No. 19-14551

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

***GRUVER*, *RAYSOR*, AND *JONES* PLAINTIFFS-APPELLEES' MEMORANDUM OF LAW IN RESPONSE TO THE COURT'S JURISIDICTIONAL QUESTION**

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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, the Campaign Legal Center, Paul Weiss Rifkind Wharton & Garrison LLP, Brazil & Dunn 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:

1. Bryant, Curtis – *Plaintiff/Appellee*
2. Defend, Educate, Empower – *not an organization in this action*
3. Jones, Kelvin Leon – *Plaintiff/Appellee*
4. Miller, Jermaine – *Plaintiff/Appellee*

5. Oats, Anthrone – *Witness*

6. Paul Smith – *Attorney for Plaintiffs/Appellees*

7. Paul Weiss Rifkind Wharton & Garrison LLP – *Attorneys for Plaintiffs/Appellees*

8. Pérez, Myrna – *Attorney for Plaintiffs/Appellees*

Dated: December 26, 2019

/s/ *R. Orion Danjuma*
Counsel for Gruver *Plaintiffs-Appellees*

GRUVER, _RAYSOR_, AND _JONES_ PLAINTIFFS-APPELLEES' MEMORANDUM OF LAW IN RESPONSE TO THE COURT'S JURISIDICTIONAL QUESTION

Plaintiffs-Appellees in the *Gruver*, *Raysor*, and *Jones* cases submit this memorandum of law in response to the jurisdictional question raised by the Court on December 12, 2019. *See* Dec. 12, 2019 Order. The Court directed the parties to "address whether Governor Ron DeSantis has standing to appeal the October 18, 2019 order" issued by the district court. *Id.* at 3. Because the district court expressly excluded Florida's Governor from the scope of its preliminary injunction, and the Governor does not have a legally cognizable interest in this appeal, the Court should dismiss his appeal for lack of standing. *See* ECF 207 at 53.[1] By the same token, the Court should dismiss both the Governor and Secretary of State Laurel Lee's appeal of Plaintiffs-Appellees' Twenty-Fourth Amendment claim. The district court issued no ruling as to that claim; neither Governor DeSantis nor Secretary of State Lee has standing to appeal the district court's decision not to enter an injunction on that claim. *See* ECF 207 at 43.

I. BACKGROUND

These consolidated cases raise constitutional challenges to a Florida statute ("SB7066") requiring that citizens formerly convicted of felony offenses fully pay

[1] Documents filed with the district court are cited as "ECF __."

all legal financial obligations ("LFOs") imposed at their sentencing, regardless of their ability to pay, before they can regain their voting rights. Many Floridians who have finished their terms of incarceration or supervision are unable to pay their LFOs in full and are therefore denied access to the franchise on the basis of their financial resources under SB7066. *See* ECF 207 at 18. Plaintiffs-Appellees ("Plaintiffs") collectively filed suit challenging, *inter alia*, SB7066's denial of their voting rights based on their inability to pay LFOs.[2]

On October 18, 2019, the district court issued an order (the "Order") denying Defendants' motion to dismiss the consolidated cases and granting a preliminary injunction on Plaintiffs' Fourteenth Amendment claim. Specifically, it found, "Florida cannot deny restoration of a felon's right to vote solely because the felon does not have the financial resources to pay" outstanding legal financial obligations. ECF 207 at 30. The Order outlined procedural relief to protect seventeen individual Plaintiffs from disenfranchisement based on inability to pay LFOs. *Id.* at 50-53. The district court declined to issue a preliminary injunction on Plaintiffs' Twenty-Fourth

[2] There are four separate groups of Plaintiffs in the consolidated action: the *Gruver*, *Raysor*, *McCoy*, and *Jones*/*Mendez* Plaintiffs. *See* ECF 3. Governor DeSantis, in his official capacity, is a named defendant in three of the five consolidated cases: the *Jones*, *Mendez*, and *McCoy* complaints. *See* Compl., *Jones et al. v. DeSantis et al.*, 19-cv-300-RH, ECF 1; Compl., *Mendez v. DeSantis et al.*, 19-cv-272-RH, ECF 1; First Am. Compl., *McCoy et al. v. DeSantis et al.*, 19-cv-304-RH, ECF 7. The *Gruver* and *Raysor* Plaintiffs have not named Governor DeSantis in their respective complaints. *See* First Am. Compl., *Gruver et al. v. Barton et al.*, 19-cv-302-RH, ECF 26; Second Am. Compl., *Raysor et al. v. Lee*, 19-cv-301-RH, ECF 12.

Amendment, Due Process Clause, and vagueness claims. *Id*. at 40-50. The preliminary injunction expressly applies to "all defendants *other than the Governor* and Supervisor of Orange County." *Id*. at 53 (emphasis added). Defendants-Appellants Governor DeSantis and Secretary of State Lee ("Defendants") have appealed the preliminary injunction to this Court. In their civil appeal statement, Defendants identified "whether financial obligations imposed by a felony criminal sentence are poll taxes prohibited by the 24th amendment" as one of three issues raised on appeal. Defs.' Civil Appeal Statement at 2.

II. ARGUMENT

A. Governor DeSantis does not have a legally cognizable interest in this appeal.

Governor DeSantis does not have standing to appeal the preliminary injunction entered against other defendants in these consolidated cases. The district court issued a carefully crafted Order directed at the Secretary and Supervisors of Elections' specific responsibilities under Florida's election administration system. The injunction does not directly or indirectly restrain the Governor's exercise of his powers or duties in a manner that would confer standing to appeal this particular Order.

"Litigants must establish their standing not only to bring claims, but also to appeal judgments." *Wolff v. Cash 4 Titles*, 351 F.3d 1348, 1353 (11th Cir. 2003) (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)). Because

"a concrete and particularized injury" is an essential element of standing, appellants must suffer such an injury to invoke a federal appellate court's jurisdiction. *Hollingsworth v. Perry*, 570 U.S. 693, 704-05 (2013). "In the context of appellate standing, the primary meaning of the injury requirement is adverseness, which necessitates that the challenged order aggrieve the litigant. In other words, the appealed order must affect the litigant's interests in an adverse way." *United States v. Pavlenko*, 921 F.3d 1286, 1289 (11th Cir. 2019) (internal quotation marks and citation omitted); *see also In re Simpler Solar Systems, Inc.*, 599 Fed. App'x 367, 368 (11th Cir. 2015) (per curiam) ("[E]ven a named defendant may lack standing to appeal rulings that do not affect her interests."). A party who simply disagrees with an injunction entered against another party is not aggrieved by that injunction. *See Hollingsworth*, 570 U.S. at 705 (holding that private proponents of California's same-sex marriage ban lacked standing to appeal injunction against the ban, because "the District Court had not ordered them to do or refrain from doing anything").

As the district court observed, "the Secretary, not the Governor, has primary responsibility for elections and voting[.]" ECF 207 at 4. The Secretary and Supervisors of Election are the officials with immediate responsibility for administering Florida's voting and voter registration laws. *See* Fla. Stat. §§ 15.13, 97.012, 98.015. The Governor's role in Florida's elections is supervisory and indirect. As the State's chief executive, the Governor must "take care that the laws

be faithfully executed, commission all officers of the state and counties, and transact all necessary business with the officers of government." Fla. Const. art. IV, § 1(a). In that capacity, the Governor appoints and may fire the Secretary of State. Fla. Stat. § 20.10(1).[3]

The Governor has not disputed that he is a proper party to the consolidated litigation. Indeed, the Governor has acted as a proper party in seeking an advisory opinion from the Florida Supreme Court pursuant to his authority as chief executive in response to the *Jones*, *Mendez*, and *McCoy* lawsuits. *See* ECF 207 at 8-9; *see also* ECF 148-14 at 2.[4] Depending on the content of an ultimate order, the Governor may have standing to appeal a final judgment after trial, which is set to commence on April 6, 2020 in the consolidated cases. At this stage of the litigation, however, the district court issued a preliminary injunction that focuses narrowly on the registration, removal, and voting procedures administered by the Secretary and Supervisors of Election. In doing so the trial court made clear that its injunction is "entered . . . against all defendants other than the Governor[.]" ECF 207 at 53.

[3] Supervisors of Elections are directly elected in the normal course, not appointed by the Governor. Fla. Stat. § 98.015(1).

[4] The mechanism for obtaining such an advisory opinion arises under Article IV, section 1(c), of the Florida Constitution. The *Gruver* Plaintiffs maintain that the Governor does not have authority to obtain an advisory opinion under the facts of the current case and that the Florida Supreme Court does not have jurisdiction to consider the Governor's request.

Courts typically conclude that non-enjoined defendants lack standing to appeal an injunction entered against their co-defendants. For example, in *Natural Resources Defense Council v. Pena*, the National Academy of Sciences and the U.S. Department of Energy both appealed an injunction barring the Energy Department from using or relying on a report by an Academy committee. 147 F.3d 1012(D.C. Cir. 1998). The D.C. Circuit held that, although the Energy Department had standing to appeal, the Academy did not, because it was not enjoined or otherwise injured by the injunction. *Id*. at 1019; *see also Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1142 (9th Cir. 2018) (holding current school board members had standing to appeal injunctions against them, but non-enjoined co-defendants—former board members and the board itself—lacked appellate standing); *McLaughlin v. Pernsley*, 876 F.2d 308, 313 (3d Cir. 1989) (holding adoption agency lacked standing to appeal preliminary injunction that ran against municipal co-defendant but did not "directly or indirectly restrain [the adoption agency] from the performance of any act" or determine its liability). Moreover, in a voting rights case, as here, the Supreme Court recently held that the Virginia House of Delegates—one chamber of a bicameral legislature—suffered no cognizable injury from an injunction barring the Commonwealth of Virginia from holding elections under the House's then-current voting map. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953-56 (2019). The Court rejected the

suggestion "that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law's passage." *Id*. at 1953.

This precedent suggests that the Governor lacks standing to appeal the Order given its narrow application to procedures and duties in the domain of the Secretary and the Supervisors of Elections. ECF 207 at 53-55. Although the injunction affects access to elections for the Individual Plaintiffs, it does not restrict any of Governor DeSantis's gubernatorial powers or duties. Nor do the injunction's measures restraining other state and local officials interfere with the Governor's authority. Governor DeSantis remains free to fire and replace Secretary Lee. If he did so, the new appointee would remain bound by the district court's injunction. Because Florida law does not provide the Governor with authority to prevent individual Floridians from registering and voting, the Order does not appear to affect him. His only interest in an appeal of the instant injunction arises from a desire "to vindicate the constitutional validity of a generally applicable [Florida] law." *Hollingsworth*, 570 U.S. at 706. Traditionally, that has not been a sufficiently "concrete and particularized injury" to confer appellate standing. *Id*. at 704.[5]

[5] This is not to say that a Governor's general authority as the State's chief law enforcement officer is never sufficient to confer standing in a suit enjoining other state defendants. The Governor simply does not appear to have any interest that has been adversely affected by the specific terms of the preliminary injunction here.

B. Neither Defendant has standing to raise Plaintiffs' Twenty-Fourth Amendment claim on appeal.

However the Court resolves the Governor's standing as to Plaintiffs' Fourteenth Amendment claim, it is clear that neither Governor DeSantis nor Secretary Lee have standing to raise Plaintiffs' Twenty-Fourth Amendment claim on appeal.[6] The simple reason is that the district court declined to grant a preliminary injunction on Plaintiffs' Twenty-Fourth Amendment claim. ECF 207 at 43. The Order requires no action or inaction from any Defendant as to the Twenty-Fourth Amendment. The "adverseness" necessary for appellate standing is absent where Defendants seek to appeal the district court's decision *not to grant* a preliminary injunction on this claim. *Pavlenko*, 921 F.3d at 1289.

Had the district court granted a preliminary injunction on Plaintiff's Twenty-Fourth Amendment claim, the injunction entered would be very different. Under the Twenty-Fourth Amendment, it is facially unconstitutional to deny access to the franchise based on failure to pay "any poll tax or other tax" *regardless* of whether an individual has the means to pay. *See Harman v. Forssenius*, 380 U.S. 528, 529, 540 (1965) (finding unconstitutional regardless of ability to pay any scheme that

[6] The issue of this Court's jurisdiction over the Twenty-Fourth Amendment claim is related to the question of the scope of the Governor's standing. Plaintiffs raise the issue in light of this Court's independent duty to examine appellate jurisdiction "at any point in the appellate process." *Wahl v. McIver*, 773 F.2d 1169, 1173 (11th Cir. 1985).

"erects a real obstacle to voting in federal elections for those who assert their constitutional exemption from the poll tax"). Declining to reach the Twenty-Fourth Amendment issue, however, the district court issued a "preliminary injunction [that] was narrower than [that which] plaintiffs requested." ECF 244 at 1. The trial court concluded instead that "[t]he appropriate remedy, at least at this stage of the litigation, is to preliminarily enjoin the defendants from interfering with an appropriate procedure through which the plaintiffs can attempt to establish genuine inability to pay." ECF 207 at 50. In this posture, the *Plaintiffs* might have standing to cross-appeal the denial of an injunction under the Twenty-Fourth Amendment in order to obtain broader relief. But Defendants do not have standing to appeal Plaintiffs' Twenty-Fourth Amendment claim because they are not aggrieved by the *denial* of a broader injunction.

Defendants' statements in their opening merits brief may assist in resolving this issue. In their opening brief, Defendants acknowledge that the district court did not rule on the Twenty-Fourth Amendment claim. Defs.' Br. at 33. But Defendants state that they briefed the merits of this claim out of an abundance of caution because "Plaintiffs may raise it as an alternate ground for affirmance." *Id*. In response, Plaintiffs can clarify two matters: *First*, no Plaintiffs seek to advance the Twenty-Fourth Amendment as an alternate ground for affirming the Order. Plaintiffs have not cross-appealed and intend to produce additional factual evidence relevant to this

claim for adjudication at trial.[7] Unless advised otherwise by this Court, Plaintiffs will only brief the merits of the Twenty-Fourth Amendment claim in an abundance of caution should the Court reach the issue notwithstanding Plaintiffs' position that appellate jurisdiction is lacking.

Second, Plaintiffs *cannot* advance the Twenty-Fourth Amendment claim as an alternate ground for affirmance. As explained above, the injunction entered by the district court is not based on the Twenty-Fourth Amendment because it hinges on one's inability to pay—a criterion that is not relevant to a Twenty-Fourth Amendment claim. If Plaintiffs prevailed on their Twenty-Fourth Amendment claim, a different injunction based on a different legal standard would be required, potentially prohibiting Florida from conditioning voter restoration on payment of certain types of LFOs depending on whether they constitute taxes.[8] The district court

[7] *See* First Am. Compl., *Gruver et al. v. Barton et al*., 19-cv-302-RH, ECF 26 at ¶¶70-71; *see also Hillsborough Clerk Pat Frank Sues State for Taking Millions from Local Courts*, Tampa Bay Times (Oct. 22, 2018), https://www.tampabay.com/news/localgovernment/Hillsborough-Clerk-Pat-Frank-sues-state-for-taking-millions-from-local-courts_172877559/ (reporting that the Clerks of Court for Hillsborough, Santa Rosa, and Lee Counties are currently suing state officials for what they allege to be an excessive diversion of costs collected by Clerks to the State's general revenue fund). In addition to the lack of appellate jurisdiction, consideration of the Twenty-Fourth Amendment claim is premature in light of this forthcoming factual evidence.

[8] By the same token, Defendants would not have standing to appeal the district court's decision not to issue an injunction on Plaintiffs' due process or vagueness claims. These claims are not alternative grounds for affirming the district court's injunction. If Plaintiffs had prevailed on due process and vagueness, the injunction

reserved judgment on that issue and there is no appellate jurisdiction for this Court to review it at this juncture. To enable the parties to focus on the pertinent questions before this Court, Plaintiffs request that the Court clarify that the Twenty-Fourth Amendment issue raised by Defendants falls outside the scope of the instant appeal.

III. CONCLUSION

For the foregoing reasons, the *Gruver*, *Raysor*, and *Jones* Plaintiffs respectfully request that the Court dismiss Governor Ron DeSantis from this appeal and dismiss Defendants' appeal of the trial court's decision not to issue a preliminary injunction on Plaintiffs' Twenty-Fourth Amendment claim.

Dated: December 26, 2019 Respectfully submitted,

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and relief ordered would have been very different than the ability-to-pay procedures outlined under the current Order.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of FED. R. APP. P. 27(d)(2)(A) because this brief contains 2,632 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

This brief 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 brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

Dated: December 26, 2019

s/ R. Orion Danjuma
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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 December 26, 2019. 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.

Dated: December 26, 2019

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