No. P22-153 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
****

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

****

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. *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 submit that their short reply brief will aid the Court's consideration of the constitutional issues in this case and the need for a writ of supersedeas by addressing arguments made in Plaintiffs' response.

Legislative Defendants' proposed reply brief is filed contemporaneously as an attachment to this motion.

Respectfully submitted this the 14th day of April, 2022.

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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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CERTIFICATE OF SERVICE

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

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This the 14th day of April, 2021.

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Counsel for Legislative Defendants

No. P22-153 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
****

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

****

REPLY IN SUPPORT OF LEGISLATIVE DEFENDANTS' PETITION FOR WRIT OF SUPERSEDEAS

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Legislative Defendants offer this short reply brief to correct certain points in Plaintiffs' recently filed response to our petition for a writ of supersedeas.

Throughout, Plaintiffs' response reflects their failure to grapple with two fundamental aspects of this matter. First, lifetime felon disenfranchisement is the default in North Carolina. Absent legislation to restore felons' voting rights, such as N.C.G.S. § 13-1, all convicted felons would remain disenfranchised under the North Carolina Constitution. It is against this backdrop that Plaintiffs' claims must be assessed. And against this backdrop, Plaintiffs claims of disparate impact and discriminatory intent all fail.

Second, changing the status quo on the eve of an election to allow tens of thousands of additional felons to register and vote, as the Superior Court has tried to do, would throw the

election into disarray. The State Board of Elections has informed the Court of the many steps needed to make this change, some of which already cannot be completed in time for the primary elections. And even if they could be, the circulation of conflicting guidance will necessarily cause voter confusion—which could cause even those felons who currently *can* vote to simply forgo voting. This was all true when Legislative Defendants petitioned for supersedeas, at which point absentee ballots had already been distributed. It is even more true now that Plaintiffs waited more than a week to file their response after this Court temporarily stayed the Superior Court's injunction, even though the Court indicated that it would rule on our petition once Plaintiffs had responded. That is an additional week during which the State Board did not act to implement the full scope of the Superior Court's injunction and in which the status quo for felon voting, which has been in place for over a year, has stayed in place. And now early voting for the primary elections is only two weeks away. For the reasons discussed in our petition and below, this Court must issue a writ of supersedeas to preserve the status quo.

First, Plaintiffs argue that "Legislative Defendants' request for supersedeas is in service of a law that is *all parties agree* is [sic] rooted in racial discrimination against Black people and the suppression of Black political power." Pls.' Opp'n to Legis. Defs.' Pet. for Writ of Supersedeas ("Pls.' Resp.") at 4 (Apr. 13, 2022). All parties do not agree on that point. Legislative Defendants vigorously contest that Section 13-1, in its current form, is *at all* based in racism—and that is the law at issue in this suit. As counsel for Legislative Defendants explained to the trial court, Plaintiffs' expert on this subject "did not present any evidence that this version of 13-1 was crafted, amended, or authored by any particular legislator . . . with any racial animus." 8/19/21 Trans. 844:11–14 (excerpts attached as Exhibit A). Indeed, counsel argued that no felon voting restoration law has been marred by racial animus because the first restoration law was enacted in 1840, before

African Americans could vote, and "no revision to the 1840 statute . . . contain[s] any indication . . . that the changes were made with any racial animus." *Id*. at 845:22–846:3.

Although North Carolina "has a long history of race discrimination generally and race-based vote suppression in particular," *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 223 (4th Cir. 2016), Section 13-1 as it stands today is not a part of that history. Plaintiffs' own witnesses and facts presented to the Superior Court conclusively demonstrate that the enactment of Section 13-1 was an intervening event that "eliminated any taint" of racial animus, *see Johnson v. Gov. of State of Fla.*, 405 F.3d 1214, 1223–24 (11th Cir. 2005) (en banc), from North Carolina's felon re-enfranchisement scheme: (1) the bill was sponsored by all three African American representatives in the General Assembly, *see* Legis. Defs.' Pet. for Writ of Supersedeas and Mot. for Temporary Stay ("Defs.' Pet.") (Apr. 1, 2022), Ex. 7 at 55:12–23, (2) the legislative effort had the backing of the NAACP, *id.*, and (3) the proponents of the bill explicitly framed it as an attempt to broaden the restoration of citizenship rights compared to the old regime, with the goal of making it more beneficial to African Americans, *see id.* at 78:10–14. Indeed, the year after it was enacted, the North Carolina Supreme Court recognized that these goals had been accomplished and that Section 13-1 (building upon the 1971 version of the law) "further relax[ed]" "the requirements necessary for a convicted felon to have his citizenship restored." *State v. Currie*, 284 N.C. 562, 565, 202 S.E.2d 153, 155 (1974). "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbott v. Perez*, 138 S. Ct. 2305, 2324–25 (2018). The Court should reject Plaintiffs' attempts to blend Section 13-1's origins into a broader history of discrimination in which it played no part.

Second, Plaintiffs argue that they have standing to challenge Section 13-1 because it is "implementing legislation" for the provision of the North Carolina Constitution that

disenfranchises felons, *see* N.C. CONST. art. VI, § 2, cl. 3, and that the Constitution cannot accomplish that disenfranchisement alone. Pls.' Resp. at 24. But the text of both Section 13-1 and of the North Carolina Constitution, with which Plaintiffs do not engage, refute this argument. The Constitution says:

> 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, cl. 3. In order to determine whether language is "self-executing" or requires "implementing legislation," Courts look to the text itself. *See Medellin v. Texas*, 552 U.S. 491, 505 (2008) (stating that "a treaty is 'equivalent to an act of the legislature,' and hence self-executing, when it 'operates of itself without the aid of any legislative provision.'" (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 315 (1829), *overruled on other grounds, United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833)). Here, North Carolina's constitutional disenfranchisement provision operates without the aid of a legislative enactment to the extent that it commands that "[n]o person adjudged guilty of a felony . . . shall be permitted to vote." N.C. CONST. art. VI, § 2, cl. 3. Contrast this with the voter ID amendment, which expressly calls for implementing legislation and thus demonstrates that the legislature and the voters know how to require implementing legislation when they want to. *See* N.C. CONST. art. VI, § 2, cl. 4. It is only the final portion of the disenfranchisement provision—allowing reinstatement "to the rights of citizenship *in a manner prescribed by law*" (emphasis added)—that calls for implementing legislation. *See ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 387 (4th Cir. 2012) ("It is well-established that a treaty may contain both self-executing and non-self-executing provisions." (citation and quotation marks omitted)). It is therefore of no importance that North Carolina passed

implementing legislation "the very next legislative session" after the Constitution was enacted. *See* Pls.' Resp. at 24. None was required to effectuate the constitutional command.

Furthermore, the text of Section 13-1 (which Plaintiffs also largely ignore) says nothing about removing the right to vote from felons. In fact, its opening sentence: "Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored upon the occurrence of any one of the following conditions . . ." takes as a given that revocation of voting rights has already occurred by operation of the Constitution and demonstrates an attempt only to address "the manner prescribed by law" for *restoring* those rights. N.C.G.S. § 13-1.

Plaintiffs' error flows from a failure to distinguish between the self-executing portion of the Constitutional provision, which, by denying them the right to vote, is the root of their alleged injury, and the non-self-executing portion which restores the right to vote through legislation that the Superior Court has now invalidated. As a result, Plaintiffs are wrong to argue that, with Section 13-1 invalidated, there is no barrier to felons on probation voting or that such felons are not open to criminal prosecution under N.C.G.S. § 163-275(5). Because the Constitution has not been enjoined from enforcement, felons continue to be disenfranchised, and all that the invalidation of Section 13-1 does is remove the avenue for restoration.

Third, Plaintiffs claim that *State v. Hilton*, 271 N.C. App. 505, 845 S.E.2d 81 (2020), supports the Superior Court's unconventional injunction, which rather than preventing officials from enforcing North Carolina law as written, sought to supplant the legislature and rewrite North Carolina law to allow felons on probation to register to vote. The remedy in *Hilton*, however, was significantly narrower than the injunction the Superior Court entered here. In *Hilton*, the Court merely held that the phrase "for life" in a statute imposing satellite-based monitoring on

individuals convicted of sex crimes was unconstitutional and limited its enforcement to the period when an individual was on post-release supervision. 271 N.C. App. at 508, 845 S.E.2d at 84. As an initial matter, this remedy was not allowed to stand. The Supreme Court (on other grounds) reversed the decision to end satellite-based monitoring at the conclusion of supervision and therefore undid the portion of the Court of Appeals' order on which Plaintiffs now rely. *State v. Hilton*, 378 N.C. 692, 715, 862 S.E.2d 806 (2021). But even assuming the Court of Appeals' decision was not itself an overreach of the injunction power, any analogy to this case quickly breaks down. Here, the Superior Court held the General Assembly's grant of voting rights to disenfranchised felons was insufficiently generous and replaced the provision requiring restoration of rights upon "[t]he unconditional discharge of an inmate, of a probationer, or of a parolee by the agency of the State having jurisdiction of that person . . ." with a broad grant that "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." Defs.' Pet., Ex. 17 at 65, 67. Rather than severing a provision of the statute and shortening its enforcement, as the Court of Appeals tried to do in *Hilton*, the Superior Court has instead ordered officials to act as though some felons' rights have been restored *although they have not*. Furthermore, unlike in *Hilton* where the only statute impacted by the Court's injunction was the one before the Court, here the Superior Court's injunction does not stop at modifying Section 13-1. It also purports to restrain local officials from enforcing N.C.G.S. § 163-275(5) and it conflicts with the North Carolina Constitution's requirement that felons stay disenfranchised unless restored through a "manner prescribed by law."

Fourth, Plaintiffs argue that, under our analysis, "no facially race-neutral law could *ever* have a racially disparate impact." Pls.' Resp. at 31 (emphasis in original). That is untrue. If Plaintiffs could show that, as amended by African American legislators in the 1970s, Section 13-

1 had increased any racial disparity in felon re-enfranchisement—and consequently any such disparity among felons who remain disenfranchised—then Plaintiffs would have evidence of disparate impact. That evidence alone would not prove discriminatory intent, but Plaintiffs have not even tried to present such evidence. It does not suffice to say, as Plaintiffs do, that they do not need evidence of disparate re-enfranchisement because "the General Assembly has enacted a law disenfranchising people on community supervision," who are "disproportionately" African American. *Id*. The General Assembly has passed no law disenfranchising any felon. Once again, the North Carolina Constitution disenfranchises felons; Section 13-1 re-enfranchises them. Thus, to show that *Section 13-1* has a disparate impact, Plaintiffs must show that it results in a regime that is worse for African Americans than the one that was in place before the amendments implemented in the 1970s. There is no such showing in any of Plaintiffs' briefing or in the Superior Court's order.

Fifth, Plaintiffs suggest that we misconstrue the rights asserted in their Equal Protection and Free Elections Clause claims. As for equal protection, Plaintiffs allege that felons have a "fundamental right to substantially equal voting power," and that a deprivation of this right warrants heightened scrutiny even apart from any allegations of discriminatory intent. Pls.' Resp. at 34 (internal quotation marks omitted). The cases cited for this right involve "one person, one vote" challenges to district drawing, not challenges to particular voting restrictions like this case purports to be (but is not, since Plaintiffs have not challenged the actual, constitutional source of felon disenfranchisement). *See id*. at 34–35 (discussing *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002), and *Blankenship v. Bartlett*, 363 N.C. 518, 681 S.E.2d 759 (2009)). In any event, Plaintiffs argue themselves that this "*relative*" right is violated only where "a challenged statute draws a distinction among similarly situated citizens." *Id*. at 35 (emphasis in original)

(internal quotation marks omitted). This argument tacitly admits that, under the North Carolina Constitution, convicted felons have no underlying right *to vote*. Thus, Plaintiffs are forced to argue that Section 13-1 violates the Equal Protection Clause simply because it allows some people to vote who are not otherwise constitutionally entitled to do so (namely, felons who have completed their sentences) but not others (namely, felons who have not completed their sentences). But those groups are plainly not similarly situated. One has paid its debt to society, the other has not, and Plaintiffs offer no reason why this is an invalid basis for determining which felons can vote. To be clear, the Court should not accept Plaintiffs' premise. Under the North Carolina Constitution, felons have no right to vote and thus no right to vote on equal terms with any other North Carolina residents. But even on their own premise, Plaintiffs' claim fails.

As for the Free Elections Clause, the parties agree that the clause is meant to ensure "that elections in North Carolina faithfully ascertain the will of the people," but Plaintiffs argue that "the people" includes convicted felons. Pls.' Resp. at 37. Aside from the decision below, they can quote no case accepting that argument. And that argument fails for the reason above: the North Carolina Constitution, which reflects a decision by the people of North Carolina not to include convicted felons among "the people" whose will elections must reflect until their rights are restored by law. These felons are not "people living in North Carolina communities who would otherwise vote" if not for Section 13-1. *Id*. at 39. They are people who would otherwise *not* vote if Section 13-1 did not afford them an avenue for restoring their rights.

Sixth, and finally, Plaintiffs pay little heed to the havoc that their position would wreak. Contra Plaintiffs, we have not sought supersedeas simply because the Superior Court's injunction could allow more voters to vote. Of course, the State's interests are always injured when a duly enacted law, such as Section 13-1, is enjoined. And the injury is particularly grievous here: because

Legislative Defendants are likely to succeed on the merits, the Superior Court's injunction enfranchises tens of thousands of individuals who likely are *ineligible* to vote under a proper understanding of the law. That is a profound harm in the form of vote dilution to the eligible voters of this state and alone sufficient to support our petition. But there is a further injury that independently requires supersedeas: the injury that would result from allowing tens of thousands of previously ineligible voters to register *in the midst of an ongoing election*, and a mere two weeks before in-person voting opens. Plaintiffs' assertion that "there is more than enough time to implement the [Superior Court's injunction] before early voting starts" is belied by the State Board filing on which that assertion is based. Pls.' Resp. at 41. As the State Board explains, only some steps can be taken in that timeframe, and it would be impossible to take those steps without creating a risk of confusion given that materials issued under contradictory rules are already in circulation.

The ultimate victims will be voters, and not only those who stay home on election day out of confusion. Eligible voters will see their votes diluted by felon voters who remain ineligible to vote under the North Carolina Constitution. And those felon voters risk subjecting themselves to prosecution. These injuries will be irreparable.

For these reasons and those in our petition, the Court should issue the requested writ of supersedeas to maintain the status quo under the Supreme Court's order of September 10, 2021, that has been preserved since this Court's temporary stay of April 5, 2022.

Respectfully submitted this the 14th day of April, 2022.

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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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Exhibit A

IN THE NORTH CAROLINA GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COMMUNITY SUCCESS INITIATIVE; JUSTICE SERVED NC, INC.; WASH AWAY UNEMPLOYMENT; NORTH CAROLINA STATE CONFERENCE OF THE NAACP; TIMMY LOCKLEAR; SUSAN MARION; HENRY HARRISON; and SHAKITA NORMAN, Plaintiffs, v. TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as Chairman of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; KENNETH RAYMOND, in his official capacity as member of the North Carolina State Board of Elections; JEFF CARMON, in his official capacity as member of the North Carolina State Board of Elections; DAVID C. BLACK, in his official capacity as member of the North Carolina State Board of Elections, Defendants.	WAKE COUNTY 19 CVS 15941

TRANSCRIPT - THREE-JUDGE PANEL TRIAL
Thursday, August 19, 2021
Volume 4 of 4

Transcript of proceedings in the General Court of Justice, Superior Court Division, Wake County, North Carolina at the August 16, 2021, Civil Session, before the Honorables Lisa C. Bell, John M. Dunlow, and Keith O. Gregory, Judges Presiding.

Tammy L. Johnson, CVR-CM-M
Official Court Reporter
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Rev. Dr. T. Anthony Spearman
Troy Strunkey

So in that regard, with -- I had my own little timer there.

JUDGE GREGORY: He has a minute -- what I do, every time you ask a question, to be fair to the defense, I stopped it and then restarted it when he started his answer, but I am going to say he has about a minute and 36 seconds before I give him the five minutes. At that point, Judge, just for our court reporter --

THE COURT REPORTER: I'm fine to push through, but please slow it down just a tad.

MR. RODRIGUEZ: My speed, okay. Thank you.

THE COURT REPORTER: I'm okay. Thank you.

JUDGE GREGORY: Okay. So I'll restart it once he starts talking.

MR. RODRIGUEZ: Therefore, on this issue regarding the governmental interests that are served by the -- by the classification, the only classification that 13-1 makes, which is completing your sentence, restored; not completing your sentence, not restored; the evidence, we think, does not support a claim that that distinction violates the Equal Protection Clause.

So now I'm going to turn to the second -- the second claim -- the second claim of plaintiffs that 13-1 has this impermissible intent and purpose of discriminating against Black voters. The plaintiffs here presented a lot

of evidence, much of it, if not all of it, all of it, troubling and irrefutable. You can't -- I can't say anything about a newspaper report that says what it says. I can't say anything about the history that is in the -- in the archives. What I can say is that the evidence that Dr. Burton presented certainly demonstrates a shameful history of our state's use of laws, and with regard to voting in particular, to suppress the Black population. That I can't -- I can't contest that. We never tried to contest that.

However, Dr. Burton did not present any evidence that this version of 13-1 was crafted, amended, or authored by any particular legislator for any -- with any racial animus. Certainly he presented evidence of the culture and the climate that existed, not just in the 1800s, but sadly, in the not-that-distant past. Again, not refuting any of that. I can't refute what the *Charlotte Observer* writes about what the citizens of our state believed. I can't refute other comments that legislators were quoted making in various newspaper articles in the '60s and the '70s. I can't refute Richard Nixon's policies on being tough on crime and the war on drugs. Those things matter. The effects of that matter.

This case, however, is just not about that, and I want to stress that I do not say that with any disrespect or

to minimize the importance of those matters. I simply am trying to do my job in keeping focused on the things that do matter, and there is case law that indicates that even where, even where, which I'll get back to in a second, even where the particular statute at issue has a racial animus in its origin, that that can -- that -- a revision to that law, a subsequent revision to that law can be valid if the law is substantially changed and the change in that law is not motivated by any racial bias.

Now, before I talk about that text, I want to talk about the actual law and the -- the history behind the actual law. 1840 was the first codification, if I'm not mistaken, of the restoration statute, so the immediate predecessor. If you draw a line from 13-1 as it's on the books all the way back to the first time such a bill was on the books, it was 1840, before African-Americans could vote, and so it could not have been intentionally enacted to discriminate against African-Americans.

After 1840 and perhaps before 1840, but after 1840, the historical record is clear there were many laws passed that appear to be, based on Dr. Burton's testimony, motivated by this racial animus, but no revision to the 1840 statute running through, which is -- this is all in evidence -- each revision from 1877 to '97 to 1905 to 1933 to the 1973 revisions, no revisions of those statutes contain any

indication, nor did Dr. Burton testify to any legislative history from any of those revisions, contain any indication that the changes were made with any racial animus. In fact, the restoration law was at its strictest in 1840 and only improved in time. Now, it is a fair statement that when it was at its strictest, it didn't apply to African-Americans, and for a long period of time as it was improving, it still didn't apply to African-Americans. Absolutely correct.

However, the most immediate substantive change to this law came in the 1970s when Representative Johnson introduced a bill, and the bill that was introduced was aimed at automatically restoring rights upon full completion of a person's sentence, not upon release from prison. The bill as introduced by Representative Johnson does not contain a phrase, "upon release from prison." It does not contain a phrase, "upon re-entering society." Dr. Burton was asked on cross-examination whether during his research he uncovered any such drafts of bills, and he testified he did not.

Plaintiffs' theory of this case, regarding the intentional discrimination piece, appears to me to rest on this notion that Representative Johnson's intent when he introduced the bill in 1971 was thwarted at every turn throughout the process and then again in 1973 and, therefore, whatever changes were made to that statute don't

CERTIFICATION OF TRANSCRIPT

This is to certify that the foregoing transcript of proceedings taken at the August 16, 2021, Civil Session of Wake County Superior Court is a true and accurate transcript of the proceedings taken by me and transcribed by me. I further certify that I am not related to any party or attorney, nor do I have any interest whatsoever in the outcome of this action.

This 6th day of November, 2021.

Tammy Johnson, CVR-CM-M
Official Court Reporter
Tenth Judicial Circuit
Wake County, North Carolina