

SUPREME COURT OF NORTH CAROLINA

COMMUNITY SUCCESS)
INITIATIVE, et al.,)
))
Plaintiffs,)
v.)
TIMOTHY K. MOORE, *in his*)
official capacity as Speaker of the)
North Carolina House of)
Representatives, et al.,)
))
Defendants.)
)

From Wake County
No. 19 CVS 15941

From Court of Appeals
No. P22-153

**LEGISLATIVE DEFENDANTS' RESPONSE IN OPPOSITION
TO PLAINTIFFS' MOTION TO SET ORAL ARGUMENT**

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

After failing to attain a breakneck briefing schedule, Plaintiffs now seek a breakneck argument schedule. The ostensible basis for their request is the "changed circumstance" presented by an argument raised in Legislative Defendants' briefs in this appeal. But Legislative Defendants have raised that same argument in every one of the many substantive briefs they have filed in this case over the last year. Plaintiffs' new motion is nothing more than a baseless second attempt at expedition, which this Court already has properly denied. Legislative Defendants therefore oppose Plaintiffs' motion and state as follows:

1. The Superior Court has ordered that all felons serving sentences outside of prison must be permitted to register and vote. The Court of Appeals stayed that order until July 27, 2022, and the order took effect on that day. Accordingly, the State Board of Elections is now allowing such felons to register, and those who have registered will be entitled to vote in upcoming elections unless and until the Superior Court's order is reversed.

2. When Plaintiffs moved to expedite the briefing schedule, Legislative Defendants pointed out that expedition was entirely unnecessary because even expedited briefing would not be complete until after July 27, 2022, when Plaintiffs would begin to receive all the relief sought in their complaint. Plaintiffs are still (improperly) receiving that relief, and their new motion does not suggest otherwise.

3. Rather, Plaintiffs argue that expedition is necessary because “[c]ircumstances have changed.” Pls.’ Mot. To Set Oral Arg. (“Pls.’ Mot.”) ¶ 5 (Sept. 21, 2022). “Specifically,” they say, “Legislative Defendants have argued that individuals on felony supervision can be criminally prosecuted for unlawfully registering and voting notwithstanding the trial court’s injunction.” *Id.* (italics omitted). That is so because Plaintiffs have not challenged—and the Superior Court therefore could not enjoin—N.C.G.S. § 163-275(5), which makes it a crime for felons to vote “without having been restored to the right of citizenship . . . by the method provided by law.” The “method provided by law” is N.C.G.S. § 13-1, which the Superior Court *has* enjoined.

4. According to Plaintiffs, “the mere possibility of being threatened with criminal prosecution . . . risks intimidating and deterring affected individuals from registering and voting in upcoming elections.” Pls.’ Mot. ¶ 8 (italics omitted). Yet Plaintiffs fail to identify a single felon who is eligible to register and vote under the Superior Court’s order and who is being deterred in any way from doing so. Anyone familiar with this litigation, as Plaintiffs are, would readily

understand why it is implausible that an argument in Legislative Defendants' most recent briefing would have such an effect.

5. For over a year, Legislative Defendants have argued that Plaintiffs' requested relief—an injunction against Section 13-1—cannot as a legal matter protect from prosecution any felon who votes in violation of Section 163-275(5), both because Plaintiffs have not sought to enjoin Section 163-275(5) and because they have not sued any of the local prosecutors empowered to enforce Section 163-275(5). Legislative Defendants have made this argument, which goes to redressability and therefore to jurisdiction, in briefing at every judicial level.¹ Plaintiffs have been aware of this argument throughout this time: they have responded to Legislative Defendants' briefs and have attempted to rebut this argument specifically. *See, e.g.,* Pls.' Opp'n to Legis. Defs.' Pet. for Writ of Supersedeas at 24–25, Case No. P21-340 (N.C. Ct. App. Aug. 31, 2021).

6. Thus, the premise of Plaintiffs' motion is simply false. Even if it were reasonable to speculate that voter behavior could be affected by legal arguments in the briefs in this case, Legislative Defendants' jurisdictional argument has long played a prominent role in that briefing. It is not a “changed circumstance.”

7. In fact, the only change relative to that argument comes from a brief that the State Attorney General filed in a separate case. As Plaintiffs themselves note, that brief represents that felons serving sentences outside of prison will *not* be prosecuted under Section 163-275(5) for

¹ *See* Legis. Defs.' Pet. for Writ of Supersedeas at 16, Case No. P21-340 (N.C. Ct. App. Aug. 30, 2021); Legis. Defs.' Reply in Supp. of Pet. for Writ of Supersedeas at 2–3, Case No. P21-340 (N.C. Ct. App. Sept. 1, 2021); Legis. Defs.' Resp. in Opp'n to Pls.' Pet. for Writ of Supersedeas at 14, Case No. 331P21 (N.C. Sept. 4, 2021); Legis. Defs.' Proposed Findings of Fact & Conclusions of Law at 44–45, Case No. 19-CVS-15941 (Wake Cnty. Super. Ct. Sept. 10, 2021); Emergency Mot. for Stay Pending Appeal at 6, Case No. 19-CVS-15941 (Wake Cnty. Super. Ct. Mar. 30, 2022); Legis. Defs.' Pet. for Writ of Supersedeas at 12–13, Case No. P22-153 (N.C. Ct. App. Apr. 1, 2022); Legis. Defs.' Mot. for Rehearing En Banc at 14–15, Case No. P22-153 (N.C. Ct. App. Apr. 28, 2022).

voting in upcoming elections. *See* Pls.’ Mot. ¶ 7. This exercise of prosecutorial discretion does not supply jurisdiction here; it remains the case that the relief Plaintiffs seek *from the courts* cannot legally redress the injury they allege. But this development does prove that the concern supposedly animating Plaintiffs’ motion is entirely illusory.

8. Plaintiffs also ignore the context of the argument in question, *i.e.*, that it is simply jurisdictional. Legislative Defendants’ briefs contain no “threats of criminal prosecution,” Pls.’ Mot. at 1, which Legislative Defendants could not initiate. Nor do Legislative Defendants assert that any felons should or will be prosecuted for voting in reliance on the Superior Court’s order during any election conducted while that order is in effect. What our briefs do contain are multiple reasons why the Superior Court lacked authority to enter that order and thus why the order should be vacated for future elections, one reason being that the order could not and does not redress Plaintiffs’ alleged injury.

9. To briefly reiterate, the North Carolina Constitution allows convicted felons to vote only once their voting rights have been restored “in the manner prescribed by law.” N.C. CONST. art. VI, § 2, cl. 3. Courts lack the power to change the “manner” of felon re-enfranchisement that the General Assembly has “prescribed” in Section 13-1. Thus, even if Plaintiffs’ claims against Section 13-1 were correct (and they are not), the most a court could do as a remedial matter would be to enjoin Section 13-1. But that would leave *all* felons disenfranchised, because they would lack a “manner prescribed by law” for re-enfranchisement.

10. Section 163-275(5) is relevant to this argument because it shows why the claims Plaintiffs have chosen to bring (against Section 13-1) cannot redress the injury they allege (disenfranchisement) and thus why they lack standing. Even if this Court affirmed the Superior Court’s order in full, that order still would not bind any district attorneys, since none are parties

here, or prevent enforcement of Section 163-275(5), which Plaintiffs have not challenged. These are incontrovertible facts, and their effect would be the same whether or not Legislative Defendants spelled it out in their briefs. Whether a requested injunction will redress an alleged injury depends on the scope of the injunction itself. *See, e.g., Jacobson v. Fla. Sec’y of State*, 974 F.3d 1236, 1254 (11th Cir. 2020) (“[I]t must be *the effect of the court’s judgment on the defendant*—not an absent third party—that redresses the plaintiff’s injury.”) (internal quotation marks omitted). And no injunction can be issued in this case that would entitle felons still serving sentences outside of prison to vote without the threat of prosecution.

11. Plaintiffs do not explain why such a prosecution would be “unlawful” under the Superior Court’s order. Pls.’ Mot. ¶ 7. Nor could they. That order does not affect the enforceability of Section 163-275(5). Even with the relief they seek, therefore, Plaintiffs’ alleged injury remains. Legislative Defendants have made this point (repeatedly) simply because it shows the fundamental error in Plaintiffs’ legal strategy.

12. For the foregoing reasons, Plaintiffs’ supposed concern lacks any basis, and their motion is devoid of any justification for prejudicing Defendants’ preparation or the Court’s consideration in this manner.

WHEREFORE, Legislative Defendants respectfully request that the Court deny Plaintiffs’ motion and set oral argument in the regular course.

Respectfully submitted this 4th day of October, 2022.

/s/Electronically Submitted
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This the 4th day of October, 2022.

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