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' RESPONSE IN OPPOSITION TO PLAINTIFFS-APPELLEES' MOTION FOR CLARIFICATION OF ORDER GRANTING A STAY

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

CHARLES J. COOPER
PETER A. PATTERSON
STEVEN J. LINDSAY
SHELBY L. BAIRD
COOPER & KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, DC 20036
Telephone: (202) 220-9660
Fax: (202) 220-9601
ccooper@cooperkirk.com
ppatterson@cooperkirk.com
slindsay@cooperkirk.com
sbaird@cooperkirk.com

JOSEPH W. JACQUOT
NICHOLAS A. PRIMROSE
JOSHUA E. PRATT
EXECUTIVE OFFICE OF THE GOVERNOR
400 S. Monroe St., PL-5
Tallahassee, FL 32399
Telephone: (850) 717-9310
Fax: (850) 488-9810
joe.jacquot
@eog.myflorida.com
nicholas.primrose
@eog.myflorida.com
joshua.pratt
@eog.myflorida.com

BRADLEY R. MCVAY
ASHLEY E. DAVIS
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building, Suite 100
500 South Bronough St.
Tallahassee, FL 32399
Telephone: (850) 245-6536
Fax: (850) 245-6127
brad.mcvay
@dos.myflorida.com
ashley.davis
@dos.myflorida.com

Counsel for Defendants-Appellants

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, I certify that Defendants-Appellants' Amended Certificate of Interested Persons and Corporate Disclosure Statement filed on July 14, 2020 is to the best of my knowledge, complete and correct except for the following additional interested persons or entities:

1. Bangert, Ryan, *Counsel for Amicus Curiae*
2. Becker, Sue, *Counsel for Amicus Curiae*
3. Begakis, Steven C., *Counsel for Amicus Curiae*
4. Common Cause, *Amicus Curiae*
5. Consovoy, William S., *Counsel for Amicus Curiae*
6. Fitch, Lynn, Attorney General of Mississippi, *Counsel for Amicus Curiae*
7. Fram, Robert D., *Counsel for Amicus Curiae*
8. Harris, Jeffrey M., *Counsel for Amicus Curiae*
9. Hawkins, Kyle, *Counsel for Amicus Curiae*
10. Honest Elections Project, *Amicus Curiae*
11. LaFond, Jason, *Counsel for Amicus Curiae*
12. Mateer, Jeffery, *Counsel for Amicus Curiae*
13. Norris, Cameron T., *Counsel for Amicus Curiae*
14. Ramirez, Diane, *Counsel for Amicus Curiae*
15. State of Mississippi, *Amicus Curiae*

16. The Public Interest Legal Foundation, *Amicus Curiae*

17. Thompson, William, *Counsel for Amicus Curiae*

Dated: July 27, 2020

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

INTRODUCTION

Plaintiffs' so-called "Motion for Clarification" repeats the same meritless argument that has already been considered and rejected *twice*—once by this Court when it stayed the district court's permanent injunction, and once by the Supreme Court when it denied Plaintiffs' application to vacate the stay. Apparently hoping that the third time is the charm, Plaintiffs now attempt to peel back the stay under the pretense that the Court's order is unclear and in need of "clarification." In fact, however, Plaintiffs simply disagree with the *substance* of that order. Indeed, while Plaintiffs caption their filing a "Motion for Clarification," it essentially is a thinly veiled motion for reconsideration. It should be swiftly denied.

BACKGROUND

I. The District Court's Judgment and the State's Stay Motion

On May 26, 2020—shortly before the registration deadline for Florida's August primary election—the district court held that Florida's recent constitutional amendment ("Amendment 4") automatically reenfranchising felons who have completed "all terms of sentence," Fla. Const. art. VI, § 4(a), and its implementing legislation ("SB-7066"), are unconstitutional insofar as they: (1) restrict felons from voting who are otherwise eligible but "genuinely unable to pay the required amount" of the financial terms of their sentences; (2) require felons to pay "amounts that are unknown and cannot be determined with diligence"; and (3) require felons "to pay

[court] fees and costs as a condition of voting." Judgment at 3, Doc. 421 (May 26, 2020); *see also* Op. on the Merits at 118, Doc. 420 (May 24, 2020). In doing so, the district court, following the lead of a prior three-judge panel decision upholding the district court's earlier preliminary injunction, *see Jones v. Governor of Florida*, 950 F.3d 795 (11th Cir. 2020) (per curiam), deviated from the otherwise unanimous consensus of federal appellate courts that had rejected similar challenges against state reenfranchisement schemes, *see Johnson v. Bredesen*, 624 F.3d 742, 746, 751 (6th Cir. 2010); *Harvey v. Brewer*, 605 F.3d 1067, 1079–80 (9th Cir. 2010) (O'Connor, J.); *Howard v. Gilmore*, No. 99-2285, 2000 WL 203984, at *2 (4th Cir. Feb. 23, 2000); *see also Madison v. State*, 163 P.3d 757, 768–69 (Wash. 2007) (en banc).

The district court's injunction hinged on three legal conclusions. First, that conditioning reenfranchisement on a felon completing the financial terms of his sentence is wealth discrimination prohibited by the Equal Protection Clause, as applied to those unable to pay those terms. *See* Doc. 420 at 35–72. Second, that court costs and fees imposed as part of a criminal sentence are "tax[es]" under the Twenty-Fourth Amendment and that felons therefore cannot be required to pay those costs and fees as a condition on their reenfranchisement. *See id.* at 72–80. And third, that the voter registration form mandated by SB-7066 violated the National Voter Registration Act ("NVRA"). *See id.* at 101–07.

To remedy what it perceived to be wealth discrimination violative of the Equal Protection Clause, the district court rewrote the Florida Secretary of State's advisory-opinion process to perform functions it was never meant to perform, using a form and procedural prescriptions of the district court's devising. In particular, it replaced the reenfranchisement scheme set out in Florida law with procedures requiring the Division of Elections, when requested by felons, to issue advisory opinions that detail the precise amount outstanding on the felon's sentence and that provide a factual basis for any finding that the felon is able to pay, and it mandated that failure of the Division of Elections to respond to the advisory opinion request within 21 days would result in an implicit affirmation of the felon's eligibility to vote. *See id.* at 119–20. As for the NVRA violation, the district court ordered that the State and supervisors of elections "must not use a form based on [SB-7066]." *Id.* at 123.

Three days later, on May 29, 2020, the State noticed its appeal and moved the district court to stay its judgment pending appeal. *See* Governor's & Secretary of State's Notice of Appeal, Doc. 422 (May 29, 2020); Governor & Secretary of State's Mot. for a Stay Pending Appeal & Incorporated Mem. of Law, Doc. 423 (May 29, 2020). The district court denied the stay motion on June 14, *see* Order Denying a Stay, Doc. 431 (June 14, 2020), and the State moved for a stay with this Court on

June 17, *see* Defs.-Appellants' Mot. for Stay Pending Appeal & Incorporated Mem. of Law (June 17, 2020).

The State broadly requested from this Court a "stay pending appeal of the district court's order awarding declaratory and permanent injunctive relief." *Id.* at 1; *see also id.* at 21 (requesting that the Court "stay the district court's order of a permanent injunction pending appeal"). That motion argued that the district court had unjustifiably "mandated an alternate process by which the Secretary of State and Supervisors of Elections must determine the eligibility of felons to vote." *Id.* at 1. The State further explained that it was likely to succeed on the merits of its appeal because neither Amendment 4 nor SB-7066 constituted wealth discrimination in violation of the Fourteenth Amendment, *see id.* at 6–17, and because requiring felons to pay court fees and costs as part of their sentences did not run afoul of the Twenty-Fourth Amendment, *see id.* at 17–19.

The State's stay motion also took direct aim at the district court's "intrusive remedy," which the State argued "exceeded the district court's authority" because " 'the decision to drastically alter [Florida]'s election procedures must rest with the [Florida] Secretary of State and other elected officials, not the courts.' " *Id.* at 13 (quoting *Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020) (per curiam)). The State further noted that any need for the advisory-opinion "procedures—as well as the injunction against applying SB-7066 and Amendment 4 to felons unless the State

can tell them precisely what they owe—is parasitic on the district court's erroneous wealth-discrimination analysis." *Id.*

Plaintiffs opposed the State's stay motion. As relevant here, Plaintiffs contended that a stay should not issue because the State had shown no likelihood of success on the merits because it did not

> address the district court's holdings on Plaintiffs-Appellees' other claims, including that [SB-7066] as implemented by the State was void for vagueness; that the State's implementation 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.

Pls.-Appellees' Resp. in Opp'n to Mot. To Stay Pending Appeal at 15–16 (June 26, 2020) ("Stay Opp."). Plaintiffs further argued that the State could not "obtain a stay pending appeal without demonstrating likelihood of success on the merits of these separate grounds supporting the district court's remedial injunction" and because the State did not explicitly address them, it had waived them. *Id.* at 16.

In reply, the State proffered two responses to this argument: First, with respect to the district court's NVRA holding, *see* Doc. 420 at 101–07, the State conceded that it "did not discuss Plaintiffs' claims regarding Florida's voter registration form because the State [wa]s not seeking to stay the district court's injunction with regards to that form," Defs.-Appellants' Reply in Support of Mot. For Stay Pending Appeal at 9 (June 29, 2020) ("Stay Reply"). However, the State vigorously disagreed with Plaintiffs' argument that the State had somehow failed to challenge some due

process "holding" of the district court. The State explained that the district court "did not rule on Plaintiffs due process claim, but merely noted that the procedures it ordered would likewise 'satisfy due process.' " *Id.* (quoting Doc. 420 at 98). The State further reiterated that its stay motion "argued that the ordered procedures depend on the district court's erroneous wealth-discrimination analysis" and "[t]o 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." *Id.*

On July 1, 2020, the full court of appeals granted the State's petition to consider the appeal en banc in the first instance. *See* Order at 2 (July 1, 2020) ("Order"). In the same order, the Court ordered that the State's "motion to stay the permanent injunction pending appeal [was] GRANTED." *Id*.

II. Plaintiffs' Application To Vacate the Stay

On July 8, 2020, Plaintiffs filed with Justice Clarence Thomas, in his capacity as Circuit Justice for the Eleventh Circuit, an application requesting vacatur of this Court's July 1 stay order. *See* Appl. To Vacate the Eleventh Circuit's Stay, *Raysor v. DeSantis*, No. 19A1071 (U.S. July 8, 2020) ("Vacatur Appl."). In attempting to demonstrate that this Court's stay order was demonstrably erroneous, Plaintiffs

again argued that the State "did not challenge the district court's procedural due process or vagueness determinations in its stay motion." *Id.* at 43. In fact, in alleging that this Court had stayed a portion of the district court's remedy that the State never sought to suspend, Plaintiffs characterized the Court's order as "an exemplar of a court of appeals being demonstrably wrong." *Id.* at 44.

Once again, in responding to the application, the State made clear that it had "unambiguously sought to stay the district court's remedial order with regards to the advisory opinion process." Opp'n to Appl. To Vacate the En Banc Eleventh Circuit's Stay at 48, *Raysor, et al. v. DeSantis, et al.*, No. 19A1071 (U.S. July 14, 2020) ("Appl. Opp."). Indeed, the State reasserted that it argued in its stay motion and reply that the advisory-opinion process ordered by the district court depended on the district court's erroneous wealth discrimination analysis, not a standalone remedy derived from the district court's "muddled" due process musings. *Id.*

The State further explained that it "only briefly addressed [Plaintiffs'] due process claims because, while the district court stated in a cryptic portion of its opinion that [Plaintiffs'] arguments 'carry considerable force,' it did not rule on the merits of the claims." *Id.* (quoting Doc. 420 at 96). Rather, as the State explained to Justice Thomas, "the [district] court noted that the advisory-opinion procedure and immunity from criminal prosecution that it ordered for Plaintiffs' wealth-discrimination claim would likewise 'satisfy due process and remedy the vagueness

attending application of the criminal statutes.' " *Id.* at 48–49 (quoting Doc. 420 at 98–99). Therefore, "[a] ruling on Plaintiffs' due-process claim was not necessary because '[e]ven in the absence of a ruling [on those claims], the same requirements would be included for the constitutional violation addressed' in the court's wealth-discrimination analysis." *Id.* at 49 (quoting Doc. 420 at 99). Moreover, the lack of any definitive due process holding was apparent because "[a]lthough the district court acknowledged general vagueness principles, it did not explain their application to Amendment 4 or SB-7066," and although "[t]he court also cited the tripartite framework governing procedural due process claims" set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), "it did not attempt to analyze the *Mathews* factors." Appl. Opp. at 49. The State then went on to explain why Plaintiffs' procedural due process and vagueness claims were meritless in any event. *See id*. at 49–53.

Meanwhile, with respect to the district court's NVRA holding, the State repeated the point from its reply brief that it "declined to seek a stay of the district court's injunction with regards to the voter registration form which provided the basis for the court's NVRA holding, [and] so that facet of the injunction remains in place." *Id.* at 48 n.4 (citing Stay Reply at 9).

Justice Thomas ultimately referred Plaintiffs' application to the full Supreme Court, which denied it one day before Plaintiffs filed their present motion. *See*

Raysor v. DeSantis, No. 19A1071, — S. Ct. —, 2020 WL 4006868 (U.S. July 16, 2020).

ARGUMENT

Plaintiffs' motion purports to seek clarity on what already is pellucidly clear. It asks this Court to clarify that the Court's July 1 stay order "does not (a) extend to the district court's remedy for the violation of the [NVRA] . . . or (b) relieve the State of its due process obligations for the violations the State did not move to stay." Mot. for Clarification of Order Granting a Stay at 5 (July 17, 2020) ("Clarification Mot."). But the facts recounted above speak for themselves: The Court's stay order clearly does not extend to the district court's NVRA holding, which the State expressly did not challenge, and the order clearly stayed the district court's makeshift advisory-opinion process, which the State did expressly challenge.

Plaintiffs obviously do not like that this Court stayed the district court's advisory-opinion injunction. In fact, they dislike the Court's stay so much that they sought vacatur, unsuccessfully, from the Supreme Court—a remedy reserved only for "exceptional circumstances." *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308 (1973) (Marshall, J., in chambers). But however much Plaintiffs may be dissatisfied with this Court's decision to grant the State's stay motion in full, that dissatisfaction in no way justifies their present motion. It lacks any merit and should be denied.

I. The Court Does Not Need To Clarify the Stay's Effect on the District Court's NVRA Remedy.

First, Plaintiffs purport to seek "clarification" that the Court's July 1 stay order does not extend to the district court's order "prohibiting use of the July 2019 Voter Registration Form." Clarification Mot. at 13. Given the State's repeated admonitions in its filings before this Court and the Supreme Court that it accepts the district court's judgment as to the NVRA, one is left only to wonder why Plaintiffs adamantly refuse to take yes for an answer.

Plaintiffs' entire theory for seeking clarification of the NVRA remedy rests on a blatant mischaracterization of the State's actions since the district court issued its judgment on May 26. Plaintiffs claim that the State has "created unnecessary confusion regarding the status of the district court's NVRA order," *id.* at 14, pointing only to a July 6, 2020, email from Maria Matthews, Director of the Division of Elections, to the county supervisors of elections. In that email, Director Matthews simply instructed the supervisors to "continue to *accept* from registrants both versions of the statewide voter registration application form," including the form that the district court had found to violate the NVRA. Ex. A to Mot. for Clarification at 1, Email from Maria Matthews to Ron Labasky, et al., (July 6, 2020) (emphasis added).

Plaintiffs make much hay out of this sentence, effectively accusing the State of encouraging—or, at least, acceding to—violations of the district court's NVRA injunction. But even reading the July 6 email in isolation, one can readily recognize

the message Director Matthews was telegraphing: supervisors of elections should not reject a voter's completed registration application merely because the voter used a form that the district court held invalid under the NVRA. Even with the district court's NVRA injunction in place, it was inevitable that some voters acting before the court's decision in late May had obtained a copy of the 2019 form. Reading the district court's NVRA injunction to prohibit the State from even accepting those forms would operate only to *penalize* voters who acted in reliance on SB-7066, as it was implemented before the district court's judgment. Surely, Plaintiffs cannot reasonably contend that this voter-friendly interpretation of the district court's NVRA holding somehow runs afoul of the district court's remedy.

But then what about Director Matthews's July 6 email do Plaintiffs find so objectionable or confusing? Apparently recognizing that it would make no sense for Director Matthews to instruct supervisors *not* to accept registrations on the now-invalid form, Plaintiffs' real gripe is that the email "does not make clear that [supervisors] should otherwise not affirmatively use that Form." Clarification Mot. at 14. Plaintiffs infer from this silence that the State has implicitly told supervisors that they "may continue using the unlawful 2019 registration form." *Id.*

Even putting aside whether Plaintiffs' inference from silence is defensible, their "confusion" argument totally collapses once Director Matthews's July 6 email is put in context. Most importantly, Plaintiffs neglect to cite or discuss either (1) the

Secretary's notice of compliance that she filed with the district court on June 2, 2020, *see* Secretary of State's Notice of Compliance, Doc. 426 (June, 2, 2020) (attached as Exhibit A), or (2) a May 27, 2020, email from Director Matthews to the supervisors, *see* Doc. 426-1 (June 2, 2020) (attached as Exhibit B), that the Secretary attached to her notice. In the notice, the Secretary represented to the district court that "[t]he Division of Elections ha[d] updated links to its webpages with the pre-SB 7066 voter registration form, in English and Spanish, which the Supervisors of Elections are welcome to link to through their respective websites," and "ha[d] updated its online voter registration system with the pre-SB 7066 voter registration questions, in English and Spanish." Ex. A at 1.

Moreover, the May 27 email from Director Matthews attached to the notice clearly instructed the supervisors of elections that "[t]he post-SB 7066 version of the statewide voter registration application can no longer be used as it violates the [NVRA]" and that the supervisors needed to "remove any links to th[at] form from [their] website[s] and link solely to th[e] adopted version of the statewide voter registration application from" that predated SB-7066. Ex. B at 1.

Director Matthews never retracted or contradicted those unambiguous instructions, even after this Court granted the State's stay motion. Her July 6 email never advised the supervisors to reinstate links or access to the form. Rather, as the Secretary herself mentioned in the notice of compliance, "website visitors may have

a prior version of the website cached in their browser which may preclude them from viewing updated [registration] questions until they refresh the page." Ex. A at 1–2. Therefore, as the Secretary anticipated, some prospective voters would—despite the State's best efforts—access and complete the 2019 registration form even after the district court's judgment. Director Matthews's innocuous and voter-friendly request that supervisors accept the 2019 form in no way implies that the State or the supervisors were "confused" about how to proceed in light of this Court's July 1 stay order.

Understood in context, therefore, the State has faithfully complied with the district court's NVRA injunction; it has never wavered in its efforts to transition all voter registration back to the pre-SB-7066 form. And because the State has consistently expressed the same unobjectionable message to the supervisors—that the 2019 form is not to be disseminated, but *may* be accepted—there is no confusion about the State's obligations under the district court's NVRA injunction or this Court's stay order.

The Court's July 1 order stated that the State's "motion to stay the permanent injunction pending appeal [was] GRANTED." Order at 2. And, as the State expressly acknowledged, that motion did not seek a stay of the district court's NVRA injunction. *See* Stay Reply at 9. The State has therefore understood fully that the Court's stay was limited to those aspects of the district court's injunction

encompassed by the State's motion. There was no ambiguity in the July 1 order and thus no need for this Court to "clarify" its otherwise clear order.

II. The Court Does Not Need To Clarify the Stay's Effect on the District Court's Advisory-Opinion Remedy.

Plaintiffs have already argued before this Court that the State is not entitled to a stay of the district court's advisory-opinion process because the State allegedly failed to challenge the district court's due process "holding." *See* Stay Opp. at 15–16. And the State has already rebutted that argument by explaining in its reply brief (which Plaintiffs ignore) that the district court made no independent due process holding and, regardless, that the State's motion sought to stay the district court's advisory-opinion injunction *in toto*. *See* Stay Reply at 9. By granting the State's motion without any indication that it disagreed with the State's characterization of its own motion, the en banc Court necessarily rejected Plaintiffs' contrary arguments. The Court stayed in its entirety the district court's attempt to graft its own advisory-opinion process over the State's existing election regulations.

Plaintiffs, then, have no basis for seeking "clarification" from this Court. There is nothing in need of clarification: The Court necessarily found that the State was likely to demonstrate that Amendment 4 and SB-7066 do not violate the Equal Protection Clause or the Twenty-Fourth Amendment; and it agreed with the State either that the district court did not issue an independent due process ruling, or that

any due process holding did not justify the Court's sweeping injunction. That clear holding should be the end of the matter.

Plaintiffs' claims regarding the district court's supposed due process "holdings" simply parrot the arguments that they have already presented to this Court (and the Supreme Court).* Indeed, the repetitious character of Plaintiffs' assertions reveal the true nature of Plaintiffs' motion: it is based not on any genuine uncertainty about the contours of the Court's order, but rather on displeasure with its clear effect. But a "motion for clarification" is not an appropriate vehicle for a disgruntled litigant to rehash rejected arguments. Indeed, as one sister circuit recently explained when upholding sanctions imposed under 28 U.S.C. § 1927, "attempts to relitigate already decided issues in the form of a motion for clarification . . . unreasonably and vexatiously multipl[y] the proceedings, wast[ing] . . . everyone's time." *Vallejo v. Amgen, Inc.*, 903 F.3d 733, 749 (8th Cir. 2018) (quotation marks omitted) (first and second alterations added). So too here.

Plaintiffs offer only two new rejoinders not already presented before this Court. First, they argue that certain statements by the State in its initial merits brief

* While Plaintiffs' motion purports to recount a series of findings "[c]oncerning the [district court's] due process holding," Clarification Mot. at 9, all of the comments Plaintiffs cite from the district court's opinion come from the court's wealth-discrimination analysis, *see* Doc. 420 at 44, 47, 56, 63, 66, further confirming the State's consistent reading of the district court's opinion—that its equal-protection holding dictated and shaped the terms of its advisory-opinion remedy.

(submitted before the Court granted initial en banc hearing) show "the distinct due process and wealth discrimination claims in this case and that the respective remedies are not coextensive." Clarification Mot. at 18. This mischaracterizes the State's brief. In that brief (now superseded by the State's en banc merits brief, filed on July 20, 2020), the State repeated its consistent position that the district court "appeared not to rule on the ultimate merits of Plaintiffs' due process claim," Br. of Defs.-Appellants at 44 (June 19, 2020), and that "the need for the procedures it imposed on the State is parasitic on its erroneous wealth-discrimination analysis," *id.* at 45. Only after making these dispositive points did the State address—for the sake of completeness—an isolated concern of the district court that "sound[ed] in due process" and was "*arguably* unrelated to its wealth-discrimination analysis." *Id.* at 46 (emphasis added). But the State argued further that the purported narrow concern animating any independent due process holding (1) "d[id] not justify the breadth of the [court's] remedy," *id.*; (2) "rest[ed] on a premise that finds no legal support," *id.*; and (3) did not permit the district court's wholesale "rewriting [of] Florida's advisory opinion process," *id.* at 48.

Fairly read, the State's now-superseded initial merits brief did not make any concessions that would call into the question the scope or correctness of this Court's July 1 stay order. Rather, the statements in that brief were of a piece with the arguments that the State has consistently made since the district court issued its

permanent injunction. Certainly, they do not justify vacating any portion of the Court's existing stay, especially given that the State has now definitively shown in its en banc opening brief that the Plaintiffs' freestanding vagueness and procedural due process claims are meritless and should be rejected root and branch. *See* En Banc Opening Br. of Defs.-Appellants at 51–61 (July 20, 2020).

Second, Plaintiffs also argue—for the first time before this Court—that the stay should be lifted in part because the State did not comply with Federal Rule of Appellate Procedure 8(a). *See* Clarification Mot. at 17; *see also* Vacatur Appl. at 43. But this contention is a day late and a dollar short. To begin, the argument is untimely because Plaintiffs could have raised it in their June 26, 2020, response opposing the State's stay motion. But they did not. Because satisfaction of Rule 8(a) is not a jurisdictional requirement, it follows that Plaintiffs' failure to raise the affirmative defense in their opposition renders it forfeited. Just as, for example, a motion for reconsideration may not be used to raise "new arguments that were previously available, but not pressed," *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009) (quotation marks omitted), so too a motion to clarify (or amend) a stay cannot rely on available arguments that were not pressed before the stay was granted.

Moreover, even considering the merits, Plaintiffs misread Rule 8(a), which requires only that a party "must ordinarily move first in the district court for . . . a

stay of the judgment or order of a district court pending appeal" and that the district court "denied the motion." That is exactly what happened here: the State moved for a stay of the district court's judgment pending appeal, and the district court denied the motion. Even assuming arguendo that the State "did not raise th[e] precise issue" of the process due to felons seeking reenfranchisement, it satisfied Rule 8(a) because it moved for "a stay," which the district court denied. *United States v. McGowan*, No. 20-1617, 2020 WL 3867515, at *1 (6th Cir. July 8, 2020). And, in any event, the State asked the district court to "stay the effect of the final order . . . and final judgment" without restriction. Doc. 423 at 14.

CONCLUSION

There is no need for the Court to clarify its order granting the State's stay motion. By granting the State's motion, the Court correctly stayed the entirety of the district court's injunction, save the NVRA remedy that the State expressly refrained from challenging. Plaintiffs' request for the Court to reconsider that stay through a motion for "clarification" should be denied.

Dated: July 27, 2020

Respectfully submitted,

Joseph W. Jacquot
Nicholas A. Primrose
Joshua E. Pratt
Executive Office of the Governor
400 S. Monroe Street, PL-5
Tallahassee, FL 32399
Telephone: (850) 717-9310
Fax: (850) 488-9810
joe.jacquot@eog.myflorida.com
nicholas.primrose@eog.myflorida.com
joshua.pratt@eog.myflorida.com

Bradley R. McVay
Ashley E. Davis
Florida Department of State
R.A. Gray Building Suite, 100
500 S. Bronough Street
Tallahassee, FL 32399
Phone: (850) 245-6536
Fax: (850) 245-6127
brad.mcvay @dos.myflorida.com
ashley.davis@dos.myflorida.com

s/ Charles J. Cooper
Charles J. Cooper
Peter A. Patterson
Steven J. Lindsay
Shelby L. Baird
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9601
Fax: (202) 220-9601
ccooper@cooperkirk.com
ppatterson@cooperkirk.com
slindsay@cooperkirk.com
sbaird@cooperkirk.com

Counsel for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this response complies with the type-volume limitations of FED. R. APP. P. 27(d)(2)(A) because this response contains 4,425 words, excluding the parts exempted by FED. R. APP. P. 32(f).

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 proportionately spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

Dated: July 27, 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 July 27, 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: July 27, 2020

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

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

KELVIN LEON JONES, *et al.*,

Plaintiffs,

v.

CONSOLIDATED
Case No. 4:19-cv-300-RH/MJF

RON DeSANTIS, *et al.*,

Defendants.
_____/

SECRETARY OF STATE'S NOTICE OF COMPLIANCE

While the Secretary has moved for a stay of this Court's Final Order and Final Judgment and maintains that a stay is warranted, the Secretary notes that her office has taken the following steps to comply with the Final Order and Final Judgment:

1. Maria Matthews, Director of the Division of Elections, has reviewed the Final Order and Final Judgement. She has also sent to all 67 Supervisors of Elections a copy of the Final Order and related attachments. *See* **Exhibit 1**.

2. The Division of Elections has updated links to its webpages with the pre-SB 7066 voter registration form, in English and Spanish, which the Supervisors of Elections are welcome to link to through their respective websites.

3. The Division of Elections has updated its online voter registration system with the pre-SB 7066 voter registration questions, in English and Spanish; however, website visitors may have a prior version of the website cached in their

browser which may preclude them from viewing updated questions until they refresh the page. *See* https://registertovoteflorida.gov/home (last visited June 1, 2020).

4. The Division of Election has updated its advisory opinion webpage to include this Court's Final Order and the Advisory Opinion Form attached to that Final Order. *See* https://www.dos.myflorida.com/elections/laws-rules/advisory-opinions/ (last visited June 1, 2020).

5. Finally, the Division of Elections has made available a copy of this Court's "Standards Governing Eligibility to Vote After a Felony Conviction." *See* https://www.dos.myflorida.com/media/703156/attach2-standards-for-eligibilitywlink.pdf (last visited June 1, 2020).

Respectfully submitted by:

GEORGE N. MEROS, JR.
(FBN 263321)
george.meros@hklaw.com
TARA R. PRICE (FBN 98073)
tara.price@hklaw.com
Holland & Knight LLP
315 South Calhoun Street, Suite 600
Tallahassee, Florida 32301
Telephone: (850) 224-7000
Facsimile: (850) 224-8832

BRADLEY R. MCVAY (FBN 79034)
General Counsel
brad.mcvay@dos.myflorida.com
ASHLEY E. DAVIS (FBN 48032)
Deputy General Counsel
ashley.davis@dos.myflorida.com
Florida Department Of State
R.A. Gray Building Suite, 100
500 South Bronough Street
Tallahassee, Florida 32399-0250
Phone: (850) 245-6536
Fax: (850) 245-6127

/s/ Mohammad O. Jazil
MOHAMMAD O. JAZIL
(FBN 72556)
mjazil@hgslaw.com
GARY V. PERKO (FBN 855898)
gperko@hgslaw.com
EDWARD M. WENGER
(FBN 85568)
ewenger@hgslaw.com
Hopping Green & Sams, P.A.
119 South Monroe Street, Suite 300
Tallahassee, Florida 32301
Phone: (850) 222-7500
Fax: (850) 224-8551

Dated: June 2, 2020

Counsel for Florida Secretary of State Laurel M. Lee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to all counsel of record via email on June 2, 2020.

/s/ Mohammad O. Jazil
Attorney

EXHIBIT B

Mohammad Jazil

From: Matthews, Maria I. <Maria.Matthews@DOS.MyFlorida.com>
Sent: Wednesday, May 27, 2020 8:09 PM
To: SOEList; SOEStaffContacts; Earley, Mark; Overturf, Charles; Labasky, Ron - FSASE Legal Counsel
Cc: Lee, Laurel M.; Kennedy, Jennifer L.; Fitz-Patrick, Christie; McVay, Brad R.; Ard, Mark; Marconnet, Amber; Brown, Toshia; O'Brien, Colleen E.; Davis, Ashley E.
Subject: Court Order- Jones v. DeSantis re Amend 4/SB 7066
Attachments: JonesvDeSantis-Final Order20200524.pdf; Attach1 -Form Request-Advisory Opinion.pdf; Attach2 - Standards for eligibility.pdf

Dear Supervisors of Elections,

Please find attached the federal court Order (with two attachments) entered on May 24, 2020 in the "Amendment 4/SB 7066" case (Jones et al. v. DeSantis et al.; U.S.District Court, North District, Case No. 4:19cv300-RH/MJF). Please review the Order in its entirety.

The court has declared that:

(1) **Statewide voter registration application form (DS-39)**. The post-SB 7066 version of the statewide voter registration application can no longer be used as it violates the National Voter Registration Act. Please remove any links to this form from your website and link solely to this adopted version of the statewide voter registration application form English PDF / Español PDF (version 10/2013 pre-CS/SB 7066)

(2) **Fees and costs**. The requirement to pay fees and costs as a condition of voting is unconstitutional. In other words, 'legal financial obligations' is defined to mean solely fines and restitution, if ordered as part of the sentence.

(3) **Fines and restitution**. A person who is genuinely unable to pay fines and restitution, as may have been ordered as part of their sentence, may not be precluded from registering and/or voting. This inability to pay is presumed, in the absence of credible and reliable evidence that the person is currently able to pay the financial obligations at issue, if:

a. the person had an appointed attorney or was granted indigent status in the last proceeding that resulted in a felony conviction, or
b. the person submits a financial affidavit that, if submitted in connection with a felony proceeding in a Florida circuit court, would be sufficient to establish indigent status under Florida Statutes § 27.52, or
c. all financial obligations that would otherwise disqualify the person from voting have been converted to civil liens.

Please note that information set forth in a., b., or c. is not required for someone with an inability to pay to register or vote; rather, the information merely creates a presumption.

(4) **Advisory Opinion**

a. A convicted felon is entitled to request an advisory opinion from the Division of Elections regarding:
    - a request for a statement of the amount of any fine or restitution that must be paid to make the requesting person eligible to vote and/or
    - inability to pay fine or restitution using prescribed form.
b. The Division of Elections is required to post online the form* to request an advisory opinion from the Division.
c. Each defendant Supervisors of Elections must make available at each office and must post online a notice of the right to request such an advisory opinion from the Division of Elections. The Supervisor must make the required form available in hard copy and directly online or by link to state website.

(5) **Statement of Rules**

a. The Division of Elections must make the attached statement of rules governing eligibility to vote after a felony conviction available online and in hard copy.

b. Each defendant Supervisors of Elections must likewise post at its offices and online a statement of rules governing eligibility to vote after a felony conviction.

We are currently reviewing internally and finalizing the requisite advisory opinion request form* to be made available to you and online as soon as possible. Spanish translated documents will also be provided.

We are also reviewing our options and further guidance as to this order will be forthcoming as needed and if anything changes.

Respectfully,

Maria Matthews, Esq.
Division of Elections, Director
Florida Department of State
500 S. Bronough Street
Tallahassee, Florida 32399
850.245.6520
Maria.matthews@dos.myflorida.com