No. 20-12304

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Rosemary McCoy, *et al.*,

Appellants,

v.

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

Appellees.

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

APPELLANTS' BRIEF

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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 Southern Poverty Law Center states that it has no parent corporations, nor has it issued shares or debt securities to the public. The organization is not a subsidiary or affiliate of any publicly owned corporation, and no publicly held corporation holds ten percent of its stock. The Appellants hereby certify that the disclosure of interested parties submitted to this Court on October 13, 2020 is complete and correct.

Dated: October 21, 2020

/s/ Pichaya Poy Winichakul
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STATEMENT REGARDING ORAL ARGUMENT

This cross-appeal raises two issues of first impression: (1) whether a Nineteenth Amendment claim requires proof of discriminatory intent and (2) whether a complete departure from the long-standing "undue burden" balancing test set forth in the *Anderson-Burdick* line of equal protection cases is justified when the particularized group of voters at issue are women. The Supreme Court has not addressed the standard of review to which gender-based voting rights cases are entitled since the overruling of *Breedlove v. Suttles*, 302 U.S 277 (1937). Therefore, this Court's decision is critical to determining the level of legal protection lower courts must afford to female voters. Oral argument will greatly assist the Court in deciding this consequential issue.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT ii

STATEMENT REGARDING ORAL ARGUMENT iii

INTRODUCTION 1

JURISDICTIONAL STATEMENT 3

STATEMENT OF THE ISSUES ON APPEAL 3

STATEMENT OF THE CASE 4

I. Prior Proceedings and Factual Background 4

II. Standard of Review 8

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. THE TRIAL COURT APPLIED THE WRONG STANDARD TO EVALUATE APPELLANTS' GENDER-BASED EQUAL PROTECTION UNDUE BURDEN CHALLENGE TO SB 7066. 10

A. Long-standing Precedent Requires *Anderson-Burdick* Review in Challenges to Election Laws. 11

B. UNDER *ANDERSON-BURDICK*, SB 7066 UNCONSTITUTIONALLY BURDENS APPELLANTS' RIGHT TO VOTE. 14

II. THE DISTRICT COURT COMMITTED LEGAL ERROR WHEN IT APPLIED AN INTENTIONAL DISCRIMINATION STANDARD TO APPELLANTS' NINETEENTH AMENDMENT CLAIM. 19

A. The Legislative History Behind the Nineteenth Amendment and Early Supreme Court Cases Show Congress Intended the Law Be Construed in Line with the Fourteenth, Not Fifteenth, Amendment. 21

1. Pre-ratification, the Fourteenth Amendment was the source of enfranchisement efforts for women. 22

B. At Best, the Correct Legal Standard to Apply to a Nineteenth Amendment Claim Challenging a Facially Neutral Law Remains an Open Question. 27

1. The Supreme Court has not determined the proper standard for Nineteenth Amendment cases. 29

C. ASSUMING THE FIFTEENTH AMENDMENT APPLIES TO APPELLANTS' CLAIM, CONGRESS HAS EXPRESSLY REJECTED AN INTENTIONAL DISCRIMINATION STANDARD. 33

1. The intent standard asks the wrong question and places an insurmountable burden on plaintiffs. 35

D. The Nineteenth Amendment Should Be Read in Light of the Fourteenth Amendment's Guarantees of Equal Citizenship. 42

1. There is no evidence of an intent requirement in the Nineteenth Amendment itself, and the Fifteenth Amendment's intent standard cannot be read into the Nineteenth Amendment. 43

CONCLUSION 47

CERTIFICATE OF SERVICE 50

TABLE OF AUTHORITIES

Cases

Anderson v. Celebrezze,
460 U.S. 780 (1983) ..... passim

Aycock v. R.J. Reynolds Tobacco Co.
769 F.3d 1063, 1068 (11th Cir. 2014) 8

Brantley v. Brown
550 F. Supp. 490 (S.D. Ga. 1982) 38, 41

Breedlove v. *Suttles*
302 U.S. 277 (1937) 29

Burdick v. Takushi
504 U.S. 428 (1992) 10, 11, 29, 42

Burton v. City of Belle Glade
178 F.3d 1175 (11th Cir. 1999) 20, 44

City of Mobile v. Alabama
446 U.S. 55 (1980) ..... passim

City of Mobile v. Bolden
542 F. Supp. 1050 (S.D. Ala 1982) 40

Common Cause/Georgia v. Billups
554 F.3d 1340 (11th Cir. 2009) 10, 11

Crawford v. Marion County
553 U.S. 181 (2008) 8, 11

Democratic Exec. Comm. of Fla. v. Lee
915 F.3d 1312 (11th Cir. 2019) 10, 12, 18

Frontiero v. Richardson
411 U.S. 677 (1973) 28

Fulani v. Krivanek
973 F.2d 1539 (11th Cir. 1992) 12

Gomillion v. Lightfoot
364 U.S. 339 (1960) 43

Gonzalez v. Carhart
550 U.S. 124 (2007) 17

Hall v. Holder
117 F.3d 1222 (11th Cir. 1997) 38

Harper v. Va. State Bd. of Elections
383 U.S. 663 (1966) 29, 30

Ill. State Bd. of Elections v. Socialist Workers Party
440 U.S. 173 (1979) 8

J.E.B. v. Alabama ex rel. T.B.
511 U.S. 127 (1994) 28, 31, 42

Johnson v. Hamrick
155 F. Supp. 2d 1355 (N.D. Ga. 2001) 38

Leser v. *Garnett*
258 U.S. 130 (1922) 29

Little Rock Family Planning Services v. Rutledge
397 F. Supp. 3d 1213 (E.D. Ark. 2019) 14

Minor v. Happersett
88 U.S. 162 (1874) 23, 24, 25

N.C. State Conference of NAACP v. McCrory
831 F.3d 204 (4th Cir. 2016) 39

Norman v. Reed
502 U.S. 279 (1992) 8

Obama for America v. Husted
697 F.3d 23 (6th Cir. 2012) 12

Planned Parenthood of Southeast PA v. Strange
9 F. Supp. 3d 1272 (M.D. Ala. 2014) 14, 17

Planned Parenthood of Southeastern Pennsylvania v. Casey
505 U.S. 833 (1992) 13

Reed v. Reed
404 U.S. 71 (1971) 32

Reno v. Bossier Parish Sch. Bd.

520 U.S. 471 (1997) 44

Rogers v. Lodge
458 U.S. 613 (1982) 45

Sellers v. Nationwide Mut. Fire Ins. Co.
968 F.3d 1267 (11th Cir. 2020) 8

Sessions v. Morales-Santana,
137 S. Ct. 1678 (2017) 28

Stein v. Ala. Sec. of State
774 F.3d 689 (11th Cir. 2014) 12

Storer v. Brown
415 U.S. 724 (1974) 13

United States v. Reese
92 U.S. 214 (1875) 33

United States v. Virginia
518 U.S. 515 (1996) 28, 32

Village of Arlington Heights v. Metropolitan Housing Dev. Co.
429 U.S. 252 (1977) 37

Washington v. Davis
426 U.S. 229 (1976) 37

Whole Woman's Health v. Hellerstedt
136 S. Ct. 2292 (2016) 14

Williams v. Rhodes Socialist Labor Party
393 U.S. 23 (1968) 1, 8, 18

Yick Wo v. Hopkins 34

INTRODUCTION

It is well-settled that, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams v. Rhodes Socialist Labor Party*, 393 U.S. 23, 31 (1968). Yet, the state of Florida has erected a system of re-enfranchisement that bases access to the ballot box on one's economic status, thus essentially forever denying Appellants Rosemary McCoy and Sheila Singleton the right to vote simply because they are too poor.

Appellants present themselves to this Court as individuals who were convicted of felonies, but who do not deserve the permanent title of "felon." Rather, they remain United States citizens, residents of Florida, and active members of their community who simply ask for the basic, fundamental right to participate in a political system that impacts their daily lives. In our system of government, that political influence is best exercised through voting. Emphasizing the vital salience of the right to vote, Thomas Paine wrote in 1795 that "[t]o take away [the right to vote] is to reduce a [person] to a state of slavery, for slavery consists in being subject to the will of another, and [the person] that has not a vote in the election of

representatives, is in this case. Thomas Paine, *Dissertations on First Principles of Government* 19 (1795).

Appellants' lawsuit requires the state of Florida to acknowledge the compounding impact of race, class, and gender in a law like Senate Bill 7066 ("SB 7066") that ties the payment of legal financial obligations ("LFOs") to the right to vote, but artificially disentangles the continuing burdens low-income women of color face in satisfying those financial obligations. Appellants' gender-based claims under the Fourteenth Amendment's Equal Protection Clause and the Nineteenth Amendment require application of the "undue burden" standard the Supreme Court has repeatedly articulated in the *Anderson-Burdick* line of cases. For decades, the undue burden standard has been the operating framework through which cases implicating access to the franchise have been analyzed. There is no justification for the district court's total departure from well-established legal precedent in the Equal Protection Clause context. Moreover, a review of the Nineteenth Amendment's legislative history coupled with expanding rights for women all support a ruling in Appellants' favor and reversal of the district court's decision on these claims. In the alternative, Appellants ask this Court to vacate the district court's rulings and remand the case for application of the correct legal standard to the factual record.

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 SB 7066. *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, Appx01451, and Appellants Rosemary McCoy and Sheila Singleton filed their notice of cross-appeal on June 24, 2020, Appx01511. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES ON APPEAL

1. Whether the district court erred in applying a discriminatory intent standard to Appellants' Fourteenth Amendment Equal Protection Clause claim in contravention of decades of legal precedent from the Supreme Court and this Court which routinely have applied the *Anderson-Burdick* balancing test in challenges to state laws that treat voters differently in a way that unduly burdens the right to vote?

2. Whether the district court erred in holding, as a matter of first impression, Appellants' Nineteenth Amendment claim required proof of discriminatory intent?

STATEMENT OF THE CASE

I. PRIOR PROCEEDINGS AND FACTUAL BACKGROUND

Appellants' lawsuit challenges the application of SB 7066, a Florida law that requires payment of LFOs as a pre-condition for people with prior felony convictions to be eligible to vote. Even assuming someone has satisfied prison, parole, probation, and any other non-monetary obligations associated with their criminal sentence, SB 7066 forever bars them from voting until those LFOs are paid. The law also does not account for those who lack a genuine financial ability to satisfy their LFOs or the difficult economic landscape for a majority of people with criminal convictions who seriously struggle to earn enough money to satisfy their LFOs.

Appellants McCoy and Singleton were parties to the main appeal Plaintiffs-Appellees filed on May 29, 2020 and joined in the opposition brief the consolidated group of Plaintiffs-Appellees filed. Appx01511, 01548-01649. For the sake of brevity, Appellants incorporate by reference the factual background and procedural history laid out in their trial brief and opposition brief in the main appeal.[1]

[1] On September 11, 2020, after staying Appellants' cross-appeal pending the outcome of the main appeal, (Order Staying Cross-Appeal, *Jones v. Gov. of Fla.*, No. 20-12003 (11th Cir. July 28, 2020)), this Court reversed, in part, the district court's rulings in Plaintiffs' favor on their wealth-based discrimination, poll tax, and due process claims. *Jones v. Gov. of Fla.*, No. 20-12003, 2020 WL 5493770 (11th Cir. Sept. 11, 2020) (en banc). The arguments Appellants McCoy and Singleton raise in this cross-appeal were not a part of the main appeal. Therefore, this cross-appeal

Appx01062-01314, 01548-01649. This cross-appeal involves the district court's denial of Appellants' Fourteenth Amendment and Nineteenth Amendment claims which challenged the constitutionality of SB 7066 as applied to low-income women of color who face unemployment, low wages, and difficulty paying off their financial debts at much higher rates than their male and white female counterparts. Appx01536, 01539-01541. In support of these claims, Appellants submitted reports and live testimony from two experts: (1) Dr. Amanda Weinstein, an economist and assistant professor in the Department of Economics in the College of Business Administration at the University of Akron; and (2) Dr. Hannah Walker, an assistant professor of Government at the University of Texas at Austin who, at the time of trial was teaching political science at Rutgers University. Appx00993.

Dr. Weinstein's report confirmed that: "the wage differential for women of color in the U.S. is larger than the gender wage gap and larger than the racial wage gap"; Black and Hispanic women face wage penalties because of their race and gender and Black women fare even worse than Hispanic women in Florida; there is a 71% wage gap between Black women and white men, and 65% of the wage gap between Hispanic women and white men cannot be explained by observable factors "of which a significant portion is likely due to racial and gender discrimination by

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represents the first time this Court is being presented with any arguments challenging the incorrect legal standard the district court applied to Appellants' gender-based claims.

employers based on gender and race." Appx01034. Dr. Weinstein further concluded that "[w]omen of color with an incarceration in their past face a wage penalty from the incarceration in addition to the wage penalties they face already for their gender and their race," and that "[t]he wage and income differential for women of color places women of color at a distinct disadvantage (because of their gender and race) in terms of their ability to pay fines and legal financial obligations." Appx01034.

Dr. Walker's report and testimony addressed the increased challenges women of color with a felony conviction face reintegrating into society. Specifically, Dr. Walker found that: (1) the average annual earnings of a formerly incarcerated person upon release was less than $11,000; (2) formerly incarcerated people have an unemployment rate of 27%, five times higher than the national average; and (3) "43.6 percent of formerly incarcerated Black women are unemployed, compared to 35.2% percent of formerly incarcerated black men and 23.2 percent of formerly incarcerated white women who were unemployed." Appx00998. Dr. Walker further determined that:

> A larger context of institutional racism together with racial disparities in criminal justice involvement thus contribute to a cycle of cumulative disadvantage that is particularly acute for low-income women of color. Across nearly every metric reviewed [in the report], black women with felony convictions fare worse than do similarly situated white women and black men. **Thus, black women face greater obstacles to fully paying off legal financial obligations than do any other group**.

Appx01014 (emphasis added).

Despite the overwhelming amount of evidence establishing the severe obstacles low-income women of color face in trying to satisfy SB 7066's financial requirement, the district court ruled that Appellants must first prove the law was enacted for the specific purpose of denying women the right to vote. *Jones II*, 2020 WL 2618062, at *34-35, *rev'd*, *Jones v. Gov. of Fla.*, No. 20-12003, 2020 WL 5493770 (11th Cir. Sept. 11, 2020) (en banc). The district court appropriately analyzed Appellants' wealth-based discrimination claim within the narrower universe of people who can satisfy their LFOs and those who cannot. *Id.* at *13. However, it then inexplicably expanded the category of impacted people when considering Appellants' gender-based claims to every single person with a felony conviction regardless of whether they owe LFOs. *Id.* at *35.[2] Consequently, the district court erroneously asserted, in dicta:

> [T]he pay-to-vote requirement renders many more men than women ineligible to vote. This is so because men are disproportionately represented among felons. As a result, even though the impact on a given woman with LFOs is likely to be greater than the impact on a given man with the same LFOs, the pay-to-vote requirement overall has a disparate impact on men, not women.

Id.

[2] Early in the opinion, the district court noted that "[t]here are two distinctions that are critical to the [Equal Protection Clause's] constitutional analysis. The first is between individuals who have paid their LFOs and those who have not. The second involves only individuals who have unpaid LFOs; the distinction is between individuals who can afford to pay the LFOs and those who cannot." *Jones II*, 2020 WL 2618062, at *13.

Thus, Appellants' cross-appeal directly challenges the district court's adoption of a discriminatory intent standard and, by extension, its clearly erroneous factual findings.

II. STANDARD OF REVIEW

This Court reviews a district court's conclusions of law de novo and its findings of fact for clear error. *Sellers v. Nationwide Mut. Fire Ins. Co.*, 968 F.3d 1267, 1272 (11th Cir. 2020). "A court applies the wrong legal standard when it analyzes evidence under the wrong test or applies a test to evidence that the test should not apply to." *Aycock v. R.J. Reynolds Tobacco Co.*, 769 F.3d 1063, 1068 (11th Cir. 2014).

SUMMARY OF ARGUMENT

The district court should have applied an undue burden standard, not discriminatory intent, to Appellants' gender-based claims under the Fourteenth Amendment's Equal Protection Clause and Nineteenth Amendment. With respect to the equal protection claim, the Supreme Court repeatedly has held that a sliding scale analysis applies in challenges to state election laws that pose an undue burden on a particularized group of voters—*see, e.g.*, *Norman v. Reed*, 502 U.S. 279, 288-89 (1992); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979); *Williams*, 393 U.S. at 30-31; *see also Crawford v. Marion County*, 553 U.S. 181, 205 (2008) (Souter, J.

& Ginsburg, J.) (concurring with Stevens, J. that the burden must first be assessed in equal protection claims respecting the right to vote, but dissenting in the judgment)—in the instant case, low-income women of color. The expert reports from Dr. Weinstein and Dr. Walker irrefutably establish that Appellants, African-American women who have struggled to find gainful employment and earn a livable wage, are not unique in the financial hardships they face. If the district court had employed the proper legal analysis and correctly applied the facts, Appellants would have succeeded in their equal protection claim.

As to the Nineteenth Amendment claim, the district court's thin analysis and cursory consideration of overruled and/or outdated cases necessitate a reversal of its decision. The legislative history surrounding the Nineteenth Amendment reveals Congress intended it be read in line with the expansive nature of the Fourteenth Amendment, not the strict and narrow application of the intent standard the Supreme Court has adopted and Congress already has rejected with respect to the Fifteenth Amendment. Even assuming, *arguendo*, the Fifteenth Amendment does inform a court's interpretation and application of the Nineteenth Amendment, it should be considered as the Fifteenth Amendment was understood when the Nineteenth was ratified, not as the Fifteenth is interpreted today. Considering that the Fifteenth Amendment intent standard was not brought into existence until thirty years after the Nineteenth Amendment was ratified, and the standard has faced harsh criticism

even applied to the Fifteenth Amendment, there is no legitimate justification for applying the questionable standard of intent to the Nineteenth Amendment.

For these reasons, Appellants respectfully ask that the district court's denial of their Fourteenth Amendment and Nineteenth Amendment claims be reversed. In the alternative, Appellants ask that the district court's decision be vacated and the case remanded so that the district court has an opportunity, in the first instance, to reevaluate Appellants' claims applying the facts to the appropriate legal standard.

ARGUMENT

I. THE TRIAL COURT APPLIED THE WRONG STANDARD TO EVALUATE APPELLANTS' GENDER-BASED EQUAL PROTECTION UNDUE BURDEN CHALLENGE TO SB 7066.

In the case at bar, and in all cases concerning obstacles and infringements to the "precious" right to vote, courts start with the voter's burden. *Williams*, 393 U.S. at 31. Under long-standing Supreme Court and Eleventh Circuit precedent, this burden is evaluated by the sliding-scale balancing test standard set forth under the *Anderson-Burdick* jurisprudence. *See Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009). Yet, the district court erroneously applied an intentional discrimination standard to assess Appellants' Fourteenth

Amendment challenge to SB 7066, thereby depriving Appellants of the searching, fact-based "analytical process" afforded to voters facing burdensome obstacles to vote. *Anderson*, 460 U.S. at 789. Such error requires this Court to reverse the district court's decision and either rule in Appellants' favor or vacate and remand the case for further proceedings.

A. LONG-STANDING PRECEDENT REQUIRES *ANDERSON-BURDICK* REVIEW IN CHALLENGES TO ELECTION LAWS.

It is axiomatic that the undue burden test must be applied here, a challenge to a state's election law, which deprives the right to vote to those who statistically lack the financial resources to meet SB 7066's monetary requirements. *See Common Cause/Georgia*, 554 F.3d at 1352 ("The Supreme Court has rejected a 'litmus-paper test' for '[c]onstitutional challenges to specific provisions of a State's election laws' and instead has applied a 'flexible standard.'") (quoting *Anderson*, 460 U.S. at 789; *Burdick*, 504 U.S. at 434 (1992); *Crawford*, 553 U.S. at 191 n.8).

In *Anderson v. Celebrezze*, the Supreme Court set forth a multi-pronged test to determine whether an election law unconstitutionally burdens access to the franchise in violation of the Fourteenth Amendment's Equal Protection Clause. 460 U.S. at 789. Courts are expected to: (1) "consider the character and magnitude of the asserted injury" and (2) "identify and evaluate the precise interests put forward by the State." *Id*. In reaching judgment, courts must carefully consider the "legitimacy

and strength" of a state's asserted interest and "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*; *see also Stein v. Ala. Sec. of State*, 774 F.3d 689, 694 (11th Cir. 2014) ("The more a challenged law burdens the right to vote, the stricter the scrutiny to which we subject that law."). In applying the *Anderson-Burdick* standard, this Court specifically has held that proof of discriminatory intent is not required. *Lee*, 915 F.3d at 1319 ("Plaintiffs need not demonstrate discriminatory intent . . . because we are considering the constitutionality of a generalized burden on the fundamental right to vote.").

Appellants challenge SB 7066's prerequisite to voting that returning citizens pay off their LFOs as an unconstitutional, unduly burdensome requirement under the Equal Protection Clause of the Fourteenth Amendment because it disproportionately burdens women, especially women of color. This claim invokes the fundamental right to vote and is therefore distinguishable from "the traditional equal-protection inquiry" involving allegations "that discriminatory animus motivated the legislature to enact a voting law." *Id* & n.9; *see also Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1992) ("In this circuit . . . equal protection challenges to state ballot-access laws are considered under the *Anderson* test."); *Obama for America v. Husted*, 697 F.3d 23, 429-30 (6th Cir. 2012) ("When a state regulation found to treat voters differently in a way that burdens the fundamental right to vote, the *Anderson-Burdick* standard applies."). Appellants urge this Court to apply the *Anderson-*

Burdick standard, which this Court has employed in cases challenging state laws that burden the right to vote.

Moreover, the undue burden standard and analysis for voting infringements based on gender or sex is analogous to those used in reproductive freedom cases. The relationship between ballot access/voting and reproductive freedom cases was clearly adumbrated by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, where the Court articulated the foundations for the undue burden standard for Fourteenth Amendment violations that Appellants outline today. 505 U.S. 833, 873–74 (1992). The Supreme Court and lower federal courts have explicitly adopted the *Anderson-Burdick* framework for rejecting a "litmus-paper" test, *Anderson*, 460 U.S. at 789 (quoting *Storer v. Brown*, 415 U.S. 724, 729 (1974), when addressing the impact of facially gender-neutral state regulations on women. *See id*. at 874 (recognizing that a more flexible legal standard is necessary when determining the extent to which a law impacts a woman's right to freedom and liberty). As explained later in a district court case in this Circuit:

> By pointing to the ballot access cases, the *Casey* authors showed that the proper analysis recognizes that the strength of the necessary government justifications depends in part on the extent of the burdens imposed on the right. . . . [C]ourts should not rubber-stamp all ballot-access restrictions as constitutional nor should they rigidly protect third parties' access to ballots at all costs. Rather, *Anderson* and *Norman*[*v. Reed*] require an examination of the injuries to rights and the justifications for a regulation, in order to determine whether the justifications are strong enough to merit the injuries a regulation incurs. This approach rejects "any 'litmus-paper test' that will separate valid from invalid restrictions."

Planned Parenthood of Southeast PA v. Strange, 9 F. Supp. 3d 1272, 1283–84 (M.D. Ala. 2014) (quoting *Anderson*, 460 U.S. at 789); *see also Little Rock Family Planning Services v. Rutledge*, 397 F. Supp. 3d 1213 (E.D. Ark. 2019); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2318 (2016) (holding that Texas restriction on abortion providers "constitutes an 'undue burden' on their constitutional right").

These reproductive freedom cases do not require evidence of intentional discrimination to determine whether constitutional rights have been violated, as the district court erroneously held here. Rather, led by *Casey* and heavily influenced by the Court's *Anderson-Burdick* framework, they invoke and apply the "undue burden standard" to evaluate constitutional infringements that appear neutral on their face, but pose severe obstacles for women in particular.

B. UNDER *ANDERSON-BURDICK*, SB 7066 UNCONSTITUTIONALLY BURDENS APPELLANTS' RIGHT TO VOTE.

Appellants ask this Court to undergo a more rigorous review of SB 7066, a law imposing an undue burden on the right to vote through multiple forms of discrimination. As the *Anderson* Court noted "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a[n] . . . economic status." *Anderson*, 460 U.S. at 793.

At trial, Appellants proved that SB 7066's LFO requirement had a disparate, negative impact on racial minorities and those who lack a genuine financial inability to satisfy their monetary obligations as a condition precedent to their voter eligibility. Gender compounds the negative impact, leaving women of color who are returning citizens with an insurmountable burden on their right to vote.

SB 7066's undue burden on Appellants' right to vote is unequivocally clear as shown by the evidence Appellants introduced at trial which the district court erroneously analyzed under an intentional discrimination standard rather than the required undue burden standard. Appellants testified to the difficulties they continually face in finding permanent, gainful employment because of their past felony conviction, the obstacles they continue to face reintegrating into society, and the unique, personal importance of voting to them, their families, and their communities. Moreover, Appellants introduced substantial evidence at trial showing that:

- 33% of formerly incarcerated Black women who find employment obtain only part-time or occasional jobs, whereas only 14% of formerly incarcerated white men are working part-time or occasional jobs. Appx01154. Likewise, "[e]ven before they are incarcerated, women in prison earn less than men in prison, and earn less than non-incarcerated women of the same age and race." Appx01155.

- While in terms of raw numbers male incarceration exceeds that of women, the rate of growth of the incarceration of women has vastly outstripped that of men. Between 1978 and 2015, women's incarceration grew 834 percent, more than twice the rate of growth for men during the same time period. Appx00998.

- Formerly incarcerated women of color are less likely to find full time work. According to the Prison Policy Initiative, in 2008, 40 percent of formerly incarcerated Black women and 43 percent of Hispanic women were employed full time. By comparison, 58 percent of formerly incarcerated white women, 50 percent of formerly incarcerated Black men, and 58 percent of formerly incarcerated Hispanic men were employed full time. Having a criminal conviction introduces significant obstacles to finding full and gainful employment. Appx01006.

- Legal barriers to holding certain jobs may disproportionately impact women, where jobs requiring manual labor (usually held by men) less frequently screen or require special licenses to perform than do office jobs and social work (typically employing women). Thus, women of color face multiple impediments to full employment due to their race and gender, which are exacerbated by a felony conviction. Appx01006-07.

- Across nearly every metric reviewed above, Black women with felony convictions fare worse than do similarly situated white women and Black men. Thus, Black women face greater obstacles to fully paying off legal financial obligations than do any other group. The rate of incarceration in Florida is higher, the rate of poverty deeper, and the use of legal financial obligations more punitive than in other parts of the country. All of this suggest that low-income Black women with felony convictions face extreme hurdles to economic integration in Florida. Appx00997-01014.

Dr. Walker's expert report and testimony starkly reveal the multiple disparities and burdens faced by women, especially women of color, who seek to regain their voting rights following incarceration completion. Appx00997-01014. Dr. Walker's testimony established the "impediments to economic stability and independence" that low-income women, especially women of color, face before and after they exit the criminal justice system. Appx00997. Her testimony revealed how Appellants and similarly situated women are less likely than their male and white

female counterparts to satisfy SB7066's LFO requirement to vote. For further examples of such economic and financial impacts, Dr. Weinstein also testified at trial that "[t]he wage and income differential for women of color places women of color at a distinct disadvantage (because of their gender and race) in terms of their ability to pay fines and legal financial obligations." Appx01034; *see also* Appx01062 (Plaintiffs' Consolidated Pretrial Brief).

In sum, (1) women enter the criminal justice system having earned less money than men and, therefore, are less affluent; (2) women exit the criminal justice system owing LFOs they cannot afford; and (3) women of color are even less likely to find gainful employment that would allow them to pay off the LFOs. SB 7066's undue burden on Appellants' right to vote is thus manifest, as revealed by the "fact-specific analysis" of the income-, racial-, and gender-based obstacles to Appellants' exercising their franchise. *See Planned Parenthood of Se. Pa.*, 9 F. Supp. 3d at 1285. *See Gonzalez v. Carhart*, 550 U.S. 124, 1651 (2007) ("[I]n determining whether any restriction poses an undue burden on a "large fraction" of women, the relevant class is *not* "all women," and instead "must be judged by reference to those [women] for whom it is an actual rather than an irrelevant restriction.").

Appellants contend that their burdens create insurmountable barriers for them to overcome to vote under SB 7066.[3] Such dispositive barriers make up the essential definition of an undue burden, especially as applied to the fundamental and "precious" right to vote. *Williams*, 393 U.S. at 31; *Lee*, 915 F.3d at 1327 ("Voting is the beating heart of democracy. It is a fundamental political right, because [it is] preservative of all rights. It is beyond cavil that voting is of the most fundamental significance under our constitutional structure. [T]he public interest is served when constitutional rights are protected.") (internal citations and quotation marks omitted).

When the *Anderson-Burdick* test is properly applied, it becomes evident that the requisite comparison in this gender-based claim must be made between the groups facing the undue burden on the right to vote—here, low-income women of color—and low-income men. Thus, the district court erred in comparing women and men with felony convictions generally. *Jones II*, 2020 WL 2618062, at *35. Moreover, the *Anderson-Burdick* analysis clearly reveals that SB 7066 uniquely and severely burdens low-income women more than men. Thus, the application of SB 7066, a facially gender-neutral state law, produces the type of burden that violates

[3] Moreover, Florida can provide no definitive, conclusive answer about the specific amount of money that must be paid to restore the right to vote to formerly incarcerated women, which only further exacerbates Appellants' burdens. *See Jones II*, 2020 WL 2618062, at *17–23.

access to the fundamental right to vote protected by the Fourteenth Amendment. The "undue burden" on the right to vote of women—specifically women of color—imposed by the financial requirements of SB 7066 speaks loudly and strikes at the very heart of individual liberty, rights, and freedoms and it should be invalidated as unconstitutionally burdensome under the *Anderson-Burdick* framework or sent back to the district court for such review.

II. THE DISTRICT COURT COMMITTED LEGAL ERROR WHEN IT APPLIED AN INTENTIONAL DISCRIMINATION STANDARD TO APPELLANTS' NINETEENTH AMENDMENT CLAIM.

The Nineteenth Amendment to the U.S. Constitution states: "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. Const. amend. XIX, § 1. Appellants alleged in their amended complaint that women of color who complete prison and probation have fewer employment opportunities and, therefore, lack the same economic resources and ability to satisfy LFOs as their male and white female counterparts. This reality bears out in the statistics regarding the continuing wage gap based on gender and race, and the difficulties Dr. Walker's expert report discussed with respect to women of color integrating into the workforce upon exiting the criminal justice system. Appx01006-07. Appellants did not allege that gender was a motivating factor in the denial of their voting rights, but rather grounded their

claim in (1) the "undue burden" framework the Supreme Court has adopted in constitutional challenges to state election laws and (2) the expansion of legal protections for women since passage of the Nineteenth Amendment.

The district court ruled that "[t]o prevail under the Fourteenth Amendment, the plaintiffs must show intentional gender discrimination—that is, the plaintiffs must show that gender was a motivating factor in the adoption of the pay-to-vote system" analogizing it to a race discrimination claim. *Jones II*, No. 4:19CV300-RH/MJF, 2020 WL 2618062, at *34. The district court further concluded that the intentional discrimination standard for all voting-related cases in the context of the Fifteenth Amendment was settled without any recognition of Congress' indication through the 1982 amendments to the Voting Rights Act that it had rejected an intentional discrimination standard as appropriate. *Id.* at *35 (citing *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 n.8 (11th Cir. 1999) . However, there are plenty of justifications for reading the Nineteenth Amendment differently from the Fifteenth and those reasons are embedded in the legislative history behind the amendment and the Supreme Court's jurisprudence in both the voting rights and women's rights contexts. Consequently, given that "undue burden" is the appropriate legal standard for Appellants' claim, this Court should either reverse the district court's decision or vacate and remand the case so the district court can weigh the evidence using the correct legal analysis.

A. The Legislative History Behind the Nineteenth Amendment and Early Supreme Court Cases Show Congress Intended the Law Be Construed in Line with the Fourteenth, Not Fifteenth, Amendment.

The Nineteenth Amendment was ratified in 1920 and is celebrating its centennial anniversary this year. Despite the 100 years it has been in existence, there is very little case law or legal scholarship that addresses the full scope of its meaning and application. The Supreme Court has never ruled that a litigant alleging a denial or abridgement of their right to vote under the Nineteenth Amendment must prove discriminatory intent. Nevertheless, in rejecting Appellants' Nineteenth Amendment claim, the district court failed to consider the legislative history behind the amendment, especially its relation to the Fourteenth Amendment, or the case law developed over the past 100 years which steadily has expanded legal protections for women in a manner that recognizes overt as well as more sophisticated and subtle means of diminishing their voting strength.

The passage of the Nineteenth Amendment became critical to securing equal rights and equal protection under the law for women when it became clear the Fourteenth Amendment would be insufficient, and because the Fifteenth Amendment was originally designed only to protect the voting rights of African-American men. *See* Jennifer K. Brown, *The Nineteenth Amendment and Women's Equality*, 102 Yale L.J. 2175, 2184-86 (1993). Thus, women needed additional and explicit constitutional protection in the form of an amendment focused on gender or

sex. Following the Nineteenth Amendment's enactment, suffragists began to focus on voter registration and passage of the Equal Rights Amendment, leaving Congress' enforcement powers under the Nineteenth Amendment, at best, unclear because of the lack of judicial guidance. Thus, the question of what legal standard is appropriate for Nineteenth Amendment claims remains a matter of first impression presented to this Court.

One of the common threads of the Fourteenth, Fifteenth, and Nineteenth Amendments is the effort to expand citizenship status and rights for historically excluded populations. Therefore, if anything, African-American women who find themselves at the cross-section of race (Fourteenth and Fifteenth Amendments) and gender (Nineteenth Amendment) are entitled to even more heightened protection because of the multiple burdens they continue to face when trying to exercise the right to vote.

1. Pre-ratification, the Fourteenth Amendment was the source of enfranchisement efforts for women.

The historic connection between the Fourteenth and Nineteenth Amendments predates the ratification of the Nineteenth by several decades, as Congress seriously discussed incorporating women's enfranchisement into the original Fourteenth Amendment. *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the* Family, 115 Harv. L. Rev. 947, 969 (2002) (quoting

History of Woman Suffrage 91 (Elizabeth Cady Stanton, Susan B. Anthony, & Matilda Josyln Gage eds., 1882)). The original language of the would--be Nineteenth Amendment was based on the concept of equal citizenship, further indicating the relationship between the Fourteenth Amendment and women's suffrage. *Id.* at 974 (quoting 45th Cong. 9 (1878)). This means that for a full ten years before the Nineteenth Amendment was ratified, the issue of women's suffrage was considered a Fourteenth Amendment issue to be addressed in Fourteenth Amendment terms. *Id.* at 975. The amendment's language granting citizenship to "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof" suggested that universal suffrage was being automatically granted to women as well. U.S. Const. amend. XIV, § 1.

After unsuccessfully lobbying for the Fourteenth Amendment to explicitly include the right of women to vote, suffragists asked courts to read the right to vote into the Fourteenth Amendment. Even outside the legislative process, pre-Nineteenth Amendment suffragists viewed the Fourteenth Amendment as the surest defense for their attempts to vote, as they used the concept of equal citizenship as a primary defense against criminal laws prohibiting their right to vote. *Id.* at 971. In *Minor v. Happersett*, the Supreme Court addressed whether women who are citizens of the United States are entitled to vote under the Fourteenth Amendment. 88 U.S. 162, 164 (1874). The plaintiff, Virginia Minor, argued that if women were being

recognized as citizens by birth or naturalization, they should enjoy all the benefits and responsibilities of citizenship, i.e. "privileges and immunities," specifically the right to vote. *Id.* After discussing the American origins of citizenship, the Court held that the Fourteenth Amendment did not create a new category of voters, i.e. women, but instead merely provided additional legal protections to expand those male voters already enjoyed. *Id.* at 171. Thus, the Court ruled, "the Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void." *Id.* at 178.

It was only after these efforts failed that citizens began to focus seriously on a separate amendment for women. Reva B. Siegel, *supra*, at 973–74. It became clear to suffragists that they had to advance their own amendment specific to gender to achieve any level of legal protection for their political rights and personal autonomy. *Id.* at 969 (citing *History of Woman Suffrage* 91 (Elizabeth Cady Stanton, Susan B. Anthony, & Matilda Joslyn Gage eds., 1882)). This illustrates that, though the Fourteenth and Nineteenth Amendments are certainly different, the concept of women's equality is so imbedded in each that the explicit provisions in the Nineteenth Amendment cannot be adequately considered without reference to the Fourteenth Amendment.

2. Passage of the Nineteenth Amendment was grounded in the Fourteenth Amendment.

Following the unsuccessful attempts to have women's suffrage read into the Fourteenth Amendment, suffragists began the earnest multi-state campaign for ratification of a constitutional amendment to squarely recognize and protect their right to vote (originally introduced as the Sixteenth Amendment). The initial drafts of the Nineteenth Amendment's language mirrored that of the Fourteenth Amendment. This is in part because the Nineteenth Amendment was intended by Congress to be an extension of the Fourteenth Amendment and a response to cases like *Minor v. Happersett* to emphasize the full meaning of the privileges and immunities clause of the Fourteenth Amendment. *See A Sixteenth Amendment to the Constitution of the United States, Prohibiting the Several States from Disfranchising U.S. Citizens on Account of Sex: Hearing Before the Senate Comm. on Privileges & Elections*, 45th Cong. 9 (1878) (statement of Elizabeth Cady Stanton); Reva B. Siegel, *supra*, at 1031. Thus, the few legal scholars who have carefully reviewed the legislative history have concluded that a proper interpretation and application of the Nineteenth Amendment must be grounded in an understanding of the Fourteenth Amendment. This synthetic analysis calls on this Court to view the Nineteenth Amendment as a further interpretation of the Fourteenth Amendment.

For the most part, Southern states were outright hostile to the notion that Black women would be enfranchised. *See* Neil S. Siegel, *Why the Nineteenth Amendment Matters Today: A Guide for the Centennial*, 27 Duke J. Gender L. & Pol'y 235, 257

(2020) ("Ratification of the Amendment was most strongly opposed in the American South, where 'the issue of white supremacy dominated all other political considerations.'") (quoting Alan P. Grimes, *The Puritan Ethic and Woman Suffrage* 124, 125 (1967)). Notably, Florida did not initially vote for ratification of the Nineteenth Amendment and failed to do so until 1969. *See* The Florida Historical Society, *Florida Ratifies the 19th Amendment: Date in History: 13 May 1969*, https://myfloridahistory.org/date-in-history/may-13-1969/florida-ratifies-19th-amendment (last visited Oct. 20, 2020). This history also exposes the less honorable side of the women's suffrage movement in that white women in large part were permitted to vote while Black women were still in need of stronger protection. *See id.* at 242 (noting that southern states enforced the Nineteenth Amendment so that only white women enjoyed the franchise). Thus, again, the intersection of race and gender put African-American women in a precarious position in that they were and remain dependent on multiple areas of the law to secure the whole of their rights. *See generally* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139, 139-40, 166-67 (1989).

Accordingly, courts must recognize the increased impact of laws limiting political participation against Black women who historically have faced multiple and compounding forms of disenfranchisement.[4]

B. AT BEST, THE CORRECT LEGAL STANDARD TO APPLY TO A NINETEENTH AMENDMENT CLAIM CHALLENGING A FACIALLY NEUTRAL LAW REMAINS AN OPEN QUESTION.

[4] *See* Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, 108 Geo. L. J. 27, 44 (June 2020) (noting that Sen. Williams, a Democrat from Mississippi proposed an amendment that would have inserted the word "white" into the Nineteenth Amendment, which Congress ultimately rejected); Roslyn Terborg-Penn, *African American Women and the Struggle for the Vote* 131 (1998) ("The substantial opposition to the adoption of the Nineteenth Amendment throughout the South was due to the perception of many whites that Black women were eager to win the right to vote in the entire region."); Paula Giddings, *When and Where I Enter* 123 (1984) ("It was estimated by 1914 that there were 100,000 more Blacks than Whites in South Carolina, and that Black women were the largest group of voters. With this in mind, South Carolina's Senator Ben 'Pitchfork' Tillman responded to an article . . . which advocated that all women in the South be enfranchised. Citing the figures of the Black population in his state, Tillman wrote the editor: 'A moment's thought will show you that if women were given the ballot, the negro woman would vote as well as the white woman.' The consequences would be particularly disturbing, Tillman wrote, 'Experience has taught us that negro women are much more aggressive in asserting the 'rights of the race' than the negro men are. In other words, they have always urged the conflicts we have had in the past between the two races for supremacy.' Mississippi Senator J.K. Vardaman agreed. 'The negro woman,' he said, 'will be more offensive, more difficult to handle at the polls than the negro man.'"). By rejecting Senator Williams' proposed amendment to limit the Nineteenth to white women, in the face of the fear that Black women would vote in larger numbers than black men, Congress was explicitly protecting the right of Black women to vote.

The Nineteenth Amendment has been overlooked in much of voting rights litigation partially because cases involving women's involvement in political and civic life are often determined under the Fourteenth Amendment. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 534 (1996) (finding Virginia's categorical exclusion of women from educational opportunities at Virginia Military Institute violates equal protection under the Fourteenth Amendment); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31 (1994) (holding that excluding jurors based on sex violates the Equal Protection Clause); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that refusal of a woman Air Force officer to claim her husband as dependent for purposes of obtaining increased allowances and medical and dental benefits violated the Fourteenth Amendment); *see also Sessions v. Morales-Santana*, 137 S. Ct. 1678, (2017) (finding gender-based distinctions in acquiring United States citizenship by child born abroad to United States citizen parent and non-citizen parent violated equal protection clause of Fifth Amendment). Given this historic relationship between the Fourteenth and Nineteenth Amendments, the most reasonable and accurate interpretation of the Nineteenth Amendment draws it close to the Fourteenth, entitling plaintiffs bringing Nineteenth Amendment claims to the same level of scrutiny as they would receive in similar claims brought under the Fourteenth Amendment. And, as the district court recognized, Fourteenth Amendment voting rights cases brought on behalf of marginalized groups are

properly reviewed under the *Anderson-Burdick* balancing test. *Jones II*, 2020 WL 2618062, at *13–14 (citing *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789).

1. The Supreme Court has not determined the proper standard for Nineteenth Amendment cases.

There are only two Supreme Court cases in which the Court interpreted the meaning of the Nineteenth Amendment. In *Leser* v. *Garnett*, decided less than two years after the Nineteenth Amendment's passage, two women applied and registered to vote in Maryland. 258 U.S. 130 (1922). The plaintiff, Oscar Leser, requested the women be removed from the voter rolls on the ground that, because Maryland refused to ratify the amendment, it was not binding on the state and, therefore, the women remained ineligible to vote. *Id.* at 135-36. The Court, in a two-page opinion, quickly rejected that argument on federalism grounds and affirmed the registrants' constitutional right to vote. *Id.* at 136. Beyond recognizing the Nineteenth Amendment was duly ratified by the requisite number of states and enforceable, the Court did not opine as to the amendment's full breadth and scope let alone adopt a clear legal standard of review.

The second case is *Breedlove* v. *Suttles*, 302 U.S. 277 (1937), better known for having upheld a Georgia poll tax law under an antiquated interpretation of the Fourteenth Amendment, which the Court later rejected and reversed in *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966). The male plaintiff in *Breedlove* also

challenged the poll tax as a violation of his rights under the Nineteenth Amendment because the Georgia law exempted women who did not register to vote. *Breedlove*, 302 U.S. at 280. The Court justified this sex-based classification on the notion that "women may be exempted on the basis of special considerations to which they are naturally entitled. In view of the burdens necessarily borne by them for the preservation of the race, the state reasonably may exempt them from poll taxes." *Id.* at 282 (reasoning that since "[t]he laws of Georgia declare the husband to be the head of the family and the wife to be subject to him[,] . . . . [t]o subject her to the levy would be to add to [the husband's] burden"). Given Justice Butler's antiquated viewpoint, reliance on state laws governing marriages and poll taxes that have since been found unconstitutional, *Breedlove* is wholly unhelpful for purposes of guiding any court in how Congress intended the amendment to be enforced.[5]

After the ratification of the Nineteenth Amendment, the Supreme Court reexamined its rulings regarding women, voting, and the Fourteenth Amendment.

[5] The intentional discrimination or discriminatory purpose standard for the Fourteenth and Fifteenth Amendments was adopted long after *Breedlove* was decided. *See infra* Section III.C. Nevertheless, the Nineteenth Amendment holding has never been overturned. Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, *supra*, note 4, at 32-33 ("As Justice Black pointed out in dissent, however, the *Harper* majority did not overrule the part of *Breedlove* approving gender discrimination in the application of the poll tax. The Court has never returned to the issue, leaving *Breedlove* to be at least nominally good law on the meaning of the Nineteenth Amendment right to vote.").

The Court began treating "political rights such as jury service" as a serious constitutional concern—but still under the Fourteenth Amendment. Neil S. Siegel, *supra*, at 257; *see also J.E.B.*, 511 U.S. at 131. By extending these rights to women only after the passage of the Nineteenth Amendment, the Court in effect interpreted the Fourteenth Amendment through—or synthetically with—the Nineteenth Amendment. *See* Neil Siegel, *supra*, at 257.

As the Supreme Court discussed in later decisions, the Equal Protection Clause is necessary for citizens to fully enjoy the guarantees addressed in the Nineteenth Amendment. *J.E.B.*, 511 U.S. at 131 ("Many States continued to exclude women from jury service well into the present century, despite the fact that women attained suffrage upon ratification of the Nineteenth Amendment in 1920."). It is through the Fourteenth Amendment that women are granted the full freedoms guaranteed in the Nineteenth, and the history of sex discrimination even after the enactment of the Nineteenth Amendment illustrates the necessity of using the Fourteenth Amendment to inform issues of women's participation in civil and political life. *See id.* at 136 (stating that the United States' history of discrimination post-Nineteenth Amendment "warrants the heightened scrutiny we afford all gender---based classifications today").

In addition to jury participation laws, sex discrimination cases show how courts have interpreted the Fourteenth and Nineteenth in relation to each other. *See*

Reva B. Siegel, *supra*, at 1043-44 (citing *United States v. Virginia*, 518 U.S. 515 (1996)). In what has since become a foundational sex discrimination case, the Court indicated in *United States v. Virginia* that issues regarding equal citizenship can and should be read in light of the historic struggle women have experienced in gaining such citizenship. 518 U.S. at 531 (discussing "volumes of history" of sex discrimination and lack of equal citizenship). Explaining the heightened scrutiny used in sex discrimination cases, the Court noted that, until the ratification of the Nineteenth Amendment, "women did not count among voters composing 'We the People' . . . ." and that it was only afterward that the Fourteenth Amendment's promise of equal protection was seriously applied to women. *Id.* at 531–32 (citing *Reed v. Reed*, 404 U.S. 71, 73 (1971)).

This Court now has an opportunity to bring that sexist history in *Breedlove* to a close, by ruling that it is not only state statues that explicitly treat men and women differently in the context of voting, but also state statutes that have a disparate impact on women (or men) that violate the Nineteenth Amendment. The district court ruled that a Nineteenth Amendment claim must meet the same intentional standard as Fifteenth (and Fourteenth) Amendment constitutional claims. Yet, the district court's reasoning is based on a thin analogy to the text of the Fifteenth Amendment. This Court should give extensive consideration to the legislative history of the three

amendments and determine, as a matter of first impression, that proof of discriminatory intent is not required.

C. ASSUMING THE FIFTEENTH AMENDMENT APPLIES TO APPELLANTS' CLAIM, CONGRESS HAS EXPRESSLY REJECTED AN INTENTIONAL DISCRIMINATION STANDARD.

The Fifteenth Amendment to the United States Constitution provides "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend XV. During Reconstruction, the United States Supreme Court limited the Fifteenth Amendment to prevent only state-sponsored voter rights discrimination. Three cases deliberated the Fifteenth Amendment during Reconstruction. *United States v. Reese*, 92 U.S. 214, 217 (1875); *Minor v. Happersett*, 88 U.S. 162 (1874); *Slaughter-House Cases*, 83 U.S. 36 (1873). The Fifteenth Amendment is defined as "not confer[ing] the right of suffrage upon any one. It prevents the States, or the United States . . . from giving preference . . . to one citizen of the United States over another on account of race, color, or previous condition of servitude." *Reese*, 92 U.S. at 217.

After Reconstruction, the Supreme Court determined that the Fifteenth Amendment "clearly shows that the right of suffrage was considered to be of supreme importance to the national government and was not intended to be left

within the exclusive control of the States." *Ex parte Yarbrough*, 110 U.S. 651, 664 (1884). It also reasoned that the right to vote was "guaranteed by the Constitution, and should be kept free and pure by congressional enactments whenever that is necessary." *Id*. at 665. *Yarbrough* is not persuasive alone. The year after *Yarbrough* was decided, the Supreme Court decided *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), which stated that voting, "[t]hough not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights."

Extending the Fifteenth Amendment's intent standard to other voting rights cases is improper, as Congress demonstrated when it superseded by statute a Supreme Court decision requiring plaintiffs to prove discriminatory intent in Voting Rights Act cases. *See* 52 U.S.C. § 10301(a) (2014) ("No voting qualification or prerequisite to voting . . . shall be imposed or applied by any State . . . in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . ."). In *City of Mobile v. Alabama*, the Court wrongly determined that, because the Voting Rights Act of 1965 ("VRA") tracked the language of the Fifteenth Amendment and there was limited legislative history on the issue, the VRA "was intended to have an effect no different from that of the Fifteenth Amendment itself." 446 U.S. 55, 61 (1980). But those reasons were

insufficient to require plaintiffs to meet the high bar of proving discriminatory intent under the VRA, as Congress showed when it revised Section 2 of the VRA to apply to cases involving discriminatory effects, not just intentions.

As Congress found in deciding to not require intent in VRA cases, "[t]he intent test focuses on the wrong question and places an unacceptable burden upon plaintiffs in voting discrimination cases." S. Rep. No. 91-417, at 16 (1982). Rather, an undue burden test, or a "results test," is the appropriate standard in cases where a statute tracks the language of the Fifteenth Amendment and there is no direct evidence that an intent standard should be required. *Id.* at 18 ("It is true that Section 2 originally had no reference to a results or effects standard . . . . But . . . that argument proves nothing . . . .").

1. The intent standard asks the wrong question and places an insurmountable burden on plaintiffs.

The intent standard asks the wrong question in equal protection voting rights cases. Requiring a showing of intent focuses on the subjective thoughts and feelings of political actors at a specific moment in time; it does nothing to address whether citizens' right to vote is limited. Whether citizens have a voice in their government is the core issue in voting rights cases, and the United States Constitution gives citizens the right to vote without regard to race, class, or gender; it does not bar only intentional discrimination. *City of Mobile*, 446 U.S. 55 at 134 (1980) (Marshall, J., dissenting). Therefore, if a law effectively bars citizens from voting, "the motives

behind the actions of officials which took place decades before [are] of the most limited relevance." S. Rep. No. 91-417, at 193. While an undue burden standard examines whether or not citizens can exercise their right to vote, the intent standard assumes that irrelevant factors are of the greatest importance—the importance of legislators' motives pales in comparison to the value of citizens' abilities to exercise their rights in a democratic society.

Requiring a showing of intent seriously misunderstands and misstates the issues voters of color and women voters face. Much of the time, bias and bigotry are not stated or even intended; lawmakers often, with no ill intent, simply fail to consider the effect a law will have on marginalized citizens. An undue burden caused by a law may simply be "the result of a jurisdiction's insensitivity to minority interests;" some legislators may not realize potential negative effects of a particular law. 3112 Cong. Rec. H69377011 (daily ed. Oct. 5, 1981) (statement of Congressman Fascell). A lack of legislative foresight cannot be an excuse to deprive citizens of their right to vote. When a discriminatory effect is unintended and occurs because legislators simply did not seek to avoid the negative effect, it is vital that citizens have a realistic way to advocate for themselves in court. The intent standard ignores this issue and leaves citizens to suffer the consequences of legislative short-sightedness, while the undue burden standard empowers individuals with an "effective mechanism for seeking redress." *Id.*

Moreover, requiring plaintiffs to prove lawmakers' discriminatory intent, rather than an unconstitutional burden on plaintiffs' rights, requires plaintiffs to bring a nearly impossible amount of evidence. *See City of Mobile*, 446 U.S. at 134 (Marshall, J., dissenting) ("[I]t is beyond dispute that a standard based solely upon the motives of official decision-makers creates significant problems of proof for plaintiffs . . . ."). The intent standard forces plaintiffs to uncover evidence legislators would have every reason to bury in the record or keep off the record entirely. Even worse, the intent standard allows officials to enact laws and policies with discriminatory purposes "so long as they sufficiently mask their motives through the use of subtlety and illusion." *Id.* (Marshall, J., dissenting). The difficulty of proving ill intent when lawmakers have the reason and ability to hide that intent is precisely why the Supreme Court's application of the intent standard in *City of Mobile* was inappropriate and why that standard is equally inappropriate here.

The incredible burden plaintiffs bear under the intent standard is not merely a hypothetical concern. Since the inception of an intent requirement in civil rights cases, plaintiffs have lost serious claims with great discriminatory effect for a lack of documented intent. *See Washington v. Davis*, 426 U.S. 229 (1976) (hiring discrimination case dismissed for lack of invidious intent despite demonstrated disparate impact on Black applicants), *Village of Arlington Heights v. Metropolitan Housing Dev. Co.*, 429 U.S. 252 (1977) (constitutional claim against zoning

ordinance failed based on lack of discriminatory intent though Black would be residents of multifamily housing were disproportionately impacted). Since the Supreme Court applied the standards articulated in *Davis* and *Village of Arlington Heights* to challenges to election laws brought under the Fifteenth Amendment, plaintiffs have lost similarly compelling cases for lack of an identifiable animosity in the legislature. *See Hall v. Holder*, 117 F.3d 1222, 1224, 1226-27 (11th Cir. 1997) (plaintiffs presented insufficient evidence of intentional discrimination despite county's "racist past," and "an overwhelming white majority that votes as a bloc"); *Johnson v. Hamrick*, 155 F. Supp. 2d 1355, 1378-79 (N.D. Ga. 2001) (holding that at-large voting system was not maintained for discriminatory purposes because lawmakers were not "racists"); *Brantley v. Brown*, 550 F. Supp. 490, 497 (S.D. Ga. 1982) (injunction denied because plaintiffs lacked evidence of intentional discrimination and likely would not succeed at trial).

The issues of proof and lawmakers concealing malicious intentions create the very situation civil rights protections are designed to ban. Rather than extinguishing infringements on civil and political rights, constitutional provisions are left amorphous enough to permit active discrimination—just as long as it is not subjectively "intentional." This ability to state nondiscriminatory reasons for enacting a law and leave out the discriminatory reasons, under the intent standard,

gives "a license to sophisticated discriminators." 3112 Cong. Rec. H6937-7011 (statement of Congressman Frank).

In addition to distracting from the real issue at hand, rendering it nearly impossible for voters to vindicate their rights, and permitting legislators to intentionally discriminate, applying any standard higher than a demonstrated undue burden requires parties and judges to "read the minds" of legislators from decades past. 3112 Cong. Rec. H6937-7011 (statement of Congressman Edwards). But this is untenable. Citizens' abilities to exercise their rights cannot rest on mindreading; a woman's ability to vote cannot depend on a judge's "unguided, tortious look into the minds of officials . . . ." *City of Mobile*, 446 U.S. at 134 (Marshall, J., dissenting). Rather, voting rights cases should turn on objective, quantifiable evidence of a given law's effects on the relevant population.

The subjective intent standard is riddled with pitfalls, not the least of which is the inconsistency with which it would likely be applied. What is solid evidence of intent in one court's estimation may be worthless in the eyes of another. *See, e.g.*, *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214-15 (4th Cir. 2016) (reversing district court's finding of no discriminatory intent and enjoining omnibus election law finding the law "target[ed] African Americans with almost surgical precision").

Legislators who happen to communicate more clearly could have their opinions credited while others could deceive the record by conveying a different message than what is spoken via body language and tone. The undue burden standard, however, is based on objective, quantifiable evidence, such as the statistics Dr. Weinstein and Dr. Walker offered regarding the extreme difficulties low-income Black women face which directly extend the deprivation of their right to vote.

2. The intent standard would strain the resources of trial courts and pit branches of government against each other.

Forcing plaintiffs to prove legislators' malicious intent would give district courts countless more documents to assess, all while expecting judges to reach a factual conclusion about what other people were thinking months or years prior. The issue of burdening district courts is not merely hypothetical. In *City of Mobile v. Bolden*, the trial court had to dissect and explain over a century of Alabama voting law to determine the intent behind the particular statute at issue. 542 F. Supp. 1050, 1054-68 (S.D. Ala. 1982). Because the district court's analysis began with the passage of the relevant law in 1814, there was ample evidence of explicit racism in the enactment of the statute at issue, and the standard the Supreme Court established did not destroy the plaintiffs' claims. *Id.* at 1066. Today, courts deciding cases based on more recent laws would have to take on the even more time-consuming task of deciding whether more oblique statements are sufficient to establish intent.

A requirement of intent also puts courts in the position of declaring that a particular political actor is or was bigoted. This would both strain the relationship between courts and legislatures and put an additional burden on plaintiffs—courts may well shy away from declaring as a matter of fact that members of the state government purposefully denied its citizens the right to vote based on animus. *See* S. Rep. No. 91-417, at 36 ("The committee has heard persuasive testimony that the intent test is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities."). As at least one judge has noted, it is "[r]are" for cases involving accusations of direct bigotry to conclude without "a degree of acrimony" between parties. *Brantley*, 550 F. Supp. at 497.

Fortunately, there is no need for courts to make judgment calls based on subjective intentions or to dig through volumes of records to decipher legislators' thoughts and feelings. The undue burden standard requires concrete, objective evidence, unlike the elusive, subjective factors necessary to prove intent. Statistics showing that a particular group faces an insurmountable voter eligibility requirement both answer the question at issue—whether Appellants' access to the franchise is being unduly burdened—and ensures that regardless of the legislature's motive, a law's application must still comply with the Equal Protection Clause. There is no need to ask what a legislator subjectively thought at some point in time; there is only

a need to look at the law's application to groups of voters. If the outcome shows that a law unduly burdens access to the franchise, the law is invalid.

D. The Nineteenth Amendment Should Be Read in Light of the Fourteenth Amendment's Guarantees of Equal Citizenship.

The Fourteenth Amendment, not the Fifteenth, is the most appropriate to apply to a Nineteenth Amendment analysis, as the Nineteenth and Fourteenth Amendments are most closely related via legislative history and traditional interpretations of the Fourteenth Amendment itself.

The Nineteenth Amendment has been overlooked in much of voting rights litigation partly because cases involving women's involvement in political and civic life are often determined under the Fourteenth Amendment. *See J.E.B.*, 511 U.S. at 130-31 (holding that excluding jurors based on sex violates the Equal Protection Clause). Given this historic relationship between the Fourteenth and Nineteenth Amendments, the most reasonable and accurate interpretation of the Nineteenth Amendment draws it close to the Fourteenth, entitling plaintiffs bringing Nineteenth Amendment claims to the same level of scrutiny as they would receive in similar claims brought under the Fourteenth Amendment. And, as the district court recognized, Fourteenth Amendment voting rights cases brought on behalf of marginalized groups are properly reviewed under the *Anderson-Burdick* balancing test. *Jones II*, 2020 WL 2618062 at *13- (citing *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789).

1. There is no evidence of an intent requirement in the Nineteenth Amendment itself, and the Fifteenth Amendment's intent standard cannot be read into the Nineteenth Amendment.

Analyzing the Nineteenth Amendment on its own, without any consideration of the Fourteenth or Fifteenth Amendments, there is no reason to interpret the Nineteenth as requiring a showing of intentional discrimination. The slim evidence of Congress's purpose in this regard is evidenced by the fact that Congress considered a narrower enforcement clause but decided to keep a broader one. *See* Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, 108 Geo. L. J. 27, 67 (June 2020) (quoting 58 Cong. Rec. 90 at 634 (1919)). This indicates Congress's acknowledgement of the difficulty of bringing successful cases under the Amendment and the need for strong enforcement measures. It is also evidence that the drafters of the Nineteenth Amendment intended "to expand the scope of Congress's enforcement authority, rather than constrict it." *Id*. Following this logic, it is most reasonable to apply that enforcement ability to plaintiffs, since Congress is not the entity currently attempting to enforce the Amendment.

a. The Fifteenth Amendment's intent standard is questionable on its own terms.

Even now, it is not clear the Fifteenth Amendment requires proof of discriminatory intent, as the foundational Supreme Court decision stating as much is the plurality opinion in the repudiated *City of Mobile* case. 446 U.S. at 62 (citing

Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960), for the assertion that the Fifteenth Amendment requires a showing of intentional discrimination, though *Gomillion* only decided that discrimination is proven with a showing of intent, not that intent is required).

The district court cited only a footnote for its assertion that the Fifteenth Amendment requires a showing of intent. *Jones II*, 2020 WL 2618062 at *35 (citing *Burton*, 178 F.3d at 1187 n.8). The *Burton* court relied on Supreme Court precedent ultimately resting on the *City of Mobile* decision. *Burton*, 178 F.3d at 1188–89 (citing *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997)). In turn, *Reno* cites *City of Mobile* for the assertion that plaintiffs must prove intent under the Fifteenth Amendment. 520 U.S. at 481.

With such heavy reliance on *City of Mobile*, it must be noted that even in 1980, when the decision was published, the Supreme Court was divided when it determined that the Fifteenth Amendment requires a showing of intentional discrimination. Justices Marshall and Brennan argued persuasively that the intent standard was not necessary in the Fifteenth Amendment. 446 U.S. 55, 94 (1980) (Brennan, J., dissenting), *id.* at 104 (Marshall, J., dissenting). Justice Marshall correctly identified that the plurality's belief that plaintiffs could successfully bring cases under the Fifteenth Amendment with the stringent intent standard was "fanciful" and not based on prior Supreme Court precedent. *Id.* at 107 (Marshall, J.,

dissenting). Justice Marshall noted the difficulty plaintiffs would face in bringing evidence of intent, the subjectivity with which judges would have to evaluate intent, and the ultimate irrelevance of legislators' intentions in relation to citizens' abilities to vote. *Id.* at 134 (Marshall, J., dissenting).

In the aftermath of *City of Mobile*, members of the Court remained unconvinced of the validity of an intent requirement. One issue involves the subjectivity of an intent analysis. Justices Powell and Rehnquist noted that the intent standard requires courts "to engage in deeply subjective inquiries into the motivations of local officials in structuring local governments," threatening the balance between Federal courts and local politics. *Rogers v. Lodge*, 458 U.S. 613, 629 (1982) (Powell, J., dissenting).

In the same case, Justice Stevens highlighted the difficulties plaintiffs and courts face in attempting to apply the intent standard. In addition to the evidentiary burden plaintiffs bear in proving intent, the standard also increases the cost of litigation for both parties and courts. *Id.* at 645 (Stevens, J., dissenting). Furthermore, requiring proof of subjective intent thwarts uniform, evenhanded administration of the law. *Id.* at 643 (Stevens, J., dissenting). There is also a potential issue that, if intent is the primary requirement, courts could "uphold an arbitrary—but not invidious—system that lacked independent justification" and invalidate local laws that have no identifiable discriminatory effect but were enacted with discriminatory

intent. *Id.* at 642 (Stevens, J., dissenting). All these issues lead to one of the primary flaws of an intent requirement: it sanctions laws that infringe on citizens' abilities to vote because of an improper subjective focus.

b. **Even if the Nineteenth Amendment is read in light of the Fifteenth Amendment, the Nineteenth should be interpreted as the Fifteenth was when the Nineteenth Amendment was ratified.**

City of Mobile, for better or for worse, was decided in 1980. There is no reason to believe that in 1920 the people ratifying the Nineteenth Amendment believed (1) that the Fifteenth Amendment required plaintiffs to demonstrate intentional discrimination and (2) that the very specific issue of intent as understood in the Fifteenth Amendment applied to the Nineteenth. Given the burden the intent standard places on plaintiffs and courts and the reticence the Supreme Court has shown in applying the intent standard to the Fifteenth Amendment, there is little compelling reason to apply that standard to an entirely different amendment.

There is no indication that the Nineteenth Amendment was designed with an intent requirement in mind. The legislative and legal history of the Fourteenth Amendment demonstrates an already existing relationship between that and the Nineteenth Amendment, and there is no reason to disrupt that relationship in favor of the Fifteenth Amendment on the basis of legislative history and wording alone. The district court improperly required Appellants McCoy and Singleton to prove intentional discrimination under the Nineteenth Amendment because the wording of

the Nineteenth is similar to that of the Fifteenth. But this reasoning does not withstand, much less overpower, evidence of the legal and historic relationship between the Fourteenth and Nineteenth Amendments. Similarity in wording does not counter the Supreme Court's history of interpreting women's equal protection issues in light of the Fourteenth Amendment, and it does not address the need for a Nineteenth Amendment that will allow plaintiffs to succeed in cases where the original drafters intended women to succeed—in cases where women and their ability to vote are disparately impacted and unduly burdened, no matter what government officials were thinking when they enacted the offending law.

CONCLUSION

For the foregoing reasons, the district court erred in failing to apply an undue burden standard to Appellants' gender-based claims brought under the Fourteenth and Nineteenth Amendments, and Appellants respectfully request this Court reverse the district court's ruling or, in the alternative, vacate and remand to the district court for application of the appropriate legal standard.

DATED this 21st day of October, 2020. Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: October 21, 2020

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I hereby certify that on October 21, 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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