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-30-RH-MJF

REPLY BRIEF OF APPELLANTS MCCOY AND SINGLETON

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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 Certificate of Interested Persons and Corporate Disclosure Statement submitted by the Appellees in their Opposition Brief on December 21, 2020, which references Appellants' Certificate of Interested Persons and Corporate Disclosure Statement on October 13, 2020 is complete and correct.

Dated: February 10, 2021

/s/ Pichaya Poy Winichakul
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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs reiterate that neither the Supreme Court nor this Court has ever addressed the appropriate legal standard that should be applied to a Nineteenth Amendment claim. This Court and the parties will benefit from oral argument on a matter of first impression prior to the rendering of a decision of such precedential value.

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Plaintiffs desire to vote and qualify to do so in every respect except one—a requirement that is not based on a neutral factor, but undoubtedly on economic status. To continue to categorize felony disenfranchisement laws as creating a second tier of citizens is antithetical to the letter and spirit of the constitution. Over the last century, our country has struggled to realize full citizenship rights for all Americans. This appeal is about the parameters of that citizenship as it relates to two women of color, one of whom is a veteran, who now face political banishment because they cannot afford to fully satisfy the financial costs to vote under Florida's SB7066. Plaintiffs also challenge the State's commitment to ensuring the systemic and permanent exclusion of people like them from ever being able to vote. Despite the district court's ruling and the State's efforts, Plaintiffs resist the push to brand Florida as forever racist and sexist in its adoption of laws. However, that does not mean laws—especially voting restrictions—that unduly burden access to the ballot box for certain groups should go legally unchecked.

Rosemary McCoy and Sheila Singleton presented ample evidence that women of color, particularly Black women, with criminal convictions face more difficulty than any other group in finding gainful employment. This means they often lack the financial means to meet their most basic needs, let alone pay thousands of dollars at once to vote. Plaintiffs meet every voting qualification except one—they are too

broke to vote. Consequently, SB7066's LFO requirement places a severe burden on Plaintiffs' access to the ballot as compared even to other people with felony convictions.

The State should not be allowed to implement a felony re-enfranchisement scheme that creates an illusory right to vote for a subset of its citizens. Plaintiffs, therefore, respectfully ask this Court to reverse the district court's dismissal of their Fourteenth Amendment and Nineteenth Amendment claims. In the alternative, they request the case be remanded with instructions that the district court conduct the appropriate factual and legal analysis.

I. PLAINTIFFS HAVE STANDING.

Plaintiffs bring as-applied challenges to SB7066's LFO requirement under the Fourteenth Amendment and Nineteenth Amendment on behalf of low-income women of color who are unable to pay off their LFOs. *See* Appx01514 ¶¶ 72-85, 93-108. Consistent with the Florida Supreme Court's advisory opinion (hereinafter "advisory opinion"), the district court found that SB7066 contains the requirement to completely pay off LFOs as a condition of voting, but that Amendment 4 does not. Appx01329-30, 44-45. Thus, Plaintiffs' injury would be redressed by a court invalidating SB7066's LFO requirement while leaving Amendment 4 constitutionally intact. Moreover, even if a court were to conclude Amendment 4 also unlawfully requires full satisfaction of one's LFOs, the State has again failed to

prove that such a requirement is not severable as both this Court and the district court have held. *See Jones v. Governor of Fla.*, 950 F.3d 795, 831-32 (11th Cir. 2020) [hereinafter *Jones I*]; Appx01423-29.

A. A Ruling Striking SB7066 As Unconstitutional Would Redress Plaintiffs' Injuries, Notwithstanding Amendment 4's "All Terms of Sentence" Language.

Plaintiffs have standing because the injury stemming from their claims against SB7066 is redressable by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). As the district court correctly found, a "flaw in [the State's redressability] argument is the assertion that SB7066 goes no further than Amendment 4." Appx01345. The advisory opinion was limited to defining "all terms of sentence" to include LFOs; it did not, as the State suggests, define the term "completion" or read into Amendment 4 a requirement that people with felony convictions must satisfy *all* LFOs as a condition of voting.[1] *See Advisory Op. to the*

[1] The State erroneously suggests that Plaintiffs ignore Amendment 4's "all terms of sentence" language as interpreted by the Florida Supreme Court to include LFOs. The record below reveals the opposite. No party to the case below could overlook the advisory opinion because it was issued four months prior to trial and discussed extensively by the district court during the case and in its opinion on the merits. *See* Appx01345-46 ("[I]t has been clear all along that the plaintiffs assert it is unconstitutional to condition voting on payment of LFOs, especially those a person is unable to pay. . . . The Eleventh Circuit clearly understood this on appeal." (citing *Jones v. Governor of Fla.*, 950 F.3d 795, 800 (11th Cir. 2020) [hereinafter *Jones I*]); *Advisory Op. to the Governor Re: Implementation of Amendment 4, the Voting Restoration Amendment*, 288 So. 3d 1070 (Fla. 2020). In their gender-based claims, Plaintiffs here have always challenged SB7066's requirement to satisfy LFOs before

Governor Re: Implementation of Amendment 4, the Voting Restoration Amendment, 288 So. 3d 1070, 1074-75 (Fla. 2020); Appx01330. As the district court noted, "[t]he issue is important, because 'completion' could reasonably be construed to mean payment to the best of a person's ability, bringing Amendment 4, though not SB7066, into alignment with the plaintiffs' inability-to-pay argument . . . ." Appx01330.

It is axiomatic that SB7066 goes further than Amendment 4. As the district court found, "SB7066 has a number of provisions that Amendment 4 lacks, including, for example, the definition of 'completion,' the treatment of LFOs that are converted to civil liens, and the prescription of a specific, flawed registration form." Appx01345. Indeed, if Amendment 4 could be read as requiring satisfaction of all LFOs to register to vote, SB7066 would be superfluous. SB7066 was passed because legislators decided that Amendment 4 could not stand on its own to require people with felony convictions to pay off their LFOs before voting. *See Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 850-51 (7th Cir. 2000) (holding that plaintiffs had standing to challenge Indiana law causing injury, where existing, unenforced statutes prohibited similar conduct).[2]

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voting—which, as the district court noted, has never been found in Amendment 4—as applied to low-income women of color who cannot afford to pay.

[2] In *Bridenbaugh*, 227 F.3d at 850-51, the court explained that "[w]hen a state has two statutes, one effective and one ineffective, the existence of the second cannot

Florida Family Policy Council v. Freeman, 561 F.3d 1246 (11th Cir. 2009), which the State cites, is inapposite. There, the challenged judicial canon and a related statute were previously held by the Florida Supreme Court to "require the same thing," which the plaintiffs challenged. Here, the advisory opinion only defined a phrase in Amendment 4, leaving several terms undefined, including the term "completion," which is a key component of Plaintiffs' challenge to SB7066. As the State itself notes, SB7066 was passed because Amendment 4 failed to define such terms. The advisory opinion only clarified one phrase in Amendment 4, and Plaintiffs' challenge SB7066, which, as found by the district court, goes far beyond Amendment 4. Appx01345.

Even under the advisory opinion, Amendment 4 does not have a requirement that those with felonies complete their LFO payments to register to vote; SB7066 does, and it injures Plaintiffs. Thus, a ruling in their favor will redress Plaintiffs' injury.[3]

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preclude a challenge to the first, for an injunction against the first would redress the injury." Here, Amendment 4 has never been enforced against people with felony convictions to include LFOs as SB7066 has, even after the Florida Supreme Court's advisory opinion defining the phrase "all terms of sentence." A remedy against SB7066's LFO requirement would redress Plaintiffs' injuries. If such remedy applied to a future application of an LFO requirement in Amendment 4, the LFO requirement is severable, as found by the district court below. *See* section I.B., *infra*.

[3] In ruling against the *Gruver* Plaintiffs' race discrimination claim below, the district court noted that any ruling in favor of the part of their claim that SB7066's "all terms of sentence" was enacted with racially discriminatory intent would be limited

B. The State Has Not Carried Its Burden on Severability.

Plaintiffs incorporate by reference the severability argument in their opposition brief, while offering the additional following arguments. Pls. Appellees' En Banc Resp. Br. at 68-69 (Docket No. 20-12003), *Jones v. Desantis*, 975 F.3d 1016 (11th Cir. 2020) (en banc) [hereinafter *Jones II*]. As this Court in *Jones I*[4] and the district court held, the State fails to prove that an unconstitutional LFO requirement in Amendment 4 is not severable. *Jones I*, 950 F.3d 831-32; Appx01423-29. The State's assertion that *all* of Amendment 4 must fall if the State cannot prevent people who are unable to pay LFOs from voting "is a breathtaking attack on the will of the Florida voters who adopted Amendment 4." Appx01423. As both the State and district court noted, severability is intertwined with the question of remedy. Appellees' Br. at 18-19; Appx01424-25. Plaintiffs seek to invalidate SB7066 because it is unconstitutional as applied to low-income women of color who cannot satisfy its LFO requirement. *See, e.g.*, Appx01514 ¶¶ 81-85,

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because of the Florida Supreme Court's advisory opinion that defined Amendment 4's "all terms of sentence" to encompass LFOs. This rationale does not apply here because Plaintiffs do not bring facial challenges to SB7066, but rather as-applied wealth- and gender-based challenges on behalf of low-income women of color who are unable to satisfy their LFOs as required by SB7066. Notably, the district court found that the *Jones* Plaintiffs' wealth-based claims were redressable.

[4] *See Jones I*, 950 F.3d at 832 (reaching the merits of the State's severability argument and concluding that the State failed to prove "that enough Florida voters would have voted differently had they known that Amendment 4 could not be used to exclude these plaintiffs who had otherwise completed their sentences but were genuinely unable to pay their LFOs from voting").

103, 105, 107-108. They do not seek to strike any language from Amendment 4. However, if an LFO requirement like the one in SB7066 is *read into* Amendment 4, it is clearly severable.

The State cites to Florida severability law but fails to analyze its key feature: "the burden of proof . . . is properly on the challenging party" to demonstrate "the people would *not* have voted for" an amendment without an unconstitutional provision. *Ray v. Mortham*, 742 So.2d 1276, 1283 (Fla. 1999). Yet, the State has presented no evidence that voters would not have supported Amendment 4 but-for a strict requirement that all LFOs be satisfied even by those who demonstrate an inability to pay them.[5] Thus, the State has failed to show that any unconstitutional LFO requirement found in Amendment 4 to apply to low-income women of color who cannot satisfy it cannot be severed.

II. A FOURTEENTH AMENDMENT EQUAL PROTECTION CLAIM CHALLENGING AN ELECTORAL QUALIFICATION DOES NOT REQUIRE PROOF OF DISCRIMINATORY INTENT.

The State argues that the *Anderson-Burdick* undue burden legal standard, which is routinely applied to voting rights cases involving equal protection claims,

[5] As the district court found, "the state's assertion that voters understood 'completion of all terms of sentence' to mean payment of fines, fees, costs, and restitution by those unable to pay and that this was critical to passage of the amendment is fanciful." Appx01426-27. No evidence was presented to show that voters knew about LFOs in Amendment 4, let alone those who would be unable to pay. Appx01426-29. Further, the district court found that few voters would have understood LFOs themselves. Appx01428-29.

does not apply because this case does not involve the right to vote, but rather, a felony re-enfranchisement scheme. Appellees' Br. at 4, 20. This Court already has rejected the notion that people with past criminal convictions are entitled to no constitutional protections when it comes to the restoration of those rights. *See Jones II*, 975 F.3d at 1040 (noting that voting rights amendments such as Fifteenth and Nineteenth would be rendered meaningless if they only applied to those "with a pre-existing right to vote").

In *Anderson v Celebrezze*, 460 U.S. 780, 786 (1983), the Supreme Court recognized that candidate eligibility requirements impinge upon a voter's "basic constitutional rights." In doing so, the Court rejected the arguments the State raises here, which are akin to proposing a "one test fits all" application of the equal protection clause. That is not what the Supreme Court has held. *See id.* at 789 ("Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions."). For these reasons, the State's efforts to impose a discriminatory intent requirement on a claim that challenges the application, not intent, of SB7066 on low-income women of color must fail.[6]

[6] *See also Common Cause/Georgia v. Billup*s, 554 F.3d 1340, 1352 (11th Cir. 2012) (describing "constitutional challenges to specific provisions of a State's election laws" to require this "flexible standard" (internal citations omitted)); *Stein v. Ala. Sec'y of State*, 774 F.3d 689, 694 (11th Cir. 2016) ("[T]he level of scrutiny to which

The State cites to *Greater Birmingham Ministries v. Secretary of State of Alabama*, 966 F.3d 1202 (11th Cir. 2020) for the proposition that a Fourteenth Amendment equal protection claim requires proof of discriminatory intent. Appellees' Br. at 26-27. At the same time, they attempt, unconvincingly, to distinguish this Court's decision in *Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019) which expressly holds that, "[t]o establish an undue burden on the right to vote under the *Anderson-Burdick* test, Plaintiffs need not demonstrate discriminatory intent . . . ."

Moreover, *Greater Birmingham Ministries* involved a challenge to Alabama's voter identification law and relied on the Supreme Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). *Crawford* upheld a facial challenge to Indiana's voter ID law and, in so doing, noted:

> In *Anderson* . . . we confirmed the general rule that . . . [r]ather than applying any 'litmus test' that would neatly separate valid from invalid restrictions . . . a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands.

Id. at 189-90. Furthermore, in assessing the plaintiffs' arguments that the Indiana law would unduly burden the voting rights of lower income people and those with

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election laws are subject varies with the burden they impose on constitutionally protected rights."); *Dunn v. Blumstein*, 405 U.S. 330 (2015), ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.").

religious objections to being photographed, not once did the majority opinion impose a "discriminatory intent" requirement with respect to those groups of voters. *See id.* at 191 ("In neither *Norman* nor *Burdick* did we identify any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters.").[7] Here, Plaintiffs' identity as women of color unable to pay off their LFOs should be factored into the undue burden analysis of their claims, not used to impose a more stringent standard on them.[8]

Similarly, the State's reliance on *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018) is misplaced. In addition to the passage of Amendment 4 rendering the *Hand* case moot,[9] the *Jones I* panel firmly rejected the applicability of an intent standard

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[7] The decision in *Greater Birmingham Ministries*, which relies on *Anderson-Burdick* as the appropriate legal test, but then appears to blend the undue burden and discriminatory intent standards in such a way that either causes confusion as to the actual standard applied to uphold Alabama's voter ID law, has never been endorsed by the Supreme Court, or should be narrowly applied to the extent the decision reaffirms the *Anderson-Burdick* test as the correct legal standard. 966 F.3d at 1224-25.

[8] *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979), and *Parks v. City of Warner Robins*, 43 F.3d 609 (11th Cir. 1995), upon which the State relies, are inapplicable here because both involved facial challenges to employment-related provisions under the equal protection clause of the Fourteenth Amendment, which require proof of discriminatory intent. Here, Plaintiffs bring as-applied challenges to an election-related law that restricts their right to vote. Such challenges—whether implicating a protected class or not—are properly analyzed under *Anderson-Burdick*, which does not require proof of discriminatory intent. *See Democratic Exec. Comm. of Fla.*, 915 F.3d at 1319.

[9] *Hand v. DeSantis*, 946 F.3d 1272 (11th Cir. 2020).

to a wealth discrimination claim. 950 F.3d at 827-28 ("The Supreme Court has squarely held that *Davis*'s intent requirement is not applicable in wealth discrimination cases.") (en banc review denied). Likewise, the *Jacobson v. Secretary of State* case, 974 F.3d 1236**,** 1262 (11th Cir. 2020), which was ultimately resolved on jurisdictional grounds, reaffirms that when the right to vote is being burdened "even slightly," the sliding-scale undue burden test applies.

Certainly, the equal protection clause bars any form of intentional discrimination outright. However, as the *Anderson-Burdick* test lays out, that is not all that the clause prohibits; it also blocks application of election laws unduly burdening access to the ballot. When that burden is multiplied by race, class, and gender, applying the *Anderson-Burdick* test makes even more sense. Despite their gymnastic efforts to bend logic, there is no dodging that the right to vote is the whole body, not just a tangential part, of this cross-appeal. It is the act of voting, in and of itself, which is "preservative of all rights" and the reason why we have more federal constitutional amendments dedicated to its protection than any other right. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Williams v. Rhodes*, 393 U.S. 23, 38 (1968) (internal citations omitted).

III. THE NINETEENTH AMENDMENT PROTECTS AGAINST BOTH INTENTIONAL DISCRIMINATION AND UNDULY BURDENSOME VOTER QUALIFICATIONS LIKE SB7066'S LFO REQUIREMENT.

The Nineteenth Amendment was ratified in 1920, fifty years after the Fifteenth Amendment's passage. Black women could not avail themselves of the Fifteenth Amendment and the Fourteenth Amendment provided no protection for women at all. *See, e.g.*, *Minor v. Happersett*, 88 U.S. 162 (1874) (holding that Fourteenth Amendment did not enfranchise women). Thus, the significance of the Nineteenth Amendment—written with women in mind, but with gender-neutral language—cannot be diminished and subsumed in the history of an Amendment passed five decades prior.

A. Since Breedlove v. Suttles, There Has Been No Independent Constitutional Analysis Regarding the Correct Legal Standard to Apply to a Nineteenth Amendment Claim.

Since 1937, as this Court recognized in *Jones II*, there has not been a single case to provide an in-depth, independent analysis of the Nineteenth Amendment's full meaning and scope. 975 F.3d at 1043 (noting, "[t]he Supreme Court has discussed the Nineteenth Amendment in detail only twice" referencing *Breedlove v. Suttles*, 302 U.S. 277 (1937), and *Leser v. Garnett*, 258 U.S. 130 (1922)). Therefore, in almost one hundred years since *Leser*, it cannot be said with any constitutional or other legal certainty that the Nineteenth Amendment *only* protects against intentional

discrimination. Stated another way, it is not well-established that the Nineteenth Amendment affords no greater protections than the Fifteenth Amendment.

Beyond those two cases, courts have simply assumed that the Nineteenth Amendment must be read to apply in the same way the Fifteenth Amendment has. However, beyond these assumptions, there is no evidence to support that legal conclusion. Rather than expand the jurisprudence around voting rights for women, the legal landscape around gender instead focused on the areas of employment discrimination, access to equal education, and reproductive rights, to name a few.[10] Statutes also have been enacted to provide increased legal protections to women such as the Violence Against Women's Act[11] and Title IX[12]. These laws build upon the body of legal protections specifically designed to recognize the unique obstacles women still face in accessing equity and equal rights. The aim of enfranchising women was not simply so they could cast a ballot, but so they could directly influence the other areas of life that ultimately infringe upon their right of self-determination.

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[10] To the extent *Feeney*, 442 U.S. 256, and *Parks*, 43 F.3d 609, *supra* note 8, are relevant, the cases illustrate the evolution of jurisprudence on gender in other areas of life. As facial challenges to employment-related provisions under the equal protection clause, these cases also exemplify, by comparison, the lack of jurisprudential development on women's voting rights under the Nineteenth Amendment.

[11] 42 U.S.C. § 13925.

[12] 20 U.S.C. § 1681.

B. As-Applied Challenges to Facially Neutral Laws Do Not Require Proof of Discriminatory Intent.

The State continues to argue Plaintiffs must prove discriminatory intent to succeed under their Nineteenth Amendment claim. Appellees' Br. at 24. However, McCoy and Singleton have explicitly challenged SB7066 *as applied* to low-income women of color, not that the law was intentionally enacted to discriminate against women. Appx01514 ¶¶ 97-108. Thus, the State's arguments completely ignore the fundamental difference and varying burdens of proof between a facial and as-applied claim.

In *Hunter v. Underwood*, 471 U.S. 222, 233 (1985), the Supreme Court affirmed this Court's ruling that Alabama's 1901 felony disenfranchisement law was enacted for a discriminatory purpose. Left untouched and, therefore, still intact was this Court's additional holding that Alabama's law as applied to misdemeanants also violated the Fourteenth Amendment. *Id.* (opting not to address appeal of lower court's "as-applied" ruling); *see also United States v. Dallas Cnty. Comm'n*, 739 F.2d 1529, 1533 n.10 (11th Cir. 1984) (upholding lower court's evidentiary ruling to exclude proof of discriminatory intent when plaintiff only brought as-applied challenge); *Jurek v. Estelle*, 593 F.2d 672, 685 n.26 (5th Cir. 1979) (noting that Supreme Court's decision upholding Texas death penalty statute on its face did not

preclude an as-applied challenge).[13] Therefore, while this Court's decision on racial animus was sufficient to strike down Alabama's felony disenfranchisement law, this Court in *Hunter* went further in ruling that the law's disproportionate impact on Black voters based on intersections with the criminal justice system would have supported striking the law down as well. 471 U.S. at 225.

Moreover, although Plaintiffs did not bring a claim under Section 2 of the Voting Rights Act, Congress's explanation of why the Supreme Court's adoption of an intentional discrimination standard to Fifteenth Amendment claims makes clear that the strict standard in incorrect. Appellants' Br. at 43-48. In fact, this Court in *Jones II* pointed to the Supreme Court's decision in *Guinn v. United State*s, 238 U.S. 347, 364-65 (1915), invalidating Oklahoma's literacy test as applied to all voters, in recognizing that facially neutral laws can still have discriminatory effects. *Guinn*, 238 U.S. at 364-65 ("Although the [Oklahoma] constitution 'contain[ed] no express words' limiting the franchise 'on account of race, color, or previous condition of servitude,' the grandfather clause 'inherently [brought] that result into existence,' which violated the Fifteenth Amendment."). The State cannot unilaterally convert Plaintiffs' as-applied challenges into facial ones simply to impose a stricter standard

[13] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

than the law requires. Therefore, any application of a discriminatory intent standard to Plaintiffs' claims would constitute legal error.

C. The Legislative History and Political Landscape Behind the Nineteenth Amendment Support the Application of a Non-Intentional Discrimination Standard.

The State also dismisses the relevance of any legislative history and legal scholarship behind the Nineteenth Amendment, in keeping with an intellectual dishonesty that glosses over rather than confronts the political reality that existed during the amendment's passage. Appellees' Br. at 24-26. The State's constrained interpretation of the phrase "on account of" ignores the political context in which the Nineteenth Amendment was passed, the ongoing legacy of those barriers, and the continuing ways in which race, gender, and class intersect to diminish Plaintiffs' eligibility to vote under SB7066.

While some courts are reticent to rely too heavily on legislative history, Plaintiffs' Nineteenth Amendment claim is an instance when legislative history provides the greatest guidance as to Congress' goal in enacting the amendment. Appellants' Br. at 21-26. Congressional records make clear the Nineteenth Amendment ensures that a woman's sex or gender does not negatively impact her ability to vote—whether the law was intended to have that effect or not.

Moreover, the uniquely vulnerable position of Black women during the Nineteenth Amendment's passage further supports a heightened level of protection

that encompasses the multiple barriers they face in attaining full citizenship separate and apart from Black men and White women.[14] While the Nineteenth Amendment's language may mirror the Fifteenth Amendment, the history, political climate, and status of women during that time support a broader application of the law in contrast to the extremely narrow interpretation of the Fifteenth Amendment.[15] The Court should carefully scrutinize any law that would threaten the political gains women have made and err on the side of protecting, rather than diminishing, their access to the ballot. SB7066, which is the only hinderance to Plaintiffs' eligibility to vote, is such a law.

[14] *See* Steven Calebresi & Julia Rickert, *Originalism and Sex Discrimination*, 90 Tex. L. Rev. 1, 68 (2011) ("Some members of Congress feared that the Nineteenth Amendment, by enfranchising black women, who, according to some, would be more politically active than their male counterparts, would spark a 'second Reconstruction.'").

[15] *See also South Carolina v. Katzenbach*, 383 U.S. 301, 308–09 (1966) ("To be sure, our nation failed to achieve the egalitarian goal of the Fifteenth Amendment to any significant degree until Congress used its power under section 2 of the amendment to enact the Voting Rights Act of 1965."); Paula Monopoli, *Constitutional Orphan: Gender Equality and the Nineteenth Amendment* 41 (2020) (recounting how, even after the Nineteenth Amendment's ratification, "African American women were widely denied the right to register and vote in the November 1920 presidential election" and in the decades to follow in part because of a lack of enforcement legislation similar to that of the Fifteenth Amendment).

IV. BECAUSE THE DISTRICT COURT APPLIED THE INCORRECT LEGAL STANDARD TO PLAINTIFFS' CLAIMS, IT ALSO FAILED TO PROPERLY ANALYZE THE UNDUE BURDEN SB7066 PLACES ON THEIR ABILITY TO VOTE.

In contending Plaintiffs abandon any challenge to the district court's conclusion that SB 7066 disparately impacts men, the State conveniently overlooks whole sections of Plaintiffs' opening brief addressing the district court's error. The State also mischaracterizes the court's disparate impact statement as integral to the holding when it is in fact dicta, and dicta made further irrelevant by the legal error the court committed in applying the facts to the wrong standard of law. *See Ala. Legis. Caucus v. Ala.*, 575 U.S. 254, 279 (2015) ("Asking the wrong question may well have led to the wrong answer.").

A. Plaintiffs Have Not Waived Argument Challenging the District Court's Disparate Impact Statements Comparing Women to Men with Felony Convictions.

In their opening brief, Plaintiffs state: "[T]he district court erred in comparing women and men with felony convictions generally," and further explain how the court applied the wrong test and why a proper analysis would have concluded that SB7066 most negatively impacts women. Appellants' Br. at 18-19. Courts may deem an issue abandoned if it is absent from the initial briefs or made only in passing reference. *See Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n.6 (11th Cir. 1989) (noting an issue raised without any argument or development is insufficient for consideration); *Holland v. Gee*, 677 F.3d 1047, 1066 (11th Cir. 2012)

(stating that a court will not address the merits of an argument that has "not been briefed before the court"). However, is axiomatic that a party avoids that risk where it offers arguments, cites authorities, and provides discussion "so the court may properly consider [the issue]," as Plaintiffs did here. *Brown v. United States*, 720 F.3d 1316, 1332 (11th Cir. 2013) (noting a claim is properly raised when the party specifically states it and "devote[s] a discrete section of his argument to it").

While citing to case law and volumes of evidence, Plaintiffs maintained that the district court would have arrived at the correct factual and legal conclusions—that women of color lacking means to pay LFOs face an undue burden on their right to vote—had it properly applied *Anderson-Burdick* rather than an intentional discrimination standard. *E.g.*, Appellants' Br. at 8-9, 14-19; *see also Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2534 n.2 (2019) (plurality opinion) (noting that the proper articulation of a "broader question" that encompasses an issue does not render the issue waived). Therefore, Plaintiffs have not waived any challenge to the district court's statements regarding SB7066's impact on men as compared to women.

B. The District Court's Disparate Impact Statements Are Dicta.

The State again mischaracterizes the district court's ruminations on disparate impact as material to the court's holding. While it is true that "all alternative rationales for a given result have precedential value," *McLellan v. Miss. Power & Light Co.*, 545 F.2d 919, 925 n.21 (5th Cir. 1977), not all reasons are "necessary to

deciding a case," *United States v. Eggersdorf*, 126 F.3d 1318, 1322 n.4 (11th Cir. 1997); *cf. Carey v. Musladin*, 549 U.S. 70, 78–79 (2006) (Stevens, J., concurring) (clarifying that the Court's reasoning in articulating factors that support its holding is dictum rather than "clearly established law"). Statements superfluous to a court's holding are considered dicta. *See Eggersdorf*, 126 F.3d at 1322 & n.4; *Judicial Dictum*, *Black's Law Dictionary* ("An opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision and therefore not binding even if it may later be accorded some weight.").

In less than three pages of its opinion, the district court summarily rejected Plaintiffs' equal protection and Nineteenth Amendment claims on the ground that they failed to prove discriminatory intent. Appx01408-10. In fact, the court was so wedded to the intentional discrimination standard that, even though it found SB7066 "is more likely to render a given woman ineligible to vote than an identically situated man," it continued to state, "[t]his does not, however, establish intentional discrimination." Appx01409.

The court's subsequent hypotheticals on disparate impact were conditional, Appx01410 (drawing conclusions only "if a disparate impact was sufficient to establish a constitutional violation") and, thus, in no way formed the basis of its ultimate decision. *Cf. Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010)

("All statements that go beyond the facts of the case—and sometimes, but not always, they begin with the word "if"—are dicta.").[16]

The State cannot convert dicta into a legal holding out of convenience. Therefore, the district court's conflicting statements as to who SB7066 most burdens are nothing upon which this Court should rely.

C. SB7066 Imposes an Undue Burden on Low-Income Women of Color.

A proper application of the *Anderson-Burdick* test would have resulted in Plaintiffs succeeding on their claims. This necessitates reversal of the trial court's denial of Plaintiffs' Fourteenth Amendment and Nineteenth Amendment claims or at least remand for the proper application of facts to law. *See Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982) ("[W]here findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue." (citing *Kelley v. S. Pacific Co.*, 419 U.S. 318, 331–32 (1974)); *Cooper-Houston v. S. Ry. Co.*, 37 F.3d 603, 604–05 (11th Cir. 1994) (reversing judgment of district court for legal error in evaluating the evidence and remanding for factfinding); *Meche v. Doucet*, 777 F.3d 237, 247 (5th Cir. 2015)

[16] The State's reliance on *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 519-23 (9th Cir. 2011) is misplaced. In that case, the district court *did* conduct a detailed disparate impact analysis separate and apart from any intentional discrimination standard and expressly ruled plaintiffs had met their burden. *Darensburg v. Metro. Transp. Comm'n*, 611 F. Supp. 2d 994, 1043–44 (N.D. Cal. 2009). Here, the district court never seriously considered Plaintiffs' undue burden claim because it ruled the *Anderson-Burdick* legal standard did not apply.

(reversing for use of wrong legal standard but opting against remand where "the trial record unequivocally establishes [judgment for defendants]").

The district court's view of disparate impact and resulting conclusions were wrong. The court acknowledged—and the State ignores—women are less likely than men to satisfy SB7066's LFO requirement. Appx01409-10. However, rather than assess the "character and magnitude of the asserted injury," the court exalted an unsupported view of "disparate impact" that applied a strict numerical calculation of men in the criminal justice system as compared to women, Appx01410; *see also* Appellants' Br. at 7, rather than the statistical analysis courts have long adopted, which focus on the specific population the plaintiffs represent. *See, e.g.*, *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 428–29 (4th Cir. 2018) (finding housing policy requiring citizenship documents disparately impacted plaintiffs who are non-citizen Latinos); *Adams v. City of Indianapolis*, 742 F.3d 720, 732–33 (7th Cir. 2014) (applying disparate impact standard to determine whether city's testing process disparately affected Black officers and firefighters); *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 280 (5th Cir. 2008) (affirming district court's finding that employer's promotion practices had statistically significant disparate impact on Black employees); *Nash v. Consol. City of Jacksonville*, 905 F.2d 355, 358 (11th Cir. 1990) (discussing an exam's disparate impact on Black firefighters' chances of promotion); *Griffin v. Carlin*, 755 F.2d 1516, 1522-25 (11th Cir. 1985)

(affirming that disparate impact could be used to challenge the final results of a promotion process). Without elaboration, the court proceeded to note that because "men are disproportionately represented among felons[,]. . . . the pay-to-vote requirement overall has a disparate impact on men, not women." Appx01410. Again, given its prior recognition that women are more impacted by the law, this additional statement is confusing at best.

These statements have no basis in law and defy even the court's own conclusion of the facts presented. Nowhere in its opinion did the district court explore or explain how a disparate impact standard should apply to claims that intersect race, class, and gender separate from a discriminatory intent standard. Nor did the court cite to any law supporting even its application of a disparate impact theory to undue burden claims brought under the Fourteenth and Nineteenth Amendments. Thus, to the extent the district court's statements are entitled to any deference, they completely miss the mark.

Moreover, Plaintiffs' assertion that the *Anderson-Burdick* test applies is consistent with other voting rights cases involving a wide range of groups affected by state voting laws. *See, e.g.*, *Mays v. LaRose*, 951 F.3d 775, 786 (6th Cir. 2020) (arrestees); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 606 (4th Cir. 2016) (African-American plaintiffs); *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 541–43 (6th Cir. 2014) (affected voters, namely African-American, lower-

income, and voter experiencing homelessness), *preliminary injunction vacated by Husted v. Ohio State Conference of NAACP*, 573 U.S. 988 (2014); *Obama for America v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) (affected voters, who were "disproportionately women, older, and of lower income and education attainment"); *Crawford*, 553 U.S. at 198 (the elderly, homeless, and religious objectors). Had it done so, it would have determined the "character and magnitude"—the degree—to which McCoy and Singleton's ability to vote is unduly burdened by the State's restrictive scheme. *See Democratic Exec. Comm. of Fla.*, 915 F.3d at 1318 (beginning *Anderson-Burdick* review with an assessment of the plaintiffs' burden).

Dr. Walker testified that women of color "face extraordinary barriers, even relative to the barriers that all people with felony convictions face, as they try to . . . economically reintegrate into society." SAppx001330, Lines 7-12. Dr. Weinstein also concluded 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. McCoy and Singleton further testified that they had tried unsuccessfully to find gainful employment, that they struggle to satisfy their daily living needs and that, if SB7066 is enforced against them, they most likely will never be able to vote. SAppx001407-14, 1681-87; *see also* SAppx000114-15.

In sum, Plaintiffs have established that SB7066 imposes an undue burden that they lack the means to satisfy. If the district court had analyzed the facts as applied to the correct legal standard, Plaintiffs would have succeeded on their claims. Therefore, if anything, the district court's dicta further demonstrate how it failed to accord Plaintiffs' claims a proper adjudication.

CONCLUSION

For the foregoing reasons, Plaintiffs ask this Court to reverse the district court's dismissal of their Fourteenth Amendment and Nineteenth Amendment claims or, in the alternative, remand the case with instructions that the court conduct the appropriate factual and legal analysis.

February 10, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: February 10, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2021, 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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