No. P21-340 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

COMMUNITY SUCCESS INITIATIVE, et al., *Plaintiffs*, v. TIMOTHY K. MOORE, et al., *Defendants*.	)	From Wake County No. 19 CVS 15941

****

MOTION FOR LEAVE TO FILE REPLY

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Defendants Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, and Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate ("Legislative Defendants"), respectfully request leave to file a reply to respond to arguments raised in Plaintiffs' Opposition to Legislative Defendants' Petition for Writ of Supersedeas, Petition for Writ of Certiorari, and Motion for Temporary Stay and in State Board Defendants' Response to the same. *See N.C. State Conf. of NAACP v. Moore*, 817 S.E.2d 592, 593 (N.C. 2018) (mem.) (granting motion "for Leave to File Reply to Response in Opposition to Petition for Writ of Supersedeas"); *cf. Animal Prot. Soc. of Durham, Inc. v. State*, 95 N.C. App. 258, 269, 382 S.E.2d 801, 808 (1989) ("The reply brief was intended to be a vehicle for responding to matters raised in the appellees' brief.").

Legislative Defendants respectfully submit that the proposed reply will assist the Court in adjudicating this dispute. The Court, of course, can assess whether that is so for itself, and to enable it to do so Legislative Defendants have contemporaneously filed the proposed reply as an attachment to this motion.

Respectfully submitted this the 1st day of September, 2021.

COOPER & KIRK PLLC

By: /s/ Electronically Submitted
Nicole Jo Moss (No. 31958)
1523 New Hampshire Ave. N.W.
Washington, D.C. 20036
Telephone: (202) 220-9600
Fax: (202) 220-9601
nmoss@cooperkirk.com

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.

David H. Thompson*
Peter A. Patterson*
Joseph O. Masterman*
William V. Bergstrom*
1523 New Hampshire Ave. N.W.
Washington, D.C. 20036
Telephone: (202) 220-9600
Fax: (202) 220-9601
dthompson@cooperkirk.com

* Motion for admission *pro hac vice* pending

Nathan Huff
PHELPS DUNBAR LLP
North Carolina Bar #40626

4140 ParkLake Avenue,
Suite 100
Raleigh, North Carolina 27612
Telephone: (919)789 5300
Facsimile: (919) 789-5301

ATTORNEYS FOR LEGISLATIVE DEFENDANTS TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, and PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Motion was served on the parties to this action via email to counsel at the following addresses:

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

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

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

Counsel for Plaintiffs

NORTH CAROLINA DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, NC 27602
Telephone: (919) 716-0185
Paul M. Cox
pcox@ncdoj.gov
Terence Steed
tsteed@ncdoj.gov

Counsel for the State Board Defendants

This the 1st day of September, 2021.

Nicole Jo Moss

Counsel for Legislative Defendants

No. P21-340 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

COMMUNITY SUCCESS INITIATIVE, et al., *Plaintiffs*, v. TIMOTHY K. MOORE, et al., *Defendants*.	)	From Wake County No. 19 CVS 15941

****

LEGISLATIVE DEFENDANTS' PROPOSED REPLY IN SUPPORT OF PETITION FOR WRIT OF SUPERSEDEAS, PETITION FOR WRIT OF CERTIORARI, AND MOTION FOR TEMPORARY STAY

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Nothing that the other parties have said in response to Legislative Defendants' petition masks the staggering scope of what the Superior Court has done in this case. On August 23—which the State Board Defendants had said was the last possible day to start implementing changes to State elections systems—the court announced that to effectuate the intent of its original, narrow preliminary injunction, the injunction had to be expanded to allow tens of thousands of convicted felons to register to vote even though they undisputedly are not entitled to vote under the injunction's own rationale. And now Plaintiffs tell this Court that it is too late to go back.

The Court must not allow a preliminary injunction to become a *fait accompli*. Even if the Court agrees with Plaintiffs that the upcoming municipal elections are too imminent to salvage, no party disputes that the Court could reinstate the pre-expansion status quo for all future elections. But there is no reason not to reinstate that status quo now. The State Board represents that it can still return to its original implementation of the original injunction, which is all Legislative Defendants have asked the Court to allow. And no party has offered any valid defense of the Superior Court's indefensible expansion. Legislative Defendants' Petition for Supersedeas and Motion for a Temporary Stay should be granted.[1]

ARGUMENT

I. Plaintiffs Offer No Valid Objection to Keeping the Pre-Expansion Status Quo.

Plaintiffs' fail to mount any defense of the expanded injunction on the merits, and their equitable arguments serve only to show why a temporary stay is needed and a writ of supersedeas should issue promptly.

First, Plaintiffs misunderstand why they lack standing. As they admit, they have not challenged the statute that makes it a felony offense for disenfranchised felons to vote if not restored to the right of citizenship by the method provided by law, N.C.G.S. § 163-275(5). They have also chosen not to sue anyone with authority to

---

[1] Although Plaintiffs nominally oppose Legislative Defendants' Petition for a Writ of Certiorari as well, they offer no argument why certiorari is unwarranted. They also offer no argument why the expanded injunction is not appealable as of right. The State Board Defendants agree that it is.

enforce that statute. Because they did not, the relief they request would not redress the disenfranchisement they allege: even if the existing Defendants were enjoined from enforcing § 13-1 as written, no prosecutors would be bound by that injunction, and any prosecutor therefore could still enforce § 163-275(5) against any felon not re-enfranchised by § 13-1's terms who casts a vote based on a trial court injunction.[2] Plaintiffs apparently think the Superior Court has the authority literally to rewrite the statutes of North Carolina, but its authority is limited to declaring the legal rights of the parties and enjoining the enforcement of those statutes in specified circumstances—and it cannot enjoin parties not before the court.

Second, it is not at all "agree[d]" that § 13-1 "is rooted in invidious racial discrimination against Black people." Pls.' Opp'n to Leg. Defs.' Pet. for Writ of Supersedeas, Pet. for Writ of Certiorari, and Mot. for Temporary Stay at 4 (Aug. 31, 2021) ("Pls.' Opp'n) (emphases omitted). "Original sin" does not attach to "governmental action that is not itself unlawful." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). And it certainly does not attach to this statute, which—as the parties do agree—owes its current form to legislation championed in the 1970s by Joy Johnson

---

[2] For this reason, the expanded injunction cannot have "already redressed Plaintiffs' injuries." Pls.' Opp'n at 24 (emphasis omitted). The Superior Court might have intended to allow certain convicted felons to vote in upcoming elections, but it had no power to enjoin the enforcement of unchallenged laws by unnamed defendants. Nor have Legislative Defendants "belied" this argument by seeking a return to the pre-expansion status quo. *Id.* If *some* injunction is going to be in place, it is much better that it be narrowly tailored to the only purported infirmity (preventing felons from voting on the basis of wealth) that has been identified in any reasoned judicial opinion. It is Legislative Defendants' position, however, that the Superior Court lacked jurisdiction to enter even the original injunction.

and Henry Frye, African American legislators and civil-rights stalwarts. Nor does this statute disenfranchise anyone. It only re-enfranchises, and Plaintiffs offer no evidence that it disproportionately re-enfranchises white voters. To the extent felon disenfranchisement is historically rooted in racial discrimination, today that disenfranchisement is caused *by the North Carolina Constitution*:

> No person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law.

N.C. CONST. art. VI, § 2, pt. 3. All felons are automatically disenfranchised under this provision's plain terms. Without a statute providing an avenue for re-enfranchisement, felons therefore would simply remain disenfranchised—similar to how the voter ID amendment has not been effectuated while the implementing legislation has been enjoined. But this constitutional provision disenfranchising felons is not at issue here. Even if it were, Plaintiffs still lack evidence that the People of North Carolina were motivated by racial discrimination when they ratified this provision as part of the rewritten State Constitution in November 1970.

Third, Plaintiffs still fail to identify any convicted felon who remains on an *initial* term of probation or post-release supervision solely due to outstanding monetary obligations. Plaintiffs posit that "if a person owes a lot of fees or costs, the trial court will often set a longer initial term of probation to ensure that the person can pay off those monetary obligations," and they suggest without a record citation that this was the type of person who the Superior Court intended to allow to vote.

Pls.' Opp'n at 26. If so, Plaintiffs do not assert that this hypothetical person would be automatically discharged upon payment; thus, this person does not "*remain* on probation *because of* those monetary obligations." *Id.* (first emphasis added).[3] At any rate, to the extent any such felons exist (again, Plaintiffs have failed to identify any), they likely are not numerous due to the many contingencies that would need to come together to produce such a circumstance: a felon (a) sentenced to a term of probation that (b) is longer than it otherwise would have been solely because of the size of his monetary obligations who (c) is in the time period between when his initial term of probation would have ended but for the added time for monetary obligations and the end of his actual term of probation. The theoretical possibility that a small number of such felons exist does not justify expanding the injunction to cover 55,000 people. Indeed, the trial court's apparent rough attempt to capture such individuals—insisting that the injunction reach all those with only financial and regular conditions of probation—covers a class that is at most as large as 272.[4]

---

[3] Plaintiffs also assert that "it is obvious" that a federally convicted felon could likewise serve an initial term of probation for solely monetary reasons, without explaining how. Pls.' Opp'n at 27. They point out that monetary conditions can be imposed on federal felons, too. But that dodges the question, which is whether any federal felons *remain* on probation *because of* those conditions. Like state probation, federal probation is time-limited. *See* 18 U.S.C. § 3561(c).

[4] While the Department of Public Safety initially reported that 272 felons had only monetary and other regular conditions of probation, it has since indicated that this number was about three times too high and that, accounting for duplicate entries, there are only 91 such distinct offenders. Whether the true number is 91 or 272, potential overinclusivity in this small population of felons cannot justify expanding the injunction to cover tens of thousands, and it could have been dealt with in a much more targeted manner.

Fourth, the alleged difficulties with implementing the trial court's clarification of the intended scope of the original injunction are nowhere near as great as Plaintiffs make them seem. The Superior Court originally enjoined Defendants "from preventing a person convicted of a felony from registering to vote and exercising their right to vote if that person's only remaining barrier to obtaining an 'unconditional discharge,' other than regular conditions of probation pursuant to N.C.G.S. § 15A-1343(b), is the payment of a monetary amount." Pet. for Writ of Supersedeas, Pet. for Writ of Certiorari, and Mot. for Temporary Stay ("Pet."), Ex. D at 10 (Aug. 30, 2021). The Superior Court explained at trial that it had intended this language to encompass convicted felons on both initial and extended terms of probation with only monetary and other regular conditions. The only difficulty that the State Board identified with that interpretation of the language—aside from the fact that such people are not on probation for "solely" monetary reasons and thus have no right to vote under the logic of the injunction, *id.*—was that certain felons' probation conditions might be listed in State databases as "regular" even though they were classified as "special" conditions when imposed, leaving the State Board unable to isolate the convicted felons whom the Superior Court had intended to cover. *See* Pet., Ex. E at 5.

That problem could have been fixed with a single word: the Superior Court could have enjoined Defendants "from preventing a person convicted of a felony from registering to vote and exercising their right to vote if that person's only remaining barrier to obtaining an 'unconditional discharge,' other than **current** regular conditions of probation pursuant to N.C.G.S. § 15A-1343(b), is the payment of a

monetary amount." While that may have resulted in some slight overinclusivity in the class of those re-enfranchised (at most 272 felons), this overinclusion would have paled in comparison to the tens of thousands of felons covered by the expanded injunction who everyone concedes were not covered by the terms or the rationale of the original injunction.

As with all the alternative solutions to the expanded injunction identified so far, *see* Pet. at 21–23, Legislative Defendants do not propose that this alternative should be imposed either; the original injunction is itself improper despite being the status quo for purposes of this petition. But these many narrower solutions make obvious that the expanded injunction is not the right one.

Fifth, Plaintiffs are similarly incorrect that "[t]he State Board has no way of identifying and contacting people who are eligible to vote under the original injunction but who are not eligible to vote under the expanded injunction"—in other words, that the State Board cannot return to the status quo. Pls.' Opp'n at 14 (emphasis omitted). The State Board has expressly said that it can, at least with respect to the terms of the original injunction as originally interpreted by the parties. *See* State Bd. of Elections Defs.' Resp. to Pet. at 11–12 & n.5 (Aug. 31, 2021) ("SBE Resp.").

Sixth, Plaintiffs offer no support whatever for the proposition that a court can expand a preliminary injunction based on evidence presented at a later trial. Regardless, Plaintiffs fail to identify what trial evidence led to the Superior Court's newfound belief that they were likely to succeed on the merits of their trial claims;

none was put into the preliminary-injunction record;[5] and the Superior Court cited none. To the extent the expanded injunction is based on the Superior Court's self-reversal as to those claims, it is "arbitrary" on its face. *Matter of E.S.*, 378 N.C. 8, 859 S.E.2d 185, 188 (2021).

Seventh, Plaintiffs' reliance on the idea of "leveling up" is misplaced. As they themselves say, "leveling up" means "extending the right or benefit at issue to the entire previously excluded group." Pls.' Opp'n at 28. For example, if a statute extended a benefit only to women, a court finding that to be an equal-protection violation could either level up and extend that benefit also to men or level down and remove that benefit even from women. Here, the Superior Court found that Plaintiffs were likely to succeed on their claims with respect to a certain class of felons (those with only monetary obligations preventing them from being re-enfranchised) but expanded its injunction to cover *all* felons on probation or post-release supervision regardless of the impact of monetary obligations on their voting rights. That is not leveling up; that is extending relief well beyond the outermost bounds of the court's own reasoning and an abuse of discretion.

Eighth, and finally, any voter confusion that might result from correcting the Superior Court's error only shows the extent of the Superior Court's error. Such

---

[5] Plaintiffs assert that they "specifically asked the court to expand the original injunction, relying, among other things, on facts and evidence presented at trial." Pls.' Opp'n at 30. They once again offer no citation, and their written request to expand the injunction made no mention of their trial claims or the trial evidence. *See generally* Pls.' Resp. to Not. Regarding Implementation of Inj., No. 19 CVS 15941 (Wake Cnty. Super. Ct. Aug. 20, 2021), Ex. A.

confusion is precisely why trial courts should not rewrite election law at the last minute and why appellate courts should reverse them if they do. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). It is perverse for Plaintiffs to rely on the lateness of the Superior Court's intervention—and on their own extensive efforts to take advantage of that plainly unsupportable action—as reasons why the expanded injunction cannot now be touched. But their efforts to mobilize undisputedly ineligible voters do not only underscore the need for supersedeas and a temporary stay. They also indicate that organizations have the capacity to promptly notify anyone who might be affected by court orders, including an order reinstating the pre-expansion status quo. The State Board of Elections still has that capacity as well. If anything, therefore, Plaintiffs' arguments show why this Court's writ should issue promptly.

II. The State Board Has Confirmed that It Can Return to the Pre-Expansion Status Quo.

First, the State Board cites *Pender County v. Bartlett*, 361 N.C. 491, 510, 649 S.E.2d 364, 376 (2007), for the proposition that this Court should avoid "disruption to the ongoing election cycle." SBE Resp. at 2. But that case is nothing like this one and should not prevent this Court from granting Legislative Defendants' requested relief. In *Pender*, the North Carolina Supreme Court held that the configuration of an electoral district violated the North Carolina Constitution, reversing a three-judge panel that found the district constitutionally valid. 361 N.C. at 493, 649 S.E.2d at 366. The unconstitutional district had been drawn by the General Assembly in 2003, in an attempt to preempt a perceived problem under the Voting Rights Act of 1965

("VRA"). *Id.* at 494, 366. The Court concluded that the VRA did not apply to the district to shield it from the North Carolina Constitution and that it was unconstitutional as drawn.

Nevertheless, the Court declined to redraw the district itself, noting that "redistricting is a legislative responsibility and [North Carolina Law] give[s] the General Assembly a first, limited opportunity to correct plans that the courts have determined are flawed." *Id.* at 509, 376 (quotation marks omitted). Given that the legislature would not be in session again until after the deadline to file as a candidate in the 2008 elections would have passed and "candidates ha[d] been preparing for the 2008 election in reliance upon the districts as presently drawn," the court stayed its order until after the 2008 election. *Id.* at 510, 376.

Here, the trial court's written order implementing the new injunction was not reduced to writing until Friday, August 27, and Legislative Defendants sought a stay on Monday. Even now, only two business days have passed since the order became legally effective, *see, e.g.*, *West v. Marko*, 130 N.C. App.751, 755–56, 504 S.E.2d 571, 573–74 (1998) ("[A]n order rendered in open court is not enforceable until it is 'entered,' *i.e.*, until it is reduced to writing, signed by the judge, and filed with the clerk of court."), and no meaningful "reliance" can have occurred.

In fact, any reliance interest cuts in favor of a return to the previous status quo. For almost a year, the State Board of Elections has implemented clear rules for felon re-enfranchisement based on the earlier preliminary injunction, and to the extent voters and the parties have relied on any rule, it is that one. "[W]hen a lower

court intervenes and alters the election rules so close to the election date, . . . this Court, as appropriate, should correct that error," *Republican Nat'l Comm.*, 140 S. Ct. at 1207, and nothing in *Pender County* or the State Board's brief suggests otherwise.

Second, the State Board emphasizes that "time is of the essence" and that early voting for the upcoming October municipal elections begins in just over two weeks. SBE Resp. at 4. Although the Board stresses that it has worked hard in a short time to implement the new injunction, it does not suggest that it could not reverse course in time for the October municipal elections—in fact it acknowledges such a reversal *is* possible. *Id.* at 11–12 & n.5.

There are only two things the State Board says it could not do. If this Court stays the new injunction, the State Board could likely not re-reimplement the new injunction if it is later "instruct[ed] . . . to resume implementation at some later point" before the October elections. *Id.* at 8. And any alternative proposal, other than continuing to implement the expanded injunction or returning to the status quo under the prior injunction, is likely infeasible. *Id.* at 12.[6] The first issue is not a concern for this Court; the only question raised by Legislative Defendants' petition is whether the current injunction should be stayed. And regarding the "alternative proposals" that the State Board suggests Legislative Defendants have made for injunctive terms that could be ordered by the Court, all Legislative Defendants have

[6] In both cases, the difficulty with complying stems from the imminence of the October elections. The State Board does not identify any type of order it could not comply with in later elections.

requested is a return to the status quo that was in place for almost a year leading up to August 27. *See* Pet. at 17 ("[A]t this time Legislative Defendants ask the Court to stay only the expanded injunction and allow the State Board to resume its prior implementation efforts."). Alternatives were mentioned only as examples of the ways the Superior Court could have implemented a narrower remedy that still served its purposes, to demonstrate the fatal overbreadth of the new injunction. *See Travenol Lab'ys, Inc. v. Turner*, 30 N.C. App. 686, 691, 228 S.E.2d 478, 483 (1976).

CONCLUSION

Legislative Defendants respectfully request that the Court grant their Petition for a Writ of Supersedeas and Motion for a Temporary Stay forthwith.

Respectfully submitted this 1st day of September, 2021.

COOPER & KIRK PLLC

By: /s/ Electronically Submitted
Nicole Jo Moss (No. 31958)
1523 New Hampshire Ave. N.W.
Washington, D.C. 20036
Telephone: (202) 220-9600
Fax: (202) 220-9601
nmoss@cooperkirk.com

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.

David H. Thompson*
Peter A. Patterson*
Joseph O. Masterman*
William V. Bergstrom*
1523 New Hampshire Ave. N.W.

Washington, D.C. 20036
Telephone: (202) 220-9600
Fax: (202) 220-9601
dthompson@cooperkirk.com

* Motion for admission *pro hac vice* pending

Nathan Huff
PHELPS DUNBAR LLP
North Carolina Bar #40626
4140 ParkLake Avenue,
Suite 100
Raleigh, North Carolina 27612
Telephone: (919)789 5300
Facsimile: (919) 789-5301

ATTORNEYS FOR LEGISLATIVE DEFENDANTS TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, and PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 1st day of September, 2021, served a copy of the foregoing Proposed Reply with the Clerk of the North Carolina Court of Appeals and will send notification of such filing by electronic mail to the following parties at the following addresses:

For the Plaintiffs:

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

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

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

For the State Defendants:

Paul Cox
Terrence Steed
NORTH CAROLINA DEPARTMENT OF JUSTICE
P.O. Box 629
Raleigh, NC 27602
pcox@ncdoj.gov
Tsteed@ncdoj.gov

Nicole Jo Moss
Cooper & Kirk, PLLC
1523 New Hampshire Ave. NW
Washington, DC 20036

EXHIBIT A

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

No. 19-cvs-15941

COMMUNITY SUCCESS INITIATIVE, et al.,

Plaintiffs,

v.

TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY OF SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, et al.,

Defendants.

PLAINTIFFS' RESPONSE TO THE STATE BOARD DEFENDANTS' NOTICE REGARDING IMPLEMENTION OF INJUNCTION AND MOTION FOR CLARIFICATION

Plaintiffs respectfully submit this response to the State Board Defendants' notice regarding implementation of the Court's preliminary injunction and motion for clarification.

I. Changes to the State Board's Proposed New Language for Forms and Guidance

While the State Board Defendants' proposed new language for State Board forms and guidance regarding voter eligibility of individuals with felony convictions is an improvement over the incorrect language in the current forms and guidance, Plaintiffs believe that the State Board's new language should be modified in two (relatively minor) respects.[1]

First, the State Board's new language indicates that fees, fines, costs, and restitution are conditions of probation "*besides* the regular conditions of probation in G.S. 15A-1343(b)." That is incorrect. Under G.S. 15A-1343(b), those monetary obligations *are* "regular conditions of

[1] The State Board's proposed new language is as follows: "(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."

probation"—they are not "besides" the regular conditions. Accordingly, to correctly track the statute, the parenthetical in the State Board's proposed new language would need to be changed to say: "*in addition to* the *other* regular conditions of probation in G.S. 15A-1343(b)."

Second, while the State Board's proposed language mentions people on post-release supervision as potential beneficiaries of the Court's injunction, it discusses only "regular conditions of *probation* in G.S. 15A-1343(b)," without any additional information about whether a person on post-release supervision may be covered. The conditions of post-release supervision are set forth in a separate statutory provision, G.S. 15A-1368.4. That statute does not use the term "regular conditions." Instead, it specifies one "required condition" applicable to everyone on post-release supervision and other "discretionary conditions" that judges may choose to order, as well as "controlling conditions" and "reintegrative conditions." Accordingly, to properly address whether a person on post-release supervision may be covered by the Court's injunction, the parenthetical in the State Board's proposed new language would need to be changed to including, after "regular conditions of probation in G.S. 15A-1343(b)": "or the required condition of post-release supervision in G.S. 15A-1368.4(b)."[2]

The following revised version resolves those issues above (but even this language creates extremely troubling problems in implementation, as described in detail in Part II below):

> (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 (in addition to any other regular conditions of

[2] On Friday, in discussions over possible new language for the forms/guidance, the State Board's counsel asserted for the first time that the Court's injunction in fact doesn't cover anyone on post-release supervision. But both the current language on State Board forms/guidance and the State Board's proposed new language mention individuals on post-release supervision as being potentially covered by the injunction. While Plaintiffs have had only two days to investigate the State Board's new claim, we believe that there are at least some people on post-release supervision as a result of monetary obligations, though these appear to be rare cases.

probation in G.S. 15A-1343(b), or the required condition of post-release supervision in G.S. 15A-1368.4(b)) and you know of no other reason that you remain on supervision.

II. Severe Problems with Implementation of the Proposed New Language

Even with the drafting changes above, the proposed new language is either literally impossible to implement or at best massively problematic for a host of serious reasons, as the State Board's submission makes clear.

First, if DPS cannot very quickly compile a 100% complete and accurate list of the affected individuals (which appears unlikely), then the proposed new language is literally impossible for the State Board to implement because the State Board has no way of knowing which individuals on felony probation, parole, or post-release supervision can and cannot vote under the Court's injunction. That is untenable, as the State Board appears to acknowledge.

Second, even if DPS could create the required list in a matter of days (which, again, appears unlikely), the State Board takes the position (at pp. 3-4) that the list would be "overinclusive," meaning it would include individuals on felony probation, parole, or post-release supervision whom the State Board believes are *not* in fact covered by the Court's injunction. The DPS-created list thus would indicate that certain individuals can vote under the Court's injunction, when in fact they cannot. Under this view, individuals would be permitted to register and vote based on the DPS-created list indicating that they may do so, and they would then unwittingly expose themselves to felony criminal prosecution for voting before their rights were actually restored. While Plaintiffs don't necessarily accept the State Board's position that those individuals are outside the scope of the Court's injunction, the mere possibility that implementation of the injunction would inadvertently expose a class of individuals, disproportionately African Americans, to criminal prosecution for voting is obviously unacceptable. The State Board appears to acknowledge as much.

Third, for multiple reasons, the proposed new language would cause profound, widespread confusion among individuals trying to determine if they can vote under the Court's injunction, and would make it difficult or impossible for the Organizational Plaintiffs to help their clients figure it out. The statutory distinction between "regular conditions" and "special conditions" isn't one that's familiar to the affected population. As the Organizational Plaintiffs could explain to the Court in detail, most of their clients simply will not recognize this distinction and will have no idea whether their conditions of probation are "regular conditions" (listed in § 15A-1343(b)(1)-(18)), "special conditions" (listed in § 15A-1343(b1)), or some other type of non-regular condition (listed in § 15A-1343(a1), (b2), and (b4)). Under the statute, judges don't need to state the regular conditions "in open court"; they just get listed in the written judgment in the person's file. *See* § 15A-1343(b). Compounding the confusion, there are 18 regular conditions and 29 non-regular conditions (variously identified as "special conditions," "intermediate and community conditions," and "intermediate conditions"). Several of the regular and special conditions have overlapping subject matter, so a person could know that they have a particular condition but *not* know whether it is "regular" or "special." For example, two of the regular conditions include restrictions on the use of drugs and alcohol. § 15A-1343(b)(15)-(16). Similarly, two of the special conditions also include restrictions on the use of drugs and alcohol. § 15A-1343(b1)(2b) – (2c). Unless a person sentenced to probation is told in court about whether any drug- or alcohol-related conditions are regular or special—and they remember the distinction potentially long after the fact—they will not be able to determine at the time they register to vote whether only the regular conditions apply to them. Honest mistakes in confusing these two groups of conditions could subject affected individuals (who are already on felony probation) to additional felony charges for illegally voting. What's more, the

proposed new language does not list the 18 "regular" conditions, which might be helpful to some affected individuals, but would make both the relevant paragraph and the form as a whole unwieldy. Similarly, it might be helpful to some affected individuals for the forms and guidance to list the 29 non-regular conditions (so people can try to confirm that they are not subject to any of those conditions), but doing so would make the paragraph and the form as a whole even more unwieldy. A person should not have to review 47 conditions to try to figure out whether they can vote.

Fourth, the proposed new language completely ignores federal probationers, who by definition are not subject to any conditions of probation under North Carolina law, either regular or special. To be clear, this is a problem with both the current language in the State Board forms and guidance and the proposed new language, and plaintiffs have only realized this important omission of 5,075 people in the last few days. Plaintiffs are unaware of interactions between North Carolina DPS and the federal Bureau of Prisons that could enable resolution of this issue or of any way for DPS or the Board of Elections to identify the population of federal probationers who can vote under the Court's injunction.

III. Plaintiffs' Proposal for How to Proceed in these Circumstances

A. The State Board's Two Proposed "Solutions" Are Obviously Unacceptable

The State Board proposes two possible "solutions" to the problems it identifies (at pp. 3-4), but both are nonstarters for obvious reasons, as the State Board appears to recognize.

Under the State Board's first option, individuals covered by the Court's injunction would be informed, *incorrectly*, that they are *in*eligible to register and vote, and would then need to come forward and affirmatively prove that they are in fact eligible. In other words, this approach would install a regime where a class of people, disproportionately African Americans, are forced to petition for their right to vote. This harkens back to the pre-1971 statutory scheme where

people with felony convictions needed to petition for restoration of their rights—a scheme that the Defendants spent much of the trial castigating as discriminatory and wrong. Plaintiffs adamantly oppose returning to such a system now, and we do not read the State Board as suggesting that this is an appropriate or even administratively workable solution.

Under the State Board's second option, the DPS-created list of individuals covered by the Court's injunction would be "overinclusive" in the State Board's view, and thus would permit individuals with felony convictions to register and vote even though their rights were not in fact restored. Those individuals thus could expose themselves to felony criminal prosecution for an honest mistake of voting. That approach, as it is stated in the State Board's submission, is at least as bad as their first option above. Plaintiffs adamantly oppose any outcome in which individuals, disproportionately African Americans, may be exposed to criminal prosecution for voting based on DPS and the State Board's determination that they were eligible. While we do not believe the State Board is suggesting that the Court adopt their second proposal as written, they do not propose any additional solutions to eliminate the risk of exposing people to prosecution.

B. The Only Viable Way to Implement the Injunction Is to Restore Rights for All People on Felony Probation, Parole, or Post-Release Supervision

Based on the discussion above, it is abundantly clear that some other "solution" is needed, other than the unacceptable options presented by the State Board.

To set the stage, here is the situation:

The current language on State Board forms and guidance is too narrow and thus denies the right to vote to people who are in fact allowed to vote under the Court's injunction.

The proposed new language may be literally impossible to implement because DPS cannot accurately identify all of the individuals covered by the full scope of the Court's injunction.

Even if DPS could compile a complete and accurate list of the affected individuals in a matter of days, the State Board believes that the list would be "overinclusive" and thus would inadvertently expose people to criminal prosecution for voting. Beyond that, the new language in the forms and guidance would be highly confusing to individuals trying to determine if they can vote, and to the Organizational Plaintiffs in trying to help their clients figure it out.

The State Board offers no solution to these problems that is remotely acceptable.

In these circumstances, Plaintiffs see three possibilities.

1. The Court can and should expand the scope of its existing preliminary injunction to immediately restore voting rights to all individuals on felony probation, parole, or post-release supervision. Doing so would ensure that the narrower group of individuals covered by the Court's existing injunction are allowed to vote, while avoiding all of the problems discussed above. Indeed, this approach works even if DPS cannot create a complete and accurate list of the narrower group of individuals covered by the Court's injunction. The omission of 5,075 federal probationers from the State Board's proposed new language further supports a broader remedy to ensure that these individuals are not unconstitutionally denied their right to vote yet again. To be sure, this approach would restore rights to people who are on probation, parole, or post-release supervision for reasons not strictly limited to monetary obligations, but the preliminary injunction would almost certainly be in place only for the upcoming 2021 municipal elections.

"Trial courts have broad discretion to fashion equitable remedies to protect innocent parties when injustice would otherwise result." *Kinlaw v. Harris,* 364 N.C. 528, 532-33, 702

S.E.2d 294, 297 (2010). "This discretion includes the power to 'grant, deny, limit, or shape' relief as necessary to achieve equitable results." *Id.* Exercising this broad equitable discretion, the standard response to a finding of unconstitutional discrimination is to "level up" by extending the right or benefit at issue to the entire previously excluded group, and in fact, "leveling down is impermissible where the withdrawal of a benefit would violate the constitution." *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 920 (M.D. Pa. 2020). For example, after finding that a statute extending financial benefits to children of an unemployed "father" was unconstitutional, the Supreme Court did not hold that no one got benefits, but instead extended the statute to cover children of unemployed mothers as well. *Califano v. Westcott*, 443 U.S. 76, 80, 92-93 (1979) (affirming district court decision "ordering that 'father' be replaced by its gender neutral equivalent"); *accord, e.g., Frontiero v. Richardson*, 411 U.S. 677 (1973) (extending statute conferring discretionary benefit on men to confer that benefit on women as well). Similarly, after finding that a disability program and a food stamp program unlawfully excluded particular classes of individuals, the Supreme Court extended the programs to the wrongfully excluded classes. *Jimenez v. Weinberger*, 417 U.S. 628, 630-631 & n.2, 637-638 (1974); *Dep't of Agriculture v. Moreno*, 413 U.S. 528, 529-530, 538 (1973).

2. If DPS is able to create the required list of accurate individuals in the short time available (which appears unlikely), the Court could adopt the proposed new language for the forms/guidance and also add a provision to its injunction designed to eliminate the risk that implementation would inadvertently expose people to criminal prosecution for voting. For instance, the Court could add a provision enjoining enforcement of the statutory provision criminalizing voting before rights restoration, N.C.G.S. 163-275(5), with respect to persons on probation, parole, or post-release supervision from an North Carolina State court conviction who

receive the new language on the State Board forms/guidance. That way, the State Board could identify people covered by the Court's injunction using a DPS-created list that the State Board believes is overinclusive, without a risk that people on the list will later be criminally prosecuted for voting before their rights were actually restored.

3. The only other possibility is to leave in place the status quo—in other words, leave the current language on State Board forms and guidance, even though that language is inconsistent with the Court's injunction and continues to deny the right to vote to individuals based on an unconstitutional requirement to pay money to vote. That should be unacceptable to everyone.

* * * * *

Based on the incorrect, overly narrow language in the current forms and guidance, a class of people—disproportionately African Americans—were once again denied their right to vote in the November 2020 elections based on an unconstitutional requirement to pay money. In a presidential election year where an important statewide race was decided by only 401 votes, that is nothing short of tragic. It should not happen again.

Because this issue surfaced only recently, there is very little time to fix it, and fixing it is not a simple matter, as both the State Board's and Plaintiffs' submissions make clear. Plaintiffs agree with the State Board that the Court's guidance is needed, but the two options put forward by the State Board are unacceptable. We accordingly urge the Court to give full effect to its preliminary injunction by revising the injunction to restore rights to all individuals on felony probation, parole, or post-release supervision.

Respectfully submitted this the 20th day of August 2021.

FORWARD JUSTICE

/s/ Daryl Atkinson

Daryl Atkinson (NC Bar # 39030)
Whitley Carpenter (NC Bar # 49657)
Caitlin Swain (NC Bar #57042)

Kathleen Roblez (NC Bar #57039)
Ashley Mitchell (NC Bar #56889)
400 W Main St., Suite 203
Durham, NC 27701
daryl@forwardjustice.org

Counsel for Plaintiffs

ARNOLD & PORTER KAYE SCHOLER LLP

R. Stanton Jones*
Elisabeth Theodore*
601 Massachusetts Ave. NW
Washington, DC 20001-3743
(202) 942-000
stanton.jones@arnoldporter.com

PROTECT DEMOCRACY PROJECT

Farbod K. Faraji*
Protect Democracy Project
2120 University Ave.,
Berkeley, CA 94704
farbod.faraji@protectdemocracy.org

Counsel for Plaintiffs

* Admitted pro hac vice