NO. _____ TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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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
No. 19 CVS 15941

****

PETITION FOR DISCRETIONARY REVIEW PRIOR TO DETERMINATION BY THE COURT OF APPEALS AND MOTION TO SUSPEND APPELLATE RULES

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INDEX

TABLE OF AUTHORITIES

CASES **Page(s)**

CONSTITUTIONS, STATUTES, AND RULES

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiffs Community Success Initiative, Justice Served NC Inc, Wash Away Unemployment, the North Carolina State Conference of the NAACP, Timothy Locklear, Susan Marion, Henry Harrison, and Shakita

Norman ("Plaintiffs") respectfully petition this Court to certify for discretionary review, prior to determination by the Court of Appeals, the Final Judgment and Order of the three-judge panel entered on March 28, 2022, in *Community Success Initiative v. Moore*, No. 19 CVS 15941 (attached hereto as Exhibit A). In that order, the three-judge panel majority held that N.C.G.S. 13-1 violates both the Equal Protection Clause and the Free Elections Clause of the North Carolina Constitution.

Plaintiffs seek discretionary review from this Court given the exceptional importance and urgency of the appeal, and of Legislative Defendants' Petition for a Writ of Supersedeas, which has the potential to create immense confusion before the May 2022 primary election and cause substantial and irreparable harm. Plaintiffs further move to suspend the North Carolina Rules of Appellate Procedure to the extent necessary to prevent manifest injustice to the Constitution of the State of North Carolina and to the citizens of the State.

INTRODUCTION

Plaintiffs in this action challenge N.C.G.S. § 13-1, which denies the voting franchise to North Carolinians who are living in our communities while on probation, parole, or post-release supervision from a felony

conviction. As the Superior Court recognized, the statutory denial of the franchise to people with felony convictions—even if they are not incarcerated—derives directly from a post-Civil War effort to use felony disenfranchisement schemes as a tool for suppressing the political power of African American men.

The statute continues to have its intended effect today. Although African Americans constitute 21.51% of the voting-age population in North Carolina, they represent 42.43% of the people denied the franchise under section 13-1 by virtue of being on community supervision (*i.e.*, probation, parole, or post-release supervision). In *every* county in North Carolina with sufficient data, the percentage of the African American population that is denied the franchise by virtue of being on community supervision is higher than the percentage of the White population that is disenfranchised on this basis. All in all, the statute denies the franchise to over 56,000 people living in North Carolina communities—people who have just as much of a stake in our elections as any other North Carolinian.

The Superior Court correctly enjoined this vestige of Jim Crow on two separate occasions. First, on September 4, 2020, the Court granted

summary judgment to Plaintiffs on their claim that 13-1 creates a wealth-based classification in violation of the Equal Protection Clause and the Ban on Property Qualifications. The Court then 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.

On March 28, 2022, after a four-day trial on the merits, the Superior Court fully and permanently enjoined 13-1's denial of the franchise to persons on felony probation, parole, or post release supervision, finding it violates both the Equal Protection Clause and the Free Elections Clause. The Court found that "the legislature's decision in the 1970s to preserve section 13-1's denial of the franchise to people living in the community was itself independently motivated by racism" and that "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…are prohibited from voting" (Ord. pp 56, 59). On March 30, 2022, Legislative Defendants filed a Motion for a Stay Pending

Appeal and a Notice of Appeal with the Superior Court. The Superior Court denied the Motion for a Stay Pending Appeal on April 1, 2022.

Plaintiffs seek this Court's discretionary review in light of the exceptionally urgent questions presented by this case and Legislative Defendants' Petition for a Writ of Supersedeas. This Court's review is urgently necessary, and there is no time for intermediate review by the Court of Appeals. Absent the injunction entered below, section 13-1 will deny the vote to over 56,000 citizens in the upcoming May 2022 primary election, which is less than two months away. North Carolina's deadline to register to vote prior to the early voting period is April 22nd, leaving limited time for previously disenfranchised persons to register to vote pursuant to the Superior Court's ruling. Individuals impacted by the judgment have already begun attempting to register to vote. If the Court of Appeals were to grant a writ of supersedeas, even if this Court later vacated that writ, there would be widespread confusion among people on community supervision, and many would ultimately be deterred from registering and voting. Because the subject matter of this case raises issues of significant public interest and a delay in adjudication will cause substantial harm to Plaintiffs, this Court should assume immediate

jurisdiction over the appeal in this case, including all motions, petitions, or other matters stemming from that appeal.

PETITION FOR DISCRETIONARY REVIEW

Pursuant to N.C.G.S. § 7A-31(b) and Rules 2 and 15(a) of the North Carolina Rules of Appellate Procedure, Plaintiffs respectfully petition this Court to exercise its authority to grant discretionary review of the Final Judgment and Order prior to determination by the Court of Appeals. As shown below, this case satisfies several of the statutory criteria under N.C.G.S. § 7A-31(b) for certification prior to determination by the Court of Appeals, any one of which is sufficient to justify this Court's exercise of discretionary review.

STATEMENT OF PROCEDURAL HISTORY

Plaintiffs filed their initial complaint as well as a motion to set an expedited case schedule on November 20, 2019. On December 3, 2019, Plaintiffs filed an amended complaint. Defendants filed answers and motions to dismiss the amended complaint in January 2020; the motions to dismiss were subsequently withdrawn.

On May 11, 2020, Plaintiffs filed a motion for summary judgment or, in the alternative, a preliminary injunction. On June 17, 2020, this

action was transferred to a three-judge panel of Superior Court, Wake County, pursuant to N.C.G.S § 1-267.1 and N.C.G.S. § 1A-1, Rule 42(b)(4). 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 four states and the District of Columbia. On August 19, 2020, the panel presided over a full-day hearing on the Motion.

On September 4, 2020, Plaintiff's motion for summary judgment 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 then 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.

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

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

Trial on these issues was held in Wake County before the three-judge panel on August 16, 2021 through August 19, 2021. On August 19, 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 September 4, 2020 preliminary injunction.

On August 23, 2021, the panel orally issued an amended preliminary injunction — expanding the injunction entered on September 4, 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. This Order applied to individuals convicted in North Carolina state court and those individuals convicted in federal courts. The amended preliminary injunction was filed on August 27, 2021. The Superior Court denied Legislative Defendants' Motion for a Stay of this order, but the Court of Appeals granted a Writ of Supersedeas on September 3, 2021. On September 10, 2021, this Court ruled that the original injunction from September 2020 should be maintained, but that anyone who registered

during the time the expanded injunction was in effect could remain registered.

On March 28, 2022, the Superior Court entered a final judgment in the Plaintiffs' favor, with a majority of the panel finding that 13-1 violates both the Free Elections Clause and the Equal Protection Clause. On March 30, 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 April 1, the Superior Court denied Legislative Defendants' Motion for a Stay of this order. That same day, Legislative Defendants filed a Petition for a Writ of Supersedeas and Motion for Temporary Stay with the Court of Appeals.

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

N.C.G.S. § 13-1's 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 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." (Ord. p 10, ¶ 23).

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 was 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 barred all people with felony convictions from voting unless their rights were restored "in the manner prescribed by law." (*Id*). 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. (Ord. p 12, ¶ 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. (*Id*). 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). Nonetheless, "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. 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 17, ¶ 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." (Ord. p 18 ¶ 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 17 ¶ 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." (Ord. p 19, ¶ 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. (Ord. p 19, ¶ 45). 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. (*Id*). 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. (Ord. p 21, ¶ 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 panel 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 (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 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 community supervision. (Ord. p 26, ¶ 62). Although African Americans represent 21% of the voting 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. (Ord. p 26, ¶ 61)

In *every county* across the State for which sufficient data is available to perform comparisons, the percentage of the African American voting age population that is disenfranchised by being on 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 1 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).

In sum, 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 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 Plaintiff's 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 Plaintiff's 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 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. (Ord. p 37, ¶ 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. at 95:11-96:2. 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 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 WHY CERTIFICATION SHOULD ISSUE PRIOR TO DETERMINATION BY THE COURT OF APPEALS

Under N.C.G.S § 7A-31(b), this Court may certify a case for discretionary review before determination by the Court of Appeals if "any" of the following five circumstances applies: (1) "[t]he subject matter of the appeal has significant public interest"; (2) "[t]he cause involves legal principles of major significance to the jurisprudence of the State"; (3) "[d]elay in final adjudication is likely to result from failure to certify and thereby cause substantial harm"; (4) "[t]he work load of the courts of the appellate division is such that the expeditious administration of justice requires certification"; or (5) "[t]he subject matter of the appeal is

important in overseeing the jurisdiction and integrity of the court system." This case paradigmatically satisfies several of these conditions, any one of which is sufficient to justify this Court's exercise of discretionary review.

I. The Voting Rights of Over 56,000 Members of North Carolinian's Communities Is a Matter of Significant Public Interest.

It can hardly be disputed that "[t]he subject matter of the appeal has significant public interest." N.C.G.S. § 7A-31(b)(1). This Court has long recognized that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws." *Blankenship v. Bartlett,* 363 N.C. 518, 522, 681 S.E.2d 759, 762 (2009) (quotations omitted). The ability of all members of the community who "shar[e] an identity" and "humane, economic, ideological, and political concerns" to participate in electing their leaders "is at the foundation of a constitutional republic." *Texfi Indus. v. City of Fayetteville*, 301 N.C. 1, 13, 269 S.E.2d 142, 150 (1980).[1] Elections in this State must reflect "the

[1] This Court also has a long history of certifying cases for review prior to determination by the Court of Appeals when a constitutional matter is in question. *See, e.g., Hart v. State*, 773 S.E.2d 885 (N.C. Oct. 10, 2014); *Richardson v. State*, 773 S.E.2d 885 (N.C. Oct. 10, 2014); *Cubbage v. Bd. of Trs. of the Endowment Fund*, 773 S.E.2d 884 (N.C. Oct. 10, 2014); *State v. Young*, 773 S.E.2d. 882 (N.C. Mar. 12, 2014); *State v. Seam*, 773 S.E.2d 882 (N.C. Mar. 12, 2014); *State v. Perry*, 773 S.E.2d 882 (N.C. Mar. 12, 2014); *Hoke Cty. Bd. of Educ. v. State*, 579 S.E.2d 275 (N.C. Mar. 18, 2003); *Pope v. Easley*,

will of the people," *State v. Lattimore*, 120 N.C. 426, 26 S.E. 638, 638 (1897), and this appeal will determine whether individuals living in North Carolina communities while on community supervision are part of "the people" whose will must be heard.

This appeal will determine whether over 56,000 people living in North Carolina communities will be able to vote in the upcoming May 2022 primary election, the November 2022 General Election and in future elections. The "public interest...favors permitting as many qualified voters to vote as possible" and "upholding constitutional rights serves the public interest." *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 247-48 (4th Cir. 2014) (quotation marks and citations omitted). These North Carolinians are our neighbors, co-workers, and family members. They also pay taxes and otherwise contribute to our communities. Like all other citizens, their lives are governed by the laws enacted and enforced by elected officials. But unlike their neighbors, they are denied the ability to participate in choosing their community's representatives.

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548 S.E.2d 527 (N.C. May 3, 2001) Court of Appeals); *Williams v. Blue Cross Blue Shield*, 552 S.E.2d 637 (N.C. July 19, 2001) *Bailey v. State*, 541 S.E.2d 141 (N.C. Nov. 4, 1999).

There is an especially urgent public interest in this appeal because of the racist history of the law and its continued discriminatory impact today. As the Superior Court held, the racist history of the original 1877 statute carried over to the amendments made in the 1970s; and Black North Carolinians are still disproportionately impacted by this law today. (Ord. pp 55-64) *Cf. State v. Robinson*, 375 N.C. 173, 846 S.E. 2d 711 (2020). Section 13-1's disenfranchisement of people on community supervision systematically deprives African American communities of an equal voice in North Carolina elections, and this appeal will determine whether that will remain the case in the May 2022 primary election and beyond.

A case can rise to the level of "significant public interest" either due to the importance of the issues at stake or the importance of the litigants involved. Here, both factors are present. The litigants in this case include some of the highest-ranking officials in North Carolina, including the Speaker of the House of Representatives, the President Pro Tempore of the Senate, and each of the members of the State Board of Elections. Plaintiff North Carolina NAACP is the oldest and largest civil rights organization in the state. This case has understandably garnered

significant public attention, due to both the litigants and the subject matter at hand.

II. The Constitutionality of N.C.G.S. § 13-1 Involves Legal Principles of Major Significance to the State's Jurisprudence.

This appeal also "involves legal principles of major significance to the jurisprudence of the State." N.C.G.S. § 7A-31(b)(2). This case involves several constitutional challenges to actions of the North Carolina General Assembly. The significance of these types of constitutional challenges is supported by the fact that appeal to the Supreme Court lies of right in cases "[w]hich directly involve[s] a substantial question arising under the Constitution of…this State." N.C. Gen. Stat. §7A-30(1). Furthermore, this Court has never before addressed the constitutionality of legislation implementing the North Carolina Constitution's provision regarding felony disenfranchisement. This Court has granted discretionary review prior to a determination by the Court of Appeals in numerous cases where the constitutionality of the State's election laws was at stake, s*ee, e.g., Holmes v. Moore,* 868 S.E. 2d 315 (N.C. 2022) (constitutionality of photo voter ID legislation)*; Harper v. Hall*, 379 N.C. 656 (2021) (constitutionality of redistricting plans); *James v. Bartlett*, 359 N.C. 260 (2006) (out-of-precinct provisional

ballots); *Stephenson v. Bartlett*, 355 N.C. 354 (2002) (redistricting plans), and where a constitutional challenge was brought to legislation passed by the North Carolina General Assembly. *See, e.g., Cooper v. Berger*, 370 N.C. 392 (2018) (constitutionality of a law that consolidated several elections functions under the newly created State Board of Elections); *Pope v. Easley*, 354 N.C. 544 (2001) (constitutionality of statute expanding size of the Court of Appeals).

The legal questions presented here meet both of those criteria and are of equal legal significance. N.C.G.S. 13-1 denies the voting franchise to individuals who are on community supervision for a felony conviction, and the Superior Court found that the law has both a discriminatory intent and effect, disproportionately affecting African Americans. At the same time, the North Carolina Constitution states that "all elections shall be free" and that "no person shall be denied equal protection of the laws." The proper interpretation of the Free Elections Clause—which has no federal analogue—and the Equal Protection Clause are of paramount importance to the future of voting rights litigation in this State.

III. Absent Discretionary Review, Delay in Final Adjudication Will Cause Substantial Harm.

Discretionary review is independently necessary because "[d]elay in final adjudication is likely to result from failure to certify and thereby cause substantial harm." N.C.G.S. § 7A-31(b)(3). This case will come before this Court eventually, as an appeal of right will lie following any determination by the Court of Appeals, under N.C. Gen. Stat. 7A-30(1). Certifying this case now, rather than waiting for it to go through intermediate review by the Court of Appeals, would promote judicial efficiency as well as prevent harm to individuals on community supervision, who would otherwise be denied the franchise for yet another election cycle.

It has now been over two years since the Complaint in this case was filed. Individuals on community supervision have already been told once during this litigation that they regained the right to register and vote, only to be told the opposite shortly thereafter. The May 2022 primary election is less than two months away, and the deadline to register to vote is less than a month away, on April 22nd. Multiple levels of appellate review in this timeframe—whether review of a petition for a writ of supersedeas or review of the merits—would likely cause enormous

uncertainty and confusion among the over 56,000 North Carolinians re-enfranchised under the Superior Court's order. Granting discretionary review would avoid this harm and enable this Court to provide certainty to over 56,000 North Carolinians on whether they can vote in the upcoming elections.

Furthermore, the recent March 28, 2022 order has raised a new issue that only this Court can resolve. As of information available to Plaintiffs on April 1, 2022, the State Board of Elections is currently not processing registration forms for individuals on community supervision for a felony conviction, due to what the State Board perceives as a possible "conflict" between the March 28th Superior Court Order and this Court's September 10, 2021 Order regarding the expanded preliminary injunction in this case.[2]

Despite the Superior Court's unambiguous order issued on March 28th, the State Board sent an email to county boards directing them not to process voter registration requests for individuals on felony supervision. (Ex. C, March 29, 2022 Email to County Boards of Elections).

[2] On March 31, 2022, Plaintiffs filed a Notice of Violation of March 28, 2022 Injunction and Request for Emergency Hearing with the Superior Court (attached hereto as Exhibit B). State Board Defendants filed a response on April 1, 2022 (attached hereto as Exhibit C).

Instead, the State Board instructed County Board to "keep registration applications" for these individuals in an incomplete queue. (*Id*). Already, there are numerous news outlets reporting that individuals on community supervision have regained the right to register and vote in upcoming elections; while others are reporting that those registrations aren't actually being processed right now by the State Board. (*See* Will Doran, *Why NC's Felon Voting Rights Ruling Isn't Going Into Effect*, Raleigh News & Observer (March 30, 2022) (attached hereto as Exhibit D)). In a filing with the Superior Court, the State Board admitted to being confused about how to reconcile the March 28, 2022 Superior Court Order and this Court's September 10, 2021 Order regarding the expanded preliminary injunction in this case, stating that it "welcomes any further guidance from this Court on this issue...and continues to endeavor to be in full compliance with the Court's order." (Ex. C, p 5).

Under these circumstances, only immediate review by this Court will bring final resolution and give certainty to the over 56,000 individuals currently on felony supervision who are seeking to vote in the upcoming May primary. A failure to certify the case for review could

cause substantial harm by leaving this Court without sufficient time to resolve these matters.

IV. The Proper Judicial Role in Reviewing Felony Disenfranchisement Legislation Is Important to the Jurisdiction and Integrity of the Court System.

Finally, this Court may allow immediate discretionary review where "[t]he subject matter of the appeal is important in overseeing the jurisdiction and integrity of the court system." N.C. Gen. Stat. § 7A-31(b)(5). That is the case here.

Defendants argued below that the General Assembly has nearly unfettered discretion in enacting a statutory felony disenfranchisement scheme, and that the courts therefore have only limited authority to review and invalidate legislation that the General Assembly passes on felony disenfranchisement. (*See* Petition for Writ of Supersedeas and Motion for Temporary Stay, COA No. 22-153, at p 13 (April 1, 2022)) (attached hereto as Exhibit E).[3]. The nature and scope of judicial review over legislation that affects the voting rights of scores of North

[3] Plaintiffs have attached here as Exhibit E the brief filed by Legislative Defendants in support of a Petition for Writ of Supersedeas and Motion for Temporary Stay. Plaintiffs have not attached here Exhibits 1-25 that were filed along with Legislative Defendant's petition.

Carolinians is critically important to the jurisdiction and integrity of the court system in this State.

ISSUES FOR WHICH REVIEW IS SOUGHT

Plaintiffs respectfully request that the Court allow discretionary review on the following issue:

> Whether the three-judge panel correctly enjoined, as violative of the North Carolina Constitution, section 13-1's denial of the franchise to people on community supervision.

MOTION TO SUSPEND APPELLATE RULES

In addition to petitioning for discretionary review prior to determination by the Court of Appeals, Plaintiffs also respectfully move under Rules 2 and 37(a) to suspend the appellate rules as necessary to facilitate a prompt decision on this filing, the appeal from the Superior Court's order below, and on any related matters stemming from that appeal or the underlying order.

Rule 2 authorizes this Court to "suspend or vary the requirements or provisions" of the North Carolina Rules of Appellate Procedure in order "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest." This Rule "relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of

importance in the public interest or to prevent injustice which appears manifest to the Court." *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007) (quotation marks omitted). Appellate courts exercise this discretionary residual power "with a view towards the greater object of the rules." *Id.* at 316, 644 S.E.2d at 205. This Court also possesses general supervisory authority under article IV, § 12(1) of the North Carolina Constitution, which the Court "will not hesitate to exercise … when necessary to promote the expeditious administration of justice." *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975).

This is the paradigmatic case for exercising this Court's supervisory authority and residual power under Rule 2. In light of the exceptionally important and urgent questions at stake, suspending the appellate rules is in the public interest. Plaintiffs respectfully request that this Court grant this petition and set an expedited schedule that will allow for sufficient time for a decision by this Court prior to the May 2022 primary election.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court allow discretionary review prior to determination by the Court of

Appeals, assume immediate jurisdiction over the appeal in this case, including any and all motions, petitions, remedial proceedings, or other matters stemming from that appeal or the underlying order, and suspend the appellate rules as necessary.

Respectfully submitted this 4th day of April 2022.

FORWARD JUSTICE

/s/ Daryl Atkinson
Daryl Atkinson
N.C. State Bar No. 39030
P.O. Box 1932
Durham, NC 27702
(984) 260-6602
daryl@forwardjustice.org

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.

Whitley Carpenter
N.C. State Bar No. 49657
Caitlin Swain
N.C. State Bar No. 57042
Kathleen Roblez
N.C. State Bar No. 57039
Ashley Mitchell
N.C. State Bar No. 56889
wcarpenter@forwardjustice.org
cswain@forwardjustice.org
kroblez@forwardjustice.org
amitchell@forwardjustice.org

ARNOLD & PORTER KAYE SCHOLER LLP

R. Stanton Jones*
Elisabeth S. Theodore*
601 Massachusetts Ave NW
Washington, DC 20001-3743

(202) 942-5000
stanton.jones@arnoldporter.com
elisabeth.theodore@arnoldporter.com

PROTECT DEMOCRACY PROJECT

Farbod K. Faraji*
2120 University Ave
Berkeley, CA 94704
(202) 579-4582
farbod.faraji@protectdemocracy.org

Counsel for Plaintiffs

**Pro hac vice motions forthcoming*

CERTIFICATE OF SERVICE

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:

Nathan Huff
K&L Gates
430 Davis Drive, Suite 400
Morrisville, NC 27560
Nate.Huff@klgates.com

Nicole Moss
Cooper & Kirk, PLLC
1523 New Hampshire Ave NW
Washington, D.C. 20036
nmoss@cooperkirk.com

Counsel for Legislative Defendants

Terence Steed
Mary Carla Babb
N.C. Department of Justice
114 W. Edenton St.
Raleigh, NC 27603
tsteed@ncdoj.gov

Counsel for State Board Defendants

This the 4th day of April 2022.

/s/ *Daryl Atkinson*

Daryl Atkinson
(N.C. State Bar No. 39030)

EXHIBIT A

FILED

2022 MAR 28 PM 4:20

WAKE CO., C.S.C.

BY: SCJ

NORTH CAROLINA

COUNTY OF WAKE

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

COMMUNITY SUCCESS INITIATIVE, *et al.*,

Plaintiffs,

v.

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

Defendants.

FINAL JUDGMENT AND ORDER

TABLE OF CONTENTS

This matter came on for trial in Wake County before the undersigned three-judge panel on August 16 through August 19, 2021. In this litigation, Plaintiffs seek a declaration that N.C.G.S. § 13-1, the North Carolina statute providing for the restoration of rights of citizenship—which includes the right to vote—for persons convicted of a crime, is facially unconstitutional and invalid under the North Carolina Constitution to the extent it prevents persons on probation, parole, or post-release supervision from voting in North Carolina elections. Plaintiffs also seek, in the alternative, injunctive relief. Specifically, Plaintiffs contend Section 13-1 of our General Statutes violates Article I, Sections 10, 11, 12, 14, and 19 of our Constitution.

BACKGROUND

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

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

3. On September 4, 2020, a majority of the undersigned panel granted in part and denied in part Plaintiffs' motion for summary judgment, granted summary

judgment in part to Defendants, and granted a preliminary injunction. The preliminary injunction was granted with respect to Plaintiffs' claims under Article I, §§ 11 and 19 for those persons convicted of a felony and, as a result, made subject to property qualifications.

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

a. that N.C.G.S. § 13-1 violates the Equal Protection Clause of the North Carolina Constitution by depriving all persons with felony convictions subject to probation, parole, or post-release supervision, who are not incarcerated, of the right to vote;

b. that N.C.G.S. § 13-1 violates the Equal Protection Clause of the North Carolina Constitution by depriving the African American community of substantially equal voting power; and

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

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

6. On August 23, 2021, the panel orally issued an amended preliminary injunction expanding the injunction entered on September 4, 2020, to enjoin

Defendants from denying voter registration to any convicted felon who is on community supervision, whether probation, post-release supervision, or parole. This Order applied to individuals convicted in North Carolina state court and those individuals convicted in federal courts. The amended preliminary injunction was filed on August 27, 2021.

LEGAL STANDARD

A. Facial Constitutional Challenges

7. "It is well settled in North Carolina that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *City of Asheville v. State*, 369 N.C. 80, 87-88, 794 S.E.2d 759, 766 (2016)(quoting *Glenn v. Bd. of Educ.*, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936)); *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989).

B. Equal Protection

8. *Village of Arlington Heights v. Metro Hous. Dev. Corp.* sets out the appropriate framework by which to analyze whether an official action was motivated by discriminatory purpose. 429 U.S. 252 (1977). The North Carolina Court of Appeals discussed this framework in *Holmes v. Moore*, 270 N.C. App. 7, 16, 840 S.E.2d 244, 254 (2020). "[P]roof of a racially discriminatory intent or purpose" will show "a violation of the Equal Protection Clause." *Id.*

9. *Arlington Heights* laid out a non-exhaustive list of factors for courts to consider. *Id.* at 18, 840 S.E.2d 244 at 254 (2020). Those factors include: (1) the law's historical background, (2) the specific sequence of events leading to the law's enactment, including any departure from the normal procedural sequence, (3) the legislative history of the decision, and (4) the impact of the law and whether it bears more heavily on one race than another. *Arlington Heights*, 429 U.S. at 266-68.

10. Plaintiffs "need not show that discriminatory purpose was the 'sole[ ]' or even a 'primary' motive for the legislation, just that it was 'a motivating factor.'" *Holmes*, 270 N.C. App. at 16–17 (*quoting Arlington Heights*).

11. "Once racial discrimination is shown to have been a substantial or motivating factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor. Although . . . North Carolina caselaw generally gives acts of the General Assembly great deference, such deference is not warranted when the burden shifts to a law's defender after a challenger has shown the law to be the product of a racially discriminatory purpose or intent." *Holmes*, 270 N.C. App. at 19 (quotation marks and citations omitted).

12. The injury in an equal protection claim lies in the denial of equal treatment itself, not the ultimate inability to obtain the benefit. *Holmes*, 270 N.C. App. at 14 n. 4. The fact that Plaintiffs may ultimately be able to comply with the requirements of N.C.G.S. § 13-1 and vote is not determinative of whether

compliance with the requirements of N.C.G.S. § 13-1 results in an injury to Plaintiffs. *See id.*

13. Further, North Carolina's Equal Protection Clause expansively protects "the fundamental right of each North Carolinian to substantially equal voting power." *Stephenson v. Bartlett*, 355 N.C. 354, 379, 562 S.E.2d 377, 394 (2002). "It is well settled in this State that the right to vote on equal terms is a fundamental right." *Id.* at 378, 562 S.E.2d at 393 (internal quotation marks omitted).

14. If a statute interferes with the exercise of a fundamental right, strict scrutiny applies even if the affected group is not a suspect class. *Stephenson*, 355 N.C. at 379, 562 S.E.2d at 394; *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990).

C. Free Elections Clause

15. The Free Elections Clause, Art. I, § 10, mandates that elections must be conducted freely and honestly, to ascertain, fairly and truthfully, the will of the people.

16. Our Supreme Court has elevated this principle to the highest legal standard, noting that it is a "compelling interest" of the State "in having fair, honest elections." *State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 840 (1993).

17. North Carolina's Free Elections Clause dates back to the North Carolina Declaration of Rights of 1776. *Harper v. Hall,* 2022-NCSC-17, P134 (2022). The framers of the Declaration of Rights modeled it on a provision in the 1689

English Bill of Rights stating that "election of members of parliament ought to be free." *Id.* (quoting Bill of Rights 1689, 1 W. & M. c. 2 (Eng.)).

18. As the Supreme Court of North Carolina explained 145 years ago, "[o]ur government is founded on the will of the people," and "[t]heir will is expressed by the ballot." *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 220 (1875)). A "free" election, therefore, must reflect to the greatest extent possible the will of *all* people living in North Carolina communities. *Id.* at 222-23 (the franchise belongs to "every" resident, as "government affects his business, trade, market, health, comfort, pleasure, taxes, property and person").

FINDINGS OF FACT

A. 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

19. Plaintiffs' expert Dr. Vernon Burton serves as the Judge Matthew J. Perry Distinguished Professor of History at Clemson University. 8/16/21 Trial Tr. 64:16-17; PX-27 at 1 (Burton Report); PX-28 (Burton CV). The Court accepted Dr. Burton as an expert in American history with a particular focus on the American South, race relations and racial discrimination in the American South, the Civil War and Reconstruction, and the civil rights movement. 8/16/21 Trial Tr. 76:8-23. Dr. Burton described the history and intent behind North Carolina's felony disenfranchisement and rights restoration provisions. The Court credits Dr. Burton's testimony, as well as the materials on which he relied, and accepts his findings and conclusions.

1. The 1800s

20. Between 1835 and 1868, North Carolina's Constitution forbid African Americans, including free African Americans, from voting. During this period, North Carolina did not have a disenfranchisement provision specific to felons, but rather excluded "infamous" persons from suffrage. N.C. Const. Art. I, § 4, pt. 4 (1776, amended in 1835) (authorizing the legislature to pass laws for restoration of rights to "infamous" persons). Infamy could result either from a conviction for an infamous crime such as treason, bribery, or perjury, or from the receipt of an infamous punishment such as whipping. 8/16/21 Trial Tr. 82:2-16; Joint Stipulation of Facts ("Fact Stip.") ¶ 21 (attached as Exhibit 1 to the parties' Proposed Joint Pre-Trial Order).

21. In 1868, after the Civil War, North Carolina adopted a new Constitution as a condition of rejoining the Union. Approximately 15 of the 120 delegates to the 1868 Convention were African American, and others were prominent advocates for equality. 8/16/21 Trial Tr. 97:4-15. The 1868 Constitution provided for universal male suffrage, eliminated property requirements to vote, and abolished slavery. N.C. Const. of 1868, art. I, § 33; *id.* art. VI, § 1; Fact Stip. ¶ 24. The 1868 Constitution did not contain a felony disenfranchisement provision. 8/16/21 Trial Tr. 97:23-25.

22. The 1868 Constitution, particularly its universal suffrage provision, provoked a violent backlash by White supremacists, called the Kirk Holden War. *Id.* at 98:1-25. 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.*; PX-27 at 24-26.

23. As part of this backlash against African American suffrage, in the late 1860s, White former Confederates in North Carolina conducted an extensive campaign of convicting African American men of petty crimes *en masse* and whipping them to disenfranchise them "in advance" of the Fifteenth Amendment. 8/16/21 Trial Tr. 83:22-93:2; PX-27 at 19-22. Contemporary newspapers acknowledged that the goal of this whipping campaign was to take advantage of North Carolina's law in existence at the time that disenfranchised anyone subject to a punishment of whipping. 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." PX-161. An 1867 article in *Harper's Weekly* described "the public whipping of colored men as fast as they were convicted and sentenced to be whipped by the court," taking place "every day during about a month," and explained the purpose: "even if the suffrage were extended to colored men," those punished by a whipping "are disqualified in advance." PX-158; *see also* PX-159 (March 1867 Atlantic Monthly article recounting same). Rep. Thaddeus Stevens described this vicious campaign on the floor of the U.S. House of Representatives, explaining that "in one county …

they whipped *every adult male* negro whom they knew of. They were all convicted and sentenced at once, and [the Freedmen's Bureau official] ascertained by intermingling with the people that it was for the purpose of preventing these negroes from voting." PX-160 (emphasis added). Stevens understood that this tactic would continue unless Congress stepped in and accordingly proposed a federal law banning disenfranchisement "for any crime other than for insurrection or treason," *id.*, but it did not become law.

24. 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." 8/16/21 Trial Tr. 100:2-6; *see id.* at 104:10-105:14. The amendments were ratified in 1876 and included provisions banning interracial marriage and requiring segregation in public schools. 1875 Amendments to the N.C. Const. of 1868, Amends. XXVI & XXX; Fact Stip. ¶ 25. Another amendment stripped counties of the ability to elect their own local officials, including judges, giving that power instead to the General Assembly. Amend. XXV; Fact Stip. ¶ 25. The purpose of this amendment was to prevent African Americans from electing African American judges, or judges who were likely to support equality. PX-27 at 31; 8/16/21 Trial Tr. 104:10-105:14.

25. Notably, the 1876 constitutional amendments also disenfranchised everyone "adjudged guilty of felony." 1875 Amendments to the N.C. Const. of 1868, Amend. XXIV. 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.

26. In 1877, in the first legislative session after the 1876 constitutional amendments were ratified, the General Assembly enacted a law implementing the felony disenfranchisement constitutional provision. Fact Stip. ¶ 26. The 1877 law barred all people with felony convictions from voting unless their rights were restored "in the manner prescribed by law." *Id.*; PX-52 at 519-20 (1876-77 Sess. Laws 519, Ch. 275, § 10); 8/16/21 Trial Tr. 108:19-110:6.

27. For the method of rights restoration, the 1877 disenfranchisement statute incorporated a preexisting statute from 1840 that governed rights restoration for individuals convicted of the most heinous crimes—treason and other "infamous" crimes. Fact Stip. ¶¶ 23, 27. The 1877 statute took all of the onerous requirements for rights restoration that had previously applied only to people convicted of treason and for the first time extended them to anyone convicted of any felony. 8/16/21 Trial Tr. 112:20-113:10, 165:15-18.

28. The 1877 law did not just disenfranchise people with felony convictions, it also continued that disenfranchisement even after those individuals were released from incarceration and living in North Carolina communities.

29. Extending the 1840 statute to apply to felonies meant that individuals had to wait four years from the date of their felony conviction to file the petition seeking rights restoration. They also had to secure the testimony of "five respectable witnesses who have been acquainted with the petitioner's character for three years next preceding the filing of the petition, that his character for truth and honesty during that time has been good." Fact Stip. ¶ 23. The witness requirement meant that no one could petition for rights restoration until at least three years had elapsed since their release from prison. 8/16/21 Trial Tr. 112:8-19. In addition, the extension of the 1840 statute meant that anyone convicted of a felony was required to individually petition a judge for the restoration of voting rights, and the judge had unfettered discretion to reject the petition. Fact Stip. ¶ 23. Likewise, anyone convicted of a felony was required to post their petition for rights restoration on the courthouse door for a 3-month period before their hearing, and anyone from the community could come in to oppose the petition. *Id.* Until 1877, these requirements applied only to people convicted of the most egregious crimes against the community, like treason.

30. The 1877 implementing legislation also created harsh new penalties for voting before one's rights were restored. PX-52 at 537 (1876-77 N.C. Sess. Laws., Ch. 275, § 62). The legislation provided that a person who voted before their rights were restored after a felony conviction "shall be punished by a fine not exceeding one thousand dollars, or imprisonment at hard labor not exceeding two years, or both." *Id.* Dr. Burton described that penalty as "extraordinary for the time,"

particularly in light of the fact that the per capita income of African American people in the South at the time was just $40.01. 8/16/201 Trial Tr. 113:12-114:2; PX-27 at 36. These penalties carry through to this day. 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.

31. The goal of the felony disenfranchisement regime established in 1876 and 1877, including the 1877 expansion of the onerous 1840 rights restoration regime to apply to all felonies, was to discriminate against and disenfranchise African American people. 8/16/21 Trial Tr. 114:10-19; PX-27 at 24-37.

32. White Democrats drew on the success of the whipping campaign, when they for the first time realized that they could use crime-based disenfranchisement as a tool to suppress African American votes and African American political power. *Id.* at 95:16-96:2. The idea was to accomplish indirectly what the Fifteenth Amendment prohibited North Carolina from doing directly. The state constitutional amendment was proposed by Colonel Coleman, a former Confederate who had been instructed by his nominating county to lead a "crusade" against the "radical civil rights officers' holders party," *i.e.*, the party that supported equal rights for African American people. *Id.* at 100:25-102:5. The committee that prepared the 1877 implementing legislation was chaired by Colonel John Henderson, another former Confederate who later would preside over the lynching of three African Americans. *Id.* at 105:18-106:12.

33. The disenfranchisement regime capitalized on Black Codes that North Carolina had enacted in 1866, which allowed sheriffs to charge African American people with crimes at their discretion, thus disenfranchising them. 8/16/21 Trial Tr. 82:17-83:21.

34. All the African American delegates at the 1876 convention voted against felony disenfranchisement; one explained that the "measure was intended to disenfranchise his people." *Id.* at 103:15-104:9. A contemporary North Carolina newspaper advocating for the provision stated in 1876 that "the great majority of the criminals are Negroes" and that felony disenfranchisement would therefore tend to "restrain their race from crime." PX-162; PX-27 at 31. White North Carolinians declared that "all Negroes are natural born thieves." PX-27 at 33-34. Other Democrats used coded language, like asserting that felony disenfranchisement was needed to ensure the "purity of the ballot box," signaling to all that their efforts targeted African American voters. *Id.* at 25, 29-31.

35. The 1877 law's adoption of the requirement to petition an individual judge for restoration had a particularly discriminatory effect against African American people considering the contemporaneous 1876 constitutional amendment stripping African American communities of the ability to elect local judges. The judges appointed by the Democrat-controlled legislature in the 1870s were White Democrats who were committed to White supremacy and were unlikely to grant a petition to restore an African American person's voting rights. 8/16/21 Trial Tr. 111:12-112:7.

36. Legislative Defendants conceded at trial that the goal of the 1870s legislative enactments was to discriminate against African Americans:

> 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 African American 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 African American population. That I can't -- I can't contest that. We never tried to contest that.

8/19/21 Trial Tr. 176:19-177:7.

37. The Court reiterates its finding in the expanded preliminary injunction order: "As acknowledged by Legislative Defendants at trial, there is no denying the insidious, discriminatory history surrounding voter disenfranchisement and efforts for voting rights restoration in North Carolina." 8/27/21 Order on Am. Prelim. Inj. ("Am. PI Order") at 8.

38. North Carolina's decision in 1877 to disenfranchise people with felony convictions even after they are released from incarceration and are living in the community has remained unchanged to this day.

2. 1897 to 1970

39. Between 1897 and 1970, the legislature made various small adjustments to the procedure for restoration of rights and recodified that law at N.C.G.S. § 13-1, but the substance of the law was largely unchanged. Individuals

convicted of felonies were still required to petition individual judges for the restoration of their voting rights.

40. In 1933, a change in the law instituted a requirement that felons wait "two years from the date of discharge" instead of four years from the date of conviction before they were eligible to petition for voting rights restoration. 8/16/21 Trial Tr. 121:1-12; LDX-46. And petitioners were still required to present five witnesses who had been acquainted with them for the three years directly preceding the restoration petition. LDX-1 (1969 version of N.C.G.S. § 13-1). Though the requirements for rights restoration were slightly relaxed in certain ways during this period, none of those changes were likely to help African American people, who had been "effectively" disenfranchised by this time "by other means," including North Carolina's poll tax and literacy test established in 1899. 8/16/21 Trial Tr. 173:13-174:1; PX-27 at 41.

3. The Early 1970s

41. In the early 1970s, the only African American legislators in the General Assembly—two of them in 1971, and three in 1973—tried to amend section 13-1 to eliminate its denial of the franchise to people who had finished serving their prison sentence. As Senator Mickey Michaux explained, the African American legislators' priority at that time, and the "priority" of the North Carolina NAACP, was "automatic restoration applicable across the board—at the least, the restoration of your citizenship rights after you completed imprisonment." PX-156 ¶ 15 (Michaux Affidavit).

42. In 1971, Reps. Joy Johnson and Henry Frye proposed a bill amending section 13-1 to eliminate the petition and witness requirement and to "automatically" restore citizenship rights to anyone convicted of a felony "upon the full completion of his sentence." PX-55 at 1; 8/16/21 Trial Tr. 132:2-133:16. But their proposal was rejected. Their proposed bill was amended to retain section 13-1's denial of the franchise to people living in North Carolina's communities. In particular, the African American legislators' 1971 proposal was successfully amended in committee to specifically require the completion of "any period of probation or parole"—words that had not appeared in Rep. Johnson and Frye's original proposal—and then successfully amended again to require "two years [to] have elapsed since release by the Department of Corrections, including probation or parole." PX-55 at 2 (Committee Substitute); *id.* at 6 (Odom Amendment); 8/16/21 Trial Tr. 134:10-135:12. The amendments also deleted the word "automatically" and added a requirement to take an oath before a judge to obtain rights restoration. PX-55 at 2 (Committee Substitute). The 1971 revision to section 13-1 passed as amended. It thus required people with felony convictions to wait two years from the date of the completion of their probation or parole, and then to go before a judge and take an oath to secure their voting rights. LDX-2 (1971 session law).

43. Rep. Frye explained on the floor of the North Carolina House of Representatives in July 1971 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." PX-56 ("Felon Citizenship Bill Gets House Approval," *The News & Observer* (Raleigh, NC), July 8, 1971); *see* 8/16/21 Trial Tr. 138:14-19.

44. In 1973, the three African American legislators were able to convince their 167 White colleagues to further amend the law to eliminate the oath requirement and to eliminate the two-year waiting period after completion of probation and parole, but they were not able to reinstate voting rights upon release from incarceration. LDX-6. Senator Michaux explained, with respect to the 1973 revision, that "[o]ur aim 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." PX-156 ¶ 16 (Michaux Affidavit); PX-175 at 85:22-24 (Michaux Deposition). "To achieve even that victory, we vehemently argued and appealed to our colleagues that if you had served your time, you were entitled to your rights. Ultimately, what we achieved was a compromise." PX-156 ¶ 16.

45. The record evidence is clear and irrefutable that the goal of these African American legislators and the NC NAACP was to eliminate section 13-1's denial of the franchise to persons released from incarceration and living in the community, but that they were forced to compromise in light of opposition by their 167 White colleagues to achieve other goals, such as eliminating the petition requirement. Both Henry Frye's statement on the House floor and Senator Michaux's affidavit makes clear that the African American legislators wanted disenfranchisement to end at the conclusion of "prison" or "imprisonment." PX-56; PX-156 ¶¶ 15-17. But as Senator Michaux explained: "We understood at the time

that we would have to swallow the bitter pill of the original motivations of the law—the disenfranchisement at its core was racially motivated—to try to make the system practiced in North Carolina somewhat less discriminatory and to ease the burdens placed on those who were disenfranchised by the state." PX-156 ¶ 18.

46. Defendants have argued that the original 1971 bill proposed by the African American legislators was ambiguous because it referred to restoration after completion of a "sentence," and did not use the word prison. The Court rejects this argument. Henry Frye's statement on the House floor made clear that that term referred to a "prison" sentence, and there would have been no need to amend the bill to add "probation or parole" on Legislative Defendants' theory. Defendants nonetheless suggest that the addition of the words "probation or parole" in amendments to the 1971 bill simply "clarified" what the original bill meant all along. The Court does not find this persuasive in light of Henry Frye's contemporaneous statement that he *opposed* the amendments and preferred the original language which he said he understood to mean the completion of a "prison" sentence. PX-56.

47. In support of this argument, Defendants also point to a single ambiguous sentence from Senator Michaux's deposition. 8/16/21 Trial Tr. 199:5-200:4. When read as a whole, Senator Michaux's deposition and affidavit contradict Defendants' arguments. The deposition and affidavit conclusively establish—consistent with the official legislative records and contemporaneous news report—that the African American legislators intended and in fact initially proposed a bill to

eliminate the disenfranchisement of people on felony supervision. *Id.* at 200:9-20; PX-56; PX-156 ¶¶ 15-16 (Michaux Affidavit); PX-175 (Michaux Deposition).

48. It was well understood and plainly known in the 1970s that the historical and original motivation for denial of the franchise to persons on community supervision in the post-reconstruction era had been to attack and curb the political rights of African Americans. PX-56 ¶ 14. It was also clear that section 13-1's implementation was mostly focused on and intended to negatively affect African Americans' political participation. *Id.* Indeed, the reason the NC NAACP made a push to amend the statute was precisely because the law was having a major impact on African American's registration opportunities. *Id.* No Defendant disputed during trial that the legislators in the 1970s understood the law's racist origins and discriminatory effects, nor did Defendants introduce any contrary evidence.

49. Rep. Jim Ramsey, who chaired the House Committee offering the committee substitute adding back in the words "probation and parole," openly acknowledged in 1971 that the provision governing restoration of voting rights was "archaic and inequitable." PX-56. Rep. Ramsey provided no explanation for the Committee's decision to nonetheless preserve the existing law's disenfranchisement of people after their release from any incarceration.

50. Defendants presented no evidence at any time during trial advancing any race-neutral explanation for the legislature's decision in 1971 and 1973 to

preserve, rather than eliminate, the 1877 bill's denial of the franchise to persons on community supervision.

51. There was no independent justification or race-neutral explanation for retaining the rule from 1877 that denied the franchise to individuals after release from incarceration in the 1971 and 1973 amendments to section 13-1. 8/16/21 Trial Tr. 148:10-18. That provision was added back without explanation.

52. As Legislative Defendants acknowledged at trial, racism against African Americans remained rife in North Carolina, including in the General Assembly, in the 1970s. There were 3 African American legislators and 167 White ones. PX-56 ¶ 10. Many of the White legislators openly held racist views. *Id.* Legislators used racial slurs to refer to then-Reps. Johnson, Frye, and Michaux. *Id.* ¶ 11. The Ku Klux Klan was active, arch-segregationist George Wallace won North Carolina's presidential primary in 1972, and Jesse Helms was elected to the U.S. Senate. *Id.* ¶ 6; PX-27 at 47, 59; 8/16/21 Trial Tr. 128:15-16. An effort to repeal North Carolina's racist literacy test failed in 1970.

53. The "Law and Order" movement of the 1960s and 1970s painted African American individuals as criminals and focused on increasing the severity of criminal punishments. 8/16/21 Trial Tr. 123:1-125:25; 126:25-127:19. As explained by the News & Observer in 1968 that, "[t]o many North Carolinians, law and order means keep the [n-word] in their place." PX-168.

54. North Carolinians clearly associated the expansion of voting rights for people with felony convictions with the expansion of voting rights for African

Americans, even during the 1960s and 1970s. 8/16/21 Trial Tr. 128:17-129:6. A piece in the Asheville Citizen Times warned against the passage of federal "voting rights legislation" on the ground that it would enable "unconfined felons" to vote, *i.e.*, people with felony convictions who were living in the community on probation, parole, or supervision. *Id.* The Chairman of North Carolina's Board of Elections issued a statement in 1970 warning against amendments to the Voting Rights Act on the ground that it would enable felons to vote. *Id.* at 129:7-22. Even in the 1970s, people in North Carolina understood that maintaining felony disenfranchisement "is one way of … keeping African-American people from voting." *Id.* at 130:7-16. .

55. The 1971 and 1973 revisions to section 13-1 carried forward three key elements of the original, racist 1877 legislation: the disenfranchisement of all people with any felony conviction, not just a subset; 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 incarceration. *Id.* at 148:16-149:6. The current version of section 13-1 continues to carry over and reflect the same racist goals that drove the original 19th century enactment. *Id.* at 149:7-15.

B. Present Day Effect of N.C.G.S. § 13-1.

56. Plaintiffs' expert Dr. Frank Baumgartner serves as the Richard J. Richardson Distinguished Professorship in Political Science at the University of North Carolina at Chapel Hill. PX-1 at 1 (Baumgartner Report); PX-2 at 1 (Baumgartner CV). The Court accepted Dr. Baumgartner as an expert in political science, public policy, statistics, and the intersection of race and the criminal justice system. 8/18/21 Trial Tr. 9:22-10:7. Dr. Baumgartner addressed, among other

issues, the number of persons denied the franchise due to felony probation, parole, or post-release supervision in North Carolina, as well as the racial demographics of such persons, at both the statewide and county levels. All parties stipulated to Dr. Baumgartner's main findings regarding the number of people on felony probation, parole, or post-release supervision, and many of his findings regarding the extreme racial disparities in disenfranchisement among African American and White North Carolinians. Fact Stip. ¶¶ 40-42, 46-56. The Court credits Dr. Baumgartner's testimony and accepts his conclusions.

1. Denial of the Franchise to Over 56,000 Persons on Community Supervision.

57. At least 56,516 individuals in North Carolina are denied the franchise due to probation, parole, or post-release supervision from a felony conviction in North Carolina state or federal court. 8/18/21 Trial Tr. 14:25-20:6; PX-3; Fact Stip. ¶¶ 40-42. Of these persons, 51,441 are on probation or post-release supervision from a felony conviction in 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. PX-3; Fact Stip. ¶ 40. Based on data published by the federal government, 5,075 individuals are denied the franchise due to probation from a felony conviction in North Carolina federal court. PX-3; Fact Stip. ¶ 42 (data as of December 31, 2019); *see also* Fact Stip. ¶ 41 (5,064 individuals as of June 30, 2020).

58. In individual counties, the overall rate of disenfranchisement ranges from 0.25% to roughly 1.4% of the voting-age population. *Id.* at 20:19-22:16.

59. 25 counties in North Carolina have an overall disenfranchisement rate lower than 0.48% (the 25th percentile and below); 50 counties have an overall disenfranchisement rate from 0.48% to 0.83% (the 25th to 75th percentile); and 25 counties have an overall disenfranchisement rate higher than 0.83% (the 75th percentile and above). 8/18/21 Trial Tr. 23:4-22. These numerical cutoffs at 0.48% to 0.83% can be used generally to designate counties as having "low," "medium," and "high" rates of disenfranchisement. *Id.* at 23:23-24:3.

60. In 9 counties—Cleveland, McDowell, Pamlico, Beaufort, Madison, Sampson, Duplin, Lincoln, and Scotland Counties—more than 1% of the entire voting-age population is denied the franchise due to felony probation, parole, or post-release supervision. 8/18/21 Trial Tr. at 24:4-25; PX-1 at 10; PX-7; Fact Stip. ¶ 46.

2. Racial Disparities in Felon Disenfranchisement

61. North Carolina's denial of the franchise on felony probation, parole, or post-release supervision disproportionately affects African Americans by wide margins at both the statewide and county levels. 8/18/21 Trial Tr. 12:16-19; PX-1 at 3-4. African Americans comprise 21% of North Carolina's voting-age population, but over 42% of those denied the franchise due to felony probation, parole, or post-release supervision from a North Carolina state court conviction alone. 8/18/21 Trial Tr. 27:20-28:14; PX-4; Fact Stip. ¶ 47. African American men are 9.2% of the voting-age population, but 36.6% of those denied the franchise. PX-1 at 7; Fact Stip. ¶ 50. In comparison, White people comprise 72% of the voting-age population, but only

52% of those denied the franchise. 8/18/21 Trial Tr. 27:20-28:14; PX-4. These numbers are the very definition of a racial disparity. 8/18/21 Trial Tr. 28:3-4.

62. In total, 1.24% of the entire African American voting-age population in North Carolina are denied the franchise due to felony probation, parole, or post-release supervision, whereas only 0.45% of the White voting-age population are denied the franchise. 8/18/21 Trial Tr. 28:15-29:12; PX-4; PX-6; Fact Stip. ¶ 48. The African American population is therefore denied the franchise at a rate 2.76 times as high as the rate of the White population. 8/18/21 Trial Tr. 29:13-22; PX-4. If there were no racial disparity in the impact of section 13-1, that ratio would be 1.0. The African American-White disenfranchisement ratio of 2.76 shows a very high degree of racial disparity in disenfranchisement among African American and White North Carolinians. 8/18/21 Trial Tr. 29:20-30:2.

63. Although more White people are denied the franchise due to felony post-release supervision than African American people in aggregate, this does not affect the finding that African American people are disproportionately affected by section 13-1. *Id.* at 30:3-17. There are nearly 6 million voting-age White people in North Carolina, compared to fewer than 1.8 million voting-age African American people. PX-4. Thus, to determine whether racial disparities exist, it is necessary to compare African American and White rates of disenfranchisement, rather than aggregate numbers of disenfranchised African American and White people. 8/18/21 Trial Tr. 30:3-17.

64. The statewide data reveal an extremely high degree of racial disparity, with African American people denied the franchise due to felony probation, parole, or post-release supervision at a much higher rate than White people. *Id.* at 34:24-35:9.

65. Extreme racial disparities in denial of the franchise to persons on community supervision also exist at the county level. PX-1 at 9-20. In 77 counties, the rate of African Americans denied the franchise due to felony probation, parole, or post-release supervision is high (more than 0.83% of the African American voting-age population), whereas there are only 2 counties where the rate of African American disenfranchisement is low (less than 0.48% of the African American voting-age population). 8/18/21 Trial Tr. 37:8-17; PX-8. In comparison, the rate of White disenfranchisement is high in only 10 counties, while the rate of White disenfranchisement is low in 53 counties. 8/18/21 Trial Tr. 36:21-37:7; PX-8. These numbers show the extreme racial disparities in denial of the franchise to persons on community supervision. 8/18/21 Trial Tr. 37:18-38:7.

66. In 19 counties, more than 2% of the entire African American voting-age population are denied the franchise due to felony probation, parole, or post-release supervision. 8/18/21 Trial Tr. 44:10-15; PX-9; Fact Stip. ¶ 49. In 4 counties, more than 3% of the African American voting-age population are denied the franchise. 8/18/21 Trial Tr. 44:21-24. In 1 county, more than 5% of the African American voting-age population are denied the franchise, meaning that 1 in every 20 African American adult residents of that county cannot vote due to felony probation, parole,

or post-release supervision. *Id.* at 44:24-45:21. In comparison, the highest rate of White disenfranchisement in any county in North Carolina is 1.25%. *Id.* at 40:18-41:11, 45:22-25; Fact Stip. ¶ 49. These numbers, too, show the extreme racial disparities in denial of the franchise to persons on community supervision. 8/18/21 Trial Tr. 46:3-17.

67. 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. Fact Stip. ¶ 51.

68. Among the 84 counties where there is sufficient data for comparison, African Americans are denied the franchise due to felony probation, parole, or post-release supervision at a higher rate than White people in every single county. *Id.* at 53:4-9; PX-1 at 15; PX-11. There is not a single county where the White disenfranchisement rate is greater than the African American rate, and there are only 2 counties where the rates are close. 8/18/21 Trial Tr. 53:10-16. In 24 counties, the African American disenfranchisement rate is at least four times greater than the White rate. *Id.* at 54:2-14. In 8 counties, the African American disenfranchisement rate is at least five times greater than the White rate. *Id.* at 56:3-19.

69. In sum, 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 level and the county, African American people are disproportionately denied the franchise by wide margins. 8/18/21 Trial Tr. 78:2-22. As Dr. Baumgartner aptly put it, "We find in every case that it works to the detriment of the African American population." *Id.* at 78:21-22.

70. Legislative Defendants' expert Dr. Keegan Callanan opined that there is no racial disparity in denial of the franchise to persons on community supervision because "100% of felons of every race in North Carolina" are disenfranchised. LDX-13 at 3; PX-177 (Callanan Dep.). In its September 2020 summary judgment order, the Court found that Dr. Callanan's report was entitled to "no weight" because it was "unpersuasive in rebutting the testimony of Plaintiffs' experts, was flawed in some of its analysis and, while Dr. Callanan is an expert in the broad field of political science, his experience and expertise in the particular issues before this panel are lacking." MSJ Order at 8. Dr. Callanan's opinions still are entitled to no weight.

C. 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.

71. 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.

1. Expected Voter Turnout Among People on Felony Supervision

72. Plaintiffs' expert Dr. Traci Burch is an Associate Professor of Political Science at Northwestern University and a Research Professor at the American Bar Foundation. PX-30 (Burch CV); PX-29 at 1 (Burch Report); 8/17/21 Trial Tr. 7:5-8. The Court accepted Dr. Burch as an expert in political science, public policy, statistics, and racial disparities in political participation. 8/17/21 Trial Tr. 13:20-14:10. Dr. Burch analyzed, among other issues, voter turnout and registration for persons who have been denied the franchise in North Carolina due to felony probation, parole, or post-release supervision. *Id.* at 14:12-15:2; PX-29 at 3. The Court credits Dr. Burch's testimony and accepts her conclusions.

73. Section 13-1 prevents thousands of people living in North Carolina communities from voting who would vote if not for the disenfranchisement. PX-29 at 4; 8/17/21 Trial Tr. 15:16-22. 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 the next presidential election 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%. PX-29 at 20-21; 8/17/21 Trial Tr. 37:6-38:3.

74. To examine the recent voter registration and turnout statistics of people in North Carolina with felony convictions, Dr. Burch matched data on felony offenders from the North Carolina Department of Public Safety ("DPS") to voter registration and history data containing information on all registered voters from the North Carolina State Board of Elections. PX-29 at 8; 8/17/21 Trial Tr.17:10-22.

75. 38.5% of North Carolinians currently on felony supervision had registered to vote in the past, and about 20.1% of otherwise eligible voters now on felony supervision, who were over the age of 18 and were not serving a sentence for a felony conviction in 2016, voted in the 2016 presidential election. PX-31; 8/17/21 Trial Tr. 20:11-17.

76. 39.8% of African Americans currently on felony supervision, and 38.5% of Whites, had ever registered to vote. Voter turnout was also similar between the two groups: 20.3% of African Americans currently on felony supervision, and 21.3% of Whites, voted in the 2016 general election. PX-32; 8/17/21 Trial Tr. 21:7-24.

77. Despite these similar registration and turnout rates, about 1.5 million African Americans were registered to vote in North Carolina in 2016, compared with 4.8 million Whites. The number of African American individuals on community supervision that are denied the franchise under section 13-1 relative to the overall number of African American registered voters is almost three times as high as number of White individuals on community supervision that are denied the franchise under section 13-1. PX-29 at 12; 8/17/21 Trial Tr. 22:2-11.

78. Despite roughly similar turnout in the past among African Americans and Whites on felony supervision, the denial of the franchise to persons under community supervision has a greater impact on African American voter turnout than White voter turnout because African Americans are a smaller percentage of the total voting-age population. PX-29 at 12; 8/17/21 Trial Tr. 22:2-11.

79. Dr. Burch also analyzed gender differences in the voting behavior of the community supervised population. Her methodology likely produced underestimates for turnout among women primarily because the matching approach will underestimate voter registration and turnout among women who change their names because of entering or leaving a marriage. PX-29 at 13; 8/17/21 Trial Tr. 24:4-8.

80. Women registered in the past at higher rates than men: 43.1% of women currently on felony supervision had registered to vote in the past, compared with only 37.3% of men. Turnout rates in the presidential election were also higher: 21.8% of women currently on felony supervision voted in the 2016 general election, compared with 19.6% of men. PX-32; 8/17/21 Trial Tr. 24:9-21.

81. The pattern of voting participation by age largely mirrors that of the broader population: older individuals vote at higher rates than younger individuals and voting among younger cohorts in the community supervised population lags significantly behind voting among older people on felony supervision. PX-29 at 14; 8/17/21 Trial Tr. 27:17-25.

82. Among people currently on felony supervision who were ages 18 to 29 at the time of the 2016 general election (about 39% of the community supervised population), 36.1% had ever registered to vote and 15.1% voted in the 2016 general election. PX-34; 8/17/21 Trial Tr. 25:19-23. Among those ages 30 to 44 at the time of the election, 40% had ever registered to vote and 21% voted in the 2016 general election. PX-34; 8/17/21 Trial Tr. 26:6-9. Among those ages 45 to 60 at the time of

the election, 48.2% had ever registered to vote and 30% turned out to vote in 2016. Those over the age of 61 at the time of the election reported the highest participation: 50% of these older persons had ever registered and 36% voted in the 2016 general election. PX-34; 8/17/21 Trial Tr. 26:10-25, 27:1-16.

83. The type of punishment a person received also impacted the voting behavior of people under felony supervision. Among the overall community supervised population, there is some small participation differences between people who have served time in prison for a felony conviction and those who have not. PX-29 at 15; 8/17/21 Trial Tr. 26:10-25, 27:1-16. Among those currently on felony supervision who have never served time in prison for a felony conviction, 40.5% have registered to vote in the past and 20.6% voted in the 2016 general election. PX-29 at 15; 8/17/21 Trial Tr. 28:19-25. In comparison, among those who have served time in prison for a felony conviction in the past, 37.0% have registered to vote in the past and 19.7% voted in the 2016 general election. PX-29 at 15-16; 8/17/21 Trial Tr. 29:4-10.

84. Of the 372,422 eligible North Carolina voters who have 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. PX-35; 8/17/21 Trial Tr. 32:7-19.

85. Turnout among the group of people who had completed their felony supervision at the time of the 2016 general election varied by demographic characteristics. African Americans in this cohort voted at a slightly higher rate than

Whites (29.8% to 26.3%). Turnout among those under age 30 was lower (13.1%) than that of the oldest group of voters (35.46%). PX-35; 8/17/21 Trial Tr. 33:10-35. People who had served only felony supervision without time in prison voted at a slightly higher rate than those who had served some time in prison (28.5 to 27.3%). PX-29 at 17; 8/17/21 Trial Tr. 34:5-13.

86. A substantial number of the 34,644 people who were eligible voters at the time of the 2016 general election and experienced their first felony conviction and disenfranchisement after the election—20.4%—voted in the 2016 general election. PX-29 at 18; PX-36; 8/17/21 Trial Tr. 34:14-20, 35:16-20. Turnout rates among this group were lower than the population who had finished serving their felony sentences at the time of the 2016 general election because this group was disproportionately younger, with half of them under age 30 at the time of the 2016 general election. PX-36; 8/17/21 Trial Tr. 35:21-36:1-4. Among this group, those who experienced their first felony conviction after age 61 voted at nearly three times the rate of those under age 30 at the time of the 2016 general election. PX-36; 8/17/21 Trial Tr. 36:14-21.

87. There is also a large disparity in turnout rates across punishment type. Only 17.7% of people who would eventually serve time in prison voted in the 2016 general election, compared with 22.7% of those would serve only a felony supervision sentence with no time in prison. PX-29 at 20; 8/17/21 Trial Tr. 36:22-37:1-5.

88. The Court accepts Dr. Burch's conclusion that, based on her analyses, at least 20% of persons on felony supervision in North Carolina would vote in upcoming elections if they were not denied the franchise. The Court further accepts Dr. Burch's conclusion that important subgroups of this class of voters—including women, African Americans, and older people—would vote at even higher rates. PX-39 at 2; 8/17/21 Trial Tr. 39:1-14, 40:10-16.

89. The Court agrees that Dr. Burch's 20% estimate is conservative for several reasons: (1) the process of matching DPS files with election records underestimates the registration and turnout of women because they may change their names due to marriage, divorce, or other life events; (2) the process relies on exact matching so typographical and other errors will cause false negatives; and (3) some individuals may have moved out of state and thus are no longer eligible voters in North Carolina, or may have lived and voted in different states prior to their North Carolina conviction. PX-39 at 2; 8/17/21 Trial Tr. 39:15-40:1-9.

90. Both voter turnout and voter registration are indications of future voting behavior, and political scientists sort voters into two categories: "core voters"—people who vote consistently in every election—and "peripheral voters"—people who vote episodically in elections of high interest. PX-39 at 3; 8/17/21 Trial Tr. 41:12-42:1-3.

91. Looking at only 2016 turnout data might accurately capture the voting behavior of "core voters," but ignoring registration rates and other data would underestimate the extent to which "peripheral voters" might participate in a given

election if they were not denied franchise due to being on community supervision. PX-39 at 3; 8/17/21 Trial Tr. 42:12-43:1.

92. Additionally, 22.6% of people currently on felony supervision who were eligible during the 2012 general election voted. PX-39 at 4; 8/17/21 Trial Tr. 43:16-21.

93. When Dr. Burch combined the data from the 2012 and 2016 elections, she observed that the North Carolina felony supervision population is split into core and peripheral voters. PX-39 at 4; 8/17/21 Trial Tr. 43:22-45:2. 18% of the eligible population voted in only one of the 2012 and 2016 general elections, but not both. These are peripheral voters. PX -40; 8/17/21 Trial Tr. 44:16-19. Additionally, 13.7% of the people on felony supervision voted in both 2012 and 2016 elections. These are core voters. PX-40; 8/17/21 Trial Tr. 44:20-23.

94. 31.7% of people currently under felony supervision voted in one *or* both of the 2012 and 2016 presidential elections. At least 20% of those currently on felony supervision would vote in upcoming elections if they were not disenfranchised. PX-40; 8/17/21 Trial Tr. 45:3-17, 45:18-46:1-4.

95. People convicted of felonies who later completed a felony supervision sentence in North Carolina have turnout rates at or above 20% over the last three presidential elections. PX-39 at 6; 8/17/21 Trial Tr. 46:20-48:19. At least 20% of those currently on felony supervision would vote in upcoming elections if they were not disenfranchised.

2. The Potential Impact on Elections

96. To evaluate whether the denial of the franchise to persons on community supervision may affect election outcomes in North Carolina, Plaintiffs' expert Dr. Baumgartner 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. 8/18/21 Trial Tr. 89:4-17; PX-1 at 26. The Court credits Dr. Baumgartner's testimony and accepts his conclusions.

97. In 2018 alone, there were 16 different county elections where the margin of victory in the election was less than the number of people denied the franchise due to felony supervision in that county. 8/18/21 Trial Tr. 91:19-92:3; PX-21; Fact Stip. ¶ 57. 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. 8/18/21 Trial Tr. 92:5-93:5. 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.* at 93:21-94:2. 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.* at 94:3-11.

98. The number of African Americans denied the franchise due to being on felony supervision exceeds the vote margin in some elections. 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.* at

94:12-95:10. 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.* at 95:11-96:2. 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.* at 96:15-97:1.

99. People living in the community on felony supervision have an interest in the outcome of county elections, as does everyone. *Id.* at 93:6-20. That is especially true of a county sheriff's race. As Dr. Baumgartner explained:

> [W]e all have an interest in every race. Democracy matters, but people in this case and the people in this category have a particular interest in the criminal justice actors, district attorney, sheriffs, judges, but they have an interest in everything, but certainly a County Sheriff, you know, runs the jail. That's an important function in criminal justice, so people certainly have an interest in those races in particular, the people of this cat- -- the people that we're talking about who are disenfranchised under these policies.

Id. at 96:3-14. This Court agrees.

100. Legislative Defendants' expert Dr. Callanan attempted to offer some criticisms of Dr. Baumgartner's analysis regarding the potential impact on election outcomes. Dr. Baumgartner explained why those criticisms are incorrect, *id.* at 97:4-100:17; PX-25, and the Court once again concludes that Dr. Callanan's report is entitled to no weight.

101. 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. *Id.* at 100:18-22. 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.* at 100:23-101:13. 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.* at 101:14-22.

102. There are also many 2018 state House and state Senate races that had a vote margin of less than 100 votes. *Id.* at 101:23-102:6; PX-22. Dr. Baumgartner did not receive data that would have allowed him to calculate the number of disenfranchised persons in each of these House or Senate districts. 8/18/21 Trial Tr. 102:17-103:1. Nevertheless, the closer the margin of any election, the greater the chance that North Carolina's denial of the franchise to over 56,000 persons on felony supervision could affect the outcome of the election. *Id.* at 103:2-20.

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

1. N.C.G.S. § 13-1 Does Not Serve Any Legitimate State Interest

103. As the Court noted in September 2020, in its interrogatory responses, Defendants initially put forward "numerous" possible state interests that section 13-1 might be thought to serve. 9/4/20 Order of Inj. Relief ("PI Order") at 9; *see* LDX-144; SDX-146. The Court at that time accordingly 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. PI Order at 9.

104. Nevertheless, at trial in August 2021, Defendants failed to introduce any evidence supporting a view that section 13-1's denial of the franchise to people on felony supervision serves any valid state interest today.

105. The State Board's Executive Director testified that the State Board is *not* asserting those interests to justify enforcing the challenged law today. PX-176 (excerpts from Bell 30(b)(6) Dep.). The State Board Defendants' interrogatory response identified interests including "regulating, streamlining, and promoting voter registration and electoral participation among North Carolinians convicted of felonies who have been reformed"; "simplifying the administration of the process to restore the rights of citizenship to North Carolinians convicted of felonies who have served their sentences"; "avoiding confusion among North Carolinians convicted of felonies as to when their rights are restored"; "eliminating burdens on North Carolinians convicted of felonies to take extra steps to have their rights restored after having completed their sentences"; "encouraging compliance with court orders." *Id.* at 176:20-206:15. The Executive Director testified that the State Board is not asserting that the denial of the franchise to people on felony supervision serves any of these interests as a factual matter in the present day, and she admitted that the State Board is unaware of any evidence that denying the franchise to such people advances any of these interests. *Id.*

106. Indeed, the State Board's Executive Director conceded that *striking down* section 13-1's denial of the franchise to people on felony supervision would "promote their voter registration and electoral participation." *Id.* at 182:17-22.

107. 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.

108. The Legislative Defendants 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.

109. In closing argument, Legislative Defendants asserted that section 13-1 serves an interest in "creat[ing] . . . the finish line for when . . . the loss of rights is finished, when it terminates." 8/19/21 Trial Tr. 166:2-10. The Court does not find this alleged interest persuasive or legitimate.

110. Legislative Defendants also asserted in closing argument that section 13-1 serves an interest in "t[ying] the restoration to the completion of the sentence," including the completion of any period of supervision. *Id.* at 166:11-22. But Defendants did not support this circular logic with any evidence to justify why it is a legitimate interest.

111. To the extent Defendants still contend that the challenged scheme serves interests "requiring felons to complete all conditions of probation, parole, and post-trial supervision," as they did in interrogatory responses, those interests are tautological. Nor have Defendants introduced any evidence that withholding the franchise encourages completion of post-release and probationary conditions, and there is no empirical evidence to support such a claim in any of the scholarly literature. PX-29 at 22-34 (Burch Report).

112. To the extent Defendants still contend that the challenged scheme serves an interest in withholding restoration of voting rights from people with felony convictions who do not abide by court orders, they have introduced no evidence that the prospect of disenfranchisement results in higher rates of compliance with court orders, and there is no support in the scholarly literature for such a claim. *Id.* at 32. In any event, section 13-1 denies the franchise to people on felony supervision *regardless* of whether they are complying with court orders and the conditions of their supervision.

113. Defendants have argued that the changes to section 13-1 in the early 1970s served a valid state interest in eliminating onerous procedural requirements for rights restoration, such as a requirement to petition a court with supporting witnesses or swear an oath before a judge. *See, e.g.*, 8/19/21 Trial Tr. 166:23-167:18, 169:17-22. But those procedural requirements are not at issue in this case. Plaintiffs instead challenge section 13-1's denial of the franchise to people on felony supervision.

114. In any event, while the final decision to restore a person's voting rights is no longer left to the discretion of a judge, there remains a number of discretionary decisions, especially in sentencing, but also in whether to charge an individual, what offenses to charge, whether to reduce charges, and whether a plea offer is extended, that have a direct effect upon when a person's right to vote is restored. Am. PI Order at 5. Section 13-1's denial of the franchise to people on probation, parole, or post-release supervision exacerbates the inequitable effects of that

judicial discretion, because judges retain discretion in deciding the length of probation and whether to terminate a person's probation. Pursuant to N.C.G.S. § 15A-1342(a), a court may place a convicted person on probation for the appropriate period as specified in N.C.G.S. § 15A-1343.2(d), not to exceed a maximum of five years. And pursuant to N.C.G.S. § 15A-1342(b), a court has discretion to terminate an individual's probation "at any time … if warranted by the conduct of the defendant and the ends of justice." *See also* Fact Stip. ¶ 44. The median duration of probation for persons sentenced to felony probation in North Carolina state court is thirty months. *Id.* ¶ 43.

2. N.C.G.S. § 13-1 Does Substantial Harm

115. In contrast to the absence of evidence that section 13-1's denial of the franchise to people on felony supervision serves any valid state interest today, the evidence establishes that such denial of the franchise causes serious harm to individuals and communities, and in fact undermines important state interests including several of the interests put forward by Defendants.

a. Testimony of Plaintiffs' Expert Dr. Burch

116. Section 13-1's denial of the franchise to persons on felony supervision does not advance those interests put forward by the State and instead causes only harm.[1]

[1] Much of Dr. Burch's analysis of potential state interests in her report concerned the effect of conditioning rights restoration on the satisfaction of financial conditions of supervision, which was no longer relevant at trial given the Court's September 2020 summary judgment order.

117. 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." In fact, section 13-1 may even decrease turnout. PX-29 at 36-37; 8/17/21 Trial Tr. 58:4-13.

118. 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%). PX-29 at 39; 8/17/21 Trial Tr. 60:2-18. In other words, the experience of being denied the franchise decreases turnout among an otherwise similarly situated population. 8/17/21 Trial Tr. 64:8-65:2.

119. People who served probation sentences for misdemeanors are 15% less likely to vote following their sentence, whereas people who served probation sentences for felony convictions (and thus were denied the franchise) are 40% less likely to vote following their sentence. This 25% differential in turnout rates can be attributed to the experience of felony disenfranchisement. PX-39 at 9-10; 8/17/21 Trial Tr. 63:9-64:5.

120. The scholarly literature shows that the existence of felony disenfranchisement laws themselves lead to widespread confusion and misunderstandings among people with felony convictions about whether they can vote, even in states with automatic restoration. Audit studies have shown that, despite official policies, local bureaucrats themselves can contribute to confusion

about voting rights by failing to respond to questions or by answering questions incorrectly. PX-29 at 37; 8/17/21 Trial Tr. 58:14-59:1-5.

121. A 2014 peer-reviewed study of North Carolina's re-enfranchisement notification procedures concluded that those procedures have no effect on registration and turnout among people who have finished serving their sentences, including probation and parole. 8/17/21 Trial Tr. 59:6-60:1. The researchers concluded that North Carolina's forms and guidance "lacked clarity" and that the information tended to be lost or crowded out. *Id.* Although Defendants asserted that the documents provided to people ending probation have changed since 2014, they did not introduce any evidence that the documents used today are any clearer than those used at the time of the 2014 study.

122. 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. *Id.* at 65:13-66:18. Felony disenfranchisement is among a long list of stigmatizing and wide-ranging collateral consequences for people convicted of felonies, including civil restrictions on voting, officeholding, and jury service; employment and occupational licensing, and even economic exclusions from welfare, housing, and other public benefits. There are more than 35,000 such penalties in state and federal law across the United States. *Id.* at 65:13-66:1; PX-29 at 40.

123. Denial of the franchise to people on felony supervision reduces political opportunity and the quality of representation across entire communities in North

Carolina. The population of people on felony supervision who are denied the franchise in North Carolina is highly concentrated into particular neighborhoods. 8/17/21 Trial Tr. 67:3-23. Felony disenfranchisement rates of young adults living in certain neighborhoods in North Carolina is as high as 18 to 20 percent. *Id.* Such a high level of communal denial of the franchise can discourage other young people from voting, because voting is a social phenomenon. Indeed, turnout among eligible voters is lower in communities with higher rates of denial of the franchise among people living in those communities. *Id.* at 67:24-68:15. These communities are less likely to be the subject of voter mobilization efforts by political parties, have less turnout, and have less political power and political equality as a consequence of the denial of the franchise to people on felony supervision. *Id.* at 66:22-67:23, 68:16-69:17; PX-29 at 43.

124. Denial of the franchise to persons on felony supervision harms individuals, families, and communities for years even after such supervision ends. PX-29 at 45; 8/17/21 Trial Tr. 69:18-70:6.

b. Testimony from the Department of Public Safety

125. DPS documents given to impacted individuals about their voting rights are unclear and can easily lead to confusion. It is critically important for DPS documents to inform people about their voting rights in simple, clear, plain English terms, and it is critically important to confirm that affected individuals have received, read, and clearly understood any written materials provided to them about their voting rights. 8/19/21 Trial Tr. 70:1-20. But the DPS forms are not simple or

clear, and they do not speak in plain English about the basic question of whether the person is permitted to vote.

126. One DPS form contains multiple lists of things that people on probation are and are not permitted to do, but not one of those lists mentions voting. *Id.* at 75:20-78:10 (discussing SDX-28). The form further states that "upon completion of your sentence," your voting rights are restored," but the "sentence" referred to there is different than the "active sentence" referred to earlier on the same page; one refers to probation and the other refers to incarceration. *Id.* at 79:21-80:16. DPS does not have any policy directing probation offers to explain to people on probation receiving this form that the reference to a "sentence" at the end of the form is different than the "active sentence" referred to earlier on the same page. *Id.* at 80:25-81:8. While this form may be clear to someone who has spent decades working as a probation officer and top DPS official focused on community supervision, it could easily confuse a person on probation.

127. Another DPS form designed to inform people about the restoration of their voting rights does not even use any iteration of the word "vote." *Id.* at 90:15-91:14 (discussing SDX-15).

128. DPS does not provide any information about voting rights to people being transferred from supervised to unsupervised probation. *Id.* at 93:20-94:4. Nor does DPS provide people with any information about voting rights (or anything else) upon completion of their unsupervised probation. *Id.* at 94:9-22. Despite her many years of experience at DPS working on community supervision, Maggie Brewer.

DPS's Deputy Director of Community Supervision, testified that she does not even know whether people on unsupervised probation are permitted to vote. *Id.* at 87:18-24, 94:5-8.

129. Section 13-1's denial of the franchise to people on felony supervision does not avoid confusion, but instead engenders it. If section 13-1 applied only to people who were incarcerated, all people with felony convictions could simply be told upon their release from prison that they are eligible to vote.

c. Testimony from the State Board of Elections

130. In addition to confirming that the State Board is not advancing state interests in support of the denial of the franchise to persons on felony supervision today, the State Board's Executive Director also made it clear that such denial of the franchise is very difficult to administer and leads to material errors and problems.

131. For instance, according to a 2016 audit titled "Post-Election Audit Report," in a data-matching process used by the State Board, 100 out of 541 individuals who were initially identified as having voted illegally due to a felony conviction were in fact eligible voters, based on further investigation. PX-50 at 408; 8/18/21 Trial Tr. 194:2-22. That is a false positive rate of nearly 20%. *Id.*

132. The State Board uses a related data-matching process to identify people convicted of felonies in North Carolina state courts who are registered voters, and these individuals' registrations are then canceled. But when a voter is identified by this data-matching process as being ineligible to vote based on a felony conviction, the State Board does not conduct any further investigation to determine

the accuracy of the persons identified in the data match as ineligible based on a felony conviction. 8/18/21 Trial Tr. 195:5-23.

133. Voter registration application materials used by the State Board of Elections as recently as February of 2020 explained to voters that: "if [you were] previously convicted of a felony, you must have completed your sentence, including probation and/or parole" but did not include the words "post-release supervision" anywhere on the form. 8/18/2021 Trial Tr. 197:7-25; 198:1-11 (discussing PX-43 at 352). Multiple State Board guides providing instructions to poll workers from as recently as the 2020 elections likewise mention "probation or parole" but not "post-release supervision." *Id.* at 201:1-25; 202:1-24; 203:1-3 (discussing PX-51 at 557, 559); 8/18/21 Trial Tr. 204: 24-25; 205:1-20 (discussing PX-46 at 256). The State Board's Executive Director acknowledged that if a person on post-release supervision asked a poll worker, "I finished serving my jail sentence or prison sentence but I'm on post-release supervision. Can I vote?" the poll worker might consult the State Board's instructions and conclude, incorrectly, that the answer was "yes." 8/18/21 Trial Tr. 203:20-25; 204:1-3.

134. A person on post-release supervision could truthfully answer the question poll workers are trained to ask, "Are you currently on probation or parole for a felony conviction?" with the answer: "no." Based on their "no" answer, that person would be permitted to cast a ballot. Notwithstanding the voter's honest answer, the person could then be prosecuted for the crime of voting illegally. 8/18/21 Trial Tr. 205:17-25; 206:1-7.

d. Testimony of the Organizational Plaintiffs

135. The Organizational Plaintiffs' testimony further demonstrates the harms caused by section 13-1's denial of the franchise to people living in the community on felony supervision.

136. There is rampant confusion among persons on felony supervision about their voting rights. For example:

a. Dennis Gaddy, the Executive Director of Community Success Initiative, testified that CSI's clients are often confused about whether they are allowed to vote. 8/16/2021 Trial Tr. 53:8-9, 56:21-57:1-21. He further testified that when clients are disenfranchised due to felony supervision, they cannot effectively advocate for themselves, their families, or their communities. *Id.* at 58:16-59:16. Mr. Gaddy testified that during his seventeen years of educating people convicted of felonies about their voting rights, he has witnessed how not being able to vote causes many people to lose hope, and not being able to vote means that you do not have a civic voice. Mr. Gaddy lamented that clients often feel frustrated on being required to pay taxes but not being allowed to vote. *Id.* at 59:10-60:4.

b. Diana Powell, the Executive Director of Justice Served NC, testified that section 13-1 is confusing, that many impacted community members are afraid to vote, and that due to frequent address changes, many people are never informed that their rights are

restored. She testified that most people are unsure as to whether they have a felony or misdemeanor conviction and are afraid of being rearrested for voting. 8/17/21 Trial Tr. 163:21-165:7.

c. Corey Purdie, the Executive Director of Wash Away Unemployment, testified that it is difficult to discuss voting with impacted community members because it is difficult to convince them that they are legally able to participate in the process. 8/19/21 Trial Tr. 45:3-7. In his interactions with impacted community members, Mr. Purdie finds that people are in fear of voting after incarceration due to the confusing nature of the law, and many fear being charged with another felony and facing even more prison time for mistakenly voting under this law. *Id.* at 45:10- 46:2. Mr. Purdie testified that in his community outreach, he finds that people are confused and scared to vote "all the time." *Id.* at 46:3

d. Rev. T. Anthony Spearman, President of the North Carolina NAACP, testified that he explains the current felony disenfranchisement law to NC NAACP members "all the time"; and that the individuals he speaks to are often confused about whether they are eligible to vote under N.C.G.S. 13-1. *Id.* at 20:15-23. He testified that "the NAACP is very much concerned about helping these persons be the best somebodies they can be, and they cannot do that...without being mentored to know what their rights are."

Id. at 20:08-12. Rev. Spearman further testified that "the vote is one of the most powerful nonviolent change agents in the world, and to rob a man or woman of their right to vote ... it's just hard to conceive of, that we would do that." *Id.* at 23:09-16.

e. Individual Plaintiff Timmy Locklear also testified that confusion about his eligibility to vote has kept him from voting in past elections. *Id.* at 30:18-30:23.

137. Section 13-1's denial of the franchise to people on felony supervision also harms the Organizational Plaintiffs themselves, forcing them to divert scarce resources and interfering with the missions of their organizations. Fact Stip. ¶¶ 3-15; 8/16/21 Trial Tr. 58:4-59:16 (Mr. Gaddy); 8/17/21 Trial Tr. 165:23-166:7, 167:4-13 (Ms. Powell); 8/19/21 Trial Tr. 46:23-48:4 (Mr. Purdie); 8/19/21 Trial Tr. 17:23-20:19, 22:8-23:8 (Rev. Spearman).

138. Mr. Gaddy also testified movingly about the devastating impact that disenfranchisement had on him personally after he was released from incarceration and living in the community on felony supervision. After release from incarceration, Mr. Gaddy could not vote for another seven years because he was on probation. He lamented that he missed a lot of elections over those seven years and was particularly devastated to miss the election of the first African American President in 2008. 8/16/2021 Trial Tr. 60:5-61:1-24.

139. Mr. Purdie had a similar experience. He testified that the fear and confusion created by this law, combined with the carceral experience, creates a

feeling of hopelessness. 8/19/21 Trial Tr. 36:23-37:16 (Purdie). This law has a silencing affect, making impacted people feel as if their voice does not matter. *Id.* at 49:22-50:10. Mr. Purdie testified that to restore a sense of hope, we must unmute our impacted community members—we must restore their voice. *Id.* at 51:16-21.

e. Testimony of the Individual Plaintiffs

140. The testimony of two Individual Plaintiffs fully demonstrated the profound damage that section 13-1 does to people living in communities across North Carolina.

141. Timmy Locklear, a 58-old member native of Lumberton, North Carolina, now lives in Wilmington. 8/19/21 Trial Tr. 25:14-22. Since his release from prison in October 2019, he has worked directing traffic at the New Hanover County Landfill, and he never had any violations of the conditions of his post-release supervision. *Id.* at 28:11-19. Before his 2018 felony conviction, he participated in North Carolina elections, and he testified that he would have voted in the March 2020 primary elections if he were not disenfranchised due to post-release supervision. *Id.* at 30:6-31:1. When Mr. Locklear completed his post-release supervision in July 2020, his probation officer did not talk to him about his voting rights or give him a voter-registration form, and they never sent him any forms in the mail about voting. *Id.* at 29:1-30:5. Mr. Locklear nevertheless re-registered to vote and voted in the November 2020 elections. *Id.* at 31:2-8. When asked why it was important for him to vote, he testified: "It felt good. I hadn't voted in a long time." *Id.* at 31:9-11.

142. Shakita Norman lives in Wake County, where she works as an Assistant General Manager at Jiffy Lube, takes care of her five children, and pays her taxes. 8/17/21 Trial Tr. 148:16-149:14, 154:20-23. She wants to vote, particularly for members of the school board because all of her children attend Wake County Public Schools. *Id.* at 148:25-149:5, 153:16-22. But she cannot vote because, due to a felony conviction in 2018, she has been stuck on "special probation" for 2.5 years running. *Id.* at 152:9-25. To complete her special probation, she must serve a total of 200 more days of "weekend jail." *Id.* at 151:02-13. But she has not been able to serve any weekend jail since March 2020 because the jails are closed due to the pandemic. *Id.* at 151:18-152:5. Ms. Norman has now been on probation and thus prohibited from voting for nearly three years, even though she has had no probation violations. *Id.* at 152:9-25. Ms. Norman does not know when she will be able to complete her required weekend jail days, or when she will be off probation and able to vote again. *Id.* at 152:6-8, 154:14-16. She voted in North Carolina elections before her conviction, and she testified that she would have voted in the March and November 2020 elections if she were not disenfranchised. *Id.* at 153:3-154:5. When asked why she believes that people on felony supervision should have the right to vote, she testified:

> Well, most people that's like me, even though I'm on probation, I still pay taxes, I go to work every day, I take care of my family. I should -- I should be able to have that, to have that moment. I should be able to say something, and I want people that's in the future that's in the situation that I'm in to be able to have that voice and be able to say something and it gets heard.

Id. at 154:17-155:2.

Based on the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

I. N.C.G.S. § 13-1's Denial of the Franchise to Persons on Probation, Parole, or Post-Release Supervision Violates the North Carolina Constitution's Equal Protection Clause

1. The Equal Protection Clause of the North Carolina Constitution guarantees that "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const., art. I, § 19.

2. It is well-established that North Carolina's Equal Protection Clause provides greater protection for voting rights than federal equal protection provisions. *Stephenson v. Bartlett*, 355 N.C. 354, 377-81 & n.6, 562 S.E.2d 377, 393-96 & n.6 (2002); *Blankenship v. Bartlett*, 363 N.C. 518, 522-28, 681 S.E.2d 759, 763-66 (2009)). North Carolina courts have repeatedly applied this broader protection for voting rights to strike down election laws under Article I, § 19. *Stephenson*, 355 N.C. at 377-81 & n.6, 562 S.E.2d at 393-95 & n.6; *Blankenship*, 363 N.C. at 522-24, 681 S.E.2d at 762-64.

3. Section 13-1's denial of the franchise to people on felony supervision violates North Carolina's Equal Protection Clause both because it discriminates against African Americans and because it denies all people on felony supervision the fundamental right to vote.

A. N.C.G.S. § 13-1 Impermissibly Discriminates Against African American People in Intent and Effect and Denies Substantially Equal Voting Power to African American People

4. Section 13-1's denial of the franchise to people on felony supervision has the intent and effect of discriminating against African Americans, and unconstitutionally denies substantially equal voting power on the basis of race.

5. To prevail on a race discrimination claim under Article I, § 19, a plaintiff "need not show that discriminatory purpose was the sole or even a primary motive for the legislation, just that it was a motivating factor." *Holmes v. Moore*, 270 N.C. App. 7, 16, 840 S.E.2d 244, 254-55 (2020) (internal quotation marks omitted). "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.* (internal quotation marks omitted).

6. The legislature cannot purge through the mere passage of time an impermissibly racially discriminatory intent. *See Hunter v. Underwood*, 471 U.S. 222 (1985) (striking down a felony disenfranchisement law originally passed with the intent to target African Americans); *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.").

7. The legislature's decision in the 1970s to preserve section 13-1's denial of the franchise to people living in the community was itself independently motivated by racism.

8. There is no evidence to demonstrate that N.C.G.S. § 13-1 would have been enacted without a motivation impermissibly based on race discrimination, and the Court concludes that it would not have been.

9. Section 13-1's denial of the franchise to people living in the community on felony supervision was enacted with the intent of discriminating against African American people and has a demonstrably disproportionate and discriminatory impact.

B. N.C.G.S. § 13-1 Impermissibly Deprives All Individuals on Felony Probation, Parole, or Post-Release Supervision of the Fundamental Right to Vote.

10. N.C.G.S. § 13-1 interferes with the fundamental right to vote on equal terms as it prohibits people with felony convictions from regaining the right to vote even while they are living in communities in North Carolina, so long as they have not completed probation, parole, or post-release supervision. *See Stephenson*, 355 N.C. at 378, 562 S.E.2d at 393.

11. People on felony supervision share the same interest as, and are "similarly situated" to, North Carolina residents who have not been convicted of a felony or who have completed their supervision. "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., Inc. v. City of Fayetteville*, 301 N.C. 1, 13, 269 S.E.2d 142, 150 (1980). North Carolinians on felony supervision share in the State's "public [burdens]" and "feel an interest in its welfare." *Roberts v. Cannon,* 20 N.C. 398, 4 Dev. & Bat. (Orig. Ed.) 256, 260-61 (1839).

12. As the Court held in its preliminary injunction order in September 2020, under Article I, § 19, when legislation is enacted that restores the right to vote, thereby establishing terms upon which certain persons are able to exercise their right to vote, such legislation must not do so in a way that imposes unequal terms. As allowed by Article VI, § 2(3), of our Constitution, the legislature has chosen to restore citizen rights—specifically here, the right to vote—to those with felony convictions. But in N.C.G.S. § 13-1, it has done so on unequal terms in violation of Article I, § 19.

C. N.C.G.S. § 13-1's Violation of Article 1, § 19 Triggers Strict Scrutiny

13. Under Article I, § 19, strict scrutiny applies where either: (1) a "classification impermissibly interferes with the exercise of a fundamental right," or (2) a statute "operates to the peculiar disadvantage of a suspect class." *Stephenson*, 355 N.C. at 377, 562 S.E.2d at 393 (internal quotation marks omitted); *accord Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 746, 392 S.E.2d 352, 355 (1990). Thus, if a statute interferes with the exercise of a fundamental right, strict scrutiny applies even if the affected group is not a suspect class. *Stephenson*, 355 N.C. at 379, 562 S.E.2d at 394; *Northampton County*, 326 N.C. at 747, 392 S.E.2d at 356.

14. N.C.G.S. § 13-1 both interferes with the exercise of the fundamental right of voting and operates to disadvantage a suspect class. Therefore, it is subject to strict scrutiny.

II. N.C.G.S. § 13-1's Denial of the Franchise to Individuals on Probation, Parole, or Post-Release Supervision Violates the North Carolina Constitution's Free Elections Clause

A. N.C.G.S. § 13-1 Prevents Elections from Ascertaining the Will of the People

15. 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. This clause has no federal counterpart.

16. N.C.G.S. § 13-1's denial of the franchise to people on community supervision violates the Free Elections Clause by preventing elections that ascertain the will of the people.

17. 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.

18. Section 13-1's denial of the franchise to persons on community supervision strikes at the core of the Free Elections Clause, moreover, because of its grossly disproportionate effect on African American people. 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.

19. 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.

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

B. N.C.G.S. § 13-1's Interference with Free Elections Triggers Strict Scrutiny

21. Because the right to free elections is a fundamental requirement of the North Carolina Constitution, *Harper*, 2022-NCSC-17, P139, N.C.G.S. § 13-1's abridgment of that right triggers strict scrutiny. *See Northampton*, 326 N.C. at 747, 392 S.E.2d at 356. That is so regardless of the General Assembly's intent in passing the law. When statutes implicate state constitutional provisions concerning the right to vote, "it is the effect of the act, and not the intention of the Legislature, which renders it void." *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 225-26 (1875). The effect of section 13-1 is to deny the franchise to over 56,000 people, disproportionately African Americans.

22. In any event, strict scrutiny would apply here even if the General Assembly's intent were relevant in evaluating a Free Elections Clause claim. In manipulating the electorate by disenfranchising groups of voters perceived as undesirable, N.C.G.S. § 13-1 resembles the very English laws that were the impetus for North Carolina's original free elections clause.

23. Section 13-1's denial of the franchise to persons on felony supervision is therefore subject to strict scrutiny.

III. N.C.G.S. § 13-1's Denial of the Franchise to Persons on Community Supervision Cannot Satisfy Strict or Any Scrutiny

24. For the reasons set forth above, section 13-1's denial of the franchise to persons on community supervision is subject to strict scrutiny under both the Equal Protection Clause and the Free Elections Clause. To satisfy strict scrutiny, Defendants must establish that this provision furthers a compelling government interest and is narrowly tailored to do so. *Northampton Cnty.*, 326 N.C. at 747; *DOT v. Rowe*, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001). Defendants failed to make such a showing on all claims.

25. At a minimum, section 13-1's denial of the franchise is subject to intermediate scrutiny. The Supreme Court has consistently applied intermediate scrutiny where the government's discretion to regulate in a particular field had to be balanced against other constitutional protections. Under intermediate scrutiny, the government must show that the challenged law "advance[s] important government interests" and is not more restrictive "than necessary to further those interests." *Id.* Defendants have failed to establish that section 13-1's denial of the franchise to people on felony supervision advances any "important" government interest, much less in an appropriately tailored manner.

26. Furthermore, because N.C.G.S. § 13-1 does not withstand an intermediate level of scrutiny, it fails strict scrutiny as well. *See M.E. v. T.J.,* 275

N.C. App. 528, 559, 854 S.E.2d 74, 101 (2020*)* (articulating intermediate scrutiny as a less restrictive standard than strict scrutiny).

27. Under any level of scrutiny, Defendants must show that the challenged law adequately serves sufficient state interests today, not just that the law served some state interest in the past. A "classification must substantially serve an important governmental interest *today*, for . . . new insights and societal understandings can reveal unjustified inequality that once passed unnoticed and unchallenged." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (internal quotation marks omitted) (emphasis original)). Defendants failed to do so.

28. Section 13-1's denial of the franchise to people on felony supervision does not advance any valid state interest. Further, much of the evidence presented demonstrates that section 13-1 causes grave harm and undermines important state interests such as voter participation.

29. N.C.G.S. § 13-1's denial of the franchise to persons on community supervision violates North Carolina's Equal Protection Clause, Article I, § 19, and the Free Elections Clause, N.C. Const., art. I, § 10 and does not satisfy strict scrutiny.

IV. The Constitutional Provision Regarding Felony Disenfranchisement Does Not Insulate N.C.G.S. § 13-1 From Constitutional Challenge

30. Defendants argue that Article VI, § 2, cl. 3 of the North Carolina Constitution precludes Plaintiffs from challenging the manner of rights restoration set forth in N.C.G.S. § 13-1. That is incorrect.

31. The Court rejected this argument from Defendants in its preliminary injunction order in September 2020 and rejects it again today.

32. Article VI, § 2, cl. 3 reflects a delegation of authority to the General Assembly to "prescribe[] by law" the contours of the restoration of the franchise, and legislation enacted by the General Assembly pursuant to this delegation must comport with all other provisions of the North Carolina Constitution. Because "all constitutional provisions must be read *in pari materia*," 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.

33. The Court recognizes that Article VI, § 2(3) of our Constitution grants the General Assembly the authority to restore citizen rights to persons convicted of felonies. As discussed above, however, Article I, § 19 of our Constitution forbids the General Assembly from interfering with the right to vote on equal terms, and Article I, § 10 requires that elections be free so as to ascertain the will of the people. Accordingly, when the General Assembly prescribes by law the manner in which a convicted felon's right to vote is restored, it must do so on equal terms and in a manner that ensures elections ascertain the will of the people.

34. "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.

35. In any event, implementing legislation *has* been enacted, and any statute enacted by the General Assembly must comport with all provisions of the North Carolina Constitution. As concluded above, section 13-1 fails, beyond all reasonable doubt, to do so.

It is therefore ORDERED, ADJUDGED, AND DECREED THAT:

1. 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.
2. Defendants, their agents, contractors, servants, employees, and attorneys, and any persons in active concert or participation with them, are hereby enjoined from preventing any person convicted of a felony from registering to vote or voting due to probation, parole, or post-release supervision.

3. 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.

SO ORDERED, this the 28th day of March, 2022.

Lisa C. Bell, Superior Court Judge

3/28/22

Keith O. Gregory, Superior Court Judge

as a majority of this Three Judge Panel

DISSENT

Judge Dunlow dissents from the majority's decision and order.

For the reasons specified in my dissent to the majority's Order on Summary Judgment, I dissent from the final order of the majority issued today.

This Court would make the following:

FINDINGS OF FACT

1. Article VI, Section 2, Part 3 of the North Carolina Constitution provides:

> **Disqualification of felon.** 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.

2. The Plaintiffs in this action do not challenge the provisions of Article VI, Section 2, Part 3 of the North Carolina Constitution.

3. Because the provisions of Article VI, Section 2, Part 3 of the North Carolina Constitution are not challenged in this litigation, this Court must, in analyzing this facial challenge, begin with the assumption that all convicted felons who have not had their rights of citizenship restored are properly and lawfully disenfranchised pursuant to Article VI, Section 2, Part 3 of the North Carolina Constitution.

4. The manner prescribed by law for the restoration to the rights of citizenship is found at N.C.G.S. § 13-1.

5. In the present action, Plaintiffs make a facial challenge to N.C.G.S. § 13-1 (the restoration provision), requesting this Court, "Declare that N.C.G.S. § 13-1's disenfranchisement of individuals while on probation, parole, or suspended sentence is facially unconstitutional and invalid . . . ."

6. The particular provision being challenged in this action is N.C.G.S. § 13-1(1) which provides:

> Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored upon the occurrence of any one of the following conditions:

(1) The unconditional discharge of an inmate, of a probationer, or of a parolee by the agency of the State having jurisdiction of that person or of a defendant under a suspended sentence by the court.

7. N.C.G.S. § 13-2(a) provides:

> The agency, department, or court having jurisdiction over the inmate, probationer, parolee or defendant at the time his rights of citizenship are restored under the provisions of N.C.G.S. § 13-1(1) shall immediately issue a certificate or order in duplicate evidencing the offender's unconditional discharge and specifying the restoration of his rights of citizenship.

8. There has been no evidence presented that any agency, department or court having jurisdiction over an inmate, probationer, parolee or defendant at the time his rights of citizenship are restored under the provisions of N.C.G.S. § 13-1(1) has failed to immediately issue a certificate or order in duplicate evidencing the offender's unconditional discharge and specifying the restoration of his rights of citizenship.

9. Each and every individual who is disqualified from voting under the provisions of Article VI, Section 2, Part 3 of the North Carolina Constitution is automatically restored the right to vote under the provision of N.C.G.S. § 13-1(1).[2]

10. The Plaintiffs have offered, and the Court received, a myriad of testimony, statistical analysis and evidence relating to the impact the provision of Article VI, Section 2, Part 3 of the North Carolina Constitution (felon disenfranchisement) has on the African American population.

11. The Plaintiffs have offered no testimony, statistical analysis or evidence relating to the impact, if any, N.C.G.S. § 13-1 has on the African American population or any other suspect class.

12. "[F]elons do not enjoy the same measure of constitutional protections . . . as do citizens who have not been convicted of a felony." *State v. Grady*, 372 N.C. 509, 567, 831 S.E.2d 542, 582 (2019). As a result of their own conduct, felons are subject to these reduced constitutional protections, which "society . . . recognize[s] as legitimate." *See id.* at 555, 831 S.E.2d at 575. Our courts have recognized that there is a dividing line, for constitutional rights, between those who have "served [their] sentence[s], paid [their] debt[s] to society, and had [their] rights restored," and those who have not. *Id.* at 534, 831 S.E.2d at 561.

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[2] The Court will take judicial notice that the only prerequisite for an individual to have their citizenship rights restored automatically is that the individual live long enough to complete the term of their sentence, probation, parole and/or post-release supervision.

13. Establishing a process by which convicted felons can regain their citizenship rights, including the right to vote, is a valid and legitimate governmental interest.

14. Establishing a restoration process that requires convicted felons to complete their terms of imprisonment, probation, parole or post-release supervision before regaining their citizenship rights, including the right to vote, is a valid and legitimate governmental interest.

15. The Free Elections Clause of the North Carolina Constitution mandates that elections in North Carolina faithfully ascertain the will of the people. The people whose will is to be faithfully ascertained are the persons who are lawfully permitted to vote in North Carolina elections.

16. Because convicted felons, who have not had their citizenship rights restored, are not lawfully permitted to vote in North Carolina elections, the Free Elections Clause has no application to those persons.

Based on the foregoing findings of fact, this Court would make the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter.

2. N.C.G.S. § 13-1 does not bear more heavily on one race than another.

3. N.C.G.S. § 13-1 does not have the intent nor the effect of discriminating against African Americans.

4. The intent of the legislature in enacting N.C.G.S. § 13-1 was to, "substantially relax 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).

5. N.C.G.S. § 13-1 does not interfere with the exercise of a fundamental right.

6. N.C.G.S. § 13-1 does not operate to the peculiar disadvantage of a suspect class.

7. Because N.C.G.S. § 13-1 does not interfere with the exercise of a fundamental right nor does it operate to the peculiar disadvantage of a suspect class, the appropriate level of review to apply in this facial challenge is rational-basis review.

8. N.C.G.S. § 13-1 bears a rational relationship to valid and legitimate governmental interests.

9. The Plaintiffs have failed to meet their heavy burden of showing that N.C.G.S. § 13-1 bears no rational relationship to any legitimate government interest.

10. N.C.G.S. § 13-1 does not violate the Equal Protection Clause of the North Carolina Constitution.

11. N.C.G.S. § 13-1 does not violate the Free Elections Clause of the North Carolina Constitution.

Based on the foregoing findings of fact and conclusions of law, this Court would:

ORDER, ADJUDGE and DECREE

1. The Plaintiffs' prayers for relief are DENIED, and the Plaintiffs' complaint is hereby DISMISSED.

This the 25 day of March, 2022.

John M. Dunlow
Superior Court Judge

CERTIFICATE OF SERVICE

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

Daryl Atkinson
Whitley Carpenter
daryl@forwardjustice.org
wcarpenter@forwardjustice.org
Counsel for Plaintiffs

R. Stanton Jones*
Elisabeth S. Theodore*
stanton.jones@arnoldporter.com
elisabeth.theodore@arnoldporter.com
Counsel for Plaintiffs

Farbod K. Faraji*
Aditi Juneja*
farbod.faraji@protectdemocracy.org
aditi.juneja@protectdemocracy.org
Counsel for Plaintiffs

Orlando L. Rodriguez
114 W. Edenton St.
Raleigh, NC 27603
orodriguez@ncdoj.gov
Counsel for Legislative Defendants

Terence Steed
114 W. Edenton St.
Raleigh, NC 27603
tsteed@ncdoj.gov
Counsel for State Board Defendants

*Admitted pro hac vice

This the 28th day of March 2022.

Kellie Z. Myers
Trial Court Administrator
10th Judicial District
kellie.z.myers@nccourts.org

Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

EXHIBIT B

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.

NOTICE OF VIOLATION OF MARCH 28, 2022 INJUNCTION AND REQUEST FOR EMERGENCY HEARING

Plaintiffs submit this notice to advise that the State Board Defendants are openly violating this Court's March 28, 2022 Final Judgment and Order, specifically its order enjoining Defendants and their agents from preventing North Carolinians from registering to vote based on felony supervision. In light of the State Board Defendants' refusal to comply with the Court's injunction and the upcoming election, Plaintiffs request an emergency hearing at the Court's earliest convenience, today if possible. In support, Plaintiffs state as follows:

1. On March 28, 2022, this Court issued its Final Judgment and Order declaring N.C.G.S. § 13-1's disenfranchisement of persons on felony supervision invalid under the North Carolina Constitution's Equal Protection Clause and Free Elections Clause.

2. The Court's Final Judgment and Order (at p. 64) "hereby enjoined" all Defendants and their agents from preventing persons with felony convictions "from registering to vote or voting due to [felony supervision]." The Court further stated (at p. 65) as follows: "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."

3. Despite this unambiguous injunction, on March 30, 2022, the State Board's General Counsel sent an email to county boards directing them not to register people if they remain on felony supervision. The State Board instructed county boards instead to "keep registration applications of voters who are on probation, parole, or post-release supervision it receives in the Incomplete Queue." Ex. A (Mar. 29, 2022 email from K. Love).

4. There is no legitimate basis for the State Board Defendants or county boards to hold registration applications from persons on felony supervision as "Incomplete" or otherwise refuse to register such persons, and doing so is an open violation of this Court's injunction. Contrary to the email from the State Board's General Counsel, an "imminent appeal" is not a valid basis to violate a court injunction. Nor does this Court's March 28 Final Judgment and Order in any way "conflict" with the North Carolina Supreme Court's previous order concerning a stay of the amended preliminary injunction order. This Court's Final Judgment and Order supersedes the Court's prior amended preliminary injunction, thus rendering the pending appeal of that preliminary injunction moot. Indeed, that is what all parties, including the State Board Defendants themselves, recently advised the Court of Appeals. *See* Ex. B (Joint Motion to Hold Briefing Deadlines in Abeyance, at ¶ 4).

5. On March 30, 2022, upon learning of the State Board's email to county boards, Plaintiffs promptly wrote to State Board Defendants' counsel requesting that the State Board Defendants' violation of this Court's injunction be immediately resolved. State Board Defendants' counsel initially advised that they would reply by 9 a.m. on March 31, but as of this filing, they still have not responded.

6. This is not the first time the State Board Defendants have failed to comply with an injunction of this Court in this case.

7. Voter registration for the 2022 primaries ends in 22 days, on April 22, 2022.

8. In light of the State Board Defendants' open violation of the Court's March 28, 2022 injunction, Plaintiffs request that an emergency hearing at the Court's earliest convenience. Plaintiffs' counsel are prepared to appear in person or via WebEx, as the Court directs.

9. The Court should take prompt action to enforce its March 28, 2022 injunction, and should order other appropriate relief to remedy the State Board Defendants' unjustifiable noncompliance and deter future noncompliance with court orders.

Respectfully submitted this the 31st day of March 2022.

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

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

Exhibit A

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

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

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.

Exhibit A

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

EXHIBIT B

No. 22-136 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

COMMUNITY SUCCESS INITIATIVE, ET AL.,	)	
Plaintiff-Appellees,	)	
v.	)	
TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, ET AL.,	)	From Wake County No. 19 CVS 15941
Defendant-Appellants,	)	

****

JOINT MOTION TO HOLD BRIEFING DEADLINES IN ABEYANCE

****

NOW COME 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"), and respectfully move the Court to hold in abeyance the briefing deadlines for this appeal. In support, Legislative Defendants state as follows:

1. This is an appeal from a preliminary injunction that the Wake County Superior Court entered on August 27, 2021, which had ordered Defendants to allow all convicted felons under community supervision to register and vote despite the restrictions of N.C.G.S. § 13-1.

2. Since that time, the parties have submitted proposed findings of fact and conclusions of law to the Superior Court, which held trial on the constitutionality of § 13-1 from August 16 to August 19, 2021, and which is due to render final judgment on that question.

3. This Court accepted the settled record on appeal and deemed it timely filed on February 16, 2022. Under Appellate Rule 13(a)(1), Appellants' principal briefs are due on March 18, 2022.

4. The Superior Court's final judgment, which could issue at any time, will likely moot or at least alter the issues in this appeal. Legislative Defendants therefore respectfully request that the Court hold the briefing deadlines for this appeal in abeyance.

5. State Defendants join this Motion. Plaintiffs consent to the requested abeyance.

Respectfully submitted this 9th day of March, 2022.

COOPER & KIRK PLLC

By: /s/ Electronically Submitted
Nicole Jo Moss
State Bar No. 31958
David H. Thompson*
Peter A. Patterson*
Joseph O. Masterman*
William V. Bergstrom*
1523 New Hampshire Ave. NW
Washington, D.C. 20036
T: (202) 220-9600
F: (202) 220-9601

NORTH CAROLINA DEPARTMENT OF JUSTICE

By: /s/ Electronically Submitted
Terence Steed
State Bar No. 52809
Mary Carla Babb
State Bar No. 25713
114 W. Edenton Street
Raleigh, NC 27603
T: (919) 716-6567

nmoss@cooperkirk.com
dthompson@cooperkirk.com
ppatterson@cooperkirk.com
jmasterman@cooperkirk.com
wbergstrom@cooperkirk.com

*Appearing *Pro Hac Vice*

tsteed@ncdoj.gov
mcbabb@ncdoj.gov

ATTORNEYS FOR THE STATE DEFENDANTS

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.

PHELPS DUNBAR LLP
Nathan Huff
State Bar No. 40626
Jared M. Burtner
State Bar No. 51583
4141 ParkLake Ave., Suite 530
Raleigh, North Carolina 27612
T: (919)789-5300
F: (919) 789-5301
nathan.huff@phelps.com
jared.burtner@phelps.com

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

EXHIBIT B

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 9th day of March, 2022, served a copy of the foregoing Motion with the Clerk of the North Carolina Court of Appeals and will send notification of such filing by electronic mail on the following parties at the following addresses:

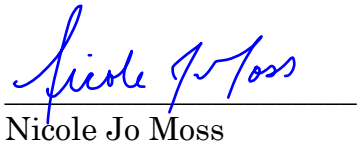
For the Plaintiffs:

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

EXHIBIT B



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

EXHIBIT C

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 19 CVS 15941
COMMUNITY SUCCESS INITIATIVE; JUSTICE SERVED NC, INC.; NORTH CAROLINA STATE CONFERENCE OF THE NAACP, Plaintiffs, v. TIMOTHY K. MOORE, et al., Defendants.	**STATE BOARD DEFENDANTS' RESPONSE TO NOTICE OF ALLEGED VIOLATION OF MARCH 28, 2022 INJUNCTION AND REQUEST FOR EMERGENCY HEARING**

The North Carolina State Board of Elections and its members ("State Board Defendants") hereby respond to Plaintiffs' Notice of Violation of March 28, 2022 Injunction and Request for Emergency Hearing.

Plaintiffs' allegations of violations of the Court's final order are unwarranted and meritless. State Board Defendants stand ready to continue their efforts to implement this Court's final order expeditiously, including the provision enjoining the State 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) Pursuant to that mandate, the State Board has directed all county boards, among other things, not to reject pending applications for registration from applicants who are on probation, parole, or post-release supervision. Further implementation is ongoing and expected to continue in the coming days, absent further court order.

For these and other reasons detailed below, Plaintiffs' Notice alleging violations is meritless and no emergency hearing is necessary. Nonetheless, in responding to Plaintiffs' Notice, the State Board seeks and invites any further guidance the Court considers appropriate as to its methods of compliance.

BRIEF FACTUAL BACKGROUND

At an August 23, 2021 hearing, this Court expanded an injunction it had previously entered to require the State Board Defendants to ensure that all persons serving felony community supervision could register to vote and could vote. In order to implement this, the Court directed the State Board to refrain from refusing registration to any person on community supervision. The Court expressly directed the State Board to immediately implement the expanded injunction starting that day and not to wait for a written order from the Court. Pursuant to that express directive, the State Board immediately worked to implement the Court's expanded injunction. The Court would later enter an order to this same effect on August 27, 2021.

Both State Board Defendants and Legislative Defendants filed notices of appeal of the Court's above-noted order. Legislative Defendants also sought a stay from this Court of its expanded preliminary injunction from this Court, which the Court denied, and then sought a writ of supersedeas in the Court of Appeals, which was granted on September 3, 2021.

That same day, Plaintiffs sought a writ of supersedeas in the Supreme Court of North Carolina. On September 10, 2021, the Supreme Court issued an order on plaintiffs' petition for writ of supersedeas. The Supreme Court ordered 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." (Ex. A, N.C. Sup. Ct. Order, No. 331P21-1 (Sept. 10, 2021)). The Court also ordered that the Court of Appeals' stay entered on September 3, 2021, "be implemented prospectively only, meaning that any person registered to vote at a time when it was legal for that person to register under then-valid court orders as they were interpreted at the time, shall remain legally registered voters." The Court directed the State Board not to

remove from any database any person legally registered under the expanded preliminary injunction between August 23, 2021 and Sept. 3, 2021, and declared those individuals were legally registered voters until further order was entered. Finally, the Supreme Court otherwise denied the petition for writ of supersedeas without prejudice.

The appeal of the expanded preliminary injunction order remains pending in the Court of Appeals. The parties sought an order from the Court of Appeals to have that appeal held in abeyance until this Court issued its final order. Based upon that motion, the Court of Appeals extended the deadline for the State Board Defendants and Legislative Defendants to file their Appellant Briefs until May 18, 2022.

This Court issued its final order this past Monday, March 28, 2022. Therein, the Court declared the statute challenged by this litigation, N.C.G.S. § 13-1, in violation of the state Constitution's Equal Protection and Free Speech Clauses, to the extent it denied franchise to persons on felony probation, parole, or post-release supervision. The Court also enjoined the State Board and others "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) The Court clarified 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." (*Id.* at 65 ¶ 3)

Legislative Defendants filed a Notice of Appeal and an Emergency Motion for Stay pending appeal on March 30, 2022. Contemporaneous with the filing of this Response, State Board Defendants are filing a Response to Legislative Defendants' Emergency Motion for Stay.

On March 31, 2022, Plaintiffs filed their Notice of Violation of March 28, 2022 Injunction and Request for Emergency Hearing, contending incorrectly that the State Board Defendants have failed to comply with this Court's March 28, 2022 order.

DISCUSSION

The State Board Has Already Taken Administrative Steps to Comply with this Court's Order.

Pursuant to this Court's March 28, 2022 order and within less than 24 hours of receiving it, the State Board sent instructions to county boards to comply with that order by ensuring that no one will be denied registration status. (*See* Ex. B, Mar. 29, 2022 Email to Cty. Bds.) The State Board instructed the county boards not to generate or send felon denial letters to voters and not to send removal letters to voters who are on probation, parole, or post-release supervision. The Board also instructed county boards to hold, pending further instruction, any registration applications they receive from voters who are on probation, parole, or post-release supervision.

Subsequent to that email, the State Board suspended the automated removal process for non-incarcerated felons who were already in the removal queue in the Statewide Election Information Management System ("SEIMS") software. In accordance with N.C.G.S. 163-82.14(c)(3), 35 days after a felon removal letter is generated, SEIMS will automatically process the record for removal; to prevent this automated process from removing non-incarcerated felons who were already in the removal queue, the State Board created a customized process that it applied to the over 800 voter registration records that were in the removal queue. The State Board also instructed the county boards to research individual cases where a voter registration was in the removal queue and the State Board could not match it to the felon matching list by first name, last name and birthdate; only after the county boards conducted an individual review and determined that the voter was currently incarcerated would the registration be processed for removal.

Despite what Plaintiffs contend in their Notice, these steps demonstrate compliance with the Court's March 28, 2022 order: no one is being denied registration status and no one is being denied the opportunity to vote. The State Board made it clear to county boards that the directive

to "hold" registration applications from voters on probation, parole, or post-release supervision was only temporary, directing those boards to proceed in this manner "until further instruction," to allow the Board to ensure that its actions were appropriate.

As noted above, the State Board remains ready to fully comply with the Court's order and respectfully invites further direction from the Court, if the Court believes the State Board's manner of compliance requires adjustment.

The State Board Defendants complied with the Court's order in this manner in a good-faith attempt to avoid any possible conflict with the Supreme Court's September 10, 2021 order. The Board recognizes the preliminary injunction stayed by the Supreme Court has now merged into the permanent injunction, and the appeal of the preliminary injunction is mooted. But there is no order dismissing that appeal. As previously stated, the Supreme Court's order 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." (Ex. A, N.C. Sup. Ct. Order) Though the appeal itself may be moot, there has been no action by the appellate courts to dispose of that appeal, which remains pending. The State Board welcomes any further guidance from this Court on this issue as well, and continues to endeavor to be in full compliance with the Court's order and in a manner that is acceptable to the Court.

Plaintiffs are incorrect in suggesting that the State Board Defendants' understanding of the Supreme Court's September 10, 2022 conflicts with the statement in the Joint Motion to Hold Briefing Deadlines in Abeyance filed in the appeal of the expanded preliminary injunction pending in the Court of Appeals. (*See* Joint Motion at ¶ 4, attached to Plns.' Not. of Violation) Specifically,

in that motion, it was noted that "[t]he Superior Court's final judgment, which could issue at any time, *will likely moot or at least alter the issues in this appeal*." (*Id.* (emphasis added)) This is consistent with what is detailed above about the Supreme Court's order. State Board Defendants welcome any further guidance the Court deems appropriate.

Finally, Plaintiffs contend in their Notice that "[t]his is not the first time the State Board Defendants have failed to comply with an injunction of this Court in this case." (Not. of Violation, ¶ 6) Plaintiffs do not say what this statement refers to. State Board Defendants surmise that Plaintiffs may be referencing State Board Defendants revision of its voter registration forms and other documents in an attempt to comply with this Court's preliminary injunction entered on September 4, 2020, based upon the parties' original interpretation of order.

To the extent Plaintiffs are suggesting that the State Board previously, intentionally violated an order of this Court is flatly wrong and mischaracterizes what occurred during the Board's implementation of the September 4, 2020 preliminary injunction. After that injunction was issued, the State Board worked directly with the Plaintiffs to ensure the proper interpretation that preliminary injunction. Despite what Plaintiffs now imply in their Notice, their counsel previously told this Court that "the plaintiffs also don't believe that any errors in the -- in the forms following the Court's injunction were intentional." (Ex. C, Trial Tr. Vol. 4 p. 800) In fact, the State Board worked with Plaintiffs' counsel to ensure that the language for the revised forms was appropriate. (*See id.* at 798) Indeed, Plaintiffs' counsel acknowledged that they "did work with counsel for the defendants to -- in connection with the language that appears, I -- I believe, on all of the forms[.]" (*Id.* at 800)

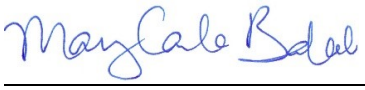
State Board Defendants have acted in good faith at all times, and are not in violation of this Court's final order.

CONCLUSION

As explained above, the State Board is currently in compliance with the Court's March 28, 2022 order. Plaintiffs' Notice of Violation is meritless and no emergency hearing is necessary. If the Court believes otherwise, the State Board Defendants hereby seeks the Court's guidance and will continue to comply with court directives.

Respectfully submitted, this the 1st day of April, 2022.

JOSHUA H. STEIN
Attorney General



Mary Carla Babb
Special Deputy Attorney General
N.C. State Bar No. 25731
mcbabb@ncdoj.gov

N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
Phone: 919-716-6900
Fax: 919-716-6763

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the forgoing document was served on the parties to this action via email and was addressed to the following counsel:

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

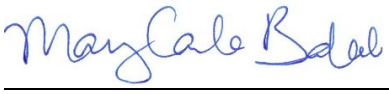
Counsel for Plaintiffs

PHELPS DUNBAR
4141 Parklake Avenue, Suite 530
Raleigh, NC 27612
Telephone: 919-789-5300
Jared M. Butner
jared.butner@phelps.com
Nathan A. Huff
nathan.huff@phelps.com

COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
Telephone: 202-220-9600
Nicole Jo Moss
nmoss@cooperkirk.com
Peter Patterson
ppatterson@cooperkirk.com

Counsel for Legislative Defendants

This the 1st day of April, 2022.



Mary Carla Babb
Special Deputy Attorney General

EXHIBIT A

North Carolina Supreme Court Order, No. 331P21-1 (Sept. 10, 2021)

No. 331P21-1 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

* * * * * * * * * * * * * * * *

COMMUNITY SUCCESS INITIATIVE; JUSTICE SERVED NC, INC; WASH AWAY UNEMPLOYMENT; NORTH CAROLINA STATE CONFERENCE OF THE NAACP; TIMOTHY LOCKLEAR; DRAKARUS JONES; SUSAN MARION; HENRY HARRISON; ASHLEY CAHOON; AND SHAKITA NORMAN	)	
	)	WAKE COUNTY
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; AND DAVID C. BLACK, IN HIS OFFICIAL	)	

CAPACITY AS MEMBER OF THE NORTH)
CAROLINA STATE BOARD OF)
ELECTIONS)

* * * * * * * * * * * * * * * * * * *

ORDER

On Plaintiffs' Petition for a Writ of Supersedeas and Emergency Motion for a Temporary Stay, this Court orders 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. Further, the Court orders that the Court of Appeals stay issued 3 September 2021 be implemented prospectively only, meaning that any person who registered to vote at a time when it was legal for that person to register under then-valid court orders as they were interpreted at the time, shall remain legally registered voters. The North Carolina Board of Elections shall not remove from the voter registration database any person legally registered under the expanded preliminary injunction between 23 August 2021 and 3 September 2021, and those persons are legally registered voters until further Order.

In all other respects, Plaintiffs' Petition for a Writ of Supersedeas and Emergency Motion for a Temporary Stay is denied without prejudice.

By order of the Court in conference, this the 10th day of September 2021.

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10 day of September 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals
Ms. Nicole J. Moss, Attorney at Law, For Moore, Timothy K., et al - (By Email)
Mr. Nathan A. Huff, Attorney at Law, For Moore, Timothy K., et al - (By Email)
Mr. Daryl V. Atkinson, Attorney at Law, For Community Success Initiative, et al. - (By Email)
Ms. Whitley J. Carpenter, Attorney at Law, For Community Success Initiative, et al. - (By Email)
Ms. Kathleen F. Roblez, Attorney at Law, For Community Success Initiative, et al. - (By Email)
Ms. Ashley Mitchell, Attorney at Law, For Community Success Initiative, et al. - (By Email)
Mr. Terence Steed, Assistant Attorney General, For State Board of Elections - (By Email)
Mr. Stephen D. Feldman, Attorney at Law, For Community Success Initiative, et al. - (By Email)
Mr. Matthew W. Sawchak, Attorney at Law, For Community Success Initiative, et al. - (By Email)
Mr. Adam K. Doerr, Attorney at Law, For Community Success Initiative, et al. - (By Email)
Ms. Caitlin Swain, Attorney at Law, For Community Success Initiative, et al.
Mr. Paul Mason Cox, Special Deputy Attorney General, For State Board of Elections - (By Email)
Mr. Jared M. Butner, Attorney at Law, For Moore, Timothy K., et al - (By Email)
Ms. Kellie Z. Myers, Trial Court Administrator - (By Email)
West Publishing - (By Email)
Lexis-Nexis - (By Email)

EXHIBIT B

Email from
N.C. State Board of Elections
General Counsel Katelyn Love
to
County Boards of Elections
(Mar. 29, 2022)

Babb, Mary Carla (Hollis)

From: Love, Katelyn <Katelyn.Love@ncsbe.gov>
Sent: Tuesday, March 29, 2022 4:19 PM
Cc: SBOE_Grp - Legal
Subject: Update Regarding Court Order Restoring Felon Voting Rights
Attachments: 2022.03.28 Final Judgment and Order 19 CVS 15941.pdf

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

EXHIBIT C

CSI v. Moore, No. 19 CVS 15941
Excerpts from Trial Transcript, Volume 4
(Aug. 19, 2021)

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
Tenth Judicial Circuit
Wake County, North Carolina

was that predicating franchise on the basis of financial obligations was a wealth-based voting, which is prohibited. So I wanted the record to -- we -- we wanted the record to reflect that.

JUDGE GREGORY: That's correct.

JUDGE BELL: Judge Dunlow, did you have anything you wanted to add, or --

JUDGE DUNLOW: I do not wish to add anything.

JUDGE BELL: -- clarification? Judge Gregory, any clarification on that?

JUDGE GREGORY: No. You said everything that we've discussed.

JUDGE BELL: For counsel that was present, do you wish to add anything in terms of what was discussed?

MR. COX: This is Paul Cox for the State Board of Elections. I would just say we take the Court's direction, and I want to reiterate what Your Honor said at the beginning, is that certainly this was not done with the intention to thwart the Court's order and, in fact, we worked with the plaintiffs' counsel in crafting the language and we will -- we will endeavor to get this changed to the Court's satisfaction immediately.

I -- I will -- I would just simply raise for the record there -- there -- we'll just need to work through this with the Department of Public Safety because the State

Board of Elections has no way of identifying the population that doesn't have their supervision term extended and -- and may be on their initial term and only on their initial term by reason of a financial obligation. We'll just need to work through that.

There -- the reason I raise that is because, you know, the current process brings a data feed in from DPS to determine who -- who has to be sent a denial of registration letter, and so we -- we will need to work with the Department of Public Safety to determine whether it's possible to -- I don't know whether it's possible. I hope it's possible to identify this population of people that were not included in the language earlier and to ensure that that population is not informed of their denial of registration. I guess that's -- that's all I have to add.

I guess the only other thing would be, you know, we -- just to put on the record that in crafting the language, the State Board is always very sensitive to making sure that its language is not confusing to a voter and does not lead a voter to do something that may be illegal, so, you know, a lot of care and effort went into ensuring that, and, you know, we will make this change and -- consistent with the Court's order. Thank you.

JUDGE BELL: All right. Thank you, Mr. Cox.

MR. JONES: Could we just have one minute?

JUDGE BELL: Uh-huh.

MR. JONES: First of all, I'll be the third to say that the plaintiffs also don't believe that any errors in the -- in the forms following the Court's injunction were intentional. Mr. Cox is right, that the plaintiffs' counsel did work with counsel for the defendants to -- in connection with the language that appears, I -- I believe, on all of the forms that -- that you mentioned, so I just wanted to -- to put that out there.

We certainly welcome the change to the forms because the change that -- that Your Honors described would allow more people to -- to vote, so -- so we certainly welcome that in terms of changing the forms. However, as Mr. Cox alluded to, and I know from our discussions with them last fall around these issues, my understanding is that you can change the forms to -- to say there that there is this class of people who are now able to vote, but DPS doesn't have any -- any way to identify who they are, and you heard testimony that DPS is the one who feeds information through the night feed to the State Board of Elections so that the State Board of Elections has records, lists of who is allowed to register and who's not, who is allowed to vote and who is not, who could be investigated, prosecuted, and convicted of a felony if they -- if they weren't actually allowed to vote, and so if the DPS has no

ability to identify these people, that's problematic for -- for our clients, for their clients, for this -- this population.

So in addition to confirming that -- that the forms will be changed, we would ask that -- that the defendants be given some time period, a deadline to tell us whether DPS actually believes that there is a feasible mechanism to identify the individuals who are now re-enfranchised as a result of the correct interpretation of the Court's order because without an ability to identify them, it would be -- it would very problematic for just a lot of obvious reasons, and we would potentially seek additional relief.

JUDGE BELL: Okay. Thank you. So with all of the evidence having been presented, I believe we are in a position to move to closing arguments. It is 2:35. Are you-all prepared to proceed?

MR. ATKINSON: I am, Your Honor.

JUDGE BELL: You'll be arguing for the plaintiffs, Mr. Atkinson? Will -- will you be the only one arguing for the plaintiffs, sir?

MR. ATKINSON: Yes.

JUDGE BELL: Okay. So why don't we -- do you want to take break? We're going to take a quick break and you-all are welcome to do the same and come right back in.

EXHIBIT D

POLITICS & GOVERNMENT

NC election officials aren't letting felons register to vote, despite new court ruling

BY WILL DORAN

UPDATED MARCH 30, 2022 6:06 PM

The Rev. William Barber was arrested June 23, 2021, with more than 20 others for obstructing traffic in front of the Hart Senate Building during a protest in Washington. The protest was live-streamed on social media by the Poor People's Campaign. BY POOR PEOPLE'S CAMPAIGN: A NATIONAL CALL FOR MORAL REVIVAL

RALEIGH

People with felony records who are out of prison, but still on probation or parole, were granted the right to vote in North Carolina on Monday in a high-profile lawsuit against the state.

One of the lawyers who successfully argued the case, Daryl Atkinson of Durham-based Forward Justice, said Monday's ruling was "the largest expansion of voting rights in NC since the Voting Rights Act of 1965," The News & Observer reported.

But an email Tuesday from state officials obtained by The N&O indicates that none of the roughly 55,000 people affected by Monday's ruling will actually be able to exercise their new voting rights — at least not at the moment.

Elections officials in all 100 counties were instructed by the N.C. State Board of Elections to sit on any such registration applications they get, doing nothing with them until further notice. They were told not to deny the applications, but not to approve them either, and instead keep them in limbo due to questions the state board has about Monday's ruling. Officials worry it might conflict with a different order, just last year, from the state's highest court.

"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," the email says.

The issue could soon be moot, however, since Republican lawmakers announced Wednesday they plan to appeal the ruling. They also filed a motion asking for Monday's ruling to be put on hold while that appeal plays out.

The judges ruled the law unconstitutional for generally violating people's rights, as well as for racial discrimination, but legislators say the court overstepped its bounds. They have made similar accusations in other recent election-related lawsuits, including those in which courts have found the state's redistricting plans and voter ID law to also be unconstitutional.

"This is an unrivaled attempt by judges to legislate from the bench," said Republican Sen. Warren Daniel, who co-chairs the Senate's committee on election law, in a press release. "Piece-by-piece the courts are chipping away at the legislature's

constitutional duty to set election policy in this state and seizing that authority for themselves."

WHAT DOES THIS MEAN FOR THE PRIMARY?

The 2022 primary election is less than two months away, on May 17, and the deadline to register to vote is April 22.

That means there are only a few weeks left for the elections board to answer its lingering questions about whether Monday's ruling is enforceable — unless the legislature first succeeds in getting the ruling temporarily stopped, via its appeal.

A spokesman for the State Board of Elections, Pat Gannon, said they expect to have an answer, one way or another, in time for the primary.

"We anticipate getting clarity on this issue before early voting starts," he said.

Early voting starts April 28, and anyone who is eligible to vote but misses the April 22 deadline to register can still register in person during early voting.

WHY IS THERE CONFUSION?

The three-judge panel that issued the ruling Monday said in its ruling extending voting rights that the decades-old felony disenfranchisement law is unconstitutional.

"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," the judges wrote.

But the State Board of Elections nonetheless has doubts.

The board believes Monday's ruling directly conflicts with a different ruling from the N.C. Supreme Court, Tuesday's email from the board's top attorney to county

election officials says.

Complicating matters further is the fact that both rulings came in the same lawsuit, but in different parts of the legal challenges that are currently at different levels of the courts system.

That other ruling, from 2021, came after Republican legislators who want to keep the law had previously appealed a lower court's ruling that it was unconstitutional. The Supreme Court sent it back down to lower courts, where it's still pending, and ordered that the status quo remain in place in the meantime — which has now created the confusion as to whether Monday's ruling is enforceable.

"We are currently working to determine how to implement this decision," the email says.

WHAT HAPPENS NEXT?

The first question is whether the N.C. Court of Appeals will grant Republican lawmakers' request to put a stay on Monday's ruling, stopping it from being enforced while their appeal is underway. If that happens, then any confusion from the Board of Elections would likely be cleared up through future court orders.

If granted, the 55,000 people in question likely wouldn't be able to vote in the primary — but might be able to vote in November's general election. That would depend on how quickly the appeal makes its way through the system and how the higher courts rule on it.

If the court doesn't grant the request, though, then the election board's questions about the potentially conflicting court orders will need to be resolved another way.

"We will send further instructions as soon as possible," the board's lawyer wrote in the email to the county officials telling them to wait for more information before

taking any action.

For more North Carolina government and politics news, listen to the Under the Dome politics podcast from The News & Observer and the NC Insider. You can find it at https://campsite.bio/underthedome or wherever you get your podcasts.

This story was originally published March 30, 2022 3:08 PM.

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AUGUST 16, 2021 2:50 PM

WILL DORAN

919-836-2858

Will Doran reports on North Carolina politics, particularly the state legislature. In 2016 he started PolitiFact NC, and before that he reported on local issues in several cities and towns. Contact him at wdoran@newsobserver.com or (919) 836-2858.

EXHIBIT E

No. TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
****

COMMUNITY SUCCESS INITIATIVE; JUSTICE SERVED NC, INC.; WASH AWAY UNEMPLOYMENT; NORTH CAROLINA STATE CONFERENCE OF THE NAACP; TIMOTHY LOCKLEAR; DRAKARIUS JONES; SUSAN MARION; HENRY HARRISON; ASHLEY CAHOON; and SHAKITA NORMAN,	)	
Plaintiffs,	)	From Wake County
v.	)	
	)	No. 19 CVS 15941
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*; STACY EGGERS IV, *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*; and TOMMY TUCKER, *in his official capacity as member of the North Carolina State Board of Elections,*[*]	)	
Defendants.	)	

[*] The current State Board members are listed pursuant to N.C. R. CIV. P. 25.

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PETITION FOR WRIT OF SUPERSEDEAS AND MOTION FOR TEMPORARY STAY

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INDEX

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitutions, Statutes and Rules

Other Authorities

No. TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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COMMUNITY SUCCESS INITIATIVE; JUSTICE SERVED NC, INC.; WASH AWAY UNEMPLOYMENT; NORTH CAROLINA STATE CONFERENCE OF THE NAACP; TIMOTHY LOCKLEAR; DRAKARIUS JONES; SUSAN MARION; HENRY HARRISON; ASHLEY CAHOON; and SHAKITA NORMAN,	)	
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Defendants.	)	

****

PETITION FOR WRIT OF SUPERSEDEAS AND MOTION FOR TEMPORARY STAY

****

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 petition this Court to issue a temporary stay and a writ of supersedeas.

INTRODUCTION

The Superior Court has issued an injunction that is plainly irreconcilable with the North Carolina Constitution. Under Article VI, § 2, anyone convicted of a felony may not vote "unless that person shall be first restored to the rights of citizenship in the manner prescribed by law." The Superior Court held unconstitutional the "manner prescribed by law," found in N.C.G.S. § 13-1, meaning that felons serving sentences outside of prison now have no lawful means of regaining their voting rights and thus remain disenfranchised under Article VI, § 2.

Yet, the Superior Court has permanently enjoined Defendants to allow such persons to register and vote. And the court has done so on the eve of an election—indeed, in a manner that, if not stayed, will insulate the ruling from this Court's review with respect to the upcoming elections.

This is the second time in this litigation that the Superior Court has upended the State's rules for felon enfranchisement with elections approaching. The last time, this Court—in a decision later upheld by the Supreme Court—stayed the Superior Court's attempt to suddenly permit all of

the tens of thousands of felons serving sentences outside of prison to register and vote, instead allowing the State Board of Elections to maintain the narrower rules promulgated under the Superior Court's original preliminary injunction.

The Superior Court's permanent injunction, which has the same scope as the preliminary injunction that this Court stayed, must be stayed as well. Although the Superior Court's original preliminary injunction was itself erroneous, rules issued pursuant to that injunction have been in place for over a year and for two election cycles. Like last time, therefore, Legislative Defendants ask only that this Court prevent disruption by staying the permanent injunction to the extent it departs from the status quo under the original preliminary injunction and as reflected by the Supreme Court's order of September 10, 2021. A stay is again warranted because Legislative Defendants are likely to succeed on the merits of their appeal from the Superior Court's judgment, which commits several fundamental errors in holding that North Carolina's *re*-enfranchisement statute violates the North Carolina Constitution by *dis*enfranchising felons,[1] and because the Superior Court's last-minute rewrite of election rules will "result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (per curiam). Indeed, absentee voting for the upcoming primary elections has already opened.

Legislative Defendants noticed an appeal and filed for a stay in the Superior Court, which denied the stay request in a split decision with Judge Dunlow dissenting. *See* Not. of Appeal (Wake

[1] Legislative Defendants have filed a notice of appeal that encompasses both the Superior Court's final judgment and its earlier order granting summary judgment to Plaintiffs on certain claims, the same claims on which the original preliminary injunction was based. However, for purposes of this stay, Legislative Defendants seek to preserve the status quo following the Supreme Court's September 10, 2021 order, which includes the State Board of Elections allowing felons on probation to vote if their only reason for being on probation is outstanding fines, fees, or restitution. So, while Legislative Defendants are appealing the summary judgment ruling that resulted in that practice, they will focus on their likelihood of success on the merits in appealing from the final judgment in this motion.

Cnty. Super. Ct. Mar. 30, 2022), Ex. 1; Emergency Mot. for Stay Pending Appeal (Wake Cnty. Super. Ct. Mar. 30, 2022), Ex. 2; Order (Wake Cnty. Super. Ct. Apr. 1, 2022), Ex. 25. Accordingly, Legislative Defendants respectfully request that this Court issue a writ of supersedeas to the Superior Court of Wake County to stay the order issued on March 28, 2022 to the extent specified above pending resolution of the appeal from that order. Legislative Defendants also request that the Court temporarily stay enforcement of that order until the Court can rule on this petition for a writ of supersedeas.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. North Carolina's Provisions for Felon Disenfranchisement and Re-Enfranchisement.

The North Carolina Constitution provides that:

> 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. "[E]xcluding those who commit serious crimes from voting" is a "common practice," and the U.S. Supreme Court has held that the federal "Equal Protection Clause permits States to disenfranchise all felons for life, even after they have completed their sentences." *Jones v. Gov. of Fla.*, 975 F.3d 1016, 1025, 1029 (11th Cir. 2020) (en banc); *see Richardson v. Ramirez*, 418 U.S. 25, 56 (1974). Indeed, the Court has specifically held that North Carolina's disenfranchisement provision does not violate equal protection. *See Fincher v. Scott*, 352 F. Supp. 117 (M.D.N.C. 1972), *summarily aff'd* 411 U.S. 961 (1973).

North Carolina does not disenfranchise all felons for life. The statute at issue here, N.C.G.S. § 13-1, "automatically restore[s]" voting rights to convicted felons "upon the occurrence of any one of" several conditions, including "[t]he unconditional discharge of . . . a probationer[ ]

or of a parolee by the agency of the State having jurisdiction of that person" (or by the United States or another state as the case may be). § 13-1(1), (4)–(5). Although North Carolina long provided for re-enfranchisement in more limited circumstances, the current version of § 13-1 dates back to the early 1970s. The North Carolina Supreme Court has already spoken to the intent of those laws: "It is obvious that the 1971 General Assembly . . . intended to substantially relax the requirements necessary for a convicted felon to have his citizenship restored," and "[t]hese requirements were further relaxed in 1973." *State v. Currie*, 284 N.C. 562, 565, 202 S.E.2d 153, 155 (1974).

II. Section 13-1 Embodies the Efforts of African American Reformers To Liberalize North Carolina's Re-Enfranchisement Laws.

North Carolina has disenfranchised some felons at least since 1835. Expert Report of Orville Vernon Burton at 10 (May 8, 2020), Ex. 3. Restoration for these felons was onerous and involved securing private legislation restoring an individual to his rights. *Id.* at 11. By 1840 (and possibly before), North Carolina disenfranchised individuals who had committed "infamous" crimes, which were defined, at least in part, to include crimes for which whipping was a suitable punishment. *Id.* at 11, 15. An "infamous" criminal in 1840 had a standardized, but still quite difficult, path to re-enfranchisement which required waiting at least four years after conviction, petitioning a court for restoration, and presenting five witnesses who would attest to his character based on at least three years of acquaintance. 1840 N.C. Laws, ch. 36, Ex. 4. The system could be gamed: In 1866, in anticipation of an expansion of the franchise to African Americans, North Carolina courts began a practice of sentencing them to whipping as a way of pre-emptively disenfranchising them. Ex. 3 at 19–20.

In 1868, North Carolina put in place a new state constitution that briefly did not restrict the rights of felons to vote—however that was changed by amendment in 1876. Laws implementing

that amendment were passed and again, the process of achieving restoration of rights was difficult and subject to discretion on behalf of the decisionmaker. *See, e.g.* 1899 N.C. Laws, ch. 44., Ex. 5. The law was updated many times over the next century, but in 1970 the law still required a waiting period before a felon could get his rights back and required him to petition a court and convince a judge he was deserving of re-enfranchisement. N.C.G.S. § 13-1 *et seq.* (1969), Ex. 6.

In 1971, the effort to enact a much more straightforward version of § 13-1 was spearheaded by the only two black members of the General Assembly—Reps. Joy Johnson and Henry Frye—who were supported in their reform efforts by the NAACP. Trans. of Dep. of Sen. Henry M. Michaux, Jr., 55:12-23 (June 24, 2020), Ex. 7. The original version of the bill introduced in the House, H.B. 285, stated: "Restoration of Citizenship – Any person convicted of an infamous crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored to him upon the full completion of his sentence or upon receiving an unconditional pardon." Gen. Assembly, 1971 Sess., House DRH3041, HB 285, Ex. 8. The law, as enacted, was amended to remove "automatically" from the text and add in "including any period of probation or parole" after "full completion of his sentence. Gen. Assembly, 1971 Sess., HB 285, Committee Substitute, Ex. 9. In lieu of automatic restoration, the enacted 1971 law required a felon to secure a recommendation of restoration from the State Department of Correction and to take an oath of allegiance to have his rights restored immediately. Otherwise, he had to wait for two years after his sentence had been served to receive the right to vote. *Id.*

In 1973, Reps. Johnson and Frye, now joined by a third black legislator, Sen. Henry Michaux, tried again and this time achieved their aim of enacting a bill that granted automatic and immediate restoration of rights to all felons as soon as they completed their sentences. Ex. 7 at 74:21–75:2. Senator Michaux called the result a "victory," Aff. of Henry M. Michaux, Jr. ¶ 16

(May 7, 2020), Ex. 10, and noted that the only two things the law didn't accomplish and that he wished it did were to exclude *extended* supervision (where a probationer's or parolee's term is extended because he violated one the conditions of his release or committed a new felony) and to return a felon's Second Amendment rights alongside his voting rights, Ex. 7 at 83:13-84:11; 103:7–12.

III. The Superior Court Enjoins Enforcement of § 13-1.

Plaintiffs are four organizations and six convicted felons who either are or were on probation or post-release supervision. They brought this lawsuit in November 2019 to challenge § 13-1 and its application to "probationer[s]" and "parolee[s]"—more specifically, to convicted felons serving terms of "post-release supervision" under N.C.G.S. § 15A-1368 *et seq.* or "probation" under N.C.G.S. § 15A-1341 *et seq.*[2] On September 4, 2020, the Superior Court granted summary judgment for Plaintiffs on their claims that § 13-1 creates a wealth-based classification in violation of the Equal Protection Clause, N.C. CONST. art. I, § 19, and imposes a property qualification on voting in violation of N.C. CONST. art. I, § 11. The same day, the Superior Court issued a preliminary injunction that required the Defendants to allow to register to vote any person convicted of a felony whose "only remaining barrier to an 'unconditional discharge,' other than regular conditions of probation . . . is the payment of a monetary amount" or who "has been discharged from probation, but owed a monetary amount upon the termination of their probation or if any monetary amount owed upon discharge from probations was reduced to a civil lien." Order on Inj. Relief at 10–11, No. 19 CVS 15941 (Wake Cnty. Super. Ct. Sept. 4, 2020), Ex. 11.

[2] North Carolina eliminated parole with the Structured Sentencing Act, 1993 N.C. Laws ch. 538. For any convicted felons who might still be subject to parole, the relevant conditions are similar to those of probation and post-release supervision. *See* N.C.G.S. §§ 15A-1372, -1374.

For nearly a year, the State Board Defendants implemented this injunction pursuant to its plain terms, instructing voters that they were eligible to vote if they were serving extended terms of probation and knew no reason why their terms had been extended other than for non-compliance with their monetary obligations. During trial in August 2021, however, the court made an oral ruling that all parties had misinterpreted the preliminary injunction, which the court had "intended" to cover any "individuals who are subject to post-release supervision, parole, or probation solely by virtue of continuing to owe monetary obligations." Order on Am. Prelim. Inj. at 7, No. 19 CVS 15941 (Wake Cnty. Super. Ct. Aug. 27, 2021) ("Expanded PI Order"), Ex. 12. The expanded preliminary injunction, which was reduced to writing on August 27, 2021, stated "it is necessary for equity and administrability of the intent of the September 4, 2020 preliminary injunction to amend that injunction to include a broader class of individuals," expanding the scope to restore voting rights to tens of thousands of convicted felons who remained on probation or post-release supervision for reasons other than monetary obligations. Expanded PI Order, Ex. 12 at 10.

The Superior Court denied Legislative Defendants' motion for a stay pending appeal of the expanded preliminary injunction, *see* Order, No. 19 CVS 15941 (Wake Cnty. Super. Ct. Aug. 27, 2021), Ex. 13, but this Court granted a writ of supersedeas, staying the order, *see* Order, No. P21-340 (N.C. Ct. App. Sept. 3, 2021), Ex. 14. The Supreme Court agreed and ordered that the status quo under the original injunction be maintained, with the caveat that any felons who registered to vote during the brief period when the expanded injunction was in effect should remain registered voters. Order, No. 331P21-1 (N.C. Sup. Ct. Sept. 10, 2021), Ex. 15. Thus, until Monday of this week, the status quo—which was in place for last fall's municipal elections—was that a felon who had not registered to vote while the expanded preliminary injunction was in effect and was still under some form of supervision could register only if "serving an extended term of probation,

post-release supervision, or parole" with "outstanding fines, fees, or restitution" and if the felon did "not know of another reason that [his] probation, post-release supervision, or parole was extended." *See Who Can Register*, N.C. STATE BD. OF ELECTIONS (as last visited Apr. 1, 2022), https://bit.ly/3IQAlTY, Ex. 16.

On Monday, March 28, 2022, seven months after the conclusion of trial, and the very same day that absentee ballots were made available for the statewide primary, the Superior Court entered judgment in favor of Plaintiffs, concluding that § 13-1 violates the Equal Protection Clause, Article I, § 19, and the Free Elections Clause, Article I, § 10, of the North Carolina Constitution on the ground that it disenfranchises felons, particularly African American felons. Final Judgment and Order at 62, No. 19 CVS 15941 (Wake Cnty. Super. Ct. March 28, 2022) ("Final Order"), Ex. 17. The new injunction has the same scope as the expanded preliminary injunction did. The Final Order states:

> 1. 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.
>
> 2. Defendants . . . are hereby enjoined from preventing any person convicted of a felony from registering to vote or voting due to probation, parole, or post-release supervision.
>
> 3. 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.

Ex. 17 at 64–65.

Early voting for North Carolina's statewide primaries begins on April 28. *Calendar of Events*, N.C. STATE BD. OF ELECTIONS, https://bit.ly/35l15y4 (last visited March 30, 2022). The Superior Court's new injunction threatens to upset the status quo with precious little time for the State Board Defendants to implement the court's new injunction, which will expand the franchise to over 50,000 felons who are otherwise not eligible to vote because they are on some form of

supervision. *See* Ex. 16. The timing of the Superior Court's opinion appears designed to tie the State Board's and this Court's hands. After having already found Plaintiffs likely to succeed on the merits, the Superior Court took seven months to issue an opinion that largely tracks Plaintiffs' proposed findings of fact and conclusions of law. The Superior Court left the State Board with slightly more than the approximate amount of time the Board had previously indicated it would need to implement the expanded preliminary injunction even for off-year municipal elections. *See* Not. Regarding Implementation of Inj. and Mot. for Clarification at 6 (Aug. 21, 2021), Ex. 18 (noting that the State Board needed clarity on the rules by August 23 in order to implement them in time for early voting on September 16).

However, the State Board has not started registering voters who would not be eligible to vote under the preliminary injunction and this Court's stay order. The State Board has instructed the county boards of election "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 while they should allow individuals on probation or parole to file applications for registration, they should neither enroll nor deny them, but rather hold their applications until the State Board knows how to apply the law properly. Mar. 29 email from K. Love to multiple recipients, Ex. 19.[3] Legislative Defendants moved for a stay of the injunction pending appeal in the Superior Court on March 30, 2022, and informed the court in their motion that, in light of the urgency of the issue—with the status quo presently maintained and any changes (especially changes followed by

[3] Plaintiffs filed a notice in the Superior Court alleging that the State Board's approach violates the new permanent injunction. *See* Not. of Violation (Wake Cnty. Super. Ct. Mar. 31, 2022), Ex. 24. As the State Board has since explained, however, the approach represents a good-faith effort to comply with two apparently conflicting orders (one from the Superior Court, one from the Supreme Court) and to avoid the confusion that proceeding with full implementation would inevitably cause until the courts provide further guidance. *See infra* Part II. Plaintiffs' request for relief from this alleged violation is still pending.

reversals) at this late stage likely to cause significant confusion before the statewide primaries—they would seek emergency relief from this Court by April 1, 2022 regardless of whether the court had acted on the motion by that date. The Superior Court denied Legislative Defendants' stay motion this afternoon.

REASONS THE COURT SHOULD ISSUE A WRIT OF SUPERSEDEAS

The writ of supersedeas serves "to preserve the status quo pending the exercise of appellate jurisdiction," *Craver v. Craver*, 298 N.C. 231, 238, 258 S.E.2d 357, 362 (1979), and may issue "when an appeal has been taken, or a petition for . . . certiorari has been filed to obtain review of [a] judgment, order, or other determination" and "a stay order . . . has been sought by the applicant . . . by motion in the trial tribunal and such order . . . has been denied." N.C. R. APP. P. 23(a)(1). Legislative Defendants have filed a notice of appeal from the Superior Court's judgment and the Superior Court has denied a stay, so this Court's consideration of this petition is appropriate.

Although supersedeas precedent is limited, it supports applying the familiar balancing test for temporary relief. The writ should issue where (1) the petitioner is likely to succeed on the merits of the appeal, (2) irreparable injury will occur absent a stay, and (3) the balance of the equities favors preserving the status quo during the appeal. *See Abbott v. Town of Highlands*, 52 N.C. App. 69, 79, 277 S.E.2d 820, 827 (1981) (stay appropriate where "[t]here was some likelihood that plaintiffs would have prevailed on appeal and thus have been irreparably injured"); *see also, e.g., Home Indem. Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 113, 117–19, 493 S.E.2d 806, 809–11 (1997); *N. Iredell Neighbors for Rural Life v. Iredell Cnty.*, 196 N.C. App. 68, 79, 674 S.E.2d 436, 443 (2009). All three factors supported preserving the status quo seven months

ago when this Court first granted supersedeas in this case, and they again support preserving the status quo now under strikingly similar circumstances.

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

The Superior Court's judgment rests on several clear errors of fact and law. Indeed, the Superior Court did not even address Legislative Defendants' arguments that Plaintiffs lacked standing, which was necessary to the court's subject-matter jurisdiction. Permanent injunctions are reviewed for an abuse of discretion, *see Mid-Am. Apartments, L.P. v. Block at Church St. Owners Ass'n, Inc.*, 257 N.C. App. 83, 89, 809 S.E.2d 22, 27 (2017), and "a trial court by definition abuses its discretion when it makes an error of law." *State v. Rhodes*, 366 N.C. 532, 536, 743 S.E.2d 37, 39 (2013) (cleaned up). Legislative Defendants will show in this appeal that the Superior Court's injunction is an abuse of discretion founded on multiple errors of law.

a. The Plaintiffs Lack Standing to Challenge § 13-1 and the Superior Court Lacked Power To Rewrite the Law

The law that Plaintiffs challenged, and that the Superior Court has now permanently enjoined, does not disenfranchise individuals convicted of felonies in North Carolina. The North Carolina Constitution does. Article 6, Section 2 of the North Carolina Constitution says in part:

> 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.

Section 13-1, which Plaintiffs challenge here, is that "manner prescribed by law." This leads to fatal problems for Plaintiffs' case.

Plaintiffs lack standing to challenge Section 13-1. "As a general matter, the North Carolina Constitution confers standing on those who suffer harm." *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 642, 669 S.E.2d 279, 281 (2008). But more specifically, that harm must be traceable to the statute the plaintiff has challenged. "The rationale of the standing rule is that only one with a

genuine grievance, one personally injured by a statute, can be trusted to battle the issue." *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, 370 N.C. 553, 557, 809 S.E.2d 558, 561 (2018) (citation and alteration omitted); *see also Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962) ("Only those persons may call into the question the validity of a statute who have been injuriously affected thereby in their persons, property or constitutional rights."). Here, Plaintiffs have not been injured by the statute they challenge. Rather, they have sued to invalidate as discriminatory (and have now invalidated) the very avenue by which they may *regain* their right to vote. Although the trial court found that, for example, "§ 13-1 interferes with the fundamental right to vote on equal terms as it prohibits people with felony convictions from regaining the right to vote even while they are living in communities in North Carolina," Ex. 17 at 57, that is not at all the functioning of § 13-1, but rather the work of the North Carolina Constitution. Plaintiffs have picked the wrong target with their lawsuit—a statute that has never "injuriously affected" them—and as a result they lack standing to bring this suit.

Lacking a "direct injury" attributable to the statute they have chosen to challenge, *Comm. to Elect Dan Forest v. Emp's Pol. Action Comm.*, 376 N.C. 558, 608 (2021), Plaintiffs likewise lack standing because their injury cannot be "redressed by a favorable decision" within the power of the Superior Court, *Marriott v. Chatham Cnty.*, 187 N.C. App. 491, 494, 654 S.E.2d 13, 16 (2007) (standing requires "that the [alleged] injury will be redressed by a favorable decision"); *see also Breedlove v. Warren*, 249 N.C. App. 472, 478, 790 S.E.2d 893, 897 (2016). Ordinarily, when a court finds a statute unconstitutional, a declaration of its unconstitutionality (sometimes accompanied by injunction prohibiting its enforcement) "is the most assured and effective remedy available." *Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006) (cleaned up). Not so here—a declaratory judgment that §13-1 is unconstitutional actually *hurts* the people Plaintiffs

seek to represent. That declaration would close off the sole avenue by which a felon may regain his rights but leave in place the constitutional provision that strips it away in the first place. Furthermore, it would have no impact on the criminal prohibition on felons voting "without having been restored to the right of citizenship in due course and by the method provided by law," N.C.G.S. § 163-275(5), except to ensure that the population capable of violating that statute grows continuously in the absence of a "method provided by law" to re-enfranchise them. Indeed, such a declaration would (as the Superior Court's does) *invite* lawbreaking by felons who mistakenly believe that a court declaring § 13-1 unconstitutional has any impact on the validity of § 163-275(5), which it did not consider, or that an injunction against the State Board Defendants somehow applies against local law enforcement officials, who were not a party to the case.

To summarize: the result of the court's order is that all felons serving sentences outside of prison remain disenfranchised under the North Carolina Constitution, since the court has enjoined the "manner prescribed by law" for felon re-enfranchisement. N.C. CONST. art. VI, § 2, pt. 3. Thus, the effect of the order can only be to induce violations of § 163-275(5) and to subject violators to prosecution.

Of course, that is not what the Superior Court *attempted* to do in issuing the injunction. The panel stated: "[U]nder 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." Ex. 17 at 65. Evidently, the Superior Court viewed itself as removing *any* North Carolina law, be it statute or constitution, before the court or not, standing in the way of felons on supervised release who might seek to vote. This it could not do. North Carolina reserves for the legislature, not the courts, the authority to create new laws. "When a court, in effect, constitutes itself a superlegislative body, and attempts to rewrite the law according to its predilections and notions of enlightened legislation,

it destroys the separation of powers and thereby upsets the delicate system of checks and balances which has heretofore formed the keystone of our constitutional government." *State v. Cobb*, 262 N.C. 262, 266, 136 S.E.2d 674, 677 (1964); *see also C Invs. 2, LLC v. Auger*, 277 N.C. App. 420, 430, 860 S.E.2d 295, 302 (2021) ("The role of the courts is to interpret statutes as they are written. We do not rewrite statutes to ensure they achieve what we, or the parties in a lawsuit, imagine are the legislature's policy goals."); *Davis v. Craven Cnty. ABC Bd.*, 259 N.C. App. 45, 48, 814 S.E.2d 602, 605 (2018) ("This court is an error-correcting body, not a policy-making or law-making one." (quotation marks omitted)).

The Superior Court's violation of the separation of powers is patent here. As explained, the State Constitution provides that felons may only be re-enfranchised in the "manner prescribed by law." By attempting to take upon itself the power to prescribe the manner for felon re-enfranchisement after declaring unconstitutional the General Assembly's prescription, the Superior Court improperly exercised the lawmaking authority constitutionally reserved for the General Assembly.

The Superior Court thus had no authority to rewrite § 13-1 to restore voting rights upon "release from prison" rather than "unconditional discharge" from a criminal sentence. And the court certainly had no authority to invalidate the Constitution's disenfranchisement provision as applied to felons serving sentences outside of prison, which the court's injunction effectively does, where Plaintiffs *have not challenged that constitutional provision* in this litigation. Furthermore, it is not possible for one provision of the North Carolina Constitution to invalidate another. By exceeding its authority when crafting the injunction, the trial court necessarily abused its discretion. *See South Carolina v. United States*, 907 F.3d 742, 753 (4th Cir. 2018).

The trial court entered an injunction that purports to rewrite North Carolina law because Plaintiffs challenged a law that never caused them any injury. Whether considered as a lack of standing for the Plaintiffs or authority for the trial court, the result is the same: the injunction cannot stand and Defendants must prevail on appeal.

b. Section 13-1 Does Not Violate the Equal Protection Clause or the Free Elections Clause

Wholly apart from Plaintiffs' lack of standing to challenge § 13-1 and the separation of powers concerns raised by the Superior Court's injunction, Legislative Defendants are likely to succeed on the merits of their appeal.

i. The Superior Court Erred by Applying Strict Scrutiny

The Superior Court erred in applying strict scrutiny to § 13-1 when analyzing Plaintiffs' Equal Protection challenge. Strict scrutiny is only appropriate where a government classification "impermissibly interferes with the exercise of a fundamental right" or "operates to the peculiar disadvantage of a suspect class." *Liebes v. Guilford Cnty. Dep't of Pub. Health*, 213 N.C. App. 426, 428, 713 S.E.2d 546, 549 (2011) (citation omitted). Otherwise, rational-basis review applies. *Id.* Section 13-1 neither interfere with any fundamental right nor disadvantages any suspect class.

As to the first point, the Superior Court held that § 13-1 interferes with "[a] fundamental right to vote." Final Order at 57. But convicted felons do not have such a right. Under the North Carolina Constitution, a felon is barred from voting "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. Under that provision, felons for whom the General Assembly provides no path to re-enfranchisement are disenfranchised for life. And when the General Assembly does provide a path to re-enfranchisement, the right to vote is restored only when the conditions for restoration have been met. Similarly, the United States Constitution follows its own Equal Protection Clause

immediately with "an affirmative sanction" of "the exclusion of felons from the vote." *Richardson*, 418 U.S. 24, 54 (1974); *see also* U.S. CONST. amend. 14, § 2. As a result, federal courts of appeals have uniformly concluded felons do not have a fundamental right to vote. *See, e.g.*, *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (O'Connor, J.).

In holding otherwise, the Superior Court did not confront these authorities, but merely asserted that felons who are not currently in prison are "similarly situated" to "North Carolina residents who have not been convicted of a felony" because they "feel an interest in [the State's] welfare." Ex. 17 at 57 (quoting *Roberts v. Cannon*, 20 N.C. 398, 4 Dev. & Bat. (Orig. Ed.) 256, 260–61 (1839)). That felons and non-felons alike may have an interest in how they are governed does not make them similarly situated for these purposes when both the North Carolina and United States constitutions expressly treat them differently. *See State v. Grady*, 372 N.C. 509, 567, 831 S.E.2d 542, 582 (2019) ("[F]elons do not enjoy the same measure of constitutional protections . . . as do citizens who have not been convicted of a felony.").

The Superior Court also noted that the Equal Protection Clause protects "the fundamental right of each North Carolinian to substantially equal voting power." *Stephenson v. Bartlett*, 355 N.C. 354, 379, 562 S.E.2d 377, 394 (2002). But Plaintiffs *have* no claim under that principle. Convicted felons are not constitutionally entitled to any vote until their voting rights are restored in the manner that the General Assembly provides. And *Stephenson* itself recognizes that constitutional provisions—such as the felon-disenfranchisement provision and the Equal Protection Clause—must be read "in conjunction." *Id*. at 378, 562 S.E.2d at 394. This principle thus provides no basis for strict scrutiny, either.

It appears that the Superior Court applied strict scrutiny primarily because it had incorrectly found a violation of a fundamental right, *see* Ex. 17 at 58 ("Thus, if a statute interferes with the

exercise of a fundamental right, strict scrutiny applies even if the affected group is not a suspect class."), though the court also appears to have done so because it incorrectly found that § 13-1 disadvantages a suspect class, *see id*. ("N.C.G.S. § 13-1 both interferes with the exercise of the fundamental right of voting and operates to disadvantage a suspect class. Therefore, it is subject to strict scrutiny."). To the extent it applied strict scrutiny on the latter basis, that was another error. This Court has applied a distinct framework to claims of allegedly discriminatory burdens on the right to vote: not the tiers of scrutiny, but the burden-shifting framework that the U.S. Supreme Court established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *See Holmes v. Moore*, 270 N.C. App. 7, 16, 840 S.E.2d 244, 254 & n.5 (2020); *see also Libertarian Party of N.C. v. State*, 365 N.C. 41, 42, 707 S.E.2d 199, 200–01 (2011) ("adopt[ing] the United States Supreme Court's analysis for determining the constitutionality of ballot access provisions").

Under that framework, the plaintiff has the initial burden to show that discriminatory intent was a motivating factor in the passage of the law at issue with either direct evidence of racial animus—of which Plaintiffs have none here—or circumstantial evidence drawn from the law's purported impact, legislative process and legislative history, and historical background. *See Arlington Heights*, 429 U.S. at 266–268. That evidence must support "an inference [of discriminatory intent] that is strong enough to overcome the presumption of legislative good faith" that attaches to all legislative acts. *Abbott v. Perez*, 138 S. Ct. 2305, 2329 (2018); *see also Holmes*, 270 N.C. App. at 19, 840 S.E.2d at 256 n.7 (noting "our Supreme Court's strong presumption that acts of the General Assembly are constitutional" (cleaned up)). If Plaintiffs had made this showing (which they did not), the burden would have shifted to Defendants to show that the General Assembly would have enacted § 13-1 even without the allegedly discriminatory motivation. If

Defendants had not made that showing (which they did), then § 13-1 would be unconstitutional and the inquiry would be over.

The Superior Court itself purported to follow this framework. *See* Ex. 17 at 5–6. Although the Superior Court's conclusions under that framework were incorrect, they gave the court no basis to apply strict scrutiny. In any event, strict scrutiny is also inappropriate because § 13-1 does not operate to disadvantage a suspect class of people. On its face, § 13-1 makes no distinction between felons based on race, sex, or any other suspect or quasi-suspect class. The *only* distinction it draws is between felons who have completed their sentences and felons who have not—and that "reasonable distinction" does not offend equal protection. *See State v. Stafford*, 274 N.C. 519, 535, 164 S.E.2d 371, 382–83 (1968). Section 13-1 thus draws no arbitrary lines. And as shown below, it has no discriminatory effect.

The Superior Court also erred in applying strict scrutiny to Plaintiffs' claim under the Free Elections Clause. *See* Ex. 17 at 60. That clause provides simply that "[a]ll elections shall be free," N.C. CONST. art. I, § 10, and requires that voters be free to choose how they cast their ballots without coercion, intimidation, or undue influence. Again, § 13-1 does not deprive anyone of the right to vote—a felony conviction and the North Carolina Constitution do that. And "a constitution cannot be in violation of itself." *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 394. It therefore cannot be, as the Superior Court held, that North Carolina's elections are not free within the meaning of its constitution merely because some people are *constitutionally* precluded from participating in them. *See* Ex. 17 at 59. Moreover, § 13-1 not only does not deprive anyone of the right to vote, it *extends* the right to vote to felons who otherwise would be disenfranchised. Thus, "the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights . . . is inapplicable," because the distinction being challenged is only "a limitation on a reform measure

aimed at eliminating an existing barrier to the exercise of the franchise." *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966).

Without any basis to apply strict scrutiny, the Superior Court should have applied rational-basis review to Plaintiffs' Free Elections claim and should have analyzed their Equal Protection claim only under the *Arlington Heights* framework or, at most, applied rational-basis review to that claim as well. Section 13-1 easily survives rational-basis review. That standard merely requires that a statute "bear *some* rational relationship to a conceivable legitimate government interest." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (emphasis in original). Section 13-1 fulfills a valid government interest in offering felons a method by which to regain their rights, and in fact significantly streamlines the process from previous versions of the law. *See Currie*, 284 N.C. at 565, 202 S.E.2d at 155. In doing so, it reasonably draws a line between the rights of felons who have paid their debt to society and those who have not. These are sensible policy choices that the General Assembly was well within its authority to make, *see Jones v. Gov. of Fla.*, 975 F.3d 1016, 1029–30 (11th Cir. 2020) (en banc), and which are solely within the province of the General Assembly, not the courts, to change. *See Davis*, 259 N.C. App. at 48, 814 S.E.2d at 605.

For the reasons that follow, Plaintiffs also failed to establish any violation of the Equal Protection Clause under *Arlington Heights* or any violation of the Free Elections Clause.

ii. The Evidence Does Not Establish Discriminatory Intent

As an initial matter, the Superior Court failed to start its analysis with the presumption that the General Assembly enacted § 13-1 in good faith, as the court was required to do. *See Abbott*, 138 S. Ct. at 2324. In fact, the words "good faith" appear nowhere in the court's opinion. As a result, the court failed to make any factual findings under the correct standard. "[F]acts found under misapprehension of the law are not binding . . . and will be set aside," and legal conclusions

based on those facts are necessarily erroneous as well. *Van Hanford v. McSwain*, 230 N.C. 229, 233, 53 S.E.2d 84, 87 (1949). In any event, legal conclusions are reviewed *de novo*. *See In re C.H.M.*, 371 N.C. 22, 28–29, 812 S.E.2d 804, 809 (2018). And the Superior Court committed legal error by concluding that § 13-1 was passed with discriminatory intent based on any of the facts before it.

1. Impact

When assessing the impact of the statute, it is important to remember, again, just what Plaintiffs challenged. They have not challenged the whole of North Carolina's felon disenfranchisement regime, nor have they challenged any state action that might result in African Americans disproportionately being charged with and convicted of felonies, or anything else that might contribute to a difference in the rates of disenfranchisement between black and white North Carolinians. They have only challenged North Carolina's restoration law, and fatally, Plaintiffs did not even attempt to show that as a practical matter Section 13-1 re-enfranchises felons of different races at a different rate. An intentional discrimination claim requires proof of *both* disparate impact and discriminatory intent, *see Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1355 (4th Cir. 1989), and Plaintiffs have wholly failed to make the former showing.

Nevertheless, the Superior Court stated, without explanation that § 13-1 "has a demonstrably disproportionate and discriminatory impact." Ex. 17 at 57. Though unexplained, this statement must be the result of two errors: first the Superior Court necessarily conflated § 13-1 with other elements of North Carolina's felon disenfranchisement regime which cause the loss of voting rights. Second, it credited testimony from Plaintiffs experts who testified, for example that "The African American population is . . . denied the franchise at a rate 2.76 times as high as the rate of the White population." Ex. 17 at 26. But the Supreme Court has cautioned that exactly this sort of reasoning, dividing one percentage by another can create "[a] distorted picture," *Brnovich*

v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2345 (2021), and indeed it does here. In fact, 1.24% of African Americans of voting age in North Carolina are disenfranchised by reason of a felony conviction, which is just 0.81% greater than the 0.45% of the white electorate that is similarly disenfranchised. Ex. 17 at 26. Comparing these ratios is misleading because, although it is true that African American voters are disenfranchised 2.76 times more than white voters, that statement "mask[s] the fact that the populations [are] effectively identical." *Brnovich*, 141 S. Ct. at 2345.

In any event, regardless of how expressed, the relative percentages of African Americans and whites who are disenfranchised by reason of a felony conviction is irrelevant to the claims Plaintiffs actually made in this case. Again, Plaintiffs are not (and could not, in this state constitutional challenge) challenging the provision of the North Carolina Constitution disenfranchising felons. Instead, they are challenging the re-enfranchisement law. Plaintiffs have not even attempted to make a legally relevant showing of disparate impact.

Therefore, no reliable evidence shows that § 13-1 disenfranchises African Americans at a significantly greater rate than members of another race—which, again, § 13-1 could not do because it does not disenfranchise anyone.

2. Legislative Process and Legislative History

The Superior Court erred again when it concluded that § 13-1, which was championed by the NAACP and the only three black members of the General Assembly in 1973, was motivated by racially discriminatory intent. Ex. 17 at 56. As noted, the court failed to presume that the legislature operated in good faith. *See Abbott*, 138 S. Ct. at 2324. In fact, in crediting circumstantial

evidence of the popularity of the "Law and Order" movement, the court appeared to presume exactly the opposite. *See, e.g.*, Ex. 17 at 22.

The court also misread legislative history, which in fact demonstrates that the 1971 and 1973 changes to the law accomplished the primary goals of the reforming legislators by "substantially relax[ing] the requirements necessary for a convicted felon to have his citizenship restored." *Currie*, 284 N.C. 562 at 565, 202 S.E.2d at 155. It was not, as the court incorrectly concluded, "the goal of these African American legislators and the NC NAACP . . . to eliminate section 13-1's denial of the franchise to persons released from incarceration," Ex. 17 at 19, but to make the process automatic *upon completion of a felon's sentence*, PX175 at 78:10–14, Ex. 7.[4] And even assuming, contrary to the evidence, that the Superior Court was right about the intent of the sponsors of the bill, that would not mean that a committee was "independently motivated by racism" when it added language to clarify that full completion of a sentence included periods of probation or parole. Ex. 17 at 56. The Superior Court's reliance on highly attenuated circumstantial evidence of racism, *see, e.g.*, *id*. at 22 ("The Ku Klux Klan was active, arch-segregationist George Wallace won North Carolina's presidential primary in 1972, and Jesse Helms was elected to the U.S. Senate."), is incompatible with the presumption of good faith, *Abbott*, 138 S. Ct. at 2329.

3. Historical Background

The Superior Court relied on atmospherics so heavily because the historical record, when limited, as it should be, to the enactment of the challenged law itself, demonstrates definitively that the enactment of the act served as an intervening event that severed North Carolina's felon re-

[4] The Superior Court also erred in classifying its analysis of the intentions of the 1971 and 1973 sponsors of bills in revising § 13-1, as reflected by the text of the proposed bills, as findings of fact. Because these "findings" go directly to the court's conclusions about how § 13-1 ought to be interpreted and applied, they are more properly classified as conclusions of law. *See In re David A. Simpson, P.C.*, 211 N.C. App. 483, 487–88, 711 S.E.2d 165, 169 (2011).

enfranchisement process from any past discrimination. *See Abbott*, 138 S. Ct. at 2324–25. "No one disputes that North Carolina 'has a long history of race discrimination generally and race-based vote suppression in particular.' " *N.C. State Conf. of the NAACP v. Cooper*, 430 F. Supp. 3d 15, 25 (M.D. N.C. 2019) (quoting *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 223 (4th Cir. 2016)). But the Superior Court's own finding that the 1973 law was championed by the NAACP and the only three black members of the General Assembly strongly undercuts any argument that § 13-1 itself was the product of that history.

In finding otherwise, the Superior Court improperly imputed to people in 1973 the motivations of the individuals who amended North Carolina's constitution in the 1870s to disenfranchise felons in the first place. *See* Ex. 17 at 21 ("It was well understood and plainly known in the 1970s that the historical and original motivation for denial of the franchise to persons on community supervision in the post-reconstruction era had been to attack and curb the political rights of African Americans. . . . Rep. Ramsey provided no explanation for the Committee's decision to nonetheless preserve the existing law's disenfranchisement of people after their release from any incarceration.").

Reference back to the 1860s is particularly inappropriate because, shortly before the new §13-1 was enacted, North Carolina replaced its Constitution of 1868 with a new constitution, known as the 1971 Constitution. *See Stephenson*, 355 N.C. at 367, 562 S.E.2d at 387. The 1971 Constitution, which is still in place today, independently required the disenfranchisement of all felons and the Superior Court erred in imputing any past discriminatory intent to the disenfranchisement required by the 1971 Constitution. The re-adoption of the disenfranchisement provision by the 1971 Constitution was an intervening event that severed the link with any discriminatory intent reflected in the 1868 Constitution.

What is more, it was error to impute any discriminatory intent to the General Assembly based on North Carolina's disenfranchisement of felons. As we have emphasized, that disenfranchisement is caused by the State Constitution. That disenfranchisement, therefore, must be taken as the baseline against which § 13-1 is measured. Only racial discrimination *independent from* the constitutional baseline could impugn § 13-1. *Cf. Arlington Heights*, 429 U.S. 252, 264–65 (1977). Given the history of § 13-1 as a reform bill championed by civil rights leaders, had it properly framed its analysis, the Superior Court would have reached a different result.

The Eleventh Circuit rejected a strikingly similar argument in *Johnson v. Gov. of State of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc). In that case, the court rejected the plaintiffs' argument that "racial animus motivated the adoption of Florida's [felon] disenfranchisement law in 1868 and this animus remains legally operative today despite the re-enactment in 1968," noting that the "re-enactment eliminated any taint from the allegedly discriminatory 1868 provision, particularly in light of the passage of time and the fact that, at the time of the 1968 enactment, no one had ever alleged that the 1868 provision was motivated by racial animus." *Id.* at 1223–24. Here, if anything, the case for finding this law, backed by the NAACP with the explicit goal of broadening the restoration of citizenship rights compared to the old regime, removed the taint of prior discrimination rather than ratified it is even stronger than it was in *Johnson*.

This evidence is strong enough that, even if the burden shifted to Defendants, it would demonstrate that § 13-1 was supported by valid motivations. One need not search for hints of secret racism to explain why an amendment clarifying that no felon could vote until he had completed all elements of his sentence was passed by the General Assembly. Not only is such a line easily administrable by the State and easily understood by the felons it impacts, but it also affirmatively advances the State's "interest in *restoring* felons to the electorate after justice has been done and

they have been fully rehabilitated by the criminal justice system." *Jones*, 975 F.3d at 1034. The record clearly establishes that § 13-1, which was championed by the only African American legislators serving at the time, would have been enacted even absent any allegedly discriminatory motives.

For these reasons, Plaintiffs are likely to succeed in any number of ways in showing that the Superior Court erred in holding § 13-1 violated the Equal Protection Clause.

iii. The Evidence Does Not Establish Any Violation of the Free Elections Clause

For three reasons, it was impossible for Plaintiffs to prove that § 13-1 violates the Free Elections Clause of the North Carolina Constitution.

First, felons whose voting rights have not been restored in the manner prescribed by law are not part of the voting public that the Free Elections Clause protects. This follows from the North Carolina Constitution itself. One provision (the Free Elections Clause) states that "[e]lections shall be free." N.C. CONST. art. I, § 10. Another (the felon-disenfranchisement provision) states that "[n]o person adjudged guilty of a felony . . . 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. Because "a constitution cannot be in violation of itself," *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 394, it follows that a convicted felon has no right to vote—and thus no claim under the Free Elections Clause—until his rights are restored in the manner that the General Assembly prescribes. And because the Constitution's felon-disenfranchisement provision does not require the General Assembly to pass any law restoring felons' voting rights, it follows that the General Assembly cannot have violated the Free Elections Clause by passing one.

Second, the Free Elections Clause must be construed according to the re-enfranchisement baseline against which it was adopted. *Cf. Brnovich*, 141 S. Ct. at 2338–39 (interpreting Section 2

of the Voting Rights Act, as amended in 1982, according to the "standard practice" of voting regulation at that time, "a circumstance that must be taken into account"). The citizens of North Carolina voted in 1970 to ratify the operative Free Elections Clause. At that time, as the evidence clearly shows, the State's re-enfranchisement regime was much more restrictive than it is today. *See* Ex. 6. Felons were not automatically re-enfranchised upon completing their sentences as they are today. Instead, they needed to wait three years, petition for restoration, and subject themselves to judicial discretion (and the situation was even worse when the Clause was first ratified in 1868, under the original 1840 re-enfranchisement law, the strictest of them all). *See* Ex. 4. With the passage of the current version of § 13-1 in 1973, therefore, the State's re-enfranchisement regime is now more lenient than it ever was before. If the Free Elections Clause was ratified while a more restrictive regime was in place—and if the people of North Carolina were satisfied that, even with that regime, the State's elections would be "free," N.C. CONST. art. I, § 10—it cannot be the case that a less restrictive re-enfranchisement regime violates this Clause.

And third, Plaintiffs failed to offer any evidence that § 13-1 constrains any voter's choice about whom to vote for. Instead, they attempt to locate such a constraint in the fact that disenfranchised felons cannot vote at all until their voting rights are restored. This is not the sort of constraint on a voter's "conscience" that violates the Free Elections Clause. *Clark v. Meyland*, 261 N.C. 140, 143, 134 S.E.2d 168, 170 (1964); *accord Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 610, 853 S.E.2d 698, 735 (2021). And in any event, felons' disenfranchisement does not result from § 13-1. It results from the North Carolina Constitution. Plaintiffs therefore *could* have no evidence that § 13-1 interferes with a voter's choice. Without § 13-1, the disenfranchisement remains. Indeed, no felon would be re-enfranchised.

For these reasons, Legislative Defendants are also likely to succeed in showing that the Superior Court erred in holding that § 13-1 violates the Free Elections Clause.

II. Defendants Face Irreparable Harm in the Absence of a Stay of the Final Judgment.

"Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (cleaned up). The injury is exacerbated when an election law is enjoined on the eve of an election. "A State indisputably has a compelling interest in preserving the integrity of its election process," *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (quotation marks omitted), and "once the election occurs, there can be no do-over and no redress," *Holmes v. Moore*, 270 N.C. App. 7, 35, 840 S.E.2d 244, 266 (2020) (quotation marks omitted). That is not the only reason courts should avoid changing election rules on the eve of elections: "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4–5; *accord, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam).

For the second time in seven months, the Superior Court has violated these principles. For over a year—including a presidential election—the State Board of Elections has published clear rules for felon re-enfranchisement pursuant to a preliminary injunction based on certain claims in this case. In August of last year, from the bench at trial over the other claims, the Superior Court ordered the State Board to suddenly adopt different rules and, when the State Board pointed to serious problems with the new rules, the court sought to enjoin § 13-1's application to any felons on probation or post-release supervision over a conference call. In the process, the State Board told the Superior Court on August 22, 2021—25 days before one-stop early voting began for municipal elections—that in order to effectuate the expanded preliminary injunction it would need to begin

implementing changes "immediately." Req. for Clarification at 8 (Aug. 22, 2021), Ex. 20. This Court was required to step in to prevent the chaos that the Superior Court's actions had threatened to create, granting supersedeas, staying the expanded preliminary injunction, and reinstituting the original preliminary injunction. The Supreme Court maintained the stay.

And now, the Superior Court has issued a permanent injunction on a strikingly similar timeline. Early voting was 31 days away for North Carolina's statewide primary when the Court issued its order two days ago, and confusion is certain to result if this Court does not stay execution of its injunction and return to the status quo ante. Indeed, confusion has already ensued. The day after the Superior Court's order, the State Board's General Counsel observed that it "apparently conflict[ed]" with the "order from the North Carolina Supreme Court last year in the same case," which had "ordered that 'the status quo be preserved'" for the then-imminent municipal elections and thus affirmed the re-implementation of the original preliminary injunction, while allowing all felons who had registered under the expanded preliminary injunction to vote. Ex. 19 at 1. Although neither this Court nor the Supreme Court expressly addressed the likelihood of Defendants' success on the merits of their appeal, that was a necessary consideration under the supersedeas standard, and thus the stay of the expanded preliminary injunction places the validity of the new (but similar) permanent injunction in further doubt.

Accordingly, the General Counsel advised that "[u]ntil 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." *Id*. (emphasis omitted). And yesterday morning, the State Board voted unanimously to direct its counsel to file a response to the stay application in the Superior Court "ask[ing] the court how to proceed under [its] order" and explaining "the urgency of the situation and timelines that should be contemplated in light of the

April 22 voter registration deadline for the May 17 primary." *Statement on* Community Success Initiative v. Moore *Case*, N.C. STATE BD. OF ELECTIONS (Mar. 31, 2022), Ex. 21. As of that time, the State Board's website continued to provide the registration guidance for felons promulgated under the original preliminary injunction, and it still did the last time checked shortly before this filing. *See* Ex. 16.

Pursuant to the State Board's instructions, its counsel in the Attorney General's Office filed a response to the stay application in the Superior Court today. Although the State Board formally took no position on the stay application, it "request[ed] that the Court take into account the State Board's need for certainty and consistency, and the administrative considerations that implementation presents." State Bd. Defs.' Resp. to Emergency Mot. for Stay Pending Appeal at 1 (Wake Cnty. Super. Ct. Apr. 1, 2022), Ex. 22. The State Board also explained its "good-faith" efforts to comply with the Superior Court's new injunction while "avoid[ing] any possible conflict with the Supreme Court's September 10, 2021 order," entered in the appeal from the expanded preliminary injunction that has not yet been dismissed, by holding rather than denying registration applications from felons covered by the new injunction and suspending automated removal of non-incarcerated felons from election-management software. *Id*. at 4–5. For the same reasons, the State Board explained that "Plaintiffs' Notice alleging violations" of the new permanent injunction "is meritless." State Bd. Defs.' Resp. to Not. of Alleged Violation at 1 (Wake Cnty. Super. Ct. Apr. 1, 2022), Ex. 23.

If the State Board were required to proceed with "full implementation of voter registration" of felons covered by the new injunction in time for the upcoming elections, however, the State Board informed the Superior Court of the "complexity of the task at hand." Ex. 22 at 6. Such a change "takes considerable time and effort," requires cooperation from "the 100 county boards of

elections' staff," and has "many moving parts that may not be obvious to the external observer," including changes to the Board's software (which can take a week or more to make and are difficult to reverse), distributing new voter-registration forms, and updates to other agencies' data systems. *Id*. at 7–8. And all this will occur while absentee voting is already underway and "[t]here are likely hundreds of thousands of voter registration forms in circulation" already. *Id*. at 7. "[H]aving multiple forms in circulation and contradictory guidance within a short period of time creates a risk of confusion both to voters and county administrators." *Id*. at 6.

Time is therefore of the essence. Absentee ballots have already been made available for the primaries. The State Board now has about the same amount of time (plus a weekend) to implement new rules for these statewide elections as it said it needed to implement new felon-voting rules for certain municipal elections last fall. Just as in that go-round, an order to begin implementing such changes would "result in voter confusion and consequent incentive to remain away from the polls," especially given the new injunction's departure from the status quo established by this Court and the Supreme Court in the preliminary injunction appeal. *Purcell*, 549 U.S. at 4–5. "As an election draws closer, that risk will increase." *Id*. at 5. But the Superior Court, having denied Legislative Defendants' stay motion without explanation, has shown no consideration of that danger. In these "extraordinary circumstances," it is imperative that this Court stay the permanent injunction and prevent it from sowing further confusion. N.C. R. APP. P. 8(a). If the State Board begins to register felons under the new injunction—as it has been putting itself in the position to do, *see* Ex. 22 at 4–6, and as the trial court could order it to do at any time—and a stay comes too late, the State Board must begin to reverse itself (again), and even more confusion will result. Of course, that is not a reason to *deny* a stay, for such a rule would create incentives for trial courts to issue injunctions on the eve of an election in an effort to prevent the court of appeals from acting to

correct an erroneous order. Indeed, that is what the Superior Court appears to have attempted to do here, and the confusion that its order has already caused is entirely its own doing. Ending the confusion requires this Court to act now.

Leaving aside voter confusion and the difficulty of administering a significant change on the eve of an election, if the Superior Court's order is not stayed other harms are sure to result. All eligible voters stand to have their vote diluted by felons who are still ineligible to vote under the North Carolina Constitution. Indeed, the court found that its own injunction could swing the results of dozens of elections where the margin of victory was considerably less than the 56,000-plus people who it has suddenly enjoined Defendants to include on the voter rolls. Final Order at 38–39. And any felons who register and vote under the Superior Court's injunction but who remain ineligible to vote under the North Carolina Constitution—a status that the injunction does not change—risk subjecting themselves to prosecution under N.C.G.S. § 163-275(5).

MOTION FOR TEMPORARY STAY

Pursuant to Rule 23(e) of the North Carolina Rules of Appellate Procedure, Legislative Defendants also respectfully move this Court to issue a temporary stay of the Superior Court's order of March 28, 2022 until the Court rules on the foregoing petition for a writ of supersedeas. Legislative Defendants do not suggest that the State Board order the denial of felon voting registrations during this temporary stay, but rather that such applications not be acted on pending a determination by this Court and, if necessary, the Supreme Court. This should not prejudice any felons even if the petition for writ of supersedeas ultimately were denied, because there should be sufficient time for the petition to be adjudicated such that any registrations held due to a temporary stay could be processed in time to allow for voting in the upcoming primary. In support of this

Motion, Legislative Defendants incorporate and rely on arguments presented in the foregoing petition.

CONCLUSION

Wherefore, Legislative Defendants respectfully pray that this Court issue its writ of supersedeas to the Superior Court of Wake County to stay the above-specified order pending issuance of the mandate of this Court following its review and determination of the appeal; that this Court temporarily stay enforcement of the above-specified order until such time as this Court can rule on this petition for a writ of supersedeas; and that Legislative Defendants have such other relief as the Court might deem proper.

Respectfully submitted this 1st day of April, 2022.

By: /s/ Electronically Submitted
Nicole Jo Moss (State Bar No. 31958)
COOPER & KIRK, PLLC

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*
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
Telephone: (202) 220-9600
Facsimile: (202) 220-9601
nmoss@cooperkirk.com

* Applications for *Pro Hac Vice* admission forthcoming

Nathan Huff (State Bar No. 40626)
K&L GATES
430 Davis Drive
Suite 400
Morrisville, NC 27560
Telephone: (919) 314-5636
Facsimile: (919)516-2045
Nate.Huff@klgates.com

Counsel for Legislative Defendants

VERIFICATION

The undersigned attorney for Legislative Defendants, after being duly sworn, says:

I have read the foregoing Petition for a Writ of Supersedeas and Motion for Temporary Stay and pursuant to Appellate Rule 21, I hereby certify that the material allegations and contents of the foregoing petition are true to my knowledge, except those matters stated upon information and belief and, as to those matters, I believe them to be true.

I also hereby certify that the documents attached to this Petition for a Writ of Supersedeas and Motion for Temporary Stay are true and correct copies of the pleadings and other documents from the file in Wake County Superior Court and/or are documents of which this Court can take judicial notice.

Nathan Huff

Wake County, North Carolina

Sworn to and subscribed before me this 1st day of April, 2022.

Courtney Ritter

Courtney Ritter
Notary's Printed Name, Notary Public

My Commission Expires: 9-19-23

COURTNEY RITTER
NOTARY PUBLIC
WAKE COUNTY, NC
COMMISSION EXPIRES
Sept. 19, 2023

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Petition and 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
Terence Steed
tsteed@ncdoj.gov
Mary Carla Babb
mcbabb@ncdoj.gov

Counsel for the State Board Defendants

This the 1st day of April, 2022.

/s/ Electronically Submitted
Nicole Jo Moss

Counsel for Legislative Defendants