its enactment do not wipe out the law's original intent. 471 U.S. at 232-33. Regardless of whether N.C.G.S. § 13-1 "would be valid if enacted today without any impermissible motivation, ... its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." *Id.* at 233; *see also Ramos v. Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring) ("[W]here a legislature actually confronts a law's tawdry past in reenacting it[,] the new law may well be free of discriminatory taint," but "[t]hat cannot be said of the laws at issue here."). When the Court concludes that

this law "was likely motivated by discriminatory intent, the burden shifts to Defendants 'to demonstrate that the law would have been enacted without this factor.'" *Holmes*, 840 S.E.2d at 264-65 (quoting *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 221 (4th Cir. 2016)). But neither State Board Defendants nor Legislative Defendants even attempted to argue that they could carry this burden. This is for good reason. It is apparent that North Carolina's statutory disenfranchisement of people convicted of all felonies even while they live in the community would never have come to pass but-for an explicitly racist effort to prevent African Americans from voting. Thus, Plaintiffs' showing of discriminatory intent under the *Arlington Heights* factors is dispositive.

b. The Law Impermissibly Denies Substantially Equal Voting Power to Similarly Situated Groups.

Legislative Defendants acknowledge that classifications involving a "fundamental right" are subject to strict scrutiny under North Carolina's Equal Protection Clause. (LD Br. at 15). However, they ignore the fundamental right at the center of Plaintiffs' equal protection claim—the fundamental right to "substantially equal voting power and substantially equal legislative representation," which the North Carolina Supreme Court has held is a uniquely protected right under Article I, § 19. *Stephenson*, 355 N.C. at 382, 562 S.E.2d at 396. Heightened scrutiny applies under North Carolina's Equal Protection Clause whenever a challenged statute draws a "distinction among similarly situated citizens" that deprives one group of

citizens of substantially equal voting power relative to the other. *Stephenson*, 355 N.C. at 377-78, 562 S.E.2d at 393-94. The right to substantially equal voting power under the North Carolina Constitution focuses on classifications that affect the *relative* voting power of similarly situated groups of citizens. Whether each individual in each group, standing alone, maintains a personal "fundamental right to vote" is not determinative. For instance, in *Blankenship v. Bartlett*, an individual's right to elect judges was *not* a fundamental right, but the Court still applied heightened scrutiny because the challenged judicial districts created a "disparity in voting power between similarly situated residents of Wake County." 363 N.C. at 527, 681 S.E.2d at 766. *King ex rel. Harvey-Barrow v. Beaufort County Board of Education*, 364 N.C. 368, 704 S.E.2d 259 (2010), though not a voting rights case, is also analogous. There, the Supreme Court held that even though a suspended student does not have a "fundamental right to alternative education ... under the state constitution," heightened scrutiny still applied where the State provided alternative education to some suspended students but not others, because there is a constitutional right "to equal education access" across students. *King*, 364 N.C. at 373, 377, 704 S.E.2d at 261, 265.

Here, N.C.G.S. § 13-1 denies the franchise to people under felony community supervision and impermissibly deprives similarly situated groups of substantially equal voting power regardless of whether each individual has a fundamental right to vote. For instance, if the General Assembly prescribed that only people with felony convictions over 50-years-old can vote—or only those who were registered to vote

before their conviction—heightened scrutiny would apply because the scheme affords differential voting power to similarly situated groups of people. N.C.G.S. § 13-1 creates such classifications as well. The statute deprives substantially equal voting power to the group of people on community supervision relative to similarly situated groups of people, including those with felony convictions who have finished their community supervision. The people in both groups have felony convictions, both live and work in their communities after having been deemed by the State fit to return to society, but one group has voting power and the other has none. For this reason, the challenged law is subject to heightened scrutiny. *Stephenson*, 355 N.C. at 377-78, 562 S.E.2d at 393-94; *Blankenship*, 363 N.C. at 527-28, 681 S.E.2d at 766.

Regardless, and contrary to Legislative Defendants' position, individuals on community supervision do personally maintain a fundamental right to vote. Legislative Defendants assert that there is "no support or reasoning" for affording such individuals this fundamental right. (LD Br. pp. 15-16). Of course there is. "The right to vote is the right to participate in the decision-making process of government" among all those "sharing an identity with the broader humane, economic, ideological, and political concerns of the human body politic." *Texfi Indus.*, 301 N.C. at 13, 269 S.E.2d at 150. People on felony community supervision share the same concerns as everyone else living in their communities. These individuals are our neighbors, our friends, our family members, our co-workers, and members of our churches. People on felony community supervision "are subject to the laws enacted and enforced within our communities." North Carolinians on community supervision thus share in the

State's "public burthens" and "feel an interest in its welfare." *Roberts*, 4 Dev. & Bat. (Orig. Ed.) at 260-61.

IV. Section 13-1's Denial of the Franchise to Individuals Currently on Felony Community Supervision Violates the Free Elections Clause of the North Carolina Constitution.

N.C.G.S. § 13-1's denial of the franchise to people on felony community supervision violates the Free Elections Clause by preventing elections that ascertain the will of the people. (Ord. p 59 ¶ 16). North Carolina's elections do not faithfully ascertain the will of the people when such an enormous number of people living in communities across the State—over 56,000 individuals—are prohibited from voting. (*Id.* at ¶ 17). Legislative Defendants argue that Plaintiffs' Free Elections Clause claim fails because a person on community supervision for a felony conviction has no *individual* right to vote and therefore no claim under the Free Election Clause. Their premise is wrong.

The Free Elections Clause of the North Carolina Constitution declares that "[a]ll elections shall be free." N.C. Const., art. I, § 10. It mandates that elections in North Carolina faithfully ascertain the will of the people. (Ord. p 59, ¶ 15). The Free Elections Clause protects not only the individual right of a voter to cast his or her ballot, but the *collective* right of the people to elections that accurately reflect their will. In other words, the Free Elections Clause guarantees a 'fundamental' right—to have elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people. *See Harper v. Hall*, No. 413PA21, 2022 N.C. LEXIS 166 at para. 159 (Feb. 14, 2022) (holding that the challenged redistricting plans violate the Free

Elections Clause, and that this clause "guarantees the central democratic process by which the people's political power is transferred to their representatives"); *Common Cause v. Lewis*, No. 18-cvs-014001 at 9 (Wake Cty. Super. Ct. Sept. 3, 2019). "Because the right to free elections is a fundamental requirement of the North Carolina Constitution, N.C.G.S. § 13-1's abridgment of that right triggers strict scrutiny. *See Northampton Cty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990). (Ord. p 60, ¶ 21) Defendants do not deny that the right under the Free Elections Clause for elections to reflect the will of the people is a "fundamental right." *Common Cause*, 2019 WL 4569584, at *110.

In the instant case, the Superior Court followed precedent when it determined that Section 13-1's denial of the franchise to persons on felony community supervision, some 56,000 individuals, a disproportionate number of whom are African American, strikes at the core of the Free Elections Clause. (Ord. p 59, ¶ 18) The challenged disenfranchisement scheme under 13-1 infringes on the right shared by disenfranchised and non-disenfranchised people alike to be governed by leaders chosen according to the will of the people. The evidence presented at trial proved that in at least nine counties, more than 1% of the total voting-age population is denied the right to vote by virtue of being on felony community supervision. (Ord. p 25, ¶ 60). In 19 counties, more than 2% of the African American voting-age population is denied the franchise due to felony community supervision. (Ord. p 27, ¶ 66) Given this overwhelming evidence, the Court properly found that "Elections cannot faithfully ascertain the will of *all* of the people when the class of persons denied the

franchise due to felony supervision is disproportionately African Americans by wide margins at both the statewide and county levels". (Ord. p 59, ¶ 18). Nor do North Carolina elections faithfully ascertain the will of the people when the vote margin in both statewide and local elections is regularly less than the number of people disenfranchised in the relevant geographic area. Elections do not ascertain the will of the people when the denial of the franchise to such a large number of people has the clear potential to affect the outcome of numerous close elections.

In sum, N.C.G.S. § 13-1 prevents thousands of people living in North Carolina communities who would otherwise vote from casting ballots, thereby preventing the will of the people from prevailing in elections that affect every aspect of daily life.

V. The Defendants Will Not Face Irreparable Harm if the Motion to Stay is Denied.

If the State Board properly implements the trial court's Final Order, all individuals on community supervision for a felony conviction will be permitted to register and vote in the upcoming May primary elections.[2] It is hard to see how allowing more disproportionately Black residents to vote in primary elections this Spring will cause Legislative Defendants "irreparable" harm. Legislative Defendants argue that "confusion is certain to result if the Court does not stay execution of its injunction and return to the status quo ante," and cites to the State Board's allegation

[2] Legislative Defendants arguments related to the timing of the May 2022 primary elections do not apply at all to upcoming elections in July 2022 and thereafter; therefore, if the Court determines time-based arguments have merit, the Final Order clearly should not be stayed for the subsequent contests.

that they are unclear on how to implement the Superior Court's Final Order (LD Br. at 28). However, the Superior Court's order could not have been clearer: the Court ordered that "For the avoidance of doubt, under this injunction, if a person otherwise eligible to vote is not in jail or prison for a felony conviction, they may lawfully register and vote in North Carolina." (Ord. p 65 ¶ 3).[3]

Legislative Defendants also argue that voters will be confused by this "last-minute re-write of election rules." (LD Br. 2). But the Legislative Defendants fail to explain how *enforcement* of this particular order to give voting rights back to individuals on felony community supervision would cause "voter confusion" or an "incentive to remain away from the polls." This is not analogous to laws which seek to put in place a new *impediment* to voting shortly before an election.

Following the Court's original preliminary injunction, individuals with felony convictions could vote if they could attest that:

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.

[3] On 31 March, Plaintiffs filed a Notice of Violation of the 28 March 2022 Injunction and Request for Emergency Hearing with the Superior Court, notifying them that the State Board was declining to process registration applications for individuals on community supervision, citing an alleged "conflict" with the Supreme Court order on the expanded preliminary injunction. The State Board Defendants filed a brief in opposition on 1 April, and this issue is currently pending with the Superior Court.

The standard set forth by the Superior Court is much simpler to understand and to implement than the status quo, and the State Board of Elections could implement this injunction by changing its forms back to the exact same language it used after the Superior Court issued its 23 August 2020 expanded preliminary injunction order. At that time, the State Board Defendants changed all guidance and forms to say that a person could register to vote if they could truthfully state: "I am not in prison for a felony conviction." *(See* Plaintiff's Opp. to Legislative Defs.' Pet. for Writ of Super., No. P21-340, pp. 14-15 (Aug. 31, 2021)). The State Board was able to adopt new language and guidance within hours of the Court's ruling. *Id.* And on the exact same day the ruling came down, the State Board also issued a press release and a numbered memo about the changes to the voting laws for individuals on community release. *Id.*

Indeed, in the State Board's Response to Response to Plaintiffs' Petition for Discretionary Review and Motion to Suspend Appellate Rules, the State Board details all the steps they have already taken in preparation for possible implementation of the Superior Court's order, and set forth a timeline which shows that there is more than enough time to implement the before early voting starts for the 17 May 2022 primary. (*See* Ex. A at pp 6-7). In addition, North Carolina has set aside 17 days for early voting for the May 2022 primary – April 28th through May 14th - during which time individuals may both register to vote and cast their ballot in person. *See* "Vote Early in Person," North Carolina State Board of Elections, *accessible at* https://www.ncsbe.gov/voting/vote-early-person. The Legislative Defendants and the

state cannot be harmed by the failure to give effect to a statute that was enacted with racially discriminatory intent. Even if implementation of the Court's final order could be said to cause Legislative Defendants any irreparable harm (and it could not), that harm certainly does not outweigh the extreme harm to Plaintiffs and thousands of others from a stay.

VI. The Equities and the Public Interest Foreclose a Stay.

The equities and public interest categorically foreclose granting the Petition for Writ of Supersedeas and issuing a long-term stay of the Superior Court's final order. Such a stay would cause devastating, immeasurable harm to Plaintiffs and the more than 56,000 affected individuals, after this right was granted and quickly taken away last Fall. Even the State Board Defendants acknowledge the "importance of preventing substantial harm to any individual's right to exercise the franchise." (Ex. A, p 2). Following the issuance of the injunction, Plaintiffs and many others across the State worked to educate people about the trial court's order and to help people apply for registration and prepare to vote. A long-term stay issued in this case would result in yet another election cycle where thousands of North Carolinians, disproportionately Black people, are unlawfully disenfranchised. Furthermore, the Superior Court's 19 August 2021 ruling from the bench made clear that the "status quo" that Legislative Defendants want this Court to return to is one that in fact disenfranchises people who are eligible to vote even under the Court's original order.

Another long-lasting stay of the voting rights of this disproportionate class of Black people would do lasting—and potentially permanent—harm to the

community's faith in a later ruling by the courts in Plaintiffs' favor. Many people may never believe they are allowed to vote again, even when they are.

While granting a Writ of Supersedeas of the Court's Final Judgement and Order would cause the gravest of irreparable harm to Plaintiffs, denying it would cause no cognizable harm to Defendants. The harm of denying eligible voters the right to vote clearly outweighs any harm to Legislative Defendants. Granting Legislative Defendants Petition for Writ of Supersedeas would deny the fundamental constitutional right to vote to tens of thousands of North Carolinians in the upcoming primary election. They have been disenfranchised long enough on the basis of North Carolina's unconstitutional laws that prevent them from voting due to their supervision status. That denial of the franchise ended on 28 March 2022, and the Court should not reinstate it.

CONCLUSION

For the foregoing reasons, Legislative Defendants' Petition for Writ of Supersedeas should be denied.

Respectfully submitted this 13th day of April 2022.

Electronically submitted

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N.C. R. App. P. 33(b) Certification:
I certify that all of 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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Pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, I hereby certify that a copy of this document has been duly served upon the following counsel of record by email:

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This 13th day of April 2022.

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EXHIBIT A

NO. 331P21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

COMMUNITY SUCCESS INITIATIVE, et al., Plaintiffs, v. TIMOTHY K. MOORE, et al., Defendants.	From Wake County No. 19 CVS 15941 (Related COA P22-153)

****

STATE BOARD DEFENDANTS' RESPONSE TO PLAINTIFFS' PETITION FOR DISCRETIONARY REVIEW AND MOTION TO SUSPEND THE APPELLATE RULES

****

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA.

The North Carolina State Board of Elections and its members ("State Board Defendants") provide this response to Plaintiffs' Petition for Discretionary Review of the superior court's 28 March 2022 order and Motion to Suspend the Appellate Rules.

STATE BOARD DEFENDANTS' POSITION

Without conceding that N.C.G.S. § 13-1 is unlawful, the State Board Defendants acknowledge the importance of preventing substantial harm to any individual's right to exercise the franchise. *See Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 393 (2002) ("It is well settled in this State that the right to vote on equal terms is a fundamental right.") (citation and internal quotation marks omitted). It is for this reason that State Board Defendants stand ready to continue their efforts in implementing the superior court's 28 March 2022 order as expeditiously as possible, should this Court direct it to do so. State Board Defendants nonetheless defer to the Court's discretion and, thus, take no position on Plaintiffs' Petition for Discretionary Review or Motion to Suspend the Appellate Rules.

Currently, the superior court's 28 March 2022 order, enjoining the Board "from preventing any person convicted of a felony from registering to vote or voting due to probation, parole, or post-release supervision" (Mar. 28, 2022 Order p. 64, ¶ 2), has been temporarily stayed by the Court of Appeals, pending that court's consideration of Legislative Defendants' petition for writ of supersedeas. (*See also* Legislative Defs.' Pet. for Writ of supersedeas and Mot. for Temporary Stay, attached to Plns.' Pet. for Disc. Review as Ex. E). In its order granting the temporary stay, the Court of Appeals directed the State Board to order that voter registration applications from nonincarcerated felons

be held and not be acted on until further order of that court. (Order Granting Temporary Stay, No. P22-153 (Apr. 5, 2022)). The State Board is following that directive. (See Apr. 5, 2022 Email to Cty. Bds., Exhibit A to Affidavit of State Bd. Executive Director Karen Brinson Bell, attached to this Resp.). It is the State Board Defendants' understanding that, but for an order from the Court of Appeals denying the petition for writ of supersedeas and dissolving the temporary stay, or an order by this Court, the temporary stay order will remain in place.

Plaintiffs have requested, as part of their Petition for Discretionary Review, that this Court "assume immediate jurisdiction" not only over just the appeal of the superior court's 28 March 2022 order, but also over all "motions, petitions, or other matters stemming from that appeal." (Plns.' Pet. for Disc. Review pp. 5-6). In light of Plaintiffs' broad request, the State Board Defendants submit the following information to ensure the Court has full knowledge regarding (1) the administrative steps that the State Board has put in place to comply with the superior court's 28 March 2022 order; and (2) the additional administrative steps that would be required to implement the superior court's 28 March 2022 order for those individuals who are on felony probation, parole, or post-release supervision for the 17 May 2022 primary and municipal elections.

First, within less than 24 hours of receiving the superior court's 28

March 2022, the State Board sent instructions to county boards to comply with that order by ensuring that no one affected by that order will be denied registration. (*See* Mar. 29, 2022 Email to Cty. Bds., attached as Exhibit A to Plns.' Pet. Ex. C; *see also* Bell Aff., ¶¶ 3-4). The State Board instructed county boards to hold, pending further instruction, any registration applications they receive from voters who are on felony probation, parole, or post-release supervision. *Id.* Pursuant to the Court of Appeals' Order granting the temporary stay, the State Board has continued to order the county boards to hold those application and not act on them, pending further order from the Court of Appeals or this Court. (*See* Apr. 5, 2022 Email to Cty. Bds., attached as Exhibit A to Bell Aff.). The State Board also took additional, preliminary steps toward implementation. (*See* Apr. 1, 2022 State Board Defendants' Response to Notice of Alleged Violation of March 28, 2022 Injunction and Request for Emergency Hearing, attached to Plns.' Pet. as Ex. C, pp. 4-6).

These steps demonstrate compliance both with the superior court's 28 March 2022 order and the subsequent stay issued by the Court of Appeals. No one covered by the superior court's order is being denied registration status. (Bell Aff., ¶ 6). As Plaintiffs reference in their petition, the State Board Defendants complied with the superior court's order in this manner in a good-faith attempt to avoid any possible conflict with this Court's 10 September 2021 order staying enforcement of the superior court's expanded preliminary

injunction order. (Sept. 10, 2021 N.C. Sup. Ct. Order, No. 331P21-1, attached as Exhibit A to Plns.' Pet. Ex. C). In that order, this Court required that the "status quo be preserved pending defendant's appeal of the expanded preliminary injunction issued initially by the trial court on 23 August 2021 in open court by maintaining in effect the original preliminary injunction issued on 4 September 2020 as it was understood at the time and implemented for the November 2020 elections." (*Id.*) Although the appeal of the preliminary injunction about which this Court entered its 10 September 2021 order is now likely moot, there is no order dismissing that appeal. The appeal therefore remains pending. State Board Defendants of course welcome any guidance from this Court with regards to compliance with the superior court's 28 March 2022 order, in light of this Court's 10 September 2021 order.

Second, the State Board Defendants wish to apprise this Court of dates relevant to the 17 May 2022 primary and municipal elections and the administrative steps required to be taken for those individuals who are on probation, parole, or post-release supervision due to felony convictions to vote in those elections.

Absentee ballot distribution began on 28 March 2022.[1] *See* N.C.G.S. § 163-227.10(a). Based on discussions with vendors and county elections

[1] Mailing of Absentee Ballots | 2022 Statewide Primary | NCSBE (Last visited Apr. 13, 2022).

directors, State Board staff have determined that it would almost certainly be infeasible for all counties to procure new absentee envelope stock for the ongoing primary election. (*See* Bell Aff., ¶ 9) Voter registration before the primary will end on 22 April 2022.[2] *See id.* § 163-82.6(d) (providing that voter registration ends 25 days prior to the primary). Early voting for the primary, during which eligible individuals may register and vote at the same time, starts on 28 April 2022.[3] *See id.* § 163-227.2(b).

State Board staff estimate that they will need seven business days to input software changes into the Statewide Election Information Management System ("SEIMS") software, plus one day to update county computers, in order to have the system prepared for the start of early voting on 28 April. (*See* Bell Aff., ¶ 11) This would allow time to modify the language about voter qualifications related to felony status on attestation forms in the State Board's electronic pollbook utilized when voters check in or register to vote at early voting sites and on Election Day. *Id.*

To implement the trial court's decision for the primary, the State Board would also need to immediately instruct the county boards to reprint or reprocure any pre-printed voter-facing materials that include voter eligibility

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[2] Voter Registration Deadline | 2022 Statewide Primary | NCSBE (Last visited Apr. 13, 2022).

[3] One-Stop Early Voting Period Starts | 2022 Statewide Primary | NCSBE (Last visited Apr. 13, 2022).

language, to the extent possible. *Id.*, ¶ 12. These include voter registration forms for same-day registration during early voting, provisional voting applications, large signage for polling places that communicates voting eligibility, and authorization-to-vote forms that are used for voter check-in on Election Day. *Id.* This will present differing levels of burden for different counties as explained in the attached affidavit. *Id.,* ¶ 13.

While altering language on voter registration forms online can be accomplished quickly, there are currently hundreds of thousands of registration forms in circulation, and even the most expeditious implementation will not be able to completely replace these forms, resulting in multiple versions of the forms in circulation. *Id.,* 14. Thus, while every effort will be made to communicate accurate information in the voting process, there will likely be some degree of lack of uniformity in voting materials that cannot be fully addressed at this stage in the primary election process. *Id.*, ¶ 15.

Moreover, if implementation is ordered, the State Board will need to direct the county boards to issue remedial instructional materials to the thousands of poll workers who will work during the election and prepare remedial signage that would be posted at voting sites. *Id.*, ¶ 16. As explained in Executive Director Bell's attached affidavit, given the proximity to the 17 May election, some level of voter and poll worker confusion can be expected if the trial court's order were to be implemented for the primary. *Id.*, ¶¶ 17, 18.

To ameliorate such confusion, the State Board would immediately change all public facing information on its website, direct county boards to change their websites, instruct staff to inform voters about the change in law, place new signage at polling sites, and direct voters with questions to the appropriate election official on site who is educated on the change in law. (*See* Bell Aff., ¶¶ 18, 22).

In addition, the State Board must work with other agencies to accomplish many tasks if implementation is ordered. This includes updating the data feed received from the Department of Public Safety *Id.*, ¶ 19, working with the Department of Motor Vehicles to update the online voter registration system and in-person registration at DMV offices *Id.*, ¶ 20, and working with the Department of Health and Human Services and the county agencies it oversees to update their registration processes. *Id.*, ¶ 21.[4]

Third, based on those remaining administrative steps, the State Board estimates that any directive to implement the superior court's order issued prior to 18 April 2022 would allow enough time to complete many of these tasks ahead of the start of in-person voting—particularly the software coding required to have updated voter eligibility attestation language available before early voting—but some contradictory materials will remain in circulation

[4] These agencies are required to offer voter registration services under the National Voter Registration Act, 52 U.S.C. §§ 20504, 20506.

leading to a risk of confusion. (*See* Bell Aff., ¶ 22). For the remaining tasks described above and in the accompanying affidavit that are not possible before the election, such as entirely replacing voter-facing materials, elections staff will take as many ameliorative steps as possible to educate staff and the public. *Id.,* ¶¶ 17, 18, 22. Thus, while certain implementation actions can be taken immediately, others are often time consuming, have an associated cost that has not been budgeted for, and cannot be fully implemented for weeks or even months. *Id.*, ¶ 22. Should implementation be ordered on or after 18 April, the risk of confusion grows the closer we get to the 17 May primary. *Id.*

Nonetheless, the State Board will strive to accomplish any and all implementation tasks as expeditiously as possible, and implement remedial training, education, new signage, and other steps to ameliorate resulting confusion to the greatest extent possible should this Court order implementation. *Id.*, ¶ 18, 22.

CONCLUSION

The State Board Defendants take no position on Plaintiffs' Petition for Discretionary Review and Motion, and defer to the discretion of the Court.

Electronically submitted this the 13th day of April, 2022.

JOSHUA H. STEIN
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N.C. R. App. P. 33(b) Certification:
I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed it.

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Electronically submitted this the 13th day of April, 2022.

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Mary Carla Babb
Special Deputy Attorney General

ATTACHMENT

Affidavit of
North Carolina Board of Elections
Executive Director Karen Brinson Bell

NO. 331P21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

COMMUNITY SUCCESS INITIATIVE, et al., Plaintiffs, v. TIMOTHY K. MOORE, et al., Defendants.	From Wake County No. 19 CVS 15941 (Related COA P22-153)

AFFIDAVIT OF KAREN BRINSON BELL

I, Karen Brinson Bell, swear under penalty of perjury, that the following information is true to the best of my knowledge and state as follows:

1. I am over 18 years old. I am competent to give this affidavit, and have personal knowledge of the facts set forth in this affidavit. I am the Executive Director of the State Board of Elections, which is a role I have held since June 2019. I have consulted with senior staff at the State Board in the preparation of this affidavit, and we have consulted with county directors of elections, as well.

2. This affidavit provides administrative matters for the Court's

consideration in the event that it chooses to grant the pending Petition for Discretionary Review and expedite this action.

3. In less than 24 hours of the issuance of the 28 March 2022 superior court final judgment, the State Board sent instructions to county boards to comply with that order by ensuring that no one who is serving a felony sentence outside of prison or jail will be denied registration status. (*See* Mar. 29, 2022 Email to Cty. Bds., attached to Plns.' Pet. as Exhibit B) Counties were instructed to hold voter registration applications from such individuals pending further clarification from the courts.

4. Among many other steps taken internally to prepare for implementation, the State Board instructed the county boards not to generate or send felon denial letters to prospective registrants and not to send registration removal letters to voters who are on probation, parole, or post-release supervision.

5. On 5 April 2022, the Court of Appeals issued a temporary stay and ordered that the "North Carolina State Board of Elections shall not order the denial of felon voter registration applications received pursuant to the 'Final Judgment and Order' but shall order such applications to be held and not acted on until further order of this Court."

6. On the same day, the State Board sent instructions to county boards to comply with that order by continuing to hold registration for

individuals who are not incarcerated, including those on felony probation, parole and post-release supervision, and not to print any letters for the removal of non-incarcerated felons who are existing registrants. (*See* Apr. 5, 2022 Email to Cty. Bds., attached hereto as Exhibit A) The State Board noted that it would continue "to organize plans to implement the trial court's judgment, in the event that the Court of Appeals or the state Supreme Court orders that we proceed with implementation." *Id.*

7. Those plans include, but are not limited to, preparing revised voter registration forms—of which there are 19 varieties, depending on the method of registration—that could be placed into circulation as soon as possible; preparing revised voting forms and other documents with updated eligibility language; and developing plans to carry out the various other administrative processes that would be required to implement new eligibility rules, including coding revisions to the statewide software used for in-person voting by county elections officials in thousands of locations across the state and working with other state agencies to update registration forms and practices at those agencies.

8. If this Court is inclined to enter an order reinstating the trial court's order or otherwise altering the status quo, there are several important dates and administrative issues for the Court's consideration related to the upcoming 17 May 2022 primary election.

9. Absentee ballot distribution began on 28 March 2022.[1] *See* N.C.G.S. § 163-227.10(a) (providing that absentee ballots are distributed 50 days before the primary). The county boards have already procured, printed, and sent out absentee ballots to voters who have requested them. New requests for absentee ballots are fulfilled on a rolling basis. The absentee ballot application appears on the ballot envelope and includes felon eligibility language that a voter must attest to. State Board staff have contacted vendors and county elections directors and have determined that it would almost certainly be infeasible for all counties to procure new absentee envelope stock for the ongoing primary election.

10. Voter registration before the primary will end on 22 April 2022.[2] *See id.* § 163-82.6(d) (providing that voter registration ends 25 days prior to the primary). Early voting for the primary, during which eligible individuals may register and vote at the same time, starts on 28 April 2022.[3] *See id.* § 163-227.2(b).

11. State Board staff estimate that they will need seven business days to input software changes into the Statewide Election Information

[1] Mailing of Absentee Ballots | 2022 Statewide Primary | NCSBE (Last visited Apr. 13, 2022).
[2] Voter Registration Deadline | 2022 Statewide Primary | NCSBE (Last visited Apr. 13, 2022).
[3] One-Stop Early Voting Period Starts | 2022 Statewide Primary | NCSBE (Last visited Apr.13, 2022).

Management System ("SEIMS") software in order to have the system prepared for the start of early voting, plus an additional day for the county computers to be refreshed with those changes. This would allow time to modify the language about voter qualifications related to felony status on attestation forms in the State Board's electronic pollbook utilized when voters check in or register to vote at early voting sites and on Election Day. The current attestation requires voters to attest, under penalty of a felony, that they are not currently serving a felony sentence under any type of supervision, unless they are serving an extended term of supervision due to outstanding monetary obligations. That attestation would be incorrect for any voters deemed newly eligible under the trial court's decision.

12. To implement the trial court's decision for the primary, the State Board would also need to immediately instruct the county boards to reprint or reprocure any pre-printed voter-facing materials that include voter eligibility language, to the extent possible. These include voter registration forms for same-day registration during early voting, provisional voting applications, large signage for polling places that communicates voting eligibility, and authorization-to-vote forms that are used for voter check-in on Election Day.

13. Some counties would not face significant difficulty correcting their voter-facing materials, either because they have sufficient resources

available to procure what they need and/or the volume of materials they would need to change is low enough (given a small population, for example) that the board's staff could manage. However, many counties would face challenges in procuring these materials at the volume required to replenish their existing supplies, especially given a current paper shortage.[4] For example, for the many county boards that preprint their Election Day forms, they have already procured authorization-to-vote forms, likely in an amount sufficient to cover every registered voter in the county. Additionally, the county boards are unlikely to have the funds in their budgets to procure a new set of voter-facing forms for in-person voting and may have to seek emergency appropriations from their county boards of commissioners. Given these challenges, the county boards may need to resort to alternative means of correcting voter-facing forms, including using stick-on labels with the correct attestation language that could be placed over top of the existing language, or absent that option, providing prominent signage at the voting site indicating that a court order has superseded the attestation language on the forms and has deemed county residents serving felony sentences outside of jail or prison eligible to vote.

14. While it requires minimal steps to adjust the attestation

[4] https://www.politico.com/news/2022/03/18/supply-chain-ballot-paper-shortage-00018460.

language on voter registration forms so that those forms are updated on the State and county board websites, distributing those forms in usable quantities to the county boards and the public takes a significant amount of time. There are likely hundreds of thousands of voter registration forms currently in circulation. They are in every county board office, Department of Motor Vehicles ("DMV") office, local Department of Social Services ("DSS") and Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC") offices, and in the hands of dozens of political and civic organizations throughout the state. While changes to these forms have been prepared, it is not possible at this stage of the primary election to procure and distribute an amount of forms that would even come close to replacing the current stock of registration forms in circulation. To carry out their statutory duties to accept voter registrations from the public at large, the elections boards will have to mostly rely on their existing stock of forms for the near future. Accordingly, there will need to be multiple versions of voter registration forms in circulation and lawfully recognized by elections officials for the many months it would take to fully replace the current stock. Additionally, the State Board will have to identify substantial funds that have not been allocated for this purpose, since the State Board is responsible for the printing and distribution of voter registration forms.

15. Accordingly, although the State and county boards will make

every effort to communicate accurate information in the voting process, there will likely be some degree of lack of uniformity in voting materials that cannot be fully addressed at this stage in the primary election process, especially given the varying budgetary and administrative constraints faced by the 100 county boards. And the closer we get to Election Day, the greater the risk of lack of uniform materials.

16. Many counties have begun training poll workers for in-person voting in the May primary. There are thousands of poll workers who will work during the election, whether during early voting or on Election Day. Some counties had begun such training before the trial court issued its decision, and training has been ongoing throughout the state since that time. If the decision is to go into effect before the primary, the State Board will need to direct the county boards to issue remedial instructional materials to poll workers to accompany any remedial signage that would be posted at voting sites.

17. Given the proximity to the primary election, some level of voter and poll worker confusion can be expected if the trial court's order were to be implemented for the primary. The elections boards will make every effort to alleviate that confusion. If a decision is made to move forward with new felon eligibility rules, the closer we get to one-stop voting (and certainly Election Day), the greater the potential is for confusion and administrative error.

18. If poll workers and/or voters do not have the correct information about the requirements for voters serving a felony sentence, there is a risk that a voter serving a felony sentence could decide to leave rather than voting. If a poll worker provided the wrong information, this could potentially form the basis for an election protest if the number of voters who received the wrong information and therefore did not vote could have been outcome-determinative in a contest. See G.S. § 163-182.10(d)(2) and § 163-182.13(a)(2) (grounds for a new election include: "Eligible voters sufficient in number to change the outcome of the election were improperly prevented from voting."). Should implementation be ordered, it will result in the use of different forms containing different language. To ameliorate these conflicts, the State Board would immediately change all public facing information on its website. They would further direct county boards to change their websites, instruct staff to inform voters about the change in law, and to direct any voters with questions to the appropriate election official on site who is educated on the change in law.

19. Finally, it is not just State Board systems that would need to be changed. The State Board will work with the Department of Public Safety ("DPS") to have them update the data feed the State Board receives to remove from the felon reports those who are now eligible to register under the trial court's order.

20. The State Board will also need to work with the DMV to update its system, which is used for online voter registration. A large portion of registration occurs via online registration through the DMV. The DMV and its vendor typically require extensive documentation and months for the State Board to accomplish changes to the online voter registration system.

21. The State Board will also have to ensure that the Department of Health and Human Services, and the many county DSS and WIC agencies that it oversees, get the right information and implement the changes correctly when they are conducting registration. The same is true with local DMV offices.

22. This additional information is provided to inform the Court that while certain implementation actions can be taken immediately, others are often time consuming and cannot be fully implemented for weeks or even months. It is also provided to inform the Court that, if the State Board were ordered to implement changes prior to 18 April, many of the tasks described above can be implemented, but there will still be contradictory materials in circulation, resulting in a risk of confusion. And it should be noted that the risk of confusion grows the closer we get to the 17 May primary because the amount of contradictory materials in circulation will be greater. Nonetheless, the State Board stands ready to implement any directive from this Court.

This the 13th day of April, 2022.

Karen Brinson Bell, Executive Director
N.C. State Board of Elections

Sworn to and subscribed before me this 13th day of April, 2022.

CARLOS E. CASALLAS
NOTARY PUBLIC
WAKE COUNTY, N.C.
My Commission Expires 08/20/22

(Notary Public)

My commission expires: 08/20/22

EXHIBIT A

Apr. 5, 2022 Email to Cty. Bds

Babb, Mary Carla (Hollis)

From: Love, Katelyn <Katelyn.Love@ncsbe.gov>
Sent: Tuesday, April 5, 2022 7:54 PM
Cc: SBOE_Grp - Legal
Subject: RE: Update Regarding Court Order Restoring Felon Voting Rights
Attachments: Order P22-153.pdf

Directors (bcc State Board members),

The NC Court of Appeals today issued a temporary stay of the trial court's order that restored the voting rights of felons who are not incarcerated. The court also ordered that voter registration forms received from voters who would be eligible to register under the trial court's order not be denied but instead be held and not acted on until further order of the court. The stay will last while the court considers a petition filed by the legislative defendants seeking to permanently stay the trial court's order while this case is on appeal.

You should continue to follow the original guidance we sent in the email below, to **hold registrations for individuals who are not incarcerated**, including those on felony probation, parole and post-release supervision. Also, **do not print any letters in the I-Queue for the removal of non-incarcerated felons** who are existing registrants.

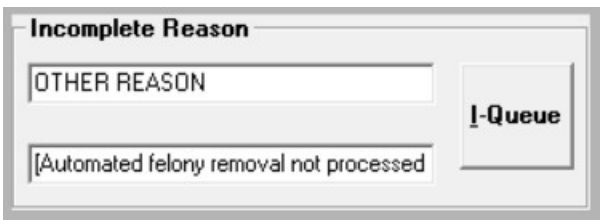
Below are two additional updates on carrying out the current stay:

State Board Pause to Automated 35-Day Removals

On March 30, the State Board ran a SEIMS script to stop the automatic removal of existing registrants who were matched for a felony conviction and were sent a notice of their ineligibility, as long as these registrants were not inmates. Typically, after 35 days have elapsed after printing these notices from the I-Queue and the voter has not appealed, SEIMS automatically removes the registrant. We stopped this automated process for approximately 800 registrants across the state who are not inmates, according to Department of Public Safety data. We worked individually with a small group of counties to clarify the inmate status of approximately 40 registrants that were in the removal process, as well.

Pre-Election Incomplete Letters

As a result of this pause in the 35-day removal process, some counties are noticing that these individuals are appearing in the I-Queue to receive a pre-election notice because of incomplete registration information. These records/notices list the incomplete reason of **Other Reason: [Automated felony removal not processed due to court order on 3/28/22].** In accordance with previous guidance, **these notices need to be manually removed from VoterScan and not sent to voters**. Please note that printing these letters will not start the 35-day countdown for removal or denial of registration.



The State Board is continuing to organize plans to implement the trial court's judgment, in the event that the Court of Appeals or the state Supreme Court orders that we proceed with implementation.

Sincerely,

Katelyn Love | General Counsel
o: 919-814-0756 | f: 919-715-0135

NORTH CAROLINA
STATE BOARD OF ELECTIONS

From: Love, Katelyn <Katelyn.Love@ncsbe.gov>
Sent: Tuesday, March 29, 2022 4:19 PM
Cc: SBOE_Grp - Legal <Legal@ncsbe.gov>
Subject: Update Regarding Court Order Restoring Felon Voting Rights

Directors (bcc State Board members),

Yesterday afternoon, a North Carolina Superior Court ruled that the state law restricting persons with felony convictions who are not incarcerated from voting or registering to vote is unconstitutional. Under this ruling, people who are serving a felony sentence outside a jail or prison are now eligible to register to vote in North Carolina. This includes people on felony probation, parole, or post-release supervision. The decision is attached.

We are currently working to determine how to implement this decision in light of (1) an imminent appeal of the decision; and (2) an apparently conflicting order from the North Carolina Supreme Court last year in the same case. That decision ordered that "the status quo be preserved" pending appeal of the expanded preliminary injunction, an appeal that is still ongoing.

Until further instruction, county boards of elections should keep registration applications of voters who are on probation, parole, or post-release supervision it receives in the Incomplete Queue. Do not generate or send felon denial letters to these voters, regardless of whether the application was received before or after Monday, March 28. Do not send a removal letter to voters who are on probation, parole, or post-release supervision.

To complete this process, counties can refer to the DOC Felon County List, the DOC Felon State Matching List and the N.C. DPS Offender Search to confirm a registrant's status. The DOC Felon County List contains a "DOC Placement" column that will show whether the person is an inmate or on probation/parole. If a person is an **inmate** serving a felony conviction, they are ineligible to register to vote and you may proceed with your regular processes. Note that the DOC Felon State Matching List does not show whether a person is an inmate; therefore, you will need to also refer to the DOC Felon County List before processing a denial or a removal.

For registrants with **any status other than inmate**, the county should hold these registrations in the Incomplete Queue until further guidance is available. Counties should continue with the felony denial and removal processes for those classified as an inmate.

For the federal felon records found on Filezilla, the counties may use the Federal Bureau of Prisons' Search. If a felon's record identifies a prison in the "Location" column, they are ineligible to register to vote and may be removed/denied registration per current processes.

Counties should not remove or deny a voter registration application unless they can confirm the person is an inmate serving a felony conviction. If you are unsure, please keep the record in the Incomplete Queue.

We will send further instructions as soon as possible to address how to ultimately process these records in the Incomplete Queue, and whether registration and voting forms will be updated.

Sincerely,

Katelyn Love | General Counsel
o: 919-814-0756 | f: 919-715-0135

NORTH CAROLINA
STATE BOARD OF ELECTIONS