No. 19-14551

In the United States Court of Appeals for the Eleventh Circuit

KELVIN LEON JONES, ET AL.,

Plaintiffs–Appellees,

v.

RON DESANTIS, ET AL.,

Defendants–Appellants.

APPELLANTS' MOTION FOR STAY PENDING APPEAL AND INCORPORATED MEMORANDUM OF LAW

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
NO. 4:19-CV-300-RH-MJ

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Defendants–Appellants certify that the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1:

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No publicly traded company or corporation has an interest in the outcome of this case or appeal.

Dated: February 11, 2020

s/Charles J. Cooper
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APPELLANTS' MOTION FOR STAY PENDING APPEAL AND INCORPORATED MEMORANDUM OF LAW

Pursuant to Federal Rule of Appellate Procedure 8(a)(2)(A)(ii), Appellants Governor Ron DeSantis and Secretary of State Laurel M. Lee respectfully move for this Court to stay pending appeal the district court's preliminary injunction, ordered on October 18, 2019. *See* Order Den. Mot. to Dismiss or Abstain and Granting Prelim. Inj., Doc. 207 (Oct. 18, 2019) (attached as Exhibit A).

This appeal concerns the validity of Florida's historic decision to extend the franchise to felons who have completed all terms of their sentences—including financial terms such as fines and restitution. Despite the reasonableness of the electorate's decision, and in conflict with the only appellate courts to have addressed the question, the district court held that it likely violates the Equal Protection Clause as applied to felons who cannot afford to pay the financial terms of their sentence. The district court therefore entered a preliminary injunction prohibiting the Secretary from taking any action to prevent the 17 individual Plaintiffs from registering to vote or voting.

Appellants subsequently moved to stay the district court's injunction pending appeal, and the district court denied the motion in part and granted the motion in part. It denied the motion altogether with respect to registration. But it entered a limited stay of the injunction to the extent it allows Plaintiffs to vote. The district court, however, set an expiration date of February 11 for the stay, reasoning that by

that point it would be "two weeks after the scheduled oral argument" in this Court and at that time this Court "will be far better positioned than [the district court] to decide whether the preliminary injunction's voting provisions should be allowed to take effect." Order Staying Prelim. Inj. in Part at 11, Doc. 244 (Dec. 19, 2019) (attached as Exhibit B).

Thus, absent either an extension of the stay or a decision reversing the district court, Plaintiffs will be free to vote in the upcoming Florida Presidential Preference Primary Election. As even the district court acknowledged, to the extent it was wrong about the likely merits of this case—as Appellants submit it was—permitting ineligible voters like Plaintiffs to cast a ballot will inflict irreparable harm on the State and be contrary to the public interest. *See* Doc. 244 at 11.

As discussed at argument in this case, mandatory early voting in the Presidential Preference Primary begins on March 7. *See* FLA. STAT. § 101.657(1)(d). But Plaintiffs may be able to vote before then, as the counties in which some of them reside have opted for optional early voting beginning as soon as March 2. *See id.* And while Appellants are not aware of any Plaintiffs having done so, they potentially could request vote-by-mail ballots, which may be canvassed as early as February 24. *See* FLA. STAT. § 101.68(2)(a).

For these reasons, absent a decision reversing the district court's judgment in advance of the date when Plaintiffs may begin voting, Appellants request that the Court stay the district court's injunction pending its decision on this appeal.

BACKGROUND

The factual background of Amendment 4, SB-7066, and this litigation is set forth at length in Appellants' prior briefing. *See* Br. of Appellants 5–10 (Dec. 13, 2019). Rather than repeat that background here, we focus on the district court's stay ruling and the consequences of the expiration of the district court's limited stay absent action by this Court.

District Court Stay Ruling. On December 19, 2019 the district court partially granted Appellants' motion to stay the preliminary injunction pending appeal. *See* Doc. 244. The district court did not stay the portions of its order allowing Plaintiffs to *register* to vote. *See id.* at 8–11. The district court did stay the portions of its order allowing Plaintiffs to cast a ballot and vote. *See id.* at 11. The court, however, set the stay to expire on February 11, 2020. *See id.* It reasoned that "[b]y that point . . . the Eleventh Circuit panel will have at least a tentative view of the likely outcome. That court will be far better positioned than this one to decide whether the preliminary injunction's voting provisions should be allowed to take effect." *Id.*

Consequences of Expiration of Stay. On January 28, 2020 this Court heard oral argument. At oral argument, the Court asked if the State would be obliged to let

Plaintiffs vote in the Presidential Preference Primary if the stay is allowed to expire on February 11, 2020 without any further action by the Court. *See* Oral Argument at 34:07–34:27. Appellants responded that the State would be required to allow Plaintiffs to vote under those circumstances. *See id.* Therefore, absent an extension of the stay or a ruling reversing the preliminary injunction, the State will be irreparably harmed, and the public interest will not be served, if Plaintiffs—who are not eligible to vote under Amendment 4 and SB-7066—are allowed cast a ballot in the Presidential Preference Primary. *See* Doc. 244 at 11.

Election day for the Presidential Preference Primary is March 17, 2020. *See* FLA. STAT. § 103.101(1); Fla. Div. of Elections, *Election Dates for 2020*, FLA. DEP'T OF STATE, https://bit.ly/2H3bheK (last visited Feb. 11, 2020). Voting in the Primary, however, can occur in advance of that date. Indeed, Supervisors of Elections can begin canvassing vote-by-mail ballots as early as February 24, 2020. *See* FLA. STAT. § 101.68(2)(a). While we are not aware of any Plaintiffs having requested a vote-by-mail ballot, they still could do so. In addition, several Plaintiffs, such as Kelvin Jones, reside in counties holding optional early voting days as soon as March 2, 2020. *See, e.g.*, Complaint, Doc. 1 at ¶ 10 (noting that Jones is a citizen of Hillsborough County); *Election Dates & Deadlines*, HILLSBOROUGH CTY., https://bit.ly/2OzPyiO (last visited Feb. 11, 2020). And others reside in counties where early voting begins as mandated on March 7, 2020. *See, e.g.*, Declaration of

Emory Marquis "Marq" Mitchell, Doc. 152-3 at ¶ 18 (noting that Mitchell is registered to vote in Broward County); *Early Voting Dates, Hours, and Sites*, BROWARD CTY. FLA. SUPERVISOR OF ELECTIONS, https://bit.ly/3bkn8Dk (last visited Feb. 11, 2020). Thus, absent a stay or a reversal of the preliminary injunction, the State faces the possibility of sustaining irreparable harm beginning on March 2, 2020, or even as early as February 24 if a Plaintiff were to request and cast a vote-by-mail ballot.

ARGUMENT

To secure a stay pending appeal, this Court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hand v. Scott*, 888 F.3d 1206, 1207 (11th Cir. 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). Of these factors, the first two are the "most critical." *Id.* (quoting *Nken*, 556 U.S. at 434).

These factors mirror the standards governing the merits of this Court's review of the district court's preliminary injunction order, and as we have explained extensively in our briefing and at oral argument those factors favor Appellants. *See* Br. of Appellants 19–52; Appellants' Reply Br. 3–33 (Jan. 22, 2020). We

incorporate those arguments by reference here, and briefly reiterate several key points.

Likelihood of Success on the Merits. Appellants are likely to succeed on the merits of this appeal for several reasons.

First, because Plaintiffs have not even attempted to show intentional discrimination, their equal-protection claim fails to get out of the starting gate. Indeed, this Court expressly held in *Hand* that "a reenfranchisement scheme could violate equal protection" *only* "if it had *both* the purpose *and* effect of invidious discrimination." 888 F.3d at 1207 (emphasis added). Given the absence of any showing of intentional discrimination, Plaintiffs' claims must fail.

Second, it is well-established that felons forfeit the right to vote upon conviction and, therefore, that States may deny felons the franchise *permanently*. *See Richardson v. Ramirez*, 418 U.S. 24 (1974); *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc). Accordingly, because this case does not involve the fundamental right to vote, even if Plaintiffs' equal-protection claims were cognizable they would be subject only to rational-basis review. The circuit courts that have addressed the question—including the pre-split Fifth Circuit, in a decision that binds this Court—therefore have held that rational-basis review applies to equal-protection challenges to felon disenfranchisement and reenfranchisement schemes. *See Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010); *Harvey v.*

Brewer, 605 F.3d 1067, 1079 (9th Cir. 2010) (O'Connor, J.); *Hayden v. Paterson*, 594 F.3d 150, 170 (2d Cir. 2010); *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983); *Shepherd v. Trevino*, 575 F.2d 1110, 1114–15 (5th Cir. 1978).

Third, rational-basis review applies for the additional, independent reason that Amendment 4 and SB-7066 do not disenfranchise *anyone*, but instead only *reenfranchise* felons who complete all terms of their sentences. As the Supreme Court held in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), rational-basis review applies when the "distinction challenged" in voting legislation is "a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise." *Id*. at 657.

Fourth, the People of Florida drew not only *a* rational line but perhaps *the most* rational line in establishing completion of punishment in full as the qualifying condition for felons regaining eligibility to vote. Both the Washington Supreme Court and the Sixth Circuit have held that this is a rational line to draw in challenges materially identical to this one, *see Bredesen*, 624 F.3d at 747; *Madison v. State*, 163 P.3d 757, 772 (Wash. 2007) (en banc), and no appellate court has held to the contrary.

Fifth, even if Plaintiffs were correct on the merits—and they are not—they *still* would not be entitled to an injunction allowing them to vote. That is because "when a statute is defective because of its failure to extend to some group a constitutionally

required benefit," the court must decide whether to "declare it a nullity or extend the benefit to include those who are aggrieved by exclusion." *United States v. Booker*, 543 U.S. 220, 247 (2005) (quotation marks omitted). And here, under established principles of Florida severability law, the Court would be required to declare the benefit of felon reenfranchisement a nullity. For one, the district court's injunction effectively wrote additional language into Amendment 4 and SB-7066 and therefore amounted to improper "judicial legislation" in violation of Florida's "strict separation of powers doctrine." *Schmitt v. State*, 590 So. 2d 404, 414 (Fla. 1991). For another, the district court's injunction frustrates the "chief purpose" of Amendment 4, which is to extend the franchise to felons *only* "upon completion of all terms of their sentence." *Advisory Op. to the Att'y Gen. re: Voting Restoration Amendment*, 215 So. 3d 1202, 1207–08 (Fla. 2017). The district court's injunction frustrates this chief purpose by requiring the State to allow some felons to vote who *have not* completed all terms of their sentence. It therefore cannot be said that the People would have adopted Amendment 4—and the Legislature enacted SB-7066 to implement that Amendment—subject to the condition established by the district court. *See State v. Catalano*, 104 So. 3d 1069, 1080–81 (Fla. 2012).

Remaining Factors. As explained in our briefing, Appellants' Reply Br. 33, the remaining factors flow from the likelihood of success determination. Indeed, even the district court agreed, reasoning that "[i]f a plaintiff is allowed to vote but it

turns out the plaintiff is ineligible, the State will suffer irreparable harm, and the public interest will not be served. The public interest in the integrity of elections outstrips . . . the interest of an individual plaintiff in voting." Doc. 244 at 11; *see also id.* at 10 ("The public interest lies primarily in honoring the fundamental principle that those who are eligible should be allowed to vote and those who are ineligible should not be allowed to vote."); Doc. 207 at 52 ("The public interest lies in resolving this issue correctly and implementing the proper ruling without delay."). If the Court agrees that Appellants are likely to succeed on the merits, it therefore follows that the remaining stay factors counsel against allowing Plaintiffs to vote despite their ineligibility to do so under State law.

CONCLUSION

For the foregoing reasons, if this Court has not reversed the district court by the time Plaintiffs may begin voting, this Court should stay the district court's preliminary injunction pending appeal.

Dated: February 11, 2020

Respectfully submitted,

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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 2,113 words, excluding the accompanying documents authorized by FED. R. APP. P. 27(a)(2)(B).

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

Dated: February 11, 2020

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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 February 11, 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.

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