DOCKET NO. 19-14551

United States Court of Appeals

for the

Eleventh Circuit

KELVIN LEON JONES, JEFF GRUVER, EMORY MARQUIS MITCHELL, BETTY RIDDLE, KRISTOPHER WRENCH, KEITH IVEY, KAREN LEICHT, RAQUEL WRIGHT, STEVEN PHALEN, CLIFFORD TYSON, JERMAINE MILLER, FLORIDA STATE CONFERENCE OF THE NAACP, ORANGE COUNTY BRANCH OF THE NAACP, LEAGUE OF WOMEN VOTERS OF FLORIDA, CURTIS D. BRYANT, JR., JESSE D. HAMILTON, LATOYA A. MORELAND, LUIS A. MENDEZ,

Plaintiffs/Appellees,

v.

RON DESANTIS, in his official capacity of GOVERNOR OF FLORIDA, FLORIDA SECRETARY OF STATE,

Defendants/Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
CASE NO: 4:19-cv-00300-RH-MJF
(Hon. Robert L. Hinkle)

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, the NAACP Legal Defense and Educational Fund, Inc., the American Civil Liberties Union Foundation, Inc., the American Civil Liberties Union Foundation of Florida, Inc., the Brennan Center for Justice at NYU School of Law, Paul Weiss Rifkind Wharton & Garrison LLP, the League of Women Voters of Florida, the Florida State Conference of Branches and Youth Units of the NAACP, the Orange County Branch of the NAACP, and Michael A. Steinberg, Esq., state that they have no parent corporations, nor have they issued shares or debt securities to the public. The organizations are not subsidiaries or affiliates of any publicly owned corporation, and no publicly held corporation holds ten percent of their stock. I hereby certify that the disclosure of interested parties submitted by Defendants-Appellants Governor of Florida and Secretary of State of Florida is complete and correct except for the following corrected or additional interested persons or entities:

1. Bryant, Curtis – *Gruver Plaintiff/Appellee*
2. Defend, Educate, Empower – *not an organization in this action*
3. Jones, Kelvin Leon – *Plaintiff/Appellee*

4. Miller, Jermaine – *Gruver Plaintiff/Appellee*
5. Oats, Anthrone – *Witness*
6. Smith, Paul – *Attorney for Raysor Plaintiffs/Appellees*
7. Paul Weiss Rifkind Wharton & Garrison LLP – *Attorneys for Gruver Plaintiffs/Appellees*
8. Pérez, Myrna – *Attorney for Gruver Plaintiffs/Appellees*
9. Nelson, Janai S. – *Attorney for Gruver Plaintiffs/Appellees*
10. Spital, Samuel – *Attorney for Gruver Plaintiffs/Appellees*

/s/ *Julie A. Ebenstein*
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STATEMENT REGARDING ORAL ARGUMENT

This Court's Order on December 13, 2019 provides for the appeal of the district court's preliminary injunction order to be heard for oral argument on January 28, 2020. Appellees agree that this important voting rights case warrants oral argument.

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INTRODUCTION

Before January 2019, Florida was one of just four States that permanently disenfranchised citizens with felony convictions. Florida had by far the most punitive disenfranchisement regime in the United States, disenfranchising a larger percentage of its citizens than any state in the country—more than 10% of its voting-age population and more than 21% of its Black voting-age population. More than 1.6 million Floridians were disenfranchised, making Florida responsible for more than 25% of criminal disenfranchisement nationwide.

Faced with this democratic crisis, Floridians overwhelmingly voted for the Voter Restoration Amendment ("Amendment 4"), which ended the state's permanent felon disenfranchisement policy and automatically restored voting rights to more than a million Floridians with non-disqualifying felony convictions who have "completed all terms of sentence including parole and probation." *See* Fla. Const. Art. VI § 4(a) (2018). After Amendment 4 became effective on January 8, 2019, Defendants allowed Plaintiffs and other returning citizens[1] to register to vote, regardless of whether they had any outstanding legal financial obligations ("LFOs")—including restitution, fines, court fees, and costs. Defendants also did

[1] This document refers 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.

not identify any returning citizens as potentially ineligible to vote, or designate anyone for removal from the voter rolls, based on outstanding LFOs.

On June 28, 2019, Governor DeSantis (the "Governor") signed into law Senate Bill 7066 ("SB7066"), which defined "completion of all terms of sentence" to require payment of *all* LFOs regardless of a person's ability to make payment. Fla. Stat. § 98.0751(2)(a)(5).

SB7066's disenfranchising impact is massive. Florida has acknowledged that most criminal defendants are indigent, and that Florida courts have "minimal collections expectations" for over 85% of fines and fees. Plaintiffs' expert has determined that more than 80% of the returning citizens he has identified—hundreds of thousands of potential voters—have outstanding LFOs.

Plaintiffs are 17 returning citizens who are prohibited from voting solely because they are unable to pay their LFOs. But this Court, sitting *en banc*, held that access to voting rights restoration "cannot be made to depend on an individual's financial resources." *Johnson v. Governor*, 405 F.3d 1214, 1216 n.1 (11th Cir. 2005) (en banc). This squarely applicable holding is buttressed by decades of U.S. 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 punishing criminal defendants because of their inability to pay, *Bearden v. Georgia*, 461 U.S. 660, 671–72 (1983).

The district court therefore correctly determined that "Florida ... cannot deny restoration of a felon's right to vote solely because the felon does not have the financial resources to pay the ... financial obligations." ECF 207 at 30.[2] The district court then issued a narrow injunction prohibiting the Secretary of State (the "Secretary") from removing the 17 Plaintiffs from the voter rolls or preventing them from voting based on outstanding LFOs that they cannot pay.

The Equal Protection Clause does not allow a state to condition restoration of the franchise on wealth. If this Court reverses the preliminary injunction, Plaintiffs will suffer the irreparable constitutional injury of being disenfranchised in upcoming elections solely because they lack financial resources. Defendants, on the other hand, have failed to identify any concrete harm that the district court's injunction causes them. Moreover, reversing the district court's order risks creating confusion and chaos among Florida's electorate and election officials just ahead of the February 18, 2020 registration deadline, and the early voting period that begins on March 7, 2020.

For these reasons, this Court should affirm the district court's preliminary injunction.

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

JURISDICTIONAL STATEMENT

The district court's subject matter jurisdiction arises under 28 U.S.C. §§ 1331 and 1343. It granted a preliminary injunction on October 18, 2019. ECF 207.

Defendants-Appellants Governor DeSantis and Secretary of State Lee ("Defendants" or "State Defendants") noticed their appeal on November 15, 2019. ECF 219. This Court has jurisdiction over the district court's interlocutory order under 28 U.S.C. § 1292(a)(1).[3] The district court retains jurisdiction over the remaining claims in the consolidated case proceeding toward trial scheduled for April 6, 2020. ECF 203; *see Alabama v. Envtl. Prot. Agency*, 871 F.2d 1548, 1553–54 (11th Cir. 1989).

Plaintiffs-Appellees ("Plaintiffs") sought preliminary injunctive relief pursuant to their First, Fourteenth, and Twenty-Fourth Amendment claims. ECF 108; 98-1. The district court entered a preliminary injunction only on Plaintiffs' Fourteenth Amendment claim, finding that Plaintiffs showed a substantial likelihood of success on the merits of that claim and "easily met the

[3] *See* Gruver, Raysor, and Jones Plaintiffs-Appellees' Memorandum of Law in Response to the Court's Jurisdictional Question, *Jones v. DeSantis*, No. 19-14551 (Dec. 26, 2019) ("Jurisdictional Br.").

other three prerequisites to a preliminary injunction of the scope set out in [the] order." ECF 207 at 51.

The district court expressly declined to "rul[e] on whether the Florida fees are taxes within the meaning of the Twenty-Fourth Amendment[.]" *Id.* at 43. There is no appellate jurisdiction over this claim. Jurisdictional Br. Defendants do not have standing to raise Plaintiffs' Twenty-Fourth Amendment claim because it was not a basis for the preliminary injunction issued and they are not aggrieved by the district court's decision *not* to issue an injunction pursuant to the Twenty-Fourth Amendment. *Id.* at 13–16. This Court should confine its review to the Fourteenth Amendment claim on which the district court ruled. *See Kaimowitz v. Orlando, Fla.*, 122 F.3d 41, 43 & n.1 (11th Cir. 1997) (per curiam) (holding "the scope of [this] [C]ourt's jurisdiction is limited to matters directly related to" the district court's decision to grant a preliminary injunction, and declining to review arguments relating to claims left undecided by the district court) (citing *Callaway v. Block*, 763 F.2d 1283, 1287 n.6 (11th Cir. 1985) (observing this Court "go[es] no further into the merits than is necessary to decide the interlocutory appeal.")).

STATEMENT OF THE ISSUES

Did the district court properly enjoin SB7066's legal financial obligation requirement as applied to Plaintiffs, who are unable to pay, because the

requirement violates the Fourteenth Amendment's prohibitions on conditioning access to the franchise on a person's financial resources?

STATEMENT OF THE CASE

I. Factual Background

A. Amendment 4's Passage

Before January 2019, Florida was one of only four States that permanently disenfranchised nearly all its citizens convicted of a felony and had the most punitive felony disenfranchisement scheme in the nation. As of 2016, Florida was responsible for more than 25% of criminal disenfranchisement nationwide. *See* ECF 98-1 at 12–13. Although Black people comprised 16% of Florida's 2016 population, they comprised approximately 33% of those disenfranchised because of felony convictions. *Id.* at 12 n.3.

During the 2018 elections, returning citizens launched a ballot initiative campaign to end Florida's system of permanent disenfranchisement. Widespread media coverage of the campaign estimated that passage of Amendment 4 would restore voting rights to between 1.2 and 1.6 million Floridians.[4] ECF 207 at 18–19. On November 6, 2018, a supermajority of Florida voters (64.55%) supported

[4] *See, e.g.*, Complaint at 28 n.4, *Gruver v. Barton*, No. 1:19-cv-121 (N.D. Fla. June 28, 2019), ECF 1 ("*Gruver* Compl.").

Amendment 4's passage. ECF 207 at 6. Following Amendment 4's ratification, Article VI, Section 4 of Florida's Constitution, in pertinent part, 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 went into effect 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, the Florida Department of State's ("DOS") Division of Elections (the "Division") and county Supervisors of Elections ("SOEs") treated returning citizens as eligible registrants, approving their facially sufficient voter registration applications, notwithstanding any outstanding LFOs they might have had. On February 11, 2019, the Secretary instructed SOEs

to permit returning citizens to register to vote. *See* ECF 98-22.[5] And while Florida law requires the Division to notify SOEs if it has "credible and reliable" evidence that a registered voter is potentially ineligible because of a felony conviction, *see* Fla. Stat. § 98.075(5), the Division during this time did not identify or provide notice to SOEs of any returning citizens who might be ineligible based on outstanding LFOs.

Many returning citizens registered and voted in local elections held during Spring 2019. *See* ECF 98-4 ¶ 7; ECF 98-8 ¶ 4; ECF 98-14 ¶ 14; ECF 98-15 ¶ 10. Plaintiffs are all returning citizens and registered voters who have outstanding LFOs they cannot afford to pay. *See* ECF 207 at 2 & 3 n.1; *see also* ECF 98-4 to ECF 98-13; ECF 148-20.

C. SB7066's Challenged Provisions

SB7066 was signed into law on June 28, 2019, and became effective on July 1, 2019. The law prohibits returning citizens from registering or voting until they make full payment of *all* LFOs "contained in the four corners of the sentencing document." Fla. Stat. § 98.0571(2)(a). Thus, SB7066 blocks automatic voting rights restoration for returning citizens who have completed incarceration, parole, and probation, but who have LFOs that they are unable to pay. SB7066 even

[5] The Division recalled information it had sent prior to Amendment 4 identifying returning citizens as potentially ineligible. ECF 98-22.

requires payment of LFOs that a Florida court has converted to a civil lien—"a longstanding Florida procedure that courts often use for obligations a criminal defendant cannot afford to pay." ECF 207 at 7; *see also* Fla. H. Staff Analysis, H.B. 1381 (May 13, 1998) (noting courts typically reserve civil lien conversion for when returning citizens have "no ability to pay" the LFOs assessed); 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.").

During the 2019 legislative session, election officials noted that procuring complete and accurate information about outstanding LFOs owed by returning citizens is impossible, because Florida's records of LFOs are decentralized, and sometimes inaccessible, inconsistent, or missing altogether. ECF 207 at 43–44; Complaint at 45–46, *Gruver v. Barton*, No. 1:19-cv-121 (N.D. Fla. June 28, 2019) ("*Gruver* Compl."). Representative Grant, a co-sponsor of SB7066, testified that no existing database conclusively provides centralized information regarding returning citizens' outstanding LFOs. *See Gruver* Compl. at 46. Another co-sponsor noted it would cost "millions of dollars" to accurately track all LFOs.[6] During hearings and debate, Representative Grant testified he refused to

[6] *See* Lawrence Mower, *Amendment 4 Will Likely Cost 'Millions' to Carry Out. Here's Why.*, Tampa Bay Times (Apr. 4, 2019), https://www.tampabay.com/florida-politics/2019/04/04/amendment-4-will-likely-cost-millions-to-carry-out-heres-why/.

commission "a study to know how many people are impacted" by SB7066; similarly, another co-sponsor, Representative Perry, testified that he did not know how many Floridians had outstanding LFOs. *Gruver* Compl. at 49.

In his signing statement, Governor DeSantis opined that the breadth of automatic restoration under Amendment 4 "was a mistake." *See* Letter from Ron DeSantis, Governor, to Laurel Lee, Secretary of State (June 28, 2019), http://www.flgov.com/wp-content/uploads/2019/06/6.282.pdf.

D. Effect of SB7066

For many returning citizens who are unable to pay, including Plaintiffs, SB7066 reinstates lifetime disenfranchisement. *See, e.g.*, *Gruver* Compl. at 47–48. The Florida House of Representatives Staff determined in two reports that "[m]ost criminal defendants are indigent." Fla. H. Staff Analysis, H.B. 1381 (May 13, 1998); Fla. H. Staff Analysis, H.B. 13 (June 23, 1999). In 2018, the Florida Court Clerks & Comptrollers ("FCCC") reported that the collections rate for LFOs was just 20.55%, and that Florida courts have "minimal collections expectations" for over 85% of fines and fees."[7]

[7] Fla. Court Clerks & Comptrollers, *2018 Annual Assessment and Collections Report, Statewide Summary* – Circuit Criminal at 11, https://finesandfeesjusticecenter.org/content/uploads/2019/01/2018-Annual-Assessments-and-Collections-Report.pdf.

Plaintiffs' expert, Dr. Daniel Smith, collected data from 58 of Florida's 67 counties, and identified 542,207 returning citizens with Florida felony convictions. ECF 153-1 ¶¶ 5–6. Dr. Smith determined 19.5% of these individuals have no outstanding LFOs, while the remaining 80.5%—more than 436,000 people—have outstanding LFOs and remain disenfranchised by SB7066. *Id.* at 4, tbl.1, ¶ 7. Nearly 59% of Floridians with felony convictions have at least $500 in outstanding LFOs; 37.5% have at least $1,000 outstanding. *Id.* at 12, tbl. 3. Black returning citizens are more likely than white returning citizens to have outstanding LFOs. *See id.*, *see also id.* ¶ 9.

Dr. Smith's findings were based on data available at the time of his analysis. They are limited to data from the 58 counties that provided him with data, and are biased *against* inflating the number of persons with felony convictions who have outstanding LFOs. *See* ECF 98-3 at ¶¶ 23, 43; 153-1 ¶ 11 n.3. Defendants did not offer a counter-estimate of the number or percentage of returning citizens who continue to owe LFOs.

E. SB7066's Implementation

DOS has not yet implemented SB7066's LFO provisions, *see* ECF 152-93 at 152:2–153:13, 168:20–25, because it (a) does not know which type of LFOs are actually disqualifying under SB7066, ECF 152-94 ¶ 23; and (b) cannot determine whether or not returning citizens have paid their LFOs because it lacks accurate

and 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 of Court, and some clerks will only provide Division unofficial summaries instead of case documents).

SB7066 established a Restoration of Voting Rights Work Group, tasked with studying restoration of voting rights in Florida. Fla. Laws Ch. 2019-62 § 33. In November 2019, the Work Group submitted a report with non-binding recommendations, including that individuals be provided an opportunity "to demonstrate a partial or full inability to pay outstanding [LFOs] and obtain a judicial determination on ability to pay." ECF 240-1 at 25. None of the recommendations have been implemented.

F. Upcoming Elections and Registration Deadline

Florida is holding a presidential preference primary and local elections on March 17, 2020, with an early voting period beginning March 7, 2020. The registration deadline is February 18, 2020. Fla. Stat. § 97.055(1)(a). Plaintiffs seek to vote in the upcoming election. Though the State is not yet implementing SB7066's LFO provisions, Plaintiffs face removal from the rolls and potential prosecution for illegal voting if the injunction is reversed.

II. Prior Proceedings

Gruver Plaintiffs[8] filed suit on June 28, 2019. *Gruver* Compl. Luis Mendez filed suit on June 15, 2019, No. 4:19-cv-272, ECF 1. Kelvin Leon Jones filed suit on June 28, 2019, No. 4:19-cv-300, ECF 1. The case was subsequently consolidated with two other actions filed in the Northern District of Florida. Order of Transfer & Consolidation, *Gruver v. Barton*, No. 1:19-cv-121 (N.D. Fla. June 30, 2019), ECF 3.[9] Defendants in the consolidated actions are the Secretary, the Governor, and SOEs of the ten counties where Plaintiffs reside.

SOE Defendants ("County Defendants") jointly moved to dismiss Plaintiffs' Complaints. ECF 96. State Defendants filed a separate motion to dismiss or abstain. ECF 97. The district court denied the motions on August 15, 2019 and October 18, 2019, respectively. ECF 107; 207.

On August 2, 2019, all Plaintiffs in the consolidated cases 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 hearing on October 7–8,

[8] *Gruver* Plaintiffs-Appellees are Jeff Gruver, Emory Marquis "Marq" Mitchell, Betty Riddle, Kristopher Wrench, Keith Ivey, Karen Leicht, Raquel Wright, Steven Phalen, Clifford Tyson, Jermaine Miller, Florida State Conference of the NAACP, Orange County Branch of the NAACP, and League of Women Voters of Florida.

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

2019, *see* ECF 201; 202, the district court granted in part Plaintiffs' requested preliminary injunction on October 18, 2019, ECF 207.

The district court granted narrow relief, ruling that denying Plaintiffs' right to vote based on their inability to pay LFOs violates the Fourteenth Amendment. *Id.* The district court applied this Court's *en banc* decision in *Johnson* that "[a]ccess to the franchise cannot be made to depend on an individual's financial resources." 405 F.3d at 1216 n.1. The injunction applies only to the Secretary and nine SOEs. It prohibits them from taking any action that "prevents an individual plaintiff from applying or registering to vote ... based only on a failure to pay a financial obligation that the plaintiff asserts the plaintiff is genuinely unable to pay," or "prevents an individual plaintiff from voting ... based only on a failure to pay a financial obligation that the plaintiff shows the plaintiff is genuinely unable to pay." ECF 207 at 53–54. The Order "does not prevent the Secretary from notifying the appropriate [SOE] that a plaintiff has an unpaid financial obligation[.]" *Id.* at 54.

On the same day that the injunction was issued, Governor DeSantis publicly stated his agreement with the Order and "recognize[ed] the need to provide an avenue for individuals to pay back their debts as a result of true financial

hardship." ECF 244 at 5; *see also* ECF 239 at 6:03–16 (confirming the Governor's public statement accurately represented his position).[10]

Four weeks later, State Defendants noticed their appeal, ECF 219; five days after that, they moved for a stay pending appeal in the district court, ECF 234. County Defendants did not appeal from the Order.

On December 19, 2019, the district court temporarily stayed the portion of the injunction prohibiting the Secretary and nine SOEs from preventing Plaintiffs from voting, but maintained the injunction's prohibition against preventing Plaintiffs from registering to vote and remaining registered. ECF 244 at 12. The stay remains effective until (a) this Court "affirm[s] the preliminary injunction or dismiss[es] the Secretary's appeal, regardless of whether the mandate has issued, or (b) February 11, 2020[,]" whichever is earlier. *Id*.

A two-week trial begins on April 6, 2020. ECF 203.

III. Standards of Review

This Court reviews a preliminary injunction ruling under a demanding standard, for clear abuse of discretion. *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 968 (11th Cir. 2005). Reversal is

[10] On October 31, 2019, *Gruver* Plaintiffs moved to extend the injunction to additional plaintiffs who joined the Amended Complaint, ECF 211, which the district court denied on January 9, 2020 to ensure that this Court had jurisdiction to promptly address the appeal of the earlier order, ECF 247.

appropriate "only if the district court applies an incorrect legal standard, or applies improper procedures, or relies on clearly erroneous factfinding, or if it reaches a conclusion that is clearly unreasonable or incorrect." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005).

A district court may grant an injunction when: (1) the movant has a substantial likelihood of success on the merits; (2) the movant will suffer irreparable injury unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the injunction may cause the opposing party; and (4) the injunction is not adverse to the public interest. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004).

SUMMARY OF ARGUMENT

The district court's preliminary injunction rests on a straightforward application of binding precedent from the Supreme Court and the Eleventh Circuit. In *Harper*, the Supreme Court set forth the basic principle that the Equal Protection Clause prohibits States from discriminating on the basis of wealth in access to the franchise. 383 U.S. at 666. In *Johnson*, this Court sitting *en banc* held that principle applies to returning citizens in Florida seeking access to voting rights restoration through the clemency process, 405 F.3d at 1216 n.1.

These and other authorities establish a clear mandate: states cannot enact voting restrictions that would allow a wealthy person to cast a ballot while a

similarly-situated poor person cannot. SB7066 squarely contravenes this principle by requiring payment of LFOs as a condition for automatic rights restoration, regardless of ability to pay. The district court was thus well within its discretion to issue a narrow preliminary injunction, prohibiting Defendants from preventing the Plaintiffs from registering to vote or casting a ballot based on their inability to pay.

On appeal, Defendants' various arguments ultimately rest on a single assertion: that Florida may freely deny restoration based on inability to pay LFOs because Plaintiffs have lost their right to vote upon conviction of a felony. But *Johnson* forecloses that argument. This Court unambiguously concluded that "restoration of the franchise" cannot be conditioned on restitution payments an individual cannot afford to pay. *Id.* Defendants suggest that pronouncement was not binding, but that is incorrect. This Court in *Johnson* made clear that it ruled for the State only "*[b]ecause* Florida d[id] not deny access to the restoration of the franchise based on ability to pay." *Id.* (emphasis added).

More broadly, Defendants' position mistakes the constitutional basis for Plaintiffs' claims. Plaintiffs do not dispute that, as a general matter, states may disenfranchise individuals due to a felony conviction. But it does not follow from that general rule that states may *discriminate* on an impermissible basis against people with past felony convictions when granting access to the franchise. Under *Harper*, wealth-based distinctions in voting are invidious and presumptively

unconstitutional. Impermissible restrictions with respect to allocating the franchise do not somehow become valid when applied to returning citizens. A state cannot disenfranchise returning citizens who lack a particular net worth any more than it could choose to disenfranchise only those of a particular race or sex.

Moreover, a separate but related line of Supreme Court authority prohibits states from increasing individuals' criminal punishment based on their inability to pay LFOs. Contrary to Defendants' representations, this prohibition is not limited to incarceration, but instead applies to circumstances such as payment of fines or other "collateral consequences" of a conviction. Nor is this case law restricted to the exercise of fundamental rights. By disenfranchising Plaintiffs, Florida unconstitutionally punishes them for their lack of wealth.

And, even assuming *arguendo* that Defendants were correct that SB7066's wealth-based restriction is subject only to rational basis review, the LFO requirement would still fail as applied to Plaintiffs. Put simply, there is no rational basis for conditioning restoration upon payment of a financial obligation that an individual lacks the ability to pay.

The district court also was well within its discretion in concluding that the remaining preliminary injunction factors favor Plaintiffs. While Plaintiffs will suffer the irreparable injury of disenfranchisement this March absent an injunction, Defendants cannot identify any burdens they face in complying with the

injunction, other than speculative administrative burdens should the district court expand its injunction to a proposed class. And the preliminary injunction serves the public interest because, as Defendant Governor DeSantis conceded in his public statements, it will prevent disenfranchisement due to financial hardship.

Though Defendants have separately raised Plaintiffs' Twenty-Fourth Amendment claim, this Court should confine its review to the Fourteenth Amendment claim because the district court withheld judgment on the Twenty-Fourth Amendment claim and Defendants lack appellate standing to contest that decision. If this Court did entertain the claim, it should determine that SB7066's broad LFO provisions encompass assessments that meet the definition of impermissible taxes under the Twenty-Fourth Amendment.

Finally, any severability analysis is inappropriate in this case, given that the district court did not strike down SB7066, much less Amendment 4, but simply provided a constitutionally required exception for Plaintiffs.

The judgment below should be affirmed.

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits

A. The District Court Correctly Applied *Johnson v. Governor* in Holding that SB7066 Unconstitutionally Conditions Access to the Franchise Based on Wealth

The district court's injunction follows binding Supreme Court and Eleventh Circuit precedent. This Court sitting *en banc* in *Johnson* held, in the specific context of "restoration of the franchise," that "[a]ccess to the franchise cannot be made to depend on an individual's financial resources." 405 F.3d at 1216 n.1. *Johnson* applied *Harper*, which likewise holds that "a State violates the Equal Protection Clause of the Fourteenth Amendment *whenever* it makes the affluence of the voter or payment of any fee an electoral standard." 383 U.S. at 666 (emphasis added).

Given *Johnson*'s unambiguous language, the district court did not err in concluding that Plaintiffs are likely to succeed on the merits. The plaintiffs in *Johnson* challenged, *inter alia*, Florida's requirement that returning citizens pay restitution to apply for restoration to the Board of Executive Clemency ("Clemency Board" or the "Board"). This Court resolved the issue through a straightforward analysis. *First*, the *en banc* Court set forth the applicable legal rule: "Access to the franchise cannot be made to depend on an individual's financial resources." 405

F.3d at 1216 n.1 (citing *Harper*, 383 U.S. at 668).[11] *Second*, it applied the law to the facts of the case, noting that returning citizens otherwise entitled to apply for restoration, but "who cannot afford to pay restitution," could have the restitution requirement waived and apply for restoration via a hearing. *Id*.[12] *Third*, *Johnson* held that the state's clemency system passed constitutional muster *because of* this waiver procedure: "Because Florida does not deny access to the restoration of the franchise based on ability to pay, we affirm[.]" *Id*. *Fourth*, as the *Johnson* plaintiffs were not required to make restitution payments in order to apply for restoration, the Court noted that its decision "say[s] nothing about whether conditioning an application for clemency on paying restitution would be an invalid poll tax." *Id*.

[11] The Second Circuit similarly applied *Harper* in the voting rights restoration context in *Bynum v. Conn. Comm'n on Forfeited Rights*, 410 F.2d 173, 175 (2d Cir. 1969).

[12] The 2001 Rules of Executive Clemency ("Clemency Rules" or "Rules) permitted the Board to review a written application for clemency without conducting a hearing for applicants with certain convictions if the applicant had fulfilled specified requirements, including payment of restitution. 2001 Fla. R. Exec. Clem. 9 (eff. June 14, 2001), App'x Vol. 3 to Defs.' Mot. for Summ. J. at 121, *Johnson v. Bush*, No. 00-cv-3542 (S.D. Fla. Jan. 8, 2002)("2001 Fla. R. Exec. Clem."). If applicants had outstanding restitution, the Rules permitted the applicant to apply without payment and the Board would hold a hearing to consider the application. 2001 Fla. R. Exec. Clem. 10. The applicant was not required to attend the hearing. 2001 Fla. R. Exec. Clem. 8(I)(A).

Defendants argue for the first time on appeal that *Johnson*'s application of *Harper* was dicta.[13] App. Br. at 20. That is wrong. The principle set forth in *Johnson* that restoration cannot depend on an individual's financial resources is a holding and delineates a controlling legal rule. Moreover, it is an accurate statement of binding law. A judicial holding incorporates "not only the result but also those portions of the opinion necessary to that result," including the "rationale upon which the Court based the results of its earlier decisions." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66–67 (1996). Conversely, "dicta is defined as those portions of an opinion that are not necessary to deciding the case." *United States v. Kaley*, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) (quotations omitted); *see also id.* (defining dicta as statements "that could have been deleted without seriously impairing the analytical foundations of the holding") (quotation omitted).

[13] *See* ECF 205 at 230:07 (district court noting Defendants "don't even discuss the *Johnson* footnote"), 242:09–11 (district court stating "[a]t some point, unlike in your briefing, you are going to have to come to grips with Note 1 in the *Johnson* case" with no subsequent response from Defendants as to *Johnson*'s precedential effect); *see also* ECF 239 at 27:21–28:22 (district court noting Defendants "didn't even discuss" *Johnson* in their briefing despite Plaintiffs "cit[ing] it prominently"). "Arguments raised for the first time on appeal are not properly before this Court." *Hurley v. Moore*, 233 F.3d 1295, 1297 (11th Cir. 2000). Even setting *Johnson* entirely aside, a range of other Supreme Court authority supports Plaintiffs' likelihood of success. *See infra* §§ I.B, I.D. Defendants raise their first response to this authority on appeal as well.

While the last sentence of *Johnson*'s first footnote reserves judgment on whether restitution payments meet the definition of a *poll tax*, Defendants are wrong that *Johnson* "declin[ed] to say anything on" whether requiring such payments "would be constitutional as applied to those who lacked the ability to pay." App. Br. at 20. Quite the contrary, *Johnson* made clear this was the precise "rationale upon which the Court based the results of its ... decision." *Seminole Tribe*, 517 U.S. at 66–67 (1996). This Court held that voter restoration cannot depend "on an individual's financial resources" and ruled for the State "*[b]ecause* Florida does not deny access to the restoration of the franchise based on ability to pay." *Johnson*, 405 F.3d at 1216 n.1 (emphasis added). If Defendants were correct that *Johnson* said "*nothing*" and "left open the question presented in this case," App. Br. at 20, then the entire footnote "could have been deleted," which is clearly not true here, *Kaley*, 579 F.3d at 1253 n.10. Without the footnote, there would be no explanation of how or why the Court resolved the claim.

Contrary to Defendants' intimations, a poll tax is not the only form of financial restriction on voting that is unconstitutional. Separate and apart from the Twenty-Fourth Amendment's categorical prohibition on poll taxes, the Fourteenth Amendment prohibits conditioning the franchise on wealth or payment and thereby denying the franchise based on inability to pay. *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 123–24 (1996) ("[P]articipat[ion] in political processes as voters and

candidates cannot be limited to those who can pay for a license."). Candidate filing fees, for example, are not poll taxes; nevertheless, the Supreme Court has struck down such fees because the requirements would restrict access to the political process based 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.").

The *Johnson* plaintiffs pled *both* a poll tax and a wealth discrimination theory in their complaint: they alleged that the restitution requirement both (1) rendered "ex-felons' ability to regain the right to vote depend[ent] on their financial resources," and (2) was "the practical equivalent of a poll tax." Compl.-Class Action at ¶ 84, *Johnson v. Bush*, No. 00-cv-3542, 2000 WL 34569743 (S.D. Fla. Sept. 21, 2000). The parties' briefing—including Florida's briefs—similarly distinguished analysis of a wealth discrimination theory from a poll tax claim.[14] As

[14] *See* Br. of Plaintiffs-Appellants, No. 02-14469C, 2002 WL 34346130 (11th Cir. Oct. 8, 2002) (describing issue on appeal as whether restitution requirement "constitutes a poll tax in violation of the 24th Amendment ... as well as wealth discrimination under the Equal Protection and Due Process clauses of the Fourteenth Amendment"); Br. of Defendants-Appellees at *53, No. 02-14469C, 2002 WL 34346131 (11th Cir. Nov. 22, 2002) (contending plaintiffs' "wealth-discrimination claim must necessarily fail" and, separately, that "Plaintiffs' poll tax claim is *equally* without merit") (emphasis added); En Banc Br. of Plaintiffs-Appellants, at *1, No. 02-14469C, 2004 WL 5467044 (11th Cir. Aug. 27, 2004) (incorporating brief and statement of issues submitted to panel).

to the first theory, *Johnson* reaffirmed the principle that the "ability to regain the right to vote" cannot depend on financial resources; and given that the *Johnson* Plaintiffs were not required to make restitution payments in order to apply for rights restoration, the Court declined to reach the question of whether such payments are "the practical equivalent of a poll tax." *Id.* Here, the district court made the same analytical distinction between poll taxes and other forms of wealth discrimination in voting in addressing Plaintiffs' Fourteenth Amendment claim separately from Plaintiffs' Twenty-Fourth Amendment claim. *See* ECF 207 at 41–42.

Thus, the district court correctly recognized that SB7066 violates *Johnson*'s holding by conditioning restoration on returning citizens' ability to pay LFOs. The Eleventh Circuit follows its prior precedent "unless and until … [a] subsequent Supreme Court or en banc decision [that is] clearly on point … actually abrogate[s] or directly conflict[s] with" the prior holding. *United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019) (quotation marks omitted). This Court's *en banc* precedent contradicts Defendants' central theory on appeal and demonstrates that Plaintiffs are likely to succeed on the merits.

B. Supreme Court Precedent Establishes that Access to the Franchise Cannot Be Based on Ability to Pay

Defendants' assertion that they can deny Plaintiffs access to the franchise based on their inability to pay LFOs is not only incompatible with *Johnson*, it runs afoul of the Supreme Court's decision in *Harper*.

Harper sets forth an overarching principle prohibiting States from conditioning access to the franchise on wealth. The Equal Protection Clause "restrains the States from fixing voter qualifications which invidiously discriminate," and a "requirement of fee paying" to access the ballot "causes" this form of proscribed, "'invidious' discrimination[.]" *Harper*, 383 U.S. at 666–68. The classification itself is categorically impermissible: "introduc[ing] wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." *Id.* at 668. The Court likened discrimination in voting based on "[w]ealth" to discrimination based on "race, creed, or color"—none of these factors are "germane to one's ability to participate intelligently in the electoral process." *Id.*

The Supreme Court later reiterated in *M.L.B.* that, although fee requirements "ordinarily are examined only for rationality," an exception applies to laws conditioning access to the franchise on the ability to pay a fee 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." 519 U.S.

at 123.[15] The district court properly recognized this exception "squarely" applies to SB7066. ECF 207 at 32. SB7066 violates the Equal Protection Clause because it does precisely what *Harper* and *M.L.B.* forbid: it conditions access to the franchise on payment of financial obligations that Plaintiffs cannot afford to pay, though they would be "otherwise qualified to vote." *Harper*, 383 U.S. at 668.

Defendants argue that none of *Harper*'s reasoning applies because Plaintiffs were lawfully disenfranchised for felony convictions. App. Br. at 22 n.3. But Defendants misperceive the constitutional violation in this case. The district court accepted that "a state can properly disenfranchise felons, even permanently[.]" ECF 207 at 28.[16] The question here, however, is not whether

[15] More recently, the Court noted that regardless of whether a photo identification requirement for voters at the polls could be justified by a legitimate state interest, it would nonetheless 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." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008).

[16] As the district court correctly recognized, ECF 207 at 26, while felony convictions are permissible for states to consider in establishing voter qualifications, the *manner* of felony disenfranchisement must still comply with the Fourteenth Amendment, *see Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (remanding Plaintiffs' challenge to a felony disenfranchisement regime for consideration of their claim that the manner of felony disenfranchisement lacked uniformity and violated the Equal Protection Clause); *Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978) (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").

Plaintiffs' voting rights were lawfully revoked, but whether Plaintiffs, who would be eligible to vote in Florida but for their inability to satisfy an LFO requirement, may be subject to a discriminatory wealth-based restriction on the franchise. They cannot. An otherwise "invidious" classification does not suddenly become permissible when applied to returning citizens. For example, even though a State may lawfully disenfranchise all individuals for felony convictions, a felony disenfranchisement law that discriminates based on "race, creed, or color," *Harper*, 383 U.S. at 668, is clearly invidious and unconstitutional, *see Hunter v. Underwood*, 471 U.S. 222, 232–33 (1985) (striking down racially discriminatory felony disenfranchisement scheme); *Hobson v. Pow*, 434 F. Supp. 362, 366–67 (N.D. Ala. 1977) (striking down felony disenfranchisement law that discriminated based on gender).[17]

The same is true of wealth-based distinctions, as the district court observed: "a statute automatically restoring the right to vote for felons with a net worth of $100,000" would be patently unconstitutional. ECF 207 at 33–34. A person's affluence does not become "germane to one's ability to participate

[17] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736–38 (2017), does not support Defendants' position because the Supreme Court struck down a law prohibiting those convicted of sexual offenses from accessing social media, nothing that even the government's interest in regulating those who commit "serious crime[s]" cannot be "insulated from all constitutional protections."

intelligently in the electoral process" simply because they were convicted of a felony. *Harper*, 383 U.S. at 668.[18] Defendants fail to explain how the wealth of a person convicted of a felony is more relevant than the wealth of any other voter. *See* ECF 207 at 33. A voter is no less qualified to vote "because he lives in the city or on the farm," *Harper*, 383 U.S. at 667, and a law that made rights restoration contingent on such a distinction would become no more constitutional because it pertained to individuals with felony convictions.

Nor does it matter whether Plaintiffs' interest in voter restoration arises from a state-created mechanism versus an intrinsic "fundamental" right. In *Harper*, the Supreme Court declined to identify the source of the plaintiffs' voting rights, observing that "the right to vote in state elections is nowhere expressly mentioned" in the federal Constitution, but nevertheless held that wealth-based restrictions on the franchise are impermissible in state elections. 383 U.S. at 665. Broadly speaking, States' statutory grants of voting rights are subject to limits under the Equal Protection Clause, even when the underlying

[18] To the extent Defendants contend that payment of LFOs demonstrates *willingness* to complete the financial terms of one's sentence, the district court's injunction accepts the legitimacy of the requirement as applied to returning citizens who can afford to pay. ECF 207 at 27–28. But when a returning citizen cannot pay, imposing the requirement is pure wealth-based discrimination: returning citizens with enough money can vote while the indigent remain disenfranchised solely due to their lack of resources.

rights themselves are not directly protected by the Constitution. *See Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (observing "citizens [have] no federal constitutional right to vote for electors for [president]," but Equal Protection Clause nevertheless protects the right to vote in Presidential elections against "arbitrary and disparate treatment"); *O'Brien v. Skinner*, 414 U.S. 524, 529–31 (1974) (invalidating the denial of absentee registration privileges to some voters, even though the federal constitution does not guarantee a right to vote by absentee ballot). Here, Florida was not obligated to enact Amendment 4, but once it did, the Equal Protection Clause prohibits the State from conditioning restoration on wealth. *See Harper*, 383 U.S. at 665 ("lines may not be drawn which are inconsistent with the Equal Protection Clause['s]" prohibition on wealth-based qualifications).

The Supreme Court has similarly invalidated laws that exclude those who cannot afford to pay filing fees from ballot access, despite a candidate's lack of a "fundamental" right to appear on the ballot. *M.L.B.*, 519 U.S. at 124 n.14 (citation omitted). In *Bullock*, the Court struck down Texas's filing fee, applying a heightened standard of review because the system "f[ell] with unequal weight" due to "economic status," and invalidated the law because the plaintiff-candidates had "affirmatively alleged that they were unable, not simply unwilling, to pay the assessed fee." 405 U.S. at 142–46. It did so even though "the Court ha[d] not

heretofore attached such fundamental status" to aspiring candidates' right to ballot access. *Id.* at 142–43. Similarly, in *Lubin*, the Court invalidated California's filing fee that deprived an indigent candidate of access to the ballot, because "a state may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." 415 U.S. at 718. In both cases, the Court recognized the effects of wealth-based voting restrictions on the broader electoral system.[19] In both cases, the Court invalidated the filing fee as an impermissible wealth-based restriction without attaching "fundamental rights" status to the candidate's ballot access.

C. There Are No Adequate Alternatives for Restoration Available to Returning Citizens Unable to Pay LFOs

The district court did not err in finding there are no adequate alternatives for individuals who are unable to pay LFOs. ECF 207 at 38–40. Under *Johnson*, though a State may disenfranchise returning citizens "permanently," it cannot "deny access to the restoration of the franchise based on ability to pay" if restoration is available to those who can pay. 405 F.3d at 1216–17 & n.1. In

[19] More than a million returning citizens—more than 10% of voting-age Floridians—may be eligible for rights restoration under Amendment 4, and the State has "minimal collections expectations" for 85% of LFO debt associated with their convictions. SB7066 thus "falls with unequal weight on voters ... according to their economic status," and thereby creates a systemic "disparity in voting power based on wealth." *Bullock*, 405 U.S. at 144.

Johnson, Florida's clemency procedures passed constitutional muster because *any* returning citizen was permitted to submit a clemency petition by seeking a waiver of the requirement that they first pay restitution. *Id*.; *see also* 2001 Fla. R. Exec. Clem. 8(I)(A) (permitting "Waiver of the Rules" for a clemency petition "[i]f an applicant cannot meet the requirements" including payment of restitution). Through the waiver procedure, poor people with felony convictions could apply for clemency just as meaningfully as those with financial means.[20]

That is not the case under SB7066. Defendants assert, App. Br. at 9, that individuals can circumvent SB7066's LFO requirement in three ways: (1) modification allowing termination of the obligation "upon the payee's approval," Fla. Stat. § 98.0751(2)(a)(5)(d)–(e); (2) completion of community service hours "if the court … converts [LFOs] to community service," *id*.; or (3) receiving a discretionary grant of clemency. Though some small subset of returning citizens may be able to relieve some LFO requirements through these mechanisms, they do not provide actual alternatives that make automatic restoration "equally accessible" regardless of financial resources. ECF 207

[20] Though the waiver procedure required an additional step—petitioners with outstanding restitution applied for consideration "with a hearing" (which petitioners were not even required to attend) rather than simply on paper—this alternative ensured that all individuals could access clemency regardless of their financial resources.

at 30.[21]

First, any relief under these procedures is wholly discretionary and does not ensure that those unable to pay their LFOs have the same opportunity for restoration as those who have financial means. SB7066's "termination" procedure vests a "payee"—often a private third party[22]—with absolute and unreviewable discretion to grant or deny termination. Fla. Stat. § 98.0751(2)(a)(5)(e)(II). That payee has no obligation to consider ability to pay at all in making this determination. Similarly, courts have no obligation to convert any LFOs into community service, even if a court finds that an individual is unable to pay. *See id.* §§ 98.0751(2)(a)(5)(e)(III); 938.30(2). By the same token, a grant of clemency is a discretionary act of grace rather than an alternative ensuring automatic rights restoration for individuals who cannot pay. The Clemency Board retains broad discretion to extend or withhold clemency based on unarticulated or subjective criteria. *See Hand v. Scott*, 888 F.3d 1206, 1209 (11th Cir. 2018); *see also*

[21] *Cf.*, *e.g.*, *Lubin*, 415 U.S. at 719 n.5 (noting that a write-in option for indigent candidates likely would not be "an adequate alternative" to candidate filing fees because an indigent candidate must "rest his chances solely upon those voters who would remember his name and take the affirmative step of writing it on the ballot").

[22] The record evidence demonstrates that counties and courts often contract to assign LFO debt to private collections agencies, which would then retain authority over termination of that debt under SB7066. *See, e.g.*, ECF 167-35; ECF 167-36.

Beacham v. Braterman, 300 F. Supp. 182, 184 (S.D. Fla. 1969) (affirming that restoration through the clemency process "is part of the pardon power and as such ... not subject to judicial control.") *aff'd* 396 U.S. 12 (1969). The Board is under no obligation to even consider ability to pay, let alone restore returning citizens' voting rights on that basis. In a system where the wealthy receive automatic rights restoration, it is not a reasonable alternative to make the poor pray for an act of grace.

Second, it is uncontested that these alternatives are wholly unavailable to many returning citizens. Individuals with out-of-state or federal convictions—such as Plaintiffs Karen Leicht and Steven Phalen—cannot seek termination or community service. *See* ECF 207 at 39; ECF 239 at 8:25–9:21.

Even for those with Florida convictions, the district court did not abuse its discretion in finding that community service conversion is an impracticable alternative. *See* ECF 207 at 38–40. Plaintiff Gruver testified that he contacted the court to seek conversion of his LFOs to community service and was advised that because his debt had been assigned to a private company, as is common, "there was nothing the court could do." *See* ECF 152-23 at ¶¶ 4–8. Community service conversion is unavailable in most judicial circuits. Rebekah Diller, *The Hidden Cost of Florida's Criminal Justice Fees*, 23 Brennan Ctr. for Just. (2010), https://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf.

And as the district court found, even where community service is offered, the prospect of rights restoration by working off debt "is often wholly illusory" in practice. ECF 207 at 39. Community service hours are credited at the federal minimum hourly wage, *see* Fla. Stat. §§ 938.30(2), 318.18(8)(b)(1)–(2), currently $7.25 per hour, *see* 29 U.S.C. § 206(a)(1)(c), which would leave Plaintiffs with significant debt disenfranchised for "years" because they cannot afford to qualify for automatic restoration under SB7066. [23]

As for clemency, Florida's current rules no longer allow returning citizens who cannot pay restitution to apply for restoration, thereby precluding anyone with restitution debt from even seeking relief through this mechanism. *See* Fla. R. Exec. Clem. 9.A.3, 10.A.2 (2011). And those with other LFO obligations who can apply have a very small chance of having clemency granted: fewer than 3,000 people were restored through clemency over the seven-year period that the current rules have been in place. *Hand v. Scott*, 285 F. Supp. 3d 1289, 1310 (N.D. Fla. 2018).[24]

[23] *See* ECF 204 at 149:06 (Wright testimony regarding over $50,000 in LFO debt); *id.* at 167:20–168:04 (Riddle testimony regarding impracticability of community service option given work and family obligations).

[24] Clemency is also impracticable because it moves at a "glacial speed." ECF 207 at 5. Returning citizens cannot apply until at least five or seven years after completing their sentence and must satisfy other requirements not necessary for automatic restoration under Amendment 4. *See* Fla. R. Exec. Clem. 9.A, 10.A (2011).

The record makes clear that the mechanisms cited by Defendants do not make automatic restoration available to all returning citizens regardless of financial resources.[25] If SB7066 mirrored the Clemency Rules reviewed in *Johnson*, such that LFO requirements would be waived "[i]f an applicant cannot meet the requirements" for automatic restoration, the equal protection analysis might be different. 2001 Fla. R. Exec. Clem. 8(I)(A). Instead, SB7066 creates a patchwork of inconsistent, discretionary mechanisms that might grant relief to some. But the many others who are denied such discretionary relief—or precluded from requesting it at all—would have been "den[ied] access to the restoration of the franchise based" solely on their "ability to pay." *Johnson*, 405 F.3d at 1216 n.1. That is a direct violation of the Fourteenth Amendment's prohibition against wealth-based discrimination.

[25] Defendants further mischaracterize SB7066 in implying that it "allow[s] a court to modify any and all outstanding financial obligations" and permits them to be "waive[d]entirely." App. Br. at 31–32. Even for returning citizens who can seek modification, this mechanism remains subject to the other limitations of "sub-subparagraph e."—namely that LFO debt can only be terminated with "payee's approval." Fla. Stat. § 98.0751(2)(d)–(e). Courts are, at a minimum, powerless to modify LFOs where they are not the payee.

D. The District Court Correctly Found that SB7066 Unconstitutionally Punishes People for their Inability to Pay LFOs

As the district court observed, an independent line of Supreme Court authority has held in various contexts that "punishment cannot be increased because of a defendant's inability to pay." ECF 207 at 32. SB7066 does this by extending the disenfranchisement of returning citizens because they cannot afford their LFOs. Such a scheme accomplishes "little more than punishing a person for his poverty" in violation of the Fourteenth Amendment. *Bearden*, 461 U.S. at 671; *see also Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

A long line of cases establish the basic principle that the state may not sanction people because of their inability to pay. *Bearden* itself concerned whether a State may lawfully revoke probation for failure to pay a fine the probationer is unable to pay. 461 U.S. at 668. In *Griffin*, the foundational "equal justice" case, the Court held that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." 351 U.S. at 19. *Griffin* held unconstitutional the denial of trial transcripts to defendants who sought to appeal felony convictions but could not afford transcript fees. *Id*. at 17. Drawing on both due process and equal protection, the Court explained the state could not "discriminate[] against some convicted defendants on account of their poverty[.]" *Id*. at 17–18; *see also, e.g.*, *Williams v. Illinois*, 399 U.S. 235, 242 (1970)

(invalidating statute authorizing extension of term of imprisonment beyond the statutory maximum based on failure to pay a fine because it "ma[de] the maximum confinement contingent upon one's ability to pay").

In *Bearden*, the Supreme Court synthesized prior precedent, explaining that "[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 failure to pay" before imposing a sanction for nonpayment. *Id.* at 672–73.

More broadly, *Bearden* held that determining the constitutionality of a particular state sanction 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. *Bearden* eschewed the traditional framework for equal protection and due process claims that would otherwise apply outside the context of state punishment for inability to pay. Because shoehorning questions related to sanctioning poverty into "the equal protection framework is a task too Procrustean

to be rationally accomplished," the Supreme Court did not evaluate whether a fundamental right or suspect classification was at issue. *Id*. at 666 n.8.

Bearden's factors all weigh strongly in Plaintiffs' favor because (1) the individual interest implicated is the foundational democratic interest in political participation and (2) SB7066 affects Plaintiffs' interests by completely barring their ability to vote. And as detailed further, *see infra* Section I.E., (3) there is no valid connection between SB7066's disenfranchisement regime and the proposed legislative purpose, while (4) there remain alternative means for Defendants to obtain payment where possible.

After ignoring the *Griffin*/*Bearden* case line in the district court, Defendants mistakenly argue for the first time on appeal that these cases only hold that states may not "*imprison* a person solely because he lacked the resources to pay" LFOs, and that *Bearden* applies only when a case implicates a fundamental right. App. Br. at 24 (citation omitted). But the Supreme Court has stated directly that "*Griffin*'s principle has not been confined to cases in which imprisonment is at stake[.]" *M.L.B.*, 519 U.S. at 11. In *Mayer v. City of Chicago*, where a $500 fine but no incarceration was at issue, the Court held that the "invidiousness of the discrimination ... is not erased by any differences in the sentences that may be imposed." 404 U.S. 189, 197 (1971) . Noting that a "fine may bear as heavily on an indigent accused as forced confinement," *Mayer* described other "collateral

consequences" such as the loss of a professional license that could be "even more serious" than confinement. *Id.*

Defendants rely on *United States v. Plate*, 839 F.3d 950 (11th Cir. 2016), but *Plate* did *not* hold that *Bearden*'s constitutional principle is limited "only" to incarceration. App. Br. at 24. To the contrary, *Plate* described the unlawful injury in that case as being "treated more harshly in [one's] sentence than [one] would have been if she (or her family and friends) had access to more money, and that is unconstitutional[.]" *Plate*, 839 F.3d at 956. *Plate* supports Plaintiffs—not Defendants—because "more harsh[]" treatment is precisely what SB7066 imposes in prolonging disenfranchisement. *Id.*

Contrary to Defendants' assertions, App. Br. at 24, the *Griffin*/*Bearden* case line is *not* limited to vindication of a "fundamental" right. In *Griffin*, the Supreme Court emphasized that there is no fundamental right to "appellate courts … or appellate review at all." 351 U.S. at 18.[26] Nevertheless, if a State makes such review available, it cannot do so "in a way that discriminates against some

[26] Likewise, in *San Antonio School District v. Rodriguez*, the Supreme Court observed that 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" despite expressly holding that there is no fundamental right to education. 411 U.S. 1, 25 n.60, 37 (1973). This indicates that the Court did not consider a fundamental right to be a necessary predicate to a wealth-discrimination claim under *Griffin*.

convicted defendants on account of their poverty." *Id*. Similarly, *Bearden* never relied on any "fundamental rights" analysis. Indeed, people convicted of a felony *lose* a fundamental right to physical liberty, in the same manner that, according to Defendants, they lose the fundamental right to vote. *See Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (stating that probation "[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty"). And just as rights restoration derives from Florida state law, "[p]robation or suspension of sentence comes as an act of grace" and has no "basis in the Constitution, apart from any statute." *Escoe v. Zerbst*, 295 U.S. 490, 492–93 (1935).[27]

Bearden makes clear that, while states need not employ probation, if they make it available, they cannot limit it to those wealthy enough to pay LFOs. *See* 461 U.S. at 670 (probation reflects determination that "the State's penological interests do not require imprisonment" and cannot be withheld from those unable to pay LFOs). The same is true here: just as the interest in probation in *Bearden*

[27] Defendants' reliance on the out-of-circuit, split decision in *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010) is misplaced. *Bredesen*'s majority misapplied a fundamental rights lens onto the *Griffin*/*Bearden* case line. *See also id*. at 624 F.3d at 754–80 (Moore, C.J., dissenting) (detailing numerous ways majority diverged from Supreme Court authority). And it bears noting that Tennessee's financial requirements were much narrower in only requiring payment of restitution and child support, whereas SB7066 sweeps in all forms of LFOs. *Id*. at 745. In any event, Supreme Court and Circuit precedent clearly control here, not *Bredesen*.

arose from state law, Plaintiffs' avenue for voter restoration derives from Amendment 4—and neither can be denied based on the inability to pay a fine.

As the district court correctly concluded, the *Griffin*/*Bearden* case line is an independent basis for Plaintiffs' likelihood of success.

E. There Is No Rational Basis for Denying the Right to Vote to Plaintiffs Who Cannot Afford to Pay Outstanding LFOs

Although wealth-based restrictions on voting are categorically prohibited by the Fourteenth Amendment, SB7066's LFO requirement would fail even under rational basis review.

Despite Defendants' suggestions to the contrary, the "rational-basis standard is not a toothless one," *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981) (quotations omitted), particularly in the elections context. Nearly all the cases that Defendants cite are in the context of "social welfare" laws governing benefits, commercial transactions, and taxes—where courts take a particularly deferential approach and impose virtually no limits on states. *See, e.g.*, *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012) ("legislatures have especially broad latitude in creating classifications and distinctions in tax statutes") (quotation marks, alteration omitted). In the elections context, courts have held that, even when the right at issue is statutory, rational basis review imposes meaningful limits on the state. *See, e.g.*, *Bush*, 531 U.S. at 107 (determining Florida "accorded arbitrary and disparate treatment to voters in its different counties");

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.").

Thus, even though *Richardson* permits felony disenfranchisement, courts have routinely noted that such schemes would fail rational basis review under the Equal Protection Clause if they create irrational or arbitrary classifications. States cannot "disenfranchise similarly situated blue-eyed felons but not brown-eyed felons," *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983); or to re-enfranchise "only those felons who are more than six-feet tall," *Harvey v. Brewer*, 605 F.3d 1067, 1079 (2010). In other words, even if Florida has the general authority to disenfranchise returning citizens, it cannot do so using arbitrary or irrational criteria.

Defendants incorrectly frame the issue before this Court as whether an LFO requirement is rational *generally*. The correct issue, however, is whether the LFO requirement is rational *as applied to Plaintiffs*, who cannot afford to pay. Indeed, Defendants conceded below that this was the case, telling the district court that "[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]*." ECF 234 at 11 (emphasis added). Thus, the preliminary injunction order did not determine that SB7066 was *facially* unconstitutional, but instead that it was

unconstitutional *as applied to plaintiffs that are "genuinely unable to pay*." ECF 207 at 53 (emphasis added); *see also* ECF 244 at 4–5 ("[T]he precise issue in this case" is whether Florida may condition restoration on payment of LFOs that a "felon is genuinely unable to pay.").

Defendants cite the Ninth Circuit's decision in *Harvey v. Brewer* for the proposition that "appellate courts have uniformly rejected challenges to laws requiring felons to complete the financial aspects of their sentences before voting, both generally *and specifically as applied to those who cannot afford to pay*." App. Br. at 2 (emphasis added). But that not only ignores *Johnson*, it plainly mischaracterizes *Harvey*, which explicitly allowed, without deciding, that "[p]erhaps withholding voting rights from those who are truly unable to pay their criminal fines due to indigency *would not pass this rational basis test*." 605 F.3d at 1080 (emphasis added).

There is no rational basis for conditioning voting rights on payment of LFOs as applied to individuals who are unable to pay those LFOs.

First, withholding voting rights from those unable to pay their debts cannot rationally facilitate the goal of debt collection. While Florida may insist that all returning citizens make full payment of outstanding LFOs before restoration, App. Br. at 28, imposing prolonged or permanent disenfranchisement on people *unable to pay* does not "aid[] collection of the revenue," *Tate v. Short*, 401 U.S. 395, 399

(1971); *see also Bearden*, 461 U.S. at 670 ("[r]evoking the probation of someone who ... is unable to make restitution will not make restitution suddenly forthcoming."). The denial of returning citizens' voting rights cannot serve as an incentive for repayment if they are genuinely unable to pay.

Second, rights restoration under the preliminary injunction order does not terminate Plaintiffs' debt. Defendants claim that "a specific exemption for indigent felons [might] provide an incentive to conceal assets and would result in the state being unable to compel payments from some non-indigent felons." App. Br. at 29 (quotation omitted). But Florida maintains direct means of collecting LFOs even after a person's voting rights have been restored. *See Bearden*, 461 U.S. at 672 (noting a "State is not powerless to enforce judgments against those financially unable to pay a fine"). If states have "other means for exacting compliance with [payments]" that are "at least as effective," *Zablocki v. Redhail*, 434 U.S. 374, 389 (1978), it "necessarily casts considerable doubt upon the proposition that the [new provision] could rationally have been intended to prevent those very same abuses," *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 537 (1973). In fact, the injunction—which requires a process by which returning citizens may assert inability to pay, then permits the state to rebut that assertion—is *likelier* to disclose a person's assets than the existing system, where no such inquiry occurs.

Third, the injunction does not impose an administrative burden on Defendants. Defendants' argument that it would "strain the State's registration apparatus" "to provide individualized determinations as to whether up to 430,000 felons can or cannot afford to pay their [LFOs]," App. Br. at 30–31, is speculative at best. The injunction applies only to the seventeen Plaintiffs. Moreover, nothing in the record demonstrates it would be administratively costly to create an ability-to-pay exception. Indeed, the district court suggested systems that would eliminate much of the need for individualized determinations, including a rebuttable presumption of inability to pay for those found indigent by a state court. *See* ECF 239 at 35:2–18. And, the injunction permits Defendants to use their *current* voter registration and cancellation procedures and include an ability to pay inquiry. ECF 207 at 37–38. Thus, while the LFO requirement itself has been far costlier and administratively burdensome than the pre-SB7066 regime,[28] there is nothing in the record indicating that the preliminary injunction order would be administratively burdensome.

[28] *See, e.g.*, ECF 142-93 at 109:20–110:06 (Director Matthews estimating that a precursor bill to SB7066 would, "at a minimum ... quadruple the amount of staff needed," without even considering out-of-state or federal convictions); ECF 153-4 (Director Matthews detailing "challenges we will face in trying to determine financial obligations" and stating that "[m]y staff simply are not versed or professionally trained at this level.").

Finally, even if Defendants' framing were correct—that the question is the general validity of the LFO requirement rather than its application to Plaintiffs—SB7066 still fails. Defendants have conceded that, under rational basis review, SB7066 would be unconstitutional if there were "evidence that felons unable to pay their outstanding [LFOs] vastly outnumber those able to pay." App. Br. at 29. The factual record demonstrates this is indeed the case. As noted *supra*, Florida itself has determined that "[m]ost criminal defendants are indigent," Fla. H. Staff Analysis, H.B. 1381 (May 13, 1998); Fla. H. Staff Analysis, H.B. 13 (June 23, 1999), and state courts typically collect only about 20% of all fines and fees and have "minimal collections expectations" as to the remaining 85% of fines and fees. In light of that record, SB7066's LFO requirement leaves the vast majority of returning citizens disenfranchised due to outstanding LFOs and is unconstitutional.

II. The District Court Correctly Determined that the Remaining Factors Favor Plaintiffs

The equitable factors for a preliminary injunction favor Plaintiffs whose right to vote will be denied absent injunctive relief. If Plaintiffs are denied the opportunity to vote in the March elections, they will suffer irreparable harm that far outweighs any burden on Defendants. The public interest in free and fair elections will suffer as well.

A. Absent an Injunction, Plaintiffs Will Suffer Irreparable Harm

Without an injunction, Plaintiffs will be disenfranchised in the March election. "An injury is irreparable if it cannot be undone through monetary remedies." *Scott v. Roberts*, 612 F.3d 1279, 1295 (11th Cir. 2010) (quotation marks omitted). Denial of the right to vote in an election is indisputably irreparable; "there can be no do-over and no redress." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). Irreparable injury is thus presumed when laws prevent voting. *League of Women Voters of Fla. v. Detzner*, 314 F. Supp. 3d 1205, 1223 (N.D. Fla. 2018) (citing *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)).

Defendants argue that Plaintiffs do not have the right to vote, so they will not be harmed by its denial. App. Br. at 4, 18, 47–48. But this is merely a circular repetition of their merits arguments and does nothing to refute Plaintiffs' irreparable harm, independent from the merits.

B. The Balance of Equities Favors Plaintiffs

The balance of the equities favors Plaintiffs because while they will be denied the right to vote absent an injunction, Defendants suffer no harm if the injunction remains in place. Defendants claim two types of harm: (1) being prevented from enforcing a state statute; and (2) the administrative burden of evaluating ability to pay. Both arguments fall flat.

First, Defendants claim they suffer harm by being prevented from enforcing SB7066. *See* App. Br. at 49. If this abstract harm were dispositive, federal courts would never preliminarily enjoin state statutes; but this Court routinely affirms preliminary injunctions doing just that. *Cf., e.g., Lebron v. Sec'y, Fla. Dep't of Children & Families*, 710 F.3d 1202, 1218 (11th Cir. 2013). Moreover, Defendants' reliance on *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (Rehnquist, J., in chambers) and *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) is misplaced because the courts below had enjoined the implementation of a statute in full. Likewise, the injunction in *Hand*, cited in App. Br. at 50, 52, prohibited Florida's Clemency Board from "apply[ing] its own laws[.]" 888 F.3d at 1214 (citation omitted).[29]

In contrast, the district court's injunction is narrow in scope and impact. The district court did not entirely invalidate SB7066's LFO provisions, but merely required an exception to a generally applicable statute. This minor alteration to the operation of SB7066 does not constitute irreparable harm. *See Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1331 (11th Cir. 2019) (finding an injunction "respected" "Florida's sovereignty" by limiting relief to affect a "limited aspect" of election procedures, "instead of throwing out the plausibly

[29] Moreover, the injunction in *Hand*, unlike here, failed to serve the plaintiffs' interests in speedy restoration of voting rights. *See Hand*, 888 F.3d at 1214–15.

legal with the constitutionally problematic"); *Ga. Muslim Voters Project v. Kemp*, 918 F.3d 1262, 1276 (11th Cir. 2019) (Jill Pryor, J., concurring) (rejecting Florida's identical argument and affirming an injunction that "borrowed heavily from the processes already in place").

Moreover, Defendants cannot claim irreparable harm from being prevented from enforcing SB7066's LFO requirements when the record demonstrates that they have failed to enforce them thus far. *See supra* Factual Background. Whatever general interest Defendants have in enforcing Florida's laws, it is not present in the context of SB7066's LFO requirements, an "administrative nightmare" that Defendants cannot enforce uniformly or consistently and have not enforced since the law became effective. ECF 205 at 293:8.

Second, Defendants face no administrative burden should County Defendants need to determine Plaintiffs' ability to pay their LFOs. The injunction does not require *any* affirmative actions by State Defendants whatsoever, but simply prohibits them from removing Plaintiffs from the rolls or preventing them from voting on account of their inability to pay. It is the County SOEs who are tasked under Florida law with making final assessments as to voter ineligibility; State Defendants who have brought this appeal provide zero evidence that *they* will be burdened by SOEs' ability-to-pay determinations.

Defendants focus instead on possible administrative burdens if the district court certifies a class and expands the preliminary injunction. App. Br. at 50. But the district court has not yet ruled on class certification. And no party has filed a motion seeking expansion of the preliminary injunction to any yet-to-be-certified class. This Court lacks jurisdiction to consider the propriety or effects of future rulings on either issue.

Even assuming Defendants face some administrative burdens in complying with the injunction, "[a]ny potential hardship imposed" on State Defendants "pales in comparison to that imposed by unconstitutionally depriving [Plaintiffs] of their right to vote." *Fla. Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, WL 6090943, at *8 (N.D. Fla. Oct. 16, 2016). "There is no contest between the mass denial of a fundamental constitutional right and the modest administrative burdens to be borne by [the Secretary of State's] office and other state and local offices involved in elections." *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016); *see also League of Women Voters of N.C.*, 769 F.3d at 244; *United States v. Georgia*, 892 F. Supp. 2d 1367, 1377 (N.D. Ga. 2012) (describing imposition of administrative burdens on Georgia as "minor when balanced against the right to vote, a right that is essential to an effective democracy").

C. The Preliminary Injunction Serves the Public Interest

An "injunction's cautious protection of the Plaintiffs' franchise-related rights is without question in the public interest." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005). And the public interest is served when constitutional rights are protected. *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1327. Denying eligible voters the right to vote will also undermine public confidence in elections. Failure to count legitimate votes "would be harmful to the public's perception of the election's legitimacy." *Id.* Though he is appealing the district court's injunction, the Governor has publicly announced that there needs to be "an avenue for individuals unable to pay back their debts as a result of true financial hardship." ECF 244 at 5. Therefore, it would undermine even the Governor's understanding of the public interest to reverse the injunction.

III. Defendants' Arguments Regarding the Twenty-Fourth Amendment Are Not Properly Before This Court

For the reasons stated in the jurisdictional statement and Plaintiffs' separately filed jurisdictional brief, this Court lacks jurisdiction over this claim. *See* Jurisdictional Br. at 13–16.

Defendants concede that the district court "withheld judgment" on the Twenty-Fourth Amendment claim, App. Br. at 11, but nevertheless brief the issue. Because the preliminary injunction does not require Defendants to do or refrain from doing anything related to Plaintiffs' Twenty-Fourth Amendment claim, it did

not "affect [Defendants'] interest in an adverse way" as is necessary for appellate standing on this claim. *United States v. Pavlenko*, 921 F.3d 1286, 1289 (11th Cir. 2019). Plaintiffs do not and cannot advance this argument because the preliminary injunction hinges on Defendants' denial of Plaintiffs' right to vote based on their inability to pay LFOs, a consideration not relevant to a Twenty-Fourth Amendment claim. Defendants' attempt to shoehorn the Twenty-Fourth Amendment claim into an appeal from the district court's order circumvents the presentation of a full record at trial. This Court cannot rule on it at this juncture.

Nonetheless, because Defendants raised the issue, Plaintiffs explain below why they are likely to succeed.

A. SB7066 Must Comport with the Twenty-Fourth Amendment

The district court correctly observed that the Twenty-Fourth Amendment does not contain a carve out for people with felony convictions. ECF 207 at 40. The plain text prohibits States from "den[ying] or abridg[ing]" voting rights "by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV. To the extent SB7066 imposes a requirement that Plaintiffs pay "any other tax" in order to be reenfranchised, it "denie[s]" them the right to vote in contravention of this prohibition. *Id.*

The Amendment is expansive: it is a categorical prohibition on taxes as a condition of the franchise for *anyone*. The Twenty-Fourth Amendment "abolished

absolutely" any tax "as a prerequisite to voting." *Harman v. Forssenius*, 380 U.S. 528, 542 (1965) (emphasis added). Its drafters and proponents intended for it to reach any obligation that exacted "a price for the privilege of exercising the franchise." *Id.* at 539.

Defendants' proposition that "the Constitution does not require the State to allow felons to vote" does not make poll taxes permissible. App. Br. at 36. The prohibition against poll taxes is not solely tied to the Fourteenth Amendment, but rather has an independent, textual basis elsewhere in the Constitution. Like race discrimination under the Fifteenth Amendment, or gender discrimination under the Nineteenth, the Twenty-Fourth's prohibition is categorical and therefore applies even in the context of rights restoration. *See Hunter*, 471 U.S. at 233; *see also Shepherd*, 575 F.2d at 1114. A state cannot prohibit returning citizens from voting based on the failure to pay a tax any more than it could deny rights restoration only to people of color, or only to men, or only to returning citizens under age 21. *Cf. Harman*, 380 U.S. at 540–42 (recognizing parallels between the Fifteenth and Twenty-Fourth Amendments).

Defendants are thus left with non-binding, out-of-circuit authority for their arguments. App. Br. at 34–36. *Harvey*'s three-sentence analysis on this claim did not examine the Twenty-Fourth Amendment's text or cite any case law—let alone reckon with *Harper* and *Harman*. *See Harvey*, 605 F.3d at 1080. Likewise, the

unpublished *Howard v. Gilmore* decision contained scant analysis. *See* No. 99-2285, 2000 WL 203984, at *2 (4th Cir. Feb. 23, 2000). And *Johnson v. Bredesen* reflexively relied on *Harvey* and *Howard* without conducting any of its own textual or historical analysis. *See* 624 F.3d 742, 750 (6th Cir. 2010); *cf. also id.* at 766–76 (Moore, C.J., dissenting) (conducting textual and historical analysis of Twenty-Fourth Amendment).

B. SB7066's LFO Requirements are "Taxes" Under the Twenty-Fourth Amendment

The Twenty-Fourth Amendment's plain text prohibits not only any "poll tax," but also any "other tax." U. S. Const. amend. XXIV; *see* ECF 207 at 41. Congress included this broad "other tax" language to prevent governments from circumventing the Amendment's purpose. *Abolition of Poll Tax in Federal Elections: Hearing on H.J. Res. 404, 425, 434, 594, 601, 632, 655, 663, 670 & S.J. Res. 29 Before the Subcomm. No. 5 of the H. Comm. on the Judiciary*, 87th Congr., 2d Sess. 15 at 51 (1962). Accordingly, the Twenty-Fourth Amendment's bar is not limited to poll taxes but also reaches their "equivalent or milder substitute[s]," *Harman*, 380 U.S. at 540–41, that perpetuate the "disenfranchising characteristics of the poll tax," *id.* at 542. Defendants' proposal to limit the Amendment's application to an "explicit and unambiguous poll tax," App. Br. at 38, would render the "other tax" language superfluous, *see Corley v. United States*, 556 U.S. 303, 314 (2009).

Courts use a functional approach to determine what constitutes a tax. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 646–66 (2012). The "standard definition of a tax" is "an enforced contribution to provide support for the government." *United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 606 (1975) (citation omitted). And "the essential feature of any tax" is that "[i]t produces at least some revenue for the Government." *Sebelius*, 567 U.S. at 646.

SB7066's LFO provisions meet this simple definition. Florida relies on LFOs to fund its court system, ECF 98-1 at 27–32, 46–47; *Crist v. Ervin*, 56 So.3d 745, 752 (Fla. 2010), and the State government more generally, *see, e.g.*, *Florida Revenue Estimating Conference 2019 Florida Tax Handbook* at 38, http://edr.state.fl.us/content/revenues/reports/taxhandbook/taxhandbook2019.pdf; ECF 98-1 at 27–32. Defendants themselves justify SB7066 as an attempt to generate revenue. *See* ECF 132 at 31; ECF 163 at 11–12. And, as the district court noted, certain LFOs may be imposed on criminal defendants irrespective of guilt, indicating they are a means of revenue rather than a punitive measure. ECF 207 at 20–22; *see e.g.*, Fla. Stat. § 938.29(1); *id.* § 938.04; ECF 148-23 at 10.

IV. The Preliminary Injunction Requires No Severability Analysis

Defendants' final argument regarding severability is without merit. App. Br. at 43. A severability analysis is plainly unwarranted; the district court did not enjoin or invalidate *any* provision of Florida law—not SB7066, and certainly not

Amendment 4. It merely prohibited SB7066's LFO requirement from applying to Plaintiffs because of their inability to pay. Such as-applied relief does not require severing any of SB7066's text, let alone Amendment 4's text, and cannot trigger wholesale invalidation of the amendment. Federal courts do not invalidate swaths of state law whenever the Constitution requires an as-applied exception to a generally applicable law. *See, e.g.*, *Griffin*, 351 U.S. at 18–19 (requiring waiver of fees for appellate transcript for indigent defendants without engaging in severability analysis); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (requiring religious exemptions without severability analysis of state criminal statute); *AFSCME v. Scott*, 717 F.3d 851, 870, 873 (11th Cir. 2013) (vacating invalidation of executive orders, remanding with instructions to create as-applied exemption); *see also United States v. Booker*, 543 U.S. 220, 322 (2005) (Thomas, J., dissenting) (acknowledging that courts generally "dispose[] of as-applied challenges to a statute by simply invalidating the particular applications of the statute without saying anything at all about severability"); *id.* at 281 n. 6 (Stevens, J., dissenting) (rejecting contention that courts "must engage in a severability analysis if a statute is unconstitutional only in some of its applications").

Moreover, where a challenged scheme deprives one group of individuals of a particular right granted to others, the Constitution favors extending the right to those excluded, rather than depriving everyone of it. *See Penn v. Att'y Gen. of*

State of Ala., 930 F.2d 838, 844–46 (11th Cir. 1991). Indeed, Defendants agree that nullifying Amendment 4 "is an absurd outcome … that should be avoided." ECF No. 239 at 74–75. Nullification of Amendment 4 is not legitimately at issue where no one is seeking it. *See Califano v. Jobst*, 434 U.S. 47, 90 (1977).

Finally, even if severability were implicated—and it is not—an LFO requirement would be readily severable. The touchstone of severability analysis is whether the law's overall purpose can be accomplished without the infirm provisions. *See Wollschlaeger v. Gov. of Fla.*, 848 F.3d 1293, 1318 (11th Cir. 2017) (en banc). Amendment 4's primary purpose was to end permanent disenfranchisement in Florida; an exception for the indigent in no way contravenes that purpose. Thus, an LFO requirement is readily severable from Amendment 4.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court affirm the district court's order granting a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: January 10, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on January 10, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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