No. 20-12003

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.

DEFENDANTS-APPELLANTS' REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

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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CERTIFICATE OF INTERESTED PERSONS

Pursuant to FED. R. APP. P. 26.1 and 11th Cir. Rule 26.1-2(c), I certify that the Certificates of Interested Persons contained in Defendants-Appellants' Motion for Stay Pending Appeal and Incorporated Memorandum of Law is, to the best of my knowledge, complete.

Dated: June 29, 2020

s/ Charles J. Cooper
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DEFENDANT-APPELLANTS' REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

At issue in this appeal is the constitutionality of the Florida electorate's decision to condition felon reenfranchisement on the completion of *all* terms of criminal sentences—including financial terms. This important question is pending before the Court on an expedited schedule, as the August Primaries and November General Elections are quickly approaching. The district court's permanent injunction conflicts not only with binding Circuit and Supreme Court precedent, but also with the only appellate courts to have addressed this issue. This erroneous judgment extends the right to vote to up to a million felons who are ineligible under Florida law. Because allowing ineligible voters to cast a ballot would inflict irreparable harm on the State and all Floridians, this court should stay the district court's injunction pending its resolution of this appeal.

ARGUMENT

I. Appellants Are Likely To Succeed On The Merits.

A. Amendment 4 And SB-7066 Do Not Violate The Fourteenth Amendment.

Plaintiffs misinterpret binding case law in asserting that both the panel in *Jones v. Governor of Florida*, 950 F.3d 795 (11th Cir. 2020) (per curiam), and the district court properly applied Supreme Court and Circuit precedent in upholding Plaintiffs' equal-protection claim.

1. Plaintiffs first contend that *Jones*'s equal-protection holding is binding. Pls.-Appellees' Resp. in Opp'n to Mot. to Stay Pending Appeal 4 (June 26, 2020) ("Resp."). But *Jones*'s conclusion contravened binding Supreme Court and Circuit decisions. *See* Defs.-Appellants' Mot. for Stay Pending Appeal and Incorporated Mem. of Law 6–13 (June 17, 2020) ("Mot."). A panel of this Court is bound as a matter of precedent, not by *Jones*, but by the earlier binding decisions it contravened. *See Morrison v. Amway Corp.*, 323 F.3d 920, 929 (11th Cir. 2003). And because *Jones* clearly erred by contravening binding precedent—working a manifest injustice by wrongly enfranchising ineligible voters—*Jones* does not control as law-of-the-case. *See United States v. Williams*, 728 F.2d 1402, 1405–06 (11th Cir. 1984).[1]

2. Plaintiffs also parrot *Jones*'s baseless assertion that the Supreme Court has held that discriminatory intent is not required for wealth discrimination cases. Resp. 5–6 (citing *M.L.B. v. S.L.J.*, 519 U.S. 102, 126–27 (1996)). *M.L.B.* held only that the intent requirement in *Washington v. Davis*, 426 U.S. 229, 240 (1976), does not apply in wealth-discrimination cases in which a wealth-neutral law's disadvantages "apply to *all* indigents and *do not reach anyone outside that class*." 519 U.S. at 127 (emphases added). But SB-7066's payment requirements do not fall

[1] We have petitioned the Court for initial en banc review on the ground, among others, that a panel may not consider itself free to correct the *Jones* panel's errors.

under this exception, as Plaintiffs themselves emphasized that a felon could even be "a millionaire" yet unable to repay financial penalties. Doc. 239 at 54:2–10.

To get around this problem, *Jones* invented the concept of "truly indigent" and defined it as "those genuinely unable to meet their financial obligations to pay fees and fines, and make restitution to the victims of their crimes." 950 F.3d at 813. But this redefinition of "indigency"—untied to any absolute level of poverty, *contra United States v. Shepherd*, 922 F.3d 753, 758 (6th Cir. 2019)—would nullify *M.L.B.*'s distinction between the general purposeful-intent requirement and those rare cases involving disadvantages that apply solely to indigents. *See* 519 U.S. at 127.

Plaintiffs argue that the holding in *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018)—that "a reenfranchisement scheme could violate equal protection if it had *both* the purpose and effect of invidious discrimination," *id.* at 1207—is inapposite because *Hand* is not a wealth discrimination case. Resp. 6 n.3. But nothing in *Hand* suggests that it was limited to its facts. Rather, the Court applied the purposeful-discrimination requirement, correctly, as a general principle of equal-protection law. *See* 888 F.3d at 1209–10; *see also Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (applying the requirement in a sex discrimination case); *Joel v. City of Orlando*, 232 F.3d 1353, 1359 (11th Cir. 2000) (wealth discrimination).

Thus, the district court's and the *Jones* panel's decisions sustaining Plaintiffs' wealth discrimination claim contravened binding precedent, for Plaintiffs have not shown that SB-7066 was adopted "because of, not merely in spite of," any "adverse effects" upon felons unable to complete the financial terms of their sentences. *See Feeney*, 442 U.S. at 279 (quotation omitted).[2]

3. Plaintiffs next insist that *Jones* and the district court correctly applied heightened scrutiny to their equal-protection claim. First, they contend that nothing in *Shepherd v. Trevino*, 575 F.2d 1110 (5th Cir. 1978) "indicates rights restoration laws are *immune* from heightened scrutiny under the Equal Protection Clause." Resp. 7. True, but that is beside the point. Obviously, if a reenfranchisement law discriminated on the basis of race or sex, heightened scrutiny would apply. But apart from such invidious discrimination, *Shepherd* holds categorically that rational-basis review applies to "selective . . . reenfranchisement of convicted felons." 575 F.2d at 1114–15.

Plaintiffs also wrongly assert that *Katzenbach v. Morgan*, 384 U.S. 641 (1966) is inapplicable because it supposedly rested on Congress's powers under Section 5 of the Fourteenth Amendment. Resp. 7–8. But the Supreme Court, relying on

[2] Plaintiffs wrongly assert that the district court's "finding" regarding discriminatory intent arose from "detailed factual findings." Resp. 6 n.4. Setting aside that the district court lacked jurisdiction to rule on the merits in denying the stay motion, *see* Mot. 9, the court's order cited zero trial evidence to support its new finding.

Katzenbach, made clear that its principles also apply to State laws in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 39 (1973).

Moreover, Plaintiffs continue to propagate the myth of a unified "*Griffin-Bearden* line" of wealth-discrimination cases. *See* Resp. 8. But these are separate lines of cases, and neither line supports them. Mot. 12–13.

4. Plaintiffs' contention that Florida's reenfranchisement scheme does not pass rational-basis review is equally unfounded. Plaintiffs first rely on *Jones*'s conclusion that rational-basis review can proceed on an as-applied basis. Resp. 8. But this conception of rational-basis review eviscerates the standard, which requires courts to consider whether "the legislative *classification*" at issue is rational. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (emphasis added); *see also In re Wood*, 866 F.2d 1367, 1370 (11th Cir. 1989).

Second, Plaintiffs argue that the requirement that felons complete their financial terms of sentence is irrational because the district court found that the mine-run of felons are unable to pay the financial terms of their sentence. Resp. 8–9. But this is a non sequitur: The State has a compelling interest in ensuring that *all felons* complete *all terms* of sentence. Plaintiffs, echoing the *Jones* panel, contend that this interest is illegitimate because it "punish[es]" certain felons for their poverty. Resp. 9–10. But Amendment 4 and SB-7066 punish no one: A felon loses his right to vote as punishment for *committing a felony*, not for being unable to satisfy the

financial terms imposed as part of that sentence. The financial terms, like any other terms of a sentence, are simply part of the debt, as determined by the court, that the felon owes to society. That many, even most, felons are unable to complete their sentences does not undermine the rationality of the State's choice to nevertheless demand completion by all felons.[3]

Third, Plaintiffs assert that the State's interest in the payment of financial terms of sentence is undermined by the first-dollar policy. Resp. 10–11. But Appellants have already demonstrated that the policy is entirely consistent with the State's demand that every felon pay his debt to society to rejoin the electorate and actually *favors* the felon. *See* Mot. 16–17. Thus, Amendment 4 and SB-7066 easily pass rational-basis review.

5. Finally, Plaintiffs wrongly assert that the district court's advisory-opinion remedy was warranted by the State's inaction and did not exceed its judicial authority. Resp. 11–12. First, the State abided by the district court's preliminary injunction, which applied only to seventeen Plaintiffs. And Plaintiffs can cite no authority that the preliminary injunction obligated the State to voluntarily implement a new system while simultaneously challenging the court's order. Second, the

[3] Plaintiffs have not abandoned the argument that SB-7066 also incentivizes collection. The State has an interest in encouraging payment from felons, *see Johnson v. Bredesen*, 624 F.3d 742, 748 (6th Cir. 2010), which provides yet another rational basis for the law. Nor have Appellants ever conceded that SB-7066's rationality turns on the proportion of felons able to regain voting eligibility.

district court's remedy—imposing an intricate advisory-opinion process—exceeds its judicial authority to review state statutes, which does not "extend . . . to prescribing *new* rules of decision on the state's behalf." *Ga. Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1288 (11th Cir. 2019) (Tjoflat, J., dissenting). Even if Amendment 4 and SB-7066 were unconstitutional (and they are not) the district court should have enjoined the State's officers from enforcing them and left it to the State to devise a suitable remedy. *See Califano v. Westcott*, 443 U.S. 76, 95 (1979) (Powell, J., concurring in part and dissenting in part).

B. Amendment 4 And SB-7066 Do Not Violate The Twenty-Fourth Amendment.

Amendment 4 and SB-7066 do not impose an unconstitutional tax under the Twenty-Fourth Amendment for two main reasons: (1) the Twenty-Fourth Amendment does not apply to reenfranchisement; and (2) financial penalties imposed as a part of a *criminal sentence* are not taxes.

Three circuit courts have concluded, correctly, that disenfranchised felons do *not* have a Twenty-Fourth Amendment claim because they, by definition, do not have a fundamental right to vote, and reenfranchisement statutes only *restore* voting rights. *See Johnson v. Bredesen*, 624 F.3d 742, 751 (6th Cir. 2010); *Harvey v. Brewer*, 605 F.3d 1067, 1080 (9th Cir. 2010) (O'Connor, J.); *Howard v. Gilmore*, 2000 WL 203984, at *2 (4th Cir. Feb. 23, 2000). Plaintiffs' argument ignores the dispositive fact that Amendment 4 and SB-7066 do not *disenfranchise* anyone—

Florida's "indisputably constitutional disenfranchisement statute accomplished that" at the moment of conviction. *Bredesen*, 624 F.3d at 751. Plaintiffs, unable to refute this simple logic, argue that the uniform decisions of other circuits should be ignored because they "contained scant analysis." Resp. 13 n.14. But *Bredesen's* logic is as simple as it is irrefutable, and few words are necessary to express it.

Even if the Twenty-Fourth Amendment had some bearing, Plaintiffs have not shown how court fees and costs could plausibly constitute unconstitutional "other taxes" when they, like every financial term of sentence, were imposed *as punishment for the conviction of a crime*.[4] Indeed, the Supreme Court explained in *NFIB v. Sebelius* that "[i]n distinguishing penalties from taxes . . . if the concept of penalty means anything, it means punishment for an unlawful act or omission." 567 U.S. 519, 567 (2012) (quotation omitted). And the court fees and costs are included in a criminal sentence *as punishment* for the individual's felony. While *Bredesen* did not specifically address fees and costs, the district court's decision to treat these obligations as conceptually different from other financial terms of a criminal sentence contravenes the reasoning adopted by the Sixth Circuit: that conditioning reenfranchisement on the completion of court-ordered, punitive obligations did not

[4] Defendants who plead no contest and/or have adjudication withheld, like those who are convicted, are required to pay court fees and costs because they are subject to punishment by the State. *See* FLA. STAT. § 948.01; § 960.291(3). Defendants who are acquitted, by contrast, do not pay fees and costs. *See* FLA. STAT. § 939.06. This reinforces that fees and costs are tied to culpability and are punitive.

violate the Twenty-Fourth Amendment because they are "legal financial obligations Plaintiffs themselves incurred." *Bredesen*, 624 F.3d at 751.

C. Plaintiffs' Remaining Claims Are Irrelevant.

Appellants did not discuss Plaintiffs' claims regarding Florida's voter registration form because the State is not seeking to stay the district court's injunction with regards to that form.

However, Plaintiffs wrongly assert that Appellants did not demonstrate a likelihood of success in challenging the district court's remedial injunction. Resp. 16. The district court did not rule on Plaintiffs due-process claim, but merely noted that the procedures it ordered would likewise "satisfy due process." Doc. 420 at 98. And Appellants argued that the ordered procedures depend on the district court's erroneous wealth-discrimination analysis. Mot. 13–14. To the extent there is a concern that felons will be deterred from registering because they do not know if they owe *anything*, that fear (1) is speculative; and (2) would at most require enjoining the State from referring for prosecution any felons who register to vote with the mistaken belief that they do not have outstanding financial obligations.

II. The Remaining Stay Factors Favor The State.

Plaintiffs' discussion of the remaining factors reinforces Appellants' argument that the propriety of a stay in this case ultimately "turns on the likelihood of success on the merits." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d

237, 252 (6th Cir. 2006) (cleaned up). Once it is established that Plaintiffs are unlikely to succeed on the merits, it follows that every one of the "hundreds of thousands" of felons that Plaintiffs contend will be reenfranchised by the injunction likely is ineligible to vote. *See* Resp. 19. Plaintiffs' response further misconstrues several aspects of the remaining factors.

First, Plaintiffs contend Appellants cannot claim irreparable harm regarding the integrity of the upcoming August Primary and November General elections if the district court's injunction remains in place because the State did not remove any felons from the voter rolls with unpaid financial obligations before administering several elections since last fall. Resp. 17–18. But there was no need to remove those felons, because even registered felons who *know* they have outstanding criminal penalties and therefore are ineligible under Amendment 4 and SB-7066 *should not* vote. *See* Doc. 244 at 10–11. And if felons nevertheless have voted illegally, that does not nullify the State's interest in stopping such activity in the future. Further, given the State's paramount interest in preventing unlawful *voting* it reasonably has not affirmatively sought to correct improper *registration*, particularly with these lawsuits pending and the issuance of a preliminary injunction. Indeed, it is inconceivable that Plaintiffs truly believe that the State's equitable position would be strengthened had it actively sought to remove putative class members from the voting rolls after these lawsuits were filed.

Second, Plaintiffs argue that a stay risks confusion about voter eligibility because the district court's preliminary injunction and the *Jones* decision "created settled expectations among voters regarding the state of the law." Resp. 20. This makes no sense. Those decisions, which were preliminary and only applied to the *seventeen named Plaintiffs*, should not have given felons in the class or subclass—nor organizational Plaintiffs or election officials—any expectations regarding felons' eligibility to register or vote generally. Indeed, the district court's order on the merits—the subject of this appeal—is the *only* order that has significantly changed the status quo with regards to felon eligibility under Florida's reenfranchisement scheme. Thus, contrary to Plaintiffs' assertions, it should be stayed to minimize voter confusion.

The State and all Floridians will be irreparably harmed if the State is correct on the merits and *hundreds of thousands* of ineligible voters take part in the upcoming elections.

CONCLUSION

This Court should stay the district court's injunction pending appeal.

Dated: June 29, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-volume limitations of FED. R. APP. P. 27(d)(2)(C) because this motion contains 2,575 words, excluding 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: June 29, 2020

s/ Charles J. Cooper
Charles J. Cooper
Counsel for Defendants-Appellants

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 29, 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.

Dated: June 29, 2020

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