UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

KELVIN LEON JONES, et al., Plaintiffs, v. RON DESANTIS, in his official capacity as Governor of Florida, et al., Defendants.	Consolidated Case No. 4:19-cv-300-RH-CAS

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS GOVERNOR DESANTIS AND SECRETARY OF STATE LEE'S MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

On October 18, 2019, this Court issued a narrow preliminary injunction ("the Order"), enjoining the Secretary of State and Supervisor of Elections ("SOEs") Defendants from "tak[ing] any action that . . . prevents an individual plaintiff from applying or registering to vote," or "from voting . . . based only on failure to pay a financial obligation that . . . the plaintiff is genuinely unable to pay." ECF 207 at 53–54.[1] That same day, Defendant Governor Ron DeSantis publicly stated his agreement with the Order: "Today's ruling affirms the Governor's consistent position that convicted felons should be held responsible for paying applicable restitution, fees and fines while also recognizing the need to provide an avenue for individuals to pay back their debts as a result of true financial hardship." Lawrence Mower, *Being Poor Shouldn't Stop Florida Felons from Voting, Judge Rules in Amendment 4 Case*, Tampa Bay Times (Oct. 18, 2019), https://www.tampabay.com/florida-politics/buzz/2019/10/19/being-poor-shouldnt-stop-florida-felons-from-voting-judge-rules-in-amendment-4-case/.

After nearly a month, and after administering municipal elections with the preliminary injunction in place, Defendants Governor DeSantis and Secretary of State Laurel M. Lee (collectively, "State Defendants") filed their Notice of Appeal

[1] The Order does not apply to the Orange County SOE. ECF 207 ("the Order") at 53–55.

on November 15, 2019. After waiting another twelve days, during which State Defendants held another election under the preliminary injunction, State Defendants filed their motion to stay the injunction on November 27, 2019.

State Defendants fail to demonstrate *any* of the necessary factors for obtaining a stay. *First*, State Defendants fail to demonstrate that this Court's narrow and flexible injunction causes them irreparable harm. The injunctive relief ordered by the Court names the seventeen Individual Plaintiffs, all of whom are registered voters with outstanding legal financial obligations ("LFOs"), who undisputedly lack the ability to pay. Indeed, the Secretary has issued guidance to SOEs advising that they should apply the Order to these seventeen individuals, belying her new assertion in the instant motion that the injunction will irreparably harm her. *See* October 28, 2019 Email, attached here as Exhibit A. The injunction ordered no relief against Defendant Governor DeSantis, and with respect to the only other movant, the Secretary of State, it simply requires her to refrain from interfering with the Individual Plaintiffs' registrations and voting. Order at 53, 55.

The State Defendants conceded at the last hearing that the *only* harm the Court's Order potentially causes them is an administrative burden. But courts have uniformly rejected the expenditure of time, effort, and money as cognizable irreparable harm warranting the extraordinary remedy of a stay. Indeed, the Order does not require the Secretary to alter her practices that have remained in place

since the challenged law's July 1, 2019 effective date. That is, since SB7066 went into effect, the Secretary has accepted and processed all facially sufficient applications for registration, and has identified as potentially ineligible only those voters who are currently incarcerated or on probation or parole, while taking no action with respect to outstanding LFOs. Matthews Dep., ECF 152-93, 152:6–153:13. The injunction does not prohibit the Secretary from continuing that practice. Moreover, it explicitly permits her to identify for the Supervisors any voter with outstanding LFOs. Order at 54. And, to the extent she prefers a different process, nothing in the Order prevents the Secretary from creating and implementing another policy, so long as it is consistent with the constitutional command that access to the franchise cannot be based on one's financial resources. *Id.* Indeed, the Court its most recent hearing suggested that instituting a process of rebuttable presumptions would pose little burden on the State and voters. Dec. 3 Tr. 35:9–18.

Second, the balance of the equities favors Plaintiffs. A stay would permit Defendants to remove Plaintiffs from the registration rolls and disenfranchise them in the March 2020 presidential primary election—an irreparable injury that can never be remedied, and which far outweighs any purported burdens on the State Defendants. A stay would also disserve the State Defendants—if their appeal fails, there will be little time to implement a constitutional process for ensuring those

genuinely unable to pay LFOs can register before the March 2020 elections. Granting a stay would also disserve the public interest, which favors permitting eligible voters to register and vote.

Third, State Defendants have failed to demonstrate their likely success on the merits on the single claim this Court ruled on in its Order. The Court's October 18 decision is a direct application of the Eleventh Circuit's *en banc* decision in *Johnson v. Governor*, 405 F.3d 1214 (11th Cir. 2005) (en banc). *Johnson* articulated an unambiguous principle: "[a]ccess to the franchise cannot be made to depend on an individual's financial resources." *Id.* at 1216 n.1. In their motion, State Defendants provide no reason for this Court to depart from its straightforward application of *Johnson* in its preliminary injunction order, which prohibited Defendants from withholding voting rights from Plaintiffs solely based on their inability to pay LFOs.

Thus, State Defendants failed to show that any of the four factors necessitate a stay, and their motion should be denied.

BACKGROUND AND PRODEDURAL HISTORY

Amendment 4, effective January 8, 2019, automatically restores voting rights to Floridians with felony convictions who have "completed all terms of sentence including parole and probation." *See* Fla. Const. Art. VI § 4(a) (2018). On May 3, the Florida legislature passed, and on June 28, 2019, the Governor signed,

SB7066, which defined "completion of all terms of sentence" to require payment of all LFOs, including civil liens. Fla. Stat. § 98.0751(2)(a)(5).

Since SB7066's enactment, Defendants have permitted applicants to register using a voter registration form that pre-dates SB7066. Matthews Dep. 210:3–7. Defendants have processed and registered returning citizens who submit facially valid registration forms, with the Secretary identifying as potentially ineligible only those who have not yet completed incarceration, parole, or probation. *Id.* 152:12–153:13. Thus far, Defendants have not sought to identify voter registration applicants who have outstanding LFOs for removal from the voter rolls. *Id.* 130:14–19, 152:6–153:13, 199:9–20.

The Governor signed SB7066 into law on June 28; Plaintiff groups filed their complaints on June 28 and July 1. ECF 1; Case No. 4:19-cv-00301-MW-MJF, ECF 1; Case No. 4:19-cv-00304-RH-CAS, ECF 1. Plaintiffs promptly moved for preliminary relief on August 2, 2019. ECF 98-1. Thereafter, this Court set a briefing schedule "with a goal of providing enough time for diligent consideration of the issues in this [C]ourt and on appeal and for unhurried implementation of the ultimate decision by state elections officials." ECF 91 at 3; ECF 100 at 1 (quoting July 23 order); ECF 107 (August 15, 2019 order setting preliminary briefing schedule); ECF 212 at 2 (November 1 order) ("The schedule that led to issuance of the October 18 order was established to provide sufficient time for an appeal to and

ruling by the United States Court of Appeals for the Eleventh Circuit before the March 2020 presidential primary.").

True to its word, this Court issued its order on October 18, 2019, ten days after the preliminary injunction hearing concluded, leaving Defendants ample time to resolve this matter at the Eleventh Circuit. The injunction does not mandate a specific procedure for complying with its central requirement that the Secretary cannot deny registration or voting based solely on the inability to pay outstanding LFOs. And it expressly "does not prevent the Secretary from notifying the appropriate Supervisor of Elections that a plaintiff has an unpaid financial obligation." Order at 54. SOE Defendants did not join State Defendants in the appeal or their motion for a stay.

Yet, State Defendants did not file their notice of appeal until almost one month after this Court's preliminary injunction decision, on November 15, 2019. State Defendants then waited another twelve days before filing this motion for a stay on November 27, 2019. Meanwhile, Defendants conducted municipal elections on November 5 and 19, with this Court's preliminary injunction in place. On December 5, 2019 State Defendants moved the Eleventh Circuit for an expedited briefing schedule, which the Court granted, in part, on December 11, 2019. State Defendants' appeal from this Court's Order will be fully briefed by January 21, 2020 and oral arguments will be held January 28, 2020.

LEGAL STANDARD

This Court considers four factors when deciding whether to stay an injunction pending appeal. The factors mirror those it considered when preliminarily enjoining Defendants' unconstitutional conduct:

> (1) whether the stay applicant has made a strong showing that it 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.

Democratic Exec. Comm. of Fla. v. Lee, 915 F.3d 1312, 1317 (11th Cir. 2019).

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (citation omitted). Rather, it is "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Id.* (citation omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–434; *see also Ga. Muslim Voter Project ("GMVP") v. Kemp*, 918 F.3d 1262, 1267 (11th Cir. 2019); *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1317.

"A showing of irreparable injury is the *sine qua non* of injunctive relief." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc) (emphasis added, internal citation omitted); *GMVP*, 918 F.3d at 1267. "[T]he asserted irreparable injury must be neither remote nor speculative, but actual and imminent." *Siegel*,

243 F.3d at 1176. Failure to show an injunction causes irreparable injury is an adequate and independent basis for denying a motion to stay pending appeal. *See id.* at 1175–76. But demonstrating irreparable harm—without more—does not justify ordering a stay. *Nken*, 556 U.S. at 433 ("A stay is not a matter of right, even if irreparable injury might otherwise result.") (internal citation omitted). The party seeking a stay bears the burden of proof—based on all applicable factors—that a stay is appropriate. *See, e.g., Matter of O'Keeffe*, No. 15-mc-80651, 2016 WL 5795121, at *1 (S.D. Fla. June 7, 2016) ("A stay pending appeal is an extraordinary remedy for which the moving party bears a heavy burden.").

ARGUMENT

I. State Defendants Are Not Irreparably Harmed By This Court's Injunction

State Defendants have failed to demonstrate that this Court's injunction irreparably, or even significantly, harms them. The State has asserted that the irreparable injury they face is the administrative burden of implementing this Court's Order. *See* Dec. 3 Tr. 32:9–23 ("Court: 'So the irreparable harm is the administrative burden.' Mr. Primrose: "Yes, Your Honor.'"). But this argument fails because this Court's Order does not impose substantial burdens on State Defendants.

As an initial matter, a stay is unwarranted solely due to the State Defendants' delay in seeking relief. *See, e.g., Hirschfeld v. Bd. of Elections*, 984

F.2d 35, 39 (2d Cir. 1993) (four-week delay in filing motion to stay constituted "inexcusable delay" that "severely undermines the [moving party's] argument that absent a stay irreparable harm would result."); *Affinity Labs of Tex. v. Apple Inc.*, No. 09-04436 CW, 2010 WL 1753206, at *2 (N.D. Cal. Apr. 29, 2010) (waiting seven weeks to file the motion to stay "weigh[ed] heavily against granting the stay."); *New York v. United States Dep't. of Commerce*, 339 F. Supp. 3d 144, 149 (S.D.N.Y. 2018) (denying stay due in part to Defendants' delay in filing their motion which, "in itself, belies Defendants' conclusory assertions of irreparable harm.").

Furthermore, the Eleventh Circuit has held that administrative burdens alone are not generally sufficient to constitute irreparable harm. *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough" to reach the level of irreparable harm) (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)) (quotation omitted). But even setting this authority aside, State Defendants have not established any substantial burden imposed by this Court's order. This is so for several reasons.

First, the Order prohibits the Secretary from taking any action to prevent the Plaintiffs from registering or voting based solely on their inability to pay

outstanding LFOs. Order at 53–54. The Individual Plaintiffs already established that they are unable to pay their outstanding LFOs through uncontested declarations supporting preliminary relief. ECF 098-4 to ECF 098-18. Each has registered and several have voted, *see* ECF 98-4 at ¶ 7, ECF 98-8 at 4, ECF 98-14 at ¶ 14, ECF 98-15 at ¶ 10, consistent with the Order. This was no burden for the Secretary, and it hardly constitutes harm given the Governor's public statements following the Court's Order. Under the terms of the Order, the Secretary cannot interfere with the Individual Plaintiffs' registrations and voting, which is no burden at all.

Second, the Order simply maintains the status quo and does not require the Secretary to alter the manner in which she has administered elections since the law was passed, since she has accepted registrations and declined to initiate the removal of voters with outstanding LFOs since SB7066 became effective. Prior to the issuance of the Order, the Secretary was not undertaking any efforts to identify voters with outstanding LFOs to the Supervisors. The Order, which simply prohibits denial of registration or voting based on the inability to pay LFOs, is consistent with the Secretary's status quo prior to the Order's issuance.

Third, State Defendants can comply with the Order using the current procedures set forth in Florida law. Order at 37–38, 50–51. Consistent with Florida law, and as the Secretary was doing before the Order was issued, the Secretary

must accept and process facially valid voter registration applications from all applicants, including returning citizens. If the Secretary later determines "that a plaintiff has unpaid financial obligations that will make the plaintiff ineligible to vote," the Court's Order expressly permits the Secretary to provide that information to Supervisors. Order at 54. As the Secretary has often repeated, under current Florida law and practice, local Supervisors of Elections (and not the Secretary) make the final determination of voter ineligibility. *See* Fla. Stat. § 98.0751(3)(b); *see* Defs.' Resp. in Opp'n to Mot. for Prelim. Inj., ECF 132 at 12; Matthews Dep. 168:2–9, 208:8–19. The Order simply prohibits the Supervisors—none of whom seek a stay—from removing plaintiffs solely because they are unable to pay outstanding LFOs. Order at 54. The Secretary's obligation to provide guidance to Supervisors does not impose a cognizable burden on her office. Fla. Stat. §§ 97.012(1)–(2), (14). Thus, State Defendants suffer no real harm where, as here, "the district court's injunction borrow[s] heavily from the processes already in place[.]" *GMVP*, 918 F.3d at 1276.

Fourth, State Defendants are not *prohibited* by the preliminary injunction from adopting and implementing a different process for assessing voter ineligibility—provided that such a process does not interfere with the registration

and voting of plaintiffs who genuinely lack such an ability to pay.[2] Any "rush" State Defendants feel to create such new procedures is entirely self-imposed, resulting solely from their delay in acting on this Court's injunction, which was issued almost two months ago. After this Court issued its order, State Defendants indicated to the public their support of the Court's order. Indeed, this Court indicated in a November 1, 2019 order that it no longer expected an appeal given the delay and the Governor's statement, *see* ECF 212 at 3–4, and State Defendants did not correct that assumption until the filing of their appeal two weeks later. As this Court noted, ultimately, "[t]he defense, for whatever reason, decided to introduce . . . 40 days . . . of delay into the process," Dec. 3 Tr. 4:25–5:2, in an apparent effort to "try to run out the clock so that people who are eligible to vote don't get to vote in the March presidential primary or . . . in the November [2020] election[s]," *id.* 37:23–38:2. The State has not sought to adopt any new processes to comply with the preliminary injunction; it has not even identified any processes it might potentially adopt or shown with any concrete facts that their implementation would be burdensome. State Defendants cannot now claim irreparable harm for their own unexplained delay.

[2] In this sense, the Court gave considerable discretion to the State for how to comply with the injunction, and avoided intruding on the State's policy choices any more than necessary by leaving the State to decide, consistent with the Constitution, whether and how to construct a procedure for determining inability to pay.

Fifth, hypothetical facts about the purported difficulty of administering unspecified processes that the State might adopt in the future—or about the effect of possible rulings on the class certification motion currently before this Court or the advisory proceedings in the Florida Supreme Court—do not provide a basis for finding irreparable injury. "[S]imply showing some 'possibility of irreparable injury' fails to satisfy the" irreparable harm standard for a stay, because that "possibility standard is too lenient." *Nken*, 556 U.S. at 434–35 (internal quotations and citations omitted); *see also Democratic Exec. Comm. of Fla.*, 915 F.3d at 1317 ("[T]he party seeking the stay must show more than the mere possibility of . . . irreparable injury.").

"The harm considered by the district court is necessarily confined to that which might occur in the interval between ruling on the preliminary injunction and trial on the merits." *United States v. Lambert*, 695 F.2d 536, 540 (11th Cir. 1983). Here, State Defendants have not identified any administrative burdens that they purportedly faced in administering the dozens of elections in November and December 2019, or will face in upcoming elections, with the preliminary injunction in place. There is no harm to State Defendants from keeping the same practices that were in place during recent elections—which are, in fact, the same practices that have been in place since the effective date of SB7066—through final judgment after the upcoming April 2020 trial. State Defendants' failure to show

irreparable injury is alone sufficient grounds to deny a stay. *See Siegel*, 234 F.3d at 1176 (11th Cir. 2000).

Finally, State Defendants' reliance on *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (Rehnquist, J., in chambers) and *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) is misplaced. In both cases, the courts below had enjoined the implementation of a statute in full. Likewise, in *Hand v. Scott*, cited in Defs.' Mot., ECF 234, at 17–18, the Eleventh Circuit found the State Executive Clemency Board was irreparably harmed because the injunction in that case prohibited the Board from "apply[ing] its own laws . . . ." 888 F.3d 1206, 1214 (11th Cir. 2018) (citation omitted). [3] But here, the impact of the Court's order is narrow in scope and impact. This Court did not enjoin SB7066 in its entirety or even enjoin the LFO provisions in their entirety. Instead, this Court required an alteration to the generally applicable statute to accommodate voters who would otherwise be denied the right to vote solely because of their financial resources. This alteration to the operation of SB7066 does not constitute irreparable harm.

[3] Moreover, the Eleventh Circuit noted in *Hand* that the injunction in that case, unlike here, failed to serve the plaintiffs' interests in speedy restoration of their voting rights. *See Hand*, 888 F.3d 1206, 1214–15 (11th Cir. 2018) (noting that the injunction in that case "permanently enjoins the defendants from enforcing the current voter-restoration scheme, in the absence of a stay the Governor is barred from reenfranchising anyone (including any of the nine appellees)").

II. The Balance of the Equities Favors Denial of a Stay

A. Plaintiffs Will Be Disenfranchised if the Court Grants a Stay, which Outweighs Any Burdens on State Defendants

The remaining equitable factors—whether the stay will substantially injure other interested parties and the public interest—lean heavily in Plaintiffs' favor. Absent a stay, Plaintiffs will be subject to removal from the registration rolls and disenfranchisement. Countless courts have recognized that denial of the right to vote constitutes irreparable injury. *See, e.g.*, *Harris v. Graddick*, 592 F. Supp. 128, 135 (M.D. Ala. 1984); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("Courts routinely deem restrictions on fundamental voting rights irreparable injury."); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote therefore constitutes irreparable injury."); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (similar). And while State Defendants warn about the risk that Plaintiffs will be "re-disenfranchis[ed]" right before the March 2020 elections, Defs.' Mot. at 18, a stay would simply permit State Defendants to re-disenfranchise them—and cause them irreparable harm—immediately.

Moreover, as this Court noted in the hearing, a stay would guarantee irreparable harm to eligible voters even if the Eleventh Circuit affirms this Court's

Order before the presidential preference elections in March 2020.[4] This is so because a ruling is likely to arrive close to the voter registration deadline in February 2020, and a stay would deprive eligible voters of the opportunity to register or re-register in time for the March 2020 elections. If voters with an inability to pay their LFOs are to get registered and processed in accordance with this Court's Order prior to the registration deadline, all parties would benefit from continuing the registration process now. Dec. 3 Tr. 23:17–24:11; 27:6–20; 29:8–24; 40:12–16. Otherwise, returning citizens will face uncertainty and the threat of prosecution when they apply for registration.

Thus, even assuming Defendants face some administrative burdens in complying with this Court's injunction, "[a]ny potential hardship imposed" on the State Defendants "pales in comparison to that imposed by unconstitutionally depriving [Plaintiffs] of their right to vote." *Fla. Democratic Party*, 2016 WL 6090943, at *8*; see also Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016) ("There is no contest between the mass denial of a fundamental constitutional right and the modest administrative burdens to be borne by [the Secretary of State's] office and other state and local offices involved in elections."); *League of Women*

[4] The Eleventh Circuit recently granted Defendants' motion to expedite their appeal, ensuring that briefing will be complete in January 2020, and set oral argument for January 28, 2020. This relief further undermines the State Defendants' basis for a stay here.

Voters of N.C., 769 F.3d at 244 (holding that a state may not "sacrific[e] voter enfranchisement at the altar of bureaucratic (in)efficiency and (under-)resourcing"); *Obama for Am.*, 697 F.3d at 434 ("[T]he State has not shown that its regulatory interest in smooth election administration is 'important,' much less 'sufficiently weighty' to justify the burden it has placed on nonmilitary Ohio voters."); *Stewart v. Blackwell*, 444 F.3d 843, 872 (6th Cir. 2006) ("Governments almost always attempt to justify their conduct based on cost and administrative convenience, but the State's reliance on these factors is not necessarily rational."); *United States v. Georgia*, 892 F. Supp. 2d 1367, 1377 (N.D. Ga. 2012) (describing the imposition of administrative, time, and financial burdens on Georgia as "minor when balanced against the right to vote, a right that is essential to an effective democracy").

B. A Stay Would Disserve Public Interest

An "injunction's cautious protection of the Plaintiffs' franchise-related rights is without question in the public interest." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 324 F. Supp. 2d 1358, 1355 (N.D. Ga. 2004), *aff'd*, 408 F.3d 1349 (11th Cir. 2005) (holding that the loss of the opportunity to register and vote causes irreparable harm because "no monetary award can remedy" this loss); *see also Obama for Am.*, 697 F.3d at 437 (holding that the public interest "favors permitting as many qualified voters to vote as possible"). The public has a "strong interest in

[permitting the exercise of] the fundamental political right to vote." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (internal quotation marks omitted). Here, a stay would disserve the public interest.

III. The Secretary Has Not Made a "Strong Showing" That She Is Likely to Succeed on the Merits

The Secretary has not and cannot establish a "strong showing" that she is likely to succeed on the merits. *Nken*, 556 U.S. at 434 (citation omitted). This Court's preliminary injunction decision was a necessary application of binding precedent from the Supreme Court and the Eleventh Circuit. Accordingly, Defendants have no likelihood of success on the merits.

A. State Defendants' Novel Merits Arguments Are Waived

State Defendants simply disregarded binding authority in contesting the preliminary injunction. Despite extensive briefing by Plaintiffs, Defendants' opposition brief never discussed or even cited the first footnote in *Johnson*—which this Court correctly held is binding—or *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966), *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), *Bearden v. Georgia*, 461 U.S. 660 (1983), the other relevant Supreme Court authority relied upon by Plaintiffs. Nor did Defendants provide any arguments to distinguish these lines of authority during the preliminary injunction hearing.

Now, Defendants advance novel theories on the merits for the first time in their stay petition. The pivot in Defendants' position underscores the improbability of their success on the merits. Litigants cannot obtain a stay of an injunction based on new contentions never presented prior to the decision. Such arguments are untimely and thus waived. *See, e.g.*, *Jet Networks FC Holding Corp. v. Goldberg*, No. 09-cv-21082, 2009 WL 10668551, at *4 (S.D. Fla. Sept. 16, 2019) (declining to consider argument "raised for the first time in [a] Motion for a Stay Pending Appeal"); *see also In re Egidi*, 571 F.3d 1156, 1163 (11th Cir. 2009) ("Arguments not properly presented in a party's initial brief or raised for the first time in the reply are deemed waived."); *ODonnell v. Harris Cty.*, 260 F. Supp. 3d 810, 815 (S.D. Tex. 2017) (deeming "arguments and authorities . . . waived" where they were offered "for the first time in the motion to stay" because "a motion to stay should not be used to relitigate matters, submit new evidence, or 'raise arguments which could, and should, have been made before the judgment issued'" (quoting *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863–64 (5th Cir. 2003)).

Having ignored controlling precedent all along, Defendants cannot rehabilitate their position now. This Court should hold that these new contentions are now waived and need not be addressed. *See Wallace v. Mangiaracina*, 745 F. App'x 356, 359 (11th Cir. 2018) (consideration of arguments not raised below "is seldom justified in reviewing argument of counsel in a civil case").

B. This Court Correctly Ruled that the Right to Vote Cannot Depend on an Individual's Financial Resources

Even if the Court were to entertain this second bite at the apple, Defendants' new arguments are meritless. Defendants cannot demonstrate a likelihood of success on the merits when controlling precedent contradicts their position. As this Court recognized, the *en banc* Eleventh Circuit has already outlined "a succinct statement . . . addressing th[e] very issue" Defendants now appeal. Order at 29. *Johnson v. Governor of Florida* held, in the specific context of rights restoration in Florida, that "[a]ccess to the franchise cannot be made to depend on an individual's financial resources." 405 F.3d at 1216 n.1. The *Johnson* court applied *Harper v. Virginia State Board of Elections*, which likewise holds that "a State violates the Equal Protection Clause of the Fourteenth Amendment *whenever* it makes the affluence of the voter or payment of any fee an electoral standard." 383 U.S. at 666 (1966) (emphasis added). *Harper* and *Johnson* are consistent with a multitude of corresponding authority set forth by Plaintiffs.

Defendants' new arguments are confused and meritless. State Defendants now suggest that the Court misinterpreted *Johnson*. State Defendants' argument relies upon their interpretation of the last sentence of the first footnote: "In doing so, we say nothing about whether conditioning an application for clemency on paying restitution would be an invalid poll tax." *Johnson*, 405 F.3d at 1216 n.1

(11th Cir. 2005). But that sentence does not contradict the preceding sentences prohibiting wealth discrimination in voting; it merely clarifies the scope of the decision. Defendants have muddled the core constitutional principles at issue in this case. *See* Defs.' Mot. at 7 n.1. The Fourteenth Amendment prevents states from restricting access to the franchise based on ability to pay. *See*, *e.g.*, *M.L.B.*, 519 U.S. at 123–24 ("[P]articipat[ion] in political processes as voters and candidates cannot be limited to those who can pay for a license."). The Fourteenth and Twenty-Fourth Amendments *also* prohibit states from imposing poll taxes or other taxes on the right to vote—such assessments are facially unconstitutional *regardless* of ability to pay. *Johnson* addresses the former question and declines to reach the latter.

The Eleventh Circuit held that Florida could not bar individuals "who cannot afford to pay restitution" from submitting a clemency petition. *Johnson*, 405 F.3d at 1216 n.1 (emphasis added). In so holding, *Johnson* made clear in the last sentence of the footnote that it was not reaching the *broader* question of whether "conditioning an application for clemency on paying restitution would be an invalid poll tax." *Id.* Defendants' counter-interpretation is plainly incorrect: if the footnote were limited to the poll tax question, then the Eleventh Circuit would never have referenced "ability to pay." *Id.* As Defendants admit, ability to pay is not relevant to analysis of a poll tax. Defs.' Mot. at 7 n.1. Thus, Defendants are

simply mistaken that "the *Johnson* court left open the question presented in this case." *Id.* at 8. To the contrary, *Johnson* is a directly applicable holding that Florida cannot block restoration of voting rights to returning citizens based on their inability to pay LFOs and it squarely rejects Defendants' contention that individuals with felony convictions are not protected by the Constitution's prohibition against wealth-based access to the franchise. The decision only leaves open whether payment of restitution is a facially unconstitutional poll tax.[5]

State Defendants also attempt to manufacture novel explanations for why SB7066 has a rational basis. Rational basis has never been the standard of review applied by the Supreme Court or Eleventh Circuit for claims involving access to the franchise based on financial resources. But even if it were, State Defendants' new contentions—in addition to being waived—fare no better than their original arguments.

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[5] Having failed even to cite *Bearden* prior to the preliminary injunction, Defendants now erroneously contend that "*Bearden* only held that 'it violates equal protection principles to *incarcerate* a person'" for inability to pay LFOs. Defs.' Mot. at 10 (quoting *United States v. Plate*, 839 F.3d 950, 956 (11th Cir. 2016)) (emphasis added by Defendants). Defendants misrepresent the authority which nowhere suggests that the constitutional principle is limited "only" to incarceration. To the contrary, the Eleventh Circuit described the unlawful injury as "being treated more harshly in [one's] sentence than [one] would have been if she (or her family and friends) had access to more money, and that is unconstitutional[.]" *Plate*, 839 F.3d at 956. And as Plaintiffs previously noted, the Supreme Court has repeatedly rejected limiting *Bearden*'s principle to incarceration. Pls.' Repl. in Supp. of Mot. for Prelim. Inj., ECF 177-1, at 22 n.11.

First, State Defendants suggest that SB7066 passes rational basis review because it is not "aimed at encouraging the collection of payments from *indigent* felons, but from *all* felons." Defs.' Mot. at 12 (citation omitted). But that misconstrues the pertinent legal question decided by this Court, which focuses on those unable to pay. The Order expressly recognizes that "a state can rationally choose to take into account . . . whether the felon has paid any financial obligation" and further "decide that the right to vote should not be restored to a felon who is able to pay but chooses not to do so." Order at 28. However legitimate the State's overall interest in collecting LFOs may be, it cannot provide a rational basis for the LFO requirement *as applied* to individuals who cannot pay. *See Harvey v. Brewer*, 605 F.3d 1067, 1079–80 (9th Cir. 2010) (observing that "withholding voting rights from those who are truly unable to pay" might not "pass th[e] rational basis test"). State Defendants' attempted reframing offers no rational basis for such gratuitous punishment.

Next, State Defendants argue that "a specific exemption for indigent felons [might] provide an incentive to conceal assets and would result in the state being unable to compel payments from some non-indigent felons." Defs.' Mot. at 12 (quoting *Johnson v. Bredesen*, 624 F.3d 742, 748 (6th Cir. 2010)). But that rationale makes no sense particularly in light of this Court's Order. If individuals are permitted to assert inability to pay and the State has an opportunity rebut that

assertion, such a process is far more likely to *disclose* a person's assets than a system where such an inquiry never occurs. Furthermore, if individuals affirm that they are unable to pay their LFOs for purpose of voting, this does nothing to *relieve* them from the obligation to pay. Where an individual has financial resources, the State retains all of its ordinary collection mechanisms to obtain payment including wage garnishment and seizure of assets, *see, e.g.*, Fla. Stat. § 77.01 (right of writ to garnishment)—all of which are far more direct and effective than the indirect penalty of disenfranchisement.

Finally, State Defendants argue that it would be administratively costly for the state to design a system "to provide individualized determinations as to whether up to 430,000 felons can or cannot afford to pay their [LFOs]." Defs.' Mot. at 13. But ultimately, the Secretary would only need to announce standards for Supervisors to apply, and those standards need not be complicated or difficult to administer. Furthermore, discovery shows that SB7066's LFO requirement has been far costlier and administratively more burdensome on State Defendants than the prior regime. *See, e.g.*, Matthews Dep. 106:22–107:7 (Director Matthews admitting that her staff will need "train[ing] in criminal terminology" to comply with SB7066), 109:20–110:6 (Director Matthews estimating that a pre-cursor bill to SB7066 would, "at a minimum . . . quadruple the amount of staff needed," without even considering out-of-state or federal convictions); ECF 153-4 (Director

Matthews detailing "challenges we will face in trying to determine financial obligations" and stating that "[m]y staff simply are not versed or professionally trained at this level").[6] And administrative costs alone cannot justify denying the right to vote. *See supra*, Section II.A.

C. This Court Properly Addressed State Defendants' Other Arguments, and They are Unlikely to Succeed on those Bases

This Court correctly determined that there are no alternative processes currently in place that cure SB7066's constitutional infirmities. *See* Order at 36, 39–40. State Defendants first claim that the Executive Clemency Board provides a "sufficient" restoration path for Plaintiffs. Defs.' Mot. at 13–14. But whereas Amendment 4 ensures *automatic* restoration, clemency is a *discretionary* act of grace that does not guarantee restoration. *See Hand*, 888 F.3d at 1209 (noting the broad discretion of the executive to deny clemency based on subjective criteria). Furthermore, there are extensive practical problems with the clemency process. Order at 5–6. People with outstanding restitution cannot apply for clemency under the current Rules of Executive Clemency. *See* Rules of Executive Clemency 9.A.3, 10.A.2. As such, many Plaintiffs—including Rosemary McCoy, *see* ECF 98-14 at ¶ 9; Karen Leicht,

[6] One of SB7066's sponsors also suggested that the State would need to spend millions of dollars to create a statewide system to track LFOs. Lawrence Mower, *Amendment 4 will likely cost 'millions' to carry out. Here's why.*, Tampa Bay Times (Apr. 4, 2019) https://www.tampabay.com/florida-politics/2019/04/04/amendment-4-will-likely-cost-millions-to-carry-out-heres-why/.

see ECF 98-7 at ¶¶ 2, 6; Steven Phalen, *see* ECF 98-11 at ¶¶ 2-3—are shut out from the clemency process *for precisely the same reason* that they cannot vote under SB7066: because they cannot afford to pay their restitution.

Additionally, clemency moves at a "glacial speed." Order at 5. Returning citizens are prohibited from applying for clemency until five or seven years after completing their sentence, and must satisfy numerous other requirements. *See* Rules of Executive Clemency 9.A, 10.A; *see* Order at 5, 36. Even those without outstanding restitution obligations must sit out multiple election cycles before applying for clemency, are ineligible to apply for clemency for reasons that are not disqualifying under Amendment 4, such as misdemeanor arrest, and can be denied restoration at the Board's discretion. *See* Rule of Executive Clemency 9.A. Several Plaintiffs also testified to this Court that clemency is not a viable option for their rights restoration. *See* PI Hr'g Tr. 150:15–151:2; 170:13–171:16; 260:23–261:4. For these and other reasons, the clemency process does not conform to the constitutional directive that any alternative rights restoration "method [be] equally accessible to the felon or otherwise comport[] with constitutional requirements." Order at 30.

This Court also correctly rejected Defendants' next argument: that SB7066's modification and community service conversion provisions cure any constitutional infirmities. *See* Defs.' Mot. at 14. This is simply not true. Neither SB7066's

modification provisions nor its termination provision require any determination of ability to pay. *See* Fla. Stat. § 98.0751(2)(a)(5). Under these provisions, returning citizens who cannot pay would have to rely on unreviewable discretion—often vested in private third parties—to agree to waive their LFOs. *See* Pls.' Repl. in Supp. of Mot. for Prelim. Inj., ECF 177-1, at 24–25. Furthermore, the community service conversion provision fails to "eliminate the disparate treatment of otherwise-qualified felons based on financial resources" and "is often wholly illusory" in practice, for a panoply of reasons. Order at 39–40; PI Hr'g Tr. at 149:6 (testimony of Ms. Wright); 167:20–168:4 (testimony of Ms. Riddle). Finally, it is uncontested that the modification provisions have no application to plaintiffs with out-of-state or federal convictions—such as Plaintiff Karen Leicht, *see* ECF 98-7 at ¶ 6; and Plaintiff Steven Phalen, *see* ECF 98-11 at ¶ 10. *See* Order at 39.

State Defendants' repeated protestations regarding severability are a red herring. Federal courts do not invalidate swaths of state law whenever they apply a constitutionally required exemption on the facts of a particular case. No severability analysis is presented here particularly given that the Court has not struck any provision of Florida law. Indeed, the Court observed that as a general matter "a state can rationally choose to take into account . . . whether the felon has paid any financial obligation." Order at 28. Instead, this Court held that SB7066's LFO requirements were unconstitutional *as applied* to the individual plaintiffs in

light of their inability to pay. Likewise, there was no need for *Johnson* to engage in a severability analysis of the Governor's clemency powers under state law in order to hold that a returning citizen cannot be denied the opportunity to apply for clemency based on inability to pay. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (affirming injunction that left criminal statute intact but prevented state from "arresting and prosecuting plaintiffs" due to religious exemption, *Maynard v. Wooley*, 406 F. Supp. 1381, 1389 (D.N.H. 1976)); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (Fourth Amendment requirement of probable cause hearing prior to "extended restraint of liberty following arrest" did not trigger severability analysis of provisions of Florida criminal procedure), *AFSCME Council 79 v. Scott*, 717 F.3d 851, 873 (11th Cir. 2013) (vacating district court's order that Florida governor's executive order was facially unconstitutional and remanding, without a severability analysis, to district court to "recraft its relief to cover only those groups as to which the Executive Order's application is unconstitutional"); *Binderup v. A.G.*, 836 F.3d 336 (3d Cir. 2016) (holding, without a severability analysis, that otherwise constitutional statute was unconstitutional as applied to plaintiffs); *Sampson v. Buescher*, 625 F.3d 1247, 1249 (10th Cir. 2010) (same).

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

NORTHERN DISTRICT OF FLORIDA LOCAL RULE 7.1 CERTIFICATION

Pursuant to N.D. Fla. L.R. 7.1(F), this motion contains fewer than 8,000 words. It contains **6,717 words**.

Date: December 13, 2019

Respectfully submitted,

/s/ Julie A. Ebenstein

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** *Pro Hac Vice* applications forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2019, I served a true and correct copy of the foregoing document via electronic notice by the CM/ECF system on all counsel or parties of record.

/s/ *Julie A. Ebenstein*
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