DOCKET NO. 20-12003

United States Court of Appeals
for the
Eleventh Circuit

Kelvin Leon Jones, *et al.*,
Plaintiffs-Appellees,

v.

Ron DeSantis, in his official capacity
as Governor of the State of Florida, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court for the
Northern District of Florida, Case No. 4:19-cv-300-RH/MJF

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INTRODUCTION

Before January 2019, more than 1.6 million Floridians were denied access to the political process—10% of the State's voting-age population. In 2018, Floridians overwhelmingly approved the Voter Restoration Amendment ("Amendment 4"), automatically restoring voting rights to Floridians with non-disqualifying convictions who "complet[ed] all terms of sentence including parole and probation."

Senate Bill 7066 ("SB7066") subsequently defined "completion of all terms of sentence" to require payment of *all* legal financial obligations ("LFOs") contained in the sentencing document, providing no exception for individuals unable to pay or on payment plans, or those whose LFOs were converted to civil liens. Under this pay-to-vote system, hundreds of thousands of Floridians cannot vote solely because they lack enough money. As a panel of this Court held, this violates equal-protection principles because it creates two classes of otherwise identical returning citizens:[1] those who can afford to vote, and those who are unable to pay.

The system also violates due-process principles because Florida cannot administer it. The district court's meticulous factual findings show Florida's LFO records are often inaccurate, missing, conflicting, destroyed, or scattered across the State. Consequently, the State cannot determine what amounts, if any, many

[1] Plaintiffs refer to persons with felony convictions (other than for murder or a sexual offense) who have completed all terms of incarceration, parole, and probation as "returning citizens" throughout.

returning citizens owe. The State will not be able to complete even an initial review of *already-registered* returning citizens' voter eligibility *until 2026*. And yet, returning citizens seeking to register must swear under penalty of perjury that they are eligible, risking criminal prosecution if they cannot prove they are right. Such a system is not only irrational—it deters from registering those who *owe nothing* but are unable to prove it, disenfranchising *eligible* Floridians.

Conditioning re-enfranchisement on court fees and costs assessed to fund the government also violates the Twenty-Fourth Amendment, which prohibits "any poll tax or other tax" as a precursor to voting. Defendants' position that the Amendment does not apply to returning citizens would vitiate not only the Twenty-Fourth Amendment—its text, its purpose, and Supreme Court precedent—but all voting amendments in the Constitution.

The State has done virtually nothing to administer SB7066, while returning citizens and local election officials have languished over several election cycles without any guidance about voter eligibility. Florida thus continues to deprive the right to vote to countless citizens. Such a "system" is irrational, cruel, and unfair. It is also unconstitutional.

JURISDICTIONAL STATEMENT

The district court's subject matter jurisdiction arises under 28 U.S.C. §§ 1331 and 1343.

The district court issued an opinion following trial on May 24, 2020, and enjoined enforcement of certain provisions of SB7066. *Jones v. DeSantis*, No. 4:19CV300-RH/MJF, 2020 WL 2618062 (N.D. Fla. May 24, 2020) ("*Jones II*"). Defendants noticed their appeal on May 29, 2020. ECF 423.[2] This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether SB7066 violates the Fourteenth Amendment by preventing returning citizens from registering and voting solely based on LFOs they are unable to pay.

2. Whether SB7066 violates the Twenty-Fourth Amendment because fees and costs that fund Florida's criminal-justice system constitute "other taxes" under the Twenty-Fourth Amendment and SB7066 requires returning citizens to pay fees and costs as a condition of voting.

3. Whether Florida's pay-to-vote system violates the Fourteenth Amendment by failing to provide a mechanism for returning citizens to determine whether they are eligible to register and vote, or how much they must pay to become eligible.

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

STATEMENT OF THE CASE

I. Factual Background

A. Amendment 4's Passage

For the 2018 election, returning citizens launched a ballot initiative campaign to end Florida's permanent disenfranchisement. Widespread media coverage estimated passage of Amendment 4 would restore voting rights to 1.2 to 1.6 million Floridians. ECF 286-13 ¶¶ 122, 133 n.123. On November 6, 2018, a supermajority of Florida voters (64.55%) supported its passage. ECF 207 at 6. Following ratification, Florida's Constitution provides:

> (a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability. *Except as provided in subsection (b) of this section, any disqualification from voting arising from felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation.*
>
> (b) *No person convicted of murder or a felony sexual offense shall be qualified to vote until restoration of civil rights.*

Fla. Const. Art. VI § 4(a), (b) (2019) (emphasis added).

Amendment 4 became effective on January 8, 2019, automatically restoring voting rights to returning citizens. *See* Advisory Op. to the Attorney Gen. Re: Voting Restoration Amendment, 215 So. 3d 1202, 1208 (Fla. 2017) ("[T]he chief purpose of the amendment is to automatically restore voting rights to [certain] felony offenders[.]").

B. Amendment 4's Implementation Before July 1, 2019

From January 8 until July 1, 2019, Florida's Department of State's ("DOS") Division of Elections (the "Division") and county Supervisors of Elections ("SOEs") implemented Amendment 4 as only requiring completion of incarceration, parole, and probation. They treated returning citizens as eligible registrants, approving their facially sufficient voter registration applications notwithstanding any outstanding LFOs. On February 11, 2019, Secretary of State Lee instructed SOEs to permit returning citizens to register to vote. *See* ECF 98-22. And although Florida law requires the Division to notify SOEs if it has "credible and reliable" evidence a registered voter is potentially ineligible because of a felony conviction, *see* Fla. Stat. § 98.075(5), as of trial the Division had neither identified nor provided notice to SOEs of *any* returning citizens potentially ineligible due to unpaid LFOs. *Jones II* at *24, *44.

Many returning citizens registered and voted in local elections during Spring 2019. *See* ECF 152-2 ¶ 7; 152-6 ¶ 4; 152-12 ¶ 10; 152-13 ¶ 10. Individual Plaintiffs are all returning citizens who have outstanding LFOs they cannot afford to pay, and who registered to vote soon after Amendment 4's passage. *See* ECF 207 at 2–3 n.1; *see also* ECF 152-2 ¶ 6; 152-12 ¶ 11; 152-12 ¶ 11. Organizational Plaintiffs are nonpartisan, not-for-profit membership organizations that conduct voter registration

in Florida and have members who are returning citizens with LFOs they cannot afford. *Jones II* at *7–9.

C. SB7066's Challenged Provisions

SB7066 became effective on July 1, 2019. It prohibits returning citizens from registering or voting until they pay the specific amount "contained in the four corners of the sentencing document," Fla. Stat. § 98.0751(2)(a), regardless of inability to pay, and even where a Florida court has converted the LFO to a civil lien—a longstanding Florida procedure employed when an individual cannot pay their financial obligations. *Jones II* at *31; *see also* Fla. H. Staff Analysis, H.B. 1381 (May 13, 1998) (noting courts typically reserve civil-lien conversion for returning citizens with "no ability to pay" LFOs assessed), *cited in Jones v. Gov. of Fla.*, 950 F.3d 795, 816 (11th Cir. 2020) ("*Jones I*"); ECF 98-25 ¶ 14 (courts enter civil judgments "when clients are indigent or the amount of [LFOs] owed is so high that it is unrealistic to believe they could ever pay it"). SB7066 requires payments of civil liens, even though such obligations are removed from the criminal-justice system's enforcement. *Jones II* at *31.

From July 2019 through April 2020, the State applied SB7066 using what the court termed the "Actual-Balance Method" to calculate how much returning citizens must pay to vote. *Id*. at *18. This method simply deducts from the original obligation any payment towards the principal debt without counting payments towards interest,

fees, and surcharges. *Id*. Days before trial, however, the State introduced a new theory for calculating pay-to-vote obligations, identified as the "Every-Dollar Method." *Id*. at *21. The State calculates the cost to vote by comparing the original LFO obligation with the total amount of money paid by, or on behalf of, a returning citizen. All payments—even those for interest, debt collection agency fees, or other surcharges not included in the sentencing document— "count" toward payment for voting, even if the money is not directed to the sentenced obligation. *Id.* at *21–23.

By trial, the Division had not completed internal review of outstanding LFOs for a single registered voter based on any policy. *Id*. at *24, *44. And although Florida law requires the Division to notify SOEs if it has "credible and reliable" evidence a registered voter is potentially ineligible because of a felony conviction, *see* Fla. Stat. § 98.075(5), as of trial the Division had neither identified nor provided notice to SOEs of any returning citizens potentially ineligible due to unpaid LFOs. *Jones II* at *24, *44; *see also id*. at *9 (describing Florida's law governing registration and removal).

D. Florida Supreme Court's Advisory Opinion

On January 16, 2020, the Florida Supreme Court issued a non-binding advisory opinion, determining that "all terms of sentence" in Amendment 4 includes fines, restitution, fees, and costs. *See Advisory Op. to the Governor re: Implementation of Amendment 4*, 288 So. 3d 1070, 1075 (Fla. 2020). It expressly

does not interpret what constitutes "completion" in the phrase "completion of all terms of sentence," or whether converting LFO obligations to civil liens could constitute "completion." *Id*. at 1075 ("[T]he Governor requests advice solely as to the narrow question of whether the phrase 'all terms of sentence' includes LFOs ordered by the sentencing court. We answer only that question."). It also explicitly declines to interpret voters' or the Amendment sponsors' intent or understanding of Amendment 4. *Id*. at 1078 ("our opinion is based not on the Sponsor's subjective intent or campaign statements").

E. SB7066's Effect

For many returning citizens, including Individual Plaintiffs and members of Organizational Plaintiffs, SB7066 reinstates lifetime disenfranchisement. At trial, Dr. Daniel Smith testified that he identified records for one million individuals residing in Florida with past Florida state convictions for qualifying felonies who have completed their sentence, including incarceration and supervision. ECF 360-48 ¶ 9 (Smith Second Supplemental Report).[3] Of those, 774,490, or approximately 77%, have outstanding LFOs. *Id*. ¶ 22. The majority of those with outstanding LFOs owe more than $1,000. *Id*. ¶¶ 25 tbl.3, 31. Dr. Smith testified that these data are "conservative," meaning they are "biased against inflating the number of persons

[3] The district court fully credited the expert testimony of Dr. Smith. *Jones II* at *16 n.82.

with felony convictions who are otherwise eligible to vote under SB7066 but for their outstanding LFOs." *Id.* ¶¶ 4–5, 36.

The district court found, and Defendants do not challenge, "that the overwhelming majority of felons who have not paid their LFOs in full, but who are otherwise eligible to vote, are genuinely unable to pay the required amount, and thus, under Florida's pay-to-vote system, will be barred from voting solely because they lack sufficient funds." *Jones II* at *16. In making this finding, the Court cited the State's own data, including: (1) testimony and data from Florida public defenders that somewhere between 70–90% of felony criminal defendants are indigent and consequently appointed counsel, ECF 360-48 ¶¶ 42, 46; Trial Tr. Day 2 at 276:3–25, 278:3–25 (Haughwout Testimony), 351:1–352:7 (Martinez Testimony);[4] (2) from Florida Court Clerks and Comptrollers data showing "minimal collections expectations" based on inability to pay for between 58.2% to 68.4% of all fines and fees assessed to returning citizens from 2013–2018 —either because those returning citizens were determined indigent or had their LFOs converted to a civil judgment or lien, ECF 360-48 ¶ 37; and (3) two legislative reports noting "[m]ost criminal defendants are indigent," *Jones I* at 816.

[4] Transcript page and line numbers are designated by the court reporter. *See* 11th Cir. R. 28-5.

SB7066 also requires payment of all fees and costs, which are responsible, "in significant measure," for funding Florida's courts. *Jones II* at *28. These are directly levied by and paid to governmental entities and are mandatory amounts generally assessed regardless of culpability—that is, someone adjudged guilty of a violent offense is assessed the same as someone who pleads no-contest to a minor nonviolent offense and is not adjudged guilty. *Id*. Such fees are collected in the same way as are civil debts, including through collection agencies. *Id*.

F. SB7066's Implementation

DOS has not implemented SB7066's LFO provisions, *see* ECF 152-93 at 152:2–153:13, 168:20–25 (Matthews Deposition), because it (a) does not know which type of LFOs are disqualifying under SB7066, ECF 152-94 ¶ 23; and (b) cannot determine whether returning citizens have paid their LFOs because it lacks accurate, reliable records, *see* ECF 207 at 43–44; ECF 152-93 at 184:14–20; ECF 153-4 (stating records are often misplaced or destroyed by clerks, and some clerks will only provide the Division unofficial summaries instead of case documents). By the start of trial in April 2020, the Division had registered approximately 85,000 individuals with felony convictions it needed to screen for disenfranchising LFO obligations. *Jones II* at *24. But in the 18 months between Amendment 4's adoption and trial, the Division had not completed the review of a single registration for

disqualifying LFOs. *Id*. Division caseworkers can process 57 registrations per day, meaning it would take over five years to complete its review, once begun. *Id*. at *24.

Returning citizens often cannot determine the LFO obligation included in a judgment. The county SOEs and Clerks of Court generally do not possess that information, and what information they do possess is often inconsistent. *Id.* at *16–17; *see also* ECF 360-47 (Burch Report); Trial Tr. Day 1 at 143:3–206:16, 221:5–225:6 (Burch Testimony).[5] Often, returning citizens find it difficult or impossible to acquire copies of their judgments, decipher them, determine their original LFO obligation, and calculate whether they still owe LFOs. *Jones II* at *45–46. Florida has incomplete records, especially for older felonies. *Id*. at *19. Expert witness Dr. Traci Burch found inconsistencies in the payment records of 98% of a randomly selected group of returning citizens. *Id.*; *see also* ECF 360-47 at 9. Additionally, there are often no records for restitution, which is frequently paid to the victim directly. *Jones II* at *20.

G. Upcoming Elections and Registration Deadline

Florida's general election and local elections are on November 3, 2020, with an early voting period beginning October 24. The registration deadline is October 5. Fla. Stat. § 97.055(1)(a). Individual Plaintiffs seek to register or remain registered

[5] The district court fully credited the expert testimony of Dr. Burch. *Jones II* at *17 n.86.

and vote in the upcoming election. Organizational Plaintiffs plan to engage in voter registration efforts and their members with outstanding LFOs seek to register and vote.

II. Prior Proceedings

Gruver Plaintiffs filed suit on June 28, 2019, and the *McCoy* Plaintiffs filed suit on July 1, 2019.[6] *Gruver* Compl.; *McCoy* Compl. The cases were consolidated with three other actions. Order of Transfer & Consolidation, *Gruver v. Barton*, No. 1:19-cv-121 (N.D. Fla. June 30, 2019), ECF 3; *McCoy v. DeSantis*, No. 4:19-cv-304 (N.D. Fla. July 2, 2019), ECF 4.[7]

On August 2, 2019, all Plaintiffs jointly moved for a preliminary injunction on their claims under the First, Fourteenth, and Twenty-Fourth Amendments. ECF 108; 98-1. After a two-day evidentiary hearing, *see* ECF 201; 202, on October 18, 2019, the district court granted the requested preliminary injunction in part, ruling that denying Plaintiffs' right to vote based on inability to pay LFOs violates the Fourteenth Amendment. ECF 207.

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[6] *Gruver* Plaintiffs are Jeff Gruver, Emory Marquis "Marq" Mitchell, Betty Riddle, Kristopher Wrench, Keith Ivey, Karen Leicht, Raquel Wright, Steven Phalen, Clifford Tyson, Jermaine Miller ("Individual Plaintiffs"), Florida State Conference of the NAACP, Orange County Branch of the NAACP, and League of Women Voters of Florida ("Organizational Plaintiffs"). *McCoy* Plaintiffs are Rosemary McCoy and Sheila Singleton.

[7] The consolidated cases share a common docket under Consolidated Case No. 4:19-cv-300.

Defendants appealed, ECF 219, and on February 19, 2020, a unanimous panel of this Court upheld the preliminary injunction, concluding SB7066 unconstitutionally discriminates on the basis of wealth, as-applied to those genuinely unable to pay. *Jones I*. Defendants sought rehearing en banc, which this Court denied. *See* Order, *Jones v. Gov. of Fla*., No. 19-14551 (11th Cir. Mar. 31, 2020).

On May 24, 2020, after an eight-day bench trial, the district court ruled SB7066 is unconstitutional and violates the National Voter Registration Act ("NVRA"). *Jones II* at *38. The district court held the "pay-to-vote" system did not survive heightened scrutiny, the proper standard for evaluating the system's effect on returning citizens genuinely unable to pay their LFOs. *Id.* at *13–26. Nor did it, in the alternative, survive rational-basis scrutiny, whether viewed from the perspective of those unable to pay, or generally applied. *Id*. at *15–16. The court further held Florida's pay-to-vote system is plagued by intractable administrative problems, rendering it irrational, contrary to due-process principles, and void for vagueness. *See id.* at *44 ("the requirement to pay, as a condition of voting, amounts that are unknown and cannot be determined with diligence is unconstitutional"). The court also ruled SB7066 violates the Twenty-Fourth Amendment regarding fees and costs because they constitute "other tax[es]." *Id.* at *27–29.[8]

[8] The district court ruled against Plaintiffs' race-discrimination and gender claims. *Jones II* at *35–36.

Defendants subsequently appealed and moved for a stay pending appeal. ECF 423; 427.[9] The district court denied the stay on June 14. ECF 431. On July 1, this Court granted Defendants' motion to stay pending appeal and petition for initial hearing en banc. Order, *Jones* v. *Gov. of Fla*., No. 20-12003 (11th Cir. July 1, 2020). Plaintiffs filed an application requesting vacatur of the stay order, which the Supreme Court denied on July 16. Plaintiffs also filed a motion for clarification of this Court's stay order, which it granted in part. Order, *Jones v. Gov. of Fla*. No. 20-12003 (11th Cir. July 29, 2020).

III. Standard of Review

On appeal from a bench trial, this Court reviews de novo a district court's conclusions of law, but findings of fact cannot "be set aside unless clearly erroneous." *MiTek Holdings, Inc.* v. *Arce Eng'g Co.*, 89 F.3d 1548, 1554 (11th Cir. 1996) (quotations omitted). Provided "the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. Bessemer City*, 470 U.S. 564, 565 (1985). "A finding that is 'plausible' in light of the full record—even if another

[9] The ten SOEs did not appeal.

is equally or more so—must govern." *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017).

A district court has broad equitable discretion to grant permanent injunctive relief. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). This Court must review the appropriateness of the district court's remedy for abuse of discretion. *Connor v. Finch*, 431 U.S. 407, 415 (1977).

SUMMARY OF ARGUMENT

The district court, following well-established precedent and relying on an extensive and mostly uncontested factual record, correctly held: (i) withholding restoration of voting rights due to inability to pay LFOs cannot withstand any level of scrutiny under the Fourteenth Amendment; (ii) SB7066 is void for vagueness and violates procedural-due-process principles; and (iii) fees and costs constitute a tax, thus violating the Twenty-Fourth Amendment.

Applying heightened scrutiny to wealth discrimination in voting aligns with decades of Supreme Court precedent prohibiting states from making a voter's affluence "an electoral standard," *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966), and from punishing criminal defendants because of their inability to pay, *Bearden v. Georgia*, 461 U.S. 660, 671–72 (1983). *Harper* applies to returning citizens since it prohibits states from drawing "invidious" distinctions based on wealth in voting—as Florida does by its pay-to-vote system. *Bearden* is not limited

to its facts; it outlines a general test to determine when distinctions based on financial resources violate the Constitution. And discriminatory intent is not a required showing for wealth-based claims.

Even if rational basis were the correct standard of review, Florida's pay-to-vote system cannot pass constitutional muster, given the district court's factual findings that the "mine-run" of otherwise eligible returning citizens are "genuinely unable to pay the required amount." *Jones II* at *15–16. The legislature knew when it passed SB7066 that the overwhelming majority of returning citizens are unable to pay their outstanding LFOs balances.

The district court also properly determined SB7066 is unconstitutionally vague and violates due-process principles. The record makes clear Defendants cannot inform returning citizens of the amounts owed and whether those LFOs have been paid. Because Florida makes it a crime to falsely affirm eligibility or to vote fraudulently, Defendants' failures force returning citizens to risk prosecution to register, and will deter hundreds of thousands of eligible voters from participation. *See id*. at *25–26.

SB7066's costs and fees requirement also violates the Twenty-Fourth Amendment. Costs and fees are taxes because, as the district court found, their function is to "pay for [Florida's] criminal-justice system in significant measure." *Id.* at *28. Further, Defendants' contention that the Twenty-Fourth Amendment does

not apply to returning citizens has no basis in the Constitution's text and contravenes the Amendment's purpose: to "abolish[] absolutely" any tax "as a prerequisite to voting." *Harman v. Forssenius*, 380 U.S. 528, 542 (1965).

Finally, in a "breathtaking attack on the will of the Florida voters," *Jones II* at *40, Defendants argue that Amendment 4 must be struck down entirely if Plaintiffs prevail. However, there is no credible evidence supporting Defendants' "fanciful" proposition, *id.* at *41, n.177, that Amendment 4 would not have passed absent its unconstitutional application. The district court properly enjoined unconstitutional applications of the LFO requirement while keeping the purpose of Amendment 4 intact. *Id*. at *41.

ARGUMENT

I. *Jones I* and the District Court Properly Held That Wealth Discrimination in Elections is Subject to Heightened Scrutiny

Jones I correctly held that withholding restoration of voting rights due to inability to pay LFOs is subject to heightened scrutiny under the Fourteenth Amendment, and that it cannot withstand that scrutiny. 950 F.3d at 817–23. That determination rests on a straightforward application of two lines of Supreme Court precedent. In *Harper*, the Court held the Equal Protection Clause prohibits states from restricting access to the franchise on the basis of wealth. 383 U.S. at 666. In *Bearden*, the Court held states cannot punish individuals solely due to their inability

to pay financial sanctions. 461 U.S. at 671–72. In *M.L.B.* v. *S.L.J.*, the Supreme Court said wealth discrimination in these two areas—access to the franchise and criminal-justice administration—triggers heightened scrutiny. 519 U.S. 102, 124 (1996). This case implicates *both* areas. Decades-long precedent demonstrates the pay-to-vote system is unconstitutional.

A. *Harper* Prohibits Wealth Discrimination in Access to the Franchise

Harper prohibits states from conditioning access to the franchise on wealth. *Harper* held a "[s]tate 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. The Court likened conditioning access to voting based on "[w]ealth" to discrimination based on race because it "is not germane to one's ability to participate intelligently in the electoral process." *Id.* at 668. The Court reaffirmed these principles in *M.L.B.*, where it recognized that fee requirements "ordinarily are examined only for rationality," but held that heightened scrutiny applies to fees that condition access to the franchise, because "[t]he basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license." *M.L.B.* at 123–24.

Defendants say *Harper* does not apply to Florida's pay-to-vote system because returning citizens lost their right to vote as the result of a conviction.[10] Def. Br. at 39.[11] However, "nothing in *Harper*'s analysis turned on the assumption that those who would be unable to pay the fee personally had a fundamental right to vote." *Jones I* at 822. The Supreme Court has thus applied *Harper*'s reasoning even where franchise-related rights are not "fundamental." For example, the Supreme Court has invalidated candidate filing fees because such requirements restrict access to the political process on the unconstitutional "criterion of ability to pay." *Bullock v. Carter*, 405 U.S. 134, 149 (1972); *see also Lubin v. Panish*, 415 U.S. 709, 718 (1974) ("[I]n the absence of reasonable alternative means of ballot access, a State may not … require from an indigent candidate filing fees he cannot pay."). Even though candidates in *Bullock* had no "fundamental" right to appear on the ballot, the Court applied heightened scrutiny because the system "f[ell] with unequal weight" due to "economic status" and because the plaintiff-candidates had "affirmatively alleged that they were unable, not simply unwilling, to pay the assessed fee." *Bullock*, 405 U.S. at 142–46; *see also Lubin*, 415 U.S. at 714. Indeed, *Harper* noted

[10] This Court made no such distinction when it cited *Harper* in the context of rights restoration. *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1216 n.1 (11th Cir. 2005) (en banc).

[11] This brief cites to the file-stamped page numbers recorded on Pacer for Defendants' opening brief.

"the right to vote in state elections is nowhere expressly mentioned" in the Constitution, but it still held wealth-based restrictions on the franchise are impermissible in state elections. 383 U.S. at 665.

State-granted voting rights are subject to heightened scrutiny, even if granted by state law and not the Constitution. *See O'Brien v. Skinner*, 414 U.S. 524, 529–31 (1974) (invalidating denial of absentee registration privileges to some voters despite absence of federal right to vote by absentee ballot). If a state charged a fee for early voting or absentee ballots, that would not be excluded from *Harper*'s ambit because these statutorily-created features were "wholly reformatory" or "not … generous enough," or because the payment requirements did "not themselves disenfranchise" anyone. Def. Br. at 22, 49. Florida's pay-to-vote system is hardly "reformatory."[12] And it is not exempt from *Harper* merely because the restoration regime is created by state law.[13]

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[12] *Katzenbach v. Morgan*, 384 U.S. 641 (1966) does not support Defendants' notion of SB7066 as "reformatory" because it did not involve wealth-based restrictions on voting, arose from the entirely different context of Congress's enforcement power under section 5 of the Fourteenth Amendment, and did not address whether a state-enacted measure would be unconstitutional. *Id.* at 649–50. Even if *Katzenbach* applies to state law, SB7066's definition of "completion," extending disenfranchisement beyond conversion to civil liens, is more restrictive than what Amendment 4 requires. *Jones II* at *10.

[13] Defendants can no longer claim Florida permanently extinguishes Plaintiffs' right to vote after voters amended the constitution such that Fla. Const. Art. VI §

Improper burdens on voting rights—like wealth-based restrictions—do not become permissible if applied only to those with felony convictions. *See Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (holding states may disenfranchise based on felony convictions but remanding for consideration of equal protection arguments); *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (Section 2 of the Fourteenth Amendment generally permits felony disenfranchisement but "was not designed to permit the purposeful discrimination ... which otherwise violates § 1 of the Fourteenth Amendment"); *Hand v. Scott*, 888 F.3d 1206, 1212 (11th Cir 2018) (noting viewpoint discrimination in granting clemency might violate First Amendment); *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) ("[A] state could not choose to re-enfranchise voters of only one particular race."). *Harper* makes clear "lines may not be drawn" inconsistent with the constitutional prohibition on wealth-based qualifications. 383 U.S. at 665. Nothing in *Harper* suggests lesser scrutiny applies when a subset of the population is targeted by a wealth-based restriction.[14] Florida's pay-to-vote system is unconstitutional because

4(a) (2019) contemplates both suspension and automatic restoration of rights in one provision.

[14] Defendants' analogy to children and noncitizens is illustrative: If a state chose to lower the voting age to seventeen, but only upon payment of $1,000, that requirement would be "invidious" even though seventeen-year-olds have no "fundamental" right to vote.

it does precisely what *Harper* and *M.L.B.* forbid: condition access to the franchise on financial obligations Plaintiffs cannot afford to pay, although they would be "otherwise qualified to vote." *Id*. at 668; *see also Jones I* at 808 (applying *M.L.B*. exception for franchise access).

Defendants next argue that, because a state may impose costs tangential to voting, such as obtaining underlying documents required for a free voter-identification card, then Florida may require returning citizens to pay to vote. But *Crawford v. Marion Cty. Election Bd.*, supports Plaintiffs—not Defendants. 553 U.S. 181 (2008). The Court in *Crawford* upheld Indiana's photo-identification requirement because the state provided it for free. *Crawford* noted that it would be invalid "under our reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification." *Id*. at 198; *see also Brakebill v. Jaeger*, 932 F.3d 671, 679 (8th Cir. 2019) (denying preliminary injunction for a *Harper* violation in part because the ID required to vote was available for free). Contrary to Defendants' suggestions, Plaintiffs are not arguing that no cost can ever be incurred in connection with voting. *Crawford* acknowledged that, under the ID law, some small proportion of voters might face *indirect* costs that are not constitutionally significant. 553 U.S. at 201. But here, Florida imposes *direct* costs, requiring "[f]ull payment of fines or fees ordered by the court," Fla. Stat. § 98.0751(2)(a)(5)(b), as a

condition for rights restoration. Such a requirement crosses the line identified in *Crawford* and *Harper* as "invidious" for voters who cannot pay. 553 U.S. at 189.[15]

B. The Pay-to-Vote Requirement Unconstitutionally Punishes People for Inability to Pay

This Court should affirm the decision below because the LFO requirement falls squarely within the second domain identified by *M.L.B.* as triggering heightened scrutiny—wealth-discrimination in the administration of criminal justice. Decades of Supreme Court precedent establishes a clear constitutional principle: "punishing a person for his poverty" violates the Fourteenth Amendment. *Bearden*, 461 U.S. at 671; *see also Griffin v. Illinois*, 351 U.S. 12, 19 (1956). This doctrine is limited; states retain broad authority to impose financial sanctions, even if an individual cannot pay. But heightened scrutiny squarely applies where, as here, a state imposes punishment or collateral consequences due to a person's inability to pay financial penalties. *Jones I* at 817–818 (collecting cases). The Constitution provides an essential check when the state operates as a debt collector.

In *Griffin*, the foundational "equal justice" case, the Supreme Court held unconstitutional the denial of trial transcripts to defendants who sought to appeal

[15] Defendants strangely contend that SB7066 does not require "payment of a fee" and that *Harper* is distinguishable because "if a voter had $1.50, he could vote, and if he did not have enough, he could not vote." Def. Br. at 22. But this is no distinction; it is precisely the claim pressed here: "Two hypothetical felons here have committed the same crime, with identical culpability, yet one is deemed [automatically] qualified to vote based on ability to pay." *Jones I* at 827.

felony convictions but could not afford transcript fees. 351 U.S. at 19. Drawing from both the Due Process and Equal Protection Clauses, the Court explained a state could not "discriminate[] against some convicted defendants on account of their poverty[.]" *Id.* at 18. In *Bearden*, the Court synthesized its wealth-discrimination precedent, explaining, "[d]ue process and equal protection principles converge" when people are treated differently based on their wealth: the Due Process Clause guards against practices that are "fundamentally unfair or arbitrary," and the Equal Protection Clause protects people from being "invidiously denied ... a substantial benefit" available to those with the financial resources to pay. 461 U.S. at 665–66. Together, these principles require an "inquir[y] into the reasons for the failure to pay" before imposing a sanction for nonpayment. *Id.* at 672–73.

Bearden eschewed the traditional tiers-of-scrutiny "equal protection framework" and rejected basing its review on whether a fundamental right or suspect classification was at issue. *Id*. at 666 n.8. Rather, to determine the constitutionality of a sanction for failure to pay, *Bearden* requires "a careful inquiry" into four relevant factors: (1) "the nature of the individual interest affected," (2) "the extent to which [that interest] is affected," (3) "the rationality of the connection between legislative means and purpose," and (4) "the existence of alternative means for effectuating the purpose." *Id*. at 666–67. As *Jones I* held, *Bearden*'s factors all weigh strongly in Plaintiffs' favor.

First, "voting is undoubtedly a weighty interest." *Jones I* at 825. Voting implicates the foundational principles of political participation central to American democracy. The fact that Plaintiffs' right to vote derives from Amendment 4 does not vitiate the significance of that interest, any more than a probationer's "conditional" interest in liberty is diminished by the fact that it arises from state law. *Id.* at 823.

Second, the need for heightened scrutiny is especially strong here, where "because of their impecunity[, an individual] is completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." *Walker v. City of Calhoun*, 901 F.3d 1245, 1261 (11th Cir. 2018). Here, Plaintiffs have sustained such an absolute deprivation: they are completely barred from the franchise.[16]

[16] Defendants suggest alternative avenues by which Plaintiffs might regain voting rights. But "[a]ll three avenues suffer from a common and basic infirmity—they are entirely discretionary in nature." *Jones I* at 826. SB7066 vests a "payee" with absolute and unreviewable discretion to deny termination of an LFO debt. Fla. Stat. § 98.0751(2)(a)(5)(e)(II). The uncontested record evidence shows that community-service conversion is unavailable in most cases. *Jones I* at 826. Discretionary grants of clemency are exceedingly rare and subject to significant waiting periods. *Id*. Moreover, all three are inaccessible to those with out-of-state or federal convictions. *Id*. Where the wealthy receive automatic rights restoration, it is insufficient to make the poor pray for an act of grace. The person denied that grace is absolutely deprived.

Third, whatever the State's interest in payment of LFOs, there is no legitimate rationale for punishing individuals for financial obligations they are genuinely unable to fulfill. "The State cannot draw blood from a stone." *Jones I* at 827. *Bearden*'s due-process component protects against punishment for "lack of fault[.]" 461 U.S. at 669.[17]

Fourth, Florida retains better alternatives to collect LFOs. *See, e.g.*, Fla. Stat. § 28.246(6) (authorizing referral to collection agencies); *id*. § 77.0305 (authorizing garnishment of wages); *id*. § 932.704 (authorizing civil-forfeiture proceedings). Disenfranchisement is unnecessary where "other means for exacting compliance with [payments]" exist and are "at least as effective." *Zablocki v. Redhail*, 434 U.S. 374, 389 (1978). Punitive interests are satisfied by the many non-financial terms required, rather than the financial terms an individual cannot satisfy.

In objecting to application of *Bearden*, Defendants appear to have abandoned what was previously their chief argument: that wealth-based discrimination applies only to fundamental rights. *See Jones I* at 822–23 (finding Defendants' "fundamental

[17] Contrary to Defendants' bizarre analogy about lengthy carceral sentences for the elderly, Def. Br. at 42, the issue is not whether individuals can be sentenced to terms they are unlikely to complete but rather that individuals cannot be punished for inability to comply.

right" argument incompatible with precedent).[18] Instead, Defendants pivot to contending that wealth-based discrimination claims are restricted to the precise factual scenarios of prior Supreme Court cases, *e.g.*, access to appellate transcripts and imprisonment. In doing so, Defendants have "run amok with a venerable common law method … [by] consciously setting out to 'confine each case to its own facts' … which would virtually eliminate all precedent." *Communications Inv. Corp. v. F.C.C.*, 641 F.2d 954, 976 (D.C. Cir. 1981); *see also id.* ("[T]o say a case has been confined to its facts is just a polite way to say it has been ignored."); *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring) (precedent must apply to new scenarios or doctrine would become "so limited to its facts that its underlying principle is … repudiated").

Defendants are incorrect for several reasons. First, *Bearden* does not direct courts to circumscribe their analyses to one particular context, but to examine "the

[18] *See Griffin*, 351 U.S. at 18 (no fundamental right to "appellate courts or … appellate review at all"); *Escoe v. Zerbst*, 295 U.S. 490, 492–93 (1935) ("[p]robation … comes as an act of grace" and has no "basis in the Constitution, apart from any statute"). Defendants' reliance on *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010) is misplaced given the majority's misapplication of a fundamental-rights lens. *See also id*. at 754–80 (Moore, C.J., dissenting) (detailing numerous ways majority diverged from Supreme Court authority). *Bredesen* is further distinguishable because Tennessee's law was much narrower in scope (requiring only payment of restitution and child support) and because Tennessee "expressly [took] into account 'ability to pay' when calculating [those] restitution and child support awards." *Id.* at 750 n.3.

nature of the individual interest affected." 461 U.S. at 664–67 (emphasis added). *M.L.B.* likewise held "the Court [first] inspects the character and intensity of the individual interest at stake[.]" 519 U.S. at 104. This initial criterion would be superfluous if "*Griffin*'s principle" applied only to imprisonment (or to appellate transcripts). *Bearden* specifically discusses imprisonment because that was the sanction at issue. But in referring broadly to denial of "a substantial benefit," *Bearden* unquestionably contemplated application of its doctrine beyond the factual context of previously decided cases. 461 U.S. at 665.

Indeed, *Bearden* stated, "*Griffin*'s principle … has been applied in numerous other contexts." *Id*. at 664 (collecting cases). For example, *Mayer v. City of Chicago* rejected the government's argument that *Griffin* should be confined to the facts of prior decisions, holding that the "invidiousness of the discrimination ... is not erased" when a defendant risks only a fine rather than incarceration. 404 U.S. 189, 197 (1971). Furthermore, the "Supreme Court expressly and repeatedly [has] extended *Griffin*'s equality principle beyond the realm of criminal justice" into certain civil domains. *Jones I* at 820 (collecting cases). The Supreme Court noted it would likely violate *Griffin* if public education were "made available by the State only to those able to pay a tuition assessed against each pupil"—a scenario well outside the scope

of imprisonment or access to judicial processes. *San Antonio School Districts v. Rodriguez*, 411 U.S. 1, 25 n.60 (1973).[19]

Nor do the decisions Defendants cite restrict *Griffin*/*Bearden* in the manner they suggest. *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988), involved fees charged for school-bus transportation and does *not* suggest *Griffin* is confined to judicial processes. Rather, *Kadrmas* described the Court's wealth-discrimination doctrine as encompassing "decisions in which we have held that government may not *withhold certain especially important services* from those who are unable to pay for them." *Id*. at 460 (emphasis added). *Kadrmas* declined to apply heightened scrutiny *not* because the case did not involve transcript access specifically, but because the State "does not maintain *a legal or a practical monopoly* on the means of transporting children to school." *Id*. at 460–61 (emphasis added). In contrast, here, Florida *does* maintain a monopoly over access to the franchise. Plaintiffs' only way to participate in the democratic process is to fully pay Florida LFOs—which they cannot afford.[20]

[19] This portion of *Rodriguez* is dictum but "is of considerable persuasive value, especially because it interprets the Court's own precedent." *United States v. City of Hialeah*, 140 F.3d 968, 974 (11th Cir. 1998).

[20] *Christopher v. Harbury*, 536 U.S. 403 (2002), and *Lewis v. Casey*, 518 U.S. 343 (1996), discuss case precedent in terms of judicial access not to limit the doctrine, but because the plaintiffs were seeking access to judicial processes.

Similarly, *Walker* in no way limited wealth-discrimination doctrine to judicial-access cases. *Walker* stated, "[t]he *sine qua non*" of a *Griffin*/*Bearden*-style claim "is that the State is treating the indigent and the non-indigent categorically differently." 901 F.3d at 1260; *see also United States v. Plate*, 839 F.3d 950, 956 (11th Cir. 2016) (holding it "unconstitutional" to be "treated more harshly in [one's] sentence than [if one] … had access to more money"). And contrary to Defendants' contentions that *Griffin* and *Bearden* are independent lines of precedent, *Walker* noted "the Supreme Court *synthesized* [*Griffin* and related wealth-discrimination case] law in *Bearden*[.]" 901 F.3d at 1259 (emphasis added).

Finally, contrary to Defendants' contentions, *Bearden* never suggested an interest must be "vested" for heightened scrutiny to apply. A requirement that individuals pay $5,000 to commence probation or be jailed would not evade *Bearden* simply because probation had not yet "vested." And *Bearden*'s immediate precursors did not involve "vested" rights. *Tate v. Short* held that jailing a person "solely because of his indigency" "constitutes precisely the same unconstitutional discrimination" regardless of whether the underlying statute authorized imprisonment or only fines. 401 U.S. 395, 398 (1971). *Griffin* involved no "vested" right to transcripts, but held that states must finance transcripts for indigent individuals' appeals. 351 U.S. at 18.

Plaintiffs' request is more modest and does not ask Florida to waive debt or fund any service. Plaintiffs seek *cessation of punishment*—here, disenfranchisement—that continues due to inability to pay. Defendants flatly concede that states have no valid "penological interests" in disenfranchising "for mere inability to pay," but suggest *Bearden* only applies if punishment arises from a "*separate* offense of failing to pay a fine." Def. Br. at 48. That limitation makes no sense. Probation revocation in *Bearden* triggered imprisonment *authorized under the original* statute of conviction. 461 U.S. at 670 (probation reflected determination that imprisonment was unnecessary though authorized under burglary/theft statutes). Under Defendants' faulty logic, if the statute for an underlying offense required incarceration to continue until all LFOs had been paid, *Bearden* would not apply because the statute's "outer limit" permits lifetime imprisonment for inability to pay. The point of *Bearden*, *Tate*, and *Williams v. Illinois*, 399 U.S. 235 (1970), is that *it does not matter* whether a sanction is an add-on, conversion, or component of the original offense. Punishment for inability to pay is unconstitutional.

Even if a conditionally vested interest were required, Amendment 4 confers one. Floridians mandated that "voting rights shall be restored" automatically upon completion of all terms of sentence. Fla. Const. Art. VI § 4(a). This represents far more of an entitlement than a case-specific probation determination. Floridians categorically determined that penological interests do *not* require permanent

disenfranchisement—only completion of sentence. The only remaining obstacle is Plaintiffs' "mere inability to pay," which Defendants agree is not a valid "penological interest" standing alone. Def. Br. at 48. That concession demonstrates that the pay-to-vote requirement is unconstitutional.

C. Discriminatory Intent is Not Required for Claims of Wealth Discrimination in Voting

Defendants erroneously argue that Plaintiffs' wealth discrimination claim requires a showing of intentional discrimination, as in *Washington v. Davis*, 426 U.S. 229 (1976), a race-discrimination case. But the Supreme Court expressly rejected a *Davis* intent requirement for wealth-discrimination claims. *M.L.B.*, 519 U.S. at 126–127; *see also Jones I* at 828 ("[I]ntent requirement is not applicable in wealth discrimination cases."). Moreover, Florida's pay-to-vote system is not "wealth-neutral" because, in operative effect, it necessarily disenfranchises only returning citizens unable to pay. *See Williams*, 399 U.S. at 242; *Griffin*, 351 U.S. at 17–18. And *Harper* recognizes that a payment-based voting system *inherently* discriminates based on wealth. 383 U.S. at 666. This is not mere disparate impact along the lines of *Davis*, 426 U.S. at 229, but an invidious facial distinction.

As the Supreme Court explained in *Williams*, a state classifies based on wealth when the "operative effect" of a statute falls on those unable to pay. 399 U.S. at 242. *Williams* reviewed a statute permitting an additional period of incarceration for failure to pay and noted "[o]n its face the statute extends to all defendants an

apparently equal opportunity[.]" *Id.* Nevertheless, this was an "illusory choice ... for any indigent" because "in operative effect [it] exposes only indigents to the risk" of extended punishment. *Id.*; *see also Griffin*, 351 U.S. at 18 (requiring a trial-transcript fee "discriminates against some convicted defendants on account of their poverty"). While Florida's pay-to-vote system contains no facial distinction between those able and unable to pay, in operative effect, it exposes only indigent individuals to extended punitive disenfranchisement and thereby "works [the same] invidious discrimination solely because [a] plaintiff is unable to pay." *Williams*, 399 U.S. at 242.[21]

Defendants next criticize *Jones I* for failing to delineate an objective measure of indigency. But this ignores that the Supreme Court's wealth-discrimination precedent uses the term "indigency" interchangeably with "inability to pay." *See, e.g.*, *M.L.B.*, 519 U.S. at 127 (noting fees "are wholly contingent on *one's ability to pay*, and thus visi[t] different consequences on two categories of persons") (emphasis added; quotations omitted); *Bearden*, 461 U.S. at 666 n.8 (noting indigency in this context is a relative term rather than a classification"); *Griffin*, 351 U.S. at 12, 18–20; *Boddie v. Connecticut,* 401 U.S. 371, 374 (1971) ("[D]ue process

[21] *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000), illustrates the difference because the statute punished "camping" and contained no financial classification whatsoever.

does prohibit a state from denying, *solely because of inability to pay*, access to its courts") (emphasis added); *Williams*, 399 U.S. at 243 (a state may not imprison "a defendant who is financially *unable to pay a fine*") (emphasis added). This Court recently summarized the doctrine, noting "the Supreme Court held that it violates equal protection principles to incarcerate a person solely *because he lacked the resources to pay* a fine or restitution." *Plate*, 839 F.3d at 955–56 (quotations omitted; emphasis added). Under this doctrine, "indigent" denotes an inability to pay without a precise income requirement. *See Lubin*, 415 U.S. at 710 (declining to evaluate plaintiff's level of poverty since he was unable to pay $701.60 filing fee); *Bullock*, 405 U.S. at 144 (noting that filing fee would burden the less affluent, without assessing degree of poverty).

Even if there were a meaningful distinction between "indigency" and "inability to pay," the district court's findings were based on uncontested record evidence of "indigency," as defined by Florida law in assigning public defenders, calculating debt-collection expectations, and converting LFOs to civil liens. *Jones II* at *16. The distinction is also fleeting given the collection mechanisms the government has at its disposal, which ensure wealthy people unable to afford their LFOs will not remain wealthy.

Nor is a showing of discriminatory intent required for all claims involving returning citizens. Defendants rely on *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018),

and *Shepherd v. Trevino*, 575 F.2d 1110 (5th Cir. 1978). Both are inapposite because neither reviewed pay-to-vote requirements. "*Shepherd* got it right, *because* the classification did not implicate wealth or any suspect classification." *Jones I* at 824 (emphasis added). And *Hand* did not involve a wealth-discrimination claim or an automatic-restoration scheme, but rather held that plaintiffs needed to establish more than the risk of discriminatory treatment inherent in a "purely discretionary" individualized clemency regime. 888 F.3d at 1210. Even if intentional discrimination were a relevant standard in wealth discrimination claims, the district court found purposeful discrimination amply supported on this record. *See Jones II* at *31–32; *see also* Order Denying Stay, ECF 431 at 8 (the legislature intended to "prefer those with money over those without."). Under settled precedent, the LFO requirement unconstitutionally discriminates on the basis of wealth.

II. Florida's Pay-to-Vote System is Unconstitutional Even if Rational-Basis Review Applies

Though heightened scrutiny applies, the district court's uncontested factual findings demonstrate the LFO requirement would fail even under rational-basis review.

Under *Richardson*, 418 U.S. at 24, states may generally disenfranchise people based on felony convictions, but the *manner* of such disenfranchisement must still comply with the Fourteenth Amendment. *See Jones I* at 822 ("[T]he abridgement of a felon's right to vote is still subject to constitutional limitations."); *see also Shepard*,

575 F.2d at 1114 (rejecting "proposition that section 2 [of the Fourteenth Amendment] removes all equal protection considerations from state-created classifications denying the right to vote to some felons while granting it to others"). *Richardson* permitted states to consider felony convictions in establishing voter qualifications but "it surely did not address the critical factual circumstances permeating this case." *Jones I* at 821–22. A state may lawfully disenfranchise *all* individuals for felony convictions, but cannot deny restoration on prohibited bases. *See Hobson v. Pow*, 434 F. Supp. 362, 366–67 (N.D. Ala. 1977) (striking down as irrational a felony disenfranchisement law that discriminated based on gender). This is true not just for suspect classifications. Irrational or arbitrary forms of felony disenfranchisement are also prohibited. *See Harper*, 383 U.S. at 668; *Harvey*, 605 F.3d. at 1079 (states cannot rationally "re-enfranchise only those felons who are more than six-feet tall"); *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983) (states cannot "disenfranchise similarly situated blue-eyed felons but not brown-eyed felons"). An irrational restriction on the franchise does not somehow become rational if applied only to returning citizens. *See Shepherd*, 575 F.2d at 1114 ("nor can we believe that section 2 [of the Fourteenth Amendment] would permit a state to make a completely arbitrary distinction between groups of felons with respect to the right to vote"). "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process," and is an inherently arbitrary

criterion for voter qualifications, prohibited by the Fourteenth Amendment. *Harper*, 383 U.S. at 668.

A. The LFO Requirement is Irrational As-Applied to Those Unable to Pay

The LFO requirement "is clearly not" rational "as applied to those unable to pay." *Jones I* at 810. As *Jones I* noted, the LFO requirement cannot possibly incentivize people to pay LFOs they cannot afford, nor can it facilitate collection of those LFOs. *Jones I* at 811; *see also Bearden*, 461 U.S. at 670 ("Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming."); *Zablocki*, 434 U.S. at 389 ("[W]ith respect to individuals who are unable to meet the statutory requirements, the statute merely prevents the applicant from getting married, without delivering any money at all into the hands of the applicant's prior children."); *Tate*, 401 U.S. at 399 (imposing prolonged disenfranchisement on people unable to pay does not "aid[] collection of the revenue").

After previously arguing that this Court should evaluate the LFO requirement as-applied to those unable to pay,[22] Defendants now assert this sort of as-applied analysis is inappropriate under rational-basis review. Def. Br. at 51. They are wrong.

[22] *See* Defs. Mot. to Stay PI, ECF 234 at 11 (arguing "[t]he only remaining question is whether there exists a rational basis for withholding voting rights from felons who are genuinely unable to pay their [LFOs]").

As noted above, the first step for determining an equal-protection classification in a wealth-discrimination case is to evaluate the restriction as-applied to those who cannot pay. *See Williams*, 399 U.S. at 242 (evaluating "operative effect" of facially neutral statute). An as-applied approach is consistent with past Supreme Court and federal appellate decisions. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("Because in our view the record does not reveal any rational basis …, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case."); *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856, 859–60 (9th Cir. 1976) ("As applied to the appellant in this case, the double bond requirement is not reasonably or rationally related to a legitimate governmental purpose[.]"). And Justice O'Connor's opinion in *Harvey* indicated it would be proper to evaluate Arizona's LFO requirement as-applied to those unable to pay, rather than generally, noting, "withholding voting rights from those who are truly unable to pay" LFOs might not even "pass this rational basis test" *Harvey* applied to returning citizens who could pay.[23]

[23] Defendants suggest *Harvey* establishes rational basis as the governing standard but omits that the ruling was expressly predicated on the fact that "no plaintiff alleges that he is indigent, so … we explicitly do not address challenges based on an individual's indigent status." 605 F.3d at 1079. Justice O'Connor's point was that, as-applied to those unable to pay, the State's rationales might not even pass rational basis—the standard the court was left to apply since it had no evidence of plaintiffs' indigency.

B. SB7066's LFO Requirement is Irrational Generally

More broadly, the LFO requirement fails rational-basis review even when considering its *general* application because returning citizens who are genuinely unable to pay their LFOs "are in fact the *mine-run* of felons affected by this legislation." *Jones I* at 814. The uncontested trial evidence demonstrates that the mine-run of returning citizens cannot pay their LFOs. *Jones II* at *16. Therefore "the focus of the rationality evaluation [is] on indigent felons," for whom the requirement is "clearly irrational." *Jones I* at 815–16.

Under the mine-run standard, the rationality of "broad legislative classification[s]" is "judged by reference to characteristics *typical* of the affected classes[.]" *Califano v. Jobst*, 434 U.S. 47, 55 (1977) (emphasis added); *see also Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 316–17 (1976) (determining mandatory retirement age for police officers rational because classification based on largely accurate generalizations); *Vance v. Bradley*, 440 U.S. 93, 109 (1979) (stating that legislative classification must be "generally pertinent to its objective"). When applying rational-basis review to a general class of persons, the classification must "broadly correspond[] to reality" and must reflect "common-sense generalizations" and underlying assumptions reasonably conceived to be true. *Jones I* at 815. Here, the LFO requirement is irrational because in light of the evidence at trial, it is not "conceivable for Florida to believe a reasonable proportion could pay." *Id.* at 817.

As *Jones I* noted, Defendants in previous briefing "appear[] to almost concede the point," *id*. at 814, that the LFO requirement would be irrational if there were "evidence that felons unable to pay their outstanding [LFOs] vastly outnumber those able to pay," Def. PI Appellate Br. at 43. Based on a voluminous record of uncontested facts, the district court found "as a fact that the overwhelming majority of felons who have not paid their LFOs in full, but who are otherwise eligible to vote, are genuinely unable to pay the required amount." *Jones II* at *15–16. Defendants admit as much, noting that "hundreds of thousands" of returning citizens cannot pay their LFOs. Def. Br. at 20–21. Therefore, the uncontested trial record unambiguously established that the LFO requirement fails rational-basis review generally, because "the mine-run of felons affected by the pay-to-vote requirement are genuinely unable to pay." *Jones II* at *16.

Defendants now pivot to asserting that it is irrelevant that the overwhelming majority of returning citizens cannot pay their LFOs because "legislative choices scrutinized under rational-basis review … 'may be based on rational speculation unsupported by evidence.'" Def. Br. at 57 (quoting *F.C.C. v. Beach Commc'ns*, *Inc.*, 508 U.S. 307, 315 (1993)). Defendants suggest it was "arguable" to the Legislature that most returning citizens could afford to pay—even though such speculation was indisputably wrong. Def. Br. at 57–58.

Defendants' new argument fails because the legislative record demonstrates

the legislature knew that the overwhelming majority of returning citizens are unable to pay their outstanding LFO balance. *Jones II* at *16. Several facts developed at trial support the district court's findings. *First*, the district court's "mine-run" factual finding was based principally on *Florida's own data* that was available to legislators. *See id.* at *16 n.81; *see also supra* Factual Background, I.E. Indeed, this Court recognized that *the Florida Legislature itself* has determined that "[m]ost criminal defendants are indigent." *Jones I* at 816 (quoting H.R. Staff Analysis, H.B. 1381, Reg. Sess. (Fla. 1998); H.R. Staff Analysis, H.B. 13, Reg. Sess. (Fla. 1999)).

Second, the district court expressly found "the Legislature had no reason to believe" "any significant number of felons were able to pay but chose not to." *Jones II* at *16. Defendants do not contest this factual finding.

Third, the legislature failed to identify anyone who is refusing to pay LFOs they can afford, and Defendants do not contest that the individual Plaintiffs in this case lack the financial means to satisfy the thousands of dollars they own in LFOs.[24] ECF 431 at 16. The record shows the vast majority of returning citizens are indigent under Florida law.[25] It is irrational for legislators to assume indigent returning

[24] For this reason, it is similarly irrational for the legislature to believe that individuals "owing less than $1,000 would eventually be able to repay that debt." Def. Br. at 58.

[25] The district court found 80-90% in Palm Beach are assigned a public defender due to indigency and Palm Beach County charges at least $668 to all indigent

citizens—whom they know comprise the vast majority of returning citizens—struggling to "put[] food on the table, a roof over their heads, and clothes on their backs," *Jones I* at 811—have excess funds to repay hundreds or thousands of dollars in LFOs.

Rational-basis review is not a rubber stamp. *See Schweiker v. Wilson*, 450 U.S. 221, 234 (1981) (the "rational-basis standard is not a toothless one") (quotations omitted). This is particularly true in cases concerning wealth-based restrictions on voting, where legislative deference should be limited because, as this Court and the Supreme Court have determined, a person's ability to pay has no relevance to their electoral participation. *See Harper*, 383 U.S. at 668; *see also Fulani v. Krivanek*, 973 F.2d 1539, 1547 (11th Cir. 1992) ("a party's ability to pay a verification fee is not rationally related to whether that party has a modicum of support").

After shifting rationales throughout the course of litigation, Defendants now identify the State's interest in SB7066's LFO requirement as "that *all* felons

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individuals convicted of a felony. *Jones II* at *28. 70-75% of persons charged with a felony in Miami-Dade County are assigned a public defender due to indigency and Miami-Dade charges at least $700 to all indigent individuals convicted of a felony. Trial Tr. Day 2 at 351:11–18; 355:21–25 (Martinez Testimony). Persons facing criminal charges are assigned a public defender because they earn, at most, 200 percent of the federal poverty guidelines. Fla. Stat. § 27.52(2)(a).

complete *all* terms of sentence to repay their debt to society." Def. Br. at 35.[26] Yet this "interest" is merely a tautological recitation of the statute. Defendants also advance an "interest in enforcing the [criminal] punishments it has imposed." Def. Br. at 35. But the pay-to-vote requirement simply punishes people for their poverty and does not promote enforcement since the majority are indigent and cannot pay. Moreover, costs and fees are non-punitive LFOs assessed regardless of culpability, and serve no punitive purpose.

Furthermore, the State's every-dollar policy negates whatever interest the State might claim in ensuring completion of sentence. The State's "every-dollar method gravely undermines this debt-to-society rationale" because "most felons are no longer required to satisfy the criminal sentence" under it. *Jones II* at *22. The every-dollar approach only ensures the individual has paid enough money to vote; an individual need *not* make a victim whole with restitution, "repay their debt to society," Def. Br. at 53, or complete the terms of their sentence at all. Often, it means

[26] Defendants' argument that the State has a "legitimate interest in treating all felons equally," Def. Br. at 53, also fails because, as noted *supra* Argument, I.B, wealth classifications punish the indigent and those unable to pay more harshly than those who are able to pay. Indeed, the district court expressly found that "[t]he Legislature would not have adopted SB7066 but for the actual motive to favor individuals with money over those without." ECF 431 at 8. This is the exact opposite of treating all returning citizens equally.

they fill the coffers of the State by paying interest, fees, and surcharges, or enriching private debt-collection agencies.

III. Florida's Pay-to-Vote System is Void for Vagueness and Violates Procedural Due Process

To become eligible to vote, SB7066 requires individuals to pay an amount that is often unknowable. Defendants claim "the State can rationally demand that *all* felons—including those unable to pay—satisfy all financial aspects of their sentences," but "need not show the precise amount owed." Def. Br. at 70. The district court correctly determined such a Kafkaesque system fails to provide due process.[27]

The evidence adduced at trial revealed an irrational and unworkable system. SB7066, coupled with the State's "staggering inability to administer" it, *Jones II* at *14, *16, makes it "sometimes hard, sometimes *impossible*" for Floridians to determine whether they are eligible to register and vote, *id*. at *36. Due process

[27] The State questions whether the district court ruled on the due-process claims. Def. Br. at 69. But the court made its due-process ruling clear. *See Jones II* at *36–37, *44; ECF 431 at 5, 9, 11 (noting the State did not seek stay of due-process rulings). The court also explicitly noted its remedy was not limited to wealth-discrimination but that "the advisory-opinion procedure and attendant immunity will satisfy due process and remedy the vagueness attending application of the criminal statutes." *Jones II* at *37; *see also id.* at *43 (requiring State to inform people who are able to pay how much they owe). The district court also concluded that the pay-to-vote system fails rational-basis review because of the State's "staggering inability to administer the system" and "call[s] into question whether the pay-to-vote system is rational even as applied to those who are able to pay." *Id.* at *14.

requires the State to provide citizens with a way to make such a determination without requiring that they risk prosecution. Florida's system fails to provide that.

A. The Pay-to-Vote System is Void for Vagueness

SB7066 purports to define voter qualifications. But Defendants themselves cannot decipher or apply the law, making it impossible for voters and elections officials alike to determine eligibility. *Id*. It is therefore void for vagueness.

First, SB7066 fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). It is a crime in Florida to falsely affirm eligibility or fraudulently vote, Fla. Stat. §§ 104.011, 104.041, but SB7066 makes it *impossible* for some to know whether they violate the law by registering and voting. *Second*, SB7066 fails to "provide explicit standards for those who apply them" so as to avoid the potential for "arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108–09. Consequently, the Secretary and the SOEs have taken positions on eligibility that vary over time and across county boundaries. *See Jones II* at *16–21 (finding the State cannot accurately determine original financial obligations, the amount paid, or what must be paid to register); *id.* at *21–23 (describing the every-dollar method created ten days before trial). *Third*, SB7066 inhibits the exercise of the right to vote because its vagueness "lead[s] citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."

Grayned, 408 U.S. at 109 (internal marks omitted). The result is that *even voters who are eligible* under SB7066 are deterred from registering and voting because of an absence of clear rules.

The State does not dispute the district court's findings that SB7066 renders it impossible for many to determine their eligibility. *Jones II* at *23. Nor could it. The district court found "trying to obtain accurate information" from clerks or SOEs "will almost never work." *Id.* at *17. Even those who can obtain original sentencing records—and this is not a given—"will not always be able to determine which financial obligations are subject to the pay-to-vote requirement" because the State itself does not provide clear or consistent rules for that determination. *Id.* Should a returning citizen somehow calculate their original obligation, determining the amount the State deems paid "is often impossible," *id.* at *18, because in March Defendants decided to "retroactively reallocate payments" towards the original sentence, regardless of how the payment actually applied, *id.* at *21.

Defendants simply disclaim all responsibility for determining voter eligibility, acknowledging they are incapable of informing returning citizens how much they must pay to vote. Def. Br. at 70–71. Never mind the Secretary's and SOEs' obligation under Florida law to make eligibility determinations, *see* Fla. Stat. § 98.0751, the federal requirement that the Secretary inform registrants of eligibility

requirements, 52 U.S.C. § 20507(a)(5)(A), and the State's duty under federal law to promote the exercise of the right to vote, *id.* § 20501(a)(2).

Defendants' position contravenes the void-for-vagueness doctrine, which requires laws to provide fair notice of what is prohibited "because we assume that man is free to steer between lawful and unlawful conduct." *Grayned*, 408 U.S. at 108. Defendants cannot claim that "[w]hether [a] felon can determine his eligibility ... without additional help from the State is simply not relevant." Def. Br. at 75.

The State claims only factual ambiguities are at issue, not legal vagaries. *Id.* at 74–75. But, as the district court correctly observed, "the clarity of the statutory words is meaningless" when the words cannot be applied to "known or knowable facts." *Jones II* at *36 (citing *Giacco v. Pennsylvania*, 382 U.S. 399, 402–03 (1966)); *see also Watkins v. United States*, 354 U.S. 178, 209–15 (1957) (invalidating conviction because application of law necessitated reference to sources of factual information that "leave the matter in grave doubt"); *Int'l Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 221 (1914) (invalidating conviction because legal standard was premised on unknowable fact: "the market value ... under normal market conditions"). For this reason, the district court held, "the requirement to pay, as a condition of voting, amounts that are unknown and cannot be determined with diligence is unconstitutional." *Jones II* at *44.

SB7066's infirmities are not just limited to impossible factual determinations. Defendants themselves cannot explain the law's basic application. Defendants began review of just 17 "test cases" under the every-dollar method—the cases of the individual plaintiffs. And even in those 17 cases, Defendants could not always say whether an LFO charged was one that SB7066 required to be repaid. Trial Tr. Day 6 at 1305:3–1317:5, 1325:10-1331:2 (Matthews Testimony). Defendants admitted they could not advise all Plaintiffs how to steer between lawful and unlawful conduct. *Id.* at 1315–16.

The State's assumption that "the sole question for eligibility is whether *any* amount remains outstanding," Def. Br. at 70, does not resolve the unconstitutional vagueness. Under the every-dollar method, the State can no more determine whether returning citizens must pay $0 to vote than any other amount. *See Jones II* at *18–23. Plaintiff Clifford Tyson's case is illustrative. As the district court noted, Tyson owes fees imposed as part of a felony sentence that he cannot afford. But "under the every-dollar method, he may be eligible to vote," depending on how much he owes in fees and how much he paid towards costs of supervision decades ago—facts that no one can determine. *Id.* at *8, *20, *22.

Nor do the scienter requirements for submitting false voter registration information or voting when unqualified, *see* Fla. Stat. §§ 104.011(2), 104.15, resolve the unconstitutional vagueness because neither returning citizens nor Defendants can

determine whether they are qualified electors. The "willfulness" requirement for a conviction does not provide returning citizens with adequate notice of whether their registration accords with the law. Voters who fear prosecution will be deterred from voting; contrary assertions "ring[] hollow." *Jones II* at *25 (noting: (1) the legislature rejected a good-faith provision protecting registrants after July 1, 2020; (2) the State's form warns against submitting a false statement, omitting any reference to the requirement that a violation be known; (3) voter mistakes have led to prosecution; and (4) the Secretary has warned SOEs against advising voters to register if they are unsure of eligibility).

B. The Pay-to-Vote Requirement Violates Procedural Due Process

Under SB7066, there is no workable process for many Floridians to determine their eligibility, leaving them to register at their own peril.

Defendants argue their removal procedure provides due process to returning citizens already registered to vote, but ignore the absence of any due process for those not yet registered. Defendants suggest unregistered returning citizens are not entitled to *any* due process because SB7066 does not cause a deprivation. But the LFO requirement does not grant new rights; it denies automatic restoration. *See supra* Argument, I.A; *Kapps v. Wing*, 404 F.3d 105, 114 (2d Cir. 2005) (due process required for eligibility where benefit has "fixed eligibility criteria"). Defendants'

concession that due-process rights attach *after* registration proves the point. Voters' eligibility cannot depend on whether they risk prosecution to register.

Defendants' advisory-opinion procedure is insufficient to provide due process under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (requiring courts to examine (1) "the private interest" affected; (2) "the risk of an erroneous deprivation;" and (3) "the Government's interest").

First, few if any interests are more deserving of due-process protections than the right to vote. *See Ga. Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1270–71 (11th Cir. 2019) (Jill Pryor, J., concurring).

Second, the risk of erroneous deprivation is extremely high. By its own admission, the State simply cannot determine eligibility for many voters. *See supra* Factual Background, I.G. A process with no resolution is no process at all.

Third, Defendants have no interest in depriving people with felony convictions of a workable registration process. They complain the district court "rewrote" the advisory opinion procedure. Def. Br. at 78. But, they do not suggest the court's remedy imposes any "fiscal and administrative burdens" contemplated by *Mathews*, 424 U.S. at 335, let alone any that would outweigh Plaintiffs' interest in a process protecting against erroneous deprivations. In fact, the State does not contest the district court's conclusion its remedy would "allow much easier and more

timely administration than the system the State now has in place" and eliminate the significant burdens placed on SOEs. *See Jones II* at *43–44.

For these reasons, SB7066 violates both the void-for-vagueness doctrine and procedural due process.[28]

IV. The District Court's Remedy is Proper

Faced with an "administrative train wreck" created by SB7066, *Jones II* at *34, the district court crafted a workable remedy for returning citizens to determine whether they are eligible to vote. Defendants do not claim the remedy would burden the State and do not dispute that it would actually make elections administration far easier for them. *See id.* at *43-44. Instead, they claim the district court "transgressed its authority" by creating new elections procedures. Def. Br. at 78. Defendants too narrowly construe the authority a district court has to adequately remedy constitutional and civil-rights violations, ignore the State's year-long failure to offer any administrative solutions, and overstate the breadth of the court's remedy.

"[W]hile federalism certainly respects states' rights, it also demands the supremacy of federal law when state law offends federally protected rights." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1331 (11th Cir. 2019). Thus, "[o]nce a right and a violation have been shown, the scope of a district court's

[28] Even if the ruling on due process were incorrect, the district court's judgment would be supported on the grounds the pay-to-vote system lacks uniformity and violates the First Amendment. *Jones II* at *37-40.

equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971). These broad remedial powers have been upheld in a variety of contexts, *see Judge v. Quinn*, 624 F.3d 352, 360 (7th Cir. 2010) (collecting cases), and include the power to redraw legislative districts, *see Wise v. Lipscomb*, 437 U.S. 535, 540 (1978), reassign students, *Swann*, 402 U.S. 1, and abrogate collective bargaining agreements, *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 839 F.2d 1296, 1314-15 (8th Cir. 1988).

In the elections context, "the district court has the power to order the state to take steps to bring its election procedures into compliance with rights guaranteed by the federal Constitution, even if the order requires the state to disregard provisions of state law." *Judge*, 624 F.3d at 355–56 (quotations omitted). Defendants overstate the court's obligation to defer to the legislature, relying on a dissent in *Califano v. Westcott*, 443 U.S. 76 (1979), a case *affirming* a district court's broadly-crafted remedy. Def. Br. at 79; *see also Califano*, 443 U.S. at 78 (citing *Kemp*, 918 F.3d at 1288 (Tjoflat, J., dissenting)). Although courts should give states an opportunity to remedy violations themselves when possible, "when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the unwelcome

obligation of the federal court to devise" its own remedy. *Wise,* 437 U.S. at 540 (1978).

More than a year after the Governor signed SB7066, and with many elections gone by, the State has "done almost nothing" to generate a process for administering it. *Jones II* at *36. Recognizing this failure, Defendants proposed the advisory-opinion process as a solution at trial. Trial Tr. Day 7 at 1381:4–14 (Matthews Testimony). With elections on the horizon, the district court "t[ook] the State up on its suggestion." *Jones II* at *42. Far from "drastically alter[ing] Florida's election procedures," Def. Br. at 78, the district court simply provided a reasonable timeline, a standardized form, and evidentiary presumptions to guide the State's pre-existing process. The district court did not grant voters the right to vote if the State failed to respond to an advisory opinion request within 21 days; it simply determined the voter could then assume eligibility until the State provides "credible and reliable" evidence to the contrary. *Jones II* at *45. With elections imminent, the district court carefully crafted a modest remedy based on the State's own existing procedures.

Defendants imply this conflicts with rules governing the advisory-opinion process. Def. Br. at 78. The only apparent tension is that the process was originally intended for campaign-finance context, not voters' eligibility. *See* Fla. Stat. § 106.23(2); Fla. Admin. Code R. 1S-2.010(2). But Defendants cannot complain about

that dissonance when they offered this very process to the district court as a solution for voters. Trial Tr. Day 7 at 1381:4–14 (Matthews Testimony).[29]

By "borrow[ing] heavily from the processes already in place," rather than "cutting an entirely new scheme from whole cloth," the district court respected Florida's sovereignty while enforcing federal law. *See Kemp*, 918 F.3d at 1276–77 (Jill Pryor, J., concurring); *see also Lee*, 915 F.3d at 1331 (upholding alterations to Florida's election scheme because they were limited to remedying harm and "preserved ... the rest of the scheme"). Without a remedy, Florida heads into more elections with hundreds of thousands confused about their eligibility and elections officials unable to help them. The Court should therefore uphold the district court's remedy.

V. SB7066 Violates the Twenty-Fourth Amendment

A. The District Court Correctly Held that the Twenty-Fourth Amendment Applies to Voting Rights Restoration

The Twenty-Fourth Amendment's prohibition is categorical: access to the franchise cannot be contingent on paying taxes. Defendants, however, ask this Court to create an atextual carve-out, claiming the Amendment has no application to returning citizens.

[29] As the district court noted, "[i]t is not at all clear that the Florida statutes on which the State relies" actually provide prospective voters with a process for seeking advice on voting eligibility. *Jones II* at *37.

Under the Twenty-Fourth Amendment, the right to vote "shall not be denied or abridged ... by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV, § 1. The Amendment's plain text applies broadly to all "citizens," and makes no distinction based on whether voting is a long-held or newly-created right, whether conferred by state constitutional provision or some other source. Consistent with this text, the Supreme Court has described the Twenty-Fourth Amendment as having "abolished absolutely" any tax "as a *prerequisite* to voting[,]" *Harman*, 380 U.S. at 542 (emphasis added), and has not delimited its scope to protect only individuals with "pre-existing" voting rights, as Defendants claim here, Def. Br. at 44.

Understanding the Twenty-Fourth Amendment's categorical prohibition on poll taxes as protecting everyone, including returning citizens, is consistent with the scope of other Amendments governing the right to vote. *Cf. Chiafalo v. Washington*, 140 S. Ct. 2316, 2331 (2020) (Thomas, J., concurring) (citation omitted) ("When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself."). The Twenty-Fourth Amendment's text mirrors the Fifteenth, Nineteenth, and Twenty-Sixth Amendments, which also direct that "[t]he right ... to vote" "shall not be denied or abridged" based on race, sex, or age, respectively. Just as it would plainly violate these Amendments to offer reenfranchisement only to white, male, or 30-year-old

returning citizens, it violates the Twenty-Fourth Amendment to offer rights restoration only to those able to pay a tax. *See Harman*, 380 U.S. at 540–42 (recognizing parallels between the Fifteenth and Twenty-Fourth Amendments). The Twenty-Fourth Amendment must be read in *pari materia* with these virtually identical voting Amendments, as categorical bans not subject to exceptions in the rights-restoration context. *See Chiafalo*, 140 S. Ct. at 2331 ("Nothing in the Constitution's text or history indicates that the Court should take the strongly disfavored step of concluding that [constitutional terms] ha[ve] two different meanings in [] closely aligned provisions.").

Attempting to limit this constitutional principle, Defendants rely on *Richardson v. Ramirez*, Def. Br. at 62–63, but that case did not address rights restoration or analyze the Twenty-Fourth Amendment. Regardless, as discussed *supra*, Argument, I.A, II, *Richardson* rejected Defendants' contention that the State has unfettered discretion over rights restoration. States' authority to disenfranchise does not give "States power to impose burdens on the right to vote, where such burdens are *expressly prohibited in other constitutional provisions*." *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (emphasis added).

The Twenty-Fourth Amendment's full protections "would be of little value if they could be … indirectly denied," *Smith v. Allwright*, 321 U.S. 649, 664 (1944), or "manipulated out of existence," *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960),

simply because the voter has a felony conviction. Such a scheme "subverts the effectiveness of the Twenty-Fourth Amendment" for hundreds of thousands of otherwise-eligible returning citizens. *Harman*, 380 U.S. at 542. Along with objections that poll taxes "exacted a price for the privilege of exercising the franchise," another core motivation undergirding the Twenty-Fourth Amendment was to eliminate their use as devices to exclude disfavored groups, specifically Black and poor citizens. *Id.* at 539–40 (citing legislative hearings). The pay-to-vote system contravenes these objectives. Indeed, the district court found Florida enacted SB7066's LFO requirement "to favor individuals with money over those without." ECF 431 at 8. And the court found the requirement disproportionately impacts Black returning citizens, who disproportionately owe LFOs and have greater amounts of debt as compared to white returning citizens. *Jones II* at *33; ECF 286-13; ECF 360-48. Holding the Twenty-Fourth Amendment inapplicable to returning citizens undermines its core purpose.

B. The District Court Properly Applied the Supreme Court's "Functional Approach" to Find That Fees and Costs are Taxes

The Twenty-Fourth Amendment's prohibition on "deni[al] or abridge[ment]" of the right to vote "by reason of failure to pay any poll tax or other tax" is deliberately broad. Merriam-Webster Law Dictionary defines "deny" as "to refuse to grant," *see Deny*, Merriam-Webster Online Dictionary (2020), https://www.merriam-webster.com/dictionary/deny#legalDictionary (last visited

July 29, 2020), and "abridge" as "to diminish" or "reduce in scope," *see Abridge*, Merriam-Webster Online Dictionary (2020), https://www.merriam-webster.com/dictionary/abridge#legalDictionary (last visited July 29, 2020). "By reason of" requires "the 'simple' and 'traditional' standard of but-for causation," which asks whether "a particular outcome would not have happened 'but for' the purported cause." *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1739 (2020) (citations omitted).

Moreover, the Amendment bans not only poll taxes but also any "other tax" on voting, words that must have an independent meaning. It protects against restrictions of the franchise through "sophisticated as well as simple-minded" tax schemes. *Harman*, 380 U.S. at 540–41. It prohibits "any material requirement" operating as "an abridgment on the right to vote" and imposed based on declining to pay a tax. *Id.* at 541–42 (striking down Virginia's certificate-of-residence requirement that could be avoided by paying a tax). Here, but for outstanding LFOs, the voting rights of otherwise eligible returning citizens would be automatically restored under Amendment 4. Thus, if an LFO constitutes a "tax," then conditioning the franchise on payment of that tax violates the Twenty-Fourth Amendment's prohibition on "den[ying] or abridg[ing]" the right to vote "by reason" of failure to pay a tax.

Defendants agree the Supreme Court's "functional approach" is the proper legal test to determine whether assessments are taxes. Def. Br. at 64 (citing *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) ("*NFIB*")). Applying that analysis, the district court held that fees and court costs qualify as taxes. *Jones II* at *27–29. Defendants attack the district court's factual findings undergirding that conclusion, but they cannot satisfy their steep burden to overturn these unequivocally supported factual findings.

Well-established Supreme Court precedent dictates the "essential feature of any tax" is that "[i]t produces at least some revenue for the Government." *NFIB*, 567 U.S. at 564 (citing *United States v. Kahriger*, 345 U.S. 22, 28 n.4 (1953)); *see also United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 606 (1975) ("[T]he standard definition of a tax" is an "enforced contribution to provide for the support of government."). If an exaction "was laid to raise revenue," then its identity as a tax "is beyond question." *United States v. Constantine*, 296 U.S. 287, 293 (1935). Along with the chief consideration of revenue generation, *NFIB* provides for other factors under its functional test, including the size of the exaction, scienter, and enforcement mechanisms. 567 U.S. at 565–66.

The district court considered all of these factors, and correctly held fees and costs qualify as taxes. *Jones II* at *28–29. The district court did not clearly err in

finding the primary purpose and function of fees and costs[30] routinely assessed on criminal defendants is to "pay for [Florida's] criminal-justice system in significant measure[.]" *Id.* at *28 & n.139 (citing Fla. Const. art. V, § 14 and testimony of veteran public defender); *see also Crist v. Ervin*, 56 So. 3d 745, 752 (Fla. 2010) ("[C]ourt-related functions of the clerks' offices are to be funded entirely from filing fees and service charges."). Florida statutes require that payments of fees and costs be retained in various trust funds to generate revenue for court-related functions and the excess be remitted to the Florida Department of Revenue to fund other areas of State government. *See* Fla. Stat. §§ 28.37(3), 213.131, 215.20, 142.01, 775.083(1), 775.089(1)(a)(2), 960.17, 960.21.

The district court also properly evaluated the other *NFIB* factors. The court did not clearly err in finding most fees and costs are assessed uniformly "without regard to culpability." *Jones II* at *29. They do not turn on guilt or scienter; they are imposed whether a defendant is convicted, enters a no-contest plea, or has adjudication of guilt withheld. *Id.* at *28–29. Most are assessed at relatively modest amounts set by statute, that do not vary based on the severity of the offense, a judge's assessment of culpability, or the amount of a victim's losses. *Id.* And fees and costs are typically imposed for *any* type of felony offense, which puts them in stark

[30] Although fines generate revenue for the government, the district court determined that fines' *primary* purpose is to punish a defendant rather than to raise revenue. *Jones II* at *28.

contrast to fines or punitive exactions which derive from "*precise conduct* that gives rise" to the financial obligation. *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 781 (1994) (emphasis added).

Defendants claim the uniformity of fees and costs does not alter their nature as penalties, and that penalties do not have to be proportional to wrongdoing to be punitive. Def. Br. at 67. But the crucial point is not the sameness of the fee, but the fact that the fee is imposed on the guilty *and not guilty* alike. As an example, fees and costs are also imposed if adjudication of guilt is withheld. *Jones II* at *28–29. By statute, a court may withhold adjudication of guilt where the "ends of justice and the welfare of society *do not require that the defendant presently suffer the penalty* imposed by law" and therefore "the court shall stay and withhold imposition of the sentence" but nevertheless assess court costs and fees. Fla. Stat. § 948.01(2) (emphasis added). This disposition's very purpose is to *withhold* punishment, so the defendant does not "suffer the penalty imposed by law" or "other damning consequences" and is not "judicially brand[ed] … as a convicted criminal." *Clarke v. United States*, 184 So. 3d 1107, 1115 (Fla. 2016); *see also Clinger v. State*, 533 So. 2d 315, 316 (Fla. 5th DCA 1988) (holding that if adjudication of guilt is withheld, "the defendant is not a 'convicted person'").[31] Yet in the event of

[31] Nor does the fact that courts retain the power to punish in nolo contendere plea cases mean costs and fees are punitive. Such pleas involve no admission of guilt,

adjudication of guilt withheld, costs and fees are still imposed, which, again, weighs against Defendants' characterization of them as always being punitive. Since Florida's own constitution and laws indicate that fees and costs are assessed to raise revenue, rather than punish, the district court's identical factual finding is not clearly erroneous.

Defendants rely on *Martinez v. State* to support their contrary position. Def. Br. at 65–66 (citing 91 So. 3d 878, 880 (Fla. 5th DCA 2012)). *Martinez*, however, examined only *a single* type of fee, the costs of prosecution, and failed to consider several *NFIB* factors, including revenue generation, size of the exaction, and scienter. The *Martinez* analysis Defendants highlight—that fees and costs are relevant to double jeopardy because they are criminal, rather than civil, in nature—is not dispositive. Unlike the court's approach in *Martinez* and Defendants' claim, the factual findings here were based on the district court's application of factors under the functional-approach test. *Jones II* at *29.

Defendants' contention that fees and costs are "materially indistinguishable" from fines is belied by the court's factual finding. Def. Br. at 64. The district court found, and Defendants admit, that unlike fines, fees and costs do not vary based on a judge's discretion or the legislature's assessment of culpability. *Jones II* at *28;

Vinson v. State, 345 So. 2d 711, 713, 715 (Fla. 1977), making any associated fees and costs not tied to culpability, since they are imposed regardless if someone pleads nolo contendere.

Def. Br. at 67. Unlike mandatory fines, which are offense-specific, fees and costs seldom change based on the convicted offense. *See Kurth Ranch*, 511 U.S. at 784. Finally, as the district court found, unlike many fines, the amount of each fee or cost is "comparatively modest," *Jones II* at *28, often adding up to an amount roughly similar to the tax in *NFIB, compare id.* at *28 (fees in Palm Beach county total $548–$668)*, and NFIB*, 567 U.S. at 539 ($695 minimum tax under individual mandate)*, with Jones II* at *7 & n.39 (assessing Plaintiff Ms. Wright's $50,000 mandatory fine).

Defendants' arguments that fees and costs are not taxes because they were "incurred" by criminal defendants' conduct and can have regulatory or rehabilitative effects is without merit. Def. Br. at 67–68. As the Supreme Court has explained, "taxes that seek to influence conduct are nothing new." *NFIB*, 567 U.S. at 567. And most taxes are incurred through an individual's conduct—for example, by engaging in commerce generally (sales tax), buying specific goods (excise tax), or purchasing a home (property tax)—and likewise may "affect individual conduct." *Id.*; *see also id.* at 563 ("[G]oing without insurance [is] just another thing the Government taxes, like buying gasoline or earning income[.]").

Defendants fall back on semantics, claiming if costs and fees "are legitimate portions of a felon's criminal sentence, then there is no conceptual difference between requiring their payment and fines or restitution." Def. Br. at 67. But the

analysis "[i]s not controlled by [the government's] choice of label," and "exactions not labeled taxes nonetheless" may function as such. *NFIB*, 567 U.S. at 564.

Finally, the district court's narrow ruling that costs and fees qualify as taxes does not create a circuit split. The district court *agreed* with the Sixth and Ninth Circuits' holding that requiring payment of fines and restitution does not violate the Twenty-Fourth Amendment. *Jones II* at *28–29; *see Bredesen*, 624 F.3d at 751 (requiring payment of restitution and child support does not violate the Twenty-Fourth Amendment); *Harvey*, 605 F.3d at 1080 (same regarding fines and restitution). No circuit has addressed in a published opinion whether conditioning re-enfranchisement on payment of *fees or court costs* violates the Twenty-Fourth Amendment.

Nor has any circuit majority opinion analyzed whether LFOs constitute "other tax[es]" under the Twenty-Fourth Amendment. *See Jones II* at *27, *29; *Bredesen*, 624 F.3d at 751 (failing to conduct textual analysis of "other tax"); *Harvey*, 605 F.3d at 1080 (holding the challenged statute "does not transform [plaintiffs'] criminal *fines* into poll taxes"); *Howard v. Gilmore*, No. 99-2285, 2000 WL 203984 at *2, (4th Cir. Feb. 23, 2000) (analyzing whether $10 processing fee was "an unconstitutional *poll tax*") (emphasis added). The district court's holding that fees and court costs are not explicitly poll taxes but are "other taxes" is, therefore, not

inconsistent with the cases Defendants cite, which conducted a narrower review of distinguishable LFOs.

If these cases held that the Twenty-Fourth Amendment does not apply to rights restoration, Def. Br. at 63, this out-of-circuit authority is unpersuasive. *Harvey*'s three-sentence analysis did not examine the Amendment's text or cite any case law. *See* 605 F.3d at 1080. Likewise, the unpublished *Howard* decision contained scant analysis. *See* 2000 WL 203984, at *2. And *Bredesen*'s majority reflexively relied on *Harvey* and *Howard* without conducting its own textual or historical analysis. *See* 624 F.3d 742, 750. The Twenty-Fourth Amendment's text and Supreme Court doctrine demand a different result.

VI. This Court Should Reject Defendants' Attempts to Invalidate Amendment 4

Defendants conclude by arguing that if requiring payment to vote is unconstitutional, Amendment 4 should be struck down entirely, permanently disenfranchising even those who paid all LFOs.

Defendants argue the permanent injunction dramatically rewrites Amendment 4. But the injunction is hardly radical; it simply applies "completion of all terms of sentence" to avoid constitutional infirmities. The Supreme Court did exactly this in *Bearden*, *M.L.B.*, and innumerable other areas of constitutional law without wholly invalidating underinclusive statutory regimes in their entirety. *See*, *e.g.*, *Kemp*, 918 F.3d 1262. When a law is underinclusive, "the normal judicial remedy is to extend

the benefits to the deprived group. Otherwise, the result is an imposition of hardship on a number of persons whom the [State] intended to protect." *Cox v. Schweiker*, 684 F.2d 310, 317 (5th Cir. 1982) (citation omitted); *see also Califano v. Westcott*, 443 U.S. at 89; *Penn v. Att'y Gen. of Ala.*, 930 F.2d 838, 844–46 (11th Cir. 1991)). Defendants themselves agree invalidating Amendment 4 "is an absurd outcome" and "should be avoided." ECF 239 at 74:19-75:1. Defendants' approach to severability, if adopted, endangers a vast array of legislation and voter initiatives if drafters failed to predict every possible unconstitutional application. The presumption in favor of severability addresses precisely this problem.

Defendants' "breathtaking attack on the will of the Florida voters" fails from the outset, *Jones II* at *40, when Defendants wrongly assert Plaintiffs "cannot show they are entitled to" relief under "severability principles," Def. Br. at 79. The burden of invalidating Amendment 4 falls squarely on Defendants, who must overcome the presumption that an unconstitutional provision is severable. *See Ray v. Mortham*, 742 So. 2d 1276, 1281 (Fla. 1999).

Contending "severability is a question of law rather than fact," Def. Br. at 64–65, Defendants conspicuously omit any citation to *Florida* severability law, *see Wollschlaeger v. Gov. of Fla.*, 848 F.3d 1293, 1318 (11th Cir. 2017) (en banc) (Florida law governs severability). In *Ray v. Mortham*, the Florida Supreme Court affirmed "the burden of proof … is properly on the challenging party" to demonstrate

"the people would *not* have voted for" an amendment without an unconstitutional provision. 742 So. 2d at 1283. *Ray* then reviewed the factual and "statistical evidence in the record" of voter intent and held the amendment's unconstitutional requirements were severable. *Id*.

Jones I explicitly offered Defendants a second chance to meet their severability burden at trial. 950 F.3d at 832 n.15. But Defendants advanced *no credible evidence whatsoever* that voters would not have supported Amendment 4 but-for discriminatory wealth-based conditions for re-enfranchisement, *i.e.*, requiring payment of taxes or of LFOs from those unable to pay. At trial, Defendants relied on the testimony of Dr. Barber, whose opinion the court found wholly "fanciful" and "unfounded." *Jones II* at *41, n.177.[32] Defendants' expert couldn't say that "all terms of sentence" was necessary to Amendment 4's passage, much less whether voters would have insisted on enforcing unconstitutional terms. ECF No. 363-2 at 85:11–12 (Barber Deposition) ("I can't say that. I don't think anyone can say that."). The district court maintains the best position to judge the witness's

[32] On appeal, Defendants attempt to sidestep this deficiency by arguing "[t]here is no basis to conclude that Amendment 4 would have cleared the 60% threshold" if it included exceptions for taxes and inability to pay. Def. Br. at 66. Not only does this ignore the district court's findings, it is precisely the "conjecture and speculation" that cannot overcome the presumption favoring severability. *Ray*, 742 So. 2d at 1283; *see also id*. at 1281 (clarifying a challenger cannot simply "cast doubt on whether the amendment would have passed").

credibility and evidence and so long as they are not clearly erroneous this Court cannot reverse its findings, "even if it would have weighed the evidence differently." *Anderson*, 470 U.S. at 573–74.[33]

No basis for invalidating Amendment 4 exists because the Florida Supreme Court expressly left unanswered the meaning of "completion." *See Advisory Op. to the Gov. Re: Implementation of Amendment 4*, 288 So. 3d at 1075 (answering only "narrow question of whether the phrase 'all terms of sentence' includes LFOs"). The Court expressly observed during oral argument it could *avoid* conflict with the U.S. Constitution by declining to define "completion." Oral Argument, Advisory Op. to the Gov. Re: Implementation of Amendment 4, SC19-1314, at 1:13:58–1:14:11 (Fla. Nov. 6, 2019) (colloquy with Luck, J.), https://thefloridachannel.org/videos/11-6-19-florida-supreme-court-oral-arguments-advisory-opinion-to-the-governor-re-implementation-of-amendment-4-the-voting-restoration-amendment-sc19-1341. The District Court observed, "'completion' could reasonably be construed to mean payment to the best of a person's ability[.]" *Jones II* at *6. As the Florida Supreme

[33] Defendants criticize the judgment below for supposedly applying only one prong of severability analysis, but the court simply summarized Defendants' own argument that "the key determination is whether the overall [voter] intent is still accomplished without the invalid provisions." *State v. Catalano*, 104 So. 3d 1069, 1080–81 (Fla. 2012). *Jones I* already examined the other factors, finding, "The first and fourth requirements are not challenged by the State" and would be easily met. 950 F.3d at 832. Defendants offered no new argument, ECF 268 at 12, leaving open only whether they could advance anything at trial beyond speculation about voters' intent. They did not.

Court suggested, constitutional avoidance in interpreting "completion" is the appropriate path rather than wholesale invalidation of Amendment 4. *Pine v. City of W. Palm Beach,* 762 F.3d 1262, 1270–71 (11th Cir. 2014) (applying "reasonable presumption that [the legislature] did not intend the [interpretation] which raises serious constitutional doubts") (citation omitted).

Finally, Defendants erroneously argue securing LFOs from returning citizens was Amendment 4's "main purpose." Def. Br. at 83. This argument simply presumes Defendants' conclusion. Amendment 4's ballot summary and text nowhere reference LFOs, emphasizing instead the non-monetary obligations of probation and parole. To qualify for restoration of rights, returning citizens must complete a gauntlet of requirements including incarceration and numerous supervision conditions. Then they must pay all fines and restitution they can. Not even the most tendentious reading supports Defendants' position that allowing any exceptions to full payment of LFOs would "gut[] [Amendment 4's] main purpose." Def. Br. at 83. Amendment 4's purpose was to grant automatic restoration, and end lifetime disenfranchisement and Florida's long history as an outlier among states.

CONCLUSION

For the foregoing reasons, the district court's injunction should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2020, 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.

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