No. 20-12003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Kelvin Leon Jones, *et al.*,

Plaintiffs-Appellees,

v.

Ron DeSantis, in his official capacity
as Governor of the State of Florida, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court for the
Northern District of Florida, Case No. 4:19-cv-300-RH/MJF

PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO MOTION TO STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, the NAACP Legal Defense and Educational Fund, Inc., the American Civil Liberties Union Foundation, Inc., the American Civil Liberties Union Foundation of Florida, Inc., the Brennan Center for Justice at NYU School of Law, Paul Weiss Rifkind Wharton & Garrison LLP, the League of Women Voters of Florida, the Florida State Conference of Branches and Youth Units of the NAACP, and the Orange County Branch of the NAACP state that they have no parent corporations, nor have they issued shares or debt securities to the public. The organizations are not subsidiaries or affiliates of any publicly owned corporation, and no publicly held corporation holds ten percent of their stock. I hereby certify that the disclosure of interested parties submitted by Defendants-Appellants Governor of Florida and Secretary of State of Florida is complete and correct except for the following corrected or additional interested persons or entities:

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INTRODUCTION

On May 24, 2020, after an eight-day trial, the district court entered an Order (the "Order") enjoining enforcement of certain provisions of Senate Bill 7066 ("SB7066") and providing clarity to returning citizens[1] regarding their eligibility to register and vote. ECF 420. Defendants Governor Ron DeSantis and Secretary of State Laurel M. Lee ("Defendants-Appellants") moved the district court to stay the Order pending this appeal, and the district court denied that motion (the "Stay Order") because Defendants-Appellants could not demonstrate a likelihood of success on the merits, any harm to the State, or a public interest in favor of a stay. ECF 431. Defendants-Appellants now move this Court for a stay, recycling the same arguments the district court rejected and, remarkably, urging this Court to ignore the law of the case established in *Jones*. Because Defendants-Appellants again fail to satisfy *any* of the factors warranting a stay, their motion should be denied.

First, Defendants-Appellants are not likely to succeed on the merits. They raise two primary arguments on appeal—both fail. As to the first, which challenges Plaintiffs' wealth discrimination claims, this Court has already ruled. Under binding precedent, denying the franchise to those who cannot pay their legal financial obligations ("LFOs") does not withstand heightened scrutiny and violates the Fourteenth Amendment. *Jones* v. *Governor of Fla.*, 950 F.3d 795, 817 (11th Cir.

[1] This brief refers to people with felony convictions as "returning citizens."

2020); *see also This That and the Other Gift and Tobacco, Inc.* v. *Cobb County*, 439 F.3d 1275, 1284-85 (11th Cir. 2006) ("The fact that the earlier panel opinion in this case was decided during the preliminary injunction stage does not impact the applicability of the law-of-the-case doctrine in this case.").

As to the second, Defendants-Appellants are unlikely to prevail on their argument that the Twenty-Fourth Amendment's categorical prohibition on the payment of a poll tax or other tax contains a carve-out for returning citizens. Nor can they demonstrate that the district court's factual findings regarding the role of fees and costs in the Florida judicial system were clear error.

Second, Defendants-Appellants fail to demonstrate they will suffer irreparable harm absent a stay. Throughout this litigation, and since Amendment 4 went into effect on January 8, 2019, the Florida Department of State has accepted and processed facially sufficient voter registration applications from returning citizens, and has not sought to remove them from the voter rolls on account of unpaid LFOs. In fact, the Department of State administered numerous local and federal elections across Florida over the past year and a half without removing *any* registered voters based on outstanding LFOs. The injunction does not prohibit the Secretary from maintaining that pre-existing policy for voter registration. Nor does the Order require the Secretary to significantly alter its removal processes, should it begin to remove registered voters on account of unpaid LFOs.

Third, a stay of the Order would irreparably harm Plaintiffs and the Plaintiff Class by: (1) permitting State Defendants to remove eligible voters from the registration rolls; (2) preventing returning citizens from receiving timely assurances as to whether their right to vote has been restored (in advance of impending registration deadlines); and (3) requiring returning citizens to face the threat of prosecution for registering and exercising their right to vote in upcoming elections.

Finally, Defendants-Appellants fail to show the public interest favors a stay. To the contrary, as discussed above, a stay would undermine the public interest by prohibiting eligible voters from registering and voting. *See Jones*, 950 F.3d at 830-31.

In sum, the State asks this Court to grant a stay that would enable them to continue to disenfranchise hundreds of thousands of voters in a manner contrary to binding Circuit law of the case, to disenfranchise others on the sole basis of unpaid taxes in contravention of the Twenty-Fourth Amendment, and to refuse eligible voters any path to determine their eligibility in violation of procedural due process.

ARGUMENT

All four factors for determining whether a stay is warranted weigh against a stay here. Those factors are (1) whether Defendants-Appellants have made a strong showing they are likely to succeed on appeal, (2) whether Defendants-Appellants will be irreparably injured absent a stay, (3) whether issuance of a stay will

substantially injure Plaintiffs, and (4) where the public interest lies. *Democratic Exec. Comm. of Fla.* v. *Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019). Importantly, a "stay pending appeal is an extraordinary remedy for which the moving party bears a heavy burden." *Matter of O'Keeffe*, No. 15-mc-80651, 2016 WL 5795121, at *1 (S.D. Fla. June 7, 2016).

I. Defendants-Appellants Are Unlikely to Succeed on the Merits

Defendants-Appellants have not made a "strong showing" they are likely to succeed on the merits. *Nken* v. *Holder*, 556 U.S. 418, 434 (2009) (citation omitted). The district court's Stay Order followed binding precedent from the Supreme Court and this Court.

A. Eleventh Circuit and Supreme Court Precedent Recognizes the Right to Vote Cannot Depend on an Individual's Financial Resources

The Eleventh Circuit has already held that withholding voting rights due to an inability to pay LFOs violates the Fourteenth Amendment. *Jones*, 950 F.3d at 795. That decision is binding in the Eleventh Circuit and controls this case. *See, e.g.*, *This That and the Other Gift and Tobacco, Inc.*, 439 F.3d at 1284. In a footnote, however, Defendants-Appellants claim this Court is bound "by the earlier circuit decisions *Jones* contravened" and since "contravening Circuit precedent is clearly erroneous, *Jones* does not control as law-of-the-case." Mot. at 7. Defendants-Appellants are mistaken. *Jones* does *not* contravene any earlier Circuit decisions and is consistent

with Supreme Court precedent.[2] Defendants-Appellants also fail to identify any instance where a federal Court of Appeals ignored its own binding precedent *from the same case* in order to issue a stay. Plaintiffs-Appellees are also aware of no such case.

This Court has already considered and appropriately rejected Defendants-Appellants' other arguments. Defendants-Appellants argue that the Eleventh Circuit erred by not requiring Plaintiffs to show purposeful discrimination, which they describe as "a general principle of equal protection law" exemplified by *Personnel Adm'r of Mass*. v. *Feeney,* 442 U.S. 256, 279 (1979) and reaffirmed by *Hand* v. *Scott*, 888 F.3d 1206 (11th Cir. 2018) (Mot. at 8). But, as this Court has already noted, the Supreme Court has expressly distinguished *Feeney* and *Washington* v. *Davis*, 426 U.S. 229, 240 (1976), holding that discriminatory intent is not required for wealth discrimination claims. *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 126-27 (1996); *see*

[2] *United States* v. *Williams* does not hold otherwise. It stands for the unremarkable proposition that "[a] decision of a legal issue or issues by an appellate court . . . *must be followed* in all subsequent proceedings in the same case . . . unless [1] the evidence on a subsequent trial as substantially different, [2] controlling authority has since made a contrary decision of the law applicable to such issues, or [3] the decision was clearly erroneous and would work a manifest injustice." 728 F. 2d 1402, 1406 (11th Cir. 1984) (emphasis added). None of those exceptions are applicable here and it is a stay that would lead to manifest injustice by denying voters a fundamental right.

also Jones, 950 F3d at 828 ("Moreover, the Supreme Court has never required proof of discriminatory intent in a wealth discrimination case[.]").[3]

Defendants-Appellants attempt to evade *M.L.B.*'s settled holding by claiming that it is limited to cases involving access to judicial proceedings. Mot. at 8. But *M.L.B.* has no such limitation. It explicitly relied on *Bearden* v. *Georgia*, 461 U.S. 660 (1983), a probation revocation case, to reject Defendants-Appellants' intentional discrimination requirement. *See M.L.B.*, 519 U.S. at 105 (noting lack of purposeful discrimination requirement "is demonstrated by *Bearden*, in which the Court adhered in 1983 to *Griffin*'s principle of equal justice") (internal quotations and citation omitted). Indeed, *M.L.B.* contemplated applying the same principle to the precise circumstances here: access to the franchise. *See id*. at 124 ("The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license.") (citing *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663).[4]

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[3] Defendants-Appellants' reliance on *Hand* is misplaced for the same reason. *Hand* is not a wealth-discrimination case. 888 F.3d at 1207.

[4] Even if intentional discrimination were required—which it is not— the district court "expressly" found the "Legislature would not have adopted SB7066 but for the actual motive to favor individuals with money over those without." Order at 8. This finding is not "baseless": it arises from detailed factual findings following eight days of trial—evidence Defendants-Appellants do not attempt to rebut. Defendants-Appellants incorrectly argue the Court lacked "jurisdiction" to make such a finding in rejecting the stay motion. Mot. at 9. *Showtime/The Movie Channel, Inc.* v. *Covered Bridge Condominium Ass'n, Inc*. simply held a district court did not have

Defendants-Appellants' contention that rational basis review applies to Plaintiffs-Appellees wealth-discrimination claim, (Mot. at 9-13), is equally meritless and, like their other arguments, has already been rejected by this Court. Heightened scrutiny applies here where "access to [the franchise] is made to depend on wealth." *Jones*, 950 F.3d at 823. This conclusion does not conflict with *Shepherd* v. *Trevino*, 575 F.2d 1110 (5th Cir. 1978) as Defendants-Appellants argue, because, as they acknowledge, that case did not implicate wealth. *See Jones*, 950 F.3d at 824 ("*Shepherd* got it right, because the classification did not implicate wealth or any suspect classification."). Nothing in *Shepherd* indicates rights restoration laws are *immune* from heightened scrutiny under the Equal Protection Clause. *Shepherd*, 575 F.2d at 1115 ("[W]e are similarly unable to accept the proposition that section 2 removes all equal protection considerations from state created classifications denying the right to vote to some felons while granting it to others.").

Nor does *Katzenbach* v. *Morgan* require a different result. 384 U.S. 641 (1966). As this Court explained, *Katzenbach* did not involve wealth-based

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"authority to dismiss the case" once a notice of appeal had been filed. 895 F2d 711, 713 (11th Cir. 1990). Nothing in that ruling would preclude the district court from clarifying its previous Order based on the same operative set of facts. In any event, the district court's underlying post-trial judgment outlines the same findings. *See, e.g.*, ECF 420 at 84 (finding it "[c]urious if not downright irrational" that SB7066 requires payment of civil liens even though "the obligation is removed from the criminal-justice system"); *id*. at 91 (noting that SB7066's treatment of civil liens constituted "discrimination against those unable to pay").

restrictions on voting; it arose from the entirely different context of Congress's enforcement power under section 5 of the Fourteenth Amendment. *Jones*, 950 F.3d at 824 (citing *Katzenbach,* 384 U.S. 641 at 657). Similarly, this Court rejected Defendants-Appellants' argument that the *Griffin-Bearden* line of cases does not apply in the rights restoration context. *Jones* 950 F.3d at 819. This Court relied on both *Johnson* v. *Governor* and *Harper*, which in turn relied on *Griffin* in holding that voting qualifications "drawn on the basis of wealth or property, like those of race are traditionally disfavored." *Id.* at 822-825 (citing *Harper*, 383 U.S. at 668 (citing *Griffin* v. *People of State of Illinois*, 351 U.S. 12 (1956))).[5]

But even if rational-basis review applied, Plaintiffs would still prevail. In *Jones*, this Court "had little difficulty condemning [SB7066's LFO requirement] as irrational" *as-applied* to those "genuinely unable to meet their financial obligations." *Jones*, 950 F.3d at 813. The Court also noted the LFO requirement would likely be irrational *generally* if returning citizens who are genuinely unable to pay their LFOs "are in fact the *mine-run* of felons affected by this legislation." *Id*. at 814.[6] If

[5] *Walker* v. *City of Calhoun*, 901 F.3d 1245, 1264 (11th Cir. 2018) does not limit *Bearden* as Defendants-Appellants contend. Mot. at 12. Indeed, the Eleventh Circuit explained that the "sine qua non of a *Bearden* or *Rainwater* style claim [] is that the State is treating the indigent and the non-indigent categorically differently," and as such Plaintiffs' claim "falls within the *Bearden* and *Rainwater* framework." *Walker,* 901 F.3d at 1259.

[6] This Court noted that Defendants "appear[] to almost concede" that SB7066's LFO requirement is irrational if most returning citizens are unable to pay their LFOs,

Plaintiffs established at trial the mine-run of felons are unable to pay their LFOs, "the focus of the rationality evaluation would be on indigent felons," for whom the requirement is "clearly irrational." *Id*. at 815-16.

After an eight-day trial, the district court found "as a fact" that "the overwhelming majority of felons who have not paid their LFOs in full, but who are otherwise eligible to vote, are genuinely unable to pay the required amount, and thus, under Florida's pay-to-vote system, will be barred from voting solely because they lack sufficient funds." Order at 43. The uncontested trial record supports the *exact* factual finding that this Court determined would be required to support a conclusion that the LFO requirement fails rational-basis review generally. Defendants-Appellants offer no basis to set aside that finding because there is none, they do not even suggest it was clearly erroneous. *See Media Servs. Grp., Inc.* v. *Bay Cities Comm., Inc.*, 237 F.3d at 1329 (11th Cir. 2001).

The *only* rationale presented by Defendants-Appellants in their Motion is that "Florida's interest in punishing a felony is not satisfied until all the terms of a felon's sentence are completed in full." Mot. at 15. As an initial matter, the State has thus abandoned any pretense that the purpose of the SB7066 is to incentivize collection. *See* Order at 71; *Jones*, 950 F.3d at 811. But punishing a person solely for their

(*Jones*, 950 F.3d at 814)—a concession Defendants now try to walk back on appeal after the district court's factual finding to that effect.

inability to pay is the precise constitutional violation prohibited by *Bearden* and related precedent. "[U]nder any plausible theory of retribution, punishment must at least bear some sense of proportionality to the culpability of the conduct punished to be rational," and here the "punishment is linked not to their culpability, but rather to the exogenous fact of their wealth." *Jones*, 950 F.3d at 812. A "wealthy identical felon, with identical culpability, has his punishment cease. But the felon with no reasoned prospect of being able to pay has his punishment continue solely" due to his indigency. *Id*.

In addition, the Defendants-Appellants' entire rationale is undermined by Florida's "every-dollar method" policy,[7] which no longer requires a returning citizen to actually complete the terms of their sentence, just to pay a "monetary amount" equal to the amount included in their sentence. Defendants-Appellants claim this policy allows the returning citizen to pay their "financial debt to society," which is "defined precisely as the amount set out within the four corners of his sentencing document."[8] Mot. at 16-17. However, under the State's "every dollar method policy," a returning citizen would become eligible to vote after payment of state fees

[7] Defendants-Appellants refer to this as the "first-dollar method."

[8] Notably, the record demonstrates that there is nothing "precise" about sentencing documents and it is often "impossible" for a returning citizen to determine what LFOs they owe. *See* Order at 46-47.

and surcharges that accumulate after sentencing, while balances remain unpaid on victim restitution and LFOs imposed at the time of sentence.[9]

Finally, there is no merit to Defendants-Appellants' contention that the district court engaged in an "intrusive remedy" or "exceeded [its] authority" by utilizing the State's *existing* advisory opinion process. Mot. at 13. Indeed, the district court took "the State up on its suggestion" for incorporating the state's advisory opinion process in any remedy (Order at 97, 113-114), it simply sets certain reasonable limits to protect returning citizens' reliance on an advisory opinion process—and ensures that such a process is in fact in place.[10] And contrary to Defendants-Appellants' claim, (Mot. at 13), the district court implemented its streamlined process only after Defendants-Appellants completely abdicated their responsibilities for implementing SB7066. *See* Order at 65 ("In the 18 months since Amendment 4 was adopted, the Division has had some false starts but has completed its review of *not a single* registration."). And failed to implement any process consistent with the trial court's preliminary injunction ruling, affirmed by this Court. As the district court noted,

[9] Even if the State were able to assert a legitimate interest in enforcing the LFO requirement, it would be undermined by the State's "staggering inability to administer the pay-to-vote system," as laid out in extensive detail at trial. Order at 44.

[10] This differs from the out-of-circuit case *Thompson* v. *Dewine*, 959 F.3d 804, 812 (6th Cir. 2020) where the Court was confronted with multiple categorical changes to Ohio's voting procedures including changes to candidate filing deadlines and petition signature methods. A far cry from the Order here.

"[t]he State had more than six months after entry of the preliminary injunction, and more than three months after the Eleventh Circuit's definitive ruling in *Jones I*, to come up with its own process for determining inability to pay. The State chose to do nothing." Stay Order, ECF 431 at 13.

B. The District Court Correctly Held that Conditioning the Right to Vote on Costs and Fees Violates the Twenty-Fourth Amendment

Defendants-Appellants are also unlikely to succeed on the merits of Plaintiffs' Twenty-Fourth Amendment claim.[11] Defendants-Appellants make the broad assertion that returning citizens "do not have a Twenty-Fourth Amendment claim" because they "simply do not have a right to vote . . . ." Mot. at 17. The plain text of the Twenty-Fourth Amendment says otherwise.

As Defendants-Appellants have emphasized, "words matter"[12] and the textual analysis here is straightforward. The Twenty-Fourth Amendment provides that the right to vote "shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV, § 1. Following Amendment 4, returning citizens are automatically restored to the franchise upon completion of all terms of their sentence. Following passage of SB7066, "all terms of sentence"

[11] Even if the State could show likelihood of success on this claim—it cannot—the State cannot show irreparable harm in light of the independent wealth discrimination holding and the district court's factual finding that the majority of people to whom the LFO requirement applies are unable to pay their outstanding LFOs.
[12] ECF 132 at 32.

included payment of the LFOs outlined in SB7066. If a particular type of LFO constitutes a "tax," the Twenty-Fourth Amendment precludes Florida from "den[ying] or abridg[ing]" voting rights based on the "failure to pay" that tax. *Id*. This straightforward interpretation is reinforced by the drafters' statements that the Twenty-Fourth Amendment was intended to prevent the government "from setting up any substitute tax in lieu of a poll tax" as a means of negating "the amendment's effect by a resort to subterfuge in the form of other types of taxes."[13]

Defendants-Appellants are unlikely to succeed on appeal because they do not address the actual text of the Twenty-Fourth Amendment. Defendant-Appellants also fail to address the hypothetical posed by the district court that a "law allowing felons to vote in federal elections but only upon a payment of a $10 poll tax would obviously violate the Twenty-Fourth Amendment." Order at 72. The non-binding, out-of-circuit cases cited by Defendants-Appellants do not support such a reading.[14] States do not have the power to impose burdens on the right to vote, where such

[13] Outlawing Payment of Poll or Other Tax as Qualification for Voting in Federal Elections, H.R. Rep. No. 1821, 87th Cong., 2d Sess. 5 (1962).

[14] The three-sentence analysis on this claim in *Harvey* v. *Brewer* did not examine the Twenty-Fourth Amendment's text or cite any case law. *See* 605 F.3d 1067, 1080 (9th Cir. 2010). Likewise, the unpublished *Howard* v. *Gilmore* decision contained scant analysis on this issue. *See* No. 99-2285, 2000 WL 203984, at *2 (4th Cir. Feb. 23, 2000). And *Johnson* v. *Bredesen* relied on *Harvey* and *Howard* without conducting any of its own textual or historical analysis. *See* 624 F.3d 742, 750 (6th Cir. 2010); *cf*. also *id*. at 766-76 (Moore, J., dissenting) (conducting textual and historical analysis of Twenty-Fourth Amendment).

burdens are prohibited in other constitutional provisions. *Williams* v. *Rhodes*, 393 U.S. 23, 29 (1968).

Defendants-Appellants' claim that court costs and fees should be considered penalties and not "taxes," (Mot. at 18), also fails. As the Supreme Court held in *National Federation of Independent Business* v. *Sebelius*, the "essential feature of any tax" is that "[i]t produces at least some revenue for the Government." 567 U.S. 519, 646–66 (2012); *see also United States* v. *Constantine*, 296 U.S. 287, 293 (1935) (noting that if the intent of an exaction is to raise revenue, "its validity [as a tax] is beyond question"). Here, the facts found at trial demonstrate that the costs and fees at issue produce far more than "some revenue." In fact, "Florida has chosen to pay for its criminal justice system in significant measure through such fees." Order at 76. Since the primary (if not sole) purpose of these costs and fees is to generate funds for Florida, they constitute "other taxes" under the Twenty-Fourth Amendment.

The State's contention that fines and fees should be considered "punishment for the conviction of a crime," (Mot. at 18), also cannot withstand scrutiny. Fees and costs in Florida are assessed against criminal defendants irrespective of culpability and include cases resolved following *nolo contendere* pleas or where

adjudication is withheld.[15] Moreover, such cost and fees contain fixed amounts that while "imposed by the Judge, is ordinarily determined by the Legislature," and are generally collected "in the same manner as other civil debts or taxes owed to the government, including by reference to a collection agency." Order at 78. The district court's finding that costs and fees function as taxes is based on fact-bound determinations about Florida's criminal justice system that the State does not, and cannot, contend are clearly erroneous.

Bredesen does not hold otherwise. *Bredesen* concerned restitution and child support payments—both of which consider ability to pay at sentencing—not court costs and fees. 624 F.3d at 742. The *Bredesen* court did not consider whether fees and costs would qualify as taxes. *Id*. And restitution—which is generally paid directly to the victim and varies from case to case—is distinct from court costs and fees, which are paid to the state and do not vary with the commission of specific offenses.

C. Defendants-Appellants Make No Showing of Likely Success on Plaintiffs' Remaining Claims

Defendants-Appellants do not address the district court's holdings on Plaintiffs-Appellees' other claims, including that the LFO requirement as implemented by the State was void for vagueness; that the State's implementation

[15] *See, e.g.*, Fla. Stat. § 938.27(1) (imposing costs of prosecution on criminal defendants even where adjudication is withheld).

denied procedural due process; and that absent the Court's remedy, the State's implementation infringed First Amendment rights and violated equal protection and the NVRA because of its disuniformity. Requiring payment of "amounts that are unknown and cannot be determined with due diligence is unconstitutional." Order at 118. The district court's injunction provides returning citizens a method for registering if they cannot determine whether or how much LFOs they owe, which is especially important where, as here, "a person who claims a right to vote and turns out to be wrong may face criminal prosecution." Order at 96. And the district court held that its remedy will satisfy due process requirements and address vagueness, *if implemented in a timely and proper manner*. Order at 98-99. Defendants-Appellants cannot obtain a stay pending appeal without demonstrating likelihood of success on the merits of these separate grounds supporting the district court's remedial injunction. But Defendants-Appellants have failed to make any such argument in their stay motion, and have thus waived them.

II. Defendants-Appellants Are Not Irreparably Harmed by the Order

Defendants-Appellants provide only glancing reference to the equitable factors that this Court must consider when determining if a stay is appropriate. Defendants-Appellants do not, and cannot, demonstrate the district court's Order causes them irreparable harm. Thus, the stay must be denied. *See Siegel* v. *Lepore*, 234 F.3d 1163, 1176 (11th Cir. 2000); *see also Democratic Exec. Comm. of Fla.*,

915 F.3d at 1317 ("The party seeking the stay must show more than the mere possibility of . . . irreparable injury.").

The Order does *not* change the function of the registration process or otherwise require a change to Defendants-Appellants' own practices for list maintenance during the pendency of litigation.[16] Instead, the Order simply provides clarity to voters regarding their eligibility—and to the Department regarding the permissible conditions for removal, should the State begin to undertake list maintenance on account of unpaid LFOs. All Defendant supervisors have complied or plan to comply with the district court's Order and *none* have moved for a stay—proving that the Order does not impose any undue burden on Defendants-Appellants. *See* Stay Order, ECF 431 at 14.

Since the passage of Amendment 4 more than a year and a half ago, the Florida Department of State has accepted and processed facially sufficient voter registration applications from otherwise eligible Floridians with past felony convictions, without assessing whether applicants have outstanding LFOs, and it has continued to do so following the effective date of SB7066. *See* ECF 408 at 1180:25-1186:10. Over the past year, the Secretary identified approximately 85,000 registered voters requiring manual review related to past felony convictions. Order at 64-65. At no point prior

[16] There is also no administrative burden on the State from utilizing its existing advisory opinion system or making such forms available.

to the Order did the Secretary identify *any* voters to the Supervisors for removal on the basis of unpaid LFOs. Defendants-Appellants did not remove any returning citizens with unpaid LFOs from the rolls before administering dozens of local elections in November and December 2019, or the March 2020 presidential preference primary.[17] *See* ECF 98-1 at 27, n.1. Therefore, it is not credible for Defendants-Appellants to claim now that they will be irreparably harmed by following largely the same election procedures that have been in place since the commencement of this litigation.[18]

It is also not the case, as Defendants-Appellants contend, that the district court enjoined Defendants-Appellants from effectuating Amendment 4 or SB7066. Mot. at 20. The Order merely enjoins the State from doing so in an unconstitutional manner. The State remains free to require citizens who are genuinely able to pay their fines and restitution to do so as a condition of rights restoration pursuant to the terms of SB7066. What the State cannot do is deny its citizens the right to vote

[17] Notably, Defendants-Appellants have never suggested elections conducted over the past year are "corrupted" or "open to challenge." Mot. at 20.

[18] To the extent Defendants-Appellants claim they are harmed due to the fact they need to review and determine the eligibility of thousands of returning citizens, that is a problem of their own making. For nearly a year since SB7066's effective date, State Defendants-Appellants have failed to take *any* action to address or implement the LFO requirement. The district court's Order streamlines the process for determining voter eligibility and *reduces* the burden on the State by shrinking the pool of voters for whom a specific LFO determination is required.

solely on the basis of wealth or unpaid taxes, or by requiring them to pay an unknown and indeterminate amount of money.[19]

III. Plaintiffs Will Be Irreparably Harmed by a Stay

Plaintiffs-Appellees—not the State—will be irreparably harmed by a stay. Defendant-Appellants devote a single sentence to addressing this factor, arguing that Plaintiffs-Appellees cannot be harmed by a stay because it "would only prevent them from exercising a right they have forfeited . . . ." Mot. at 21. They are wrong.

If a stay is granted, hundreds of thousands of *eligible* returning citizens, including Plaintiffs, Organizational Plaintiffs' members, and the members of the Plaintiff Class and Subclass will be deprived of their right to cast a ballot in the many elections taking place in their communities in the upcoming weeks and months.

A stay would also preclude Organizational Plaintiffs' members, and the members of the Plaintiff Class and Subclass from registering to vote due to the fear of prosecution, Order at 25 ("It is likely that if the State's pay-to-vote system remains in place, some citizens who are eligible to vote . . . will choose not to risk prosecution and thus will not vote."), and hinder Organizational Plaintiffs' ability to perform protected voter registration activities. The denial of the right to vote in a single

[19] The cases cited by Defendants-Appellants do not hold differently. In *Maryland* v. *King*, the statute was enjoined in full. 567 U.S. 1301 (2012) (Roberts, C.J., in chambers). Meanwhile in *Hand*, the Eleventh Circuit found the State Board of Executive Clemency was irreparably harmed because the injunction prohibited the Board from "apply[ing] its own laws." 888 F.3d at 1214.

election is irreparable. *See Jones*, 950 F.3d at 828 ("The denial of the opportunity to cast a vote that a person may otherwise be entitled to cast—even once—is an irreparable harm."); *People First of Alabama* v. *SOS*, Order Denying Stay, No. 20-12184, at 24 (11th Cir. June 25, 2020) ("One wrongfully disenfranchised voter is one too many.") (citing *Lee*, 915 F.3d at 1321).

Finally, a stay risks creating significant confusion amongst already registered voters as to whether they are eligible to vote and hampering voter registrations efforts during these elections. *See Purcell* v. *Gonzalez*, 549 U.S. 1, 5-6 (2006) (finding that "[c]ourt orders affecting elections, *especially conflicting orders*, can themselves result in voter confusion," and thus counseling against interference by appellate courts absent a compelling reason) (emphasis added). This is particularly so here, where the district court's preliminary injunction order, this Court's affirmance of the same, and the *en banc* court's prior denial of review have created settled expectations among voters regarding the state of the law.

IV. A Stay Would Disserve the Public Interest

This Court already made clear that denial of the right to vote is not in the public interest. *Jones*, 950 F.3d at 830-31. Meanwhile, an "injunction's cautious protection of the Plaintiffs' franchise-related rights is without question in the public interest." *Charles H. Wesley Educ. Found., Inc.* v. *Cox*, 324 F. Supp. 2d 1358, 1355 (N.D. Ga. 2004) (holding that the loss of the opportunity to register and vote causes

irreparable harm because "no monetary award can remedy" this loss), *aff'd*, 408 F.3d 1349 (11th Cir. 2005). In light of the public's "strong interest" in permitting exercise of "the fundamental political right to vote," *Purcell*, 549 U.S. at 4, a stay would greatly *disserve* the public interest.

Defendants-Appellants' lone argument to the contrary is that a stay would "serve the People of Florida's substantial interest in the enforcement of valid laws." Mot. at 21. But Florida is not entitled to effectuate a law that unconstitutionally *disenfranchises* voters. Nor is it in the "public interest" to restrict eligible voters from voting. *See Florida Democratic Party* v. *Scott*, 215 F. Supp. 3d 1250, 1258 (N.D. Fla. 2016).

CONCLUSION

For these reasons, Defendants-Appellants' Motion to Stay should be denied.

Dated: June 26, 2020

Respectfully submitted,

/s/ David Giller

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CERTIFICATE OF COMPLIANCE

I certify that this Response complies with the type-volume limitations of Fed. R. App. P. 35 because it contains 5,195 words.

This Response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Response has been prepared in a proportionally spaced typeface using Microsoft Word for Office in 14-point Times New Roman font.

Date: June 26, 2020 /s/ David Giller

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on June 26, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: June 26, 2020 /s/ David Giller